

PATTERNS OF VIOLENCE IN INTIMATE RELATIONSHIPS

A CRITICAL EXAMINATION OF LEGAL RESPONSES

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Submitted in fulfilment of the requirements for the degree of

Doctor of Philosophy

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Christchurch, New Zealand
2006**

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ABSTRACT

In this thesis, red flags for dangerousness/lethality established from domestic violence and homicide research provided the social framework for an examination of legal responses to violence in intimate heterosexual relationships. The research investigated these gendered, structural patterns of violence and the effectiveness of criminal justice interventions in keeping victims safe. Agency interactions with offenders and victims prior to women's deaths were reviewed in selected cases. Criminal law constructions of violence in intimate relationships were evaluated for their recognition and understanding of primary risk factors for dangerousness/lethality.

The research found major red flags remain invisible in criminal law stereotypes of violence between intimates. The significance of these risk factors for dangerousness/lethality is therefore overlooked, misunderstood and even misrepresented in defence of violent offenders. Although the aim of the *Domestic Violence Act 1995* is to ensure effective protection for victims, the study found a significant number of women (and sometimes other family members and children) experience further sub-lethal and lethal violence following legal interventions with perpetrators. Lacking a principled policy foundation, central focus on victim safety and clear framework for interventions, legal responses are internally incoherent and inconsistent with New Zealand Family Violence Prevention Strategy.

The New Zealand government has committed to principled domestic violence intervention and consistency in law and policy. This will require: a) legislative reform; b) public and professional education on the dynamics of violent relationships, including the interrelationship between sub-lethal and lethal assaults; and c) monitoring of criminal justice interventions to improve accountability. Until this is accomplished, stories of abused women and their children, including informal attempts to seek help and contact with state and community agencies will continue to be dishonoured by a legal system which silences their voices and fails to learn lessons from their injuries and deaths.

PART I

CENTRALISING VICTIM SAFETY

CHAPTER ONE: INTRODUCTION

A great many people now agree that men who beat up their wives or girlfriends do a bad thing. Many understand that children who witness such violence against their mothers can only be harmed by the experience. Many sympathize with battered women, and hardly anyone any more - apart from religious fundamentalists - seem to think that women should put up with abuse...But no matter how you interpret the numbers it's clear that male violence is not going *down*...Why, when things seem to have changed so much for the better, do they seem so much the same? Why, when we actually keep score, do they seem *worse*?¹

I INTRODUCTION: THE RESEARCH CONTEXT

There is widespread agreement that domestic violence has now reached epidemic proportions.² The increasing toll of disability and death recently prompted the New Zealand Prime Minister and Principal Family Court Judge to denounce abuse in the home as a blight on the country and an issue confronting all New Zealanders.³ Since underreporting creates uncertainty about rates of offending,⁴ the following figures are subject to evidence indicating that government agencies may be responding to only around 10 per cent of domestic violence incidents.⁵

Police point to a growing rate of call-outs to domestic violence incidents. The figure of 24,700 in 2002-2003 increased to 30,692 in the period 2004-2005.⁶ Around half of murders in New Zealand are the result of domestic violence.⁷ New Zealand women are more likely to be killed by a person who is 'well known' to them than by anyone else.⁸ Studies indicate that about ninety percent of

¹ Diane Shoos, 'Representing Domestic Violence: Ambivalence and Difference in *What's Love Got to Do with It*' (2003) 15 *National Women's Studies Association Journal* 57, 59, citing Ann Jones, *Next Time She'll Be Dead* (1994) 6-7 (emphasis in original).

² See, eg, *The Country's Top Family Court Judge Says New Zealand's High Rate of Domestic Violence Means We Can No Longer Boast of Being the Best Country in the World to Bring Up Children*, New Zealand Herald, 28 March 2006; *Clark Backs Judge's Domestic Violence Comments*, New Zealand Press Association 28 March 2006.

³ Ibid.

⁴ Ministry of Justice, *Responses to Crime: Annual Review 1999* (1999) 29. Allison Morris, *Women's Safety Survey 1996* (1997) 60, found only 8% of women who disclosed abuse by current partners had contacted the police about the most recent violent incident and only 21% who disclosed abuse by recent partners had informed the police.

⁵ Ministry of Health, *Family Violence Intervention Guidelines: Child and Partner Abuse* (2002) 23, 38.

⁶ *The Country's Top Family Court Judge Says New Zealand's High Rate of Domestic Violence Means We Can No Longer Boast of Being the Best Country in the World to Bring Up Children*, New Zealand Herald, 28 March 2006.

⁷ Ibid.

⁸ Ian Miller and Nestar Russell, *Homicide in New Zealand 1988-94: Patterns and Relationships* (Paper presented at the 11th Annual Conference of the Australian and New Zealand Society of Criminology, Victoria University of Wellington, 29 January-1 February 1996) 14.

intimate partner homicides are perpetrated by men against current or estranged women partners.⁹ Between 20 November 2005 and 3 January 2006, six women, one child, and the new partner of one of the female victims were killed. Three of the six women had protection orders in force against their killers. One was granted a temporary order just two days before she was killed. One woman had recently applied for her order to be discharged in the hope her child's father would take a more active role in the child's life. One of the men involved, but none of the women, had attended a court-funded domestic violence programme.¹⁰

Although a raft of domestic violence reforms over the past three decades have challenged cultural attitudes and criminal justice responses, outcomes have proved disappointing. Following the introduction in 1981 of legislation intended to inculcate public attitudes that domestic violence is not a matter for 'good-natured tolerance' or a 'hand-washing' attitude,¹¹ a Ministerial Committee of Inquiry reported in 1987 that traditional beliefs about women as the chattels of their husbands apparently remained operative in New Zealand.¹² Research on repeated breaches of protection orders commissioned by the Victims Task Force in the early 1990s described 'a gap' between women's experiences of violence and legal responses.¹³ Recommendations from this research, and a report by Sir Ronald Davison, the former Chief Justice of New Zealand,¹⁴ were largely incorporated in the *Domestic Violence Act 1995*. While the Act and related legislative reforms were regarded as having the potential to create a legal culture more sympathetic to battered women and children,¹⁵ there is evidence of a decline in effective implementation of the legislation, coinciding with a period of intense activity by, and publicity for, the Fathers' Rights movement.¹⁶

⁹ Ministry of Health, above n 5, 37. The Taskforce for Action on Violence within Families, *The First Report* (2006) 32, notes that between 2000 and 2004 (inclusive), 54 women were murdered by men and three men were murdered by women. As discussed in the following chapter, these statistics on women's family-violence related deaths may significantly underestimate the actual death toll.

¹⁰ *The Country's Top Judge Says New Zealand's High Rate of Domestic Violence Means We Can No Longer Boast of Being the Best Country in the World to Bring Up Children*, New Zealand Herald, 28 March 2006.

¹¹ New Zealand, *Parliamentary Debates* (1981) 442 NZPD 4228.

¹² Committee of Inquiry into Violence, *Report of Ministerial Committee of Inquiry into Violence* (1987) 30, 96.

¹³ Ruth Busch, Neville Robertson and Hilary Lapsley, *Domestic Violence and the Justice System: A Study of Breaches of Protection Orders* (1992).

¹⁴ Sir Ronald Davison, *Report of Inquiry Into Family Court Proceedings Involving Christine Madeline Marion Bristol and Alan Robert Bristol* (1994) 41.

¹⁵ Although researchers expressed concern regarding under-resourcing. See, eg, Ruth Busch, 'Editorial' (1996) 4 Waikato L.Rev. i, vi.

¹⁶ *New Zealand Has High Female Murder Rate*, New Zealand Herald, 20 April 2002; Wendy Davis, 'Gender Bias, Fathers' Rights, Domestic Violence and the Family Court' [2004] BFLJ 299.

Of particular concern is a report by the National Collective of Women's Refuges indicating that abused women are losing confidence in the legal and justice system.¹⁷

Feminists who broke the silence surrounding violence in the home conceptualised the problem as one of male violence toward women and children. However, despite decades of research there is still no consensus among researchers, advocates and academics over the nature of intimate partner violence, the gender of persons who typically inflict and sustain it, or how society should respond to it. Studies focusing upon male violence investigate interventions that may decrease the risk that intimate women partners will be seriously injured or killed.¹⁸ Those who argue that females are just as physically aggressive as males, even at the most severe end of the violence continuum, suggest the task is to account for the perplexing reality that men are overwhelmingly the perpetrators of serious violence outside the home, but the sexes converge in their rates of perpetration within it.¹⁹ Complaints by advocates for battered women that courts are too lenient on domestic violence offenders are disputed by judges,²⁰ and a recent controversial decision to discharge without conviction, a husband who assaulted his pregnant wife, was defended by the judge in question, who acknowledged that other members of the judiciary might adopt a different approach.²¹

In 2002, the New Zealand government published its national Family Violence Prevention Strategy. The strategy calls for a consistent, coherent response to family violence across state sectors and consistency in relevant law, policy and service delivery.²² Although the document refers to 'appropriate' intervention,²³ no detail is provided on the form that legal intervention should take. This vacuum is currently occupied by conflicting theoretical analyses, research, and related recommendations that compete for the attention of policymakers. While the policy also gives

¹⁷ Davis, above n 16, 299, citing Sheryl Hann, *The Implementation of the Domestic Violence Act 1995: A Report from the National Collective of Independent Women's Refuges Inc* (2004). See also, *Faith in Protection Orders Wanes*, New Zealand Herald, 20 October 2005.

¹⁸ See, eg, Jacquelyn Campbell, et al, 'Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study' (2003) 93 *American Journal of Public Health* 1089. Desmond Ellis and Walter De Keseredy, 'Rethinking Estrangement, Interventions and Intimate Femicide' (1997) 3 *Violence Against Women* 590.

¹⁹ Terrie Moffit, et al, *Sex Differences in AntiSocial Behaviour* (2001) 69.

²⁰ *Courts Cop Flak Over Domestic Violence*, Waikato Times, 4 July 2000; *Judge Disputes Claims on Domestic Violence*, Waikato Times, 12 July 2000.

²¹ *Jail 'Not For All Violent Husbands'*, Hawkes Bay Today, 12 October 2005.

²² Ministry of Social Development, *Te Rito: New Zealand Family Violence Prevention Strategy* (2002).

²³ *Ibid* 11.

paramountcy to the principle of victim safety,²⁴ best practice guidelines and standards refer to internal agency, or institutional accountability, as opposed to accountability to battered victims.²⁵ Since, as discussed below, research shows abused women who turn to the legal system for help are at increased risk of further violence; this approach may underestimate the need for systematic monitoring of legal responses to evaluate their effectiveness in keeping victims safe.²⁶

II THE SOCIAL FRAMEWORK OF DOMESTIC VIOLENCE

The Victorian Law Reform Commission notes that rather than base legal responses on abstract philosophical principles, law should reflect the social context in which family violence typically occurs. Social framework evidence enables an individual accused's actions to be located 'within the broader framework of the experiences of victims of family violence more generally'.²⁷ By reorienting the analysis from a study of individual cases in isolation, to structural patterns of offending, members of the public and professionals gain a better understanding of 'the social realities of family and relationship violence'. This evidence is therefore invaluable in countering misconceptions about domestic violence and assisting individuals to identify their own unconscious assumptions and biases.²⁸

The social reality of intimate partner violence is reflected in domestic violence and homicide research which identifies patterns of behaviour associated with risk of further serious and lethal violence. These red flags for dangerousness/lethality offer a means of standardising domestic violence risk assessment instruments and providing greater protection for victims of violence and their children.

III THE SOCIAL FRAMEWORK: RED FLAGS FOR DANGEROUSNESS/LETHALITY

New Zealand Family Violence Prevention Strategy notes the need to review and evaluate existing domestic violence screening and risk assessment tools, guidelines and procedures.²⁹ Risk assessment, defined as 'an assessment of the dangerousness as well as lethality potential of the

²⁴ Ibid 12.

²⁵ Ibid 38.

²⁶ Monitoring and evaluation is expressed in reference to '[e]nsuring that legal sanctions under the *Domestic Violence Act 1995* (DVA) are effectively monitored and enforced': at 22.

²⁷ Victorian Law Reform Commission, 'Reinterpreting "Reasonable"' (2004) 78 LIJ 99.

²⁸ Ibid. See, also, Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004) [1.39]-[1.45].

²⁹ Ministry of Social Development, above n 22, 36.

offender in order to provide adequate protection to past and future victims',³⁰ provides professionals dealing with domestic violence and individual battered women with a sense of the risk they may face. To avoid becoming embroiled in controversy over use of the term 'lethality' on its own, research in this area is careful to define risk assessment as synonymous with dangerousness assessment (which encompasses lethality assessment).³¹ Neil Websdale cautions that

the absolute distinction between lethal and non lethal cases is a false dichotomy; rather there is a range or continuum of violence and entrapment that underpins abusive intimate relationships. Indeed, it would be far more appropriate and useful to employ the term 'dangerousness' rather than 'lethality' assessment.³²

While assessments of risk will never be foolproof, 'to the extent risk assessment tools provide a common or shared language for talking about battered women's victimization, they are both helpful and powerful'.³³ Given increasing public demands that criminal justice agencies justify acts or omissions in high profile cases, risk assessment can also facilitate consistent, standardised, transparent interventions.³⁴

Lesley Laing divides rapidly proliferating domestic violence risk assessment instruments into three groups according to validity studies. That is, those where no attempt has been made to establish validity; those where validity has been evaluated, but no results reported in the scientific literature; and instruments for which published validity data is available.³⁵ The 'Danger Assessment Tool' developed by Jacquelyn Campbell in 1985 and revised in 1988 following reliability and validity studies was recently investigated by a team of researchers who found that 'despite certain limitations, the tool can with some reliability identify women who may be at risk of being killed by

³⁰ Standards New Zealand, *Screening, Risk Assessment and Interventions for Family Violence Including Child Abuse and Neglect* (2006) 71.

³¹ Lesley Laing, *Risk Assessment in Domestic Violence* (2004) 11, Australian Domestic and Family Violence Clearinghouse www.austdvclearinghouse.unsw.edu.au at 15 November 2005.

³² Neil Websdale, *Lethality Assessment Tools: A Critical Analysis* (2000) 1, National Electronic Network on Violence Against Women, Applied Research Forum, www.vaw.umn.edu/Vawnet/lethality.htm at 15 November 2005.

³³ Neil Websdale, 'Battered Women at Risk' (2005) 11 *Violence Against Women* 1214, 1217.

³⁴ Metropolitan Police Service, *Findings from the Multi-agency Domestic Violence Murder Reviews in London: Prepared for the ACPO Homicide Working Group*, (2003) Appendix III 'MPS Risk Assessment Model for Domestic Violence Cases', 2.

³⁵ Laing, above n 31, 11.

an intimate partner'.³⁶ Key risk factors included: access to or ownership of guns; prior use of a weapon; threats to kill, especially those involving use of a weapon; prior serious injury; threats of suicide; drug or alcohol abuse; forced sex against a female partner; obsessiveness/extreme jealousy/ dominance.

A number of jurisdictions have incorporated the following elements in domestic violence risk assessment instruments to be utilised by criminal justice and other agencies to identify situations of high risk and take appropriate steps to ensure victims' safety.³⁷

A Repeat Victimisation

There is general agreement that an act of violence is the strongest risk factor for future violence.³⁸ Research in the United States (US) found rates of repeat victimisation in domestic violence cases exceed those for other types of offences. One in five domestic violence victims reported they had experienced a series of three or more assaults in the previous six months that were so similar they could not distinguish one from another. For assaults in general, fewer than one in ten involved this type of victimisation.³⁹ New Zealand research examining police records of domestic violence call-outs found that in nearly half (45.2%) of the sample of 166 offences and incidents, police had attended previously. In one in five of the incidents police had attended three to five times previously and in six per cent of cases police had attended ten or more times previously. Nearly half of offenders had criminal court histories (46.4%) and nearly one in three (30%) of offenders had a domestic protection order against them.⁴⁰ This pattern of recidivism indicates that '[o]ne of the most robust, simple and straightforward risk factors for domestic violence is that of a previous assault'.⁴¹

³⁶ Jacquelyn Campbell, et al, 'Assessing Risk Factors for Intimate Partner Homicide' [2003] NIJ Journal 14, 14. See, also, Ministry of Health, above n 5, 45, which includes a 'Danger Assessment Scale' for use by health professionals.

³⁷ See, eg, Appendix IV. See, also, Ministry of Health, above n 5.

³⁸ Angela Browne, Kirk Williams and Donald Dutton, 'Homicide Between Intimate Partners: A 20-Year Review' in M Dwayne Smith and Margaret Zahn (eds), *Homicide: A Source Book of Social Research* (1999) 149; Sylvia Walby and Andrew Myhill, 'Assessing and Managing Risk' in Julie Taylor-Browne (ed), *What Works in Reducing Domestic Violence? A Comprehensive Guide for Professionals* (2001) 307.

³⁹ US Department of Justice, *Violence Between Intimates* (1994) 1. See, also, Nicole Hunter, 'Protecting Survivors, Holding Perpetrators Accountable' (Paper presented at the Women's Legal Service, Conference on Women, Feminism and the Law, Brisbane, October 2004) 3.

⁴⁰ J J Taylor, 'Child Witness Pilot Project' Presentation to *Children and Family Violence: Effective Interventions Now Conference*, 4-5 July 1999. Ministry of Justice website: http://www.justice.govt.nz/pubs/reports/family_conference/author_8.html Retrieved 24 February 2003.

⁴¹ Walby and Myhill, above n 38, 307, 314.

Physical abuse of the female by the male before the lethal event is also a well established feature of domestic homicide, no matter which of the partners is killed.⁴²

Studies of homicide cases...indicate that a substantial majority of homicides committed by women occur in response to male aggression and threat...Similarly, clinical and research studies document a history of physical abuse and threat by men who eventually kill their victims.⁴³

Estimates indicate that between 67 and 80 per cent of women who are killed by current or estranged male partners have previously been battered by their killers.⁴⁴ Carolyn Block, the principle researcher with the *Chicago Women's Health Risk Study*, a comprehensive, collaborative study of lethal and sub-lethal intimate partner violence, notes almost half of the abused women in the study had experienced at least one prior 'severe or life threatening' injury, defined as: permanent injury; being severely 'beaten up'; being choked; or burned; internal injury; head injury; broken bones; or a threat or attack with a weapon.⁴⁵ The frequency of abuse, as opposed to severity of last incident increased the risk of the woman being killed, or of the woman killing her abusive partner.⁴⁶ These studies demonstrate that domestic violence and domestic homicide cannot be conceptualised and studied as distinct, unrelated phenomena or events.⁴⁷

⁴² See, eg, Browne, Williams and Dutton, above n 38; Byron Johnson, De Li and Neil Websdale, 'Florida Mortality Review Project: Executive Summary' in National Institute of Justice and American Bar Association, *Legal Interventions in Family Violence: Research Findings and Policy Implications* (1998). Ministry of Health, above n 5, 45, 'Danger Assessment Scale' acknowledges the strong association between prior abuse and later homicide for intimate female partners. Gerris Serran and Philip Firestone, 'Intimate Partner Homicide: A Review of the Male Proprietariness and the Self-Defense Theories' (2004) 9 *Aggression and Violent Behaviour* 1; Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994). See, also, research cited in Myrna Dawson, 'The Cost of "Lost" Intimacy: The Effect of Relationship Status on Criminal Justice Decision Making' (2003) 43 *Brit.J.Criminol.* 689, 692. Peter Jaffe and Myrna Dawson, 'Domestic Homicide: Critical Issues in the Development of Death Review Committees, A Literature Review and Discussion Paper' in Domestic Violence Death Review Committee, *Annual Report to the Chief Coroner: Case Reviews of Domestic Violence Deaths, 2002* (2004) Appendix B 59.

⁴³ Browne, Williams and Dutton, above n 38, 150-151.

⁴⁴ Amy Karan and Lauren Lazarus, 'A Lawyer's Guide to Assessing Dangerousness for Domestic Violence' (2004) 78 *F.B.J.* 55. Patricia Easteal, *Killing the Beloved: Homicide between Adult Sexual Intimates* (1993) 179, notes 'the most recurrent theme in the killings by both men and women was the antecedents of physical and emotional violence toward the woman'.

⁴⁵ Carolyn Block, 'How Can Practitioners Help an Abused Woman Lower Her Risk of Death' [2003] *NIJ Journal*, 4, 5.

⁴⁶ *Ibid.*

⁴⁷ See, eg, Metropolitan Police Service, *Findings from the Multi-agency Domestic Violence Murder Reviews in London: Prepared for the ACPO Homicide Working Group*, (2003) 16, noting that '[d]omestic homicide cannot be separated from domestic violence'. See, also, Victorian Law Reform Commission, above n 28, [4.154], noting the need for better understanding by criminal justice personnel of the interrelationship between domestic violence and the use of fatal force.

As discussed above, in the absence of appropriate intervention, acts of violence appear likely to increase in frequency and intensity over time.⁴⁸ The US National Institute of Justice sponsored research conducted by the National Center for State Courts which

confirmed previous research showing a strong correlation between the severity and duration of abuse - the longer women experience abuse, the more intense the behaviour is likely to become and the more likely women are to be severely injured by their abusers.⁴⁹

However, Lundy Bancroft and Jay Silverman note considerable variation in abusive style among men who exercise a pattern of coercive control in their relationships. 'This pattern of control and intimidation may be predominantly psychological, economic, or sexual in nature or may rely primarily on the use of physical violence'.⁵⁰ While tactics short of physical violence may be sufficient to maintain control once dominance is established, the abuser's resort to physical violence when necessary to retain or regain control constitutes an ongoing threat. Therefore, the potential for escalating violence appears inherent in the battering relationship.

B Separation

Contrary to cultural discourses which focus on the battered woman's 'failure' to leave, '[m]ost women try to leave abusive relationships'.⁵¹ Although women who kill male intimates are likely to be responding to physical aggression by the male; separation from a controlling male partner is a risk factor for serious/lethal violence against women.⁵² The scientific status of separation as a red

⁴⁸ Patricia Tjaden and Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey* (2000); Metropolitan Police Service, above n 34, 10.

⁴⁹ Jeremy Travis, *Research Preview* (1998) citing research by Susan Keilitz, et al, *Civil Protection Orders: Victims' Views on Effectiveness*, National Center for State Courts (1998). See, also, Cheryl Hanna, 'No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions' (1996) 109 Harv.L.Rev. 1849,1895; Walby and Myhill, above n 38, 315; Campbell, et al, above n 18, 1089; Lisa Sanctis, 'Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence' (1996) 8 Yale J.L. & Feminism 359, 388-389. Johnson, Li and Websdale, above n 42. R Emerson Dobash and Russell Dobash, 'The Politics and Policies of Responding to Violence Against Women' in Jalna Hanmer and Catherine Itzen (eds), *Home Truths About Domestic Violence: Feminist Influences on Policy and Practice A Reader* (2000) 187, 195-196, note this common pattern of repeat and escalating violence by male offenders prior to the final lethal assault has been known in the United States since the 1950s although it is often ignored. Myrna Raeder, 'The Admissibility of Prior Acts of Domestic Violence: *Simpson and Beyond*' (1996) 69 1463, 1468 cites a number of studies revealing this pattern. Cf Morris, above n 4, 51, finding repeat victimisation was not always characterised by a pattern of increasing frequency and severity.

⁵⁰ Lundy Bancroft and Jay Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002) 3.

⁵¹ Block, above n 45.

⁵² Marvin Wolfgang, 'Victim-Precipitated Criminal Homicide' in Marvin Wolfgang (ed), *Studies in Homicide* (1967) 72; George Barnard, et al, 'Till Death Do Us Part: A Study of Spouse Murder' (1982) 10 Bull.Am.Acad.Psychiatry & L. 271, 274, 278 found the wife's departure from the relationship was perceived by males in the sample as a 'rejection

flag is now well established.⁵³ One study found a common explanation given by men for killing estranged women partners was 'inability to accept what they perceived to be a rejection of them or their role of dominance over their eventual victim'. Actual departure or the threat of separation was especially provoking, representing 'intolerable desertion, rejection, or abandonment'. When killing the women, male offenders believed they were reacting to a previous offence on the part of their wives (the woman's leaving).⁵⁴ New Zealand research has also revealed high rates of abusive behaviours toward women post-separation.⁵⁵

The US National Violence Against Women Survey found married women who lived apart from their husbands were nearly four times more likely to report that their husbands had raped, physically assaulted and/or stalked them than were women who lived with their husbands.⁵⁶ The Chicago Study also found '[t]hree-fourths of homicide victims and 85 per cent of women who had experienced severe but nonfatal violence had left or tried to leave in the past year'.⁵⁷ Women who asked their partners to leave, but the men refused were at especially high risk, as were women whose partners threatened to kill them if they left.⁵⁸

[by the wife] of them or of their role of dominance over their eventual victim'. These men were described as killing in response to 'the culturally prescribed image of what it is to be [a] man'. Margo Wilson and Martin Daly, 'Who Kills Whom in Spouse Killings? On the Exceptional Sex Ratio of Spousal Homicides in the United States' (1992) 30 *Criminology* 189, 206. cite a comprehensive list of sources showing self-defence or escape from oppression and violence is the usual motive when women kill men. Studies of intimate partner homicides in Canada, in New South Wales and in Chicago illustrate the same gendered pattern of offending: Margo Wilson and Martin Daly, 'Spousal Homicide Risk and Estrangement' (1993) 8 *Violence and Victims* 3; Margo Wilson and Martin Daly, 'Spousal Homicide' 14 *Juristat* (Statistics Canada, Ottawa: Canadian Centre for Justice Statistics, March 1994); C R Block and A Christakos, 'Intimate Partner Homicide in Chicago Over 29 Years' (1995) 41 *J.Res.Crime & Delinq.* 496. Aileen McColgan, 'In Defence of Battered Women who Kill' (1993) 13 *OJLS* 508, n 46, cites one study showing that in 99 out of 100 cases in which men killed intimate partners, the woman was attempting to break out of the relationship. In a further study of 42 women from 15 American states who were charged with the murder or attempted murder of partners many of the women had left and been followed and forced to return. Many continued to be intimidated long after leaving and found police protection ineffective.

⁵³ The Victorian Law Reform Commission, above n 28, [4.117] cites a recent review of the scientific status of research on domestic violence which found a number of areas of agreement among researchers, including agreement concerning the potential for use of fatal force when women attempt to exit abusive relationships.

⁵⁴ Browne, Williams and Dutton, above n 38, 159.

⁵⁵ Morris, above n 4, 54, found just over half (51%) of women who had recently separated had experienced abuse since the separation.

⁵⁶ Tjaden and Thoennes, above n 48, iv.

⁵⁷ Block, above n 45, 6.

⁵⁸ Carolyn Block, et al, *The Chicago Women's Health Risk Study: Risk of Serious Injury or Death in Intimate Violence A Collaborative Research Project* (2000) 272.

C Threats to Kill

Vengeance threats against intimate female partners are established risk markers for dangerousness/lethality.⁵⁹ Websdale and his colleagues found situations in which the '[p]erpetrator makes threats to kill the victim; often providing details of intended modus operandi and communicating those details in some form or other, however subtle, to the victim herself, family members, friends, colleagues at work, or others' were a frequent antecedent of both multiple and single domestic violence killings.⁶⁰ The Chicago research found women whose partners threatened them with murder were 15 times more likely than other women to be killed. When those threats were accompanied by use of a weapon, women were 20 times more likely to be killed.⁶¹ Consequently, domestic homicide researchers warn threats to kill must be taken seriously.⁶²

D Possessive Behaviours and the Theme of Control

A recent review of international research and literature notes the major themes to emerge from research on domestic homicide are masculine control and possessiveness. Male accusations of sexual infidelity, women's unilateral decisions to leave an intimate relationship, or a more generalised inability to control an intimate female partner precipitate a large majority of women's deaths.⁶³ Male, but rarely female sexual rivals are also vulnerable to lethal violence perpetrated by jealous and sexually possessive partners. The themes of control and possessiveness are also apparent in the tendency for men who kill intimate partners to take their own lives as well, '[a]s if they might, in this way, achieve an indissoluble union in death'.⁶⁴

Kenneth Polk found jealousy and allegations of sexual misconduct (which family and friends of the victim frequently described as delusional) drove male perpetrators to extraordinary efforts to monitor and control the behaviour of female partners. This theme of masculine control was encapsulated in cases where men informed their partners and the world: 'If I can't have you, no one will'.⁶⁵ Patricia Easteal's study also describes an obsessive possessiveness in relation to which the

⁵⁹ See, eg, Ministry of Health, above n 5, Appendix L.

⁶⁰ Websdale, above n 32, 3. See, also, Metropolitan Police Service, above n 34, 11.

⁶¹ Campbell, et al, above n 36, 16.

⁶² Johnson, Li, and Websdale, above n 42, 40. *C/f Do the Crime, Do the Time, ACT Says*, Evening Post, 6 July 1999, noting that less than one in four offenders convicted of threatening to kill or cause grievous bodily harm are sent to prison. Those imprisoned served an average of less than eight months' jail.

⁶³ Serran and Firestone, above n 42, 12.

⁶⁴ Ian Leader-Elliott, 'Passion and Insurrection in the Law of Sexual Provocation' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (1997) 149, 150.

⁶⁵ Polk, above n 42, 189.

term 'jealousy' seemed insufficiently strong enough to encompass. Cases in this category often revealed elements of severe emotional and/or psychological abuse with the woman's behaviour closely monitored, including preventing attempts to leave the house.⁶⁶

E Stalking

Studies consistently report stalking and harassment as very strongly associated with severity of past violence and continued severe violence in the future, even when other risk and protective factors are taken into account.⁶⁷

Stalking commonly occurs after the relationship but can also occur before the relationship ends. Stalkers are more likely to be violent if they have had an intimate relationship with the victim. Furthermore, stalking is revealed to be related to lethal and near lethal violence against women and coupled with physical assault, is significantly associated with murder and attempted murder. Stalkers...are a potentially very dangerous group. Stalking behaviour and obsessive thinking are highly related behaviours. Stalking must be considered a high risk factor for both femicide and attempted femicide, and abused women should be advised accordingly.⁶⁸

F Prior Violence toward Previous Partners

The London Metropolitan Police Service (MPS) Risk Assessment Model for Domestic Violence indicates that rather than a 'special problem' arising from the dynamics of the particular intimate relationship, domestic violence 'tends to be part of a perpetrator's pattern of repeated aggression toward other persons persisting over the life course'.⁶⁹ There is strong evidence that men who are abusive in one relationship are likely to abuse again in the next relationship.⁷⁰ Men who are motivated by jealousy and possessiveness to commit crimes against intimate partners apparently constitute a particular category of recidivist offenders.⁷¹

⁶⁶ Easteal, above n 44.

⁶⁷ See, eg, Block, et al, above n 58, 271; The Wisconsin Coalition Against Domestic Violence, *2003 Wisconsin Domestic Violence Homicide Report* (2005); Washington State Coalition Against Domestic Violence, *Findings and Recommendations from the Washington State Domestic Violence Fatality Review: Every Life Lost is a Call for Change* (2004).

⁶⁸ Metropolitan Police Service, above n 34, 11 (citations omitted).

⁶⁹ Ibid.

⁷⁰ See, eg, research and discussion in Donna Coker, 'Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill' (1992) 2 S.Cal.Rev.L.& Women's Stud. 71, 112-113.

⁷¹ See, eg, Lana Muzinic, et al, 'Forensic Importance of Jealousy' (2003) 27 Coll. Antropol. 293. Cf *R v Wilson* [1996] 1 NZLR 147, 152.

The danger of pathological jealousy is seen in its possibility of repeating. It can occur by entering a new relationship during which violence can mostly repeat...jealousy is often a motive in murders by offenders released from prison or hospital, who had a previous history of a crime due to jealousy.⁷²

G *Forced Sex*

Research indicates intimate partners who are sexually assaulted are subjected to more serious injury. Victims who report a domestic sexual assault also tend to have a history of domestic abuse, whether or not it has been reported previously.⁷³

H *Suicide Threats*

Suicide threats and attempts are also established risk factors for violence against current or former women partners.⁷⁴ 'The coupling of homicide with suicide is a frequent occurrence with men who kill family members.'⁷⁵ Although 'some murder-suicides [in intimate partner relationships] occur shortly after the onset of "malignant jealousy", more often there has been a chronically chaotic relationship fraught with jealous suspicions, verbal abuse, and sub-lethal violence.'⁷⁶

Research also suggests a pattern of so-called 'suicide pacts' or 'mercy killings' by older men.

Usually the elderly male partner, who may be suffering ill-health himself, kills the ailing female with a gun and then commits suicide. The motive for the homicide allegedly is to end her suffering. His own subsequent suicide is attributed to his loss of his love object, the prospect of impending helplessness, and more rarely, guilt. However, suicide pacts and so called mercy killings are not as simple as they might first appear. In Florida, Byron Johnson and I have found it necessary to

⁷² Muzinec, et al, above n 71, 298 citing PD Scott, (1977) 131 Br.J.Psychiatry, 127. See also, Victoria Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1997) 106 Yale L.J. 1331, 1373-1374 citing statistics; Domestic Violence Death Review Committee, *Annual Report to the Chief Coroner: Case Reviews of Domestic Violence Deaths, 2002* (2004) 31-32, recommends resources be directed to increasing awareness that abusive men pose a danger to future as well as current partners.

⁷³ Metropolitan Police Service, above n 34, 5.

⁷⁴ Ibid 12.

⁷⁵ Barbara Hart, 'Beyond the "Duty to Warn": A Therapist's "Duty to Protect" Battered Women and Children' in Kersti Yllo and Michele Bograd (eds), *Feminist Perspectives on Wife Abuse* (1988) 241. See, also, Kerry Healey, Christine Smith and Chris O'Sullivan, *Batterer Intervention: Program Approaches and Criminal Justice Strategies* (1998) 41, noting suicide threats feature in ongoing lethality assessments of batterers who are undergoing treatment.

⁷⁶ Neil Websdale, Maureen Sheeran and Byron Johnson, *Reviewing Domestic Violence Fatalities: Summarizing National Developments* (1998) 32, Violence Against Women Online Resources, <http://www.vaw.umn.edu> at 15 November 2005.

explore the possibility that some of these killings in fact constitute murder and may have been preceded by abuse.⁷⁷

Although killings of elderly, ailing women by their male partners generally receive a sympathetic response from the public and courts, Polk's research found the theme of masculine control was also evident in these cases.⁷⁸

I *Seeking Help from Formal and Informal Sources*

It is clear from Australian,⁷⁹ UK⁸⁰ and US⁸¹ research, that many battered women are in contact with the criminal justice system before they are killed. Research also indicates that women often seek help from the criminal justice sector only after fairly extensive periods of abuse, and often when other sources of help seeking have failed.⁸² The Chicago research found '[a]bused women who were killed, and especially those abused women who killed their partners, were much more likely to have sought help, compared to severely abused women not involved in homicide.'⁸³ Women who had experienced severe violence in the past year, who were making active efforts to obtain formal interventions to stop the violence, such as seeking help from a counsellor or agency; contacting the police; going to court; or obtaining an order of protection, were at higher risk for continuing severe violence.⁸⁴

Research also suggests that protection orders are not as effective against abusers with a history of violence.⁸⁵ The MPS Risk Assessment Model cites violation of civil or criminal court orders as associated with an increased risk of further violence. Consequently, prior arrests for violation of protection orders must be taken seriously.⁸⁶

⁷⁷ Ibid 33.

⁷⁸ Polk, above n 42, 44.

⁷⁹ Easteal, above n 44, 182.

⁸⁰ Metropolitan Police Service, above n 47.

⁸¹ Block, et al, above n 58.

⁸² See, eg, Karla Fischer and Mary Rose, 'When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection' (1995) 41 *Crime and Delinquency* 414.

⁸³ Block, above n 45, 5.

⁸⁴ Block, et al, above n 58, 277.

⁸⁵ Susan Keilitz, et al, *Civil Protection Orders: Victims' Views on Effectiveness* (1998); Anna Stewart, 'Who are the Respondents of Domestic Violence Protection Orders?' (2000) 33 ANZJ Crim 77, 86.

⁸⁶ Metropolitan Police Service, above n 34, 16. See, also, Websdale, above n 32, 3.

J *Victim's Fear of Abuser and Premonitions of Death*

A woman's level of fear of her partner is a reliable predictor of his future violence.⁸⁷ The grim reality that many women predict their own demise at the hands of violent men is reflected in the present research. Accordingly, risk assessment can never be a substitute for careful consideration of the victim's perception of the batterer's potential for future violence and lethality.

Although the science and practice of risk assessment in the domestic violence field is in its infancy, the above risk factors have been incorporated in risk assessment guidelines for lawyers, domestic violence programme providers, police, probation officers and health professionals.⁸⁸ Websdale notes that

[f]or all the concerns about lethality prediction instruments among the advocacy community,...there are elements in a number of instruments that perceptively capture the kinds of relationship characteristics, batterer behaviors, and various system responses that researchers have documented across the country...As such, the instruments expose players like police officers to issues that they may not otherwise consider or have been trained to think through.

Risk assessment instruments...may also provide a touchstone for victims themselves as they seek to strategize about their futures and those of their children. This is not to say that battered women always minimize their victimization, or that they do not have the wherewithal to work things out for themselves. Rather, risk assessment scores and dangerousness predictions may provide another (and perhaps very different) lens through which to see themselves, their batterers, and their overall predicaments.⁸⁹

Since it is impossible to foretell with certainty which batterer will attempt to kill a battered woman and/or her children, there may also 'be value in women understanding that any battering relationship might end in homicide'.⁹⁰

⁸⁷ Victorian Law Reform Commission, above n 28, 162, citing Office for Women, Department of Premier and Cabinet, Queensland Government (2000) 133. See, also, Laing, above n 31, citing inter alia, Edward Gondolf, *Batterer Intervention Systems: Issues, Outcomes and Recommendations* (2002) 174. However, Jacquelyn Campbell, 'Commentary on Websdale' (2005) 11 *Violence Against Women* 1206, 1207, notes that 'in our study of IP homicide and attempted homicide, only about half of the women who died or almost died recognized that their partner was capable of killing them'.

⁸⁸ See, eg, Karan and Lazarus, above n 44; Healey, Smith and O'Sullivan, above n 75, 41; Ministry of Health, above n 5. See also, Appendix IV.

⁸⁹ Websdale, above n 32, 6.

⁹⁰ Ibid 4.

IV THE PRESENT RESEARCH

Research showing that as the violence becomes increasingly serious women are especially likely to turn to the legal system for help demonstrates the centrality of criminal justice interventions to victim safety. Campbell, a leading risk assessment researcher and commentator, notes that in addition to the red flag behaviours discussed above, determinations of risk must 'start taking into account the protective actions of the victim and the quality of safety provided by the system, when for instance, she calls the police or obtains a protective order'.⁹¹ Safety Audits in overseas jurisdictions aim to improve institutional responses to domestic violence. These are premised on the assumption 'that an opportunity for centralizing victim safety...exists at every point of interaction within those institutions.'⁹²

Mary Ann Dutton, a writer and researcher on violence against women, recently commented that, while most risk assessment methods look at risks posed by batterers, safety audits examine risks posed by the criminal justice system.⁹³

Accordingly, the present research combines an examination of red flags for dangerousness/lethality in domestic violence cases with an investigation of criminal justice responses to these structural patterns of offending.

To gain a comprehensive understanding of domestic violence that is subject to legal intervention, an online collection of New Zealand newspaper reports was searched for all domestic violence cases on the database. In the absence of systematic indexing of legal judgments in domestic violence cases, this method provided the information necessary to track down legal reports. Although domestic violence cases are generally perceived as turning on their own particular facts,⁹⁴ the data collected facilitated a study of structural patterns of offending and legal responses.

⁹¹ Campbell, above n 18, 1210.

⁹² Ellen Pence and Dorothy Smith, 'The Safety and Accountability Audit' (2004) 5, prepared for the National Institute of Justice and Office on Violence Against Women 26 October 2004.

www.ojp.usdoj.gov/nij/wawprog/safety_audit_background.pdf at 6 December 2006

⁹³ Amanda McCormick, 'Domestic Violence Safety and Accountability Audit' www.data.ipharos.com/praxis/documents/auditdescription.pdf at 6 December 2006.

⁹⁴ See, eg, Geoff Hall, 'Sentencing (II): Matters of Aggravation and Mitigation [1985] NZLJ 184, noting that '[i]n domestic disputes the level of culpability varies greatly, preventing sensible preconceptions as to an appropriate sentence based for example on some kind of tariff: *R v Lavea* 11 December 1979 (CA197/79)'.

The research is organised in three parts. Part I examines the relevance of the above red flags in the New Zealand context. The findings are compared with Australian research revealing masculine control to be the overriding theme in domestic homicide cases. Criminal justice responses to sub-lethal assaults are examined from the standpoint of victim safety. Given that the quality of the legal response may have a direct bearing on whether a pattern of violence culminates in homicide,⁹⁵ the research also selected cases of lethal assaults to review agency interventions with victims and offenders prior to the women's deaths.

While legal acknowledgement of risk factors for dangerousness/lethality is central to victim safety, such recognition is also essential to achieve justice for victims who are killed. Therefore, case studies in Part II follow male perpetrators of lethal violence into the courtroom to examine constructions of red flags at trial and at sentencing. Part III examines contemporary divisions and debates which obstruct principled domestic violence intervention. This Part also presents a summary of the research findings and related recommendations.

V AIMS AND BENEFITS OF THE PRESENT RESEARCH

Although violence against women has been recognised as a significant public health problem⁹⁶ 'little is known about the most effective ways of reducing the consequent mortality, morbidity and disability.'⁹⁷ The present research aims:

- To explore the relevance in New Zealand of risk markers for dangerousness/lethality established from social science research;
- To contextualise intimate partner homicides through examination of these structural patterns of offending;
- To investigate legal responses to sub-lethal assaults from the standpoint of victim safety;
- To review agency interventions with victims and offenders prior to the killings of current or former women partners;

⁹⁵ See, eg, Metropolitan Police Service, above n 47, 16.

⁹⁶ Janet Fanslow, 'Violence Against Women: Priorities for Public Health Research in New Zealand' (1994) 107 *New Zealand Medical Journal* 63, 63.

⁹⁷ *Ibid.*

- To examine constructions of red flags for dangerousness/lethality at trial and at sentencing;
- To identify areas in which responses might be improved.

Benefits envisaged include

- Improved frameworks for assessing culpability; greater offender accountability; internal consistency in legal responses to domestic violence; external consistency with national domestic violence intervention strategy; better targeting and management of high risk situations; with the associated potential to save women's lives.

VI CONCLUSION

Risk markers for dangerousness/lethality have increasingly been integrated in overseas domestic violence interventions.⁹⁸ However, the present research found these red flags remain hidden within legal stereotypes of male violence against female intimates. The 'crime of passion' analysis camouflages a structural pattern of violence against women in the context of separation and the dangerousness/lethality potential of masculine control and obsessive jealousy/possessiveness. The red flag of repeat victimisation is also rendered invisible in legal analyses which construct the final lethal event in a history of battering as an unintentional, almost accidental by-product of a violent relationship. These stereotypes, which share a conception of male violence against current or estranged intimate partners as typically spontaneous, unpredictable offending,⁹⁹ are inconsistent with social science research. Homicide research has chillingly revealed that many women seek help and protection before they are killed. Since many homicides are preceded by a history of battering, and many victims seek formal and informal assistance prior to the final lethal event,¹⁰⁰ experts suggest that 'domestic homicides are the single most preventable types of homicides'.¹⁰¹

⁹⁸ Campbell, above n 18, 1212. See, also, Ministry of Health, above n 5.

⁹⁹ Myrna Dawson, 'Intimate Femicide Followed by Suicide: Examining the Role of Premeditation' (2005) 35 *Suicide and Life-Threatening Behavior* 76, 87, citing authorities for this 'archetype of anger-driven or expressive crime'.

¹⁰⁰ See, eg, Polk, above n 42, 193, noting constructions of spousal homicide as typically involving a rapid and spontaneous shift from humiliation to uncontrollable rage are not supported by empirical data. 'It has been found that a majority of men who kill their wives have given careful thought to the murder they are going to perform (although often the accounts display an exceptional level of rage)...Many husbands who kill their wives know exactly what they are doing, and if anything express a sense of relief once the goal, the wife's death, has been attained.'

¹⁰¹ Karan and Lazarus, above n 44, 55.

In the absence of a social framework to ground legal responses, 'common sense' understandings of violence in intimate relationships maintain and perpetuate old patriarchal values of male dominance and female submission. These legal norms of relationship undermine the ability of the legal system to assess and manage risk. An artificially compartmentalised response also isolates the policy implications of interventions with battered victims from their consequences for battered defendants and children living with violence. This fragmented approach both produces and masks internally incoherent, contradictory legal analyses. The perception of law as a closed, autonomous system of rules also facilitates the application of legal principles without reference to New Zealand Family Violence Prevention Strategy. Consequently, law and national domestic violence policy are profoundly inconsistent.

Although the *Domestic Violence Act 1995* aims to ensure effective legal protection for victims¹⁰² the study found women (and sometimes other family members and children) continue to experience further, even lethal violence following criminal justice interventions with batterers. Accordingly, principled intervention grounded in the social reality of domestic violence victims; improved data collection systems; and monitoring to ensure consistency and accountability is recommended.¹⁰³ Legislative reform is also essential to ensure that the goals of victim safety and batterer accountability in New Zealand Family Violence Prevention Strategy¹⁰⁴ are not routinely undermined by competing attitudes, policies, and practices in the courts.

¹⁰² Under s 5, this object is also to be achieved by recognition that all forms of domestic violence are unacceptable.

¹⁰³ The United Nations Convention on the Elimination of All Forms of Discrimination against Women Monitoring Committee, Fifth Periodic Report of New Zealand, CEDAW/C/NZL/5, 625th and 626th sess, (CEDAW/C/SR.625 and 626) 14 July 2003 [415] expressed concern at the lack of systematic collection of data on violence against women in New Zealand.

¹⁰⁴ Ministry of Social Development, above n 22, 20.

CHAPTER TWO: THEORY, METHOD, AND OVERVIEW OF DATA

"Where there are no names, there are no deaths, in every country of the world."

Laura Bonaparte, one of the Mothers of the Plaza Del Mayo of Argentina, speaking at the Couchiching Institute on Public Affairs in Ottawa, Canada, September 1995.¹

I INTRODUCTION

This chapter reviews methodological issues and difficulties associated with domestic violence research. A system of classification which captures the human cost of domestic homicide and its interrelationship with sub-lethal domestic assaults is analysed and adopted. The research design, including data sources and method of data collection is discussed, and the reliability of this method is tested by comparing the general homicide sample with official homicide statistics. An overview of the data collected is provided.

Since most serious violence and homicide between adult sexual intimates is perpetrated by men against women, male pronouns are generally used to refer to batterers and female pronouns to refer to victims. Rather than subsume women-killing within the gender neutral category of homicide, or even less appropriately, within the gender specific category of manslaughter, the term intimate femicide is used throughout the research to denote the killing of female sexual intimates.² Uxoricide is the term used to signify wife killing, and femicide technically refers to the killing of any woman. However, Myrna Raeder notes that because the term intimate femicide addresses public denial about the extent of intimate partner violence and its links to woman killing, it is particularly appropriate to killings arising from women's relationships with batterers.³ Its use also

¹ Cited in Washington State Coalition Against Domestic Violence, *Honouring their Lives, Learning from their Deaths: Findings and Recommendations from the Washington State Domestic Violence Fatality Review* (2000) 3 (emphasis in original).

² Karen Stout, "Intimate Femicide": Effect of Legislation and Social Services' in Jill Radford and Diana Russell (eds), *Femicide: The Politics of Women Killing* (1992) 133, 133, states the term 'intimate femicide' was introduced at the 1976 International Tribunal on Crimes against Women to emphasise that 'when women are killed, it is not accidental that they are women' (citations omitted). Jill Radford, 'Introduction' in Jill Radford and Diana Russell (eds), *Femicide: The Politics of Woman Killing* (1992) 3, defines femicide as a form of sexual violence which focuses on the man's desire for power, dominance and control. The term 'gives women's experiences and understandings priority...and as such is consistent with one of the basic tenets of feminism - women's right to name our experience'.

³ Myrna Raeder, 'The Admissibility of Prior Acts of Domestic Violence: *Simpson* and Beyond' (1996) 69 S.Cal.L.Rev. 1463, 1466.

'explodes one of the most pervasive myths of patriarchal culture - that the home provides a safe haven for women'.⁴

II BARRIERS TO RESEARCH ON VIOLENCE AGAINST WOMEN

A *Inadequate Data Collection and Monitoring of Violence against Women*

1. *Sub-Lethal Intimate Partner Violence*

The Ministry of Justice advises it extracts data on all finalised criminal prosecutions from the Case Monitoring Subsystem of the Law Enforcement System (the former Wanganui computer). This system is operated by Courts, Police and Corrections. Information is offender-related and does not specify the nature of the relationship between the offender and victim. For this reason official statistics utilise the offence category of male assaults female under s 194 of the *Crimes Act 1961* as a proxy code for violence against intimate female partners. Police offence codes relating to common assault under the *Crimes Act* and *Summary Offences Act 1981* can also indicate the assault was 'domestic'.

Since the relevant legislation does not stipulate that offending must take place in the context of a past or present intimate relationship, victims and offenders could be neighbours, close associates, or extended family members. If the seriousness of offending is categorised according to maximum statutory penalty, these offences represent a low level of crime seriousness. Violence toward female intimates may result in different and/or more serious charges, and these are not recorded. Since this system of data collection lacks information on the context and nature of offending it cannot shed light on structural patterns of violence in intimate relationships.

Gaps in recording and monitoring of sub-lethal assaults give rise to conflicting views on the extent of the problem. The resulting confusion is illustrated by Police and Women's Refuges reports in December 2000 that they were dealing with record levels of domestic violence.⁵ Two months later, the Principal Family Court judge was widely reported as advising attendees at a law seminar that there was strong evidence to suggest rates of domestic violence in New Zealand were

⁴ Diana Russell, 'Preface' in Jill Radford and Diana Russell (eds), *Femicide: The Politics of Woman Killing* (1992) xi.

⁵ *Record Domestic Violence Mars Christmas*, Dominion, 27 December 2000; *Refuges Crowded as Women say 'Enough'*, Press, 27 December 2000.

declining.⁶ Although the judge cited a fall in applications for protection orders as evidence for this contention, a spokesperson for Women's Refuge responded that protection order applications are a poor gauge of levels of violence. Rather, Refuge was dealing with high numbers of women and children and 'family violence was still rife in the community'.⁷ Following media reports in 2002 of a woman paying \$12,000 to obtain protection from a violent partner, the National Coordinator for Women's Refuge blamed legal costs for a decline in the number of women seeking protection orders.⁸

2. *Lethal Intimate Partner Violence*

Surprisingly, the present study found it difficult to access reliable information regarding rates of intimate femicide and the contexts in which these killings take place. Unlike sub-lethal relationship violence which has an extremely low reporting rate,⁹ homicide has a high reporting rate. Ian Miller and Nestar Russell note the public also has an expectation that these killings will be rigorously investigated. Consequently, homicide data has the potential to enhance understanding of the nature and context of violent offending in New Zealand:

Homicide rates...provide a measure of violent crime (even if other offences are under-reported or disguised, eg. assault, sexual offences, and domestic violence). The gravity of murder and the nature of homicide investigations provides detailed information about these offences, and provides insight into the complex relationships that contribute to such offences, and to some extent to their putative motivations.¹⁰

However, the classification system used by Miller and Russell fails to pinpoint homicides occurring in the context of sexual intimacy. That is, the nominated degrees of relationship: 'well known'; 'known'; 'not known'; and 'not established'¹¹ are too vague. The closest degree of relationship 'well known' is defined to include 'intimates' and relationships between 'residential or

⁶ *Domestic Violence 'on the wane' - Family Court*, Press, 28 February 2001; *Domestic Violence in NZ 'falling'*, Press 28 February 2001.

⁷ *Domestic Violence 'on the wane' - Family Court*, Press, 28 February 2001.

⁸ *Legal Costs Hit Women Seeking Safety*, New Zealand Herald, 4 June 2002.

⁹ Ministry of Justice, *Responses to Crime: Annual Review 1999* (1999) 29.

¹⁰ Ian Miller and Nestar Russell, *Homicide in New Zealand 1988-94: Patterns and Relationships* (Paper presented at the 11th Annual Conference of the Australian and New Zealand Society of Criminology, Victoria University of Wellington, 29 January-1 February 1996) 1.

¹¹ Ibid 14, citing examples of the 'well known' degree of relationship as including 'family members, intimates, relatives, work colleagues, social contacts, residential or other contacts (where a good degree of prior knowledge is established)'.

other contacts (where a good degree of prior knowledge is established).¹² This could encompass incidents as disparate as neighbours arguing over money, and a fatal wife beating as the culminating event in a history of violence in the relationship. While the study also nominates 'domestic disputes' as the single greatest cause of murders between 1988 and 1994,¹³ this description of motive fails to acknowledge, much less explain, the different circumstances in which men and women in intimate relationships kill, and are killed.

Although the state collects data on intimate femicide, this information does not appear to be routinely extracted and published. The police have collected homicide data since 1988¹⁴ but the term 'domestically related' employed by the National Homicide Monitoring Programme is not confined to intimate relationships.¹⁵ Simply knowing that 'between 1993 and 1998 inclusive, 42.8% of murders and 36.8% of manslaughters were domestically related'¹⁶ sheds little light on intimate partner deaths or the contexts in which they occur. The New Zealand Health Information Service (NZHIS) identifies homicides and records cause of death according to information received from the Coroner (in conjunction with any other available information). Mortality statistics are coded according to information about the victim and the method of killing. However, the NZHIS separately records only those homicides by a spouse or partner that do not fit within one of its established assault codes. Thus the NZHIS advises use of its data as a guide to homicides between adult sexual intimates would be highly misleading.¹⁷ Information from this source is in the form of computer generated data rather than narrative summaries which precludes in-depth analyses of the cases.

Disturbing research from Harvard University indicates that New Zealand women are killed at one of the highest rates in the industrialised world.¹⁸ However, the dearth of meaningful, accessible

¹² Ibid.

¹³ Ibid 15, finding 39.22 per cent of homicides arose from a 'domestic dispute' and a further 28.44 per cent from a 'personal dispute'.

¹⁴ Ibid 4.

¹⁵ The Ministry of Justice, above n 9, 29 fn 25, observes that '[d]omestically related homicides are those where a domestic relationship exists between the offender and victim. A domestic relationship includes: husbands and wives, de facto or ex-de facto husbands and wives, parents, custodial parents, non-custodial parents, de facto parents, their children, adult children, grandparents and grandchildren, siblings, step-siblings, relatives, girlfriends and ex-boyfriends'.

¹⁶ Ibid 29.

¹⁷ Email to the author from Chris Lewis, Information Analyst, New Zealand Health Information Services, 12 January 2005.

¹⁸ *NZ Has High Female Murder Rate*, New Zealand Herald, 20 April, 2002. The US, Finland, Switzerland and Belgium were the only countries whose rates of femicide were higher than New Zealand's.

data produces the same confusion about intimate femicide rates that characterises the non-lethal domestic violence debate. In 1997, police reported that campaigns to raise awareness of domestic violence and changes to police policy - which now requires active intervention and deterrence - had resulted in halving the numbers of women in New Zealand murdered by an intimate partner. Rates of murder had fallen from an average of 14 per year prior to the launch of the campaigns in 1993, to seven murders in 1996.¹⁹ This highly publicised account of declining intimate femicide rates may have produced a false sense of complacency. Although the present study found no media reports of subsequent trends through time, in fact, the year following the reported reduction in intimate femicide rates, numbers returned to the pre-1996 figure and remained at or near this figure in following years. In 2002 - the final year for which homicide data was collected - the highest annual rate for the research period was recorded.

The New Zealand Court of Appeal has also remarked on an increase in homicides in intimate partner relationships.²⁰ Although the Court's comment was cast in gender neutral terms, New Zealand women have always been far more likely to be killed by men with whom they have a sexual relationship than to kill them. There is also alarming empirical evidence (at least in Australia), that while the rate of domestic homicides may have remained fairly constant, the gross disparity between the homicidal conduct of men and women may be worsening.²¹

B Difficulties Accessing Legal Reports and Court Records

Gaps in official data on violence in intimate relationships are compounded by the absence of any systematic method for accessing relevant court judgments. Many of these cases are not reported, and without a systematic means of searching, cases are difficult to find. Domestic violence researchers have remarked upon the difficulty of finding cases involving battered woman

¹⁹ Sergeant J J Taylor, 'Intervention Into Family Violence by New Zealand Police' in J Patrick, H Foster and B Tapper (eds), *Successful Practice in Domestic Violence in New Zealand* (1997) 99, 105; *Policy on Home Violence Paying Off, say Police*, Dominion, 2 September 1997.

²⁰ *R v Maru* [2001] CA 449/00 (Unreported, McGrath, Robertson and Randerson JJ, 26 July 2001) [24].

²¹ Ian Leader-Elliott, 'Passion and Insurrection in the Law of Sexual Provocation' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (1997) 149, 150, cites New South Wales statistics which he suggests are probably the best indicator of Australian trends showing that despite a constant rate of domestic homicide over the last quarter century, as the proportion of killings by women has declined, the proportion of killings by men has steadily risen. Callie Rennison and Sarah Welchans, *Intimate Partner Violence* (2000) note that although the number of intimate partner homicides in the US decreased over the period 1976 to 1998, white females represent the only category of victims for whom intimate partner homicide has not decreased substantially since 1976.

syndrome evidence.²² Julia Tolmie observes that this situation raises 'serious issues about the manner in which legal cases are selected for reporting and the impact that this has on judicial consciousness and on women'.²³ While this criticism is addressed toward difficulties in accessing information regarding battered women defendants, it is equally applicable to research on battered women who are killed. Without a complete picture of how courts are analysing and responding to patterns of violence in intimate relationships it is difficult to ascertain the quality of the legal response.

The present research embarked on a study of the interrelationship between mother and child abuse. Permission to conduct a pilot study of court files was obtained from the Department for Courts. The conditions imposed required the researcher to travel to Wellington to physically search for files in the District Court and to obtain file numbers for cases in the High Court. When these tasks were accomplished, the researcher was required to seek leave from the Wellington High Court judge to examine the files. After complying with the travel and search conditions, further conditions were imposed by the judge. These included establishing the whereabouts of every offender to inform the men about the research, the contact details of the researcher, and requesting their views, as well as those of the Crown in relation to the application for access. The judge also determined to read each file before granting leave. The resulting time delays prevented completion of the pilot study and the research project, as originally envisaged, collapsed.²⁴ Research on domestic violence offending against children could not be conducted and a great deal of time spent on data collection, research and analysis was wasted. Following a change of research topic, the conditions relating to consent, contact with the Crown and prior judicial perusal of the data were applied to a request to access trial transcripts, raising insurmountable difficulties in some cases.

Inadequate legal reporting of child abuse and neglect cases and insubstantial coverage in the media necessitates resort to court records. Inability to access this data therefore leads to a lack of accountability for the way domestic violence cases are processed. The new framework for

²² Rebecca Bradfield, 'Is Near Enough Good Enough? Why Isn't Self-defence Appropriate for the Battered Woman?' (1998) 5 *Psychiatry, Psychology and Law* 71, 81 n 2 citing Kearney J in *Secretary*, Unreported, Supreme Court, NT, 12 December 1995.

²³ Julia Tolmie, 'Case and Comment *Secretary*' (1996) 20 *Crim LJ* 185, 227-228.

²⁴ Samantha Jeffries, *Gender Judgments: Investigation of Gender Differentiation in Sentencing and Remand in New Zealand* (D Phil Thesis, University of Canterbury, 2001) examined Christchurch District and High Court files. Jeffries notes 'the implausibility of obtaining the written informed consent of participants, due to transitory life styles and the low probability of response'. In the present study, the nature of offending also made personal contact difficult.

accessing court information proposed by the New Zealand Law Commission should go some way toward ameliorating problems with access. However, as noted by the Commission, the presumption that court information will be made available unless there is a good reason to withhold it will require 'a culture change in courts in favour of this presumption of accessibility'.²⁵

C The Nature of the Material and its Cultural Consumption

Jane Caputi has drawn attention to the ways state institutions legitimised and propagated femicide in its various forms across time and place. For three centuries, witch killing was institutionalised by church and state. Elite and popular art graphically depicted the torture, drowning and burning of women:

Some feminists might feel these popular press images were the snuff films and *Penthouse* magazines of their day. They purported to be on-the-spot depictions of tortures and burnings, with naked and half-naked female bodies screaming and writhing in endless postures of agony, surrounded by well-dressed male judges, religious accusers, 'prickers', and other righteous gentlemen of the time.²⁶

Caputi notes that when the state apparatus upholding the witch-craze collapsed by the mid-eighteenth century, a new mode of femicide (beyond the ongoing murder of wives) with a new manner of execution, a new type of perpetrator, and a new form of propaganda emerged. The explicitly eroticized murder of women heralded in the early nineteenth century by the writings of the Marquis de Sade - was first enacted by an unknown man named 'Jack the Ripper' who killed and mutilated prostitutes in London in 1888. The names of de Sade and the Ripper have become household words and sexual killings - both in fact and in fiction - are an hourly occurrence. Serial killers of women can achieve the status of cult heroes²⁷ and in the new millennium, images of women being beaten, stabbed, eviscerated, tortured and set on fire are regarded as 'entertainment', and available for popular consumption due to their legal designation as 'speech'.

²⁵ New Zealand Law Commission, *Access to Court Records*, Report 93 (2006) [9].

²⁶ Jane Caputi, 'Advertising Femicide: Lethal Violence against Women in Pornography and Gorenography' in Jill Radford and Diana Russell (eds), *Femicide: The Politics of Woman Killing* (1992) 203, 205 (citations omitted).

²⁷ See, eg, Deborah Cameron, "'That's Entertainment"?: Jack the Ripper and the Selling of Sexual Violence' in Jill Radford and Diana Russell (eds), *Femicide: The Politics of Woman Killing* (1992) 184-185, noting that 'Ripperologists' as they laughingly call themselves, produce pseudo-intellectual, romanticised versions of Victorian London and Jack the Ripper in 'scholarly' publications, hotels are named after this serial killer of women and in 1988 the Ripper Centenary spawned a fresh outbreak of male writing which 'apart from wilful ignorance and complacent male stupidity (for all the Ripperologists I know of are men) is a barely suppressed erotic excitement with the idea of killing for sexual pleasure - and in the case of Jack the Ripper, of *getting away with it*'. (emphasis in original.)

Correspondingly, if you simulate a woman's stabbing death it can be rapturously applauded as cinematic genius (the shower scene in Alfred Hitchcock's *Psycho*) or it can be hailed as a seductive sculptural masterpiece (Alberto Giacometti's *Woman with Her Throat Cut*). Though modern femicide is officially disowned, only covertly propagated, and nominally illegal, its artistic and entertainment value would suggest that it, like the witch-craze, is ultimately sponsored by the masculinist state.²⁸

A pernicious aspect of representations of femicide as 'entertainment' is the normalisation of male violence against women in popular culture. As Dame Silvia Cartwright has observed, the fact that violence against women is so much a part of our culture can operate to diminish its topicality.²⁹

While feminist outrage and acts of protest may occasionally be triggered by killings of individual women, Jill Radford notes femicide has rarely been the subject of feminist analysis. Most feminist writing focuses on the survivors of male violence, rather than on its perpetrators, and there are few feminist texts on men who kill women.

One reason for the reluctance to acknowledge femicide is its finality. This finality puts it outside traditional feminist modes of working. When a woman is killed, there may be no survivor to tell her story. There is no way of sharing the experience of violent death; all that can be shared are the pain and anger of those who have known such a loss. And this pain, far from being a basis for unity and strength - as it is in support groups for women who have survived sexual violence - can be undermining and silencing. In many cultures coming to terms with death is considered a private matter. Women who do speak out have to be mindful of the impact their words may have on those close to the dead woman. There is also the danger of being faced with the accusation of making 'political capital' out of grief. For these reasons femicide is perhaps one of the most harrowing and sensitive dimensions of male violence for feminists to address. Unfortunately, feminist silence on this important subject, however understandable, leaves it open to justification or denial by the larger culture.³⁰

²⁸ Caputi, above n 26, 206.

²⁹ Dame Silvia Cartwright, 'Thoughts on Women and Violence, and Women and the Law' [1993] (4) CJC 2.

³⁰ Radford, above n 2, 4.

Compounding the above difficulties is the sadism and excessive violence associated with intimate femicide.³¹ In their review of the research, Angela Browne, Kirk Williams and Donald Dutton found a pattern of overkill to be characteristic of many partner homicides with female victims. 'Often these assaults involved lengthy and excessive violence far beyond what would have been necessary to cause death.'³² The present study also found Court of Appeal judgments - often the only available/accessible legal record of the offending - are sanitised accounts of the violence involved. Many cases also exhibited elements of sexualised savagery, which, if noticed, went unremarked.

Investigating this extreme form of violence and criminal justice responses causes considerable pain, anger and despair to those who work in this area.³³ Without appropriate support, the work is potentially self destructive. Consequently, Jane Caputi and Diana Russell emphasise the importance of facing the horror involved in ways that do not destroy, but save us.³⁴ Researchers in this field also report experiencing challenges from family, friends and acquaintances, who believe there must be something 'wrong' with a person who spends so much time and energy on the subject of woman killing.³⁵ Since it remains 'unspeakably painful for most women to think about men's violence against us, whether individually or collectively, when we do attempt to think about the unthinkable, speak about the unspeakable, as we must, the violence, disbelief, and contempt we encounter is often so overwhelming that we retreat, denying or repressing our experiences'.³⁶ Nevertheless, when the stories of intimate femicide remain untold, individuals and systems may continue to operate in ways that produce injustice for deceased victims and risk further unnecessary female suffering and death.

³¹ See, eg, Jacquelyn Campbell, "'If I Can't Have You, No One Can': Power and Control in Homicide of Female Partners' in Jill Radford and Diana Russell (eds), *Femicide: The Politics of Woman Killing* (1992) 99, 103 detailing acts of extreme violence by male offenders and noting none of the cases involving adult women killing men displayed sadistic behaviour.

³² Angela Browne, Kirk Williams and Donald Dutton, 'Homicide Between Intimate Partners: A 20-Year Review' in M Dwayne Smith and Margaret Zahn (eds), *Homicide: A Sourcebook of Social Research* (1999) 149, 161.

³³ Jill Radford, 'Preface' in Jill Radford and Diana Russell (eds), *Femicide: The Politics of Woman Killing* (1992) xi, xii.

³⁴ Jane Caputi and Diana Russell, 'Femicide: Sexist Terrorism against Women' in Jill Radford and Diana Russell (eds), *Femicide: The Politics of Woman Killing* (1992) 13, 21.

³⁵ Diana Russell, 'Acknowledgments' in Jill Radford and Diana Russell (eds), *Femicide: The Politics of Woman Killing* (1992).

³⁶ Caputi and Russell, above n 34, 20.

III THE PRESENT RESEARCH

A *Issues of Naming and Confidentiality*

The Washington State Fatality Review Panel has a tradition of naming those who were killed as a result of domestic violence 'in order to draw attention to the institutional and systemic problems which allowed their deaths'.³⁷ The present research adopts this policy and the names of women in the intimate femicide case studies have not been altered. However, except in cases of homicide/suicide, the names of male perpetrators of intimate femicide have been altered for reasons of confidentiality. To avoid exposing women to the risk of retaliatory violence, or otherwise causing distress, the names of offenders and victims and any other identifying information have been omitted from the case studies of sub-lethal assaults.

B *Domestic Violence Homicide: Issues of Classification and Definition*

1. *Classification: Control versus Victim/Offender Relationship*

Kenneth Polk notes that virtually all sociological studies since 1958 have classified homicides according to particular forms of relationship existing between the victim and the offender prior to the homicide. Consequently, it is a commonplace criminological observation that most victims of homicides knew the person who took their life. While this system of classification is empirically verifiable, it is sorely lacking in explanatory value.³⁸ For example, simply knowing that most homicides involve some form of close relationship does not explain why males predominate by a factor of approximately 9:1 as perpetrators of homicide; or why New Zealand women should be at most risk from persons well known to them.³⁹

The theme of masculine control identified in domestic homicide research and studies relating to sub-lethal assaults⁴⁰ is also central to the Washington Domestic Violence Fatality Review Panel definition of domestic violence fatalities as: '*those fatalities which arise from an abuser's efforts to seek power and control over his intimate partner*'.⁴¹ This focus on control rather than the victim/perpetrator relationship allows research to capture more fully the human cost of domestic violence. Domestic violence fatalities under this classification system include:

³⁷ Washington State Coalition Against Domestic Violence, above n 1, 3.

³⁸ Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994) 4.

³⁹ Miller and Russell, above n 10, 14.

⁴⁰ Martin Daly and Margo Wilson, *Homicide* (1988).

⁴¹ Washington State Coalition Against Domestic Violence, *Every Life Lost is a Call for Change: Findings and Recommendations from the Washington State Domestic Violence Fatality Review* (2004) 86 (emphasis in original).

1. All homicides in which the victim was a current or former intimate partner of the perpetrator.
2. Homicides of people other than the intimate partner which occur in the context of domestic violence or in the context of attempting to kill the intimate partner. For example, situations in which an abuser kills his current/former partner's friend, family or new intimate partner, or those in which a law enforcement officer is killed while intervening in domestic violence.
3. Homicides occurring as an extension of or in response to ongoing abuse between intimate partners. For example, when an individual kills children in order to exact revenge on his partner.
4. Suicides which may be a response to abuse.⁴²

The Panel notes this classification system is wider than the one used by most criminal justice reporting agencies as it takes into account that abusers sometimes kill non-family members. It is narrower as it excludes cases in which family members kill one another, but the death does not take place in the context of intimate partner violence.⁴³

Since research which relies on degrees of relationship may result in killings that are integrally linked to the intimate partner relationship not being classified as domestic violence deaths at all, the present study adopts Polk's and David Ranson's definition of intimate homicide and related killings as those cases in which 'sexual, marital or romantic intimacy link the central actors'.⁴⁴ This definition, which encompasses homicides of non-family members such as police officers attempting to intervene, and persons who were perceived by the perpetrator to be sexual rivals, captures the theme of violence as a mechanism of control. All reported homicides in which the central actors were linked by sexual, marital or romantic intimacy were classified as 'domestic violence homicides', whether or not a prior history of violence could be established.

2 The Definition of 'Homicide'

Section 158 of the *Crimes Act 1961* defines homicide as 'the killing of a human being by another, directly or indirectly, by any means whatsoever'. Polk observes that such 'common sense' definitions can be misleading as it has long been recognised that some killings, such as those during war are lawful, and others, such as those in self defence, are justifiable. For this reason,

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Kenneth Polk and David Ranson, 'The Role of Gender in Intimate Homicide' (1991) 24 ANZJ Crim 15, 23.

some homicide studies focus exclusively upon killings that are deemed unlawful. However, it is difficult to ascertain as an empirical matter how or why such determinations are made by courts and juries. Moreover, since the aim is to study the context of the offending, rather than decisions made at some later point in the criminal justice system, it is necessary to approach the problem at the earliest juncture: at the point where police identify a case in which a victim or victims have been killed by another person or persons.⁴⁵

New Zealand homicide research illustrates how distortions can arise when selected charges are the focus of investigation. Miller and Russell defined homicide to include persons charged with murder irrespective of the eventual court outcome, but excluded persons charged with manslaughter.⁴⁶ However, this definition excludes killings by habitual batterers whose final lethal act of violence results in a manslaughter rather than murder charge. Many intimate femicides are followed by suicide of the perpetrator and these cases would also remain invisible if homicide research was restricted to charges or convictions of offenders.

Polk notes that relying on police and coronial conclusions as to whether a homicide took place will mean that some cases will be treated as homicide where the preponderance of evidence led the police or Coroner to conclude that a homicide had occurred, but the perpetrator could not be identified, or insufficient evidence existed to charge the primary suspect. He argues that the few inaccuracies that might result from defining homicide according to police and coronial decisions are much to be preferred to the 'gross distortions that would result if convicted killers were the only focal point of the investigations'.⁴⁷

Police and coronial findings determined the classification of a death as homicide in the present study. Since this definition of homicide did not rely upon murder/manslaughter convictions it included the few cases in which court proceedings were stayed. Cases that were deemed by police and/or coroners as suspicious, but for which no finding of homicide could be made, were recorded and analysed separately. Although neither charges nor convictions were necessary in order to classify a death as homicide (for example, in cases of homicide/suicide), outcomes for all reported cases were collected and analysed.

⁴⁵ Polk, above n 38, 9.

⁴⁶ Miller and Russell, above n 10, 1. Cases of murder/suicide and cases where the death was deemed to be 'murder' but no person was charged were included in the study: at 1.

⁴⁷ Polk, above n 38, 10.

IV THE RESEARCH METHOD

After consultation with library staff at the University of Canterbury, the Newztext INL data base was chosen as the most user friendly method of accessing media reports of domestic violence cases. The provincial and metropolitan newspapers listed below were the source from which the data were collected. These newspapers also reported cases from other geographical areas in New Zealand.

Waikato Times
Sunday Star Times
Sunday News
The Dominion
The New Zealand Herald
The Evening Post
The Press
The Timaru Herald
Evening Standard
The Daily News
Truth
The Southland Times
Nelson Mail

Domestic violence related cases were extracted from this pool of reports. The database was cross searched using a number of search terms. Reports dated back to 1974 and cases from that year to the end of 2002 were collected. A large amount of information was collected including violence between siblings, parents/children, and other family members. Following the collapse of the original research project, data collected under some categories became superfluous to the present study.

As demonstrated below, time periods needed to be narrowly defined to ensure that all cases were retrieved. A record was kept of each time period searched, under each search term. The search term 'assault' found reported cases involving offenders who were charged with common assault, assault against a female/child, and other assault charges, as well as reports classified in the database under the category of 'assault'.

Period: 3/2/2000 - 3/3/2000; Category 'assault':

					<u>Total</u>
3/2/2000 - 7/2/2000	4 pages	@	25 per page	=	100
	1 page	@	2 " "	=	2 = 102
8/2/2000 - 11/2/2000	4 pages	@	25 per page	=	100
	1 page	@	9 " "	=	9 = 109
12/2/2000 -15/2/2000	2 pages	@	25 per page	=	50
	1 page	@	7 " "	=	7 = 57
16/2/2000 -22/2/2000	5 pages	@	25 per page	=	125
	1 page	@	6 " "	=	6 = 131
23/2/2000 -27/2/2000	3 pages	@	25 per page	=	75
	1 page	@	19 " "	=	19 = 94
28/2/2000 - 3/3/2000	4 pages	@	25 per page	=	100
	1 page	@	8 " "	=	8 = 108
					—————
Total Reports examined under 'assault' category					
for the month of February 2000:					601

The *Domestic Violence Act 1995* changed the legal response to violence in intimate relationships.⁴⁸ Courts and others acting under the legislation are required to be guided by the Act's object to reduce and prevent domestic violence and ensure effective legal protection for victims.⁴⁹ Since the Act created a new regime for dealing with relationship violence and media reports were not comprehensive in earlier years,⁵⁰ case study analyses, charts and figures relate to offending perpetrated between 1995 and 2002.⁵¹ Due to time constraints, data collected for the year 2002 was restricted to homicides only.

Cases were tracked, and (where this information was available), the prosecution of offenders was followed from the preliminary hearing, through the trial, to the sentencing and any subsequent appeal. Newspaper reports document the preliminary appearance of the defendant in court, the

⁴⁸ See, eg, Dick Webb, et al, *Family Law in New Zealand* (11th ed, 2003) vol 2, 1429, noting inter alia that the definition of violence was extended to include psychological abuse. Relationships coming within the Act's protective powers were widened.

⁴⁹ Section 5.

⁵⁰ Some newspapers came on line earlier than others.

⁵¹ With the exception of *Case Study W/94/1* discussed below, at p 241, which demonstrates the application of s 80 *Criminal Justice Act 1985*.

outcome of the hearing and subsequent sentencing - often following the preparation of reports such as pre-sentence, reparation and psychological reports. Information typically includes: name of defendant; offence charged; nature of the relationship between defendant and victim; age of victim and defendant; circumstances of offending; extent of physical injury inflicted (for example whether hospitalisation or medical treatment was required) and sentencing outcome. Reports could also indicate whether the parties were living together or separated, provide information regarding criminal history - including any prior violence against the victim, and alert the researcher to the fact that the defendant had appealed the conviction and/or sentence.

Hard copies of all reports were downloaded and filed. Information in the reports was analysed in depth and narrative summaries produced. Spreadsheets were compiled to provide a statistical overview of the research findings. Where possible, cases identified from the database were matched with relevant legal judgments.

V CAVEATS & QUALIFICATIONS

A *Missing Data*

Where the terminology used to describe the relationship between victim and offender did not clearly point to sexual, marital or romantic intimacy, the case was excluded. For example, a male 'boarder' killed the three year old daughter of a woman after the child's mother demanded that he leave her home. Another offender described as a 'boarder', moved into the home of a woman and her 12 year-old daughter and murdered the woman shortly thereafter. After waking the girl, the offender showed her the axe used to kill her mother, wrapped a telephone cord around her neck, and during an ordeal lasting two and one half hours, sexually violated and attempted to rape the child. Since no intimate relationship was revealed between the offenders and the children's mothers, these cases were excluded. In some femicide cases, women victims were described as the 'friends' of perpetrators, although other factors pointed to an intimate relationship. Absent further clarification these cases were also excluded.

Reports of offences involving breaches of protection orders and assaulting a female were often limited in details to the name of the offender and the sentence. These cases could not be counted. Even when an assault case was clearly identified as involving an intimate partner relationship it could nevertheless be excluded. For example, where an alleged offender made no plea at the preliminary hearing, or entered a not guilty plea, and no other reports on the case could be found,

the case was excluded. A number of women died shortly after being assaulted by a male partner against whom only assault charges were laid. These cases were recorded as assaults, but excluded from both the general homicide analysis, and the subset of intimate partner homicides.

Not every New Zealand newspaper was included in the database. Thus assaults in geographical locations not covered by the reports will have been missed unless reported elsewhere. In homicide cases, this is more likely to have occurred where no trial was involved, for example, if a guilty plea was entered. When both partners died in circumstances pointing to homicide/suicide, family requests for privacy may have resulted in under-counting of these cases.

B *The Newspaper Reports*

A number of studies of violence against women have utilised media reports in combination with other data sources. Sue Lees' study of the operation of the provocation defence in homicide trials at the Old Bailey (the Central Criminal Court in London) was based on analysis of press reports and attendance at homicide trials.⁵² Jacquelyn Campbell's research on homicide cases in the US city of Dayton, Ohio, combined a search of police files with a study of the city's two major newspapers for the same time period of five years. Domestic violence fatality reviews in the US also use newspapers reports to identify and provide information on domestic homicides.⁵³

Elliot Slotnick notes that because the media serve as the primary link between the government and the governed, it is difficult to overestimate the importance of journalistic coverage of judicial decision making.⁵⁴ It is also a fundamental principle of the English legal system that the process of ruling must be undertaken in public.

Lord Diplock in a later decision of that Court [House of Lords] suggested that this principle has two aspects. First, that the proceedings be held in open Court with all evidence communicated to

⁵² Sue Lees, 'Naggers, Whores and Libbers: Provoking Men to Kill' in Jill Radford and Diana Russell (eds), *Femicide: The Politics of Woman Killing* (1992) 267.

⁵³ The Wisconsin Coalition Against Domestic Violence, *2003 Wisconsin Domestic Violence Homicide Report* (2005) conducted an Internet search for newspaper accounts of homicides. If there were gaps in what the Panel could learn about a homicide from newspaper accounts it had access to a number of official and community sources of data.

⁵⁴ Elliot Slotnick, 'Media Coverage of Supreme Court Decision Making: Problems and Prospects' (1991) 75 *Judicature* 128.

the Court being communicated publicly. Secondly that there be publication to a wider public of fair and accurate reports of the proceedings.⁵⁵

However, it is doubtful whether all or indeed many legal commentators would endorse the ability of journalists to unerringly convey the legal import of what is said and heard at trials. Slotnick discusses the contrasting views of two US Supreme Court judges on this issue. Justice Brennan portrays the role of the press in reporting judicial decision making as crucial to a democratic society. Justice Scalia disparages the instructional and inspirational role of the press as portrayed by Justice Brennan, asserting instead that 'law is a specialized field, fully comprehensible only to the expert':

For Justices Brennan and Scalia the media-Court link appears to offer uniquely different possibilities and prospects. For Brennan, the media can be the vehicle through which a democratic polity is informed and energized and through which the Court learns about the public it serves. For Scalia, the media cannot fulfil effectively an informative function. Consequently, its task need not be facilitated by judges and media (and public) criticism are treated as generally irrelevant to the pursuit of the judicial function.⁵⁶

Anticipating objections by legal professionals who might endorse Justice Scalia's view that legal issues are too complicated for lay journalists to understand,⁵⁷ when media reports concerned a legal issue or some controversial aspect of the trial and/or sentencing, an attempt was made to confirm the reported details by examining legal judgments or trial transcripts. However, these often proved disappointing sources of information. This was mainly due to gaps in reporting, including issues of evidence highlighted by the media not being discussed in the judgments, prosecution and defence summaries not made available with trial transcripts, and difficulties accessing data.

Although it is certainly the case that the opinions of courts as a source of news 'are only as informative as the reporter's lay comprehension of them',⁵⁸ when information in the body of the article was compared with the relevant legal report (where available), the contents were generally

⁵⁵ Geoff Hall, *Sentencing Law and Practice* (2004) 693, citing *Scott v Scott* [1913] AC 417 (HL).

⁵⁶ Slotnick, above n 54, 130-131.

⁵⁷ *Ibid* 130.

⁵⁸ *Ibid* 132.

consistent. A recent study found widespread concern regarding sensationalistic reporting of scientific research to be exaggerated. Although headlines were twice as likely as newspaper stories to moderately or highly exaggerate claims, in the majority of cases, the substantive reports reasonably reflected the scientific information.⁵⁹

In addition to scepticism from legal professionals, the print media has not been valued as a source of objective and unbiased reporting by feminists. Lisa Evan found media coverage of domestic violence appeared to be presented as a warning to women rather than to their male assailants.⁶⁰ The Wisconsin Fatality Review Panel also found media stories of intimate femicide reinforced myths about domestic violence by victim-blaming or perpetrator excusing attitudes, and by constructions of the fatal violence as coming 'out of the blue, as opposed to being the culmination of a history of violence and controlling behaviors'.⁶¹ The present research supports feminist criticism that male violence against women enters the media through 'strategies of recuperation' which reinscribe the feminist critique within a hegemonic narrative.⁶² However, as discussed in Part II, media narratives also reflect stories of intimate femicide that are endorsed by the courts.

C *The Legal Reports*

While objectivity is often posited as a central requisite of legal discourse, law promotes a fundamentally masculinist view of society.⁶³

Generations of legal thought have been devoted to and by those who have been dominant in the legal culture: the men. Gradually we are beginning to understand that a male view is not all encompassing. No matter that generally speaking male legal scholarship and judicial thought has

⁵⁹ Timothy Caulfield and Tania Bubela, 'Media Representations of Genetic Discoveries: Hype in the Headlines?' (2004) 12 *Health Review* 53.

⁶⁰ Lisa Evan, 'Desperate Lovers and Wanton Women: Press Representations of Domestic Violence' (2001) 27 *Hecate* 147, 156.

⁶¹ Wisconsin Coalition Against Domestic Violence, above n 53, 12.

⁶² Wendy Kozol, 'Fracturing Domesticity: Media, Nationalism, and the Question of Feminist Influence' (1995) 20 *Signs* 646, 647. See, also, Jenny Rankine, 'How Newspapers Construct Lesbian Lives' (1989) 19 *Sites* 64.

⁶³ Catharine MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' in D Kelly Weisberg, *Feminist Legal Theory: Foundations* (1993) 427, 432, 435, argues: 'Substantively, the way the male point of view frames an experience is the way it is framed by state policy.' Therefore, when law 'is most ruthlessly neutral it will be most male; when it is most sex blind it will be most blind to the sex of the standard being applied. When it most closely conforms to precedent, to "facts" to legislative intent, it will most closely enforce socially male norms and most thoroughly preclude questioning their content as having a point of view at all'. Stephen Schulhofer, *The Feminist Challenge in Criminal Law* (1995) 143 U.Pa.L.Rev. 2151, 2161, also observes that 'criminal law is, from top to bottom, preoccupied with male concerns and male perspectives'. Therefore, 'even handed inaction is nonetheless an affirmative policy that contributes to the subordination of women'.

been benign, unconsciously its focus has been on what those scholars and judges knew best: the male view of life.⁶⁴

Laurie Taylor points out that well before legal arguments begin, a number of unconscious decisions are made about how to shape consideration of the facts and the actors: whether to adopt a narrow or broad time frame; which factors are 'legally' relevant; whether to define intent broadly or narrowly; and whether to take a narrow or broad view of the defendant. 'These decisions, whether conscious or unconscious, are *political* decisions.'⁶⁵

Legal research also involves consideration of legal precedents (cases previously decided) and the highest (or strongest) authority, such as a Court of Appeal decision, usually prevails.⁶⁶ However, appellate courts are obliged to take a view of the facts that is most favourable to the accused:

This means, of course, that students who only read appellate judgments receive a particular version of 'what happened', often with little, if any, of the factual doubts and possible inconsistencies that would be most obvious in the trial transcript or the trial judge's summing up. And not only do they get a view of the facts 'most favourable to the accused', they of course get a judicial construction of those 'facts'.⁶⁷

Given that persons facing a sentence of imprisonment may attempt to rationalise or justify their actions, an accused's version of events can be confused, inaccurate or even deliberately misleading.⁶⁸ When the victim is not available to provide her interpretation of what transpired; statements by persons close to the victim provide a much needed counterpoint to stories of homicide told by defendants. Consequently, newspaper reports of conversations with the victim's family or friends helped fill the gap left by the missing voice of the victim in legal reports.

A potential objection to incorporating the voice of the victim through the observations of her family and close friends may be that such evidence is untested and biased. This issue was recently examined in US research on intimate femicide which used proxy informants who were

⁶⁴ Dame Silvia Cartwright, above n 29, 3.

⁶⁵ Laurie Taylor, 'Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense' (1986) *UCLA L.Rev.* 1679, 1730 (emphasis in original).

⁶⁶ 'Feminist Legal Research' [1999] (2) *Feminist Law Bulletin* 3.

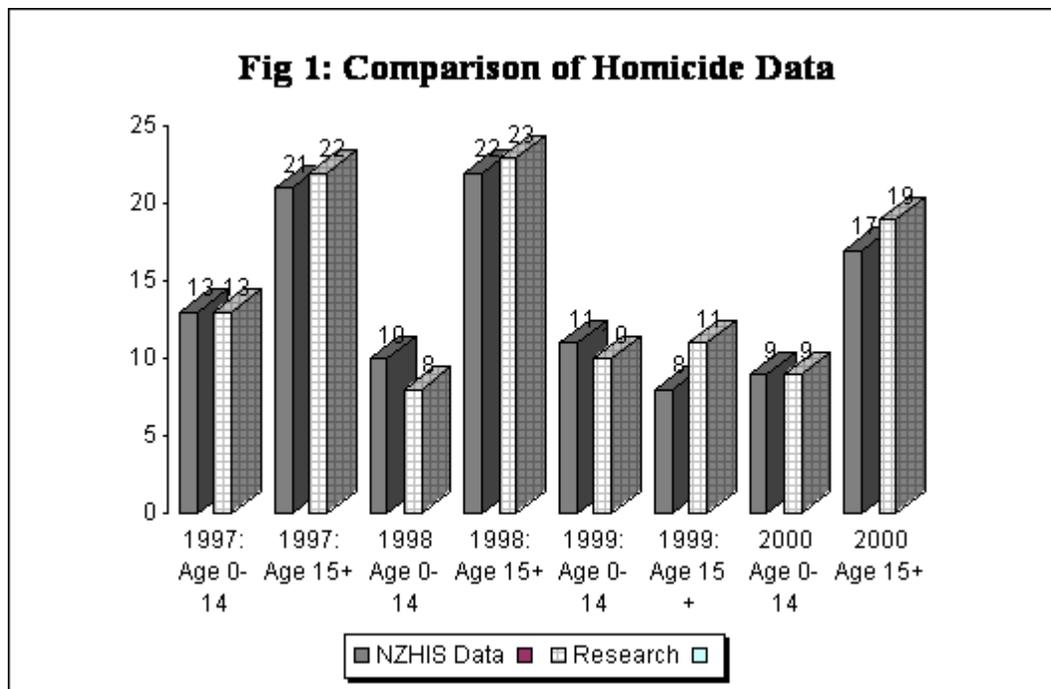
⁶⁷ Jenny Morgan, 'Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 *MULR* 237, 239.

⁶⁸ Polk, above n 38, 18, 172.

knowledgeable about the victim's relationship with the perpetrator. A pilot study found no tendency for such persons to under or over report the deceased victims' exposure to established risk factors and a good correspondence between proxy reports and police records of previous domestic incidents. '[I]f anything, we found more knowledge of previous physical abuse among proxies than among police'.⁶⁹

VI THE GENERAL FEMICIDE SAMPLE

The absence of systematic monitoring and reporting of domestic homicide prohibited a comparison between NZHIS data and information on lethal violence in intimate relationships collected for the present study. However, since *all* female homicide deaths reported during the period of the current research were recorded, it was possible to compare the present research findings on rates of femicide with data recorded by the NZHIS. NZHIS data was only available up to the year 2000.⁷⁰ By comparison, media reports became more comprehensive as more sources came on line and by 1997 it appeared that full coverage had been achieved. Therefore comparisons between the present findings and NZHIS data are limited to the years 1997-2000.



⁶⁹ Jacquelyn Campbell, et al, 'Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study' (2003) 93 *American Journal of Public Health* 1089, 1094.

⁷⁰ Provisional 2001 data awaited a number of outstanding Coroner's cases.

As illustrated in Figure One, the present study recorded three less child homicides than those in official data. For reasons discussed above, the research was also expected to underestimate rates of femicide. So it is unclear why seven additional homicides with adult female victims were identified in the present research. The perpetrators in two homicide/suicide cases could not be identified. If these cases conform to other homicide/suicide events, females were also the likely victims. Since the study revealed higher rates of femicide than official data, Table One provides outcomes for cases involving adult female victims.

Table One: Outcomes for Homicides of Female Victims Age 15-84+ Years

Homicide of Female Victims Age 15-84+ Years

<u>Outcome</u>	<u>2000</u>	<u>1999</u>	<u>1998</u>	<u>1997</u>	<u>Total</u>
Murder Conviction	10	5	10	11	36
Manslaughter Conviction	5	4	3	5	17
Insanity Verdict	1		1	4	6
Homicide/Suicide	2		4	2	8 ⁷¹
Lesser Conviction		2			2
Murder Charges Only*			2		2
Accused Died Before Trial	1				1
Unidentified Perpetrator**			3		3
<u>TOTAL</u>	19	11	23	22	75

* Trials failed following Court rulings that certain Crown evidence was inadmissible.

** Police offers of reward for information leading to conviction of the women's killers remained unclaimed in three cases.

The researcher sought an explanation for the disparate homicide data. NZHIS personnel advised they publish data before receiving every Coroner's Report as some cases may take a number of years to resolve. These cases will generally have a provisional code (based on other information) but in the absence of a final Coroner's Report a small number of cases may be classified as 'Injury Undetermined Whether Accidentally or Purposely Inflicted' (E980-E989; 1997-1999) or as 'Event of Undetermined Intent' (Y10-Y34; 2000). Further, if the homicide involved negligence, the death may not have been recorded as 'Homicide and Injury Purposely Inflicted' (1997-1999 coding) or as

⁷¹ The identity of the perpetrator could not be established in two homicide-suicide cases.

'Assault' (2000 coding). This might account for a total of four adult female deaths in the present sample; two negligent manslaughter deaths and two deaths resulting in lesser charges.

A recent report by the Taskforce for Action on Violence within Families also appears to significantly underestimate rates of women who are killed in the context of family violence. The Taskforce reports a total of 56 female family violence-related deaths between 2000 and 2004 inclusive.⁷² However, the present study found a total of 43 confirmed family violence-related femicides over the period 2000 to 2002 inclusive.⁷³ The official figure of 56 deaths would therefore require a dramatic fall in femicide rates over the period 2003 to 2004. No such decline was reported.

The present study identified a further 17 cases in which women died in suspicious circumstances and police launched a homicide investigation. Cases in which the actual killing is not observed and the alleged offender denies any involvement create a significant obstacle to accurate assessments of the number of female deaths arising from domestic homicides. In almost all of the suspicious death cases in which a homicide could not be confirmed, a current or estranged male partner was a primary suspect. Since most homicides of women occur in private homes, often without witnesses to the killing, NZHIS data on female deaths classified as 'Event of Undetermined Intent' may be significantly correlated with deaths occurring in domestic settings. Further research on this issue is necessary.

VII THE INTIMATE PARTNER HOMICIDE SAMPLE: BASIC INCIDENT AND RELATIONSHIP DATA

The following data in relation to intimate partner homicide (excluding killings of sexual rivals or other third parties) for the period 1995 to 2002 emerged:

⁷² Taskforce for Action on Violence within Families, *The First Report* (2006) 32. Although these deaths are described as 'family violence-related murders', the Report notes this figure was obtained from data relating to cases investigated as homicide.

⁷³ This figure includes 38 intimate partner homicides, plus four cases in which the mother of the offender was killed and one case involving the aunt of the offender as victim. During this period, two further women were killed by men with whom they were living at the time and another woman's death was investigated as an intimate femicide by police. The Coroner returned an open verdict.

Table Two: Homicides between Intimate Partners 1995-2002

	<u>Homicide Rate</u>
Male Perpetrators	87
Female Perpetrators	12

Studies do not always indicate whether de facto partners and homosexual partners are included in the 'spousal' category.⁷⁴ In the present research, one gay male killed his estranged partner. Eighty six male-perpetrated homicides and 12 female-perpetrated homicides occurred in the context of a married or de facto heterosexual relationship. (Table Two excludes the two homicide/suicide cases involving intimate partners in which the identity of the perpetrator could not be established.)

Some homicide studies count victims rather than incidents. For example, if one assailant kills three victims that would count as three homicides.⁷⁵ However, the present study counted homicide incidents and not the number of victims killed. Therefore, a scenario in which husband kills estranged wife and two children would be counted as one homicide.

A Gender

New Zealand studies report between 83 and 90 per cent of partner homicides are committed by men against women partners or ex partners.⁷⁶ This pattern is reflected in the present research finding approximately 88 per cent of perpetrators of intimate homicides were men.

B Race and Income

Data on race and ethnicity could not be gathered due to insufficient information in the reports. A number of studies suggest socio-economic as opposed to racial variations offer a better explanation for variations in homicide rates. New Zealand research indicates that poor women are around eight times more likely to be murdered than wealthier women.⁷⁷ US studies also indicate

⁷⁴ Patricia Easteal, 'Homicide Between Adult Sexual Intimates: A Research Agenda' (1993) 26 ANZJ Crim 3, 13.

⁷⁵ Jenny Morgan, *Who Kills Whom and Why: Looking Beyond the Legal Categories*, Victorian Law Reform Commission, Occasional Paper No 1 (2002) 12, fn 46.

⁷⁶ Janet Fanslow, David Chalmers and John Langley, 'Homicide in New Zealand: An Increasing Public Health Problem' (1995) 19 *Australian Journal of Public Health* 50. Ministry of Health, *Family Violence Intervention Guidelines: Child and Partner Abuse* (2002) 37, citing Janet Fanslow, J Kotch and David Chalmers, *Partner Homicide in New Zealand 1978-1987*, Unpublished.

⁷⁷ Tony Blakely, et al, 'Socio-economic factors and mortality among 25-64 year olds followed from 1991-1994: The New Zealand Census-Mortality Study' (2002) 115 *New Zealand Medical Journal* 93.

that once socio-economic status is controlled, blacks are no more likely than whites to perpetrate domestic homicide.⁷⁸

Polk observes that while gender stands out as a persistent feature of homicide, privileged males appear much less likely to resort to lethal violence against women partners or sexual rivals. He suggests that the mature male with wealth, an established class position, and recognised status in the community, has more access to political power and less need to resort to physical violence either to subdue the competition, or to control a female partner. By contrast, violence may become the mechanism through which marginalised men express and defend their masculinity.

The real winners in the male world of class, wealth, status and power are able to establish their dominance by virtue of their economic and social position in the market place, in the world of work, on bureaucratic ladders, in corridors of power, or perhaps in extreme forms of rational conflict, in the courts. Those at the bottom of the economic heap however will have fewer such resources available. For them, a major vector along which masculinity can be defined and...negotiated, is that of physical prowess and violence.⁷⁹

C Employment Status

Recent US research found unemployment was the most important demographic risk factor for intimate femicide. After controlling for a comprehensive list of more proximate risk factors, only the abuser's lack of employment significantly predicted risk, increasing risk four-fold relative to the employed abusers. 'Unemployment appears to underlie increased risks often attributed to race/ethnicity, as has been found and reported in other analyses related to violence.'⁸⁰

Where employment status was known, 55.1 per cent of male offenders and 44.5 per cent of female offenders were unemployed.⁸¹ Of those offenders employed at the time of the homicide 41.9 per cent were in unskilled occupations and 25.8 per cent were in skilled or semi-skilled positions. Of the remainder, 16.1 per cent owned or managed a business, 12.9 per cent were farmers and one male was a medical professional who was employed as head of psychological medicine at a New

⁷⁸ Neil Websdale, Maureen Sheeran and Byron Johnson, *Reviewing Domestic Violence Fatalities: Summarizing National Developments* (1998) 32, Violence Against Women Online Resources, <http://www.vaw.umn.edu> at 15 November 2005, citing studies.

⁷⁹ Polk, above n 38, 205-206.

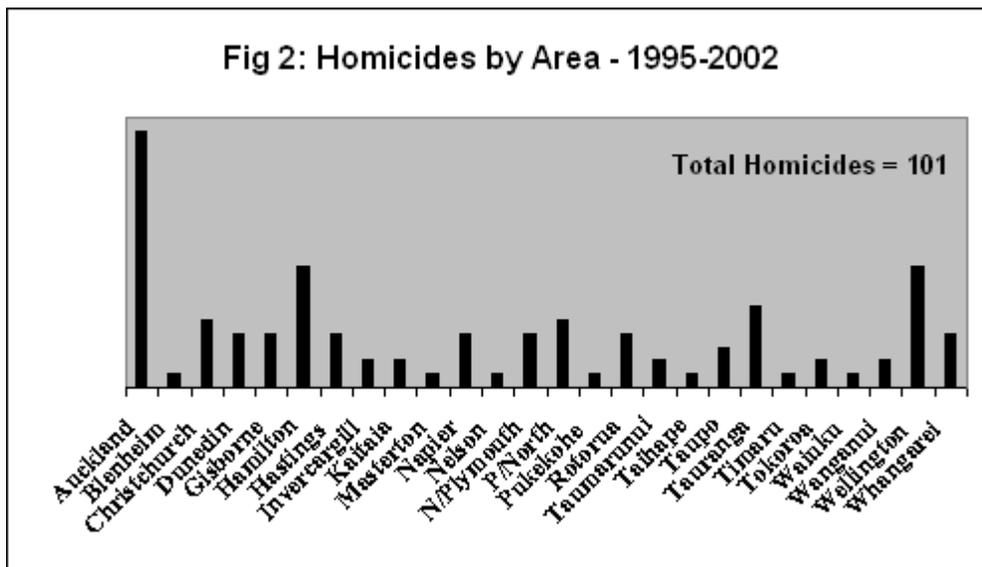
⁸⁰ Campbell, et al, above n 69, 1093.

⁸¹ The employment status of 18 males and three females could not be determined.

Zealand University. A further retired male offender had headed two major New Zealand psychiatric hospitals. The nurses in the sample were also psychiatric nurses: one female employed at the time, one male listed as a registered psychiatric nurse and a further male general and psychiatric nurse whose experience included service in hospital intensive care wards. Five male offenders were retired and two were University students.

D Geographical Area

The distribution of homicides is shown in Figure 2. Geographical area is defined as the court of initial appearance. In seventeen homicide/suicide cases the place the incident occurred is substituted for court of initial appearance.



E Nature of Offender/Victim Relationship

Sixty three per cent of male perpetrators killed women de facto partners or girlfriends and 67 per cent of female offenders killed unmarried partners. This increased risk to unmarried adult intimates is also noted in Canadian and Australian research.⁸² One intimate partner homicide was identified as arising from a same gender intimate relationship. The gay male killed his estranged partner.

⁸² Christopher O'Donnell, Angie Smith and Jeanne Madison, 'Using Demographic Risk Factors to Explain Variations in the Incidence of Violence Against Women (2002) 17 *Journal of Interpersonal Violence* 1239.

F Age of Victims and Offenders

Female perpetrators of homicides tended to be younger than males (mean age for women 35.3 years and 37.1 years for men).⁸³ Although younger women in this study were at most risk of lethal violence by an intimate partner, and women aged 20-29 were at greatest risk, a significant number of older women (aged 60 or more years) were also victims of intimate femicide.⁸⁴ Two women were in their 70s and the oldest was aged eighty-six. The two male victims who were aged over 60 years were both killed by men: one male victim was killed by a male associate of the female offender, and another male victim, aged 62 years, was killed by an estranged male partner.

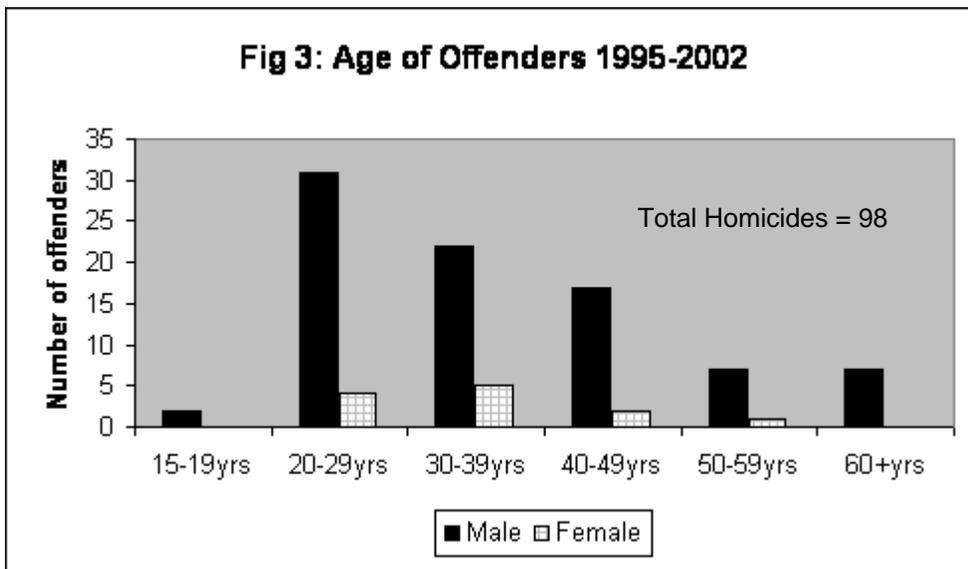


Figure 3 shows gender differences in age of offenders were most apparent at both ends of the age range.⁸⁵ Two male offenders were under age 20. No female offenders were under age 20 and none were aged 60 or more years.

A Canadian study suggests an even greater risk may be incurred by young women whose husbands are much older (10 or more years) than themselves.⁸⁶ In the present study, nine men killed female partners who were 10 or more years their junior. Three men killed women who were 10 or more years older than themselves. The male associate of one female offender killed her partner who

⁸³ This data excludes two homicide/suicide cases.

⁸⁴ Ages for five female victims and one male victim could not be determined.

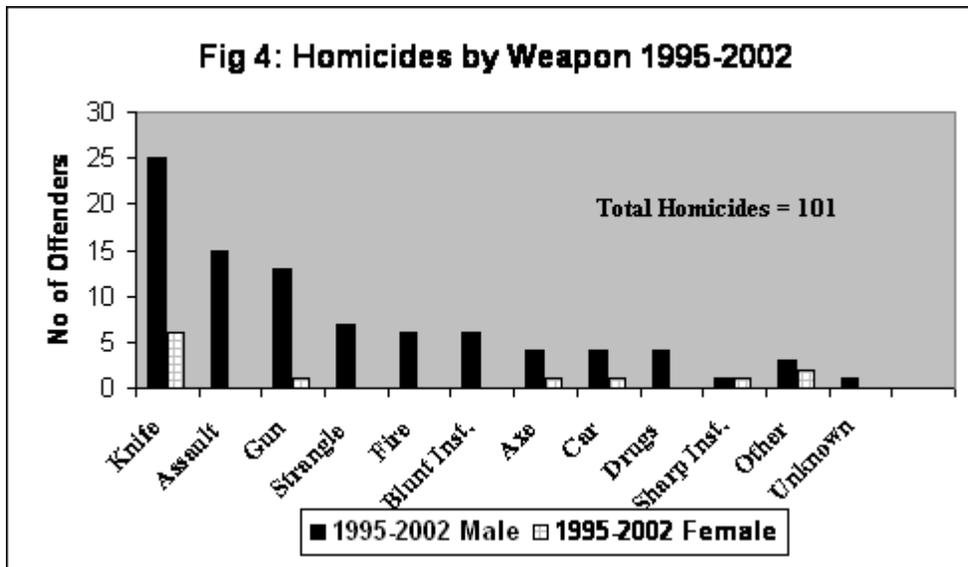
⁸⁵ Age of one male perpetrator could not be determined.

⁸⁶ Margo Wilson, Martin Daly and Christine Wright, 'Uxoricide in Canada: Demographic Risk Patterns (1993) 35 Can.J.Crim. 263.

was more than 10 years her senior. No females killed male partners who were 10 or more years younger than themselves.

G Method of Killing

Homicides by use of weapon are represented in Figure 4.



Research by Carolyn Block and her colleagues found a significant number of women (18%) died by strangulation and this issue may be especially important for elderly or disabled women. The researchers note the importance of collecting and publishing information on strangulation in criminal justice and public health epidemiological datasets.⁸⁷

H Homicide Location

Consistent with overseas research finding the majority of intimate partner homicides take place in or around the home,⁸⁸ 84 per cent of homicides in the present study occurred in private homes. Eighty-six per cent occurred in or around the home of the victim. Sixteen homicides took place in public areas. Settings for these killings varied as shown in Table Three.

⁸⁷ Carolyn Block, et al, *The Chicago Women's Health Risk Study: Risk of Serious Injury or Death in Intimate Violence A Collaborative Research Project* (2000) 277.

⁸⁸ See, eg, US Department of Justice, *Violence Between Intimates* (1994) reporting around 86% of victims who were killed by spouses were killed at home. See also, Patricia Easta, *Killing the Beloved: Homicide between Adult Sexual Intimates* (1993) 33, finding two-thirds of the killings between adult sexual intimates occurred in the victim's home in contrast to 40 per cent of other homicides.

Table Three: Public Settings of Intimate Partner Homicides by Gender

<u>Setting</u>	<u>Male Perpetrators</u>	<u>Female Perpetrators</u>
Streets	7	1
Rivers	1	1
Car Park	1	
Hospital		1
Courthouse	1	
Beach		1
Park	1	
School grounds	1	
Total	12	4

I *Prior History of Violence*

It is now well established that many victims of intimate femicide are beaten before they are killed.⁸⁹ Recent research found a prior act of choking and/or threat to kill may be especially highly correlated with lethality.⁹⁰ However, notwithstanding empirical evidence of the interrelationship between domestic violence and intimate femicide information on perpetrators' histories of violence in newspaper and legal reports was sketchy.

Legal commentators observe that it is difficult to argue domestic violence is sufficiently serious to warrant the use of lethal force by battered women when past violence in the relationship is trivialised 'as a symptom of a turbulent relationship...[or] described variously as "marital discord", "disputes not amenable to logic", "matrimonial discord", or "domestic problems"'.⁹¹ The present study found euphemisms for violence such as 'domestic dispute', references by legal actors to male offenders who could 'turn very nasty', or who had 'nasty tempers', and descriptions of intimate relationships as 'volatile', 'turbulent', or 'tempestuous' provided strong hints of a history of violence in the relationship that could not be verified. Depictions of 'mutual' violence and warring parties who could 'give as good as they got' also appeared curiously inapt given that the women victims had been seriously injured or killed.

⁸⁹ See, eg, Jacquelyn Campbell, et al, 'Assessing Risk Factors for Intimate Partner Homicide' [2003] NIJ Journal 14, 18.

