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## What Counts as Domestic Violence? A Conceptual Analysis

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# WHAT COUNTS AS DOMESTIC VIOLENCE? A CONCEPTUAL ANALYSIS

MICHELLE MADDEN DEMPSEY\*

## INTRODUCTION

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## ABSTRACT

This article analyzes the conceptual structure of domestic violence and critiques various influential accounts of domestic violence operating in the criminal justice system, legal and sociological academia, and the domestic violence advocacy community. Part I presents a preliminary philosophical analysis of domestic violence with the goal of furthering our understanding of the correct use of

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this concept. This analysis centers around three key elements of domestic violence: violence, domesticity, and structural inequality. Part II develops an explanatory model of domestic violence based upon these key elements. Part III examines and critiques four principal accounts of domestic violence, each of which reflects the conflicting ways in which the concept of domestic violence is used in the language and methodology of the criminal justice, academic, and advocacy communities. Finally this article endorses an account of domestic violence that roughly corresponds to the one employed in the recent work of sociologist Michael Johnson.

### INTRODUCTION

*"The current debate about the use of and over-reliance on the criminal justice system [in addressing domestic violence] is serious and important. If discussed employing a full and accurate definition of domestic violence . . . its resolution can greatly strengthen current efforts to eliminate domestic violence."*

—Jody Raphael<sup>1</sup>

This article analyzes the conceptual structure of domestic violence with the goal of promoting a better understanding of this concept and several of its related concepts. The analysis set forth in this article provides a strong conceptual grounding upon which to understand domestic violence and thereby to advance current debates regarding the criminal justice system's response to domestic violence offenses.<sup>2</sup>

Academic literature has aired two sets of lively, extensive, and often heated debates regarding domestic violence in recent decades. The first debate has appeared in the sociological literature for nearly three decades and addresses the issue of gender prevalence in domestic violence.<sup>3</sup> The second debate has appeared in legal

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1. Jody Raphael, *Rethinking Criminal Justice Responses to Intimate Partner Violence*, 10 VIOLENCE AGAINST WOMEN 1354, 1361 (2004).

2. The analysis set forth in this article need not be limited to the criminal justice system's responses to domestic violence, but within this context an answer to the question of what counts as domestic violence may prove most helpful in furthering debates regarding matters such as pro-arrest policies and mandatory victim participation in domestic violence prosecutions. See *infra* note 4.

3. 'Gender prevalence' herein refers to the rate at which males commit domestic violence against females as compared to the rate at which females commit domestic violence against males. Suzanne Steinmetz sparked the debate regarding gender prevalence in domestic violence by claiming in her early work to document the allegedly widespread phenomenon of "husband battering." Suzanne K. Steinmetz, *The Battered*

literature for nearly two decades and addresses the question of how the criminal justice system should respond to domestic violence cases in which the victim does not want the suspected offender to be arrested and/or later requests that charges be dismissed.<sup>4</sup> Oddly, the

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*Husband Syndrome*, 2 VICTIMOLOGY 499, 499 (1978). Some key works in the sociological debate regarding gender prevalence in domestic violence include: R. EMERSON DOBASH & RUSSELL DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* (1979) [hereinafter DOBASH & DOBASH, *VIOLENCE AGAINST WIVES*]; Richard Berk et al., *Mutual Combat and Other Family Violence Myths*, in *THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH* 197 (David Finkelhor et al. eds., 1983); Dawn H. Currie, *Violent Men or Violent Women: Whose Definition Counts?*, in *ISSUES IN INTIMATE VIOLENCE* 97 (Raquel Kennedy Bergen ed., 1998); Shamita Das Dasgupta, *Just Like Men? A Critical View of Violence by Women*, in *COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND* 195 (Melanie F. Shepard & Ellen L. Pence eds., 1999); Russell P. Dobash & R. Emerson Dobash, *The Context-Specific Approach*, in *THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH*, *supra*, at 261 [hereinafter Dobash & Dobash, *The Context-Specific Approach*]; Russell P. Dobash & R. Emerson Dobash, *Women's Violence to Men in Intimate Relationships: Working on a Puzzle*, 44 BRIT. J. CRIMINOLOGY 324 (2004) [hereinafter Dobash & Dobash, *Women's Violence to Men*]; Ann Grady, *Female-on-Male Domestic Abuse: Uncommon or Ignored?*, in *NEW VISIONS OF CRIME VICTIMS* 71 (Carolyn Hoyle & Richard Young eds., 2002); Holly Johnson, *Rethinking Survey Research on Violence Against Women*, in *RETHINKING VIOLENCE AGAINST WOMEN* 23 (R. Emerson Dobash & Russell P. Dobash eds., 1998); Gayla Margolin, *The Multiple Forms of Aggressiveness Between Marital Partners: How Do We Identify Them?*, 13 J. MARITAL & FAM. THERAPY 77 (1987); Daniel G. Saunders, *Wife Abuse, Husband Abuse, or Mutual Combat?: A Feminist Perspective on the Empirical Findings*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 90 (Kersti Yllö & Michele Bograd eds., 1988); Murray A. Straus, *Injury and Frequency of Assault and the "Representative Sample Fallacy" in Measuring Wife Beating and Child Abuse*, in *PHYSICAL VIOLENCE IN AMERICAN FAMILIES* 75 (Murray A. Straus & Richard J. Gelles eds., 1990) [hereinafter Straus, *Injury and Frequency*]; Murray A. Straus, *The Controversy over Domestic Violence by Women: A Methodological, Theoretical, and Sociology of Science Analysis*, in *VIOLENCE IN INTIMATE RELATIONSHIPS* 17 (Ximena B. Arriaga & Stuart Oskamp eds., 1999) [hereinafter Straus, *Domestic Violence by Women*]; Kersti A. Yllö, *Through a Feminist Lens: Gender, Power, and Violence*, in *CURRENT CONTROVERSIES ON FAMILY VIOLENCE* 47 (Richard J. Gelles & Donileen R. Loseke eds., 1993) [hereinafter Yllö, *Through a Feminist Lens*]; Kersti Yllö, *Using a Feminist Approach in Quantitative Research: A Case Study*, in *THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH*, *supra*, at 277 [hereinafter Yllö, *Using a Feminist Approach*]; WALTER S. DEKESEREDY & MARTIN D. SCHWARTZ, NAT'L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN, *MEASURING THE EXTENT OF WOMAN ABUSE IN INTIMATE HETEROSEXUAL RELATIONSHIPS: A CRITIQUE OF THE CONFLICT TACTICS SCALES* (1998), [http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR\\_ctscrit.pdf](http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_ctscrit.pdf).

4. The legal debate has focused on the propriety of pro-arrest or mandatory arrest policies, whereby the suspect is arrested irrespective of the victim's wishes, and 'no-drop' policies, whereby charges are prosecuted irrespective of the victim's request to dismiss. San Diego, California, first adopted such policies in the mid-1980s. See generally CASEY G. GWINN & ANNE O'DELL, NAT'L CTR. ON DOMESTIC AND SEXUAL VIOLENCE, *STOPPING THE VIOLENCE: THE ROLE OF THE POLICE OFFICER AND THE PROSECUTOR* (1992), <http://www.ncdsv.org/images/StoppingViolence.pdf>. Recent debates regarding such policies have taken the form of (often scathing) critiques of Linda Mills's controversial work, *INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE* (2003). For critique and discussion of Mills's work, see Annalise Acorn, *Surviving the Battered*

*Reader's Syndrome, or: A Critique of Linda G. Mills' Insult to Injury: Rethinking Our Responses to Intimate Abuse*, 13 UCLA WOMEN'S L.J. 335 (2005); Donna Coker, *Race, Poverty, and the Crime-Centered Response to Domestic Violence*, 10 VIOLENCE AGAINST WOMEN 1331 (2004) [hereinafter Coker, *Race, Poverty, and the Crime-Centered Response*]; Walter S. DeKeseredy, Book Review, 44. BRIT. J. CRIMINOLOGY 621 (2004); Raphael, *supra* note 1; Evan Stark, *Insults, Injury, and Injustice: Rethinking State Intervention in Domestic Violence Cases*, 10 VIOLENCE AGAINST WOMEN 1302 (2004).

Literature concerning the broader debate regarding such policies includes ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000); Mary E. Asmus, Tineke Ritmeester & Ellen L. Pence, *Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies from Understanding the Dynamics of Abusive Relationships*, 15 HAMLINE L. REV. 115 (1991); Cynthia Grant Bowman, *The Arrest Experiments: A Feminist Critique*, 83 J. CRIM. L. & CRIMINOLOGY 201 (1992); Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263 (1987); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001); Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1043-1046 (2000); Dasgupta, *supra* note 3; David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects*, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 157 (N. Zoe Hilton ed., 1993); Leigh Goodmark, *Law is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7 (2004); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996); Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999); Christine O'Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937 (1999); Melanie Randall, *Domestic Violence and the Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law*, 23 ST. LOUIS U. PUB. L. REV. 107 (2004); Arthur L. Rizer III, *Mandatory Arrest: Do We Need to Take a Closer Look?*, 36 UWLA L. REV. 1 (2005); Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657 (2004); Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. ILL. L. REV. 533 (1996); Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133 (1994); Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173 (1997); Cathleen A. Booth, Note, *No-Drop Policies: Effective Legislation or Protectionist Attitude?*, 30 U. TOL. L. REV. 621 (1999); Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853 (1994); Jessica Dayton, Note, *The Silencing of a Woman's Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN'S L.J. 281 (2003); Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159 (2003); Machaela M. Hctor, Comment, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643 (1997); Nichole Miras Mordini, Note, *Mandatory State Interventions for Domestic Abuse Cases: An Examination of the Effects on Victim Safety and Autonomy*, 52 DRAKE L. REV. 295 (2004); Kalyani Robbins, Note, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205 (1999); Miriam H. Ruttenberg, Note, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171 (1994); Joan Zorza, *Mandatory Arrest for Domestic Violence: Why It May Prove the Best First Step in Curbing Repeat Abuse*, CRIM. JUST., Fall 1995, at 2; Anannya Bhattacharjee, *Whose Safety?: Women of Color and the Violence of Law Enforcement* (May 2001) (unpublished Justice Visions working paper), available at <http://www.afsc.org/community/WhoseSafety.pdf>.

sociological debate has had little significant influence on the legal debate.<sup>5</sup> One possible reason for this lack of academic cross-fertilization may be that the sociological debate has largely centered on the issue of research methodology.<sup>6</sup> Sociological literature understands the question of what counts as domestic violence principally as a methodological question of how sociologists ought to measure domestic violence.<sup>7</sup> Many legal academics are seemingly reluctant to engage with questions of sociological research methods,<sup>8</sup> and perhaps for this reason legal academic literature has failed to employ insights developed in the sociological literature to examine the underlying conceptual question of what counts as domestic violence. This failure is regrettable, and this article is one step towards its rectification.

