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# BRINGING DOWN THE BEDROOM WALLS: EMPHASIZING SUBSTANCE OVER FORM IN PERSONALIZED ABUSE

ORLY RACHMILOVITZ\*

## ABSTRACT

This article explores what makes domestic violence special and whether privileging certain abusive relationships, and thus certain victims, over others is justified. It argues that abuse in familial, romantic, or cohabitating relationships is not necessarily any more harmful than abuse in other personal relationships; that harm from abuse should be identified through substantive criteria, for which marriage or cohabitation should not be proxies; and that heightened protections should be extended accordingly. The article pinpoints the criteria that justify distinguishing domestic violence from other forms of violence and examines how federal and state domestic violence laws define protected victims and relationships. An analysis of these statutes uncovers their problematic underinclusiveness on one hand, and their overinclusiveness on the other. In analyzing relationships and victims excluded from protection, the article challenges the exclusion of these relationships and victims by proposing a “personalized abuse” framework, which abandons the use of categories for identifying victims, and instead creates a substantive formula that focuses on the relationship itself to identify victims in need of legal recourse. The personalized abuse framework targets relationships in which abuse is likely to be cyclical, repetitive, and most psychologically harmful to the victim. The article then examines how, by eliminating categories, the personalized abuse framework is more inclusive than existing domestic violence laws.

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## INTRODUCTION

Abuse takes many forms. Violence can be physical, sexual, emotional, or financial<sup>1</sup> — all of which are harmful to victims.<sup>2</sup> The legal system has addressed the severity of abuse in relationships through domestic violence law, which affords victims remedies that are unavailable through ordinary criminal statutes, which generally target violent crimes between strangers. Legal measures against domestic violence include mandatory arrest or warrantless arrest of abusers upon incidents of abuse; restraining orders and criminalization of order violations; consideration of abuse in divorce and custody proceedings; police training; data collection on abusers; enhanced penalties; and funding of social services.<sup>3</sup>

But who are the victims that the legal system protects? Does the law protect victims of violence in any kind of relationship, or is protection limited — as existing domestic violence statutes suggest — to only familial, opposite-sex, romantic, and cohabitating relationships? Ruth Colker theorizes that domestic violence laws only protect victims in marital relationships or relationships that fit the marriage-mimicry model.<sup>4</sup> Yet, according to Colker, most women have been abused in relationships that do not fit the marriage-mimicry model the law privileges; rather, they have been victimized by friends, roommates, schoolmates, neighbors, coworkers, and other non-relatives.<sup>5</sup> She therefore criticizes the marriage-mimicry model, stating:

[The law] now articulates the presumption that domestic violence is worse than other kinds of violence. This evolution in the law has not been accompanied by the development of a theory to

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1. Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2021-26 (1993). Acts constituting domestic violence are: "(I) attempting to cause or intentionally, knowingly, or recklessly causing bodily injury or physical illness; (ii) rape, sexual assault, or causing involuntary deviate sexual intercourse; (iii) placing by physical menace another in fear of imminent serious bodily injury; or (iv) the infliction of false imprisonment." 42 U.S.C.A. § 10701(8)(A) (2007). I use the term "abuse" to refer to these acts, as well.

2. Although the term "victim" may have a stigmatizing effect and suggest weakness, I use this term in a value-neutral sense: a "victim" has been subjected to abuse, and without the assistance of legal and societal institutions, the abuse is exacerbated. See BATTERED WOMEN AND THE LAW 107-10 (Clare Dalton & Elizabeth M. Schneider eds., 2001).

3. See, e.g., Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1853-55 (2006).

4. *Id.* at 1844. Colker defines marriage-mimicry as "relationships that are characterized by monogamous, long-term, intimate commitments and financial interdependence." *Id.*

5. *Id.* at 1880.

explain why we have an enhanced, rather than neutral, law of domestic violence. Only when we answer the fundamental question of why domestic violence is worse than comparable violence outside the domestic sphere will we begin to answer the question of how the law should define domestic violence. In the meantime, we have a legal system that reflexively privileges marriage and those in marriage-like relationships without asking who is truly deserving of those privileges.<sup>6</sup>

This article attempts to do just that: explore what makes domestic violence special and whether privileging certain abusive relationships, and thus certain victims, over others is in fact justified. I argue that abuse in familial, romantic, or cohabitating relationships is no different or more harmful than abuse in other personal relationships.<sup>7</sup> I argue that abusive relationships should be identified through substantive criteria for which marriage should not be a proxy, and that heightened protections should be extended accordingly. The law should replace domestic violence frameworks that emphasize predetermined categories of relationships with a broader personalized abuse framework.<sup>8</sup> Only then will all abuse victims in need of legal recourse be adequately protected.

Part I of this article maps out domestic violence scholarship to pinpoint the criteria that commentators generally invoke to justify distinguishing domestic violence from other forms of violence. Current scholarship presents four micro-level characteristics (accessibility to the victim, violation of trust, power imbalance, and control and dependence) along with two macro-level patterns (cyclicality and psychological harms) as the rationales for separating domestic violence from other violent crimes.

Part II examines who are legally recognized as victims by looking at federal and state definitions of domestic violence victims. This Part then analyzes the problems arising from these statutes. Identification of domestic violence relies on categorization of victims and relationships. Gender, physical-spatial, and romantic/sexual categories have been constructed by domestic violence laws and only victims

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6. *Id.* at 1882-83.

7. By "personal relationships" I do not mean "private." Instead, I refer to relationships that are close and intimate in ways beyond just sexual or romantic. These are relationships built on a strong emotional bond between parties.

8. I use the term "personalized abuse" to illustrate that violence exists in different types of personal relationships, not just "domestic," familial, or romantic relationships. This term also illustrates that violence is *personal* and facilitated by the relationship itself — it is perpetrated by a certain person on the other party in the context of a particular close, personal relationship, and that relationship itself is what enables the onset and continuation of abuse.

who fall into these categories are afforded protection.<sup>9</sup> As a result, domestic violence laws are underinclusive<sup>10</sup> and several types of victims — such as men — and relationships — such as same-sex couples, friends or roommates, and people dating — face obstacles in gaining recognition as victims of abuse even though they can satisfy the characteristics used by commentators to distinguish domestic violence from other violence.<sup>11</sup>

Part III proposes the personalized abuse framework, which employs the micro-level characteristics and macro-level concerns discussed in Part I to create a substantive formula, which replaces current domestic violence categories and identifies victims in need of legal recourse.<sup>12</sup> Part III analyzes how eliminating categories makes the personalized abuse model more inclusive than existing domestic violence laws, particularly when applied to friends and roommates. Finally, Part III grapples with possible counter arguments to the personalized abuse model, including efficiency of the legal system, privacy concerns, and stalking laws. This article concludes by highlighting the strength and significance of the personalized abuse framework.

## I. DISTINGUISHING DOMESTIC VIOLENCE

A review of domestic violence literature reveals several recurring ideas as to why the legal system accords domestic violence, as currently defined, special treatment.<sup>13</sup> These reasons can be divided into two main groups. The first contains micro-level reasons for heightened protection: specific characteristics of violence within domestic relationships make the violence particularly harmful. The second contains macro-level reasons: violence within domestic relationships creates long-term patterns that are highly problematic.<sup>14</sup>

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9. See generally Colker, *supra* note 3 (discussing the marriage-mimicry model as the basis for domestic violence laws).

10. Also, domestic violence laws can be overinclusive, resulting in protection of relationships that may not warrant such protections. For a more elaborate discussion of such a relationship, see Part III.B.1.

11. See generally Colker, *supra* note 3 (discussing relationships outside of the marriage and marriage-mimicry model that are not afforded protection).

12. By “substantive formula” I refer to the test I propose in Part III, which is designed to identify personalized abuse using the micro-level characteristics and macro-level patterns of domestic violence as indicia of the nature (and thus substance) of abusive relationships.

13. According to Colker, domestic violence is currently defined consistently with the marriage-mimicry model. Colker, *supra* note 3, at 1844.

14. The micro-level characteristics and macro-level patterns are interrelated, as the micro-level characteristics contribute to the macro-level patterns. For a more in depth discussion, see Part I.B.

### *A. Micro-Level Characteristics of Domestic Violence*

Existing scholarship has persuasively identified four micro-level characteristics of abuse within domestic relationships that justify heightened protection against domestic violence. These four micro-level characteristics, which are common in most cases of domestic violence, have a predictive role in the occurrence of the macro-level patterns discussed below. These characteristics also exist, however, in relationships not currently deemed "domestic." Thus, they inspire the personalized abuse framework that I later propose as an alternative to current domestic violence laws. The four micro-level characteristics are: accessibility and familiarity; violation of trust; imbalanced power dynamics and control; and dependence.

#### *1. Accessibility and Familiarity*

One reason violence in a relationship differs from random violence between strangers is that the perpetrator takes advantage of the relationship to gain access to the victim.<sup>15</sup> Relationships built on close personal interactions<sup>16</sup> inevitably involve parties gaining information about each other. This information ranges from preferred lunch options to schedules, habits, and favorite hangouts.<sup>17</sup> Such knowledge enables the accessibility that makes domestic violence most harmful, as it increases victim's exposure and vulnerability to the abuser.<sup>18</sup> Therefore, accessibility and familiarity between abuser and victim can make violence between the two particularly problematic.<sup>19</sup> In a cohabiting relationship, for instance, the victim has nowhere to escape, as the abuse takes place in the home itself.<sup>20</sup> But

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15. Maria Amelia Calaf, *Breaking the Cycle: Title VII, Domestic Violence, and Workplace Discrimination*, 21 LAW & INEQ. 167, 178 n.66 (2003) (noting that through disclosure in the relationship, the abuser gains access to the victim's personal information, which may pose a serious risk to the victim).

16. By "personal interactions" I refer mainly to social relationships that are *not limited* to a professional or utilitarian context, though they may be somewhat professional or utilitarian. Instead, I am concerned more with intimate (but not necessarily sexual) relationships. I elaborate on this further in Part III when proposing the personalized abuse framework and its test.

17. Calaf, *supra* note 15, at 178 n.66.

18. See Lisa G. Lerman, Commentary, *The Decontextualization of Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 217, 234 (1992) (arguing that continued access to the victim increases likelihood of additional and more severe acts of violence).

19. See Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 8 (2006) (noting that the abuser's mere presence in the home may be sufficient for arrest under protective orders, as well as criminal prosecution).

20. Patricia Mahoney et al., *Violence Against Women By Intimate Relationship Partners*, in THE SOURCEBOOK ON VIOLENCE AGAINST WOMEN 147 (2001).

even in a non-cohabiting relationship, the abuse is facilitated by the abuser's familiarity with the victim's lifestyle, mainly where and when the victim is most approachable and most vulnerable.<sup>21</sup> Also, when the relationship comes to an end, the abuser may still exploit the relationship, continuing to access the victim, carrying on the abusive and controlling behavior.<sup>22</sup> By contrast, violent acts between strangers tend to be more random and are devoid of the personal aspects of accessibility and familiarity, which enable domestic violence to be ongoing and effective in intimidating and controlling the victim.<sup>23</sup>

Behaviors, such as presence at the victim's home, making phone calls, or showing up at the victim's workplace, are the target of domestic violence laws, even though these behaviors are not in and of themselves criminal.<sup>24</sup> Legal mechanisms, such as protective orders, express the law's recognition of the roles accessibility and familiarity play in increasing the likelihood that abusers will be violent toward their victims at a certain time or place.<sup>25</sup> Accessibility and familiarity facilitate the planning and premeditation of violence.<sup>26</sup>

When an abuser has easy access to the victim, violence is uniquely problematic. Moreover, in extreme cases, the abuser's presence or potential access are sufficient to distress the victim.<sup>27</sup> As a result, acknowledging the aggravating effect of accessibility on domestic violence and preventing abusers from taking advantage of their familiarity with victims is most significant in justifying heightened protection for domestic relationships.

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21. *Id.*

22. Laurel A. Kent, Comment, *Addressing the Impact of Domestic Violence on Children: Alternatives to Laws Criminalizing the Commission of Domestic Violence in the Presence of a Child*, 2001 WIS. L. REV. 1337, 1364 (2001) (arguing that in situations of joint custody, abusers still have access to their victims even after divorce, which allows them to continue abuse).

23. Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. ILL. L. REV. 533, 546-47 (1996) (basing the relative severity of domestic violence, in comparison to an isolated incident of violence between strangers, on the victim's lack of a "safe haven" from the abuser).

24. Suk, *supra* note 19, at 17.

25. *See id.* at 19 (stating that protection orders prohibiting presence in the home diminish perpetrators' opportunities for violence).

26. There may be situations where one may gain access or knowledge of another by means that are independent of a relationship, such as spying or use of the internet. Celebrity stalking can be such a case where the stalker has no relationship with the victim, but may gain access through the media, the internet, or by following or spying on the victim.

27. *See* Suk, *supra* note 19, at 19-20 (discussing the causality between the presence of the abuser and the potential for violence, as well as intimidation and fear caused by the abuser's presence).



## 2. Violation of Trust

Trust — that is to say, one's expectation that one's actions, beliefs, and feelings will be positively accepted by another — is essential to the success of relationships.<sup>28</sup> Trust leads to the voluntary surrender of something valuable in expectation that the other person will care for it.<sup>29</sup> In the context of close, personal relationships, it is the self — body and soul — that is the object of trust which one shares with the other person. We count on them to hold these dear.

Trust is fluid and changes over time with experience.<sup>30</sup> Some people may be more trusting by nature, and their initial trust in others is greater.<sup>31</sup> As relationships progress, the level of trust changes in response to each person's actions.<sup>32</sup> One's trust in another may increase or decrease according to whether the other proves trustworthy by acting as expected and does not violate that trust by acting inconsistently with expectations.<sup>33</sup>

Whereas most relationships serve as a support system, violence has the opposite effect of turning what should be a healthy, supportive relationship into the most harmful and threatening of all.<sup>34</sup> Domestic violence is a deep violation of trust; not only is the abuser unworthy of trust, but — much like with accessibility — he or she manipulates the victim's trust to facilitate the abuse.<sup>35</sup> People in relationships let their guard down in expectation that the other party will be trustworthy and unthreatening.<sup>36</sup> The violation of trust in relationships through abuse is more devastating than acts that may be a violation of trust from strangers.<sup>37</sup> It is also more harmful as victims are less

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28. Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1461 (2005).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Wanless, *supra* note 23, at 546-57 (arguing that domestic violence is inconsistent with one's need to feel safe in their own home).

35. Colker, *supra* note 3, at 1868 (arguing that domestic violence is more harmful than other forms of violence as it is a violation of trust).

36. See Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183, 202 (1995) (arguing that expectations in relationships differ from expectations from strangers).

37. Trust is not always contingent on a relationship between parties. Even when a personal relationship does not exist, interactions between people involve trust. These can be interactions between bank teller and client or patient and doctor. I further discuss the distinction between personal relationships and other relationships in Part III.A.2. As to the more egregious nature of the betrayal of trust involved in domestic violence in comparison to random street violence, see Jennifer P. Maxwell, *Mandatory Mediation of Custody in Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV. 335, 342-43 (1999).

likely to engage in self-protective behavior as long as abusers have yet to be perceived as a threat.<sup>38</sup> Keeping in mind the cyclical nature of domestic violence,<sup>39</sup> the victims' trust comes into play in the abusive cycle: abusers attempt to redeem themselves by offering apologies and promises of the end of the abuse, yet they often break those promises, violating their victims' trust by becoming violent again.<sup>40</sup>

### 3. *Imbalanced Power Dynamics and Control*

Domestic violence is the abuser's way of exerting control over the victim.<sup>41</sup> The abuser is enabled by a power imbalance in the relationship.<sup>42</sup> Different kinds of power exist in violent domestic relationships: physical and, even more importantly, emotional or social power. All often intertwine in the relationship's abusive dynamic. Violence is meant to maintain or advance one of the parties' interests and high position in the relational structure, while keeping the other party inferior.<sup>43</sup> This imbalance, in which one party is stronger than the other, is a mechanism of control and a way to sustain power in the relationship.<sup>44</sup> Violence is used as a source of power, when other ways of achieving power fail.<sup>45</sup> Not only does it increase power in the relationship, but it increases the abuser's self-esteem and ensures victim's compliance.<sup>46</sup> This self-reinforcing pattern is likely to continue as long as the abuser gets away with it and does not face consequences.<sup>47</sup>

Female subordination in the social structure and a limitation on resources for women are thought to foster domestic violence.<sup>48</sup> By

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38. *Id.* (stating that victims of violence in personal relationships are injured more than victims of stranger violence because victims of domestic violence probably do not protect themselves as they would from strangers, due to trust in their abuser).

39. See Part I.B.1.

40. See Erin Ann O'Hara, *Apology and Thick Trust: What Spouse Abusers and Negligent Doctors Might Have in Common*, 79 CHI.-KENT. L. REV. 1055, 1073 (2004) (noting that victims of domestic violence tend to forgive abusers who attempt to resume the relationship).

41. See Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371, 390 (2003) (arguing that domestic violence, as a form of private torture, is distinguished by a power imbalance between parties).

42. *Id.*

43. *Id.*

44. Jana L. Jasinski, *Theoretical Explanations for Violence Against Women*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN, *supra* note 20, at 5, 11-12 ("Power is the ability of one individual to influence the other.").