⁹⁰ Block, et al, above n 87, 277.

⁹¹ Bradfield, above n 22, 79.

Based on evidence of past convictions, court orders of protection against the offender, and reports of witnesses, family and friends, a history of violence was established in 45 per cent of intimate femicide cases. This is very likely to under-estimate rates of prior violence due to inadequate recording/reporting of these incidents. Although prior violence toward female partners played a significant role in the deaths of male partners, no male victims were reported as seeking court assistance to protect themselves from the violence of female partners and no cases conformed to descriptions of a 'battered husband syndrome'.⁹²

J Separation/Estrangement

Information on this issue could not be ascertained in some cases, particularly in earlier years of the research. Women victims of lethal and non-lethal assaults were frequently described as living in 'on-again off-again' relationships. This term was employed to signify a dysfunctional relationship, and sometimes by defence counsel to imply fickleness on the part of a female victim, as opposed to a relationship disrupted by outbursts of violence.

At least 49 per cent of women who died were either separated from their partners, or had expressed an intention to end the relationship before they were killed. One female killed an estranged partner and the male associate of another female offender killed her partner shortly after he announced his intention to end the relationship. As discussed in the following chapter, the motives and circumstances of estrangement killings differed according to the gender of perpetrators.

K Involvement of Third Parties

When women are the targets of lethal and sub-lethal violence third parties can also become victims.

We cannot understand the true death toll of domestic violence unless we also examine the many other homicides which take place as abusers seek to control their intimate partners. The children, friends and families of victims of domestic violence are at risk when abusers become homicidal.⁹³

⁹² Suzanne Steinmetz, 'Family Violence: Past, Present and Future' in Marvin Sussman and Suzanne Steinmetz (eds), *Handbook of Marriage and the Family* (1987).

⁹³ Washington State Coalition Against Domestic Violence, *'Tell the World What Happened to Me': Findings and Recommendations from the Washington State Domestic Violence Fatality Review* (2002) 11.

Familicide, or the killing of an intimate partner and children in the same incident is a rare but recurring variety of intimate femicide.⁹⁴ Six intimate femicides were accompanied by the killing of a third party in addition to the female victim. In two cases, three children aged seven, five, and two years were killed at the same time as their mothers. Research also indicates unborn children are at risk from domestic violence.⁹⁵ Two pregnant women were killed in the present study, one of whom was said by the Crown to have miscarried three times due to assaults by her partner. In two further incidents, the female victim's new male partner was killed.

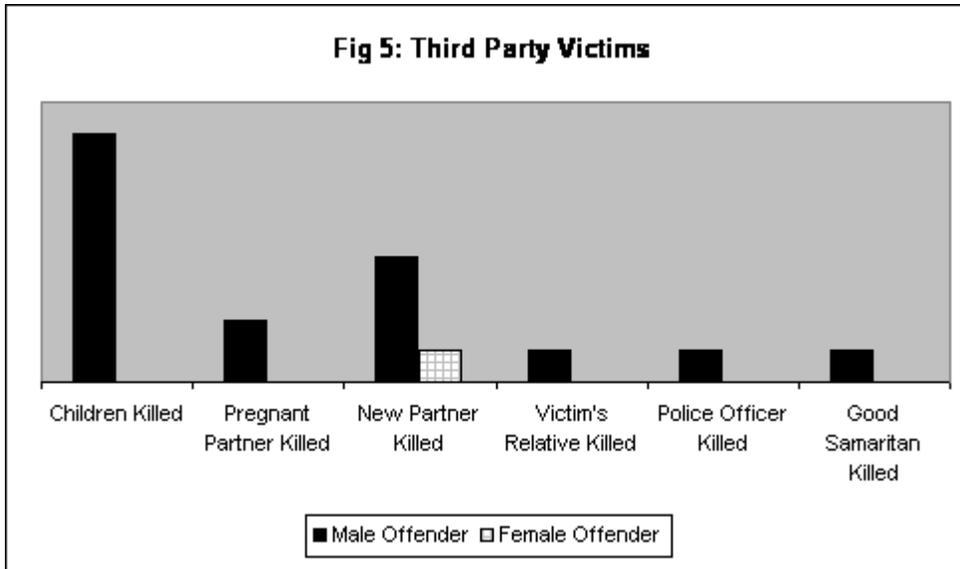
In seven further incidents, the female partner or ex-partner was abused and a third party killed. Two children aged 3 years and 11 months and a 'good Samaritan' neighbour who intervened in the violence were killed in one incident. In three further cases, children aged 10 years, 16 months and ten months were killed. The female victim's father who attempted to intervene, and the female victim's new male partner were killed in the fifth and sixth cases. An estranged partner and her family were held hostage and one of two police officers attempting to intervene was killed in the seventh.

In five more cases, the male perpetrator killed his partner or ex-partner and injured a third party. In one incident the perpetrator was subsequently charged with the attempted murder of his three children, and in a further incident a child aged four months, a 'good Samaritan' and a female friend of the victim were injured. Female friends of the victim were injured in two additional incidents and a mother was badly burned trying to save her daughter in the fifth case.

Violence or threats to hurt or kill children by the male also played a major role in the homicides of one male and one female victim. As shown in Figure 5, children comprised the major category of victims, followed by new partners. In one case a lesbian killed her partner's male lover. No children were injured or killed during assaults by women on male intimates.

⁹⁴ Margo Wilson and Martin Daly, 'Spousal Homicide' (1994) 14 *Juristat* 1.

⁹⁵ Audrey Mullender, 'Meeting the Needs of Children' in Julie Taylor-Browne (ed), *What Works in Reducing Domestic Violence? A Comprehensive Guide for Professionals* (2001) 35, 37. Richard Gelles, 'Violence and Pregnancy: Are Pregnant Women at Greater Risk of Abuse?' (1988) 50 *Journal of Marriage and the Family* 841, noting that women under 25 years are both more likely to be pregnant and to be abused by husbands and partners.



L *Child Witnesses*

Although children were present as witnesses, and were killed or injured both accidentally and deliberately in the course of violence aimed at the mother, child advocates point out that violence toward or in the presence of children often goes unremarked by the adults in their world.⁹⁶ This may explain the lack of information on this issue in both the legal and newspaper reports. While female victims of violence and the few female perpetrators were described as 'mothers', and newspaper reports occasionally noted that women were killed in houses they shared with their children, often no reference was made to the whereabouts of children during the lethal assault. Consequently, the following findings are likely to significantly underestimate the nature and extent of child involvement in intimate partner homicides.

In three incidents involving female offenders, children were present as witnesses (one case) or in the house at the time the homicide occurred. Children were present as witnesses, or at least in the house at the time the killing occurred in 37 per cent of homicides committed by male offenders. Small children ran for help while their mother was being killed; were splattered with their mother's blood during the homicide; left alone with the body for extended periods after the homicide; or discovered their dead parent upon arriving home. After witnessing her struggling

⁹⁶ David Fergusson and L John Horwood, 'Exposure to Interparental Violence in Childhood and Psychosocial Adjustment in Young Adulthood' (1998) 22 *Child Abuse and Neglect* 339.

mother being doused with petrol and set alight, one 13 year-old girl led her six brothers and sisters to safety from the burning home.

VIII THE SUB-LETHAL DOMESTIC VIOLENCE SAMPLE

In recognition of the interrelationship between domestic violence and domestic homicide the research examined patterns of sub-lethal violence toward intimate partners.

Table Four: Sub-Lethal Violence against Intimate Partners 1995-2001

	<u>Sub-Lethal Assaults</u>
Male Perpetrators	769
Female Perpetrators	59

The above table represents verified cases of sub-lethal violence toward intimate partners. A case was treated as verified if the perpetrator pleaded guilty to an offence(s) of violence, or was convicted following a not guilty plea. Non-lethal cases which involved more than one victim were counted as a single incident. Cases in which a defendant was convicted of multiple assaults were also counted as a single case. That is, it was number of defendants and not number of assaults that were counted. No cases of sub-lethal violence between gay males were identified. Five cases of non-lethal violence involved lesbian partners.

A *Gender*

Table Four demonstrates that men predominate as perpetrators of intimate partner violence that is subject to criminal justice intervention.

B *Race and Ethnicity*

Lack of information prevented an analysis of this issue. Diane Shoos suggests feelings of humiliation and fear of exposure, which compound the problem of underreporting, may be especially acute for women in middle class professional households who believe they should be 'above' the abuse or able to control it, and whose careers and professional reputations may also be at risk.⁹⁷ However, while no category of women is immune from intimate partner violence, there is clear evidence that certain conditions which may catalyse abuse are more likely to be

⁹⁷ Diane Shoos, 'Representing Domestic Violence: Ambivalence and Difference in *What's Love Got to Do with It*' (2003) 15 NWSA Journal 57, 64.

experienced by lower socioeconomic classes, resulting in a higher frequency of domestic violence in these groups.⁹⁸

Maori women appear significantly more likely to report experiencing controlling behaviour and acts of physical or sexual abuse by their partners than non-Maori women.⁹⁹ Research also indicates that Maori women experience 'the dominance of colonial values and lack of Maori personnel in the legal system as major barriers to justice'.¹⁰⁰ Inadequate social support structures which affect Maori women can also create a climate in which Pacific Island women feel trapped, leading to acceptance of the violence.¹⁰¹ '[M]igrant women face additional barriers...such as fear of implications for their immigration status, social isolation and bringing dishonour and shame to the family; a lack of understanding of the New Zealand social system; language barriers; and cultural insensitivity to their specific needs'.¹⁰² It is therefore concerning that recent research found Maori initiatives were inadequately resourced, and the needs of Pacific, migrant and women from other minority communities were particularly poorly met.¹⁰³

C Separation/Estrangement

This information was not always available. Almost half (44%) of male perpetrated assaults were committed against a separated or separating partner. Thirty nine per cent of cases relating to female perpetrators involved separated or separating partners. As discussed below, gender differences were apparent in the type of abuse that occurred in the context of separation.

D Protection Orders

In at least 26 per cent of cases, the female victim of a male partner or ex-partner had obtained a protection or trespass order. Some women were badly injured trying to serve trespass orders on estranged partners without assistance from the police. In four cases involving female offenders, male victims had obtained a protection order. In one case both parties had taken out protection orders and at the time of the female offender's conviction for breach of a protection order, the male

⁹⁸ Vito Ciraco, 'Fighting Domestic Violence with Mandatory Arrest, Are We Winning?: An Analysis in New Jersey' (2001) 22 *Women's Rts.L.Rep.* 169, 178, citing studies.

⁹⁹ Allison Morris, *Women's Safety Survey 1996* (1997) 16, 28.

¹⁰⁰ New Zealand Law Commission, *Justice: The Experiences of Maori Women: Te Tikanga o Te Ture: Te Matauranga o nga Wahine Maori e pa ana ki tenei*, Report 53 (1999) [26].

¹⁰¹ Jo Cribb, "'Being Bashed is Just Something I Have to Accept": Western Samoan Women's Attitudes Towards Domestic Violence in Christchurch' [1997] *Social Policy Journal of New Zealand* 164.

¹⁰² Ministry of Social Development, *Te Rito: New Zealand Family Violence Prevention Strategy* (2002) 40.

¹⁰³ Jennifer Hand, et al, *Free From Abuse: What Women Say and What Can Be Done* (2002) 169.

victim acknowledged that he was serving a sentence of imprisonment for his sixth breach of the protection order that the woman had taken out against him.

E Comparison of Charges with Official Data

Only thirty-nine per cent of sub-lethal assault cases involved a charge of assaulting a female under s 194 of the *Crimes Act 1961*. While this figure would certainly have been much higher if all reported cases could have been confirmed, use of the section as the proxy denominator of intimate partner assaults clearly fails to capture rates of violence against women in the home and the serious nature of many assaults.

IX TYPES OF VIOLENCE BY GENDER

In 2004, the Principal Family Court Judge was reported as stating that the public should become more aware of the 'at times unbelievable things that New Zealanders do to other New Zealanders'.¹⁰⁴ Although the judge's comment is framed in gender neutral terms, as noted by the New Zealand Law Commission, studies reveal important differences between acts of violence perpetrated by men and women in the context of sexual intimacy. One study found:

No wife directed punches so injuries would not show; nor did wives say this what they would do...No husband was threatened with a gun, or chased with guns, knives, axes, broken bottles...Husbands were not kicked or stamped on with steel capped boots or heavy work boots; no husband was 'driven furiously' in the family car, nor was any tossed out at traffic lights....Strangling and choking were not used. No wife attempted suffocation with a pillow. Husbands were not...isolated from friends, nor were any given ultimatums about time spent away from home shopping...No husband had arms twisted and fingers bent, none was frog marched out to the garden to hose, dig or mow the lawn. None was ordered to weed the garden whilst being kicked from the rear.¹⁰⁵

The present study also found violent tactics used by men which had no parallel in female offending. For example, no male was seriously injured after attempting to escape the violence of a female partner by jumping through a closed glass window. No men were injured when they leapt

¹⁰⁴ *That Would Enable the Public to See the 'at Times Unbelievable Things That New...'*, New Zealand Press Association, 1 September 2004.

¹⁰⁵ New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (2001) x-xi citing J Scutt, *Even in the Best of Homes* (Penguin, Victoria, 1983).

out of speeding cars to escape the violence. No men were pushed out of moving cars. No men were choked to the point of unconsciousness, revived, and then choked again. No men were beaten for hours at a time. No female offenders admitted to deliberately directing beatings to a male partner's face in order to damage his appearance. No women stubbed live cigarettes out on men's bodies, or admitted to cutting off men's hair in order to lower their morale. No women bit male partners in their genitals. No woman beat her male partner for five hours, punching him about the head and body, pulling out clumps of his hair leaving bare patches on his scalp, choking him until he blacked out, and after attempting to rape him, cut her own face with a scalpel and dripped blood on him saying she would tell others that he attacked her.

Although both men and women damaged the property of estranged partners, women were rarely involved in home invasions and retaliatory violence against men from whom they were estranged. Women had blood smeared over their faces, were handcuffed, tied up, beaten and forced to watch apparent suicide attempts by estranged male partners. It was women, and not men, who were forced to give up their employment and go into hiding with their children following threats to kill, or cause grievous bodily harm from estranged male partners. Men also physically and sexually assaulted children to punish estranged partners. One offender who raped a woman friend of his estranged wife when she attempted to collect the wife's clothes was described by the judge as having done so in order to 'hit back at his wife'.

X CONCLUSION

Official systems of data collection appear to significantly underestimate rates of lethal and sub-lethal assaults against women sexual intimates. The research found no evidence of systematic indexing/monitoring of legal interventions. In the absence of meaningful, accessible data and monitoring to ensure accountability it is impossible to examine patterns of violence in intimate relationships, evaluate the quality of legal responses, or improve interventions based on this concrete reality.

As discussed above, common classification schemes are of limited usefulness in describing the dynamics of offending in the context of an intimate relationship. To capture the true human cost of domestic violence, the definition of a domestic violence fatality should be based on the theme of masculine control. This theme of control, which is central to patterns of offending associated with dangerousness/lethality, is further examined in the following chapter.

CHAPTER THREE: THE SOCIAL FRAMEWORK - RED FLAGS & THE THEME OF CONTROL

Women are killed by intimate partners - husbands, lovers, ex-husbands, or ex-lovers- more often than by any other category of killer...In 70 to 80 per cent of intimate partner homicides, no matter which partner was killed, the man physically abused the woman before the murder. Thus one of the primary ways to decrease intimate partner homicide is to identify and intervene promptly with abused women at risk.¹

I INTRODUCTION

A theoretical schism between law and the social sciences can inhibit law's responsiveness to the social reality of crime. Accordingly, it is necessary to examine the social context when assessing the effect of current laws and making recommendations for change.² Taking 'reality as a starting point...helps to ensure that we do not take for granted abstract legal categories that may obfuscate rather than clarify the resolution of a legal problem'.³ This methodology contrasts with the specialised methodology employed in law, which is generally referred to as legal formalism. The latter approach principally measures the internal consistency of legal rules and their sources. As a result, there may be little cognisance of their substantive content and social effect.⁴ Therefore, empirical evidence from the social sciences is essential to avoid the subordination of women's concrete experiences to legal abstractions, and ensure that law responds to social reality rather than its own internal imperatives.⁵

This chapter explores the social context of intimate femicide in New Zealand. Kenneth Polk's study of homicides in Victoria, Australia, which builds on the influential sexual proprietariness thesis,⁶ found the overriding theme to emerge from intimate femicide cases was 'masculine control, where women become viewed as possessions of men'.⁷ The theme of masculine control

¹ Jacquelyn Campbell, et al, 'Assessing Risk Factors for Intimate Partner Homicide' [2003] *NIJ Journal* 14, 18 (citations omitted).

² Jenny Morgan, *Who Kills Whom and Why: Looking Beyond the Legal Categories*, Victorian Law Reform Commission, Occasional Paper No 1 (2002) v.

³ *Ibid* 1, citing Nathalie Des Rosiers, 'Reforming or Rethinking the Law? Canada's Experience of Law Reform' (Notes for a speech delivered at the Rencontre internationale des juristes d'expression française 29 June to 2 July 2000).

⁴ Margo Stubbs, 'Feminism and Legal Positivism' in D Kelly Weisberg (ed) *Feminist Legal Theory: Foundations* (1993) 454, 461, noting cognition is controlled 'by employing devices such as specialized legal logic, hierarchical and procedural rules, dichotomous definitions, and an entrenched analytical focus on appellate court decisions'.

⁵ Carol Smart, *Feminism and the Power of Law* (1989) 23-24.

⁶ See, eg, Martin Daly and Margo Wilson, *Homicide* (1988); Margo Wilson and Martin Daly, 'Spousal Homicide Risk and Estrangement' (1993) 8 *Violence and Victims* 3.

⁷ Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994) 56.

also dominated in female-perpetrated killings, most of which 'resulted from the attempt of the male to assert control over the behaviour of his partner through the use of violence'.⁸ Polk's typology of homicides was utilised by the Victorian Law Reform Commission,⁹ along with data from two other Australian studies,¹⁰ to provide the social context for the Commission's Report on defences to homicide.¹¹

Since problems of comparability arise when analysing different data sets due to the different aims of the studies,¹² the research adopts Polk's methodology and system of classification, albeit with some modifications to reflect the circumstances in which New Zealand homicides took place. Where relevant, the analysis also draws on Patricia Easteal's Australian study of homicide between adult sexual intimates.¹³

II THE SAMPLES: A PRELIMINARY COMPARISON

A *Polk's Research*

One hundred and one homicides in Polk's sample were committed in the context of sexual intimacy. In 73 of these cases, males took the lives of female sexual intimates. Twelve cases involved women killing male intimates. Men killed real or imagined male sexual rivals in 13 cases. Two female offenders killed female sexual rivals and the killing of another woman by a female offender arose in the context of a lesbian relationship.

Polk found the overriding theme of homicide in the context of sexual intimacy, no matter which of the parties was killed, was that of masculine control.¹⁴ This theme had two distinct sub-patterns. The first involved masculine possessiveness, with violence used as a control strategy generally aimed at controlling the reproductive capabilities of younger women. Approximately 80 per cent of intimate femicides were perpetrated in this context of masculine possessiveness/control. The second sub-pattern, which concerned a smaller number of cases, exhibited a pattern of suicidal male depression. The male plans his own death and the (usually elderly) woman partner is seen as a commodity or possession which the male must dispose of prior to his suicide. The theme of

⁸ Ibid 24.

⁹ Morgan, above n 2, v.

¹⁰ Ibid, citing Jenny Mouzos, *Femicide: The Killing of Women in Australia 1989-1998* (1999); Alison Wallace, *Homicide: The Social Reality* (1986).

¹¹ Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) [2.37-2.43].

¹² Morgan, above n 2, 11.

¹³ Patricia Easteal, *Killing the Beloved: Homicide between Adult Sexual Intimates* (1993).

¹⁴ Polk, above n 7, 56-57.

control was manifest 'in the husband's view (not shared by the wife) that the couple should "both go together"'.¹⁵

The male is going through some form of depressive crisis which is severe enough to lead him to consider suicide. These events revolve, then, around the decision of the male to take his own life, with the killing of the woman being a secondary consequence of this decision. These males are not primarily focused on the destruction of their partner, but reach the point of insisting, after they have concluded that their own lives must end, that their partner should be a part of this decision as well.¹⁶

Fifteen homicide/suicide cases were classified by Polk as falling within the second depression/suicide sub-pattern of offending. A breakdown in the physical and/or mental health of the parties was a major contributing factor. In some cases in which masculine depression appeared to be brought on by various effects of the ageing process, Polk found hints that the decision to end life was a joint one. The decisions of younger depressed males to commit suicide were generally fuelled by their precarious economic circumstances. Men whose economic dreams had been shattered saw no option but to commit suicide and to 'protect' their wives from the fate that would subsequently befall them by killing them. Polk found no cases of a depressed woman killing her partner as part of her suicide plan. In the majority of cases in which women killed men, women were responding to the violent behaviour of a male partner.

B *The Present Research*

Of one hundred and six homicides in the context of sexual intimacy, eighty-six homicides were perpetrated by male offenders with females as victims. Five males killed male victims. Thirteen females killed male victims. The identity of the perpetrator could not be established in two homicide/suicide cases. In all other homicide/suicide cases the perpetrator was a male. Contrary to assertions that 'the sexes are similar on partner violence perpetration even at the most severe end of the violence continuum',¹⁷ these findings are consistent with a large body of evidence that men are the typical perpetrators of violent deaths in the context of sexual intimacy.

¹⁵ Ibid 45.

¹⁶ Ibid 44.

¹⁷ See, eg, Terrie Moffitt, et al, *Sex Differences in Anti Social Behaviour: Conduct Disorder, Delinquency, and Violence in the Dunedin Longitudinal Study* (2001) 69

To minimise difficulties with comparability, the present study classified homicides according to examples provided by Polk. However, the categories of 'economic gain' and 'killing intoxicated women' are particular to the present research. The former cases appear to have been classified by Polk under the control theme of 'discarding an unwanted partner'. The latter cases, as discussed below, are also appropriately categorised as control cases. The combined totals of these two categories, when added to cases in the jealousy/control category, produce a total of 72 cases (84 per cent of intimate femicides) which conformed to the theme of masculine possessiveness/control. The circumstances of offending could not be established in 10 cases involving male perpetrators due to insufficient information. In five of these cases men killed women partners and committed suicide.

Table Five presents a slightly modified version of Polk's system of classification. As discussed below, the present research does not reflect Polk's depression/suicide sub-pattern of offending.

Table Five: Circumstances of Homicide between Intimate Heterosexual Partners

Intimate Partner Homicides (N=98)	
Female Victim/Male Offender	86
Jealousy/Control	67
Economic Gain	2
Killing Intoxicated Women	3
Insufficient Evidence re Motive	10
Special Cases	4
Male Victim/Female Offender	12
Precipitated by victim's violence	7
Jealousy/Control	1
Economic Gain	2
Other	1
Insufficient Evidence re Motive	1

Two intimate femicide scenarios which were included in Polk's research were excluded from the present study. First, Polk cites a case in which the male 'struck up a sexual relationship' with a

child and the homicide was 'a crude attempt on the part of the male to fend off the consequences of public disclosure of the relationship'.¹⁸ Although such cases were found in the present study, they were classified under the category 'child abuse' and excluded from the sample of intimate partner homicide cases. In Polk's second homicide scenario, a young woman who rejected the continued sexual attentions of a male associate was killed as a result. While 'technically' no relationship between the pair had been established, Polk included the case because 'the two had known each other, the early moves toward a sexual relationship had been made, and it appears that it was the young woman's resistance to the male's sexual advances which resulted in her death'.¹⁹ An almost identical scenario was revealed in the present research. However, the case was excluded from the intimate partner homicide sample as the deceased woman rejected the existence of a romantic relationship.

Two women killed following male threats of departure.²⁰ One woman had been subjected to an appalling history of violence by her husband. The one gay male who killed his estranged partner cited a number of reasons for his actions, including feelings of rejection after his partner ended the relationship. Four men killed a known or suspected male sexual rival. No women killed female sexual rivals. One lesbian killed a male sexual rival. Consistent with Polk's research, there were no cases of depressed women killing partners, elderly or otherwise, as part of a suicide plan. Women who killed men most often did so in response to violence by the male victim.

III THE MALE PROPRIETARINESS THESIS

The male proprietariness thesis emerged from the work of Martin Daly and Margo Wilson.²¹ These researchers posit men's use of lethal and sub-lethal violence toward female intimates as a cross-culturally ubiquitous outcome of marital conflict over female autonomy. Male possessiveness and the need to control an intimate partner are manifestations of a struggle by men for control over the productive and reproductive capacities of their female partners.²² Proprietary

¹⁸ Polk, above n 7, 51.

¹⁹ Ibid 50.

²⁰ Polk found two cases where women killed male partners in response to the threat of the male to leave. In a further case, the woman and her male lover contracted with another male to kill the husband so the couple could be free to start a new life together.

²¹ Polk, above n 7, 211, suggests that the value of this thesis is that it reaches across the major forms of homicide. 'By entering the argument first with the proposition that much of homicide is dominated by gender, and then branching outward from that to discuss situations of masculine control over the sexuality of women, masculine competition for status among themselves, and masculine competition for scarce resources, a conceptual framework follows which embraces the scenarios of homicide which have emerged from the case studies'.

²² See, eg, Martin Daly and Margo Wilson, *Homicide* (1988).

men not only view their partners as theirs exclusively, but also experience feelings of entitlement signified by the recurring declaration: 'If I can't have her, no one else can!'²³

Although sexual jealousy and obsessive/possessiveness are well established risk factors for dangerousness/lethality, the proprietariness thesis conceptualises masculine possessiveness in wider terms than the obvious sexual jealousy which is frequently present in these cases:

'Jealous' and 'possessive' are the terms most often used to describe the mindset of men who have beaten or killed wives, but we prefer to describe such men as 'proprietary'. Proprietariness implies a more encompassing mindset, referring not just to the emotional force of one's desire for exclusivity, but also to feelings of entitlement. Proprietary entitlements in people have been conceived and institutionalised as identical to proprietary entitlements in land and chattels.²⁴

For Daly and Wilson, spousal homicide is a dysfunctionally extreme manifestation of conflicts over control in heterosexual relationships.²⁵ 'Control is attained through the use of violence, with sublethal assaults and threats of homicide being effective control mechanisms.'²⁶ Recent research also found excessive jealousy and possessiveness to be an important factor both in cases where women were killed, and those where abuse did not result in fatality.²⁷ Geris Serran and Philip Firestone cite a number of authorities for the proposition that male proprietariness is best conceptualised along a continuum of proprietariness and female partners on a continuum of resistance in order to effectively determine risk.²⁸ Desmond Ellis and Walter DeKeseredy have integrated the male proprietariness thesis with a theory of interventions based on variations in battering men's responses to women's decisions to exit an abusive relationship.²⁹

The theme of male proprietariness and violence as a tactic of control is also apparent in the following risk assessment instrument in use by legal professionals in the US:

²³ Geris Serran and Philip Firestone, 'Intimate Partner Homicide: A Review of the Male Proprietariness and the Self-Defense Theories' (2004) 9 *Aggression and Violent Behavior* 1, 2-3.

²⁴ Margo Wilson, Martin Daly and Christine Wright, 'Uxoricide in Canada: Demographic Risk Patterns' (1993) 35 *Can.J.Crim* 263, 264.

²⁵ Daly and Wilson, above n 22.

²⁶ Serran and Firestone, above n 23, 4 (citations omitted).

²⁷ Carolyn Block, et al, *The Chicago Women's Health Risk Study: Risk of Serious Injury or Death in Intimate Violence A Collaborative Research Project* (2000).

²⁸ Serran and Firestone, above n 23, 6.

²⁹ Desmond Ellis and Walter DeKeseredy, 'Rethinking Estrangement, Intervention, and Intimate Femicide' (1997) 3 *Violence Against Women* 590.

The presence of 'morbid, obsessive possessiveness', extreme jealousy, rage and/or depression over separation, increase in frequency of violence, stalking behaviors, death threats, and perceived betrayal, especially coinciding with changes in life stressors in the life of the abuser, has emerged as a recipe for lethality. The time of attempted or actual separation from the relationship has been universally recognized as the most dangerous period...Other indicators, which some may consider as more obscure, including the presence of a stepchild in the home, and an abuser's job status, have emerged in recent leading studies. An abuser's unemployment status has consistently emerged as the single most important life stressor factor, which has far-reaching implications for society.³⁰

The proprietariness thesis is an evolutionary theory. Evolutionary psychologists posit legal prohibitions against adultery which traditionally excused men (but not women) who retaliated with lethal violence in response to spousal adultery as part of a process aimed at increasing male reproductive success, and the survival of descendants. Unless the male consistently monitors his partner, or isolates her from other men, he may be cuckolded into investing in and caring for a child who is not related to him. Consequently, 'the return on his investment of time and resources in terms of his genetic representation is zero'.³¹

Serran and Firestone note that it would appear to follow from theories which posit the human species as evolving psychological mechanisms to defend confidence of paternity that men would be especially likely to kill expendable postmenopausal wives. However, Daly and Wilson suggest that 'jealous, proprietary motives would be particularly prevalent among men with younger wives for various reasons. First, younger women are more attractive to men, being a younger wife is associated with a greater probability that she will end an unsatisfactory marriage, attract the attention of other men, and become remarried'.³²

However, critics of evolutionary explanations for male sexual proprietariness note that to function adaptively, sexual jealousy requires a sufficient degree of reality testing. By contrast, obsessive jealousy is a maladaptive survival strategy characterised by consistent and pervasive misreading of social cues of the spouse. The inordinate amount of time spent monitoring and surveilling the

³⁰ Amy Karan and Lauren Lazarus, 'A Lawyer's Guide to Assessing Dangerousness for Domestic Violence' (2004) 78 *F.B.J.* 55, 61-62.

³¹ Rebecca Burch and Gordon Gallup Jr, 'Pregnancy as a Stimulus for Domestic Violence' (2004) 19 *Journal of Family Violence* 243, 244.

³² Serran and Firestone, above n 23, 3.

activities of the female partner is also undertaken at the expense of family survival activities such as procuring nourishment and shelter. Nor is obsessive jealousy and possessiveness confined to females of child bearing age. It can occur across a wide age range including the geriatric age for both male individuals and their spouses.³³

While the sexual proprietariness thesis offers valuable insights into the phenomenon of intimate partner violence, evolutionary explanations overlook important ways themes related to violence are embedded in cultures.³⁴ Culture 'plays a causal role by providing the scripts for the ways in which males and females are to behave.'³⁵ For most feminists, placing power at the centre of theories of men and masculinity reflects the reality that discourses of male dominance are *political*.³⁶ When themes of male control and female subordination are associated with innate biological mechanisms which are not susceptible to conditioning or learning, unequal gender relations may be institutionalised as timeless, inevitable, natural, and even 'normal'.³⁷ Attention is thereby deflected from cultural discourses and practices which endorse and perpetuate male dominion over women.

IV MEN KILLING WOMEN AND MALE SEXUAL RIVALS

A *Sub-Pattern One: Masculine Possessiveness/Control*

Polk found male killers alleged sexual misconduct in one-third of the male jealousy cases. The decision to destroy a woman rather than allow her to fall into the hands of a competitor was also captured in cases where men informed their partners and the world: 'If I can't have you, no one will'.³⁸ Patricia Easteal notes that

[t]his can be labelled as jealousy, or an inability to accept separation, or obsessiveness, or pathological possessiveness, or any of another hundred terms...The derivation of such attitudes

³³ J Arturo Silva, et al, 'The Dangerousness of Persons with Delusional Jealousy' (1998) 26 J Am Acad Psychiatry Law 607, 619-620.

³⁴ Joseph Vandello and Dov Cohen, 'Male Honor and Female Fidelity: Implicit Cultural Scripts That Perpetuate Domestic Violence' (2003) 84 *Journal of Personality and Social Psychology* 997, 1008.

³⁵ Ibid.

³⁶ Nigel Edley and Margaret Wetherell, 'Masculinity, Power and Identity' in Paula Gilbert and Kimberly Eby (eds), *Violence and Gender: An Interdisciplinary Reader* (2003) 106, 110.

³⁷ Donatella Marazziti, et al, 'Normal and Obsessional Jealousy: A Study of a Population of Young Adults' (2003) 18 *European Psychiatry* 106, 107, note that '[t]he boundary between "normal" and "pathological" jealousy is extremely difficult to define and this represents a formidable problem for clinicians. Where the line is drawn between normal and morbid jealousy depends largely upon the social customs of the society in question. Thus jealousy is considered morbid when it exceeds that level of possessiveness which is regarded as the norm for that society or culture'.

³⁸ Polk, above n 7, 32.

toward a female partner are not difficult to locate: a society where women have been long regarded as the property or possession of man. This ownership attitude is exemplified in [a case in which] the estranged de facto husband had 'belted the victim on many occasions' and had said '*If I can't have you, nobody will*'. He also threatened, 'If you do (have an affair), I'll shoot your kid'. And, he did: he shot the ten-year-old boy, the woman, and himself.³⁹

In the present research, this pattern of masculine possessiveness/control encompassed a variety of scenarios:

1 Scenario One: Jealousy/Possessiveness

Cases studies in the present research support Polk's finding that considerable planning and calculation is not inconsistent with killings fuelled by jealous rage.

The Jealousy Scenario: Case Study M/00/1

Gerald, the 37 year-old male offender, told police he killed Natasha, his 23 year-old partner, who was around 12 weeks pregnant at the time of her death, because she had been 'fooling around' on him. (Natasha had repeatedly denied accusations that she was unfaithful.) Prior to the homicide, Gerald lured Natasha to a shed by asking her to help him fix the seat of a car. Gerald said he did this as he did not want anything 'going down' inside the house. He stated there was no argument between the pair and he gave Natasha no warning before attacking her and beating her in the head with a knuckle-duster. At some stage a noose was placed around Natasha's neck - which resulted in a number of abrasions - and a jacket was thrown over her head. A claw hammer was used to cause skull fractures and brain damage. Natasha was placed in the car with the rope still around her neck and the car doused with petrol and set alight.

Gerald, who was injured in the fire, told police he believed Natasha had been sleeping with his friends: 'I'm a useless prick. I should have killed myself and not her', he said. However, at trial, defence counsel claimed Gerald had become angry and lost his self-control due to his belief that Natasha was unfaithful. 'Provocation can be the tiniest little trigger. There is a cumulative effect where things said and things done mount and mount...'

The woman victim in the following case study successfully negotiated a temporary respite from what amounted to extreme and terrifying violence by the jealous male. However despite an apparently mutual agreement to separate she was murdered shortly thereafter.

³⁹ Easteal, above n 13, 108-109 (emphasis in original).

The Jealousy/Separation Scenario: Case Study W/02/10

Robert, the 52 year-old offender, who had a history of violence against women, pleaded guilty to a charge of murdering Wendy, his 56 year-old estranged partner, and to a further charge of wounding her with intent to injure which related to an assault on Wendy two weeks before the murder. Following Robert's guilty plea, seven other charges including unlawfully discharging a firearm at Wendy with intent to do grievous bodily harm, kidnapping, threatening to kill, wounding with intent to cause grievous bodily harm, and assault relating to an attack on Wendy around 16 months before the murder, were withdrawn.

The prosecution stated details relating to the assault charge were recorded in a written statement Wendy delivered to her lawyer the day before she was killed. The letter revealed the couple were attending a function and Robert became angry and jealous when a male associate made an 'off-hand remark' to Wendy. Robert accused Wendy of having 'sexual aspirations' towards the male and when the couple returned home he repeatedly knocked her to the floor, dragged her by the hair to the kitchen and held a knife to her throat. At this stage Wendy's hands were badly injured when she tried to fend off the knife attack and she was cut on her nose with the knife, on the side of her face, and on her stomach. After repeatedly threatening to kill her, Robert told Wendy: 'I'm going to watch you bleed to death'.

A third party arrived at the house, and, while holding the knife to Wendy's throat, Robert informed the visitor that Wendy was out. He then smashed and slashed various household items, cut an electric cord and placed it around Wendy's neck. After telling her he would die before going to jail, and would kill her in the process, Robert was dissuaded from tying Wendy up with belts from a drawer after she promised she would not leave him. Later, Robert cleaned up 'some of the destruction' and the following day Wendy received medical attention which included 14 stitches to her hands.

After expressing his remorse, Robert agreed the relationship should end. Accordingly, he collected his property and left to live in another North Island city. The Court was told Robert lived with one of his sons, registered with several dating agencies, and placed personal advertisements in newspapers. The day before the murder Robert sought medical attention saying he was depressed and could not sleep. He was placed on a three-day monitoring and contact plan. That same day he borrowed a .22 rifle and ammunition from his son, who heard Robert make two telephone calls to Wendy in which he appeared to be pleading with her and making explanations. The next morning, after telephoning the mental health unit to advise he was now feeling well, Robert travelled to the city where Wendy lived.

Later that day, Robert presented at a police station, produced bullets from his pocket, and told police that he had just shot 'his lady' with a rifle, and had left the weapon beside her on the bed. Police and ambulance staff found Wendy lying dead on her bed, shot twice in the chest, and once in the head.

2 Scenario Two: Separation Homicides

Polk notes that in separation homicide cases, there is often no hint of any involvement by the female victim with a sexual rival. The issue is sheer masculine possessiveness. Separation serves to escalate the violent anger of the male who kills in response to the woman's attempts to move out of his sphere of power and control. "The power of the male to control is demonstrated by the very act of destruction of his "possession".⁴⁰

The following case from the present research starkly illustrates this theme:

The Separation Scenario: Case Study W/96/1

David, the 27 year-old offender, who was a tattooist by occupation, tattooed the words: 'Property of David' on the face of Leonie, his 26 year-old girlfriend. Leonie's mother stated her daughter hated the tattoo and was ashamed and embarrassed to go out in public. David had a history of violence and was convicted for assaulting Leonie the year before he killed her. Leonie 'ran away' from the relationship, but met up with David by chance, and was persuaded to accompany him to the home of his relative for a 'talk'. Later she tried to leave, telling David that a friend had told her not to talk to him. David responded by punching Leonie's tooth out. David subsequently told police that he decided then: '*If I can't have her no one will*'. He said he knew he was in trouble given his past conviction for assaulting Leonie, and resolved to 'continue with his mission'. David strangled Leonie with such force that he broke his thumb. He then beat her in the head with a pickaxe handle, strangled her with a karate belt and stabbed her 28 times. Leonie died with her status as the offender's property tattooed across her face.

In his discussion of the estrangement scenario, Polk cites a case in which the deceased woman 'made the unfortunate mistake' of returning home to collect some belongings and died as a result.⁴¹ As in the following case study, some women in the present research were killed when they returned to their homes. While the suggestion that these women were mistaken could be construed as implying some element of fault on the part of deceased victims, it is crucial to recognise that it

⁴⁰ Polk, above n 7, 44.

⁴¹ Ibid 22.

is the abuser's decision whether to use violence, and not the victim's decision to return home to collect personal belongings, or to fetch a protection order, or to meet with the offender, that determines whether the woman survives.

The Separation Scenario: Case Study L/00/4

Alison, a 32 year-old chef, told friends she was leaving Keith, her 41 year-old de facto partner, 'for a new life'. Alison packed her belongings and organised a moving truck to transport her furniture. After leaving her two-year old child in the care of her parents, Alison returned to the house to collect some remaining items. She was shot and killed by Keith who then fled to the bush. Fearing for the safety of Alison's parents and her child, police placed all three in hiding as they searched for Keith, whom they described as 'an alcoholic and in poor physical shape'. Around six months later, Keith's body was discovered in the bush by a trampler. The rifle and empty beer cans were with the body.

While the decision of the woman in the following case to meet with her killer might also be interpreted as a 'mistake'; had the meeting ended amicably rather than in the woman's death, her decision would doubtless have been regarded as rational and appropriate.

The Separation Scenario: Case Study A/02/3

The police summary of facts stated 28 year-old Lyndon, and Langaola, his 23 year-old wife, had a 'stormy and violent relationship'. The court heard that upon being told by his wife of her intention to end the relationship, Lyndon responded that he would 'hunt her down and kill her' if she left. Despite this threat, Langaola left the couple's home, but was so terrified of her estranged husband that until her death four days later she made sure she was never alone. Following her departure, Lyndon 'became more possessive and obsessed, following and stalking [his wife]'. After repeated telephone calls from Lyndon, Langaola finally agreed to meet him, but only in a public place and only if a friend could also be present.

Langaola and a female friend met with Lyndon, who, against their protests, insisted that they drive to his home to collect some belongings. The two women made a pact not to split up. However, after assuring Langaola's friend that he would not harm his wife, Lyndon prevailed on the woman to leave the scene to purchase cigarettes. Once alone, he smashed a chopping board over Langaola's head, stabbed her 42 times, and slashed her throat. Lyndon then stabbed himself and attempted to cut his own throat.

Lyndon later told police he was angry and jealous, and after deciding to kill his wife, he arranged to meet her and persuaded her friend to leave to give him the opportunity. In mitigation, defence counsel cited the offender's belief that his wife was 'carrying on with another man'.

When a separated or separating woman is attempting to weigh the dangers involved in staying or returning home, the property at the centre of the dilemma is often her own. As discussed below, rather than focus upon women's lawful decisions to remain in or return to their homes, the inquiry is more usefully directed toward cultural and legal norms which equate male proprietariness and the theme of control with romantic love.

3 Scenario Three: Homicide and Suicide of Perpetrator: The Estrangement Connection

Table Six: Suicide and Attempted Suicide of Perpetrator

<u>Accompanying Offence</u>	<u>Suicide of Perpetrator</u>	<u>Attempted Suicide of Perpetrator</u>
Homicide of female partner by male offender	14	13
Homicide of male partner by female offender		1
Homicide of male associate of female partner	1	
Assault on female partner	7	
Assault on police officers	1	
Total*	23	14
<u>Unconfirmed 'Domestic Disputes'</u> **		
Suicide in prison	3	
Suicide while on bail	2	
Total	28	14

* Excludes two intimate partner homicide/suicides - gender of perpetrator unknown.

** Excludes one male shot dead by police following a 'domestic dispute'. This scenario is sometimes described as 'suicide by cop'.⁴²

No woman in the present study committed suicide following the killing of her male partner or rival. One female perpetrator attempted suicide after killing her current male partner. In comparison, as shown in Table Six, fourteen male offenders took their own lives after killing their partners. One male killed himself following the murder of his estranged partner's new male

⁴² The Washington State Coalition Against Domestic Violence, *Every Life Lost is a Call for Change: Findings and Recommendations from the Washington State Domestic Violence Fatality Review* (2004) 22, 'included the deaths of abusers killed by law enforcement in counts of suicidal abusers. In all of these cases, abusers acted consciously with life-threatening force that compelled law enforcement officers to respond with deadly force. This behavior has been defined by researchers as "suicide by cop" or "law enforcement officer-assisted suicide"'. (citations omitted.)

partner. Males also committed suicide in the context of assaults on female partners, on a police officer, and following 'domestic disputes'. Death may have been the intention in a further 13 cases in which male offenders tried unsuccessfully to kill themselves after killing their partners or ex-partners.

In Polk's study, no women killed their male partners prior to their own suicide, and Easteal reports only one female perpetrated homicide/suicide. Easteal posits intimate femicide followed by suicide of the perpetrator as the manifestation of an almost uniquely masculine inability to separate one's own identity from that of one's partner.

If a principle theme in homicide-suicides between adult sexual intimates was the inability to see oneself as a separate entity from one's partner with consequent obsessive possessiveness, then we would expect to find that the suicide of offenders was more common when the couple was estranged. [The following data] affirms that hypothesis.⁴³

Consistent with Easteal's observation, of the nine homicide/suicide cases in the present study in which the gender of the perpetrator and the situational context could be established, all involved male offenders killing an estranged female partner or a woman attempting to extricate herself from the relationship. (In five of the fourteen cases, the context of the offending could not be established.)

Estrangement Killings by Men Followed by Suicide: Case Study G/01/1

The relationship between Chanel the 21-year-old female victim and Lee the 23-year-old male offender 'deteriorated' and the young woman broke off the association. The Coroner heard that Lee contacted his estranged girlfriend and proposed marriage two days before the murder/suicide. Chanel refused his marriage proposal and the following day told a friend that she feared her ex-boyfriend would kill her. At this time she asked advice about obtaining court orders and changing her telephone number.

On the night of the killing, Chanel had been out socially with her two flatmates. A female flatmate returned home to find Lee naked in Chanel's bedroom. When confronted, Lee attacked her. Arriving home around 3 am, Chanel heard her flatmate's screams and smashed in the glass door of the flat to go to her aid. Another flatmate called the police. Lee then attacked his ex-girlfriend, stabbing her in the chest and throat. After mortally wounding Chanel, Lee then stabbed himself twice. Both died at the scene of the homicide. A note

⁴³ Easteal, above n 13, 102.

found in Lee's jeans confirmed his plan to commit the murder-suicide. Approximately four months later, Chanel, a police clerk, was remembered at an annual Remembrance Day service for police personnel who died while in service and in retirement. A senior police officer told reporters that persons who knew the couple described Lee as 'just a regular guy' and Chanel as a 'beautiful woman'. The killings were 'just a tragedy', he said.

The apparent acceptance by the police officer in the above case that an offender who invaded his estranged partner's home, injured her flatmate, and killed the woman who rejected him, could reasonably be described as 'a regular guy' indicates that the cultural association of separation violence with romantic love has rendered this red flag for dangerousness/lethality benign. Domestic violence fatality reviews typically emphasise the importance of educating professionals and the public, including victims and their families, about the red flag of male sexual proprietariness. In the absence of such education, obsessive jealousy and possessiveness may be misconstrued by victims and those close to them as indicative of a deep level of romantic affection.

Estrangement Killings by Men Followed by Suicide: Case Study L/98/6

Bertram, the 22 year-old offender and Lauren, the 19 year-old woman victim were living together in the home of Lauren's parents. The night before she was killed, Lauren informed Bertram that the relationship was over. Approximately 24 hours later, Bertram poured petrol throughout Lauren's bedroom and a flame ignited the vaporised petrol fumes while Bertram was standing at the door of the bedroom. Lauren died in the fire and dental records were required to formally identify her body. Lauren's brother escaped from the house unharmed. Lauren's mother was taken to hospital with extensive burns to her legs which she suffered while trying to save her daughter. Bertram also escaped from the house but later died in hospital.

Lauren's father, who told reporters that his daughter had ended her relationship with Bertram the night before she was killed, said he had no ill-feelings towards Bertram who was 'madly in love' with his daughter. 'It was just insane jealousy' he said.

Polk and Eastal observe that although mental illness may distort the motives of male offenders who kill estranged partners, these cases frequently exhibit the same themes of proprietariness and male control that are a dominant feature of homicides committed by offenders who are not mentally unwell. The following case study reinforces this insight.

Estrangement Killings by Men Followed by Suicide: Case Study G/01/3

Family and friends of 21 year-old Lauren and 30 year-old Danny described the couple's relationship as characterised by Danny's obsessively controlling behaviour and abuse. The inquest heard Danny had a history of violence towards women and drug abuse. The year before the killing, police found him naked in the street, making threats to kill, and claiming he was the 'anti-Christ'. Danny was diagnosed as having a mental illness, exacerbated by heavy cannabis use, and spent four weeks as a compulsory patient in secure care at a psychiatric institution. After satisfying health professionals he was no longer a danger, Danny was released into the care of the community mental health service. However, he refused to take prescribed medication, and failed to attend his follow-up appointments with a psychiatrist. When he missed his second appointment, no check was made to ascertain whether Danny should come off the medication. Instead, he was discharged from the mental health service altogether.

After extracting a promise from Lauren to join him there, Danny flew to Australia. However, Lauren and her family viewed his departure as an opportunity to successfully end the abusive relationship. Lauren's mother told journalists that her daughter 'plucked up courage' to telephone Danny and inform him the relationship was over, and she would not be joining him in Australia. The following day, Danny flew back to New Zealand, obtained a temporary driver's licence, hired a car, and travelled to Hamilton, where he stole a gun. He then drove to Lauren's home, broke into the house and shot the young woman in the head as she lay in her bed. After leaving the murder scene, Danny crashed the vehicle he was driving and then shot and fatally wounded himself, leaving a suicide note in the car. Police found empty cans from two six-packs of beer in the car.

An independent psychiatrist told the inquest that when searching for answers to this murder/suicide, people should look at Danny's history of violence and drug abuse. However, the Coroner criticised a mental health system that allowed Danny to leave the country unnoticed after refusing to take anti-psychotic medication and failing to attend medical appointments. His refusals to take injections and failure to keep his appointments should have been seen as 'major red flag signals'.

Lauren's uncle, a serving police officer, told reporters that Danny was quite well known for saying 'you can get away with anything if you act nuts'. He said 'the system, politicians and mental health experts' were out of touch with reality. 'They seem to get this idea of superiority, that their ideas are somehow more important than our ideas'. Lauren's mother said her daughter was 'the sort of business-minded person the country needs'. The young woman designed most of her own furniture and loved rimu. 'The dearest rimu coffin you could have, that's what I got her', her mother said.

Since the 'major red flag signals' identified by the Coroner in this case related to shortcomings in the offender's mental health care, a crucial opportunity to educate society about structural patterns of violence in intimate relationships, in particular the 'red flags' associated with male sexual proprietariness, was missed.

4 Scenario Four: Killing to Conclude an Argument

The need to control some behaviour of the woman is central to the proprietariness thesis. Rebecca and Russell Dobash note that many violent men do not believe women partners have the right to argue, negotiate, or debate with them. In these circumstances, violence is used to silence debate and to reassert male authority.⁴⁴ The following are examples from the 10 cases classified under this scenario of violence as a tactic of control.

Homicide as the Ultimate Method of Concluding an Argument: Case Study H/00/2

Mark, the 31 year-old male offender, had a history of assaults against Trina, his 31 year old woman partner. Police were called to a 'domestic incident' at the home the couple shared with Mark's parents and three children. The Court later heard that Mark arrived home after drinking and the couple argued. Mark launched an assault on Trina during which both his mother and his father attempted to intervene. In response to his mother's attempt to telephone the police, Mark pulled the telephone from the wall. Mark's mother then helped the children to escape through a window to the home of a neighbour to call the police. Before police arrived, Mark stabbed Trina in the neck and chest with a kitchen knife. The children of the mortally injured woman watched as police and emergency services personnel unsuccessfully attempted to save her life.

When police inquired of Mark how Trina had sustained her injuries, Mark, whose hands and wrists were covered in blood, responded: 'I don't know. I didn't do nothing'.⁴⁵ Police officers later gave evidence that as he was being driven to the police station, Mark remarked: 'Good job, the bitch is dead' and began to laugh.⁴⁶

Homicide as the Ultimate Method of Concluding an Argument: Case Study D/96/5

Brian, the 24 year-old male offender and Marilyn, his 52 year-old partner were being driven in a car when they argued about a hotel Marilyn wanted to visit. The driver, who was a friend of the offender, later told

⁴⁴ Rebecca E Dobash and Russell Dobash, 'Men's Violence and Programs Focused on Change' (1997) 8 CICJ 243, 250.

⁴⁵ Transcript of Proceedings, *R v H* (High Court, Gisborne, Williams J, 6 August 2001) 85.

⁴⁶ *Ibid* 128.

police that Brian made a racial comment to which Marilyn took exception. He said Marilyn kicked Brian, who responded by 'pounding her on the head' for about ten minutes. He said there was blood on Marilyn's face and blood on the back seat and he told the pair to get out of the car. The last time he saw the couple, they were sitting together on the side of the road 'just hugging each other'.

Another male witness told the Court he heard shouting outside his home late in the evening and went outside to his front fence. He saw Brian kicking Marilyn who was lying on the ground. The kicks were aimed at Marilyn's head and the only movement of her body was from the force of the kicks. Brian was 'just raving basically, yelling' the witness said. At one stage he heard a crunching sound 'like eggshell breaking'. When he walked out of his gate and on to the street Brian approached him 'quite aggressively' and stated: 'Me and my mate are having a fight. We've been on the piss. What's it to you, mate?' The witness went back into the house and called the police. When he went back to the road, Brian was less agitated and Marilyn, whose face was 'quite contorted', was still lying on the ground, with a dark stain on her head. The witness said he went back inside to tell the police to send an ambulance and found a blanket to cover Marilyn. When he returned and placed the blanket over Marilyn, Brian remarked 'It's cold isn't it? This is my wife.' Brian then lay on the ground and pulled the blanket over both of them. When police arrived, Brian, who was covered with blood, appeared from under the blanket and stood up.

A post-mortem revealed Marilyn 'died from brain injuries and airway obstruction caused by multiple kicks to her face and head'. Brian told police the pair had 'a domestic' about his drug habit and drinking. Police officers later gave evidence that Brian 'made derogatory and violent comments towards women' as he was being driven to the police station. At one point Brian was heard to say: 'This is what happens to women when they annoy you. You throw them on the heap'.

While many intimate partner homicides sit comfortably within categories of killings arising from sexual proprietariness, the types sometimes 'blur at the edges' or one or two cases in a particular category may stand out from the rest.⁴⁷ For example, the following case was categorised as killing to conclude an argument. However, it might also have been classified as a manifestation of male possessiveness and sexual jealousy.

Homicide as the Ultimate Method of Concluding an Argument: Case Study V/02/13

Gary, the 25 year-old offender and Cheyanne, his 18 year-old girlfriend went out to a movie. The couple argued and the young woman went home by herself. Gary stayed in town drinking, and then visited a strip club. The sentencing judge noted that during the night Gary appeared to have 'fuelled some form of

⁴⁷ Kenneth Polk and David Ranson, 'The Role of Gender in Intimate Femicide' (1991) 24 ANZJ Crim 15, 23.

jealousy that was raging within him'. Gary arrived home at about 6 am, awoke his sleeping girlfriend, and argued with her over his belief that she had been cheating on him. Defence counsel stated: 'The conflict escalated with her being on the bed and him holding her down and ripping off her pyjamas and underpants, holding her neck and banging her head on to the concrete wall of the flat'. Gary did not alert the police and when they arrived he refused to grant them immediate access. Cheyanne was subsequently found lying naked on a double bed with head injuries. She died in hospital as a result of severe brain injury.

Gary admitted he had previously been violent towards Cheyanne, but told police: 'I have never been that vicious before'. Defence counsel claimed Gary was guilty of manslaughter, and not murder: 'You can be vicious but not kill somebody' he said.

Cheyanne's mother stated Gary had been violent towards her daughter in the past, but despite pleas from the family Cheyanne always went back to him. She said the family had forgiven Gary. Cheyanne's father said Gary, with tears 'streaming down his face', had told him that he loved Cheyanne 'very very much'.

5 Scenario Five: Discarding an Unwanted Partner

In a further control theme, the offender initiates a new sexual relationship and the killing is a means of discarding an unwanted partner:

The case might be made...that in the eyes of the husband his wife was a disposable possession, to be cast away when a new love entered his life. In such a scenario, the wife is still viewed as property, but property which can be cast off when so willed by the male, and thus the killing is an ultimate expression of control.⁴⁸

In the present study, this theme was identified in three cases involving male offenders who were living with their partners at the time of the homicide while pursuing a sexual relationship with a third party.⁴⁹

In a variant of the 'discarding an unwanted partner' theme, two further killings were classified as motivated by economic gain. The deeply indebted male perpetrator in one case was the beneficiary of his wife's substantial life insurance policy. He had previously called upon the services of women in the sex industry and had spent time with a sex worker on the night he killed

⁴⁸ Polk, above n 7, 50.

⁴⁹ In two cases, following the convictions of offenders, their new female partners announced their intention to marry the men.

his wife and daughter. His attempt to find an alibi upon this liaison was unsuccessful. The male in the second case also stood to gain a significant amount of money from his wife's life insurance policy. His wife's jewellery and other items were found in the offender's car after a delaying device was used to burn down the house in which the woman was apparently sleeping. She was badly burned and later died in hospital.

6 Scenario Six: *Killing Intoxicated Women*

When killings were preceded by an argument they were included in 'Scenario Four' above. However, in three cases, no evidence was found that the couple argued before the offender launched the lethal assault. The mere fact that the women were intoxicated, without more, apparently infuriated their male partners, who were themselves intoxicated.

Homicide of Intoxicated Woman: Case Study K/98/1

James, the 21 year-old male offender pleaded guilty to a charge of manslaughter. The Court was told that James and his 15 year-old girlfriend Wynell were walking home after drinking at a local Pool Club. Wynell 'kept falling over' and James 'became frustrated'. He proceeded to punch the girl in the head and face and kick her as she lay on the ground. After Wynell lost consciousness, James dragged her to a van where they stayed the night before he drove her home the following day. Wynell was flown by rescue helicopter to hospital but died on life support four days later. Family members stated that there were 'no signs of trouble in the relationship', and it had never occurred to them that James was capable of hurting Wynell.

In response to James' sentence of four years' imprisonment, family members noted that with good behaviour, together with the four months' imprisonment already served, James could be released after spending 18 months in jail. Calling for judges to impose tougher sentences, the family disagreed with the judge's assessment of James as 'remorseful', describing him as 'emotionless' throughout the whole ordeal. An aunt of the young victim described her niece as 'a loving, caring girl', who loved children and art.

7 Scenario Seven: *'Killing the Competition'*

Polk notes that in a variant of the estrangement scenario 'the action shifts to encompass the male competition in the sexual triangle' and the male takes the life of the man he perceives to be his

'sexual competition'.⁵⁰ As illustrated below, lethal male violence in this context is sometimes directed at both parties, and sometimes aimed exclusively at the male sexual competitor.

'Killing the Competition' in the Context of Estrangement: Case Study T/01/2

In a double homicide described by the Crown as motivated by 'obsessive jealousy', Richard, the 57 year-old male offender shot and killed Helen, his 43 year-old ex partner and Paul, her 42 year-old new male partner. Helen's brother gave evidence that Richard told him shortly before the killings that his association with Helen was 'far from over' and: *'If I can't have her, no one else will'*. A former lodger and friend of Richard told the court that prior to the double homicide, Richard announced that he wanted Helen back and would 'fight to the bitter end'. At this time he threatened to kill both Helen and Paul.

A 111 call from Helen which documented the last moments of her life was replayed in court. Helen named her ex-partner as the person who had shot both herself and her new male partner. Richard's voice could be heard in the background, repeatedly saying: 'I love you...I wanted you to be my best friend and my partner for the rest of my life.' The tape continued for more than 40 minutes with Helen struggling for breath and repeatedly dropping the telephone. The operator kept reassuring Helen that 'help was on the way' while Helen continued to plead for assistance: 'Help me please...I can't hang on much longer...I'm going to die'. When police arrived they found Paul dead on the front lawn. He had been shot twice in the chest. Helen lay dead in the kitchen, the telephone beside her. Richard had left the scene to give himself up at the local police station. When police searched Richard's property they found 'obsessive' notes and diary items written by him about his 'love and rejection'. The writings included a note to Helen warning her that she would have 'two male deaths on [her] conscience'. Police also found a painting 'of a woman and bullets had been fired at it'.

An emergency services worker went public with concerns over the 40 minute delay in the police response to Helen's 111 call. The matter was referred to the Police Complaints Authority. The sentencing judge described this double murder as 'a crime of passion in "the eternal triangle of love and jealousy"'.

Neil Websdale notes that rather than assume red flags culminate in, or indeed cause death, it may be better to assert that these risk factors are associative or correlative; with the clear understanding that correlation is not proof of causation.

[I]t is clear from other research that lethal outcomes may also depend upon the availability of emergency medical services, especially in the first hour after the shooting or stabbing...Clearly,

⁵⁰ Polk, above n 7, 57.

battered women in rural areas may be at a distinct disadvantage insofar as it may be more difficult to summon emergency medical assistance for them in cases of serious assaults that produce life-threatening injuries. Put differently, cases that appear to exhibit more classic and intense signs of lethality may not culminate in death because better emergency medical services are available to avert death. These cases would then only be coded as aggravated assaults and would not end up among the population of lethal cases used to generate predictive matrices.⁵¹

As demonstrated in *Case Study T/01/2* above, risk assessment instruments should acknowledge the increased risk to rural women who are encountering red flag behaviours associated with increased risk of serious violence/lethality.

Polk describes a case of 'killing the competition' which differed from other cases in that the male offender had apparently never been violent towards his estranged wife, or towards her new male partner prior to the homicide. The offender also confined his lethal violence to his sexual rival.⁵² Although Polk theorises the perpetrator's anger in such cases as aimed at the sexual rival, the male offender in the following case clearly placed the blame for the victim's death on the female survivor. Thus 'killing the competition' may operate as a form of punishment of the woman.

'Killing the Competition' in the Context of Estrangement: Case Study B/96/4

Bradley's mother stated her son had been deeply disturbed by the death of a close family friend. Bradley 'cracked' at that point and told her he was 'sick of being stolen from and shit on'. Bradley shot and killed the male lover of his former fiancée in the hallway of the victim's home. Bradley's former partner, who witnessed the shooting, stated that after killing the male, Bradley told her: 'This is all your fault. I blame you'. Bradley then shot and killed himself.

A feature of homicides motivated by jealousy and beliefs of sexual betrayal was the savagery of the violence involved. Easteal also found that '[o]ne aspect of many of these homicides which cannot be perceived through...tables and numbers is the degree of brutality involved in a number of these killings. This ferocity was particularly present in situations where a knife was used by a male'.⁵³ The present research found this aspect of male violence toward women generally passed without media or public commentary.

⁵¹ Neil Websdale, *Lethality Assessment Tools: A Critical Analysis* (2000) 4 (citations omitted).

⁵² Polk, above n 7, 55.

⁵³ Easteal, above n 13, 40.

The killings of women who are beyond child bearing age by elderly, jealous, possessive men challenge evolutionary explanations of male proprietariness. As discussed in Part II, the jealous 66 year-old offender in *Case Study P/02/6* killed his 65 year-old wife after the couple had lived apart for 11 years. This killing was motivated by the offender's jealous, apparently delusional belief, that his elderly estranged wife was romantically involved with another man.⁵⁴

B *Sub-Pattern Two: Masculine Depression and Homicide Followed by Suicide*

Polk distinguishes this theme of male depression/suicide from that in sub-pattern one as men in the first category are primarily focused upon the destruction of their partners. He suggests that careful reading is required to distinguish the male depression/suicide cases from those in which men kill their partners out of a sense of possessiveness or jealousy and then take their own lives:

The key element of the [second] sub-pattern identified here is that a reading of the case narrative indicates that it is profound depression which has pushed these males to the point where they contemplate the step of committing suicide. Their primary goal is self destruction. In a way analogous to that of jealous males, these husbands view their wives as possessions which should be carried along in this final journey...In contrast, most of the masculine killings of women in the context of sexual intimacy are primarily about the destruction of the women, then when that goal is accomplished some of the males (14 in all) took their own life.⁵⁵

This second sub-pattern of offending was not supported in the present research. Polk suggests that unlike cases in sub-pattern one, the primary goal of offenders in the second sub-category is their own self-destruction and not the killing of the women.⁵⁶ However, in the nine cases in the present study, which on first inspection fell within the depression/suicide sub-pattern, no offender who took the life of a female partner was successful in also taking his own life.

Five elderly, and a younger offender whose wife was chronically ill, killed their ailing wives. Another younger depressed male who was burdened by his gambling debts, took the life of his wife and two young children. These seven offenders were unsuccessful in their attempts to kill

⁵⁴ See, below, at p 260.

⁵⁵ Polk, above n 7, 49.

⁵⁶ Ibid 47-48.

themselves.⁵⁷ The murder prosecution of a further 70 year-old male who had previously headed two mental health hospitals was stayed after the offender was held mentally unfit to stand trial. It could not be ascertained whether the offender's 65 year-old wife was chronically ill at the time she was killed. There was no evidence that this male attempted suicide. In the following case study, the younger depressed male in financial difficulties took the life of his wife, but made no attempt on his own. Rather than conforming to Polk's second sub pattern, this homicide might better be categorised in the control theme of discarding an unwanted partner.

Discarding an Unwanted Partner: Case Study E/99/4

Warren, the 37 year-old male offender, attacked Sandra, his 38 year-old wife with a tomahawk as she lay asleep in bed. Sandra was struck 22 times in the back of the head with the hatchet. During the attack, Sandra put her hands to the back of her head to try to protect herself and received extensive injuries to both hands. After killing his wife, Warren dialled 111 and told the police operator he killed Sandra because 'he was out of work and owed money'. Police found Sandra dead in the bedroom and a teenage girl also present in the house. At depositions, the court heard the taped 111 call. Warren told the operator: 'he had just killed his wife with an axe. He said he loved his wife and had killed her because he owed money and because he was out of work'. Warren also informed the operator that 'he was in financial trouble, had just been made redundant from [his place of employment] and had not been able to find work since. The family car had been repossessed, the phone had been cut and the power was about to be cut'. He said he 'just flipped' and did not remember killing Sandra. The operator noted Warren 'seemed strangely calm for a man who had just killed his wife with an axe'.

At sentencing, following Warren's guilty plea to a charge of murder, defence counsel stated that Warren loved his wife and was at a loss to explain why he had attacked her. Warren 'had psychological problems that needed treatment, and he hoped that as he gained insight into his condition others would be helped'. The Crown made no submissions at sentencing. The judge stated there was only one sentence he could pronounce, that of life imprisonment. Warren replied: 'Thank you, Your Honour'.

While the above offender claimed he could not remember the killing, a clue as to motive may be found in cases from the sample of sub-lethal assaults. In one case, the offender informed an undercover police officer posing as a 'hit man' that he wanted his partner killed because she was 'like a typical bloody woman. She spends everything'. In a further case, the judge stated that the

⁵⁷ An unsuccessful attempt to kill his 84 year-old wife was followed by suicide of the 85 year-old perpetrator in one further case.

offender, who attacked his de facto partner with a jemmy bar and knife while she slept, 'seemed to be blaming the woman for his disastrous financial position'.

If the primary aim of offenders in the second sub-pattern is their own destruction, it seems a 100 per cent failure rate must negate the hypothesis. The reality that no offender accomplished what Polk posits as the 'primary goal' of killing himself, following the killing of his partner, suggests that women partners were the primary targets of these men. This proposition is supported by evidence from the present study that, following the disposition of their cases, offenders frequently lost their former inclination to kill themselves.

Although court and media reports generally portray men who kill in this context sympathetically, some journalists expressed discomfort at the sight of the elderly male offender in the following case, exiting the court with a jubilant smile of triumph, backed up by a thumbs-up gesture at the camera.

Homicide of Ailing Elderly Partner: Case Study K/99/3

The 87 year-old man killed his 86 year-old wife by giving her sleeping pills and then suffocating her by wrapping her head in plastic. The victim who was suffering from a number of medical conditions had apparently told others that she 'wished she could go'. The offender, who had taken a number of sleeping pills, was found by nursing home workers in another room with a plastic bag over his forehead. The offender later said that he passed out before he could secure the plastic bag to his head. He stated he had asked his wife 'Do you really want to go?' and she had replied 'Yes please'. The defence claimed the offender was executing an existing suicide pact and the killing was 'a final act of love'. The offender was charged with murder but subsequently agreed to plead guilty to a reduced charge of manslaughter.

The sentencing judge held special circumstances existed under s 5 *Criminal Justice Act 1985* which justified a non-custodial sentence. Although the offender's support of euthanasia was regarded as an aggravating feature of offending, the judge noted that the special circumstances included: his wife's ill health; the offender was elderly; had a close relationship with his wife over the years; pleaded guilty; and cooperated with the police. His wife had encouraged the offender to commit the offence which was motivated by feelings of love and compassion.⁵⁸ The offender was sentenced to two years' supervision. While accepting that a sentence of imprisonment was inappropriate in this case, the prosecutor emphasised

⁵⁸ *R v K* (Unreported, High Court, Auckland, Paterson J, 29 April 1999).

that 'the Crown is not taking a position on either side of the euthanasia debate. Nor is it encouraging others [to carry out mercy killings]'.

Subsequently, the offender, who is described as 'putting his back out lifting his wife day after day', told reporters that he had been stopped by residents in the Rest Home, and by members of the public out on the street, and told 'Congratulations on a good job'. He stated it was his intention not to pursue the alleged suicide pact: 'Providing I'm 90 per cent fit, I'm quite happy to stay [alive]. But if I get to the stage where I realise I'm on my last legs, I'll take those legs out - I shall find a way of going' he said.

One reporter observed that while the above offender stated that his life was not as much 'fun' since his wife died; it certainly was easier, now that the burden of caring for her had been lifted. 'His attempt to die with his wife failed. [The offender], who could see no reason to live without his wife, now says he's happy to still be alive. We just have to take his word for it that [his wife] is happier dead'.

The director of the Catholic Bioethics Centre queried whether the same leniency would be shown if the killing had involved a younger couple. He told reporters the legal response to this killing revealed

a lack of understanding of how to deal with pain when there is a 'pragmatic response', such as death, available that is ultimately acceptable to authorities. 'People look to the law in this very secular society for their working source of morality and ethics, so if something is legal, then it's also moral and ethical'.

Female victims of so-called 'mercy' killings ranged in age from 64 to 86 years. However, in *Case Study D/00/3* a 57 year-old male took the life of his ailing 49 year-old wife. Although little information on this case could be found, the murder conviction is interesting in light of the above suggestion that the legal system may adopt a different approach when the couple are younger.

Homicide of Ailing Partner: Case Study D/00/3

The adult children of the victim and perpetrator found their mother dead and their father seriously wounded at the couple's home. The female victim was suffering from a kidney disorder which had required dialysis and three operations. The last operation to insert a plastic tube was performed two weeks before her death. The offender, who was also suffering from health problems, quit his employment a week earlier to care for

his ailing wife. After attacking and killing his wife, the offender then stabbed himself in the abdomen. Friends and relatives of the couple stated they were at a loss to explain the murder and attempted suicide. Despite both suffering illness, the couple were described as 'loving and happy'. The first trial of the offender was aborted as a result of concerns over the way evidence was translated. The offender was convicted of murder and sentenced to life imprisonment following his second trial. It is not known what defences were run.

Under s 102 of the *Sentencing Act 2002*, a defendant who is convicted of murder must be sentenced to life imprisonment unless, given the circumstances of the offence and the offender, a sentence of life imprisonment would be 'manifestly unjust'. Commenting on this proviso, the Select Committee cited inter alia 'what are commonly known as "mercy killings", [and] failed suicide pacts' as examples of circumstances which might qualify as manifestly unjust.⁵⁹ As illustrated by the following case study, elderly men who reach 'the end of their tether' and murder their physically or mentally ill wives may be regarded as particularly suitable candidates for a finding that life imprisonment would be 'manifestly unjust'.

Homicide of Ailing Elderly Partner: Case Study L/02/2

Frank, the 77 year-old male offender, fed his 73 year-old wife Olga with sleeping tablets and then hit her over the head with a mallet, and smothered her with a pillow. After killing Olga, Frank, who was suffering from mild diabetes, attempted to kill himself by cutting his wrists. While waiting to die, Frank wrote a note to his son that read: 'Sorry, I can't take it any more. (She) is getting worse every day. Sell the house and you will get something out of it. Please cremate us and have a private funeral'.

Frank told the attending police officer: 'I've been married to her for 54 years, and I couldn't take it any more.' After being cautioned, he stated: 'I knew what I was doing, she had bad Alzheimer's. It's a mercy killing. I've got nothing to live for. I know it's serious and I knew what I was doing. I've got nothing to hide. I was going to call you last night when I didn't die but I thought you would be too busy.' While on bail, Frank told reporters: 'It just got too much for me...It doesn't haunt me - I've slept well and never had any nightmares. I'd do it again, I wouldn't hesitate.' Referring to his unsuccessful suicide attempt, Frank stated: 'I shouldn't be here if I'd done the job properly...The police told me how I should have done it - they're hard shots'. Although he wished he had joined his wife, Frank stated he would not attempt to kill himself again.

⁵⁹ Geoff Hall, *Sentencing Law and Practice* (2004) 591.

Subsequently, the court was told that Frank decided to kill Olga about three weeks before the murder. He had unsuccessfully attempted to gas the pair two weeks earlier. Frank refused to consider professional care for his wife because: 'I wanted to keep her to myself for as long as I could.' He believed Olga 'wouldn't have wanted to be locked away somewhere. She would have been violent with the staff, she was bad enough with me, let alone a stranger'. [His wife apparently told others that Frank beat her.] Defence counsel claimed the existence of a suicide pact as ten years earlier the couple had agreed that if either got Alzheimer's they would 'do each other in'. He said Frank had acted out of compassion and could have defended the murder charge on the ground of his wife's provocation.

The Crown responded that this was not the 'mercy killing' the accused claimed; but premeditated murder which involved violence. There were other options Frank could have pursued rather than a subjective decision that it was best for his wife that he kill her. The prior unsuccessful attempt indicated a degree of premeditation, exacerbated by the 'arrogance' of the accused in deciding that his wife should die. Olga's death had been 'devoid of dignity' and had served the interests of the accused who was struggling to cope with his wife's illness.

However, the sentencing judge found Crown submissions that Frank was motivated by a degree of self interest unconvincing. While accepting that there was no 'suicide pact' as defined in the *Crimes Act*, and evidence showed Olga had struggled for her life for some minutes before death occurred,⁶⁰ the judge cited with apparent approval, a psychiatric report which stated Frank's actions 'appeared to be those of a loving and devoted husband, who was profoundly distressed at his wife's condition'.⁶¹ Frank's refusal to seek help for himself or his wife was due to his 'strong feelings of independence and pride' and was 'understandable'.⁶² On a 'true' construction of events, Frank had 'reached the end of his tether' following his 'loyal and continuing efforts to look after [his] wife'.⁶³

It gave the judge no pleasure to conclude that a sentence of 18 months imprisonment should be imposed as the taking of a human life was not permitted '*even for the highest and best motives*'.⁶⁴ Frank was granted leave to apply for home detention.

Legal constructions of elderly women's deaths as 'merciful', and offenders as 'compassionate', are deeply problematic. The above narrative of a 'mercy killing' perpetrated by a 'loving' offender with 'the highest and best motives' can only be sustained by ignoring Olga's clear desire to survive,

⁶⁰ *R v L* (Unreported, High Court, Hamilton, Randerson J, 29 August 2002) [7].

⁶¹ *Ibid* [16].

⁶² *Ibid* [40].

⁶³ *Ibid* [39].

⁶⁴ *Ibid* [62] (emphasis added).

as evidenced by her desperate struggles to fend off her husband's murderous attack. This legal response to intimate femicide, and associated lenient sentences, may in turn influence prosecutorial discretion whether to even lay criminal charges. (In 2002, the police chose not to press charges against two elderly males whose female partners were found dead with plastic bags over their heads.)⁶⁵

Feminist legal commentators point out that there is more than one way to construct the circumstances in which men kill their women partners.⁶⁶ The above case would not be classified as a 'mercy killing' under Polk's analysis. Indeed, Polk argues these killings exhibit the same proprietary attitudes towards women found in the jealousy/separation cases. 'In a way analogous to that of jealous males, these husbands view their wives as possessions which should be carried along in this final journey'.⁶⁷

Easteal's analysis of the 'elderly offender' cases differs from Polk's, although both researchers found the same male 'ownership' motif to be present when older-age perpetrators killed ailing female partners. Easteal suggests that the killing of sick wives by elderly men may reflect rigidity in gender roles which precludes the ongoing nurturing and care of the woman by the man.

The task of dealing with chronic illness, either one's own or one's partner, plunged the sample of elderly perpetrators into depression.... Older men who were compelled by circumstances beyond their control, to caretake and nurture their sick wives, could not adjust to that role. It is worth noting that there were no homicides committed by older women in similar circumstances.⁶⁸

Many women nurse elderly, ailing male partners, and many are no doubt so profoundly distressed at their partner's physical and mental deterioration that at times, they also 'reach the end of their tether'. However, as Easteal observes, it is noteworthy that these circumstances do not culminate in lethal violence by wives.

⁶⁵ These cases were not included in the homicide sample.

⁶⁶ See, eg, Jenny Morgan, 'Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 MULR 237.

⁶⁷ Polk, above n 7, 49.

⁶⁸ Easteal, above n 13, 90-91.

V WOMEN KILLING MEN

Twelve women in Polk's study killed a current or estranged intimate partner. In eight of the twelve cases this was in direct response to the violence of the male victim.⁶⁹ Coincidentally, the present study also found twelve cases of women who killed a male partner. Prior violence by the male victim was confirmed in seven of these cases. Of these seven women, four were acquitted (three murder charges and one manslaughter charge). A further woman was one of two defendants who successfully raised the sexual provocation defence.⁷⁰ Defence counsel told the Court of Appeal, without objection from the Crown, that the victim's violence toward the female perpetrator 'involved physical and emotional violence including bashings, cutting with a machete, infliction of a venereal disease and continued infidelities'.⁷¹ The Court noted that the woman's

violence and apparent indifference to its results were, as [defence counsel] submitted, more than a jealous response by a jealous wife of her husband's transferring his affections elsewhere. They were in our opinion to such extent a consequence of the deceased's treatment of her over two decades, and of her limited perception of means by which it might be resisted as not to warrant the sentence of 7 ½ years imposed.⁷²

In the sixth case, the woman's defence of self-defence was unsuccessful despite a history of violence by the male victim, including a previous assault for which he was convicted and sentenced to 6 months' imprisonment. The defendant told the police in a video interview that the male victim had assaulted and threatened to kill her. However, the Crown maintained the woman had stabbed the offender as he was running away. Summing up, the judge is reported as instructing the jury that the male victim weighed more than 16 stone and

there was no evidence supporting the Crown case that [the female offender] pursued [the male victim] from the house and struck him from behind. For myself, I cannot see it...but you are perfectly entitled to disagree with me'...[The judge] also questioned whether it would be more probable that [the victim] turned to face [the defendant] then (sic) ran away from her.

⁶⁹ Polk, above n 7, 146.

⁷⁰ See, *R v S* [2002] CA 249/01 (Unreported, Anderson, Williams and Baragwanath JJ, 27 March 2002); *R v F* (1998) 16 CRNZ 88. The cultural backgrounds of the women featured strongly in both cases.

⁷¹ *R v S* [2002] CA 249/01 (Unreported, Anderson, Williams and Baragwanath JJ, 27 March 2002) [5].

⁷² *Ibid* [23].

She says that he turned on her: I will kill you, you f***bitch. What is she expected to do? Punch him? Kick him? Put the knife on the ground? These things happen in a flash'.⁷³

The jury convicted the defendant of manslaughter. In the seventh case, defence counsel told the court that the woman offender had been living in an abusive relationship and was suffering from post-traumatic stress disorder. This woman pleaded guilty to a charge of manslaughter.

One woman killed a male from whom she had separated. As illustrated below, the dominant theme of sexual jealousy and proprietary ownership/control beliefs found in relation to male perpetrators was missing from this case.

Estrangement Killings by Women: Case Study H/02/1/F

Tammy, the female offender, described as a prostitute, lived with Nicholas for 'about a month'. Tammy told police her estranged partner had promised to give her his black MR2 sports car in return for sexual favours for himself and his friends. However, friends of Nicholas stated the car was his 'pride and joy' and he loved it 'very, very much'. Nicholas refused to hand over the car and Tammy tried to take it. Registration records showed the car ownership was changed into her name three times in three weeks. Around four months later, Tammy and one male and one female co-offender arranged for Nicholas to meet them at a beach. Defence counsel for the female co-offender stated that she had agreed to take part in a 'revenge' beating of Nicholas over the disputed ownership of the car. The group took drugs and sniffed solvents and Nicholas, who was 'wasted' on solvents, was set upon by the three offenders. Police stated he was kicked and punched, bound and gagged, and placed in the boot of his sports car. Tammy drove off with Nicholas in the boot of the car to a shopping mall car-park where the police found her. Nicholas had suffocated.

The Crown accepted that the three probably had not planned to kill Nicholas, but knew that their actions were likely to end in death. The sentencing judge noted Nicholas had been lured to the beach so that his car could be taken from him. Tammy was convicted of murder.

In a further 'separation' case, the woman's male lover stabbed her male partner to death shortly after the victim announced his intention to end the relationship. The woman denied any involvement in the killing of her partner. Again, there is no hint that this homicide was motivated by sexual jealousy or proprietary attitudes towards the deceased. Rather, the killing appeared to be

⁷³ *Case Study F/00/1/F.*

motivated by the loss of financial benefits which would ensue from estrangement. The deceased victim had supported the female offender financially and at some time during their 18 month relationship made a will naming her as the sole beneficiary. A clause in the will required the pair to be living together at the time of the testator's death. Prior to the homicide, the female offender apparently told a friend that she wanted to see 'the old bastard dead' and that when he died, she would inherit his property. Both male and female accused were convicted of murder.

A further female was convicted on a charge of careless use of a firearm. The prosecution stated at sentencing that while passing the gun to her husband, a child's intervention caused the firearm to discharge. Insufficient data was available to ascertain the context of the homicide in one further case.

VI THE 'SPECIAL' CASES

Polk defines 'special' cases as

a special [small] group of cases that will confound any attempt to classify the killing on the basis of the social dynamics which link offender with victim, precisely because these dynamics cannot be determined on the basis of the information available, even when at times that information is vast indeed.⁷⁴

Four cases in which men killed intimate female partners that appeared not to fall within any of the above categories were placed in this category. One male threw his girlfriend from a bridge into a dam. She drowned. Although some witnesses claimed the offender knew that his girlfriend could not swim, the offender denied this. Two males injected women partners with an overdose of drugs. In one case, the offender, who had a substantial history of criminal convictions including weapons offences, injected his girlfriend who had a 'fear of needles' with morphine. The court accepted that this was at the deceased woman's request. The offender was convicted of manslaughter. The second woman also died after the offender injected her with morphine. The prosecutor told the court that although it was likely the morphine caused the woman's death, pathologists could not rule out the possibility that death was caused by an asthma attack. Although other evidence indicated that the couple were separated at the time, defence counsel stated they had recently reconciled following a 'volatile' five year marriage. The offender in this

⁷⁴ Polk, above n 7, 156.

case was convicted on a charge of administering the drug and sentenced to a term of nine months' imprisonment. He was subsequently convicted of a 'terrifying' home invasion involving a woman and child. One further intoxicated male crashed his car killing his estranged girlfriend and her new male partner.

VII ALLEGED VICTIM PRECIPITATION

While no male defendants alleged a history of battering by the female victim, in two cases male perpetrators claimed the homicides were perpetrated in self defence. These cases are presented below:

Alleged Victim Precipitation: Case Study M/96/2

The 20 year-old male offender killed Stephanie, his 19 year-old partner, in the flat 'the couple shared with their infant daughter'. The offender told police he killed Stephanie after she 'went schizo' over his refusal to make her scrambled eggs on Mother's Day. He stated Stephanie lunged at him with a knife and he responded by putting her in a choke hold. The offender denied he had used an extension cord to 'finish the victim off' stating that he thought she was already dead and used the cord to stop her body from twitching. Stephanie's body stayed in the flat for 10 days. [No information on the infant's whereabouts at the time or subsequent to the killing was available.] During this time, Stephanie's body was 'packaged' and with the help of a male associate, was placed in the boot of a car where it was discovered about six weeks after she died. The offender was convicted of murder and his appeal subsequently dismissed by the Court of Appeal.

Alleged Victim Precipitation: Case Study M/01/5

The 26 year-old male offender was described as living in an 'on-off' relationship with Helen, the 22 year-old victim. A male witness described the offender as becoming 'paranoid' about Helen and other men. He said he warned the offender to 'chill out' and give Helen some space. The offender told police the pair argued and Helen attacked him. They fought, and he held her down by the neck. When he realised she had stopped breathing, he tried to resuscitate her.

However, police alleged Helen had been strangled and a cord placed around her neck to make the death appear a suicide. The offender's brother gave evidence that the offender told him Helen had died from an overdose of drugs. Subsequently, his brother confessed to strangling Helen. Under cross-examination, the witness became unclear whether the word 'strangled' had actually been used. The offender also told a female associate that Helen had died from a drug overdose administered by him. Believing that to be the case, the woman assisted the offender to dispose of Helen's body and clean the flat. When Helen's body

was eventually found, it was badly decomposed and the cause of death could not be fully investigated. The offender, who was originally charged with murder, pleaded guilty to manslaughter on the morning the trial was to begin.

Helen's family and friends told reporters that justice had not been done in this case. One friend observed: 'Surely strangling a person to death does not come under [manslaughter]. Is this the green light for any disgruntled ex-boyfriend who does not want the relationship terminated to follow [the offender's] example. Helen was accomplished in martial arts...She would have fought him to the last breath - such knowledge agonises her friends.'

VIII CONCLUSION

The present research found a gendered variation in context and motivations of partner killings which appears to hold true internationally.⁷⁵ While male possessiveness and control is the dominant theme in cases of intimate femicide; women who kill men are usually responding to violence by the male. Controlling behaviour; prior use of violence; obsessive-possessiveness and excessive jealousy; threats to kill; stalking; suicidal ideations; the status of the relationship - whether the parties are separated, or in the process of separating - are red flags for serious violence and lethality which should be taken into account along with questions about the batterer's personal pathology; use of drugs/alcohol; employment status; history of abuse outside the home; and access to weapons when determining risk. Battered women in rural areas appear at increased risk due to difficulties accessing emergency assistance.

The conventional wisdom that the risk of domestic assault declines from the time women reach their mid-thirties⁷⁶ needs rethinking. Polk identifies killings of elderly women as part of a pattern of male proprietariness associated with depression and suicide of the perpetrator. However, given that no elderly male who killed an ailing woman partner or depressed younger male in economic straits accomplished this presumed goal of self destruction, these cases may be better categorised under the control theme of discarding an unwanted partner. As Polk acknowledges, regardless of which sub-theme they are allocated to, masculine proprietariness is implicated in these killings. Accordingly, health professionals and others dealing with domestic violence must be made aware of the risk to their partners posed by elderly, depressed/suicidal men.

⁷⁵ Morgan, above n 2, 28.

⁷⁶ Julie People, 'Trends and Patterns in Domestic Violence Assaults' (2005) 89 *Crime and Justice Bulletin* 1, 6; Tamara Burrows, Ross Homel and Cindy Gallois, (2003) 36 *ANZJ Crim* 192.

Since male sexual jealousy and possessiveness claimed the lives of women who were beyond child-bearing age, cultural cues appear more deeply implicated in masculine possessiveness than biological or evolutionary theories would suggest. Although evolutionary theorists may be pessimistic about the potential of the criminal justice system to protect battered women,⁷⁷ cultural theorists argue it is wrong to assume that men 'are incapable of changing the cultures that define them'.⁷⁸

Men's behaviour and attitudes are learned and sustained within the context of friends, relatives, the community, the justice system, the popular media and other arenas that form the overall context of individual's daily lives. The messages from these contexts vary; they may reinforce, support, ignore or reject the use of violence towards partners; often they are mixed.⁷⁹

The following chapter explores the messages the legal system sends when responding to sub-lethal violence in intimate relationships.

⁷⁷ See, eg, Polk, above n 7, 37.

⁷⁸ Edley and Wetherell, above n 36, 112.

⁷⁹ Dobash and Dobash, above n 44, 243.

CHAPTER FOUR: SUB-LETHAL ASSAULTS

THE MISSING FOCUS ON VICTIM SAFETY

Safety for women must be at the core of all activities in responding to situations in which domestic violence has occurred.¹

I INTRODUCTION

This chapter examines contemporary criminal justice responses to violence in intimate relationships. A shift is traced from traditional legal support of a husband's right to beat his wife, to current expectations that women will forgive the violence in order to protect and preserve family relationships. Case studies review legal responses to red flags for dangerousness/lethality and factors relied on to mitigate this offending.

The research found the present compartmentalised legal response permits rules and principles relevant to one domestic violence category to develop inconsistently with policy and practice in relation to another. As a result, legal approaches to battered victims conflict with approaches to battered defendants. Interventions with battered mothers overlook their implications for children and create a tension between the roles of battered women as wives and mothers. This fragmented response is inconsistent with New Zealand Family Violence Prevention Strategy requiring integrated and comprehensive intervention.²

Red flags for dangerousness/lethality have not been systematically incorporated into domestic violence interventions. Although the provision of effective legal protection for victims of domestic violence is a principle aim of the *Domestic Violence Act 1995*,³ legal responses fail to keep women (and sometimes other family members and children) safe. A disturbing aspect of this devastating social reality is the silence surrounding it. Opportunities to investigate current practices, improve risk assessment protocols and enhance protection for victims have therefore been lost. Consequently, the state has become unaccountable to women who risk their financial and personal security, and even their lives, by turning to the legal system for help.

¹ Dennis Falk and Nancy Helgeson, 'Building Monitoring and Tracking Systems' in Melanie Shepard and Ellen Pence (eds), *Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond* (1999) 89, 90.

² Ministry of Social Development, *Te Rito: New Zealand Family Violence Prevention Strategy* (2002) New Zealand Family Violence Prevention Strategy 14.

³ Section 5(1)(b).

II THE CRIMINALISATION OF INTIMATE PARTNER VIOLENCE

A *The Police Response*

Prior to 1986, police domestic violence policy encouraged police officers to mediate between the parties, rather than arrest offenders.⁴ A police officer responding to a domestic violence call and finding an assault had taken place would take no action other than allowing a 'cooling off' period. In 1987, a Report by the New Zealand Committee of Inquiry into Violence observed that the concept of family privacy effectively legitimised violence in the home as it failed to indicate to the abuser that society disapproved of his actions. The Committee noted that it was only in 1985 that rape within marriage became a criminal offence and domestic assaults were still not routinely reported in official statistics. This social context supported perceptions that constructions of women as the chattels of their husbands and the myth that 'an Englishman's home is his castle in which he is free to do as he pleases', were still operative in New Zealand.⁵

Changes in police policy relating to domestic violence were outlined in Commissioner's Circular 1987/11. The Circular directed that where possible the victim should not be required to make a formal complaint, or give evidence in court, unless such evidence was necessary to avoid collapse of the prosecution.⁶ The first survey of this policy change showed nation wide inconsistencies in its application and research commissioned by the Victims Task Force also found gaps in its implementation.⁷ The policy was not articulated in subsequent updates although legal materials indicate its ongoing relevance.⁸ By contrast, legal academics continued to promote the view that arresting the batterer would, in many cases, be an unacceptable criminal justice response. One leading family law text observed that '[i]f tempers have already cooled, *no matter how serious and recent the violence*, an arrest may be inappropriate or indeed provocative'.⁹

⁴ Sergeant JJ Taylor, 'Intervention Into Family Violence by New Zealand Police' in Jon Patrick, Helen Foster and Brian Tapper (eds), *Successful Practice in Family Violence in New Zealand* (1997) 99, 99.

⁵ New Zealand Committee of Inquiry into Violence, *Report* (1987) 96, 101.

⁶ Police Commissioner, 'Domestic Dispute Policy Changes', *Commissioner's Circular, 1987/11*.

⁷ Ruth Busch, Neville Robertson, and Hilary Lapsley, *Domestic Violence and the Justice System: A Study of Breaches of Protection Orders* (1992).

⁸ Dick Webb, et al, *Family Law in New Zealand* (11th ed, 2003) vol 2, 1431, noting that '[u]nder more recent policy, the police will arrest and charge the perpetrator without the victim's laying a complaint'. The authors cite 'Husband and Wife' *The Laws of New Zealand* (para 66) as authority for this proposition.

⁹ P R Webb, et al, *Family Law in New Zealand* (5th ed, 1992) 7510 (emphasis added).

Following recommendations from the 'Bristol Report',¹⁰ and the report of the Victims' Task Force,¹¹ the *Domestic Violence Act 1995* took effect on 1 July 1996. Police policy was updated to coincide with the introduction of the Act. Except in 'exceptional circumstances' offenders are to be arrested, and where action other than arrest is contemplated, the officer's supervisor must be consulted. This policy is described as 'pro-arrest'.¹² The discretion whether to arrest has been more strictly curtailed in US jurisdictions requiring mandatory arrest of offenders.¹³ Paula Martin observes that when arguing for or against mandatory arrest, it is important to be clear about the objectives it is hoped will be achieved.

[D]oes mandatory arrest aim to prevent reoffending by those people arrested or is it more of a general deterrent to the population as a whole? The conference expanded on this by questioning whether the policy should be addressing total cessation of violence or time-limited cessation, i.e. time to failure should also be built in as an outcome measure.¹⁴

However, the Domestic Abuse Intervention Project in Duluth, Minnesota, (DAIP) focuses on consistent responses which centralise victim safety. Ellen Pence and Coral McDonnell point out that if success is measured by counting arrests and conviction rates, or a reduction of the repeat cases entering the system, rather than on building safety considerations into the infrastructure, the system can actually become more harmful to victims.¹⁵

A significant change in attitude was necessary for New Zealand police to move from a policy of mediation to one of presumptive arrest.¹⁶ In 1999, the Ministry of Justice noted that the re-emphasis in 1993 of police domestic violence policy requiring that where sufficient evidence existed, in the absence of exceptional circumstances offenders should be arrested, was likely linked to a sharp rise in charges resulting in conviction in 1994. However, the steady decline in

¹⁰ Sir Ronald Davison, *Report of Inquiry Into Family Court Proceedings Involving Christine Madeline Marion Bristol and Alan Robert Bristol: Report to the Minister of Justice* (1994).

¹¹ Busch, Robertson, and Lapsley, above n 7.

¹² Paula Martin, '4th International Family Violence Research Conference' [1995] *Social Policy Journal of New Zealand* 181, 182.

¹³ Vito Ciraco, 'Fighting Domestic Violence With Mandatory Arrest, Are We Winning?: An Analysis In New Jersey' (2001) 22 *Women's Rts.L.Rep.* 169, 182, notes police still have discretion in determining probable cause. Ciraco divides the states with mandatory arrest laws into three categories based on the statutory threshold required for arrest.

¹⁴ Martin, above n 12, 182.

¹⁵ Ellen Pence and Coral McDonnell, 'Developing Policies and Protocols in Duluth, Minnesota' in Jalna Hanmer and Catherine Itzen (eds), *Home Truths About Domestic Violence: Feminist Influences on Policy and Practice A Reader* (2000) 249, 249.

¹⁶ Sergeant Taylor, above n 4, 100.

conviction rates for domestic assaults since 1995 may indicate that police have become less vigorous in implementing police policy, 'including a greater tendency to document attendances without making an arrest'.¹⁷ Subsequent research finding variable enforcement of the legislation by police personnel who sometimes lacked knowledge of either the remedies available or of how best to manage domestic violence complaints, particularly where a culture existed that was unsupportive of the 1995 Act,¹⁸ provides some support for this observation.

B *The Prosecution*

During the period of the present research, s 5 of the *Evidence Act 1908* provided that the spouse of a person charged with an offence was not a compellable witness for the prosecution. In early cases, the rationale for upholding a husband's privilege to prevent his wife from testifying against him was the biblical concept of 'one mind, one flesh'. The policy later came to be justified in terms of a unity of interest between husband and wife.¹⁹ William Blackstone notes husband and wife were not permitted to give evidence for or against each other 'partly because it is impossible their testimony should be indifferent; but principally because of the union of person'.²⁰

The modern rationale of spousal non-compellability has been described as the need 'to lessen the danger of dissension in the home and disturbance of the peace within families'.²¹ Strong condemnation of attempts to punish women who refuse to testify against violent men²² apparently produced a de facto policy of non-compellability in relation to unmarried victims.²³ Since the state has responsibility for prosecutions, and victims of crime are not usually given the choice whether to give evidence, this intervention model permits dismissal of charges in the face of evidence the defendant committed a crime - but only in domestic violence cases.

¹⁷ Ministry of Justice, *Responses to Crime: Annual Review 1999* (1999) 30.

¹⁸ Helena Barwick, Alison Gray and Roger Macky, *Domestic Violence Act 1995: Process Evaluation* (2000) 87.

¹⁹ Judge David Harvey, 'Spousal Non-Compellability' [1997] NZLJ 114, 115.

²⁰ William Blackstone, *Commentaries on the Laws of England* (16th ed, 1825) vol 1, 443.

²¹ *R v M-T* [2003] 1 NZLR 63, 65 (CA).

²² The decision in *R v Renshaw*, *The Times*, 23 June 1989, to sentence a young woman complainant to seven days imprisonment for refusing to give evidence against her violent partner attracted strong criticism in the UK.

²³ Judge David Harvey, above n 19, 114, citing *R v Burgess* Unreported, Williamson J, 18 February 1992, where the witness was excused as parties had reconciled, were cohabiting, had a family, and were attempting to develop a meaningful relationship.

The *Evidence Act 2006* abolishes spousal non-compellability.²⁴ As it went to the Select Committee, the Bill provided a discretion for judges to excuse spouses, de facto partners and civil union couples from giving evidence if such evidence would cause undue damage to the relationship. That exception was removed by the Select Committee. Although the New Zealand Law Commission has recognised that the public interest in prosecuting perpetrators of domestic violence must be balanced with the need to protect victims who testify from retaliatory violence,²⁵ the Act promotes the former public interest, but is silent as to the latter. Given research showing an elevated risk to women who seek formal interventions to stop the violence, statutory intervention is recommended to ensure that the present emphasis on the duty of the citizen in a civilised society to be available to give evidence²⁶ is accompanied by a reciprocal commitment to ensuring that this civic duty can be safely discharged.²⁷

C The Courts

Contrary to an apparently widespread belief that New Zealand domestic violence policy and legislation is punitive in nature,²⁸ legal responses to this social problem are set within a therapeutic paradigm. The *Domestic Violence Act 1995* has a strong rehabilitative focus, reflecting a preference in society and among the legal community for counselling over incapacitation or deterrence through punishment.²⁹ Domestic violence victims may apply for a protection order directing the respondent not to engage in further abusive behaviours. The legislation provides a police power of arrest for breach of the injunction, with counselling and treatment as the preferred sentencing response. Offenders are court-mandated into group environments in which new ways of dealing with anger and more egalitarian concepts of intimate heterosexual relationships are taught.³⁰

²⁴ Section 71 provides that any person is eligible to give evidence, and a person who is eligible to give evidence is compellable to give that evidence.

²⁵ New Zealand Law Commission, *Evidence*, Report 55, Vol 1 (1999) 93.

²⁶ See, eg, Judge David Harvey, above n 19, 117.

²⁷ See, discussion below, at p 325.

²⁸ See, eg, John Braithwaite and Heather Strang, 'Restorative Justice and Family Violence' in Heather Strang and John Braithwaite (eds) *Restorative Justice and Family Violence* (2002) 1, 17 noting that advocates of restorative justice frequently caricature the criminal law response to domestic violence offenders as punitive and stigmatizing, when the reality is that rehabilitation is a much more predominant response than punishment.

²⁹ See, eg, Judith Martin, et al, 'Attitudes to Reducing Violence towards Women: Punishment or Prevention?' (1993) 106 *New Zealand Medical Journal* 115. Barwick, Gray and Macky, above n 18, found judges, court staff, lawyers and police approved of the rehabilitative focus of the New Zealand legislation.

³⁰ See, eg, Sally Merry, 'Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection' (2003) 25 *Hum.Rts.Q.* 343, 365, for discussion of these programmes.

However, batterer treatment is also the route by which dangerous men may persuade female partners to return to them.³¹ A temporary separation is a common response to a battering incident and if the batterer expresses regret, promises to reform, and enters a treatment programme, his partner is likely to decide the relationship is worth another try.³² Consequently, programme providers and probation officers in the US note the importance of locating education and treatment within the criminal justice sector as this allows for intensive monitoring to ensure abusers complete treatment programmes, and sanctions to secure their continuing participation.³³

By contrast, research indicates that recognition of the need to promote victim safety through monitoring and sanctioning of offenders who fail to attend programmes or who are unremittingly disruptive during the programme itself is missing from New Zealand legal interventions. Research found only about a third of offenders referred to programmes actually completed them. Prosecutions for non-attendance were not generally pursued with enthusiasm.³⁴ While in some cases there were valid reasons for non-attendance, in many cases there was no obvious reason for failure to attend, yet no action had been taken by criminal justice agencies. This was due in part because of the time required to prepare a file for prosecution, and in part because staff were discouraged from pursuing respondents who failed to attend treatment programmes when they saw the sanctions handed down by judges.³⁵

Given overseas evidence that the effectiveness of batterer treatment depends upon the quality of force that supports it,³⁶ these findings raise grave concerns regarding the ability of legal interventions to enhance victim safety by holding batterers accountable. Indeed, the decision in *Police v Tapsell*³⁷ supports UK research indicating that the more contact domestic abusers have with the criminal justice system, the more sophisticated they become in their offending, and in

³¹ US programme providers Russell P Dobash, et al, 'Confronting Violent Men' in Jalna Hanmer and Catherine Itzin (eds), *Home Truths About Domestic Violence: Feminist Influences on Policy and Practice* (2000) 289, 304, observe that men who enter voluntary counselling because they want their partners to return, or because they fear they will leave them, drop out once they have secured their partner's 'co-operation'.

³² Edward Gondolf and Ellen Fisher, *Battered Women as Survivors: An Alternative to Treating Learned Helplessness* (1988) 77-87.

³³ Kerry Healey, Christine Smith and Chris O'Sullivan, *Batterer Intervention: Program Approaches and Criminal Justice Strategies* (1998) 94.

³⁴ Barwick, Gray and Macky, above n 18.

³⁵ Ibid 91-96.

³⁶ Healey, Smith and O'Sullivan, above n 33, 80.

³⁷ (Unreported, High Court, Dunedin, Hansen J, 25 August 2004).

getting away with it.³⁸ In *Tapsell*, the offender was convicted of indecent assault, intentional damage, and male assaults a female in relation to offending against his then partner. He was sentenced to 200 hours community work, concurrent on each charge. The Crown appealed on the basis that the sentence was manifestly inadequate and wrong in principle. The offender had over 100 prior criminal convictions and the pre-sentence report indicated that he had been discharged from a Stopping Violence programme because of his disruptive behaviour. The report writer held little hope for an improvement in the offender's behaviour.³⁹ The judge noted the Crown argument

that the primary focus on sentencing in this case must be the protection of the victim, deterrence and denunciation. He said this is because of the widespread violence and assaults upon females and the criticisms of both the police and the Court in having a too lenient approach to sentencing in this area. He said the personal circumstances of the offender and the need for rehabilitation must be secondary but submitted that a man with over 100 criminal convictions had no realistic prospect of reform.⁴⁰

Acknowledging that the sentence was 'clearly very lenient'; the judge held it was not manifestly unjust. The appeal was dismissed. No reference is made to the sanctions, if any, imposed as a result of the offender's failure to complete the Stopping Violence programme.

One commentator observes that perceptions of criminality and degrees of blameworthiness may be expressed, not through legislation, but in the sentences that judges impose.⁴¹ Given evidence that batterer treatment programmes are limited in their ability to change batterers,⁴² especially in the case of recidivist offenders,⁴³ in the absence of accountability, a clear framework for interventions,

³⁸ Metropolitan Police Service, *Getting Away With It: A Strategic Overview of Domestic Violence Sexual Assault and 'Serious' Incident Analysis* (2004) 8.

³⁹ *Police v Tapsell* (Unreported, High Court, Dunedin, Hansen J, 25 August 2004) [13].

⁴⁰ *Ibid* [14].

⁴¹ Helene Carbonatto, 'Dilemmas in the Criminalisation of Spousal Abuse'[1994] *Social Policy Journal of New Zealand* 21, 27.

⁴² David Adams, 'The Emerge Program' in Jalna Hanmer and Catherine Itzin (eds), *Home Truths About Domestic Violence: Feminist Influences on Policy and Practice* (2000) 310, 321.

⁴³ Richard Johnson, 'Intensive Probation for Domestic Violence Offenders' (2001) 65 *Federal Probation* 36. Maryann Syers and Jeffrey Edleson, 'The Combined Effects of Coordinated Criminal Justice Intervention in Woman Abuse' in Karen Maschke, *The Legal Response to Violence Against Women* (1997) 286, 296, note that the most potent police visit is the first one - it is the combination of first visit during which an arrest is made, followed by court-mandated treatment that appears to be the best predictor of lower recidivism rates.

and a meaningful response from the courts, the present treatment prescription may simply offer another false hope to women, thereby exposing them to further danger.⁴⁴

III RETURNING THE FOCUS TO DECRIMINALISATION: THE RULE OF LOVE

A *The Transition from a Rule of Force to a Rule of Love*

'Far from protecting women from it the law historically sanctioned the abuse of women within marriage as an aspect of the husband's ownership of his wife and his "right" to chastise her.'⁴⁵

Under the doctrine of coverture, by entering into marriage, the wife's legal status as a married woman was reduced to 'either none or no more than halfe a person'.⁴⁶ Blackstone explained:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law - French a *feme-covert*...and her condition during her marriage is called her coverture.⁴⁷

Frances Dolan notes that coverture, both as the collection of restrictions imposed on married women, and as the figurative notion that the wife is 'covered' by her husband, was always understood as a strategy designed to overcome, in the husband's favour, the dilemma of who should have legal responsibility within the partnership of marriage. 'Lawyers and judges used marital unity as a legal fiction, that is, as a set of imaginary "facts" created to achieve a legal result.'⁴⁸ Early male legal theorists expressly justified unequal allocation of legal power between husband and wife on the basis of men's greater capacity to use force to achieve dominance over women.⁴⁹ Since the wife's property effectively passed into her husband's hands upon marriage, Ngaire Naffine observes that the married woman was deprived of the economic independence necessary to effectively challenge her husband's authority.⁵⁰ This legal subjection of the wife to

⁴⁴ See, eg, Healey, Smith and O'Sullivan, above n 33, 59.

⁴⁵ *Lavallee v R* [1990] 1 SCR 852, 872 per Wilson J.

⁴⁶ Francis Dolan, 'Battered Women, Petty Traitors and the Legacy of Coverture' (2003) 29 *Feminist Studies* 249, 255, citing *The Lawes Resolutions of Women's Rights: or The Lawes Provision for Woemen*, compiled by I.L. and revised by T.E. (London, 1632) sigs I7, B2v. Dolan notes the most thorough discussion of authorship favours Thomas Edgar (1602-1692): at 274, n13.

⁴⁷ Blackstone, above n 20, (emphasis in original).

⁴⁸ Dolan, above n 46, 257.

⁴⁹ Ian Leader-Elliott, 'Passion and Insurrection in the Law of Sexual Provocation' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (1997) 149, 165.

⁵⁰ Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57 *MLR* 10, 19.

the rule of her husband conferred a state-sanctioned license upon husbands to beat, rape, and terrorise their wives.

English common law adopted an amended version of the Roman doctrine of *patria potestas* which gave a husband the right to 'unrestrained physical chastisement' of his wife.⁵¹ Removing the power of life and death,⁵² common law allowed for 'subtle' or 'domestic' chastisement of wives.⁵³ One of the earliest clear authorities for a husband's right to beat and in some cases imprison his wife is set out in a published manual of procedure in 1516.⁵⁴ In *Sir Thomas Seymore's Case* the majority held that a wife could have no remedy at common law against a husband who beat and threatened her for she was *sub virga viri*, that is, under the rod of her husband.⁵⁵ The level of cruelty required to obtain a magistrate's order was high. The violence had to be 'persistent' and a wife could not complain of assaults she had 'condoned': 'Reaching the end of her tether after a long history of assaults, covered up or forgiven in the vain hope of improvement, she would have to wait for a fresh incident to give grounds for relief.'⁵⁶

Susan Atkins and Brenda Hoggett observe that the most insidious concept of all to emerge from the cruelty cases was the doctrine of provocation. This doctrine prevented a wife from obtaining a divorce for cruelty unless it appeared that 'she was a person of good temper and had always behaved well and dutifully to her husband'. In the leading case of its time, Sir William Scott in *Waring v Waring* explained:

⁵¹ J David Hirschel, et al, 'Review Essay on the Law Enforcement Response to Spouse Abuse: Past, Present, and Future' (1992) 9 Just.Q. 247, 250.

⁵² G Kristian Miccio, 'With all Due Deliberate Care: Using International Law and the Federal Violence Against Women Act to Locate the Contours of State Responsibility for Violence Against Women' [1998] Col.Hum.R.L.Rev. 641, n 22 explains that under ancient Roman law 'the authority to rule within the familias gave the patriarch complete control over wife and children. The father could sell his children into slavery, withhold or give consent to marriage and order divorce. Additionally, the father was vested with the authority to order his wife put to death if she committed adultery'.

⁵³ *Ibid*, noting that Blackstone's references to 'subtle chastisement' and 'domestic chastisement' suggest the physical force inflicted on wives fell short of beating, but nothing could be further from the truth. 'Husbands were permitted to inflict injury upon their wives as long as the resulting harm was not life threatening. Conduct that resulted in black eyes, welts, and split lips constituted no violation of law. Such beatings were inflicted with impunity and beyond the purview of the state'.