The step taken in this article is admittedly preliminary, and any fully developed theory of domestic violence or social policy responding to domestic violence will require a great deal of further explication.<sup>9</sup> As such, this article does not aim to settle the existing legal or sociological debates regarding domestic violence. Rather, its aim is simply to set forth a clearly developed conceptual analysis of domestic violence: one that may bring clarity to the existing legal debates. Specifically, as a project of *conceptual analysis*, this article

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Such policies, and the debates they engender, are increasingly present in England. See SUSAN S.M. EDWARDS, *POLICING 'DOMESTIC' VIOLENCE: WOMEN, THE LAW AND THE STATE* (1989); CAROLYN HOYLE, *NEGOTIATING DOMESTIC VIOLENCE: POLICE, CRIMINAL JUSTICE AND VICTIMS* (1998); Louise Ellison, *Prosecuting Domestic Violence Without Victim Participation*, 65 MOD. L. REV. 834 (2002); Louise Ellison, *Responding to Victim Withdrawal in Domestic Violence Prosecutions*, 2003 CRIM. L. REV. 760 (2003); Carolyn Hoyle & Andrew Sanders, *Police Response to Domestic Violence: From Victim Choice to Victim Empowerment?*, 40 BRIT. J. CRIMINOLOGY 14 (2000).

5. While the sociological debates are noted in one recent law review article, its author fails to take seriously the conceptual issues that underlie this conflict and, instead, simply assumes that family violence researchers have accurately captured the "empirical reality" of domestic violence. 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, 793 (2003). For discussion of family violence researchers, see *infra* Part III.B.

6. See *supra* note 3.

7. See *supra* note 3.

8. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002). On the potential to overcome such reluctance by integrating methodologies based on various disciplines within law school faculties, see David E. Van Zandt, *Discipline-Based Faculty*, 53 J. LEGAL EDUC. 332 (2003).

9. This article is part of a larger project regarding the criminal prosecution of domestic violence, which explores the intrinsic value prosecutorial decisions may have in making a society less patriarchal and the relevance of this value to the proper exercise of prosecutorial discretion in domestic violence cases. Michelle Madden Dempsey, *Domestic Violence and the Uncooperative Victim: Rethinking the Purpose of Criminal Prosecution* (forthcoming) (unpublished D.Phil. thesis, Oxford University) (on file with author).

aims to do the following: to take an idea, specifically the concept of domestic violence, and to break it down into its constituent parts. The purpose of this analysis is not merely to track linguistic usage or to stipulate a meaning of domestic violence, but rather to explain what is important about domestic violence and to "establish an evaluative test" for the concept.<sup>10</sup>

This article does not express an opinion on the question of whether the criminal law should seek to set domestic violence offenses apart, for example, by specifically prohibiting 'domestic battery.'<sup>11</sup> However, the belief that domestic violence offenses call for a distinct conceptual analysis clearly underlies this article's approach. This belief is in keeping with the observation that not all crimes are "covered by a single moral map."<sup>12</sup> What follows can be understood, therefore, as an exercise in the moral cartography of domestic violence: it provides a moral map that can, in part, guide the exercise of criminal justice policy in such cases.

This article proceeds in three parts. The first part unpacks three conceptual elements that constitute domestic violence: violence, domesticity, and structural inequality. The second part employs these three conceptual elements to develop an explanatory model of domestic violence. The final part uses this explanatory model to clarify and critique three influential accounts of domestic violence: the violence account, the domestic account, and the structural inequality account, and to explain and defend a fourth account of domestic violence, Johnson's account.

## I. THREE ELEMENTS OF DOMESTIC VIOLENCE

Domestic violence is best understood in terms of three distinct elements: violence, domesticity, and structural inequality.

### A. Violence

Many accounts of violence "incorporate some strong notion of illegitimacy into the very meaning of violence,"<sup>13</sup> and some go so far as to equate all violence with normative illegitimacy. Such accounts

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10. Brian Bix, *Conceptual Questions and Jurisprudence*, 1 LEGAL THEORY 465, 479 (1995).

11. For further analysis, see generally Victor Tadros, *The Distinctiveness of Domestic Abuse: A Freedom-Based Account*, in DEFINING CRIMES 119 (R.A. Duff & Stuart P. Green eds., 2005).

12. John Gardner, *Crime: In Proportion and Perspective*, in FUNDAMENTALS OF SENTENCING THEORY: ESSAYS IN HONOUR OF ANDREW VON HIRSCH 31, 48 (Andrew Ashworth & Martin Wasik eds., 1998).

13. C.A.J. Coady, *The Idea of Violence*, 3 J. APPLIED PHIL. 3, 3 (1986).

are referred to herein as legitimist accounts. The account of violence set forth in this article rejects legitimist accounts of violence. In order to explain clearly what is being rejected, the next two sections will examine two leading types of legitimist accounts of violence.

### 1. *Traditional Legitimist Accounts*

The first account of violence to be considered is referred to herein as the traditional legitimist accounts of violence. Two aspects of such accounts are worth noting at this point: (1) they conceive of all violence as illegitimate by definition; and (2) they adopt a narrow conception of what counts as violence, typically restricting their focus to the direct, physical use of force.<sup>14</sup>

Traditional legitimist accounts are prevalent in philosophical literature, where they typically come in one of three flavors: political legitimist accounts, legal legitimist accounts, and moral legitimist accounts. For example, Stanage bases his account of violence on its political illegitimacy, claiming that violence is best understood in the context of a political civil order, and that violent acts are by definition "*dis-order[ed and] un-civil.*"<sup>15</sup> In contrast, Hook conceptualizes violence on the basis of its legal or moral illegitimacy, defining violence as "the 'illegal' or 'immoral' use of . . . force."<sup>16</sup> Traditional legitimist accounts of violence do not always make explicit the normative framework upon which claims of illegitimacy are based. For example, Girvetz offers a traditional legitimist account of violence by defining violence as "illegitimate and unsanctioned acts" but he fails to identify what system of norms make these acts illegitimate and unsanctioned.<sup>17</sup>

This article rejects legitimist accounts of violence for reasons explained in Part I.A.3. It does, however, use the concept of illegitimacy to further its analysis, by dividing categories of action into the legitimate and illegitimate. Thus, this article must answer the question that Girvetz did not<sup>18</sup> and clearly specify the normative system invoked by relying on the concept of legitimacy. The normative system invoked herein is that of morality. In other words, when an act is described as legitimate or illegitimate, it is used in

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14. See *id.* at 4-5.

15. Sherman M. Stanage, *Violatives: Modes and Themes of Violence*, in REASON AND VIOLENCE: PHILOSOPHICAL INVESTIGATIONS 207, 226 (Sherman M. Stanage ed., 1975).

16. SIDNEY HOOK, REVOLUTION, REFORM AND SOCIAL JUSTICE 225 (1976).

17. Harry Girvetz, *An Anatomy of Violence*, in REASON AND VIOLENCE: PHILOSOPHICAL INVESTIGATIONS, *supra* note 15, at 183, 185.

18. See *id.*



the sense that it is *morally* legitimate or illegitimate.<sup>19</sup> This article does not attempt to develop or defend any particular set of moral norms. Rather, it only attempts to develop a model within which competing accounts of domestic violence and the conflicting sets of moral norms that form the basis of these accounts can be better understood.

## 2. Structuralist Accounts

The second legitimist account of violence to be considered is referred to herein as the structuralist account. Two aspects of such accounts are worth noting: (1) they conceive of all violence as illegitimate by definition, and for that reason they are examples of legitimist accounts of violence, and (2) they adopt a broad view of what counts as violence, including both the direct, physical use of force (personal violence) and the existence of structural inequalities (structural violence).<sup>20</sup> Thus, under a structuralist account of violence, structural inequality is, by definition, violence.<sup>21</sup>

Notable among the structuralist accounts is Galtung's foundational work on peace and violence, wherein he claims that all unjust social conditions, such as poverty, are best understood as forms of violence.<sup>22</sup> Galtung's point in characterizing structural inequality as violence appears to be to launch a normative attack against such inequality — to claim that it is by definition normatively illegitimate. The logic goes something like this: all violence is bad; all structural inequality is violence; therefore, all structural inequality is bad. The first premise derives from traditional legitimist accounts of violence, the second premise marks the structuralist accounts' unique contribution to the analysis of violence, and the conclusion reflects the political awakening that advocates of structuralist accounts seek to achieve.