45. *Id.*

46. *Id.*

47. ROGER J. R. LEVESQUE, ADOLESCENTS, SEX, AND THE LAW: PREPARING ADOLESCENTS FOR RESPONSIBLE CITIZENSHIP 227 (2000).

48. Jasinski, *supra* note 44, at 11-12.

reinforcing those dynamics, domestic violence perpetuates male patriarchy and dominance over women.<sup>49</sup> Because of disparities in rights and opportunities based on sex and gender, opposite-sex relationships have been considered inherently unequal, usually causing the power imbalance to tip in favor of men.<sup>50</sup> Socially constructed sex stereotypes also serve to privilege men over women and create a social structure supporting domestic violence based on power imbalances not only in a specific relationship, but also in society at large.<sup>51</sup> Violence therefore stems from the male abuser's desire for control over his female victim, which feeds on the inequality and power imbalance in the relationship.<sup>52</sup>

Understanding domestic violence as a way to control the victim can help explain a situation where a woman is the more powerful party (financially, socially, or otherwise) and is still abused.<sup>53</sup> Here, the man may use violence to restructure the power dynamics in his favor, as violence could also be a manifestation of powerlessness in the relationship.<sup>54</sup> Limiting the power imbalance rationale to opposite-sex marriages or marriage-mimicking relationships, however, ignores abuse in other relationships where violence also stems from imbalanced power dynamics and the desire of one party to control the other; power imbalances and a desire for controlling the other party are not exclusive to opposite-sex, romantic relationships.<sup>55</sup>

As a result of the power imbalance, the abuser employs violence as a pattern of control<sup>56</sup>: abusers will start by making rules that are extremely controlling over all aspects of everyday life,<sup>57</sup> rules which are often abusive in and of themselves, and punish the victim for breaking them.<sup>58</sup> One study presented the example of a man who

49. *Id.* at 12.

50. Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 1005-06 (1995) (arguing entrapment of women caused by domestic violence is consequential to sexual inequality between men and women).

51. Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 10, 26-31 (1998) (discussing socially constructed power hierarchies associated with domestic violence).

52. Bonnie E. Carlson, *Questioning the Party Line on Family Violence*, in BATTERED WOMEN AND THE LAW, *supra* note 2, at 122-23 (explaining that gaining and maintaining control and power in the relationship are key elements in domestic violence); Jasinski, *supra* note 44, at 12.

53. For a more detailed example of such a relationship, see Part III.B.1.

54. Jasinski, *supra* note 44, at 12.

55. Carlson, *supra* note 52, at 123; see also Part II.B.2 for further discussion.

56. Fischer et al., *supra* note 1, at 2126-27.

57. *Id.* at 2127-31; Stark, *supra* note 50, at 986 (finding that control of women through domestic violence extends to all areas of life, including sexuality, outside relationships, and work).

58. Fischer et al., *supra* note 1, at 2127-28.

put his demands in writing: his wife had to make sure the children kept their rooms clean and would not argue with each other; he had freedom to come and go as he pleased; he could have a girlfriend; and his wife had to perform oral sex or engage in anal sex with him upon his demand.<sup>59</sup> Her failure to comply with any of the rules was punished by violence.<sup>60</sup> Gradually the victim internalized these rules, requiring less action on the abuser's part to enforce them.<sup>61</sup> It is almost as if the victim initiates the ways in which to adhere to the rules. For example, a woman whose partner isolated her as part of the abuse, learned over time not to tell people where she lived and not to allow her family to visit.<sup>62</sup> Yet the abuser will continue the abusive punishments for breaking rules to preserve the pattern of domination and control, "teach[ing the victim] a lesson."<sup>63</sup> Emotional abuse also helps cement the control and domination by further instilling fear, humiliation, and social isolation.<sup>64</sup> These patterns of control distinguish domestic violence from violence between strangers and justify heightened protections.<sup>65</sup>

As a dynamic of the power imbalance, domestic violence not only leads to control over the victim while in the relationship, but also limits his or her ability to withdraw from the relationship.<sup>66</sup> Hence, domestic violence is characterized by the bigger picture — a pattern of control in which the abuser asserts complete dominance over the victim.<sup>67</sup>

#### 4. Dependence

Despite the abuse, parties in a violent domestic relationship share characteristics in common with other close relationships.<sup>68</sup> They may have an intimate bond, mutual hopes and dreams, and

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59. *Id.* at 2127 (citing ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 59 (1987)).

60. *Id.*

61. *Id.* at 2129.

62. *Id.*

63. *Id.* at 2131.

64. *Id.* at 2132.

65. Joan Erskine, Note, *If It Quacks Like a Duck: Recharacterizing Domestic Violence as Criminal Coercion*, 65 BROOK. L. REV. 1207, 1216-17 (1999) (arguing that because fear is an ongoing product of domestic violence controlling patterns, it is unlike assault between strangers).

66. See Suk, *supra* note 19, at 21 (arguing that protective orders mitigate the abuser's ability to control the victim).

67. Joan S. Meier, *Notes from the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295, 1317-18 (1993) (noting the severity of domestic violence as a controlling pattern directed to dominate the victim through physical injury and other types of violence).

68. Mahoney et al., *supra* note 20, at 147.

a history of shared experiences.<sup>69</sup> This emotional attachment, which is not exclusive to romantic relationships<sup>70</sup> and may form at different stages of the relationship,<sup>71</sup> makes it extremely difficult for the victim to end the relationship despite, and sometimes because of, the abuse.<sup>72</sup> Psychological research has explained this phenomena through traumatic bonding theory.<sup>73</sup> The victim perceives the first incident of abuse as abnormal or as inescapable.<sup>74</sup> The victim consequently tries to strengthen the emotional bond with the abuser.<sup>75</sup> The victim believes that changing his or her behavior to comply with the abuser's demands can prevent violence.<sup>76</sup> By the time the victim realizes the violence is ongoing and inevitable, the emotional bond is so strong that ending the relationship seems impossible.<sup>77</sup> According to this theory, instead of remaining passive in the relationship, the victim attempts to regain the lost sense of power by developing a strong positive attachment to the abuser, which makes leaving all the more difficult.<sup>78</sup> The traumatic bond effectively traps the victim in the relationship.<sup>79</sup> The victim adapts to the abuse, yet takes up different survival strategies.<sup>80</sup> As a result, the victim's commitment to the relationship and the abuser grows,<sup>81</sup> and the victim cannot easily opt out of the relationship.<sup>82</sup> Traumatic bonding can occur in all stages of the

69. *Id.*

70. See, e.g., Ethan Leib, *Friendship & the Law*, 54 UCLA L. REV. 631, 643 (2007) (discussing the intimacy formed in friendships).

71. See Denise Bricker, Note, *Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 1379, 1391 (1993) (arguing that the first serious incident of violence typically only occurs after steps have been taken towards commitment, thus making it more difficult for the victim to end the relationship).

72. Mahoney et al., *supra* note 20, at 147.

73. Geneva Brown, *When the Bough Breaks: Traumatic Paralysis — An Affirmative Defense for Battered Mothers*, 32 WM. MITCHELL L. REV. 189, 194, 240 (2005) (arguing that despite its acceptance in psychology, courts are still rather reluctant to recognize the effect of traumatic bonding on domestic violence victims).

74. *Id.* at 211.

75. *Id.*

76. *Id.*

77. *Id.* at 211-12.

78. Marya Kathryn Lucas, *An Invitation to Liability?: Attempts at Holding Victims of Domestic Violence Liable as Accomplices When They Invite Violations of Their Own Protective Orders*, 5 GEO. J. GENDER & L. 763, 786 (2004) (explaining that traumatic bonding is the victim's way of restoring power and self-worth through positive emotions for the abuser); Stark, *supra* note 50, at 997 (explaining that escalating violence actually increases attachment to abuser).

79. See Brown, *supra* note 73, at 240.

80. *Id.*

81. *Id.* at 211; see also LEVESQUE, *supra* note 47, at 224 (explaining how parties of abusive relationships become more committed to the relationship because of "traumatic bonding").

82. Brown, *supra* note 73, at 211-12.

relationship.<sup>83</sup> In fact, adolescents in early dating stages are especially susceptible to it as they tend to conform to relationship norms more extremely and feel more pressure to ensure the relationship's success.<sup>84</sup>

Other ways in which a party may be dependent on the other are due to attachments to the latter's friends or family.<sup>85</sup> Because abuse isolates the victim from other relationships, it is probable that a victim's social ties are limited to those closest to his or her abuser.<sup>86</sup> The prospect of ending an abusive relationship and being left without a social network actually strengthens the emotional attachment and dependency of the victim on the abuser.<sup>87</sup>

There may be additional obstacles to leaving a relationship, such as finding alternative living arrangements or sorting out the possible division of property or other contractual obligations.<sup>88</sup> Such legal or financial burdens, as well as the emotional and social factors, increase dependence on the abuser and may eliminate the victim's ability to discontinue the relationship.<sup>89</sup> And so, dependence further exacerbates the abuser's accessibility to the victim, as well as the power imbalance in the relationship.

### *B. Macro-Level Patterns of Domestic Violence*

The four characteristics of domestic violence listed above are significant as indicia of larger overarching patterns in domestic violence that further justify the distinction between domestic violence and acts of violence between strangers. These patterns, the cyclical nature of domestic violence and the severe psychological effects, can be expected as the result of the four characteristics.

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83. LEVESQUE, *supra* note 47, at 224.

84. *Id.* at 224 (maintaining that notions of gender roles and sex stereotypes pressure teenagers to form and stay in relationships, and make them more prone to traumatic bonding).

85. Mahoney et al., *supra* note 20, at 147.

86. *Id.* (explaining that women often develop close bonds to the family and friends of the abuser making it more difficult to leave for fear of losing those relationships as well); see also Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women's Syndrome*, 21 HOFSTRA L. REV. 1191, 1224-25 (1993) (explaining the isolation and subsequent dependency on the abuser that results from the abusive relationship).

87. See Dutton, *supra* note 86, at 1224-25 (explaining that isolation as a result of domestic violence decreases victim's sense of self-worth and increases attachment and dependency on abuser).

88. *Id.* at 1233-34.

89. See *id.* at 1232-35, 1239-40 (arguing that fear of retaliation is reasonable based on statistics that most women killed by abusers have been killed after leaving the relationship).

### 1. Cyclicality and Repetition

Unlike violence between strangers,<sup>90</sup> violence in relationships is likely to be an ongoing abusive pattern that reinforces control, domination, and subordination of the victim by the abuser.<sup>91</sup> The abuse in personal relationships is often repetitive and escalates over time.<sup>92</sup> Moreover, there may be periods of time where the abuse subsides and others when it increases, given its cyclical nature.<sup>93</sup>

Lenore Walker has articulated three stages of what she refers to as the "Cycle of Violence."<sup>94</sup> The first is the "tension building" stage which involves relatively minor incidents of violence.<sup>95</sup> Although the victim tries to appease the abuser, the violence gradually worsens, becoming more abusive and oppressive, as each party senses the onset of the imminent second phase, the "acute battering incident."<sup>96</sup> This is a destructive and brutal attack that ends only at the will of the abuser. Resistance on the part of the victim may actually make things worse.<sup>97</sup> Finally, the violence gives way to the third phase — the "tranquil loving phase" — a non-violent period of relief.<sup>98</sup> To make amends for the prior violence, the abuser exhibits warm and nurturing behavior.<sup>99</sup> Once the tranquil phase subsides, tension begins to build yet again, followed by another acute violence phase, thus repeating the cycle of domestic violence.<sup>100</sup>

Walker's "Cycle of Violence" theory illustrates how the four micro-level concerns, put together, lead to cyclicality and repetition in domestic violence. First, as I have discussed, an abuser's violent behavior cannot take place, let alone repeat itself or escalate in severity, if the abuser does not have access to the victim. Second, the cycle of violence reinforces the power imbalance and an abuser's control over his or her victim. The victim's attempts to prevent violence

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90. See Erskine, *supra* note 65, at 1216-17 (stating that abusive relationships are ongoing interactions and therefore differ from assault between strangers).

91. Mahoney et al., *supra* note 20, at 145.

92. *Id.* at 146.

93. *Id.*

94. Lenore Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds*, in *BATTERED WOMEN AND THE LAW*, *supra* note 2, at 65.

95. *Id.* (specifying that minor battering may include slaps and verbal abuse).

96. *Id.*

97. *Id.*

98. *Id.* at 66.

99. *Id.*

100. See Jerry von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed Toward Women and the Impact on Child Witnesses*, 27 W. ST. U. L. REV. 111, 145-46 (2000) (discussing how the cycle of violence is repetitive and why victims remain in violent relationships).

during the tension building phase legitimizes the violence, as it reinforces the abuser's sense of entitlement and validates the abuser's use of violence as an effective way to control the victim.<sup>101</sup> Violation of trust and interdependence are both exacerbated at the tranquil phase.<sup>102</sup> On one hand, the abuser tries to instill trust in the victim during this stage, yet violates it again during the violent phases that follow.<sup>103</sup> On the other hand, the parties' interdependence is solidified, as once again an illusion of peace is created.<sup>104</sup> Neither party feels independent from the other or capable of functioning upon separation.<sup>105</sup>

It is reasonable, then, to conclude that the four characteristics of domestic violence intertwine to feed the cyclical repetitive nature of domestic violence. Cyclicity and repetition are to be expected in a dependent relationship where parties have access to each other, when the relationship manifests a power imbalance leading to control of one party by the other, and when trust is repeatedly violated.<sup>106</sup>

## 2. *Psychological Harms*

The characteristics of domestic violence, detailed above, as well as its cyclical pattern result in severe psychological ramifications for victims.<sup>107</sup> These psychological patterns, their commonality in victims and their relative severity, set domestic violence apart from violent acts between strangers, justifying heightened protection.

Survivors of violence often point to the psychological aspects of the abuse as the most harmful and long lasting.<sup>108</sup> Violence in relationships has been found to cause mental health problems such as anxiety, depression, posttraumatic stress, substance abuse and

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101. Walker, *supra* note 94, at 65 (arguing that a victim's attempt to prevent escalation is a double edged sword as it validates the abuser's sense of entitlement to abuse as a form of control).

102. *Id.* at 66.

103. *Id.*; see also Colker, *supra* note 3, at 1868 (arguing that violation of trust in intimate partner violence is more harmful than violence in other kinds of relationships).

104. Walker, *supra* note 94, at 66.

105. *Id.*

106. Although all micro-level characteristics may contribute to cyclicity, the combination of all four is not necessary, as explained *infra* in Part III.

107. See John Hamel, *Domestic Violence: A Gender-Inclusive Conception*, in FAMILY INTERVENTIONS IN DOMESTIC VIOLENCE: A HANDBOOK OF GENDER-INCLUSIVE THEORY AND TREATMENT 3, 10-11 (John Hamel & Tonia L. Nicholls eds., 2007) (listing the variety of psychological problems that can develop as a result of prolonged physical and verbal abuse); Dutton, *supra* note 86, at 1221-23 (listing the numerous negative psychological effects that can result from physical and sexual violence).

108. Walter S. DeKeseredy & Martin D. Schwartz, *Definitional Issues*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN, *supra* note 20, at 23, 29.



suicidal tendencies, in both women and men,<sup>109</sup> as well as cognitive difficulties such as memory loss, trouble concentrating,<sup>110</sup> and dissociative disorders.<sup>111</sup> Other harms, such as lowered self-esteem, sexual dysfunction, and development of a range of mental disorders are also products of prolonged abuse.<sup>112</sup>

Failure to control the abusive situation and the unpredictability of the abuser's behavior results in "learned helplessness," a depressive state of mind in which the victim believes he or she is unable to leave the abuser because of a perceived lack of control in the relationship.<sup>113</sup> The victim becomes more passive and less driven to escape the relationship.<sup>114</sup> Abuse, therefore, crushes the victim's sense of self and his or her view of others and the world.<sup>115</sup> The victim then believes that such extreme means of control in a relationship are normal and to be expected.<sup>116</sup> Abuse endangers the very existence of the victim, not merely in the physical sense, but also in the psychological sense because it compromises identity and selfhood.<sup>117</sup>

Another psychological harm victims of domestic violence may experience is Posttraumatic Stress Disorder (PTSD).<sup>118</sup> PTSD is a psychiatric disorder that results from a life threatening experience.<sup>119</sup> Symptoms include flashbacks, nightmares, intrusive thoughts, and feelings of detachment and disassociation. These coping mechanisms help relieve the trauma.<sup>120</sup> A substantial number of abuse victims suffer from PTSD.<sup>121</sup> A prior history of abuse increases the likelihood

109. See Hamel, *supra* note 107, at 10; see also Stark, *supra* note 50, at 985 (specifying psychological, as well as physical, harms of abuse).

110. See Dutton, *supra* note 86, at 1221-22 (pointing out different psychological dysfunctions that result from violence).

111. *Id.* at 1221; Stark, *supra* note 50, at 997.

112. Dutton, *supra* note 86, at 1221-23; Stark, *supra* note 50, at 997.

113. Jasinski, *supra* note 44, at 7.

114. See Jessica Savage, *Criminal Law Chapter: Battered Woman Syndrome*, 7 GEO. J. GENDER & L. 761, 762 (2006) (explaining the role of the cycle of violence in forming learned helplessness in victims).

115. Dutton, *supra* note 86, at 1218.

116. Erskine, *supra* note 65, at 1220 (explaining why parties may not necessarily find their abusive relationship to be criminal).

117. ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 48 (2000).

118. Loring Jones et al., *Post-Traumatic Stress Disorder (PTSD) in Victims of Domestic Violence*, 2 TRAUMA, VIOLENCE & ABUSE 99 (2001); Dutton, *supra* note 86, at 1198.

119. Dutton, *supra* note 86, at 1198 (describing symptoms of PTSD in battered women); Am. Psychiatric Ass'n, *Let's Talk About Posttraumatic Stress Disorder*, available at <http://www.healthyminds.org/factsheets/LTF-PTSD.pdf> (last visited Feb. 8, 2008).