⁵⁴ Maeve Doggett, *Marriage, Wife-Beating and the Law in Victorian England* (1992) 4-5, notes a writ of *supplicavit* was available from the Court of Chancery and the King's Bench to the wives of violent husbands which contained the proviso that the husband 'should not do, nor procure to be done, any Damage or Evil to her of her Body, otherwise than what reasonably belongs to her Husband, for the Sake of Government and Chastisement of his wife lawfully...'. This proviso was decisive in *Sir Thomas Seymore's Case*.

⁵⁵ Godb. 215; 72 ER 966.

⁵⁶ Susan Atkins and Brenda Hoggett, *Women and the Law* (1984) 128.

I do not mean by this that every slight failure on the part of the wife is to be visited with intemperate violence on the part of the husband...But if the conduct of the wife is inconsistent with the duties of that character, and provokes the just indignation of the husband, and causes danger to her person, she must seek the remedy for that evil, so provoked, in the change of her own manners.⁵⁷

Although as Dolan points out, it was only gradually acknowledged that husbands could be tyrants, it had long been feared that wives could be traitors. A statute of 1352 defined husband killing as warranting a charge of treason. Women who killed their husbands were convicted of petit treason and burned alive. Husbands who killed wives were guilty only of murder as 'there is subjection due from the wife to the husband, but not *e converse*'.⁵⁸ Even a legally separated wife could be found guilty of treason and burnt at the stake.⁵⁹ Dolan notes that many of the documented accounts of petit treason narrate a history of domestic violence against the wife. However a history of battering was not taken as justifying, or even explaining, a wife's murder of her husband.⁶⁰

Naffine observes that a further violence was done to the wife that was explicitly sexual. The law of primogeniture, which ensured the passage of property to the eldest son of the marriage upon the death of the husband and father, was concerned with 'posterity and the family lineage':

For this law to work...it was vital that the law recognise the male right of control over (the fertility of) his wife. The husband had to have access to her reproductive body as well as the right to exclude all others from her body (for he had to know that his sons were his)...The legal fiction employed to guarantee this right was to treat a woman's consent to marriage as much the same thing as consent to intercourse (with her husband)...Once married, the wife was therefore presumed to have consented to every act of intercourse with her husband: a married woman had no right to refuse the proposal to be possessed.⁶¹

Women's activism threw doubts on the legitimacy of gender status laws and brought pressure to bear on lawmakers and legal elites. Blackstone's commentaries on the doctrine of chastisement

⁵⁷ Ibid 129 citing (1813) 2 Hagg. Con. 153.

⁵⁸ Leader-Elliott, above n 49, 164, citing Mathew Hale, *The History of the Pleas of the Crown* (3rd ed, 1800) Vol 1, 380.

⁵⁹ Dolan, above, n 46, 261.

⁶⁰ Ibid 269.

⁶¹ Naffine, above n 50, 19.

were relegated to an era where society was 'much more rude' and in 1871, a US Court observed that a husband's 'privilege, ancient though it be, to beat [his wife] with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law'.⁶²

Nevertheless, the historian Reva Siegal notes that when gender status laws are challenged,

legal elites may begin to cede status privileges, but they will also defend them. They will initially defend privileges within the traditional rhetoric of the status regime - but because the traditional rhetoric of the status regime is now socially contested, they will begin to search for 'new reasons' to justify such status privileges as they choose to defend. As reform of the common law marital status rules illustrates, this process of ceding and defending status privileges will result in changes in the constitutive rules of the regime and its justificatory rhetoric - with the result that, over time, status relationships will be translated from an older, socially contested idiom into a newer more acceptable idiom. In short, civil rights reform ...does not simply abolish a status regime; in important respects, it modernizes the rules and rhetoric through which status relations are enforced and justified.⁶³

Accordingly, when judges stopped insisting upon a husband's legal prerogative to beat his wife, they began to declare that criminal law should not intervene in domestic violence in order to protect the privacy of marriage and promote domestic harmony. 'Once translated from an antiquated to a more contemporary gender idiom, the state's justification for treating wife beating differently from other kinds of assault seemed reasonable in ways the law of chastisement did not.'⁶⁴ Although judges often discussed the affective life of marriage as if it were normatively 'outside' of law, Siegal notes that in practice, judges acted creatively and synthetically to bind privacy to violence and so preserve the chastisement prerogative.⁶⁵

This construction of affective privacy transformed the doctrine of chastisement by preserving the husband's marital prerogative in a new juridical form - as legal immunities. 'In 1957 the then Master of the Rolls warned of the dangers of intervening between husband and wife: "among

⁶² Reva Siegal, "'The Rule of Love': Wife Beating as Prerogative and Privacy' (1996) 105 Yale L.J. 2117, 2135, citing *Fulgam* 46 Ala. 143 (1871).

⁶³ *Ibid* 2179.

⁶⁴ *Ibid* 2120.

⁶⁵ *Ibid* 2183.

themselves they can claim a kind of sacred protection behind the door of the family home which, generally speaking, the civil law may not penetrate".⁶⁶ A policy of non-intervention in domestic violence persisted far into the twentieth century and was reflected inter alia in the barring of married women's tort claims against violent husbands, and the immunity of husbands from prosecution for raping their wives.⁶⁷ If the husband's violence was kept out of the public realm, it would properly be forgiven by the altruistic wife. As one legal scholar explained: 'The rule of love has superseded the rule of force'.⁶⁸

B *The Rule of Love in Contemporary Interventions*

Ian Leader-Elliott observes that society has inherited from the doctrines of marital unity and chastisement an unspoken assumption that marriage and equivalent relationships are enclaves within which the usual rules relating to violence do not apply.⁶⁹ Although societal acceptance that the infliction of violence by one partner against the other is not inconsistent with a loving relationship appears contrary to the focus in national domestic violence policy on 'healthy gender roles' and 'non-violent concepts of masculinity',⁷⁰ as discussed throughout this research, this assumption pervades criminal law responses to violence in intimate relationships.

Consistent with national domestic violence policy, a recent world conference on family violence also focused on male sex-role stereotypes and cultural images of masculinity.⁷¹ However, the female counterpart to the domestically violent male is rarely the subject of inquiry. Naffine notes the Romantic ideal of womanhood is that of 'complete devotion...with soul and body' to the man. The woman 'who devotes herself completely to a man, "becomes a *more perfect* woman".⁷² Interviews with battered women reveal discourses of 'perfect love' can bind women in relationships with battering men and impede attempts by others to intervene.⁷³ Since the power

⁶⁶ Atkins and Hoggett, above n 56, 133.

⁶⁷ The *Crimes Amendment Act 1985* repealed the former s 128(4) *Crimes Act 1961* which contained the immunity rule.

⁶⁸ Siegel, above n 62, 2170.

⁶⁹ Leader-Elliott, above n 49, 165.

⁷⁰ Ministry of Social Development, above n 2, 14.

⁷¹ Janine Moss, 'World Conference on Family Violence: Sharing Solutions, Changing the World' [1999] *Social Policy Journal* 172, 175-176. Since there were probably fewer than 40 males among the 450 conference delegates, it may be premature to assume a universal or even widespread acknowledgement of the need to challenge physically and sexually aggressive male stereotypes.

⁷² Naffine, above n 50, 13, citing Friedrich Nietzsche, *The Gay Science, Translated, with Commentary, by Walter Kaufmann* (1974) 319 (emphasis in original).

⁷³ Alison Towns and Peter Adams, "'If I Really Loved Him Enough, He Would Be OK': Women's Accounts of Male Partner Violence' (2000) 6 *Violence Against Women* 558, 566.

of perfect love to transform or redeem the loved one is axiomatic to depictions of perfect love, these discourses script women to love better to stop their male partner's violence. Jealousy and possessiveness may be reinterpreted as placing an onus on the woman to avoid attracting the attention of other men, thereby restricting her freedom of expression and association. There may also be 'a seductive invitation to the woman to forgive a man who is so powerfully afflicted by his love for her that he is at times driven "berserk" to use violence against her'.⁷⁴

This cultural equation of male jealousy/possessiveness with romantic love is also evident in *Case Study D/99/11(S)*. The couple in this case separated following alleged assaults by the offender on his partner who took out a protection order. While on bail on the assault charges, the offender sought out his estranged partner in breach of his bail conditions. Finding her with another man, he attacked the woman, threatened her with a knife and left the house with the couple's 10-month old child, still wielding the knife. He was shot by police. At depositions, with her baby daughter playing at her feet, the woman reportedly gave evidence of her partner's attack on her, his threats to kill, and how he had tied her up on the day of the shooting. Informing the Court that she wished to reconcile with the offender and did not want him imprisoned, the woman stated: 'I know that deep down [the offender] didn't want to hurt me. He was just...showing me who was boss'.⁷⁵

Two apparently opposing views of female love in the face of male aggression can be contrasted. An Auckland psychologist is reported as suggesting that women have traditionally mistaken male aggressiveness and bullying with strength or charisma: '[A] lot of women kid themselves with "naïve idealism"...It's that belief that underneath that rough exterior is a heart of gold - "he might have shot a few people, but its because no one loved him and I can provide all that now"...it's those mothering, nurturing traits that should be saved for our children'.⁷⁶ By contrast, Nan Seuffert argues that psychological discourses of female love in the face of horrific abuse fail to acknowledge ambiguities and complexities in relationships and discount battered women's heroism.⁷⁷

⁷⁴ Ibid.

⁷⁵ The sentencing judge noted that he had been swayed inter alia by the victim's attitude and expressed his regret that under home invasion legislation he was unable to impose a lesser sentence.

⁷⁶ *Allure of the Bad Boy Proves Hard to Resist*, Truth, 30 March 2001.

⁷⁷ Nan Seuffert, 'Domestic Violence, Discourses of Romantic Love, and Complex Personhood in the Law' (1999) 23 MULR 211.

Although Seuffert's analysis implies some criticism of feminist activists who 'are uncomfortable with, or embarrassed for, women who state that they love their abusers',⁷⁸ other legal scholars suggest that in the present system of gender inequality, 'romantic love plays an apologetic role; it mystifies women about their dependency on men and reinforces male hegemony'.⁷⁹ Alison Young observes that:

Just as it is possible to argue that the legal construction of marriage permits a degree of violence to be perpetrated on the wife by the husband, so it can be said that contemporary elaboration of the nature of romantic love contains within it the potential for precisely the kind of reactions that lead to the battered woman being categorized as having a psychiatric disorder.⁸⁰

The present research found Seuffert's contention that 'when a woman states in court that she loves, or loved, an abusive partner, the court has no jurisdiction to hear her statement and no lens of precedent through which to reflect and refract this love'⁸¹ needs refining. While courts may be unable 'to hear the claims of love made by women who have killed abusive partners',⁸² courts have little difficulty validating, even valorising women's protestations of love and pleas for leniency when mitigating the sentences of their batterers.⁸³ These expressions of love and pleas for leniency frequently occur in the context of gross violence toward the female victim.

In *Case Study D/97/1(S)*, the sentencing judge noted that despite evidence at depositions from a gynaecologist who described the victim's 'horrific' genital injuries as 'the worst he'd seen in 25 years', the woman had minimised the extent of her suffering, forgiven the offender, and the couple were planning a new life together. In *Case Study T/97/2(S)*, the offender was convicted of disfiguring his partner with reckless disregard after he set her alight. Defence counsel stated that the offender had acted in the 'heat of the moment' during a serious domestic dispute. The couple

⁷⁸ Ibid 212.

⁷⁹ Francis Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' in Patricia Smith (ed), *Feminist Jurisprudence* (1993) 65, 86.

⁸⁰ Alison Young, 'Conjugal Homicide and Legal Violence: A Comparative Analysis' (1993) 31 Osgoode Hall L.J. 761, 805.

⁸¹ Seuffert, above n 77, 235.

⁸² Ibid 232.

⁸³ Geoff Hall, 'Victim Impact Statements: Sentencing on Thin Ice?' (1992) 15 NZULR 143, 158-161 notes that the weight to be attached to victim impact statements under s 8 of the *Victims of Offences Act 1987* was earlier considered in *Lowe v Police* (1988) 3 CRNZ 199. While the Court in *Lowe* held this legislation did not require courts to surrender their responsibility to impose the appropriate sentence, in *R v B*, (Unreported, High Court, Dunedin, Smellie J, 14 June 1989) Smellie J noted that while it would ordinarily be quite inappropriate for a victim to suggest the punishment to be imposed, 'the one exception to that is where the victim volunteers a plea of clemency or compassion'. Such pleas are a notorious feature of domestic violence cases.

were reconciled and now wanted to support each other and look after their child. In *Case Study K/97/3(S)*, the victim was punched in the face, dragged through a car window, punched, kicked and her throat cut with a butcher's knife. Police stated that the wound 'came within a whisker' of hitting a main artery. The couple married 20 days after the assault. The victim told the Court that the offender 'was the only man she had ever loved'.⁸⁴

In *Case Study K/00/6(S)*, the judge granted leave to apply for home detention to an offender who beat his partner, and kicked her in the face with his steel-capped boots so hard that one of her eyes fell out. The sentencing judge stated that he had taken into account the fact that the victim 'was still with [the offender], still loved him and wanted him back'. In *Case Study G/05/1(S)*, the victim received multiple stab wounds to her throat, body, legs and hands. The attack left her 'permanently scarred and disabled'. Defence counsel acknowledged that 'the assault was horrible. The injuries were awful'. However, the woman refused to make a statement, or appear in court to testify against the offender and prepared an affidavit about their relationship in his favour. Although the Crown argued that this could be seen as the act of a dependent battered woman whose real need was to be protected, the sentencing judge stated that the only mitigating factors saving the offender from a longer jail term were the victim's support and the offender's remorse.⁸⁵

⁸⁴ See, also, *Case Study H/08/6(S)* where the judge described 'an appallingly terrifying series of events' in which the victim was grabbed and thrown onto the bed, pulled by the hair, grabbed by the ears, and verbally abused. She was then pinned against the wall with the offender's forearm across her throat, had her head banged against the wall several times and was head-butted. Following this, she was taken to a local reserve where the offender again took her by the ears and banged her head into the ground, tearing two earring studs from her right ear. Later that morning, he assaulted her again, throwing food at her, picking her up and throwing her to the ground, ripping her dress and spitting on her. The judge noted that although the victim had suffered terribly at the hands of the offender, she still wanted the relationship to continue. In *Case Study N/01/23(S)* the offender was convicted of rape, unlawful sexual connection, and breach of a protection order in relation to his partner. The sentencing judge noted that the victim still loved the offender and they had resumed a relationship. The woman wanted to protect her partner, particularly as they had children together.

⁸⁵ In *Case Study W/08/5(S)* the offender was convicted on four charges of injuring with intent to injure and one of cruelty to an animal. The judge stated that he was sorry to have to read out the details of these assaults but the offender had to face the cruelty he had engaged in. In the first incident the offender slashed his wife's hand with a knife. In the second, without warning, the offender 'drove her head-first into a wall, causing severe concussion. The woman was left with vision problems'. In the third, the offender 'hit the woman across the back of a leg with a sword. A few moments later he slashed her across the face with the blade, opening a gash across her nose'. In the fourth, the offender 'began punching the woman and when she retaliated he threw a knife at her, swung the sword at her again, head butted her and put her in a headlock. She escaped only after [the offender] had slammed her head-first against a wall'. The judge noted that on this occasion the woman was found to have injuries to her head, arms, legs, chest and face. The offender was also convicted of kicking a two month-old terrier pup with his steel-capped boots breaking the dog's hind leg. Defence counsel stated that the offender and his 'now pregnant 18 year-old partner' were reconciled. The offender's sentence was described by the sentencing judge as 'appropriate' given his remorse and his wife's wish to resume their relationship. Later that year the offender was convicted of attempting to procure the murder of the police officer who arrested him.

Abusers were also congratulated as 'lucky' or 'fortunate' to have such a forgiving partner or spouse. In *Case Study T/99/8(S)*, the offender, who was fined after punching his partner in the face and locking her out of her home, was described by the sentencing judge as 'lucky your partner continues to support you'. In *Case Study C/99/8*, police personnel watched the woman victim exit the passenger door of a car and fall to the ground. The offender exited the car and assaulted her, stopping only when police dragged him away. Following his assault conviction, the offender was discharged. The sentencing judge noted that the offender was 'fortunate' his partner had written to the court on his behalf.

Notwithstanding earlier legal commentary suggesting that victims' pleas for leniency are irrelevant on appeal,⁸⁶ the New Zealand Court of Appeal has acknowledged the relevance of victim forgiveness when discounting an abuser's sentence. In *Case Study P/99/10(S)*, the offender was convicted of attempting to procure the murder of his partner. The intended victim stated that 'she had no fear of [the offender] and wanted him to return to her as soon as possible'. When reducing the offender's sentence, the Court of Appeal noted that: 'A sentence of two and a half years will in all the circumstances, including the unusual feature of the intended victim's attitude and desire to retain her relationship with the appellant, meet the overall ends of justice'.⁸⁷ Subsequently this offender was convicted of attempting to procure the murder of his former wife in order to collect her life insurance. This second intended victim stated that she had been 'an absolute fool' to ignore signs that the offender was trying to kill her, including the fact that he had planted petrol filled containers around their home.⁸⁸

⁸⁶ Geoff Hall, 'Sentencing (I): Matters of Aggravation and Mitigation' [1985] NZLJ 139, 142, stating: 'A plea for mercy by the victim of an offence, after sentence has been imposed, is a matter that should not be considered by an appellate Court: *R v Pritchard* (1973) 57 Cr App R 492. A complainant's subsequent attitude to the degree of sentence is an irrelevant consideration: *R v Hampton* [1965] Crim LR 564'.

⁸⁷ *R v P* [1999] CA 202/99 (Unreported, Henry, Anderson and Robertson JJ, 28 July 1999) [10].

⁸⁸ See, also, *Case Study M/06/4(S)* where the offender's partner informed him that she wanted to end their two and a half year relationship and refused to leave a bar with him. The offender responded by throwing beer at a man whom he believed was romantically interested in his partner. When his partner tried to prevent him from throwing the bottle, the offender picked up a piece of broken glass from the floor, dragged the woman by the hair and slashed her face with the glass. She was cut from her mouth to her ear and required 60 stitches to her face. A witness later stated that the offender then wrapped his legs around the woman's neck and tried to choke her. The witness said he tried various ways learned after 14 years' experience as a prison officer to break the offender's hold on the woman. In the end, he 'grabbed his private parts and lifted him off the woman'. A barman also gave evidence that the offender deliberately slashed the woman's face. Subsequently, both the victim and the offender claimed the victim's injuries were accidental. The jury convicted the offender of wounding the woman with intent to injure and he was sentenced to two and a half years' imprisonment. On appeal the Court of Appeal in *R v M* [1997] CA 128/97 (Unreported, Eichelbaum CJ, Henry and Heron JJ, 23 September 1997) [3-4], reduced the sentence by six months noting that the judge had given insufficient weight to the punishment the offender received by virtue of the loss of his career as a soldier. The offender had benefited from an anger management course and the offender and victim had reconciled. While the

A sentencing policy which provides offenders with an incentive to manipulate or coerce victims so as to influence the disposition of their cases is inconsistent with New Zealand Family Violence Prevention Strategy aimed at consistent, comprehensive legal intervention⁸⁹ and batterer accountability.⁹⁰ Sentences may differ according to the different attitudes of domestic violence victims. The policy may also create different sentencing regimes for the same acts of violence depending upon the status of victims and offenders as intimate partners or strangers. 'In other words, will the status of the victim as wife or de facto spouse, rather than a stranger, be more relevant in sentencing than the actus reus of the offence?'⁹¹

C *Battered Wives versus Battered Mothers: What's Love Got To Do With It?*

Under the *Domestic Violence Act 1995* violence in the presence of children constitutes an act of psychological abuse.⁹² In the UK, the law was clarified in 2005 to require courts to consider the harm to children of witnessing violence against another person.⁹³ However, the present research found the impact of violence on children was not generally acknowledged when courts refused to allow a case to proceed without the victim's participation,⁹⁴ or mitigated the sentences of batterers based on the attitudes of their victims.⁹⁵ Nor did the judicial response to offenders who launched attacks upon women who were holding young children appear especially denunciatory.⁹⁶ As

wishes of domestic violence victims should be treated with 'considerable reserve' they should not be entirely discounted in this case.

⁸⁹ Ministry of Social Development, above n 2, 13, 16.

⁹⁰ Ibid 12.

⁹¹ Ruth Busch, 'Was Mrs Masina Really "Lost"?: An Analysis of New Zealand Judges' Attitudes Towards Domestic Violence' (1993) 8 OLR 17, 40.

⁹² Section 3.

⁹³ Home Office, *Domestic Violence: A National Report* (2005) 7.

⁹⁴ See, eg, *Case Study L/99/19(S)* where the seven months pregnant victim received second and third degree burns after allegedly being pushed into a fire during an argument with her partner. The offender was charged with wounding with intent to cause grievous bodily harm. The victim subsequently recanted and defence counsel requested a discharge. Although the Crown wished to proceed with the charges, the judge granted the discharge.

⁹⁵ In *Case Study M/01/26* the offender launched an attack on his partner and continued to assault her as she held a two-year-old child. The offender admitted a charge of assaulting a female and the judge described the attack as 'cowardly' and 'savage'. The judge noted that the offender 'would have been put in jail had it not been for the victim's wishes that he remain in the community'. In *Case Study S/99/20(S)* the offender admitted two charges of assault with a weapon, one of threatening to kill and one of indecent assault. The judge stated that the offender fought with his wife and mother-in-law, threatened to kill his children while holding a knife and held the knife to his mother-in-law's throat. The offender then subjected the women to humiliation by forcing them to remove their clothes and lie down in 'positions of a sexual nature'. The judge stated that the offending appeared to be impulsive behaviour, the offender was remorseful, and had strong 'family support'. His sentence of imprisonment was suspended.

⁹⁶ In *Case Study R/01/8(S)* the offender launched an attack on the woman while she was holding a child. The child's left femur (thighbone) was broken. The judge accepted that the offender had no intention to harm the child, and the injury was the result of a very serious assault on his partner. The offender was sentenced to 4 months' PD, nine months' supervision and ordered to undertake drug, alcohol and relationship counselling. In *Case Study W/01/9(S)*

illustrated in the following case study, despite the legislative prohibition against inflicting violence in the presence of a child, judges deferred to the attitudes of battered victims notwithstanding the presence of a child witness.

Violence in the Presence of Children and Victim Forgiveness: Case Study S/99/6

The 35 year-old male offender appeared for sentencing after pleading guilty to an assault on his partner. At the time the offender launched the attack, the woman victim was holding a small child in her arms. The offender punched the woman in the face with a closed fist and after she fell to the ground, he continued to punch and kick her. The sentencing judge noted that after punching and kicking his partner, the offender bit the woman 'all over her body, including her feet, legs, arms, elbows and around the throat'. Shortly after this assault the woman collapsed and died at her home. Although at the time of sentencing, a spokesperson for the Coroner told the media that the woman's death was still under investigation, the judge stated her death was 'unrelated' to the offender's assault. Adding that he had seen photographs of the woman taken after the attack, the judge told the offender that if he also had copies of the photographs they would prove a 'lasting reminder' of his violence, now that his partner was dead.

In a letter to the Court, the victim expressed a 'dying wish' that her partner not be sentenced to prison. Instead, she wanted the offender 'to do something about his problems'. The offender's problems, as cited by the judge, were related to his violence and use of alcohol. The reports note: 'Saying he had agonised over the case [the judge] said there was no doubt the attack demanded a prison sentence but the court was constantly being reminded, not that it needed to be, of taking into account the victim's views'. The judge suspended an 18 month prison sentence and sentenced the offender to six months' periodic detention, nine months' supervision and counselling.

The above offender's 'problems' with violence indicate that this was not his first assault. Battered mothers who witness their abusers being congratulated and rewarded with reduced sentences on the basis of their victims' forgiveness are likely to get the message that courts approve of women

after 'punching, slapping and kneeing' the victim, she was 'slapped' around the head while holding a child. The sentencing judge noted that the assault arose from a 'destructive relationship'. The offender was sentenced inter alia to 5 months' PD. In *Case Study R/06/5* the offender aimed a kick at the three year-old child's mother, and struck the child in the head instead. The sentencing judge noted the kick had not been deliberately aimed at the child, but at her mother, who the offender also 'prodded' 20 times with a fork. The offender was sentenced to 5 months' PD and one years' supervision to include counselling. Cf *Case Study K/08/7(S)* where the offender assaulted a woman and breached a protection order soon after he had been released from prison for 'similar offences'. The sentencing judge stated that whilst the assault 'was not the worst case of its kind', the offence was aggravated because it happened in front of the woman's eight month-old baby. In *Case Study N/01/24(S)* the judge is reported as stating he remembered the case clearly, particularly the evidence of the offender's wife and child, and was 'frankly alarmed' that the couple were considering a reconciliation. Should reconciliation occur, the violence would probably escalate and involve the couple's child.

who 'stand by' violent men. In stark contrast, courts roundly punish and condemn battered mothers who 'stand by' while children are abused.⁹⁷

Acceptance of a battered woman's choice to remain in the abusive relationship turns to outrage at her 'failure' to leave or stop the abuse when her children are injured or killed. Although a wealth of evidence reveals battering constrains a mothers' ability to parent effectively,⁹⁸ the following response to a sentencing remark that the defendant, whose child was killed by her partner, may have been a victim of battered women's syndrome, is not atypical:

[T]his was no battered woman. She had been assaulted a few times by [the offender] but by her own admission to police, while he was beating [her son] he left her alone. She was a manipulative, lying coward who, instead of placing herself between her child and danger, was happy for him to take [the offender's] punches instead of her.⁹⁹

Courts are also highly critical of women who fail to prioritise the protection of children over their relationships with violent men.¹⁰⁰ In *R v Emery* the defendant stated that her partner had routinely and severely abused both herself and her baby daughter. Her failure to protect her child was the result of her fear of her partner and inability to act independently from him. However, the Lord Chief Justice in the English Court of Appeal noted that the case clearly called for a substantial period of imprisonment. The mother's paramount duty was to protect her child and her failure to do so, with resulting harm to the child, could not

be excused by other pressures that there may have been upon the mother, unless they were such as to render her incapable of action. Still less can such failure be excused by a mother putting her

⁹⁷ See, eg, *Law Society Wants Goff to Get Tougher with Child Abusers*, *Dominion*, 30 August 2000.

⁹⁸ See, eg, Lundy Bancroft and Jay Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002).

⁹⁹ Deborah Coddington, 'Disciplined to Death' in *North and South*, February 2000, 32, 36. See, also, David McLoughlin, 'The Canonisation of Tania Witika' in *North and South*, November 1998, 33; *Law Society Wants Goff to Get Tougher with Child Abusers*, *Dominion*, 30 August 2000; *Neglect Judgment Angers Welfare Groups*, *Press*, 16 November 2000; *Sentences for Child Abusers Seen as Unfair*, *Press*, 23 March 2001.

¹⁰⁰ In *Case Study N/97/1(M)*, the mother was convicted after failing to intervene in her partner's abuse of the child (the offender had also threatened to kill the mother). Defence counsel noted that all the woman wanted in life 'was to have a husband and a family'. The sentencing judge described the mother's behaviour as 'reprehensible'. In *Case Study N/99/1(M)*, a female offender, who had not personally abused her three young children, was convicted of wilfully permitting the children to be ill-treated by her partner. Defence counsel stated that the mother's level of intellectual ability, and abusive and traumatic upbringing, meant she lacked the skills to protect herself or to confront her partner. However, the judge stated that while the woman may not have been aware of the extent of the abuse she 'should have "ejected" her partner from the house or reported the problems'.

relationship with her partner, *or even her own protection*, before the life and health of her child, as the learned judge found was the case here.¹⁰¹

The well established correlation between child abuse and women battering may ensure that many, if not most prosecutions of mothers for failing to protect children are currently being brought against battered women.¹⁰² Researchers note a not uncommon pattern in which a battered mother has previously sought protection from police and the courts but when that protection proves ineffective, the woman reverts to the only other tactic available to her, that of placating her abuser.¹⁰³ Given New Zealand research indicating that children are most at risk from their fathers,¹⁰⁴ constructions of battered mothers' culpability

need to avoid the common injustice done to women by attributing to them sole responsibility for children's protection and well-being. If we believe women and men are to share responsibility for the well-being of their children, we can no longer ignore the role of battering men as fathers.¹⁰⁵

While the Court in *Emery* observed that the battered mother had 'ample opportunity to seek help from others', research shows abused women are at increased risk of violence at the time they attempt to leave or seek help. Holding battered mothers accountable for the violence inflicted by male partners on children,¹⁰⁶ while refusing to denounce and deter attacks on women in the context of separation, would be profoundly unjust. Yet, as discussed below, this is the very situation in which abused women are presently entrapped.

¹⁰¹ [1993] 14 Cr.App.R 394, 396-397 (emphasis added).

¹⁰² See, eg, Karen McDonald, 'Michigan's Efforts to Hold Women Criminally and Civilly Liable for Failure to Protect: Implications for Battered Women' (1998) 44 Wayne L.Rev. 289.

¹⁰³ Neville Robertson and Ruth Busch, 'Seen but not Heard? How Battered Women and their Children Fare Under the Guardianship Amendment Act 1995' [1997] BFLJ 177.

¹⁰⁴ *Dads Are Killing Kiwi Kids*, Sunday News, 13 July 1997 4, citing New Zealand research showing that of children intentionally killed between 1988 and 1995, 38% were killed by a father figure; 24% were killed by their natural father and 14% by their step-father or de facto parent. Mothers were killers in 12% of cases.

¹⁰⁵ Einat Peled, 'The Battered Women's Movement Response to Children of Battered Women: A Critical Analysis' (1997) 3 *Violence Against Women* 424, 428.

¹⁰⁶ In *R v Lunt* [2004] 1 NZLR 498, the Court of Appeal held that the parental duty to provide 'necessaries' under s 152 *Crimes Act 1961* did not extend to 'protection from physical violence'. However, the Court noted such a duty arose at common law, thus an indictment could be preferred for manslaughter where a parent failed to protect a child from foreseeable physical violence resulting in death. Section 5 *Domestic Violence, Crime and Victims Act 2004* (UK) creates a statutory offence of failure to protect. See also, *A-G's Reference 24 of 2001* [2001] EWCA Crim 894.

IV THE RED FLAGS FOR DANGEROUSNESS/LETHALITY

The object of the *Domestic Violence Act 1995* as set out in s 5(1) is to reduce and prevent violence in domestic relationships by

- (a) Recognising that domestic violence, in all its forms, is unacceptable behaviour; and
- (b) Ensuring that, where domestic violence occurs, there is effective legal protection for its victims.

Laypersons are unlikely to have difficulty affirming the unacceptability of domestic violence and the need for effective legal protection for victims as paramount principles of intervention. However, legal commentators note these objects may clash with other legal principles.¹⁰⁷ Since judicial balancing of these competing principles has enormous implications for victim safety, the following case studies explore judicial responses to established risk factors for dangerousness/lethality and factors accepted by courts as mitigating offending in these contexts.

A 'A "Severe or Life-Threatening" Incident'

The *Chicago Women's Health Risk Study* notes two different scenarios of intimate femicide have emerged from domestic violence research. In one scenario, a regular pattern of violence eventually leads to the fatal event. In a second scenario, something about a particular violent incident signals a risk of future death or serious injury.¹⁰⁸ These researchers identified a prior 'severe or life threatening' incident (defined to include: permanent injury; being severely 'beaten up'; being choked; burned; internal injury; head injury; broken bones, and a threat or attack with a weapon)¹⁰⁹ as a risk factor for future serious violence and lethality.

1. *Being Severely 'Beaten Up'*

During the period of the research, the judicial response to 'serious' violence was governed by s 5 of the *Criminal Justice Act 1985* as amended by s 2 of the *Criminal Justice Amendment (No 3) Act 1987*.¹¹⁰ Under s 5, imprisonment was mandatory for persons convicted of an offence punishable

¹⁰⁷ Webb, et al, above n 8, 1433, citing as an example, a respondent's right to be heard which meant an abusive father could cross-examine the two daughters he had sexually abused.

¹⁰⁸ Carolyn Block, et al, *The Chicago Women's Health Risk Study: Risk of Serious Injury or Death in Intimate Violence A Collaborative Research Project* (2000) 269.

¹⁰⁹ Carolyn Block, 'How Can Practitioners Help an Abused Woman Lower Her Risk of Death' [2003] NIJ Journal, 4, 5.

¹¹⁰ Repealed by the *Sentencing Act 2002*.

by a term of imprisonment of two or more years, who used 'serious' violence or caused serious danger to the safety of any person in the course of committing the offence. The offence of assault by a male on a female under s 194 *Crimes Act 1961* (the proxy denominator of intimate partner violence) carries a maximum penalty of two years' imprisonment. The legislation provided a judicial discretion to impose a sentence other than imprisonment if the court determined that 'special circumstances of the offence or of the offender' rendered a full-time custodial sentence inappropriate.¹¹¹

'Serious' violence was not defined in the legislation. The Court of Appeal emphasised that the measure of seriousness was to be found in the acts themselves, rather than consideration of the effects of the violence in terms of subsequent injuries.¹¹² Since 'serious violence' did not necessarily imply serious injury, Warren Brookbanks suggested that the solution to whether or not the violence was serious 'must be obtained with reference to objective criteria standing apart from the actual exercise of violence in the particular case'.¹¹³ On this analysis, an attack which did not involve serious injury was serious violence because it was perpetrated against a police officer.¹¹⁴

By contrast, the fact that the charge was assault by a male on a female was held not to be relevant to determinations of serious violence.¹¹⁵ Consistent with this approach, assaults against women, including pregnant women, and children were not automatically categorised as serious.¹¹⁶ For example, the pregnant woman in *Case Study T/01/22(S)* was 'struck' by her partner in what the judge described as a 'nasty' assault. Defence counsel stated it was not serious violence and the offender was fined. In *Case Study P/00/17(S)* the offender, whose relationship with his partner was ending, walked into the bedroom of the woman's seven year-old daughter, pulled back the covers and punched the child in the face with a closed fist. The sentencing judge observed that the

¹¹¹ Section 7 of the Act created a general limitation on the use of imprisonment and s 7(3) specified that this limitation was subject to s 5. W Brookbanks, 'Property Offences and Special Circumstances in the *Criminal Justice Act 1985*' [1987] NZLJ 163, 163, citing W Hodge, *Doyle Criminal Procedure in New Zealand* (2nd ed, 1984) suggests that the opposing policy statements of anti-imprisonment under s 7 and pro-imprisonment in s 5 set 'the stage for a political "tug-of-war"'. The phrase 'special circumstances' thus became determinative of which policy statement would prevail in a particular case.

¹¹² *R v Dunn* [1989] CA 113/89 (Unreported, Casey, Hardie Boys and Wylie JJ, 9 May 1989)

¹¹³ W Brookbanks, 'Serious Violence and Special Circumstances: Criminal Justice Act 1985, s 5' [1987] NZLJ 390, 390, 391.

¹¹⁴ *Ibid.*

¹¹⁵ *Kelly v Police* (Unreported, High Court, Rotorua, Doogue J, 15 May 1991).

¹¹⁶ It was not unusual for men who assaulted pregnant women to avoid a custodial sentence. For example, in *Case Study B/00/24(S)* the offender smashed two windows in the house of a seven-month-pregnant woman and held a knife to her throat. He admitted charges of assaulting a female, assault using a butcher's knife as a weapon, assaulting police, resisting arrest and intentional damage. His six month jail sentence was suspended.

effect on the mother and child was considerable. Both required counselling, and they had moved to another city. The judge stated that this was 'on the border of being serious violence'.¹¹⁷

Considerations of 'serious' violence included whether the violence inflicted was an open-handed slap; a roundhouse or a punching blow; a head-butt or 'nudge with the head'; a hit; or a punch. In this lexicon of abuse, the term 'serious' violence might not apply to a woman who was 'slapped' so hard her neck cracked, or 'pulled' so her head hit a concrete wall. In *Case Study F/08/10(S)* defence counsel noted it was unclear whether 'pushing' the woman to the ground, then picking her up and repeatedly 'slapping' her face, leaving her with a bruised face, grazed chin, and cut hand, constituted serious violence.¹¹⁸

In many reported cases there was no discussion of whether the violence was serious or not and no explanation for the non-custodial sentence was provided.¹¹⁹ For example, the offender in *Case Study H/99/18* who admitted beating his partner who was nine months' pregnant, was convicted on charges inter alia of assault on a female. The sentencing judge observed that he had never before been confronted with an assault on a woman who was so close to giving birth. The judge told the offender 'You are extremely lucky that the child was not born dead. Then you might have faced a manslaughter charge.' The offender was sentenced to six months' periodic detention.¹²⁰

Where a sentence of imprisonment was imposed, it could be suspended under s 21A *Criminal Justice Act 1985*. 'A suspended sentence has no punitive effect whatsoever, although it probably will have if a further imprisonable offence is committed within the period in which the suspension lasts.'¹²¹ Since courts were required under s 5 to impose a full-time custodial sentence for serious

¹¹⁷ The offender was sentenced to four months' PD, ordered to undertake counselling and to pay \$350 to cover the counselling costs of the victim and her mother. In *Case Study H/08/17* the offender, who punched and kicked his partner was described by the judge as coming 'as close as it gets' to serious violence.

¹¹⁸ The offender was sentenced to five months' PD.

¹¹⁹ In *Case Study M/00/18(S)* the offender, who was charged with assaulting a female, 'hit' his former partner in the mouth. The woman suffered a cut which required 11 stitches to close. The offender was fined and sentenced to supervision.

¹²⁰ Periodic detention (PD) as an alternative to imprisonment requires offenders to participate in supervised, unpaid work, for a specified period of time. Periodic detention and community service were abolished by the *Sentencing Act 2002* and replaced by a sentence of 'community work'. This offender was additionally sentenced to nine months' supervision, 1 year driving disqualification and ordered to undertake 'anger management counselling'.

¹²¹ Michael Bodie, 'Suspended Sentences and s 5 of the *Criminal Justice Act* [1995] NZLJ 103, 104 (citations omitted).

violence, a sentence of imprisonment could not be suspended without first determining that special circumstances were present.¹²²

In a beating described by the sentencing judge as 'savage', the offender in *Case Study W/00/9(S)* responded to his partner's attempt to stop him from drink-driving by beating and kicking her while wearing steel-capped boots. The judge noted that the beating was severe. The woman suffered black eyes, a broken nose and required plastic surgery. When stopped by police, the offender was too intoxicated to blow into a breath test. Defence counsel told the court that 'poor communication and the strains of managing the couple's newborn baby were likely causes of mounting stress'. Although the judge found it hard 'to imagine a worse drink-driving incident', he suspended the one year jail sentence for two years. Campaigners for tougher drink-driving laws criticised the suspended sentence, describing the decision as 'incomprehensible'. Community outrage was directed at the driving offence, rather than the decision to suspend the sentence of an offender who kicked and beat a woman so badly she required plastic surgery.¹²³

The *Sentencing Act 2002* abolished the power to suspend a sentence of imprisonment. However, the Select Committee drew attention to the sentencing alternatives *inter alia* of home detention,¹²⁴ and an order to come up for sentence if called on.¹²⁵ As discussed below, use of these sentencing options in domestic violence cases requires careful monitoring.

2. Attempt to Strangle or Choke

The Chicago Study identified any attempt to strangle, choke or smother a woman as a risk factor for severe or fatal violence. The researchers recommended that practitioners 'ask an abused woman if her partner has ever tried to choke her or grab her around the neck'.¹²⁶

In the present research, violence involving strangling and choking also met with a non-custodial sentencing response. For example, in *Case Study M/00/19(S)* the offender was convicted of threatening to kill and assaulting a female. The offender grabbed the victim's throat, pushed her

¹²² Ibid, citing *R v Wright, R v Malcolm* (Court of Appeal, CA 390, 391/94., 23 February 1995).

¹²³ In *Case Study S/06/7*, the offender faced a charge of assaulting his partner and was described by his counsel as a 'recidivist' in that crime. The judge noted that by law he was required to sentence the offender to a term of imprisonment, but the offender was attending an anger management course. The judge sentenced the offender to a term of imprisonment of one day.

¹²⁴ Section 97 *Sentencing Act 2002*.

¹²⁵ Section 110 *Sentencing Act 2002*.

¹²⁶ Block, above n 109, 6.

head into a concrete wall, and threatened to slit her throat. The woman told the Court 'I thought I was going to die that day'. Her injuries included lumps on her head, bruising and welts on her neck. The offender was sentenced to four months' periodic detention. In *Case Study R/00/23(S)* the offender admitted assaulting a female. At sentencing, he denied 'punching' his former partner, but admitted pushing her 'really hard'. The offender also admitted holding a pillow over the woman's face. The judge noted that the woman's injuries included two black eyes, swelling and bruising to both cheeks and bruising to her arms. However, after citing the probation report description of the offender as 'kind, caring, hard working, soft-hearted and placid' the judge sentenced him to a fine.¹²⁷

3. *Threat or Assault with a Weapon*

The Chicago researchers found women who reported that an intimate partner had 'scared them with a weapon' were much more likely to experience severe violence in the follow-up period. Women homicide victims were also about twice as likely to have been threatened with a knife or gun, or to have a knife or gun used on them, than were other abused women.¹²⁸ Accordingly, 'severe or life threatening' violence was defined to include 'a threat or attack with a weapon'.¹²⁹

Offenders in the present study who threatened their partners with a weapon also avoided imprisonment. For example, the offender in *Case Study D/97/14(S)*, who admitted assaulting his wife and breaching her protection order, smashed his wife's head into a wall, grabbed her by the throat and threatened her with a knife during the assault. Stating that the offender should read the victim impact report so he could see what he had done to his wife, the judge is reported as telling the offender: 'This was quite a severe assault...This is your last warning - you will go to jail if you breach the order or assault her again'.

As illustrated above, notwithstanding the presumption of a custodial sentence for serious violence under s 5, many offenders whose violence met the research definition of a 'severe or life-threatening incident' avoided imprisonment. Therefore, the following section examines 'special circumstances' considered by courts to warrant an alternative to a full-time custodial sentence.

¹²⁷ Such outcomes were apparently due to unreported 'special circumstances'.

¹²⁸ Block, et al, above n 108, 272-273.

¹²⁹ Block, above n 109, 5.

4. '*Special Circumstances of the Offence or of the Offender*'

In *R v Donaldson*¹³⁰ Thomas J warned that s 5 could not be given an artificial or strained construction so as to avoid its impact. Legal commentary also observed that the term 'special circumstances' implied 'matters of mitigation outside of the ordinary range of factors which palliate guilt'.¹³¹ However, while not at all unusual or exceptional in domestic violence cases, victim forgiveness was regarded as a 'special circumstance'. For example, in *Case Study S/97/6(S)*, the judge informed an offender who broke his wife's pelvis after running over her in his car that 'the only thing stopping him from sending [the offender] to jail was his wife's plea for leniency'.

Courts also regarded loss of family support resulting from the offender's imprisonment as a special circumstance. In *Case Study K/06/2(S)*, the offender, who was originally charged under the *Crimes of Torture Act 1989* after repeatedly beating his partner and burning her, was told by the judge that he was not being imprisoned because the victim had written to the Court saying this would deprive herself and her children of the offender's financial and emotional support. In *Case Study W/01/22(S)*, the offender admitted a charge of injuring his disabled wife with intent to injure. The judge accepted that this serious assault was triggered by a build-up of frustrations arising from his wife's disability and the problems of caring for her. The offender was reportedly advised by the judge to consider staying away from home 'until matters have settled down'. Although he had previous convictions for violence, including three for assaults on another family member, the judge suspended the sentence of imprisonment, telling the offender that: 'In the end probably your wife and your family need your moral and physical help'.

A sentencing approach which treats a batterer's repeated use of violence as irrelevant to his capacity to nurture and care for his family is extremely dangerous. Since research indicates people with disabilities face at least one and a half times greater risk of violence than the non-disabled

¹³⁰ (1997) 14 CRNZ 537, 546 (CA).

¹³¹ Brookbanks, above n 113, 393.

population, and much of this violence is perpetrated by family members,¹³² disabled women may be especially vulnerable to this analysis.¹³³

B *The Red Flag of Repeat Victimisation*

1. *The Criminal Justice Act and Recidivist Offenders*

Section 5(2) of the *Criminal Justice Act* dealt with recidivist violent offenders. The section provided that persons convicted of an offence punishable by imprisonment for a term of two or more years, who had previously been convicted of such an offence within the preceding two years, and who used violence against, or caused danger to the safety of any other person in the course of committing the offences, should be imprisoned in the absence of 'special circumstances' of the offence or the offender. Since there was no requirement of 'serious' violence under this subsection, Brookbanks observed that the

standard of violence *simpliciter* will mean that it will be extremely difficult to avoid the presumption of imprisonment. 'Special circumstances' will not be easy to establish and will offer little relief to most offenders; and granted the fact that 'serious violence' may imply no injury at all, 'violence' may be found to be present in respect of conduct which in other circumstances would seem quite innocuous.¹³⁴

Notwithstanding this observation, the research found seriously violent recidivist abusers frequently avoided a sentence of imprisonment. Victim forgiveness was relied on as a 'special circumstance' justifying an alternative to imprisonment. Recidivist abusers also avoided imprisonment where this was perceived as having a negative impact on their families. In *Case Study R/08/7(S)*, the report states that the offender, who punched his wife in the head, and kicked her in the head, torso and stomach, 'avoided going to prison for his second male assaults female conviction only because Hamilton District Court judge James Rota did not want to hurt his family financially'. The judge is reported as telling the offender:

¹³² Miriam Ticoll, Family Violence Prevention Division, Health Canada, *Violence and People with Disabilities: A Review of the Literature* (1994) 17. Mary Ann Curry, Dena Hassouneh-Phillips and Anne Johnston-Silverberg, 'Abuse of Women with Disabilities: An Ecological Model and Review (2001) 7 *Violence Against Women* 60, note that unlike women without disabilities, disabled women may be dependent on their abuser for essential care and may not have any external validation that what they are experiencing is abuse.

¹³³ Men who used violence toward seriously ill women sometimes claimed their violence arose from frustration that the victim was not taking her medicine. Defence counsel apparently anticipate that courts will regard this context as a mitigating factor. Courts appeared to do so.

¹³⁴ Brookbanks, above n 113, 408.

If I send you to jail, I deprive your family of money. I have to think about that because I genuinely care for your family. If you continue to knock her about, at the end of the day that is your problem if they go without money and do it hard. That's not my problem, it's yours. [As the offender left the dock, the judge stated: Maybe I'm too soft.]

Repeat offenders could also be harshly reprimanded and sentenced to a period of imprisonment, which was then suspended.

2. A Judicial Typology of Recidivist Abusers

Violent offenders are not a homogeneous group.¹³⁵ Batterer typologies therefore have the potential to enhance victim safety by acknowledging that a 'one size fits all' rehabilitative response is inappropriate. In October 2005, a judge in a New Zealand pilot Family Violence Court was reported as articulating a typology of battering men apparently in use by the Court:

The family man, who has lashed out under stress, with police having visited several times before; the cobra, who is repeatedly remorseful and fuelled by drugs; and the rottweiler, who shows no remorse and whom Judge Recordon likens to Once Were Warriors Jake the Muss. The first two could be dealt with without prison, [the judge] said.¹³⁶

The empirical foundation for this typology of batterers is not discussed in the report. However, the approach appears surprisingly indifferent to a large body of research showing repeat victimisation is a leading risk factor for future victimisation,¹³⁷ and a red flag for serious violence and

¹³⁵ See, eg, Amy Holtzworth-Munroe, et al, 'A Typology of Male Batterers: An Initial Examination' in Ximena Arriaga and Stuart Oskamp (eds) *Violence in Intimate Relationships* (1999) 45, 46. Gondolf and Fisher, above n 32, report that sociopathic or antisocial batterers exhibit a recurring and increasingly serious pattern of violence towards their partners. These men are likely over represented among those who kill estranged partners. Desmond Ellis and Walter DeKeseredy, 'Rethinking Estrangement, Interventions, and Intimate Femicide' (1997) 3 *Violence Against Women* 590, identify a further pattern not included in the Gondolf and Fisher typology of males who have rarely or never abused or beaten their partners, but who kill them and others as a reaction to separation. For this male, and others like him, who tend to be ranked low in terms of attributes that indicate superordinate male status, separation is seen as abandonment and the likelihood of multiple killings post-separation increases.

¹³⁶ *Jail 'Not for all Violent Husbands'*, Hawke's Bay Today, 12 October 2005.

¹³⁷ Sylvia Walby and Andrew Myhill, 'Assessing and Managing Risk' in Julie Taylor-Browne (ed), *What Works in Reducing Domestic Violence? A Comprehensive Guide for Professionals* (2001)314, note that '[o]ne of the most robust, simple and straightforward risk factors for domestic violence is that of a previous assault'. See also, Block, above n 109.

lethality.¹³⁸ An assumption that certain categories of recidivist abusers will avoid imprisonment also appears inconsistent with research showing men with longer and more serious histories of violence are more intractable to treatment interventions.¹³⁹

Risk assessment grounded in domestic violence research would likely regard the 'family man' whose violence has resulted in police call-outs in the past and whose further act(s) of violence result in his appearance in court, and the 'cobra's' drug-fuelled violence as posing a high risk to their partners. Prior police contact is an established risk factor for dangerousness/lethality. Consequently, researchers note the need for police to document police attendance in response to domestic violence call-outs. Although drug and alcohol abuse may exacerbate conflicted interactions, research indicates that this factor does not create the necessary or sufficient conditions for relationship violence to occur.¹⁴⁰ Differentiating remorseful abusers from men who show no remorse also misunderstands the dynamics of violent relationships.¹⁴¹ Remorse, apologies and promises to change are an integral feature of the cycle of violence.¹⁴² Domestic violence research is replete with cases in which men repeatedly abuse their partners, express remorse, and subsequently go on to severely injure or kill their victims.

Judicial depictions of recidivist abusers as 'family men' lack cognisance of the inter-generational effects of partner abuse and a wealth of research showing the devastating effects of violence on children:

¹³⁸ See, eg, Metropolitan Police Service, *Findings from the Multi-Agency Domestic Violence Murder Reviews in London: Prepared for the ACPO Homicide Working Group* (2003) Appendix III 10. See, also, Walby and Myhill, above n 137, 315; Jacquelyn Campbell, et al, 'Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study' (2003) 93 *American Journal of Public Health* 1089, 1089; Lisa Sanctis, 'Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence' (1996) 8 *Yale J.L. & Feminism* 359, 388-389.

¹³⁹ Johnson, above n 43, 37. Ken McMaster, the then National Convenor of Men for Non-Violence, in *Hitting Home: Men Speak About Abuse of Women* by Julie Liebrich, Judy Paulin and Robin Ransom, Department of Justice, in association with AGB McNair' [1995] *Social Policy Journal of New Zealand* 173, 175, notes that based on clinical experience with both men who are violent and those whom they victimise in 'the majority of situations the abuse is incremental in that it becomes more serious, frequent and intrusive over time'.

¹⁴⁰ Richard Gelles, 'Alcohol and Other Drugs are Associated with Violence - They are Not its Cause' in Richard Gelles and Donileen Loseke (eds), *Current Controversies on Family Violence* (1993) 182. K Leonard, 'Alcohol Use and Husband Marital Aggression Among Newlywed Couples' in Ximena B Arriaga and Stuart Oskamp (eds), *Violence in Intimate Relationships* (1999) 17.

¹⁴¹ Geoff Hall, 'Sentencing (II): Matters of Aggravation and Mitigation' [1985] NZLJ 184, 190, notes that lack of contrition is not a factor to be considered by the court at sentencing.

¹⁴² See, eg, Lenore Walker, *The Battered Woman Syndrome* (1984) 95-104.

The public interest in ensuring legally and socially acceptable behaviour is not restricted to the present but is multi-generational. The inter-generational effect of violence within the family...is well known. To treat such behaviour as having other than a 'public' effect is to ignore its significance not only within the immediate relationship between victim and offender, but also for the ripple effect that it has upon the children and thereby the future and effectively will condone and perpetuate a social evil of substantial proportions.¹⁴³

A typology of batterers which assumes violent recidivists can expect to 'be dealt with without prison' would not be accepted in cases of violence between strangers. Since a great deal of serious and lethal violence in New Zealand is perpetrated against women in the home, allowing 'the relationship' to mitigate repeated acts of violence is tantamount to authorising violence against women.

C The Red Flag of Separation

Martha Mahoney's groundbreaking work defined separation violence as 'the particular assault on a woman's body and volition that seeks to block her from leaving, retaliate for her departure, or forcibly end the separation'.¹⁴⁴ Consistent with overseas research, the present study found women who asked men to leave their homes, or alternatively left themselves, were at risk of sub-lethal and lethal violence. Women were stalked, physically abused, raped and sexually violated by estranged partners,¹⁴⁵ who also physically and sexually assaulted children to punish their mothers.¹⁴⁶ Judges described offenders as 'ritualistically' plaguing and assaulting former partners; 'setting out to torment and destroy' the women; and making the lives of women and children 'a living hell'. Women were hounded for many years after separating from abusive men.¹⁴⁷ 'Beleaguered' and 'unfortunate' women victims were forced to give up their employment and relocate with children;

¹⁴³ Judge David Harvey, above n 19, 115.

¹⁴⁴ Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1990) 90 Mich.L.Rev. 1, 6.

¹⁴⁵ In *Case Study N/97/17(S)* the court heard the offender, who attacked his partner and caused injuries to her genitals wanted to 'ruin her for anyone else'.

¹⁴⁶ In *Case Study N/97/3(C)* the offender raped the couple's daughter in front of his divorced wife. The mother of the child stated that she was too frightened to intervene as the offender threatened to slit her throat. In *Case Study L/97/2/(C)* the offender, who beat his partner and punched her 8 year-old child in the face, was said to have done so because of his jealousy. In *Case Study N/01/1(C)* the judge noted that the offender raped his 3 year-old step-daughter to 'get back at his partner'.

¹⁴⁷ In *Case Study T/06/9* the offender was imprisoned for three months in relation to his 20th conviction for trespassing at his ex-wife's home. The prosecutor stated that the couple had been separated for nine years and the offender had been imprisoned seven times and spent about 18 months in jail over the past five years for the same offence. The judge noted that the probation service had 'bent over backwards' to help the offender but despite every effort to help him, the offender did not want to do as he was told.

were abused at their places of work; tied up; kidnapped; forced to jump out of moving cars; chased at high speed; and their homes set on fire by offenders.¹⁴⁸

However, rather than scorn and opprobrium, law generally constructs this offending from a perspective of empathy with the pain caused to the offender by the defection of his spouse or lover.¹⁴⁹

1. *The Crime of Passion Analysis and Associated Empathy with Offenders*

Crimes of violence against separated and separating women are constructed in law as 'tragic' and 'sad' (as opposed to despicable) 'crimes of passion'. Offenders who perpetrate violence against estranged partners are said to experience 'cascades of violent emotion', and 'disordered thought processes', which render them unable (as opposed to unwilling) to control themselves and deal non-violently with the end of the relationship. By viewing the woman's decision to terminate the relationship as provoking the offender to lose his self-control, the victim is inculpated in the offending.

In *Case Study W/08/2(S)*, the offender responded to his wife's expressed desire to separate from him by attacking her with a meat cleaver in a 'sustained and terrifying' attack. The sentencing judge noted that the offender first attacked his wife with his fists. As she crouched down in a corner with her arms over her head, she was struck in the head and body with the meat cleaver. Following the attack, the woman was left 'with life-long injuries and a legacy of psychological trauma'. However, the judge observed that the circumstances were also tragic for the offender. The offender still loved his wife, and her desire to separate caused him to lose control and attack her. While accepting that domestic violence must be denounced and deterred, the attack was out of character, and was caused by the offender's psychiatric condition and the stresses in his life which caused him to lose control.

Termination of the relationship, even when this was due to the offender's use of violence, appeared to be accepted as self-evidently mitigating.¹⁵⁰ In *Case Study J/01/16(S)*, the offender was

¹⁴⁸ In *Case Study D/00/28(S)* the offender torched his estranged partner's home causing damage amounting to \$270,000.00.

¹⁴⁹ See, eg, Elizabeth Rapaport, 'The Death Penalty and the Domestic Discount' in Martha Fineman and Roxanne Mykitiuk (eds), *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (1994) 224, 230.

convicted on charges of assaulting a female and breach of a protection order after going to the victim's workplace and punching her up to six times about her ribs and head in breach of her protection order. The Court was told that the offender was having difficulties dealing with his marriage break-up. Sentencing him to a fine, the judge noted that the offender had earlier breaches of protection orders on his record and there must not be any more. In *Case Study W/00/2(S)*, the offender, who pleaded guilty to assault, threatening to kill and breach of a protection order, verbally abused, kicked, punched, and threatened to rape and kill his former partner by hanging her. He was sentenced to nine months' imprisonment, suspended for nine months.¹⁵¹

The tendency to view separation violence through the lens of romantic passion was not displaced by evidence that the violence was premeditated and life-threatening.¹⁵² Although jealousy and possessiveness are well-established risk factors for serious violence and lethality,¹⁵³ the context of jealousy was seen to mitigate, as opposed to aggravate the offending.¹⁵⁴ The separated woman's forming of a new relationship was invariably regarded as mitigating the violence. In *Case Study C/99/2(S)*, the offender attacked his estranged wife from whom he had recently separated. The Court was told that the offender 'had been under considerable stress at the time of the incident because he knew his former wife had a new relationship'. Noting that this was serious violence, the judge found sufficient mitigating circumstances to suspend the sentence. In *Case Study W/00/1(S)*, the offender, who was living apart from his wife, went to the woman's home and seeing

¹⁵⁰ For example, in *Case Study W/99/4(S)* the offender, who assaulted his son and threatened his partner with an idling chain-saw, was sentenced to periodic detention. The judge noted that the offender had 'lost everything and it was unlikely that his relationship with his partner would resume'.

¹⁵¹ In *Case Study M/01/3(S)* the offender met his ex-girlfriend by chance and accompanied the woman and her friends to a bar. Following an argument, the offender pushed his ex-girlfriend down the stairs and kned her in the face. A male intervened and the offender left. In the early hours of the morning, the offender went to the woman's home and smashed a terracotta pot over the head of a man he found in his ex-partner's bedroom. The male left and was later found unconscious beside the road. His ex-partner was sleeping in another room and while she slept, the offender went to the kitchen, turned on all the elements of a stove, draped the woman's clothes over the elements and watched them burn. Before leaving, he dropped a lit cigarette on the woman's bed. The woman was awoken by the smoke and escaped from the house before fire-fighters arrived. Damage caused by the fire was estimated at around \$73,000. The offender's sentence of 18 months' imprisonment was suspended for two years.

¹⁵² In *Case Study W/99/5(S)*, the 19 year-old offender arrived at the home of his ex-partner armed with a shotgun. When the young woman refused to get into his car, the offender shot her in the back as she was running away from him. A third party who tried to intervene was injured, and the offender then shot himself. All parties survived. The offender had apparently stalked the woman for several weeks, assessing her movements. He 'ignored three separate protection orders taken out by [the victim]...never accepted the relationship had ended...and asked a workmate: "If you were going to kill someone which gun would be best?."' However, the Crown told the jury it was a 'tale of unrequited love gone terribly, terribly wrong' and two jurors wept when the guilty verdicts on the various charges were handed down.

¹⁵³ See, eg, Block, et al, above n 108, 269.

¹⁵⁴ For example, in *Case Study J/01/29(S)* the offender assaulted a male he saw sitting in a car beside his former partner. Defence counsel told the court that 'alcohol and jealousy were the reasons the defendant beat up the man'. The offender was fined.

her new partner's van parked outside, entered the house carrying a screwdriver. The offender 'barged into the lounge where his estranged wife's partner was sitting on the floor watching television', and stabbed the man in the side of the head with the screwdriver, causing him to bleed profusely. After also punching the man several times in the head, the offender advanced on his wife, pointed the screwdriver at her, and told her to lick the blood off and that she would be next. The offender's 15 month sentence of imprisonment was suspended.

Since the judgments of courts send powerful messages to the community, the research found men who harassed and abused estranged partners had an expectation that courts would view their behaviour sympathetically. For example, in *Case Study N/00/15(S)*, the offender went to the home of a woman who had a protection order against him, knocked on her door and window, and after refusing to heed her repeated demands that he leave, entered the house. When the woman telephoned the police, he 'took several knives, put a large serrated bread knife to his chest and told her to kill him'. In court, defence counsel stated that his client 'viewed his action as a crime of passion'.

2. 'Character Enhancement' of the Separation Offender

Carolyn Copps Hartley describes a strategy employed in domestic violence cases which she terms 'character enhancement of the abuser'. The violent offender is depicted as a normally decent man whose offence is out of character.¹⁵⁵ The victim is implicated in the offending - but for her conduct, the violence would not have occurred.

In *Case Study J/08/4(S)*, the offender broke into his estranged partner's home at about 3.30 am and attacked the woman and her new boyfriend with a socket wrench in the presence of a small child. After the woman ran from the house taking her two children with her, the offender continued to beat the boyfriend with the wrench, punch and kick him until police intervened. Although the offender told police he would have killed the couple had his young son not been present, he was described by the sentencing judge as 'essentially a good person'.¹⁵⁶ In *Case Study V/06/1(S)*, the offender, who suspected his wife was having an affair with her employer, attacked the pair when

¹⁵⁵ Carolyn Copps Hartley, "'He Said, She Said': The Defense Attack of Credibility in Domestic Violence Felony Trials' (2001) 7 *Violence Against Women* 510, conducted an in-depth study of the trial process in domestic violence felony cases, focusing on themes and strategies used by the defence.

¹⁵⁶ See, also, Elisabeth McDonald, 'Provocation, Sexuality and the Actions of "Thoroughly Decent Men"' (1993) 9 *Women's Studies Journal* 126.

he found them together in the tea-room. Following his convictions for assaulting his wife and assaulting and wounding her employer, the sentencing judge stated that the offender was facing a situation which 'made an apparently, decent, law-abiding man crack'.

This approach also allowed courts to condemn the violence, but sentence the offender leniently. About six weeks after separating from his de facto partner, the offender in *R v M* invaded her home around 2.30 am 'crazed with alcohol and jealousy'.¹⁵⁷ Entering the bedroom where she was sleeping with her new boyfriend, the offender attacked his ex-partner with a 30 centimetre-long butcher's knife, stabbing her in the leg, the shoulder and the forehead. When her boyfriend came to her rescue, the woman escaped and her boyfriend was stabbed in his hand. After failing to find his ex-partner, the offender stabbed large holes in the bedroom wall, slashed the furniture and items of the woman's clothing. The judge noted that the effect on the woman victim involved stab wounds and obvious emotional trauma. Her boyfriend had since committed suicide, and his suicide was 'not unconnected with this event and the pressures that it produced for him'.¹⁵⁸

The judge observed that the offender had attempted 'to paint the picture of a husband who comes home and finds his wife being unfaithful to him'. His referees from the community also described the crime as 'understandable, almost to the point of acceptability'. One referee suggested that '90% of men would do the same when confronted with that type of incident'.¹⁵⁹ After refusing to accept these analyses, the judge then remarked that apart from this incident, the offender was 'a good father and a good man', who had acted under extreme emotional trauma. In light of the offender's strong community support, and the fact that the victim was 'effectively supporting' him and recognised the harm to the couple's children if the offender went to prison,¹⁶⁰ a restorative justice approach was required. On the charges of wounding with intent to cause grievous bodily harm and wounding with reckless disregard for safety the offender was sentenced to nine months' imprisonment.

Although a number of variables are implicated in sentencing decisions,¹⁶¹ the above analyses led to outcomes which failed to reflect the grave social implications of separation violence.

¹⁵⁷ (Unreported, High Court, Whangarei, Fisher J, 28 March 1996) 1.

¹⁵⁸ Ibid 2.

¹⁵⁹ Ibid 1-2.

¹⁶⁰ The extent to which the victim's support was influenced by messages from her community that '90 per cent of men would do the same' is unknown.

¹⁶¹ See, eg, Hall, above n 86, 139; Hall, above n 141, 184.

Empathetic legal narratives of male passion deflected attention from harms to women and children inflicted by men who invaded their estranged partners' homes under the cover of night, assaulted and injured the terrified women, often in the presence of their children and in breach of their protection orders. Legal constructions of separation violence also failed to acknowledge the human rights implications of these assaults on women's autonomy, and the relationship between this structural pattern of offending and the ability of abused mothers to protect children by exiting abusive relationships.

This criticism is echoed in the comments of one woman in the present study who recognised the dangers inherent in the offender's escalating violence and ended the relationship. After escaping with her seven year-old daughter to a Woman's Refuge, she took out a protection order, and set up in a new home. The judge noted that the offender did everything he could to track her down. After locating her home, he cased the grounds, and returned armed with a baseball bat. Smashing through a ranch slider door with the bat, the offender beat the woman with the weapon, while repeatedly stating he was going to kill her. The violence only ceased when the couple's terrified child, who witnessed the attack, begged the offender: 'Don't kill mummy'. Following the offender's conviction and sentence, the victim expressed her dissatisfaction with the legal response: 'I just find that the justice system is not as fair as it should be. For women in our situation, we have these protection orders to protect us but they don't actually protect women.' She said abusive men had to be made more accountable. 'I hope that women being abused get help and get out because once you are in an abusive relationship, they don't stop. What women have to realise is the longer you stay...the harder it is to get out.'¹⁶²

D Other Red Flag Offending

Legal perceptions of separation violence through the lens of romantic love and male passion are likely to obscure the dangers of other red flag behaviours which occur in the context of separation.

1. Suicide Threats

Suicide threats and attempts are an established risk factor for serious violence and lethality.¹⁶³ However, men who attacked estranged women partners and subsequently claimed their intention was merely to kill themselves in the presence of their victims, or to 'scare' the women in

¹⁶² *Case Study S/00/25(S)*.

¹⁶³ See, discussion above, at p 13.

furtherance of their suicide plans frequently encountered judicial understanding as opposed to denunciation. In *Case Study M/00/3(S)*, the offender assaulted the victim, handcuffed her, and locked her in a wardrobe to force her to watch his apparent suicide. The offender was convicted of assault and fined. In *Case Study W/06/1(S)*, the offender, who admitted kidnapping his estranged partner and breaching a protection order, was acquitted on two charges of raping her at knifepoint. The offender stated that it was not his intention to harm the woman, but to release her, and gas himself in his car. At the completion of his trial, the offender was described as 'an anxious man of depressive nature' whom the judge did not think was 'naturally violent'. Instead, the offender had 'desperately wanted to talk to his partner on the day of the offence'.¹⁶⁴

Although male suicide in the context of separation is generally associated with intimate femicide, as previously discussed, it was also a feature of sub-lethal assaults.¹⁶⁵

2. *Stalking*

The Chicago Study found controlling behaviour and stalking to be strongly associated with the severity of violence in the past year and continued severe violence in the future. 'This was true for each individual racial/ethnic group, as well as for pregnant women.'¹⁶⁶ In *Case Study G/99/7(S)* the judge noted that the offender, whose actions were 'clearly' those of a stalker, had 'terrified' the

¹⁶⁴ In *Case Study W/08/1*, the offender went to the home of his estranged wife who had been granted a protection order, waited until his step-daughter left for school, and then entered the house armed with a metal bar and carrying a rope with one end fashioned as a noose, a balaclava, gloves and 'various hand tools'. Once inside, he confronted the woman in her bedroom and began beating her about the head with the bar. The victim subsequently stated that she thought she would be killed and her only hope was to pretend to be dead. After protecting herself by wedging her head under the bed, she lay as still as she could. The offender then fetched the noose and placed it over his head. As he was doing so, the woman ran past him screaming, and called the police. Upon their arrival, the police cut the offender down. The sentencing judge noted that the offender had been convicted of threatening to kill his first wife in 1981, and in 1984 he discharged a firearm after his then partner indicated a desire to leave him. That woman dived through a closed window to get away. The victim of his current offending had a protection order in force and this was the fourth time the offender had breached it. The judge told the offender: 'You are a serious danger to any woman in the future who forms, then terminates, a relationship with you'. However, on appeal, the Court of Appeal reduced his sentence by two years, stating that the sentencing judge may not have given enough weight to the psychological condition of the offender in the light of the pressures upon him.

¹⁶⁵ See, discussion above, at p 67. For example, in *Case Study T/02/1(S)* the offender was described in court as keeping his partner 'a virtual prisoner', monitoring her every movement, following her to her workplace and 'abusing her if he thought she got too close to colleagues'. After waking the woman from sleep, pinning her to the mattress, and head-butting her four or five times, the offender 'bit the woman's upper lip, ripping his teeth from side to side. That resulted in a section of her upper lip being ripped and left hanging loose'. Following intervention by a third party, the woman ran from the house, with the offender in pursuit. After chasing and catching her, the offender 'ripped off the piece of lip and threw it away'. He pleaded guilty to charges of assaulting a female and assault with intent to injure. Nine days later, the offender, who was considered 'at risk' and placed on 'special watch', was found dead in his prison cell. Prison staff would not comment further as the matter had been referred to the coroner and the police. Eight days later, in the same prison, a prison inmate who was charged with murdering his de facto partner was also found dead in his cell.

¹⁶⁶ Block, et al, above n 108, 271.

victim in breach of her protection order. The offender avoided a sentence of imprisonment and subsequently went on to kidnap and assault his seriously ill partner in breach of her protection order. The woman was badly injured during the second assault.

3. Violence in retaliation for seeking legal intervention

The Chicago Study found women 'who were making active efforts to obtain formal interventions to stop the violence, such as seeking help from a counselor or agency, contacting the police, going to court, or getting an order of protection, were at higher risk for continued severe violence'.¹⁶⁷ However, where the only evidence that this was the motive for the assault came from the victim, the research found no reported recognition of this structural pattern of offending as a threat to victim safety and the successful prosecution of domestic violence cases. Indeed, as discussed in Part II, in a case of lethal separation violence the victim's conduct in reporting her partner's violence to the police was accepted as supporting a provocation defence for her killer.

In *Case Study M/97/18(S)* the offender, a recidivist abuser, wrote letters to the victim while in jail awaiting trial on charges of assaulting her and breaching a protection order, urging her not to give evidence against him. In a somewhat equivocal response, the sentencing judge noted that the offending 'could be seen as a pathetic attempt by a distraught man or, more sinisterly, as an attempt to manipulate the victim'.¹⁶⁸

V RISK MANAGEMENT: THE MISSING FOCUS ON VICTIM SAFETY

A The Focus on Rehabilitation

The research found recidivist batterers were sentenced on multiple occasions to treatment programmes. In *Case Study R/99/15(S)* the offender, who was convicted of assaulting a child, assaulting his ex-partner, and threatening to kill, was reported as having previously attended six anger management courses. Violent men who repeatedly failed to attend programmes could also avoid meaningful sanctions. In *Case Study M/00/20(S)*, the offender admitted four charges of

¹⁶⁷ Ibid 277.

¹⁶⁸ The offender was sentenced to nine months' imprisonment. In *Case Study A/00/29(S)* the offender was acquitted by a jury on charges inter alia of assaulting his former partner, threatening to kill her, and forcing her at gunpoint to strip naked, dig her own grave and lie in it. He was convicted of attempting to pervert the course of justice by arranging for a former prison inmate to contact the woman and threaten her with a contract killing if she did not withdraw the charges. The male who made the threat was sentenced to two months' PD and given a suspended jail sentence. The offender was sentenced to four months' PD to 'mark society's condemnation' of the offence. The judge noted that the offender had already served nine months in prison on remand and thus had served an appropriate jail sentence on the 'gagging charge'.

failing to comply with a court order that he complete an abuse intervention programme. The offender was first ordered to attend a programme when an interim protection order was served on him in 1996. That order became permanent and the offender was twice convicted of breaching it. The prosecutor stated that between September 1996 and June 2000 the offender had been directed, or had signed contracts to agree to attend eight 16-week programmes, but failed to attend any. The offender was sentenced to six months' supervision and convicted and discharged on an additional charge of failing to appear at court.¹⁶⁹

Since repeat victimisation is a red flag for future violence and a risk factor for dangerousness/lethality, repeated attempts to rehabilitate recidivist offenders in the context of lack of monitoring and accountability of batterers who enter treatment undermines the emphasis on effective legal protection for victims in the *Domestic Violence Act*.

B *Victim-Blaming*

Although the *Domestic Violence Act* acknowledges the unacceptability of all forms of domestic violence,¹⁷⁰ victim-blaming is an institutionalised response to violence in intimate relationships. In court, victims are blamed for conduct and character deficiencies such as inadequate mothering, bad housekeeping, and inviting the behaviour by nagging or drinking. In cases of repeat victimisation, sentencing judges sometimes implicated victims in the offending by attributing the violence to a 'destructive' or 'dysfunctional' relationship. The problematic nature of this analysis was revealed when abusers not only continued to assault their partners, but also perpetrated acts of violence toward 'innocent' third parties. Warring metaphors of violence which implied mutually aggressive persons also belied the reality that only one of the parties sustained injuries.

Courtroom constructions of separation violence also operated to confuse, even reverse, the roles of perpetrator and victim. Violence was attributed to the frustration of offenders who were the victims of 'on-again, off-again' relationships. Despite strong evidence that the instability of the relationship was linked to the offender's use of violence, no such connection was acknowledged. Victims of separation violence who attempted to keep on good terms with former partners were

¹⁶⁹ In *Case Study C/01/10(S)* in which the offender, who was convicted on charges of assaulting his wife, his mother-in-law and his step-daughter, in addition to his seventh and eighth driving while disqualified convictions, had his sentence deferred to allow him to complete drug rehabilitation and stopping violence programmes. He failed to complete them. While noting a custodial sentence was 'richly deserved', the judge accepted defence counsel submission that having a suspended sentence of imprisonment hanging over the offender's head, might motivate him

¹⁷⁰ Section 5(1)(b).

also blamed for sending offenders 'mixed messages'. Ironically, it was the messages batterers received from the legal system that were 'mixed'. As defendants, batterers were permitted to deny or minimise their violence and blame victims. Once convicted, they were sentenced to batterer treatment, where denial, minimising and victim-blaming are prohibited.¹⁷¹

C The Human Cost of Legal Intervention

Although courts, police and probation officers routinely make decisions about the risks posed by domestic violence offenders, the present study found little evidence of a standardised risk assessment instrument and referral protocol in use by police, probation and the courts. Courts sometimes declined to follow a recommendation in the pre-sentence report and/or refused to defer to the wishes of victims, but these decisions appeared to depend upon judges' informal assessments of risk. For example, in *Case Study W/00/5(S)*, the judge noted that the offender's assaults and threats against his estranged wife had resulted in her experiencing significant trauma. The seriousness of the charges and the offender's lack of remorse rendered the recommendation in the probation report of a suspended sentence of imprisonment inappropriate. In *Case Study C/00/22(S)*, the judge remained unconvinced that the offender was amenable to rehabilitation despite his victim's support. Since there was an unacceptable risk that the offender would 'erupt' again, the issue of deterrence became more prominent.¹⁷² By contrast, the offender in *Case Study M/97/8(S)* punched his wife in the face five times, knocking her unconscious. He was convicted on charges of assaulting a female and breaching a protection order. The judge is reported as stating that the only reason he decided to suspend the prison sentence was the genuine wish of the offender's wife that her assailant not be sent to jail. Two months later, this offender beat his wife with a vacuum cleaner pipe and punched her in the face several times, loosening her teeth.

¹⁷¹ See, eg, Healey, Smith and O'Sullivan, above n 33.

¹⁷² See, also, *Case Study T/08/13(S)* in which the offender, who had previously assaulted his partner, and was under supervision at the time he beat her again, was imprisoned and told a sentence of PD would simply amount to a licence to hit his partner again. In *Case Study B/00/8(S)* the judge refused to suspend the offender's prison sentence despite a letter from his girlfriend stating that she did not want him imprisoned. The judge noted that the offender had a history of breaching court orders, a suspended sentence had already been imposed, and the current offences were serious. The sentence was a matter for the whole community, and not just for the accused and the prosecuting authorities. In *Case Study N/99/16(S)* the judge noted that the offender's partner had 'ended up on crutches' as a result of the kicking she received from the offender in breach of a protection order. When sentencing the offender to six months' imprisonment the judge noted that the court's primary function was to punish offenders and not to provide social services for those who could not resist offending.

Formalised risk assessment requires the gathering of complete information about the violent record of the defendant, including information on protection orders.¹⁷³ Yet courts sometimes seemed unaware of exactly how many prior convictions the offender had garnered for assaulting the complainant.¹⁷⁴ No inquiry appeared to be undertaken into prior arrests and police call-outs that did not proceed to court. In contrast to research showing 84 per cent of women apply for protection orders on the grounds of physical violence,¹⁷⁵ and respondents who have multiple applications taken out against them are especially dangerous,¹⁷⁶ courts appeared to credit respondents of protection orders for not previously perpetrating violence despite the existence of the protection order.¹⁷⁷

The Taskforce for Action on Violence within Families notes that domestic violence is 'usually a deliberate strategy to exert domination and power over others'.¹⁷⁸ However, many judges appeared not to subscribe to this analysis. Rather, the view of the judge in *Case Study P/99/3(S)* that domestic violence occurs 'because people give way to the effects of alcohol, temper and frustration' was one which was frequently expressed. This perception of domestic violence as a problem of anger management is controversial.¹⁷⁹ 'In domestic-violence situations the offender specifically targets a weaker family member for the purposes of control, not just because he is angry.'¹⁸⁰ Indeed, in the aforementioned case in which the judge also described the frequency of male assaults on women as a 'national disgrace', the offender's sentence of imprisonment was suspended and the offender went on to perpetrate further violence against his partner.

¹⁷³ Healey, Smith and O'Sullivan, above n 33, 89.

¹⁷⁴ In *Case Study W/99/13(S)* the offender beat his pregnant partner with a broken broomstick, smashed household items and windows. The sentencing judge is reported as telling the offender: 'Sadly you have a bad record of violence. You have some 15 previous convictions relating to violence, some or all of those related to the same victim.' In *Case Study W/00/13(S)* the offender was convicted of breaching a protection order in relation to his estranged partner. The sentencing judge is reported as stating that the offender had a 'long list of assaults, some of them on women and possibly some on his ex-partner'.

¹⁷⁵ Barwick, Gray and Macky, above n 18, 53.

¹⁷⁶ Anna Stewart, 'Who are the Respondents of Domestic Violence Protection Orders?' (2000) 33 ANZJ Crim 77.

¹⁷⁷ In *Case Study W/00/11(S)* in addition to assault convictions, the offender, who beat his partner so badly she suffered permanent injury, was also convicted and discharged for breaching the woman's protection order. The judge is reported as noting that the offender had not previously used violence against the victim. In *Case Study S/06/8(S)* the offender punched his ex-wife, pulled out her hair and stabbed her several times in the chest and neck. She was saved from further violence by the intervention of a neighbour. The sentencing judge noted that the woman had taken out a non-molestation order, but then she allowed the offender to visit. When sentencing the offender, the judge remarked that he had taken into account his early guilty plea, his remorse and lack of previous convictions.

¹⁷⁸ See, eg, Taskforce for Action on Violence within Families, *The First Report* (2006) 4.

¹⁷⁹ Healey, Smith and O'Sullivan, above n 33, 24-25.

¹⁸⁰ Johnson, above n 43, 38 (citations omitted).

At least 20 US state standards and guidelines prohibit couple counselling for batterers.¹⁸¹ 'Mediation frames violence as a derivative of conflict when it is really about power and domination'.¹⁸² However, the offender in *Case Study K/01/2* who admitted a charge of assaulting a female, was sentenced to nine months' supervision and directed by the court to attend an 'Abuse Intervention Programme and Attitude Programme', and to undertake 'family counselling' with his partner. Some time after the court-ordered counselling, the offender broke into the locked home of his former partner and in the presence of the couple's three year-old daughter, threatened to kill the woman, and smeared blood from a serious cut he received while smashing a window to gain entry on the woman's face. The judge told the offender, '[m]y fear is that one day you are going to hurt someone. I am sure that psychologically you have already hurt your daughter'.

While the media occasionally draw attention to cases in which women are beaten, stabbed, shot and killed by offenders who were the targets of earlier criminal justice interventions, the present study found many more such incidents. Cases in which re-offending had a lethal outcome are discussed in the following chapter. Following are further examples of sub-lethal re-offending.

In *Case Study M/97/11(S)*, defence counsel for an offender who assaulted his partner over 'an extended period of time' stated that the complainant had ended the relationship, taken out a protection order, and the offender had lost custody of his child. He had attended a Stopping Violence Programme and the complainant asked for leniency. When sentencing the offender to four months' periodic detention, the judge reportedly told him: 'Apparently you have made changes. Had you not, you would be facing a jail sentence'. The offender was subsequently convicted of raping his former partner, performing oral sex on her, aggravated burglary of her home and four breaches of a protection order in relation to offending which occurred a few months later.

¹⁸¹ Healey, Smith and O'Sullivan, above n 33, 25, noting that disapproval 'is based on a belief that victims of abuse are intimidated and cannot fully participate in therapy in the presence of their abusers. If victims do reveal the batterer's violence or disclose other problems, they face the threat of reprisal. Restrictions on couples therapy and individual psychotherapy for battering are a point of contention between feminist-oriented batterer intervention providers and mental health providers in many communities'.

¹⁸² Loretta Stalans and Arthur Lurigio, 'Public Preferences for the Court's Handling of Domestic Violence Situations' (1995) 41 *Crime and Delinquency* 399, 405. Judge Boshier, *A Review of the Family Court* (1993) 119, recommended avoidance of mediation as a means of dispute resolution in New Zealand domestic violence cases. The fear is that victims of violence will be coerced into agreeing to orders which may compromise their own and/or their children's safety.

In *Case Study T/01/20(S)*, the offender received a suspended term of imprisonment for assaulting his partner. Within a month he assaulted the same woman and threatened to kill her in breach of a protection order. The victim was hospitalised and underwent surgery as a result of the second attack. Just six weeks after he received a suspended sentence of imprisonment, the offender in *Case Study A/99/12(S)* argued with his estranged wife, then travelled to the home of her sister and smashed a rock in her face three times, leaving the woman permanently disfigured. The victim's nine year-old daughter witnessed the attack, and 'had been affected by it'. The offender in *Case Study H/94/1(S)*, whom the judge described as having one of the worst records of assaulting women he had seen, was under a suspended sentence at the time he assaulted his pregnant partner. His one year suspended sentence was activated, with an added one month imprisonment. Eleven months later, this offender forced his way into his former partner's home and perpetrated a 'savage attack' on the woman as she huddled over her child to protect it.¹⁸³ One month and one day after the offender in *Case Study M/97/4(S)* received a suspended sentence for beating his partner; he inflicted a further 'shocking' beating on the woman. The offender's fifth conviction for assaulting a female brought a jail sentence. In *Case Study S/01/2(S)*, following a sentence of home detention in relation to an assault which the judge described as 'one of the worst cases of a man assaulting a woman he had come across for many years', the offender was subsequently convicted of attempting to murder the woman.¹⁸⁴

When women have attempted in vain to use the criminal justice system to protect themselves, failure to keep the batterer away puts pressure on women to return to the battering relationship. This situation has devastating implications for children. In *Case Study H/01/9(S)*, the battered woman recognised that her de facto partner was becoming increasingly dangerous, and requested

¹⁸³ In *Case Study O/00/10(S)* the offender beat his wife so severely she needed reconstructive surgery to repair her face. During the 40 minute beating, which ended when the woman's daughter raised the alarm with neighbours, the offender punched his wife three times in the face, gripped her by the back of the neck and slammed her face into a wall and the floor. The woman's injuries included a broken jaw, a fractured eye socket and severe bruising. The offender had been convicted of a prior assault on his wife just one month earlier. The attack by the offender in *Case Study A/06/6(S)* resulted in permanent disfigurement of his estranged partner's face and scarring on her neck and leg. The judge noted that the offender had avoided a jail sentence for threatening to kill a woman only a short time before the assault.

¹⁸⁴ In *Case Study R/01/11(S)* the offender's third assault on the victim and breach of her protection order was met with a sentence of four months' imprisonment and leave to apply for home detention. Later that year, the offender was charged with rape, wounding with intent to cause grievous bodily harm, unlawfully detaining, and two counts of unlawful sexual connection, in relation to the same complainant. The physical assault involved attacking his partner with a metal tube or curtain rod, punching and kicking her as she lay on the floor. After making the woman and her daughter clean the house and remove bloodstains from the walls and carpet, in response to his partner's statement that she wanted to end the relationship 'another assault began that continued sporadically throughout the night'. The offender also threatened to stab the woman and her children. The offender was convicted on the wounding charge. The outcome of the sexual offence charges is unknown.

he leave the family home. He refused to go, informing her that she 'could not kick him out without a protection order'.¹⁸⁵ The following day, the male murdered the woman's two daughters age 11 and 12 years.¹⁸⁶ The children's mother told the court that she had taken out a protection order against the offender a few years earlier, but he had ignored the order and it was easier to let him stay in the home. 'You can't cut [the offender] out. I tried before: he won't leave...police can't stop him', she said.

Failure of batterer accountability also places abusive men's lives at risk. One woman in this study who employed lethal self defence against her husband stated that after calling the police 'dozens of times' and taking out a protection order, these legal avenues failed her and 'I ended up marrying the guy because I could not get away from him...The law doesn't do anything for me'. The deceased victim in this case had previously beaten the woman and assaulted their four week-old son. He received a two month sentence of imprisonment following these assaults.¹⁸⁷

Although women in the present study were assaulted, injured, maimed, disfigured and sometimes killed following abusers' interactions with the legal system, a culture of silence militated against institutional accountability for the ways these cases were processed.

VI PRINCIPLED CRIMINAL JUSTICE INTERVENTION

A *The Power and Control Analysis*

The power and control model of domestic violence, developed by the DAIP in Duluth, Minnesota, is commonly used to explain the many facets of domestic violence.¹⁸⁸ Rather than a one-off incident of physical or sexual abuse, domestic violence is defined as 'a range of tactics by which abusers seek to maintain power and control over their partners'. Psychologically abusive tactics include denial, minimising, blaming, isolation, intimidation, invalidating a partner's reality, manipulation, and using children and economic privileges.¹⁸⁹ Studies show aspects of men's controlling and coercive behaviour include jealousy motivated strictures on what women wear and

¹⁸⁵ The offender had assaulted the mother with a knife and threatened to kill her.

¹⁸⁶ Apparently to prevent the discovery of his sexual offending against the children.

¹⁸⁷ *Case Study S/01/F*.

¹⁸⁸ The power and control wheel was developed by Minnesota Program Development Inc.

¹⁸⁹ Randye Semple, 'Psychological Abuse in Intimate Relationships: A New Zealand Perspective' (2001) 30 *New Zealand Journal of Psychology* 60.

how they look; restrictions on women's movements outside the home; commanding women 'keep their heads down' in public; forced sexual activity and financial exploitation.¹⁹⁰

Julie Stubbs notes that

a control-based theoretical analysis of domestic violence is preferable because it has the capacity to recognize a number of features of domestic violence such as that: domestic violence includes a range of behaviours and coercive tactics not all of which are immediately discernible to others; it is often repetitive, meaningful and strategic, reflecting deeply held attitudes and beliefs rather than an isolated incident; and there are social and cultural dimensions that give meaning to the violence, that may authorize or sustain gender-based violence, and may constrain women's options in dealing with violence.¹⁹¹

The above observation highlights the importance of the power and control analysis to societal and system accountability for the way violence against women is constructed, prosecuted and punished.¹⁹² This systemic analysis can be distinguished from more limited theories which concentrate on individual abusers and/or victims in isolation.¹⁹³

B *Principled Sentencing*

Although the judicial typology of batterers discussed above apparently presumes that some recidivist batterers will avoid imprisonment, the power and control model of intervention is premised upon the assumption that the batterer will be held accountable. This requires a consequence for every act of violence, and incremental penalties for further acts of violence.¹⁹⁴ This intervention approach also appears consistent with established sentencing principles. For example, Hall notes that while a sentence cannot be increased merely because an offender has previous convictions, with the result that he is punished twice for the same offence,

¹⁹⁰ Catherine Itzen, 'Gendering Domestic Violence: The Influence of Feminism on Policy and Practice' in Jalna Hanmer and Catherine Itzen (eds), *Home Truths About Domestic Violence: Feminist Influences on Policy and Practice* (2000) 356, 358, citing Jalna Hamer, 'Out of Control: Men, Violence and Family Life' in J Popay, J Hearn and J Edwards (eds), *Men, Gender Divisions and Welfare* (1998).

¹⁹¹ Julie Stubbs, 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (2002) 43-44 (citations omitted).

¹⁹² Pence and McDonnell, above n 15, 251-252.

¹⁹³ Ruth Busch and Neville Robertson, "'What's Love Got To Do With It?' An Analysis of an Intervention Approach to Domestic Violence' (1993) 1 Waikato L.Rev. 109, 131.

¹⁹⁴ Ruth Busch, 'Editorial' (1996) 4 Waikato L.Rev. i, iii.

[t]he commission of several offences of the same or similar type will normally result in an offender receiving a more severe sentence on the basis that his previous convictions indicate a predilection to commit a particular type of crime...This is especially so where a second offence is committed against the same victim.¹⁹⁵

However, as discussed above, the present study found little evidence of a graded system of legal sanctions within a framework of increasing severity. When the court activated a suspended sentence of imprisonment and imposed a concurrent sentence in relation to subsequent offending, depending on the length of the sentence, an offender could also avoid sanctions for the previous or current assaults.¹⁹⁶ When more than one victim was involved and the sentences run concurrently, violence toward one of the victims effectively remained unpunished. The same problem occurred in cases where offenders perpetrated a number of assaults on different occasions against the same victim and the sentences for each were expressed as running concurrently. Sentences for breach of the victim's protection order also ran concurrently with sentences for assaults.

During the research, s 21D of the *Criminal Justice Act 1985* required courts to consider granting leave to apply for release to home detention to offenders sentenced to two years' imprisonment or less.¹⁹⁷ Although use of this sentencing option in domestic violence cases has the potential to expand opportunities for offenders to re-offend or reactivate a regime of harassment, seriously violent, recidivist offenders and those who perpetrated assaults in the context of separation were granted leave to apply for home detention.¹⁹⁸ This sentencing option appeared particularly inappropriate when applied to an offender whose violence forced the victim to flee her home and relocate somewhere else with her children.

¹⁹⁵ Hall, above n 141, 187 (citations omitted).

¹⁹⁶ For example, in *Case Study T/06/10(S)* the offender, who had been convicted in relation to three violent offences in the previous three years, beat his wife so badly she nearly died. Five months earlier, he received a one year sentence of imprisonment for assaulting a child which was suspended. Telling the offender he was lucky he was not appearing for murder, the judge ordered that the suspended sentence be served concurrently with the four year sentence for the present offending.

¹⁹⁷ See, also, s 97 *Sentencing Act 2002*.

¹⁹⁸ In *Case Study H/01/22(S)*, the offender met up with his partner in a bar where she was drinking with friends. After arguing with the woman, the offender hit her in the face with a glass which smashed on impact, cutting the woman's face. She required surgery and the attack left her permanently scarred. Defence counsel told the court the offender had a momentary loss of control. Although the complainant stated she still feared her former partner, he was sentenced to 15 months' imprisonment and granted leave to apply for home detention.

Hall notes that 'the most significant factor in sentencing involves an assessment of the gravity of the offence'.¹⁹⁹ In the light of traditional legal condonation of wife-beating, when courts weigh the comparative gravity of domestic assaults against the full range of offending in the criminal calendar, a longstanding tendency to trivialise this offending may be reflected in sentencing outcomes.²⁰⁰

C Monitoring and Evaluation from the Standpoint of Victim Safety

The Hamilton Abuse Intervention Project (HAIP) set up in July 1991 was modelled on the philosophy and practices of the DAIP in Minnesota. The project required criminal justice agencies and frontline battered women's advocacy groups to work collaboratively to achieve consistent interventions and batterer accountability through incrementally severe sanctions for repeat acts of violence. Battered women were provided with support and advocacy throughout the criminal justice process and beyond. Men's attendance at court-mandated treatment programmes was monitored, with penalties for those who were uncooperative or failed to attend. Protocols for sharing information between agencies were developed. Compliance with the protocols was systematically monitored and intervention practices were evaluated from the standpoint of victim safety.²⁰¹ Collaborative relationships between government agencies and the community were forged to provide strong and direct intervention when necessary.²⁰² In addition to contextualising violence within a cultural framework of power and control, the analysis also 'accounted for the impact of colonization on Maori life and violence against Maori women by Maori men'.²⁰³ As a result, the HAIP project received good support from Maori activists and Refuge workers. Subsequent research confirmed the benefits of HAIP for Maori and non-Maori battered women.²⁰⁴

Nevertheless, following the pilot period of three years, government funding for the HAIP project was cut. Sixty five per cent of funds received were tagged for different forms of independent

¹⁹⁹ Hall, above n 86, 140.

²⁰⁰ In *R v Green* (1994) 11 CRNZ 641, 645, the Court of Appeal noted that [e]ven a robber of long habit and perhaps ineradicable inclination is entitled to a sentence balanced by comparison with worse crimes and more depraved offenders'. Cf Hall, above n 141, 184, 188, citing '*domestic difficulties*' as a background circumstance which may mitigate offending. Credit may also be given to offenders who have 'weakened under pressure (eg loss of job through redundancy, *domestic crisis*)'. (emphasis added.)

²⁰¹ Roma Balzer, 'Hamilton Abuse Intervention Project: *The Aotearoa Experience*' in Melanie Shepard and Ellen Pence (eds), *Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond* (1999) 239, 240-241.

²⁰² Ibid 248-249.

²⁰³ Ibid 240.

²⁰⁴ Ibid 252.

monitoring and this level of funding was withdrawn from the project. Roma Balzer notes the immediate effect of this move was to almost destroy the viability of HAIP. However, the government's action has had much wider and longer-lasting ramifications:

In taking [that] action...the government has decided against making the HAIP experiment standard national practice. It has once again left it to local groups to argue for a collaborative government and community-based program effort to confront this violence. It has retreated from a commitment to its own obligation to be accountable to a broader vision of intervention. No funding is available through any of the conventional funding sources for the independent monitoring of agencies and practitioner performance. In many parts of the country, government agencies give mere lip service to interagency collaboration, and victim's advocacy groups are accorded the status of service providers with little or no allowance for them to critique how agencies' performance affect battered women.²⁰⁵

While the family safety teams currently being piloted by the government have a monitoring function, policies and practices which fail to promote victim safety evolve within a particular work culture. Systematic, independent monitoring, including input from specialist domestic violence advocates is necessary. The tracking system should follow the victim and offender from the time of initial contact with the police, through the Refuge, court and prison system, into the rehabilitation course, probation office and beyond.²⁰⁶

VII CONCLUSION

Although feminists have succeeded in defining domestic violence as a crime, progress has been uneven and gains achieved cannot be taken for granted.²⁰⁷ The present compartmentalised legal response to domestic violence lacks awareness of the interconnections between various categories of abuse. Consequently, while battered victims' protestations of love and forgiveness are regarded as reliable, credible assertions of agency when courts sentence their abusers; feminists note these assertions are disbelieved and discredited when articulated by battered defendants.²⁰⁸ Legislation deeming violence in the presence of a child or within earshot of a child to be psychological abuse

²⁰⁵ Ibid 253.

²⁰⁶ Falk and Helgeson, above n 1, 91.

²⁰⁷ See, eg, Wendy Davis, 'Gender Bias, Fathers' Rights, Domestic Violence and the Family Court' [2004] BFLJ 299, 309, noting that allegations by the Fathers' Rights movement and some politicians and sections of the media that the Family Court is biased against men have influenced the direction of family law, both locally and internationally, despite an almost complete absence of reliable empirical data to support these claims.

²⁰⁸ See, eg, Seuffert, above n 77.

frequently remains unacknowledged when courts mitigate batterers' sentences according to the wishes of battered mothers. Although this practice also sends a message of approval to women who remain in abusive relationships, law has become increasingly willing to prosecute battered mothers for failing to protect their children from battering men. The 'crime of passion' construction of separation violence and related empathy with violent men²⁰⁹ lacks acknowledgement of the relationship between this violence and mothers' ability to protect their children by safely exiting abusive relationships. This fragmented response is inconsistent with New Zealand Family Violence Prevention Strategy which seeks consistent, comprehensive intervention that keeps victims safe and holds abusers accountable.

Assumptions that 'the relationship' mitigates repeated acts of abuse have their origins in historical legal condonation of violence against wives. Minimising the dangers inherent in violent relationships also permits batterers to be repeatedly ordered to attend treatment programmes in the absence of monitoring and meaningful sanctions for non-compliance. Abused women are compelled to testify against violent men without recognition of the elevated risk of violence in these circumstances and related provision of protection and support. The primary red flags of separation and repeat victimisation are also masked by legal analyses which fail to challenge debilitating and dangerous cultural constructions of romantic love at the individual and societal level. Although domestic violence legislation emphasises the importance of effective legal protection for victims, silence surrounding the casualty toll of women and children who are harmed following criminal justice interventions with domestic violence offenders has contributed to a systemic failure of state accountability to abused women and their children.

²⁰⁹ In *Don't Blow It, Youth Warned*, Press, 13 November 1997, defence counsel for an offender convicted of his fourth, fifth and sixth breaches of a protection order told the court that: 'If this was Shakespeare, we would say "How Beautiful"'.

CHAPTER FIVE: REVIEW OF AGENCY RESPONSES TO LETHAL ASSAULTS

If I die, I want you to tell the world what happened to me.

I don't want other women to suffer as I have suffered.

I want them to be listened to.

Maria Teresa Macias (1959-1996), Sonoma County, California, 1996¹

I INTRODUCTION

The reality that decades of reform have failed to substantially alter the toll of women's deaths from domestic violence has led US² and Canadian³ jurisdictions to establish domestic violence fatality review panels. The Home Office and London Metropolitan Police Service (MPS) also set up 'Domestic Violence Murder Review' panels to investigate and report on domestic homicides perpetrated in London between 1 January 2001 and 6 April 2002.⁴ These reviews have now been placed on a statutory footing.⁵

Neil Websdale notes that fatality reviews

are increasingly part of an expanding arsenal of multiagency, interdisciplinary strategies for addressing the effects of violence against women. Underpinning these strategies is a concern about the risks of harm faced by women and other family members and a desire to improve the accountability of individual service agencies and to enhance the effectiveness of interagency co-ordination efforts. If conducted thoroughly and thoughtfully, fatality reviews may yield a more comprehensive understanding of the causes of and prevention strategies for domestic violence.⁶

¹ Washington State Coalition Against Domestic Violence, *Tell the World What Happened to Me': Findings and Recommendations from the Washington State Domestic Violence Fatality Review* (2002) 3.

² Neil Websdale, Maureen Sheeran and Byron Johnson, *Reviewing Domestic Violence Fatalities: Summarizing National Developments* (1998) Violence Against Women Online Resources, <http://www.vaw.umn.edu> at 15 November 2005 describe the state-by-state matrix of Domestic Violence Death Review initiatives.

³ In Ontario, domestic violence fatality reviews have been set up under s 15(4) of the *Coroners Act 1990*. The Domestic Violence Death Review Committee, *Annual Report to the Chief Coroner: Case Reviews of Domestic Violence Deaths, 2002* (2004) 12, notes the legislation 'allows for not only an extensive investigation process, but also a systematic examination that provides the basis for recommendations for preventing deaths in similar circumstances'.

⁴ Metropolitan Police Service, *Findings from the Multi-agency Domestic Violence Murder Reviews in London: Prepared for the ACPO Homicide Working Group* (2003).

⁵ Section 9 *Domestic Violence, Crime and Victims Act 2004* (UK).

⁶ Neil Websdale, 'Reviewing Domestic Violence Deaths' [2003] *NIJ Journal* 26, 28.

Websdale and his colleagues distinguish the 'investigative' model of fatality review from a 'systems approach'.

The 'investigative model' prioritises the need to identify domestic violence fatalities which have not previously been identified as domestic violence related by police, prosecutors, and coroners. Its goals include understanding how or why deaths were not classified as domestic violence related and working toward clearer elucidation of causes of death...The 'systems approach' prioritizes the need to identify how interventions were ineffective. The goal is to change the policies and procedures of involved agencies. Under this model, it is not necessary to identify every domestic violence related death.⁷

Systems reviews consistently report that women engage in multiple attempts to seek help before they are killed.⁸ The Ontario Domestic Violence Death Review Committee found a domestic homicide would likely have been predicted by knowledgeable professionals in five of the eleven cases the panel reviewed. Furthermore, in every case it examined, 'family members, friends, neighbours, and/or professionals had some knowledge of the escalating circumstances between the perpetrators and victims'. These persons failed to appreciate the significance of the situation and the information available to them.⁹ The Committee concluded that domestic violence risk assessment tools have the potential to save lives.¹⁰

The London MPS review also found no standardised domestic violence risk assessment tool was applied across the MPS and its partner agencies. Although red flags for serious violence/lethality were present in the majority of cases, these were not identified due to little guidance or research about what they are.¹¹ Courts granted bail to repeat domestic violence offenders who went straight to the homes of their victims and seriously assaulted or killed them.¹² Probation and Corrections Departments paroled violent offenders to the homes of women they had been imprisoned for battering and women were killed within a short time of their release.¹³

⁷ Websdale, Sheeran and Johnson, above n 2.

⁸ Washington State Coalition Against Domestic Violence, *Every Life Lost is a Call for Change: Findings and Recommendations from the Washington State Domestic Violence Fatality Review* (2004) 6. See also, Metropolitan Police Service, above n 4, 16.

⁹ Domestic Violence Death Review Committee, above n 3, 30.

¹⁰ Ibid 44.

¹¹ Metropolitan Police Service, above n 4, 10.

¹² Ibid 31.

¹³ Ibid 29.

While accepting that perpetrators are individually responsible for their violent acts, the Washington Review Panel notes that the quality of agency interventions, and provision of options for victims to obtain some measure of safety, self-determination and economic autonomy, is the responsibility of all persons in our society.

What we have learned from in-depth reviews of domestic violence fatalities over the last seven years is that domestic violence and domestic violence homicides are not an inevitable fact of life. Most homicides are preceded by multiple efforts to get help by the victim and multiple opportunities for the legal system and community to hold the abuser accountable...The actions and choices of both victims and abusers are substantially influenced by the institutional, social and cultural reality which surrounds them...[W]e identify the shortcomings in policy, practice, knowledge, training, collaboration, resources, communication and referrals that worked to amplify abusers' ability to control and terrorize their partners, or conspired to create insurmountable obstacles to safety and autonomy for domestic violence victims and their children.¹⁴

This chapter reviews agency interventions with victims and offenders prior to lethal assaults. Following a 'systems review' of selected cases, an 'investigative review' explores women's deaths in situations that call for ongoing monitoring and improved protocols for coroners and others investigating deaths.

II MISSING DATA

Cases and commentaries in this chapter are subject to a proviso regarding the nature and availability of data. The Wisconsin Domestic Violence Homicide Review provides an example of data available when fatality committees are established on a statutory footing. The Panel gathered anonymous demographic information from a computerised official data base followed by an Internet search for newspaper accounts of the selected homicides. If there were gaps in this data, the panel could access police and court records; contact local domestic violence programmes; district attorney's offices; adult protective services; medical examiners/coroners; and community response coordinators in the counties where the homicides took place.¹⁵

By comparison, in many cases in the present study where prior violence against the victim and/or prior convictions for domestic violence by the perpetrator could be established, no information on

¹⁴ Washington State Coalition Against Domestic Violence, above n 1.

¹⁵ Wisconsin Coalition Against Domestic Violence, *2003 Wisconsin Domestic Violence Homicide Report* (2005) 13.

the nature and quality of interventions was found. As demonstrated by the following case, without information about prior agency interactions with abusers it is impossible to identify the ways in which interventions were ineffective, or to hold institutions accountable.

*Case Study H/00/2: The Role of the Victim in Criminal Justice Interventions*¹⁶

In 1991, 32 year-old Trina was granted a final non-molestation order against Mark, her 31 year-old male partner. In 1996 Mark was convicted of wounding Trina with intent to injure and sentenced to two and a half years' imprisonment. In 1998 he appealed to the High Court against a refusal of bail in the District Court in relation to a further charge of assaulting Trina. In the lower Court, Trina offered to give evidence in support of the bail application 'that it was she who assaulted the offender, not the other way around, and that in fact he did not assault her on the night in question'.¹⁷ The District Court judge considered Trina's offer to give this evidence but declined bail as Mark had a 'lengthy list' of prior convictions, including a number involving violence; breach of various Court orders; and a conviction for escaping and failure to answer bail.

On appeal, Trina signed a statement in the High Court which was attached to Marks' affidavit in which she stated: 'He did not hit or touch me once...he did not assault me at all and I told the policeman in Court this'.¹⁸ However, an independent bystander witnessed the assault and signed a police officer's statement in his notebook. Although that statement had yet to be tested under cross-examination, the judge noted it was a careful and detailed recollection of events. Accordingly, it could not be said that the charges against Mark would fail despite Trina's stance. The judge observed:

[I]t is commonly the case that, for whatever reason, women in circumstances such as that in which [Trina] found herself on this night and on previous occasions, continue to support those who have assaulted them so the reasons for her taking the attitude which she has consistently taken during and since the bail hearing must remain imponderable.¹⁹

In 2000, Mark arrived home in the early hours of the morning and after arguing with Trina and assaulting her, Mark stabbed her in the neck and chest with a kitchen knife. Trina's children witnessed the unsuccessful attempts of emergency services to revive their mother.

¹⁶ See, discussion of this case, above at p 71.

¹⁷ *H v Police* (Unreported, High Court, Rotorua, Williams J, 21 May 1998) 2.

¹⁸ *Ibid.*

¹⁹ *Ibid* 5.

A wealth of research over almost three decades has exposed barriers to effective and safe participation in the criminal justice process that confront battered women.²⁰ The judge's description of battered women's withdrawal from, or lack of support for prosecutions as 'imponderable' is therefore dispiriting.

The offender in this case was reported as having a 'lengthy list' of past convictions. However, despite a search of the database, a search for unreported judgments, and the obtaining of a transcript of the murder trial, no information on the nature of these convictions, or the extent, if any, to which they related to his partner was found. Nor was information available on the role Trina played in the offender's earlier conviction and subsequent imprisonment for assaulting her. The offender's prior convictions included 'breach of various Court orders' but it could not be established whether some or all of these related to the protection order Trina had sought and been granted, and if so, whether she had cooperated in the prosecution of the offender on these occasions. Penalties imposed in relation to these convictions also remain unknown. Given an apparently clear pattern of escalating violence, it is particularly unfortunate that no information could be found relating to the 1998 offending. Consequently, it could not be ascertained whether the offender was convicted of the alleged assault in the absence of Trina's evidence, and if so, the sanctions involved, and if relevant, the period of imprisonment imposed.

III THE SYSTEMS REVIEW

In September 1998, the media reported that during the previous 18 months at least four New Zealand women were killed by male partners who were on bail on charges of breaching protection orders at the time of the lethal assault.²¹ Official statistics do not isolate domestic violence offending from other acts of violence perpetrated while on bail,²² so the present study could not

²⁰ Lee Bowker, 'A Battered Woman's Problems Are Social, Not Psychological' in Richard Gelles and Donileen Loseke (eds), *Current Controversies on Family Violence* (1993) 154, 158-160 identified the six barriers to escape as fear of worse battering; fear of harm to children; retaliation against parents or other close relatives; poverty and homelessness; shame; failure and public sin; loss of social identity and one's entire way of life.

See also, Minnesota Center Against Violence and Abuse, *Barbara J Hart's Collected Writings* <http://www.mincava.umn.edu/> at 15 November 2005 providing a comprehensive analysis of obstacles to battered women's participation in prosecutions; Kersti Yllo and Michele Bograd (eds) *Feminist Perspectives on Wife Abuse* (1988); Louise Ellison, 'Prosecuting Domestic Violence without Victim Participation' (2002) 65 MLR 834; Louise Ellison, 'Responding to Victim Withdrawal in Domestic Violence Prosecutions' [2003] Crim.L.R. 760.

²¹ 'Raw Deal' for Women in Courts, Press, 24 September, 1998;

²² See, eg, Barbara Lash, *Research Findings: Trends in the Use of Bail and Offending While on Bail 1990-1999* (2003).

confirm these cases.²³ However, during the period 2000 and 2002, at least four more women were killed by offenders who were on bail on domestic-related charges at the time they killed current or estranged female partners. The following case study is also significant for the number of victim and offender interactions with state agencies shortly before the killing which failed to avert the final lethal assault.