This article rejects structuralist accounts of violence for reasons explained in Part II.A.3. The concept of structural inequality, however, furthers the analysis of domestic violence set forth herein, by including structural inequality as a necessary element of domestic violence in its strong sense.<sup>23</sup>

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19. The discussion here may suggest too strict a division between normative systems such as law, politics, and morality. This discussion is not meant to suggest that these systems properly can be understood as conceptually unrelated, but further discussion of this matter is beyond the scope of this article.

20. See, e.g., Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RES. 167, 168 (1969).

21. *Id.* at 171. See also Coady, *supra* note 13, at 4.

22. See Galtung, *supra* note 20, at 170-71.

23. See *infra* Part II.

### 3. Critique of Legitimist Accounts

This article rejects the first premise of legitimist accounts of violence, which claims that all violence is normatively illegitimate. This premise conflates normative and empirical accounts of violence and, in doing so, creates two problems. The first problem arises when legitimist accounts attempt to identify what counts as violence as an empirical matter, based on their understanding of violence as a normative (illegitimate) matter.<sup>24</sup> Working from the normative to the empirical obscures important ways in which the concept of violence actually functions in the English language. For example, shooting and killing someone typically is understood as a violent act, while the question of its normative legitimacy is a distinct issue. Thus, a person who shoots and kills an attacker in self-defense is one who has committed a *violent but legitimate* act. Conversely, beginning with the normative assessment and using that to control an empirical assessment prevents an understanding of the act of shooting and killing a person as violent.<sup>25</sup> The legitimist accounts' inability to conceptualize such an act as violent renders these accounts useless in understanding the concept of violence in the way the concept is used in the criminal justice system.

The second problem mirrors the first and crops up when legitimist accounts attempt to identify what counts as violence as a normative (illegitimate) matter, based on their understanding of violence as an empirical matter.<sup>26</sup> Working from the empirical to the normative without stopping along the way to conduct an independent normative evaluation of the act in question leads to a tremendous amount of question-begging in legitimist accounts of violence. Since legitimist accounts view all violence as illegitimate by definitional fiat,<sup>27</sup> they ignore the fundamental normative question of whether a certain act, described empirically, *should* be considered normatively illegitimate.

This article also rejects the second premise of the structuralist accounts of violence, which claims that all structural inequalities are violence. While structuralist accounts provide a compelling tool in progressive political discourse as a means of challenging preconceived notions regarding the legitimacy of social conditions and of motivating society to awaken to and perhaps remedy unjust

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24. See Coady, *supra* note 13, at 13.

25. *E.g.*, Galtung, *supra* note 20, at 168-69 (claiming that people killed by an earthquake do not die a violent death).

26. See Coady, *supra* note 13, at 4-5.

27. See *id.* at 3.

inequalities, little is gained from conflating the concepts of structural inequality and violence. Rather, violence and structural inequality are best understood as distinct concepts, albeit ones that are often related. Moreover, in terms of reflecting common usage and facilitating the joining of issue with policymakers, structuralist accounts of violence are unsatisfying insofar as they fail to reflect the way the concept of violence is used in the criminal justice system.

#### *4. A Proposed Non-Legitimist, Narrow Account of Violence*

This article proposes that violence can be best understood under a non-legitimist, narrow account. This account of violence does two things: (1) it creates conceptual space in which to understand violence as either legitimate or illegitimate, and (2) it adopts a narrow view of what counts as violence, focusing on the direct, physical use of force.

First, the account of violence proposed here includes both legitimate violence and illegitimate violence. Specifically, under this account, violence is merely a *prima facie* wrong, the doing of which can be justified, all things considered.<sup>28</sup> In this sense, this proposed account is consistent with Coady's view "that resort to violence even when morally justifiable should commonly be regarded as a matter for regret."<sup>29</sup>

Second, the account of violence proposed here rejects the notion of structural violence and instead conceives of violence narrowly, as the direct, physical use of force. The use of the word 'direct' implies a rejection of Harris's broad account of responsibility, wherein the failure to prevent violence is understood as doing violence.<sup>30</sup> The use of the word 'physical' is meant to reinforce a rejection of the notion of structural violence, in which violence is understood in terms of states of affairs rather than actions.<sup>31</sup> Note, however, that the use of the word 'physical' is not meant to suggest any requirement that violent acts result in injury or damage, such as bruising, for example. In other words, violent acts are no less violent for their

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28. For a detailed discussion of the concept of justification, see John Gardner, *Justification and Reasons*, in HARM AND CULPABILITY 103 (A.P. Simester & A.T.H. Smith eds., 1996).

29. Coady, *supra* note 13, at 17.

30. See JOHN HARRIS, VIOLENCE AND RESPONSIBILITY 24-47 (1980). The ascription of responsibility for omissions (or negative actions) is beyond the scope of this article. Rather, this article primarily addresses violent acts rather than omissions.

31. See Galtung, *supra* note 20, at 175.

failure to cause injury or damage.<sup>32</sup> Finally, the use of the word 'force' in this article means the exertion of energy or strength upon an object.<sup>33</sup> In this sense, a storm can be said to be violent, but as the topic here is criminal law, this article focuses on the ways in which people are violent.

Before moving on, this article's use of the term 'violence' should be distinguished from its use of the term 'abuse.'<sup>34</sup> The concept of abuse serves as an umbrella category that includes both *violent abuse* and *nonviolent abuse*. Further, some forms of violence can be understood as members of a completely distinct category from abuse, in that there exists a category of *nonabusive* violence.<sup>35</sup>

### B. Domesticity

What makes violence into *domestic* violence? One tempting but not terribly illuminating approach to answering this question is the 'recipe approach': simply take the concept of violence, add domesticity, and mix. This approach is both incomplete and conceptually inadequate, but this section does not address these issues.<sup>36</sup> Rather, this section clarifies the meaning of the term 'domesticity' and unpacks the reasons why domesticity is relevant to understanding domestic violence.

Domesticity is simply "the quality or state of being domestic" or possessing a "domestic character."<sup>37</sup> What does it mean for violence to possess a domestic character? This question is addressed below by examining two common ways of characterizing the difference between domestic and nondomestic violence, or 'generic violence.'

#### 1. Location

One way to differentiate domestic violence from generic violence is to focus on the location in which the violence occurs. Although no statutory provisions or government policies in the United States or

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32. *Contra* Coady, *supra* note 13, at 15 (adopting a definition of violence that requires "injury on or damage to persons or property").

33. This definition of "force" coincides with its meaning in the Oxford English Dictionary. 6 OXFORD ENGLISH DICTIONARY 33-35 (2d ed. 1989).

34. This distinction is elaborated and clarified in Part III.

35. Violent self-defense is an example of nonabusive violence.

36. The incompleteness of this approach is illuminated in the discussion of the final element of domestic violence (structural inequality) in Part I.C. The conceptual inadequacy of the recipe approach is addressed in Part II, which builds an explanatory model of domestic violence that examines the various relationships that exist between elements of domestic violence, rather than simply mixing all of the elements together.

37. 4 OXFORD ENGLISH DICTIONARY, *supra* note 33, at 945.

England define domestic violence by reference to its physical location, the relevance of location to understanding domestic violence is reflected in government reports and academic literature that characterize domestic violence as "violence in the home."<sup>38</sup>

Why might the location of the violence be relevant to understanding what counts as domestic violence? One possible answer to this question points to the location of the home as a "private" sphere, where people's conduct is protected from external scrutiny.<sup>39</sup> Under this account, generic violence is conceptualized as "public" violence and domestic violence is conceptualized as "private" violence.<sup>40</sup> Paradigms of generic violence occur in "public" locations, such as pubs or streets; whereas paradigms of domestic violence occur in "private" spaces, such as the home.<sup>41</sup> Historically, the public-private dichotomy has been used as a basis on which to prevent criminal prosecution of domestic violence, even where victims actively sought assistance from the criminal justice system.<sup>42</sup> More recently, however, with increasing criminal justice intervention into domestic violence, particularly in cases where the victim requests assistance, the historical conception of domestic violence as a private matter has been eroded.<sup>43</sup>

Another possible reason why location might be relevant to understanding what counts as domestic violence is the symbolic

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38. *E.g.*, Richard J. Gelles, *Family Violence*, 11 ANN. REV. SOC. 347, 348 (1985); HER MAJESTY'S INSPECTORATE OF CONSTABULARIES & HER MAJESTY'S CROWN PROSECUTION SERVICE INSPECTORATE, *Violence at Home: The Investigation and Prosecution of Cases Involving Domestic Violence* 4, 6, 19 (2004), <http://www.hmcp.si.gov.uk/reports/DomVio0104Rep.pdf>; SAFETY, HEALTH AND EMPLOYEE WELFARE DIV., U.S. DEPT OF AGRICULTURE, *Domestic Violence Awareness Handbook* (2005), <http://www.usda.gov/da/shmd/aware.htm>.

39. See KATHERINE O'DONOVAN, *Sexual Divisions in the Law* 11 (1985).

40. See, *e.g.*, Donileen R. Loseke & Richard J. Gelles, *Introduction: Examining and Evaluating Controversies on Family Violence*, in *CURRENT CONTROVERSIES ON FAMILY VIOLENCE*, *supra* note 3, at ix-x (describing family violence as "private family matters"). The public-private dichotomy has been widely critiqued in feminist legal theory. See, *e.g.*, *CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW, AND PUBLIC POLICY* (Susan B. Boyd ed., 1997); *FEMINISM, THE PUBLIC AND THE PRIVATE* (Joan B. Landes ed., 1998); Nicola Lacey, *Theory into Practice?: Pornography and the Public/Private Dichotomy*, in *FEMINIST THEORY AND LEGAL STRATEGY* 93 (Anne Bottomley & Joanne Conaghan eds., 1993); CATHERINE A. MACKINNON, *Toward a Feminist Theory of the State* 168-69 (1989); O'DONOVAN, *supra* note 39; *PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES* (Margaret Thornton ed., 1995).