120. *Id.*

121. Jones et al., *supra* note 118, at 100 (citing studies that found anywhere from thirty-one to eighty-four percent of domestic violence victims suffer from PTSD).

for PTSD as a consequence of later abuse.<sup>122</sup> Though psychological abuse is as harmful as physical abuse,<sup>123</sup> life-threatening and extensive abuse will increase the severity of PTSD symptoms.<sup>124</sup>

Based on symptoms of PTSD, social scientists have identified a subset of PTSD specific to abuse victims known as Battered Woman Syndrome (BWS).<sup>125</sup> BWS manifests itself mainly in the victim's decreased ability to respond effectively to the abuse.<sup>126</sup> The victim becomes psychologically trapped in the relationship.<sup>127</sup> The victim feels helpless in stopping the abuse,<sup>128</sup> as such attempts prove futile in light of the escalating danger.<sup>129</sup> The victim then focuses on survival rather than escape.<sup>130</sup>

Critics of BWS, as well as PTSD, have noted that it further victimizes and pathologizes victims by depicting them as passive<sup>131</sup> and does not account for abused persons who reach a point of agency and leave.<sup>132</sup> However, as a more comprehensive discussion of the critiques of both disorders are outside the scope of this paper, I will merely respond by arguing that if domestic violence, including battered woman syndrome are no longer restricted to traditional categories of gender and relationship forms, and are seen as more inclusive of all sorts of victims, this can help minimize concerns regarding the victimization and pathology of women. Furthermore, I will point out that for the sake of the arguments made here, I believe that these disorders — and primarily PTSD — can and should serve as indicators for those in need of legal remedies due to abuse.

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122. *Id.*

123. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 872 (1993); Kristina C. Evans, Note, *Can A Leopard Change His Spots: Child Custody and Batterer's Intervention*, 11 DUKE J. GENDER L. & POL'Y 121, 134 (2004).

124. Jones et al., *supra* note 118, at 111.

125. Lenore Walker, *The Battered Woman Syndrome Is a Psychological Consequence of Abuse; Current Controversies on Family Violence*, in BATTERED WOMEN AND THE LAW, *supra* note 2, at 118 (explaining that in order to diagnose BWS, there must first be a diagnosis of PTSD). Victims often suffer, however, from more than the minimum symptoms required for PTSD diagnosis. *Id.*

126. Mary Ann Douglas, *The Battered Woman Syndrome*, in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 39, 39-40 (Daniel J. Sonkin ed., 1987).

127. *Id.*

128. *Id.* at 41.

129. *Id.* at 41-42.

130. See Stark, *supra* note 50, at 998 (explaining learned helplessness in the context of BWS as a depressive, fatalist, and passive coping mechanism concentrating on survival strategies).

131. *Id.* at 1000 (criticizing BWS and PTSD for stigmatizing domestic violence victims).

132. Jasinski, *supra* note 44, at 8.

## II. DOMESTIC VIOLENCE IN THE LAW

Now that the micro-level characteristics and macro-level patterns of domestic violence have been identified and used to justify heightened protections against domestic violence, this article turns to a more detailed discussion of how the law defines domestic violence, specifically in terms of the parties of domestic violence that the law chooses to protect. In this section, I will first review the different definitions in several jurisdictions. I then go on to discuss the problems associated with these definitions: their reliance on traditional relationship categories<sup>133</sup> identified by physical space requirements and traditional sexual or romantic aspects. Lastly, I will discuss specific forms of relationships and their inclusion or exclusion from the protection of domestic violence laws due to the legal definitions reviewed.

### A. Legal Definitions of Domestic Violence

Definitions of domestic violence vary and, although domestic violence encompasses different acts of abuse, legislation limits the types of relationships and people protected by domestic violence laws. So, whom does the law recognize as a domestic violence victim? The answer depends on the jurisdiction. A common thread, however, is that the law privileges traditional family units, such as marriages or marriage-mimicking relationships, which are deemed most worthy of protection.<sup>134</sup>

#### 1. Federal Law

Consistent with broader family law regulation, domestic violence has mainly been considered a matter of state law, with the major exceptions being the federal Violence Against Women Act (VAWA)<sup>135</sup> and the Crimes and Criminal Procedure Act.<sup>136</sup> VAWA allocates federal funding to states' domestic violence treatment and rehabilitation programs.<sup>137</sup> VAWA defines domestic violence as acts that occur between spouses or former spouses, cohabiting partners (whether cohabiting presently or in the past), and persons who have parented

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133. By "traditional" I mean romantic, opposite sex, monogamous, and preferably marital relationships.

134. Colker, *supra* note 3, at 1856 (arguing that states provide legal recourse mostly to married couples and opposite-sex, unmarried couples with children or those in a spouse-like relationship).

135. Violence Against Women Act of 1994, 42 U.S.C.S. § 13925 (2007).

136. 18 U.S.C.S. § 921 (2007).

137. 42 U.S.C.S. § 13925(b).

a child together.<sup>138</sup> The provision also defers to specific regulation by jurisdiction, indicating that a person committing acts of domestic violence is a person who is “similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.”<sup>139</sup>

In defining domestic violence, the provisions in VAWA and in the Crimes and Criminal Procedure Act all rely on the classic family unit<sup>140</sup>: a man and woman in a marriage or a marriage-mimicking relationship, with or without children.<sup>141</sup> They afford protections to victims who are or were in such a relationship with the abuser, mainly identified by cohabitation or parenting, or in the welfare provision — by an intimate or sexual relationship.<sup>142</sup>

Reported court opinions generally do not challenge the marriage-mimicking model.<sup>143</sup> *White v. Dep’t of Justice*<sup>144</sup> is an example of a case where the Crimes and Criminal Procedure Act was at stake.<sup>145</sup> In *White* the court relied on earlier factual findings about the relationship between White and the woman he abused and determined that he was similarly situated to a spouse.<sup>146</sup> The court found that the two had cohabited for a long period of time and that, even when they began maintaining separate residences, their relationship was still “similar to a spousal relationship, including expectations of fidelity

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138. § 13925(a)(6). It should be noted that in sub-sections (7) and (8), the Act accounts for violence in the dating context, which I will specifically discuss in Part II.B.3.

139. *Id.* VAWA also defines domestic violence in the context of public health and welfare as an act between two people who are spouses or former spouses; are or were intimate or sexual partners; or have a child together whether biologically, by adoption, or by legal custodianship, or are stepparents of a minor. 42 U.S.C.S. § 10701(8) (2007). No reported cases have been found to discuss deference to state law, therefore the question of limitation or expansion of federal domestic violence law through deference to state law remains unresolved.

140. The federal criminal statute defines domestic violence to be committed by a current or former spouse, by a person with whom the victim shares a child, by a person currently or formerly cohabiting with the victim as a spouse, or by a person similarly situated to a spouse. 18 U.S.C.S. § 921(a)(33)(A)(ii) (2007).

141. *Id.*

142. *Id.*; 42 U.S.C.S. § 10701(8)(A).

143. *United States v. Hayes*, 482 F.3d 749 (4th Cir. 2007), is an example of an opinion regarding the federal crime of domestic violence between former spouses. See *United States v. Kavoukian*, 315 F.3d 138 (2d Cir. 2002), for an example of a case where a federal domestic violence conviction was reversed and remanded because the relationship between the defendant and the woman abused was not a “domestic relationship” as proscribed by the criminal provision.

144. 328 F.3d 1361 (Fed. Cir. 2003).

145. *Id.* at 1363.

146. *Id.* at 1369.

and monogamy, shared expenses, shared household responsibilities, social activities in common, and discussions about having children."<sup>147</sup> This language by the court demonstrates that, under federal law, domestic violence protections are very much limited to marriage-mimicking relationships.

## 2. State Law

State laws addressing domestic violence differ on whom the state recognizes as worthy of protection as a victim. Although the scope of victims' recognition is generally very limited, some states are slightly more comprehensive in their protections than others, either through explicit legislative language or by making room for broad judicial discretion.<sup>148</sup> Specifically, some states, such as Delaware, had narrow definitions limiting domestic violence to strictly familial relationships, whether in the context of blood relations, marriage or co-parenting.<sup>149</sup> Other states, like Nebraska and Washington, provide slightly more comprehensive definitions of domestic violence and recognize relationships beyond those that are merely familial.<sup>150</sup> For example, they

147. *Id.* at 1369-70.

148. *See, e.g.*, NEB. REV. STAT. ANN. § 42-903 (LexisNexis 2007).

149. Before amending its law in 2007, Delaware offered an example of legislation that narrowly defined victims of domestic violence. In Delaware, a victim was either a family member of the abuser, former spouses, opposite-sex cohabiters raising a child of either or both, or members of an opposite-sex couple maintaining separate residences but having a child in common. DEL. CODE ANN. tit. 10, § 1041(2) (2006). The Delaware statute further specified who is considered a family: husband and wife, a man and woman living with a child of either or both, or any person related by blood or marriage living together and falling under certain degrees of relationship. DEL. CODE ANN. tit. 10, § 901(12) (2007).

A few things stand out from statutes like Delaware's, all reflecting traditional concepts of what constitutes a family and of families' significance. First, there is a strong emphasis on family ties (whether by blood or marriage) as a range of familial relationships were recognized. Also, if not related by blood, parties were required to be either presently or formerly in an opposite-sex marital relationship or co-parent a child. Therefore, a sexual relationship alone was not enough. Second, recognition of these relationships was conditioned on parties living together under one roof, which is a spatial requirement. Cohabitation alone was not recognized as a relationship in the context of these domestic violence statutes when there were no children in the picture. Co-parenting was the only cure for a lack of any or all conditions (family relations, marriage, and cohabitation). This may imply that, more than protecting people who are abused, Delaware was particularly concerned with protecting children. It can therefore be expected that many abusive relationships in Delaware remained unaddressed by the state, leaving victims of same-sex, dating, childless-cohabitation relationships, and friends and roommates who may have suffered abuse to their own devices. This exclusion from protection may have been the rationale behind the statute's recent amendment. DEL. CODE ANN. tit. 10, § 1041 (2007).

150. NEB. REV. STAT. ANN. § 42-903; WASH. REV. CODE ANN. § 10.99.020 (LexisNexis 2007).

include romantic or spatial relationships.<sup>151</sup> Some states focus on the combination of romantic and spatial criteria in their definitions. Two examples of these are California and Illinois.<sup>152</sup> Lastly, New Jersey and North Dakota are examples of states that have relatively broad definitions: the former, by disaggregating the spatial requirement from the familial or romantic requirement;<sup>153</sup> the latter, by permitting extensive court discretion.<sup>154</sup>

*a. Familial or Romantic Relationships — Nebraska and Washington*

Several states offer protection from domestic violence to victims that are either family members or in a romantic relationship with their abuser.<sup>155</sup> As such, Nebraska's domestic violence statute<sup>156</sup> is slightly more encompassing than Delaware's prior regulation. Nebraska's statute includes cohabiting relationships, regardless of whether they have children.<sup>157</sup> It also includes dating relationships, as long as the relationship is a "frequent, intimate association[] primarily characterized by the expectation of affectional or sexual involvement, but does not include a casual relationship or an ordinary association between persons in a business or social context."<sup>158</sup> This provision thus excludes friends, co-workers, roommates, and most notably short-lived dating relationships, which may not have lasted because of early abuse, and yet are unprotected. It also privileges marital relationships and those in which there is strong potential for a traditional marital relationship.<sup>159</sup>

Another state which has a rather narrow approach to dating relationships is Washington, whose domestic violence law defines dating as a romantic relationship between people over sixteen.<sup>160</sup> The statute further articulates a three prong test the court may use to find whether a relationship is a protected dating relationship.<sup>161</sup>

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151. By "spatial" I refer to relationships where parties share a residence, whether coupled with a romantic relationship or not, such as in the case of roommates.

152. *People v. Young*, 840 N.E.2d 825, 831-32 (Ill. App. Ct. 2005); Colker, *supra* note 3, at 1858.

153. N.J. STAT. ANN. § 2C:25-19 (West 2007).

154. N.D. CENT. CODE § 14-07.1-01(4) (2007).

155. In this context a romantic relationship is a non-marital relationship, and therefore is not a familial relationship. Still, the romantic relationship is marriage-mimicking.

156. NEB. REV. STAT. ANN. § 42-903 (LexisNexis 2007).

157. *Id.*

158. *Id.*

159. *Id.*

160. WASH. REV. CODE ANN. § 26.50.010(3) (LexisNexis 2007).

161. *Id.*

The court can consider the length of the relationship, its nature,<sup>162</sup> and the frequency of interaction.<sup>163</sup> This again seems to privilege relationships that are on the path to become marital or marriage-mimicking, identified mainly by romantic and sexual aspects of a relationship.

*b. Romantic and Spatial — California and Illinois*

Other states focus on the combination of both a romantic relationship and cohabitation as criteria in their definitions; examples of these are California and Illinois.<sup>164</sup> These states restrict domestic abuse protections to situations where the relationship meets both the spatial requirement of a common household and the romantic requirement, following traditional concepts of domestic violence occurring in marriage-mimicking relationships.<sup>165</sup>

California courts have moved away from demanding a sexual component to the relationship, but they have not done away with the romantic aspect.<sup>166</sup> In *People v. Ballard*, the abuser appealed a domestic violence conviction arguing the cohabiting relationship did not constitute domestic violence since the relationship between the two parties was not sexual.<sup>167</sup> The court rejected this argument, holding that a cohabiting relationship did not require a sexual relationship, as long as the parties live or have lived together as husband and wife.<sup>168</sup> The court found that in this case the parties had indeed been in a cohabiting relationship because they had been living "together in one bed" for two years.<sup>169</sup>

Later California opinions emphasized requirements of romantic relationships, as well.<sup>170</sup> First, in *People v. Moore* the court noted that a purely platonic relationship was not sufficient for cohabitation

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162. The Washington statute defines a dating relationship as a "social relationship of a romantic nature." *Id.* Case law has used sex as indicative of a romantic relationship: "[T]he evidence must merely establish that the couple had a 'social relationship of a romantic nature.' The sentencing court was entitled to conclude that two adults who have sex are involved in a romantic relationship." *State v. Doane*, No. 38404-0-I, 1997 Wash. App. LEXIS 744, at \*4 (Wash. Ct. App. May 12, 1997).

163. WASH. REV. CODE ANN. § 26.50.010(3).

164. *People v. Young*, 840 N.E.2d 825, 831-32 (Ill. App. Ct. 2005); Colker, *supra* note 3, at 1858.

165. Colker, *supra* note 3, at 1858.

166. *People v. Ballard*, 249 Cal. Rptr. 806 (Cal. Ct. App. 1988).

167. *Id.* at 807.

168. *Id.* at 809.

169. *Id.* at 808.

170. *People v. Moore*, 52 Cal. Rptr. 2d 256 (Cal. Ct. App. 1996).

under domestic violence law.<sup>171</sup> Then, in *People v. Taylor*,<sup>172</sup> the court defined cohabitation as living together in a substantial relationship, which manifested at least by permanent sexual or amorous intimacy.<sup>173</sup> The actual living arrangements, though, were not required to be permanent or continuous or even exclusive.<sup>174</sup> Thus, the court created a two pronged test for cohabitation: (a) the existence of a substantial ongoing romantic relationship; and (b) that the parties lived together for significant periods.<sup>175</sup>

California courts appear reluctant to abandon the idea that domestic violence can exist only in romantic relationships. While they may have rejected sex as a requirement of protected relationships, they are unyielding when it comes to requiring the relationship to be romantic in nature and have a past record of cohabitation. California courts, therefore, continue to privilege marriage-mimicking relationships and are more concerned with violence in these relationships than in others.

Two Illinois cases lead to similar conclusions on courts' favoring romantic relationships in deciding domestic violence cases. In *People v. Young*, the court reduced a domestic violence conviction to battery.<sup>176</sup> The defendant had attacked a woman who stayed at the same homeless shelter.<sup>177</sup> The court did not find living in a homeless shelter sufficient for a domestic relationship, as a homeless shelter is not a permanent residence where the two had stayed together for an extended, indefinite period of time.<sup>178</sup> Further, the court held that cohabitation requires that the two intended to live together as a "cohesive unit," and that coincidentally staying at the same shelter does not meet this standard.<sup>179</sup> Additionally, the court reduced the domestic violence conviction based on the nature of the relationship, which the court found to be a non-romantic friendship.<sup>180</sup> Looking to the statutory intent behind the Illinois domestic violence statute, the court concluded the Illinois statute was intended to protect victims in intimate, though not necessarily sexual, relationships between familial or household members; casual relationships were insufficient.<sup>181</sup> The court held, therefore, that in the context of domestic

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171. *Id.*

172. *People v. Taylor*, 12 Cal. Rptr. 3d 693 (Cal. Ct. App. 2004).

173. *Id.* at 696.

174. *Id.* at 697.

175. *Id.*

176. *People v. Young*, 840 N.E.2d 825, 834 (Ill. App. Ct. 2005).

177. *Id.* at 827.

178. *Id.* at 830.

179. *Id.* at 831.

180. *Id.* at 832.

181. *Id.* at 831.



violence, the relationship "must be, at a minimum, an established relationship with a significant romantic focus."<sup>182</sup>

This intimate romantic relationship rule has led another Illinois court to find that the same-sex couple in *Glater v. Fabianich* was also protected by Illinois domestic violence laws.<sup>183</sup> Without going into detail about the relationship, the court found it to be an intimate one and that it constituted a protected relationship because domestic violence laws were not limited to marriages alone.<sup>184</sup> The court further found that the two men had shared a common household in Fabianich's apartment; Glater had paid rent, kept personal belongings there, shared expenses, and performed chores.<sup>185</sup> These aspects made their relationship fall under the scope of the domestic violence statute.<sup>186</sup>

Like California courts, Illinois courts also provide domestic abuse protections only in situations where the relationship meets both the spatial requirement of a common household and the romantic requirement, thus also adhering to the conventional categories of relationships worthy of domestic violence protections. This approach is particularly troubling when the court seems to be forcing those categories on cases which may not fit into them in order to grant legal recourse. In *Fabianich*, it was not clear that the relationship between the two men was indeed romantic.<sup>187</sup> In fact, the court refers to Fabianich's best friend's testimony that she thought the two men were best friends.<sup>188</sup> Yet the court rejects this and finds the relationship between the men to be intimate, without specifying what evidence led the court to this conclusion.<sup>189</sup> Had domestic violence laws not been limited to cover only marriage-mimicking relationships, the court's conclusion as to the type of relationship between the two would not have been necessary;<sup>190</sup> the court would have been free to

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182. *Id.* at 832.