A Case Study One

*Battered Victim or Battered Free Agent?: Case Study T/00/6*²⁴

Sam, the 32 year-old offender had served six prison sentences for assaulting females, and had a history of threatening and violent behaviour toward Millie, his 41 year-old partner, over their two year relationship. At the time he killed Millie, Sam was on parole after serving three-quarters of a 14-month prison sentence for a previous assault on her. While in prison for this offence, Sam sent a number of abusive and threatening letters to Millie which the police recovered after her death. In a letter addressed to 'My Lovely' he told Millie she had four options when he was released: 'I stay, I stay and crack you, I crack you and leave, I get life'. He warned her: 'I don't need to be pissed to crack you and I most likely be sober next time I do it and then you will know and feel it properly what it is like to f***me around, go on do it again and find out... You see I don't care about anyone else but how you treat me is how I treat you. Like a dog. If it takes off you give it a hiding ...next time I am going to take some teeth, next time break your legs'. In another letter he wrote: 'Wait till I get hold of you. Nothing can stop me when my mind is set to do something'. Upon his release, Sam was sent to live at Millie's home as a condition of his parole.

Two weeks after his release from prison, members of Millie's family requested that Sam's probation officer recall him to prison as he was continuing to assault Millie and had failed to attend 'relationship counselling' as a condition of his parole. However, the probation officer decided not to recall Sam as his sentence was due to expire some six days later. Following complaints over the probation officer's handling of this case, a Corrections Department Internal Audit Report found the probation officer had decided to give Sam a 'second chance'. The Report also found Sam had been considered at high risk of re-offending and within a day of his release had continued his assaults on his partner. Referral notes written by the probation officer to a relationship counsellor recorded his concern that Millie had accepted Sam back, and that she was being physically abused by him.

²³ The 24 September report discusses these cases in terms of fatalities. However, an earlier report: *Alarm at Rise in Domestic Violence*, Press, 22 September 1998 states four offenders on bail for breaches 'killed or tried to kill their partners'.

²⁴ The victim/agent dichotomy is further discussed in Chapter Ten.

Sam and Millie also visited Work and Income New Zealand. At this time, Millie had 'blackened eyes and appeared frightened'. However, no action was taken by WINZ staff as Millie 'had not wanted to press charges'.

A social worker later gave evidence that she accompanied the police to Millie's home the month before she was murdered to remove her 14 year-old son from her care after reports of domestic violence. The social worker noted that at the time she met the boy's mother, Millie had a black eye and broken glasses. Millie told the social worker: 'I know that I am going to die at the hands of Sam'. When asked by defence counsel why she did not pass this comment on to the police, or take it seriously, the social worker responded that she did take it seriously, and removed Millie's son the following day. However, she could only give Millie advice: 'She knew what her fate was, but she wasn't prepared to move'.

On the night of the murder, the couple attended a party and Millie refused to go home with Sam. He left alone, but subsequently returned armed with a baseball bat. Millie's friends had hidden her. Sam warned those present that he would kill Millie if she was not home by 6 pm. The police were called and witnesses complained that Sam had threatened to kill his partner. Sam was arrested and taken to the police station. A police officer later gave evidence that during the police interview, Sam denied he had threatened other people at the party, stating that the only person he would threaten to kill was his 'missus'. Sam was charged with possession of an offensive weapon and threatening to kill. He was given police bail, and a police officer delivered him back to Millie's home.

Millie was asked by the attending officer if she 'had any problems' with this arrangement and reportedly responded that 'everything was okay'. At this time, Millie also told the officer that 'one day [Sam] was going to kill her, but he was a good man and she loved him'. Sam then entered the room and put his arm around Millie. The couple were told by the police officer to work out their problems when they were sober and the officer left. Presumably out of concern for Millie's safety, the officer asked a male neighbour to 'keep an eye' on the couple. Some time that evening, Sam beat Millie 'from head to foot until her face was unrecognisable and five of her ribs were broken'. She died from throat injuries inflicted with a spade handle. The sentencing judge later noted that Sam believed his partner 'got what she deserved'.

Millie's sister told reporters that she blamed this murder on the Department of Corrections for paroling the offender to her sister's home and refusing to recall him when faced with evidence of ongoing physical violence. She pointed out that it was difficult for the family to remove Sam from Millie's home as his parole conditions specified that he reside there. Millie owned her own home, so she could not leave without a large financial loss. Millie's sister said her family 'wanted a law change that set a minimum time frame before

someone could be paroled to their victim's home'. A Woman's Refuge spokesperson agreed, noting that 'abused women would find it hard to turn their abusive partners away'.

However, criminal justice personnel told the media that the Parole Board had been informed by Sam's probation officer that Millie consented to the residence condition. Millie's sister replied that Millie was too afraid of Sam to deny his request. 'Of course she couldn't refuse him...she was afraid of him. It should never have been an option. At some point they have to make a judgment call and see the bigger picture' she said. Considering Millie had left behind a son, who was taken away by the child protection agency because of Sam's violence, and whose last memory was of his mother with a black eye, Millie's sister considered Sam's sentence of imprisonment was not long enough. 'To a 14-year old boy with no mother, it's not very long at all', she said.

Victim advocates agreed with Millie's sister that the risks faced by Millie, and her family's concerns about them, had been minimised. However, the Corrections Department Internal Audit found management of the offender's parole 'did not demonstrate a lack of integrity and concern' for Millie. Even so, action should have been taken over the offender's failure to attend relationship counselling and management of high-risk offenders needed to be improved. Millie was described as having 'battered women's syndrome' and the Report notes 'major power and control issues' in her relationship with Sam. When releasing the report, the Corrections Minister stated that under new legislation, sentencing judges, parole boards and probation officers would have more tools at their disposal to keep 'the public' safe. It was also likely that violent offenders like Sam would receive longer sentences. The new Parole Board would be able to issue an interim recall order if parole conditions were breached, and this would speed the return of the offender to custody. No reference was made to the proposal by Millie's family of a minimum time period before offenders could be paroled to the homes of their former victims.

Police also defended their actions in bailing Sam to Millie's home. A police detective stated that many in the area, including the local Women's Refuge, who had smuggled Millie out of town a few months earlier, had warned her that she would be killed by her partner. The police were helpless to save Millie, who had 'cuddled up' to Sam in front of the police officer: 'If a person won't tell us what is happening to them how can we help them? Our hands were tied - we can only act within our legal boundaries', he said. Noting that the case was 'typical' of battered women who refuse to leave abusive men, a police sergeant is reported as stating that: 'She [Millie] was a lovely person and just couldn't say "no"'.

A domestic violence risk assessment tool would have alerted agencies involved in this case to Sam's dangerousness and potential for lethal violence. Escalating violence, public displays of

aggression toward the victim, and a highly controlling abuser, are strongly correlated with lethality.²⁵ Recent abuse (within 30 days of the current incident) increases the risk either that the woman will be killed, or that she will kill her abusive partner.²⁶ The Campbell et al study found abused women whose partner's threatened them with murder were 15 times more likely than other women to be killed. Threats with a weapon were rated as especially serious.²⁷ The addition of survivors' predictions to risk assessment tools can significantly improve their accuracy.²⁸ It is therefore disturbing that Millie's premonitions of her death were ignored or trivialised, both by the attending police officer, and the child social worker.²⁹

While intervention in the form of skilled assistance with safety planning,³⁰ and risk management for both victim and perpetrator, may have averted the final deadly outcome in this case, shortcomings in agency interventions were obscured by critical evaluations of the deceased woman's inability to say 'no' to domestic violence. This response belied the concrete reality of Millie's unsuccessful attempts to protect herself.

1. The Police Response

Given the paramountcy of victim protection in police domestic violence policy,³¹ the actions of police in this case appear exceptionally self-defeating. Sam had a history of violence against Millie and had only recently been released from a sentence of imprisonment for assaulting her. He armed himself with a weapon and publicly threatened to kill her. The threat was taken so seriously by witnesses that they called the police and hid Millie to protect her. Nevertheless, after arresting and

²⁵ See, eg, Peter Jaffe and Myrna Dawson, 'Domestic Homicides: Critical Issues in the Development of Death Review Committees' in Domestic Violence Death Review Committee, *Annual Report to the Chief Coroner: Case Reviews of Domestic Violence Deaths, 2002* (2004) Appendix B 53; Jacquelyn Campbell, et al, 'Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study' (2003) 93 *American Journal of Public Health* 1089.

²⁶ Carolyn Block, 'How Can Practitioners Help an Abused Woman Lower Her Risk of Death?' [2003] *NIJ Journal* 4, 5.

²⁷ Jacquelyn Campbell, et al, 'Assessing Risk Factors for Intimate Partner Homicide' [2003] *NIJ Journal* 14, 17-18.

²⁸ See research cited by Lesley Laing, *Risk Assessment in Domestic Violence* (2004) 8-10, Australian Domestic & Family Violence ClearingHouse www.aust.dvclearinghouse.unsw.edu.au at 15 November 2005.

²⁹ Neil Websdale, *Lethality Assessment Tools: A Critical Analysis* (2000) 5, National Electronic Network on Violence Against Women, Applied Research Forum, VAWnet www.vaw.umn.edu/Vawnet/lethality.htm at 15 November 2005 warns that use of risk assessment tools by police, probation officers and court personnel should not be a substitute for listening to abused women.

³⁰ See, eg, Appendix V.

³¹ Sergeant JJ Taylor, 'Intervention into Family Violence by New Zealand Police: Appendix: Police Family Violence Policy' in Jon Patrick, Helen Foster and Brian Tapper (eds), *Successful Practice in Family Violence in New Zealand* (1997) 99, 106.

charging the offender, police bailed him, and delivered him to the home of the woman against whom he had made the threat.

Acknowledgement that domestic violence is a process rather than a series of discrete events has been codified in the *Domestic Violence Act 1995*.³² Accordingly, assessments of victim safety require the specific incident to be viewed in the context of the offender's overall history of violent behaviour. However, the Washington Review Panel observes that the criminal justice system has difficulty responding to this concept of domestic violence. 'Domestic violence advocates on Fatality Review panels and advisory committees have observed that victims often feel a profound disconnect between their experience of domestic violence as a pattern of behaviour and the incident-based response of the criminal legal system.'³³ This problem is apparent in the police failure to recognise that Sam's threat to kill Millie, in the context of his past violence toward her, required highly proactive police intervention.

Despite the paramountcy of victim safety in police domestic violence policy, courts have ruled that the protection of domestic violence victims does not have automatic pre-eminence over the rights of persons arrested to be presumed innocent, and to have their bail applications given 'appropriate consideration'.³⁴ Consequently, police policy required the officers considering bail to weigh the circumstances of the offending (in this case a history of serious violence) and the safety of the victim, alongside the provisions of the *New Zealand Bill of Rights Act 1990*.

Nevertheless, had a protection order against the offender been in force police would have been prohibited from releasing him on bail. Section 51 of the *Domestic Violence Act* which required offenders who contravened protection orders to be held in custody during the 24 hours immediately following arrest was subsequently incorporated in s 23 of the *Bail Act 2000*. In red flag cases like the above, the existence or otherwise of a protection order as the determining factor in whether the law will prioritise women's safety appears anomalous. Some women in this study who were killed had protection orders, others did not. Given evidence of economic and other barriers to obtaining

³² Section 14 of the Act requires the Court to consider whether the abusive behaviour may, if viewed in isolation appear 'minor or trivial' but may nevertheless form 'part of a pattern of behaviour' from which the applicant and child need protection.

³³ Washington State Coalition Against Domestic Violence, above n 1, 66.

³⁴ *Whithair v Attorney-General* [1996] 2 NZLR 45, 52 (CA).

protection orders,³⁵ women's lives should not have to depend upon the existence or otherwise of a protection order.

Before releasing Sam, police policy required that Millie be informed of the decision to grant him bail and afforded 'appropriate protection and/or support'.³⁶ It is not known whether Millie was contacted by police prior to bailing and delivering the offender to her home. However, the query whether Millie had 'problems' with police actions was made at the point police returned Sam to her home, which may indicate that no prior contact occurred. One of the issues frequently identified by review panels is the failure of police to conduct separate interviews with victims and perpetrators at domestic violence scenes.³⁷ (Websdale also warns against placing women in the situation of completing risk assessment tools in close proximity to batterers.)³⁸ Sam appears to have been in close proximity at the time the police officer questioned Millie - he entered the room immediately afterward - and Millie may well have believed he was in a position to hear, and exact retribution, if dissatisfied with her response.

Aside from this obvious point, Millie made it clear to the police officer that she feared Sam would kill her. The fact that this statement was accompanied by a declaration of love for her partner was apparently sufficient for the officer to ignore Millie's fears for her life. However, the fact that women may continue to feel strong emotional ties towards abusive men, or even 'cuddle up' to them, does not imply a licence to commit violence. Perpetrators of intimate femicide (including the offender in this case) frequently express their love for the women they kill. Such expressions of attachment by either the offender or the victim should not be invoked by police as a reason for failing to implement police policy or to circumvent application of risk assessment protocols.

Police policy currently requires assault victims to identify abusers and outline their complaints in their presence.³⁹ While this investigative strategy may be intended to increase the chances of a successful prosecution, it overlooks research showing an elevated risk to women seeking formal interventions. Since fear of reprisal may lead women to minimise or deny the violence in the abuser's presence, the most dangerous batterers may remain unaccountable.

³⁵ See, eg, *Faith in Protection Orders Wanes*, New Zealand Herald, 20 October 2005.

³⁶ Dick Webb, et al, *Family Law in New Zealand* (11th ed, 2003) vol 2, 1516.

³⁷ Washington State Coalition Against Domestic Violence, above n 1, 66, provides examples of a number of other failures of police work commonly identified by panels.

³⁸ Websdale, above n 29, 6.

³⁹ Webb, et al, above n 36, 1515.

The MPS domestic violence policy regards Articles 2, 3 and 8 of the European Convention on Human Rights as placing police under a positive duty to protect both adult and child victims of domestic violence. If the actions of police have left the victim in immediate danger, the police service exposes itself to legal challenge.⁴⁰ Police action similar in kind to that in the above case would arguably attract such a challenge.

2. The Probation Service and Department of Corrections

The probation officer's response to the family's complaints of renewed violence toward Millie illustrates the same misunderstanding of the process of domestic violence as the police response. The probation officer artificially disconnected Sam's post-release assaults from his history of violence against women in general, and his pattern of assaults against his partner in particular. By construing the latest assault as a 'first' offence; Sam's previous history of violence disappeared. The resulting 'clean slate' permitted the probation officer to afford him a 'second' chance. The dangerousness/lethality potential of repeat victimisation and potential for escalation is obscured by this analysis, which reduces the process of domestic violence to a 'static, one dimensional, snapshot'.⁴¹

The reports indicate that Sam was considered to be at high risk of re-offending prior to his release. In this context, the decision to parole Sam to Millie's home, thereby providing him with increased opportunities to renew his assaults, while simultaneously restricting Millie's opportunities to escape, appears perverse. Millie's consent to this residence condition was obtained in the context of Sam's repeated threats to her life. The condition obstructed attempts by Millie's family to remove Sam, and Millie owned her home so she could not leave it without incurring substantial economic costs. Tragically, the parole address was the residence to which Sam was bailed and delivered by the police shortly before he brutally murdered Millie.

Commenting upon the role of the probation service in this case, the Corrections Minister announced that probation officers were now trained to understand 'controlling relationships', and it was now policy to recall a high-risk offender, with no 'second chance'. However, use of this

⁴⁰ Metropolitan Police Service, above n 4, 3.

⁴¹ See Benjamin Bowling, 'Racial Harassment and the Process of Victimization: Conceptual and Methodological Implications for the Local Crime Survey' (1993) 33 *Brit.J.Criminol.* 231, 232, discussing the implications of this analysis for the criminal justice response to racially motivated offending.

'second chance' terminology suggests an ongoing dissonance between victims' experiences of a continuing pattern of abuse, and the criminal justice tendency to view violence in terms of specific, discrete, incidents.⁴²

The Minister also announced that forthcoming sentencing and parole legislation might recommend that offenders were not paroled to their victims' homes 'unless it helped rehabilitation'. However, the ensuing legislation failed to address the position of domestic violence victims. The key test under s 28(2) of the *Parole Act 2002* is whether the Parole Board are satisfied that the offender poses an undue risk to the safety of the community, or any person, or class of persons. When considering this issue, the Board must have regard to the 'support and supervision available to the offender following release' and 'the public interest in the reintegration of the offender into society'.⁴³ Since the best predictor of post-incarceration dangerousness is a history of prior assaultive behaviour,⁴⁴ paroling domestic violence offenders to the homes of their former victims in the belief that this will assist rehabilitation is extremely dangerous.

Just how dangerous this practice is for New Zealand women is revealed by the present research. Four months after Millie was killed, a further offender who had habitually assaulted his partner served six months of a nine month sentence of imprisonment for an assault which left the woman bruised and with two broken ribs. (This woman had taken out a protection order against the offender.) The offender was paroled to the home of his former victim and killed the woman when she tried to order him out of her home 19 days after his release. Surprisingly, this further example of the failure of current criminal justice practices in domestic violence cases, so soon after Millie was killed, attracted little media/public attention. As discussed below, two further offenders were convicted of violent assaults against their partners, served a short term of imprisonment and were released to the homes of their former victims. These women were also killed shortly thereafter.

When assessing whether an offender poses an undue safety risk, the Parole Board is required to consider the likelihood of further offending, and the nature and seriousness of any likely

⁴² For an overseas example of the use of this 'second chance' terminology see: *Court Offered a Second Chance, and Three Now are Dead*, Minneapolis-St.Paul Star Tribune, 20 September 2004.

⁴³ Under s 7 of the Act, the paramount consideration for the Board is the safety of the community. Other principles that must guide the Board's decisions include under s 7(2)(a) that offenders must not be detained any longer than is consistent with the safety of the community, or subject to release conditions or detention conditions that are more onerous, or last longer, than is consistent with the safety of the community.

⁴⁴ Campbell, et al, above n 25, 1093.

subsequent offending.⁴⁵ However, Barbara Hart suggests that despite irrefutable evidence to the contrary, batterers have not yet been identified as a category of recidivist offenders.⁴⁶ An apparent example of this problem is New Zealand research which examines issues of identification and management of high risk violent offenders. While the research notes a supportive spouse is a positive factor when predicting recidivism, no distinction is made between domestic violence and other violent offenders. Consequently, there is no discussion of risk management issues when the high risk offender's violence has been directed against his supportive spouse.⁴⁷ Such approach can be contrasted with recognition in the UK of the serious implications of domestic violence for Corrections and the Probation Service:

Traditional ways of dealing with male offenders, including their strategies for rehabilitation, are based on the assumption that the sooner the offender returns to a settled family life (supported by his partner), the better the outcome will be. Where there has been domestic violence, however, this is tantamount to encouraging a repetition of the crime. The woman may feel unable to refuse, however, particularly when this is stipulated as a condition of parole. The probation service is now re-thinking their approach to men who abuse.⁴⁸

A US probation programme reports that a major reason why supervising domestically violent men is such challenging, and at times, very dangerous work, is that most 'have been socialized to believe that they have a right to use violence to control their families. This makes motivating the offender to change his behavior very difficult, since he sees no moral reason to change'.⁴⁹

Without an understanding of the dynamics of violent relationships, or standardised domestic violence risk assessment, police, parole and probation decisions can systematically undermine the aim of the *Domestic Violence Act 1995* to provide effective legal protection for victims. High rates of domestic homicide,⁵⁰ and patterns of repeat victimisation and escalation, make it essential that

⁴⁵ Section 7(3) *Parole Act 2002*.

⁴⁶ Minnesota Center Against Violence and Abuse, above n 20, 44.

⁴⁷ Nick Wilson, *New Zealand High-Risk Offenders: Who Are They and What Are the Issues in their Management and Treatment?* (2004) 11, notes most of the high risk offenders were imprisoned for between eight months and 3.62 years and these relatively short periods of imprisonment limited the ability of Corrections to deliver intensive treatment.

⁴⁸ Nicola Harwin and Jackie Barron, 'Domestic Violence and Social Policy' in Jalna Hanmer and Catherine Itzin, *Home Truths About Domestic Violence: Feminist Influences on Policy and Practice* (2000) 205, 212.

⁴⁹ Richard Johnson, 'Intensive Probation for Domestic Violence Offenders' (2001) 65 *Federal Probation* 36, 37.

⁵⁰ Ian Miller and Nestar Russell, *Homicide in New Zealand 1988-94: Patterns and Relationships* (Paper presented at the 11th Annual Conference of the Australian and New Zealand Society of Criminology, Victoria University of Wellington, 29 January-1 February 1996).

the criminal justice system responds systematically to the special problems posed by domestic violence offenders.

3. *Involvement of Other Agencies*

While courts, professionals and the general public 'are often impatient with battered women for not leaving the abuser, assuming that the mother and children will be safer after separation, data reveal that leave-taking is fraught with danger'.⁵¹

It is a potentially fatal error to assume that children will always be safer if their mother leaves the abuser. Post-separation violence can be more lethal than anything that went before, posing grave risks both to women and children. Intervention needs to take the whole family into account and multi-agency working designed to hold the perpetrator to account while helping the woman and children to be safe may be most effective overall.⁵²

Child protection policies must acknowledge that cooperation with child safety plans may increase the mother's risk of danger.

Staff at WINZ appeared unaware that the onus was not on Millie to 'press charges' against Sam (notwithstanding that she appears to have done so in the past). As previously discussed, early police policy relating to domestic violence directed that where possible, the victim should not be required to make a formal complaint, or give evidence in court, unless such evidence was necessary to avoid collapse of the prosecution.⁵³ Legal materials indicate the ongoing relevance of this policy, at least in relation to laying a formal complaint.⁵⁴ The Ministry of Health Intervention Guidelines also suggest that police pro-arrest policy 'mean[s] that [police] can arrest and charge the abuser if they have evidence of partner assault, without necessarily requiring the victim to make a formal complaint or give evidence'.⁵⁵

If police have reverted to their pre-1987 practice of relying on victims to determine the extent, if any, of criminal justice interventions, urgent action is necessary. On the other hand, if the 1987

⁵¹ Minnesota Center Against Violence and Abuse, above n 20, 69-70.

⁵² Audrey Mullender, et al, *Children's Perspectives on Domestic Violence* (2002) 224.

⁵³ Police Commissioner, 'Domestic Dispute Policy Changes', *Commissioner's Circular*, 1987/11.

⁵⁴ Webb, et al, above n 36, 1431, citing 'Husband and Wife' *The Laws of New Zealand* (para 66) as authority for the proposition that police will arrest and charge the offender without requiring the victim to lay a complaint.

⁵⁵ The Ministry of Health, *Family Violence Intervention Guidelines: Child and Partner Abuse* (2002) 51.

policy of not requiring victims to lay a complaint is extant, then the reactions of WINZ staff in this case demonstrate the importance of public and professional education in relation to this issue.

Millie predicted her own death at the offender's hands and relayed her fears to police and the social worker. The following case study provides further grim evidence of the accuracy of battered women's premonitions of death.

B Case Study Two

Media commentary on this case notes that 'in a recent Government-driven initiative, the State will step in and remove children from couples who won't end abusive relationships'. However, a social and legal system which blames and penalises mothers who fail to 'end abusive relationships', while ignoring separation violence as a barrier to escape, and failing to direct adequate resources to ensure safe exit, perpetrates a deep injustice on New Zealand women and children.

Battered Victim or Battered Free Agent?: Case Study F/02/1

Forty-seven year-old Christine began a relationship with 26 year-old Nick 18 months before Nick killed her in 2002. The Court heard police had been called 'many times' to the address, both by independent witnesses and by Christine herself. Christine 'frequently' telephoned or personally presented at the local police station to report Nick's violence and threats of violence. Nick was also asked 'many times' to leave the family home. In addition to numerous complaints to police, Christine escaped on a number of occasions to a Women's Refuge and took out protection and trespass orders against Nick. Some time during the relationship, Nick was sentenced to six months imprisonment for assaulting Christine and holding a knife to her throat. Refuge workers reported that while Nick was incarcerated Christine 'thrived' and began to take charge of her life.

Following his release, agencies, including the Probation Department and Women's Refuge, were on occasions so worried for Christine's safety that they also contacted the police. Records held by the agencies all indicated that the offender exerted oppressive control over Christine and her young daughter. Nick's 'anger [was] fed by jealousy and a paranoid belief that Christine was interested in other men.' As the violence escalated, Women's Refuge workers stated that three months before she was killed, Christine was 'the domestic equivalent of a shell-shock victim. She would tell us the only way she was going to get out of this mess was if he [Nick] killed her...he created that person who had no other options and he did it by keeping her isolated and filled with dread.'

On the occasion of the final lethal assault, Nick knocked Christine to the ground and repeatedly kicked and stomped on her face and head, twice breaking her jawbone and breaking her teeth. Christine was stabbed 11 times in the chest and once in the neck with such force that one of her ribs was severed from her sternum. Christine's jeans and underpants were cut from her body with the knife.

Following her death, a police detective told reporters that Christine 'made no secret of the fact she was assaulted by [Nick] frequently and he had threatened to kill her'. The detective noted that the offender's behaviour was so oppressive that Christine could not go anywhere without him: 'She went to a number of meetings that were arranged for her (about domestic violence) but he would arrive at the door during it and make her go home with him. It was kind of like persistent stalking' the detective said. Nevertheless, police and the media concluded that Christine wanted to help Nick reform and 'kept going back to him'. It was this behaviour that 'cost her life'.

The police detective noted that this case was 'typical' of other domestic violence cases in the region. The problem lay with Christine - she was a 'gentle' woman who had 'loved too much'. The detective recalled that a few months before her death, Christine made a complaint to the police, but withdrew it before the matter got to court: 'She did the right things in getting the court orders, but she always relented and went back to him.' However, Refuge workers stated that society had let Christine down. 'We all have to take responsibility. It's easy for us to take this sort of thing on face value, forget it, and get on with life' a Refuge spokesperson said.

It is deeply troubling to find no reported review of agency responses to Christine's numerous attempts to seek help and survive Nick's violence. The official construction of this intimate femicide in terms of an emotionally or psychologically helpless victim who 'loved too much' flies in the face of evidence that throughout this short relationship Christine repeatedly sought protection from the violence. According to police, Christine 'made no secret' of Nick's frequent assaults and threats to kill. (It is not known whether she was also terrorised by the offender during his short period of incarceration.) Following a heroic, but unsuccessful battle for survival, it appears Christine, like other women in this study, 'just gave up'.⁵⁶

Since the corollary of placing the onus of arrest and prosecution on victims is victim blaming,⁵⁷ the official narrative of Christine's personal pathology silenced consideration of her struggle to survive

⁵⁶ See, eg, *Case Study D/00/7* discussed below.

⁵⁷ Ruth Busch, Neville Robertson and Hilary Lapsley, *Domestic Violence and the Justice System: A Study of Breaches of Protection Orders* (1992) 161.

the violence and attempts to seek help. The public were therefore advised that the lesson to be learned from Christine's death was the need to remove children from battered mothers who cannot or will not leave violent men.

1. *Missing Information*

At his sentencing, it was revealed that Nick had garnered 45 criminal convictions in the eight years prior to his killing of Christine. No information was available on the nature of these offences, or the extent, if any, to which they involved crimes against Christine. Although Nick's violence toward Christine involved repeated breaches of a protection order, it is not known whether these were the subject of charges, and if so, the type and length of sentences that were imposed.

As previously discussed, Nick's action in holding a knife to Christine's throat should have alerted all involved in this case that Christine was in grave danger. The reports note that the Probation service contacted police out of concern for her safety - which suggests some ongoing involvement of the criminal justice system with the offender. Yet no information on action by police or the probation officer in relation to this warning was found.

2. *The Police Response*

The detective's comment that Christine's withdrawal of her complaint prevented the police from pursuing a prosecution against Nick further suggests that police have reverted to their pre-1987 policy of holding the battered woman responsible for state intervention. Over a decade ago New Zealand researchers warned that complainant-reliant criminal justice intervention fails to acknowledge threats and pressures that are brought to bear on victims to withdraw their complaints, assuming instead that women have power they in fact lack.⁵⁸ Under this policy, batterers may avoid legal sanctions for life-threatening assaults as well as capitalise on the fear of their victims by having the charges reduced.⁵⁹

Given the seriousness of Nick's violence, it is difficult to accept that Christine's 'frequent' complaints could not have been pursued by police without placing the decision whether to proceed

⁵⁸ Ibid 160-161.

⁵⁹ For example, the offender in *Case Study F/08/12(S)* admitted charges of assault with intent to rape and assaulting a female. The victim was punched and kicked in the head, ribs, kidneys and limbs for refusing to have sex with the offender. The following morning, when she again refused the offender beat the woman again. The police stated a charge of rape had been withdrawn as the complainant feared for her safety and could not be relied on to give evidence against the offender.

with charges on her.⁶⁰ In all cases, and clearly in this one, the threat of retaliation was real. It may be that police have been discouraged from pursuing charges in the absence of victim cooperation due to the unwillingness of courts to support this prosecution strategy.⁶¹ If the victim gives evidence that she lied in her original statement to police, in the absence of independent testimony the charges are likely to be dismissed.⁶² Nevertheless, the present study found police *can* obtain a conviction when both the offender and the victim deny an attack occurred and there are no other witnesses to the assault.⁶³ This highlights the importance of enhanced evidence gathering techniques in domestic violence cases.

Although 'fast-track' options are specified as a component of current police domestic violence policy, it is not known whether these were utilised in an attempt to retain Christine's commitment to prosecution of the batterer. It is clearly unjust to require battered women who are in need of protection to remain resolute throughout the granting of bail and long delayed court processes when research shows this can expose women to further abuse.⁶⁴ Hart notes domestic violence victims are among those who are most likely to require state assistance in relocation and in legal process to change the victim's identity. Victims of domestic violence must be eligible for witness protection programmes when it becomes apparent that their lives may be in danger.⁶⁵

⁶⁰ New Zealand Commissioner of Police, *Commissioner's Circular 37/8/1* (1987) stated that an arrest should occur without the need for a complaint from the victim. Nor should the victim be required to give evidence in court unless there was no case to answer without her evidence.

⁶¹ See, eg, *Case Study L/99/19(S)* where the offender allegedly pushed his seven months' pregnant de facto partner into a fire causing second and third degree burns. The offender was charged with wounding with intent to cause grievous bodily harm. However, the victim subsequently stated that she had not told police the truth. The defence requested a discharge on the basis of the victim's altered version of events. Although the Crown wished to proceed with the charges, the judge granted a discharge stating that if the case went ahead, a jury could not be reasonably satisfied of guilt.

⁶² See, eg, *Case Study D/97/19(S)* where the defendant was charged with injuring the victim with intent to injure and assaulting her in breach of her protection order. At trial, the Crown was successful in having the recanting victim declared a hostile witness. The woman continued to deny that the defendant attacked her, stating that she made her original statement because she was angry with the defendant. She said she had woken up in hospital, but could not say how she got there. The judge dismissed the charges. In *Case Study H/01/25(S)* the nine months' pregnant victim and her father were rushed to hospital following alleged assaults by the defendant who was charged with three assaults and a charge of intentional damage. The woman received bruising but her unborn child was unharmed. Her father suffered a broken arm, cuts to the head and a badly bruised chest. At trial, the woman victim recanted and the charges were dismissed.

⁶³ In *Case Study H/06/10(S)* the offender punched his girlfriend twice in the face. At trial, both the offender and the victim gave evidence that no assault occurred. Although the only two witnesses to the assault denied any attack had occurred, the jury relied on 'peripheral evidence' to convict the offender.

⁶⁴ Jennifer Hand, et al, *Free From Abuse: What Women Say and What Can Be Done* (2002). The researcher has been informed by one defence counsel that delay is a common tactic employed in the hope that battered women will recant before the court hearing.

⁶⁵ Minnesota Center Against Violence and Abuse, above n 20, 41.

Utilisation of an appropriate risk assessment tool would immediately have revealed that Christine was in grave danger. The case involved if not all, then at least the majority of indices of lethality identified by domestic violence research: repeated acts of violence; controlling behaviour; jealousy and possessiveness; threats to kill involving use of a weapon; victim premonitions of death; and the presence of a step-child in the family.⁶⁶ These red flags for dangerousness/lethality should have resulted in a pro-active criminal justice response. However, attention was diverted from shortcomings in agency interventions by a focus on the 'typical' battered woman's self-abnegating and pathological construction of romantic love.

C Case Study Three

While data on legal responses to past domestic assaults was often unavailable, the research points to a pattern of repeated attempts to rehabilitate violent men prior to the final lethal incident. As demonstrated by the following case study, this unprincipled approach to treatment may be manipulated for the benefit of habitual batterers whose violence escalates to lethality.

Battered Victim or Battered Free Agent?: Case Study D/00/7

The sentencing judge described a ten-year history of assaults inflicted upon Matekino by David, her 31 year-old male partner. The couple had four children, the first born when Matekino was age 15 years. Four years before David killed her, the state removed Matekino's children from her care. The sentencing judge notes that this was due to the violent nature of the relationship and 'issues surrounding the victim's absences from home'.⁶⁷ David had three previous convictions for assaulting Matekino. In 1993 he was directed to receive counselling. In 1997 he received a sentence of 12 months' imprisonment which the judge noted reflected that this assault involved serious violence. David was granted an early release to attend and complete a domestic violence prevention programme. Following its completion, David told his probation officer that the programme had 'put things into perspective'.⁶⁸ In striking contrast to this assertion, violence relating to the third conviction was alleged to include kicking, strangling, and punching Matekino and beating her with a baseball bat over four days. Following his conviction for this assault, Matekino apparently tried to reduce David's sentence by telling the Court that she had lied in her statement to police. David was sentenced to a term of four months' imprisonment and was released from prison just two months before he beat Matekino to death.

⁶⁶ See, eg, Campbell, et al, above n 25, finding the presence of stepchildren in the home was an element which increased the risk of femicide. See also: Aruna Radhakrishna, et al, 'Are Father Surrogates a Risk Factor for Child Maltreatment?' (2001) 6 *Child Maltreatment* 281.

⁶⁷ *R v D* (Unreported, High Court, New Plymouth, Laurenson J, 29 October 2001) [15].

⁶⁸ *Ibid* [19].

At trial, several witnesses gave evidence that they had seen David assault Matekino on a number of occasions, and had repeatedly warned him that these attacks could one day prove fatal. David allegedly responded that the witnesses should 'mind their own business'. One witness stated he saw David punching Matekino around the head about five or six times on one occasion: 'She was actually screaming out for help but I didn't want to get involved. [David] was taller than me and quite a bit bigger'. Another male witness described how months before her death, he witnessed David punching Matekino one or two times in the face, while kneeling over her as she lay on the floor. 'For a female they would have been hard (punches), not something you would normally see' he said. Later, the witness asked David why he continued to assault his partner. David allegedly replied: 'Sometimes she's so stupid, she annoys me.'

Matekino's father told reporters he knew that the relationship was violent and had warned David that he should control his anger. He said the whole family were trying to put a stop to it as 'we thought it was going to kill her'. Part of his daughter's reluctance to leave the area was her desire to be near her children. Despite the fact that she did not have custody, and needed court permission to spend time with them, she had hopes of regaining custody of her children. Also, Matekino thought that 'David really loved her. I do think he loved her', her father said.

Following Matekino's death, a newspaper editorial noted that 'psychiatrists have names for it, but [Matekino] merely accepted that this [violence] was her lot in life. It is one of life's mysteries why some women would quit a relationship at the first hint of violence, and yet others endure years of mental cruelty and brutality beyond imagination...[Matekino's] life and death always was just a matter of time'. A police spokesperson also described the homicide as avoidable: 'Firstly, the young woman could have got out of the relationship and secondly, [the offender] could have resisted the temptation to beat her.'

In striking contrast, Matekino's best friend stated that Matekino 'was scared'. The beatings had become more frequent in the months leading up to the homicide as David was jealous and believed Matekino had been sleeping with other men. '[H]er whole body had been broken by him. If it wasn't her arms, it was her legs...All her body was in pain, from the top to the bottom. She'd get earache all the time, now and then she'd get bleeding from her ears. She said it was something about her brain, that her head was always being smashed up' her friend said. Seventeen days before she was killed, Matekino attempted to seek Women's Refuge assistance but was turned away as she owed rent from a previous stay. Her friend said Matekino had been angry at this rejection and: 'I think she gave up then...she just totally gave up'.

At sentencing, David's defence counsel submitted that the fact Matekino 'kept coming back' to David should be regarded as a mitigating feature of this killing. Addressing David, the judge responded that: 'The

question is, of course, whether she was able to escape from you. I don't know. Certainly, at the end, there was evidence to indicate that she was scared and wished to be kept away from you'.⁶⁹

1. *Criminal Law and the Courts*

The four month sentence of imprisonment imposed in relation to David's third conviction for assaulting Matekino - proof that prior attempts at rehabilitation had failed - appears a manifestly inadequate legal response to serious violence by this recidivist batterer. A history of violence is a major risk factor for dangerousness/lethality. Therefore, the sentencing principle that an offender who has previously received a lenient sentence will subsequently be sanctioned more severely due to his failure to avail himself of the opportunity for rehabilitation⁷⁰ appears especially apposite to domestic violence offending. However, the emphasis on victim responsibility in this case deflected public attention from the quality of legal responses to habitual abusers.

Defence counsel's submission that batterers who kill women who return to abusive relationships should have their sentences reduced is both alarming and deeply ironic. The approach appears to be a modern variant of the old criminal law doctrine that a woman cannot complain of violence she has condoned.⁷¹ Rather than outright rejection of this analysis, the judge's remark that 'at the end', there was evidence Matekino 'was scared and wished to be kept away' from David implies the submission was considered credible, albeit irrelevant on the facts of this case.

However, batterer treatment is a state-sponsored intervention strategy in domestic violence cases. Consequently, women whose partners attend stopping violence programmes must have a legitimate expectation that the violence will cease. A woman who returns to an abusive relationship following her partner's completion of a programme must therefore be exercising her agency and choice in a reasonable way. To hold otherwise, is to argue that contrary to prevailing societal beliefs, batterers are *not* amenable to treatment.

Accordingly, Matekino must have been acting as a reasonable agent when she returned to the relationship following the offender's completion of the counselling programme he was court-ordered to attend. So also must she have acted reasonably when she returned to the relationship

⁶⁹ Ibid [34].

⁷⁰ Geoff Hall, 'Sentencing (II): Matters of Aggravation and Mitigation' [1985] NZLJ 184, 187.

⁷¹ See, eg, Susan Atkins and Brenda Hoggett, *Women and the Law* (1984) 129, for a discussion of the doctrine of condonation.

following the batterer's completion of the stopping violence programme he attended as a condition of his early release. (It could also be argued that women have a legitimate expectation not to be killed following decisions by criminal justice personnel that offenders may be safely released to the homes of their former victims.)

If partial responsibility for their deaths is to be sheeted home to deceased victims who keep returning to abusive relationships, then society and the courts must accept responsibility for creating an expectation that batterer treatment programmes work. Since victim blaming is deeply engrained in the legal system, there is an urgent need for the state to direct resources to educating and informing women of the *actual* potential of programmes to reform recidivist batterers, and the optimum conditions for successful treatment.

In a cruel distortion of battered women's social reality, the assertion by defence counsel that Matekino failed to leave is belied by the judge's acknowledgement that 'at the end' Matekino 'was scared and wished to be kept away' from the offender. Thus rather than an example of battered women's so-called failure to leave, this intimate femicide is more accurately categorised as a *separation attack*.

2. Community Agencies

While the extent of her participation in David's earlier prosecutions for assaulting her remains unknown, media reports that Matekino simply accepted that violence was 'her lot in life' ignore clear evidence of her previous contact with police, and her escape on a number of occasions to Women's Refuge. Matekino was killed shortly after she was turned away from Refuge due to her failure to pay her past accommodation costs. One newspaper observed that there 'would be few of us guiltless enough to point the finger of blame at the refuge. That refuges should be so poorly funded they're forced to refuse help to a woman who's failed to pay her \$10 or \$12 a night rent is a disgrace'. While this observation might have prompted concerted demands for better funding of Refuges, a focus on the 'inevitability' of Matekino's death due to her 'failure' to leave failed to hold the state accountable for discharging its obligation to provide all New Zealand women with access to temporary safe housing.

3. *Child Protection*

Policies to protect children from domestic violence must be cognisant of their impact upon battered mothers. Following the removal of their children by the state, battered mothers may choose, as Matekino did, to remain close to their children, rather than attempt to escape from the batterer by moving to another geographical location. Penalising battered mothers, while leaving abusers at large to inflict further violence on women who want to stay close to their children, simply increases the risk of further serious injury and lethality.

D Case Studies Four and Five

Overseas and New Zealand research reveal access changeover times are particular risk situations for separated women, with the potential to expose both the woman and her children to further abuse.⁷² Three women in this study were killed during access changeover times, and a further woman was killed when she attended an access hearing at a courthouse. However, while killings of battered women who 'failed' to leave abusive relationships were constructed in terms of victim helplessness and pathology; women who were killed after leaving abusive relationships and taking their children with them had *their* actions scrutinised for the extent to which they provoked their former partners to perpetrate lethal violence.

Separation Killings and Child Access: Case Study B/97/4

Stephine lived with Michael her 25 year-old male partner for 'several years'. During this time, Michael was physically violent toward Stephine 'on a number of occasions'.⁷³ After three previous attempts to separate, Stephine exited the relationship and applied for, and was granted, a protection order which covered herself and her two children.

On the day of the homicide, pursuant to an arrangement made with Michael's mother, Stephine drove with a female friend to the home of the mother to drop off the couple's one year-old daughter for an access visit. The Crown later stated that Stephine made the 'fatal mistake' of going to the front door with her daughter. Stephine's friend heard the child cry and heard Stephine calling out 'What are you doing Michael...stop it!' The friend then ran to the house, found the door locked, and unsuccessfully tried to kick it in. After calling police from a nearby house she returned, and upon entering through the back door, found Stephine lying on her back covered with blood, calling out 'help me, help me, help me.'

⁷² Busch, Robertson and Lapsley, above n 57; Alison Chetwin, Trish Knaggs and Patricia Young, *The Domestic Violence Legislation and Child Access in New Zealand* (1999). See, eg, *R v Nepia* [1983] NZLR 754 involving a victim who was stabbed 14 times after arriving to collect her children.

⁷³ *R v B* (Unreported, High Court, Rotorua, Randerson J, 24 March 1998) 2.

A pathologist later gave evidence that the deep knife wounds on both Stephine's hands and severed tendons were defence injuries. Stephine was also slashed in the throat with the knife, severing a major artery, and stabbed four times in the back, one of the wounds piercing her lung. During the attack, Michael also assaulted his mother and father. The Crown contended that after killing Stephine, Michael made a 'half-hearted' attempt to kill himself.

At trial, the Crown stated the background to this killing was a history of violence by Michael who wanted total control of Stephine. Michael's mother told the Court that her son was depressed and angry and had threatened to kill both himself and Stephine on a number of occasions. Michael's father confirmed his wife's evidence.⁷⁴ Although an affidavit that Stephine had sworn in support of the protection order described the couple's daughter as a 'child of our relationship', Michael alleged that he had been provoked to kill Stephine when she informed him that their daughter was not his child.⁷⁵

1. *Criminal Law and the Courts*

Although the batterer in the above case study had been attending a domestic violence programme, no information was available on whether he had completed the programme, and if not, whether he had been referred back to the court for non-attendance, and if so, the type, if any, of sanctions involved.

Prior to enactment of the *Domestic Violence Act 1995* and the *Guardianship Amendment Act 1995* courts generally promoted conciliation and resolution by agreement between the parties in relation to access arrangements, whether or not the non-custodial parent had used violence within the family. The *Guardianship Amendment Act 1995* created a rebuttable presumption that a parent who has used violence in a domestic situation is not to be regarded as a fit and proper person to have custody of, or unsupervised access to, the child. Section 3 of the Act requires the Court to consider whether or not to place conditions on any supervised access order to protect the safety of the custodial parent. Such conditions may include a requirement that the parent not be required to have face-to-face contact with their abuser.⁷⁶ Under s 27 of the *Domestic Violence Act 1995* the court can also include special conditions in a protection order which are 'reasonably necessary' to

⁷⁴ Ibid 3.

⁷⁵ Ibid.

⁷⁶ *McMaster v Soley* (Unreported, Family Court, Christchurch, Judge Kean, 3 March 2000).

protect the protected person from further domestic violence and these may relate to the manner in which arrangements for access to a child are to be implemented.

Research on this issue found that in the majority of cases (68%) no clear directions from the court about access occurred, or parents could not remember whether directions had been made. Unsupervised access was taking place immediately after a protection order had been made in a significant number of cases (23%). In most cases, such access was occurring without any assessment of risk, or formalised direction from the court, and in contravention of the non-contact conditions of the protection order. Almost all custodial parents who used formal supervised access centres reported that they had been harassed by the non-custodial parent when arriving at or leaving the centre. This conduct was in breach of the protection order, and left custodial parents feeling very unsafe. The researchers concluded that 'courts need to take into consideration that any access places custodial parents in the position of being accessible to the non-custodial parent and assess the safety implications of this'.⁷⁷

It could not be ascertained what, if any, conditions relating to access changeover were attached by the court to Stephine's protection order. Sir Ronald Davison's Report recommended children should be delivered and collected by an independent person at access changeover times or the delivery and collection supervised by an independent person.⁷⁸ This recommendation was not taken up in 1995 legislation. Had Stephine not been exposed to her estranged partner's violence at the access change-over point, the lethal outcome on this particular occasion would have been avoided.

2. Other Agencies

Although red flag evidence of Michael's stalking, threats to kill, threats to commit suicide and recent assault with a weapon made the final lethal attack reasonably foreseeable, it could not be ascertained whether Stephine's lawyer or the programme provider undertook a risk assessment, or alerted Stephine to Michael's potential for dangerousness/lethality and helped her with safety planning.

⁷⁷ Chetwin, Knaggs and Young, above n 72, 85.

⁷⁸ Sir Ronald Davison, *Report of Inquiry into the Family Court Proceedings Involving Christine Madeline Marion Bristol and Alan Robert Bristol* (1994) (the 'Bristol Report') 42, concerned the killing of children by their father in the context of estrangement. The children were in their father's care by consent order.

The following case study chillingly reveals how victim-blaming camouflages structural patterns of offending and inadequate/ineffective agency responses to women who are killed after 'begging authorities for help'.

Separation Killings and Child Access: Case Study G/01/7

Jarrold, the 33 year-old offender, and Tracey, his 34 year-old partner, lived together for approximately 5 years during which time the couple had 'broken up 5 or 6 times'.⁷⁹ In October 2000, Tracey left the relationship taking her four children and obtained interim custody of the couple's 3½ year-old son. At the time of her death she had been separated from her partner for approximately three months. Following an alleged assault by Jarrold, Tracey obtained a temporary protection order which also covered the couple's child. Under the provisions of the *Domestic Violence Act 1995*, Jarrold had three months from the time the temporary protection order was made to apply to the Family Court for a full hearing before the order was made permanent. However, the approaching Christmas holiday period, coupled with a busy Family Court schedule resulted in advice from his lawyer that a hearing could not be set down for some months.

Tracey originally provided Jarrold with liberal access to his son. A female friend of the couple, who provided her home as an access drop-off point, later gave evidence that Jarrold exercised access 'whenever he wanted'. However, the witness said things 'began to get crazy' and Tracey became uncomfortable with the access arrangements. Following an incident in December 2000, after which her new partner reported to police that Jarrold had driven a car at him, Tracey stopped access saying she 'wanted things sorted out properly in court'.

Two days before the homicide, Jarrold's new female partner broke off their relationship after discovering Jarrold had gained the assistance of her son to telephone his child in breach of the protection order.

On the day of the murder, Tracey and her family were picnicking at a park. Her three children age 8, 10 and 15 years and her new partner went down to the river to swim, leaving the child at the centre of the access dispute and his mother sitting on a blanket by the car. A witness later gave evidence that Jarrold arrived at the park and the child ran toward his father's car, followed by Tracey who was walking behind. The witness stated 'the man in the car was yelling and swearing at the woman. She just sounded like she was saying it wasn't her fault'. The witness saw Tracey walk away from the car carrying the child and Jarrold exit his vehicle and approach Tracey, who was standing by her car holding the child. The witness watched as Jarrold grabbed Tracey in a headlock and began stabbing her repeatedly. Shouting for help, the witness ran toward the couple and called out to Jarrold to stop. By this time, Tracey no longer had hold of the child, who was

⁷⁹ *R v G* [2002] CA 372/01 (Unreported, McGrath, Robertson, and Gendall JJ, 8 August 2002) [2].

'just standing there watching'. Several people ran over to the scene, and one man armed with a cricket bat and another male tried to 'sneak up on the offender' but both backed off when Jarrod turned and saw them. Jarrod continued to stab Tracey. As she lay dying on the ground, Jarrod collected the child, who was splattered with his mother's blood, and drove away.

An off-duty detective armed with a jack handle, and his brother-in-law armed with a dog chain, unsuccessfully attempted to smash the windscreen of Jarrod's car and set chase leaving the detective's wife and others to tend to the mortally wounded woman. A lengthy police chase ensued and the offender's car was finally forced to stop by road spikes and a police block. A police officer later gave evidence that Jarrod spoke through a partially open car window and stated 'I know I've done something wrong, I know it, I couldn't help it, I went to see my boy... they were all there. I saw her with her new boyfriend, I had a couple of beers and I just lost it, I know I shouldn't have done it but I just lost it'.

At trial, a pathologist gave evidence that Tracey received 31 wounds mostly to her head, neck, upper body and arms. There were also seven defence wounds to her hands where she had tried to fend off her attacker. Five of the wounds could have proved fatal on their own, particularly the cutting of her carotid artery, and an injury in which a portion of the knife was left in her skull.

Tracey's new partner told the Court that Jarrod threatened him on several occasions and told him 'to keep away from his son'. Four witnesses gave evidence that Jarrod also made 'dark threats' to kill Tracey prior to his carrying them out. A long time male friend of the offender stated that Jarrod told him he still loved Tracey, could not live without her, and was going to kill her. Under cross-examination, the witness said he could not be sure whether the offender had said he wanted to kill Tracey, or that he was going to kill her. Jarrod's father told the court that his son told him two months before the homicide that he was considering killing Tracey because 'he was going through pain' and thought this 'would ease the pain'. His son's problem was 'basically he still loved [Tracey] and he wanted to be with [her]'. The father stated that he 'agonised' over his son's threats for some time, while trying to decide what action to take. Eventually, he telephoned Tracey to express his concern. Although he did not give her the 'exact details' of his son's threats, he warned Tracey to 'be on her guard'. Police also spoke with the offender about threats he had allegedly made against Tracey over the telephone. Although at this time, a protection order was in place, it appears no further action was taken by police.

Jarrod's father also stated that shortly after the separation, his son purchased a car and informed him that he needed it to drive around unrecognised. 'He basically said he wanted it to keep an eye on what [Tracey] was doing.' Jarrod's brother also gave evidence that although the offender told others the car was for his new girlfriend, Jarrod 'called it the "snoop wagon" and used it to spy on [Tracey]'. On one occasion the offender

had been 'snooping around' Tracey's home and saw her with her new partner. The witness said his brother told him 'he felt better after that, because he now knew for certain [Tracey] was seeing someone else'.

Jarrold's brother and his father talked about getting him psychiatric help. However, staff at a local psychiatric unit informed his father that 'they couldn't do anything until [Jarrod] had done something'. The witness said he was so concerned about his brother's behaviour that he believed 'the best thing that could happen was that [Jarrod] would hopefully get locked up'. Asked by defence counsel if Jarrod had caused the family a lot of problems, his brother replied that he had, but said despite this he did not resent him. Jarrod's mother also gave evidence that prior to Tracey's death there had been difficulties regarding child access as Tracey 'wanted more structured visits'. She and his father believed their son 'needed professional counselling to get over [Tracey] and to let go of her'. Shortly before the murder, Jarrod told his mother that his life was not worth living. Although she agreed with defence counsel that her son seemed to have been contemplating suicide, the witness said she did not take her son's comments seriously.

Jarrold gave evidence in his defence. He told the Court that he 'did not think he had ever loved anyone the way he loved Tracey'. He stated that on the day of the killing he arrived at the park and told Tracey he wanted to take the child for a drive. She refused, called him crazy and told him he 'needed time to get his head sorted out'. Tracey also told him she would be complaining about this breach of the protection order to police.

Defence counsel argued that because of his under-treatment for severe clinical depression, Jarrod had been particularly vulnerable to provocation from Tracey leading up to and just before the killing. It was 'obvious' said counsel, that Tracey was using access to his son to punish Jarrod for 'not acting in a way she expected him to'. A psychologist stated Jarrod had known intellectually that his relationship with Tracey was over, but he could not 'let go' emotionally. Jarrod loved his son intensely and was compensating for his own childhood. Jarrod had also developed a conduct disorder which meant he disliked rules, such as protection orders. In response to a question by the trial judge as to what acts Tracey had done that were provocative, the psychologist replied that these were: 'her comments about [Jarrod] being a crazy person, picking up the boy, holding and restraining him, preventing him talking to his father and walking away'.

Tracey's brother told reporters that prior to her death, Tracey 'had been begging authorities for help to protect her from Jarrod'.

Despite the presence of all or most of the established risk factors for dangerousness/lethality in this case, Tracey died. Had Jarrod's depression, suicide threats, threats to kill his estranged partner,

threats to her new partner; stalking and harassment of her post-separation been identified as high risk behaviours requiring pro-active intervention, including immediate and detailed safety planning, Tracey's death might have been avoided. However, the research found no evidence of a fatality review of agency interventions in response to Tracey's brother's statement that his sister had been 'begging authorities for help' before she was killed.

1. *Criminal Law and the Courts*

Tracey's death could have been depicted in a way which educated the public about red flags for lethality, including the increased danger to women and children post-separation. Instead, this killing of a woman by a jealous, estranged male partner, who stalked her in his 'snoop wagon', threatened to kill her, threatened her new male partner, and 'disliked rules such as protection orders', was attributed to Tracey's attempt to obtain 'more structured' access arrangements and the granting of temporary protection orders to separated women.

After the trial, Jarrod's defence counsel criticised legislative provisions in the *Domestic Violence Act 1995* which permit ex parte hearings for the granting of protection orders:

Defence counsel, Dr Donald Stevens, doesn't practise family law so was shocked when he read the Domestic Violence Act that outlines protection orders. He said the balance has been lost. 'It infuriates fathers so much' he says 'to no longer have access or interim custody...and it was done behind their back'. It could, he adds, send people over the edge. He said it suits the applicant to get the order but also to allow some contact, but doesn't always work when dealing with those emotionally troubled or angry over the way they have been treated.

On this analysis, separating women should receive *less* rather than greater legal protection from jealous, abusive male partners.⁸⁰ The assertion that granting protection orders erodes the rights of fathers and provokes violence against separated women fails to acknowledge that it was Jarrod's abusive and threatening behaviour that prompted Tracey to restrict his original liberal access to his child. Jarrod's own family recognised the danger he posed to Tracey, and warned her to that effect. The social reality that Jarrod finally killed Tracey in the presence of her child surely constitutes evidence that her concerns for her own and her child's safety were justified.

⁸⁰ Sir Ronald Davison, above n 78, 41, found 'the laws relating to domestic protection and to protection of children in custody and access situations...are inadequate to deal with the types of domestic violence that we are currently faced with'. The *Domestic Violence Act 1995* provisions regarding custody and access were largely in response to this report.

The views of defence counsel in the above case are shared by fathers' rights groups who argue that men are victimised by the 'one-sided Family Court system' which dispenses protection orders too readily.⁸¹ These unsubstantiated claims of gender bias have apparently resulted in courts lifting the bar for without-notice protection orders.⁸² However, a

Women's Refuge report notes that what motivates almost all women who apply for protection orders is fear and a desire to make themselves and their children safe. This is reflected in Australian research about women's attitudes to access where 'one of [the] most striking findings was that most women who had experienced violence in their relationships still wanted their children to have some contact with their other parent, but what they sought (and often did not get) was an arrangement that ensured the safety of the children and themselves'.⁸³

The following case provides further stark evidence of the way claims of gender bias against fathers distort the social reality of women and children.

Three weeks after separating from the children's mother, the father in this case strangled his two daughters to death and committed suicide. The case was used by fathers' rights groups to promote their claims that suicides by 'desperate dads' had become increasingly common. A representative of one group queried: 'How alone, threatened, and cornered must this man have felt to have found resolution by taking the lives of his children and his own? There are many in political power and in the courts and the bureaucracy that have blood on their hands once again.'⁸⁴ The National Director of the group remarked: 'We encourage men to mourn the passing of their children as though they have died, because they have died from their lives'.⁸⁵ The Commissioner for Children is also reported as expressing his concern over the case and citing the principal Family Court

⁸¹ *Group Backs Fathers' Fight*, Daily News, 11 September 1998 reports that Men Against Female Emotional Abuse (MAFEA) was the first group of its kind to fight protection orders. The report notes that the organiser of the group had been involved in a custody battle and had a protection order out against him on the grounds of psychological abuse.

⁸² Wendy Davis, 'Gender Bias, Fathers' Rights, Domestic Violence and the Family Court' [2004] BFLJ 299, 302-303, noting recent research 'found that 61 per cent of the without-notice applications that were directed to proceed on notice involved severe abuse'. The research 'called for further research about the exercise of judicial discretion in directing applications to proceed on notice as well as further training for Judges on the dynamics of domestic violence'.

⁸³ *Ibid* 304-305 (citations omitted).

⁸⁴ *When The Strain Gets Too Much*, Press, 11 August 2001.

⁸⁵ *Ibid*.

judge's recommendation that courses be provided to assist couples to move on from their break-up and focus on working out child access arrangements.⁸⁶

However, the actual facts of this case are in striking contrast to a 'fathers' rights', or even a children's rights analysis. The maternal grandfather of the deceased children told reporters that although the children's father had been verbally abusive he had never been denied access to the children and there were no issues over custody.⁸⁷ The children's mother stated that she made sure their father 'had as much access to the girls as he wanted'. The father would call or send a text message that he wanted to see the girls, and since the father had no transport, the mother would drive the children to his address herself. Indeed, it was the mother who suggested her daughters spend time with their father on the night they were killed.⁸⁸ 'I thought, rather than drag them through the courts; we should be able to do this in a civilised manner.' The mother was angry at media reports linking her daughters' deaths to 'fathers' rights' claims over custody and access: 'It doesn't have to be a custody battle for something like that to happen. I'm not trying to scare people. But this has nothing to do with custody'. She did not dwell on her decision to take the children to their father on the night they were killed: 'If it wasn't the Friday night, it would have been the Saturday night... I think he did this to punish me. He's given me a life sentence', she said.⁸⁹

Despite incontrovertible evidence that women (and children) are most in danger at the time they leave or attempt to leave a violent relationship, and recognition of this elevated risk in New Zealand Family Violence Prevention Strategy⁹⁰ and Ministry of Health Intervention Guidelines,⁹¹ the legal system has systematically failed to respond to separation violence as a gendered, life-threatening pattern of offending against women and children.⁹² The terrible social reality that New Zealand women are being killed despite 'begging authorities for help' therefore remains unacknowledged.

⁸⁶ *Men Poorly Equipped to Deal with Break Ups*, Nelson Mail, 8 August 2001.

⁸⁷ *Death Inquiry Finishes*, Press, 7 August 2001.

⁸⁸ *Mother Dealing With Her Grief*, Nelson Mail, 25 August 2001.

⁸⁹ *You've Got to Move On'... Bereaved Mum Faces the Future*, Nelson Mail, 25 August 2001.

⁹⁰ Ministry of Social Development, *Te Rito: New Zealand Family Violence Prevention Strategy* (2002) 24.

⁹¹ Ministry of Health, above n 55.

⁹² In *Courting Family Tragedy*, Sunday Star Times, 13 December 1998, 2, Auckland and Dunedin lawyers discuss the 'frustrations' experienced by their clients when a protection order is issued. A spokesman for the 'Caring Fathers' organisation suggests two classes of protection order are necessary - one for fathers with a history of violence, and another for fathers who perpetrate separation violence - the latter apparently to reflect the less serious nature of separation violence.

2. *Other Agencies*

As discussed above, the family of the offender in *Case Study G/01/7* unsuccessfully attempted to seek intervention by health professionals. This was a recurring pattern in the research.

A further offender referred by his general practitioner for urgent psychiatric assessment was found to pose no risk and refused admittance for treatment. He killed his wife the following day.⁹³ The Coroner found another male who killed his estranged partner when she left their 'volatile' relationship had been inappropriately discharged from mental health treatment.⁹⁴ The Coroner criticised the outpatient mental health care of a further offender who killed his estranged partner after he was discharged from inpatient treatment.⁹⁵ The father of another offender contacted mental health authorities to express his concern regarding his son's post-separation depression and abusive behaviour. The offender was interviewed by a mental health worker who advised that he was an adult and should take responsibility for his life. A few hours later, this offender killed his estranged partner.⁹⁶ Another offender presented at a local hospital requesting psychiatric assistance but was turned away. This offender also killed his partner a few hours later.⁹⁷ Another male killed his wife a few hours after he was assessed by a mental health team and permitted to return home.⁹⁸ Yet another offender sought medical help and was placed on a three day monitoring plan. He murdered his estranged partner the following day.⁹⁹

In 2002, the Ministry of Health published domestic violence intervention guidelines for use in a number of health professions and clinical settings. The Ministry's 'Danger Assessment Scale' drawn from domestic violence research is accompanied by safety planning protocols.¹⁰⁰ However, research published in 2003 found little consistency in forensic risk assessment and the data on which some approaches were based was of questionable validity.¹⁰¹ In 2004, an offender who had previously sought help from mental health services killed his estranged wife and six month-old son and set fire to himself. Police had been called twice previously to the home. The local Women's

⁹³ *Case Study C/95/2.*

⁹⁴ *Case Study P/97/8.*

⁹⁵ *Case Study G/01/3.*

⁹⁶ *Case Study S/97/6.*

⁹⁷ *Case Study M/99/7.*

⁹⁸ *Case Study K/01/9.*

⁹⁹ *Case Study W/02/10.*

¹⁰⁰ Ministry of Health, above n 55.

¹⁰¹ Callum McCall, 'A Review of Approaches to Forensic Risk Assessment in Australia and New Zealand' (2003) 10 *Psychiatry, Psychology and Law* 221.

Refuge had also become involved. Relatives of the deceased woman stated that 'she had a protection order against [the offender], escape plans in place for her children and an electronic security system installed in her home'.¹⁰² However, a police spokesperson told the media that the offender's drug taking, history of violence, and the context of estrangement, 'certainly didn't highlight any problems as far as the mental health services were concerned'.¹⁰³

E Case Studies Six and Seven

Although the overwhelming majority of offenders who commit acts of serious domestic violence are men, overseas research indicates that a significant number of arrested women are self-defending or angry victims of violence.¹⁰⁴ The following case study provides an insight into police and judicial responses to angry domestic violence victims.

The Angry Homicide Victim: Case Study M/02/4

Bill, the 34-year-old male offender was in an 'on again, off again' relationship with 28-year-old Karnia for 'several months'.¹⁰⁵ Bill had abused Karnia on 'several' occasions¹⁰⁶ and had prior convictions for violence, including assault with a weapon and two counts of assaulting a female. A week before he killed Karnia, Bill was arrested and charged with an assault against her. On the morning of the homicide, Bill appeared in the District Court, pleaded guilty to the assault, and was bailed on terms that he not associate with Karnia, and not consume alcohol. Upon his return home, Karnia was apparently waiting outside Bill's house.¹⁰⁷ Bill later stated that he told Karnia to leave. Before she did so, Bill gave her a sum of money and Karnia returned later that day with a bottle of bourbon. An 'altercation' developed, and Bill summoned a neighbour, who forcibly restrained Karnia by holding her down and lying on top of her. The sentencing judge later stated that the 'precise details' of this altercation were unknown, but it was 'highly likely they were of a relatively petty nature'.¹⁰⁸ The police were called.

¹⁰² *Upsurge in Concern About Family Safety: More Calls to Police*, Otago Daily Times, 24 May 2004.

¹⁰³ *Double Homicide Suspect Had Drug Habit - Police*, New Zealand Press Association, 22 May 2004.

¹⁰⁴ Kerry Healey, Christine Smith and Chris O'Sullivan, *Batterer Intervention: Program Approaches and Criminal Justice Strategies* (1998) 73, note intervention programmes differentiate between: self-defending and angry victims, mutually combatant women and primary physical aggressors with the latter constituting approximately two per cent of women arrested for domestic violence.

¹⁰⁵ *R v M* [2004] 1 NZLR 71 (CA).

¹⁰⁶ *Ibid* 75.

¹⁰⁷ Karnia's reasons for seeking out the offender: whether from a sense of connectedness; a desire for reconciliation; a need to establish whether he had been taught a salutary lesson from his experience in court; and/or assurance that legal intervention had effected a change in his abusive behaviour; remain unknown.

¹⁰⁸ *R v M* [2004] 1 NZLR 71, 74.

The attending police officer gave evidence that he arrived at the home to find Karnia was 'irate'. So he handcuffed her to a pole while he 'tried to resolve the dispute'. The sentencing judge subsequently observed that the officer 'was on duty on his own and needed to separate [the couple] whilst he endeavoured to calm the situation down'.¹⁰⁹ Bill told the police officer that Karnia had consumed an 1125ml bottle of bourbon, had become angry when he refused to drink with her, and had broken a mirror. (Karnia's version of the incident was not reported.) The police officer agreed with defence counsel that Bill 'was calm and sober' throughout the time he was present. The officer obtained assurances from the pair that there would be no further problems, released Karnia, and left the property.

Shortly thereafter, Bill beat Karnia and stabbed her three times in the chest. Bruises on Karnia's body indicated that she had received seven blows to her head and face. Her forearms were slashed in places, and in addition to a serious chest wound, Karnia died from another deep penetrative knife wound to her heart. While she lay dying, Bill contacted emergency services claiming that Karnia had stabbed herself. When police returned to the house, Karnia was lying on the bed in a pool of blood. Bill subsequently changed his account of Karnia's death, alleging that she had threatened him, and in particular, told him she was going to 'get [a gang] onto him' and 'get somebody to kill him'.

The Court of Appeal cites the following passage from the police video interview:

'Question: How did it happen? Answer: She said she was going to get the [gang] onto me for hitting her last week. Her parents don't like me. Question: So what did you do? Answer: I went to the toilet. She was lying on the bed. I came back. The knife was by the bed, by the floor. She was mouthing off saying I was going to be killed. I said is that right...I stabbed her in the chest and said I hope you die you little bitch. Question: How many times did you stab her? Answer: In the chest. Question: Why did you stab her in the chest? Answer: Because I wanted to kill her. Question: How long did you think about it before you decided to stab her? Answer: Probably a minute, she just kept mouthing. I didn't say anything. I thought about being at Court today because of her and stabbed her. Question: How were you feeling when she was mouthing at you on the bed? Answer: I just wished she would shut up. Question: What were you thinking just before you stabbed her? Answer: Well, your going to get it good bitch now aren't you. Question: What did you think as you stabbed her? Answer: Take it, take that.'¹¹⁰

This account omits any reference to Bill beating Karnia prior to her 'mouthing off' at him as she lay on the bed.

¹⁰⁹ Ibid.

¹¹⁰ Ibid 74-75.

The court heard medical evidence that a car accident three years earlier had produced behaviour and personality changes in the offender. These included paranoia, impulsiveness, aggressive anti-social behaviour, and loss of control. Bill's personality was summarised as: 'currently marked by the presence of passive aggressive, aggressive antisocial, and paranoid traits at clinically significant levels. These are manifest in his irritability, verbal and physical aggression, impulsivity, disregard for the effects of his actions on others, and suspiciousness.'¹¹¹

Nevertheless, the sentencing judge found 'the events of the evening of the murder were brought about by [Karnia] who had goaded [Bill] badly.'¹¹² (The Court of Appeal notes Bill's conduct was also influenced by the alcohol he had consumed in breach of his bail conditions.)¹¹³ Invoking the *Sentencing Act 2002*, the judge determined that a sentence of life imprisonment would be manifestly unjust. On the night of the offence Bill was not 'the full quid' and was 'every bit as battered (in moral terms) in his mind as a battered woman.'¹¹⁴ Although expert opinion suggested Bill posed an on-going risk, the judge thought it unlikely that Bill would ever again find himself in the extreme situation that occurred in this case. The Court of Appeal overturned this decision and imposed a sentence of life imprisonment. In doing so, the Court noted that the degree of static risk posed by Bill would not change. Nor was the dynamic risk likely to be manageable to such an extent that amenability to lifetime recall should be displaced.

As Sally Merry observes, the 'innocent' victim in law is not the woman who fights back, drinks, or takes drugs along with her abuser.¹¹⁵ Given so little information is available from the victim's perspective, a fatality review of this case can only hint at possible shortcomings.

1. *The Police Response*

Although Bill was on bail at the time he killed Karnia, no review of police handling of the original domestic violence call could be found.

Busey attributes the frequency with which police arrest self-defending victims to the sometimes confusing behaviors a victim may display to police. For example, the victim may feel safe to express her own anger after the police have arrived, or the victim may express anger toward the police because the justice system failed to protect her in the past. Victims suffering from post-

¹¹¹ Ibid 75.

¹¹² Ibid 81.

¹¹³ Ibid 76.

¹¹⁴ Ibid.

¹¹⁵ Sally Merry, 'Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence (2003) 25 Hum.Rts.Q. 343.

traumatic stress disorder (PTSD) may have angry outbursts or take aggressive postures - such as picking up a knife - which they feel are necessary in order to survive...research in Wisconsin shares this conclusion: 'Research with the community sample of domestically violent [women] indicated most were motivated by a need to defend themselves from their partner's assaults or were retaliating for previous beatings'.¹¹⁶

The reasons for Karnia's 'irate' behaviour at the time of the original police call-out remain unaddressed in the reports. Nor is it known whether police policy requiring officers who attend domestic violence call-outs to consult with their supervisor if no arrest is made¹¹⁷ was followed in this case. There is no information on whether, and how, the attending officer assessed the issue of victim safety (a paramount principle of police intervention). Completion of a risk assessment instrument to assist in determining which party was the primary aggressor might have alerted the police officer to a number of red flags for lethality: Bill's history of violence against women, including Karnia; his recent assault and Karnia's decision to report the violence to police; Bill's psychological disturbance; aggressive behaviour outside the relationship; unemployment; and use of alcohol and drugs. In the absence of such assessment, it was Karnia who was forcibly restrained by police.

2. Criminal Law and the Courts

It is not known whether, and if so how, the District Court assessed the likelihood of further violence against Karnia, including the possibility of retaliation for her decision to involve the police. The sentencing judge's balancing of Bill's lethal attack with evidence that Karnia 'forced herself [on Bill] and took advantage of him and his drugs'¹¹⁸ depends upon a perception of equal antagonists and a woman who could 'give as good as she got'.¹¹⁹ The history of battering in this relationship and Karnia's eventual death illustrates that this was not the case. Although the Court of Appeal recognised Bill posed an ongoing risk to public safety, it is significant (in terms of domestic violence risk assessment), that the sentencing judge did not. In order to view Karnia as the provoker of lethal violence, it is necessary to ignore or trivialise Bill's beating of Karnia to which she was apparently responding at the time she was killed.

¹¹⁶ Healey, Smith and O'Sullivan, above n 104, 73.

¹¹⁷ Webb, et al, above n 36, 1515.

¹¹⁸ *R v M* [2004] 1 NZLR 71, 73.

¹¹⁹ Donald Nicolson, 'Telling Tales: Gender Discrimination, Gender Construction and Battered Women Who Kill' (1995) 3 Fem.L.S. 185, discusses this analysis in battered defendant cases.

The following case provides further evidence of the need for police training on risk assessment protocols which can assist to identify the primary aggressor. The depressing reality that many women who seek help from the legal system before they are killed have predicted their own demise is also evident in this case.

The Angry Homicide Victim: Case Study H/00/8

Thirty four year-old Jian separated from her 41 year-old husband John and was granted a protection order. In a letter written to her husband two months before she was killed, Jian told him she had made up her mind to leave because of his gambling and violence: 'Time after time, if it was not physical abuse, it was verbal abuse. You threatened me at every turn.' She told her husband he had never treasured her and had squandered her money. 'I really cannot work like this any more...You are not a human being. You are not a man...You should begin anew to earn your own living....I would rather die than live...You thought you could control me like this forever...If another violent behaviour should occur, do you want to kill me? The child will then have no mother.' Jian's family stated that they also received a letter from Jian a few days before she was killed which confided her fears that her husband would kill her.

Less than an hour before her death, Jian pleaded for help during a 111 call from her cell phone outside a closed police station. Jian told the police operator that her estranged husband had taken her son and was threatening to kill him. After informing the operator that she had a protection order, Jian was advised to wait outside the station while units were sent out to her. A male associate of Jian, who was present at the time, later gave evidence that two police officers arrived, and after a computer check, queried the existence of the protection order. Jian's cell phone rang, and after telling police that her husband had demanded \$30,000 or he would kill their son, it was decided that Jian should return to the unit she occupied in the same building as her husband to retrieve the protection order. Cross-examined by defence counsel, the attending police officer agreed that at this time the male associate warned police that Jian's estranged husband might be waiting outside her home when they arrived. Jian did not want to leave her car unattended, so was permitted to drive on ahead alone, while the male associate travelled with police. The officers lost her in traffic.

Fearing for her son's safety, and believing her husband was elsewhere, Jian entered her home to fetch her protection order. However, although her unit had been locked, her husband had persuaded their son to reach through a slot in the front door to open it. The husband, described by the Crown as 'eaten up with anger and jealousy' had kept watch for his estranged wife from an upstairs window, armed with a hammer. On seeing a knife, he decided to use that instead. By the time police arrived, they heard 'full-on, hard core screaming' and entered the house in time to find the offender straddling his dying wife. In addition to defence wounds

to her hands and forearms Jian was stabbed in her heart and lung and the stab wounds in her shoulder and back suggested she was trying to escape. Her face was also 'a target area'. The reports do not mention the whereabouts of the boy during this attack on his mother.

A senior police officer (who declined to be named) told reporters the case was symptomatic of a lack of supervision in the police. A senior police officer should have travelled with Jian, and the constables should have called their sergeant as soon as they realised a threat to kill a child had been made. 'If the cops had done their jobs right, it would never have happened', he said. In a further report, a police officer is quoted as stating that it would be a serious misjudgement to allow a woman in a custody dispute back into a potentially volatile situation without first securing the scene. 'Common sense dictates...that if there's been a domestic at the address, you would make sure that the woman stayed outside until you made sure it was safe. For all they knew he could have been sitting there with a firearm waiting for her to come back...I would be asking those cops some real serious questions about why they didn't tell her "You wait here, we'll go back to the address" or "Come with us in one of the cars"'. However, although a Police Complaints Authority investigation was pending, the police commander told reporters he believed that the two officers had done a 'really professional job'. He said staff had been 'reminded' that family violence would not be tolerated and that protection orders were not to be taken lightly.

By contrast, a domestic violence advocate complained that police should not have required the victim to return home to provide evidence of her protection order. The Education Co-ordinator of Auckland's Domestic Violence Centre was reported as stating that a police review of this case was only a 'small part of the picture...Many agencies miss vital clues because they have yet to build domestic violence risk factor assessment into their work practice.' He wanted an inter-agency death review team set up, so lessons could be learnt from this homicide. No subsequent reports relating to either this recommendation, or the finding of the Police Complaints Authority, could be found.

At trial, the jury heard a tape of Jian's call to the police communications centre on the afternoon she was killed. Jian repeatedly told the call taker that her estranged husband had taken her son and was threatening to kill him. She stated she had a temporary protection order against the offender and police had been called six days previously. (The jury heard Jian had applied to have the protection order discharged, but this had not occurred.) Defence counsel claimed Jian's husband had been provoked into killing his wife. When ruling on the admissibility of certain evidence, the trial judge noted that the offender was claiming Jian had started the fight. Accordingly, evidence that the police had been called to the home just six days before Jian

was killed might be 'very helpful to the defence'. This evidence was said to provide 'some basis' for arguing that 'it was the deceased who was behaving in an aggressive way, at least verbally' on that occasion.¹²⁰

The judge's suggestion that Jian may have been verbally aggressive at the time of the earlier police call-out indicates that no action was taken by police against the offender despite the protection order. Research reveals police attitudes that women 'bring the violence on themselves', or could avoid it by 'being quiet', or whose husbands allege are 'looking for a fight' are often implicated in police failure to arrest the abuser.¹²¹ If some police officers construct domestic violence victims as troublesome or undeserving, and the violence against them as trivial, the strong investigatory procedures required to establish probable cause for arrest will be missing. Without further information it is only possible to speculate whether this may explain why no action was taken when police attended the domestic violence call-out six days before the offender murdered his estranged wife.

Four days after Jian's murder, a newspaper office received a telephone call from a man who threatened a copy-cat killing. The male was arrested by police after stating that he also was on the verge of killing his wife. He reportedly spoke of his anger that a protection order prohibited him from contacting his partner directly, stating his belief that protection orders were 'worthless' as they aggravated the situation. His wife's order would not stop him from going to her home and killing her: 'I'm going to go around and kill her if I don't get satisfaction...I don't care if I go to jail. I would rather she died and I was in prison and [his child] was brought up by strangers' he told the call taker. No reports relating to subsequent court appearances, or the disposition of this case could be found by searching available records.

IV INVESTIGATIVE FATALITY REVIEWS

The aims of investigative reviews include understanding how or why deaths were not classified as domestic violence related.

In particular, the investigative reviews make much of the need to improve protocols for coroners and others investigating deaths. If this is achieved then the outcome will be not only a more

¹²⁰ *R v H* (Unreported, High Court, Auckland, Fisher J, 15 November 2000) [12].

¹²¹ N Zoe Hilton, 'Police Intervention and Public Opinion' in N Zoe Hilton (ed) *Legal Responses to Wife Assault: Current Trends and Evaluation* (1993) 37.

accurate count of domestic violence related deaths, but also an increase in public awareness of domestic violence as a threat to life and well-being.¹²²

The following categories of cases requiring monitoring and review were identified from the present research.

A Misclassification of Domestic Violence-related Deaths

1 Drug-Taking versus Domestic Violence

As demonstrated by the following case, attributing women's deaths to drug-taking has the potential to downplay or ignore the role of domestic violence.

Misclassification of Domestic Violence Deaths: Case Study O/98/1(I)

Camellia, age 25 years, whose occupation was described as 'solo mother', appeared in Court and admitted a charge of assault on a child. The Prosecutor noted that Camellia was preparing her seven year-old son for school and 'asked the boy something and after he lied to her, she smacked him on the bottom four or five times with an open hand'. The child was then hit 'with a vacuum cleaner pipe, twice on a leg and twice on an arm. After the boy apologised [Camellia] calmed down and comforted him. He did not go to school that day or the next'. Two days later, Camellia 'left the house, leaving a note saying she had to get away from it all and needed help. Later that day the child was admitted to Christchurch Hospital with a swollen left arm, bruising to his back near the buttocks, a grazed elbow, bruising to his chest, shoulder, and legs, and a cut to his head'. When interviewed by police, Camellia stated that she came from 'a violent domestic situation and was coping with an out-of-control drug habit'. She was remanded on bail for sentencing in August 1998. (No report of her sentence could be found.)

Around two years later, a woman who lived with Camellia answered the door about 3 am and found three men standing on the doorstep. The jury was told one of the men, armed with a tomahawk, pushed her against the wall, while Camellia's ex-husband 'held a machete against her cheek, asking: 'Where is the bitch?' The offender with the tomahawk passed it to Camellia's ex-husband who went into a bedroom where Camellia was asleep. The Court heard that Camellia 'woke up screaming...as her ex-husband beat her with a tomahawk'. While her estranged partner was repeatedly striking Camellia with the blunt end of the axe, another man removed a crying baby from the bedroom. The three men were convicted on various charges which included burglary, kidnapping, wounding with intent to cause grievous bodily harm and wounding with intent to injure.

¹²² Websdale, Sheeran and Johnson, above n 2, 23.

Approximately four months after this attack, Camellia, aged 28 years, was found dead in the bath in her home at about 2.30 am. Police originally treated Camellia's death as a possible homicide. However, after ascertaining that her ex-partner was still in prison, her death was subsequently declared accidental. Although police found no evidence of drug taking in the bathroom, the Coroner found Camellia drowned after taking a potentially fatal dose of morphine either before or during the bath. 'The medical evidence is that she died by drowning but it is also clear she almost certainly lost consciousness because of an overdose of morphine that caused her to slip and that caused the drowning'. The Coroner regarded Camellia's death as 'really a chicken and egg situation, if drowning had not occurred, the morphine would have resulted in death anyway - it's a grim scenario and grim way of putting it'. A police detective gave evidence that although morphine was now a problem in New Zealand, he was unsure if it was a problem in the area where Camellia lived.

The Coroner concluded that the message must go out from the court that taking illegal drugs was a life threatening practice which could and would continue to take lives. 'If this is a wake-up call to even one possible victim [Camellia's] death will have served some purpose' the Coroner said.

The conclusion that Camellia's death would 'serve some purpose' if one person were influenced not to take illicit drugs fails to look beyond the symptom of drug taking, to the scourge of domestic violence and its impact on Camellia's life, her drug taking and her death. Research shows tranquillisers, alcohol and/or illicit drugs are often used by battered women as a means of blocking out the effects of the violence.¹²³ However, in the absence of protocols to facilitate Coroners' understandings of domestic violence, society will remain unaware of the true human cost of this violence and its impact on society.

2 Deaths arising from 'Relationship Break-ups'

In June 2005, the Christchurch Coroner publicly reported that 'depression, relationship break-ups and backgrounds of drug and alcohol dependency' were the chief factors behind eleven suicides he had recently ruled on.¹²⁴ One report notes: 'The themes running through these inquests were familiar: suicide afflicts more men than women and is closely associated with depression, and often

¹²³ Sue Griffiths, 'Women, Anger and Domestic Violence: The Implications for Legal Defences to Murder' in Jalna Hanmer and Catherine Itzin (eds), *Home Truths About Domestic Violence: Feminist Influences on Policy and Practice A Reader* (2000) 133, 141.

¹²⁴ *Suicide Factors Emerge*, Press, 18 June 2005; *Concern over Suicide Silence*, Waikato Times, 23 April 2005.

linked to relationship breakdowns and alcohol misuse'.¹²⁵ However, this analysis fails to acknowledge the interrelationship between domestic violence and suicide.

Coroners' findings are an essential source of information and the public are dependent upon a complete set of facts in order to extract the lessons that are to be learned from each case. When the role of domestic violence is overlooked, opportunities to educate the public and develop proactive strategies to prevent future deaths in these circumstances are lost.

3 *Suicides of Domestic Violence Victims*

As previously discussed, the male boyfriend of one woman in the present research was assaulted by his girlfriend's former partner and committed suicide. The judge noted the assault and the suicide were not unrelated.¹²⁶ In *Case Study NS/99/1(C)* the offender was charged with beating and sexually abusing his 16 year-old daughter who committed suicide. Research also shows a significant number of women who commit suicide do so because they have been abused by an intimate partner.¹²⁷ '[W]ithout more thorough examination of these cases, we cannot be sure how many of these women's despair was directly tied to feeling trapped and abused at the hands of their partners.'¹²⁸ New Zealand research on the relationship between suicide and domestic violence is overdue.

B *Death Following an Assault: Only Assault Charges Laid*

The present study found a significant number of women died shortly after being assaulted by an intimate partner, but the male faced only assault, as opposed to more serious charges. (These cases were not included in the sample of lethal assaults.) There are a number of possible explanations for this pattern of domestic violence followed by the death of the victim and conviction of the offender on assault-related charges. However, given the present tendency to downplay or minimise the lethality potential of male assaults upon women, these cases require monitoring to improve understanding of deaths in this category and the legal issues involved.

R v Erutoe demonstrates that a tendency to downplay the role of domestic violence in women's deaths extends beyond the legal system. In this case, the pathologist concluded that the deceased

¹²⁵ *Breaking the Taboo*, Press, 23 June 2005.

¹²⁶ See, discussion of this case above, at p 123.

¹²⁷ Websdale, above n 6, 30.

¹²⁸ Washington State Coalition Against Domestic Violence, above n 1, 19.

women's injuries were consistent with a motor vehicle injury. After police and the pathologist announced her death as the result of a motor accident, the woman's husband told family members that he killed her. The Court of Appeal notes a 'curious' feature of the pathologist's evidence was that at the time he made his original finding he doubted that the woman's injuries were received in a motor vehicle accident. However, the pathologist only resiled from this position following the husband's confession and a further examination.¹²⁹

C Unresolved Cases

Although the actual rate is likely to be much higher, a significant number of women died or disappeared in suspicious circumstances indicating domestic violence during the period of this study. Following are examples of deaths in this category.

Unresolved Cases: Case Study C/96/2(I)

In 1996 a 24 year-old woman was found floating and unconscious in an Auckland river. She was taken to hospital and died two days later. The victim's ex-partner told police the woman had fallen out of a dinghy the pair were occupying and disappeared despite his attempts to save her. Although an autopsy found the victim had injuries to her scalp consistent with blunt force trauma, the cause of death was established as accidental drowning. In early 1997, the victim's friends and family, dissatisfied with the police investigation, approached the police requesting that the file be re-opened. However, at the inquest in late 2000, a police spokesperson gave evidence that due to 'work pressures' on police, a homicide investigation was not launched until late 1997.

The Coroner heard that the woman had a 'tempestuous' relationship with her ex-partner and told friends she wanted to leave him. However, he allegedly threatened her with violence should she end their relationship. The woman served a trespass order on her ex-partner and terminated the relationship. The following month, her ex-partner allegedly broke into her home, forced the woman to the floor, and put a gun to her head. A friend gave evidence that she had pleaded with the woman to get help to protect herself from her ex-partner. However, the woman replied: 'You don't understand what you're dealing with. He told me he'll kill me and he'll come after you, too.'

A police officer gave evidence that the woman, probably in an attempt to get property back from her ex-partner, had met him at a Boating Club and the pair rowed out to a launch. Police conducted tests in the river which showed the woman could not have drowned in the circumstances described by her ex-partner.

¹²⁹ [1990] 2 NZLR 28, 32.

However the absence of witnesses, and 'problems with admissibility of evidence' meant the police could not proceed with criminal charges. 'It is the police view, however, that the death is suspicious and the file remains open', a police spokesperson said.

Unresolved Cases: Case Study D/98/2(I)

In 1998, an ambulance was called to the home of a wealthy 65 year-old woman. Medical treatment and resuscitation were unsuccessful and the woman died at the scene. The woman's 46 year-old partner, who had begun a relationship with her about six weeks before her death, was the last known person to see her alive. He told police that after the pair had dinner and sex the woman began suffering shortness of breath at which time he called an ambulance. The attending doctor refused to sign a death certificate stating the cause of death. However, the woman's death was not regarded by the police as suspicious, and her body was handed over to her family. She was cremated two days after she died, and her house commercially cleaned.

In the absence of a death certificate, a routine blood sample was ordered and sent to the Institute of Environmental Science and Research. The sample revealed a massive amount of heroin in the woman's system - four times more than the previous highest recorded amount in an overdose victim by the Institute. Police launched an investigation 'on the back foot' having no body; the main evidence in any suspicious death investigation. The high levels of heroin and/or morphine in the victim's body suggested that death had occurred soon after the drug entered her system. However, police inquiries established that the woman did not have the contacts to obtain heroin or morphine. She had a fear of needles and disliked taking even her own medicine. The woman's family and friends told police she would never knowingly have taken the narcotics and they suspected 'foul play'.

In a police interview, with his lawyer present, the woman's partner told police that he had no knowledge of the heroin. At the inquest, police stated that suicide was the least likely cause of the woman's death. The Coroner found the presence of morphine at a fatal level to be 'unexplained'. After the inquest, police continued their calls for answers to the woman's death: 'We are certain that we have not been told the whole story in relation to this incident', a police spokesman said.

Unresolved Cases: Case Study M/97/1(I)

On New Year's Day 1997 the woman and her partner attended a party to celebrate the New Year. By about 1.30 am most of the guests had left. At 2 am the woman and her partner were alone in the bar. Four other guests were outside on a concrete patio. A witness told police he heard the woman shouting, which caused him to turn and look through the door. He saw the woman and her partner arguing. As he watched, the woman fell backwards and was then pulled up by her partner. Shortly after, the male shouted for someone

to call 111. The woman's throat had been cut with a broken glass. When the ambulance arrived, ambulance officers endeavoured to resuscitate the woman. Meantime, her partner destroyed the homicide/accident scene by upturning a table, smashing a glass, and trampling blood through the floor. Following unsuccessful attempts to revive the woman, police were called at 2.19 a.m. Although the results of forensic examinations were as yet unknown, the day after the incident the officer in charge of the investigation decided that the woman's severe neck and throat injuries were the result of a 'freakish accident'. The media and the deceased's family were advised accordingly. Following complaints from the deceased woman's father, and her sister, a serving police officer, the investigation was re-opened. At the conclusion of that investigation, the file was submitted to the Crown Solicitor, who advised there was insufficient evidence to pursue a homicide charge.

At the inquest, the woman's partner stated that the deceased had stumbled into a wineglass he was holding in his hand: 'I'm not sure how it happened but she sort of fell into me and we both went down', he said. He acknowledged the relationship had been violent, but denied he had been arguing with the woman immediately before she received the injuries. The Coroner recorded an open verdict stating that the evidence did not enable him to find 'exactly how [the deceased] came to suffer the wound to her neck as a result of which she died.'

The deceased woman's family complained to the Police Complaints Authority. After a police investigation, the family's complaints were upheld on a number of grounds. Investigation deficiencies were described by police as 'errors of judgment'. The Authority held that 'it would have been more prudent' for the officer to have awaited the result of forensic examinations, the blood/alcohol tests, fracture tests on the glass, and blood grouping before a final decision was made whether this death was an accident or homicide. Evidence from the witness who saw the couple arguing; evidence that a chain worn by the woman's partner had been broken, placed in his pocket and never taken for forensic tests; and evidence that the relationship between the deceased and her partner was 'turbulent', should have persuaded the officer in charge to undertake further background enquiries into the relationship. Having regard to the explanations the woman's partner offered for her death, the police should have interviewed him using video facilities. It would also have been 'preferable' if initial interviews with witnesses at the party had been followed up by qualified investigators. Furthermore, only those witnesses remaining at the scene were interviewed. Again, it would have been preferable for a wider range of those who attended the function earlier - friends and work colleagues - to be spoken to by experienced investigators. In all these circumstances, the early conclusion of accidental death was 'probably premature and clearly risky'.

After this report was published, a police spokesman told the media that the officer in charge of the initial investigation was counselled, but not disciplined, because that was the recommendation of the Authority.

The deceased woman's father told the media: 'I think that's wrong - I think that's shocking...We would have liked to have seen him reprimanded. Over his incompetence they [the police] have had to rewrite the manual. That's got to tell you something'. He believed that had the investigation into his daughter's death been handled properly from the start, the result may well have been different. But 'we've got to put the matter to rest and that's the end of it', he said.

During an investigation into the death of a woman who also died when her throat was cut in the presence of her male partner, the Coroner in *Case Study T/97/2(I)* twice adjourned the inquest for further investigation by police and evidence from the deceased's male partner. The court heard two persons who were drinking at the house at the time initially lied about the woman's death. Subsequently, they stated that the woman died after her partner pulled her toward him and the pair fell to the floor, causing the woman to accidentally smash through a conservatory door and cut her throat. The Coroner noted that no charges would be laid and police would follow up on the failure of the woman's partner to appear at the inquest.

In the final stages of this research, a police investigation was launched into the disappearance of a woman who set off to meet with her estranged partner. The woman's partner stated she arrived at his home, their meeting was amicable, and the woman left. However, she has not been heard from since. After an unsuccessful offer of reward for information, police announced in 2003 that all avenues of the inquiry had been exhausted. The woman's mother, who shared a house with her daughter and her three grandchildren, appeared on national television pleading for information. She stated her daughter was extremely security-conscious, and would not stop to pick up hitchhikers in the dark. The mother told reporters that all she had left was hope....'Once you've given that up, you've had it', she said.¹³⁰

As illustrated by the cases above, challenges to police findings rely substantially on the willingness and ability of the deceased's family members to press for review. The role of the independent Police Complaints Authority (PCA) is highly circumscribed and does not overcome police domination of the complaints process. Investigation of complaints is conducted by police officers and the PCA cannot investigate of its own volition unless there are reasonable grounds to believe it is in the public interest to do so. An individual-initiated, reactive, ad hoc complaints procedure cannot provide the systematic monitoring necessary to improve accountability in domestic violence

¹³⁰ *Waiting for Her Daughter to Drive In*, New Zealand Herald, 11 April 2003.

cases. Graeme Dunstall notes that the independent initiative of the Authority is envisaged to be used only sparingly, and this has proven to be the case.

Given that the police have been left with the main responsibility to control the misconduct of their members, 'the soft influences of culture, education, and conscience' remain as (as for forces elsewhere) perhaps the crucial constraints on New Zealand police behaviour.¹³¹

To ascertain the true prevalence of violence in intimate relationships it is necessary to investigate the extent to which the official category of women's deaths for which no finding could be made whether injuries were accidentally or purposefully inflicted refers to death in the context of an abusive relationship. As discussed in Chapter Two, this research is also overdue.

V CONCLUSION

The cases show many abused women are killed following frequent and fruitless appeals to the criminal justice system for help. This social reality is masked by oppositional discourses of deceased women as pathological victims or provocative agents which obscure a pattern of struggle and resistance by deceased victims. This included exiting the relationship, summoning the courage to seek help from police, and pursuing convictions against violent men. As Patricia Easteal points out, cases in which state intervention failed to avert women's deaths 'are in some ways, even more depressing than those which involved little or no intervention from the criminal justice system'.¹³²

Pervasive misunderstandings about the significance of risk factors for dangerousness/lethality reveal the need for public and professional education and a standardised risk assessment tool for use across agencies dealing with domestic violence. Systematic review of domestic violence fatalities is also crucial to identify gaps and shortcomings in agency interventions and provide greater protection for battered women. Margaret Hobart notes fatality reviews should go beyond examination of the criminal justice system, to critical analysis of the broad spectrum of community support.¹³³ Lessons learned should be used to update standards and best practice guidelines, improve risk assessment protocols and counter victim-blaming which has become an institutionalised response to violence in intimate relationships.

¹³¹ Graeme Dunstall, 'Police in New Zealand' in D K Das (ed), *Police Practices: An International Review* (1994) 393 (citations omitted).

¹³² Patricia Easteal, *Killing the Beloved: Homicide between Adult Sexual Intimates* (1993) 105.

¹³³ Margaret Hobart, *Advocates and Fatality Reviews* (2004) 15.

PART II

**COURTROOM CONSTRUCTIONS OF RED FLAGS
FOR DANGEROUSNESS/LETHALITY IN
INTIMATE FEMICIDE CASES**

CHAPTER SIX: THE 'RED FLAG' OF SEPARATION

PART I: THE SEXUAL PROVOCATION DEFENCE

Alison Aris made up her mind to leave her partner for a new start so she packed her things and organised a moving truck. She never found a new life. On Tuesday, the New Lynn mother was found, shot to death, in an Arahoe Rd house. Police have started a manhunt, across Auckland and in the rugged Waitakere Ranges, for her de facto, Keith Ray London, 41...Ms Aris, a 32-year-old chef, was shot in the head after going to the house to pick up some belongings around midday. She had left her two-year-old daughter...with her parents.¹

The answer to the common question, 'Why doesn't she leave?' is that women do leave or try to leave.²

I INTRODUCTION

New Zealand's national domestic violence prevention strategy acknowledges separation as a period of increased danger for women and children.³ Ministry of Health guidelines for practitioners also warn of the increased risk of violence around the period of separation.⁴ The *Domestic Violence Act 1995* recognises separation violence can extend beyond the individual woman and her children by providing new partners of previously victimised ex-spouses with the opportunity to obtain protection orders under the Act.⁵ National domestic violence policy expresses a related concern that current processes for working through custody and access issues may compromise the safety of women and children. Accordingly, action is contemplated to 'review the operation of legislation that interfaces with the Domestic Violence Act 1995...to ensure consistency in approach and effective integration in law, related policy and service delivery'.⁶

Notwithstanding this emphasis on integrated, consistent law and policy, no consideration is given to reviewing the operation of s 169 of the *Crimes Act 1961* which codifies the common law doctrine of provocation.⁷ Given criticism by the New Zealand Law Commission of the way the

¹ *Manhunt After Woman Shot*, Dominion, 29 June 2000. This *Case Study L/00/4* is discussed above, at p 66.

² Carolyn Block, 'How Can Practitioners Help an Abused Woman Lower Her Risk of Death?' [2003] NIJ Journal 4, 6.

³ Ministry of Social Development, *Te Rito: New Zealand Family Violence Prevention Strategy* (2002) 24.

⁴ Ministry of Health, *Family Violence Intervention Guidelines: Child and Partner Abuse* (2002) Appendix J offers safety planning as a patient resource to assist women prepare for separation and long term safety after separation.

⁵ Section 16. See, also, Ruth Busch, 'Editorial' (1996) 4 Waikato L.Rev. i, ii.

⁶ Ministry of Social Development, above n 3.

⁷ The *Children, Young Persons, and their Families Act 1989*; *Guardianship Act 1968*; *Family Proceedings Act 1980*; *Protection of Personal and Property Rights Act 1988* are specified as requiring review to ensure consistency in law, policy and service delivery.

doctrine is applied in domestic violence cases,⁸ and critical commentary on its operation in cases of separation violence,⁹ there appears a striking inconsistency between law and national domestic violence policy.

The partial defence of provocation reduces liability for intentional killings to manslaughter if, in the circumstances of the case, something said or done by the deceased (or in some cases a third party) was sufficient to deprive the offender of his power of self-control and thereby induce him to commit the act of homicide.¹⁰ The provocation must have actually deprived the offender of his power of self-control and the objective or evaluative component of the defence requires the offender's behaviour to be judged by 'an estimation of the effect of the provocation on the self-control of a hypothetical "ordinary" person'.¹¹ Sexual provocation, defined by Ian Leader-Elliott as 'the claim that infidelity, desertion or sexual humiliation drove the offender to kill a rival or sexual partner' is 'a distinct variety of the defence, with its own peculiar history'.¹² This form of provocation is commonly raised in intimate femicide cases¹³ and is sometimes described as '*le crime passionnel*'¹⁴ or a 'heat of passion' killing, denoting a crime committed in the throes of passion, especially sexual passion.

The New Zealand Law Commission notes the provocation defence diverges from modern values in significant respects. Its historical genesis is apparent in the way it is currently used to excuse killings arising from jealousy and possessiveness, or in response to perceived insults to a man's 'honour'. Echoing a previous recommendation advocating abolition of the defence provided the

⁸ See, eg, New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (2001) [105].

⁹ See, eg, Elisabeth McDonald, 'Provocation, Sexuality and the Actions of "Thoroughly Decent Men"' (1993) 9 *Women's Studies Journal* 126; Sue Lees, 'Naggers, Whores, and Libbers: Provoking Men to Kill' in Jill Radford and Diana Russell (eds), *Femicide: The Politics of Woman Killing* (1992) 267; Graeme Coss, 'Provocation, Law Reform and the Medea Syndrome' (2004) 28 *Crim LJ* 133.

¹⁰ Provocation is not available as a defence in cases other than homicide, although it remains a factor which may be taken into account at sentencing.

¹¹ Gerald Orchard, 'Culpable Homicide' in A P Simester and W J Brookbanks (eds), *Principles of Criminal Law* (2nd ed, 2002) 507, 525.

¹² Ian Leader-Elliott, 'Passion and Insurrection in the Law of Sexual Provocation' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (1997) 149, 151.

¹³ The Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) [2.22], cites research by the New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper 31 (1993), para 3.98, which found the defence is commonly used by men who kill female intimates in a jealous rage, while women are more likely to call on the defence where they have been victims of long term abuse.

¹⁴ Joshua Dressler, 'Rethinking Heat of Passion: A Defense in Search of a Rationale' (1982) 73 *J.CrimL.& Criminology* 421 n1.

sentence of life imprisonment for murder ceased to be mandatory,¹⁵ the Commission called for its abolition.¹⁶ However, notwithstanding an apparent consensus that the provocation defence is in need of statutory reform,¹⁷ calls for its demise may hold little or no political appeal.¹⁸

A number of submissions to the Commission were in favour of reforming the defence to exclude 'acts of sexual infidelity and other acts causing jealousy, and reporting the defendant's unlawful acts to the police' from its scope.¹⁹ The Victorian Law Reform Commission also raised the possibility of excluding certain defined conduct. Circumstances that could be removed from the ambit of the defence included: the deceased leaving, attempting to leave, or threatening to leave an intimate relationship; suspected, discovered or confessed infidelity; a context of sexual intimacy or spousal homicide; where the accused had engineered a confrontation with the deceased, for example if he killed in breach of a protection order.²⁰

However, critics of such reform argued that

the exclusion of certain circumstances from the scope of the defence might be applying an overly simplistic view of the range of factors which might be relevant in any particular case. For instance, there are very few cases in which the provocation will be simply that the person says he or she is leaving. The context is critical.²¹

This chapter explores 'the range of factors' that may be relevant to a provocation defence in the context of separation violence. Separation violence was defined as encompassing cases in which the parties had separated in fact, or where the provoking party sought to terminate the relationship. Given research showing formal and informal support networks are crucial to women's ability to safely exit abusive relationships, violence in response to victims' appeals for assistance to family and associates, and reporting an abusive partner to the authorities were included as separation

¹⁵ The Criminal Law Reform Committee, *Report on Culpable Homicide* (1976) [15], based its case for abolition of the defence mainly on its belief that the 'hybrid person' test had become too complex for juries. The role of the Committee as a reform body under the auspices of the Department of Justice has now been subsumed by the New Zealand Law Commission.

¹⁶ New Zealand Law Commission, above n 8, [120].

¹⁷ Warren Brookbanks, 'English Law Commission Project on Partial Defences to Murder' in England and Wales Law Commission, *Partial Defences to Murder: Consultation Paper 173* (2003) Appendix D [95].

¹⁸ *R v Rongonui* [2000] 2 NZLR 385, 447 (CA) per Thomas J.

¹⁹ New Zealand Law Commission, above n 8, [111].

²⁰ Victorian Law Reform Commission, above n 13, [2.57-2.58].

²¹ *Ibid* [2.61].

scenarios. The study also investigated whether an offender who killed an estranged partner, or one who was attempting to escape, could access the provocation defence despite a history of violence toward the deceased victim.

The research does not attempt to prove the statistical likelihood of a manslaughter verdict.²² Instead, the methodology employed in Victoria Nourse's study of the provocation defence which viewed 'getting to the jury' as the measure of a successful provocation claim rather than the actual jury verdict is adopted.²³ As Nourse points out, if the sample were limited to those cases where a provocation plea was accepted, this would provide a skewed picture of legal practice as it would not give a sense of those cases in which juries were actually instructed on provocation.

Criminal law is a potent means by which the state regulates the conduct of citizens and sets standards of acceptable behaviour. Section 169(3) of the *Crimes Act 1961* makes evidence of provocation a question of law and was intended 'to ensure that provocation is not lightly left to a jury'.²⁴ Since it has never been the law that *any* provocation will suffice, before evidence of provocation can raise a jury question the objective component of the defence requires that the conduct complained of was capable of amounting to behaviour which might provoke the 'ordinary person' and potentially reduce the crime from murder to manslaughter.²⁵ Therefore, a decision to allow the jury to consider the defence expresses a normative judgment that the alleged provocation was sufficient to provoke an ordinary person to respond with lethal violence. Nourse notes that if judges usually allow allegations of sexual provocation to go to the jury, this may reflect a policy to send almost every case to the jury for fear of reversal on appeal. However, even if this were the case, a decision to allow the jury to consider the defence has legal meaning. While expediency may explain the practice, it neither sets a legal standard, nor accounts for its legitimacy. 'One cannot answer questions about the proper legal practice by asserting the existence of an expedient one.'²⁶ Accordingly, this chapter is concerned with the substantive content of provocation claims as opposed to the verdicts of juries.

²² Difficulties accessing data also precluded such investigation. The Victorian Law Reform Commission, 'Getting Away With Murder' (2003) 77 LIJ 89, 89, notes that provocation is most commonly raised by men who kill women in the context of sexual intimacy.

²³ Victoria Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1997) 106 Yale L.J. 1331.

²⁴ *R v King* (1987) 7 CRNZ 591, 593 (CA). By contrast, *R v Nepia* [1983] NZLR 754 (CA); *R v Taaka* [1982] 2 NZLR 198 (CA) are authority that the defence is not lightly to be withdrawn from the jury.

²⁵ Lord Hobhouse in *R v Smith(Morgan)* [2001] 1AC 146, 195 (HL) notes this test expresses 'a concept used not infrequently in the criminal law to prevent a legitimate defence from becoming a licence to commit crimes'.

²⁶ Nourse, above n 23, 1357.

Following a brief outline of the history of sexual provocation, case studies examine the operation of the doctrine in the various separation scenarios. Mechanistic constructions of self-control are critiqued, and the moral basis of the defence is examined. A connection is drawn between the close association of intimate femicide with a provocation analysis and the dominant stereotype of lethal male violence as spontaneous and unpredictable offending. The chapter concludes that contemporary elaborations of sexual provocation have their origins in patriarchal legal norms that have successfully resisted decades of law reform. These relationship norms obscure the social reality of a gendered, structural pattern of violence toward women and children which the legal system is presently failing to acknowledge and address.

II THE ORIGINS & DEVELOPMENT OF PROVOCATION

Recognisable theoretical foundations of provocation doctrine can be traced to the seventeenth century,²⁷ although as far back as the fourteenth century English criminal law drew a distinction between premeditated killings (*malice prepense*) and hot-blooded killings (chance medley).²⁸ At a time when the mandatory penalty for premeditated murder was execution 'common law developed the crime of manslaughter, or a homicide without malice aforethought, for which the penalty was handburning and forfeiture of one's goods, but not death'.²⁹ The origins of provocation are therefore inextricably linked to a desire to mitigate the harshness of a mandatory death sentence.³⁰

'Malice aforethought' (in the sense of premeditation) was implied in cases when a man suddenly killed without provocation. This legal fiction developed to cover unpremeditated killings where there was only 'trivial' provocation or where the response of the accused was excessive, in which case the defence would fail whether the accused had acted under sudden provocation or not.³¹ Early courts restricted conduct that could amount to adequate provocation to four categories which were by 'general consent' allowed to be sufficient provocation.³² In *R v Mawgridge*³³ these were classified as a grossly insulting assault; witnessing a friend or relative being attacked; witnessing

²⁷ England and Wales Law Commission, *Partial Defences to Murder: Consultation Paper 173* (2003) Part I, [1.24].

²⁸ Michael Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 J.C.L. 216, 217.

²⁹ Joshua Dressler, above n 14, 426.

³⁰ Victorian Law Reform Commission, above n 13, [2.3].

³¹ Allen, above n 28, 218, citing *Oneby* (1727) 92 ER 465 and East in *Pleas of the Crown* (1803) Vol I, 234.

³² *R v Smith (Morgan)* [2001] 1 AC 146 (HL) per Lord Hoffman.

³³ (1707) Kel 119, 135-137; (1707) 84 ER 1107, 1114-1115.

the illegal arrest of another; and seeing a man in adultery with the accused's wife.³⁴ Lord Holt in *Mawgridge* made it clear that English courts were enforcing gender relations grounded in the protection of property rights.

When a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter; for jealousy is the rage of a man, and adultery is the highest invasion of property....a man cannot receive a higher provocation.³⁵

Jeremy Horder explains the moral underpinning of cases in the seventeenth and early eighteenth centuries as deriving from a Restoration code of behaviour in which affronts to a man's 'honour' were expected to lead to righteous anger and retaliation against the provocateur.³⁶ However, Leader-Elliott suggests English courts were more responsive to the interests of property, and more inclined to put the value of human life above the value men placed on their honour. Accordingly, while insults to honour were at the heart of the French excuse for the *criminel passionnel*, and French law allowed a husband to kill his wife, or her lover, or both of them, if they were caught in adultery,

the insistence, in English law, on direct observation of adultery and the denial of a complete defence to the avenging husband formed part of an ensemble of rules intended to deter recourse to arms for the sake of honour...It is hardly surprising that an era so much more violent than ours was so much more restrictive in its recognition of sexual provocation. The imposition of patriarchal order on the dispositions of property required the creation of a fraternal pact, restricting violence among men.³⁷

³⁴ In *R v Mawgridge* (1707) Kel 119; (1707) 84 ER 1107, Holt LCJ noted parents who killed 'obstinate and perverse' children and enraged masters who killed insolent servants had no defence. Andrew Ashworth, 'The Doctrine of Provocation' (1976) 35 CLJ 292, 293-294, suggests the old categories reflected conduct regarded as either immoral or unlawful. The latter category became relevant if adultery of the wife (a crime of immorality punishable by the ecclesiastical courts) precipitated the killing. A boxing to the ears, *Stedman* (1704) unpublished, reported in [1803] I E. East Pleas of the Crown 234; insulting words, *Hugget's Case* [1666] Kel 59, 84 ER 1082, *R v Palmer* [1913] 2 KB 29; and the sight of unfaithfulness by one's fiancé *R v Greening* [1913] 3 KB 846 were also inadequate provocation.