41. See RICHARD J. GELLES, *The Violent Home: A Study of Aggression Between Husbands and Wives* 93 (1974).

42. See EDWARDS, *supra* note 4, at 49-51.

43. See HOYLE, *supra* note 4, at 2-7.

significance of the home as a place of comfort, safety, and protection.<sup>44</sup> As Gardner and Shute have noted with regard to rape, “[o]ften the special symbolism of a particular act or class of acts is tied to the particular symbolism of acts which are regarded as their moral opposites.”<sup>45</sup> When violence occurs within the home, symbolizing comfort, safety, and protection, a moral opposition between ‘home as danger’ and ‘home as protection’ results. Thus, to the extent that home-based violence is the symbolic antithesis of safety and security in the home, location becomes important to understanding the concept of domestic violence.

## 2. *Relationship of Parties*

An equally fruitful way to differentiate domestic violence from generic violence is to focus on the nature of the relationship between the parties. In generic violence, the parties typically have no pre-existing relationship; whereas, in domestic violence, the parties necessarily stand in a domestic relationship, typically characterized by intimacy, familial ties, or a shared household.<sup>46</sup> Focusing on the nature of the relationship between the parties is the most common way of differentiating domestic violence from generic violence in U.S. and English law.<sup>47</sup> The relevant types of relationships have been defined in a number of ways, more or less broadly. The most common way of defining a domestic relationship in U.S. statutes is in terms of a “family or household member,”<sup>48</sup> which typically includes relationships between spouses, parents and children, siblings, and current or former intimate partners.<sup>49</sup> The definition less frequently includes extended familial relations, for example,

44. See, e.g., Loseke & Gelles, *supra* note 40, at x (“In a society such as ours, . . . houses and families are often idealized as havens . . .”).

45. John Gardner & Stephen Shute, *The Wrongness of Rape*, in OXFORD ESSAYS IN JURISPRUDENCE 193, 210 (Jeremy Horder ed., 2000) (examining the particular significance of sexual penetration in understanding the wrongness of rape).

46. See 4 OXFORD ENGLISH DICTIONARY, *supra* note 33, at 944 (defining “domestic” as “intimate, familiar, ‘at home’”).

47. See, e.g., ROGER BIRD, DOMESTIC VIOLENCE: LAW AND PRACTICE (4th ed. 2003) (discussing the concept of association as an element of domestic violence in English civil law); NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW 725 (2001) (quoting Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1 (1996)).

48. E.g., ARK. CODE ANN. § 9-15-103(2) (2006) (defining “domestic abuse”); CAL. WELF. & INST. CODE § 18291(a) (Deering 2005) (defining “domestic violence”); FLA. STAT. ANN. § 741.28(2) (LexisNexis 2006) (defining “domestic violence”); IDAHO CODE ANN. § 39-5202(1) (2005) (defining “domestic violence”); LA. REV. STAT. ANN. § 46:2132(3) (2005) (defining “domestic abuse”).

49. E.g., ALASKA STAT. § 18.66.990(3) (2005).

up to fourth degree consanguinity;<sup>50</sup> platonic roommates;<sup>51</sup> and the relationship between elderly or disabled persons and their caregivers.<sup>52</sup>

Why might the relationship between the parties be relevant to understanding what counts as domestic violence? Two answers present themselves, each of which tracks the discussion above regarding the relevance of the location of the violence. First, domestic relationships carry strong connotations of privacy that transcend the physical location of the parties at any given moment.<sup>53</sup> Second, the special symbolism of physical affection within many domestic relations, and its contrast with physical violence in such relationships, may explain the particular relevance of the relationship in conceptualizing domestic violence.<sup>54</sup> Insofar as a loving touch, hug, or kiss represents the ideal expression of physical affection between romantic partners or parents and children, this may explain why, when replaced by a slap or punch, such violence is considered particularly problematic.

### *C. Structural Inequality*

This section explains the concept of structural inequality and highlights two key underlying concepts in order to understand what, if any, role structural inequality plays in understanding domestic violence. Subsequent sections employ the concept of structural inequality to delineate two types of domestic violence and to highlight the differences between competing accounts of domestic violence.

#### *1. Unpacking Structural Inequality*

Structural inequalities are a function of social structures. Social structures are the "sets of rules and principles that govern activities in the different domains of social life."<sup>55</sup> When social structures sustain or perpetuate the uneven distribution of social power, they

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50. *E.g.*, *id.* § 18.66.990(4)(E).

51. *E.g.*, N.J. STAT. ANN. § 2C:25-19 (West 2005) (defining "domestic violence").

52. *E.g.*, 750 ILL. COMP. STAT. ANN. 60/103(6) (West 2005) (defining "domestic violence").

53. *See, e.g.*, Loseke & Gelles, *supra* note 40, at ix (emphasizing "the value of secrecy in maintaining a public image of respectability" with regard to family matters).

54. *See* Gardner & Shute, *supra* note 45, at 210.

55. ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY ONLINE VERSION 2.0, <http://www.rep.routledge.com/article/R036SECT1> (Edward Craig ed.) (last visited Jan. 25, 2006).

can be understood as *structural inequalities*.<sup>56</sup> Structural inequalities inform our practical understanding regarding the way the world works by providing a context for recognizing which people generally hold power in relation to which other people.<sup>57</sup> Like acts of violence, acts which tend to sustain or perpetuate structural inequalities constitute *prima facie* wrongs, but they have the potential (at least analytically) to be rendered justifiable, all things considered.<sup>58</sup> That said, what follows is based in part on the belief that most (if not all) structural inequalities are usually unjustifiable, all things considered, as in the paradigmatic examples of racism and patriarchy.<sup>59</sup>

## 2. Power and Control

There are two key concepts that underlie structural inequality: power and control.<sup>60</sup> Power is the ability or entitlement to exercise control over another person.<sup>61</sup> In any relationship, the more powerful person may use his or her power as an instrument of control over the less powerful person. Power, in the sense employed herein, is an inherently social concept. As Arendt has observed:

Power is never the property of an individual; it belongs to a group . . . . When we say of somebody that he is "in power" we actually refer to his being empowered by a certain number of people . . . . [*P*otestas in populo, without a people or group there is no power . . . .<sup>62</sup>

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56. See YVES R. SIMON, *PHILOSOPHY OF DEMOCRATIC GOVERNMENT* 207 (1951), available at <http://www.nd.edu/Departments.Maritain/etext/pdg.htm>.

57. See Galtung, *supra* note 20, at 175.

58. Gardner, *supra* note 28, at 107-08. The realm of justifiable structural inequality is arguably quite limited, for example, to the adult-child inequality. John Stuart Mill, *The Subjection of Women*, in MILL: TEXTS, COMMENTARIES 133 (Alan Ryan ed., W.W. Norton & Co.) (1997). Some commentators, however, claim that even this inequality is unjustifiable. See, e.g., SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* 72-104 (1970); Christine Parton, *Women, Gender Oppression and Child Abuse*, in *TAKING CHILD ABUSE SERIOUSLY: CONTEMPORARY ISSUES IN CHILD PROTECTION THEORY AND PRACTICE* 41 (The Violence Against Children Study Group ed., 1990). This article does not fully explore the adult-child inequality or parent-child domestic violence.

59. For a detailed account of patriarchy as unjustified inequality, see SYLVIA WALBY, *THEORIZING PATRIARCHY* (1990).

60. See The Duluth Abuse Intervention Project, *The Power and Control Wheel*, <http://www.duluth-model.org/documents/PhyVio.pdf> (last visited Jan. 25, 2006) [hereinafter Duluth Abuse Intervention Project].

61. See HANNAH ARENDT, *ON VIOLENCE* 44 (1970), cited in Stanage, *supra* note 15, at 225-26.

62. *Id.*



If one accepts Arendt's social account of power, it makes sense to conceptualize structural inequalities in any given relationship in terms of the relevant social group or groups to which the individuals belong. This article accepts Arendt's account, but in doing so, does not intend to essentialize diverse people's experiences of structural inequalities.<sup>63</sup> Rather, acceptance of this account merely reflects the belief that there is something useful to be gained from working with concepts based on social groups such as "women" and "men," and in recognizing that social power is often granted or denied on the basis of one's membership in various social groups.<sup>64</sup>

## II. AN EXPLANATORY MODEL OF DOMESTIC VIOLENCE

This section presents an explanatory model of domestic violence using the three elements previously examined. This model presents a philosophical analysis of domestic violence and several key related concepts and provides a framework within which to explain and critique leading accounts of domestic violence.

### A. *Constructing the Model*

The model consists of four spheres. Three intersecting spheres represent the elements discussed in Part I: violence, domesticity, and structural inequality. Each of these three spheres represents an array of acts, any of which can be characterized respectively as 'a violent act,' 'an act taking place in a domestic context,' and 'an act which tends to sustain or perpetuate structural inequality.' The fourth sphere cuts across all three of these intersecting elements and delineates acts that are, all things considered, legitimate from those that are illegitimate. This fourth sphere is called the 'sphere of moral illegitimacy.' Illegitimate acts fall within this sphere, while legitimate acts fall outside this sphere. The outline of this sphere is presented as a broken line, which represents the contested nature of the moral judgments attributed to many of the concepts that fall at the sphere's edges and penumbra. The intersections of the various spheres create space for thirteen distinct conceptual

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63. Other works have addressed these complexities more fully. See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Sandra Fredman & Erika Szyszczak, *The Interaction of Race and Gender*, in DISCRIMINATION: THE LIMITS OF LAW 214 (Bob Hepple & Erika Szyszczak eds., 1992).