183. *Glater v. Fabianich*, 625 N.E.2d 96, 99 (Ill. App. Ct. 1993).

184. *Id.* at 99.

185. *Id.*

186. *Id.*

187. *Id.* at 98.

188. *Id.*

189. *Id.* at 99.

[*Fabianich*] would have us hold that the [Illinois Domestic Violence] Act only applies to persons related by marriage or blood. We decline to take such a restrictive view as the Act was designed to prevent abuse between persons sharing intimate relationships. Based on the evidence, we believe the trial court had subject matter jurisdiction.

*Id.*

190. Colker, *supra* note 3, at 1859 (noting that states' coverage of "spouse-like" relationships reflect the marriage-mimicry model shaping domestic violence legislation).

include this case as domestic violence, regardless of whether the relationship was romantic.<sup>191</sup>

*c. Broadening Domestic Violence Law — New Jersey and North Dakota*

A recent New Jersey case shows signs of a new direction that is less contingent on the combination of the spatial requirement and the romantic requirement. In *Hamilton v. Ali*, the court found two college suitemates to be “household members.”<sup>192</sup> Analyzing the legislative intent behind New Jersey’s domestic violence law, the court held that the term “household members” was left undefined to allow for broad judicial interpretation to protect a wide variety of family or family-like relationships and, therefore, provides protection to as many victims as possible.<sup>193</sup> The court also discussed the students’ living conditions to establish that they were household members.<sup>194</sup> The court considered the daily interaction between the two, the overnight stays in the same apartment, personal belongings stored in common areas, and shared property, such as furniture.<sup>195</sup>

Another example of a statute allowing for broad judicial discretion is North Dakota’s domestic violence law.<sup>196</sup> The statute defines a victims of domestic violence as spouses or former spouses, family members related by blood or marriage, persons in a dating relationship, persons who are cohabiting or have cohabited, persons who have a child in common regardless of whether they are or have been married or have cohabited, or *any other persons with a sufficient relationship to the abuser as determined by the court*.<sup>197</sup> This definition creates the possibility for North Dakota courts to include many kinds of relationships within the scope of domestic violence and to stray from preconceived notions of what constitutes domestic violence.<sup>198</sup> The statute provides an opportunity to look at the characteristics of domestic violence, as previously presented in this article, and to extend protection to other forms of relationships in which one

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191. *Id.*

192. *Hamilton v. Ali*, 795 A.2d 929, 934 (N.J. Super. Ct. Ch. Div. 2001).

193. *Id.* at 931.

194. *Id.* at 933-34.

195. *Id.*

196. N.D. CENT. CODE, § 14-07.1-01(4) (2007).

197. *Id.*

198. See SCHNEIDER, *supra* note 117, at 67 (explaining that traditionally, domestic violence was considered an act of males exercising domination over females, usually in the context of marriage).

party may be abused by the other.<sup>199</sup> Unfortunately, with no case law in North Dakota interpreting the "sufficient relationship" provision, it is uncertain which relationships courts will be likely to include.<sup>200</sup> It may be wise, then, to look to cases in other states to determine whether courts have been inclined to broaden the relationship categories of domestic violence.

Although the New Jersey case may appear to be a step towards a more substantive analysis of non-marital relationships according to the characteristics and nature of the relationship, the Illinois and California cases are still very much contingent on concepts of domestic violence as abuse within a spatially confined romantic relationship.<sup>201</sup> As a result, it seems that a provision such as that in the North Dakota statute can cut both ways in courts' determinations on finding a certain relationship deserving of domestic violence protections.

### *B. Problems with Existing Domestic Violence Definitions*

Domestic violence law as discussed above addresses abuse in relationships based on form rather than substance.<sup>202</sup> Courts will grant domestic violence protections to victims in relationships that fall into categories often associated with domestic violence. These include family units based on blood or marriage, such as relationships that are marriage-like or have the potential to evolve into marriage.<sup>203</sup> Courts shy away from scrutinizing relationships for the substantive

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199. See Colker, *supra* note 3, at 1880 (noting that relationship status should not be the focal point of domestic violence legislation).

200. See N.D. CENT. CODE § 14-07.1-01(4) (2007). *Cf.* Holtz v. Holtz, 595 N.W.2d 1, 9 (N.D. 1999) (stating that domestic violence statute extends to dating relationships and people who have been or are living together); Kasprowicz v. Kasprowicz, 575 N.W.2d 921, 923 (N.D. 1998) (noting that domestic violence is violence directed at any member of the household).

201. *People v. Taylor*, 12 Cal. Rptr. 3d 693, 697 (Cal. Ct. App. 2004) (stating living without a permanent residence constitutes cohabitation); *People v. Moore*, 52 Cal. Rptr. 2d 256, 263 (Cal. Ct. App. 1996) (addressing whether the defendant can cohabit with two or more people at the same time); *People v. Ballard*, 249 Cal. Rptr. 806, 809 (Cal. Ct. App. 1988) (discussing the defendant's knowledge of the legal definition of "cohabit"); *People v. Young*, 840 N.E.2d 825, 830 (Ill. App. Ct. 2005) (stating transitory housing is not sufficient for domestic violence laws to apply); *Glater v. Fabianich*, 625 N.E.2d 96, 99 (Ill. App. Ct. 1993) (stating sharing a common household is enough for the domestic violence laws to apply).

202. By "form" I refer to the configuration or type of a relationship, or the labels used to identify relationships. The configuration of a relationship can relate to the sex of the parties. In contrast, the type of relationship could be romantic, sexual, platonic, familial and so on. By "substance" I mean the essence or quality of the relationship. Looking to the substance of the relationship would involve a deeper examination of the interaction, as I discuss further in Part III.

203. Colker, *supra* note 3, at 1857.

characteristics explained in Part I, which can point to the nature and causes of the abuse. This narrow view of domestic violence centers around categories of relationship forms, such as space and romance, excludes other relationships that can be equally abusive, and fails to protect abuse victims in such relationships.<sup>204</sup>

### *1. Categories of Domestic Violence Definitions*

The existing framework of domestic violence statutes builds on categories designed to identify victims and relationships that fit the marriage-mimicry model and therefore deserve the law's attention.<sup>205</sup> The above analysis of domestic violence law has pointed out three categories: the sex category, the physical-spatial category, and the romantic/sexual category.<sup>206</sup> The framework relying on these categories consequently misses its target as it is inadequate in identifying who needs protection from abuse.

#### *a. Essentializing Sex and Its Use as a Category*

As most domestic violence laws now use gender-neutral terms, the sex of parties seems less of a restriction on domestic violence protections.<sup>207</sup> Sex, as a category, appears to have evolved along with the feminist movement.<sup>208</sup> Yet the law generally perceives domestic violence as a manifestation of sex inequality and female subordination.<sup>209</sup> Sex and gender still very much color the view and the law of domestic violence.<sup>210</sup>

The feminist movement has shaped concepts of domestic violence, as the movement sought to bring domestic violence from behind closed doors into the light by recognizing it as a problem warranting legal attention.<sup>211</sup> Feminism has framed domestic violence as a power struggle between the sexes, in which men assert their domination of women through violence in the home as part of a broader social context of coercive control, rooted in structural sex inequality.<sup>212</sup>

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204. *Id.*

205. *Id.* at 1857-58.

206. See Part II.A.2.

207. SCHNEIDER, *supra* note 117, at 62 (noting the impact of gender neutrality on legal reforms).

208. *Id.*

209. *Id.* at 67 (discussing the traditional heterosexist framework).

210. See Bricker, *supra* note 71, at 1430.

211. See Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 753 (2007).

212. SCHNEIDER, *supra* note 117, at 5 (describing feminist legal theorists' view of domestic violence as heterosexual intimate violence in a larger system of coercive control and subordination of women by men); see also Maxine Eichner, *On Postmodern*

Perhaps inadvertently, feminist approaches to domestic violence rely on sex stereotypes<sup>213</sup> and, to some degree, even reinforce them.<sup>214</sup> Explanations of domestic violence rely on stereotypes about women's passivity, size, physical weakness, and economic dependence on men.<sup>215</sup> Emphasizing these stereotypes implies there is truth to them, and suggests that society should address them by targeting domestic violence rather than deconstructing the stereotypes themselves. Focusing on sex stereotypes without undermining them maintains that domestic violence is only about male domination and sex inequality.<sup>216</sup> Without seeking to change the stereotypes underlying domination and inequality, the feminist model reproduces the very social norms it seeks to battle and utilizes the law in a way that continues to construct gender.<sup>217</sup> Furthermore, it portrays women in a paternalistic, even patronizing manner, as incapable of autonomous judgments about their lives and relationships.<sup>218</sup>

To fully protect all victims of violence in any relationship form, the law must recognize that the traditional feminist approach, which limits domestic violence laws protections to women, excludes others in need of protection based on "formality."<sup>219</sup> In other words, feminist theory protects women alone from violent relationships, overlooking the substantive characteristics of such violence, from which a variety of relationships may suffer.<sup>220</sup> This is not to say that domestic violence is not about domination and inequality in the relationship, only that these are not necessarily a result of gender issues; instead, inequality in a relationship, and subordination of one party by another, can occur regardless of the genders of those involved.<sup>221</sup> Postmodernism has influenced this more fluid approach of varying power dynamics in relationships,<sup>222</sup> maintaining that power dynamics cannot be

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*Feminist Legal Theory*, 36 HARV. C.R.-C.L. L. REV. 1, 9 (2001) (presenting the feminist model under which men who hold power intentionally use it against powerless women).

213. See Bricker, *supra* note 71, at 1430 (discussing the flaws of gender stereotypes with regard to battered woman syndrome in the context of same-sex domestic violence).

214. *Id.* at 1425.

215. *Id.*

216. See *id.* at 1425-26.

217. See Eichner, *supra* note 212, at 25-26 (arguing that when the law is framed around gender distinctions it serves to reproduce gender culturally).

218. See Suk, *supra* note 19, at 68 (describing the debate in domestic violence literature between protecting women and promoting their self-determination).

219. By "formality" I refer to the structural definitions domestic violence laws are based on, i.e. — *who* is the victim or the perpetrator and the *form* of relationship these laws apply to, usually intimate sexual relationships such as marriage or marriage-mimicry.

220. Bricker, *supra* note 71, at 1385.

221. *Id.* at 1383-84.

222. See Eichner, *supra* note 212, at 3.

The impact of postmodernism has been particularly great in women's studies. Here, postmodernism has sparked debate over whether women's experience

essentialized into one category.<sup>223</sup> Therefore relationships can be abusive regardless of the gendered power dynamics within them. Postmodernist feminism argues that gender categories should be deconstructed because they reinforce power imbalances<sup>224</sup> and allow power to remain in the hands of the traditionally powerful — i.e., men.

Domestic violence laws in some jurisdictions have become something of a hybrid between second wave feminist ideas<sup>225</sup> and postmodern feminism; on one hand legislators draft laws in gender-neutral terms (i.e., men can be victims of women), but on the other hand, laws still center around the assumption that domestic violence can exist only within the category of opposite-sex relationships (i.e., men cannot be victims of men). Gender categories have been deconstructed, yet courts scrutinize other aspects of the abusive relationship in order to determine whether it constitutes domestic violence.<sup>226</sup> Aside from gender, domestic violence protection still hinges on other relationship categories that may make the relationship marital-mimicking.<sup>227</sup> Categories such as the physical-spatial category, and the romantic-sexual category continuously perpetuate conventional notions of domestic violence as solely a family matter,<sup>228</sup> rather than

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can ever ground feminist theory, how and whether to treat women's identity as significant, and whether feminist criticism can have any definable subject or object. In the subfield of feminist history, postmodern skepticism regarding gender has ignited a debate over whether gender is ever a useful category of historical analysis and whether feminist historians should read history for differences within gender categories.

*Id.*

223. *Id.* at 23 (presenting Foucault's idea that power is not held by a particular person, but is exercised within the context of relations).

224. *Id.* at 30 (noting that postmodern feminism attempts to deconstruct identity categories which are means of maintaining power imbalances). Though I believe identity categories are significant on a personal level (as Eichner argues as well, *id.* at 47), they are not necessarily the best tool for the law to use as indication for who is in need of legal protections.

225. The feminist movement of the 1960s-80s, known as second-wave feminism, focused mainly on women's equal civil rights. See generally Sacha E. de Lange, *Toward Gender Equality: Affirmative Action, Comparable Worth, and the Women's Movement*, 31 N.Y.U. REV. L. & SOC. CHANGE 315, 316 (2007) (discussing the history of affirmative action and the women's rights movement). Second-wave feminism was concerned with domestic violence as a manifestation of "patriarchal views that women are objects and reflected conservative ideology that subordinated women's issues by deeming them private and thus inappropriate for legal response. Feminists fought against the patriarchal attitudes that sought to render women objects of men and deny women agency in domestic and sexual relationships." Gruber, *supra* note 211, at 753-54.

226. Colker, *supra* note 3, at 1849-50.

227. *Id.* (presenting the marriage-mimicry model as the basis for domestic violence protections). Under this model, courts look for either an intimate relationship and/or a common household. *Id.*

228. The approach that violence in the family context is a private matter that should

a matter that broadly concerns relationships regardless of the kind of relationship involved.

*b. The Physical-Spatial Category*

The spatial category in domestic violence law refers to the definitions of domestic violence based on cohabitation or the "household members" requirement.<sup>229</sup> The spatial category is a product of the notion that abuse in relationships results from gendered power dynamics in the context of the family home, which traditionally represented the physical dimension of family relationships.<sup>230</sup> Therefore, protection of victims hinges on their ability to show that they had shared a common household with their abuser.<sup>231</sup> Having to show proof of a common household can be quite a restrictive demand on the victim.<sup>232</sup> If the common living arrangement was not long-term,<sup>233</sup> the victim rarely satisfies this burden.<sup>234</sup> Even when the period of cohabitation was short-term or sporadic,<sup>235</sup> courts continuously emphasize the importance of the living arrangement to demonstrate some sort of deliberate commitment, as in the cases of *Young* and *Glater*.<sup>236</sup> Consequently, it seems that courts are really looking to protect marriage-like relationships, rather than abusive relationships in which the victim is in dire need of legal recourse, regardless of the form that relationship takes.<sup>237</sup>

One might argue that the use of spatial categories in domestic violence laws is justified, particularly in light of my prior discussion regarding accessibility to the victim. Yet space and accessibility are not synonymous. The spatial category limits protections to those

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remain independent from state intervention has been widely criticized by the feminist movement. I discuss this more in depth in Part III.C.2.

229. See legislation discussed in Parts II.A.1 and II.A.2.

230. See Suk, *supra* note 19, at 15 (noting that because the home historically symbolized abuse due to gendered power, protective orders removing the husband from the home allow the home to be the woman's fortress, instead of her prison).

231. Colker, *supra* note 3, at 1850.

232. See *id.* at 1861-63.

233. *Id.* at 1861. Long-term, however, does not mean permanent. In *Hamilton*, the fact that the two college suite-mates were to live together for a year was long-term enough. *Hamilton v. Ali*, 795 A.2d 929, 934 (N.J. Super. Ct. Ch. Div. 2001).

234. Colker, *supra* note 3, 1861-63.

235. See, e.g., *People v. Taylor*, 12 Cal. Rptr. 3d 693, 697 (Cal. Ct. App. 2004) (discussing a couple which alternated between living together in a car and living separately with their respective family members).

236. *People v. Young*, 840 N.E.2d 825, 830 (Ill. App. Ct. 2005); *Glater v. Fabianich*, 625 N.E.2d 96, 99 (Ill. App. Ct. 1993).

237. See Colker, *supra* note 3, at 1864 (discussing the six-factor test the Iowa Supreme Court employed that deliberately favors marriage-like relationships).

relationships which are, quite literally, confined to the walls of the home. Accessibility is a broader notion recognizing that access can exist in relationships where parties are not, and never have been, living together. The physical aspect of accessibility is required, in my mind, for findings of domestic violence, but that physical aspect is not contingent on a common household alone.

*c. The Romantic/Sexual Category*

The third categorical requirement for granting protection to victims is that the relationship between the victim and the abuser be romantic or sexual. Whether framed as intimate, sexual, or romantic, the law seeks to protect relationships that resemble marriages in that the relationships feature commitment, monogamy, and emotional interdependence.<sup>238</sup> The problem arises when the focus shifts from the characteristics of the relationship to the form of the relationship, i.e., marriage or marriage-mimicry.<sup>239</sup> By focusing attention on form, or a relationship unit identified by romance and/or sex, the law fails to look at what makes the relationship prone to abuse.

As demonstrated above, domestic violence laws require a relationship to be romantic or sexual to be protected, unless the parties are related by blood. Some jurisdictions go as far as to deny protection to relationships that may satisfy the spatial category but lack a romantic or sexual component.<sup>240</sup> Domestic violence law therefore assumes that abusive relationships intertwine with romantic or sexual relationships.<sup>241</sup> Such an assumption blinds the law from recognizing that abuse in non-romantic relationships can be just as problematic as abuse in romantic relationships. Acknowledging that abuse is a manifestation of imbalanced power dynamics based not only on gender, but also on differences in education, income, class, age, or personal attributes,<sup>242</sup> the law will be able to recognize that disparities may result in abusive dynamics in a variety of relationships, regardless of any sexual or romantic components.<sup>243</sup> The romantic/sexual

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238. *Id.* at 1858.

239. *Id.* at 1843.

240. NEB. REV. STAT. § 42-903(3) (2007). By explicitly denying protection to relationships within a "social context," Nebraska will doubtfully afford protections to friends, even if they share a common household. *Id.*; see also W. VA. CODE ANN. § 48-27-204(4) (2007) (providing a similar provision in West Virginia's domestic violence statute).

241. See Colker, *supra* note 3, at 1879.

242. Carlson, *supra* note 52, at 123 (mentioning other factors, apart from gender, that influence resources that contribute to the distribution of power in relationships).