³⁵ (1707) 84 ER 1107, 1115 per Holt LCJ.

³⁶ Jeremy Horder, *Provocation and Responsibility* (1992).

³⁷ But see Laurie Taylor, 'Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense' (1986) 33 UCLA LR 1679, 1694, noting that until the 1960s and 1970s statutes in four North American states made it justifiable for the husband to kill his wife's lover.

No reported case before the early nineteenth century concedes the possibility of a defence for men who killed unfaithful wives and legal texts of the period are equally silent on this issue.³⁸ Since there was an absolute requirement of 'ocular inspection', and the killing had to be an immediate response to catching the adulterers in the act, Leader-Elliott notes the occasions when such condition could be met must have been rare.³⁹ These constraints on the doctrine were abandoned in the nineteenth and twentieth centuries.

Provocation doctrine has never been truly consistent, coherent or logical.⁴⁰ While in the early cases it was the magnitude of the wrong done to the husband and not the intensity of his rage which palliated homicide, Leader-Elliott notes uncertainty over its rationale was apparent as early as 1727 when Lord Raymond in *R v Oneby* reformulated the defence as one in which reason was said to have lost 'her dominion' or become displaced from her 'seat' under the impetuous demands of passion.⁴¹ 'Provocation was conceived as a domain of suspended reason, a temporary madness excited by some serious cause, in which "the law condescends to human frailty"'.⁴² Around the middle of the nineteenth century judges changed the law in two further ways. First, they shifted 'the emphasis of the law from the question of whether the angry retaliation by the accused, though excessive, was in principle justified, to a consideration of whether the accused had lost self-control'.⁴³ Second, judges generalised the specific situations which the old law regarded as sufficient provocation into a rule that whatever the alleged provocation, it must be 'something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act'.⁴⁴ Although earlier cases appeared to treat the objective test in provocation as mere evidence of subjective passion, it 'gradually became clear that the "reasonable man" test was an independent and indispensable substantive element'.⁴⁵

These changes swept the established code of provocative conduct away, but the defence still required that the provocation in question be a 'wrongful' act or insult:

³⁸ Leader-Elliott, above n 12, notes that even if law denied such a defence, juries might nevertheless have returned a sympathetic verdict of manslaughter.

³⁹ Ibid 153.

⁴⁰ England and Wales Law Commission, above n 27, [1.32].

⁴¹ (1727) 92 ER 465, 472.

⁴² Leader-Elliott, above n 12, 159, citing *R v Kirkham* (1837) 173 ER 422, 424, per Coleridge J.

⁴³ *R v Smith(Morgan)* [2001] 1 AC 146, 160 (HL) per Lord Hoffman.

⁴⁴ *R v Welsh* (1869) 11 Cox CC 336, 339.

⁴⁵ Dressler, above n 14, 427, citing *R v Welsh* (1869) 11 Cox CC 336, 338.

If the moral notion was that, while the defendant had gone too far, the victim was partly responsible by his conduct for causing the defendant's reaction, it would turn the notion [of provocation] on its head to apply it in circumstances where the victim had a right to behave as he did.⁴⁶

The elaboration of a new ideal of 'companionate marriage' some time in the early decades of the 19th century was accompanied by a 'progressive enlargement of excuses for jealous homicide'.⁴⁷ Although *Mawgridge* was authority that words of reproach or infamy were insufficient 'without more' to found a sexual provocation defence, '[f]rom 1871 to 1946, a line of English cases held that words alone could sufficiently provoke if those words confessed adultery'.⁴⁸ This trend was temporarily arrested in 1946, when the House of Lords in *Holmes v DPP*⁴⁹ held as a matter of law that a confession of adultery could not amount to provocation. Words alone, save of a most extreme and exceptional character, could not reduce culpable murder to manslaughter. Although adultery had not been available as a partial excuse to women who killed philandering husbands, Viscount Simon in *Holmes* declared that wives who killed husbands or their husband's lovers after witnessing adultery could also avail themselves of the defence.⁵⁰ In reality, this is a concession to formal as opposed to substantive gender equality:

Although the defence of provocation upon the discovery of adultery now applies to women as well as to men, it is a shallow concession to equality that bears little legitimacy or meaning. Cases and social studies show that women rarely react to their husband's infidelity with deadly violence. In contrast, men who kill their wives or lovers frequently act after accusing them of infidelity.⁵¹

The reasonable man of the UK defence came under scrutiny in *Bedder v DPP*⁵² where an 18 year-old man was accused of stabbing a prostitute to death because she allegedly jeered at his

⁴⁶ England and Wales Law Commission, above n 27, [1.27] citing the Law Commissioner's Digest of 1839.

⁴⁷ Leader-Elliott, above n 12, 157. Reva Siegal, "'The Rule of Love': Wife Beating as Prerogative and Privacy' (1996) 105 Yale L.J. 2117 discusses the shift in US criminal law from an analysis of violence against wives as the prerogative of husbands to a judicial view of companionate marriage.

⁴⁸ Taylor, above n 37, 1695, citing inter alia *R v Rothwell* (1871) 12 Cox CC 145, 147 where the court held that 'under special circumstances there may be...a provocation of words...if a husband suddenly hearing from his wife that she had committed adultery, and he having had no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter'.

⁴⁹ [1946] 2 All ER 124 (HL) per Viscount Simon.

⁵⁰ Ibid 127-128. *Holmes* involved a husband who beat his wife and strangled her to death after she admitted her infidelity. The husband had also been unfaithful.

⁵¹ Taylor, above n 37, 1697 (citations omitted). As discussed in Part I, two women offenders in the present study raised sexual provocation as a defence and claimed their cultural backgrounds as mitigating features of the offending. One was identified as a battered woman.

⁵² [1954] 2 All ER 801 (HL).

impotence.⁵³ The House of Lords ruled that to invest the reasonable man with the peculiar characteristics of the accused would make 'nonsense' of the objective limb of the defence. The reasonable man could not be impotent - notwithstanding that the defendant in this case was: 'If the reasonable man is then deprived in whole or in part of his reason, or the normal man endowed with abnormal characteristics, the test ceases to have any value'.⁵⁴

Trenchant criticism of *Bedder* 'facilitated the regression of men's matrimonial evolution'⁵⁵ through statutory reform of the defence in New Zealand⁵⁶ and the UK.⁵⁷ Within 11 years of the *Holmes* prohibition against confessions of adultery this limitation was removed. Sue Bandalli notes that in permitting words to amount to provocation, UK legislators had the 'nagging' (as well as the unfaithful) wife in mind. The Royal Commission paid particular note to the submissions of Lord Denning and the Chief Justice that words should amount to provocation and *should* cover the case of a husband whose patience is exhausted by a persistently nagging wife and so suddenly strikes out and kills her.⁵⁸

From its beginnings, New Zealand criminal law was also engaged with the question of a wife's adultery. Warren Brookbanks notes that at the time a Criminal Code Bill was introduced in 1883, the law recognised the infliction of a blow or the sight by the husband of his wife's adultery might amount to provocation. By providing the grounds for provocation in s 165 of the *Criminal Code Act 1893* as 'any wrongful act or insult' legislators ensured that an insult without a blow could be sufficient provocation.⁵⁹

⁵³ When he failed to perform, the prostitute jeered at *Bedder* and tried to leave. *Bedder* held on to her as she hit and kicked him, then stabbed her to death. Nourse, above n 23, 1402 fn408, notes that while legal scholars have had great sympathy for *Bedder*, feminists have seen this sympathy as another example of the law bowing to male concerns about virility. Rather, the jury should have been instructed to consider whether *Bedder* intentionally created the conditions of his own defence, either by refusing to allow the victim to leave (her 'striking' him in this scenario is an act of self defence) or by soliciting the prostitute knowing he was impotent.

⁵⁴ [1954] 2 All ER 801, 803-804 (HL).

⁵⁵ Sue Bandalli, 'Provocation - A Cautionary Note' (1995) 22 *Brit.J.Law & Soc.* 398, 399.

⁵⁶ Section 169 *Crimes Act 1961*.

⁵⁷ Section 3 *Homicide Act 1957*.

⁵⁸ Bandalli, above n 55, citing Royal Commission, *Report on Capital Punishment 1949-1953* (1953; Cmnd. 8932; Chair, Sir Ernest Arthur Gowers) [55]. Bandalli notes that men have been particularly sensitive to loquacious wives throughout the ages and the Branks (a spiked cage placed over the woman's head with a spike or pointed wheel to pin down her tongue) was devised to punish women adjudged quarrelsome or not under the proper control of their husbands.

⁵⁹ Brookbanks, above n 17, [9].

Earlier statutory tests of provocation expressly required the homicide to be committed in 'the heat of passion caused by sudden provocation', which the offender must have acted upon 'on the sudden' and before there had been 'time for his passion to cool'. The *Crimes Act 1961* dispensed with these formulae. The *Holmes* restriction on words alone as sufficient provocation was also dispensed with, and the restriction of provocative conduct to any 'wrongful' act or insult was removed. By providing that 'anything done or said may be provocation' legislators significantly expanded the reach of the sexual provocation defence. In an avowed response to the decision in *Bedder* that the personal characteristics of an accused could not be taken into account when examining the gravity of the verbal provocation,⁶⁰ s 169(2) invests in the person with 'ordinary' power of self-control, the 'characteristics' of the accused person.⁶¹ This hybrid person test, which attributes certain 'characteristics' to the hypothetical ordinary person 'has been the single most controversial and complex aspect of New Zealand's provocation defence'.⁶²

Trial judges in New Zealand retain the responsibility of ruling on whether the subjective and objective limbs of the test are satisfied. Although the evidence must support a 'credible narrative of causative provocation',⁶³ the accused need not make out a prima facie case of provocation,⁶⁴ and a 'liberal view' is taken, even where the evidence relied upon is 'somewhat equivocal'.⁶⁵ Despite evidence that abusive men cultivate delusions of sexual betrayal,⁶⁶ the accused is not required to prove the provocation actually occurred. Nor is it essential that he give evidence of provocation and loss of self-control.⁶⁷ The defence will not necessarily be negated by time lapse and delayed reaction,⁶⁸ and the provocative conduct need not come from the deceased victim.⁶⁹ There is no requirement that the conduct be involuntary⁷⁰ as 'New Zealand law does not require a complete

⁶⁰ (1961) 328 NZPD 2681. The 'Memorandum of Explanation' accompanying the first reading of the 1961 Crimes Bill contained a detailed discussion of *Bedder* and the need to avoid such a result in New Zealand.

⁶¹ In *R v McGregor* [1962] NZLR 1069, 1081, (CA) North J observed this hybrid subjective/objective standard involves the 'fusion of two discordant notions'.

⁶² Brookbanks, above n 17, [21].

⁶³ *R v Matoka* [1987] 1 NZLR 340, 344 (CA).

⁶⁴ *R v Anderson* [1965] NZLR 29 (CA); *R v Taaka* [1982] 2 NZLR 198 (CA).

⁶⁵ *R v Makoare*, [2000] CA 469/99 (Unreported, Blanchard, Robertson and Williams JJ, 18 April 2000) [4].

⁶⁶ Leader-Elliott, above n 12, 153; Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 543, notes: 'Medical men now recognise that the *crime passionelle* is sometimes the result of intense worry and depression reaching the psychotic state of morbid jealousy, when the jealousy may be based on beliefs that are without foundation.'

⁶⁷ Orchard, above n 11, 526.

⁶⁸ *Ibid* 528-529, citing *R v Taaka* [1982] 2 NZLR 198 (CA) as authority that 'neither the lapse of some hours nor intervening conduct of some complexity and apparent deliberation are necessarily fatal to the defence'.

⁶⁹ *R v P* [2000] 1 NZLR 234 (CA).

⁷⁰ *R v Campbell* (1997) 15 CRNZ 138 (CA).

loss of self-control, to the extent that the accused really did not know what he was doing'.⁷¹ The previous requirement that the response to the provocation must be proportionate⁷² is no longer a rule of law, and it 'may now be arguable whether lack of proportion will ever justify withdrawing the defence from the jury, and even whether it is relevant in applying the "ordinary person" limb'.⁷³

In summary, the provocation defence has evolved from a theory of partial justification based on moral culpability and wrongdoing by the victim (whom the law assumed partially deserved his or her fate) to a theory of lost self-control and partial excuse in which the traditional element of wrongfulness - and to some extent moral norms and values - has given way to a focus on whether the defendant lost self-control, and a reasonable or ordinary person in the same situation might have done likewise. Consequently, crying infants,⁷⁴ and physically or mentally handicapped persons,⁷⁵ may be provokers of lethal violence.

Just as society was confronted in the late 1950s and 1960s with concerted action to improve women's status, the law of provocation shifted the inquiry away from changing social norms and values toward a more subjective focus on individual defendants. Confessions of adultery can trigger this partial excuse,⁷⁶ and while under *Bedder* it could not be founded upon sexual taunts, the ordinary man is no longer expected to tolerate attacks on his sexual prowess.⁷⁷ The defence is no longer limited to offering a partial excuse to men motivated by jealousy and rivalry to kill their

⁷¹ Brookbanks, above n 17, [17].

⁷² *Mancini v DPP* [1942] AC 1, 9 (HL).

⁷³ Orchard, above n 11, 532.

⁷⁴ In *R v Doughty* (1986) 83 Cr App R 319 the prosecution argued acts which constituted provocation should involve some element of wrongfulness. Thus the crying and restlessness of a 17 day-old baby could not constitute provocation. However, the Court of Appeal held that the words of the English statute required the defence to be left to a jury where there was evidence that the baby's crying had caused the D to lose his self control and kill it. In New Zealand, in *R v Iorangi* [2000] CA 533/99, 534/99 (Unreported, Elias CJ, Gault and Fisher JJ, 30 March 2000), a father who killed his 17 month-old child after he could not stop the infant from crying during a televised rugby game was said to have lost his self-control. The defendant had assaulted the child on two previous occasions.

⁷⁵ See eg, *R v Simpson* (Unreported, High Court, Auckland, Potter J, 12 October 2001), where the defendant who strangled his terminally ill mother was provoked by her pitiable condition. In *R v L* (Unreported, High Court, Hamilton, Randerson J, 29 August 2002) [26-27], defence counsel suggested that had the case gone to trial the accused, who killed his elderly wife who was suffering from Alzheimer's disease, may have relied on provocation. (The judge noted the defence may have failed due to the extent of deliberation involved in the killing.)

⁷⁶ Finbarr McAuley, 'Provocation: Partial Justification, Not Partial Excuse' in Stanley Yeo (ed), *Partial Excuses to Murder* (1991) 19, 21, argues that the established claim of provocation by adultery would also include acts of sexual betrayal by an unmarried cohabitant.

⁷⁷ McDonald, above n 9, 129, discusses the 1980 *Minnitt* case in which the sexual provocation was based on the wife's alleged description of the defendant as a 'sterile bastard' and a 'terrible lover' with too small a penis.

wives' paramours,⁷⁸ and now permits men who kill female partners or ex-partners to rely on it.⁷⁹ Indeed, research indicates that the male paramour is now less likely than the female partner to become the subject of violence at the hands of the jealous male.⁸⁰ As Leader-Elliott observes, the marked expansion of the doctrine, during a period of marked decline in acceptance of other concessions to masculine aggressiveness is the most striking aspect of the sexual provocation defence.⁸¹

III SEPARATION AND FEMALE 'INFIDELITY'

Research shows intimate femicide is frequently associated with allegations that the victim was unfaithful whether or not such claims are substantiated.⁸² '[T]he point here is that many close to the victim allege that the male had deluded himself into believing that his partner was unfaithful, and the weight of the evidence suggests that males are too ready to not only believe in their partner's infidelities, but to react to these with violence.'⁸³ However, while legal academics may differ over whether provocation is a defence of partial excuse, or one of partial justification, scholars on both sides of the debate assume allegations of unfaithfulness in the context of an intimate relationship provide sufficient basis for a sexual provocation claim.⁸⁴

Nourse's research found that where the provocation relied on the deceased's 'infidelity', the researcher was as likely, if not more likely to find a relationship that had ended, was ending, or in which the victim sought to leave, as opposed to an affair or sexual infidelity alone. Although female sexual betrayal would, by definition, appear to depend upon a continuing relationship, courts simply *presumed* defendants' claims were 'rational' even where time or other factors

⁷⁸ Leader-Elliott, above n 12, 153, notes no reported case before the early 19th century concedes the possibility that provocation might provide a partial excuse to a husband who killed his wife.

⁷⁹ McDonald, above n 9; Jenny Morgan, 'Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 MULR 237, 256 citing research by the New South Wales Law Reform Commission.

⁸⁰ J Arturo Silva, et al, 'The Dangerousness of Persons with Delusional Jealousy' (1998) 26 J Am Acad Psychiatry Law 607, 615, citing research.

⁸¹ Leader-Elliott, above n 12, 157.

⁸² See, eg, Angela Browne, Kirk Williams and Donald Dutton, 'Homicide Between Intimate Partners: A 20-Year Review' in M Dwayne Smith and Margaret Zahn (eds), *Homicide: A Sourcebook of Social Research* (1999) 159.

⁸³ Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994) 33.

⁸⁴ See, eg, McAuley, above n 74, 21 arguing provocation entails a denial that the D's actions were entirely wrongful thereby implying the D was partially justified in reacting as he did because of the untoward conduct of the victim. Wrongful conduct likely to provoke violent retaliation includes 'any conduct likely to provoke violent retaliation' which would include 'acts of sexual betrayal by an unmarried cohabitant'. On the partial excuse side of the debate, Joshua Dressler, 'Why Keep the Provocation Defence?: Some Reflections on a Difficult Subject' [2002] 86 Minn.L.Rev. 959, 981, 999, argues provocative conduct should encompass non-criminal violation of widely shared social norms, which include adultery, including cases in which the D makes a reasonable mistake as to whether adultery in fact occurred, and where adultery did in fact occur, but the D mistakenly killed the wrong person.

suggested quite the contrary. Thus defendants were permitted to enforce a relationship by claiming an emotional attachment that the victim had repudiated. 'Given that the criminal law rarely if ever embraces those who use violence in response to lawful acts, this should be a controversial outcome...although presently it is not.'⁸⁵ Indeed, the mere sight of an estranged wife walking toward her lover in the street may be sufficient to provoke the jealous male.⁸⁶

In New Zealand, the husband and wife in *R v Nepia*⁸⁷ had been separated for a period of twelve months. The wife was stabbed fourteen times by her estranged husband when she arrived with a woman friend to collect her child following an access visit. Apparently, the husband had not returned the child as initially arranged and the couple argued. The wife requested her friend call the police and when she left the scene to do so, on the uncorroborated word of the husband, his estranged wife told him he would not get access again and that the car she was driving belonged to her new de facto partner.

Perhaps in recognition of the danger of rendering killings of separated women 'singularly vulnerable to the tactical use of the provocation card',⁸⁸ the trial judge withdrew the defence from the jury. In so doing, the judge observed:

In this day and age a separated man and father who has had difficulty but has had access to his children and who has had and who had instructed a solicitor previously in respect of access would not as a reasonable man be deprived of self control to the extent of the actions taken by the accused in this case.⁸⁹

⁸⁵ Nourse, above n 23,

⁸⁶ In *R v Davies* [1975] 1 QB 691 the wife began an association with another male. After being threatened with a firearm by her husband she left the matrimonial home to live with her parents. The husband broke into the home of her parents, went into a bedroom where his estranged wife was sleeping and again threatened her with a firearm. The police were called and the husband was charged with offences relating to the break-in and possession of the firearm. He was bailed on condition he not molest his wife. Subsequently, while on bail, the husband attempted to set fire to the house in which his estranged wife was living. He then bought a shotgun and ammunition and later drove to the library where his wife worked. He stated he saw her new male associate walking toward the library and that made him angry. When his wife left her workplace, he called her name, she answered 'What?' and turning to face him, saw the gun, stepped back two or three paces and said 'No, no'. The husband then shot and killed her. The Court of Appeal accepted that the wife's conduct over the previous year could be considered as acts of provocation and the mere presence of her new male partner outside her workplace could also amount to provocation. Cf *Holmes v DPP* [1946] AC 588 (HL) neither the wife's confession of adultery or her 'pertinent' inquiry about the offender's own sexual misconduct were sufficient grounds for provocation.

⁸⁷ [1983] NZLR 754 (CA).

⁸⁸ Mitchell Davies, 'Leaving Provocation to the Jury: A Homicidal Muddle?' (1998) 62 J.C.L. 374, 384, makes this comment in relation to abandonment of the proportionality principle as a legal test.

⁸⁹ [1983] NZLR 754, 756 (CA).

However, the Court of Appeal determined that the defence had been too lightly withdrawn from the jury. A reasonable jury could find that the 'ordinary' man might go berserk and kill his estranged wife following her alleged remark that she would terminate access and her 'revelation that she had formed an association with another man'.⁹⁰

Nourse points out that when courts emphasise female infidelity as opposed to the status of the parties as separated, they enforce the male offender's view of the status of the relationship over that of the female victim:

[I]nfidelity implies an ongoing relationship to which the parties are expected to be faithful. But what if the parties are legally divorced? Separated by force of law? What if the defendant finds the rival in the arms of his *ex*-wife, *ex*-lover, or *ex*-girlfriend? A jilted lover snaps when he sees his *former* girlfriend 'dancing' with another man? A battered woman is thwarted by physical force when she *tries to leave* for another?...Seen through the lens of infidelity, these cases may seem only minor extensions of our canonical image of a crime of passion. Seen through the lens of departure, however, these cases challenge us to ask whether it is possible to be unfaithful to a relationship if one party believes that there is no relationship at all.⁹¹

In earlier cases, judicial tolerance of male sexual jealousy/possessiveness did not extend to separation assaults on unmarried women.⁹² In *R v Tai*,⁹³ the New Zealand Court of Appeal noted that the fact the offender's girlfriend showed an intention to break off the relationship, 'something which is by no means uncommon and which every girl must be held free to do if she wishes', could not amount to provocation. Consequently, legal commentary suggests it may well be the case that the objective limb of the test cannot be satisfied where the provocation consists of a mere admission of unfaithfulness or the intimation of a decision to end a relationship. This view is qualified by the proviso that 'the particular circumstances must be considered'.⁹⁴ Whether the defence reaches the jury in 'particular circumstances' concerning unmarried women, and the sort of circumstances that might suffice are examined below.

⁹⁰ Ibid 757. Orchard, above n 11, 527 n 139, cites this decision as illustrating that sexual provocation may be founded on 'the revelation of [an] adulterous relationship plus a threat of loss of access to children'.

⁹¹ Nourse, above n 23, 1359.

⁹² See, eg, *R v Gauthier* (1943) 29 Cr App R 113, 118-119.

⁹³ [1976] 1 NZLR 102, 106 (CA).

⁹⁴ Orchard, above n 11, 527-528, citing *R v Anderson* [1965] NZLR 29 (CA); *R v Tai* [1976] 1 NZLR 102 (CA).

IV THE CONTEXT OF SEPARATION: THE CASE STUDIES

A Unmarried Women's Attempts to Terminate Intimate Relationships as Sexual Provocation

A number of women in the present study opted not to leave their homes, but demanded instead that their male partners do so. In these cases, the woman's intention to terminate, or at least gain a temporary respite from the relationship was no less clearly articulated, and the response of the jealous male no less lethal than in cases in which the woman fled from her home, but was pursued and killed by the jealous male.

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Charles, the 26 year-old offender and Karen, his 26 year-old girlfriend had a brief romantic involvement which Karen 'was trying to end'. At about 1 pm on 4 July 1997 Karen's mother, who had gone to her daughter's home to investigate the lack of response to her telephone calls, found Karen's body in the bedroom of her home. Karen had been attacked with a garden spade and her throat had been cut. The spade and two blood-stained kitchen knives were found in the room. Police stated Karen had suffered 'horrific' injuries and her 3 year-old daughter, who was in the house at the time her mother was killed, might have been alone with her dead mother for up to 16 hours.

In the days before the killing, Charles spoke to a number of medical professionals, including his general practitioner, about his suicidal feelings. He was also taking the anti-depressant Prozac. On 30 June 1997, Charles was admitted to a psychiatric unit and treated for depression apparently after taking a drug overdose. However, on 1 July he left the unit and did not return. Charles' father told the Court he telephoned the unit on the afternoon of 3 July to advise that Charles, who was living with his parents, had 'difficulties accepting the end of his relationship' with Karen, and his parents were concerned Charles may be suicidal.

A psychiatric nurse gave evidence that following this telephone call she interviewed Charles at his home about 7.30 pm that day. The nurse stated she knew Charles had been a voluntary patient at the acute psychiatric ward a few days earlier and had been discharged. She said he had an appointment with a doctor the following day which Charles had assured her he would keep - although his father did not believe that he would. During the visit she heard Charles 'yelling' at his mother and Charles admitted being 'preoccupied' with Karen. She noted Charles appeared vague, although he assured her that he would not harm himself.

⁹⁵ No legal judgments in relation to this case were found. Attempts to access the trial transcript were also unsuccessful.

After interviewing Charles, the nurse reportedly told his parents that 'Charles was 25, an adult, and should take responsibility for his own life.'

Some time following this interview, Charles went to Karen's home. Two of Karen's neighbours later gave evidence of hearing screams late that night or in the early hours of the morning. One witness said she awoke between midnight and 1 am and heard a high pitched crying which continued for a few minutes. Another stated he heard a male voice from behind Karen's home in the early hours of the morning and an intense scream lasting 10 to 20 seconds. At this time Karen's home was the only one with lights on.

Charles gave evidence at his trial on a charge of murder. He told the Court of his anxiety at Karen's desire to have 'space' in their relationship. He said Karen had refused his proposal of marriage and would not allow him to move in with her. When she told him she 'did not want to see him as often' he became depressed and sad. He stated he had taken a spade and broken into her home through a dining room window after which he went to her kitchen and retrieved two knives. He intended to use one to kill Karen and the other to kill himself. Charles went to her bedroom and 'it just happened'. Charles said he tried to cut his wrists while in Karen's bedroom.

A forensic psychiatrist told the Court of two interviews he conducted with Charles following the killing. During the first interview, after prompting from his father to 'tell him what you told me', Charles stated Karen told him she would be 'getting the biggest guy around tomorrow if you turn up'. In the second interview, Charles stated that Karen also told him she already had a 3 year-old child, and did not need another. When he said he would see Karen around, she replied 'in your dreams'. After this exchange, Charles said he felt he had 'had enough' and decided then to kill her. From these meetings and the information he had available, the psychiatrist concluded that Charles had a personality disorder. Features of this disorder were 'persistent feelings of inadequacy, dependency on others in decision making and problem solving and persistent fear of rejection. There was long-standing paranoia, pathological jealousy and obsessional behaviour'. In the psychiatrist's opinion, at the time of the killing, Charles had been suffering from 'a major depressive episode'.

Defence counsel noted that mental illness was 'something easily swept under the carpet because we are not sure what was going on it people's minds' and Charles 'might have been placed in the "too hard basket"'. Counsel noted that Charles' characteristics, as detailed by the psychiatrist, were not transitory as Charles had 'virtually the same reaction in 1992 after a previous relationship ended'. Evidence was given by Charles' former partner who stated that she became concerned about his possessiveness and cruel sense of humour. When she tried to end their relationship, Charles engaged in sexually and psychologically abusive behaviour

which continued for some months. A friend of Charles also gave evidence that Charles was obsessed with Karen and fearful she might find another man.

Defence counsel told the jury that Charles had been provoked by Karen's threat to find a 'bigger man' if Charles returned; her comment regarding his childish behaviour; and her refusal to resume the relationship. The crumbling of the relationship, together with Karen's comments could amount to provocation. 'It was the only logical, plausible explanation'. Although the Crown had questioned Charles' selective memory, counsel inquired of the jury: 'was not he [Charles] likely to remember [Karen's] words because they went to the heart of his insecurities? They were words and phrases likely to be spoken in annoyance and frustration at the accused having returned to her house'.

The Crown told the jury the three elements of murder had been established in this case. There had been a death; the accused had admitted responsibility for it; and also acknowledged he entered Karen's home committed to causing her death. The Crown noted there were four points to the provocation defence: The first was whether Karen actually said the words claimed by Charles. The only evidence of this came from Charles and was a 'selective and self-serving explanation'. The next was whether, if she did say these things, this would have deprived a person, having the power of self control of the ordinary person but otherwise having the accused's characteristics of the power of self control? Thirdly, did it in fact deprive him of his self control and fourthly, did that induce him to commit the homicide? It was the Crown's view that none of these four points were satisfied.

Karen was described by the Crown as sensitive and kind. She had treated Charles with 'kid gloves' and '[i]t was a great irony that her kindness might have been her undoing.'⁹⁶ Defence counsel also informed the jury that they were not to 'think that someone is being blamed'. The judge is reported as directing the jury that the defence of provocation did not imply any criticism of Karen, who 'could not have been expected to appreciate or expect the consequences that followed her alleged comments'. Karen had 'emerged as kind, popular, and in the words of her father, "probably too nice to people"'.

The jury convicted Charles of murder. Defence counsel told reporters he was 'disappointed' at the murder verdict, but at the end of the day, it was the jury's decision whether to accept or reject the defence. Although it was not a difficult case to defend, it 'was sad and tragic. There are never any winners in a case like this'.

After pressure from Charles' family, two internal investigations and a report from the Health and Disability Commissioner, it was revealed that while Charles' individual care met applicable standards, and a staff nurse

⁹⁶ No explanation of this comment is provided.

had not breached the Code of Health and Disability Consumers' Rights, there was a need to ensure active communication within a multi-agency service, continuing systems audits and assertive follow-up care. The Chief Executive of Healthcare Otago publicly announced that Charles' family would receive an apology. Although he also observed that 'depressed people do not usually go on to kill others...staff are treating the unpredicted, if not unpredictable', the Labour Associate Health Spokesperson, who requested an investigation of the case, is reported as stating that prior to the murder Charles had been examined by a psychiatrist who believed Charles to be a danger both to himself and to Karen.

While media reports focused on possible failures or 'procedural weaknesses' in Charles' care and management by the mental health system, there is no discussion of the risk assessment instrument employed by health professionals in this case. Charles had a history of abusive and controlling behaviour, was jealous, possessive, experiencing 'difficulties accepting the separation', and had contemplated suicide. Prior abusive incidents, threats of suicide, obsessive jealousy, possessiveness, and controlling behaviours, in the context of a woman's attempts to break free from an intimate relationship, are major risk factors for dangerousness/lethality.⁹⁷ Given that the lethality risk Charles posed to Karen did not go unnoticed by at least one mental health professional, it is concerning that her death could be categorised as 'the unpredicted, if not unpredictable'.

Cultural depictions of domestic violence often send the message that the burden of change is on women and 'the ultimate solution to domestic violence...is to simply stand up to the abuser'.⁹⁸ Domestic violence information pamphlets also advise women to 'stand up' to domestic violence.⁹⁹ While standing up to an abuser may prove successful in some cases; such conduct may also put women at increased risk.¹⁰⁰ As demonstrated above, standing up to a bully is also behaviour which may subsequently form the basis of a sexual provocation defence.

⁹⁷ Browne, Williams and Dutton, above n 82, 161; See, also, Sylvia Walby and Andrew Myhill, 'Assessing and Managing Risk' in Julie Taylor-Browne (ed), *What Works in Reducing Domestic Violence? A Comprehensive Guide for Professionals* (2001) 307.

⁹⁸ Diane Shoos, 'Representing Domestic Violence: Ambivalence and Difference in *What's Love Got to Do with It*' (2003) 15 *NWSA Journal*, 57, 68 (citations omitted).

⁹⁹ A fact sheet for victims of violence published by the New Zealand Department for Courts is titled 'Standing Up to Domestic Violence: A Guide to Protection Orders and the Domestic Violence Act' (Wellington, Department for Courts, 1996).

¹⁰⁰ Neil Jacobson and John Gottman, *When Men Batter Women: New Insights Into Ending Abusive Relationships* (1998) 252-253.

The judge's observation that Karen 'could not be expected to appreciate or expect the consequences that followed her alleged comments' implies Charles' lethal response was considered by the judge to be objectively extraordinary behaviour. Since the required standard of self-control purports to deny the defence 'to those whose reactions show a lack of self-control falling outside the ordinary or common range of human temperaments',¹⁰¹ Charles' response should have failed the objective limb of the test. The contrary decision that conduct which would be regarded as innocuous by the 'ordinary woman', could simultaneously constitute 'grave and weighty'¹⁰² provocation to the 'ordinary man', deprives all women of the possibility of understanding, much less challenging the kind of behaviour criminal law is imposing upon women who wish to exit unwanted relationships and pre-empt their killers' sexual provocation claims.

Contemporary evaluations of provocation ignore the social reality that a woman is not generally the physical match of a male who is intent on denying her freedom and autonomy. Gender differences in physical strength and aggressiveness are likely to require imaginative techniques to safely accomplish exit. Given that women who are attempting to terminate their relationships with abusive men face potentially deadly choices, inventing a 'bigger man' to deter the abuser can readily be envisaged as one such protective strategy. Recent interviews with abused women also found that for some, recognition they had assumed a 'mother' rather than a lover position in relation to their partner was a decisive factor in their decision to end the relationship.¹⁰³ However, if women articulate this understanding ('I already have one child and don't need another') the law may provide an excuse for the man who kills in response to it. The formal autonomy of unmarried women to enter and exit intimate relationships recognised in *Tai* is thereby undone by women's 'kid glove' efforts to do so.

Joshua Dressler points out that when psychiatric evidence is given that a defendant had become *obsessed* with the deceased woman and this, together with several personality attributes *peculiar to the defendant* caused him to react in a particular way, if the defendant deserves to have his culpability mitigated it is not because he was 'adequately provoked'. What is being advanced in such cases is a diminished capacity defence disguised in provocation garb.¹⁰⁴ Nourse notes that the

¹⁰¹ Orchard, above n 11, 531, citing *R v Enright* [1961] VR 663, 669; *Stingel v R* (1990) 171 CLR 312 (HCA).

¹⁰² *R v McGregor* [1962] NZLR 1069, 1075 (CA).

¹⁰³ Alison Towns and Peter Adams, "'If I Really Loved Him Enough, He Would Be OK": Women's Accounts of Male Partner Violence (2000) 6 *Violence Against Women* 558.

¹⁰⁴ Dressler, above n 84, 988.

emotional claims of defendants in these cases ask us to accept meanings about relationships as much as they purport to describe a defendant's personality or character.

To embrace the defendant's emotional judgments in these circumstances not only allows the defendant to serve as judge and executioner, but also as legislator. It allows the defendant to stand above the victim and enforce at penalty of death a set of emotional judgments that are, at best, partial.¹⁰⁵

If a policy of autonomy for unmarried women in forming and leaving intimate relationships can be subverted on the basis that individual male offenders are pathologically averse to its practice then no statement of policy is immune from such claims. Although reports of the trial also fail to make clear when the alleged verbal provocation took place, the words appear to have been spoken in response to Charles' breaking into Karen's home armed with a spade. As a matter of policy (apart from likely public indignation) courts would be reluctant to permit an armed offender who invades the home of a stranger to advance a provocation defence based on the verbal response of the householder. To demand that a woman whose home is invaded by an armed ex-partner be more polite and accommodating than a householder confronted with an armed stranger appears no more morally or ethically justifiable.¹⁰⁶

Charles was a serial offender, who had demonstrated a propensity for violence against women who attempted to *practice* the ideal of female autonomy recognised in *Tai*. If the freedom of unmarried women is subject to exceptions based on the idiosyncrasies of individual defendants which render them less likely to respect it, both the policy and the freedom it espouses become meaningless.

B *The Violent Pursuit of the Separated Wife*

Although the context of separation per se may be insufficient to trigger the defence,¹⁰⁷ appending an allegation of verbal abuse appears to suffice. As one legal commentator observes, in the absence of witnesses, apart from the children, only the offender's version of events is heard. Thus the following is an account of 'what he said she said or did'.¹⁰⁸

¹⁰⁵ Nourse, above n 23, 1338.

¹⁰⁶ See *R v W* [1996] 1 NZLR 147 (CA) for a further example of verbal provocation in the context of home invasion by an estranged male partner.

¹⁰⁷ Victorian Law Reform Commission, above n 13, [2.61].

¹⁰⁸ Morgan, above n 79, 242.

Sexual Provocation and the Violent Pursuit of the Separated Wife: Case Study S/00/10

Thirty-four year-old Liam, beat his estranged wife Jiang to death in a car park in the presence of their two small children who were splattered with their mother's blood. During their five year relationship, the couple lived in Levin and Jiang worked for 'long hours' with her husband in his market garden. Family members gave evidence of prior violence by Liam toward his wife, including an attempt to suffocate her and threats to kill her. Jiang's mother came to stay with her daughter for about four months. Mother and daughter then left the home and did not return. Jiang went to live in another city with her uncle and worked in his takeaway business. Liam remained in the family home with the couple's two children.

After the separation, Jiang consulted a lawyer who wrote to her husband about 'matrimonial matters, including property issues'.¹⁰⁹ Liam made a number of unsuccessful attempts to persuade Jiang to return to the relationship during the 'several months' period of their estrangement.¹¹⁰ The week of the homicide he visited Jiang's residence with members of his family and tried to speak to his estranged wife. Although she was on the premises, Jiang's uncle informed Liam that his wife was not there, that she had not changed her mind about leaving the relationship, and would not return to live with him. The day before the killing, Liam again travelled to the city in which Jiang lived, taking the two children with him. On that occasion he met with his estranged wife and there was evidence of angry words and 'pushing' of his wife. Liam returned the following day demanding to speak to his wife. Jiang left the shop with the two children and accompanied him to the car park. Liam later stated that at this time he again asked his wife to resume the relationship and she again refused. They argued and he knocked her to the ground and repeatedly bashed her head on the tar sealed surface of the car park, causing skull fractures and deep injury to her brain from which she died.¹¹¹ Liam told police he was angry because his wife was going to leave him, wanted his property and intended to resume a relationship with a former boyfriend.

At trial, the Crown contended that Liam was concerned about his estranged wife's property claim, wanted to secure her return, and upon discovering that she would not accede to his demands, became angry and carried out his prior threat to beat her to death.¹¹² However, defence counsel claimed that Jiang had provoked Liam. Matters relied on as constituting provocation were: Liam had sponsored Jiang to come from China to New Zealand to be his wife and she had obtained her New Zealand citizenship shortly before the separation; Jiang had left the relationship leaving Liam to look after the children; she had made a claim for a matrimonial property settlement; had stated an intention to divorce Liam; and a further intention to leave her

¹⁰⁹ *R v S* [2001] CA 407/00 (Unreported, Richardson P, Blanchard and Randerson JJ, 5 July 2001) [10].

¹¹⁰ *Ibid* [2-5].

¹¹¹ *Ibid* [11].

¹¹² *Ibid* [13].

uncle's home and live with a former boyfriend. While in the car park she had also 'pushed the offender away' and allegedly told him that she only married him to gain money and residency in New Zealand.¹¹³ The jury convicted Liam of murder.

Jenny Morgan points out that once sexual provocation claims are stripped of the intensifiers of departure and betrayal it becomes clear that women need not do or say very much to provoke their own demise.¹¹⁴ The Court of Appeal acknowledged Liam's distressed state subsequent to his wife's departure which led him to be miserable, irritable, and lacking his usual interest in work, did not distinguish him from others facing the normal stresses of a relationship breakdown.¹¹⁵ So, apart from leaving an abusive relationship and refusing to return, what else did Jiang do?

Civil law grants wives the right to leave abusive relationships and matrimonial property claims are a legally approved and legislatively provided for aspect of separation. Given judicial concern that fathers maintain a substantial role in their children's lives,¹¹⁶ and complaints by fathers' rights groups that men are prevented from participating equally as parents by social policies that give preference to women, advancing Jiang's decision to leave the children with their father in support of a provocation defence appears perverse. We have only Liam's word that Jiang confessed to using him to gain money and residency. By comparison, Patricia Easteal found women from other cultures, brought into Australia as brides, appeared at increased risk of homicide by the sponsoring male, particularly if the husband/killer had a history of assault against other women.¹¹⁷

Judicial acceptance that an 'ordinary' man might respond with lethal violence to his estranged wife's decision to begin life anew with another (perhaps less abusive) male partner assumes a husband retains an ongoing proprietary interest in his wife despite their separation.

It is only possible to argue that the provocation defence potentially applies to anger following unfaithfulness in the context of a relationship that has ended, if the reality is substituted with the

¹¹³ Ibid [15], [18].

¹¹⁴ Morgan, above n 79, 245.

¹¹⁵ *R v S* [2001] CA 407/00 (Unreported, Richardson P, Blanchard and Randerson JJ, 5 July 2001) [19].

¹¹⁶ In *Taking the Sting Out of Family Law: Peter Boshier says that Australian Initiatives Point the Way Forward For Our Family Court*, New Zealand Herald, 12 August 2004, the Principal Family Court judge is reported as emphasising the importance of helping fathers, in particular, to maintain a substantial role in their children's lives.

¹¹⁷ Patricia Easteal, *Killing the Beloved: Homicide between Adult Sexual Intimates* (1993) 180, suggests the relevant government bodies would do well to check the histories of sponsoring males before allowing them to 'import' another victim. See, also, *Case Study H/02/11* below, at p 327.

male's 'fantasy' relationship. He still conceives his former partner as his possession...The availability of the defence of provocation in these circumstances suggests that...the legally endorsed position in respect of the status of a relationship is that 'it ain't over, until HE says it is'.¹¹⁸

Michael Detmold comments that when criminal law adopts the male offender's subjective view of the status of the relationship and ignores the external reality, it perverts the dignity of self and other which in relation is absolutely equal. Although in the subjective mind of the male offender the relationship is not terminated, 'the existence or non-existence of a relation is a real and objective question, a thing in the world, a *relation* of subjectivities, not a thing in the mind of one subjectivity':

In patriarchy...there is an illusory (private) metaphysics at work giving men the authority to deal with their women without regard to the relational question of whether they really are their women any longer. If a man loves a woman in his mind, that is, as it were, where the action is. So, in his mind she is still his woman no matter what is going on in the real world.¹¹⁹

If Jiang's attempt to 'stand up' to the offender had been set in the context of a structural pattern of violence toward women, as a matter of policy the court may have been less willing to find that an 'ordinary' man could respond to her comments by holding his estranged wife by the neck and repeatedly bashing the back of her head on the pavement until she was dead.

When the relationship the deceased victim had repudiated was marred by the offender's prior use of violence and courts nevertheless allow a provocation plea, they are providing the opportunity for a manslaughter verdict based, at least in part, on the defendant's own prior violence. Allowing the defence to go to the jury in such cases

betrays an implicit judgment that the departure reflected betrayal, desertion, or abandonment. If we were to believe that the defendant's own wrongful acts caused the departure, we would not describe the case as one of 'lingering feelings' even though the defendant may well have had such emotions. What makes the defendant's claim rationally productive of emotion is not the fact of the prior

¹¹⁸ Rebecca Bradfield, 'Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife' (2000) 19 U Tas LR 5, 32.

¹¹⁹ Michael Detmold, 'Provocation to Murder: Sovereignty and Multiculture (1997) 19 Syd LR 5, 25.

relationship alone, nor the leaving itself, but a set of *meanings about relationships* in which it is wrong to leave, in which leaving breaches a covenant implicit in the relationship.¹²⁰

Furthermore, the reality that 'the triers of fact in these cases returned murder verdicts does not diminish the fact that the law permitted these cases to come out quite differently, allowing defendants with essentially "unclean hands" to claim the law's leniency'.¹²¹

C Protection Orders and Child Access Disputes as Sexual Provocation

As previously discussed, the offender in *Case Study B/97/4*¹²² killed his partner in breach of her protection order when she dropped off their child for an access visit. Although the affidavit the woman signed acknowledged that the offender was the child's father, her killer was permitted to mount a provocation defence based on an alleged comment that the child was not his.

In *Case Study G//01/7*¹²³ the offender threatened and stalked his estranged partner in his 'snoop-wagon' and eventually killed her in breach of her protection order and in the presence of her child. Despite the deceased victim's unsuccessful appeals to authorities for help, the offender was portrayed as a loving family man, driven to kill his estranged partner by her efforts to seek legal protection and structured access arrangements. Defence counsel also criticised the granting of ex parte protection orders to separating women, and another male speculated that 'draconian non-custodial-parent rules' meant the offender would get better access to his son now his estranged wife was dead and he was in prison.¹²⁴ A representative of one men's group also predicted that more killings would follow, given the New Zealand government's lack of positive family policy.¹²⁵

By contrast, victim advocates expressed their mounting concern regarding the effectiveness of protection orders, inadequate follow-up of breaches by police, the imposition of token sentences for breaches and the need for greater protection of women within the first six months of leaving a

¹²⁰ Nourse, above n 23, 1378.

¹²¹ Ibid 1355. Although Ronnie Mackay, 'The Provocation Plea in Operation - An Empirical Study' in England and Wales Law Commission, *Partial Defences to Murder* 290 (2004) Appendix A [5], found 'a mere 8.5% (n=6, all male defendants) had perpetrated some form of domestic violence', since most domestic violence goes unreported, or if reported, may not proceed to a conviction, a history of prior convictions is not a reliable indicator of presence or absence of violence.

¹²² See, discussion of this case above, at p 161.

¹²³ See, discussion of this case above, at p 164.

¹²⁴ *Why Does It Take A Murder?* Evening Post, 31 October 2001.

¹²⁵ *More Killings Will Follow*, Evening Post, 31 October 2001.

relationship when separating women are most at risk.¹²⁶ The victim's children planted a tree in memory of their mother at a vigil where their mother and 'hundreds of other women and children who had been victims of violence were remembered by people who attended'.¹²⁷

D *Battered Women's Attempts to Seek Formal and Informal Assistance as Sexual Provocation*

Family, community, and formal service networks are especially important to the safety of separating women in countering on-going violence and the jealous surveillance of abusive males.¹²⁸ This social reality is acknowledged in national domestic violence policy which emphasises the need for all persons in society to understand the dimensions of domestic violence and play their part in preventing it. Those who become aware of situations of violence are called upon to 'act promptly and appropriately'.¹²⁹

In a perverse contradiction of national domestic violence policy, the legal system permits the deceased woman's help-seeking efforts to be advanced in support of a provocation defence.

1. *Reporting Violence to the Police as Sexual Provocation*

Battered Women's Help Seeking as Provocation: Case Study T/97/5

George, the 24 year-old male offender, had a 'difficult' relationship with Kim, his 24 year old partner over a period of around 18 months. George told police that the day before the homicide he saw Kim kissing and fondling a shopkeeper and believed she was offering him sex. (The shopkeeper stated that nothing happened between himself and Kim, although 'he said she had been making suggestions to him about sexual activity'.)¹³⁰ Later that afternoon the couple went to a cemetery where George attacked Kim, punching and kicking her and stomping on her neck. 'The bashing only stopped when the pair had sex.'

Kim's injuries were so severe that George took her to the local hospital the next day, but only after extracting a promise that she would not report the assault to the police. Kim left the hospital because she was 'uneasy' about George's presence there.¹³¹ A number of witnesses were shocked at the extent of Kim's injuries, including her sister who stated: 'I told her [Kim] to get down to the police station but she wouldn't go...I rang the police, they came around and talked her into going to the station to make a statement.' A

¹²⁶ *Concern over Protection Orders for Women*, Dominion, 15 January 2001; *The Non-Protection of Tracey Patmore*, Dominion, 25 October 2001.

¹²⁷ *Vigil Tries to Snuff Out Violence*, Evening Post, 15 February 2001.

¹²⁸ Jennifer Hand, et al, *Free From Abuse: What Women Say and What Can Be Done* (2002).

¹²⁹ Ministry of Social Development, above n 3, 14.

¹³⁰ *R v T* (Unreported, High Court, Wellington, Neazor J, 11 December 1998) 2.

¹³¹ *Ibid* 3.

police spokesman stated that although Kim was initially reluctant, she went with police to the local police station, allowed police to photograph her injuries and made a statement about the assault. The officer said Kim was asked by police if she required the services of a Woman's Refuge and when she declined this assistance she was driven by police car back to the home of her sister.

George was watching nearby, and saw Kim arrive in the marked patrol car. After police drove off, he attacked Kim with a knife telling her: 'You said you loved me, you promised'. Kim was stabbed repeatedly until the knife broke. She escaped and ran back into the house but was followed by George, who obtained a further knife from the kitchen and continued to stab her, stopping only when the second knife also broke. When ambulance officers arrived the broken knife was still embedded in Kim's back. Family members, including three adults and six children ranging in age from 3 to 8 years witnessed the attack. Kim 'was dead within a very short time of making the complaint and the argument starting'.¹³²

George later told police that he had become angrier and angrier as time went by because he thought Kim might make a complaint regarding his prior violence toward her, although she had promised that she would not. George said that after arguing with Kim over her broken promise, he 'lost it'. He was charged with murder and a further charge of wounding with intent to cause grievous bodily harm in relation to the earlier assault. At trial, defence counsel argued George had been provoked by Kim's complaint to the police and her earlier infidelity with the shopkeeper.

The jury were told to 'consider the part low intellect played in [George's] reaction, including [Kim's] promise not to go to the police.' George's actions must also be viewed in the context of the relationship. Kim was addicted to solvents and was the dominant one in the partnership. She had refused to let George go. When George met her, he had a job, accommodation, and lived a 'regular life' but by the time he killed her, he had no job and no accommodation.¹³³ The Crown argued that the jury must not confuse anger with the specific legal defence of provocation as George had deliberately chased and killed Kim because she had reported George's earlier assault to the police. The jury acquitted George of murder and convicted him of manslaughter.

At sentencing, the judge noted that the crime had 'elements of dominance and revenge'. Rather than Kim trying to dominate George in the relationship, it was George who was trying to dominate her. George also had 'a considerable history of violence' toward Kim during the relationship.¹³⁴ However, the judge accepted

¹³² Ibid.

¹³³ Ibid 2.

¹³⁴ Ibid 3.

that George had 'lost good things in his life' because of his relationship with Kim.¹³⁵ (The judge also noted that 'even after she had been to the hospital, according to the statement that was produced, she [Kim] was telling you [the offender] one thing, and other people she was dealing with something else'.)¹³⁶

Despite 'the background of this relationship', and the urgings by defence counsel on George's behalf, the judge accepted that there could not be a lenient sentence for a lethal assault on a woman who had simply complained to the police about an earlier violent attack. George was sentenced to eight years' imprisonment on the manslaughter charge and two years' imprisonment on the charge of causing grievous bodily harm. The sentences to be served concurrently. The judge added that he wished to make a further comment about this case to the effect that he agreed with defence counsel it was 'simply scandalous' for merchants to have continued supplying Kim with solvents when she was a known user.¹³⁷

Kim's sister, who had originally contacted the police, told the media the justice system needed reviewing. George 'was going to serve five to six years and he'll have his life back. Nothing will bring Kim back'. Women's Groups described themselves as 'astounded', 'incredulous' and 'outraged' at the decision to allow the provocation defence in this case, noting it sent all the 'wrong messages' to battering men. One group observed that the decision flew in the face of the *Domestic Violence Act* and police policy based on the premise that battered women would report violence against them. Another group suggested the decision that a woman who had been beaten so badly she was taken to hospital, who then complained to the police, could have that complaint used to reduce the seriousness of the offence and the length of sentence defied 'common sense'. The Labour Justice spokesman described the case as a 'travesty of justice'.

In response to this public criticism, the then Minister of Justice is reported as stating that the government had no plans to review the law on provocation. The decision had been made by the jury and no one else apart from the 12 jurors knew what went on in the jury room. A Ministry of Justice source noted the case was considered to be an 'exceptional and somewhat anomalous' one: 'That is essentially why the minister is not convinced that there is any need to turn the whole system upside down'. Although the Crown stated it was considering appealing against the trial ruling which allowed the jury in this case to consider provocation, no subsequent appeal was found.

The Ministry's description of this case as 'exceptional and somewhat anomalous' highlights the extraordinary nature of the 'ordinary man'. Reporting a batterer to the police is not 'exceptional' or 'anomalous' conduct. Losing one's self-control and killing the victim for reporting the violence

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid 5.

might well be regarded as exceptional or anomalous' conduct which falls 'outside the ordinary or common range of human temperaments'.¹³⁸ Thus as Leader-Elliott points out, the 'provocation defence makes responsibility depend on an estimate of the extraordinary - the *atypical* - responses of the ordinary man.'¹³⁹ Although George's personal characteristics may have enhanced his perception that Kim's conduct in reporting his violence to police constituted especially grave provocation, Timothy Macklem and John Gardner note that an offender's personal idiosyncrasies can bear on the gravity of the provocation only in a limited way. 'It is not that he has his own judgment of what is insulting, and to what extent it is insulting, a judgment that needs somehow to be respected or accommodated by the law...[the issue] is how grave a certain insult *really is*, never mind how he feels about it'.¹⁴⁰ Macklem and Gardner note that the very setting of an objective standard implies an expectation that some defendants will be unable to reach it. However, as Nourse observes, if courts cannot see that the termination of a relationship is lawful conduct which ought to be uncontroversially and unambiguously protected, they are unlikely to recognise other claims in the context of an intimate relationship that rest on manifestly inappropriate emotional evaluations.¹⁴¹

Seeking formal intervention is a well established red flag for dangerousness/lethality. The New Zealand Law Commission has recognised that reporting an abusive partner to the police can be fraught with danger:

Going to the police, for example is a reasonable alternative to the use of force if thereby the [battered woman] obtains effective protection, but not if it will ensure the [woman's] safety only for as long as she is in the presence of police officers.¹⁴²

However, rather than denouncing offending in this context, and upholding women's unqualified right to report violence to police without fear of retaliatory violence, the above decision to allow the jury to consider the defence sends a message of support for batterers' demands that promises extracted from their victims not to report their crimes should be respected.

¹³⁸ Orchard, above n 11, 531, citing *R v Enright* [1961] VR 663, 669; *Stingel v R* (1990) 171 CLR 312 (HCA).

¹³⁹ Leader-Elliott, above n 12, 161-162.

¹⁴⁰ Timothy Macklem and John Gardner, 'Provocation and Pluralism' (2001) 64 MLR 815, 823.

¹⁴¹ Nourse, above n 23, 1399.

¹⁴² New Zealand Law Commission, above n 8, [24].

2. *Seeking Help from Male Associates as Sexual Provocation*

Notwithstanding the expectation in New Zealand's Family Violence Prevention Strategy that *all* members of society will play their part in preventing violence toward women, courts appear especially suspicious of third party intervention when that third party is a male associate, or new male partner.¹⁴³ As illustrated above, even the *threat* of obtaining help from an apparently imaginary 'bigger man' may be deemed provocative. The following case illustrates judicial acceptance of the claim that a male associate has no responsibility, or indeed, any *right*, to intervene to protect the battered woman from her husband's violence.

Battered Women's Help Seeking as Provocation: Case Study P/98/3

Malcolm, the 34 year-old male offender, beat Patricia, his 32 year-old wife and mother of six children to death during a birthday party for the couple's nine year old son. Malcolm had a history of violence toward his wife who had escaped to a Women's Refuge on a number of occasions in the past. Non-violence and temporary protection orders against Malcolm were issued in 1995 and again in 1998. Just three months before he killed his wife, Malcolm pleaded guilty to an assault against Patricia and received a 12 month suspended sentence of imprisonment.

On the day of the homicide, a number of people came and went during the party in the garage at the couple's home. The pair consumed 'considerable amounts of alcohol'.¹⁴⁴ At depositions, the District Court heard that around 10.30 pm Patricia became upset following an argument over Malcolm's 'dirty-dancing' with a friend of his sister who was a known prostitute. Patricia went to bed shortly after Malcolm left to go night-clubbing with a group from the party. Some time later, Malcolm's cousin entered the house with the stated intention of getting 'a feed'. Instead, he went to the bedroom and later stated he and Patricia kissed and sexually fondled each other. He denied sexual intercourse had taken place. Malcolm entered the bedroom and found his cousin, who was apparently fully dressed at the time, lying on the bed and Patricia in bed dressed only in a t-shirt. The cousin stated that Malcolm told him 'It's all right cuz', at which stage he walked out of the bedroom. The cousin acknowledged that he was aware Malcolm might respond to this situation with violence and stated: 'I thought I was going to get my head kicked in...I thought [Patricia] may have got a slap. I did not think she would end up the way she did.'

The Crown later stated that when the cousin left the room, Malcolm punched Patricia several times in the head. Patricia tried to escape through a window, but was tackled by Malcolm and the pair fell onto concrete

¹⁴³ See, eg, Wayne Gorman, 'Provocation: The Jealous Husband Defence' (1999) 42 C.L.Q. 478, discussing *R v Thibert* [1996] 1 SCR 37 (SCC).

¹⁴⁴ *R v P* [2000] 1 NZLR 234 (CA) [5].

below. Around 10 minutes later, the couple returned to the party and those present saw Patricia stumble and 'there was evidence that she had recently been beaten'.¹⁴⁵ Patricia, who at this stage was appealing to partygoers for help, was grabbed in a headlock by Malcolm and dragged up the steps at the front of the house. The cousin and another guest attempted to intervene. However, Malcolm threatened to break Patricia's neck unless they stopped trying to assist her. The Court of Appeal notes that at this point Patricia fell free to the bottom of the steps, and Malcolm once more grabbed her neck, imposed another headlock and dragged her back up the steps. 'Everyone was still trying to tell the appellant to leave his wife alone'. The cousin tried to assist Patricia but was told by Malcolm to 'f*** off' as he had tried to 'f*** his missus'.¹⁴⁶ The cousin and the guests left.

After their departure, the Crown stated that while Patricia's head was on concrete, Malcolm struck repeated blows to her head with his fists and stomped on her abdomen. After placing Patricia in bed, Malcolm rang for an ambulance and washed the pair's bloodied clothes. He also telephoned a friend and stated he had 'done a stupid thing'. A pathologist gave evidence that Patricia's death resulted from a number of injuries to her head and neck and particularly to a subdural haematoma, caused by blunt force trauma. Patricia's nose was broken and part of her dental plate was found in the rubbish bin. The other half was found near her body. Two days after her death, Patricia's court order of protection against Malcolm arrived in the mail.

Although DNA evidence confirmed that sexual intercourse between the cousin and Patricia had not taken place, defence counsel argued Malcolm was justified in thinking that sex had taken place. This was sufficient to put sexual provocation to the jury. The defence argued that Malcolm had killed his wife in a 'blind jealous rage' sparked by the 'devious and opportunistic actions of the cousin'.

To rebut the defence argument that Malcolm had lost his power of self-control, (and presumably to show Patricia had not condoned his violence - the judge noted that at all times the letters expressed disenchantment with Malcolm's violent behaviour)¹⁴⁷ the Crown introduced letters written by Patricia to Malcolm while she was in hiding from him. In one letter Patricia told Malcolm:

Too many times I put your happiness first, and trying to make you happy, forgot about me and the kids. I was a baby machine, a cook, a cleaner, a punching bag and a sex machine, and I don't want to go back to that...I have a lot of bad habits still. Like screaming. But if I don't yell, nobody listens. And at other times my heart aches for you only because you're missing out on seeing the kids

¹⁴⁵ Ibid [8].

¹⁴⁶ Ibid.

¹⁴⁷ Ibid [11]. The letters also countered Maurice's claims that he assaulted his wife in response to her abuse of their children.

grow up. They come home with new things every day, like words and books, and things they did. My heart melts when you treat me like someone special, and when you tell the kids you love them. Why does it always have to end?

And I think you're wrong when you say I make you hit me. You're the one with the problem, and you had it well before you met me. See, violence gets you nowhere. I loved you, and I gave up everything for you to come up here, and you took my heart and shit on it again. Anyway I lie in bed thinking about everything, I don't want to be hurt. I don't want you to hurt. All I ever wanted was for our kids and us to be happy. Have a happy, violence-free home. That's all.

Perhaps unsurprisingly, the police officer who read the letters at trial 'broke down' and had to pause for significant periods of time before he could continue.¹⁴⁸ One juror also broke down in tears. The trial judge told the jury that provocation must stem from the victim. Therefore, the cousin's later intervention to protect Patricia could not constitute provocation.¹⁴⁹ The jury rejected the provocation defence and convicted Malcolm of murder. Malcolm appealed to the Court of Appeal.

Before this appeal was heard, the media roundly criticised the actions of the party guests in leaving Patricia to her fate. One report described Patricia as raising 'her bloodied and swollen face and feebly lifting a hand for help' in response to which 'the crowd melted into the night'. Responding to the case, campaigners against domestic violence urged people to intervene when they witnessed aggression. A spokesperson for the 'Face Up To It' domestic violence campaign stated friends and family who witnessed assaults should ring the police, inform others, or stay with the victim during 'volatile' situations. A Women's Refuge manager noted that Patricia's agony was 'the extreme face of what many women experienced when trying to leave abusive relationships'. Patricia's sister told the media that Patricia 'always put her children first' and urged battered women to leave their abusive partners. She said many women stayed with violent men because they wanted their children to have a father around. However, 'there is only one answer if you are in a violent relationship, and that is to get right out. The kids suffer even worse than mum does'.

Subsequently, the Court of Appeal overturned the murder conviction and ordered a re-trial. The court noted that the trial judge should not have allowed the jury to hear Patricia's letters to Malcolm, which also included details of his assaults on the children, and sexual violence toward Patricia. Suggestions by the Crown in its closing address that Malcolm had been coached by his lawyer, and had engaged in sexual intercourse with Patricia at some point during the attack (DNA evidence found Malcolm's sperm and not the cousin's, Patricia's panties had been ripped, and her bra broken) were held to be prejudicial to Malcolm, and

¹⁴⁸ Ibid [13].

¹⁴⁹ Ibid [31].

the judge's direction on these issues did not remove the prejudice. The Court noted that the combined effect of these matters may well have led to the ordering of a new trial. However, it was not necessary to decide this issue as a new trial could be ordered on the basis of the judge's directions on provocation.

The Court held that the judge had wrongly instructed the jury that provocation must come from Patricia. Rather, the cousin's attempt to help Patricia was capable of amounting to provocation as the jury might find it indicated 'an understanding or association between [the cousin] and the deceased and a continuing interference in the relationship between the accused and his wife'.¹⁵⁰

This decision by the Court of Appeal that a habitual batterer could understandably become enraged at a male rival's attempt to prevent him from perpetrating further, even lethal violence against his wife constitutes an extraordinary reaffirmation of past sexist legal norms. Although courts currently regard allegations of infidelity so seriously that a deceased woman can be internally examined for evidence of her 'innocence', wife battering is a crime; sexual infidelity - actual or imaginary - is not. Given that the marriage vows no longer imply an agreement between the parties that unfaithful conduct by the wife may be punished by violence, a wife caught in adultery might expect recriminations but 'there is no doubt that she is entitled to expect her husband to refrain from violence'.¹⁵¹ As Nourse points out, since law refuses to jail adulterers, we are compelled to ask why private parties may enforce a sense of outrage that society has refused itself.¹⁵²

Robert Lithgow posits the decision in this case as confirming the flexible approach of the courts which now 'realistically accepts the social context in which individuals interact'.¹⁵³ The question must be asked: whose social context is recognised in this decision? The social context of the *victim* who continually pleaded for her right and the right of her children to live in a violence-free home is not represented in this decision. Nor are government concerns to target repeat victimisation,¹⁵⁴ to change proprietary attitudes toward women which justify or partially excuse use of violence

¹⁵⁰ Ibid [37].

¹⁵¹ Leader-Elliot, above n 12, 160. Evidence of the offender's own earlier sexual misconduct to which his wife objected could also have been regarded as provoking the conduct of which the offender complained.

¹⁵² Nourse, above n 23, 1396-1397.

¹⁵³ Robert Lithgow, 'Provocation' [2000] NZLJ 21, 22.

¹⁵⁴ Robert Teppett, 'National Organisation for Victims Assistance: 20th Anniversary Conference and International Summit [1995] *Social Policy Journal of New Zealand* 184, notes the New Zealand Crime Prevention Strategy focus on repeat victimisation.

against them;¹⁵⁵ and to engage the entire community in domestic violence interventions,¹⁵⁶ reflected in this 'flexible approach'.

Lithgow confuses the *legal* narrative with the *social* context of this homicide. The legal narrative confirms and reinforces representations of women as the possessions of male partners and homicidal rage as a rational response to a male rival's intervention to protect. The social context reveals the brutality of wife abuse, and its maintenance by members of the community, who 'melted into the night' in the face of threats to further harm the victim. The social context also reveals the killer as a serial abuser and a danger to public safety, evidenced by his violence toward his sisters and four previous partners.¹⁵⁷

3. *Seeking Help from Relatives as Sexual Provocation*

In response to the above Court of Appeal decision that third party conduct can be sheeted home to the deceased victim if she is 'sufficiently associated' with it, Lithgow notes provocation cases 'illustrate elasticity over many years as to conduct involving the victim rather than strictly emanating from the victim'.¹⁵⁸ In line with this trend, the jealous male in *Case Study S/00/10* who killed his estranged partner in the presence of the couple's children, sought to have the principle that intervention to protect the battered woman may constitute provocation extended to include relatives of the deceased victim.¹⁵⁹ Defence counsel argued in the Court of Appeal that the actions of the uncle, who hid the woman, kept the offender waiting, and lied to him about whether his estranged partner was in the takeaway shop, amounted to provocative conduct which could be attributed to the deceased victim.

However, the Court held that the uncle's conduct the day before the killing and six days earlier was not sufficiently proximate to the events and could not be associated with the separated woman's alleged provocation in the car park. The Court noted there was some evidence that the uncle kept the offender waiting 'for a short time' on the day of the killing, but that conduct could not be associated with the deceased victim.¹⁶⁰ This leaves open the possibility that had the woman hidden

¹⁵⁵ Ministry of Social Development, above n 3, 14, expresses the first goal of domestic violence prevention as that of encouraging intolerance to violence in families and promoting non-violent concepts of masculinity.

¹⁵⁶ *Ibid.*

¹⁵⁷ This aspect of the case is discussed in Chapter Nine.

¹⁵⁸ Lithgow, above n 153, 22.

¹⁵⁹ See, discussion of this case above, at p 207.

¹⁶⁰ *R v S* [2001] CA 407/00 (Unreported, Richardson P, Blanchard and Randerson JJ, 5 July 2001) [43-45].

in her uncle's shop and entreated him to lie on her behalf, perhaps directing the offender to another location, the uncle's acquiescence in her plan might be sufficient grounds for provocation if she was found by the offender shortly afterwards and killed.

Ironically, constructions of third party intervention as provocation stand in stark contrast to the approach to this issue in the Family Court. Following the killing of one woman in the present study, whose death was also the culminating event in a history of violence by the batterer, who also threatened to harm her if family or friends intervened,¹⁶¹ the killer's mother applied for access to her grandchild. While accepting that the grandmother may have been fearful of her son, the Court held her failure to intervene to protect the deceased woman, and her actions and those of other family members in reinforcing her son's conduct, militated against the grandmother's on-going involvement with her granddaughter.¹⁶²

V INDIVIDUAL CAPACITY Versus A REASONS-BASED APPROACH

Alex Reilly's examination of the literature on the philosophy and psychology of emotion found no consensus over what constitutes a loss of self-control and no consistency in how psychological theories explain the concept. Neuro-psychological research in fact supports the ability of offenders to choose patterns of behaviour even while in an extreme state of emotion.¹⁶³ Stephen Morse argues expert evidence that an actor is mentally or emotionally disordered does not compel the further conclusion that he could not have controlled his legally relevant behaviour, or even that the behaviour was related to the disorder. A mentally or emotionally disordered defendant may be aware at some level that his perceptions are 'out of line' but may be unwilling to exert himself not to act on the basis of those disordered beliefs.¹⁶⁴ Since there is no scientific measure of the strength of emotions or urges; gauging the strength of the defendant's anger and comparing it to the anger of men who do not kill in the same circumstances is all but impossible.¹⁶⁵

These arguments cast doubt on the notion that extreme emotional states can trigger an uncontrollable response. However, the provocation doctrine does not require that the loss of self-

¹⁶¹ *Case Study P/98/5*.

¹⁶² *P v P* [2001] 19 FRNZ 637.

¹⁶³ Alex Reilly, 'Loss of Self-Control in Provocation' (1997) 21 Crim LJ 320, 321, 325.

¹⁶⁴ Stephen Morse, 'Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law' (1978) 51 S.Cal.L.Rev. 527, 575-576.

¹⁶⁵ Christopher Slobogin, 'Psychiatric Evidence in Criminal Trials: To Junk or not to Junk?' (1998) 40 Wm. & Mary L.Rev1, 11.

control be complete. Since the defendant is assumed to have retained *some* control, the difficulty arises in defining the degree of reduced control that will be sufficient to found the defence. Noting the difficulty of defining whether, and at what stage self-control was lost, and then subsequently regained, Stephen Odgers suggests that 'the sufficiency of the degree of self-control actually lost would seem to depend on whether the accused is rendered qualitatively less blameworthy than a "murderer"'.¹⁶⁶ This observation hints at the normative evaluations underpinning the defence.

Nourse notes that a variety of recent scholarly works have urged a fresh examination of the concept of evaluation in the law relating to criminal defences.¹⁶⁷ Citing Nourse, the UK Law Commission highlights flaws in constructions of passion as obscuring reason, so that the quantity or intensity of the emotion, rather than the *reasons* underlying it, is said to provide the excuse.

In the past two decades, the idea of emotion as the natural enemy of reason has been seriously questioned by brain scientists and psychologists, by rhetoricians and philosophers, by classicists and even by legal scholars. That both brain scientists and philosophers may now agree that emotion reflects or assists our reasoning processes tells us something that law, and life, already reflect. When we see that someone is angry we do not call...[a] psychiatric expert for a diagnosis, we simply ask 'why'? We expect reasons, and they are typically attributions of wrongdoing and blame.¹⁶⁸

Scholars who support a reasons-based approach¹⁶⁹ argue that emotions embody beliefs and ways of seeing the world for which defendants can and should be held to account.¹⁷⁰ Dan Kahan and Martha Nussbaum point out that there is no philosophical analysis of emotions which proposes to define them without reference to underlying thoughts or beliefs essential to identifying emotions

¹⁶⁶ Stephen Odgers, 'Contemporary Provocation Law - Is Substantially Impaired Self Control Enough?' in S Yeo (ed), *Partial Excuses to Murder* (1991) 101, 103.

¹⁶⁷ Victoria Nourse, 'The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law' (1998) 50 *Stan.L.Rev.* 1435, 1437.

¹⁶⁸ England and Wales Law Commission, *Partial Defences to Murder* (2004) Part 3 [3.30, 3.52].

¹⁶⁹ See, eg, Dan Kahan and Martha Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 *Colum.L.Rev.* 269; Nourse, above n 167; Nicola Lacey, 'Partial Defences to Homicide: Questions of Power and Principle in Imperfect and Less Imperfect Worlds' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (2000) 107.

¹⁷⁰ The Victorian Law Reform Commission, *Defences to Homicide*, Options Paper (2003) [7.24 -7.27] contrasts a reasons-based approach with the capacity-based approach. The latter approach is 'based on an understanding of emotions as things we cannot control, but which control us': at [7.24].

and individuating between them.¹⁷¹ Studies showing subjects differentiate emotions, not in accordance with their physiological state, but in accordance with their beliefs about their situation, were widely regarded as having sounded the death-knell for mechanistic conceptions of self-control in cognitive psychology.¹⁷² This reasons-based analysis

allows us to look beyond the act and the circumstances of the act to why people killed and to make judgments about the values and views that drove the accused's decision to act. If criminal offences provide minimum standards of socially acceptable behaviour, then this reasons approach to defences assesses the extent to which accused persons' behaviour departed from that standard of behaviour.¹⁷³

Critics of such approach respond that provocation is not concerned with moral or social norms. Rather, 'emotion mitigates not because it expresses a morally appropriate evaluation of the actor's situation, but because it impairs volition'.¹⁷⁴ Under this analysis, emotions are

energies that impel the person to action, without embodying ways of thinking about or perceiving objects or situations in the world. They are not even very reliably hooked up to these ways of thinking and seeing; they follow laws of their own. The mechanistic conception typically sees these laws as deriving from an innate 'human nature' that precedes social shaping and responds to social cultivation only to a limited degree. Emotions lie behind culture; they are parts of our innate human equipment, to be studied by the sciences of psychology and physiology rather than by the normative disciplines of ethics and political thought...emotions are seen as feelings relatively devoid of representational or cognitive content.¹⁷⁵

The assertion that it 'cannot be seriously argued that variable interpretations of the provocation law will be such as to alter the number of victims',¹⁷⁶ apparently reflects a mechanistic theory of emotions as uncontrollable, irrational, internal forces which are largely impervious to law reform. However, research indicates that the way law deals with domestic violence offenders sends powerful messages to would-be aggressors and to the community.¹⁷⁷ If a legal rule espouses a

¹⁷¹ Macklem and Gardner, above n 140, 817, also point out that anger (like all other emotions) has a cognitive component, and it is 'of the essence of anger that there is a (supposed) wrongdoer against whom the anger is directed'.

¹⁷² Kahan and Nussbaum, above n 169, 284.

¹⁷³ Victorian Law Reform Commission, above n 170, [7.25].

¹⁷⁴ Kahan and Nussbaum, above n 169, 305-306.

¹⁷⁵ Ibid 278-279.

¹⁷⁶ Robert Lithgow, 'Provocation' [2000] NZLJ 159, 161.

¹⁷⁷ Research shows batterers ascribe responsibility to their women victims on much the same basis as the law of provocation does. See, eg, Peter Adams, Alison Towns and Nicola Gavey, 'Dominance and Entitlement: The Rhetoric

norm that 'ordinary' men can lose self-control and kill female partners who leave or reject them 'men can weave this apparent reality into narratives of excuse, and other men might feel less constrained to control their behaviour in the face of [real or imagined] infidelity'.¹⁷⁸ Nor do families of victims,¹⁷⁹ and domestic violence advocates,¹⁸⁰ who complain about the messages these trials convey fail to appreciate the import of legal evaluations of male sexual proprietariness.

Under such circumstances, the only parties from whom the law's evaluative content is possibly concealed are the decisionmakers themselves, who are spared the need to confront their appraisals directly, and less interested members of the public, who lack the information and incentive to pierce through the veneer of mechanistic rhetoric.¹⁸¹

Horder has argued for a third dimension to a general theory of culpability. He suggests that the orthodox two-dimensional approach: the subjectivist focus on intention, knowledge, advertence, actual foresight etc; and objectivist concerns with powers of cognition and what the defendant *ought* to have known, ignore a third dimension which draws on a moral theory by reference to what we (morally) expect of people experiencing desires associated with emotion.¹⁸² As Kahan and Nussbaum observe:

Such a view opens to public debate and deliberation many crucial areas of human conduct - what provocations are reasonable, what anger a reasonable citizen would experience - and thus fosters a

Men Use To Discuss Their Violence Towards Women' (1995) 6 *Discourse and Society* 387. In *Case Study G/01/3* a police officer, who was also an uncle of the victim, noted the offender, who had killed his partner shortly after she terminated the relationship, was well known for saying 'you can get away with anything if you act nuts'. Nourse notes reported testimony that one defendant warned the victim if she left he would kill her, and in response to her suggestion that 'he would go to jail' he replied that 'he would just act like he was crazy and get off'. See also *Case Study D/00/7*. A book by convicted murderer Michael Avanti, who persuaded one offender to reveal the whereabouts of his victim's body to police and subsequently received a reward of \$10,000, aims to show how easily psychiatrists can be deceived by offenders: *Revelations in Book About Dash Killing*, Dominion, 12 January 2002.

¹⁷⁸ Reilly, above n 163, 335. Eastal, above n 117, suggests that if a man reads the newspaper and discovers another male has killed his estranged wife and received a lenient sentence, such an act might gain some attraction, particularly if there is already a history of severe violence in the relationship.

¹⁷⁹ *Manslaughter Verdict Sickens Victim's Family*, Sunday News, 13 December 1998.

¹⁸⁰ *Manslaughter Verdict Outrages Dead Woman's Mother*, Press, 20 November 2004, cites the comments of a Women's Refuge spokesperson following the successful use of the defence in 2004 by a male who killed his estranged partner when she left their 10 year violent relationship that the manslaughter verdict sent the message that 'it's OK' for men to kill their partners. 'After 10 years or more of abuse, it's almost like the lessening of the charge means that there is some acceptance that if a woman chooses to live her life free from violence then it's in some way provocation for murder...It's quite an indictment of where our society is at.'

¹⁸¹ Kahan and Nussbaum, above n 169, 363.

¹⁸² Jeremy Horder, 'Cognition, Emotion and Criminal Culpability' (1990) 106 L.Q.R. 469, demonstrates this point with reference to the defence of mistaken belief in consent in rape cases. While ethically well disposed agents may regard the experience of great fear as a sound moral basis for excusing negligent consequent wrongdoing, they would not regard even a very great desire for sexual satisfaction as morally equivalent.

deliberative public culture. The mechanistic view of persons, by permitting us to ask only how strong certain impulses are, would actively discourage public deliberation on such matters.¹⁸³

When criminal law determines that an offender's aggression is out of all proportion to the deed when it occurs in response to desertion or rejection by friends, employers, or landlords, while the same acts in the context of an intimate relationship may seem 'rational', it reinforces specific norms of relationship.¹⁸⁴ In other words, constraints on access to the provocation defence are imposed, not on the basis of the intensity of the emotions involved, but because the emotions are evaluated according to cultural norms of behaviour deemed appropriate to the different relationships. These evaluations may be so deeply embedded in law that they do not seem like evaluations at all:

Rather, we might say that these evaluations simply 'are' the law. It is only when we attempt to inscribe new evaluations of motivation into the law, evaluations that are more contested than the ones already long woven into the law's fabric, that we are able to see clearly the act of evaluation at all.¹⁸⁵

Kahan and Nussbaum point out that the perception provocation is concerned with an offender's *capacity* for choice, and not with the *quality* of the emotional response, severs the correspondence between the valuation implicit in the action and the condemning retort of punishment. Since the role of evaluation in assessing the moral quality of emotions is disavowed, and the presence or absence of self-control is the only thing worth attending to, a defendant's lethal response to a battered woman's decision to exit an abusive relationship, and lethal retaliation in response to a long history of violence by the deceased, differ in no salient way. 'This disregard [for the question of evaluation] ... has social consequences...the wrong people will be treated with indulgence, and the message of deterrence sent to the community as a whole, to potential offenders in particular, will be a confused and dangerous one.'¹⁸⁶

As discussed above, legal analyses concerned exclusively with the impairment of a defendant's volition deflect normative evaluations of the defendant's reasons for acting. While a mechanistic

¹⁸³ Kahan and Nussbaum, above n 169, 361.

¹⁸⁴ Nourse, above n 23, 1376-1377.

¹⁸⁵ Carol Steiker, 'Punishing Hateful Motives: Old Wine in a New Bottle Revives Calls for Prohibition' (1999) 97 Mich.L.Rev. 1857, 1864.

¹⁸⁶ Kahan and Nussbaum, above n 169, 360.

view of self control would require us to treat large numbers of jealous and possessive male killers as beyond the parameters of rational judgment, the objective test in provocation requires evaluation of the type of conduct all citizens - including women - are entitled to expect from their fellow human beings.

VI PROVOCATION AND LEGAL CONSTRUCTIONS OF MORALITY

The transfiguration of the 'reasonable man' of the English provocation defence into the 'ordinary person' of s 169 of the New Zealand *Crimes Act 1961* recognises that 'needless killing in the throes of passion is the antithesis of reasonable conduct'.¹⁸⁷ Joshua Dressler suggests that unlike the ideal standard of the 'reasonable man', the 'ordinary man' is far less praiseworthy, which is why the provocation defence represents a concession to human weakness.¹⁸⁸ However, Leader-Elliott notes that legislative substitution of the 'reasonable' with the 'ordinary' man diminished the paradox of the unreasonable reasonable man, but did not eliminate it. Since most men who experience rejection and the break-up of a relationship manage to negotiate the related anger, bitterness and jealousy without resorting to lethal violence, 'if the defence of provocation was based on the *likely* reactions of ordinary men, of whatever culture, no man who killed from jealousy would escape conviction for murder'.¹⁸⁹

The paradoxical 'extraordinary ordinary man' test is complicated by two competing views of the moral structure of the provocation defence.¹⁹⁰ On one view, the defence is not concerned with pathological unreasonableness and is to be contrasted with a diminished responsibility defence as provocation operates only in respect of *reasonable* losses of temper. 'The rationale of the provocation defence is that the defendant is a full moral agent capable of conforming to an objective standard.'¹⁹¹ Thus Horder argues that the moral boundary between the defences of diminished responsibility and provocation is delineated by the objective standard in provocation that excludes the mental abnormalities of the accused.¹⁹² This view was accepted by the majority of the New Zealand Court of Appeal in *R v Rongonui*¹⁹³ which held that the legislative reference in

¹⁸⁷ Orchard, above n 11.

¹⁸⁸ Joshua Dressler, 'When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard' (1995) 85 J.Crim.L. & Criminology 726, 740.

¹⁸⁹ Leader-Elliott, above n 12, 161-162.

¹⁹⁰ Macklem and Gardner, above n 140, 815-816.

¹⁹¹ Mandy Burton, 'Intimate Homicide and the Provocation Defence - Endangering Women? *R v Smith*' (2001) 9 Fem.L.S. 247, 252.

¹⁹² Horder, above n 36.

¹⁹³ [2000] 2 NZLR 385.

s 169 to a person having the power of self-control of an ordinary person, 'but otherwise having the characteristics of the offender', required the characteristic to be taken into account when assessing the gravity of the provocation to the accused, but did not allow the power of self-control of the hypothetical 'ordinary' person to be affected by such characteristic.

However, as Celia Wells points out, courts and academics in common-law jurisdictions remain torn between the above strict approach to the objective test and 'one which allows the defendant's characteristics and circumstances to creep out of the gravity question and inform the self-control question as well'.¹⁹⁴ The latter approach perceives the application of a uniform standard such as that of the 'reasonable' or 'ordinary' person as insufficiently astute to the many dimensions in which people differ, including differences in temperament and mental or emotional idiosyncrasies. Since justice demands that allowances are made for handicaps for which the defendant cannot be held responsible, it is unjust to measure a defendant's conduct against objective standards they cannot meet.¹⁹⁵

In her dissenting judgment, Elias CJ in *Rongonui* argued that '[e]quality before the law is not achieved by holding those mentally damaged to the same level of culpability as those not'.¹⁹⁶ Accordingly, the 'ordinary man' should be invested with such characteristics as 'mental impairment, cognitive impairment through brain damage or senility, and heightened sensitivity through a recognised syndrome induced by abuse'.¹⁹⁷ Proponents of this approach argue that it is more consistent with the likely intention of Parliament when drafting the statutory test than the strict interpretation adopted by the majority in *Rongonui*.¹⁹⁸ Invoking the situation of the battered defendant, Elias CJ argued that requiring the jury to distinguish between the effects of battered woman's syndrome on the gravity of the provocation and its effect on the accused's powers of self-control constituted an overly subtle, 'highly artificial' distinction, which was 'likely to be so regarded by the jury'.¹⁹⁹

¹⁹⁴ Celia Wells, 'Provocation: The Case for Abolition' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (2000) 85, 90.

¹⁹⁵ See, eg, Eric Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility' (2001) 27 Mon LR 197.

¹⁹⁶ *R v Rongonui* [2000] 2 NZLR 385, 424 (CA).

¹⁹⁷ *Ibid* 422.

¹⁹⁸ Brookbanks, above n 17, [28].

¹⁹⁹ *R v Rongonui* [2000] 2 NZLR 385, 420-421.

However, gender differences in size and strength generally preclude an immediate response by the battered woman to threats of violence and taunts. Thus the battered woman's difficulty is with the requirement of a sudden and immediate loss of self-control and it is not necessary in the interests of justice to imbue her with a mental abnormality.²⁰⁰ Furthermore, while the battered woman syndrome has its origins in a laudable feminist attempt to counter gender bias in law, the analysis has been widely discredited as unscientific; inapplicable to the experiences of many battered women; offensive in its pathological connotations which imply that abused women suffer from a mental illness; misleading in its focus on the battered woman rather than on the batterer's use of violence and coercive control; and legally disadvantageous as the concept of 'learned helplessness' is incompatible with the actions of the battered defendant in actively seeking to protect herself.²⁰¹ In line with overseas jurisdictions, the New Zealand Law Commission has recommended the introduction of expert evidence on battering as opposed to establishing the existence of a particular 'syndrome'.²⁰²

Few women kill in response to sexual taunts or infidelity as the majority of intimate partner homicides by women are in response to the male victim's violence. Any advantage to women defendants from the minority approach in *Rongonui* is far outweighed by its potential to expose all women to greater danger. Diminishing support for the battered woman's syndrome stands in striking contrast to renewed interest among health professionals in the study of jealousy-related aggression.²⁰³ The 'Othello' syndrome and essentially equivalent diagnostic labels, for example: 'psychotic jealousy, erotic jealousy syndrome, delusion of infidelity, and conjugal paranoia' *are* scientifically accepted, and *are* acknowledged as relevant to 'aggression associated with domestic violence'. The present research found men who injure or kill in the context of jealousy and estrangement are also represented as suffering *inter alia* from dissociation, post-traumatic stress disorder and severe clinical depression.

²⁰⁰ See, eg, *R v Smith(Morgan)* [2001] 1 AC 146, 213 (HL) per Lord Millett.

²⁰¹ See, eg, David Faigman and Amy Wright, 'The Battered Woman Syndrome in the Age of Science' (1997) 39 *Ariz.L.Rev.* 67, noting the syndrome is unscientific and rarely results in acquittals. See, also, Evan Stark, 'Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control' (1995) 58 *Alb.L.Rev.* 973; Julia Tolmie, 'Battered Defendants and the Criminal Defences to Murder - Lessons from Overseas' (2002) 10 *Waikato L.Rev.* 91.

²⁰² New Zealand Law Commission, above n 8.

²⁰³ J Arturo Silva, above n 80; See, also, Gregory Leong, J Arturo Silva and E S Garza-Trevino, 'The Dangerousness of Persons with the Othello Syndrome' (1994) 39 *J Forensic Sci* 1445.

The normative content of psychological evaluations of male sexual proprietariness is also evident in the well recognised difficulty of establishing the point at which 'normal' jealousy can be differentiated from its pathological forms.²⁰⁴ Thus 'jealousy is considered morbid when it exceeds that level of possessiveness which is regarded as the norm for that society or culture'.²⁰⁵ Most persons who experience the break-up of a relationship will be distressed, miserable and upset, and research indicates that while psychiatrists may disagree, men may fairly readily obtain psychiatric reports to substantiate claims they were experiencing pathological jealousy, fear of rejection, or clinical depression at the time of the homicide.²⁰⁶ As discussed above, provocation is currently available to jealous men who kill women and claim some personal characteristic rendered them more susceptible to losing their self-control due to rejection and assertions of independence by an intimate partner.²⁰⁷ Permitting the accused's personal pathology to modify the objective standard of self-control would increase the likelihood of success for such claims.²⁰⁸ Thus as Mandy Burton observes, the 'creeping subjectivism' of the 'ordinary man' strengthens rather than weakens the alliance between law and psychiatry in excusing male violence toward women.²⁰⁹

Although Parliament's decision not to enact a diminished responsibility defence has been considered relevant to a restricted treatment of mental characteristics, Elias CJ suggests that 'the inevitable and deliberate effect of s 169 is to recognise a diminished responsibility within the limits of the provocation defence'.²¹⁰ However, this analysis blurs the moral boundary between the defences. Research indicates that the English defence of diminished responsibility has benefited batterers as opposed to their victims. Thirty-eight per cent 'of diminished responsibility pleas were wife killings arising, in the majority of cases where the offender was not psychotic, from "amorous jealousy or possessiveness"'.²¹¹ Responding to a proposal by two English legal scholars that law reform should acknowledge the defences of provocation and diminished responsibility are merging

²⁰⁴ Lana Muzinic, et al, 'Forensic Importance of Jealousy' (2000) 27 Coll. Antropol. 293, 294, note that pathological jealousy is sometimes described as obsessive behaviour which is not delusional, while others suggest that jealousy should be considered pathologic if a person responds with sufficient intensity to questions about their partner's infidelity.

²⁰⁵ Donatella Marazziti, et al, 'Normal and Obsessional Jealousy: A Study of a Population of Young Adults' (2003) 18 *European Psychiatry* 106, 107.

²⁰⁶ Burton, above n 191, 256.

²⁰⁷ See, discussion of *Case Study S/97/6* above, at p 201.

²⁰⁸ In *Case Study H/96/3* the defence relied on the evidence of a psychologist who stated that the six characteristics which shaped the offender's violence were developed during a childhood marred by domestic violence. The offender 'gave himself completely to [the victim]. He became dependent on her. And when she threatened to break the relationship, he was confused by her aggression, and at the same time fearful of losing someone he depended on'.

²⁰⁹ Burton, above n 191, 256..

²¹⁰ *R v Rongonui* [2000] 2 NZLR 385, 425.

²¹¹ New Zealand Law Commission, above n 8, [135].

into a single defence by shifting the inquiry to whether the defendant acted under 'extreme mental or emotional disturbance',²¹² James Chalmers warned that unless the boundaries of these defences are clearly demarcated we may cease debating whether 'infidelity' in the context of estrangement should be an adequate basis for provocation, and find ourselves evaluating whether a refusal to even enter a relationship might suffice. While the New Zealand situation is not directly analogous, this warning is nonetheless salutary.²¹³

Curiously, legal commentary also suggests that concern to deny the defence to accused persons of exceptional pugnacity and those with unusually low self-control was the rationale for excluding defendants' characteristics from the objective test of provocation.²¹⁴ The minority approach in *Rongonui* would also prohibit defendants from calling 'in aid the bad temper or self-indulgence all ordinary people can be tempted by and can overcome'.²¹⁵ However, the defence is presently available to habitual and serial domestic violence offenders. Accordingly, it is difficult to envisage what circumstances could prompt its withdrawal on the basis of the defendant's bad temper and history of violence. Indeed, on the authority of *Case Studies T/97/5* and *P/98/3* above, it is doubtful whether the defence would ever be withdrawn from the jury on the basis of a domestic killer's propensity to use violence.

Morse points out that in the absence of scientific means by which to test a defendant's capability to weigh the relevant options, or persuasive evidence that psychiatric experts can detect malingering,²¹⁶ courts, legislators and legal commentators cannot avoid the hard social, moral and legal questions by turning to mental health professionals. Since there is no bright line between free

²¹² R D Mackay and B J Mitchell, 'Provoking Diminished Responsibility: Two Pleas Merging Into One?' [2003] Crim.L.R. 745.

²¹³ James Chalmers, 'Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism' [2004] Crim.L.R. 198, 210.

²¹⁴ Odgers, above n 166, 103-104.

²¹⁵ *R v Rongonui* [2000] 2 NZLR 385, 423 (CA) per Elias CJ. See, also, Orchard, above n 11, 535, noting that the provocation standard does not extend to characteristics such as 'a disposition to lose one's temper readily, unusual pugnacity, or excitability' citing inter alia: *R v McGregor* [1962] NZLR 1069, 1081 (CA); *R v Fryer* [1981] 1 NZLR 748 (CA).

²¹⁶ Morse, above n 164, notes that while there is little systematic study of the ability of experts to identify mental health malingering, available evidence is not encouraging. Mental health experts can be quite easily fooled by faking, even when the shamming is rigged to make spotting it easier. Similarly, Slobogin, above n 165, 11-12, observes that both laboratory and field trials show the 'error rate' for diagnoses of personality disorders such as schizoid personality disorder and antisocial personal disorder is well above fifty per cent. In *Case Study G/01/7*, the defendant, who killed his partner shortly after she terminated the relationship, was said to have acted in a state of dissociation. Under cross-examination, the psychologist acknowledged that nobody but the offender knew what state he was in at the time of the homicide and the psychologist could not say when the offender went into a dissociated state, or whether he had experienced this state at all.

and unfree choices, society can only resolve on non-scientific grounds how to answer questions of moral and legal responsibility.²¹⁷ While arguments in support of retaining the provocation defence are 'generally premised on the view that a person who kills in response to provocation is less morally culpable than other intentional killers',²¹⁸ the provision of a partial excuse to proprietary men who pursue and kill separating women presently subverts civil law freedoms allowing women to exit unhappy relationships, and provides a partial excuse for male vigilantism.

VII PROVOCATION AND THE STEREOTYPE OF INTIMATE FEMICIDE: MASKING THE RED FLAGS OF SEPARATION AND REPEAT VICTIMISATION

Feminist legal scholars point out that the close association of provocation law with intimate femicide has created a dynamic in which woman killing is constructed as typically spontaneous violence, perpetrated by men pushed beyond their limits by female misconduct.²¹⁹ In reality, men who kill in the context of separation and rejection are afforded considerable latitude over issues such as pre-planning and the 'suddenness requirement'.²²⁰ The defence is said to be negated if the killing was deliberate and premeditated, but 'cooling time' is a 'flexible and uncertain consideration' and neither the lapse of a number of hours nor 'intervening conduct of some complexity and apparent deliberation' will necessarily be fatal to the defence.²²¹ As a result, the UK Law Commission notes that defendants are permitted to claim provocation in clear cases of considered revenge.²²² The Commission's consultations with psychiatrists also revealed that 'those who give vent to anger by "losing self-control" to the point of killing another person generally do so in circumstances in which they can afford to do so'.

An angry strong man can afford to lose his self-control with someone who provokes him, if that person is physically smaller and weaker. An angry person is much less likely to 'lose self-control' and attack another person in circumstances in which he or she is likely to come off worse by doing so.²²³

²¹⁷ Morse, above n 164.

²¹⁸ The Victorian Law Reform Commission, above n 13, [2.40].

²¹⁹ See, eg, Donna Coker, 'Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill' (1992) 2 S.Cal.Rev.L.& Women's Stud. 71, 83-84; Myrna Raeder, 'The Admissibility of Prior Acts of Domestic Violence: *Simpson* and Beyond' (1996) 69 S.Cal.L.Rev. 1463, 1481.

²²⁰ Horder, above n 36, 193. See also, Bradfield, above n 118, 23-24; Gorman, above n 143, 493.

²²¹ Orchard, above n 11, 528-529. In *R v Taaka* [1982] 2 NZLR 198 the fact the offender undertook a 40 km round trip to collect a firearm which was then used to commit the homicide was not fatal to the defence.

²²² England and Wales Law Commission, above n 168, [3.135, 3.136]. See also, *R v W* [1996] 1 NZLR 147 (CA).

²²³ England and Wales Law Commission, above n 168, [3.28, 3.29].

Wayne Gorman observes that the ending of a relationship does not cause sudden violence, it creates the opposite effect. 'It creates long-term anger and jealousy that may eventually result in violence. But that violence is not in response to provocation, it is in response to the jealousy that the ending of the relationship evokes.'²²⁴ However, legal narratives of provocation have diverted attention from the contradictory findings of social science research.²²⁵ Consequently, the stereotype of intimate femicide in terms of men who suddenly 'crack' or 'snap' is maintained despite obvious inconsistencies.

Donna Coker suggests that

[o]ur oppositional definitions of 'premeditation' and 'impassioned' killings fail to capture the nature of this phenomenon which is both premeditated in its obsessive quality *and* 'impassioned' in that the killer believes himself to be 'out of control'. The man 'may have fantasized events that would "trigger" him to commit homicide', rehearsing the killing, though not *planning* it in a straightforward cognitive fashion. He may describe feeling that his choice to kill is completely in the hands of fate or, perhaps more accurately, in the hands of the victim. If she continues to do 'x,' or if she refuses to do 'x,' then he will 'have no choice' but to kill. These men may be heard to say with some resignation, 'one of us is going to end up dead'.²²⁶

Coker points out that the provocation analysis perpetuates two major misconceptions about the nature of male violence toward women. First, the violence is depicted 'as an uncontrollable response, which in turn reinforces the belief that intervention can have little deterrence or prevention impact.'²²⁷ Second, the violence is attributed to a particularly provocative victim, or the dynamics of a particularly dysfunctional relationship, as opposed to the personal proclivity of the offender to be violent with female intimates. The offender is thereby depicted as an unlikely recidivist and less dangerous.²²⁸

Well established patterns of repeat victimisation and escalation in battering relationships contradict the assumption in the provocation scenario of an ordinarily non-violent male offender who

²²⁴ Gorman, above n 143, 496.

²²⁵ Polk, above n 83, 193, found that in almost two thirds of the cases involving male killers there was 'some clear element of prior planning in the events leading to the death'.

²²⁶ Coker, above n 219, 88 (emphasis in original; citations omitted).

²²⁷ Ibid 76.

²²⁸ Ibid.

suddenly and uncharacteristically 'snaps'. The calculation central to intimate femicide is also evidenced by the determined pursuit of estranged women partners, including, stalking, death threats, and the wife killer's mantra: *'If I can't have you, nobody else can'*. By contrast, the provocation stereotype has masked the two major red flags for dangerousness/lethality of separation and repeat victimisation. Junctures at which the offender's grim pursuit of his partner's destruction might have been halted by proactive intervention may therefore remain unrecognised.

VIII LEGAL NORMS OF INTIMATE HETEROSEXUAL RELATIONSHIPS

Historical legal norms of relationship which permitted men to beat and imprison non-compliant wives linger on in modern interpretations of the provocation defence. As Francis Dolan points out, the conception that a marriage may contain only one legal agent still casts women's assertions of sexual autonomy as a kind of violence that in turn provokes male retaliation.²²⁹ Although judges no longer mandate women's return to their husbands, the ghost of the *feme covert* hovers in judicial evaluations that men retain a proprietorial interest in women who want nothing more to do with them. Despite research showing the level of support and protection women can obtain from law and the community makes the difference between breaking free and becoming more embedded in abuse,²³⁰ patriarchal relationship norms continue to construct women's attempts to seek help and third party intervention as a flouting by the woman of her male partner's authority.

Why else would the law encourage protective orders in domestic violence cases but hold that juries could find such orders good causes for murderous rages? How else are we to explain that divorce or departure, lawful acts, are assumed to spawn murderous rages that survive for months and years? How else are we to understand why the reformed defense, unlike almost any other criminal code, shows compassion to defendants who have created the conditions of their own defense, who respond to what would otherwise seem trivial slights, or who use violence to punish lawful acts? *Because the relationship supplies the norms that the criminal law denies.*²³¹

Criminal law interpretations of help-seeking by battered women individualise what is, in reality, a community problem. Researchers note that while women 'have the responsibility to take action for themselves for their own safety and that of their children', this requires, and is possible, 'only in a

²²⁹ Francis Dolan, *Battered Women, Petty Traitors and the Legacy of Coverture* (2003) 29 *Feminist Studies* 249, 272.

²³⁰ Hand, et al, above n 128.

²³¹ Nourse, above n 23, 1380 (emphasis added).

context of social responsibility.²³² Acknowledgement of this social responsibility is missing from legal narratives of women who report abusers to the police; 'tell the accused one thing, and other people something else'; invent imaginary male protectors; hide from abusers; seek matrimonial property settlements; protection orders; and structured access arrangements, as provocateurs of men, as opposed to members of a particular social group who struggled, unsuccessfully, for their own (and sometimes their children's) survival.

IX CONCLUSION

The recent successful use of sexual provocation by a male who shot and killed his estranged wife's new male partner, and shot the woman causing her arm to be amputated, led one academic to describe the defence as undermining the credibility of the law and a 'nightmare' which should be abolished.²³³ However, notwithstanding criticism of mechanistic constructions of emotion, and the elusive quality of the ordinary person test (Reilly notes courts and jurors have no knowledge of the power of self-control that the 'ordinary manslaughterer' is capable of obtaining),²³⁴ the defence has remained impervious to calls from advisory bodies for its demise.²³⁵

Provocation is most commonly raised by men who kill women in the context of sexual intimacy.²³⁶ Given that the defence relies on the uncorroborated claims of killers which are highly vulnerable to fabrication,²³⁷ all women remain vulnerable to men who manufacture allegations of provocation to excuse their violence.²³⁸ (The New Zealand Court of Appeal has observed that it is difficult to exclude provocation in the setting of a close personal relationship where there can be a build-up of emotions over a period of time and a further incident can cause feelings to run high and trigger a loss of self-control.)²³⁹ Studies indicate that it is rare for prosecutors to question alleged confessions of adultery or taunts about sexual prowess which defendant's claim provoked them to kill.²⁴⁰ Judges have also acknowledged that 'a case of provocation by words may be more easily

²³² Hand et al, above n 128, x.

²³³ *Defence of Provocation A Mess - Expert*, Christchurch Press, 30 June 2003.

²³⁴ Reilly, above n 163, 320.

²³⁵ See, eg, New Zealand Law Commission, above n 8.

²³⁶ Victorian Law Reform Commission, above n 22.

²³⁷ See, also, Victorian Law Reform Commission, above n 13, [2.30].

²³⁸ Burton, above n 191, 256.

²³⁹ *R v Pita* (1989) 4 CRNZ 660.

²⁴⁰ Lees, above n 9, 267.

invented than a case of provocation by conduct, particularly when the victim was the wife of the accused'.²⁴¹

The stories law tells of sexual provocation are presently constructed in terms of the volition or capacity of individual defendants. As Nourse points out, attempts to further subjectivise the hypothetical ordinary male by imbuing him with certain of the defendant's psychological characteristics shift the standard of self-control a step further inwards, placing normative questions - which passions the law should protect - into the minds of individual defendants. These individualised analyses have masked a structural pattern of male violence towards women. It is time to confront the terrible social reality that New Zealand women are being injured and killed while attempting to escape from abusive men. In the interests of justice, the state can no longer avoid responsibility for failing to protect its citizens by blaming abused women for provoking their own deaths.²⁴²

²⁴¹ Morgan, above n 79, 262 citing Mason J in *Moffa v R* (1977) 138 CLR 601, 618 (HCA).

²⁴² See, also, Raeder, above n 219, 1478.

CHAPTER SEVEN: THE 'RED FLAG' OF SEPARATION

PART II: TOWARD A PRINCIPLED RESPONSE

A woman plans to marry the man accused of repeatedly stabbing her and breaking her arms with a hammer in an attempted murder. [The couple] applied for a marriage certificate this month.¹

Let's say I committed this crime [the murder of ex-wife Nicole Brown Simpson]. Even if I did do this, it would have to have been because I loved her very much, right?

~ O J Simpson²

[H]omicide 'is the outcome, in most cases, of a society whose interpersonal relationships deserve a thoroughgoing reanalysis'.³

I INTRODUCTION

Research has produced conflicting accounts of the relevance of estrangement to sentencing outcomes. Patricia Easteal's study of judges' sentencing remarks indicates that constructions of separation violence in terms of male passion and female infidelity also operate at sentencing.⁴ By contrast, Myrna Dawson notes various theoretical perspectives predict that offenders who victimise women from whom they are estranged will be sanctioned more severely than those who target current partners. Dawson's research found men who killed estranged partners were likely to receive harsher legal sanctions than men who killed women with whom they were co-residing.⁵ Since scholarly research has produced such disparate sentencing scenarios, this chapter includes an examination of sentencing responses to lethal separation violence.

The theory that the status of the intimate relationship (whether the parties are co-residing or separated) is predictive of punishment severity would require a major shift from legal constructions of sub-lethal separation violence and the provocation analysis of violence in the context of separation. The recommendation by the New Zealand Law Commission that juries receive

¹ *Victim to Wed*, Dominion, 23 January 1995.

² Sylvia Puente and Dov Cohen, 'Jealousy and the Meaning (or Nonmeaning) of Violence' (2003) 29 *Personality and Social Psychology Bulletin* 449, 449.

³ Jenny Morgan, *Who Kills Whom and Why: Looking Beyond the Legal Categories*, Occasional Paper No 1 (2002) 4, citing Adam Sutton, in the Preface to Alison Wallace, *Homicide the Social Reality* (1986).

⁴ Patricia Easteal, 'Sentencing Those Who Kill Their Sexual Intimates: An Australian Study' (1993) 21 *Int.J.Sociol.Law* 189, 196, cites a case in which the sentencing judge accepted that 'an estranged wife's "infidelity" seventeen months after separation could cause some righteous indignation and depression by the estranged husband'. Geoff Hall, *Sentencing Law and Practice* (2004) 84, notes that '[w]here the contributing behaviour by the victim takes the form of provocation it will be considered when sentencing in cases of assault or manslaughter'.

⁵ Myrna Dawson, 'The Cost of "Lost" Intimacy: The Effect of Relational Status on Criminal Justice Decision Making' (2003) 43 *Brit.J.Criminol.* 689.

information on the social reality of separation violence indicates that this red flag for dangerousness/lethality is also overlooked at the trials of battered defendants.⁶ Given that separation attacks are not uncommon, and media coverage of the trials of men who kill estranged partners is often extensive, an assumption that the public remain unaware of this structural pattern of offending appears surprising. Notwithstanding high rates of sub-lethal and lethal separation violence, a critique of the Commission's proposal to reform self-defence law to accommodate battered defendants also suggests that rather than resort to lethal violence the battered defendant could 'summon help or simply walk out the door'. Having chosen neither of these options; her claim of self-defence 'smacks of self-help'.⁷ The violent pursuit of the separated woman is missing from this legal analysis.

Ian Leader-Elliott suggests that the availability of the provocation excuse to battering men and the difficulty battered women experience in accessing the defence of self-defence are manifestations of an underlying assumption in criminal law 'that women are subjects of men's dominion'.⁸ Relationship norms associated with this model of heterosexual relations are discussed in this chapter. In addition to the invisibility of separation violence in law and culture, the study found legal analyses are internally incoherent and in conflict with New Zealand Family Violence Prevention Strategy. Statutory intervention is therefore essential to promote women's safety and achieve justice for battered victims and defendants.

II THEORIES OF SEPARATION VIOLENCE AND PUNISHMENT SEVERITY

The relational distance between victim and offender 'has traditionally been perceived as a key determinant of criminal justice outcomes in cases of interpersonal violence'.⁹ 'Relational distance' theory posits that as relationships change, so also will the amount and type of social control.

Typically, socio-legal and feminist theorists argue that law varies inversely with the relational distance (or what is often referred to as the degree of intimacy) that exists between victims and defendants. Specifically, they argue that 'law is most likely to become involved, to proceed

⁶ New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (2001) [46].

⁷ Charles Cato, 'Criminal Defences and Battered Defendants' [2002] NZLJ 35, 39.

⁸ Ian Leader-Elliott, 'Passion and Insurrection in the Law of Sexual Provocation' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (1997) 149, 151.

⁹ Dawson, above n 5, 690 (citations omitted).

aggressively, and to be penal in style when the parties are strangers; it is least likely to become involved and most likely to be lenient and conciliatory when they are intimates'.¹⁰

On this analysis, persons who use violence against intimate partners from whom they are estranged 'may be subject to more law than those who are still involved with their victims at the time of the crime'.¹¹ Dawson's study of intimate partner homicides in Toronto from 1974 to 1996 found male offenders who killed female partners who were in the process of separating, or from whom they were estranged, received sentences that were around two years longer than those imposed on defendants who killed in the context of an intact relationship. This raised the possibility of a sentencing hierarchy in which women who leave are viewed as somehow more victimised than women who decide to stay.¹²

Dawson's research findings support Elizabeth Rapaport's 'household threshold' thesis¹³ which posits that the ongoing legacy of patriarchal legal doctrines that defined the domestic sphere as the boundary for male rule may ensure law offers 'less protection to men who have lost the status of husband of their victims'.¹⁴ Differences in the severity of sanctions may also reflect a greater degree of preplanning in estrangement cases than in cases involving cohabiting partners.¹⁵ Punishment rationales may also inculcate women victims who have remained in violent relationships despite their perceived risk, while courts may perceive women who have attempted to minimise risk by severing the relationship as less responsible.¹⁶

This issue is explored in the following section which examines sentencing responses to lethal separation violence in the context of legislation providing for additional public denunciation and deterrence of especially repugnant offending through a minimum term of imprisonment.