64. See CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 166-70 (1987). MacKinnon correctly observes that "the status of masculinity [and femininity] . . . is accorded to [people] on the basis of their biology but is not itself biological." *Id.* at 170.



opposed to distinctions based merely on stipulation. Although the model provides space for thirteen concepts, it should not be assumed that every conceptual category corresponds to an existing usage, empirical reality, and/or objective morality. Some numbers, as discussed herein, may simply reflect empty categories: conceptual place-holders that assist in making distinctions but do not accurately account (empirically or morally) for the way in which concepts are or should be used.

Ultimately, this model is meant to provide a framework for explaining and critiquing rival accounts of domestic violence. The assistance of a clear conceptual model hopefully will facilitate better understanding and critique of the leading accounts of domestic violence and will facilitate a stronger appreciation of the assumptions and values that underlie current debates regarding the criminal justice system's response to such cases.

1. This category includes violent acts occurring in a domestic context that tend to sustain or perpetuate structural inequality and are, all things considered, illegitimate. This concept is 'domestic violence in its strong sense.' The classic paradigm of domestic violence in its strong sense is "wife beating."<sup>65</sup>

2. This category includes violent acts occurring in a non-domestic context that tend to sustain or perpetuate structural inequality and are, all things considered, illegitimate. Examples of this category include lynching, gay-bashing, and stranger rape.

3. This category includes violent acts occurring in a domestic context that do not tend to sustain or perpetuate structural inequality but are, all things considered, illegitimate. This concept is 'domestic violence in its weak sense.' Examples may include a slap by a woman on her male partner's cheek to convey offense, and the actions of a victim of domestic violence in its strong sense who engages in violent retaliation against his or her abuser.

4. This category includes nonviolent acts occurring in a domestic context that tend to sustain or perpetuate structural inequality and are, all things considered, illegitimate. This concept will be referred to as 'domestic abuse.' Examples of domestic abuse include a refusal to allow an abused person contact with friends or family, demands to know the abused person's location and companions at

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65. On the topic of wife beating generally, see Glenda Kaufman Kantor & Murray A. Straus, *The "Drunken Bum" Theory of Wife Beating*, in *PHYSICAL VIOLENCE IN AMERICAN FAMILIES*, *supra* note 3, at 203. For a critique of Straus's account of domestic violence and his research methodology, see *infra* Part III.B.

all times, or a refusal to allow the abused person to work outside the home or have access to money or other necessities.<sup>66</sup>

5. This category includes nonviolent acts occurring in non-domestic context that tend to sustain or perpetuate structural inequality and are, all things considered, illegitimate. Examples include the telling of a sexist, racist, or homophobic joke in the workplace or other nonphysical sexual or racial harassment.

6. This category includes violent acts occurring outside of a domestic context that do not tend to sustain or perpetuate structural inequality but are, all things considered, illegitimate. This concept fits the notion of 'generic violence.' A paradigm of generic violence is a pub brawl.<sup>67</sup>

7. This category includes nonviolent acts occurring in a domestic context that do not tend to sustain or perpetuate structural inequality but are, all things considered, illegitimate. This concept will be referred to as 'domestic conflict.' Examples include situations where people lose their temper with their domestic partners or family members because they are annoyed, in a bad mood, or tired.

8. This category includes nonviolent acts occurring in a domestic context that tend to sustain or perpetuate structural inequality but are, all things considered, legitimate. Some would claim that this is an empty conceptual category.<sup>68</sup> If this is not an empty category, then it is likely filled with examples such as parental punishment of a young child by giving a 'time-out' for misbehavior.

9. This category includes violent acts occurring in a non-domestic context that tend to sustain or perpetuate structural inequality but are, all things considered, legitimate. This very well

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66. These examples arise from patriarchal structural inequality. See Kersti A. Yllo & Murray A. Straus, *Patriarchy and Violence Against Wives: The Impact of Structural and Normative Factors*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES, *supra* note 3, at 383, 394-95. Other examples may be grounded in other inequalities such as racism, which could take the form of parental favoritism toward lighter skinned children in an interracial family, or heterosexism, which could take the form of an abuser's threats to "out" his or her gay, lesbian, or bisexual partner. Claire M. Renzetti, *Violence and Abuse Among Same-Sex Couples*, in VIOLENCE BETWEEN INTIMATE PARTNERS: PATTERNS, CAUSES, AND EFFECTS 70, 74 (Albert P. Cardarelli ed., 1997). See also LEMON, *supra* note 47, at 196-97 (quoting Kathleen Finley Duthu, *Why Doesn't Anyone Talk About Gay and Lesbian Domestic Violence?*, 18 T. JEFFERSON L. REV. 23, 31-32 (1996)).

67. For an example of the pub brawl as generic violence, see GELLES, *supra* note 41, at 93.

68. See, e.g., FIRESTONE, *supra* note 58, at 72-104 (advocating the abolition of the status of childhood and implying that the adult-child structural inequality is illegitimate).

may be an empty category. Some might claim, however, that this conceptual category is exemplified by a teacher spanking children at school for misbehavior.

10. This category includes violent acts occurring in a domestic context that do not tend to sustain or perpetuate structural inequality and are, all things considered, legitimate. The classic paradigm of this concept is the case of a battered wife who shoots her abusive husband in self-defense.<sup>69</sup> Further examples of this category may include play fighting, such as pillow fighting, between intimate partners or horseplay between siblings.

11. This category includes nonviolent acts occurring in a domestic context that do not tend to sustain or perpetuate structural inequality and are, all things considered, legitimate. Examples include hugging one's partner, playing a game with one's child, or helping one's sibling clean the house.

12. This category includes nonviolent acts occurring in a nondomestic context that tend to sustain or perpetuate structural inequality but are, all things considered, legitimate. An example is a teacher punishing a child at school by giving a 'time-out' for misbehavior.

13. This category includes violent acts occurring in a non-domestic context that do not tend to sustain or perpetuate structural inequality and are, all things considered, legitimate. Examples include the stabbing of a stranger-attacker in self-defense or the violent acts inherent to the game of rugby.

One relevant conceptual category is not represented in this model: a violent act occurring in a domestic context, which tends to sustain or perpetuate structural inequality, but is, all things considered, legitimate. Many believe this to be an empty category.<sup>70</sup>

### III. FOUR ACCOUNTS OF DOMESTIC VIOLENCE

Four principal accounts of domestic violence currently operate in the criminal justice system, academic literature, and advocacy communities. This section explains the usage of the concept of domestic violence under each account, and describes the nature of the conflicts and similarities between competing accounts. In addition to providing a brief overview of each account's approach to

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69. For an example of the paradigm of the battered wife engaged in self-defense, see RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE* 90 (1988).

70. The author sympathizes with this position.

domestic violence, this section utilizes the model developed in Part II to explain what counts as domestic violence and which concepts are most closely related to domestic violence under each account. These accounts overlap considerably, and common usage often jumps back and forth between various accounts depending upon the context of a given discussion. Nevertheless, these accounts bear significant differences, and in order to understand the literature and policy debates regarding domestic violence, an appreciation of the nuances of each is necessary.

### *A. Violence Account*

The violence account is the most influential understanding of domestic violence in the criminal justice and public health systems. As its name suggests, this account highlights the importance of the violence element in understanding domestic violence. Consistent with this outlook, this account is often invoked to justify a strict, formalistic law enforcement response to domestic violence, along the lines represented by the slogan "domestic violence is a crime"<sup>71</sup> and the call to take domestic violence seriously.

Structural inequality is not a necessary element for understanding domestic violence under the violence account. Rather, domestic violence is most often viewed solely in terms of violence and domesticity. In particular, this account emphasizes the relevance of *physical harm* caused by violence which occurs in a domestic context.<sup>72</sup> For example, law enforcement officers are encouraged to think of themselves as engaged in "homicide prevention," and every case of domestic violence is viewed as a potential homicide.<sup>73</sup> Paradigms of domestic violence in this account include

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71. *E.g.*, CATRIONA MIRRLEES-BLACK, HOME OFFICE, DOMESTIC VIOLENCE: FINDINGS FROM A NEW BRITISH CRIME SURVEY SELF-COMPLETION QUESTIONNAIRE 63 (1999), available at <http://www.homeoffice.gov.uk/rds/pdfs/hors191.pdf>; COMM'N ON DOMESTIC VIOLENCE, AM. BAR ASS'N, MULTIDISCIPLINARY RESPONSES TO DOMESTIC VIOLENCE, <http://www.abanet.org/domviol/mrdv/identify.html> (last visited Jan. 25, 2006); Domestic Violence Webpage for Bannock County, Idaho, <http://www.co.bannock.id.us/dvisacri.htm> (last visited Jan. 25, 2006).