243. *Id.* (explaining that the desire for power is a notion that all humans, not just men trying to dominate women, share).



category is a manifestation of how society elevates sex as deserving of special consideration. To be truly protective of all victims, the law must forgo the romantic/sexual category and disaggregate romance or sex from abuse.<sup>244</sup>

Just as the law has moved slightly away from grounding domestic violence protections in gender categories for the sake of broader protection, so must it do away with the physical-spatial and romantic/sexual categories. The law must deconstruct these categories because they distance us from the truth<sup>245</sup> about who is in need of legal recourse, regardless of the form of relationship the victim might have with the abuser. We must devise legal tools that are better equipped to recognize who constitutes a victim of abuse. These tools form the substantive approach I will discuss later in Part III. For now, I move on to discuss how the current domestic violence framework, still built on categories, denies protection of victims in relationships that do not meet the demands of either or both the physical-spatial category and the romantic/sexual category.

## 2. Case Studies

The trouble with the category-focused domestic violence laws is that they result in underinclusiveness, denying protection to those who do not fit the categories of relationships typically associated with domestic violence. When the law fails to account for these victims, it exacerbates their victimhood by forcing them to cope with abuse without assistance from the state.<sup>246</sup> The law perpetuates oppression by barring victims from resources and means that are necessary to become agents and try to escape their situation.<sup>247</sup> A more inclusive legal approach will be a step forward to ensure abused parties have an escape. Otherwise, abuse victims may find themselves falling between the cracks—realizing their abuse, but not being categorized as victims, thus left without remedy or support.<sup>248</sup> The law should therefore shift its attention from gendered notions of domestic violence and its heavy reliance on categories to identify victims. Four

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244. Colker, *supra* note 3, at 1879. Colker refers to this as the disentanglement solution, recommending that domestic violence law do away with the marriage-mimicry model. *Id.*

245. J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131, 1174 (1994) (arguing that categories that do not serve justice must be deconstructed in favor of construction of other tools, which are better in achieving justice).

246. See Meier, *supra* note 67, at 1319 (noting that the batterer's control and violence are strengthened by the failure of external, social resources to intervene and provide assistance).

247. Jasinski, *supra* note 44, at 8.

248. DeKeseredy & Schwartz, *supra* note 108, at 27.

main examples of relationships that are unaddressed (or limitedly so) by domestic violence laws because they do not conform to the gender, spatial, or romantic categories are male victims, same-sex couples, roommates or friends, and dating relationships.

*a. Abused Men*

Domestic violence is seen as a women's issue, and though men are known to be victims as well, they still have limited access to legal protection.<sup>249</sup> A framework of domestic violence that is based on its substantive characteristics, rather than categories, would provide men with the necessary recourse.

Social science research has shown that men and women are abused at similar rates.<sup>250</sup> Domestic violence perpetrated by women against men can be baffling, as it undermines the premise that violence is an expression of gender hierarchy. If men control women through violence, how can women's violence be explained? A possible answer is that women's abuse of men is about control and power as well — women who lack power in the relationship, perhaps because of the inherent gender hierarchy, may resort to abuse as a way to regain some power.<sup>251</sup> Violence can be a manifestation of powerlessness in the relationship;<sup>252</sup> under such a view, women resort to abuse to restructure the imbalanced dynamic in their favor.<sup>253</sup> Social science research has pointed to "female privilege" as a factor in abuse by women.<sup>254</sup> This means that women dominate and control their

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249. See Melody M. Crick, Comment, *Access Denied: The Problem of Abused Men in Washington*, 27 SEATTLE U. L. REV. 1035, 1035-37 (2004) (describing the difficulties that battered men in Washington state face when dealing with the legal system).

250. See, e.g., Linda Kelly, *Disabusing the Definition of Domestic Abuse: How Women Batter Men and the Role of the Feminist State*, 30 FLA. ST. U. L. REV. 791, 795 n.13, 799-800 (2003) (citing to sociological research that found men and women to commit violence at similar rates); David Fontes, Information on Male Victims of Domestic Violence, SAFE4ALL.ORG, Sept. 23, 1999, available at <http://safe4all.org/essays/2page.html> (stating that survey research indicates that males represent thirty to fifty percent of the battered population). These statistics, however, do not account for the difference in the nature of abuse — men's abuse of women may still be more violent, severe, or frequent; nevertheless, the different nature of abuse does not justify overlooking the existence of women's abuse of men. See Crick, *supra* note 249, at 1046-47 (describing the differences between violence perpetrated by male and female batterers).

251. Carlson, *supra* note 52, at 123 (mentioning other factors, apart from gender, that influence resources that contribute to the distribution of power in relationships).

252. Jasinski, *supra* note 44, at 12.

253. *Id.* (describing how resource theory explains the use of domestic violence to maintain power in a relationship).

254. See David L. Fontes, *Male Victims of Domestic Violence*, in FAMILY INTERVENTIONS IN DOMESTIC VIOLENCE, *supra* note 107, at 303, 305 (2007) (describing "female privilege" as an explanation for women battering men).

partners when realms of traditionally female gender roles (such as childcare and homemaking) come into play in the power dynamic.<sup>255</sup> In other words, women can be abusive when it comes to aspects of the relationship where they have traditionally had the upper hand.<sup>256</sup>

Basing domestic violence laws on patriarchy and gender disparities alone is insufficient, as it does not account for violence by women against men.<sup>257</sup> As a first step, statutes based on power imbalances should be crafted broadly. Yet, gender-neutrality does not go far enough: domestic violence statutes such as those presented in Part II.A.2 above may be crafted in gender-neutral terms, but they are only the first steps towards legal and social norms that will accommodate male victims.<sup>258</sup> The federal Violence Against Women Act, for instance, is gender-neutral in language,<sup>259</sup> but when implemented is inherently unlikely to protect male victims, as it is situated within an act designed as anti-discrimination legislation protecting women.<sup>260</sup> Also, when applying domestic violence laws, courts and service providers engage in "gender profiling": refusing to protect and treat men who have been abused by their female partners.<sup>261</sup> Abused men are denied protective orders or recognition of their mental state as a result of the abuse<sup>262</sup> and have very limited access to hotlines, shelters, support groups, and other resources.<sup>263</sup> Excluding men from protection of domestic violence laws increases the invisibility of male victims.<sup>264</sup> Keeping in mind the expressive function of the law, there is great

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255. *Id.*

256. *Id.*

257. See John Hamel, *Domestic Violence: A Gender-Inclusive Conception*, in FAMILY INTERVENTIONS IN DOMESTIC VIOLENCE, *supra* note 107, at 1, 6 (presenting findings on violence by women, including a study that found teenaged girls to be more aggressive than teenaged boys).

258. See David L. Fontes, *supra* note 254, at 303, 308-11.

259. Violence Against Women Act, 42 U.S.C. § 13981 (2000).

260. See Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2200-01 (1996) (discussing the Violence Against Women Act as an anti-discrimination statute providing relief to women from "gender-motivated" violence).

261. Crick, *supra* note 249, at 1036-37.

262. See *id.* at 1054-55 (discussing battered spouse syndrome).

263. The resource list on the website of Stop Abuse for Everyone (an organization devoted to providing services to a range of domestic violence victims, particularly straight men, gays and lesbians, teens, and the elderly) refers to forty-five resources assisting women compared to fifteen assisting men in California. Stop Abuse for Everyone, Resource List United States — California, <http://safe4all.org/resource-list/index?category=23> (last visited Jan. 31, 2008). In New York, the organization lists twenty resources for women and seven for men. Stop Abuse for Everyone, Resource List United States — New York, <http://safe4all.org/resource-list/index?category=52> (last visited Jan. 31, 2008).

264. On a psycho-social level, this may have severe effects. Men who are abused (and report the abuse) are seen as "wimps," unable to "take it like a man." See Fontes, *supra* note 254, at 306. Men are left in a lose-lose situation: face the stigma of failing to conform to pervasive sex-stereotypes or endure the abuse.

significance in not only crafting gender-neutral laws, but changing the common ideas about domestic violence. The law expresses and criticizes the appropriateness of social norms and is capable of reshaping them,<sup>265</sup> as much by application of the law as through its language.<sup>266</sup> Legislation that will protect all victims and provide additional resources, coupled with courts that will extend recourse equally, is crucial to shaping the way we think about domestic violence as a gender issue.

Despite domestic violence laws being gender-neutral on their face, they still manifest the concept of domestic violence as a means of oppression and subordination of women by men.<sup>267</sup> Gender categories may have been abandoned in the language, but they resonate from the spirit of the law. Moving toward domestic violence law that is inclusive can facilitate protection of males, as well as other underserved victims.

### *b. Same-Sex Couples*

While the main obstacle to protection that straight male victims face is gender categories, same-sex couples are burdened with meeting the required gender category, spatial category, and romantic category.<sup>268</sup> This may prove a difficult task, even though the rate, patterns, and consequences of abuse are practically identical in opposite-sex couples and same-sex couples.<sup>269</sup> In addition to the general harms

265. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024-25 (1996) (discussing the role of the law in making statements designed to change social norms).

266. *Id.* at 2032-33 (describing changes in social norms caused by new laws despite a lack of enforcement).

267. See, e.g., Crick, *supra* note 249, at 1037-40 (discussing how provisions in Washington's facially gender-neutral domestic violence statute appear to have been designed with only female victims in mind).

268. See, e.g., John Rosenberg, *Can Same-Sex Couples "Co-Habit" in Virginia?*, DISCRIMINATIONS, June 4, 2007, [http://www.discriminations.us/2007/06/can\\_samesex\\_couples\\_cohabit\\_in.html](http://www.discriminations.us/2007/06/can_samesex_couples_cohabit_in.html) (describing concerns that a 2006 amendment to the Constitution of Virginia would have barred same-sex couples from legal protections requiring that they "co-habit").

269. See Pam Elliott, *Shattering Illusions: Same-Sex Domestic Violence*, in VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS 1, 1 (Claire M. Rezetti et al. eds. 1996) (comparing and contrasting same-sex domestic violence and heterosexual domestic violence); Bricker, *supra* note 71, at 1387-88 (arguing that the similarities in patterns and results between same-sex and heterosexual domestic violence are dwarfed by the "couple's shared gender"); Domestic Violence in Gay Couples: Introduction to Gay Male Domestic Violence, [http://www.psychpage.com/gay/library/gay\\_lesbian\\_violence/dv\\_gay\\_couples\\_intro2.html](http://www.psychpage.com/gay/library/gay_lesbian_violence/dv_gay_couples_intro2.html) (last visited Jan. 31, 2008) (suggesting that estimates of higher domestic violence in same-sex relationships are inaccurate and that rates are actually similar to opposite-sex couples for a variety of reasons).

of domestic violence, same-sex abuse involves concerns of exposure of the parties' sexual orientation,<sup>270</sup> whether outed by the abusers as a means of emotional abuse<sup>271</sup> or having to come out to authorities when reporting.<sup>272</sup> Also, victims of same-sex abuse may feel isolated from the lesbian, gay, bisexual, and transgender community once they report the abuse, as it may be construed as attracting negative attention to the community.<sup>273</sup> This only exacerbates the need for the legal system to recognize same-sex abuse, but the categories of domestic violence remain underinclusive.

States that limit their definitions of domestic violence victims to opposite-sex couples or related family members effectively deny domestic violence protections from same-sex abused partners.<sup>274</sup> But even when domestic violence is not explicitly limited to opposite-sex couples, the heteronormative gender categories of domestic violence stand in the way of same-sex victims; stereotypical gender norms of abusive relationships persist in the application of protections to victims of same-sex abuse.<sup>275</sup>

The feminist movement focused on battling the gender issues involved in domestic violence in order to fight sexism, inadvertently excluding same-sex couples from protection and intervention.<sup>276</sup> But framed as a women's issue in which women are subordinated to men through violence, domestic violence theory cannot explain why the same dynamics of abuse appear in same-sex relationships.<sup>277</sup>

As for the physical-spatial category, same-sex couples are at a disadvantage compared to opposite-sex couples. Courts have been flexible with cohabitation of opposite-sex couples by finding sporadic and unconventional living arrangement sufficient.<sup>278</sup> This lack of stability in cohabitation can be remedied by other demonstrations

270. See Elliott, *supra* note 269, at 5 (maintaining that the nature of abuse in same-sex couples is the same and includes a unique type of emotional abuse by threats of outing).

271. Bricker, *supra* note 71, at 1391.

272. See Lee Vickers, *The Second Closet: Domestic Violence in Lesbian and Gay Relationships*, 3 MURDOCH U. ELECTRONIC J.L. (1996) (giving several reasons for the reluctance of gay men to contact the police in cases of domestic abuse).

273. See Bricker, *supra* note 71, at 1398-99 (citing reasons that gay or lesbian victims of domestic violence may be alienated from the gay community for reporting their abuse).

274. *Id.* at 1398.

275. See *id.* at 1426 (arguing that courts and experts try to fit lesbians and gay men into the "battered woman's syndrome" mold).

276. Elliott, *supra* note 269, at 6.

277. Gregory S. Merrill, *Ruling the Exceptions: Same-Sex Battering and Domestic Violence Theory*, in VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS, *supra* note 269, at 9, 11-13.

278. See, e.g., *People v. Ballard*, 249 Cal. Rptr. 806, 809 (Cal. Ct. App. 1988) (finding that a man and a woman were cohabitants despite having separate residences).

of commitment in a heterosexual relationship,<sup>279</sup> but not in a same-sex relationship.<sup>280</sup> Gay male relationships may be more short-term,<sup>281</sup> which might be misconstrued as proof of lack of commitment.<sup>282</sup> Such perceived lack of commitment is exacerbated by the absence of common heterosexual demonstrations of commitment — most notably marriage or co-parenting — and may result in courts' hesitance to acknowledge a same-sex relationship without cohabitation.

When same-sex couples do share a common household, their relationship could be misrepresented as that of friends or roommates.<sup>283</sup> In other words, the abuser might portray himself and his partner as straight parties who do not fit the notions of domestic violence as connected to intimate relationships.

Fitting into the romantic/sexual category may also be challenging for same-sex couples. Even though same-sex couples meet this requirement, they may face difficulties in jurisdictions that are reluctant to recognize same-sex relationships, because extending domestic violence protection to same-sex couples can be understood as a form of recognition of the relationship.<sup>284</sup> When the couple does not share a household or their living arrangement is insufficient to amount to cohabitation in the eyes of the court, same-sex abuse victims may find themselves without legal recourse as a result of definitions of domestic violence that rely upon the romantic category. Just as the court in *Fabianich* skirted around the issue of the nature of the relationship between the two men to grant them protection, this could have gone in the other direction entirely.<sup>285</sup> A less gay-friendly court

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279. See *id.* at 809, 812 (allowing the definition of cohabitation to be met for a man and a woman who have separate residences but are “together a lot” and “lived together in one bed”).

280. See Rosenberg, *supra* note 268.

281. DAVID ISLAND & PATRICK LETELLIET, *MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE* 15 (1991).

282. See Lawrence A. Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different From Heterosexual Married Couples?*, 66 J. MARRIAGE & FAM. 880, 896 (2004) (“Gay and lesbian couples dissolve their relationships more frequently than heterosexual couples, especially heterosexual couples with children.”).

283. Va. Sexual and Domestic Violence Action Alliance, *Frequently Asked Questions: Virginia Domestic Violence Laws and the LGBTQ Community*, <http://www.vadv.org/secAbout/FAQ%20lgbtq2tf.html> (last visited Jan. 31, 2008) (“Sometimes police do not automatically realize that the two same-sex individuals who have been fighting are not just roommates.”).

284. See, e.g., *State v. Burk*, No. CR 462510, 2005 WL 786212 (Ohio C.P. Cuyahoga County Mar. 23, 2005) (disallowing a prosecution for domestic violence because the state's domestic violence statute allowed for implicit recognition of same-sex relationships in violation of Ohio's “defense of marriage” constitutional amendment), *rev'd* by *State v. Burk*, 843 N.E.2d 1254 (Ohio Ct. App. 2005), *remand'd* to *State v. Logsdon*, No. 13-05-29, 2007 WL 4374435 (Ohio Ct. App. Dec. 17, 2007).

285. *Glater v. Fabianich*, 625 N.E.2d 96, 99 (Ill. App. Ct. 1993) (citing several factors for

could find no sexual or romantic relationship and refuse to protect a victim of same sex abuse.

*c. Social Relationships — Friends and Roommates*

Roommates and friends seem to be the least protected group when it comes to domestic violence. Feminism has conceptualized domestic violence in such a way that hinders recognition of non-romantic, non-familial abusive relationships as domestic violence.<sup>286</sup> Some statutes embody this concept by explicitly excluding social relationships from protection under domestic violence laws.<sup>287</sup> Others, such as the Violence Against Women Act, cover only spouses or spouse-like relationships.<sup>288</sup>

This exclusionary position is problematic because it ignores the abuse in the relationship, which has at its core the same characteristics of domestic violence: roommates have just as much accessibility to each other as do familial or spousal household members, and friends presumably know enough details of each other's lives to have accessibility.<sup>289</sup> These relationships too may suffer from power imbalances, resulting not from gender roles necessarily, but from other differences between parties.<sup>290</sup> Friends and roommates often have close emotional ties which result in high levels of trust.<sup>291</sup> Breaking that trust with violence can be just as devastating to friends as to spouses or family members. Finally, roommates and friends can be extremely interdependent, which might make it difficult for them to end a relationship — they also may share a long history together and be emotionally attached.<sup>292</sup> Roommates face an additional hurdle to

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finding that the petitioner and respondent shared a "common household" but not discussing sexual intimacy among them).

286. The feminist theory of domestic violence as a manifestation of men's desire for power and control over women is obviously incompatible with an inclusive definition of domestic violence that would include violence between non-intimate, same-sex friends and roommates. See Fontes, *supra* note 254, at 308 ("[Feminists] believe that men want power and control over women and explain domestic violence as the result of this desire.").

287. NEB. REV. STAT. § 42-903(3) (2007); W. VA. CODE § 48-27-204(4) (2007).

288. 42 U.S.C.S. § 13925(6) (2007).