¹⁰ Ibid, citing D Black, *The Behavior of Law* (1976) 40.

¹¹ Ibid.

¹² Ibid. Dawson notes the thesis that 'the culpability of defendants in separation killings may be greater than in intact killings because victims are perceived to be less responsible for their own demise in separation killings by virtue of their attempts, successful or otherwise, to exit the threatening relationship' is a disturbing possibility for two reasons: First, simply because it *appears* that the woman did not leave, does not mean she did not try. Second, the view that separated women are more victimised than women who choose not to leave is clearly problematic.

¹³ Elizabeth Rapaport, 'The Death Penalty and the Domestic Discount' in Martha Fineman and Roxanne Mykitiuk (eds) *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (1994), 224, 235.

¹⁴ Ibid 238.

¹⁵ Ibid 236, noting that the distinction between premeditated, calculated killings and spontaneous 'crimes of passion' fails to account for the fact that killings not requiring premeditation, such as those committed in the course of a robbery, are nevertheless ranked among the most reprehensible types of murder: at 245.

¹⁶ Elizabeth Rapaport, 'The Death Penalty and Gender Discrimination' (1991) *25 Law and Society Review* 367, 380.

III SEPARATION VIOLENCE AND THE STATUTORY RESPONSE TO EGREGIOUS MURDERS

Prior to the *Sentencing Act 2002*, a conviction for murder carried a mandatory sentence of life imprisonment. Section 89(1) of the *Criminal Justice Act 1985* expressed a general legislative policy setting the earliest time that an offender convicted of murder might be released on parole at the discretion of the Parole Board as after the expiry of ten years of the sentence.¹⁷ The 1985 Act was amended by the *Criminal Justice Amendment Act 1993* which empowered the sentencing court under s 80 to depart from this general policy in cases of offenders convicted of murder where the circumstances of the offending were so exceptional that a minimum period of imprisonment of more than 10 years was justified. The Court of Appeal repeatedly warned that the power under s 80 was to be exercised sparingly.¹⁸ Application of the section was restricted to cases that were 'so horrendous or repugnant as to justify additional denunciation',¹⁹ or which by their nature were 'so removed from the general run of offences which attract indeterminate sentences as to make that policy inappropriate'.²⁰

A *Separation Murders as Unexceptional*

Although murders of separated women were often accompanied by invasion of the women's homes, significant brutality, and perpetration of the violence in the presence of children, they were not generally regarded as meriting an additional minimum non-parole period under s 80.

Separation Murder as 'Unexceptional': Case Study M/97/2

Graham, the 46 year-old offender, broke into the home of Bobette, his estranged wife, shortly after the couple had separated and killed the mother of three children. Bobette's 11 year-old son heard his mother's screams and reached her in time to witness his father stabbing his mother and cutting her throat with the knife. Graham subsequently pleaded guilty to murder and aggravated burglary.²¹ Graham claimed he could not recall the killing and did not know why he murdered his estranged wife. Defence counsel is reported as suggesting that Graham was a man who had kept his emotions to himself for years and 'snapped' on the night of the killing. The Crown sought an extension under s 80 of the minimum non-parole period, on the

¹⁷ Section 103 *Sentencing Act 2002* provides that 'an offender sentenced to imprisonment for life for murder will serve a minimum period of imprisonment of 10 years as provided in section 84(3) of the Parole Act 2002'.

¹⁸ *R v Hapi* [1995] 1 NZLR 257; *R v Parsons* [1996] 3 NZLR 129.

¹⁹ *R v Parsons* [1996] 3 NZLR 129, 131 (CA).

²⁰ *R v W* [1996] 1 NZLR 147, 149 (CA).

²¹ *C v M* [1998] NZFLR 489, 490.

basis that the killing was premeditated, unprovoked, and a 'brutal' and 'repugnant' attack on a 'virtually defenceless victim'. However, although the sentencing judge's voice reportedly 'broke with emotion' as she described the 'grievous and loathsome' factors involved in this murder of a separated woman in the presence of her child, the judge found there were no aggravating features of this offending which would categorise the crime as 'exceptional'.

Outside the court, family members told reporters that the offender had been violent to his wife before he killed her and she had left him because of his violence. They were concerned that the offender would be free in a few years. 'Life's not life' one family member said.

Since the context of estrangement is not unusual or exceptional in intimate femicide cases, the murders of estranged partners could be accurately portrayed as not by their nature removed from the general run of domestic homicides, and therefore insufficiently horrendous or repugnant to justify additional denunciation and deterrence.

Separation Murder as 'Unexceptional': Case Study M/97/3

Donald, the 40 year-old offender and Pet, his de facto partner and 'mother of four', had been in a relationship for 'many years'. The relationship was punctuated by periods of separation. (As in so many of these cases, no explanation is given for the periods of separation or whether violence was a factor.) Following a 'domestic argument' Pet left the relationship and moved into the home of a friend. The Crown stated Donald 'could not accept the separation' and made many telephone calls to Pet's workplace pleading with her to resume the relationship. On the day of the homicide, Donald travelled to the home of his estranged partner armed with a single-barrel shotgun. Upon arrival, he placed the gun and five cartridges at the end of a veranda, went to the door and demanded to speak to Pet. She refused to go outside to meet with him, and together with a woman friend demanded that he leave or they would call the police.

In response, Donald retrieved the shotgun and fired one shot through the door lock of a ranch slider, breaking the glass. He then reloaded the shotgun, entered the house and dragged Pet outside onto the veranda where he shot her through the lower left leg, almost amputating her foot. As Pet pleaded for her life, Donald dragged her toward his car. When he released Pet to reload the shotgun, she crawled under a bush. Bending down, Donald fired again at Pet, who was hit in the chest lacerating her heart, liver and diaphragm.

Several people witnessed the shooting, including a neighbour, employed as a security guard, who stated he looked out his window after hearing the first shot. He heard a second shot, and a woman's voice crying out

for help. He said he jumped out the window in time to see Pet dragging her leg as she tried to crawl away from Donald and hide. As he watched, Donald lowered the gun and shot her again. Donald then re-loaded the shotgun and turned toward the neighbour who sprinted towards Donald and with the help of another neighbour pinned him to the ground. Others tried to help the dying woman by stemming the flow of blood from her abdominal and leg wounds. However she died at the scene and ambulance officers were unable to revive her.

During a police interview, Donald stated that he killed his estranged partner because she 'did not want to go home with him'. Donald pleaded guilty to Pet's murder. At sentencing, defence counsel reportedly told the judge that Donald had 'killed the one person who was close to him' and was remorseful. The Crown made no submissions and Donald was sentenced to life imprisonment.

The neighbour who intervened told reporters he wished he could have done more for Pet. 'I wanted to tackle [the offender] after the second shot, but I wasn't sure how quickly he would reload. She may have been alive now if I had done it.' Pet's repeated screams for help and the way she died still tormented him: 'I can't get rid of that vision' the neighbour said.

This murder of a woman who 'did not want to go home' to an apparently abusive relationship excited little public attention or outrage. Similarly, the habitual batterer in *Case Study W/96/1* who informed police that he killed his estranged girlfriend after deciding that '*If I can't have her, no one will*' did not serve a minimum non-parole period, and the case and legal response attracted little attention or controversy. Nor was s 80 invoked where an offender used two knives to stab his estranged wife to death in the foyer of the Court she attended for a hearing over access to the couple's children.²²

Two cases were found of offenders who killed a separated partner and minimum non-parole periods were imposed. In the first case, the offender murdered his estranged wife and attempted to murder her friend. The wife was tortured for six hours prior to being killed and both victims were forced to consume tabs of LSD and informed of their intended fate. The case attracted a great deal of media attention and the offender was sentenced to a minimum non-parole period of 12.5 years and his female accomplice to 13 years.²³

²² *Case Study L/98/4.*

²³ *Case Study G/95/3.*

Although defence counsel in the following case study argued that the circumstances of this separation murder 'occur so often that they are in the category of normal',²⁴ the trial judge imposed an additional minimum period of imprisonment under s 80. On appeal, the Court of Appeal stated that each aggravating factor, on its own, would arguably not be exceptional in cases of domestic homicides, but taken together could suffice. However, the Court reduced the minimum term of imprisonment imposed in the lower Court.

*An 'Exceptional' Separation Murder: Case Study W/94/1*²⁵

Peter, the 31 year-old male offender, and Kimberley, his 21 year-old partner lived together for about one year, after which Kimberley moved out of the home and returned to live with her parents. Peter was subsequently sentenced to 10 months' imprisonment following an assault on Kimberley which involved use of a firearm. Apparently, Peter was also convicted of offending against Kimberley's father.²⁶ The Court of Appeal suggests that following his release from prison, the relationship continued on an 'irregular basis'.²⁷ However, the evidence suggests Peter was stalking Kimberley. After discovering her association with another man, Peter returned home and allegedly informed his flatmate that 'she's dead'.

The following month, Peter went to Kimberley's home armed with a knife and insulating tape. After being told Kimberley was out, Peter threatened to cut the throat of her flatmate and forced him to crawl to his own bedroom, where he was gagged and his hands and feet bound with the tape. He was then tied to the bed. Some time later, Kimberley arrived home and on hearing her car, Peter again threatened to cut the flatmate's throat if he made a noise and concealed himself in the house. Kimberley made a telephone call, watched television for a short time, and then went to the bathroom, where she was confronted by Peter. At this point she was heard to 'scream out' and whilst in the bathroom suffered defensive wounds to her hands from the knife. She was then dragged by Peter into her bedroom, where she was later heard to 'scream loudly again'.²⁸ At trial, Peter gave evidence that while in the bedroom, Kimberley was shaking and complained of being cold, whereupon he cut off her jeans and underclothes with the knife. The head note to this report suggests that 'as stated in evidence... consensual intercourse [then] took place'.²⁹

²⁴ *R v W* [1996] 1 NZLR 147, 150 (CA).

²⁵ *Halls Sentencing* vol 1, Issue 50 (2001) [D/838], cites this case as authority for the Court of Appeal approach to sentencing under s 80 *Criminal Justice Act 1985*.

²⁶ *R v W* (Unreported, High Court, Greymouth, Williamson J, 17 November 1994) 5.

²⁷ *R v W* [1996] 1 NZLR 147, 150 (CA).

²⁸ *Ibid.*

²⁹ The Court of Appeal acknowledges that the act of intercourse under these circumstances was 'highly unlikely' to be consensual. *Ibid* 151.

In support of his provocation defence, Peter gave evidence that, after having intercourse with Kimberley, they had a discussion about Kimberley's relationships with other men, and he gagged her, stabbed her, and cut her throat. In addition to other injuries, the pathologist described two deep stab wounds on either side of Kimberley's neck and a third cutting injury across the front of her neck which severed the internal jugular vein and windpipe. The jury rejected the provocation defence and convicted the offender of murder.

At sentencing, psychiatric reports revealed Peter's childhood was marred by the separation of his parents and an abusive family background. As a result, he was said to be 'more vulnerable in relationships'.³⁰ Although Peter made an attempt to commit suicide after the murder by cutting his wrist, the judge noted that he also seemed prepared to justify his violence in what were completely unjustifiable circumstances. This observation was supported by a medical report stating Peter showed no evidence of remorse, or indeed, any concern for Kimberley and her family. Although defence counsel claimed this was due to an unreal appreciation of what had happened, the judge responded that this was a factor which made the offender dangerous.

When deciding that the circumstances of Kimberley's murder were exceptional, the judge noted that the word 'exceptional' meant unusual or out of line with the normal range of such offences. While the intention behind the legislation was to reflect public concern to see very severe sentences imposed for particularly repugnant offending, the judge also considered a likely primary purpose of the legislation was to limit danger to the community from some offenders who may threaten the well being of anybody with whom they form a domestic or personal relationship. In this case, the degree of premeditation; immobilising and threatening of the victim's flatmate; cruel treatment, in the nature of torture of Kimberley by refusing her medical treatment for wounds to her hands; callously cutting off her jeans and pants when she complained of being cold; having sexual intercourse with her while she was in that condition and obviously fearing for her life; together with the forceful and deliberate method of killing, which involved an intentional cutting of her throat; committed in the context of the offender's past threats to kill his estranged partner, amounted in combination to exceptional circumstances.

The judge also noted that Australian authorities on the imposition of minimum periods for this type of offending had emphasised 'the need to protect persons who might be linked in personal relationships with an accused and...the aspect of deterrence of persons tempted to commit similar offences'. Given the serious need to protect others from the offender and deter those who might be tempted to commit a similar savage attack on someone with whom they had been in a personal relationship, Peter was sentenced to a minimum of 15 years imprisonment.

³⁰ *R v W* (Unreported, High Court, Greymouth, Williamson J, 17 November 1994) 5.

On appeal, the Court of Appeal held that the trial judge had given undue weight to the need to protect others from the offender and the need to deter others who may be tempted to commit similar crimes. The Court noted Peter's only previous convictions: male assaults female and unlawful use of a firearm, related to the deceased victim. The reports had not disclosed any 'general' tendency of the offender to use violence and an earlier de facto relationship appeared to have terminated without any incident of relevance. Bearing in mind that relationship homicides generally disclose a low rate of recidivism, the Court reduced the minimum non-parole period to 13 years.³¹

Peter was also convicted of kidnapping Kimberley's flatmate. The judge in the lower Court noted that the male victim continued to experience problems arising from 'the manner in which he blames himself for not being able to cope with the situation and for the events which were happening in the room next door'.³²

The decision to allow the jury in this case to consider a provocation defence despite evidence that Peter had previously announced an intention to kill his estranged partner, had travelled to the homicide scene armed with a knife and insulating tape, had incapacitated Kimberley's flatmate in furtherance of his plan, and as the trial judge observed, had apparently formed an intention to kill Kimberley if she refused to resume the relationship, further demonstrates that violent, sexually possessive men are afforded considerable latitude in relation to issues of pre-planning and suddenness.³³

A victim-blaming analysis is also implicit in the Court of Appeal's observation that Peter's prior violence was limited to Kimberley, as opposed to a 'general tendency' to use violence. As previously discussed, this analysis implicates the victim in the offending: something about Kimberley, or Peter's relationship with Kimberley caused Peter to react in the way that he did. Peter is thereby constructed as an improbable threat to any other woman he might form an intimate relationship with.³⁴ This male-centred reasoning implies that but for women's provocation; men would not assault or murder them.

³¹ *R v W* [1996] 1 NZLR 147, 152 (CA).

³² *R v W* (Unreported, High Court, Greymouth, Williamson J, 17 November 1994) 6.

³³ See, also, Jeremy Horder, *Provocation and Responsibility* (1992) 193.

³⁴ This reasoning has been criticised by feminists in other contexts. Kathleen Mahoney, 'Gender Bias in Family Law' [1996] 308, 3120 notes in relation to sexual harassment cases, the illogicality of the use by courts of evidence that other co-workers have not been harassed by a particular defendant to corroborate the defendant's denial he sexually harassed the complainant: 'At any given time or place, billions of women are not sexually harassed by a particular man. To draw any conclusions from evidence of some of the billions not assaulted, is about as probative as a bank robber putting in as his defense, evidence from bank managers of banks he didn't rob.'

Since much, if not most domestic violence goes unreported,³⁵ lack of information that Peter had been violent toward a previous partner provides no assurance that his violence was confined to Kimberley.³⁶ There is strong evidence that men who are abusive in one relationship are likely to abuse again in the next relationship. Offenders who are motivated by jealousy and possessiveness to commit violent crimes appear to constitute a particular category of recidivist offenders.³⁷ Although the Court of Appeal noted that 'relationship homicides generally disclose a low rate of recidivism', both in the present research, and in overseas studies, there are examples of men who kill again in the same situation.³⁸

While the case attracted a minimum sentence, there is no evidence that the Court of Appeal regarded the status of the parties as estranged, or Kimberley's attempt to minimise her risk of future violence by leaving and setting up an independent place of residence as warranting its imposition. Indeed, any such interpretation is refuted by the Court's finding that the trial judge gave undue weight to the need to deter others who may be tempted to commit similar crimes.

B Separation Murders as *Insufficiently Serious*

Section 80 was amended by the *Criminal Justice Amendment Act (No2)* with effect from 16 July 1999. As specified in the long title, the purpose of the amendment was to lower the threshold for imposing non-parole periods.³⁹ The new s 80 permitted courts to impose a minimum period of imprisonment if the circumstances of the offence were 'sufficiently serious' to justify a minimum period of imprisonment of more than 10 years. Under s 80(5A), when deciding whether the circumstances were 'sufficiently serious' courts were required to consider whether these took the offending 'out of the ordinary range of offending of the particular kind', although the circumstances

³⁵ See, eg Allison Morris, *Women's Safety Survey 1996* (1997) finding only 8 percent of women who disclosed abuse by current partners and 21 per cent who disclosed abuse by recent partners reported the violence to police. Patricia Tjaden and Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey* (2000) 52, found only 7.5 per cent of women who were raped by an intimate and 7.3 per cent of women who were physically assaulted by an intimate said their attacker was prosecuted.

³⁶ In *R v Leuta* [2002] 1 NZLR 215 [140] (CA), Thomas J noted in relation to domestic violence against children that absence of evidence on the point should not be elevated to a positive virtue, as the Court does not know whether there have been prior incidents of abuse or not.

³⁷ See, eg, research and discussion in Donna Coker, 'Heat of Passion and Wife Beating: Men Who Batter/Men Who Kill' (1992) 2 S.Cal.Rev.L.& Women's Stud. 71, 112-113.

³⁸ See, eg, Victoria Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1997) 107 Yale L.J. 1331, 1403. See, also, *Case Study F/01/6*.

³⁹ *Halls Sentencing*, above n 25, [D/831], notes the Justice and Law Reform Committee stated that the purpose of the Bill was 'to give the courts more flexibility to impose longer non-parole periods in a wider range of cases than at present' and 'to address public concern that serious crimes are not dealt with severely enough by the Courts'.

need not be exceptional. The Court of Appeal accepted that s 80 as amended, would apply to a greater number of cases than had previously been the case.⁴⁰ There was general agreement that 'the principle purposes were punitive and denunciatory'⁴¹

Section 80 was applied in the cases of three offenders who killed women partners with whom they were cohabiting. In the first case, the offender, a medical practitioner who was practising and teaching as a psychiatrist at a New Zealand School of Medicine, poisoned his wife over an extended period of time. He continued to administer the drugs to his wife while she was in hospital, and various measures were taken by the offender after his wife's death to avoid detection. The Court of Appeal described murder by slow poisoning as 'amongst the most despicable of crimes'; aggravated in this case by the fact that the offender was a doctor, had deceived his medical colleagues, and abused his position in order to obtain the drugs.⁴² In addition to inducing or allowing his wife's medical team to perform a totally unnecessary six hour operation on the woman, the offender had caused her anxiety, pain and suffering over an extended period. The Court sentenced the offender to a minimum period of imprisonment of 15 years' imprisonment.⁴³

The jealous offender in the second case beat his pregnant partner with a metal knuckle duster, a noose was tightened around her neck and she was eventually killed by being struck on the head with a hammer. She was placed in a car which was torched. The offender was sentenced to a non-parole period of 12 years' imprisonment.⁴⁴ In the third case of murder within an intact relationship, the offender in *Case Study L/00/11* hacked his wife and seven year old daughter to death with a tomahawk or similar type weapon. Noting that the victims 'were in the sanctity of their own home', the Court of Appeal held that legislative change to the criterion for minimum non-parole orders from 'exceptional' to 'sufficiently serious' circumstances signalled the letting in of 'relatively less serious cases'.⁴⁵ The offender's conduct in killing his wife required strong denunciation and this was the position before any attention could be given to the fact that he had killed his daughter at the same time. For the murder of his wife alone, a period of 15 years was appropriate. The offender was sentenced to a non-parole period of 20 years.⁴⁶

⁴⁰ *R v Poumako* [2000] 2 NZLR 695 [19].

⁴¹ Hall, above n 4, 525.

⁴² *R v B* [2002] CA 418/01, 431/01 (Unreported, Blanchard, Tipping and McGrath JJ, 18 June 2002) [37].

⁴³ *Case Study B/00/12*.

⁴⁴ *Case Study M/00/1*. See, discussion of this case above, at p 63.

⁴⁵ *R v L* (2002) 19 CRNZ 574 [28].

⁴⁶ *Case Study L/00/11*.

In comparison, between July 1999 and June 2002, in five of the eight cases in which offenders killed in the context of separation and were convicted of murder, no minimum non-parole period was imposed. The 1999 amendment provided under s 80(2A) that if the Court was satisfied the murder involved home invasion, a minimum period of not less than 13 years *must* be imposed.⁴⁷ This legislation was invoked in two cases in which offenders were sentenced to a minimum non-parole period of 13 years' imprisonment.⁴⁸ In these two cases, it was the circumstance of home invasion as opposed to the relational status of the parties as separated that merited the imposition of a minimum non-parole period.

The third case in which a non-parole period was imposed can be usefully contrasted with the Court of Appeal decision to impose a 20-year non-parole period in *Case Study L/00/11*. As discussed above, this sentence included 15 years for the killing of a cohabiting wife 'in the sanctity of her home'. By contrast, after threatening to kill his estranged partner and her new partner on a number of occasions, and telling others that '*If I can't have her nobody can*', the offender in *Case Study T/01/2*⁴⁹ shot and killed the woman and her new boyfriend at the woman's home. The sentencing judge described this double homicide as a crime of passion in 'the eternal triangle of love and jealousy'. The offender was sentenced to a minimum term of 12 years' imprisonment.

C The Sentencing Act 2002

The relevant provisions of the *Criminal Justice Act* were repealed from 1 July 2002. The *Sentencing Act 2002* replaced the previous sentencing regime with a sentencing discretion in respect of murder. The legislation creates a four tier sentencing structure for offenders convicted of murder.⁵⁰ There is a presumption under s 102 that an offender who is convicted of murder will receive a sentence of life imprisonment, unless, given the circumstances of the offence and the offender, such a sentence would be 'manifestly unjust'. In intimate femicide cases, this first sentencing tier is relevant to the purported 'mercy killing' cases.⁵¹

⁴⁷ The definition of home invasion in s 17A of the *Crimes Act 1961* as inserted by the *Crimes (Home Invasion) Amendment Act 1999* was imported into s 80.

⁴⁸ In *Case Study H/00/8* the woman was stabbed to death by her estranged partner who entered her home and lay in wait for her. In *Case Study W/02/10* the offender, whose partner had also separated from him because of his violence, broke into the woman's home and shot her twice in the chest and once in the head.

⁴⁹ See, discussion of this case above, at p 75.

⁵⁰ Hall, above n 4, 592.

⁵¹ See, discussion of these cases above, at pp 77-83. See, also, Chapter Eleven.

The second tier includes the majority of offenders who will receive a sentence of life imprisonment requiring a mandatory non-parole period of ten years following the murder conviction. The third sentencing tier includes offenders sentenced to life imprisonment, but who receive a minimum non-parole period that exceeds ten years but is less than 17 years. When deciding the duration of the non-parole period for offenders in this category, the Court under s 103 as amended by the *Sentencing Amendment Act 2004* must consider the appropriate sentence necessary to satisfy all or any of four purposes specified in subsection (2). These purposes are:

- (a) holding the offender accountable for the harm done to the victim and the community by the offending;
- (b) denouncing the conduct in which the offender was involved;
- (c) deterring the offender or other persons from committing the same or a similar offence;
- (d) protecting the community from the offender.

The purpose of a minimum period order is to achieve greater punishment, denunciation and deterrence than would be achieved by the normal ten year period.⁵²

Section 104 provides for a minimum period of imprisonment of 17 years or more if certain circumstances are present. Although existing home invasion legislation was repealed by the 2002 Act, s 104 specifies unlawful entry into, or unlawful presence in, a dwelling place as a qualifying circumstance. Other circumstances include calculated or lengthy planning; if the murder was committed with a high level of brutality, cruelty, depravity, or callousness; or if the deceased was particularly vulnerable due to age, health or any other factor. If on the proven or accepted facts of a case, one of the prescribed circumstances is present, the imposition of a minimum term of 17 years imprisonment or more is mandatory. The Court is then expressly directed to impose such a minimum period pursuant to s 103 unless satisfied it would be manifestly unjust to do so.

However, while a police officer described the circumstances of the following estrangement murder as 'everybody's worst nightmare', and the killing as the worst he had investigated during his 16-year CIB career, no minimum non parole period was imposed.⁵³

⁵² *R v Howse* [2003] 3 NZLR 767 (CA).

⁵³ Under s 154(3) of the *Sentencing Act 2002*, s 104 does not apply to a crime of murder committed before 30 June 2002. The woman in this case was murdered in October 2002.

Separation Murder under the Sentencing Act: Case Study T/02/9

Kevin, the 42 year-old male offender and Edwina, the 30 year-old 'mother of three' were in a de facto relationship for nine years. At Kevin's trial, the jury heard the couple's relationship had been marred by Kevin's jealous and violent behaviour. Following one assault, Kevin warned his partner that he would kill her if she left him. On this occasion, Edwina fled to a Woman's Refuge but 'after three or four months, she gave in to his persistence and returned home'. Toward the end of the relationship, Edwina 'took on additional education and began to have a better social life'. The pair separated five days before the murder and Kevin went to live at the home of his sister.

The Crown pointed to evidence from witnesses that Kevin resented his estranged partner's new found independence and would telephone their homes to check on Edwina when she visited them. Kevin's sister told the Court that her brother telephoned her and told her 'it was all over between him and [Edwina] and that she had found someone else'. On the day of her murder, Edwina told a woman neighbour that when she informed Kevin the separation was permanent, Kevin responded that he would 'f***ing kill' her if she left him. Edwina then accepted an invitation to visit hot pools for a swim and returned home to fetch her swimming costume. During her absence, Kevin had soaked the house with petrol, and was laying in wait for Edwina. When the unsuspecting woman walked into her home, Kevin threw petrol over her and ignited the fuel with a lighter. Edwina died, 'standing upright' and 'burned head to toe'. Kevin pushed past the burning woman and doused himself with water before escaping out a window. A police detective stated that it was the worst homicide he had investigated during his 16-year CIB career: 'It is everybody's worst nightmare to imagine dying like that', he said.

Kevin was charged with murder and arson. At first, he claimed to have no memory of the events. Later, he stated that he only intended to kill himself, but Edwina grabbed the petrol bottle from him and lit it. When asked why he had waited for Edwina to return home before killing himself, Kevin replied that he thought Edwina would want to see him burn. The jury convicted Kevin of murder.

The sentencing judge noted that the jury, rightly in his view, had been satisfied on the evidence that Kevin set out to kill his estranged partner. The judge described the couple's relationship as 'up and down'. He noted that it 'had its good points, it had its low points. Most relationships are like that from time to time. No-one's perfect'.⁵⁴ Surprisingly, the judge told Kevin: 'you were a loving father and you cared for your children and your family. You worked hard and you earned money for your family. Perhaps you did more than your fair share of jobs around the home'.⁵⁵ However, Kevin also had a 'darker side'. He was jealous and possessive and could not cope with Edwina's new found independence. He had used violence against

⁵⁴ *R v T* (Unreported, High Court, Rotorua, Venning J, 10 June 2004) [6].

⁵⁵ *Ibid* [7].

her on at least two previous occasions and there was also a wilful damage charge relating to an occasion when Kevin had damaged her car. The judge noted that it seemed to be in Kevin's nature to be violent when he could not 'cope' and Kevin would have to learn that violence does not solve anything.

Although Kevin told his probation officer that he loved Edwina, he denied any responsibility for her murder. The probation report stated Kevin had no motivation to address his offending, and remained at risk of further offending until he addressed the factors underlying his actions.⁵⁶ Kevin was sentenced to life imprisonment and six years' imprisonment for the arson conviction to be served concurrently. The Crown did not ask for, and the judge did not impose a minimum non-parole period.

The detective in charge of the case told reporters that no-one could have known Kevin would kill Edwina because domestic violence often went on behind closed doors. The detective also observed that the way Kevin killed Edwina 'was just terrifying, but I believe his motivation for doing that was born out of extreme frustration and jealousy'.⁵⁷

Given that jealousy, prior violence, threats to kill, controlling behaviour, stalking and refusal to accept a woman's decision to leave are well established red flags for lethal violence, the police officer's assertion that no one could have predicted Edwina's death provides further evidence of the need to train police personnel on risk factors for dangerousness/lethality.

There is no recognition or condemnation in the sentencing remarks of the fact that Edwina was killed when she tried to escape from a violent relationship. Rather, the judge's comment that there may have been an unequal sharing of household chores hints at some fault on the part of Edwina. If Kevin *was* overburdened by doing more than his fair share of household chores, the relevance of this to the disposition of the case remains unexplained. The judge's construction of Kevin as a loving, caring, father and family man also fails to acknowledge a wealth of research on the detrimental effects to children of living with and/or witnessing violence against their primary caregiver. Although the judge noted without further discussion that the Crown did not seek an extended non-parole period,⁵⁸ no application is necessary before a minimum period may be imposed.⁵⁹ The appropriate course is to invite submissions on the point before making an order.⁶⁰

⁵⁶ Ibid [5].

⁵⁷ This statement indicates that the perception of separation violence in terms of empathy for the offender whose wife has defected is engrained in the criminal justice system.

⁵⁸ *R v T* (Unreported, High Court, Rotorua, Venning J, 10 June 2004) [3].

⁵⁹ *R v Y* [1996] CA 261/96 (Unreported, Richardson P, Gault, Henry, Thomas and Barker JJ, 23 October 1996).

According to the probation report, Kevin was at risk of serial offending. The judge also noted that it was in Kevin's nature to be violent when he could not cope.⁶¹ Consideration might therefore have been given to the s 103 purpose of protecting the community from the offender when deciding whether the circumstances were sufficiently serious to impose a minimum non parole period. If Kevin's uninvited presence in Edwina's home had been regarded as unlawful, the judge would have been required to consider imposing a non parole period under s 104. While the home invasion aspect of this case may be arguable, Edwina was a battered woman attempting to escape an abuser, and, as recognised in national domestic violence policy, was an especially vulnerable victim.⁶² However, there is no discussion of the applicability of s 104 in this context. After dousing her home with petrol, Kevin lay in wait for Edwina. Again, there is no discussion of whether the requirement of calculation under s 104 was present. Throwing fuel upon a person and igniting it was described by the police officer in charge of this case as 'everybody's worst nightmare to imagine dying like that'. The pain and suffering occasioned to Edwina up until the time her nerve endings were destroyed must have been excruciating. Yet this murder was not perceived as involving 'a high level of brutality, cruelty, depravity, or callousness' under s 104.

Since courts are unable to perceive the burning alive of a woman attempting to escape from a violent relationship as warranting the strongest possible condemnation and punishment, separation per se is unlikely to attract an extended non-parole period. Thus in the more recent case of *R v B*,⁶³ the 45 year-old woman was murdered after she ended her three year relationship with her 48 year-old de facto partner and requested he leave her home. The woman was strangled until she 'frothed at the mouth and lost consciousness'. The offender then placed the woman in a wooden chest and nailed it shut. After unsuccessfully attempting to bury the chest in at least two locations, he eventually left the chest in long grass. The offender denied any knowledge of the woman's whereabouts to her family. He was arrested after making admissions to a former partner. At sentencing, the judge noted that the murder occurred in the context of the victim's decision to end

⁶⁰ *R v Rongonui* [2001] CA 321/00 (Unreported, Richardson P, Keith, Blanchard, Tipping and McGrath JJ, 9 May 2001) [40].

⁶¹ *R v T* (Unreported, High Court, Rotorua, Venning J, 10 June 2004) [7].

⁶² Ministry of Social Development, *Te Rito: New Zealand Family Violence Prevention Strategy* (2002) 24.

⁶³ (Unreported, High Court, Christchurch, Fogarty J, 6 April 2006).

the relationship.⁶⁴ The Crown did not seek an extended non-parole period,⁶⁵ and the judge did not impose one.⁶⁶

The following section further examines sentencing responses to sub-lethal separation assaults.

IV SUB-LETHAL SEPARATION ASSAULTS

As discussed in Chapter Four, the present research found the crime of passion analysis and character enhancement of the offender generally resulted in a sympathetic judicial response to sub-lethal separation violence. While the context of separation may sometimes coincide with severe sanctions, circumstances of the offending and the offender other than the relational status of the parties appear more likely to be predictive of sentencing outcomes.

A *The Coincidence of Separation Violence and Punishment Severity*

As demonstrated by the following case study, separation offenders who initially receive lenient sentences may escalate their violence in the absence of appropriate intervention.⁶⁷

Separation Violence and Punishment Severity: Case Study S/01/2(S)

The offender was convicted of assaulting a female, threatening to kill, breaching a protection order and driving charges. The Court heard that the couple's relationship was in 'difficulties' - the victim had taken out a protection order, and was sleeping in a separate bedroom. After entering the woman's room to discuss 'a property matter' the offender suddenly lunged at her, placed both hands around her neck, and throttled her. He released his grip, and as the woman gasped for breath told her '[t]his is what I am going to do to you'. After pressing his thumbs against her windpipe and releasing her again, he locked the woman's legs between his own and told her he planned to strangle her and kill himself. The woman was kept for one and a half hours before the offender released her and swallowed sleeping pills. He was arrested after a police chase, and admitted charges of assaulting a female, threatening to kill, breaching a protection order, driving

⁶⁴ Ibid [2].

⁶⁵ Ibid [6].

⁶⁶ The deceased woman's sister told reporters domestic violence has a number of faces. In this case 'it was actually mental, not physical. It was only at the point that [the victim] said "no" that the violence occurred' she said.

⁶⁷ In a further example, the 18 year-old offender in *Case Study T/99/5(S)* was described by the sentencing judge as becoming 'quite possessive' of a 16 year-old girl. Upon finding the girl and another male in a tent, he assaulted the male and head-butted the girl in the face. He was sentenced to one months' imprisonment. About fifteen months' later, the offender broke into the young woman's home and remained hidden when she arrived home with her boyfriend, and the pair prepared and ate a meal and went to bed. Subsequently, he lured the woman out of the bedroom and attacked her with the knife, cutting her at least 27 times in the abdomen and the throat. The sentencing judge noted it was 'a miracle the woman survived'. A psychiatric report indicated that while the offender was not suffering from a mental illness, he 'was suffering emotional distress over accepting his relationship with the victim was over'.

recklessly and failure to stop. The sentencing judge described this prolonged attack, which involved strangulation of the victim, as 'one of the worst cases of a man assaulting a woman he had come across for many years'. The victim, who had been afraid she was going to lose her life, had been 'very adversely' affected by it. However defence counsel stated that the offender committed the behaviour during a personal crisis and his depression escalated to the point of attempted suicide. The offender was well thought of by his employer and friends, was deeply remorseful and the offending was 'uncharacteristic'. The offender was sentenced to imprisonment for one year and granted leave to apply for home detention.

While still under supervision for this offence, the offender broke into the same woman's home and attempted to murder her. On this occasion he made a series of unanswered telephone calls to her home which the sentencing judge noted had a 'whining, self-possessed and bullying tone'. In one call he threatened to kill himself that night. Around 6 am the woman heard the offender breaking into her home and telephoned the police. Before she could speak, the offender ran into her bedroom and attacked her. Police were able to listen in and trace the call. The tape recorded the offender telling the woman 'I didn't get to finish the job last time, but I'm going to do it now'. He then punched the woman, cutting her face, tried to strangle her while shouting abuse at her, and struck her with the telephone. The woman stated she could feel herself passing out and the tape recorded the offender telling her 'You are dying now. This time I have got you. We are both dying'. The offender then dragged the woman into her bathroom and ordered her to swallow every pill she had. Police burst into the house in time to find the offender choking the woman with a towel and dragged him away from her. He needed to be pepper-sprayed and handcuffed before being removed from the house. The offender reportedly told police 'I came around here to kill her. I wanted her to die'.

Defence counsel claimed suicide was uppermost in the offender's mind and he had not intended to kill the woman. However, the sentencing judge told the offender 'I guess it is uncertain whether in the end you would have killed her, but I rather think you would have. I think the police probably saved [the victim's] life'. The judge also remarked that 'courts can contribute to a general climate of opinion in which such behaviour is recognised for what it is - completely unacceptable'.⁶⁸

Martha Mahoney points out that in order to expose the struggle for control at the heart of separation violence, we need to recognise the potential for violence at the moment the woman

⁶⁸ In *R v S* [2003] CA 105/03 (Unreported, McGrath, Panckhurst and Doogue JJ, 5 June 2003) the Court of Appeal upheld the offender's sentence of 10 year's imprisonment with a non-parole period of 6 years and 8 months. The Court's description of the harm occasioned to the woman victim makes harrowing reading.

decides on a separation, or begins to prepare for one.⁶⁹ Unless the initial assault in the above case was identified as separation violence, research would record only the second attack - supporting the thesis that separation violence is punished severely. However, a sentence of one years' imprisonment and home detention for an assault which the judge described as 'one of the worst cases of a man assaulting a woman he had come across for many years' provides little support for the notion that the judiciary recognise violence in the context of a deteriorating relationship as especially serious. Rather, as demonstrated below, the crime of passion analysis and associated victim blaming mask this structural pattern of offending.

B The 'Out-of-Control/ In-Control' Crime of Passion Analysis

While an admission by an accused charged with murder that he intended to kill the victim will not be fatal to a provocation defence; such admission of intent by an accused charged with attempted murder would likely secure his conviction. Consequently, when separation violence fell short of homicide and the offender was charged with attempted murder, the concept of self-control was substantially modified. As in the following case study, men whose violence takes women to the brink of death are depicted as both in, and out of, control.

The 'Out-of-Control/In-Control' Crime of Passion Analysis: Case Study W/00/11(S)

A few months after the woman victim obtained a protection order against her partner, the couple argued and the male picked up a 7kg starter motor and brought it down with both hands on the woman's face. As a result of this attack, the woman was in a coma for some time, and later, while able to respond to some stimuli, could not speak. She suffered severe traumatic brain injury and massive bruising around her right eye and eye socket. A surgeon stated fractures around the woman's eye socket required the insertion of several titanium plates, with cuts to her face requiring some 100 stitches. There was some permanent deformity because of the injuries. At the time of the trial, the woman had re-established normal sleep patterns, but could only communicate 'at a very basic level'. The sentencing judge noted she was permanently injured and likely to require residential care for the rest of her life.

The offender was charged with attempted murder and, in the alternative, the Crown laid the lesser charge of assault with intent to cause grievous bodily injury. The offender denied both charges but pleaded guilty to a charge of breaching the victim's protection order by physically abusing her. A witness who spoke to the offender shortly after the attack stated that the offender spoke of being provoked by his partner who had

⁶⁹ Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 Mich.L.Rev. 1, 65.

threatened to take the children away. The witness said the offender had been distraught at the thought of losing his children. In a police interview, the offender told police he lost control of himself after his partner 'tormented' him by saying he would not be part of the family once she found another man.

The Court heard conflicting opinions from two expert witnesses about the number of blows that were struck. A forensic psychiatrist told the Court that the offender was not insane at the time of the assault, but was under 'tremendous psychological stress'. This made it difficult for him to cope with a relationship that was deteriorating and in almost constant conflict. Prison visits 'had revealed he was suffering from delusions, hallucinations and suicidal thoughts, consistent with post-traumatic stress disorder'. The offender had been treated and prescribed anti-depressants.

The Crown pointed to photographic evidence showing that there were no car parts in the lounge as the offender had claimed. Rather, the offender had made a conscious decision to fetch the starter motor and the attack was premeditated. Defence counsel responded that after hours of arguing which left the couple tired and at the end of their tether, the offender 'just snapped'. He grabbed the starter motor, bringing it down on the woman, not realising what he was doing. The offender was horrified at what he had done to the person he loved, and it was 'nonsensical' to suggest he would cold-bloodedly attempt to kill the children's mother while they slept in the same room. The 'sad reality' was that if the offender had wanted to kill his partner, he could have done so. 'All that was needed was one more blow - that he hold on to that large hunk of metal for two more seconds. But he didn't. He had a choice.' The jury acquitted the offender of attempted murder.

At sentencing, the judge is reported as stating that 'there had been some provocation by [the victim] which caused [the offender] to simply "snap" momentarily, bringing the starter motor down with both hands on [the victim's] head'. The judge noted that apart from some minor offences, the offender had not offended before. Nor had he been physically violent toward the victim before the incident. The offender was sentenced to five years' imprisonment. The judge observed that he had taken the further step of ordering a copy of his decision be made available to the couple's oldest child, if she requested it. This would enable her to explain the situation to her younger siblings.

Although an offender's violence may be crucially related to the status of the relationship as 'deteriorating', in many cases this social reality remained unrecognised. In the above case, the sentencing judge notes that the offender had not previously used violence toward his partner - despite the existence of the victim's protection order.⁷⁰ The case also demonstrates that an offender

⁷⁰ Helena Barwick, Alison Gray and Roger Macky, *Domestic Violence Act 1995: Process Evaluation* (2000) 53, found 84 per cent of applications for protection orders were based on physical abuse (88% for Maori).

who perpetrates gross acts of violence while supposedly 'out of control', is presumed to be sufficiently 'in control' to determine the exact level of violence he may inflict before bringing about, or stopping short of achieving, the victim's death.⁷¹ Defence counsel told the jury that the offender could easily have inflicted one more blow - the one required to kill the victim. 'But he didn't. He had a choice'. This 'out of control' offender is apparently capable of exercising a considerable amount of self-control.

The above account of an ordinarily non-violent offender who 'snaps' in response to a woman's taunts demonstrates that abolition of the provocation defence will not rid the law of its gender biased assumptions. The offender's statement to police reveals his understanding of the concept of provocation and how it might partially excuse his behaviour. The provision of the sentencing remarks to the victim's daughter ensured that she also would understand how criminal law mirrors the perceptions of violent men that female 'misconduct' induces men to lose control and permanently disfigure and maim persons they 'love'.

Case studies of lethal and sub-lethal assaults in the present research do not support the thesis that the status of the parties as separating/separated is regarded as an aggravating feature of domestic violence at sentencing.

V RENDERING SEPARATION VIOLENCE INVISIBLE

A *Leaving in Law: The Invisibility of Separation Violence in Legal Culture*

The New Zealand Law Commission notes expert evidence on separation violence could assist juries in battered defendant cases to understand that the defendant's claim she had no safe alternative to the use of lethal force may be reasonable.⁷² Although the Commission acknowledges that the provocation defence is used to partially excuse 'killings arising from sexual jealousy and possessiveness',⁷³ its discussion of expert evidence on separation violence is limited to cases involving battered defendants. While jurors in battered defendant cases would likely benefit from knowledge of the risk of violence when women seek help from the legal system, family, or friends; jurors in intimate femicide cases, who are invited to view these situations through the lens of female infidelity, appear no less in need of such education. Since many more battered women are

⁷¹ This issue is further discussed in the following chapter.

⁷² New Zealand Law Commission, above n 6, [46].

⁷³ Ibid [117].

killed by their batterers than kill them in self-defence, it seems contrary to the interests of justice to limit education on this issue to cases in which the batterer is the victim.

More importantly, it is difficult to understand the assumption that judges and juries are not well aware of this pattern of offending. As demonstrated above, judges have not perceived intimate femicide in the context of separation to be 'out of the ordinary range of offending of the particular kind'.⁷⁴ Extensive media coverage of these trials also makes it unlikely that members of the public are unfamiliar with this pattern of violence against women. Expert testimony is 'admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a Judge or jury. If on the proven facts a Judge or jury can form their own conclusion without help, then the opinion of an expert is unnecessary.'⁷⁵ *R v Turner* is authority that it is within the common knowledge of jurors that men may respond with lethal force to women who reject them.⁷⁶

The contradiction inherent in the Law Commission's recommendation that juries receive education on a pattern of behaviour which features prominently in the courts, and is highly publicised in the media, demonstrates how the myth of romantic love and crime of passion analysis has rendered separation violence invisible in legal and popular culture.

B *The Myth of Romantic Love and Crime of Passion Analysis*

Shelley Wright observes that as the physical exchange of women as property declined in the West - at least for white middle class women - romantic love, rather than simple exchange, became the basis of heterosexual relations.⁷⁷ A US survey of university students found participants were likely to view a man who abused his wife as romantically loving her as much as the man who did not abuse her. If the jealous man sexually assaulted his wife, participants were also far less likely to consider the crime was rape.⁷⁸ Moreover, in some cultural milieux female loyalty may be expected in the face of such aggression and the woman who stays may be perceived more positively than the

⁷⁴ Section 80 *Criminal Justice Act 1985*.

⁷⁵ *R v Turner* [1975] QB 834, 844 per Lawton LJ, cited with approval by Lord Wilberforce in *DPP v Jordan* [1977] AC 699, 718 (HL).

⁷⁶ *R v Turner* [1975] QB 834, 844, noting that jurors do not need expert evidence 'to tell them how ordinary folk who are not suffering from mental illness are likely to react to the stresses and strains of life'.

⁷⁷ Shelley Wright, 'Patriarchal Feminism and the Law of the Father' (1993) 1 *Fem.L.S.* 115.

⁷⁸ Puente and Cohen, above n 2, 453. These researchers note that 'because people may implicitly equate jealousy with love, this may lead them to discount, minimize, and perhaps even look at jealousy-related violence through "love-colored" glasses'.

woman who leaves.⁷⁹ It is therefore unsurprising that feminists emphasise the role of the relationship in excusing male violence against women. Men who are 'swept up in their feelings suddenly become less culpable of rape or battering in the same way that they are less culpable of killing'.⁸⁰

The Victorian Law Reform Commission observes that 'part of the reason why a "hot-blooded" killing may be seen to be excusable is because of a widely accepted cultural myth of "romantic passion". In books and movies we often see the man who is "driven crazy" by love, lashing out at his lover who has betrayed him.'⁸¹ Graeme Coss draws attention to a lingering sentiment apparently felt by many judges that jealous offenders who kill female intimates, male rivals or children, 'really loved' their victims and could not bear losing them.⁸² Ironically, New Zealand legal commentary on the provocation defence also suggests that an offender's love for his wife and children may qualify as a relevant characteristic in 'appropriate cases'.⁸³ This re-presentation of separation violence in the guise of romantic love highlights a disjunction between consciously articulated and explicit condemnation of domestic violence, and acceptance of norms and roles that lead to violence.⁸⁴

C Separation Violence/Home Invasion as a Norm of Intimate Relationships

Some legal commentators observe that an offender's stalking, death threats, unlawful entry into the victim's home (and as in *Case Study W/94/1* kidnapping of the victim's flatmate) are, in reality,

⁷⁹ Joseph Vandello and Dov Cohen, 'Male Honor and Female Fidelity: Implicit Cultural Scripts that Perpetuate Domestic Violence' (2003) 84 *Journal of Personality and Social Psychology* 997, noting studies indicating that in addition to economic and safety reasons, social-psychological influences may keep women in abusive relationships by suggesting that it is the proper thing to do: at 1008.

⁸⁰ Nourse, above n 38, 1388-1389. Elizabeth Stanko, 'Should I Stay or Should I Go?' (1997) 3 *Violence Against Women* 629, 630, notes: 'Date rape and physical abuse are but two examples of how men (sometimes very young men) use and abuse women under the guise of romance'. Sue Lees, 'Naggers, Whores and Libbers: Provoking Men to Kill' in Jill Radford and Diane Russell (eds), *Femicide: The Politics of Woman Killing* (1992) 267, illustrates cultural understandings of the relationship as excuse expressed in the lyrics of Blake Morrison's, *The Ballad of the Yorkshire Ripper* (1987): 'Our Pete were nivver a nutter; E'd allus a smile on t'face; that Sonia nagged him rotten, till a killed oors in er place. Cos that's the rub wi women; they push us blokes too far; till us can't be eld responsible, for being what we are'. (Sonia is Peter Sutcliffe's wife).

⁸¹ Victorian Law Reform Commission, *Defences to Homicide*, Options Paper (2003)[3.81]. Tom Jones' ballad, 'Delilah' written from the perspective of a jealous male who stabbed his ex-girlfriend to death, became a smash hit around the Western world. Nan Seuffert, 'Domestic Violence, Discourses of Romantic Love and Complex Personhood in the Law' (1999) 23 *MULR* 211, 224-225, notes the hit song 'Every Breath You Take' has been dubbed 'The Batterer's Song' by domestic violence advocates.

⁸² Graeme Coss, 'Provocation, Law Reform and the Medea Syndrome' (2004) 18 *Crim LJ* 133, 136.

⁸³ Gerald Orchard, 'Culpable Homicide' in AP Simester and WJ Brookbanks (eds), *Principles of Criminal Law* (2nd ed, 2002) 507, 538.

⁸⁴ See, eg, Puente and Cohen, above n 2; Vandello and Cohen, above n 79.

provocations to the offender's girlfriend, not to *him*. Accordingly, cases in which jealous men pursue their victims, invade their homes and engineer a confrontation should be read as those in which the provocation is self-induced.⁸⁵ However, in the same way that the habitual batterer with 'unclean hands' is permitted to access the provocation defence, this partial excuse is also available to the defendant who, in order to accomplish the final confrontation, enters uninvited into the woman's home, often having armed himself before doing so. While under s 169(5) *Crimes Act 1961* the defence is not available to an accused who incites the victim to act in the way he or she did so as to provide the offender with an excuse to kill, the present study found this statutory provision was not applied to cases in which armed, jealous men invaded the homes of estranged partners and subsequently asserted they were provoked to kill by some words of their victims.

Trivialisation of the trauma and injury to women whose homes are invaded by estranged male partners is also evident in media concerns regarding legislation providing for harsher sanctions for offending in the context of home invasion. Editorials expressed alarm that the statute might be applied to 'people's friends and lovers' so as to 'cover close relationships that turn ugly'. This scenario was contrasted with 'the conventional idea of "home invasion" such as the murder [of a woman farmer] by four armed men who burst into her home'.⁸⁶ Although home invasion is frequently an aspect of separation violence, recognition of this social reality is also missing from legal commentary which criticised the political and media focus on home invasion for increasing community fear of this crime when the chances of it happening to anyone in this country were described as 'minuscule'.⁸⁷

Given that separated women reside in homes that are not shared with male partners, denunciation by the Court of Appeal of the killing of a cohabiting wife in the 'sanctity of her home'⁸⁸ seems especially apposite to home invasion and lethal separation violence. However, while it might be argued that courts make no distinction between unlawful entry into a dwelling place by a stranger

⁸⁵ See, eg, Michael Detmold, 'Provocation to Murder: Sovereignty and Multiculture' (1997) 19 Syd LR 5, 19; Ian Leader-Elliott, 'Sex, Race and Provocation: In Defence of *Stingel*' (1996) 20 Crim LJ 72, 85. Cf Stephen Odgers, 'Contemporary Provocation Law - Is Substantially Impaired Self-Control Enough?' in Stanley Yeo (ed), *Partial Excuses to Murder* (1991) 101, 106.

⁸⁶ *Fish-hooks in Home Invasion Law*, the New Zealand Herald, 2 March 1999. In '*Family Violence is Home Invasion*', Waikato Times, 3 March 1999, the acting chief executive of the National Collective of Independent Refuges responded that home invasion legislation must also apply to domestic violence cases.

⁸⁷ *When Violence Comes to the Home*, Evening Post, 28 December 1999.

⁸⁸ *Case Study L/00/11*. See, discussion of this case above, at p 245.

and a person known to the victim,⁸⁹ judicial acceptance that home invasion is more serious when perpetrated against a stranger than against an estranged partner is explicit in *R v Burns (No 2)*.⁹⁰ In this case, the relational status of the parties as strangers was overtly recognised as aggravating the offending. Other aggravating factors were: (a) the victim was killed in her own home; (b) the attack was unusually savage and brutal; (c) young children were present; (d) the crime was elaborately planned. Aside from the stranger relationship, these circumstances are not uncommon in cases of separation killings.

Since assertions of love and intimacy rhetorically efface the violence of sexual and physical assaults,⁹¹ implicit in the *Burns* distinction between home invasion by a stranger, and 'domestically motivated' murders in which the killer and the deceased had a known previous connection,⁹² is the notion that women whose homes are invaded by estranged male partners do not experience 'real' home invasions. However, cases in the present study graphically underscore the reality that home invasions are no less terrifying, and the violence no less serious, simply because perpetrators knew the women they injured or killed.⁹³ Trivialisation of the terror involved is painfully evident in *Case Study W/94/1*.⁹⁴ As discussed above, after invading the home of his estranged partner and stabbing her, the offender cut off the woman's jeans and underclothes with a knife when she complained of the cold. Although the legal report states that the offender proceeded to have 'consensual intercourse' with the terrified woman before he cut her throat, given that courts would

⁸⁹ In *R v Kretzschmann & Carroll* [2000] CA 113, 116/00 (Unreported, Thomas, Anderson and Panckhurst JJ, 1 June 2000) [19] the two offenders adopted stand-over tactics to ensure the payment of a debt by entering the victim's house, threatening him with a gun, physically attacking him and stabbing him with a knife. The Court noted that 'the home invasion element may be even more serious by virtue of the relationship of the intruder to the victim. Each case must turn on its own circumstances'.

⁹⁰ (2000) 18 CRNZ 220.

⁹¹ Reva Siegal, "'The Rule of Love': Wife Beating as Prerogative and Privacy' (1996) 105 Yale L.J. 2117, 2205. In *R v Thibert* (1996) 104 C.C.C. (3d) 1, 22, involving provocation in the context of male sexual proprietariness, Major J, dissenting, noted that the emphasis of the majority on the husband's desire to speak privately to his estranged wife ignored the 'real world' reality that his wife was afraid of him, and 'had made it clear on a number of occasions that she did not wish to be alone with him'.

⁹² (2000) 18 CRNZ 220 [22], where the Court noted that: 'This was a callous and cold-blooded killing of a young mother who had no connection with her attacker. It was, in addition, completely unprovoked'.

⁹³ For the relevance of this point to sub-lethal separation assaults, see, *R v Oran* [2003] CA 184/02 (Unreported, Gault P, Blanchard and McGrath JJ, 13 February 2003); *R v T* [2000] CA 296/00 (Unreported, Tipping, McGechan and Fisher JJ, 21 September 2000); *R v Panine* [2003] 2 NZLR 63 (CA); *R v W* [1999] CA 157/99 (Unreported, Keith, Tipping and Gallen JJ, 27 July 1999); *R v Gibbons* [1996] CA 180/96 (Unreported, Thomas, Keith and Blanchard JJ, 26 September 1996).

⁹⁴ See, discussion of this case above, at p 241.

reject the possibility of 'free' consent to a commercial contract under these circumstances, the comparative poverty of this construction of consent is palpable.⁹⁵

The following case study points to an apparently limitless capacity to view separation violence and festering male jealousy compassionately, even when the violence occurs many years after the parties have separated.

Separation and the 'Crime of Passion' Analysis: Case Study P/02/6

Tim, the 66 year-old offender and Dawn, his 65 year-old wife, separated after a six-year marriage and lived apart for 11 years. Dawn had two children from a previous marriage, including an autistic son who was 'dependent on his mother'.⁹⁶ After leaving the couple's Northland home, Dawn eventually settled in a large pensioner complex in Auckland. During the 11-year period of separation, Dawn attempted to maintain an amicable post-separation relationship with Tim, providing accommodation when he travelled to Auckland for medical treatment, and occasionally delivering goods from Auckland to Northland in response to his requests. This arrangement broke down when Tim developed a 'jealous fixation' over Dawn's association with another man. Despite Dawn's refusal to continue providing accommodation or assistance to Tim, he persisted in his efforts to maintain contact with her, even to the extent of obtaining accommodation in the complex in which she lived.

Tim made a number of threats to kill his estranged wife including telling one witness that she 'needed a bullet'. Tim also made threats to kill the male whom he believed to be romantically associated with Dawn. (Friends of Dawn vehemently rejected any such romantic association.) The sentencing judge noted Tim had become 'obsessive' about Dawn, to the point where he was 'in effect stalking her and making her life a misery'. The judge had no doubt that matters had reached a point where Dawn was terrified of Tim, not least because of his interest in, and use of, firearms. The judge also found Dawn's fears were communicated to members of Tim's family, some of whom took steps to ensure his firearms were locked away from him.⁹⁷

⁹⁵ Mary Heath and Ngaire Naffine, 'Men's Needs and Women's Desires: Feminist Dilemmas About Rape Law "Reform"' (1993) 3 A Fem LJ 30, 37, note the present 'feeble' standard of consent in rape law 'does not mean free, uncoerced agreement to engage in intercourse. It does not demand the full volition of the subject - her positive desire for sexual relations'. Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57 MLR 10, also observes that the sexuality presupposed in the law of rape (both judicially and academically) 'is still a traditional compelling, coercive sexuality'. Aileen McColgan, 'Common Law and the Relevance of Sexual History Evidence' (1996) 16 OJLS 275, 278, notes rape within the context of an intimate relationship is notoriously difficult to establish as it does not conform to the idealised model of rape in which 'the victim is sexually inexperienced and has a 'respectable' lifestyle, whose assailant is a stranger and whose company she had not willingly found herself in'. See, also, Katherine O'Donovan, 'With Sense, Consent, or Just a Con?' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (1997) 47, 55.

⁹⁶ *R v P* (Unreported, High Court, Auckland, Laurenson J, 11 July 2003) [28].

⁹⁷ *Ibid* [2-3].

On the day of the murder, Tim cleaned and tested the loading mechanism of one of his firearms, a 30/30 Winchester rifle. Taking the gun with him, he drove from Northland to his estranged wife's pensioner unit in Auckland. The sentencing judge notes that the gun was loaded either at this time, or some time before he entered the unit. Upon entering the unit armed with the loaded rifle, Tim confronted his estranged wife who was speaking on the telephone to her daughter in Australia. The daughter gave evidence that she heard her mother twice say 'No, Tim. Please, Tim, don't do it' and heard the offender respond: 'You knew this was coming to you.' The daughter then heard a sound like a 'sickening scream' before the phone went quiet. Evidence showed Dawn remained alive for 50 minutes following the shooting, during which time Tim made no attempt to summon medical assistance.

Dawn's daughter, who had 'become terrified by what she heard over the phone',⁹⁸ made a number of calls to get help to her mother. A woman friend drove to the unit and found Dawn, who was apparently still alive. On instructions from ambulance officers, Dawn's friend worked to keep her alive while emergency services travelled to the scene. The judge commented on this woman's efforts: 'Her actions in going into the unit, apparently without any regard for her own safety, without knowing what might meet her, and solely out of concern for her friend, were extraordinarily brave and selfless. I do not think she can be commended enough. [Dawn] had a very brave friend indeed.'⁹⁹

Following the homicide, Tim drove to the home of his brother and informed him that he had killed his estranged wife. At this time he made no mention either to his brother, his sister-in-law or to the police, that the killing was accidental.¹⁰⁰ However, at trial, defence counsel claimed that during an argument over Dawn's 'infidelities', Dawn grabbed the gun, a 'tug-of-war' followed, during which the gun went off accidentally. The sentencing judge noted this version of events was 'entirely rejected' by the jury as apart from the daughter's evidence, it was quite clear from other evidence that Tim could not have been in the unit long enough for events to take place as he described. Tim was convicted of murder.

Although the sentencing remarks record that Dawn's purported romantic association had aroused the offender's jealousy 'quite unjustifiably'; the judge accepted that mitigating circumstances of this offending included the fact that 'the murder had been committed against a background of passion, namely feelings for your wife, an inability to accept the separation...exacerbated by jealousy or an inability to accept her

⁹⁸ Ibid [11].

⁹⁹ Ibid [12].

¹⁰⁰ Ibid [15].

involvement with another person.'¹⁰¹ The Court of Appeal cites without comment, the judge's view that mitigating factors included 'the suggestion that the murder was in the nature of a crime of passion.'¹⁰²

After the trial, Dawn's friends stated that they had 'listened in disbelief and anger' as the 65 year-old victim 'was portrayed in Court as the Jezebel of her pensioner village'.¹⁰³ Dawn's friend, who was highly praised by the sentencing judge, reiterated that notwithstanding assertions by defence counsel, Dawn was not involved in a romantic relationship.

Although the defence in the above case was ostensibly based on an accidental killing, the crime of passion analysis with its connotations of female infidelity and betrayal dominated at trial. It must be a matter of concern for all women that the legal system can respond to the murder of a woman by a jealous, obsessive male eleven years after the couple have separated, with victim-blaming narratives of female 'infidelity' at trial, and mitigating discourses of male 'passion' at sentencing.¹⁰⁴ The case, like so many of its kind, involved an offender who announced his murderous intentions well before the homicide, stalked his victim, travelled some distance to her home, and unlawfully entered it, bringing with him the murder weapon. These elements of planning and premeditation are patently inconsistent with the spontaneity that is widely associated with a so-called crime of passion.

The sentencing judge acknowledged that at least four of the prescribed circumstances in s 104 were relevant. These were calculated planning; unlawful entry into the victim's unit; a high level of brutality; and the vulnerability of the victim due to her age. The judge was therefore required to impose a minimum period of at least 17 years unless such sentence was considered manifestly unjust. Factors identified as mitigating were the offender's previous good character, ill health of some years, the fact that he made no attempt to flee, and that the murder was in the nature of a crime of passion. The offender was sentenced to an extended non-parole period of 13 years' imprisonment. However, the Court of Appeal subsequently concluded that there were *no* circumstances of this offending that could have justified a departure from the mandatory minimum

¹⁰¹ Ibid [37].

¹⁰² *R v P* (2003) 21 CRNZ 571 [8].

¹⁰³ The report notes that "Jezebel" means a shameless or immoral woman. In the Bible, Jezebel was the wife of Ahab'.

¹⁰⁴ In *Case Study W/02/10*, the offender, who had previous convictions for assault and injuring with intent, admitted assaulting his partner by throttling her. Defence counsel stated a combination of alcohol, tiredness and the victim's provocation caused the offender to 'snap'. The offender was fined, ordered to have counselling and placed under 12 months' supervision. In 2002, he murdered his partner when she ended the relationship because of his violence.

term of 17 years.¹⁰⁵ Although the Court had the power to increase the offender's sentence, it chose not to disturb the 13-year term. Acceptance of the sentencing judge's 'crime of passion' analysis may supply the explanation.

The paradox inherent in the Law Commission's recommendation that courts receive education on separation attacks, notwithstanding that judges and juries frequently encounter this violence in courts, in newspapers, and on television, underlines the suppression of a structural pattern of violence through the dominant rhetoric of romantic love and male passion. The social reality of separation violence as an illegitimate constraint on women's freedom and autonomy and a barrier to safe escape from violent relationships therefore remains unacknowledged.

VI THE CONSEQUENCES FOR BATTERED DEFENDANTS: WHY DIDN'T SHE LEAVE?

The masculinist construction of homicide involving a fight between two similarly physically-endowed and socially conditioned individuals underpinning the criminal law defences of provocation and self-defence has been criticised by feminists as unrepresentative of the circumstances in which many women kill. While lack of data and time constraints prevented an in-depth analysis of female-perpetrated homicide cases, the research indicates that the closer the homicide conforms to this masculinist construct of killings in the course of a fight, the greater the likelihood that the battered defendant may take advantage of present defences.¹⁰⁶ Since women's actions are judged in accordance with a male standard, when the circumstances of the homicide fall outside this stereotypical conflict model, the battered woman's access to the defence of self-defence is much more tightly restricted.

Given the unequal size and physical strength of the woman and her abuser (studies show that when battered women do use force against violent partners the result is usually an escalation of violence

¹⁰⁵ *R v P* (2003) 21 CRNZ 571 [20].

¹⁰⁶ These cases typically involve a claim of self-defence by the battered defendant; in response to which the Crown argues that the male victim had disengaged from the conflict, turned away, or was otherwise unprepared at the time the fatal blow was struck. In the five homicides in this category, four women were acquitted and a further woman was convicted of manslaughter despite a previous history of violence by the male victim. In a further case in which the couple were living together but an intimate relationship could not be confirmed, the woman argued that the male victim was the aggressor and had repeatedly punched and kicked her. However, she was convicted of murder on the basis that she had chased after the victim and stabbed him.

against them),¹⁰⁷ her lack of training in aggression, and her belief well substantiated by homicide research that escape may provoke further violence, the 'battered woman may come to believe that her only options are killing herself, letting [her abuser] kill her, or killing him - and, in addition, that her only opportunity to kill him is in a non-confrontational setting'.¹⁰⁸ However, despite feminist criticism of the assumption that the battered woman has a responsibility, on her own, to leave her home and successfully accomplish a permanent separation, the proposition that she can, and should do so, continues to be advanced in the US,¹⁰⁹ the UK¹¹⁰ and New Zealand,¹¹¹ to resist acquittal or reduction of murder charges when battered women plead self-defence or provocation after killing their partners at a time when the abuser apparently posed no imminent threat.¹¹² A battered woman's claims to have acted under duress,¹¹³ or compulsion,¹¹⁴ are similarly sabotaged by assumptions that battered women are free to pack their bags and leave.¹¹⁵ This engrained view of departure as unproblematic is currently passed from judge to jury.¹¹⁶ The following judicial remarks to a battered defendant in an earlier study typify this response:

The law itself is not without remedy and was not without remedy to you. There are friends: there are relations: there are community and Church and other avenues of advice: there are policemen,

¹⁰⁷ See, eg, Lee Bowker, 'A Battered Woman's Problems Are Social, Not Psychological' in Richard Gelles and Donileen Loseke (eds), *Current Controversies on Family Violence* (1993) 154, 156; Alison Young, 'Conjugal Homicide and Legal Violence: A Comparative Analysis' (1993) 31 *Osgoode Hall L.J.* 761, 772; Neil Jacobson and John Gottman, *When Men Batter Women: New Insights into Ending Abusive Relationships* (1998).

¹⁰⁸ Kit Kinports, 'Defending Battered Women's Self-Defense Claims' (1988) 67 *Or.L.Rev.* 393, 435. For example, at a time when the abuser is incapacitated by alcohol or sleep.

¹⁰⁹ McColgan, above n 95, 521-522, cites *State v Stewart* 243 Kan. 639, 648 where the Court ruled as a matter of law that the defendant could not plead self defence when she killed her sleeping husband, as this would amount to a 'leap into the abyss of anarchy'.

¹¹⁰ *Ibid* 522, citing the unreported case of *HM Advocate v Greig* in which Lord Dunpark commented: 'There is evidence before you that the deceased was a bully, that he assaulted his wife from time to time and that he made her life a misery. The remedy of divorce or judicial separation is available to end this torment.' In *R v Thornton* [1992] All ER 306, 312, the trial judge directed the jury that: 'There are...many unhappy, indeed miserable, husbands and wives. It is a fact of life. It has to be faced, members of the jury. But on the whole it is hardly reasonable, you may think, to stab them fatally when there are other alternatives available, like walking out or going upstairs'.

¹¹¹ *R v Wang* [1990] 2 NZLR 529 (CA).

¹¹² A perceived failure to take advantage of opportunities to retreat is relevant both to whether the force was reasonable and whether the defendant was entitled to launch a pre-emptive strike when the harm or danger was not imminent. The requirements of a sudden and temporary loss of self-control and an identifiable provocative act immediately before the killing in the defence of provocation, and the self-defence requirement of immediacy of response to an imminent act, frequently place these defences outside the reach of female defendants.

¹¹³ As with self defence, the defence of duress of circumstances or necessity requires the peril be imminent and that there be no realistic alternatives available.

¹¹⁴ The functional equivalent of imminent danger in the defence of compulsion (duress by threats) is the requirement under s 24 of the *Crimes Act* of 'immediate' death or grievous bodily harm.

¹¹⁵ See Kevin Dawkins, 'Criminal Law and Procedure' (1994) 48 *NZRL Rev* 48, 63; Elisabeth McDonald, 'Women Offenders and Compulsion' [1997] NZLJ 402.

¹¹⁶ *R v Wang* [1990] 2 NZLR 529.

there are Chamber Magistrates: there are solicitors: there are means of protection in the community.¹¹⁷

The persistence of the belief that rather than resort to self-defence a battered woman could instead 'summon help or simply walk out the door'¹¹⁸ has resulted in judicial interpretation of current self-defence law as implying a duty to escape from, rather than kill a male batterer.¹¹⁹ Legal academics similarly conclude that killing an abusive partner during a lull in the violence could never be viewed as objectively reasonable.¹²⁰ The battered woman's psychological inadequacy thus becomes the sole impediment to departure. Since she has elected not to pursue avenues of escape that were reasonably open to her, her claim of self-defence following the killing of her partner during a lull in the violence 'smacks of self-help', and fails to merit an acquittal.¹²¹ Others posit that the real motive behind these killings is revenge. Acceptance of the battered woman's self-defence claim would therefore give rise to an 'open season' on men.

Elisabeth McDonald sums up both sides of the well traversed arguments in this area:

For the woman it is argued that...in the circumstances as she believed them to be (that he would kill her when he woke up, in the morning, or some time soon) she had no reasonable alternative to avoid her own death (or the death of her children) than to kill him, by means of a 'pre-emptive strike'. For the Crown it is argued that it is unreasonable to kill him when it is possible to retreat by going to the police, to a neighbour, to a Women's Refuge or simply to sleep. To date, the Crown has had the best of the argument. The Court of Appeal has affirmed that to allow women in these situations to rely on self defence is to 'return to the law of the jungle'.¹²²

¹¹⁷ Lees, above n 80, 286, citing E Bochnak, *Women's Self-defense Cases: Theory and Practice* (1986).

¹¹⁸ Cato, above n 7, 39.

¹¹⁹ See, eg, *R v Wang* [1990] 2 NZLR 59, where the Court of Appeal endorsed the trial judge's view that launching a lethal attack on an unconscious husband could never be viewed as objectively reasonable when other alternatives such as leaving the house, seeking the aid of friends, or the police were available.

¹²⁰ This appears to be assumed as a matter of 'common sense'. See, eg, Jeremy Finn, 'R v Xiao Jing Wang' (1990) 14 Crim LJ 200. Similarly, Fran Wright, 'The Circumstances as She Believed Them to Be: A Reappraisal of Section 48 of the Crimes Act 1961' (1998) 7 Waikato L.Rev. 109, appears to assume that a battered woman's perception she cannot safely retreat is a 'mistaken belief' involving a departure from the way an 'ordinary person' in the same circumstances would perceive their options. This distinction between the circumstances as the defendant saw them and the circumstances as they 'really' were undermines the self-defence hypothesis that the woman's actions were reasonable. C/f Elisabeth McDonald, 'Defending Abused Women: Beginning a Critique of New Zealand Criminal Law' (1997) 27 VUWLR 673, 681-684.

¹²¹ Cato, above n 7.

¹²² McDonald, above n 120, 680.

As Leader-Elliott points out, the image of the petit traitor haunts the metaphors of anarchy and insurrection invoked by courts when battered women kill abusive men.¹²³ While not explicitly acknowledged, 'it is assumed that the sexual relationship, which engenders the partial defence of provocation for men, deprives women of rights of self-defence which they would have against any other violent assailant'.¹²⁴

Warren Brookbanks alludes to the 'calm and vengeful deliberation' apparent when battered women kill during a lull in the violence, which purportedly suggests a motive of revenge as opposed to a disparity in physical strength between the sexes.¹²⁵ Since Brookbanks' discussion is limited 'to the specific ways in which developments in provocation have impacted battered defendants',¹²⁶ his recommendations regarding reform of the defence do not address their potential to increase the availability of the defence to jealous, proprietary men. As Nourse remarks:

[W]hat of the men who kill their sleeping wives? If one is going to discuss intimate 'executions' what about the numerous cases in which men pursue and kill wives who are trying to leave them? To emphasise cases involving battered women who kill their partners in fear without even mentioning cases involving men who kill their partners in anger seems almost calculated to distort.¹²⁷

The criminal law emphasis on the battered *defendant's* failure to leave, while the battered *victim's* departure is re-presented as a provocation to the jealous lover, boyfriend, or husband, maintains and perpetuates a dissonance between the concrete reality of separation violence and abstract legal constructions of easy departure. Accordingly, the terrible irony of a legal system which demands

¹²³ Leader-Elliott, above n 8, 165.

¹²⁴ Ibid 166.

¹²⁵ Warren Brookbanks, 'English Law Commission Project on Partial Defences to Murder' in England and Wales Law Commission, *Partial Defences to Murder*, Consultation Paper 173 (2003) Appendix D 28, [49], noting such appearances may be illusory as battered women may be driven into a state of despair by violent abuse. Even so, 'despair which is an exceptional and abnormal emotional state of mind, is not easily accommodated within the provocation defence's focus on anger. It is less likely to lead to a sudden explosive reaction immediately following the provocation'.

¹²⁶ Ibid [46]. Brookbanks notes the New Zealand Law Commission drew attention to the irony of a defence which is successfully used by perpetrators of domestic violence, but is beyond the reach of victims of domestic violence. However, this is not followed up with a discussion of the circumstances in which men kill female intimates.

¹²⁷ Victoria Nourse, 'The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law' (1998) 50 Stan.L.Rev. 1435,1453-1454. Ironically, Eastal, above n 4, 197, found the fact that the woman victim was asleep when she was shot and killed by her male partner was perceived as mitigating as opposed to aggravating the offending. Rather than connoting revenge as the motive, the sentencing judge noted that the woman was not tortured and did not suffer the added terror of realising that she was about to be shot.

that battered women leave an abusive partner rather than resort to lethal force, but fails to punish and deter separation violence - even permitting habitual batterers who pursue and kill separating women to advance a provocation defence - remains unacknowledged.

VII NATIONAL DOMESTIC VIOLENCE POLICY Versus LEGAL ANALYSES

New Zealand Family Violence Prevention Strategy seeks an integrated, co-ordinated, collaborative response to domestic violence across the various sectors, and consistency in law, policy and service delivery.¹²⁸ However, criminal law responses to violence in intimate relationships are not merely inconsistent with national policy, they operate to undermine it.

A *Victim Safety*

National domestic violence policy requires the safety and well-being of victims to be given paramount consideration in prevention initiatives.¹²⁹ Citing '[r]esearch showing women and children are at increased risk of violence at the time of, and in the period immediately after, separation',¹³⁰ the policy notes that ignoring barriers to escape from violent relationships heightens people's vulnerability to violence and repeat victimisation, affects society's actions and responses, and creates additional barriers to accessing essential services.¹³¹

In comparison, the legal system continues to promote the view that an abused woman is free to leave a violent situation if she chooses. The dangers which national prevention strategy warns are associated with ignoring barriers to escape are inherent in this legal response.

B *Batterer Accountability*

Family Violence Prevention Strategy acknowledges the importance of holding perpetrators accountable for their violent behaviour.¹³² Court-ordered batterer treatment is also predicated on accountability. '[O]ne of the main goals of all reputable batterer intervention programmes is to get the batterer to become accountable for his abusive behaviour.'¹³³ The importance of the accountability principle is reflected in a large body of research showing battering men typically

¹²⁸ Ministry of Social Development, above n 62, 15.

¹²⁹ Ibid 12.

¹³⁰ Ibid 24.

¹³¹ Ibid 10.

¹³² Ibid 12.

¹³³ Kerry Healey, Christine Smith and Chris O'Sullivan, *Batterer Intervention: Program Approaches and Criminal Justice Strategies* (1998) 45.

deny or minimise their violence, and blame the abuse on the victim.¹³⁴ The insistence of the battering offender in *Case Study P/98/3*¹³⁵ that his wife take responsibility for his violence ('you make me hit you') is typical of men who refuse to view battering as a choice.

Even in situations of the most horrific violence, abusive men...characterize themselves as the *real* victims and view their partner's self-protection measures as attacks that must be defended against. If the woman gets a restraining order, she is doing something *to him*. A woman's decision to separate is characterized as 'abandonment'- a charged word implying she has treated her partner unjustly, maybe even abusively. The result is that a woman who attempts to separate from an abusive man is entrapped in a web of the man's making, in which every action she takes to protect herself threatens to reinforce his view that she's attacking *him*; thus, actions taken to increase her safety also have the potential to increase her danger.¹³⁶

Since legal responses mirror the batterer's justifications for violence, a woman's strategies to protect her own and her children's safety by separating, obtaining a protection order, and seeking structured access arrangements, are re-interpreted as potential insults to the batterer. Publicly funded advice to battered women to 'stand up' to their abusers¹³⁷ therefore coexists with the provision of a partial excuse for men who kill women when they do so.

C Promotion of Healthy Gender Roles and Non-Violent Concepts of Masculinity

Family Violence Prevention Strategy notes the importance of eliminating damaging sex-role stereotypes which help to perpetuate violence against women and promoting 'healthy gender roles and responsibilities, and non-violent concepts of masculinity.'¹³⁸

However, rather than inculcate new values of mutual respect in intimate relationships, the legal system reinforces old patriarchal norms of female subjugation to the authority of men. This model of heterosexual relations undermines the ability of the legal system to recognise and respond proactively to red flags for dangerousness/lethality.

¹³⁴ See, eg, *Ibid*; Damian O'Neill, 'Domestically Violent Men Speak: A Post-Structuralist Critique' (2000) 15 *New Zealand Sociology* 1; Peter Adams, Alison Towns and Nicola Gavey, 'Dominance and Entitlement: The Rhetoric Men Use to Discuss Their Violence Towards Women' (1995) 6 *Discourse and Society* 387.

¹³⁵ See, discussion of this case above, at p 215.

¹³⁶ Coker, above n 37, 107.

¹³⁷ See, eg, 'Standing Up to Domestic Violence: A Guide to Protection Orders and the Domestic Violence Act' (Wellington, Department for Courts, 1996).

¹³⁸ Ministry of Social Development, above n 62, 14.

VIII COMPROMISING RISK ASSESSMENT

A *Male Sexual Proprietariness/Masculine Control*

As discussed in Part I,¹³⁹ male sexual proprietariness, which encompasses the theme of masculine control including jealous, obsessive and sexually possessive attitudes toward women, features as a primary risk marker for serious violence and lethality in all domestic violence risk assessment instruments. Research shows violence is typically instrumental or purposive conduct.¹⁴⁰ Rather than unconnected episodes of rage, or the result of an inability to manage anger, violence is a calculated and purposeful means to control the life of an intimate partner.¹⁴¹ Polk's research revealed the majority of intimate femicide cases to be 'planned homicides rather than a swift upswelling of passionate rage'.¹⁴² Even in cases that conformed to a pattern of rage boiling over to the point of homicide, Polk found a 'foundation of marital discord...including previous threats to separate on the part of the female, and prior violence on the part of the male'.¹⁴³

By contrast, provocation doctrine continues to assert that men retain an ongoing proprietary interest in women who have repudiated the relationship. Consequently, law has responded to feminist demands for greater protection of domestic violence victims through the provision of protection orders, but permits these orders and other attempts by the victim to seek help to be advanced in support of a defence for the batterer who kills. Although research has revealed masculine control to be the major theme of intimate femicide, this understanding of control is also subverted by legal analyses in which men who perpetrate serious and lethal violence against women are said to do so while 'out of control'. Mechanistic constructions of emotion, and perpetrators who are simultaneously 'in' and 'out' of control, may not only compromise risk assessment in the criminal

¹³⁹ See, Chapter Three.

¹⁴⁰ See, eg, Richard Gelles, *The Violent Home: A Study of Physical Aggression Between Husbands and Wives* (1974); Russell Dobash and R Emerson Dobash, *Violence Against Wives: A Case Against the Patriarchy* (1979); Sally Lloyd, 'The Interpersonal and Communication Dynamics of Wife Battering' in Ximena Arriaga and Stuart Oskamp (eds), *Violence in Intimate Relationships* (1999) 91; Margo Wilson and Martin Daly, 'Till Death Us Do Part' in Jill Radford and Diana Russell (eds), *Femicide: The Politics of Woman Killing* (1992) 83, 93, citing a number of studies.

¹⁴¹ Lisa Sanctis, 'Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence' (1996) 8 *Yale J.L. & Feminism* 359, 388-389. See, also, Taskforce for Action on Violence within Families, *The First Report* (2006) 4.

¹⁴² Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994) 31.

¹⁴³ *Ibid* 42-43.

justice sector,¹⁴⁴ but also undermine the protection and risk assessment strategies of other institutions and agencies.

B Systematic Undermining of Risk Assessment

In accordance with Family Violence Prevention Strategy,¹⁴⁵ the Ministry of Health developed risk assessment guidelines for use by health professionals.¹⁴⁶ Included in the guidelines is a Safety Plan for use as a patient resource. The Plan has three parts: safety to avoid serious injury and to escape an incident of violence; preparation for separation; and long term safety after separation. When preparing for their safety, women are advised inter alia to start secret savings accounts and make other secret arrangements while trying to avoid arousing their partners' suspicions.¹⁴⁷

However, the Ministry's prior and post-separation safety strategies appear to provide fertile grounds for allegations of sexual provocation. Behaviour such as locking doors to slow down abusers, maintaining secret savings accounts, and devising secret departure plans may readily be woven into a provocation narrative of female duplicity and deceit when the woman who employs them is killed.

IX CONCLUSION

The thesis that law punishes men who perpetrate separation violence more severely in recognition of the relational status of the parties is not supported by the present research. As Nourse points out, '[i]f separation is a fact of intimate homicide, it is a fact likely to surprise lawyers. The law's vision of a crime of passion, a view reflected in treatises, casebooks, and scholarly work, focuses on sexual infidelity, not departure'.¹⁴⁸ The present tendency to inscribe estrangement killings with an air of inevitability in depictions of 'classic' or 'eternal' love triangles also sends the message that intimate femicide is a regrettable, but timeless concomitant of romantic love and male passion which the legal system can do little to prevent.

Dawson acknowledges that her findings may reflect the greater degree of planning and calculation involved in estrangement homicides, but suggests this explanation is unlikely. '[T]here was no

¹⁴⁴ In *Courts Cop Flak Over Domestic Violence*, Waikato Times, 4 July 2000, a Women's Refuge representative expressed concern that the trivialisation of domestic violence by courts could have 'a "trickle-down" effect on police'.

¹⁴⁵ Ministry of Social Development, above n 62, 36-37.

¹⁴⁶ Ministry of Health, *Family Violence Intervention Guidelines: Child and Partner Abuse* (2002).

¹⁴⁷ *Ibid* 69-71.

¹⁴⁸ Nourse, above n 38.

indication in Polk's analysis that premeditation was any more likely to occur in cases that involved estranged partners compared to current partners'.¹⁴⁹ However, while Polk's work certainly shattered the stereotype of intimate femicide as typically unplanned, spontaneous offending, the 'careful tracking' of the victim and 'scouting out of her movements to determine where and when she will be vulnerable to attack' which Polk found to be present in estrangement cases¹⁵⁰ is unlikely to be necessary when the couple are living together.

Stalking behaviours and threats may be perceived by juries as indicating a pre-planned or calculated attack resulting in a murder, rather than manslaughter conviction.¹⁵¹ Premeditation is also an aggravating feature of offending at sentencing.¹⁵² *Case Study P/02/6*¹⁵³ illustrates that the compassionate construction of separation homicide as a 'crime of passion' may not obviate harsher sanctions due to other circumstances of offending. If, as research indicates, killings in the context of estrangement are more likely to involve home invasion, and use of a gun,¹⁵⁴ or other weapon, these are further aggravating factors.¹⁵⁵ 'Abandonment rage', which appears to be implicated in the killings of estranged female partners,¹⁵⁶ is associated with prolonged violence or 'overkill'.¹⁵⁷ Such gratuitous violence normally invokes a sterner response from courts.¹⁵⁸ Thus behaviours commonly associated with separation assaults may ensure the coincidence of this offending with punishment severity.

Legal narratives of romantic love and male passion have masked the devastating toll on battered women and children of violence in the context of separation. As Rapaport points out:

¹⁴⁹ Dawson, above n 5, 705.

¹⁵⁰ Polk, above n 142, 30.

¹⁵¹ For example, the offender in *Case Study G/01/7* who stalked his estranged partner in his 'snoop wagon' and killed her in the presence of the couple's child, was convicted of murder despite his provocation claim.

¹⁵² Geoff Hall, 'Sentencing (I): Matters of Aggravation and Mitigation' [1985] NZLJ 139, 141. See also, s 9 *Sentencing Act 2002* specifying premeditation on the part of the offender as an aggravating factor.

¹⁵³ See above, at p 260.

¹⁵⁴ Dawson, above n 5, 692, cites research finding men who killed women from whom they were separated or divorced were more likely to use a gun than those who killed current partners. Of the confirmed intimate femicides in the present study, the ten offenders who used firearms as the method of killing all killed women who were separated or attempting to separate at the time. Four offenders committed suicide, and the remaining six were convicted of murder.

¹⁵⁵ Under s 104 of the *Sentencing Act 2002* unlawful entry into, or unlawful presence in, a dwelling place is a qualifying circumstance for a minimum period of imprisonment of 17 or more years. Section 9 specifies the actual use of, or threatened use of, a weapon, as an aggravating factor at sentencing.

¹⁵⁶ Angela Browne, Kirk Williams and Donald Dutton, 'Homicide Between Intimate Partners: A 20-Year Review' in M Dwayne Smith and Margaret Zahn (eds) *Homicide: A Sourcebook of Social Research* (1999) 149, 160. See, also, Healey, Smith and O'Sullivan, above n 133, 22.

¹⁵⁷ Browne, Williams and Dutton, above n 156, 161.

¹⁵⁸ Hall, above n 152, 141, notes that '[a]s a general rule, the more extreme the violence, the closer the sentence will be to the statutory maximum penalty'. See also, *R v W* [1996] 1 NZLR 147, 152; s 9 *Sentencing Act 2002*.

[S]eparation murder can be seen as the extreme of domestic tyranny, the refusal to acknowledge the independence of a woman from the will of her husband or lover at any price. If consuming a human life in appropriating the property of another is ranked among the most reprehensible murders, then deliberate destruction of another's life that cannot any longer otherwise be controlled is no less reprehensible.¹⁵⁹

While it is sometimes asserted that social norms and values are the province of the jury and not the substantive law, patriarchal values of male dominance and female submission are deeply embedded in legal norms of relationship. The invisibility of separation violence therefore requires statutory intervention to denounce and deter this violence, affirm women and children's fundamental right to leave abusive relationships, and achieve justice for battered defendants and victims. This legislative initiative would also have a much needed educative function in transforming cultural and legal attitudes which facilitate and partially excuse male violence toward women.

¹⁵⁹ Rapaport, above n 13, 229-230.

CHAPTER EIGHT: THE 'RED FLAG' OF REPEAT VICTIMISATION
***MODUS OPERANDI* AND THE**
(IR)RELEVANCE OF A HISTORY OF VIOLENCE AT TRIAL

It is time to dismantle the hegemony, legitimation and exclusive privilege accorded to those questions which are deliberated, articulated and decided on by judges and defined as the only relevant and 'real' knowledge about law and to explore common sense 'doxa' as a decisive element in shaping legal knowledge and outcomes, which exists often in opposition to explicit legal rules and to acknowledge the hitherto hidden force of facts and agency of jurors in the shaping of law.¹

I INTRODUCTION

When the habitual batterer enters a not-guilty plea to a charge of murder and provocation is not in issue, the jury is required to determine from all the relevant circumstances whether he possessed the requisite mens rea of murder. The Latin term 'mens rea' refers to the mental element of an offence which is 'usually one of the essential ingredients of a crime'.² When determining whether the defendant had the requisite knowledge and intent, the 'golden rule' stipulates that in most cases, judges need not elaborate on the meaning of intention as this issue can be left to the 'good sense' of juries.³ Susan Edwards argues that the preoccupation of judges and legal academics with substantive legal doctrine has silenced consideration and debate on the role of 'common sense' in judicial and jury decision-making. Rather than basing their findings on esoteric legal concepts of mens rea, jurors in murder trials will focus 'on the evidence and on the facts through applying their common sense and morality'.⁴

Edwards argues that when manual assault is the method of killing or *modus operandi*, 'common sense' perceptions that unarmed assaults are less dangerous than those involving use of a weapon trivialise the dangerousness/lethality potential of battering at the trials of batterers who kill. By ignoring women's greater vulnerability to physical assaults, the couple are re-presented as equal warring parties. Death by battering is thereby constructed as an unintended, almost accidental event, resulting in a manslaughter outcome for the abuser. Edwards' analysis of method of killing

¹ Susan Edwards, 'Ascribing Intention - The Neglected Role of *Modus Operandi* - Implications for Gender' [1999/2000] CIL 235, 239 (citations omitted). The term 'doxa' describes the way in which the social world appears self-evident - it refers to a taken for granted world which 'everyone knows': at 238 fn 23.

² Peter Spiller, *New Zealand Law Dictionary* (5th ed, 2002) 186.

³ *R v Moloney* [1985] 1 All ER 1025, 1036, (HL) per Lord Bridge: 'The golden rule should be that...the judge should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent'.

⁴ Edwards, above n 1, 238.

in spousal homicide and legal outcomes in England and Wales over a five year period confirmed that men were less likely to be convicted of murder if they used body force than if they used a weapon.⁵

This minimisation of the lethality potential of men's unarmed assaults has disturbing implications for criminal law analyses of the red flag of repeat victimisation. Feminists point out that despite intense social science and legal activity in the domestic violence field, law and society remain in denial of high rates of domestic violence and its links to women killing.⁶ Consequently, understanding that a history of domestic violence cannot be isolated from the final lethal incident 'is frequently absent from the legal analysis when a man's beatings escalate to murder'.⁷

Failure to acknowledge the gendered 'inequality of arms'⁸ and related disappearance of the red flag of repeat victimisation is also evident in a criminological stereotype of domestic homicide discussed by Kenneth Polk. This analysis posits 'two basic varieties' of homicide. In the first variety, the victim and offender are strangers. In the second,

people who are known to one another argue over some trivial matter, as they have argued frequently in the past. In fact, in the past their argument had on occasion led to physical violence, sometimes on the part of the offender, sometimes on the part of the victim...The individuals then find themselves in the present situation, in which: 'one of them decides that he has had enough, and he hits a little harder or with what turns out to be a lethal instrument'.⁹

Polk found scant support for this stereotype of domestic homicide as a spontaneous event, during which one or other of the parties hits a little harder, or in the wrong place, or in a moment of rage picks up what turns out to be a lethal weapon:

[A] relatively small proportion of homicides fits a pattern of people who know each other well, who have argued in the past, and then on this occasion the argument goes out of control. This happens in

⁵ Susan Edwards, 'Abolishing Provocation and Reframing Self-Defence - the Law Commission's Options for Reform' [2004] Crim.L.R. 181, 192-196.

⁶ See, eg, Myrna Raeder, 'The Admissibility of Prior Acts of Domestic Violence: *Simpson* and Beyond' (1996) 69 S.Cal.L.Rev. 1463,1466.

⁷ Donna Coker, 'Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill' (1992) 2 S.Cal.Rev.L.& Women's Stud. 71,75.

⁸ Edwards, above n 5, 188.

⁹ Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994) 197, citing the theoretical writing of Gottfredson and Hirschi, 1990.

a few cases of domestic homicide, perhaps most noticeably in the one or two cases where a woman offender is defending herself against the violence of her male partner. A very large percentage of homicides involving sexual intimacy where males kill females are clearly planned in advance (including cases where elderly males commit suicide afterwards), and thus do not correspond to this portrait of a 'typical' homicide.¹⁰

As discussed in this chapter, notwithstanding lack of empirical support for the above stereotype of domestic homicide, and inherent flaws in this analysis, case studies indicate that the construct underpins legal responses to habitual batterers who kill.

The research review of method of killing and legal outcome for intimate femicide over the period 1995 to 2002 supports Edwards' contention that men who kill women intimates by manual assault are less likely to be convicted of murder than if they use weapons.¹¹ Case studies demonstrate that a high level of violence toward deceased victims can be encompassed within 'common sense' constructions of death by battering as unlucky and unintended. Since the offender's history of violence is isolated from the lethal event the red flag of repeat victimisation is rendered irrelevant to the issue of mens rea. A manslaughter outcome is thereby available for the habitual batterer who kills his partner in a vicious, prolonged, attack. This finding is contrasted with Australian research indicating that 'lack of intent appears to be used as a defacto defence of "domestic violence"' in cases involving battered defendants.¹²

The chapter concludes that a legislative response to battering escalating to intimate femicide is necessary to signal society's opprobrium of a pattern of domestic violence culminating in death and to achieve justice for victims at the trials of battering men.

II THE MENS REA OF MURDER

A homicide which is not committed under provocation will be murder if the jury determine that the killing was accompanied by the requisite murderous intent. As Christopher Slobogin points out, legally relevant past states of mind 'are not objective facts the existence of which can be proven in the same way the occurrence of an act can be proven'. Accordingly, the jury's task is essentially

¹⁰ Ibid 198.

¹¹ See Appendix II.

¹² Rebecca Bradfield, 'Women Who Kill: Lack of Intent and Diminished Responsibility as the Other 'Defences' to Spousal Homicide' (2001) 13 CICJ 143, 144.

one of interpretation.¹³ Examples of evidence that may support an inference the accused intended to kill the victim include advance planning; the accused's knowledge that the gun was loaded at the time he levelled it; and/or that the accused deliberately aimed the gun at the victim's heart before firing it. '[S]uch inferences are a matter of evidence only. They are neither irrebuttable nor substantive rules of criminal law.'¹⁴ Conversely, the defendant may point to evidence suggesting that she or he lacked the requisite murderous intent, and although not technically a defence, such a claim, if successful, will obviate a murder conviction.

The requisite states of mind for murder, which the prosecution must prove beyond reasonable doubt, are specified in s 167 of the *Crimes Act 1961* and in a further definition of murder in s 168. These statutory provisions 'are alternatives so that, subject to any defences, an unlawful killing is murder if any one of them applies'.¹⁵ Section 167(a) conforms to the paradigm case of intentional killings by requiring that the defendant means to cause the death of the person killed. 'This requires "an actual intent to kill"'.¹⁶ Gerald Orchard notes that the word 'means' 'in its ordinary sense would appear to require that the killing be a purpose and object of the offender'.¹⁷ However, knowledge that death would be 'an inseparable consequence' of the defendant's purpose and object may constitute a second category of intention.¹⁸

Paragraph (c) of s 167 incorporates the principle of transferred mens rea so that if the defendant acts with one of the specified states of mind, but kills another person by accident or mistake, it will be murder although the defendant did not intend to hurt that individual. Under s 167(d), it is also murder where, in pursuit of an unlawful object, the defendant does an act that he knows to be likely to cause death, and thereby kills a person, even though neither death nor injury was intended. Although earlier New Zealand codes included the words 'or ought to have known' these words were dropped in 1961 'it being evidently decided that objective tests...should be eschewed'.¹⁹

¹³ Christopher Slobogin, 'Psychiatric Evidence in Criminal Trials: To Junk or not to Junk?' (1998) 40 *Wm. & Mary L.Rev* 1, 11.

¹⁴ AP Simester and WJ Brookbanks (eds), *Principles of Criminal Law* (2nd ed, 2002) 41.

¹⁵ Gerald Orchard, 'Culpable Homicide' in AP Simester and WJ Brookbanks (eds), *Principles of Criminal Law* (2nd ed, 2002) 507, 517.

¹⁶ *R v Aramakutu* [1991] 3 NZLR 429, 432 (CA).

¹⁷ Orchard, above n 15.

¹⁸ Simester and Brookbanks above n 14, 107-110. Cf Orchard, above n 15, 517, noting that if the killing is not a purpose or object of the offender, 'it may be that mere knowledge that death is virtually certain to result will not bring the case within s 167, although such knowledge would be sufficient mens rea for murder at common law'.

¹⁹ Orchard, above n 15, 520.

Common law applied an objective test if a homicide was committed in the course of committing a felony. Thus under the felony-murder rule it was murder whether or not actual malice was present. Although felony-murder is out of line with the principle of subjective fault, a modified version of the rule can be found in s 168 of the *Crimes Act 1961*.

A principal offender accused of murder under the further definition of murder in s 168 Crimes Act 1961 may be guilty of murder although the essential ingredient of death was neither intended nor foreseen as likely to ensue...To this extent strict liability is imposed in respect of culpable homicide.²⁰

The offences enumerated in s 168 are: treason; sabotage; piracy and piratical acts; offences related to escape or rescue from penal institutions or lawful detention; rape; murder; abduction; kidnapping; robbery; burglary and arson. Unlike the position at common law, it is not enough under s 168 that the defendant killed while committing one of the specified offences. The defendant must have meant to cause grievous bodily injury or 'really serious bodily harm'²¹ or commit one of the other acts (administering stupefying things or wilfully stopping breath) for a prescribed purpose.

The private nature of domestic violence and general absence of witnesses render attempts to prove the killer intended to cause the victim's death especially difficult in intimate femicide cases. If a defendant exercises his right not to testify, the Crown cannot cross-examine him. In the absence of witnesses it is extremely difficult for the jury to ascertain what an offender was thinking when he beat his partner to death. Consequently, the Crown may choose to rely on the mens rea of recklessness under s 167(b) to establish murderous intent. Pursuant to s 167(b), a killing is also murder if the offender means to cause bodily injury known to be likely to cause death and is reckless whether death ensues. Although at common law, it is sufficient that death was caused by an act done with intent to cause serious bodily harm, under s 167(b), the intended injury 'must be known to the offender to be likely to cause death'. This requires that the defendant actually appreciate the likelihood of causing death. It is not sufficient that the defendant *ought* to have been

²⁰ Gerald Orchard, 'Strict Liability and Parties to Murder and Manslaughter' [1997] NZLJ 93, 93-94.

²¹ Orchard, above n 15, 522.

aware of death as the likely outcome.²² Rather, there must be a conscious taking of the risk of causing death.²³

III 'COMMON SENSE' UNDERSTANDINGS OF MENS REA

The 'objective truth' about an offender's past mental state cannot be ascertained in the same way that it is possible to discover whether or not an event actually occurred. Slobogin points out that the actor himself may not 'know' his mental state at the time it is occurring. He may be 'ambivalent...or deceiving himself out of fear, guilt or self-protection...where the factfinder is a third party rather than the subject, the truth about mental states becomes even more contingent'.²⁴ Although it is often suggested that these difficulties can be resolved by entrusting questions of knowledge and intent to the 'common sense inferences' of juries,²⁵ '[t]riers of fact attempting to discern the individual's mental state add their own interpretative gloss to the evidence presented'. Consequently, when 'jurors name a mental state... they are crafting an interpretation that partly embodies their own assumptions, attitudes and beliefs.'²⁶

The Victorian Law Reform Commission has extensively canvassed pervasive societal myths and misconceptions about the dynamics of violent relationships.²⁷ Although these 'assumptions, attitudes and beliefs' are likely to play a crucial role in jury deliberations, Edwards observes that judicial and academic preoccupation with substantive law and the boundaries which distinguish law from fact has silenced 'any consideration or debate of the role played by common sense constructs, both in shaping judicial and jury deliberation'.²⁸ Paradoxically, while academic and judicial attention is focused on legal rules,

the law denies its own gravitas with the 'golden rule' requirement which deems that the judge should 'avoid elaboration and leave intention to the jury's good sense'. It is impossible to divine with any certainty what factors inform that good or 'common sense'. Thus juries may reach different conclusions on the same facts.²⁹

²² *R v Dixon* [1979] 1 NZLR 641, 647 (CA).

²³ *R v Harney* [1987] 2 NZLR 576 (CA).

²⁴ Slobogin, above n 13.

²⁵ See, eg, Nicola Lacey, 'A Clear Concept of Intention: Elusive or Illusory?' (1993) 56 MLR 621, 629.

²⁶ Slobogin, above n 13 (citations omitted).

²⁷ The Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) 161-169.

²⁸ Edwards, above n 1, 238.

²⁹ *Ibid* 239.

Although appeals to 'common sense' apparently assume some universal standard 'out there' which juries, no matter what their composition, can invariably access each time they are called upon to do so, modern juries are comprised of people with different cultural backgrounds, social norms, philosophical beliefs and attitudes toward domestic violence. Reliance on the 'common sense' of juries therefore posits a fictional homogeneity of societal attitudes and beliefs. Nor are legal professionals immune from engrained gender-differentiated cultural notions about appropriate social and moral behaviour.³⁰

Nicola Lacey has also criticised judicial and academic preoccupation with doctrinal elements in orthodox case analysis. Lacey observes that judicial appeals to 'ordinary usage' assume a settled, widely shared understanding of legal principles which masks uncertainty and disagreements over doctrinal concepts such as intention. These debates challenge traditional values of 'coherence and consistency of principle in criminal law'.³¹ The problematic combination of doctrinal stipulation and ordinary usage/common sense constantly pushes 'judges back towards the other, in a kind of endless dialectic'.³² William Wilson cites the decisions in *R v Hyam*³³ and *R v Woollin*³⁴ as possible examples of this juridical dialectic.

In *Hyam*, the jealous woman poured petrol and then put a lighted newspaper through her rival's letter box. Two children died in the resulting fire. H testified that she did not intend to kill or cause grievous bodily harm, but rather to frighten her rival into leaving the neighbourhood. She had established that her lover was absent, but did not know whether there were other persons in the house. The majority of the House of Lords upheld her murder conviction. By contrast, *Woollin* concerned a father who lost his temper with his baby son and threw the child with much force across the room. The infant died as a consequence of his injuries. W admitted that he realised serious injury might be caused. The judge instructed the jury inter alia that if W knew there was a substantial risk of serious injury, then the jury could find that he intended to cause serious injury. The House of Lords rejected the argument that foresight of a substantial risk of death or serious bodily harm could be an alternative mens rea to intention and overturned the murder conviction.

³⁰ See, eg, Elizabeth Schneider, 'Resistance to Equality' (1996) 57 U.Pitt.L.Rev 477; Celia Wells, 'The Impact of Feminist Thinking on Criminal Law and Justice: Contradiction, Complexity, Conviction and Connection' [2004] Crim.L.R. 503, 515.

³¹ Lacey, above n 25, 628.

³² Ibid 639.

³³ [1975] AC 55 (HL).

³⁴ [1998] 4 All ER 103 (HL).

The Court held that the jury was not entitled to find the necessary intention unless they felt sure that death or serious bodily harm was a virtual certainty as a result of the defendant's actions and that the defendant appreciated such was the case.

Woollin appeared to have ended a long-standing debate regarding the meaning of intention in criminal law. However, Wilson points out that the requirement of virtual certainty is under-inclusive as it fails to capture cases where 'there is a clear-sighted decision to subject another, by violence or otherwise, to the serious risk of death'.³⁵ Consequently, another case, with different moral facts, may see the virtual certainty test revisited.³⁶ Wilson suggests that the House in *Woollin* may have reasoned that trial judges were not bound to give the special direction in cases of murderous risk-taking. Thus where the accused's motive is morally inconsistent with definitional intention, judges may feel encouraged tactfully not to put such directions to the jury, and instead trust in their common sense.³⁷ Juries may therefore continue 'to draw inferences of direct intention from degrees of probability and so moral judgments will still play a part in juries' determinations of fault'.³⁸

The likelihood that judges may give or withhold jury directions according to moral as opposed to legal evaluations, and potentially relevant categories of offending, is not addressed in academic teachings and texts. However, Wilson suggests that '*Woollin*, unlike *Hyam*, was a classic case of "act first think afterwards". While judges have no business skewing doctrine to convict such killers of murder the same cannot necessarily be said for the likes of Mrs Hyam'.³⁹ This observation assumes a shared understanding that the moral culpability of the defendant in *Hyam* greatly exceeded that of the defendant in *Woollin*. Yet the present research found men who set women's homes on fire in the context of estrangement were not regarded by judges as especially morally

³⁵ William Wilson, 'Doctrinal Rationality after *Woollin*' (1999) 62 MLR 448, 463. Wilson notes that the test is also over-inclusive in cases involving a justifying motive. He gives as an example, the Law Commission scenario in which F throws S off the top of a blazing block of flats in a vain attempt to save S's life, although F foresees death as a virtually certain consequence: at 457. See, also, Alan Norrie, 'After *Woollin*' [1999] Crim.L.R. 532, 539, defining good motive cases as those 'where there is a "moral threshold" such that even though the accused could foresee a result as virtually certain, it is so at odds with his moral conception of what he was doing that it could not be conceived as a result that he intended'. In such cases, 'judges and juries would be "entitled to find", in terms of *principle* and without strain, that the moral threshold between what the accused intended and what she foresaw as virtually certain was sufficiently large to avoid attribution of fault': at 539.

³⁶ See, also, Norrie, above n 35, 544.

³⁷ Wilson, above n 35, 458, notes the Court accepted that the trial judge is in the best position to determine what direction is required, depending on the circumstances of the case.

³⁸ *Ibid* 461.

³⁹ *Ibid* 460.

reprehensible. This was the case even when, unlike Mrs Hyam, the offender knew that the victim was asleep in the house at the time the fire was set.⁴⁰

If, contrary to empirical research revealing intimate femicide cases exhibit a pattern of careful and thoughtful premeditation,⁴¹ lethal male violence toward women and children is constructed as a matter of 'common sense' as typically involving an unplanned, momentary loss of self-control, this would influence legal narratives of battering escalating to lethality. Indeed, as discussed below, where the sole evidence of the accused's knowledge and intent is evidence of his violence and its consequences to the victim, 'common sense' understandings of domestic violence may play a greater role in the identification of homicide as either murder or manslaughter than rules of law.

IV 'COMMON SENSE' UNDERSTANDINGS OF INTIMATE FEMICIDE

A *The Gendered Inequality of Arms*

Edwards argues that rather than view male violence toward women as disproportionate and excessive whether weapons *or* body force are used,

the law has ignored the physical disparity between the sexes so that when men kill women, using body force...instead of this force being regarded as excessive when used against a person of smaller frame and when that person is also disabled from using physical force through social conditioning, the law construes body force as a mitigating factor. Again the law reifies context such that body force *per se* is rendered less serious and sometimes even rendered benign.⁴²

This failure to acknowledge gender inequalities in size and physical strength is evident in Lord Simon's observation in *Mancini v DPP* that, when considering the common law requirement of proportionality, the instrument with which the homicide was effected is relevant: '[F]or to retort...by a simple blow, is a very different thing from making use of a deadly instrument'.⁴³ Earlier legal commentary also suggests that 'a defendant who would have had a defence if he or she had retaliated with bare hands might be guilty of murder if he or she fatally shoots or stabs the

⁴⁰ See, eg, *Case Study M/01/3(S)*, discussed above at p 122 fn 151, where the offender entered his estranged partner's house, turned on a stove element, draped the woman's clothes over it and dropped a lit cigarette on her bed. The woman was awoken by the smoke and escaped from the house before fire-fighters arrived. The offender's sentence of 18 months' imprisonment was suspended for two years.

⁴¹ Kenneth Polk and David Ranson, 'The Role of Gender in Intimate Homicide' (1991) 24 ANZJ Crim 15, 21-22.

⁴² Edwards, above n 5, 190-191.

⁴³ *Mancini v DPP* [1942] AC 1, 9 (HL).

unarmed victim'.⁴⁴ New Zealand research also found a tendency to treat weapon use as constituting more serious offending than manual assaults:

[M]ost of the assaults described in the case studies did not involve instruments yet inflicted significant physical and emotional damage. Compared with their victims, male abusers are typically taller, heavier, and have greater upper body strength and longer arms. Unlike their victims, they are very likely to have learnt how to fight. Distinguishing assaults with instruments from bare handed assaults seems to reflect a notion of 'fair fighting'. Given the disparities just described, it is difficult to imagine how this can be applied to most domestic assaults. Simply warning abusers for slapping or pushing their partners is incompatible with an understanding of the power and control dynamics of abuse and its terrorist nature.⁴⁵

New Zealand homicide research also links manual assault (punching, strangulation and kicking) with spontaneous and unpremeditated (and therefore less culpable) homicide.⁴⁶ This gender discrimination is also evident in sentencing legislation which codifies the common law position that weapon use is an aggravating feature of offending.⁴⁷ In *Case Study R/01/8*, involving a habitual batterer who killed his partner during 'a violent and sustained assault', the Court of Appeal noted that the offender's culpability was reduced due to the fact that no weapons were involved.⁴⁸

Edwards points out that since men kill women partners with body force - using fists, hands and feet - while gender disparities in size and strength generally require women to resort to a weapon, a 'presumption which attributes more or less intent and seriousness to the use of body force as compared with a weapon has specific consequences for gender justice'.⁴⁹

⁴⁴ Finbarr McAuley, 'Provocation: Partial Justification, Not Partial Excuse' in Stanley Yeo (ed), *Partial Excuses to Murder* (1991) 19, 29.

⁴⁵ Ruth Busch, Neville Robertson and Hilary Lapsley, *Domestic Violence and the Justice System: A Study of Breaches of Protection Orders* (1992) 162-163.

⁴⁶ Ian Miller and Nestar Russell, *Homicide in New Zealand 1988-94: Patterns and Relationships* (Paper presented at the 11th Annual Conference of the Australian and New Zealand Society of Criminology, Victoria University of Wellington, 29 January-1 February 1996) 16.