72. *See, e.g.*, World Health Organization, Violence Against Women, <http://www.who.int/mediacentre/factsheets/fs239/en/> (last visited Jan. 25, 2006). The World Health Organization's website regarding violence against women emphasizes that "[i]nterpersonal violence was the tenth leading cause of death for women 15-44 years of age." *Id.*

73. *E.g.*, *Governor Initiates Domestic Violence Homicide Prevention Task Force*, COALITION CONNECTION (Mich. Coalition Against Domestic and Sexual Violence, Okemos, Mich.) Feb. 2001, [http://www.mcadsv.org/Archive/cc02\\_01.html](http://www.mcadsv.org/Archive/cc02_01.html). Michigan refers to its domestic violence police specialists as its "Homicide Prevention Task Force." *Id.*

domestic homicide, attempted homicide, and acts of violence which cause permanent, disabling, or scarring physical injury.<sup>74</sup> Violence, understood in terms of its physical consequences, is the element which, if altered in nature or severity, controls the centrality of these paradigm cases. Thus, a push or slap that does not result in any physical injury would not be considered a central case of domestic violence under this account. The only exception to this generalization is where the push or slap is committed in a context that ranks high on a 'lethality assessment index,' the measurement tool that aims to predict the risk that a domestic violence offender will kill his victim.<sup>75</sup> Absent a high threat of lethality, a simple push or slap that causes no injury will be highly marginalized, to the point that it likely will not be conceptualized as a 'real' case of domestic violence.

In terms of the concepts charted on the explanatory model, the violence account understands domestic violence as encompassing both [1] and [3]. This account ultimately is unsatisfying, however, because it does not make any distinction between domestic violence in its strong sense [1] and its weak sense [3].<sup>76</sup> The concept most closely related to domestic violence is generic violence [6], which serves as the standard by which domestic violence and all institutional responses to domestic violence are measured. In other words, taking domestic violence seriously under the violence account amounts to treating domestic violence similarly to generic violence.<sup>77</sup>

The violence account marks an important historical turn in the treatment of domestic violence by the criminal justice system.<sup>78</sup> This

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74. See, e.g., Phyllis W. Sharp & Jacquelyn Campbell, *Health Consequences for Victims of Violence in Intimate Relationships*, in VIOLENCE IN INTIMATE RELATIONSHIPS, *supra* note 3, at 163, 166-67.

75. See NEIL WEBSDALE, NAT'L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN, LETHALITY ASSESSMENT TOOLS: A CRITICAL ANALYSIS 1 (2000), [http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR\\_lethality.pdf](http://www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_lethality.pdf).

76. The failure to distinguish between the strong and weak senses of domestic violence results from the violence account's omission of structural inequality in conceptualizing domestic violence.

77. Ironically, treating domestic violence similarly to generic violence results in extremely high dismissal rates in domestic violence cases because prosecutions are unlikely to proceed absent victim support even in generic violence cases. See Antonia Cretney et al., *Criminalizing Assault: The Failure of the 'Offense Against Society' Model*, 34 BRIT. J. CRIMINOLOGY 15, 15 (1994) ("[The police] will seldom take the matter further unless the victim demonstrates a firm commitment to the prosecution process."). Thus, an inherent limitation exists in the violence account's call to take domestic violence seriously, due to its unsatisfying conceptualization of domestic violence as closely related to generic violence.

78. The violence account overcomes the historical barriers to prosecution and accountability. See FAITH ROBERTSON ELLIOT, GENDER, FAMILY AND SOCIETY 179 (1996).

account, however, has been rightly criticized by feminist advocates for its failure to consider structural inequality in conceptualizing domestic violence.<sup>79</sup> The bulk of these criticisms have been expressed in debates regarding dual arrests.<sup>80</sup> Complaints that strict, formalistic crime control policies have resulted in high numbers of domestic violence victims being arrested<sup>81</sup> are often, in essence, complaints against the violence account, which fails to appreciate the role of structural inequality in understanding what counts as domestic violence.<sup>82</sup>

### *B. Domestic Account*

The domestic account is the most influential account of domestic violence in social science academic literature and is the dominant approach to empirical research in the United States.<sup>83</sup> The research performed by its adherents has produced the world's most widely cited statistics and statistical measurement model regarding the prevalence of domestic violence, the Conflict Tactics Scale (CTS).<sup>84</sup>

There are two important aspects to understanding the domestic account: its theoretical approach to answering the question of what counts as domestic violence and its methodological approach to measuring domestic violence for the purpose of empirical research.

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79. See *id.* at 177 (noting that feminists accept the "proposition that men's violence and sexual abuse are both products of, and mechanisms for sustaining, a universal patriarchal social order").

80. Dual arrest occurs when both victim and batterer are arrested in cases where the batterer subjected the victim to domestic violence in its strong sense [1], and the victim committed domestic violence in its weak sense [3], or more problematically, merely defended herself against the batterer's attack [10]. See Coker, *Race, Poverty, and the Crime-Centered Response*, *supra* note 4, at 1332.

81. See, e.g., *id.* ("Mandatory arrest policies have dramatically increased the number of women arrested.").

82. Ironically, some of those who criticize law enforcement for arresting and prosecuting victims who engage in retaliatory violence [3] are the same folks who praise the police for taking domestic violence seriously by enacting mandatory arrest laws grounded in a violence account. See, e.g., Wanless, *supra* note 4, at 545, 558-59.

83. Key works reflecting this account include GELLES, *supra* note 41; GELLES & STRAUS, *supra* note 69; MURRAY A. STRAUS, RICHARD J. GELLES & SUSAN STEINMETZ, *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* (1981); Murray A. Straus, *Measuring Intrafamily Conflict and Violence: The Conflict Tactics (CT) Scales*, 41 J. MARRIAGE & FAM. 75 (1979); Murray A. Straus & Richard J. Gelles, *Societal Change and Change in Family Violence from 1975 to 1985 as Revealed by Two National Surveys*, in *PHYSICAL VIOLENCE IN AMERICAN FAMILIES*, *supra* note 3, at 113; Murray A. Straus et al., *The Revised Conflict Tactics Scales (CTS2): Development and Preliminary Psychometric Data*, 17 J. FAM. ISSUES 283 (1996).

84. See, e.g., Straus, *supra* note 83; Straus et al., *supra* note 83.



Theoretically, the domestic account emphasizes the role of the domestic relationship as the crucial element in understanding what counts as domestic violence.<sup>85</sup> Like the violence account, the domestic account ultimately is unsatisfying because it treats structural inequality as relatively superfluous to understanding what counts as domestic violence. As Elliot notes, this account “takes ‘the family’ rather than gender inequality as its [primary] unit of analysis.”<sup>86</sup> It views patriarchal structural inequality as merely “one factor among many, and minimises the importance of men’s power in structuring family relationships.”<sup>87</sup> Paradigms of domestic violence under this account are more or less central based on the nature of the domestic relationship at issue. Central cases include spousal assault<sup>88</sup> and child abuse, while cases involving cousins or platonic roommates, for example, are highly marginalized — to the point that such cases are unlikely to be understood as ‘real’ cases of domestic violence.<sup>89</sup> Unlike the violence account, however, centrality under the domestic account remains unaffected by the presence or absence of resulting physical harm or the lethality risk.<sup>90</sup>

Methodologically, adherents to the domestic account employ an empirical research tool called the Conflict Tactics Scale (CTS).<sup>91</sup> The CTS is a questionnaire developed by family violence researcher, Murray Straus, and his colleagues at the University of New Hampshire during the 1970s.<sup>92</sup> With slight revision, the CTS remains one of the most widely used quantitative empirical research methods for measuring the overall prevalence and gender prevalence<sup>93</sup> of domestic violence.<sup>94</sup> The CTS is a tick-the-box type survey

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85. For this reason, proponents of the domestic account often refer to domestic violence as “intimate violence,” e.g., Linda Mills, *Intimate Violence as Intimate: The Journey and a Path*, 9 CARDOZO WOMEN’S L.J. 461 (2003); “family violence,” e.g., THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH, *supra* note 3; or “violence in the home,” see *supra* note 38, thereby emphasizing the importance of the domestic context in understanding domestic violence.

86. ELLIOT, *supra* note 78, at 176-77.

87. *Id.* at 177.

88. The term ‘spousal assault’ is used intentionally, rather than ‘wife assault,’ in order to clarify that the domestic account regards wife assault and husband assault equally as paradigmatic of domestic violence. See, e.g., Steinmetz, *supra* note 3, at 501.

89. See, e.g., GELLES & STRAUS, *supra* note 69, at 59-62.

90. See *id.* at 54-55 (arguing that paradigms of domestic violence range “from [spanking] to murder” and each should be understood as equally central).

91. See *supra* note 83 and accompanying text.

92. DEKESEREDY & SCHWARTZ, *supra* note 3, at 1.

93. ‘Gender prevalence,’ as used herein, is the rate at which males commit domestic violence against females as compared to the rate at which females commit domestic violence against males. See *supra* note 3.

94. See Johnson, *supra* note 3, at 27.

in which domestic violence is understood as arising out of symmetrical interpersonal conflicts that the parties dysfunctionally attempt to resolve through the use of violence.<sup>95</sup> This context of symmetry is well reflected in the introduction to the CTS:

No matter how well a couple gets along, there are times when they disagree on major decisions, get annoyed about something the other person does, or just have spats or fights because they're in a bad mood or tired or for some other reason. They also use many different ways of trying to settle their differences. I'm going to read some things that you and your ([spouse]/partner) might have done when you had a dispute, and would first like you to tell me for each one how often you did it in the past year.<sup>96</sup>

The CTS goes on to ask questions that capture data regarding physical acts committed by the respondents, without asking questions that might provide relevant data upon which to evaluate the normative legitimacy of the acts.<sup>97</sup> For example, the CTS fails to gather data that might facilitate distinctions between unprovoked assaults and self-defense<sup>98</sup> and distinctions between attacks and play fighting.<sup>99</sup> The CTS's tick-the-box approach excludes empirical evidence of, for example, asymmetrical power relations that might facilitate relevant normative distinctions in deciding whether an act counts as domestic violence.<sup>100</sup>

Employing the explanatory model once more, the domestic account understands domestic violence (theoretically) as including both [1] and [3].<sup>101</sup> The concepts that are most closely related to domestic violence are domestic abuse [4] and domestic conflict [7].<sup>102</sup> Methodologically, the CTS fails to differentiate between [1], [3], and

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95. *See id.*

96. Straus, *supra* note 83, at 87.

97. DEKESEREDY & SCHWARTZ, *supra* note 3, at 1-3.

98. *Id.* at 3.