289. Calaf, *supra* note 15, at 178 n.66 (noting that through disclosure in the relationship, the abuser gains access to the victim personal information, which may pose a serious risk to the victim).

290. Carlson, *supra* note 52, at 123 (noting other potential sources of power disparities in relationships).

291. See Maxwell, *supra* note 37, at 342-43 (stating that victims of violence in personal relationships do not protect themselves as they would from strangers due to trust in the abuser).

292. See Cameron Anderson, Dacher Keltner & Oliver R. John, *Emotional Convergence Between People Over Time*, 84 J. PERSONALITY & SOC. PSYCHOL. 1054, 1054, 1064 (2003) (finding that emotional convergence, an increasing similarity in emotional responses

ending a relationship: the party ending the relationship is burdened with either locating a third party to take over the lease or to continue his or her obligations under the lease.<sup>293</sup> Just like in other social relationships, the situation of roommates opens the possibility of the cyclicity and psychological harm that mark domestic violence.

Still, because of its reliance on categories, the law does not protect abuse in social relationships, to the detriment of victims. Although the New Jersey court in *Hamilton* recognized, as it should have, that roommates are indeed household members deserving of protection,<sup>294</sup> other courts — particularly in jurisdictions with narrower definitions centered around romantic categories — may not see things the same way. A Michigan trial court, for instance, stated that roommates did not qualify for domestic violence protections under the statute, although the statute was found to apply to a broad range of domestic offenders on appeal.<sup>295</sup> The dissent in the appeal even asserted that protecting roommates would be “absurd,” as the legislative intent, as reflected by most domestic violence definitions, was to protect romantic partners from abuse.<sup>296</sup> It seems likely, then, that failing to fall within the romantic/sexual category could exclude roommates from legal protection, despite being household members.

Whereas roommates might still have the chance to seek legal protection through the spatial category requirement, non-roommate friends do not even have that, as they are unrelated by blood or marriage and do not have a sexual relationship.<sup>297</sup> In contrast to families and lovers, friendships have been systematically ignored by the law in many areas,<sup>298</sup> including domestic violence. Although it has been argued that friendships thrive as voluntary relationships outside of the law,<sup>299</sup> at the very least, the law should account for friendships when they go wrong. In abusive situations, the law must step in and recognize the pattern of abuse where it exists.

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between partners in relationships, happens in both opposite-sex dating partners and same-sex roommates).

293. See 25 C.J.S. *Landlord* § 491 (2003) (“A lessee ordinarily is not excused from performance of his or her undertakings because of unforeseen hardship, or because of subsequent impossibility of performance, unless the impossibility results from the happening of some act or event not reasonably within the contemplation of the parties.”).

294. *Hamilton v. Ali*, 795 A.2d 929, 934 (N.J. Super. Ct. Ch. Div. 2001).

295. *In re Lovell*, 572 N.W.2d 44 (Mich. Ct. App. 1997) (overturning a lower court decision that the state’s domestic violence statute did not apply to a minor child abusing her parents due to the lack of a romantic relationship).

296. *Id.* at 46.

297. Leib, *supra* note 70, at 639 (defining friendship to exclude those in romantic relationships and those related to each other by blood or marriage).

298. *Id.* at 632-33.

299. *Id.* at 680-81.



### *d. Dating Relationships*

Dating violence is a form of abuse still unaddressed by many domestic violence statutes.<sup>300</sup> Ignoring abuse in dating relationships exacerbates the problem of domestic violence in general. For one, it reinforces “normative confusion,” or the concept that abuse in relationships is normal and unproblematic.<sup>301</sup> Adolescents are particularly prone to this.<sup>302</sup> In addition, left unaddressed, abusive relationships may progress and become more committed, more marriage-like, and more abusive.<sup>303</sup> If at that point the victim does turn to the legal system for recourse, it may be too little, too late, since abusive patterns continue as long as there are no consequences for the abuser.<sup>304</sup>

Other statutes afford protection under conditions, such as minimum age thresholds, a high frequency of encounters, or some sort of public recognition of the relationship. These effectively require the relationship to be long-term and committed — marriage-like.<sup>305</sup> Washington does not recognize teens under sixteen as victims of dating abuse.<sup>306</sup> For parties aged sixteen or older, the Washington statute includes a test to determine whether the relationship warrants protection.<sup>307</sup> The court will consider the length of the relationship, the nature of the relationship, and the frequency of interaction.<sup>308</sup> Nebraska requires that relationships be “frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement” and that it is not casual.<sup>309</sup> New Jersey’s test has been devised by case law and requires that the relationship be not merely casual and reflect an interpersonal bonding; the court must consider the length of the relationship prior to the abuse, the nature and frequency of interactions, the parties’ expectations of

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300. See, e.g., FLA. STAT. ANN. § 741.28 (West 2005) (requiring present or former cohabitation unless the abuser and victim have a child in common); KY. REV. STAT. ANN. § 403.720 (excluding dating partners unless they have a child in common or are living together or have formerly lived together); N.Y. SOC. SERV. LAW § 459-a (Consol. 2008) (excluding dating partners unless they are included as a “category of individuals deemed to be a victim of domestic violence as defined by the department in regulation”).

301. Kathryn E. Suarez, *Teenage Dating Violence: The Need for Expanded Awareness and Legislation*, 82 CAL. L. REV. 423, 429 (1994).

302. LEVESQUE, *supra* note 47, at 224.

303. See *id.* at 224, 227 (noting the high proportion of women who marry men who abused them and the self-reinforcing nature of domestic abuse).

304. *Id.* at 227.

305. *Id.* at 228-29 (describing requirements of different state domestic violence laws that function to exclude adolescents from their protections).

306. WASH. REV. CODE ANN. § 26.50.010 (West 2007).

307. *Id.*

308. *Id.*

309. NEB. REV. STAT. § 42-903(3) (2007).

the relationship, if the parties have affirmed their relationship to others, and any other factors that might affect a conclusion about the relationship.<sup>310</sup>

The result excludes short-lived dating relationships and therefore many dating relationships of adolescents, even though such relationships are not immune to violence.<sup>311</sup> Abuse can begin as early as youth begin to date.<sup>312</sup> Yet, as these relationships are less likely to be perceived as serious, stable,<sup>313</sup> publicly acknowledged, or sexual,<sup>314</sup> they may not qualify as dating relationships deserving protection.<sup>315</sup>

Therefore, even though they satisfy both the gender category and the romantic/sexual category, victims of dating abuse often remain legally unprotected.<sup>316</sup> Despite the similarities between adolescents' relationships and adults' relationships, domestic violence laws, largely designed to protect legally-recognized adult relationships, do not protect youth or young adults as effectively — or at all.<sup>317</sup> As they are neither marital (romantic/sexual category), nor involving cohabitation (spatial category), dating relationships are sometimes ignored by domestic violence laws.<sup>318</sup>

To sum up this Part, definitions of domestic violence based on categories of gender, space, or romance are underinclusive and do not protect a variety of relationships in which abuse is similar — and therefore as harmful — as violence in marriage or marriage-mimicking relationships. Statutes defining domestic violence should be reconsidered and revised so that they are more inclusive. It is time to rethink *domestic* violence, and see it as *personalized* violence, based on its substantive micro-level characteristics and macro-level patterns. A substantive approach has the capacity to identify abuse that the legal system should address to protect those in need. A new framework based on substance rather than form is more consistent with the goal of abuse law — protecting victims from harm caused

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310. *Andrews v. Rutherford*, 832 A.2d 379 (N.J. Super. Ct. Ch. Div. 2003).

311. LEVESQUE, *supra* note 47, at 223.

312. *Id.*

313. Abuse can begin after only one date, as in one of Colker's examples. See Colker, *supra* note 3, at 1860 (citing *Alison C. v. Westcott*, 798 N.E.2d 813, 814 (Ill. App. Ct. 2003)).

314. Another of Colker's examples is *Sandoval v. Mendez*, 521 A.2d 1168 (D.C. 1987). The victim was denied protection because she did not have an "intimate relationship" with the abuser, who was her roommate and her cousin's boyfriend. Colker, *supra* note 3, at 1860.

315. *Id.* at 1860.

316. *Id.* at 1868.

317. LEVESQUE, *supra* note 47, at 228.

318. See *id.* at 228-29 (describing the legal obstacles that prevent adolescents from being prosecuted under domestic violence statutes).

by persons whose relationship to the victim makes the victim most vulnerable.

### III. PROPOSAL — PERSONALIZED ABUSE

The inadequacy of current category-based domestic violence jurisprudence necessitates a new approach. Rather than viewing abuse in relationships as a domestic, familial, or romantic issue, a substantive approach recognizes abuse as existing in many different types of close, personal relationships.<sup>319</sup> Re-conceptualizing abuse in relationships as personalized abuse instead of domestic violence accounts for the psychological and behavioral aspects at its core,<sup>320</sup> that is to say, the micro-level characteristics and macro-level patterns articulated in Part I.

In this Part, I build on the micro-level characteristics and the macro-level patterns to develop a formula of personalized abuse as a substantive alternative to domestic violence laws. Such a formula can be used as a test for identifying personalized abuse in relationships that warrant the consideration of lawmakers. I then implement the personalized abuse formula on one of the relationships discussed in Part II to show how a substantive approach, removed from categories, is more inclusive. Lastly, I address some of the potential counter-arguments against the substantive personalized abuse approach.

#### A. A Substantive Approach — The Personalized Abuse Formula

In her criticism of the marriage-mimicry model of domestic violence, Colker contends that to best offer protection, the law must question who is in need of legal recourse due to abuse.<sup>321</sup> Another question to grapple with is who the law should protect as a matter of public policy.<sup>322</sup> As legal recourse necessitates allocation of public resources, the personalized abuse formula must not be overly broad. Consequently, we must prioritize individuals suffering from personalized abuse. While harms from the abuse itself can indicate who needs protection, the harm of attempting to escape the abuse, when possible, also indicates who should receive protection.

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319. Elliott, *supra* note 269, at 13-14.

320. *Id.* at 15 (arguing for a new framework for domestic violence that examines its psychological issues instead of the current gendered approach).

321. Colker, *supra* note 3, at 1845 (“[T]he marriage-mimicry model is not necessarily the correct framework, because it was developed without lawmakers asking the fundamental questions of who is most in need of legal recourse and how the law can best provide that recourse.”).

322. *Id.* at 1845-46.

The personalized abuse formula combines the micro-level characteristics, as necessary or alternative prongs, and examines them through the lens of the macro-level patterns as a test for who should be afforded heightened legal protection due to abuse. In short, personalized abuse will be identified by: (a) the abuser's exploitation of access to the victim gained in the course of the relationship; *and* (b) a violation of personal trust in a close relationship that is beyond a professional or fiduciary relationship; *and either* (c) a power imbalance that benefits the abuser and is maintained through abuse; *or* (d) fundamental dependence of the victim on the abuser. The first two prongs, along with one of the two latter prongs are necessary to identify personalized abuse victims in need of protection. The last two prongs are alternative to one another: each is harmful enough to effectively negate the victim's ability to escape the abuse without assistance and thus can weed out victims who public policy should not prioritize for heightened protections.

While a personalized abuse model is more inclusive, it is not all-encompassing. Some violent relationships, even ones that we have traditionally thought of as domestic violence, would not fall under the framework.<sup>323</sup> As the personalized abuse model is designed to identify the most troubling and destructive abusive relationships, those which fall short of its inclusion are less harmful and thus may not necessitate the same level of legal consideration.

### *1. Accessibility*

As discussed above, the abuser's access and familiarity with the victim are key — without access to the victim, the abuser will not be able to carry out the abuse, and the abuse will less likely result in controlling the victim.<sup>324</sup> Without access to the victim, the violence is more likely devoid of its cyclical and repetitive nature.<sup>325</sup> As a counter-argument, one could argue that in every violent crime, even between strangers, there is enough accessibility for the crime to occur in the first place.<sup>326</sup> Moreover, with the common use of the internet, personal information, such as an address or phone number, can be readily uncovered.<sup>327</sup> Therefore, we must refine the test for accessibility so that it incorporates personalized abuse protections.

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323. Some family members, for instance, that may fit the definitions presented in Part II would not be included in the substantive framework presented here as they may not entail a violation of trust or a power imbalance, etc.

324. Wanless, *supra* note 23, at 547.

325. *Id.*

326. *Id.*

327. Major R. Ken Pippen, *Consumer Privacy on the Internet*, 47 A.F.L. REV. 125, 128-29 (1999).

Building on the idea that the relationship itself is the source of the victim's vulnerability through sharing personal information,<sup>328</sup> we should look for a causal connection between the relationship and the accessibility. That is, in the course of the relationship certain knowledge and familiarity must have been gained by the abuser that could facilitate the abuse. In a sense, a fact finder would look at how the accessibility was achieved: was it in the course of the relationship? Was the source of the accessibility the victim? Could the abuser gain the same access independent of the relationship, and was that in fact the case?

To illustrate, consider two classmates who are friends. Although they may have come into contact only in class initially, as the relationship progressed they developed the habit of meeting on certain days at a specific time in the school's main hallway. Over time, both knew in advance that they would be meeting then and there, and had come to expect it. Had they not become friends, they would have continued to only meet in the classroom. Though not random encounters, their meetings in the classroom were independent of the relationship. On the other hand, meetings in the hallway were neither random, nor independent of the friendship. In such circumstances, the accessibility the students have to each other is a *direct product of the relationship*.

Assume the two students do not meet at school, rather at one of their homes, where one student turns violent towards the other. Here, the way the abuser gained accessibility demonstrates the line between personalized abuse and other violent crimes. On the other hand, the abuser could have learned the victim's address online or by asking a mutual friend, making the accessibility independent of the relationship and without the involvement of the victim. The relationship — or any interaction between the two students — would not be necessary for establishing accessibility.

It could be argued that the victim of an abusive friendship could easily stop meeting in the hallway and thus negate accessibility to prevent or end the abuse. This argument burdens — and somewhat blames — the victim for the continuation of his or her own abuse. While it may seem easy for the victim to distance herself from her friend and remove herself from the abuse, as the last two prongs of the personalized abuse framework demonstrate, that may not be the case. The last two prongs, therefore, complete the test by requiring dynamics that limit the victim's ability to undo the abuser's access.

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328. Calaf, *supra* note 15, at 178; Lerman, *supra* note 18, at 234.

## 2. Violation of Trust

The second prong to the personalized abuse test offered here is a violation of personal trust in a close relationship that is beyond a professional or fiduciary relationship. Most violent incidents are, to some degree, a violation of trust. Not all violence is a violation of trust that warrants the heightened protection accorded in domestic violence cases. How would that certain kind of trust, the violation of which is most troubling, be distinguished?

In characterizing domestic violence, I discussed the pivotal role of trust in close relationships as the expectation that another person will treat us in a positive and careful manner,<sup>329</sup> and that trust is fluid.<sup>330</sup> This suggests that the kind of trust that is worthy of personalized abuse protection should be a strong, deep trust. I use two forms of trust here, presented in recent social science research. The first kind of trust, prevalent in close deep relationships is termed “thick interpersonal trust.”<sup>331</sup> Thick interpersonal trust is the kind of trust we put in our family and close friends based on how well we know them and how much we have in common.<sup>332</sup> It exists when we feel secure in a relationship to which we are emotionally committed.<sup>333</sup> Therefore thick interpersonal trust is the kind of trust that is typical to relationships that develop our identity, our sense of self and our view of the world.<sup>334</sup> In short, the most significant relationships involve this kind of trust.<sup>335</sup>

On the other hand, thin interpersonal trust exists in weaker social ties, and is based not on what we may have in common, but on social norms and obligations.<sup>336</sup> This is a more rational and utilitarian type of trust as it assumes that someone whom we do not know well will act in a way that is beneficial to us.<sup>337</sup> Thin interpersonal

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329. Cross, *supra* note 28, at 1461, 1464.

330. Dmitry Khodyakov, *Trust as a Process: A Three Dimensional Approach*, 41 SOC. 116 (2007), available at <http://soc.sagepub.com/cgi/reprint/41/1/115> (theorizing that trust consists of personal trust in deep relationships, personal trust in weak relationships, and trust in institutions).

331. *Id.* at 120.

332. *Id.* at 120-21.

333. *Id.* at 121.

334. *Id.* at 120; see also Leib, *supra* note 70, at 654, (noting the significance of friendships to identity development). See generally Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271 (2007) (discussing the importance of coupling relationships to identity). But see *Developments in the Law — Privileged Communication*, 98 HARV. L. REV. 1563, 1589 (1985) (explaining the irrelevance of fiduciary relationships to identity).

335. Khodyakov, *supra* note 330, at 120.

336. *Id.* at 121.

337. *Id.* at 122.

trust is the trust we put in those with whom we do not have a strong emotional bond, or that the relationship is not of a personal nature but a professional or fiduciary one, such as the relationship between a bank teller and the client or a lawyer and her client.<sup>338</sup> This trust is so fundamental to such fiduciary relationships that the legal and medical professions, among others, have created ethical duties around it,<sup>339</sup> but it does not go to the client's deep sense of self. Her identity does not rely on these relationships.<sup>340</sup>

The distinction between thick interpersonal trust and thin interpersonal trust can be used to identify the kind of trust the personalized abuse test addresses. Abusive relationships involving thick interpersonal trust would satisfy the trust criterion for personalized abuse. This would be the kind of relationship that is central to our identity, and as violence in a close relationship has a destructive effect on our identity and selfhood,<sup>341</sup> these are the relationships to be protected. Looking for thick interpersonal trust one might examine the frequency of the interaction, its context and its nature.

Going back to our classmates (whose relationship is strictly platonic), let us assume that in addition to their hallway encounters, they have regular long phone conversations and exchange emails; that their communications — whether in person, over the phone, or via email — have long gone beyond issues concerning their studies and now revolve around the most personal and intimate details of their private lives, such as their future goals and aspirations, their family lives, and their love lives. Moreover, let us assume that these conversations have made such a deep impact on our students that they have influenced their identity. This is a relationship that embodies thick interpersonal trust, and had it become violent or abusive further down the line — for instance, one of the students throws a cellular phone at the other for not returning a phone call — is likely to be most harmful. In the context of such a close relationship that

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338. *Id.* at 122-23.