⁴⁷ See, eg, s 9(1)(a) *Sentencing Act 2002*.

⁴⁸ See, discussion of this case below, at p 295; See, also, *R v Stephens* [2001] CA 272/01 (Unreported, Keith, Doogue and Gendall JJ, 6 December 2001) [4] in relation to sub-lethal assaults.

⁴⁹ Edwards, above n 1, 242. Edwards notes that 'the legal presumption that particular methods of killing are more or less dangerous in terms of outcomes has been the subject of constitutional challenge in the United States': at 255.

B *The Relevance of Body Force to Constructions of Intention*

The private nature of domestic homicide and general absence of witnesses may require the Crown to rely on s 167(b) to support the murder charge. As discussed above, under s 167(b) it is murder if 'the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues'. In a leading judgment, Cooke P considered the meaning of bodily injury known to the offender to be 'likely' to cause death and in a passage subsequently approved by the Court of Appeal as of equal application to the words in s 167(b)⁵⁰ the judge noted:

[W]ith the words 'likely' and 'probable' there are occasions when it is unnecessary for the Judge to expand on their meaning; the Judge can simply leave the case to the jury without elaboration in this respect. But where a critical issue as to the degree of likelihood or probability clearly arises, that may not do. The jury may then be entitled to more guidance, and so it was here...

If the risk of the death of the victim was truly no more than negligible or remote in the offender's eyes, the stigma of murder should be withheld. To be distinguished from that, however, are cases *where the risk is so appreciable that to indulge in the conduct is seen by society as the virtual equivalent of intentional killing*. Every Judge who tries to formulate a test for the distinction in precise and simple terms, suitable for directing a jury, soon realises that no single formula is preferable or adequate. Expressions commonly used to indicate the degree of foresight of death required to be proved against the accused are a real risk, a substantial risk, something that might well happen.⁵¹

A habitual batterer who culminates his history of violence with a deliberate, violent and prolonged lethal attack might be presumed to have engaged in actions 'where the risk is so appreciable that to indulge in the conduct is seen by society as the virtual equivalent of intentional killing'. However,

given that s 167(b) needs to be relied on only if D might not have meant to kill, it will often be at least arguable that D lacked the requisite knowledge, even if a weapon was used, *especially if the act may have been an instinctive, unthinking reaction in the heat of the moment*. *If the injury intended was not of a kind which would normally be expected to kill it is likely that the inference of knowledge will not be possible.*⁵²

⁵⁰ *R v Meynell* [2004] 1 NZLR 507, 516.

⁵¹ *R v Piri* [1987] 1 NZLR 66, 79 (CA) (emphasis added).

⁵² Orchard, above n 15, 518 (citations omitted; emphasis added).

A 'common sense' understanding that intimate femicide typically involves an 'instinctive, unthinking reaction in the heat of the moment'⁵³ would impede the Crown's efforts to establish murderous intent. This difficulty would be compounded by a further 'common sense' assumption that manual assaults are inherently less dangerous than weapon use. In other words, even violent and prolonged battering may not be perceived as likely to inflict the kind of injury 'which would normally be expected to kill'. In the UK, Edwards suggests that

where the method of killing involves the use of the body, punching, hitting, or kicking, the prosecution usually accepts the defence submission that death was the result of a 'tragic accident' or if the case goes to trial the jury usually returns a verdict of involuntary manslaughter.⁵⁴

The following case studies demonstrate that trivialisation of the lethality potential inherent in male violence toward women permits a high level of violence to be inflicted on victims without displacing the presumption that battering as the *modus operandi* denotes lack of the requisite knowledge. By isolating the batterer's history of violence from his final lethal attack this approach also renders the red flag of repeat victimisation benign. These misunderstandings currently provide the route by which habitual batterers may escape a murder conviction.⁵⁵

V CASE STUDIES

A *Mens Rea of Attempted Murder: Drawing the Line between 'Good Hidings' and Intimate Femicide*

The offence of attempting to commit a crime can only be done intentionally.⁵⁶ Central to the construction of intention in the following case is the assumption that a habitual batterer, who repeatedly strikes a prostrate woman with a weapon, can simultaneously calculate the precise

⁵³ See, eg, *A-G's Reference (No 33 of 1996)* (1997) 2 Cr App R (S) 10, 16, where the English Court of Appeal held that the sentencing tariff on a conviction for manslaughter by reason of provocation should be increased where a knife which had been carried for use as a weapon was used; but not if the killing arose from a domestic relationship as these cases fall in 'a separate category'.

⁵⁴ Edwards, above n 1, 248. Where a provocation defence is at issue, the picking up of a weapon comes to signify a break in the accused's emotive response which facilitates an interpretation of the homicide as a deliberate and planned course of action. By contrast, where body force is used, it becomes more difficult 'to identify a point in the trajectory of the provoked reaction when it can be inferred that there was an opportunity to cool down'. Furthermore, it is generally reasoned that individuals can exercise less conscious control over a bodily reaction, than they can over the use of a weapon: at 246-247.

⁵⁵ As previously discussed, minimisation of male violence toward women also militates against battered women's self-defence claims due to a pervasive assumption that all that is necessary to escape an abusive relationship is for the woman to simply 'walk out the door'.

⁵⁶ See, s 72 *Crimes Act 1961* and commentary in Simester and Brookbanks, above n 14, 100, 122.

amount of violence - how many strikes with boots, fists, or in this case, a baseball bat - will be required to inflict grievous injury without bringing about the woman's death.

Drawing the Line between 'Good Hidings' and Intimate Femicide: Case Study K/08/9(S)

At about 7 am, police received three 111 calls from neighbours who heard screaming from a nearby house. When police arrived at the house, they smashed a window pane in the door, entered the house and were confronted by a male wielding a baseball bat. After using pepper spray to subdue him, police found a woman lying on the floor in a bedroom. The woman had suffered severe injuries to her head, hands and legs as a result of being beaten with the bat. She was taken to the local hospital, but was then airlifted to another hospital due to the seriousness of her injuries. Police reported that the victim and offender were husband and wife who had recently separated.

The following year, the offender appeared in Court on a charge of attempted murder. At the time of the trial, the woman's jaw was still wired. The Court heard the offender and victim had separated several times because of the offender's violence. Two weeks before the attack, the offender agreed to leave. However, he continued to 'pester' his wife, who took out a protection order against him. On several occasions before the attack, the offender *'told his wife that if he could not have her no one would'*. The day before the attack, a male friend of the woman spent the day at her house while she was at work. She returned from work and the male stayed the night. At about 1.30 am the woman was awoken by knocking on the front door and then on her bedroom window. She looked out the window and saw her estranged husband, who left shortly after. He returned at 7.am.

At this time, the woman's friend was waiting in his vehicle to take her to work. The front door was open. The woman's estranged husband entered the house, shut and locked the door. He proceeded to his wife's bedroom, and informed her 'I know what you've been doing'. After pushing her onto the bed, he seized a baseball bat and began hitting her with it. The woman was knocked to the floor and covered her head with her hands to try to protect herself. She was beaten around the head, arms and legs until she became unconscious. The wife's male friend heard thuds and screaming and ran to a neighbour's house and called the police. When he returned to the house the offender threatened him with the bat.

The Crown pointed to the offender's repeated threats to kill his wife and told the jury that it was only 'good fortune' the woman had not died and the offender was not facing a murder charge. However, defence counsel argued that the offender had been frustrated at his estranged wife's failure to sign transfer of ownership papers. This frustration, and his upset and anger that another man had stayed at the house prompted the attack. While accepting that the offender's intention was obviously to cause serious harm to

the woman, defence counsel stated his client had no intention to kill her. If he had such intention, the victim's injuries would be far more serious. Instead, the offender just wanted to give his wife a 'good hiding'. The jury acquitted the offender.

While media reports provide only snapshots of the entire trial process, the argument in these cases appears to be that juries may infer defendants' intentions from the amount of violence inflicted. A defendant who holds back from striking the last lethal blow can be presumed to lack the requisite murderous intent.⁵⁷

If mens rea can be inferred according to whether or not the violence was sufficient to kill the victim it would logically follow that batterers who beat their partners to death would not escape a murder conviction. However, as discussed below, no such logic is employed in intimate femicide cases. Rather, the assumption that habitual batterers consciously inflict a level of violence falling short of that necessary to cause death supports legal constructions of death by battering as 'unlucky', as opposed to intentional. Furthermore, just as the focus is on the victim in separation violence cases (her provocation), the focus in death by battering cases is often on some characteristic of the victim which contributed to her death.

The Crown contention in the above case that it was mere 'good fortune' that the woman survived is borne out by a wealth of social science research showing repeat victimisation, separation from a controlling male, threats to kill - especially the wife killer's mantra: *'If I can't have you, no one will'* - and stalking, are major red flags for lethality. This social reality is subverted by courtroom constructions of domestic violence as a series of discrete incidents and batterers as deliberately measuring the precise amount of violence necessary to inflict 'good hidings' without consciously running the risk of death.

B Disregarding the Red Flag of Repeat Victimisation and Inequality of Arms

Jury deliberations are secret and where the particular 'ground' or defence upon which the verdict is based remains unclear, the trial judge is not permitted to seek clarification from the jury.⁵⁸ In the following case studies, the basis for the verdicts was generally evident from the sentencing

⁵⁷ See, also, *Case Study W/00/11* discussed above, at p 253, where the defendant was depicted by defence counsel as deliberately choosing not to deliver one more blow with the starter motor - the blow that was necessary to kill his partner - indicating a lack of murderous intent.

⁵⁸ *R v Allison (No 35)* (Unreported, High Court, Auckland, Williams J, 29 July 2003).

remarks. However, lack of detailed information precluded attribution of a particular argument or construction of the homicide to the manslaughter outcome in some cases.

As demonstrated below, the presumption that men's unarmed attacks on women carry a low risk of lethality is not displaced by evidence that the violence was 'extreme', 'prolonged' and 'vicious'. Significantly, the judge in the following case directly acknowledged that the successful construction of this woman's death as 'unlucky' and accompanying manslaughter conviction was achieved despite contradictory medical evidence regarding the level of violence inflicted.

An 'Unlucky' Death: Case Study D/00/7⁵⁹

The jury in this case heard evidence of a ten-year history of assaults on his partner by the offender, who had three previous convictions for assaulting the deceased woman. The offender persisted in his use of violence towards his partner despite repeated warnings from family, friends and associates that his assaults would one day culminate in her death. The final lethal attack occurred two months after the offender was released from a four-month sentence of imprisonment for a previous assault on the same woman, and 17 days after the victim attempted to escape from the offender.

The method of killing involved 'a prolonged savage beating, involving extreme violence' which included 15 punches to the woman's head, around 70 bruises to various parts of her body, and a bruised liver. Any one of six blows to the victim's head could have caused the bleeding and swelling of her brain which resulted in her death. Blows to her legs had apparently been inflicted by a long length of bamboo while other blows, including those to her head and face had been inflicted by a fist. The offender acknowledged that there had been two assaults, the first some 24 hours prior with the weapon and the other, on the morning of the woman's death.⁶⁰

As the woman lay dying, the offender wrapped her in blankets leaving only her battered face exposed and placed a photograph of two of her children in her hands. A stack of religious books, photographs, a wooden 21st birthday key from her mother and a white candle were placed at her head. The offender left the dying woman in the house and presented at hospital with a single gun shot wound to his chest which he told police was self-inflicted. The police were suspicious and broke into the couple's home looking for the gun. Instead, they found the bruised, swollen body of the 25 year-old victim.

⁵⁹ See, discussion of this case above, at p 157.

⁶⁰ *R v D* (Unreported, High Court, New Plymouth, Laurenson J, 29 October 2001) [19].

The offender was charged with murder and the Crown relied on s 167(b). The only issue at trial was the defendant's state of mind at the time of the lethal attack.⁶¹ Defence counsel conceded that the offender had intended to cause bodily injury to the victim, but denied he intended to kill her. This claim was bolstered by medical evidence that 'anybody suffering death in those circumstances was unlucky'.⁶² Defence counsel told the jury that they must be sure that at the time, and in the circumstances, the offender knew that the beating was likely to kill the victim - 'not that he should have, not that *you* would have'.

The judge is reported as directing the jury that it was the Crown's contention that the ferocity of the lethal assault, and earlier warnings to the offender from his friends that his violence would one day result in his partner's death, constituted evidence that the offender knew there was a real and substantial risk of death when he punched the victim up to 15 times about her face. However, defence counsel argued that the offender was a heavy alcohol and drug user, which may have meant he was not really conscious of the possible results of his attack. 'Violence in the household had been as common an event as breakfast and there was something of the Once Were Warriors syndrome about the family'. The judge noted that while the Crown argued the offender's 'remorse was irrelevant to the case; the defence had said his remorse and attempted suicide was a startling revelation of something totally unexpected'.

The jury acquitted the offender of murder.

The offender's probation officer stated that the offender believed he was a 'victim of the system'. The offender also had difficulty accepting that his persistent violence towards his partner was either unacceptable or unwarranted. The sentencing judge noted the jury finding indicated that '[t]his was an unintended and unexpected death'. The doctor described the woman's death as 'unlucky' and the Crown accepted that the killing was unintended. However, the judge responded:

From my point of view that may be the correct analysis, based on those two perspectives. I have to say that in a case where a man strikes a woman 15 times around the head, and any one of six blows could cause death, I don't find that an unlucky death. There were six chances that death could have been caused at least.⁶³

A police detective told the media 'this was a tragic case and one that could have been avoided...Firstly, the young lady could have got out of the relationship and secondly [the offender] could have resisted the

⁶¹ Ibid [2].

⁶² Ibid [30].

⁶³ Ibid.

temptation to beat her. Unfortunately he didn't and as a result she's deceased, he's in prison and their four children don't have any parents'.

Joan Williams notes the abiding persuasiveness of arguments that women choose their own oppression.⁶⁴ It is disappointing to find a senior police officer implicating the victim in her own death rather than acknowledging barriers to escape. Portraying the 'Once Were Warriors' syndrome as a 'family' problem and the victim as freely choosing to remain in a relationship in which violence was as 'common an event as breakfast' normalises the violence and implicates the victim in the offending. The probative force of evidence that persons close to the couple feared the offender would kill the victim and repeatedly warned him to that effect is thereby diminished.

Following the murder trial and acquittal, Crown counsel in this case reportedly told the media that 'it was always difficult to get a murder conviction [in intimate femicide cases] because it was often hard to prove murder was the intent':

When your talking about a bashing, the problem is many bashings don't kill. In order to show the person knew it was likely to kill you've really got to have something more. In this case we did, we had some warnings...(but) he tried to commit suicide afterward which shows a certain amount of remorse about what happened.

Jurors who do not have specialised knowledge of the dynamics of domestic violence have no tools to deconstruct courtroom portrayals of battering relationships. Domestic homicide research indicates that 'an unplanned suicide out of remorse appears to be an extremely rare act'. Often the

⁶⁴ Joan Williams, 'Deconstructing Gender' in Patricia Smith (ed), *Feminist Jurisprudence* (1993) 531,545, noting: 'The professional who removes herself from the fast track is only part of the syndrome by which women systematically "choose" economic marginalization.' George Buzash, 'The "Rough Sex" Defense' (1989) 80 J.Crim.L.&Criminology 557, 558, discusses the contention that women choose their own oppression in the context of a 'rough sex' defence. This defence 'asserts that the victim literally "asked for" the conduct that led to the homicide and that the homicide was the result of sexual practices to which the victim consented, and may have even demanded'. Cheryl Hanna, 'No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions' (1996) 109 Harv.L.Rev. 1849, 1876, describes how the operation of this analysis in sub-lethal domestic assault cases has a chilling effect upon a woman victim's willingness to testify. Kevin Dawkins, 'Criminal Law' [1997] NZ Law Review 20, 46, discusses the English Court of Appeal decision in *R v Wilson* [1996] 3 WLR 125 in which the husband branded his wife on her buttocks with a hot knife. He concludes that the *Wilson* Court was 'entirely right in principle' to hold that consensual activity between husband and wife in the home is not normally a proper matter for criminal investigation, let alone criminal prosecution. Dawkins' discussion illustrates the way systemic gender inequalities disappear once male violence in the context of intimacy is equated with romantic love.

killer will leave instructions, notes, or other evidence showing the murder/suicide was planned.⁶⁵ Most suicides or attempted suicides in intimate relationships occur in the context of estrangement and an inability by the men to accept what they perceive to be a rejection of them and their role of dominance over the victim.⁶⁶ Murder of multiple victims and suicide is an almost exclusively male activity and this is also consistent with feelings of possessiveness and control which can extend to children, men who are perceived as sexual rivals, other people who are killed while trying to protect the woman, as well as the woman herself.⁶⁷ Suicide attempts are 'a frequent response by batterers when they have killed the object of their control with whom their identity is intertwined. Simply put, this loss brings with it inevitable feelings of rejection and abandonment which are the twin terrors at the root of many batterer's abusive personalities.⁶⁸ Since suicide attempts and threats are established risk factors for lethal violence *against a woman partner*, legal constructions of this behaviour as supporting an inference that batterers lacked the necessary murderous intent should be highly controversial.

The three-stage cycle theory of violence identified by Lenore Walker is characterised by a build-up of violence in the first two stages, and following an eruption of violence, remorse, apologies and promises to change during the third stage.⁶⁹ Women are thereby persuaded to extend multiple opportunities to abusers to repent and perpetrate further abuse. Since remorse and apologies are integral to this cycle of violence, linking the killer's remorse to the issue of mens rea appears patently inappropriate. The offender in the above case was not so remorseful that he endeavoured to seek medical help for the victim as she lay unconscious for several hours. The woman's father expressed his anger that the offender failed to call an ambulance for his daughter, and instead left her to die alone in the house. The sentencing judge also noted that the offender appeared more concerned about what would happen to him as a result of the killing, and it was difficult to ascertain whether his remorse was real or contrived.⁷⁰

⁶⁵ Gerris Serran and Philip Firestone, 'Intimate Partner Homicide: A Review of the Male Proprietariness and the Self-Defense Theories' (2004) 9 *Aggression and Violent Behaviour* 1, 5.

⁶⁶ Angela Browne, Kirk Williams and Donald Dutton, 'Homicide Between Intimate Partners: A 20-Year Review' in M Dwayne Smith and Margaret Zahn (eds) *Homicide: A Sourcebook of Social Research* (1999) 149, 159, discussing research on estrangement homicide.

⁶⁷ Serran and Firestone, above n 65, 5.

⁶⁸ Raeder, above n 6, 1469-1470 (citations omitted).

⁶⁹ See, eg, Lenore Walker, *The Battered Woman Syndrome* (1984) 95-104.

⁷⁰ *R v D* (Unreported, High Court, New Plymouth, Laurenson J, 29 October 2001) [9].

Susan Atkins and Brenda Hoggett note a longstanding belief among legal practitioners that the lower classes take a certain amount of violence for granted. Wives were even believed to 'regard an occasional thrashing as a sign of their husband's affection'.⁷¹ Considerable latitude was therefore afforded to violent husbands when the parties came from the poorer classes where marital violence might be construed as 'horseplay' or mere 'rough and tumble'.⁷² Contemporary depictions of battering as 'common an event as breakfast' also invite juries to consider wife battering as a normal feature of certain households. In a further case of battering escalating to lethality the jury were told by defence counsel to eschew standards of 'political correctness' and evaluate the offending according to the geographical location of the couple's home. The jury were informed that: '[This] was not your politically correct family. We are talking about a Glen Innes family. It is a tougher lifestyle...real life here'. Once 'real life' is presented as synonymous with wife beating the significance of repeat victimisation as a red flag for dangerousness/lethality disappears.⁷³

An Unlucky Death: Case Study T/00/5

Andrew, the 29 year-old male offender was charged with murder after beating Eliza, his 45 year-old wife to death. Andrew denied the murder charge and a further charge of sexual violation by unlawful sexual connection. At trial Andrew elected not to give or call any evidence. At the completion of Crown evidence, Andrew pleaded guilty to the sexual violation charge.

The Court heard that Andrew had been drinking at a local hotel on the day of the killing and later joined Eliza at her Christmas staff function. The couple went with a group of Eliza's co-workers to continue drinking at the hotel. Eliza became 'grossly intoxicated' and her sister and a friend put her in a car outside the hotel where she 'flaked out' on the back seat. Andrew arranged for a friend to drive himself and his wife to his brother's house. Once there, Andrew took Eliza into a room and beat her about the head and body. Eliza was struck about the head at least 10 times sending shockwaves through her brain which caused the massive haemorrhaging that killed her. The jury also heard that there were bite marks matching Andrew's teeth over his wife's pubic, inner thigh, and shin areas. After being encouraged by family members to

⁷¹ Susan Atkins and Brenda Hoggett, *Women and the Law* (1984) 128.

⁷² Ibid 129. Reva Siegal, "'The Rule of Love": Wife Beating as Prerogative and Privacy' (1996) 105 Yale LJ 2117, 2133-2134, notes that US law traditionally harboured the belief that working class and poor women tolerate a certain level of violence at the hands of their husbands. '[J]udges reasoned about the propriety of violence in the relationship with attention to the economic status of the married couple, with the result that the evidence required to prove 'extreme cruelty' varied by class, on the doctrinally explicit assumption that violence was a common part of life among the married poor'.

⁷³ The perception that certain families should not be judged by the standards of middle class Pakeha society was explicitly rejected by the Family Court in *P v P* (2000) 19 FRNZ 637.

contact the police, Andrew reported his wife's death. He originally stated Eliza's injuries were the result of her falling and striking her head on concrete.

Crown counsel told the jury that there was no doubt from the evidence heard during the trial that Andrew intended to kill his wife. Eliza was violently struck in the head at least 10 times. 'This was a grossly intoxicated and defenceless woman who was savagely attacked.' Although Andrew was drunk, he was still able to act logically and form an intention to kill. However, defence counsel responded that Andrew never intended to kill his wife. While there was an empty bottle found in the room where the beating took place, there was no evidence that Andrew used the bottle during the attack. In a police interview, Andrew stated that he thought his wife was asleep after he beat her and put her in the car before driving to their home. Andrew's brother gave evidence that Andrew informed him that he had killed his wife, but not intentionally. Counsel told the jury that while the couple's relationship had been stormy and violent, 'this situation was never meant to happen'. The jury acquitted Andrew of murder.

The jury appear to have been invited by defence counsel to draw inferences about Andrew's state of mind from the fact that he had not used the empty bottle as a weapon during the lethal attack. Yet Eliza was violently struck in the head at least 10 times. As discussed above, in *Case Study D/00/7* the victim was punched around 15 times in the head and any one of six blows could have killed her. Although the Crown in the latter case explained that 'something more' than a prolonged bashing is necessary to establish the requisite knowledge and intent, it is not possible for a man to repeatedly punch a woman in the head without running the risk of killing her - many women die as a result of such assaults. Consequently, the need for 'something more' than a protracted and savage assault involving 'extreme' violence before the necessary inference of knowledge can be drawn is deeply problematic.

C The 'Respectable' Habitual Batterer

Edwards observes that the way *modus operandi* and especially male body force has been constituted in law reveals implicit assumptions about male violence toward women.⁷⁴ As demonstrated in the following case, failure to acknowledge the power and control dynamics of battering facilitates the re-presentation of the habitual batterer as a 'respectable' person.

⁷⁴ Edwards, above n 1.

The 'Respectable' Habitual Batterer: Case Study S/99/1

On New Year's Eve, 36 year-old Jason left the hotel where he had been drinking to visit Della, his 31 year-old girlfriend, who had been drinking rum at home. He returned to the hotel and continued to drink until he returned to Della's home after midnight.

The pair had an argument, after which [Jason] pushed and punched [Della] then picked her up and threw her across the bed, striking her head on the wardrobe door. When she continued to argue, [Jason] punched her twice and threw her out of the bedroom. She was then in a subdued state of semi-consciousness, [the judge] said.

Jason pleaded guilty to a charge of manslaughter. He acknowledged that he had struck Della several times. After cleaning her blood from walls, carpet and bed, he picked her up from the floor, placed her on the bed and fell asleep beside her. The next morning, Della was in the same position in bed and he assumed she was sleeping off the effects of the rum. He left her for that day, and that night he again slept beside the unconscious woman. On the morning of January 2, Jason bathed Della, cleaned her injuries, and unsuccessfully attempted to revive her. He then called Della's family. An ambulance was called and Della was taken to hospital, where she died three days later. The prosecutor told the court Jason had cooperated with the police when questioned and was 'visibly upset' when he heard how ill his partner was. The couple had a 'close relationship' and Jason 'often baby-sat [Della's] five children'.

The sentencing judge is reported as stating that both parties had been drinking, and Della 'was seriously affected by alcohol'. The killing was described as a 'disgraceful episode'. However, the judge accepted that Jason was considered 'a respectable person' who was truly sorry for what he had done. Although the offence called for a sentence of six years' imprisonment, having regard to Jason's 'good points' this could be discounted to four years' imprisonment. (Details of Jason's 'good points' were not available.) The judge is reported as expressing 'concern' at Jason's earlier statement that 'it normally took a couple of punches before [Della] quietened down'.

The basis for the exercise of prosecutorial discretion to charge Jason with manslaughter rather than murder is unknown. A 'common sense' assumption that repeat victimisation has little or no potential for lethality, and related inference that Jason lacked the requisite murderous knowledge and intent may supply the explanation.

Domestic violence programme providers note violent men do not believe female partners have the right to argue, negotiate or debate with them. In these circumstances, physical force is used to

silence debate and reassert male authority.⁷⁵ However, Jason's use of violence to silence Della's dissent is obscured by judicial acceptance that Jason could reasonably be described as a 'respectable' habitual batterer. As discussed above, this character enhancement of domestic violence offenders also masks the theme of control in cases of separation violence.⁷⁶

Jason's failure to promptly seek medical assistance for Della was not reported as a factor which was taken into consideration at sentencing. In many, if not most cases involving battering escalating to lethal violence offenders failed to seek immediate medical assistance for their victims. While this raises the issue of potential liability under s 151 *Crimes Act 1961*, which imposes a duty to provide the necessaries of life and could found a murder conviction if the offender comes within any of the provisions of s 167, this aspect of intimate femicide often went unremarked.

VI MANIPULATING THE RED FLAG OF REPEAT VICTIMISATION FOR THE BENEFIT OF THE BATTERER

Since courtroom constructions of battering escalating to lethality steer understanding away from women's greater vulnerability to physical assaults, and the abuser's history of violence as a red flag for lethality, law provides opportunities for unjust, even perverse responses to batterers who kill.

A Using the Harmful Effects of Battering to Exculpate the Habitual Batterer

A large body of research has demonstrated the physical, emotional and mental harm which can accrue to women in battering relationships.⁷⁷ Sue Griffith's study of women's reactions to violence found three distinct response stages. The women's initial reaction was anger: at themselves for allowing the abuse; at the legal system which failed to punish the men with any degree of seriousness; and at the outcomes of the violence. This response ceased mainly as a result of the men's behaviour. The batterer's greater strength prevented the women from fighting back, while their use of apologies and promises to reform ensured women who left subsequently returned to the relationship. This triggered the shift into the second response stage in which use of tranquillisers, alcohol and/or illicit drugs as a means of blocking out the effects of the violence and the mental strategy of 'blinking out' represented the least potentially lethal responses for the men, but the most

⁷⁵ R Emerson Dobash and Russell Dobash, 'Men's Violence and Programs Focused on Change' (1997) 8 *CICJ* 243, 250.

⁷⁶ See, above, at p 122.

⁷⁷ See, eg, Illeana Arias, 'Women's Responses to Physical and Psychological Abuse' in Ximena Arriaga and Stuart Oskamp (eds), *Violence in Intimate Relationships* (1999) 139

damaging for the women. Potentially lethal resistance as the final response stage represented the women's determination to survive in the face of continued violence and diminishing response choices.⁷⁸

However, as illustrated by the following case study, the relief and numbing that some battered women seek through drink or drugs may be exploited by defence counsel to the advantage of the habitual batterer who kills.

Exploiting the Harmful Effects of Battering: Case Study R/01/8

Grant, the 45 year-old offender and Polly, his 39 year-old de facto partner of 20 years had two adult children, a son age 21 and daughter age 20 years. Grant had a number of prior convictions but none 'in the adult Court'. The sentencing judge noted Grant had a history of violence towards Polly. Evidence from a medical practitioner revealed Polly had previously sought medical attention for injuries arising from his assaults. The couple's children also knew that their father beat their mother.⁷⁹ Polly's father 'explicitly' detailed past incidents of violence and serious injuries his daughter had sustained at Grant's hands over the years. The judge noted Polly's father feared for his daughter's life and safety but could not get her to leave Grant.⁸⁰ Despite a long history of assaults against Polly, none were apparently reported.

The salient features of this homicide were recited by the judge from the police summary of facts. The couple attended an all day party at the home of Polly's brother. Grant was drinking beer and rum or whisky. He went home in the early afternoon 'for a sleep' and Polly stayed on at the party. Grant returned towards the end of the day and began drinking again. He argued with Polly, apparently because she had not returned home with him on the earlier occasion, and 'slapped her under the chin'. Polly's brothers stepped in 'to calm things down'. Grant went home about 10.00 pm and Polly's brother took her home an hour later. Her brother, on whose opinion the judge placed some weight, stated at depositions and in a victim impact report that because of the prior argument, Polly was afraid to return home and feared she would be subjected to further violence by Grant. Nevertheless, she was driven home.

Upon her arrival, Grant is described as slapping Polly several times about the head, causing her nose to bleed, pushing her outside and locking the door. Polly then tried to sleep in the wash-house but Grant went out and forced open the door. The judge stated Polly's head might possibly have been hit at this point.

⁷⁸ Sue Griffith, 'Women, Anger and Domestic Violence: The Implications for Legal Defences to Murder' in Jalna Hanmer and Catherine Itzen (eds), *Home Truths About Domestic Violence: Feminist Influences on Policy and Practice. A Reader* (2000) 133, 141-142.

⁷⁹ *R v R* (Unreported, High Court, Napier, Durie J, 18 October 2001) [15].

⁸⁰ *Ibid* [10].

Polly told Grant to leave and he apparently did. Later, Polly sought re-entry into the house. The couple argued again and Grant 'slapped' Polly about the head, knocking her to the ground. While Polly was lying on the ground, Grant 'slapped' her about the face. He then dragged her down the passageway to the bedroom, grazing her back and shoulder. Polly collapsed on the bedroom floor.

Polly's son arrived home about 1.00 am and saw his mother lying on the bedroom floor, breathing, but with some blood evident on her face. He was unconcerned, apparently because his mother had slept on the floor in the past. At 7.00 am, the son returned to his mother who was still breathing, but he could not wake her. He left the house and when he returned a short time later, his mother was dead. Death had resulted from a haemorrhage to the brain. Grant was charged with murder.

Grant denied punching or kicking Polly, and also denied he had cleaned blood from the floor or walls. However, scientific evidence showed blood had been wiped off a wall in the bedroom and, as Polly was dragged along the hallway, bloodstains were left on the carpet. At depositions, a pathologist gave evidence of external injuries to Polly's head which included extensive bruising, abrasions and grazing. Polly also had numerous cuts and bruises about her body, arms, legs and hands. The pathologist concluded Polly had died from a subdural haemorrhage resulting from force being applied to her head causing a relatively violent rotational movement. He was unable to say which of the injuries resulted in the haemorrhaging but identified any one of four blows which might have caused the necessary rotational movement of Polly's head. These were: an injury to the left side of Polly's temple; one to her jaw; an injury on the point of the jaw; and a graze to the edge of Polly's eyebrow.⁸¹

Shortly before the trial, defence counsel produced a report from a neuropathologist stating that it was possible Polly may have had a susceptibility to tearing of veins draining the brain due to a degree of brain shrinkage. Heavy alcohol intake over many years can lead to brain shrinkage. Since there were no fractures of the skull or facial bones, this was consistent with the fatal injury to Polly being 'moderately severe'. Such 'moderately severe' blows may not have been deadly to a person without that susceptibility.⁸²

The Crown accepted the defence medical evidence, and as a consequence, the indictment for murder did not proceed. Grant pleaded guilty to a charge of manslaughter. The sentencing judge noted, and the Court of Appeal later accepted, that the violence associated with Polly's death was part of a continual series of assaults and in those circumstances it was a 'violent and sustained assault'.⁸³ However, the judge also noted

⁸¹ *R v R* [2002] CA 371/01 (Unreported, Gault, Blanchard and McGrath JJ, 12 February 2002) [9].

⁸² *Ibid* [12, 23].

⁸³ *Ibid* [20].

that Grant had 'slapped' Polly, and medical evidence did not suggest 'the strong exertion of force'.⁸⁴ The judge noted a previous case involving a woman who died after being 'pushed' against a door where it was held that the appropriate starting point for the sentence must have regard to the almost accidental cause of death.⁸⁵

Given the lack of evidence of 'extreme violence' the judge noted the more aggravating feature was Grant's ongoing violence over years and sustained violence on the particular night in question. Although Grant did not know of the possible shrinking of Polly's brain, he did know that she suffered from diabetes, yet his assaults against her continued. After noting the Court of Appeal had accepted that sterner sentences were required for domestic violence, the judge discounted the sentence by one year for Grant's guilty plea, and sentenced him to seven years' imprisonment. As he did so, the judge stated: 'A sentence significantly more than 7 years' imprisonment would in my view be excessive and crushing, depriving you of all hope and that is the sentence of the Court'.⁸⁶

On appeal, the Court of Appeal noted that even without the issue of Polly's possible susceptibility to injury, the Crown had acknowledged this was always going to be a case in which a charge of murder would be difficult to prove.⁸⁷ The Court noted Grant knew Polly was not in good health, and overall, the circumstances of the assaults could not be treated as unlawful acts of violence, which, although having fatal consequences, were 'comparatively minor'. Since the penalty must reflect the Court's denunciation of a pattern of domestic violence associated with excessive alcohol consumption, while the eight year starting point was 'stern', and the reduction of twelve months 'not generous', the sentence was 'within the range open to the judge' and the appeal was dismissed.⁸⁸

Edwards notes men's use of body force becomes a highly decisive factor in cases where the defence seeks to rebut an intention to kill by arguing that the method of killing was not the cause of death. For example, strangulation may be accompanied by vagal inhibition when, as a result of strangulation, the heart suddenly stop and asphyxia results. Since vagal inhibition may occur suddenly upon the first few seconds of strangulation, the defence uses this supervening event to undermine prosecution efforts to establish intention.

⁸⁴ *R v R* (Unreported, High Court, Napier, Durie J, 18 October 2001) [6].

⁸⁵ By contrast, research by Loretta Stalans and J Arthur Lurigio, 'Public Preferences for the Court's Handling of Domestic Violence Situations' (1995) 41 *Crime and Delinquency* 399 found women victims of violence were fearful of a 'push' by a male partner as a result of the injuries envisaged.

⁸⁶ *R v R* (Unreported, High Court, Napier, Durie J, 18 October 2001) [34].

⁸⁷ *R v R* [2002] CA 371/01 (Unreported, Gault, Blanchard and McGrath JJ, 12 February 2002) [12, 26].

⁸⁸ *Ibid* [23, 24, 28].

The defence strategy employs a language which renders an atrocious act benign, stripping it of intent, design and dangerousness. The language 'pressure to the neck' supported by cardiac arrest/vagal inhibition as cause of death robs the act of its violence, heinousness and dangerousness and its lethality potential.⁸⁹

A similar strategy is evident in defence counsel's submission that Polly may have had a pre-existing condition (brain shrinkage) of which Grant was unaware. While it remains uncertain whether this possible condition played a role in Polly's death, what *is* certain is that Grant knew Polly suffered from diabetes, yet his violence toward her continued.

Legal descriptions of women being 'slapped' rather than beaten to death rhetorically efface the lethality potential of male violence toward women. Although habitual batterers frequently claim (and courts accept) that they failed to appreciate the lethality risks associated with their violence; family, friends, as well as deceased victims, were often well aware of the risk to life and limb that these men posed. Polly's family knew the risk of Grant's violence to Polly and 'feared for her life and safety'.⁹⁰ The family of the deceased woman and friends of the offender in *Case Study D/00/7* not only recognised the real or substantial risk of death occurring as a result of the offender's violence, but repeatedly warned him to that effect.⁹¹ Nor was it uncommon to find deceased victims had predicted their own demise at the batterers' hands.⁹²

The Court of Appeal noted that the penalty imposed on Grant reflected the need to denounce a pattern of domestic violence associated with excessive alcohol consumption culminating in death.⁹³ However, if no minimum period of imprisonment is imposed; those serving a sentence of imprisonment of more than two years may generally be released after serving one-third of their sentence.⁹⁴ It is doubtful whether habitual batterers who kill and then become eligible for parole after serving one third of their sentence - in some cases little more than one or two years'

⁸⁹ Edwards, above n 1, 250. See, also, discussion of *Case Study M/02/8* below.

⁹⁰ *R v R* (Unreported, High Court, Napier, Durie J, 18 October 2001) [10].

⁹¹ See discussion of this case above, at p 287.

⁹² These cases are discussed in the following chapter.

⁹³ *R v R* [2002] CA 371/01 (Unreported, Gault, Blanchard and McGrath JJ, 12 February 2002) [24].

⁹⁴ Sections 20 and 84 *Parole Act 2002*; Warren Young and Neville Trendle, 'Developing the Sentencing Framework: The Sentencing Act and Beyond' in J Bruce Robertson (ed) *Essays on Criminal Law: A Tribute to Professor Gerald Orchard* (2004) 50, 68.

imprisonment - are likely to recognise such sentences as implying denunciation of killings in the context of a history of violence toward the victim.⁹⁵

Rather than acknowledge the devastating emotional and psychic effects of battering on women, there are strong hints in these cases that courts view battered women who drink or take drugs as not completely 'innocent' victims. In *Case Study S/99/1*⁹⁶ the victim was described by the sentencing judge as 'seriously affected by alcohol'. Yet there is no evidence of violence on her part. In the above case, the sentencing judge described Polly's own way of life as making her more susceptible to severe injuries. No connection is made between Polly's drinking and Grant's violence. The Court of Appeal also describes drinking as 'common in the failures of the couple'.⁹⁷ This analysis inculcates Polly in the offending although there is no evidence at all that she was violent. Indeed, the sentencing judge notes a description of Polly as the 'breadwinner' of the family, and Grant, as 'the one who beat her'.⁹⁸ In *Case Study H/00/9*, discussed below, the offender beat his partner to death when she demanded he leave her home. Rather than acknowledge this as a separation violence scenario, the Court of Appeal notes that the attack occurred 'in the course of an argument after the deceased had returned home intoxicated from a party'.⁹⁹ These cases point to an unspoken assumption that intoxicated women are provocative or at least problematic victims.

B Using Injuries Inflicted During a Previous Assault to Exculpate the Habitual Batterer

In an extraordinary manipulation of the red flag of repeat victimisation, law permits batterers to capitalise on an injury their victims may have sustained during a previous assault to avoid a murder conviction. In the following case, the offender served a period of imprisonment for a previous assault on the victim and killed her shortly after he was released on parole. No complaint was laid in relation to an assault which was apparently perpetrated a few days before the final lethal attack. Defence counsel argued that an injury occasioned during the earlier assault may have increased the victim's vulnerability to a further attack.

⁹⁵ The New Zealand Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006) recently recommended parole eligibility for long-term sentences should be 12 months, or two-thirds of the nominal sentence, whichever is the greater. However, the Commission envisaged a compensatory judicial adjustment in sentencing practice so that prisoners would not serve more actual time as a result of parole changes.

⁹⁶ See, discussion of this case above, at p 293.

⁹⁷ *R v R* [2002] CA 371/01 (Unreported, Gault, Blanchard and McGrath JJ, 12 February 2002) [15].

⁹⁸ *R v R* (Unreported, High Court, Napier, Durie J, 18 October 2001) [10].

⁹⁹ *R v H* [2002] CA 28/02 (Unreported, McGrath, Williams and Salmon JJ, 20 June 2002) [13].

Exploiting an Injury from a Prior Assault: Case Study H/00/9

Terry, the 34 year old offender, had a history of violence against Margaret, his 42 year old partner. Margaret took out a Domestic Protection Order against Terry on 7 April 2000. On 27 July 2000, Terry was convicted of assaulting Margaret and imprisoned for nine months. The agreed statement of facts relating to this assault recorded that Terry launched an attack on Margaret, punching her in the head with a closed fist. When Margaret fell, Terry continued to punch her in the head and body and drag her about by her hair. As a result of this attack Margaret received 'numerous injuries' including two fractured ribs and contusions about the body.¹⁰⁰ According to police evidence, on the morning of the day Terry was sentenced to imprisonment for this assault, he launched a further attack on Margaret. It appears no formal action was taken regarding the latter assault and breach of the protection order although the Crown sought to admit police evidence of these offences at Terry's homicide trial.¹⁰¹

After serving six months of the prison sentence Terry was released on parole. Despite his previous assaults on Margaret, and the existence of a protection order, it appears Terry was paroled to Margaret's home.¹⁰² Less than three weeks after his release (19 days) Terry beat Margaret to death. Terry was charged with murder. However, a charge of manslaughter was substituted prior to the trial.¹⁰³

The Court heard that Margaret arrived home from a function at a friend's house around 11 pm. Neighbours heard her 'yelling and screaming at [Terry] to get out of her house'. They heard Terry complain that Margaret had spent money he had given her and later heard household items being smashed. At this stage, a neighbour called the police. Meantime, neighbours heard Terry 'yelling and screaming' at Margaret and then heard a series of punches and four or five loud thumps. Terry was heard to say: 'Is that what you wanted, look at you lying there...I don't feel sorry for you'. Terry then swore and said he would move out of Margaret's home the following morning. The police arrived some five minutes after the punching noises were heard to find Margaret unconscious on the floor. She died in hospital. Terry maintained that he had not assaulted Margaret on the night she died and refused to make a statement about the events that occurred. He elected not to give evidence at his trial.

¹⁰⁰ Ibid [17].

¹⁰¹ *R v H* (Unreported, High Court, Auckland, Williams J, 18 September 2001) concerned a bail application by the accused. The judge noted that the Crown had applied under s 344A *Crimes Act 1961* to introduce police evidence that the offender had committed a further assault on the victim on the same day he was convicted and sentenced for the earlier assault. The outcome of this application is unknown.

¹⁰² *R v H* [2002] CA 28/02 (Unreported, McGrath, Williams and Salmon JJ, 20 June 2002) [2], notes the offender was living with the victim at the time he killed her.

¹⁰³ *R v H* (Unreported, High Court, Auckland, Williams J, 18 September 2001) [2], where the judge notes, without further discussion, that the manslaughter charge was substituted some four months after Margaret's death.

A pathologist stated that Margaret's injuries were not consistent with one blow or fall or injury but were probably the result of several blows. However there were no fractures and 'moderate force' rather than 'really major force' had caused the injury.¹⁰⁴ A neuropathologist gave evidence that 'second impact syndrome' was a 'rare but well recognised possibility' when a person suffers two separate head injuries some time apart. In her opinion, Margaret had suffered an earlier injury to her head some 10 to 15 days before the final assault. The cumulative effect of the original subdural haematoma and subsequent 'moderate' use of force could result in swelling of the brain, coupled with bleeding and blood clotting inside Margaret's skull, which was the immediate cause of her lapsing into a coma and dying. The expert witness did not express an opinion on whether Margaret's death was due to second impact syndrome or not. The jury convicted Terry of manslaughter.

At sentencing, the judge noted that the violence 'did not go beyond slapping or punching' Margaret. There was also 'some speculation during the trial that Terry might have thrown her against a wall'.¹⁰⁵ The judge declined to take into account evidence of previous incidents of violence by Terry toward Margaret as it was hearsay, and too limited to found inferences which the Court could rely on.¹⁰⁶ However, the judge did take into account Terry's prior conviction for assaulting Margaret, and the fact that he was on parole at the time of the offending. Defence counsel argued that since Terry had no knowledge of the pre-existing subdural haematoma, he could not have foreseen Margaret's death as the likely consequence of his final lethal assault. Although the Crown argued that the earlier brain injury had also been caused by Terry, defence counsel dismissed this assertion as 'pure speculation'. The judge noted that while there was 'room for suspicion' that Terry had also caused the earlier injury, there was insufficient evidence. The Court of Appeal dismissed Terry's appeal against his sentence of nine years' imprisonment.

The police detective in charge of the case told reporters that the case 'highlights that domestic violence can end up with really tragic consequences'.

Terry's lethal retaliation in response to Margaret's demand that he leave her home was a predictable response, given his past history of violence towards Margaret. While as noted by the police detective, Margaret's death highlights the 'tragic consequences' of domestic violence, the case also highlights the tragic consequences of decisions that it is safe for habitual batterers to be paroled to the homes of their former victims.¹⁰⁷

¹⁰⁴ *R v H* [2002] CA 28/02 (Unreported, McGrath, Williams and Salmon JJ, 20 June 2002) [5].

¹⁰⁵ *Ibid* [10].

¹⁰⁶ *Ibid* [8].

¹⁰⁷ See, discussion of this practice in Chapter Five.

Although social science research reveals habitual batterers who refuse to desist are highly dangerous men,¹⁰⁸ minimisation of the lethality potential of male violence toward women renders the male body benign.¹⁰⁹ Consequently, despite an acknowledgement that the assault on Margaret was sustained and involved a number of blows; the violence is trivialised as not going 'beyond slapping or punching of the deceased'. Habitual batterers may therefore exploit an injury previously inflicted, and defence counsel can capitalise on the low reporting rate of domestic assaults by dismissing prosecution assertions that the batterer was responsible as 'mere speculation'.

C The 'De Facto "Habitual Batterer" Defence'

The habitual batterer in the above case chose not to admit responsibility for any prior injury to the victim. However, legal analyses which trivialise the dangers inherent in battering and ignore the red flag of repeat victimisation have created the potential for batterers to positively advance their histories of violence as negating an intention to kill. The researcher has termed this strategy the 'de facto "habitual batterer" defence'. This extraordinary, albeit uncontroversial (in the sense of absence of challenge or critique) legal analysis permits an offender who repeatedly assaults, terrorises, and finally kills his partner in a vicious attack involving use of two weapons, to rely on his past violent behaviour to avoid a murder conviction.

The absence of systematic indexing of domestic violence cases and related difficulties accessing data prevented an investigation into the popularity of the habitual batterer defence, either on its own, or in combination with other defences. Francis Dolan observes that US society pays scant attention to the 'story of a man who beats his wife to death and is charged with manslaughter because a record of beatings suggests that he did not intend to kill her this time'.¹¹⁰ This observation suggests that assumptions underpinning cases of battering escalating to lethality are not unique to New Zealand law.

¹⁰⁸ See, eg, Kerry Healey, Christine Smith and Chris O'Sullivan, *Batterer Intervention: Program Approaches and Criminal Justice Strategies* (1998) 62.

¹⁰⁹ Edwards, above n 1, 256.

¹¹⁰ Francis Dolan, 'Battered Women, Petty Traitors and the Legacy of Coverture' (2003) 29 *Feminist Studies* 249, 250, noting that the 'story of a man who beats his wife to death, and is charged with manslaughter because a record of beatings suggests that he did not intend to kill her this time, does not command our attention. However, the story of the wife who kills her brutally abusive husband can at least make it to the *Lifetime* channel'.

The De Facto Habitual Batterer Defence: Case Study M/02/8

Barbara was aged 13 years when she and Allen, the 20 year-old offender, commenced living together. Barbara had a child to Allen just before her 15th birthday and another child the following year. Barbara was 17 years old when she was killed by Allen in March 2002.

At the time of Barbara's death, Allen was serving a term of periodic detention and was subject to supervision. He was also on bail awaiting disposal of charges of assaulting Barbara's father with a weapon; possession of an offensive weapon on the same date; and common assault of the father on that date. (Whether the police opposed bail on the charge of assaulting Barbara's father, and details of earlier offending which resulted in periodic detention and supervision could not be established.) During the assault on Barbara's father, Allen allegedly attacked him with fists and knees, beat him with a broken piece of furniture, and menaced him with a knife, pricking the point of the knife into the father's head and shoulders. When defending the charges, Allen claimed the allegations were part of a conspiracy by Barbara's father to have him imprisoned. A statement from Barbara in support of this claim was presented to the Court. However, Allen was convicted on the charges and sentenced to 21 months' imprisonment. The jury at his murder trial were not permitted to hear evidence of this assault.

At his trial on a charge of murder, Allen pleaded not guilty to a representative charge of male assaults female. This charge related to assaults against Barbara between 1998 and 2001 and the sentencing judge noted that at the start of this period Barbara would have been only 13 years old. Some assaults covered by this charge possibly occurred when Barbara was pregnant.¹¹¹ However, Allen pleaded guilty to a representative charge of male assaults female covering prior assaults between April 2001 and March 2002. The sentencing judge noted these assaults included an 'extensive incident involving pulling [Barbara] around by the hair, kicking her in her head and elsewhere with [Allen's boots] and bashing her head against the wall'.¹¹² Barbara was admitted to hospital in March 2002 and was due to have a CT scan in April 2002.

The police had been called to the house some three months before the homicide and returned to the couple's home on the day of the killing to find Allen on the telephone, and Barbara lying dead in the hallway. They were informed by Allen that Barbara's father and an accomplice had killed her. The first police officer on the scene told the Court that Barbara was lying on her back, naked apart from a singlet top, with a white sock around her right elbow 'tourniquet fashion'. A pathologist later gave evidence of 44 injuries that Barbara had sustained, including a black eye and 11 injuries to her head and neck, 14 torso injuries, nine arm injuries and a variety of fresh and partly healed cuts and abrasions to her back. Barbara also had three injuries to her scalp, two of which reached the bone of her skull. In one the bone was chipped, and in the

¹¹¹ *R v M* (Unreported, High Court, Palmerston North, France J, 28 April 2003) [6].

¹¹² *Ibid* [7].

other it was indented. Barbara's arm was cut with a sharp object and her rib was fractured. She had older multiple bruising on various parts of her body and two broken ribs due to violence on an earlier occasion or occasions.¹¹³

During a videoed police interview, Allen was shown photographs of the three head injuries understood to have caused Barbara's death. The wounds were believed to have been inflicted with a broken length of broom handle used in a stabbing motion. Allen told police 'I've got nothing to say about it...I couldn't do that, man, not to my missus'. He denied there was violence in the relationship, stating that there were 'just disagreements'. Barbara, he said, was a 'very easy girl to bruise'. Allen could not explain the many injuries to Barbara's body and repeatedly accused the police of trying to confuse him: 'Honestly do you want me to turn round and say I murdered my girlfriend? I loved my missus too much and she loved me. There's no way...I would do any such bloody thing to my missus'.

Subsequently, in a voluntary videotaped statement, Allen admitted assaulting Barbara on the night of her death. He stated that the pair had been to a family outing where he 'got on the piss'. After being informed that an aunt he formerly lived with was shortly to arrive from Auckland he became angry and was still angry when the couple arrived home. Allen said he 'just lost it' and assaulted Barbara after she attempted to hug him. 'All I remember is sitting on the bed pretty angry...annoyed, angry, frustrated because my whole past was coming back, which I didn't want...I can't remember exactly what I did, but I can remember I was hitting her'. When asked why he had attacked Barbara, Allen responded that: 'She was the one that was there and I took it out on her'.

Allen claimed that following the assault, Barbara picked herself up from the floor and went to the bathroom crying - whereupon he then left the house. In response to a suggestion by police that Barbara was in fact lying in the hallway at the time Allen left, he replied: 'Prove it...I have nothing to say about it...when I left she was in the bathroom...why don't you go and ask the ghost okay?' Allen is also reported as accusing a police interviewer of trying to frame him for Barbara's death. 'I know what you are trying to do, so don't screw with my f***ing head mate...I know what you piglets are like...you don't know how much I loved her'. When asked about a broken rib Barbara had sustained, Allen replied his partner did not tell him much, and when questioned about the injuries she received on the night of her death, he responded that the police should 'go and ask the hospital'.

At trial, Allen elected not to give or call evidence in his defence. The Crown described Barbara as a 'fragile waif' weighing just 41 kilograms at the time of her death. A male witness who lived with the couple gave

¹¹³ Ibid [4].

evidence of verbal and physical violence perpetrated by Allen against Barbara. Following one assault, he and his friends physically restrained Allen to prevent further violence. Another male witness stated Allen regularly abused Barbara and would 'just beat her, pretty much, from head to toe' using 'fists, hands and sticks'. He said the injuries inflicted included bruising to Barbara's face and arms, 'fat lips' and 'black eyes'. Barbara's physical condition deteriorated in the time he knew the couple and Barbara went from 'skinnier to skinnier' and 'looked anorexic by the end'. To defence counsel, the witness acknowledged that he had done nothing to stop the abuse, although he had told his parents.

Barbara's mother gave evidence of an assault on her daughter by Allen during the time she lived with the couple around Christmas 2001. Barbara had taken Allen's dogs for a longer walk than Allen had anticipated and upon her return he became abusive and began throwing Barbara's clothes in the street. This episode attracted considerable attention in the neighbourhood and police were called. The police arrived, spoke with Allen, and left. Immediately afterward, Allen pulled the curtains, locked the doors and began to beat Barbara. Her mother told the Court she tried to intervene but was pushed back: 'He said that I had to sit there and watch and he was holding us hostage...he got numerous knives from the drawer and held them to her throat saying he would kill her. She was so frightened, she wasn't able to fight back'. As Allen was beating Barbara 'he was yelling, saying she couldn't be trusted...I really thought he was going to kill her at that point'. Barbara was admitted to hospital. Barbara's mother stated her daughter was unable to walk properly and developed a paralysis down the left side of her body. Although Barbara's condition improved she still had a profound limp, and experienced spasms down her left side, in her arm and her face. Barbara had been 'quite stressed' about the injuries which 'frightened her'. Under cross-examination, the mother was asked by defence counsel whether Allen's rage on the day of the beating was 'like something had taken him over'. The mother replied that it was 'something like that, just absolute rage'.

Defence counsel urged the jury to set aside prejudice, bias and emotion and to consider Allen's state of mind when he assaulted Barbara and what Allen believed might have happened to Barbara as a result of the attack. Reminding the jury that Allen had assaulted Barbara on a number of occasions in the past, counsel inquired of the jury: 'Why on this particular occasion, would he think that death might follow?'¹¹⁴ The jury acquitted Allen of murder.

The sentencing judge accepted that the manslaughter verdict was based on the claim that Allen had inflicted similar injuries on Barbara in the past without death ensuing, so could not have known that the injuries he inflicted during the final lethal assault were likely to cause her death. The judge noted that: 'Whilst that may

¹¹⁴ Defence counsel also suggested that it was possible an irregular heartbeat or a stroke could have reduced consciousness inhibiting the laryngeal reflex, causing Barbara to choke. Under cross-examination the pathologist regarded this possibility as 'highly unlikely'.

be a legitimate defence to murder, it equally must operate as a significantly aggravating factor when it comes to sentencing for manslaughter'.¹¹⁵

The pre-sentence report assessed Allen as at high risk of re-offending due to the combination of low motivation to change; lack of remorse; and lack of insight into his behaviour. Allen was sentenced to ten years' imprisonment with a minimum term of six years' imprisonment. On the first representative charge of assault relating to the period between 1 January 1998 and 1 April 2001 he was sentenced to six months' imprisonment. On the second representative charge, taking into account the guilty plea, Allen was sentenced to 12 months' imprisonment. All sentences to be served concurrently.¹¹⁶

The sentencing judge acknowledged Allen's lethal attack on Barbara was a sustained and violent one which involved use of two weapons, probably the jagged edge of a broomstick and a knife. Barbara's arm had been cut with a sharp instrument and her rib had been fractured. 'Considerable force' was used for the blow that chipped her skull and 'fairly considerable force' was required for the blow that led to indentation of her skull.¹¹⁷ The judge noted Allen knew at the time of his attack that Barbara was vulnerable because of her health and frailty. Allen had also acknowledged to police that he was present when Barbara was examined at hospital and an appointment made for a head scan.¹¹⁸ If such a prolonged and vicious attack on a young vulnerable woman cannot give rise to an inference that the habitual batterer knowingly engaged in actions 'where the risk is so appreciable that to indulge in the conduct is seen by society as the virtual equivalent of intentional killing',¹¹⁹ then it is difficult to know what kind of sustained violence would be sufficient to rebut the claims of habitual batterers that they lacked the requisite knowledge and intent.

Although the judge accepted that the de facto habitual batterer defence constitutes 'a legitimate defence to murder',¹²⁰ no reference is made to the body of knowledge from which this approach derives its legitimacy. Social science research does not support it. Indeed, the analysis directly contradicts empirical evidence regarding a pattern of masculine control and intentionality in

¹¹⁵ *R v M* (Unreported, High Court, Palmerston North, France J, 28 April 2003) [15].

¹¹⁶ Approximately seven months after Allen was convicted and sentenced for manslaughter and previous assaults on Barbara, he was convicted of the rape of a 12 year-old girl, the sexual violation of a seven year-old girl, the rape and other sexual violation of a 14 year-old girl and two charges of sex with under-age girls.

¹¹⁷ *R v M* (Unreported, High Court, Palmerston North, France J, 28 April 2003) [14].

¹¹⁸ *Ibid* [16].

¹¹⁹ *R v Piri* [1987] 1 NZLR 66, 79 (CA).

¹²⁰ *R v M* (Unreported, High Court, Palmerston North, France J, 28 April 2003) [15].

intimate femicide cases,¹²¹ and the potential for lethality inherent in a history of battering.¹²² The assertion that Allen could not have known his lethal attack would be likely to cause Barbara's death because he had inflicted similar injuries in the past without death occurring also appears patently ill founded. Allen had not inflicted this particular violence, in this particular way, with these particular weapon(s) on Barbara previously. If he had, Barbara would have died. Since men presently kill women without the aid of a weapon, the added factor of weapon use might be expected to support an inference of murderous intent. However, trivialisation of the dangers inherent in male violence toward women is so profound that in *R v W*, where the offender invaded his estranged partner's home and attacked her with a metal bar, the Court of Appeal attached 'some importance' to the shape and weight of the bar,¹²³ with no apparent recognition that men need not resort to a weapon - of whatever weight or shape - to beat a woman to death.

Permitting the red flag of repeat victimisation to be manipulated in this way highlights the importance of educating legal professionals about the dynamics of violent relationships and the interrelationship between domestic violence and domestic homicide.¹²⁴ The Victorian Law Reform Commission has also cautioned that progress in addressing gender bias through abolition of the provocation defence might be undermined by a substitute 'no intent' analysis under which violent men rely on extreme anger as negating an intention to kill.

[R]ecasting men's rage as a no intent defence is even more dangerous to women than the defence of provocation since it suggests that those people in a state of rage do not intend their actions, whereas

¹²¹ See, eg, Polk, above n 9, 178-179.

¹²² Sylvia Walby and Andrew Myhill, 'Assessing and Managing Risk' in Julie Taylor-Browne (ed), *What Works in Reducing Domestic Violence: A Comprehensive Guide for Professionals* (2001) 315; Metropolitan Police Service, *Findings from the Multi-agency Domestic Violence Murder Reviews in London* (2003) 16; Jeremy Travis, Research Preview (1998) citing research by Susan Keilitz, et al, Civil Protection Orders: Victims' Views on Effectiveness, National Center for State Courts (1998), finding 'the longer women experience abuse, the more intense the behaviour is likely to become and the more likely women are to be severely injured by their abusers'. See also, Desmond Ellis and Walter DeKeseredy, 'Rethinking Estrangement, Interventions and Intimate Femicide' (1997) 3 *Violence Against Women* 590 discussing the risks to women posed by antisocial and sociopathic batterers.

¹²³ [1999] CA 157/99 (Unreported, Keith, Tipping and Gallen JJ, 27 July 1999) [7] where the Court of Appeal suggested the fact that the metal bar with which the offender armed himself before entering the woman's home was 'four-sided and hollow' had 'some importance because it certainly did not have the weight of a solid implement of metal'. The Court also attached significance to the fact that the offender stated he did not bring the bar with him, but removed it from a fence he crossed in order to enter the property. However, since many victims of intimate femicide are literally killed at the hands of men, whose greater size and physical strength render a weapon unnecessary, the fact that the offender armed himself before entering the woman's home could alternatively be construed as evidence of deliberation and intentionality.

¹²⁴ Victorian Law Reform Commission, above n 27, [4.154], noting such understanding would have a significant impact at a number of stages in the legal process.

the defence of provocation acknowledged the intention but excused it on 'compassionate' grounds.¹²⁵

The Commission's warning may have proved prophetic. Defence counsel's inquiry of the mother in the above case whether the offender's rage during an earlier episode of violence was 'like something had taken him over' may mark the recasting of men's rage as a 'de facto no intent defence'.

VII CONSTRUCTIONS OF MENS REA IN BATTERED DEFENDANT CASES

Rebecca Bradfield's New South Wales study found a no intent analysis or 'de facto defence of "domestic violence"'¹²⁶ was the most frequent basis for a manslaughter conviction for battered women who killed violent male intimates. The deceased's violence was constructed in terms of its impact on the accused's psychological/emotional state. This effect, together with the accused's fear or anger before the killing, was advanced in support of a claim that the battered defendant lacked murderous intent. Since the emphasis at trial was on the woman's internal emotional or mental state, the 'external' (the deceased's violence toward the victim) was 'not seen directly - it does not itself provide a rational and reasonable account of the killing'.¹²⁷ Accordingly, while a manslaughter outcome in these cases *appeared* compassionate, this defence strategy came at the cost of a self-defence argument and possible acquittal for battered defendants.¹²⁸

Citing earlier research suggesting a tendency in criminal law to pathologise female defendants who commit serious crimes, while law supposedly treats men as rational agents,¹²⁹ Bradfield concludes that '[t]he challenge remains for the law to recognise the diversity of the experiences of women who kill, and the connection between their offending behaviour and their victimisation in a way that is not dependent on the pathologising or psychologising of women's experiences'.¹³⁰ However, the present research found the defence strategies identified by Bradfield in battered defendant cases

¹²⁵ Victorian Law Reform Commission, *Defences to Homicide*, Options Paper (2003) [3.193], citing National Association of Women and the Law, *Stop Excusing Violence Against Women, NAWL's Position Paper on the Defence of Provocation* (2000) 45. .

¹²⁶ Bradfield, above n 12, 151.

¹²⁷ Ibid 156.

¹²⁸ Ibid.

¹²⁹ Hilary Allen, 'Rendering Them Harmless: The Professional Portrayal of Women Charged with Serious Violence Crimes' in Pat Carlen and Anne Worrall (eds) *Gender, Crime and Justice* (1987) 81.

¹³⁰ Bradfield, above n 12, 158.

are also utilised on behalf of men who perpetrate intimate femicide.¹³¹ Thus while not disputing a tendency in criminal law to inappropriately pathologise the experiences of battered women; a similar tendency to pathologise men's domestic violence toward women appears to have been overlooked.

Ian Freckleton has denounced a 'forensic abuse syndrome' whereby diagnostic labels are taken from the clinical process in order to excuse criminal conduct.¹³² Citing Freckleton, Kevin Dawkins suggests that the challenge to orthodoxy posed by battered women who kill is whether present legal concepts such as reasonable force, 'can be understood and applied in a way that takes account of women's experiences of violence without rendering general defences to individuated exemptions based on psychological profiles and diagnostic stereotypes'.¹³³ This analysis of course overlooks the 'psychological profiles and diagnostic stereotypes' that routinely enter the courtroom when men perpetrate violence against women. Psychiatric evidence of pathological jealousy (the 'Othello syndrome'),¹³⁴ obsessive possessiveness, and fear of rejection are currently and uncontroversially accepted as evidence of psychological disabilities which render male offenders helpless victims of their emotions.¹³⁵

¹³¹ For example, claims that death arose from the highly charged emotional situation in which the killing took place, rather than any intention to inflict lethal violence, and suggestions that an accused obtained the weapon with some other less blameworthy intent, such as an intention to scare, are not gender specific. Representations of accused as 'tragic figures'; who are 'swept away, without volition'; or who continue to 'suffer considerable psychological pain as a result of the death of the deceased'; or who are experiencing 'retrospective amnesia' are also employed at the trials and sentencing of male offenders.

¹³² Ian Freckleton, 'When Plight Makes Right - The Forensic Abuse Syndrome' (1994) 18 *Crim LJ* 29.

¹³³ Kevin Dawkins, 'Criminal Law and Procedure' [1994] *NZRL Rev* 48, 62, lists what he describes as a 'litany' of syndromes. Those commonly employed when men kill women and claim provocation are missing from the list.

¹³⁴ See, eg, G Leong, J A Silva, E Garza-Trevino, 'The Dangerousness of Persons with the Othello Syndrome' (1994) 39 *J Forensic Sci* 1445.

¹³⁵ A male accused's depression, post-traumatic stress disorder or other mental disorder short of insanity is often central to the inquiry into the characteristics of the accused when the provocation defence is at issue. See, eg, *R v Dixon* (Unreported, High Court, Auckland, Chilwell J, 1 October 1982) where the judge ruled there was a credible narrative that the offender was suffering from a major depressive illness due to his wife's decision to separate from him and gain custody of the children. Mitigating narratives of male pathology continue to be employed when sentencing offenders who perpetrate serious and serial violence against women. For example, in *R v W* [1999] CA 157/99 (Unreported, Keith, Tipping and Gallen JJ, 27 July 1999) [15] where the offender's history of serious violence against women who attempted to leave him was attributed to his 'unusual family background which made it difficult for him to develop and maintain enduring relationships', his social isolation, his substance abuse and a car accident, the totality of which had 'left him at risk of behaving badly when relationships broke down'. See, also, Victoria Nourse, 'The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law' (1998) 50 *Stan.L.Rev.* 1435,1454, challenging the notion that criminal law limits its pathologising discourses to women. Nourse points out that, 'men have claimed for decades that they should be partially excused from spousal homicide when their emotions get the better of them. Few scholars, however, have urged that we eliminate the provocation defense because it diminishes men's moral agency' (citations omitted).

Bradfield dismisses any suggestion that her research endorses the proposition that battered women are 'getting away with murder'.¹³⁶ This indicates awareness that the study could be utilised in support of demands that abused women are punished as rational agents, rather than partially excused as pathological victims. However, by locating the battered defendant's problem within 'pervasive gendered stereotypes that construct violent female offenders as lacking agency and rationality',¹³⁷ Bradfield's study may become trapped within oppositional discourses of victim pathology and agent rationality, neither of which captures battered women's experiences.

Studies indicate that women's inability to effectively protect themselves from severe aggression and a lack of safe alternatives are common factor in incidents of lethal violence by women.¹³⁸ Thus rather than invoke the victim/agent dichotomy, it is important to focus upon Bradfield's finding that the emphasis on the battered woman's internal or mental state allows the 'external' - the deceased's history of violence and potential for future violence - to fade into the background. The battered woman's lethal response is thereby constructed in law as unreasonable. On this analysis, the battered defendant's lack of access to the defence of self-defence is not the result of acknowledging any actual mental or emotional harm the woman may have experienced as a consequence of battering.¹³⁹ Instead, the problem lies in law's failure to acknowledge the dangers inherent in battering relationships which deprives both battered defendants *and* battered victims of justice.

VIII CONCLUSION

Legal responses to habitual battering escalating to lethality fail to acknowledge the lethality potential of male violence toward women. Rather than acknowledge that men's fists are potentially lethal weapons, the present, almost macabre preoccupation with the number and type of blows struck, and whether batterers used 'light', 'moderate' or 'extreme' force to beat a woman to death

¹³⁶ Bradfield, above n 12, 144, notes her research 'is not an endorsement of the view advanced by those who would argue that stereotyped construction of female offenders means that women are "getting away with murder"' (citations omitted).

¹³⁷ Ibid 153.

¹³⁸ Browne, Williams and Dutton, above n 66, 158.

¹³⁹ The Victorian Law Reform Commission, above n 27, [4.117], notes general agreement among domestic violence researchers concerning the considerable psychological impact upon women who have been subjected to domestic violence. See, also, Tony Ward, et al, 'Explaining Some Characteristics of Battered Women: A Cognitive Deconstructionist Approach' (1995) 24 *New Zealand Journal of Psychology* 26; Paula Nurious, et al, 'Contextualising Depression and Physical Functioning in Battered Women: Adding Vulnerability and Resources to the Analyses' (2003) 18 *Journal of Interpersonal Violence* 1411; Randy Semple, 'Psychological Abuse in Intimate Relationships: A New Zealand Perspective' (2001) 30 *New Zealand Journal of Psychology* 60, discussing effects of battering.

trivialise the potential for lethality inherent in 'prolonged' and 'extreme' male violence toward women. It is now well established that the majority of women who are killed by current or estranged partners were previously beaten by their killers. Accordingly, repeat victimisation features in all domestic violence risk assessment instruments as a red flag for dangerousness/lethality. However, the assumption that batterers routinely measure their violence so as to inflict 'good hidings' without running the risk of death also permits the lethal incident to be isolated from its violent antecedents. By ignoring the gendered 'inequality of arms' and red flag of repeat victimisation battered women's deaths are constructed as unlucky or accidental. The 'socially approved vocabulary'¹⁴⁰ of intimate femicide as typically spontaneous, unpremeditated offending is thereby maintained and perpetuated.

While domestic violence is often referred to as covering a spectrum of conduct on a continuum from 'hitting, kicking, punching, sexual violence including rape, manslaughter and murder',¹⁴¹ many women in the present study were 'slapped', hit, kicked, and punched to death. Consequently, assessments of risk based on any such continuum are unlikely to capture the dangers inherent in battering relationships. Sexism, cultural and class bias evident in depictions of wife-battering as 'normal' in certain households also have the potential to compromise risk assessment in the criminal justice sector.

Legal scholars who argue against combining the separate offences of murder and manslaughter into a single crime of culpable homicide frequently do so, inter alia, on the basis that 'in the eyes of society, these are two different types of wrongdoing, and the communicative function of the law would be impaired were the law to blur that difference'.¹⁴² However, an arbitrary and indefensible delineation of the different levels of culpability is evident in the provision of a partial excuse for habitual batterers whose violence culminates in the deaths of their victims. Since it is the duty of Parliament to ensure that legal distinctions between murder and manslaughter are cogent and just¹⁴³ a domestic homicide statute is recommended. The following chapter addresses further problems associated with law's failure to acknowledge the interrelationship between lethal and sub-lethal domestic assaults.

¹⁴⁰ Coker, above n 7, 98-99.

¹⁴¹ Department of Justice, *The Domestic Protection Act 1982: A Discussion Paper* (1993) 4.

¹⁴² Simester and Brookbanks, above n 14, 32.

¹⁴³ William Wilson, 'Murder and the Structure of Homicide' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (2000) 21, 21.

CHAPTER NINE: ADMISSION OF RED FLAG EVIDENCE AT TRIAL

It is time to ask why relationship evidence is not automatically assumed to be as relevant to the prosecution's case as any other evidence of identity or motive in cases involving strangers. The simple answer may be that, previously...we did not recognize the common themes which were interspersed amid the intermittent violence punctuating the lives of women who have been murdered by their intimates. Today, we no longer can fall back on the excuse of ignorance when evaluating the probity of domestic violence history in proving femicide. Doing nothing is the equivalent of affirming the past inequities in evidentiary policy.¹

I INTRODUCTION

Since in intimate femicide cases the victim is dead, and therefore unable to refute an accused's claims that she engaged in provocative behaviour or launched an attack to which he responded in self defence, the jury's understanding that this individual woman's death conforms to a larger, structural pattern of offending may be crucial to set the lethal act in its context. However, the extent to which the jury is permitted to learn the truth about the victim's death through knowledge of its violent antecedents turns on judicial interpretation of current rules of evidence.

The law of evidence, which began its development with the decisions of common law judges in the seventeenth and eighteenth centuries,² governs the type and extent of domestic violence evidence which may be adduced at trial. In intimate femicide cases,³ evidence of prior domestic violence may include:

- evidence of friends, family, neighbours and professionals (such as doctors, social workers and counsellors) and others who have witnessed or heard the violence, have seen physical signs of it (such as cuts or bruising), or have been told about it by the accused or the deceased;
- documentary evidence, including previous or existing intervention orders or criminal court proceedings;⁴

¹ Myrna Raeder, 'The Admissibility of Prior Acts of Domestic Violence: *Simpson* and Beyond' (1996) 69 S. Cal. L. Rev. 1463, 1503

² Donald Mathieson (ed), *Cross on Evidence* (7th New Zealand ed, 2001) 11, notes evidence law can be traced to the Middle Ages although its development really began in the seventeenth and eighteenth centuries.

³ This chapter is concerned with cases in which the accused is the perpetrator of the prior violence. See, eg, Victorian Law Reform Commission, *Defences to Homicide*, Final Report, (2004) for a discussion of evidence law in relation to cases in which the accused is the victim of prior violence.

⁴ *Ibid* [4.5].

- Evidence the offender used violence toward other family members and previous intimate partners.

Myrna Raeder notes that it is only now being acknowledged that evidentiary rules evolved when women's voices were ignored or disregarded in criminal law. In a male-centred universe, domestic violence was not regarded as a pressing social problem and allegations of violence short of murder might be dismissed as the fabrication of a vengeful woman, or the overreaction of a male provoked by his victim's shrewish words or faithless deeds. Nor was intimate femicide perceived as 'a particular species of murder with dynamics transcending the individual conflict.'⁵

Raeder's US study found judges omitted to identify the structural themes that are played out in specific relationship settings when evaluating the probity of domestic violence evidence. In the absence of a framework to link prior abusive acts to the homicide event, decisions about the relevance and admissibility of domestic violence evidence lacked intellectual content:

All one could glean from the opinions was whether the judge was more concerned about the rights of criminal defendants to a fair trial, or whether the judge believed in the truth-finding function of trials regardless of the cost in an individual case. There could be no real debate because there was no real analysis. Whether courts cavalierly upheld the admission of the prior acts or rejected it, they generally declared that the evidence was probative or prejudicial without explaining why.⁶

This chapter canvasses barriers to admissibility of domestic violence evidence. Case studies explore judicial interpretations of the relevance and reliability of evidence of red flag behaviours known to be associated with intimate femicide. The study found misapprehensions about the dynamics of violent relationships result in exclusion or limitation of red flag evidence at trial. These misunderstandings include a tendency to view abusive behaviours as a series of discrete, unconnected incidents, rather than part of a strategy aimed at exerting dominance and control⁷ and isolation of the batterer's history of violence from the final lethal event. Since patriarchal relationship norms obstruct development of a principled response to red flag evidence, statutory intervention is recommended.

⁵ Raeder, above n 1, 1513.

⁶ Ibid 1498 (citations omitted).

⁷ See, eg, Taskforce for Action on Violence within Families, *The First Report* (2006) 4.

II BARRIERS TO ADMISSIBILITY OF DOMESTIC VIOLENCE EVIDENCE

Major obstacles to admissibility of domestic violence evidence are rules controlling admission of propensity evidence;⁸ the hearsay rule, which prevents or restricts the use of out of court statements made by persons who are not called to give evidence; and the discretion to exclude evidence if its prejudicial effect would outweigh its probative value. Although it is highly debatable whether juries are 'such fools as they are very often thought to be',⁹ these rules are linked by a common assumption that fact-finders, in particular juries, are unable to properly gauge the probative value of this kind of evidence, and may accord it too much weight, resulting in unfairness to the accused.¹⁰

In the absence of systematic reporting of domestic violence cases, or a digest category directed toward domestic violence evidence, it is impossible to gain a comprehensive picture of the amount and nature of evidence that courts are currently excluding. Raeder notes that

[t]his absence is telling because it confirms the hidden nature of patterns which reoccur in battering relationships and the undue emphasis on victim blaming which ignores such commonality. Until a category is established for domestic violence evidence it will be impossible to obtain a complete picture of how courts analyze prior bad acts evidence, or to provide a ready source which lawyers and judges can consult when facing these issues in their own jurisdictions.¹¹

III THE PROHIBITION ON PROPENSITY EVIDENCE

A party, (usually the prosecution) may be prevented from leading evidence 'which tends to show the accused has been guilty of other criminal acts (such as other assaults) if that evidence tends to show the accused had a propensity to "commit crime, or crime of a particular kind, or was the sort of person likely to have committed the crime charged"'.¹² The exclusion of evidence of a defendant's previous convictions, misconduct or general bad character is intended to bolster the

⁸ Section 40(1) *Evidence Act 2006* defines propensity evidence as 'evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved'.

⁹ *R v Kritz* [1950] 1 KB 82, 89 per Lord Goddard CJ.

¹⁰ Stephen Silber, 'The Law Commission's Work on Hearsay and Previous Misconduct' (1997) 37 *Med.Sci.Law* 125, 125. New Zealand Law Commission, *Evidence: Reform of the Law*, Report 55, Vol I (1999) [63-64], noting one legal commentator drew attention to the absence of empirical data indicating that juries are unable to gauge the proper value of hearsay evidence. However, most commentators, and judges in particular, perceived hearsay to be of concern in jury trials and opposed abolishing the hearsay restriction.

¹¹ Raeder, above n 1, 1494.

¹² Victorian Law Reform Commission, above n 3, [4.36], citing J D Heydon, *Cross on Evidence* (6th ed) (2000) 567.

presumption of innocence¹³ by ensuring that criminal trials focus on the offence charged, rather than on the character of the defendant.¹⁴ To allow evidence of the accused's past misconduct raises the possibility that the jury may convict the accused for a number of illegitimate reasons:

Knowledge of a defendant's prior criminal conduct may curtail a juror's worry of punishing an innocent person. Further, if the defendant was not criminally charged or convicted for the prior conduct, the jury may use this as justification for punishing the accused in the instant matter. Lastly, juror animosity may be created toward the defendant because of what he had done in the past. Another policy reason for not admitting evidence of other crimes is that it forces the defendant to explain conduct other than that which he is being charged for at trial. Consequently, a defendant may have to defend actions for which he has already answered, and for which he has already served his sentence.¹⁵

Exclusion of this evidence is also rationalised on the basis that the accused's prior misconduct is irrelevant to the present charge.

The Law Commission identifies the general irrelevance of bad character as a reason for not admitting it, and this rationale features in the case law too. In *DPP v Boardman*, one of the leading cases, Lord Hailsham stated that '[w]hen there is nothing to connect the accused with a particular crime except bad character or similar crimes, the probative value of the evidence is nil'.¹⁶

A significant exception to the general bar on propensity evidence is described as the 'similar fact' rule. Legal commentators note this terminology is misleading since it describes the rule in terms 'more apt to describe one of the principle exceptions to it'.¹⁷ The 'similar fact' exception permits propensity evidence to be adduced where the prior misconduct has 'some significant additional feature which lifts the evidence above showing only bad character or disposition to offend generally'.¹⁸ There must be 'some special characteristic or pattern', or 'some underlying unity

¹³ Section 25(c) *Bill of Rights Act 1990* affirms the right of a defendant 'to be presumed innocent until proved guilty according to law'.

¹⁴ Mathieson, above n 2, 474.

¹⁵ Sarah Lee, 'The Search for the Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence' (1998) 20 *U.Haw.L.Rev.* 221, 224-225.

¹⁶ Mike Redmayne, 'The Relevance of Bad Character' (2002) 61 *CLJ* 684, 685 (citations omitted).

¹⁷ Mathieson, above n 2, 450, noting the similar fact terminology is less common in the United States. See also, Victorian Law Reform Commission, above n 3, 143, n 423, citing J D Heydon, *Cross on Evidence* (6th ed) (2000) 439.

¹⁸ Cf s43 *Evidence Act 2006* which appears to permit evidence of 'mere' or general propensity provided the probative force of the evidence outweighs its prejudicial effect.

between the separate events'.¹⁹ The 'real question is always whether, *as a matter of common sense*, the evidence is sufficiently supportive of the prosecution case to justify allowing it to go to the jury notwithstanding any illegitimate prejudicial effect it might have'.²⁰

The similar fact exception may be particularly problematic in domestic violence cases. The requirement that prior abusive acts share a high level of similarity to the charged offence may demand similarity on the facts, as opposed to conceptual similarity. Lacking recognition of violence as a pattern of abuse and control, diverse acts of abuse leading up to the homicide may be treated by courts as separate, discrete, incidents, unrelated to the final lethal assault.

Because domestic violence crimes are so diverse in their facts, it is less likely that they will be admitted under this theory. For example, it is unlikely that the act of killing a former girlfriend's pet would be sufficiently similar to slapping a current girlfriend, or stalking an ex wife. Even though they are conceptually similar - violent acts upon an intimate partner for the purpose of maintaining power, dominance and control - they are factually *dissimilar* and therefore likely to be held inadmissible.²¹

Although admission by the prosecution of evidence of the accused's prior convictions or misconduct is generally barred, where this evidence is advanced as relevant to the defendant's credibility as opposed to propensity some leeway is permitted. For example, the prosecution may seek leave to adduce this evidence where the defendant advances his own good character, or attacks the character of a prosecution witness. If the probative value of the evidence is regarded as greater than its potential prejudicial effect, the jury must be warned both at the time leave to cross-examine is granted, and during the summing-up, that evidence of the defendant's bad character may only be taken into account on the issue of credibility and is not relevant to the likelihood that the defendant committed the offence.²² However, the distinction between evidence which may go to credibility and evidence which may go to propensity is a subtle one.²³

¹⁹ *R v Accused* (1998) 15 CRNZ 674, 680 (CA) per Gault J.

²⁰ *R v Accused* [1992] 2 NZLR 187, 191 (CA) per Cooke P (emphasis added).

²¹ Lisa Sanctis, 'Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence' (1996) 8 Yale J.L. & Feminism 359, 376.

²² *R v Kalo* [1985] 1 NZLR 219, 220, 221 (CA).

²³ *R v M* (2001) 19 CRNZ 300, 304 (CA). See, also, *R v Rakuraku* [2002] CA 321/01 (Unreported, Gault P, Ellis and Paterson JJ, 26 August 2002) [27-28] where the Court noted the violence convictions might go to propensity rather than credibility. In other circumstances, 'the subtleties of the distinction' might have been examined more closely. However, in this case, adduction of the evidence could not realistically have influenced the verdict.

In *R v Meynell*²⁴ the accused was charged with murdering his partner's child. The Crown accepted that evidence the accused had also used violence against the child's mother would not be admissible as evidence-in-chief. During the trial, defence counsel cross-examined the mother *inter alia* on her written statement to the police on the morning of the homicide in which she claimed she had never witnessed the defendant hit the child. The judge gave leave to re-examine the mother on acts of violence by the defendant committed against her on occasions when she had remonstrated with the defendant concerning his conduct towards the child. On appeal, defence counsel unsuccessfully submitted that evidence-in-chief of two prior acts of violence by the defendant against the child victim had been wrongly admitted under the *res gestae* doctrine.²⁵ (The assaults were made subject to charges to which the accused pleaded guilty and evidence of the incidents but not the fact that the accused pleaded guilty was adduced at trial.) Defence counsel also argued that prejudicial evidence of the defendant's prior violence toward the child's mother which was not admissible in-chief, should not have been elicited in cross-examination.

However, the Court of Appeal acknowledged that having a full picture of the relationship between the child and the defendant would be advantageous where it was almost certain that one of the two people (the accused and the child's mother) who were present at the time the child was killed was responsible for the death. This evidence tended to explain the mother's change of story and the impact on her of the threats could not properly be understood unless this evidence was before the jury. Defence counsel had been fully aware of the probable result of cross-examining the mother on her statement and evidence of past violence towards the mother was correctly admitted in re-examination.

The assumption that evidence of prior misconduct may increase its probative value according to the direction taken by the defence in cross-examining a witness has been criticised as illogical. Jenny McEwan notes the UK Law Commission has observed

that it is illogical to exclude evidence of previous conduct on the ground that its prejudicial effect outweighs its probative value, but then let it in later at the trial. 'The probative value of evidence of previous conduct cannot be altered by virtue of the reason for the attack on the prosecution witness.'

²⁴ [2004] 1 NZLR 507, 511.

²⁵ Peter Spiller, *New Zealand Law Dictionary* (5th ed, 2002) 264, notes: 'Where a fact is relevant to a fact in issue, because it is proximate in time, place or circumstance, it is said to be part of the *res gestae*'.

This stance is subsequently abandoned entirely. Yet its logic is unassailable.²⁶

Meynell illustrates that admissibility of evidence that the accused's violence extended to other family members will largely depend upon how the defence case is run. Had defence counsel chosen not to cross-examine the mother on her statement, evidence that the accused had also perpetrated acts of violence against the child's mother would not have been heard by the jury.

IV PROPENSITY EVIDENCE IN INTIMATE FEMICIDE CASES

The New Zealand Law Commission found the present test for evidence of prior misconduct which strikes a balance between making this evidence available if it is useful, and excluding it where it is unfairly prejudicial or of only marginal relevance²⁷ was operating well, and providing the desired consistency and flexibility.²⁸ This test of probative value versus illegitimate prejudicial effect requires courts to consider questions of degree, discretion and judgment that are not susceptible to exact codification as 'logic and common-sense' cannot be codified.²⁹ However, as discussed above, 'common sense' understandings are problematic in domestic violence cases as these are likely to reflect 'the myths and misconceptions about family violence we all share'.³⁰

The decision in *R v P* illustrates the present 'common sense' approach to evidence revealing the accused to be a serial domestic violence offender.³¹ P killed his wife in 1998 following a ten year history of violence in the relationship. The trial judge ruled evidence of violence by P toward two of his sisters inadmissible.³² The dates of these alleged assaults are unknown. However, evidence that P had used violence against four other women with whom he had a sexual relationship was held admissible both as similar fact evidence and as *res gestae* or 'part of the story'.

Violence alleged in the first relationship occurred in 1980 when P was 16 years old. This included frequent acts of violence and abuse by P in ways similar to that he had inflicted on his wife, including efforts to ensure his violence would not be witnessed by others, and accusations of sexual

²⁶ Jenny McEwan, 'Law Commission Dodges the Nettles in Consultation Paper No. 141' [1997] Crim.L.R. 93, 103 (citations omitted).

²⁷ New Zealand Law Commission, above n 10, [87].

²⁸ Ibid [175] affirming its previous view in NZLC, *Evidence Law: Character and Credibility*, PP 27 (1997) 268-271.

²⁹ *R v Davis* [1980] 1 NZLR 257, 263 (CA); *DPP v Boardman* [1975] AC 421, 452 (HL).

³⁰ Victorian Law Reform Commission, above n 3, xxxvii.

³¹ This case is discussed in full as *Case Study P/98/3* above, at p 215.

³² *R v P* [1999] CA 65/99 (Unreported, Richardson P, Heron and Goddard JJ, 18 March 1999) [6]. The basis of the trial judge's decision to exclude this evidence is unknown.

relationships with other men. Evidence of the second witness was of violence in her relationship with P in 1983-1984 similar to that alleged by the first witness. The third witness, whose relationship with P existed for almost two years from about 1984, would give evidence of violence by P similar to that of the other women, with the addition that on one occasion, in a violent outburst following her refusal to drive the car because of intoxication, P 'stomped on her and broke her leg'.³³ The fourth woman, with whom P apparently committed adultery around 1989 while he was living with his wife, described 'similar violence for similar reasons'.³⁴ The judge held this evidence would be relevant to whether P actually lost his self-control when confronted with what he believed to be his wife's adultery, and whether the type of violence, and the circumstances in which it was administered, had a pattern or characteristics or some underlying unity bearing on the offender's state of mind. P appealed.

Although the fact that many years may have passed between the different incidents does not require exclusion of similar fact evidence,³⁵ the Court of Appeal held evidence of P's violence towards women other than his wife was inadmissible as too distant in time, place and circumstance. P's conduct as a youth and young man could not be compared to his behaviour 'as a mature man in his thirties'.³⁶ Nor were the circumstances in which each was assaulted by P 'comparable with the events on the night in question'.³⁷

The latter observation may reflect the Court's view that P's earlier assaults could be distinguished from the present offending as on the 'night in question' the victim was killed. This analysis would logically preclude all prior acts of violence from qualifying as similar fact evidence in intimate femicide cases. Alternatively, or additionally, the different circumstances to which the Court alludes may be based on the allegation that P was provoked on the occasion he killed his wife. Yet evidence in his wife's letters adduced at his first trial made it clear that P believed his wife was responsible for his prior acts of violence toward her ('you make me hit you'). Given that 'most batterers deny or avoid accepting responsibility for their actions',³⁸ P may well have believed that

³³ Ibid [8].

³⁴ Ibid [8].

³⁵ Gerald Orchard, 'Similar Fact Evidence' in J Bruce Robertson (ed), *Essays on Criminal Law: A Tribute to Professor Gerald Orchard* (2004) 7, 17, noting however, that a relatively short space of time is often mentioned as assisting admissibility.

³⁶ *R v P* [1999] CA 65/99 (Unreported, Richardson P, Heron and Goddard JJ, 18 March 1999) [24].

³⁷ Ibid.

³⁸ Kerry Healey, Christine Smith and Chris O'Sullivan, *Batterer Intervention: Program Approaches and Criminal Justice Strategies* (1998) 45.

his violence toward previous partners was also provoked by his victims. Consequently, P's assaults cannot be distinguished on the basis that on one occasion or another, P was provoked into acting violently. Given that an accused's provocation claim may be rejected at trial, this is a tenuous basis for excluding domestic violence evidence.

The end result in this case was the exclusion of evidence demonstrating a continuing pattern of violence by P from 1980 up to two years before he commenced a ten year relationship with his wife, during which time he continued this pattern of violence, not only toward his wife, but also toward another woman during the time he was married.

V THE HEARSAY RULE

A non-testifying witness's out of court statement which is offered for the truth of the matter asserted in the statement is hearsay and prima facie inadmissible. In intimate femicide cases, such evidence may include a deceased woman's statements of prior violence and fear of the accused which are hearsay and inadmissible unless they fall within one of several exceptions to the hearsay rule. Although the line between evidence tendered as proof that the declarant's statement was made and an implied assertion of the truth of the statement is sometimes difficult to draw,³⁹ if the evidence is led for some purpose other than to establish the truth of the statement, the hearsay prohibition is not breached.⁴⁰

Most authorities concur with the following formulation of the hearsay rule:

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.⁴¹

³⁹ This duality arose in *R v Howse* [2003] 3 NZLR 767, where the Court of Appeal noted that when the evidence can be used both to prove the fact the words were spoken and as proof of the truth of the words this engages the hearsay rule.

⁴⁰ See, eg, *R v Gibbons* [1996] CA 180/96 (Unreported, Thomas, Keith and Blanchard JJ, 26 September 1996) where the evidence was not admitted to prove the truth of the statement, but to prove that a police officer was told of certain matters.

⁴¹ *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, 970 (PC). See also, Mathieson, above n 2, 568-569.

The hearsay rule has been widely criticised as 'one of the oldest, most complex and most confusing of the exclusionary rules of evidence'.⁴² It is generally agreed that the main justification for the exclusion of hearsay is the lack of opportunity to test a witness's evidence in cross-examination.⁴³ Such statements are not made under oath, and the jury cannot observe the declarant's demeanour while giving evidence. In a leading case, Lord Bridge provided the following rationale for the hearsay prohibition:

The rationale of excluding [hearsay] as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a juror than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard, and which has not been subject to any test of reliability by cross-examination... The danger against which this fundamental rule provides a safeguard is that untested hearsay evidence will be treated as having a probative force which it does not deserve.⁴⁴

A number of recognised exceptions to the rule exist at common law and under statute. Admissions made by an accused are a principle incursion upon the hearsay rule. Dying declarations and statements that are part of the *res gestae* are said to possess sufficient circumstantial reliability to justify their admission notwithstanding the dangers against which the hearsay rule guards. The *res gestae* exception extends to statements accompanying and explaining an act relevant to an issue in the case; spontaneous exclamations made by a victim of an offence or a bystander; and declarations of a person's own contemporaneous state of mind or emotion which may be admitted as proof of the fact intended to be asserted by the representation.⁴⁵ However, the test for *res gestae* evidence is extremely unclear.

What is meant by saying that a document or act is admissible because it is part of *res gestae* has never so far as I am aware been explained in a satisfactory manner. I suspect it of being a phrase

⁴² Mathieson above n 2, 567.

⁴³ See, eg, New Zealand Law Commission, above n 10, [50].

⁴⁴ *R v Blastland* (1986) 1 AC 41, 54 (HL).

⁴⁵ *R v M* [1997] CA 17/97 (Unreported, Richardson P, Gault and Hammond JJ, 17 March 1997) where the domestic violence victim married the accused following the assault and refused to testify against him. The Crown wished to pursue the prosecution and sought to introduce evidence of a female shop assistant under the *res gestae* exception. The Court of Appeal held this evidence was admissible with an appropriate warning to the jury. Although not mentioned in the judgment, the Court's decision may have been influenced by the fact that this was reportedly the accused's 10th charge of assaulting the victim.

adopted to provide a respectable legal cloak for a variety of cases to which no formula of precision can be applied.⁴⁶

During the period of the research, s 3 of the *Evidence Amendment Act (No2) 1980* governed the admission of documentary hearsay (a hearsay statement contained in a written document). Documentary hearsay in intimate femicide cases may consist of letters written by the deceased victim, diary entries, or statements in an affidavit sworn by her, for example in support of an application for custody, or a protection order. The declarant must have personal knowledge of the matters dealt with in the statement and be 'unavailable' to give evidence. Sections 9 to 14 of the Act set out the conditions for admissibility of oral hearsay evidence. Section 18 provided a discretion to reject any hearsay statement that would otherwise be admissible if 'the prejudicial effect of the admission of the statement would outweigh its probative value, or if, for any other reason, the Court is satisfied that it is not necessary or expedient in the interests of justice to admit the statement'. Sections 16 and 17 required consideration of the circumstances in which the statement was made, the time the statement was made, and the extent to which the maker of the statement may have a motive to misrepresent any fact or opinion about the subject matter of the statement.

The court also has a residual common law discretion to accept hearsay evidence. Admissibility turns on three distinct requirements: relevance, inability and reliability. The evidence must be relevant, the primary witness must be unable for some reason to be called to give the primary evidence and the evidence must have sufficient apparent reliability, either inherent or circumstantial, or both, to justify its admission in spite of the risk of prejudice to the defendant. As a final check, the Court must consider whether hearsay evidence which might otherwise qualify for admission should nevertheless be excluded because its probative value is outweighed by its illegitimate prejudicial effect.⁴⁷

Hearsay and evidence of prior misconduct are not exclusive categories.⁴⁸ Noting a trend since *R v Foreman*⁴⁹, Fisher J in *R v H* observed that it is no longer remarkable for hearsay statements from

⁴⁶ Ibid [7] citing *Homes v Newman* [1931] 2 Ch 112 per Lord Thomlin.

⁴⁷ *R v Manase* [2001] 2 NZLR 197 (CA).

⁴⁸ See, eg, *R v Foreman* (1990) 6 CRNZ 328.

⁴⁹ Ibid.

the deceased as to a prior violent relationship with the accused to be admitted.⁵⁰ Where the evidence is part of a continuous family history relevant to the offence charged it may be admissible as background evidence although it may establish the commission of an offence(s) with which the accused is not charged. The value of background evidence 'is not that a specific fact in issue can be inferred from it, but simply that if the fact-finders did not hear of it they would find it harder to understand the nature of what is alleged'.⁵¹ Donald Mathieson suggests that the 'debate as to whether evidence of prior misconduct should be classified as essential "background" evidence, or as similar fact evidence, should not obscure the need to assess the evidence in terms of probative value and prejudicial effect'.⁵² In *R v P* the Court of Appeal warned of the prejudice involved and significantly limited the quantity of the proposed evidence of violence by the accused toward the deceased.⁵³

VI HEARSAY REQUIREMENTS IN DOMESTIC VIOLENCE CASES

The following case studies illustrate how the hearsay requirements that the witness is unavailable to testify, and that the evidence is sufficiently reliable, are applied in cases involving recanting or uncooperative domestic violence complainants.

A *The Requirement of Unavailability*

A victim of domestic violence may be physically unavailable to testify at trial because she has been killed, or because she is unwilling to testify for some reason, or is otherwise unavailable. In intimate femicide cases, the Crown will usually have little difficulty establishing that the victim is unavailable to appear in Court and be cross-examined. In sub-lethal assault cases, high rates of victim withdrawal (studies show up to one half or more of complainants in domestic violence cases withdraw their support for prosecution),⁵⁴ and the typically secretive nature of domestic assaults, pose significant problems for prosecutors. Consequently, 'a victim's hearsay statements can

⁵⁰ (Unreported, High Court, Auckland, Fisher J, 15 November 2000) [4].

⁵¹ England and Wales Law Commission, *Evidence of Bad Character in Criminal Proceedings*, Report 273, (2001) [10.7].

⁵² Mathieson above n 2, 463-464.

⁵³ *R v P* [1999] CA 65/99 (Unreported, Richardson P, Heron and Goddard JJ, 18 March 1999).

⁵⁴ Louise Ellison, 'Prosecuting Domestic Violence without Victim Participation' (2002) 65 MLR 834, 834. See, also, Lauren Bennett, Lisa Goodman and Mary Ann Dutton, 'Systematic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective' (1999) 14 *Journal of Interpersonal Violence* 761, 763, citing various empirical studies; Linelle Letrende, 'Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence' (2000) 75 Wash.L.Rev. 973, 979, citing statistics from Seattle's Battered Women's Project.

become the only opportunity for the prosecutor to bring in the victim's "voice" at trial'.⁵⁵ However, the Court of Appeal has ruled the unavailability inquiry would seldom, if ever, be satisfied where the witness would simply prefer not to face the ordeal of giving evidence or would find it difficult to do so.⁵⁶

In *R v M-T*,⁵⁷ the Court adopted a narrow view of the circumstances in which a domestic violence complainant may be considered unavailable to testify. Under s 352 of the *Crimes Act 1961* the judge is empowered to excuse a witness who has 'just excuse' not to testify. The complainant in this case swore an affidavit in support of an application to set aside the summons requiring her appearance in court. The complainant stated inter alia that she was shortly due to give birth, had an abnormal pregnancy, and wanted to avoid further stress which might affect her child or her relationship with her partner. The trial judge excused the woman from giving evidence on health grounds, and ruled her hearsay statement of violence by the defendant admissible.⁵⁸ On appeal, the Court of Appeal ruled the statement inadmissible. Although the hearsay had been tested under cross-examination at depositions, the Court held this was the type of situation where it would seldom, if ever, be appropriate to admit hearsay evidence in substitution for the complainant giving evidence in person.

While acknowledging that its decision may contribute to evidential problems in prosecuting domestic violence cases,⁵⁹ the Court held any change to the current rules, if appropriate, must await the intervention of Parliament.⁶⁰ As a result, the prosecution case against the defendant (who had a prior conviction for assault against a former partner) collapsed. Since the Court's assumption that the complainant was 'personally able to give evidence' failed to acknowledge that she had been excused on health grounds from doing so, the case could easily have been decided differently.⁶¹

⁵⁵ Neal Hudders, 'The Problem of Using Hearsay in Domestic Violence Cases: Is A New Exception the Answer?' (2000) 49 Duke L.J. 1041, 1044, noting that if the victim recants her original evidence, her voice is obviously heard at trial, and in these situations it is the earlier statements of the victim, contradicting her evidence in court, which the prosecution seeks to introduce.

⁵⁶ *R v Manese* [2001] 2 NZLR 197 (CA) [30].

⁵⁷ [2003] 1 NZLR 63 (CA).

⁵⁸ The judge accepted the Crown argument that the complainant's hearsay statement of abuse was admissible as cogent, relevant and sufficiently contemporaneous and spontaneous to avoid any real possibility of concoction. It had been willingly given and its veracity tested under cross-examination at depositions.

⁵⁹ Ministry of Justice, *Responses to Crime: Annual Review 1999* (1999) 30, indicates police are facing increased difficulties in finding enough evidence to prosecute and convict domestic violence offenders.

⁶⁰ *R v M-T* [2003] 1 NZLR 63, 71.

⁶¹ See, Elisabeth McDonald, 'Hearsay in Domestic Violence Cases' [2003] NZLJ 174, for a discussion of the case.

While the *Evidence Act 2006* simplified the hearsay provisions, under s 18(1) admissibility is subject to a requirement that 'the maker of the statement is unavailable as a witness'. On the view of 'unavailability' taken in *M-T*, a hearsay statement to police by a domestic violent complainant who is excused from testifying is likely to remain inadmissible. Douglas Beloof and Joel Shapiro suggest exclusion of a recanting domestic violence victim's original statement of violence places wishful thinking ahead of reality.

This is because it is highly probable that a domestic violence victim's initial disclosure, not allowed into evidence, is more reliable than the victim's recantation...Clinging to the requirement of the oath as predicate for admissibility of the domestic violence victim's initial report requires naively blinding oneself to the greater forces at work upon the victim.⁶²

If a battered woman elects, for whatever reason, not to cooperate with criminal justice intervention, and the charges are dropped, or the case results in dismissal, the woman is likely to be beaten again.⁶³ The batterer is likely to interpret this lack of accountability as a licence to continue to abuse his partner without consequence, and any children of the household will suffer harm from experiencing or witnessing physical and/or psychological abuse.

The *Evidence Act 2006* abolished the rule that the spouse of a defendant is a competent but not compellable witness for the prosecution in criminal proceedings.⁶⁴ As previously discussed,⁶⁵ Clause 71 of the Bill provided for a judicial discretion to excuse persons in a 'close relationship' with the defendant from giving evidence where 'the public interest in the evidence being given is outweighed by the public interest in preventing harm to the relationship resulting from the giving of that evidence'. The provision was deleted at the Select Committee stage on the basis that: a) it may provide encouragement to complainants to decline to give evidence because of intimidation or guilt; b) the arbitrariness of determining what constitutes a 'close relationship'; and c) the anomalous consequences for the hearsay rule, especially the admissibility of a witness statement without the opportunity for cross-examination.⁶⁶ Consequently, victims of domestic violence will

⁶² Douglas Beloof and Joel Shapiro, 'Let the Truth be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence' (2002) 11 *Colum.J.Gender & L.* 1, 6.

⁶³ Cheryl Hanna, 'No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions' (1996) 109 *Harv.L.Rev.* 1849, 1895.

⁶⁴ Section 71 provides that any person is eligible to give evidence in a civil or criminal proceeding. Under s 71(1)(b) 'a person who is eligible to give evidence is compellable to give that evidence.'

⁶⁵ See, discussion above, at p 94.

⁶⁶ Justice and Electoral Committee, 'Evidence Bill: Commentary' 9.

be compellable witnesses for the prosecution. Since the legislation provides that prior out of court statements by a testifying witness are non-hearsay,⁶⁷ the victim's earlier statement to police will be admissible in evidence for its truth.

However, while accepting that citizens in a civilised society have a duty to be available to give evidence,⁶⁸ and a paternalistic focus upon the wishes of individual women risks reinforcing negative stereotypes of battered women and ultimately disempowering all women, it is unacceptable to provide a blanket policy of compellability in the absence of provisions to ensure women's safety. As discussed below, the persistent failure in criminal law to acknowledge the dangers inherent in battering relationships is likely to further endanger women by requiring victim testimony in cases which clearly call for a discretion to excuse the domestic violence complainant from giving evidence.

While no hearsay objection applies, Scott Optican and Peter Sankoff note that where the complainant recants at trial and refuses to answer questions, or testifies that the defendant's violence was accidental, or in self defence, the prosecution will be barred from introducing her prior inconsistent statement because to do so would result in cross-examining its own witness.⁶⁹ Therefore, in order to have the statement admitted, the prosecution must satisfy the trial judge that the complainant should be declared 'hostile'.⁷⁰ In addition to failing to protect victims of violence, this situation provides no guarantee of batterer accountability. Although at first glance the relevant tests for hostility under s 4(1) of the Act present no additional restriction on admissibility of the statement,

it can never be a completely inevitable result when Courts confront suddenly exculpatory testimony by the victim of an alleged domestic assault. There will always remain the possibility that, on the facts as they are presented in Court and despite a prior inconsistent complaint to police, a Judge will make no finding of hostility...As a result, the previous statement of the testifying victim will be blocked from admissibility not because of any inherent indicia of unreliability, but simply because a Judge failed to make the requisite finding of hostility permitting the Crown to challenge its own

⁶⁷ Section 4 *Evidence Act 2006* defines a hearsay statement as that 'made by a person other than a witness' which is 'offered in evidence at the proceeding to prove the truth of its contents'.

⁶⁸ Judge David Harvey, 'Spousal Non-Compellability' [1997] NZLJ 114, 117.

⁶⁹ See ss 37(4) and 94.

⁷⁰ Scott Optican and Peter Sankoff, 'The Evidence Bill 2005: A New Approach to Hearsay' [2005] NZLJ 446, 447.

witness. Indeed, the prior complaint of assault may be completely reliable and still not qualify for admission in the case!⁷¹

These legal commentators argue that the judge's perception whether the witness is manifesting a hostile demeanour indicative of her unwillingness to testify truthfully 'seems a thin and not particularly cogent reed' on which to base the admissibility of out of court statements which would otherwise present no problems of admissibility.⁷² As previously discussed, courts have tended to prioritise preservation of the relationship over batterer accountability when victims express reluctance to cooperate with domestic violence prosecutions.⁷³ Furthermore, despite a wealth of evidence showing victims' initial statements of violence are more reliable than victims' recantation, as discussed in the following section, courts may be predisposed toward the opposite view.

B *The Requirement of Reliability*

Hearsay evidence is generally admissible under the *Evidence Act 2006* provided it is sufficiently reliable and the maker of the statement is unavailable as a witness.⁷⁴ The requirement of unavailability has been discussed above. The following case study provides an insight into judicial approaches to the issue of reliability. The decision in this case to exclude hearsay and propensity evidence provided the route by which the killer escaped a potential murder conviction.

The Reliability Inquiry: Case Study H/02/11

On 8 February 2002, Ron the 45 year-old male offender, and Hasnah, his 38 year-old partner were at home alone. Ron, who was a drug addict and on a methadone programme, accused Hasnah of sexual infidelity and the pair argued. During the night Hasnah ingested between 100-150 mgs of Ron's methadone. Fifty mgs of methadone can be fatal for a non tolerant user. After ingesting the drug, Hasnah became unconscious, and although he was by profession a qualified general and psychiatric nurse, Ron did not seek medical help for her until some time after 6 pm the following day. Paramedics found Hasnah lying naked on the bed, cold to the touch, and uncovered apart from a sheet over the lower part of her legs. She had also been propped up by at least five pillows placed behind her head which partially occluded or blocked her airways. After attempts to stabilise her failed, Hasnah was admitted to an intensive care unit at the hospital

⁷¹ Ibid 448.

⁷² Ibid.

⁷³ As discussed above, although spousal non-compellability under s 5(6) of the *Evidence Act 1908* did not extend to unmarried parties, a de facto policy of non-compellability was apparently adopted in these cases.

⁷⁴ Section 18.

where she remained unconscious for some days. A CT scan revealed she was suffering from severe brain damage together with a number of other serious disorders including acute liver failure.

Subsequently Hasnah's condition improved and on 19 February she was well enough to speak to police. A police constable recorded the conversation in his notebook. Hasnah stated she had not taken the methadone willingly, nor did she want to kill herself. She said Ron had offered her the methadone which she believed was medicine and told her 'if you love me you will take this'.⁷⁵ Ron was arrested that day and charged with attempted murder and with failing to provide the necessaries of life. On 20 February, Hasnah was interviewed for a four hour period. A police constable wrote out a ten page statement which Hasnah signed on each page and wrote on the last page that she had read the statement which was true and correct. Her signature was witnessed by the constable.

Hasnah stated she had married Ron in 2001 after arriving in New Zealand on a visitor's permit. The marriage was never lawful because she had previously married in Thailand. She stated that prior to her marriage to Ron she informed him she was already married and Ron responded by asking her 'Why don't you do something about that?' So after her marriage to Ron, Hasnah filed for a divorce from her lawful husband. Hasnah further stated that a few days before she took 'the medicine', Ron noticed her looking at two men in a supermarket became jealous and would not let the matter rest. He also accused her of sleeping with her brother-in-law which she denied and questioned her about a credit card she had been given some years earlier. Ron allegedly shouted 'I've married a whore' and told Hasnah he was going to send her back to Malaysia. She said she did not want to return to Malaysia and the pair argued for one or two days until the night she ingested the methadone. (At trial, one witness gave evidence that Ron used particularly vitriolic and unpleasant language towards Hasnah and persuaded her to deface her own passport by writing demeaning and humiliating words about her sexual activity.)⁷⁶

Hasnah stated Ron told her to take the methadone as it would help her sleep. When she refused, he pushed her cheeks together with one hand so hard it made her mouth open and then tipped methadone from the bottle into her mouth. At this stage she was lying flat on her back and could not get up and run past Ron out the door. However, she thought Ron would look after her and she would be 'ok'.⁷⁷ On 21 February, Hasnah informed a social worker at the hospital that she and her husband had an argument and he told her to take the methadone as it would help her sleep. On 22 February she told a medical registrar that Ron had told her to take 'the medicine'.