99. Currie, *supra* note 3, at 106 (reporting on research that included in-depth interviews as a follow-up to administration of the CTS survey and, through the interviews, discovering that some playful acts, such as tossing a stuffed teddy bear during a play fight, were counted as "serious violence" under the CTS scales).

100. *See* DEKESEREDY & SCHWARTZ, *supra* note 3, at 2-3.

101. As with the violence account, structural inequality does not play a necessary role in conceptualizing domestic violence in the domestic account. *See supra* note 79 and accompanying text. Thus, the domestic account draws no strong distinction between domestic violence in its strong sense [1] and weak sense [3].

102. Again, because structural inequality is the only distinguishing characteristic between [4] and [7], the distinction between these conceptual categories is not strongly drawn in the domestic account.

[10] in operationalizing its concept of domestic violence. In other words, the CTS lumps together violence committed in a domestic context which might be considered legitimate, such as self-defense [10], with both types of illegitimate violence in a domestic context, [1] and [3], and counts them all equally as domestic violence.

The domestic account's methodological conflation of legitimate and illegitimate acts under the heading of domestic violence is both linguistically confusing and conceptually problematic. It is linguistically confusing because the domestic account's operationalization of the term domestic violence conflicts with common usage. Under common usage, the term domestic violence includes only illegitimate acts, and does *not* include legitimate acts (i.e., acts that are justified, all things considered). For example, when a battered woman shoots and kills her abusive husband in self-defense, and her actions are justified, she would not typically be characterized as having committed domestic violence nor is the deceased abuser typically characterized as a victim of domestic violence.<sup>103</sup> Indeed, proponents of the domestic account adopt this usage as well,<sup>104</sup> which makes their methodological operationalization of domestic violence all the more confusing and unsatisfying.

The domestic account's methodological conflation of legitimate and illegitimate acts is conceptually problematic because it suggests a fundamental inconsistency between theory and method in the domestic account. Theoretically, the domestic account adopts a legitimist account of domestic violence, consistent with the usage described above.<sup>105</sup> However, the CTS fails to operationalize the theoretical distinction between illegitimate acts of violence in a domestic setting and legitimate acts of violence in a domestic setting. In theory, the domestic account understands the former as domestic violence and the latter as something else, such as self-defense, but the domestic account's preferred research methodology, the CTS, fails to make this distinction.<sup>106</sup> The CTS's failure to operationalize this distinction means that adherents to the domestic account measure a much wider phenomenon in their empirical research than that which they theorize is problematic.<sup>107</sup>

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103. These linguistic conventions reflect the correct use, at least partially, of the concept domestic violence, as reflected in the analysis set out in Part II, wherein domestic violence in its strong sense [1] and weak sense [3] are illegitimate (i.e., unjustified).

104. See, e.g., GELLES & STRAUS, *supra* note 69, at 90.

105. See, e.g., *id.*

106. DEKESEREDY & SCHWARTZ, *supra* note 3, at 3.

107. This inconsistency has formed the target for a wide body of literature critical of the CTS methodology: Berk et al., *supra* note 3; Patricia Mahoney, Linda M. Williams & Carolyn M. West, *Violence Against Women by Intimate Relationship Partners*, in

Straus, father of the domestic account and creator of the CTS, acknowledges this failure, while dismissing critics with the claim that his approach is justified:

The criticism that the CTS does not take into account the context and meaning of the acts is analogous to criticizing a reading ability test for not identifying the reasons a child reads poorly . . . .<sup>108</sup>

Straus's response to his critics demonstrates that he has fundamentally misapprehended the nature of the critique leveled at his CTS methodology. Rather, a proper analogy is found in a reading test which operationalizes the concept 'reading' in such an overly broad manner as to include acts such as reciting the letters of each word in its concept of 'reading' and which, moreover, fails to distinguish reading-as-pronunciation (the sense in which I can still manage to 'read' French) and reading-as-comprehension (the sense in which I can no longer read French because I have forgotten the meaning of the words). A reading test that fails to make these distinctions is a test open to criticism.

### *C. Structural Inequality Account*

The structural inequality account is the standard conceptualization of domestic violence within the advocacy community, and it informs a great deal of empirical research on domestic violence, particularly in England.<sup>109</sup> Unlike the violence account and domestic account, the structural inequality account, as its name suggests, does consider structural inequality in conceptualizing domestic

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SOURCEBOOK ON VIOLENCE AGAINST WOMEN 143 (Claire M. Renzetti, Jeffrey L. Edleson & Raquel Kennedy Bergen eds., 2001); Margolin, *supra* note 3; Saunders, *supra* note 3; Yllö, *Through a Feminist Lens*, *supra* note 3; Yllö, *Using a Feminist Approach*, *supra* note 3. Occasionally, collections include contributions reflecting both domestic accounts and critiques. CURRENT CONTROVERSIES ON FAMILY VIOLENCE, *supra* note 3; ISSUES IN INTIMATE VIOLENCE, *supra* note 3.

108. Straus et al., *supra* note 83, at 285.

109. The leading proponents of the structural inequality account in empirical research are the Manchester-based Rebecca and Russell Dobash. Key works reflecting this account include DOBASH & DOBASH, VIOLENCE AGAINST WIVES, *supra* note 3; R. EMERSON DOBASH & RUSSELL P. DOBASH, WOMEN, VIOLENCE AND SOCIAL CHANGE (1992); Dobash & Dobash, *The Context-Specific Approach*, *supra* note 3; Dobash & Dobash, *Women's Violence to Men*, *supra* note 3. Research based on a structural inequality account of domestic violence has also been widely conducted in the United States. See, e.g., FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 3; Dasgupta, *supra* note 3; Yllö, *Using a Feminist Approach*, *supra* note 3.

violence.<sup>110</sup> Under this account, however, structural inequality is a necessary element in determining what counts as domestic violence.<sup>111</sup> In other words, violent acts occurring in a domestic context are only considered domestic violence if they also sustain or perpetuate a structural inequality.<sup>112</sup> This account, therefore, is unsatisfying due to its failure to recognize domestic violence in its weak sense [3].

Structural inequality account-based research in the United States has produced perhaps the most influential depiction of the dynamics of domestic violence: the power and control wheel.<sup>113</sup> According to the power and control wheel, structural inequalities (power and control) form the core of domestic violence, while abusive behaviors form a pinwheel spreading out from this core, and physical/sexual violence are presented as existing at the outer edges of the wheel.<sup>114</sup> The purpose of depicting domestic violence in this way is: (1) to emphasize the central role of structural inequality in understanding what counts as domestic violence; (2) to establish conceptual connections between different types of abusive behaviors; and (3) to suggest that abusive control may be as much, if not more, of a problem than acts of physical violence.<sup>115</sup>

In terms of the concepts charted on this article's explanatory model, the only sense of domestic violence recognized under the structural inequality account is domestic violence in its strong sense [1]. Domestic violence in its weak sense [3] is not understood as domestic violence.<sup>116</sup> The concepts most closely related to domestic violence are those illegitimate acts which sustain or perpetuate structural inequalities, even when the acts do not involve violence [4, 5] and even when they do not occur in a domestic context [2, 5]. Under most versions of the structural inequality account, patriarchy is the primary concern, and it is considered illegitimate in all of its forms.<sup>117</sup> Given this primary focus on patriarchy, the structural inequality account typically perceives a very close family resemblance

110. See, e.g., Yllö, *Using a Feminist Approach*, *supra* note 3, at 277-78.

111. See, e.g., *id.*

112. See, e.g., *id.*

113. Duluth Abuse Intervention Project, *supra* note 60.

114. *Id.*

115. *Id.*

116. The failure of the structural inequality account to recognize domestic violence in its weak sense conflicts with this article's account and has drawn criticism from proponents of the domestic account, who do not draw any distinction between domestic violence in its strong sense and weak sense. E.g., Straus, *Domestic Violence by Women*, *supra* note 3, at 21.