339. The American Bar Association has justified its self-regulation of the legal profession in the need to facilitate trust between the public, clients, and lawyers. AM. BAR ASS'N., REPORT OF THE COMMITTEE ON CODE OF PROFESSIONAL ETHICS (1906).

340. *See Developments in the Law, supra* note 334, at 1589.

An intimate relationship involves a fundamental sharing of identity. It is a "collective individuality," a "shared sense that 'we' exist as something beyond 'you' and 'me.'" . . . The need for intimacy is inherent in a concept of selfhood that is "importantly social"; we develop self identity through "dialectical interaction" with our intimates. Professional relationships lack this sense of shared selfhood. They are extensions of the self through an agent for one's own purposes, not a sharing of the self with another.

341. SCHNEIDER, *supra* note 117, at 48; *see also* Lau, *supra* note 334, at 1288-89; Leib, *supra* note 70, at 654.

has shaped one's sense of self, the abuse may result in depression or low self esteem, both damaging the victim's identity and selfhood.<sup>342</sup> When this is such a detrimental violation of trust that it brings upon the psychological harms prevalent in domestic violence, it should satisfy the second prong of the violation of trust. In a sense, this is a concern for the macro-level patterns of psychological harms serving as a proxy for the violation of such deep trust which this prong of the personalized abuse test addresses.

To complete the test and ensure that it is not too broad, attention should be paid to thin interpersonal trust within a non-personal relationship. As mentioned, relationships that are strictly professional or fiduciary should be considered relationships of thin interpersonal trust that do not constitute personalized abuse since such relationships are not ordinarily deep or close enough to cause such psychological harms associated with domestic violence. Again, the frequency, context, and nature of the bond would be indications of the sort of trust involved.

An example here can be a relationship between a judge and her clerk. Though the two may share an office where they work eight hours a day, five days a week, their relationship would remain that of thin interpersonal trust as long as their interactions are strictly work related: they only meet at the courthouse during work hours, they do not discuss their personal lives with each other, and they focus on their legal and administrative workload. For example, had the judge slapped her clerk for over-watering the plants, however reprehensible that conduct might be, it would not constitute personalized abuse; the trust between the two is not the thick interpersonal kind, and therefore such violence is unlikely to be as psychologically harmful to the clerk.

Yet, because trust is fluid, thin interpersonal trust can develop into thick interpersonal trust. If a relationship that starts out as professional progresses into more, it may satisfy this prong: over time the judge and clerk may engage in personal conversations, or even go out to dinner together or visit each other at home. At this point, what started as a professional, impersonal relationship would have grown to foster a thick interpersonal trust,<sup>343</sup> therefore susceptible to personalized abuse.

To sum up, this prong targets significant psychological harms that result from abuse in relationships that involve thick interpersonal

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342. Wanless, *supra* note 23, at 178.

343. See Khodyakov, *supra* note 330, at 120 (stating that friendships develop thick interpersonal trust that affect identity); see also Leib, *supra* note 70, at 654 (maintaining that friendships form identity).



trust. The prong does so by seeking out the kind of trust that makes the relationship deep and strong enough to be central to our sense of self. A violation of such trust through violence can be expected to cause the psychological harms with which this prong is concerned.

### 3. *Imbalanced Power Dynamics and Control*

The third prong addresses the power imbalance in the relationship. In personalized abuse, as in domestic violence, the imbalance enables the abuser to sustain control through violence.<sup>344</sup> Many relationships are built on uneven ground, without the power imbalance or control being particularly troubling.<sup>345</sup> When violence is used to exert control in the relationship, the power imbalance turns problematic. The concern here is that the micro-level characteristic of power dynamics and control lead, as discussed above, to the macro-level pattern of psychological harms<sup>346</sup> in the sense that they become obstacles for the victim to escape the relationship and the abuse.<sup>347</sup> So, to establish the power imbalance prong, we would look not only for violence that is geared to maintain the abuser's control over the victim, but also that the abuse has effectively limited the victim's ability to leave the relationship.<sup>348</sup>

Going back to our judge and clerk and their over-watered plants, this is a relationship that is inherently unbalanced, but does it warrant heightened protection on these grounds?<sup>349</sup> The judge batters her clerk for a range of reasons. She may find her writing inadequate or her restroom breaks too long, and she frowns upon the clerk's absence from the chambers when the judge arrives in the morning. The judge also forbids the clerk from having any conversations with other clerks and makes comments regarding the clerk's appearance and clothes. Whether physical abuse or emotional, *the judge exploits her authority to make abusive rules and enforces them violently to control her clerk in every aspect of their work life*. This control is so broad that the clerk finds herself performing demeaning tasks, constantly reporting to the judge as to her whereabouts, or avoiding

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344. Jasinski, *supra* note 44, at 11-12; Meyersfeld, *supra* note 41, at 390.

345. *Id.*

346. I address the practical difficulties to courts' assessment of psychological harms below, in Part III.C.1.

347. See generally Hamel, *supra* note 107 (listing psychological harms associated with domestic violence).

348. Wanless, *supra* note 23, at 178. The abuser's control and the victim's inability to leave are interrelated. Both should be considered here, as well as their causal connection.

349. We will put aside the matter of trust formerly discussed, and consider only the power imbalance.

interactions with others. In this regard, the first aspect of this prong has been satisfied, the imbalanced relationship is abusive in a way that maintains the judge's control.

Still, this is not enough to justify special protections that should be associated with personalized abuse. Heightened protections require additional public resources. In addition to criminal recourse, protective and restraining orders are made available to victims.<sup>350</sup> This means more judicial resources spent.<sup>351</sup> The orders further burden authorities that are responsible for enforcing them.<sup>352</sup> And of course, all this incurs costs, which translates to more tax dollars.<sup>353</sup> Consequently, there should be guarantees that these resources are not wasted.

This is where the second aspect of the power imbalance prong is useful. Our clerk may find she has no options but staying at this job: there are no other clerkships available in the area; she is unlikely to get a recommendation from the judge if she leaves; she has been led to believe that she is worthless at her job and is lucky to even have it; and she may also have a family to support, not to mention student loans to pay. The stakes for the clerk contemplating leaving her job are so high that she may see this option as practically nonexistent. She would likely continue on being trapped in this abusive job situation, unless state intervention becomes available to her. On the other hand, in a different scenario, the clerk could have strong support from family and friends willing to help her until she gets back on her feet and finds another job. In this scenario, we should be less inclined to provide the clerk with legal recourse, as she is less in need of it. If she has the ability to escape the judge's abuse, the justification for including this case as personalized abuse are weaker.

However, the power imbalance criterion may sometimes exclude abusive relationships that are balanced in power dynamics or have power structures favoring the victim of the abuse. I do not find this exclusion worrisome. The exclusion does not mean that the abuse itself is not troubling, just that the victim has other options or resources available outside of the legal system; therefore there is little justification for further burdening the legal system with recourse beyond that which is already available through proceedings dealing with "ordinary" violent crimes. More importantly, if a victim can

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350. Carolyn N. Ko, Note, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy,"* 11 S. CAL. INTERDISC. L.J. 361, 361 (2001-2002).

351. *Id.* at 387.

352. *Id.* at 361.

353. *Id.* at 361-62.

escape the abuse, the macro-level patterns are of less concern. For one, the victim may have not suffered severe psychological harm. Second, the ability to escape reflects a lower likelihood of cyclicity, which in turn mitigates the risk of psychological harm.

On the other hand, if despite the lack of a power imbalance favoring the victim, he or she remains unable to leave the relationship, heightened protection under the personalized abuse model should be made available. The fourth criterion, dependence, captures those cases. Recall that the third and fourth prongs are joined by a disjunctive — only one of the two is necessary to satisfy the formula for personalized violence.

#### 4. *Dependence*

The last prong of personalized violence is the existence of a fundamental dependence of the victim on the abuser. Like power imbalances, dependence prevents the victim from walking away from the abuse.<sup>354</sup> Dependence can exist even without an all-encompassing power imbalance, and therefore compensates for the shortcomings of the third prong in detecting those relationships infected by personalized abuse that would not satisfy the power imbalance prong but still necessitate protections as the victim is trapped in the relationship because of dependence on the abuser. Here again, what is at stake are the consequences of leaving the relationship.

Dependence does not necessitate a power imbalance in favor of the abuser.<sup>355</sup> Sometimes the relationship has a balanced power dynamic or even of an imbalance favoring the victim.<sup>356</sup> In the dependence prong, we are in search of a narrower aspect of the relationship in the context of which violence has ensued to confine the victim to the relationship.

The victim's dependence on the abuser can be emotional, as in the case of traumatic bonding,<sup>357</sup> financial, or social, and is not necessarily coupled with a power imbalance.<sup>358</sup> Consider an opposite-sex unmarried couple who cohabitate. Not only is the man assumed to be more powerful physically based on his sex, but he may also have more social and political ties outside of the relationship making him more powerful. This man likely has the upper hand as far as the

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354. Meyersfeld, *supra* note 41, at 379.

355. Carlson, *supra* note 52, at 123.

356. *Id.*

357. See generally LEVESQUE, *supra* note 47, at 224 (discussing traumatic bonding in the context of adolescent relationships).

358. See Carlson, *supra* note 52, at 123.

power imbalance goes.<sup>359</sup> However, he may still be dependent on his abusive partner — she may be more financially stable, they may be living in an apartment she owns, or she may be helping him pay his bills. Financially he is dependent on her, and may be unable to move out and break off the relationship for this reason. Add a couple of children into the mix, and he may fear that leaving the relationship will separate him from them as well.<sup>360</sup> He may also love his partner very much, and feel emotionally attached to her, perhaps he even feels incapable of facing life without her. He may also have been psychologically harmed in ways typical to domestic violence that hamper his ability to leave. When the man's dependence on his partner is so fundamental that it has effectively eliminated his ability to leave her, the scenario satisfies the fourth prong. On the flip side, as with the power imbalance prong, if this man does have resources enabling him to sever ties with his partner, or if he has achieved the emotional agency necessary, we may find that there is no need for heightened legal recourse beyond assault or other violence laws.

To sum up, the personalized abuse model would protect against violence in relationships where the abuser has gained direct access to the victim within the course of the relationship and has used that accessibility to carry out the abuse; where the trust in the relationship is a thick interpersonal trust and breaching it by violence is expected to cause severe psychological harms; and where there is either a power imbalance or dependence that eliminates the victim's opportunity — whether emotionally or otherwise — to escape from the relationship. If all prongs of the personalized abuse model are met, one should conclude that the victim is in need of heightened legal protection of the sort afforded to victims of domestic violence.

### *B. How Personalized Abuse Fixes Problems with Domestic Violence*

A substantive approach under the personalized abuse model is tailored to address relationship violence in two ways: first by identifying violence that does not require the full force of heightened regulation, and second by extending protections to relationships where violence is most troubling because they are characterized by the micro-level characteristics and macro-level patterns discussed earlier. An approach that is not limited to relationship forms and categories is better equipped to target abuse because existing categories are poor proxies for determining who the most troubling victims of abuse

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359. *Id.*

360. See Jasinski, *supra* note 44, at 13-14.

actually are. The personalized abuse model is more refined and enables a more appropriate distinction between the kind of abuse that is most harmful and other types of violence.

### 1. *Categories*

Relying on the gender, space, or romance categories is an oversimplified way to identify abuse victims. Marriage-mimicry categories serve as an inadequate rule of thumb for attaching protections to relationships.<sup>361</sup> Under marriage-mimicry definitions of domestic violence, any relationship that falls into a protected category would be protected by domestic violence law, even if it would not be efficient or justified to do so — that is to say, cases in which the micro-level characteristics and macro-level patterns do not exist. An example of such a relationship could be that of an unmarried opposite-sex couple. Assume this couple has been in a romantic, monogamous relationship for quite some time, all through which they live in different cities, their assets divided, and their social lives separate. As far as the dynamics between them, the woman in this scenario is stronger — she is the one with the better job and more financial security. She is also the one making the decisions in the relationship. Further, their relationship is sexual but their emotional bond is not quite strong. Also, let us assume that they spend some weekends at each other's homes, where they may keep personal belongings and perform household chores. Very recently, on the weekends the man is violent towards the woman.

Analyzing this couple's situation through the category approach would lead to concluding that domestic violence recourse would be available to the woman. She is on the receiving end of the violence and her aggressor is a man, which satisfies the gender category. Despite their maintaining separate households the couple is likely to be seen as a cohabiting couple and fall under the spatial category. This is consistent with the decisions in *Taylor*, *Fabianich*, and *Hamilton* which broadly interpreted cohabitation to include cases of separate residences and occasional but regular stays together, particularly if personal belongings were constantly left at one of the parties' residence and if household responsibilities were shared, as in the case of our couple.<sup>362</sup> Lastly, our couple is in a sexually monogamous relationship and therefore satisfies the sexual/romantic relationship.

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361. See generally Colker, *supra* note 3 (discussing the current legal framework and its "marriage mimicry" model).

362. See *People v. Taylor*, 12 Cal. Rptr. 3d 693, 697 (Cal. Ct. App. 2004); *People v. Young*, 840 N.E. 2d 825, 830 (Ill. App. Ct. 2005); *Glatter v. Fabianich*, 625 N.E. 2d 96, 99 (Ill. App. Ct. 1993).

I argue that although the woman in this relationship is a victim of violence, perhaps severe violence, she is not a victim of personalized abuse. The categories described above are used to single out relationships suffering from domestic violence, but they do so with little regard to the reasons for distinguishing this kind of abuse — the micro-level characteristics and macro-level patterns — and fail to use them as a test.

Applying the personalized abuse test I offer on this couple, we find that this is not the case to extend heightened protection. The first prong of the personalized abuse model — accessibility — exists in this scenario. Although the couple does not live together, the man has access to the woman while they spend weekends together. However, this is the only prong this scenario surely satisfies. As the relationship is not close emotionally, the couple maintains separate social lives and has a mostly long-distance relationship; it is questionable whether thick interpersonal trust has actually developed between the couple.

On the other hand, the long span of the relationship and its exclusivity may demonstrate otherwise. Still, these do not necessarily mean the bond between the two is strong enough to bring on the psychological harms with which we are concerned. The woman may experience some psychological effects, but in a relationship with a weak bond, it is unlikely these symptoms will be as severe and extensive. The second prong therefore is not completely satisfied here — there is doubt as to whether the trust between the parties is of the thick interpersonal kind and it is uncertain if the psychological harms this prong seeks to detect have affected the women.

To be sure that this couple is not a case of personalized abuse, we should also look to the third or fourth prong to see whether, as a matter of public policy, the woman should be recognized as a victim of personalized abuse in need of special legal recourse. The third prong addresses the power imbalance in this relationship. Here, the power imbalance is tipped to favor the woman, not the man who is the aggressor: she has a better job, is more financially secure, and is also the decision-maker in the relationship. She is therefore more powerful than he, and the party that effectively controls the other.

Nor is she dependent on him in any way, which is the subject of the fourth prong. She is financially stronger, they maintain different residences, and their assets have never been joined. She is socially independent as well, as they have separate social lives. Their emotional bond, again, is rather weak and thus she is emotionally independent too.

Neither of these prongs leads to a conclusion that this woman is unable to leave the relationship as the power imbalance is in her favor, and she is not dependent on the man. This means she is unlikely to be severely psychologically harmed in ways that negate her agency due to depression, low self-esteem, or learned helplessness, to name a few.

The case of this couple demonstrates how reliance on categories to define victims of domestic violence is inadequate, producing cases of over-inclusion. According to the categories approach to domestic violence, the woman would be considered a victim, yet we see that this is unjustified as she is not a party to a relationship characterized by the substantive characteristics of domestic violence. Abuse in this relationship therefore is not as harmful and should not be distinguished from other violent crimes.

## *2. Underinclusiveness*

Unlike existing domestic violence laws that are restricted to categories and certain relationship forms, the personalized abuse model is more flexible and looks at the relationship and dynamics within it. Consequently, it is neither overly broad nor does it afford protection in cases that do not warrant heightened legal attention, like that discussed in Part III.B.1 above. This approach is refined enough not to deny protections to victims in relationships that have not been traditionally considered familial or associated with abuse, and yet it does not expand heightened protection to relationships that do not need it.

In Part II.B.2 we have seen how four examples of relationships or victims have been excluded from domestic violence protections because they do not fit the categories. But would men, same-sex couples, friends or roommates, and people dating be covered by the personalized abuse model? The answer is that it depends. If any of these can show that the relationship meets the prongs, then the abuse would satisfy this substantive approach to what an abusive relationship really is. The point is that whomever might be abused is not immediately turned away by the law, rather they are given the opportunity to have their day in court.

Nevertheless, to demonstrate how the test as a whole can be implemented to include relationships not currently defined as domestic violence I use the example of friends.<sup>363</sup> Consider the following fact

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363. To avoid repetition I address only one relationship in this sub-part when applying the personalized abuse formula. I choose the example of friends as it is the least consistent with the categories of current domestic violence law.

pattern: two young women who have been best friends since childhood do not live together or work together. They meet regularly and speak over the phone almost daily. For years one would seek advice from the other on different aspects of her life: her education and career moves; social, family, or romantic life, and appearance or style. Recently the other has become more opinionated and controlling in her input, making her friend's decisions for her and intervening in the smallest details of her life. Further, when they meet she assaults her friend or verbally humiliates her during their phone conversations if she tries to protest to the abuser's instructions. As well as suffering physical injuries, the woman victimized by her friend has become less self-confident and has begun experiencing severe symptoms of depression. Between attacks, the abuser apologizes and promises never to be violent again.