117. E.g., ELLIOT, *supra* note 78, at 177.

between domestic violence [1] and stranger rape [2].<sup>118</sup> This resemblance is grounded in the belief that both domestic violence and stranger rape tend to sustain and perpetuate men's patriarchal control over women.<sup>119</sup>

Proponents of the patriarchal structural inequality account have been criticized for discounting the relevance of other forms of structural inequality, such as racism, heterosexism, and economic inequality.<sup>120</sup> Furthermore, they have been criticized for viewing the heterosexual family as a site of oppression for women.<sup>121</sup> Such criticisms come in two flavors: an external critique and an internal critique. The external critique is politically conservative and based on the joint claims that patriarchy is legitimate, and thus the heterosexual family as traditionally constructed under patriarchy is not problematic.<sup>122</sup> The internal critique is politically progressive and based on the joint claims that the family often serves as "a site of resistance and solidarity against racism for women of colour" and, therefore, "does not hold a central place in accounting for women's subordination."<sup>123</sup>

#### *D. Johnson's Account*

In the mid-1990s, Michael Johnson, an American sociologist, attempted to transcend the debates between proponents of the domestic and structural inequality accounts by developing a radically new approach to operationalizing the concept of domestic violence in empirical research.<sup>124</sup> His primary innovation was to divide domestic violence into two distinct concepts: (1) patriarchal terrorism (later called intimate terrorism), and (2) common couple violence (later called situational couple violence).<sup>125</sup>

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118. This resemblance is exemplified in feminist advocacy organizations that target domestic violence alongside nondomestic sexual assault. For examples, see Feminist Majority Foundation, Domestic Violence Resources, <http://www.feminist.org/911/crisis.html> (last visited Jan. 25, 2006). Coalitions organized around these two concepts are particularly prevalent in the United States, which has no fewer than eighteen joint domestic violence and sexual assault coalitions at the state and federal levels. *Id.*

119. See DIANA E.H. RUSSELL, RAPE IN MARRIAGE 191-94 (1982).

120. See, e.g., ELLIOT, *supra* note 78, at 182.

121. See, e.g., Mills, *supra* note 85, at 462.

122. For a critique of this position, see Currie, *supra* note 3, at 98.

123. WALBY, *supra* note 59, at 14 (citing BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER (1984)).

124. See Michael P. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women*, 57 J. MARRIAGE & FAM. 283 (1995).

125. *Id.* at 284-85. Johnson subsequently changed the names of his key concepts to "intimate terrorism" and "situational couple violence" so as not to "beg the question of the connections with patriarchy that are so clear in heterosexual relationships (but not

The key to Johnson's analytic approach lies in a methodological critique of the selection bias affecting the empirical research conducted by proponents of both accounts. Research subjects in studies conducted by proponents of the structural inequality account are typically drawn from women's shelters/refuges, police reports, and court cases.<sup>126</sup> The bias inherent in such sampling techniques has given rise to criticism levied by proponents of the domestic account, who in turn claim that their random sampling techniques are free from bias.<sup>127</sup> Johnson explains, however, that the domestic account's samples are equally biased, because proponents of the domestic account "do *not* in fact interview random samples," but instead "interview those who do not refuse to be interviewed."<sup>128</sup> With refusal rates of up to forty percent, the domestic account's sampling technique systematically excludes large populations among whom power and control may be most pronounced.<sup>129</sup>

Based on these bilateral sampling errors, and the further observation that the different sampling techniques target "virtually non-overlapping populations," Johnson hypothesized that each type of research is best understood as a measure of different types of domestic violence.<sup>130</sup> The first type of domestic violence Johnson identified, called "patriarchal terrorism" or "intimate terrorism,"<sup>131</sup> is measured by research based on a structural inequality account of domestic violence.<sup>132</sup> Common characteristics of intimate terrorism include the following: (1) it is overwhelmingly committed by men against women; (2) it appears to be motivated by men's desire to achieve (patriarchal) power and control over their intimate partners; (3) there is usually a clear distinction between victim and

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so clear in same sex relationships in which there is an intimate terrorist)" and to avoid "the risk of trivialization [inherent in the term] 'common couple violence.'" E-mail from Michael P. Johnson, Associate Professor of Sociology, Women's Studies, and African and African American Studies, Pennsylvania State University, to Michelle Madden Dempsey, Lecturer in Law, University of Oxford (Sept. 13, 2004) (on file with author).

126. E.g., Elizabeth A. Stanko, *Unmasking What Should Be Seen: A Study of the Prevalence of Domestic Violence in the London Borough of Hackney*, in DOMESTIC VIOLENCE: GLOBAL RESPONSES 227, 232 (Edna Erez & Kathy Laster eds., 2000).

127. See generally Straus, *Injury and Frequency*, *supra* note 3, cited in Michael P. Johnson, *Conflict and Control: Images of Symmetry and Asymmetry in Domestic Violence*, in COUPLES IN CONFLICT 95, 96 (Alan Booth, Ann Crouter & Mari Clements eds., 2001), available at <http://www.personal.psu.edu/faculty/m/p/mpj/boothfinal2.htm>.

128. Johnson, *supra* note 127, at 97.

129. See *id.*

130. *Id.*

131. Johnson uses the term "intimate terrorism" in his later work. See Michael P. Johnson & Kathleen J. Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 J. MARRIAGE & FAMILY 948, 949 (2000).

132. Johnson, *supra* note 127, at 97.

nonvictim, in part because persistent violence and abuse are likely, over time, to suppress the victim's efforts to fight back; and (4) the violence tends to escalate over time.<sup>133</sup> The second type of violence, "common couple violence" or "situational couple violence," is measured by domestic account-based research, and its common characteristics include the following: (1) it is committed by both men and women in roughly equal numbers; (2) it appears to be motivated by a desire "to get one's way in a particular conflict situation, within a relationship in which there is *not* a general pattern of power and control"; (3) the distinction between victim and nonvictim often breaks down since the violence is more likely to be mutual and reciprocal between the parties; and (4) the violence tends to be intermittent and de-escalate over time.<sup>134</sup> Subsequent to drawing this principal distinction, Johnson identified an additional type of violence which may take place in a domestic context: "violent resistance," in which victims of intimate terrorism use physical violence against their batterers, for example, when battered women kill their abusive husbands.<sup>135</sup>

In terms of the concepts charted on this article's explanatory model, Johnson's intimate terrorism corresponds to domestic violence in its strong sense [1], while Johnson's situational couple violence and violent resistance, when illegitimate, correspond conceptually to domestic violence in its weak sense [3]. Finally, legitimate violent resistance corresponds conceptually to the legitimate use of violence in a domestic context [10].

Johnson's account draws a number of appropriate and necessary distinctions in conceptualizing domestic violence. In theory, his account is consistent with the analysis of domestic violence in this article, insofar as his distinction between intimate terrorism and situational couple violence mirrors the distinction between domestic violence in its strong sense [1] and weak sense [3], as presented in this article. Thus, this article's theoretical account of domestic violence is largely consistent with Johnson's key distinctions. Yet the account of domestic violence offered in this article goes further than Johnson's, insofar as it examines the underlying conceptual elements that inform the relevant distinctions: violence, domesticity, and structural inequality. Additionally, this account goes further than Johnson's insofar as it analyzes the conceptual resemblances between domestic violence and key related concepts,

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133. *Id.* at 97, 101.

134. *Id.* at 97-98.

135. *Id.* at 101.



such as stranger rape [2], domestic abuse [4], sexual harassment [5], generic violence [6], domestic conflict [7], and domestic self-defense [10].

### CONCLUSION

This article purports to analyze the concept of domestic violence, but does not claim to resolve the current debates regarding domestic violence in the sociological or legal literature. Rather, the analysis set forth herein is intended to add clarity to these debates and enable those engaged in such debates to move forward more productively.

This article has analyzed the concept of domestic violence, along with several of its related concepts, and employed this analysis to examine and critique several principal accounts of domestic violence in legal and sociological literature. Rather than merely stipulating definitions in an attempt to make sense of conflicting empirical research, as Johnson does, this article has presented a philosophical analysis of domestic violence in order to clarify the conceptual and normative issues upon which these conflicts are based. This analysis is intended to facilitate a more productive and engaged debate regarding the criminal justice system's response to domestic violence by sorting out which disagreements arise from a failure to join issue and which disagreements evidence deeper philosophical conflicts. In other words, this analysis will help people embroiled in these debates to discuss the real issues more clearly rather than simply talking past one another.

This article has resisted the "recipe approach" to understanding domestic violence.<sup>136</sup> Instead, it has presented a philosophical analysis that, briefly stated, goes as follows:

1. Domestic violence and its related concepts consist of complex intersections of three elements: violence, domesticity, and structural inequality.
2. Domestic violence has two senses. In its strong sense, domestic violence reflects the intersection of violence, domesticity, and structural inequality. In its weak sense, domestic violence reflects only the intersection of violence and domesticity.
3. In order for the concept of domestic violence to be correctly applied, the act in question must be illegitimate (i.e., unjustified, all things considered).

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136. For explanation of the "recipe approach," see *supra* Part I.B.

Notably, this article has presented a detailed explanatory model of domestic violence that reflects the analysis of domestic violence and its key related concepts set forth herein. This model has enabled an explanation and critique of four influential accounts of domestic violence: the violence account, the domestic account, the structural inequality account, and Johnson's account. Each account's general theoretical approach to domestic violence has been evaluated based on how well it corresponds to the analysis of domestic violence set forth herein.<sup>137</sup> The violence and domestic accounts are found to be unsatisfactory because they fail to recognize the relevance of structural inequality in conceptualizing domestic violence. This failure leads these accounts to conflate domestic violence in its strong and weak senses. The structural inequality account is also found to be unsatisfactory because it fails to recognize that the concept of domestic violence can be correctly applied even when the violent act does not tend to sustain or perpetuate structural inequality. This failure leads this account to ignore domestic violence in its weak sense. In contrast to the first three accounts, Johnson's account is found to be largely consistent with the philosophical analysis set forth herein. However, the analysis of domestic violence in this article improves upon Johnson's account by illuminating the conceptual elements that inform his basic distinctions and by providing an account of the resemblances between domestic violence and its related concepts.

Hopefully this article has gone some way toward clarifying the nature of domestic violence and its related concepts. If successful, the analysis set forth herein has provided important insights into the elements that underpin these concepts and the analytic relation among these concepts. In doing so, this account takes a significant step toward providing Raphael's longed-for "full and accurate definition of domestic violence."<sup>138</sup>

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137. This article also has critiqued the domestic account's methodological operationalization of the concept of domestic violence. See *supra* notes 86-108 and accompanying text.

138. Raphael, *supra* note 1, at 1361.