According to the discussion above in Part II.B.2.c, domestic violence law, as it stands, would provide no remedy to this woman as she and her friend are not family members, are not involved in a sexual or romantic relationship — certainly not an opposite-sex relationship — and do not live together. Would this woman be considered a victim of personalized abuse? Recall that the formula for personalized abuse is that (a) the abuser exploits her access to the victim gained in the course of the relationship; *and* (b) the abuse is a violation of personal trust in a close relationship that is beyond a professional or fiduciary relationship; *and* (c) there is a power imbalance between the two that benefits the abuser and is maintained through abuse; *or as an alternative to (c)* — (d) the victim is fundamentally dependent on her abuser.

This scenario satisfies the first prong of the formula. Though they do not live or work together, the abusive friend has access to her victim: they meet and speak often. Additionally, being friends for years, it would be safe to assume that over the course of their long friendship the abuser has become familiar enough with her friend's life to further establish accessibility<sup>364</sup>: she most likely knows where she lives and works; what other activities in which she participates (such as what gym she goes to and when); and maybe she even knows where her parents live. The abuser is violent toward her friend during their meetings and conversations, which means she takes advantage of these opportunities to be abusive. Further, the abuser's tendency between violent spells to apologize and promise to stop the violence is consistent with the pattern typical of the cycle of violence,<sup>365</sup>

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364. See Calaf, *supra* note 15, at 178 n.66.

365. Walker, *supra* note 94, at 65-66.



facilitating the continuation of abuse. As a result, the macro-level pattern of cyclicity this prong addresses is realized here as well as the prong itself.

As for the second prong, friends often have close emotional ties which result in high levels of trust.<sup>366</sup> In this case, seeing that this is a long friendship initiated at childhood the two women presumably have developed an emotional intimate bond.<sup>367</sup> The fact that this bond has been formed as early as childhood and has been long lasting would lead to the assumption that this relationship has deeply impacted the identity and sense of self of either woman.<sup>368</sup> Through this intimacy and bonding they have probably also fostered a thick interpersonal trust: the context of the abuse itself is the "private disclosure[] . . . openness of self[] and authenticity."<sup>369</sup> The violation of this trust by abuse has been devastating to the victim, as we see from the psychological effects she has suffered. This prong's effects on macro-level patterns of psychological harm have also materialized.

Now that the first two necessary prongs have been satisfied in this situation of the two friends, what about either of the last two — the power imbalance and control or the dependence prongs? Does either of them exist here as well? And does either one of them negate the woman's ability to escape her friend's abuse? A friendship too may suffer from power imbalances, resulting not from gender roles necessarily, but from other differences between parties.<sup>370</sup> In this friendship the power imbalance stems from the increasing control one friend exerts on the other's life. An intervention in the victim's life can become so extensive that the abuser effectively controls her friend and makes all her decisions. Furthermore, she reacts to "rebellion" with violence, physical or emotional, thus "punishing" her victim for non-compliance, and cementing her control over her friend.

Still, this control must eliminate the victim's ability to separate from her friend. Given the cyclical pattern of the abuse here, the emotional commitment to their long friendship and the psychological harms caused to the victim, she could be experiencing traumatic bonding.<sup>371</sup> She is so attached to the abuser, her long-time best friend,

366. See Maxwell, *supra* note 37, at 342-43.

367. Leib, *supra* note 70, at 643.

368. See Khodyakov, *supra* note 330, at 120; see also Leib, *supra* note 70, at 654 (maintaining that friendships form identity). It would seem friendships that have persisted since childhood would have a stronger affect on parties' identities. See Holning Lau, *Pluralism — A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 329-30 (2007) (discussing identity development in childhood and adolescence).

369. Leib, *supra* note 70, at 643 (discussing the formation of trust in friendships).

370. Carlson, *supra* note 52, at 123.

371. See *infra* Part III.C.1 for a discussion on how the legal system might make such findings.

that ending the friendship may prove all the more difficult.<sup>372</sup> Also, if the woman tries to end the abuse, there is a risk that the abuser will increase her use of accessibility to resume the friendship. Her knowledge of her friend's residence, workplace, and other possible whereabouts may be utilized to continue the abuse and further reduce the victim's ability to stop the violence. The abuse, then, has been controlling and harmful enough to prevent the abused woman from ending the friendship and the abuse.<sup>373</sup>

Under the circumstances, this example of the two friends satisfies the personalized abuse formula. The victim here may need to turn to the legal system and to social services to end her friendship with her abuser. However, as long as the current domestic violence jurisprudence persists, these options are unavailable to the woman victimized by her friend.

### *C. Counterarguments*

The personalized abuse model is a departure from the conventional approach to domestic violence and as such might encounter resistance. In the following sub-part I address three of the possible counterarguments to this model, and explain how I believe they could be rebutted.

#### *1. Efficiency of the Legal System*

Proponents of narrow definitions to domestic violence have raised concerns that more inclusive models result in almost every woman being victimized and that every relationship of any kind would be deemed abusive, even behaviors which would otherwise be considered "unwanted interactions."<sup>374</sup> An overreaching approach may lead to the burdening of the legal system with proceedings that are of lower social priority<sup>375</sup> or unnecessary, which is inconsistent with principles of criminal law aiming to promote efficiency by sanctioning only unwanted conduct.<sup>376</sup> The efficiency of the legal system could suffer from

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372. See Lucas, *supra* note 78, at 786 (explaining that traumatic bonding is the victim's way to restore power and self-worth through positive emotions to the abuser); see also Stark, *supra* note 50, at 997 (explaining that escalating violence actually increases attachment to abuser).

373. As the power imbalance and control prong and the dependence prong are alternative to one another, I will not discuss the latter.

374. See DeKeseredy & Schwartz, *supra* note 108, at 28 (referring to earlier stages of relationships, when one party may aggressively court the other).

375. Colker, *supra* note 3, at 1867.

376. Richard A. Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193, 1195, 1197 (1985) (arguing that the law deems criminal those actions that are

an increased number of cases and from more complicated proceedings.<sup>377</sup> I address both concerns.

Violence is inefficient and therefore has been criminalized.<sup>378</sup> Still, must the sanctioning of violence in relationships go as far as to be criminalized under the broader personalized abuse model? I would argue that although broader, the personalized abuse model is not too expansive. It allows for the identification of only such relationships where abuse would be most troubling, not because of the form that relationship takes but because of what the relationship entails. It scrutinizes the nature of the bond and whether it is likely to be most harmful psychologically or whether there is a danger of abuse being ongoing. It weeds out relationships where abuse would not be as harmful or as continuous by excluding strictly fiduciary relationships or relationships where the victim may be able to stop the violence. All these ensure the efficiency of the model, as it does not call for unnecessary use of legal or societal resources.

Moreover, I would argue that considering the high social costs of the abusive relationship itself,<sup>379</sup> heightened legal attention which has a preventative function would outweigh the potential cost of a broader model.<sup>380</sup> Left unaddressed, abuse incurs high costs.<sup>381</sup> First, victims may require medical attention for their physical injuries.<sup>382</sup> Their psychological harms too would need treatment.<sup>383</sup> They might have to miss work or otherwise be limited in their contribution to society.<sup>384</sup> The fact that abuse is likely to be ongoing incurs even greater costs as damages increase.<sup>385</sup>

The second concern in the context of the legal system's efficiency is that a broader model might result not only in a larger amount of

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economically inefficient as they force victims to part with things that are of value to them without compensation).

377. Colker, *supra* note 3, at 1867.

378. See Posner, *supra* note 376, at 1197-99 (discussing rape as a crime of coercive transfer).

379. See generally Catherine Shaffer, *Therapeutic Domestic Violence Courts: An Efficient Approach to Adjudication?*, 27 SEATTLE U. L. REV. 981, 985-86 (2004).

In domestic violence cases, a therapeutic approach would appear efficient, as it avoids the transaction costs exacted when separate services to domestic violence victims are not coordinated. It also evades the opportunity costs of expending greater resources to later assist or heal victims who could have been helped more cheaply earlier, if alerted to appropriate services.

*Id.* at 989.

380. *Id.* at 996.

381. *Id.* at 985-86.

382. *Id.* at 985.

383. *Id.*

384. *Id.*

385. *Id.*

cases but also that proceedings will become lengthier and costlier.<sup>386</sup> One might argue that the more flexible test the personalized abuse framework proposes would burden courts with drawn out adversarial disputes involving expert witnesses to compensate for judges' limited expertise.<sup>387</sup> The solution lays, in my opinion, within a specialized courts system.<sup>388</sup> Some jurisdictions have developed domestic violence courts to handle cases of abuse.<sup>389</sup> These courts should be expanded to hear cases of personalized abuse, as well. These courts are staffed with specially trained judges, litigators, and social services providers<sup>390</sup> who could instruct victims on how to navigate the legal system and monitor abusers' compliance and cooperation.<sup>391</sup> Additionally, specialized courts could benefit greatly from attorneys knowledgeable in the dynamics of abusive relationships and their manifestations and harms, which would allow them to recognize suitable cases for these courts and the appropriate remedies.<sup>392</sup> Social services working in congruence with courts could facilitate expert testimonies and therapeutic resolutions.<sup>393</sup>

Specialization of courts is an efficient way to deal with abusive relationships: coordination of services reduces transaction costs; trained personnel speed proceedings along; therapeutic remedies prevent pricy incarceration and — most importantly — they empower victims and closely monitor abusers so that cyclicity and psychological harms are minimized.<sup>394</sup>

None of the matters discussed here are exclusive to domestic violence — the social and economic costs are relevant to personalized

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386. Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 *FORDHAM L. REV.* 1285, 1293 (2000).

387. *Id.*

388. I merely present an overview of a possible solution here. It is outside of the scope of this Article to delve into the complexities of the issue of specialized personalized abuse courts. I therefore leave this matter for future endeavors.

389. See Tsai, *supra* note 386, at 1297-1307 (discussing domestic violence courts in Quincy, Massachusetts, New York City, Dade County, Florida, and the District of Columbia). See generally Mandy Burton, *Judicial Monitoring of Compliance: Introducing "Problem Solving" Approaches to Domestic Violence Courts in England and Wales*, 20 *INT'L J. L., POL'Y & FAM.* 366 (2006) (discussing domestic violence courts in England and Wales).

390. Tsai, *supra* note 386, at 1298, 1300.

391. *Id.* at 1300-01.

392. *Id.* at 1317.

393. In Israel, for example, family courts are structured to include "assistance units" — a unit of social services providers and mental health professionals that are a cohesive part of the court. These assistance units take part in all proceedings — they offer family courts written reports on parties to include the background on the relationship and the dispute, as well as suggest resolutions that extend further than the law to include treatment and/or counseling for parties. See Family Courts Act, 1995, S.H. 153.

394. Shaffer, *supra* note 379, at 997.

abuse as well, as both models of abuse share the macro-level characteristics explaining these costs. Both, therefore, warrant similar specialized legal solutions. Once society has found the law to be an efficient tool to prevent the costs of domestic violence and to address its effects, or that the benefits of legal attention to domestic violence are greater than the costs to the system itself, it should treat personalized abuse in the same manner, as again, the concerns in both are the same.

## 2. *Family/Relationship Privacy*

Violence in the home has historically been perceived as a private matter, free of government intervention, and was considered legitimate as part of the husband's right to chastise and discipline his wife.<sup>395</sup> Yet, this only comes to serve the abuser, who is not held accountable for perpetrating the abuse.<sup>396</sup> Frances Olsen has argued that the state must step in when families malfunction by becoming abusive.<sup>397</sup> I would argue the same is true for other relationships. When personal relationships too are no longer "safe, supportive, and loving"<sup>398</sup> as they should be, and when like in families, abuse has led to their breakdown, there is no justification for non-intervention due to privacy.<sup>399</sup>

Olsen articulates an "Incoherence Argument": since the state *de facto* regulates families by recognizing certain family units and not others, and by regulating the rights and obligations of members of the family, the notion of family privacy is false.<sup>400</sup> The state distributes power in the family in a way that privileges certain parties over others and avoids intervening in certain family matters, such as abuse, as a means of maintaining these power distributions on the back of the weaker party.<sup>401</sup>

Olsen's theory fits the wider context of relationships as well. The law already regulates relationships and should not disregard personalized abuse by contending it is a private matter. The law does in fact, as Olsen suggests, regulate relationships, even if they are not marital.<sup>402</sup> Roommates and friends may be bound to each other in contractual agreements which require state intervention if questions

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395. Suk, *supra* note 19, at 11-12.

396. Jasinski, *supra* note 44, at 11.

397. Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 836 (1985).

398. *Id.* at 839.

399. *Id.* at 840.

400. *Id.* at 842-44.

401. *Id.* at 843.

402. *Id.* at 844.

of enforceability or disputes regarding breeches arise; the state also intervenes in non-marital relationships, whether opposite-sex or same-sex, when it confers certain rights and obligations on them.<sup>403</sup> Therefore, as Olsen would argue, the state must also intervene to protect parties in need in these relationships, and react to relationships derailing with abuse.<sup>404</sup> There is little justification then, for the state to wash its hands of abusive relationships because they are private.

### 3. Protection Under Stalking Laws

Stalking is defined by the Violence Against Women Act as “a course of conduct directed at a specific person that would cause a reasonable person to — (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.”<sup>405</sup> Repeated behaviors of surveillance or harassment that are threatening and controlling may constitute stalking when they produce high levels of fear.<sup>406</sup> Therefore, stalking may lead to substantial psychological harms. Moreover, most stalking victims have also been physically assaulted by their stalkers.<sup>407</sup> Although social science has identified most stalkers to be men and targets to be women, the opposite is true as well.<sup>408</sup> A possible explanation to the lower instances of men being stalked by women is that women’s stalking behavior tends to be more subtle, and might therefore be undetected or misconstrued by their victims.<sup>409</sup> Stalking usually takes place in one of two stages of relationships: before the relationship is formed, when the stalker pursues the victim in hopes of establishing a relationship; or after a breakup, usually pursuant to violence in the relationship.<sup>410</sup>

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403. *Id.*

404. Leib, *supra* note 70, at 637.

405. 42 U.S.C. § 13925(24) (2007). Examples of acts that may constitute stalking are “harassing and threatening behavior that an individual engages in repeatedly, such as following a person, appearing at a person’s home or place of business, making harassing phone calls, leaving written messages or objects, or vandalizing a person’s property.” U.S. DEPT OF JUSTICE, STALKING AND DOMESTIC VIOLENCE: REPORT TO CONGRESS 1 (2001).

406. Mahoney et al., *supra* note 20, at 152-53; see also Stacey L. Williams et al., *Intimate Stalking and Partner Violence*, in FAMILY INTERVENTIONS IN DOMESTIC VIOLENCE, *supra* note 107, at 110 (defining stalking as “a continuum of behaviors, escalating from courtship persistence to threats of physical violence, wherein the pursuer repeatedly attempts to maintain unwanted contact, directly and indirectly, with a target, and this behavior, intentionally or unintentionally, causes the target discomfort and, in extreme cases, fear”).

407. Susan E. Bernstein, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?*, in GENDER AND AMERICAN LAW: THE LEGAL RESPONSE TO VIOLENCE AGAINST WOMEN 299 (Karen J. Maschke ed., 1997).

408. Williams et al., *supra* note 406, at 116-17.

409. *Id.* at 117.

410. Bernstein, *supra* note 407, at 303.

Stalking laws have been crafted to provide further protection to victims — particularly by protecting any person from another, without requiring any relationship —<sup>411</sup> and in that regard complement domestic violence laws, but do not replace them.

First, by addressing the risk of future violence stalking laws are designed to address situations where violence has yet to occur,<sup>412</sup> thus targeting cases that are out of the scope of existing domestic violence laws in terms of the time frame of the behavior concerned.<sup>413</sup>

Second, stalking laws have been criticized for not adequately protecting stalking victims, let alone domestic violence victims.<sup>414</sup> Stalking laws require meeting high evidentiary burdens showing a “credible threat” of violence — an objective standard that does not account for victim’s heightened levels of fear in the context of stalking.<sup>415</sup> Also, while stalking laws reach every victim and perpetrator by not requiring a certain type of relationship, they are very narrow in the scope of behaviors they cover<sup>416</sup> — demanding explicit threats and not merely implied ones through seemingly innocent behavior such as sending flowers, for example.<sup>417</sup>

Lastly, by focusing on restraining orders and criminal offenses,<sup>418</sup> stalking laws are not meant to deal with all aspects of violent relationships, particularly the psychological harms these relationships cause victims, or the social structures and cultural norms enabling the existence of these relationships. A personalized abuse model extending the protections of domestic violence to a wider range of relationships and victims will facilitate service provisions, such as hotlines and shelters, and raise public awareness where stalking laws fall short.

## CONCLUSION

Domestic violence protections are currently extended based on categories that identify a form of relationship the law has traditionally viewed as worthy of heightened legal attention. These categories are too rigid to account for the many relationships which may suffer from abuse. Knocking down the barriers put up by categories opens up the doors to the legal system.

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411. *Id.* at 321.

412. *Id.* at 317-18.

413. *Id.* at 319.

414. *Id.* at 313.

415. *Id.* at 323.

416. Jennifer L. Bradfield, Note, *Anti-Stalking Laws: Do They Adequately Protect Stalking Victims?*, 21 HARV. WOMEN’S L.J. 229, 242-43 (1998).

417. Bernstein, *supra* note 407, at 316.

418. Bradfield, *supra* note 416, at 236-43.

The law would do better to extend remedies not according to the form of the relationship, but according to its nature. The personalized abuse model looks at the substance of the dynamics within the abusive relationship, and affords protection in light of the micro-level characteristics that are prevalent in violent relationships and distinguishes them from other violence and the macro-level concerns that make such violent relationships troubling. A flexible, substantive approach recognizes that abuse can happen in all sorts of relationships, not just marriages or marriage-mimicking relationships.

Finally, the personalized abuse model allows the law of abuse to develop along with society. The law cannot anticipate every type of relationship or every potential victim. Just as the family itself has evolved and expanded to include non-traditional families — single parents or same-sex couples — for instance, so too have personal relationships. When the law attempts to limit its remedies only to predictable situations, it falls short of its role to protect those in need of its attention.