⁷⁵ *R v H* [2003] 3 NZLR [3].

⁷⁶ In *R v H* (Unreported, High Court, Rotorua, Harrison J, 15 December 2003) [6], the sentencing judge notes these words may have been more a reflection of the offender's own warped thinking than of the truth.

⁷⁷ *R v H* (Unreported, High Court, Rotorua, Chambers J, 5 June 2003) [24].

Ron was released on bail. Despite a condition of non-association, a number of telephone calls were made which originated both from Hasnah and from Ron. On 27 February, a police constable returned to the hospital with a view to having Hasnah sign a brief of evidence which was substantially the same as the earlier written statement. Although she signed the last page, and began signing the preceding pages, Hasnah refused to sign the first two pages of the statement telling the officer she wanted to change her statement so that she could see Ron and be with him. Later that day, Ron contacted a solicitor and told him that his wife needed to speak to a lawyer. The solicitor spoke to Hasnah by telephone and later attended at the hospital. Hasnah advised the solicitor that she had taken the methadone voluntarily. The solicitor later described Hasnah's explanations that she did not want to hurt herself and also that she did wish to hurt herself as 'confused'. Hasnah also informed the solicitor that Ron had discovered she was lawfully married to another man and had threatened to send her back to Malaysia. However she did not want to go back to Malaysia and wanted to be with her husband. She stated Ron had not told her to change her story or threatened her in this regard.

On 1 March, Ron collected Hasnah from the hospital and they resumed living together. Over the next weekend her condition deteriorated. The pair went to the Court to arrange for Ron's bail conditions to be varied to permit them to live together. When they left the courthouse, Ron was carrying Hasnah, who was seen to fall and land on the back of her head on the road. She was readmitted to hospital the same day and her state of health rapidly deteriorated. From that point on, Hasnah was unresponsive, unable to communicate, and was diagnosed as suffering from progressive and severe brain damage as a result of oxygen deprivation consequent upon ingestion of the methadone. On 13 May 2002, she was transferred to a hospital in Malaysia where she died on 1 June 2002.

Ron was charged with murder and the Crown sought to introduce evidence of Hasnah's statement made on 20 February. The judge noted that if the statement was excluded then all oral statements made by Hasnah following the incident would be inadmissible. On the other hand, if the statement was admissible, then all oral statements made by Hasnah, including those made to others at the hospital should also be admitted.

To assist in proving Ron's guilt, and to overcome Hasnah's recantation, the Crown sought to introduce evidence from Ron's former wife that Ron had injected her with illegal drugs against her will. This woman would give evidence that Ron was jealous and controlling and she was forced to keep her eyes on the ground when she attended the supermarket as he would accuse her of adultery if she looked at a male customer. Ron was also obsessed with relationships she had before she met him and when he was injecting her with his drugs would tell her: 'If you don't agree, you don't love me'. On one occasion, she alleged Ron forced her at knifepoint to take 30 Panadeine tablets telling her: 'You are going to commit suicide. You're

just too evil to live. You're a slut.' For the next few days she was violently ill and not long after that, she ended the relationship.⁷⁸ If Hasnah's statement were excluded, this evidence would also be excluded and the Crown's murder case would collapse.

Arguing against admission of Hasnah's statement, defence counsel first suggested that spousal non-compellability was relevant to the discretion to exclude the statement. The judge held s 5(6) of the *Evidence Act* had no relevance to the case and should be confined to the situation of a spouse giving evidence on oath in court. Defence counsel also objected to the section of the statement in which Hasnah stated Ron had forcibly administered the methadone, submitting that the 'major probative value' of the evidence was outweighed by its prejudicial effect. This was particularly the case since Hasnah later refused to sign the brief of evidence based on the statement. However the judge noted Ron's 'extraordinary' delay in seeking emergency help for Hasnah was strongly probative of her account that he was involved in her ingestion of the methadone rather than his account that he played no part in it. Ron claimed Hasnah had ingested the methadone as a declaration of her love for him. However, the judge noted the 'sheer improbability' that a woman who was not herself a drug user, would suddenly decide to drink Ron's methadone as proof of her love for him. This amounted to a bizarre and irrational act and there was no evidence that Hasnah had been acting irrationally prior to this event.

Hasnah had stated on 19 February that she did not take the methadone willingly and also had conversations with medical personnel in which she claimed the defendant had told her to take the methadone - although she did not mention that he forced her to do so. While her later refusal to sign the brief of evidence and conversations with the solicitor were in conflict with her earlier statement, and threw doubts on its reliability, there had been significant discussions between Hasnah and the defendant in breach of his bail conditions, and her change of story might reflect pressure from Ron. Moreover, it was clear from the solicitor's account that Hasnah's primary concern was her ability to remain in New Zealand and she perceived the defendant and his attitude toward her as being of great significance in that respect: '[T]he sole basis of her application for residency was her marriage to [the offender]. He now had the means of exposing that as a sham'.⁷⁹

The judge further noted that if the evidence of Ron's former partner were true, this evidence was highly probative of the Crown's essential allegation in the present case that Ron had caused Hasnah to take drugs by force. The common features were: a) each woman was the wife or partner of the defendant; b) each complained he exhibited extreme jealousy; c) neither could look at a man in the supermarket without being accused of wanting to have sex with him; d) each complained the defendant forced his drugs on them in a

⁷⁸ Ibid.

⁷⁹ Ibid [46].

context of fury while accusing the victim in this case of being 'a whore' and a 'slut' and his former partner of being 'a slut'. There was no suggestion of collusion between the women as the former wife lived in Australia and had never met the victim in this case. There was undoubtedly a 'special characteristic or pattern' which emerged from the similar fact evidence and an 'underlying unity between the separate events'.⁸⁰ The judge noted it was legitimate to look at all the relevant evidence when determining the admissibility of Hasnah's statement and this included the evidence of the defendant's former wife.

The judge held the probative value of Hasnah's evidence was not so weakened that it was outweighed by the alleged prejudice to Ron. The Crown would put all statements before the Court and the defence would be able to highlight to the jury the differences in the various statements. In this way the fairness of the trial could be preserved. Hasnah's inability to testify would in this case render the absence of cross-examination less important, as the defence could make strong submissions regarding inconsistencies and Hasnah would not be present to give an explanation. It followed that the evidence of the defendant's former wife was also admissible. There was no doubt as to its relevance and it met accepted tests for similar fact evidence. The prejudice involved in allowing the jury to learn that the defendant had been capable of similar conduct in the past was easily outweighed by the high probative value with respect to the matter in issue, namely whether the defendant forced his partner to ingest his methadone. Ron appealed.

The Court of Appeal held by a majority that all the contested evidence was inadmissible. In doing so, the Court stated that the judge had underestimated the importance and potential effect which cross-examination of the deceased could have had, and therefore underestimated the prejudice to the defendant. The judge had also overestimated the degree of probative value of the statement given other material which contradicted it. On the basis of what the deceased had said to others, particularly to the solicitor, she may well have retracted her statement that the defendant forced her to drink his methadone. Although there was room for suspicion that Hasnah had other reasons for wanting to withdraw her statement apart from the falsity of this assertion: for example, pressure from the defendant or a desire to retain her immigration status and remain in New Zealand, the possibility that her recantation was motivated by a desire to tell the truth could not be dismissed. Had Hasnah lived, and been called to give evidence against Ron on a charge of attempted murder, and maintained her position that she had taken the methadone voluntarily, that would have become her evidence, unless the Crown were successful in declaring her a hostile witness. Even if she were in the position to affirm her statement, a skilled cross-examiner could have used Hasnah's inconsistent statements and the circumstances of her relationship with the defendant to impeach her evidence and raise a reasonable doubt.⁸¹

⁸⁰ Ibid [35], citing *R v M* [1999] 1 NZLR 315, 320 (CA).

⁸¹ *R v H* [2003] 3 NZLR 757 [33].

The Court noted that where, as in this case, there are substantial issues of credibility, admission of testimony without any opportunity to test the witness by cross-examination must affect the fairness of trial. Since the prejudicial effect of the statement outweighed its probative value, the various oral statements and the evidence of Ron's former wife were also inadmissible. The former because it was accepted that these were only admissible to provide balance for Hasnah's statement of 20 February, and the latter because it could not be probative of any similar fact evidence, now that Hasnah's account, to which it is said there was similarity, would not be before the Court.⁸²

However, the minority of the Court favoured admission of Hasnah's statement 'because the subsequent events, which caused the majority to find it did not have a sufficient apparent reliability, required separate consideration'.⁸³ If this was correct, there would be evidence to show the later events were both explicable in the particular circumstances and consistent with the inherent reliability of the statement at the time it was made. Furthermore, the extent of the evidence available to examine these issues was such that the defendant would not be unduly prejudiced by the inability to cross-examine the deceased.

As a consequence of the majority decision, the Crown murder case collapsed and the defendant was charged with manslaughter on the basis that he had omitted without lawful excuse to provide Hasnah with the necessities of life and thereby caused her death.

At trial, the Crown called a specialist in anaesthetics and intensive care who told the Court that in his opinion, it would have been 'very obvious' to anyone with medical knowledge that Hasnah's condition following ingestion of the methadone was serious and she required medical treatment. A consulting neurologist stated the circulatory and respiratory effects of the drug overdose were compounded by two 'baleful influences'. One was the long delay in receiving medical attention; the other was Ron's action in placing Hasnah in a 'propped up position, partially obstructing her airway and aggravating the adverse effects of failing circulation on blood flow to the brain'. Another intensive care specialist concluded that Hasnah would not have died or suffered serious brain damage if Ron had called for emergency medical assistance immediately after she consumed the methadone. He identified five major failures by Ron, including: failure to seek help; failure to maintain the deceased under constant observation; failure to administer CPR and summon help after noticing the deceased was cyanosed; leaving her naked and poorly covered for many hours; and maintaining her in a propped up position.⁸⁴ Ron was convicted of manslaughter.

⁸² Ibid [34].

⁸³ Ibid [35].

⁸⁴ *R v H (No 1)* (Unreported, High Court, Rotorua, Harrison J, 3 December 2003) [8-9].

At sentencing, the judge refused to accept Ron's claim that he fell asleep for 12 hours after Hasnah had taken a potentially fatal dose of methadone. Ron told the specialist that he knew his wife was suffering from cyanosis and was not responsive to tactile stimulus and the specialist had recorded these comments because they struck him as most unusual. Anyone with medical knowledge would know that blue or cyanosed lips provided evidence that the bloodstream was being starved of oxygen. Nor did the judge accept Ron's explanation that he propped the deceased up to assist her breathing, and expressed his satisfaction that Ron knew that positioning Hasnah in this way would aggravate any brain damage, and had deliberately taken this step. No other inference could be drawn from his decision to place Hasnah in that position and leave her cold and uncovered. Ron knew of his partner's dire medical condition and knew that the longer he waited to summon medical assistance the more likely she was to deteriorate and die. The judge told Ron: 'I repeat that you are a nurse both by training and experience. Anybody with elementary medical knowledge knows that to place a seriously ill person in this position would inevitably have an adverse, not a beneficial, effect upon her ability to inhale oxygen. Again, you know, just as any qualified nurse, that she should have been placed immediately in the recovery position....I am satisfied your prolonged failure to call an ambulance was not only grossly negligent, it was more than reckless; it was deliberate'.⁸⁵

Ron was sentenced to ten years and ordered to serve a minimum term of five years' imprisonment. His subsequent appeal against conviction and sentence was dismissed by the Court of Appeal.⁸⁶

While the focus of the majority of the Court of Appeal in this case was on the victim's capacity for mendacity, '[i]n no other class of cases is recantation, including recantation by memory loss, commonplace and even expected'.⁸⁷ Since as time passes, the abuser has increased opportunities to reassert control and pressure the victim to withdraw, enhanced evidence gathering techniques in overseas jurisdictions are based on the assumption that evidence of domestic violence collected at the time the assault occurred is more reliable as this is the time the victim is most likely to cooperate with law enforcement.⁸⁸ Investigating officers are specifically instructed to investigate domestic violence crimes on the assumption that the victim will withdraw, recant or otherwise fail

⁸⁵ *R v H* (Unreported, High Court, Rotorua, Harrison J, 15 December 2003) [17].

⁸⁶ *R v H* [2005] 2 NZLR 81.

⁸⁷ Beloof and Shapiro, above n 62, 24.

⁸⁸ Tonya McCormack, 'Convicting Domestic Violence Abusers When the Victim Remains Silent' (1998-1999) 13 B.Y.U.J.Pub.L. 427, citing San Diego and Maryland domestic violence intervention initiatives at: 439-431. Paradoxically, the 'recent complaint' rule in sexual offences cases is frequently justified on the (sexist and incorrect) assumption that a prompt complaint is more likely to be true than one made some time after the alleged offending. See, eg, Annabel Markham, 'Recent Complaint Evidence' [1997] NZLJ 79, 79.

to cooperate at any subsequent trial.⁸⁹ Thus '[w]hile out of court statements are generally considered an *inferior* kind of proof, in cases of domestic violence the victim's out of court statements are typically a *superior* form of proof'.⁹⁰

As illustrated above, judicial opinions regarding the probity and reliability of hearsay evidence may differ. Significantly, these differences may depend more upon judges' understandings of the dynamics of domestic violence than upon any clear guideline principles. The exclusion of Hasnah's hearsay statements and evidence that Ron had behaved in a similar manner toward a previous partner meant crucial information about the circumstances of Hasnah's death never reached the jury.

VII 'RED FLAGS' FOR INTIMATE FEMICIDE: WHAT THE JURY WAS NEVER TOLD

A Prior Threats to Kill

Although threats to kill, especially those involving use of a weapon, carry a high risk of serious violence and lethality,⁹¹ the jury in the following case were not permitted to hear evidence that shortly before the homicide, the deceased woman's estranged partner threatened to kill her with the murder weapon he subsequently employed to carry out his threat.

*Prior Threats to Kill with a Weapon: Case Study B/97/4*⁹²

The relationship between Michael, the 25 year-old male offender, and Stephine his partner, was characterised by arguments and physical violence by Michael toward Stephine on a number of occasions.⁹³ Stephine left the relationship three times and following her final departure, was granted a protection order which covered herself and her two children. Michael fatally stabbed Stephine with a kitchen knife when she dropped off their child for an access visit. After stabbing Stephine repeatedly in her throat and back, Michael made an attempt to kill himself by slashing his wrists and stabbing himself in the abdomen. The Crown argued the background to the offending was a history of violence by Michael, who wanted total control of his partner. However, Michael claimed he had been provoked by an alleged remark from Stephine.

⁸⁹ Louise Ellison, 'Responding to Victim Withdrawal in Domestic Violence Prosecutions' [2003] Crim.L.R. 760, 762-763.

⁹⁰ Beloof and Shapiro, above n 62, 6 (emphasis in original).

⁹¹ See, eg, Jacquelyn Campbell, et al, 'Assessing Risk Factors for Intimate Partner Homicide' [2003] NIJ Journal 14.

⁹² See, discussion of this case above, at p 161.

⁹³ *R v B* (Unreported, High Court, Rotorua, Randerson J, 24 March 1998) 2.

In a pre-trial application, the Crown sought admission of an affidavit sworn by Stephine in support of the protection order, together with oral statements made by her to some nine witnesses regarding the nature of her relationship with Michael. The judge noted the disputed evidence could be broken down into three sub-categories. 1) statements by Stephine in her affidavit or to identified witnesses regarding the general nature of her relationship with Michael; 2) statements in her affidavit and to others of 'what took place at the incident at the accused's parent's home; 3) specific evidence by Stephine in her affidavit and in oral statements made to witnesses of an incident when during an argument Michael 'grabbed her, pulled her head right back by her hair and held a kitchen knife to her throat'.⁹⁴

The 'general evidence' in category 1 related to the length of the relationship, the fact of separation, the naming of the children, 'general evidence of physical and psychological abuse, evidence the accused used a drug (Prozac) to help him cope with depression, restrictions on the deceased seeing friends and using the telephone, and evidence that she had left the accused twice previously'.⁹⁵ The Court held this part of the affidavit was admissible as a clear and straight forward account of the couple's 'difficult' relationship which was supported by and consistent with the evidence of a number of other witnesses.⁹⁶ The evidence was part of the history relating to the charge faced by the accused and also relevant to the state of mind of the deceased, including whether she was fearful of the accused and was therefore likely to have provoked the incident which led to her death. Nor were there any grounds under s 18 of the Act for rejecting it. Moreover, if the evidence were relied upon solely to prove the state of mind of the deceased then it was admissible in any event and not excluded by the hearsay rule. Since Stephine's state of mind 'in the period immediately before the murder' was relevant, evidence in the affidavit of the need for a protection order and the deceased's fears about the accused consistent with other direct and admissible evidence was also admitted.

Evidence of the incident at the home of the accused's parents was also admissible as much of it was corroborated by witnesses, including the accused's parents. (Little is known of this evidence apart from the judge's observation that the accused assaulted both his parents at this time.) Michael's parents would also give evidence that Michael had previously threatened to kill himself and Stephine.

However, specific evidence in category 3 regarding the knife assault which Stephine had repeated orally to witnesses was excluded. The judge accepted the Crown submission that this evidence was relevant in rebutting the allegation of verbal provocation. First, it showed Stephine was afraid of Michael as a result of

⁹⁴ Ibid 4.

⁹⁵ Ibid 7-8.

⁹⁶ Ibid 8.

the previous violence and was therefore unlikely to have used the alleged provoking words at the access changeover. Second, use of the knife showed it was not the first time Michael had suddenly lost his temper and that there had been recent on-going violence towards Stephine. Moreover, a domestic violence programme provider who had spoken to Michael about the contents of Stephine's affidavit was able to say that Michael had the affidavit with him when he was interviewed, and had acknowledged the entirety of its contents to be true. The judge nevertheless pointed to the possibility that Stephine's evidence had been exaggerated or embellished; bearing in mind that she had sworn the affidavit in support of an application for a protection order.⁹⁷

The judge held s 43(3) of the *Domestic Violence Act 1995* amounted to a statutory bar to admissibility of evidence of Michael's conversation with the programme provider.⁹⁸ In the absence of independent evidence to support the knife assault, there being no complaint made to the police and no medical evidence (no injury having been caused), the fact Stephine had told friends and relatives of the knife assault did no more than indicate consistency with the affidavit. The judge noted his concern that Stephine was not available to be cross-examined. (Michael was thereby able to benefit from his victim's non-appearance although he was responsible for it.) The judge also observed that 'the manner in which the knife was allegedly presented on the June occasion was plainly different from the later occasion when it was used with tragic consequences'.⁹⁹ As a point of clarification, the judge stated that had evidence from the programme provider been admissible, he would have taken the opposite view about the admissibility of the knife incident in view of the accused's apparent acknowledgement of its truth.¹⁰⁰

Michael's threat to kill Stephine with the murder weapon; his prior threats to kill; his past violence; and controlling behaviour, including suicide threats; all in the context of separation, highlight the risk of lethality Michael posed. It is not known whether this risk was recognised by the Court at the time of granting the protection order, or by the programme provider, and whether this resulted in a warning to Stephine accompanied by safety planning.

Evidence of the knife incident was acknowledged by the judge to be relevant both to Stephine's state of mind, and as background evidence. Focusing on the possibility that Stephine exaggerated or embellished this incident and pointing to the lack of independent evidence to support her allegation appears paradoxical given the judge's acceptance that the programme provider could

⁹⁷ Ibid 10.

⁹⁸ Ibid 11.

⁹⁹ Ibid 10.

¹⁰⁰ Ibid 11.

testify to the reliability of Stephine's claims. But for the statutory bar, this evidence was acknowledged as reliable and would have been admitted.

The judge's contention that 'the manner in which the knife was allegedly presented on the June occasion was plainly different from the later occasion when it was used with tragic consequences', may have been based on Michael's allegation that he was provoked on the occasion of the fatal attack. As in this case, such claims are frequently rejected by juries. Consequently, this is an unconvincing basis for excluding domestic violence evidence. Alternatively, the 'plain difference' between the assaults may refer to the fact that on the second occasion, Stephine was killed. As previously discussed, the latter distinction would operate to exclude all prior acts of violence in intimate femicide cases on the basis that none of them resulted in the victim's death.

The research was greatly hindered by a general lack of detailed discussion of the evidence excluded, and reasons for excluding it. For example, three paragraphs of Stephine's affidavit setting out the reasons she required protection from Michael were excluded without any discussion as to their content.¹⁰¹ While two paragraphs of Stephine's affidavit concerning 'her fears about the accused' were held to be admissible and relevant to Stephine's state of mind in the period immediately before the murder, there is no discussion of the nature of this evidence, or how its probative value and prejudicial effect differed from excluded evidence relevant to Stephine's state of mind (the knife assault).¹⁰²

B *Controlling Behaviour and Stalking*

Polk chillingly reveals how stalking an estranged partner points to a calculated and planned course of action:

The careful tracking of the movements of the victim as part of the plan illustrates the intentioned character of many of these homicides. When the rage has reached the point where the male is ready to kill, he often scouts out the movements of his victim, determining where and when she will be vulnerable to attack.¹⁰³

¹⁰¹ Ibid 12.

¹⁰² Evidence of the knife assault was excluded on the grounds that its prejudicial effect outweighed its probative value and it was not necessary or expedient in the interests of justice to admit it.

¹⁰³ Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994) 30.

Five paragraphs in Stephine's affidavit dealt with 'an incident when the deceased visited her solicitor' and it was alleged the accused 'was hanging about at the time of this interview'.¹⁰⁴ If Michael was stalking Stephine before he killed her, this evidence would be highly probative of calculation and planning as opposed to Michael's version of the homicide as a spontaneous outburst of violence. However, the judge excluded this evidence as neither relevant nor probative. Since the excluded paragraphs contained information considered legally relevant to Stephine's application for a protection order, some discussion of their content and reasons for exclusion might have been expected.

C Prior Violence toward the Deceased

In the great majority of intimate femicides, the woman has experienced violence at the hands of her partner in the past year. The number of days since the last act of violence is also an important risk factor. In one study, half the women killed, and three-fourths of the battered women who killed, had experienced violence within 30 days of the homicide.¹⁰⁵ By contrast, legal analyses generally overlook the interrelationship between battering and intimate femicide. Consequently, evidence of a previous assault with the murder weapon may be excluded as neither relevant, nor probative.

Prior Violence toward the Deceased: Case Study U/02/7

Ben, the 27 year-old offender, attacked Jessica, his 26 year-old partner, by striking her four or five times around the head with an iron dumb bell. When Jessica fell on a sofa unconscious, Ben struck her two more times with the weapon. Immediately afterwards, he walked to the local police station and advised officers of the circumstances of Jessica's death and his participation in it. Ben told police the couple were planning to marry but Jessica had taken off the engagement ring he bought her. He said she put the ring in a drawer, laughed at him, and said 'it's called see you later'. He became angry and killed her with the dumb bell.¹⁰⁶

Ben was charged with murder 'in the alternative under the first two limbs of s 167 Crimes Act 1961; that is, that he meant to cause (a) [the victim's] death or (b) any bodily injury to her that was known to him to be likely to cause death'.¹⁰⁷ The Crown sought leave to adduce evidence that Ben had assaulted Jessica with the murder weapon less than two months before he killed her. On the earlier occasion, Jessica is reported as

¹⁰⁴ *R v B* (Unreported, High Court, Rotorua, Randerson J, 24 March 1998) 12.

¹⁰⁵ Campbell, et al, above n 91, 14.

¹⁰⁶ Transcript of Proceedings, *R v U* (High Court, Harrison J, 7 July 2003).

¹⁰⁷ *R v U* (Trial Ruling No. 1, Unreported, High Court, Gisborne, Harrison J, 7 July 2003) [7].

suffering a broken arm and serious head injuries.¹⁰⁸ The Crown produced supplementary briefs from a number of witnesses, including Jessica's friends and relatives who encountered her after the earlier assault at which time she 'presented in a physically and emotionally distressed state [and] was obviously suffering the consequences of injuries to her arm and the back of her head'.¹⁰⁹ The judge notes Jessica was reticent about disclosing the cause of her injuries but told at least one friend that Ben was responsible. Her friends persuaded her to seek medical assistance and Jessica told the doctor who treated her broken arm that she had fallen in a horse riding accident. However, in the doctor's opinion, her injury was consistent with a heavy blow.¹¹⁰ During a police interview following her killing, Ben admitted that he had previously beaten Jessica with the dumb bell.¹¹¹

The Crown emphasised that it 'did not seek to lead [this] evidence within the general rubric of similar fact or to establish a propensity for bad conduct'. Rather, the Crown submitted that evidence of the previous assault was relevant to the second alternative under s 167(b) in that it was probative of the fact that Ben knew the murder weapon could cause injury to Jessica and that such injury was likely to cause her death.¹¹² However, the judge ruled evidence of Ben's prior assault with the murder weapon was 'not at all probative on the charge of murder'. There was no relevant causal nexus between the two events and the fact that Ben had employed the same weapon on both occasions was immaterial. All the evidence would establish was that Ben knew or must have known that striking Jessica's arm with an iron dumb bell would be likely to break a bone in that region. This would tell the jury nothing about whether Ben knew that striking her elsewhere on her body with the same weapon was likely to cause her death.¹¹³

Further, the judge noted that even if satisfied that the evidence had some probative value, he would still exclude it, as any such value was 'far exceeded by its potentially prejudicial effect'.¹¹⁴ While accepting the Crown's submission that an appropriate direction could be given to the jury, the judge held that the risk remained that evidence of the prior assault would be treated by the jury as showing a propensity for bad conduct. Accordingly, all evidence relating to Ben's prior assault on Jessica was excluded.

The nature of Ben's defence could not be ascertained from the available information. Defence counsel appeared to focus on provocation (Jessica's comment regarding removal of the ring that 'it's

¹⁰⁸ Although the pre-trial ruling focuses on Jessica's broken arm and refers only in passing to injuries Jessica suffered to the back of her head, newspaper reports and the judge's remarks at sentencing describe her earlier head injuries as 'serious'. See, *R v U* (Unreported, High Court, Gisborne, Harrison J, 11 July 2003) [5].

¹⁰⁹ *R v U* (Trial Ruling No. 1, Unreported, High Court, Gisborne, Harrison J, 7 July 2003) [4].

¹¹⁰ *Ibid* [4-5].

¹¹¹ *Ibid* [6].

¹¹² *Ibid* [7].

¹¹³ *Ibid* [8].

¹¹⁴ *Ibid* [8-9].

called see you later'). If so, as in *Case Study B/97/4* above, evidence of Ben's prior violence toward Jessica would appear to be relevant to whether she was afraid of Ben, and thus unlikely to have made the alleged comment.

The Crown sought leave to adduce evidence of the earlier assault to assist in establishing the requisite knowledge and intent. This evidence could assist in 'showing the state of knowledge of the accused as a step on the way to showing his or her intent'.¹¹⁵ Although the judge's decision to exclude this evidence focused on the irrelevance of past injuries to Jessica's arm, Jessica also received a serious head injury during the course of the earlier assault.¹¹⁶ If Ben knew that striking Jessica in the head with the dumb bell could cause serious injury, 'common sense' suggests he was more than likely to know that striking her repeatedly in the head with the same weapon could well prove fatal. However, in the absence of a principled framework for determining the admissibility of domestic violence evidence, an accused's prior history of violence may be viewed as a series of discrete incidents, rather than an escalating course of volitional conduct indicative of motive, planning and intent.

The judge in this case noted that Jessica had good cause to end this violent relationship. For the benefit of those in Jessica's whanau who felt they could have done more for her, the judge remarked that in his experience, even if Jessica had left Ben, the couple would 'inevitably' have reconciled at some stage, and Ben would 'inevitably' have killed Jessica or 'inflicted horrid injuries'.¹¹⁷ The belief that male violence toward women is somehow natural or 'inevitable' is an attitude that public institutions seek to eradicate.¹¹⁸ As feminists point out, judicial assumptions about the 'inevitability' of male violence construct battering as women's destiny.

In *Thornton* the trial judge refers to miserable marriages as being 'a fact of life'. This accords to the violent marriage the immutable nature of, for example, the daily facts of dawn and dusk.¹¹⁹

The red flag of male sexual proprietariness is also revealed by the judge's acknowledgement that Ben was 'consumed by a mixture of blind passion, jealousy and possessiveness' and if he '*could not*

¹¹⁵ Mathieson, above n 2, 486.

¹¹⁶ *R v U* (Unreported, High Court, Gisborne, Harrison J, 11 July 2003) [5].

¹¹⁷ *Ibid.*

¹¹⁸ See, eg, Jeremy Horder, *Provocation and Responsibility* (1992) 194.

¹¹⁹ Alison Young, 'Conjugal Homicide and Legal Violence: A Comparative Analysis' (1993) 31 *Osgoode Hall L.J.* 761, 780.

have Jessica, no-one else could'.¹²⁰ However, Ben is simultaneously described by the judge as 'by nature a gentle, shy, loving and loyal person' who loved Jessica, and may have been dealt 'a dreadful emotional blow' by her decision not to marry him.¹²¹ This equation of possessive, proprietary male attitudes toward women with romantic love fails to confront and challenge the very attitudes that have permitted separation violence to become endemic in our culture.¹²² The assumption that a batterer, who would 'inevitably' have killed his partner or 'inflicted horrid injuries', could reasonably be described as by nature, gentle, shy, and loving also demonstrates how criminal law norms of relationship and character enhancement of the batterer overwhelm recognition of a structural pattern of violence toward women attempting to separate from violent men.

The Epicurean metaphor of courts 'having their cake and eating it too' is apposite. Battered women who remain in violent relationships must face further 'inevitable' violence and 'horrid injuries'. However, women attempting to terminate such relationships deal their 'loving' abusers a 'dreadful emotional blow', which may well form the basis of a provocation defence.

D *Prior Violence toward Previous Intimate Partners*

In the following case, the jury were not told that the offender had previously killed his second wife, had stabbed his first wife in the throat, and allegedly beaten a third woman who was too afraid to complain to police at the time. No decisions were found relating to an application by the Crown to adduce this history as similar fact evidence, which may indicate an assumption that leave was unlikely to be granted.

Violence toward Past Intimate Partners: Case Study F/01/6

Karl, the 54 year-old offender, had been in a relationship with 37 year-old Wathanak for a period during the second half of 2001. Karl had a long history of alcoholism and 'this was thought to be a factor, and possibly the principal factor, in [Wathanak] ending their relationship'.¹²³ Wathanak, who had been living with Karl in his house, returned to live in her rental home and became 'friendly with another man'. Karl knew of this development.¹²⁴ Wathanak went out with the 'other man' on 26 December and he subsequently tried

¹²⁰ *R v U* (Unreported, High Court, Gisborne, Harrison J, 11 July 2003) [4] (emphasis added).

¹²¹ *Ibid.*

¹²² See, eg, Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Mich.L.Rev.* 1, 77.

¹²³ *R v F* [2004] CA 186/03 (Unreported, McGrath, Paterson and Doogue JJ, 7 July 2004) [2].

¹²⁴ *Ibid* [3].

unsuccessfully to contact her. Karl admitted to seeing [Wathanak] on 27 December 2001. There was no evidence of anyone else seeing her after that date. Wathanak's EFTPOS account was not operated from that time. Nor did she return to her place of employment on 16 January 2002, as she had arranged'.¹²⁵ After telling others that Wathanak had left New Zealand, Karl reported her disappearance to the police.

Police drove Karl to Wathanak's home. During the drive, Karl reportedly informed police that he would 'brain the bitch if she's just been mucking us around'. Karl let the police into Wathanak's home with a key and showed them into the smaller of two bedrooms which he claimed his estranged partner had used. However police suspected Karl had staged the room to divert police attention from the main bedroom. In the latter room, police found evidence of blood spatters on the headboard of the bed, on the walls behind, on one of the walls to the side of the bed, and on the wall opposite the foot of the bed near the doorway. Traces of blood were found on the topside of the mattress and more traces of blood and several heavy bloodstains were found on the underside of the mattress together with traces of other clear fluid. This evidence was consistent with Wathanak being killed by blows to her head as she lay on her bed.

A bloody palm print was found on the architrave of the bedroom door and as a result of 'circumstances unconnected to the alleged homicide' the ESR already had a sample of Karl's blood in its possession.¹²⁶ Forensic evidence showed the palm print was Karl's and the blood, which belonged to Wathanak, must have been on his hands when the print was made. A forensic examination of Karl's car identified Wathanak's blood on a panel inside the boot area. A neighbour later gave evidence of seeing a man carrying what appeared to be a heavy bag. Bags of a similar kind to those described were found in Karl's possession. Another witness described Karl doing something in the boot area of his car for about 10 minutes but could not see precisely what.

Although Karl denied all knowledge of her death, he was charged with Wathanak's murder. The case against him was circumstantial. Following eight days of evidence, the defence successfully contended that if the jury concluded Wathanak was dead and that her death was caused by Karl, there was no basis whatsoever upon which it could conclude her death was murder. Although the Crown argued the jury were entitled to draw a reasonable inference as to intent, defence counsel argued that a finding of intent would be speculative since there was no material on which a jury properly directed could make such a finding. Accordingly, the trial judge ruled that only a charge of manslaughter could be put before the jury.

Karl elected not to give evidence at his trial. He was convicted of manslaughter. Despite appeals to Karl from Wathanak's family, her body has never been found.

¹²⁵ Ibid.

¹²⁶ Ibid [7].

The principle in this case, that a serial domestic violence offender may escape a conviction for murder by successfully disposing of the victim's body is disturbing.¹²⁷

After the trial, it was revealed that Karl killed his second wife in 1983. Medical evidence showed the woman had been violently struck in the stomach causing intestinal damage and shattered blood vessels. She had bruises to her head, one of which caused bleeding to her brain, her throat had cartilage damage and there were five bruises on her face. Police concluded that Karl had also staged this homicide scene; in this case to make it appear that his wife had stumbled and hit her head on a coffee table. Karl was acquitted of murder and sentenced to four years' imprisonment. At his trial, evidence he had previously been convicted of maliciously wounding his first wife in 1975 was excluded.

On the earlier occasion, Karl, who had given an undertaking that he would not molest his estranged wife, or enter her home, burst into the woman's home and cut her throat. Defence counsel submitted Karl had not intended to hurt his estranged wife and was desperate to speak to her about matrimonial matters, including access to his children. Karl was sentenced to nine months imprisonment, suspended for two years for this assault. A year earlier, in 1974, Karl had been convicted of assault causing grievous bodily harm. The records of this case have been sealed and little is known of the circumstances of this offending. At his sentencing for killing Wathanak, defence counsel submitted that the sentences imposed in relation to Karl's previous offending, including the manslaughter conviction, showed that this violence 'was treated as being at the lower end of the scale'.¹²⁸

Although the Crown may not generally lead evidence of bad character, a defendant who puts his own character in issue or casts imputations on a prosecution witness may be cross-examined regarding his prior convictions with leave of the judge. This discretion to permit the defendant to be cross-examined about his own bad character, including past criminal convictions, is exercised largely within the limits of the English statutory position.¹²⁹ The judge may refuse to grant leave

¹²⁷ For a similar example see: *Case Study M/01/5* where the accused was charged with murder but the Crown accepted a guilty plea to the lesser charge of manslaughter as the woman's body was so badly decomposed when it was found that the cause of death could not be fully investigated.

¹²⁸ *R v F* (Unreported, High Court, Wellington, France J, 2 May 2003) [18].

¹²⁹ *R v Clark* [1953] NZLR 823 (CA).

or restrict the evidence that may be adduced. However, an accused can avoid disclosure of his prior convictions by not giving evidence, thereby making himself unavailable for cross-examination.¹³⁰

As one legal scholar observes, it is as if the jury are 'required to critique a movie based on a viewing of only the last five minutes without being able to appreciate the events leading to the climax'.¹³¹ In the above case, Karl was apparently permitted to create a false impression of his character as non-violent. During his trial for Wathanak's death, a witness who lived briefly with Karl is reported as agreeing with defence counsel under cross-examination that her relationship with Karl had not ended because of any violence by him. While the jury were permitted to take whatever inference they might from this evidence, they were never told of a clearly discernible pattern of offending in the context of separation, and the accused's staging of the homicide scenes.¹³²

E *The Deceased's Fear of the Abuser and Premonitions of Death*

Although research suggests that a woman's level of fear of her partner is a reliable predictor of his future violence, grim evidence that women have accurately predicted their demise at the hands of a current or estranged partner may be excluded at trial. While the pre-death premonitions of victims such as: 'Everywhere I go, he shows up. I really think he's going to kill me'¹³³ appear indisputably reliable - the victim is eventually killed - statements of belief which introduce underlying facts that form the basis for the victim's belief are generally excluded.¹³⁴

The principle danger of victim's pre-death premonitions appears to be a concern that this evidence will go beyond merely illustrating the victim's state of mind by creating an inference that the

¹³⁰ *R v Butterwasser* [1948] 1 KB 4; *R v Kino and Mete* [1997] 3 NZLR 24 (CA).

¹³¹ Lee, above n 15, 259.

¹³² Karl subsequently appealed his conviction principally on the ground that his trial counsel should have called him to give evidence, or at least warned him of the risks of not testifying. The responding affidavit by his senior trial counsel lists a number of risks attached to a decision by the accused to expose himself to cross-examination. The risk of cross-examination on his prior convictions was not included.

¹³³ Karleen Murphy, 'A Hearsay Exception for Physical Abuse' (1997) 27 *Golden Gate U.L.Rev.* 497, 522, citing *People v Simpson* No BA097211, 1995 WL 21768 at 4-5, notes this was one of seven hearsay statements made by deceased victim Nicole Brown Simpson, which was excluded from the trial of her estranged partner who was charged with her murder, as it did not conform to any recognised hearsay exception. Simpson was acquitted.

¹³⁴ See, eg, Mathieson, above n 2, 596-597 noting that while the decision in *R v Baker* [1989] 1 NZLR 738 (CA) that evidence of witnesses to whom the deceased confided her fear of the accused was subsequently restricted to state of mind evidence, the ruling 'permitted evidence to be adduced of the *reason* for the state of mind, ie the accused's threats to the deceased - a classic example of the dangerous type of evidence which the rule [against hearsay] at its best was concerned to exclude'.

statement of belief can be used to prove the fact believed. "To permit a statement of memory or belief into evidence would threaten to swallow up the hearsay rule by "allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind".¹³⁵ Neal Hudders notes some US jurisdictions ignore this rule where the facts contained in the victim's statement demonstrate the basis for her state of mind. Thus where a victim's statement of fear is accompanied by statements that the defendant caused her injuries in the past, the statement of fear is not excluded.¹³⁶

While a victim's hearsay statements of fear may be admissible under the common law exception for state of mind evidence,¹³⁷ to qualify under this exception, the deceased's state of mind must be a relevant issue at trial.¹³⁸ Where relevant, use of this evidence is limited. For example, just prior to being killed by her stepfather, the 11 year-old child victim in *R v Howse* wrote in her diary 'my dad is going to kill me'. At issue was the identity of the killer, and the Court of Appeal held that the statement was relevant and admissible as it went to the child's state of mind and illustrated her fear of her stepfather. However, the Court was critical of the trial judge's instruction to the jury on the proper use of this evidence. The judge had not made it clear that the jury could only use the statement for the limited purpose of establishing the child's state of mind and it could not be used as evidence of the conduct of the defendant.¹³⁹

A domestic violence victim's pre-death premonitions may also be admitted as *res gestae* evidence. However, this exception may not apply to statements which are more remote in time. Moreover, even if this evidence qualifies under a particular hearsay exception, it is not automatically admissible. The court has a residual discretion to refuse to admit evidence it regards as unduly prejudicial. Mathieson observes that

the crucial question is, as always in cases of borderline admissibility: what is the *real* purpose for which the evidence is tendered? If the person's state of mind as such is irrelevant, the admission of it can have no purpose other than to prove the truth of what the person knew or believed or was

¹³⁵ Hudders, above n 55, 1053, citing Federal Rules of Evidence 803 Advisory Committee's Note.

¹³⁶ *Ibid* 1054.

¹³⁷ *Averson v Kinnaird* (1805) 102 ER 1258, 1262.

¹³⁸ See, eg, *R v Blastland* 1 AC 41 (HL) where the statements made by a third party to a number of witnesses indicating he knew of the child's death before the body was discovered were held inadmissible as the maker's state of mind was not a fact in issue at the trial.

¹³⁹ *R v Howse* [2003] 3 NZLR 767 [35].

thinking or was anxious about. If so, the evidence is then hearsay, but its hearsay character is disguised by advancing it on a spurious theory as to what it is designed to prove.¹⁴⁰

Citing the hearsay exception for co-conspirators,¹⁴¹ Raeder questions why no similar exception evolved to admit domestic violence victims' pre-death premonitions. Hearsay exceptions exist to help the process of proof at trials, and the conspiracy exception evolved in large part due to the difficulty of proving conspiracies, and as a result of their hidden nature. Intimate femicide is also a private crime and woman killing undoubtedly resulted in more trials than conspiracy prosecutions. However, the pre-death premonitions of victims were treated with disdain by accurately classifying them as expressions of the victim's state of mind which were irrelevant unless the defendant opened the door to their admissibility.

I can recall my own blind acceptance of this analytical approach without even questioning why the largest category of hearsay being rejected consisted of Cassandra-like predictions by women that their batterers would kill them if they left. Even if this exclusion did not stem from misogynistic views of women, or misguided fears that any man could be provoked to kill by his wife's infidelity, the absence of female concerns in evidentiary policy resulted in the voices of female victims being stifled at trial.¹⁴²

The present research found evidence of victims' pre-death statements of fear could be excluded with little, or no, discussion or explanation. In 'Trial Ruling (No 1)', the sentencing judge in *R v U*¹⁴³ noted persons close to the deceased victim feared the offender would kill her. As an aside, the judge observed that '[i]ndeed, evidence which did not go to the jury indicated that she had a premonition of her fate'.¹⁴⁴ There is no discussion of the content of this pre-death premonition, and no other judgment relating to its exclusion was found.

In *R v H*,¹⁴⁵ the victim, who separated from her husband and took out a protection order, was killed shortly after she contacted the police for assistance. The contested documentary hearsay consisted of a letter written by the deceased to the offender some two and a half months before her death

¹⁴⁰ Mathieson, above n 2, 583.

¹⁴¹ See, Ibid 675, for discussion of this exception.

¹⁴² Raeder, above n 1, 1514.

¹⁴³ See discussion of this *Case Study U/02/7* above, at p 338.

¹⁴⁴ *R v U* (Unreported, High Court, Gisborne, Harrison J, 11 July 2003) [3].

¹⁴⁵ See, discussion of this *Case Study H/00/8* above, at p 175.

which spoke of 'difficulties in the marriage, reasons for separation, the accused's violence towards her and the deceased's current attitude towards the accused'. The other evidence was a custody affidavit sworn by the deceased around the same time which dealt with 'the deceased's attitude to custody of the child, the accused's violence towards her and her fears as to his possible behaviour'.¹⁴⁶ The Court held the letter, subject to deletion of four sentences was admissible, but the affidavit evidence was excluded. The victim's 'rhetorical statements in the affidavit about the risk posed by the accused' created a greater risk of prejudice.¹⁴⁷ No details of the nature of the victim's 'fear as to [the accused's] possible behaviour' were provided.

When excluding the affidavit evidence, the judge in *R v H* observed that the affidavit had been made 'for the specific purpose of supporting the deceased's side in a family law dispute' and this lessened its probative value.¹⁴⁸ This view is concerning. Affidavits sworn in support of custody or protection orders are a feature of separation from a violent partner. Therefore, the suggestion that these are inherently unreliable casts doubt on a great deal of domestic violence evidence in estrangement femicide cases. Although in this case, the deceased's affidavit was perceived to be less reliable than her letter intended by her for the accused's eyes only; in *P*, the Court of Appeal did not disagree with defence counsel's submission that the wife's letters may have *less* probative value than the affidavit in support of her protection order, as the latter was sworn evidence which might add to the weight a jury attached to it.¹⁴⁹

F Evidence of Forced Sex¹⁵⁰

In *P*,¹⁵¹ the Crown sought to have evidence from 40 witnesses as to earlier episodes of violence by P ruled admissible. The Crown wished to establish that P was not a man suddenly provoked, and rather than a sudden loss of self control, the lethal attack was an extreme version of a course of violent conduct by P aimed at exerting control and dominance over his wife.¹⁵² At the hearing, the Crown did not pursue its claim to adduce evidence from six witnesses and the judge held

¹⁴⁶ (Unreported, High Court, Auckland, Fisher J, 15 November 2000) [1-2].

¹⁴⁷ Ibid [15].

¹⁴⁸ Ibid.

¹⁴⁹ [2000] 1 NZLR 234 [13].

¹⁵⁰ See, eg, Jacquelyn Campbell, et al, 'Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study (2003) 93 *American Journal of Public Health* 1089, citing forced sex as a risk factor for intimate femicide. Healey, Smith and O'Sullivan, above n 38, 41, noting that incidents of forced sex are warning signs for lethality in the domestic violence lethality assessments used by programme providers.

¹⁵¹ See, discussion of *Case Study P/98/3* above, at p 215.

¹⁵² [1999] CA 65/99 (Unreported, Richardson P, Heron and Goddard JJ, 18 March 1999) [17].

admissible, but subject to one qualification, the tendered evidence of violence by P toward his wife throughout the course of their relationship. A statement to the police signed by P's wife which led to P being prosecuted and pleading guilty to a charge of assault was also ruled admissible. An affidavit sworn by P's wife that led to a temporary protection order being made against P on behalf of herself and the couple's four children was also held admissible.¹⁵³ (Following her death, the victim's protection order arrived in the mail.) P appealed.

When considering the nature and history of the relationship between P and his wife in the context of P's provocation claim, the Court of Appeal held the essential question was whether this evidence was sufficiently material and probative as to outweigh any illegitimate prejudice to P.¹⁵⁴ On this analysis, his wife's affidavit and witness statement were regarded as relevant and admissible, but evidence of witnesses who saw bruising and other injuries on the deceased woman was excluded as peripheral. Evidence of witnesses who could testify to seeing P assault his wife was limited to three witnesses and the remaining evidence excluded. As discussed above, evidence that P had inflicted violence on his sisters and other women with whom he had an intimate relationship was also ruled inadmissible.

Following his trial and conviction for murder, P's defence counsel argued in the Court of Appeal that hearsay evidence consisting of his wife's letters detailing P's violence towards her, which included past sexual assaults, had been wrongly admitted at trial. The Crown argued this evidence was relevant to whether the lethal assault was, as P claimed, a spontaneous and unpredictable act arising from his loss of the power of self-control, or a purposeful escalation of the violence. Although the initial decision to admit these letters appeared to significantly influence the jury's decision to convict P of murder, the Court of Appeal found considerable strength in defence arguments that in so far as the letters were relevant, they added little to the information already available to the jury. The Court also observed that allegations in his deceased wife's letters of P's sexual violence toward her introduced elements of potential illegitimate prejudice.¹⁵⁵ This analysis

¹⁵³ Ibid [6].

¹⁵⁴ Ibid [12].

¹⁵⁵ *R v P* [2000] 1 NZLR 234 [16]. The Court of Appeal was not required to decide whether the trial judge's decision to admit the letters warranted a retrial as it overturned P's murder conviction on the basis that the cousin's attempt to prevent P from inflicting further violence on his wife constituted a provocation to P.

appears premised on a hierarchy of domestically violent behaviours with allegations of sexual assaults as especially prejudicial to battering defendants.¹⁵⁶

By contrast, the statutory definition of domestic violence does not isolate sexual violence from physical or psychological violence.¹⁵⁷ Domestic violence is widely conceptualised and researched as a pattern of controlling behaviours which includes physically, sexually and psychologically abusive acts that are not artificially divorced from each other.¹⁵⁸ Even if a particular incident is particularly distressing, its atrocious quality can indicate the lengths to which the abuser will go to control his partner.¹⁵⁹

As Lisa Sanctis points out,

[i]f we fail to address the very nature of domestic violence we will continue to see cases where a man beats his intimate partner, even kills her, and goes on to beat or kill his next intimate partner. Since criminal prosecution is one of the few processes that can interrupt the escalation pattern so common in domestic violence, we must be willing to look at patterned behaviour during the criminal prosecution or we will miss our opportunity to address the problem at all.¹⁶⁰

The various decisions in *P* demonstrate that a batterer's violence may be met with lenient treatment at every stage of his interactions with the legal system. *P* escaped a sentence of imprisonment for a previous assault on his wife three months before he killed her. His conviction for murder was overturned by the Court of Appeal, and his second trial was aborted when a newspaper published 'background material not presented at the trial'. This 'background material' apparently related to publication by the newspaper of the content of one of his wife's letters. No further reports of legal proceedings against *P* were found.

¹⁵⁶ See, also, *M v R* (Unreported, High Court, Rotorua, Randerson J, 3 August 2000).

¹⁵⁷ Section 3 *Domestic Violence Act 1995*.

¹⁵⁸ See, eg, Healey, Smith and O'Sullivan, above n 38, 3; See, also, research by Allison Morris, *Women's Safety Survey 1996* (1997) which was commissioned by the Victimisation Survey Committee consisting of representatives from the New Zealand Police, Ministry of Justice, Crime Prevention Unit, Department of Social Welfare, Te Puni Kokiri, Ministries of Youth and Women's Affairs.

¹⁵⁹ Raeder, above n 1, 1503.

¹⁶⁰ Sanctis, above n 21, 388-389 (citations omitted).

**VIII A PRINCIPLED RESPONSE TO ADMISSIBILITY:
RECOGNISING THE THEME OF CONTROL**

Although criminal law generally regards each act of domestic violence as unique, and acts of prior abuse as constituting little more than propensity evidence, s 3 of the *Domestic Violence Act 1995* recognises domestic violence as a dynamic mix of abusive behaviours which may include multiple victimisations across a continuum of physical, sexual, emotional and psychological violence.¹⁶¹ Psychological abuse includes, but is not limited to: intimidation; harassment; damage to property; threats of physical abuse, sexual abuse or psychological abuse.

[A]buse must be considered as multidimensional, containing emotional, physical, sexual, familial and property aspects set against a framework of a systematic pattern of control and domination...control is also maintained, and fear is intensified, through the extensive use of humiliation, ridicule, criticism, and other forms of emotional abuse, financial abuse, and social isolation'.¹⁶²

Benjamin Bowling, a British criminologist, notes the tendency to view a pattern of abuse as separate, discrete incidents¹⁶³ masks essential elements of the process of victimisation:

This means that the offence cannot be set in context as part of a sustained campaign...In court, as with policing, the focus on a single event renders the process of victimization invisible...strips it of meaning for the victim and for those to whom the incident must be described (such as a police officer, judge, or jury). By rendering earlier episodes in the process of victimization 'inadmissible evidence' or irrelevant to police investigation, neither the effect on the victim nor the implications for the rest of the 'community' may be described.¹⁶⁴

¹⁶¹ Julie Stubbs, 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (2002) 42, noting this pattern of repeat victimisation is one reason why assumptions of a discrete incident underpinning restorative justice processes are not valid in domestic violence cases.

¹⁶² Raeder, above n 1, 1484.

¹⁶³ The New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (2001) [26], cites one submission noting that the defence of self-defence is constructed in a way which inclines the court 'to look for a one-off attack and to measure the defendant's use of force in relation to that attack. Such approach is based on a view of domestic violence as a series of discrete acts of physical violence between which the woman is not being abused and is free to leave'.

¹⁶⁴ Benjamin Bowling, 'Racial Harrassment and the Process of Victimization: Conceptual and Methodological Implications for the Local Crime Survey' (1993) 33 *Brit.J.Criminol.* 231, 243-244. While Bowling focuses on racial violence he notes his analysis is also applicable to domestic violence.

When control as the theme which links a multidimensional pattern of abuse is overlooked,¹⁶⁵ a domestic violence victim who alleges numerous breaches of her protection order by a single offender may find the various counts are severed, requiring her to give evidence against the abuser and undergo cross-examination by him at each separate trial.¹⁶⁶ Violence and threats toward other family members¹⁶⁷ may be excluded as merely demonstrating propensity rather than part of a pattern of control.¹⁶⁸ Failure to recognise domestic violence as a pattern of controlling behaviours may also ensure that judges differentiate property damage from physical assault; artificially isolate an abuser's threat to kill with a weapon from his successful accomplishment of the threat; and forced sex may be distinguished from physical violence in order to find dissimilarity.

The probative value of evidence that the accused escalated his use of violence post-separation, for example by stalking his estranged partner, threatening to kill her, assaulting/injuring her with the murder weapon, and the victim's prophetic premonitions of death may also remain unacknowledged. While a commonly reported pattern of domestic violence is the limited use of physical assaults once a climate of fear and the threat of violence is established,¹⁶⁹ judges may lack understanding that the nature of an accused's violence toward current and previous partners may differ according to the success or failure of other tactics of control.¹⁷⁰

The decision in *R v Goldberg*¹⁷¹ further demonstrates how failure to acknowledge the theme of control can jeopardise women's safety. In this case, a Visiting Judge found the offender, who was serving a 27-month sentence of imprisonment for assaulting his estranged partner, guilty of gross misconduct by telephoning the woman from prison in breach of her protection order. The offender sought judicial review of the decision, arguing that the complainant's hearsay statement was incorrectly admitted. Although the Crown contended that the woman's evidence was not pivotal to

¹⁶⁵ See, eg, Kevin Dawkins, 'Criminal Law' [1997] NZ Law Review 20, 23-24, arguing that persistent or on-going conduct can be met with separate charges for each type of behaviour under existing law.

¹⁶⁶ In *Case Study K/99/16(S)* the sentencing judge reportedly remarked that the offender had pleaded not guilty to five charges of breaching the woman's protection order. Following his conviction after a defended hearing on one charge, the offender reversed his not guilty plea on the others. The judge stated that 'it was clear the complainant had been severely upset by [the offender] and by having to give evidence against him. She had been living in dread of having to give evidence in four other hearings'.

¹⁶⁷ See, eg, *Case Study M/02/8* where the 'habitual batterer defence' succeeded, but evidence of the accused's violence towards the deceased's father was excluded.

¹⁶⁸ See, eg, *Case Study K/00/21(S)* where the battered woman who had suffered shocking injuries told the Court she did not ask her family for help because she feared for their safety.

¹⁶⁹ Victorian Law Reform Commission, above n 3, 161.

¹⁷⁰ See, eg, *M v R* (Unreported, High Court, Rotorua, Randerson J, 3 August 2000).

¹⁷¹ (Unreported, High Court, Rotorua, Baragwanath J, 30 May 2003).

the earlier ruling, the judge held her evidence was a material factor in the decision to convict the offender and fairness required that she be called to give evidence. When rationalising this decision that the victim of a domestic assault, whose assailant contacts her from prison in breach of her protection order, must travel to the prison and confront and be cross-examined by her abuser, the judge remarked:

I am acutely conscious of the difficulties presented by this conclusion...If a man did in fact use a prison telephone to call a woman protected by a protection order, the breach of which could be the very reason why he is in prison, to require her to enter the prison to give evidence and be exposed to cross-examination by the prisoner or his counsel would have very unhappy consequences. Nevertheless the right to cross-examine one's accuser lies so deep that...the remedy lies beyond the judicial power to modify the Judge-made rules of evidence; any reform must...be a matter for Parliament. Under the present law the prosecution must therefore rely on evidence other than that of the complainant if she is not able or willing to appear.¹⁷²

The power and control dynamics of violent relationships as well as the twin red flags of separation and repeat victimisation remain invisible in this analysis. Since the judge accepted that neither legislation nor any blanket common law rule excluded the admission of hearsay evidence in disciplinary proceedings, this case could also have been decided differently. The alternative decision provides an opportunity for abusers to use the criminal justice system to further control and intimidate their victims.

IX CONCLUSION

Myths and misunderstandings about domestic violence can affect decisions made at every stage in the legal process, including whether and how pre-trial applications are formulated, and the rulings of trial judges.¹⁷³ In the absence of a principled framework for determining admissibility, decisions about whether domestic violence evidence is mere character assassination and should be limited or excluded, or whether it is highly probative, turn on the individual judge's understanding of the dynamics of violent relationships. Furthermore, without a systematic means of accessing judgments in domestic violence cases, opportunities to challenge misunderstandings, educate the legal profession, and enhance judicial accountability are limited.

¹⁷² Ibid [68] (citations omitted).

¹⁷³ Victorian Law Reform Commission, above n 3, [4.154].

Some jurisdictions are prepared to explore the defendant's character in a criminal trial.¹⁷⁴ Recent empirical studies also suggest character evidence may be more probative than it has traditionally been assumed to be.¹⁷⁵ Where certain types of offending are involved, legislation in the UK¹⁷⁶ and New Zealand¹⁷⁷ leave it open to the prosecution to lead evidence of a defendant's propensity to commit the type of offence charged.¹⁷⁸ It is also taken for granted in other legal contexts that past criminal misconduct is predictive of subsequent criminal offending. For example,

the defendant's criminal history weighs heavily in pre-trial release determinations and in sentencing decisions, both as a statutory matter and as a matter of judicial discretion...This is primarily because what a defendant has done in the past is taken as a good indication of what he's likely to do in the future if not adequately restrained or deterred.¹⁷⁹

While it is sometimes suggested that development and modification of evidence law is 'particularly a matter with which the Judges should be entrusted',¹⁸⁰ this view of judges as genderless, objective beings who are immune from prevailing cultural norms and values serves to instantiate and legitimise existing power relations.¹⁸¹ Allowing the full story of the violent relationship to be told when battered women are killed would counter the present emphasis on victim blaming, refocus legal and public attention on reoccurring patterns of behaviour in battering relationships, and put society on notice of the need for effective action to prevent battering escalating to lethality.

¹⁷⁴ For example, David Karp, 'Response to Professor Imwinkelried's Comments' (1994) 70 Chi-Kent L.Rev. 49, 50, notes information regarding the accused's history, including his criminal record, is provided to French judges and jurors as a matter of course.

¹⁷⁵ Redmayne, above n 16, 685. See also, Edward Imwinkelried, 'Some Comments About Mr David Karp's Remarks on Propensity Evidence' (1994) 70 Chi-Kent L.Rev. 37, 37 n 5, citing research. Susan Davies, 'Evidence of Character to Prove Conduct: A Reassessment of Relevancy' (1991) 27 Crim.L.Bull. 504, 519-520, noting that whilst legal commentators argue one or two incidents do not support an inference of behavioural consistency, 'where situations are similar, past behavior is an excellent indicator of a person's likely future behavior'.

¹⁷⁶ *Theft Act 1968*.

¹⁷⁷ Section 258(2) *Crimes Act 1961* in relation to receivers; Section 23 *Evidence Act 1908* in relation to poisoners.

¹⁷⁸ The New Zealand Law Commission, above n 10, [176], considered the statutory provision relating to poisoners to be unnecessary, but thought the exception which allows evidence of previous possession of stolen goods, or previous convictions for receiving to prove guilty knowledge, was working well and should be retained.

¹⁷⁹ Karp, above n 174, 51.

¹⁸⁰ *Jorgenson v News Media (Auckland) Limited* [1969] NZLR 961 (CA) per Turner J.

¹⁸¹ See, eg, Stella Tarrant, 'Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws' (1990) 20 West.Aust.L.Rev. 573, 576.

PART III

**THEORETICAL BARRIERS TO PRINCIPLED
INTERVENTION**

RESEARCH SUMMARY

And

RECOMMENDATIONS

CHAPTER TEN: CONFRONTING THEORETICAL BARRIERS TO PRINCIPLED INTERVENTION

[A]bove the veneer of awareness and *zero tolerance* hover the ghosts of old attitudes about abuse. They haunt us especially in the form of latent ambivalence about battered women...Current ideas about domestic violence have also been complicated and ambivalence compounded by often competing contemporary discourses on victims and victimization, sexual politics in/after feminism, theories of female subjectivity and agency, and the meaning and politics of difference. As a result, responses to domestic violence in the new millennium are at once reformed and recidivist, outwardly resolute yet internally conflicted, more open yet just as frequently displaced and/or repressed.¹

I INTRODUCTION

New Zealand Family Violence Prevention Strategy seeks an integrated, consistent, comprehensive response to domestic violence. However, theoretical dichotomies and disagreements among scholars, researchers and activists over the nature of battering, gender of perpetrators, characteristics of violence and extent to which the legal system should defer to the choices of individual victims discussed in this chapter continue to inhibit development of principled domestic violence intervention.² The power of these oppositional discourses to mask victims' concrete social reality is compellingly demonstrated by the absence of inquiry into harms to women who seek help from the legal system despite the express paramountcy of victim safety in Family Violence Prevention Strategy.³

II MAJOR THEORETICAL DILEMMAS

Cheryl Hanna notes that while feminist theory has many strands, certain issues repeatedly surface as feminists attempt to move the domestic violence debate forward from thought to action.

First, the complex and often ambiguous concept of privacy has been central to our understanding of women's roles in the family, and more recently, of the relationship between family violence and women's affirmative autonomy. Do we characterize family violence as a purely public phenomenon, or is there some place for preserving a more privacy-based model of intervention?

¹ Diane Shoos, 'Representing Domestic Violence: Ambivalence and Difference in *What's Love Got to Do with It*' (2003) 15 *National Women's Studies Association Journal* 57, 59-60 (emphasis in original; citations omitted).

² Kerry Healey, Christine Smith and Chris O'Sullivan, *Batterer Intervention: Program Approaches and Criminal Justice Strategies* (1998) 15, noting that '[m]ore than in most fields, the theoretical debate affects practice'.

³ Ministry of Social Development, *Te Rito: New Zealand Family Violence Prevention Strategy* (2002) 12.

Second, a tension runs through feminist theory about the proper focus of our policy choices. Should individual women and their experiences guide our policymaking, or should we widen the lens to include aggregate social goals? Finally, we continue to struggle over what role women play in their own oppression. Are women purely passive victims, or are they blameworthy agents in their violent relationships? There are no easy answers to these questions, but coming to grips with these lingering tensions is critical to developing an effective prosecution strategy.⁴

The above divisions and disagreements which are further discussed in the following section have permitted domestic violence theory and practice to paralyse each other.⁵

A *The Victim/Agent Dichotomy*

1 *The Battered Woman: Victim or Agent?*

The tension between victim blaming arguments and arguments which call upon women to overcome their victim status is often described as the 'agency/victimization dichotomy.'⁶ 'Anti-victim' feminists criticise stereotypical images of battered women as helpless, dependent and pathological. These patronising images of female victimisation harm all women's interests and may encourage individual abused women to abdicate responsibility for their own welfare and independence.⁷ The fear that women will evade responsibility for their actions by claiming victimisation is also reflected in popular and legal commentary on battered women who kill their abusers.

The 'hidden premise' of anti-victim arguments that battered women are freely choosing individuals, or 'if we are not, the main obstacle is our own consciousness', is deeply problematic.⁸ Representations of battered women as autonomous agents ignore structural constraints on women's mobility which inhibit opportunities for women to simply pack their belongings and disappear. Economic, social and cultural factors, including the connectedness of mothers to their children,⁹

⁴ Cheryl Hanna, 'No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions' (1996) 109 Harv.L.Rev. 1849, 1868.

⁵ Ibid 1856.

⁶ Ibid 1882.

⁷ See, eg, Naomi Wolfe, *Fire with Fire: The New Female Power and How It Will Change the Twenty-First Century* (1993) denouncing 'victim feminism' and advocating 'power feminism'.

⁸ Martha Mahoney, 'Victimization or Oppression? Women's Lives, Violence, and Agency' in Martha Fineman and Roxanne Mykitiuk (eds) *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (1994) 59, 63.

⁹ Ibid.

frequently operate to curtail the options of women who are grappling with violence in their lives.¹⁰ The woman may face her own and her children's economic deprivation, loss of her home, connections to a network of friends, and emotional/financial support from extended family should she attempt to flee.¹¹ Research shows contact with the court seldom leaves women feeling protected,¹² and fear of retaliation is a major factor in women's decisions not to make a formal statement, to withdraw, or to consider withdrawal after the statement is made.¹³ Since the chances that chronic abusers will suddenly choose to desist are negligible, the violent pursuit by batterers of women who attempt to flee is well documented, and the battered woman cannot rely on the police to hold the offender in custody, or the courts to impose a lengthy period of detention, atomistic notions of agency and choice fail to capture her social reality.

Although intervention based on the 'choices' of battered women may presume an autonomy that is more theoretical than real, Hanna's experience as a prosecutor found judges often strove to uphold women's choices when determining outcomes for battering men. Even judges who were highly committed to domestic violence reform could hesitate to proceed, or to find a defendant guilty, if the complainant was uncooperative or stated at the outset that she did not want to continue with the case. 'Like prosecutors, judges may reason that if the woman wants to live in a violent relationship, it is her choice.'¹⁴ The batterer may thereby avoid any, or significant criminal law sanctions, and the next time the judge or prosecutor is confronted with the complainant she has further physical injuries.¹⁵

While women's liberation cannot be properly conceived or actualised if women are considered nothing more than victims, Diane Shoos points out that the problem cannot be resolved by simply ignoring women's experiences of oppression.¹⁶ Case studies in the present research reveal

¹⁰ Lee Bowker, 'A Battered Woman's Problems Are Social, Not Psychological' in Richard Gelles and Donileen Loseke (eds), *Current Controversies on Family Violence* (1993) 154, 158-160, identified the six principles barriers to escape as: fear of worse battering; fear of harm to the children; retaliation against parents or other close relatives; poverty and homelessness; shame, failure and public sin; loss of social identity and one's entire way of life.

¹¹ See, eg, Jennifer Hand, et al, *Free From Abuse: What Women Say and What Can Be Done* (2002); Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 Mich.L.Rev. 1; Linda Williams, 'Understanding Child Abuse and Violence Against Women: A Life Course Perspective' (2003) 18 *Journal of Interpersonal Violence* 441.

¹² Lauren Bennett, Lisa Goodman and Mary Ann Dutton, 'Systemic Obstacles to the Criminal Prosecution of a Battering Partner' (1999) 14 *Journal of Interpersonal Violence* 761, 768.

¹³ Carolyn Hoyle and Andrew Saunders, 'Police Response to Domestic Violence' (2000) 40 *Brit.J.Criminol.* 14, 24.

¹⁴ Hanna, above n 4, 1874.

¹⁵ *Ibid* 1875.

¹⁶ Shoos, above n 1, 63.

women's altruistic responses to battering men often take place in the context of serious and life-threatening violence. Representations of this social reality in terms of a dichotomous opposition of battered women as 'pure victims' or 'pure agents' reinforce the subordination of women by *either* denying battered women's agency, *or* ignoring the harmful effects of violence and domination. Nevertheless, the study found this binary opposition pervades criminal justice responses to intimate partner violence.

Following their deaths, battered women were frequently stereotyped in the media and by criminal justice personnel as passive victims, whose debilitating images of love or other personal pathology rendered them unable to leave abusive relationships. These discourses of victimisation masked the social reality that the women were killed following attempts to exercise their agency by seeking protection and attempting to escape from violent men. Conversely, constructions of battered women as autonomous, freely choosing agents ignored structural patterns of risk, resulting in inappropriate interventions which failed to promote victim safety. Furthermore, women's expressions of love and forgiveness were manipulated by defence counsel on behalf of abusive men;¹⁷ while courts validated these altruistic responses when sentencing their batterers, thus failing to provide a consistent, coherent response.

Dichotomous stereotypes of abused women as either masochistic or emotionally disturbed victims or agents who provoked their own deaths promote a culture of victim blaming which operates to camouflage gaps and shortcomings in agency interventions. These stereotypical constructions of battered women as either vengeful killers or mentally or emotionally impaired victims also obscure the reality that women are often unable to leave safely or permanently. Consequently, legal discourses of violence in intimate relationships continue to be dominated by the question, or more accurately the accusation: 'Why Didn't She Leave?'

¹⁷ For example, in *Case Study D/00/7* the fact that the deceased 'kept coming back' to the offender was advanced by defence counsel as a mitigating feature of the offending. In *Case Study P/01/6(S)* defence counsel for an offender who admitted multiple assaults and breaches of a protection order described 'the relationship' as 'bizarre' as the woman victim was continually renewing contact with the offender. In *Case Study C/01/7(S)* the offender was convicted on four charges of rape and breaching a protection order. Defence counsel noted that during the time frame of three of the rapes the complainant made a conscious choice to remain in the relationship.

2. *The Gendered Victim/Agent Dichotomy*

A gendered version of the victim/agent dichotomy is 'captured in the criminological cliché "women are mad and men are bad"'.¹⁸ This theory posits that women and men are regulated differently by criminal justice interventions which position female defendants within psychiatric discourses of victimisation and male defendants within criminal discourses of agency and wrongdoing.¹⁹ As a consequence male offenders are said to be typically sanctioned more harshly than women.²⁰

The theory that violent men are generally denied excuses for their offending due to their positioning within legal discourses of agency and blame is not supported by the present research. Discourses of male pathology are routinely advanced on behalf of male abusers. These 'psychologising' narratives enter the courtroom in cases of sub-lethal domestic violence and when habitual batterers kill. Victoria Nourse's US research also found men's provocation claims were frequently bolstered with psychiatric testimony.²¹ Similarly, Elizabeth Rapaport's study of US capital murder convictions found an emphasis upon the mental/emotional life of men who killed female intimates.²² Nor is the proposition that female defendants benefit from their positioning within discourses of victimisation and pathology supported by Australian research which indicates that an emphasis upon the battered woman's pathology operates to deprive women of access to the defence of self-defence.²³

Joan Busfield has criticised the criminological cliché 'women are mad, and men are bad'. Busfield notes that men feature prominently in certain psychiatric patient populations such as alcoholism, sexual disorders and anti-social psychopathy. Accordingly, more subtle and complex forms of

¹⁸ Fiona Raitt and M Suzanne Zeedyke, 'The Implicit Relation of Psychology and Law' (2000) 49.

¹⁹ See, eg, Hilary Allen, *Justice Unbalanced: Gender, Psychiatry and Judicial Decisions* (1987).

²⁰ See, eg, Samantha Jeffries, 'Just or Unjust? Problematising the Gendered Nature of Criminal Justice' (2002) 18 *Women's Studies Journal* 24.

²¹ Victoria Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1997) 106 *Yale L.J.* 1331, 1336.

²² Donna Coker, 'Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill' (1992) 2 *S.Calif.Rev.L.& Women's Stud.* 71, 128 n253, citing Elizabeth Rapaport, 'When is Domestic Homicide a Capital Crime?: Gender Differences in America's Death Rows in the Post-Furman Era' (Presentation for Law & Society Meeting May 28-31, 1992).

²³ See, eg, Rebecca Bradfield, 'Women Who Kill: Lack of Intent and Diminished Responsibility as the Other 'Defences' to Spousal Homicide' (2001) 13 *CICJ* 143. Donald Nicolson, 'Telling Tales: Gender Discrimination, Gender Construction and Battered Women Who Kill' (1995) 3 *Fem.L.S.* 185, 204, notes that whether battered women are treated as weak, neurotic and pathological victims or as active agents and doubly deviant, gender constructions are reinforced and the actual experiences of battered women are excluded from the courtroom. If the battered woman is seen as passive and mentally impaired she is deprived access to defences which depend upon legal notions of 'reasonable' behaviour, whereas if she is viewed as an autonomous agent she is punished harshly in order to perform 'the educative function of demarcating the proper from the improper woman'.

analyses are necessary to allow for the ways in which mental health discourses regulate the behaviour of both women and men.²⁴

B *The Sameness/Difference Dichotomy*

Competing feminist visions of sexual equality have resulted in feminist demands for formal equality - women must be treated 'the same' as men - which are opposed by feminists who point to differences between the sexes - social and/or biological - and argue women should be treated differently from men. This equal treatment versus special treatment or sameness/difference debate 'while perhaps not the most crucial in feminist legal scholarship, has probably absorbed the most energy'.²⁵ Catharine MacKinnon notes that concealed within the terms of the debate is the substantive way in which man has become the measure of all things. When male experience is the norm, the range of issues that feminists term violence against women are silenced out of the debate as these experiences happen almost exclusively to women.²⁶

For example, gender disparities in physical size and strength mean a woman's perception of danger is likely to differ from that of a man's. Although sex differences in perceptions of harm do not render women's perceptions less reasonable, it is men's perceptions of harm or danger which serves as the legal standard. Silencing of issues of male violence against women is also evident in the 'crime of passion' analysis and myth of romantic love which mask the social reality of a structural pattern of violence against women who attempt to leave violent men. Since these analyses have rendered separation violence invisible, law continues to demand that rather than resort to self-defence, battered defendants should leave violent relationships.

The invisibility of the red flag of repeat victimisation, and its re-presentation in defence of the batterer further demonstrates the power of masculinist discourses to mask a pattern of battering escalating to lethality and the interrelationship between domestic violence and intimate femicide. Consequently, responses to recidivist abusers may be repeatedly rehabilitative in the absence of monitoring and accountability. Silence surrounding harm to women following interventions with

²⁴ Joan Busfield, *Men, Women and Madness: Understanding Gender and Mental Disorder* (1996).

²⁵ Julia Sohrab, 'Avoiding the "Exquisite Trap": A Critical Look at the Equal Treatment/Special Treatment Debate in Law' (1993) 1 *Fem.L.S.* 141, 142.

²⁶ Catharine MacKinnon, 'Difference and Dominance: On Sex Discrimination' in D Kelly Weisberg (ed), *Feminist Legal Theory: Foundations* (1993) 276, 282. 'Approaching sex discrimination in this way - as if sex questions are difference questions and equality questions are sameness questions - provides two ways for the law to hold women to a male standard and call that sex equality': at 278.

batterers further highlights the subjugation of women's concrete social reality. This silencing of stories of male violence toward women maintains and perpetuates existing distributions of power.

Feminist legal theorists note that the very terms of the sameness/difference debate create a dilemma or impossible choice:

[These] are not alternative strategies and...they miss the point...Instead of accepting this representation of the issue...the task is to show how it is manipulated to defend the social status quo. This means that feminists would accomplish more by refusing to take up positions within...[this] dichotomy.²⁷

In New Zealand, Samantha Jeffries posits the 'equality versus difference' debate in terms of feminist organisations such as Women's Refuge and Rape Crisis whose concern 'with raising public awareness about and punishing more harshly, the violent and sexual victimisation of women by men' has contributed to a climate in which men are punished harshly. By comparison, judges supposedly adopt an 'ethic of care' or 'female' model of justice when sentencing female defendants. 'Thus, while we must "get tough" on criminal men, we must "care more" about offending women.'²⁸

This perception that male violence against women is sanctioned harshly is widely held, and sometimes propounded by judges.²⁹ However, it overlooks the New Zealand legislative and judicial emphasis on rehabilitating domestically violent men. New Zealand research found a high probability of supervision or community programme for domestic violence offenders.³⁰ Overseas research also reveals sanctions for domestic violence offending are typically less penal in style than responses to violence between strangers.³¹ Researchers note that by not prosecuting domestic violence cases, or sanctioning offenders too severely, 'justice in the eyes of court officials is served

²⁷ Lisa Sarmas, 'A Step in the Wrong Direction: The Emergence of Gender 'Neutrality' in the Equitable Presumption of Advancement' (1994) 19 MULR 758,759, citing Carol Bacchi, 'Do Women Need Equal Treatment or Different Treatment?' (1992) 8 *Australian Journal of Law and Society* 80, 94.

²⁸ Jeffries, above n 20, 34.

²⁹ See, eg, *Judge Fuels Controversy*, Waikato Times, 12 October 2005.

³⁰ Sue Triggs, *Sentencing in New Zealand: A Statistical Analysis* (1999).

³¹ 'Sentencing for Manslaughter by Provocation' [2004] Crim.L.R. 501, 502, noting a recent review of English Court of Appeal decisions by the UK Sentencing Advisory Panel found a tendency for domestic cases to receive a lower sentence than non-domestic cases. In *A-G's Reference (No 33 of 1996)* [1997] 2 Cr App R(s) 10, 16, the English Court excluded domestic violence cases from the ambit of an increased tariff for crimes of manslaughter where a knife had been carried and used as a weapon. The Court noted, without explanation, that domestic violence cases should be treated as a separate category.

by not severing relationships and by not penalising personal grievances too heavily...What is troubling is how, for some types of crimes and particular victim-offender relations (e.g. familial or intimate violence, rape), this ethic of care may be expressed by not hurting offenders, which can lead to continued harm and danger for victims'.³² As previously discussed, the present research found recidivist abusers are repeatedly sentenced to batterer treatment programmes. Some offenders so treated, went on to seriously injure and kill their victims.

C *The Public/Private Dichotomy and Women's Autonomy*

Feminism has exposed the dichotomy of public and private spheres as illusory as the state through its public rule-making authority determines what private 'family' forms are entitled to legal recognition, and how relations between family members should be structured.³³ Susan Edwards notes that the state has maintained its retreat from controlling or regulating abusive behaviours between heterosexual intimates through domestic violence initiatives such as the creation of dual jurisdictions, and divisions of civil and criminal law remedies for domestic violence, which carry the clear symbolic message that private violence is in certain ways distinct from violence towards non-family members. This affirmation of violence as not incompatible with social mores and values concerning the family can operate to reaffirm the hegemony of men's power within it.³⁴

State objectives of victim safety and batterer accountability³⁵ are expressed in police domestic violence policy which notes that '[v]ictim protection is best attained by stopping the violence, and implementing a process that brings the offender into the criminal justice system'.³⁶ However, feminist theorising has failed to articulate why it may be necessary for abused women to continue with domestic violence prosecutions despite their personal reluctance.³⁷ Consequently, mandatory

³² Kathleen Daly, 'Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions About Justice' (1989) 17 *Int.J.Sociol.Law* 1, 11. See, also, Antonia Cretney and Gwynn Davis, 'Prosecuting Domestic Assault: Victims Failing Courts, or Courts Failing Victims?' (1997) 36 *How.L.J.* 146, 152.

³³ Frances Olsen, 'The Myth of State Intervention in the Family' (1985) 18 *U.Mich.J.L.Reform* 837, 846, notes 'a great deal of family law doctrine can be seen as a response to the problems caused by the disjunction between legally recognised or de jure families and de facto families - the gap between the legal definition of family and the sense people have of what a family is.' See also, *Quilter v Attorney-General* [1998] NZFLR 196 (CA) interpreting the *Marriage Act 1955* as restricting the right to marry to heterosexual couples.

³⁴ Susan Edwards, 'Violence Against Women: Feminism and the Law' in Loraine Gelsthorpe and Allison Morris (eds), *Feminist Perspectives in Criminology* (1990) 141, 154.

³⁵ See, eg, Ministry of Social Development, above n 3, 12; Taskforce for Action on Violence within Families, *The First Report* (2006) 2.

³⁶ Dick Webb, et al, *Family Law in New Zealand* (11th ed, 2003) vol 2, 1513.

³⁷ Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (2000) 184, describes a deep division among feminists over whether mandatory intervention in domestic violence is a better policy choice than the courts' practice of dismissing cases when the battered woman refuses to participate. See, also, Hanna, above n 4, 1870.

legal intervention in domestic violence is frequently criticised for failing to prioritise the autonomy and individual choices of battered women.³⁸ Helene Carbonatto argues that:

What many fail to acknowledge is that spousal abuse occurs in the context of an on-going relationship, and that a woman may desire to continue a relationship for its positive and affective dimensions despite its darker side. Many of these women have emotional ties, economic ties, moments of calm, and shared histories which they experience in the course of their relationship with violent partners....these women often want the violence to stop, to be protected and to feel safe, to have access to information, support and assistance - but there is no clear evidence to suggest that arrest and punishment is what all women want.³⁹

On this view, '[t]he issue of choice is paramount - intervention must be flexible enough to be tailored to each woman's individual needs. This may or may not involve legal remedies.'⁴⁰ Proponents of this position argue that battered women are best empowered by being permitted to use the criminal justice system strategically, in ways defined by individual victims as appropriate to their needs assessments.⁴¹ Taking away the choice of prosecution disempowers women by removing their autonomy, re-victimises women by subjecting them to state coercion, and increases the risk of batterer retaliation.⁴² Intervention against women's wishes may also align the victim with the batterer, deprive victims of financial support due to the incarceration of offenders, and compromise women's safety by removing the only power resource women have in bargaining for their security.⁴³

However, critics of this model of intervention observe that if feminists 'seek to promote an ethic of justice, dignity and equality in public life, it is counterintuitive to invoke an ethic of privacy as a

³⁸ See, eg, Lucy Berliner, 'Making Domestic Violence Victims Testify' (2003) 18 *Journal of Interpersonal Violence* 666, 668, suggesting that taking the choice of whether or not to give evidence against a batterer away from the battered woman risks infantilising her and reinforcing negative stereotypes that women are incapable of making informed decisions about their lives. Bill Atkin, 'An Early Stocktake on Domestic Violence' (1996) 2 *BFLJ*, 82, 83, suggests that: 'bypassing the views of a victim of domestic violence should surely be done sparingly and only where the indications of danger are thoroughly compelling'.

³⁹ Helene Carbonatto, 'Dilemmas in the Criminalisation of Spousal Abuse' [1994] *Social Policy Journal of New Zealand* 21, 25 (citations omitted).

⁴⁰ *Ibid* 29.

⁴¹ David Ford, 'Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships' (1991) 25 *Law and Society Review* 313.

⁴² See, eg, Linda Mills, 'Killing Her Softly: Intimate Abuse and the Violence of State Intervention' (1999) 113 *Harv.L.Rev.* 551.

⁴³ Carbonatto, above n 39.

shield against extending such norms to family life.⁴⁴ The cultural association of domestic violence with romantic love normalises violence against women.⁴⁵ A structural failure of batterer accountability (victim withdrawal of support for the prosecution occurs more frequently in domestic violence than in other kinds of criminal cases)⁴⁶ fails to acknowledge the immense public costs of domestic violence,⁴⁷ as well as the personal, emotional, social and financial costs to battered women and children.⁴⁸

Permitting victim safety and batterer accountability to turn on the 'choices' of individual complainants also subverts New Zealand Family Violence Prevention Strategy aimed at consistent, comprehensive intervention. Such policy creates the potential for unjust and inconsistent outcomes as offenders who commit the same crime may receive very different treatment. Furthermore, since victims of domestic violence are often being manipulated or threatened by the offender, 'if we hand over control of the criminal case to the victim, we will, in many cases, be handing control directly to the offender.'⁴⁹ Making it clear to abusers that coercing victims to withdraw will be pointless may therefore provide greater protection for individual women.

Complainant-reliant intervention also fails to acknowledge the dangers inherent in battering relationships and the disastrous consequences for battered defendants of this policy choice. Frances Olsen points out that a criminal justice system which treats violence against sexual intimates as private, but leaves homicide fully outlawed is especially disempowering to women if battery is not recognised as a justification for, or defence to, homicide.⁵⁰ In other words, it is difficult to argue that domestic violence is sufficiently serious to warrant lethal self-defence when there is widespread acceptance that repeated crimes of violence may be overlooked in the interests of preserving abusive relationships.

⁴⁴ Barbara Woodhouse, 'The Dark Side of Family Privacy' (1999) 67 *Geo Wash L Rev* 1247, 1256.

⁴⁵ Joseph Vandello and Dov Cohen, 'Male Honor and Female Fidelity: Implicit Cultural Scripts That Perpetuate Domestic Violence' (2003) 84 *Journal of Personality and Social Psychology* 997; Sylvia Puente and Dov Cohen, 'Jealousy and the Meaning (or Nonmeaning) of Violence' (2003) 29 *Personality and Social Psychology Bulletin* 449.

⁴⁶ Bennett, Goodman and Dutton, above n 12, 763.

⁴⁷ Ministry of Social Development, above n 3, 7, cites Suzanne Snively, 'New Zealand Economic Cost of Family Violence' (1994) as conservatively estimating the potential economic cost at \$1.2 billion per year.

⁴⁸ Rebecca Dobash and Russell Dobash, 'Men's Violence and Programs Focused on Change' (1997) 8 *CICJ* 243, 243-244, provide a chilling account of the public and private costs of violence against women and children in the home.

⁴⁹ Barbara Flemming, 'Equal Protection for Victims of Domestic Violence' (2003) 18 *Journal of Interpersonal Violence* 685, 689.

⁵⁰ Olsen, above n 33, 856.

Discourses of male dominance and female submission have been eroticised in our culture and imposed on women in a context of social and economic inequality. Since cultural images of proprietary male love and female self-abnegation for the physical and emotional benefit of men are difficult to defy, the legal system should recognise this pressure and seek to diminish, rather than add to it.⁵¹ Educating the public and professionals on red flags associated with romantic love such as jealousy-related aggression, possessiveness and controlling behaviours would be a potentially life-saving initiative.

D *The Particularity/Generality Dichotomy and the Feminist Focus on the Individual*

The post modern critique of essentialism exposed a tendency in feminist theory to speak on behalf of the category 'woman' without acknowledging that differences such as race, class, and disability, profoundly interact with gender and produce different life experiences for individual women. '[I]n feminist legal theory, as in the dominant culture, it is mostly white, straight, and socioeconomically privileged people who claim to speak for all of us.'⁵² At its most radical, the critique of essentialism posits that:

To speak of any commonality among women is to commit the deconstructive-post-modern sin of 'essentialism', the 'failure' to perceive that every single aspect of human existence is supposedly 'socially produced' and determined in particular localized circumstances about which no generalizations can be made...Even to speak of common dynamics involving women in cultures that are patriarchal is rejected as 'totalizing'.⁵³

Diane Richardson notes that feminist recognition of knowledge as contextual and situated; the importance of language in constructing difference; and the need to question notions of 'truth' and 'the self' as unitary and consistent; does not demand that the category 'woman' be deconstructed out of existence: 'However diverse and varied our experiences may be, women exist as a political and as a socially constructed category, whose lives are materially shaped by belonging to that category.'⁵⁴

⁵¹ Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57 MLR 10, 35.

⁵² Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 Stan.L.Rev. 581, 588. See, also, Leigh Megan Leonard, 'A Missing Voice in Feminist Legal Theory: The Heterosexual Presumption' (1990) 12 Women's Rts.L.Rep. 39.

⁵³ Charlene Spretnak, 'The Disembodied Worldview of Deconstructive Post-modernism' in Diane Bell and Renate Klein (eds), *Radically Speaking: Feminism Reclaimed* (1996) 321, 322-323.

⁵⁴ Diane Richardson, "'Misguided, Dangerous and Wrong": on the Maligning of Radical Feminism' in Diane Bell and Renate Klein (eds), *Radically Speaking: Feminism Reclaimed* (1996) 143, 145-146.

Advocates of mandatory state intervention have been criticised as paternalistic in their presumption 'that society knows what is right for all women'⁵⁵ and 'essentialist' for underestimating the potential of coercive state intervention to harm poor and minority women. Black women may fear intervention by a criminal justice system that has historically perpetrated racist violence more than they fear their partner's violence. Women of other cultures may also fear that reporting domestic violence will bring shame upon themselves, their families and their communities. Women who lack economic resources may find themselves and their children severely disadvantaged if the batterer provides the only source of family income and he is convicted and incarcerated.

However, research indicates that economically disadvantaged women are more vulnerable to lethal and sub-lethal violence than middle or upper class women.⁵⁶ Basing state intervention on the 'choices' of individual battered women may therefore entrench marginalised women's vulnerability to violence. Sandra Coney observes that while some women have achieved high levels of success in the political, private and state sectors in recent decades, a pattern has emerged of 'two distinct groups of women in New Zealand: a small elite group that is prospering and a large group of poor or low-income women that is struggling'.⁵⁷ In this context of structural inequality, abstract, liberal notions of victim autonomy may construct an especially poisonous set of 'choices' for poor women.⁵⁸ As Ngaire Naffine points out, rather than engage in the liberal pretence that we are all equal, abstract individuals, we need to address the realities of possessive heterosexual relations in the wider culture and the violence such relations do to women.⁵⁹

Although mandatory intervention has been criticised for exposing marginalised women to unwarranted intervention by the state child protection agency,⁶⁰ as demonstrated by the present research, women are also vulnerable in jurisdictions where arrest is not mandatory. Cases in which

⁵⁵ Schneider, above n 37, 186.

⁵⁶ See, eg, Tony Blakely, et al, 'Socio-economic Factors and Mortality Among 25-64 Year Olds Followed from 1991 to 1994: the New Zealand Census-Mortality Study' (2002) 115 *New Zealand Medical Journal* 91; Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994) 205-206; Vito Ciraco, 'Fighting Domestic Violence with Mandatory Arrest, Are We Winning?: An Analysis in New Jersey' (2001) 22 *Women's Rts.L.Rep.* 169, 178.

⁵⁷ Sandra Coney, *Into the Fire: Writings on Women, Politics and New Zealand in the Era of the New Right* (1997) 77.

⁵⁸ See, eg, Rickie Solinger, 'Poisonous Choice' in Molly Ladd-Taylor and Lauri Umansky (eds) *'Bad Mothers': The Politics of Blame in Twentieth Century America* (1998) 381, 396.

⁵⁹ Naffine, above n 51, 34.

⁶⁰ See, eg, Donna Coker, 'Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review' (2001) 4 *Buff.Crim.L.R.* 801, 833.

children of battered mothers are removed by a social worker also appear to reflect an assumption that the only way a mother can protect her child is by leaving the violent relationship.

Mandatory arrest has also been criticised for increasing the rate of women who are arrested for using violence in self-defence, or in response to a pattern of abuse. This failure to identify the primary aggressor disproportionately affects women of colour.⁶¹ However, as demonstrated by the present research, police failure to identify the primary aggressor also affects intervention where there is no policy of mandatory arrest. Ellen Pence and Coral McDonnell note that the Duluth Abuse Intervention Project (DAIP) mandatory arrest policy does not remove all discretion from police, and criteria have been established for police to distinguish the primary aggressor.⁶² The DAIP model carefully monitored three different arrest policies. Arrest protocols limit police discretion to arrest in certain situations, thereby avoiding an increase in arrests of women, and reducing the rates of African-American and Native American arrests to a level more proportionate to their percentages in the population.⁶³ Similar protocols could be adopted in New Zealand.

Mandatory state intervention has been credited with reducing rates of intimate partner homicide in some US jurisdictions,⁶⁴ significantly increasing the rate of domestic violence convictions,⁶⁵ and arrests of offenders, especially those in violation of a restraining order.⁶⁶ Hanna argues that while law, and in particular police and prosecutors, ought to be knowledgeable about, and sensitive to, the different needs and concerns of battered women, the feminist critique of essentialism does not provide a practical or theoretical justification for rejection of mandated victim participation:

⁶¹ See, eg, Ibid 831.

⁶² See, eg, Ellen Pence and Coral McDonnell, 'Developing Policies and Protocols in Duluth, Minnesota' in Jalna Hanmer and Catherine Itzin (eds), *Home Truths About Domestic Violence: Feminist Influences on Policy and Practice A Reader* (2000) 249, 254.

⁶³ Kristen Little, et al, *Assessing Justice System Responses to Violence Against Women: A Tool for Law Enforcement, Prosecution and the Courts to Use in Developing Effective Responses* (1998) <http://www/vaw.umn.edu/documents/promise/pplaw.htm> at 15 November 2005, 30-31.

⁶⁴ Hanna, above n 4, 1864-1865, citing research from various US jurisdictions. Cf David Ford, 'Coercing Victim Participation in Domestic Violence Prosecutions' (2003) 18 *Journal of Interpersonal Violence* 669,678 noting several jurisdictions including San Diego and Nashville claim reductions in homicides due to more aggressive state prosecution policies but arguing that there is no reliable way to confirm the reductions are due to these policies rather than other community based intervention.

⁶⁵ Heather Cochran, 'Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence (1997-1998) 7 *Texas Journal of Women and the Law* 89, 89.

⁶⁶ Sylvia Mignon and William Holmes, 'Police Response to Mandatory Arrest Laws' (1995) 41 *Crime and Delinquency* 430.

[I]n our efforts to be racially, culturally, and economically sensitive, we cannot allow violence to go unchecked under the rationale that state intervention is always racist, ethnocentric, or classist. Allowing women to step out of the criminal process can further solidify their perception that the criminal justice system marginalizes their concerns. The underenforcement of domestic violence laws and the refusal to mandate victim participation for certain groups ultimately denies women legitimate state protection and enforcement of the right to be free from violence in their homes and in their communities. An equal and effective response to domestic violence requires that all citizens be subject to the same prosecution policies.⁶⁷

The DAIP project, upon which the Hamilton Abuse Intervention Project (HAIP) was modelled,⁶⁸ 'assume[s] that most victims of on-going abuse (intimidation, coercion and violence) are safer if the state or court has some level of control over the offender'.⁶⁹ This project is founded on monitoring and scrutiny of practices to identify problems in the system, develop solutions and evaluate the impact of new procedures.⁷⁰ In stark contrast, the present research found no evidence of systematic tracking and monitoring of criminal justice outcomes from the standpoint of victim safety. The present silence surrounding harm to domestic violence victims who turn to the legal system for help is not conducive to individual or institutional accountability.

E Disappearance of the Batterer and the Tendency to Blame

Although domestic violence was originally conceptualised as an issue of male violence toward women, feminists now point to the invisibility of the batterer in domestic violence discourses.⁷¹ Davina James-Hanman describes how the disappearance of the batterer impedes attempts to improve inter-agency cooperation:

Despite the wealth of evidence which consistently shows that domestic violence is overwhelmingly committed by men towards women, actually stating this leads to near apoplexy for some agency representatives. In many cases, this results in a shared definition never being agreed...more commonly, a pragmatic course is followed, that is, a 'gender neutral' definition is adopted for the

⁶⁷ Hanna, above n 4, 1881-1882.

⁶⁸ See, Ruth Busch and Neville Robertson, "'What's Love Got To Do With It?' An Analysis of an Intervention Approach to Domestic Violence', (1993) 1 Waikato L.Rev. 109, for a discussion of the Hamilton Abuse Intervention Project.

⁶⁹ Pence and McDonnell, above n 62, 252.

⁷⁰ Ibid 253.

⁷¹ See, eg, Catherine Itzen, 'Gendering Domestic Violence: The Influence of Feminism on Policy and Practice' in Jalna Hanmer and Catherine Itzen (eds) *Home Truths About Domestic Violence: Feminist Influences on Policy and Practice* (2000) 356, 376.

purposes of being able to progress. This is done despite the fact that this leaves a Forum existing to address a problem which it cannot, or will not, accurately define!⁷²

Drew Humphries and Susan Caringella-MacDonald observe that the success of critical feminist scholarship in refuting demeaning characterisations of women in rape and domestic violence cases may have produced a misplaced belief that once exposed, these myths require little further attention.⁷³ Startling research by Kerry Carrington and Andrew Johnson suggests that the sociological insight that punishment of the offender is functional in promoting social solidarity is reversed when women are physically and sexually assaulted by men (or boys) they know. In this case, it was punishment of the deceased *victim* and her family through victim blaming that promoted the health of the 'collective conscience'.⁷⁴

Similarly, Louise Ellison points out that the contemporary focus in domestic violence cases is not why the batterer abuses, or how society can stop him. Rather, attention is typically centred on the battered woman 'and the questions most often asked include "why does she stay with him?" and "why won't she support a prosecution?"'.⁷⁵ Two male researchers capture this cultural ambivalence toward battered women:

When we first started our research one question we heard frequently was, Why do battered women stay in these abusive relationships? This question implies an accusation, namely, what is wrong with these crazy women for staying with these awful men? Often what the questioner really means is, 'They are not like me. I would never stay. It's their own fault, and don't ask me to care about them. Serves them right for not getting out'.⁷⁶

⁷² Davina James-Hanman, 'Enhancing Multi-Agency Work' in Jalna Hanmer and Catherine Itzin (eds), *Home Truths About Domestic Violence: Feminist Influences on Police and Practice A Reader* (2000) 269, 278.

⁷³ Drew Humphries and Susan Caringella-MacDonald, 'Murdered Mothers, Missing Wives: Reconsidering Female Victimization' (1990) 17 *Social Justice* 71.

⁷⁴ Kerry Carrington and Andrew Johnson, 'Representations of Crime, Guilt and Sexuality in the Leigh Leigh Rape/Murder Case' (1994) 3 A Fem LJ 3. See, also, Donald Nicholson and Rohit Sangvi, 'Battered Women and Provocation: The Implications of *R v Ahluwalia* [1993] Crim.L.R. 728, 735, pointing to a long established tendency in the US and the UK to view domestic violence in terms of the personality defects of victims as well as batterers. Women who remain in abusive relationships elicit responses which echo the belief that sexual offence victims 'ask for it'. Alternatively, the problem of domestic violence may be constructed in terms of the individual woman's personal pathology.

⁷⁵ Louise Ellison, 'Prosecuting Domestic Violence Without Victim Participation' (2002) 65 MLR 834, 850.

⁷⁶ Shoos, above n 1, 62, citing Neil Jacobson and John Gottman, *When Men Batter Women: New Insights into Ending Abusive Relationships* (1998) 136.

Ironically, the feminist preoccupation with the choices of individual victims has reinforced the tendency toward victim blaming.⁷⁷ Joan Williams notes that refusal to see abused women as other than autonomous agents 'has been transposed into a blame-the-victim argument through the rhetoric of choice'.⁷⁸ Even sympathetic commentators may adopt the position that responsibility for the abused woman's fate begins and ends with her. Jane Ursel suggests that:

the incredible importance of respecting the victim and giving her a voice in the system has at times had tragic consequences. We can count the number of homicides that have been a result of judges respecting the woman's assessment that she is not in danger and that she supports her husband's bail request. We can count the number of homicides that have resulted in a woman agreeing to see her partner despite the restraining order...When victims and the families that love them are not able to assess risk, there is always a danger/cost to a system that respects women's assessment and does not presume to know her circumstances better than she does. This is the reality that refuge workers have to struggle with and agonise over, but what is the alternative?⁷⁹

Apart from the obvious objection that this analysis assumes a mobile, autonomous agent, whose interactions with her partner are free from physical, psychological, social, or economic coercion, the disappearance of the batterer is striking. An abused woman's decision to support her husband's bail request, or to meet with her partner despite the existence of a restraining order, may or may not result in homicide. The outcome is not in the battered *woman's* sphere of control, but in the battering *man's*.⁸⁰

As Martha Mahoney points out:

Recognizing the batterer's attempt at domination as the key to battering relationships allows a focus on his motivations rather than the psychology of the victim...The focus on the batterer's need for

⁷⁷ In *Takiari v Colmer* [1997] NZFLR 538, 542, Hammond J considered the submission that the protected person's own conduct should be taken into account and stated: 'The question is not who promoted a given situation; it is, in terms of the [Domestic Violence] Act, whether a protection is needed. However, the present research found victim blaming is an institutionalised criminal justice response to domestic violence. This tactic extends to children. For example, in *Protect Dead Kids - McClay*, Evening Post, 11 April 2002, concerning a case in which two young girls were killed by their stepfather shortly after their mother attempted to order the offender from the home, the Commissioner for Children condemned media reports of the trial for dragging the lives 'of dead little girls through the mud'. Stephen Schulhofer, 'The Gender Question in Criminal Law' (1990) 7 Soc.Phil.& Pol'y 105, 117, notes the strategy of 'blaming the victim' is the 'oldest, most common and most successful tactic in homicide cases'.

⁷⁸ Joan Williams, 'Deconstructing Gender' in Patricia Smith (ed) *Feminist Jurisprudence* (1993) 531, 546.

⁷⁹ E Jane Ursel, 'The Possibilities of Criminal Justice Intervention in Domestic Violence: A Canadian Case Study' (1997) 8 CICJ 263, 274.

⁸⁰ See, case studies and commentary in Chapter Three.

control also reconciles another discrepancy in battering studies. Bowker reports that a threat to leave the batterer may be very effective at ending the violence. However, other studies show that separation often triggers escalated violence. The same behavior - threatening to leave the relationship - might prove extremely effective or tremendously dangerous for women. The difference will depend on the men with whom they are involved. If the key to whether the violence escalates lies in the man's capacities, then any system examining the woman's behavior and psychology will poorly track the issues she faces.⁸¹

The invisibility of the batterer and emphasis on victim 'choice' also fails to confront increasingly 'public' punitive responses to battered women whose 'private' attitudes are perceived as facilitating abuse of their children.⁸²

F *The Correlation of Child and Women Abuse*

Feminist theorists and advocates have been criticised for not linking their responses to wife battering with responses to children of battered women.⁸³ There is robust evidence of the co-occurrence of violence against adult intimates and abuse of children in the relationship, estimated at between 40 and 90 percent of cases.⁸⁴ Violence against adult intimates is a significant risk factor for pregnant mothers and unborn children.⁸⁵ It is now clear that the majority of children are

⁸¹ Mahoney, above n 11, 57-58.

⁸² In the UK, the *Domestic Violence, Crime and Victims Act 2004* which instituted a procedure to review domestic violence fatalities, also created a new offence of familial homicide for causing or allowing the death of a child.

⁸³ Einat Peled, 'The Battered Women's Movement Response to Children of Battered Women: A Critical Analysis' (1997) 3 *Violence Against Women* 424.

⁸⁴ Gabrielle Maxwell, 'Children and Family Violence: The Unnoticed Victims' [1994] *Social Policy Journal of New Zealand* 81, 81, cites a New Zealand study by the National Collective of Independent Women's Refuges (1991) suggesting that 90% of the children of women receiving help from refuges had witnessed violence and 50% of the children had also been physically abused. See, also, Ministry of Health, *Family Intervention Guidelines: Child and Partner Abuse* (2002) 23; Jalna Hamer and Catherine Itzen (eds), *Home Truths About Domestic Violence: Feminist Influences on Policy and Practice* (2000) Chapters 5, 6 and 20; Sylvia Walby and Andrew Myhill, 'Assessing and Managing Risk' in Julie Taylor-Browne (ed), *What Works in Reducing Domestic Violence? A Comprehensive Guide for Professionals* (2001); Lundy Bancroft and Jay Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002) 1-3; Neville Robertson and Ruth Busch, 'Not in Front of the Children: The Literature on Spousal Violence and its Effects on Children' [1994] *BFLJ* 107; Ruth Busch, 'Safeguarding the Welfare of Children' (1995) 4 *MHL* 46; Ewan Stark and Anne Flitcraft, 'Women and Children at Risk: A Feminist Perspective on Child Abuse' (1988) 18 *International Journal of Health Services* 97.

⁸⁵ Tonya McCormack, 'Convicting Domestic Violence Abusers When the Victim Remains Silent' (1998-1999) 13 *B.Y.U.J.Pub.L.* 427, 429, cites a US report indicating that 'more babies are born with birth defects as a result of pregnant mothers being battered than from all diseases and illnesses we now immunize pregnant women against combined'. See also, Rebecca Burch and Gordon Gallup Jr, 'Pregnancy as a Stimulus for Domestic Violence' (2004) 19 *Journal of Family Violence* 243; Richard Gelles, 'Violence and Pregnancy: Are Pregnant Women at Greater Risk of Abuse?' (1988) 50 *Journal of Marriage and the Family* 841, notes that women under 25 years are both more likely to be pregnant and more likely to be abused by husbands and partners. See, also, Audrey Mullender, 'Meeting the Needs of Children' in Julie Taylor-Browne (ed), *What Works in Reducing Domestic Violence? A Comprehensive Guide for Professionals* (2001) 35, 37.

aware if their mother is being abused, seeing or hearing much of the violence that takes place. Information from Police and CYPFA files has revealed an average of just over two children are present each time the police attend a domestic violence call-out.⁸⁶ There is also evidence that witnessing domestic violence may be more detrimental to children than violence directly experienced.⁸⁷ Child witnesses are likely to suffer a host of mental and emotional problems,⁸⁸ and may be more vulnerable to engaging in acts of violence in their own relationships. In recognition of the costs to children of exposure to domestic violence, the *Domestic Violence Act 1995* provides that allowing a child to see or hear physical, sexual or psychological abuse constitutes an act of domestic violence.⁸⁹

Heightened public and professional awareness of the harmful effects of domestic violence on children and legislative/policy reforms have resulted in active encouragement from courts, police and domestic violence advocates that battered women use the legal system to protect themselves and their children. Sally Merry notes that a battered woman who begins a legal case, then drops it, then goes back for another protection order, or calls the police again but refuses to testify in court, earns the label of difficult or 'bad' victim. Since 'good' domestic violence victims are those who follow through with their cases, criminal justice actors and community support agencies are likely to be less supportive of the rights of battered women who are not 'good' victims.⁹⁰ Overseas research also indicates that if the evidence is too weak to proceed with a prosecution without the battered woman's active participation, a common approach is for prosecutors to file a report with the child protection agency.⁹¹ Thus abused women face the ultimate sanction - severance of their relationship with children - for failing to follow through with domestic violence complaints.

Kristian Miccio notes the 'Alice in Wonderland' quality of this logic. The battered mother's perceived inability to stop domestic violence justifies state intervention - but only in the form of a

⁸⁶ Sergeant JJ Taylor, 'Child Witness Project' (Paper presented at the *Children and Family Violence: Effective Interventions Now Conference*, Wellington, 4-5 July 1999). Ministry of Justice website: http://www.justice.govt.nz/pubs/reports/family_conference/author_8html at 24 February 2003.

⁸⁷ Gabrielle Maxwell and Janis Carrol-Lind, 'Distorted Childhoods: The Meaning of Violence for Children' [1998] *Social Policy Journal of New Zealand* 177.

⁸⁸ See, eg, Ibid; Bancroft and Silverman, above n 84; Audrey Mullender, et al, *Children's Perspectives on Domestic Violence* (2002).

⁸⁹ Section 3(3).

⁹⁰ Sally Merry, 'Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection' (2003) 25 *Hum.Rts.Q.* 343, 349.

⁹¹ Debra Whitcomb, *Children and Domestic Violence: Challenges for Prosecutors* (2000).

sword to sever the mother-child bond. At the same time, state inaction to protect mothers facilitates the very abuse that the state uses to justify punitive intervention.⁹²

III THE GENDER CONTROVERSY

Recent, highly publicised New Zealand research found domestic violence most commonly involves violent couples who engage in mutual acts of aggression.⁹³ Accordingly, these researchers argue that

the original theoretical model that presented domestic violence as a gender issue involving male perpetrators and female victims is no longer viable as a description of the spectrum of domestic violence. It is, of course, possible to save the feminist explanation by noting...that men predominate in cases of severe domestic violence, but this approach succeeds only if one is prepared to dismiss the mild to moderate domestic violence studied in our research.⁹⁴

In response, Michael Johnson, another domestic violence researcher, complained that the way the above research operationalised partner violence meant it had little to do with violence, and nothing at all to do with the serious form of violence that he terms 'intimate terrorism'.⁹⁵

Research finding men are overwhelmingly the perpetrators of domestic violence⁹⁶ and research showing women and men are equally violent⁹⁷ highlight the dissonance between 'crime studies' and 'family conflict' research. When domestic violence comes to the attention of police and the courts men are overwhelmingly represented as perpetrators.⁹⁸ More than 95 per cent of applicants for protection orders are women, most respondents are men.⁹⁹ Men predominate generally as

⁹² G Kristian Miccio, 'Notes From the Underground: Battered Women, The State, and Conceptions of Accountability' (2000) 23 Harv. Women's L.J. 133, 167.

⁹³ David Fergusson, John Horwood and Elizabeth Ridder, 'Partner Violence and Mental Health Outcomes in a New Zealand Birth Cohort' (2005) 67 *Journal of Marriage and Family* 1103.

⁹⁴ David Fergusson, John Horwood and Elizabeth Ridder, 'Rejoinder' (2005) 67 *Journal of Marriage and Family* 1131, 1135.

⁹⁵ Michael Johnson, 'Domestic Violence: It's Not About Gender - Or Is It?' (2005) 67 *Journal of Marriage and Family* 1126, 1127-1128.

⁹⁶ Demie Kurz, 'Physical Assaults by Husbands: A Major Social Problem' in Richard Gelles and Donileen Loseke (eds), *Current Controversies on Family Violence* (1993) 88, 89-93, citing studies. See, also, Ministry of Social Development, above n 3, 8.

⁹⁷ See, eg, Murray Straus, Richard Gelles and Suzanne Steinmetz, *Behind Closed Doors: Violence in the American Family* (1980).

⁹⁸ The Ministry of Justice, *The Age of Physical Abuse Victims and the Sentence Imposed on Their Abusers* (2001) study of sentencing outcomes for offences against adult and child victims found 91 per cent of abusers were male.

⁹⁹ New Zealand Law Commission, *Dispute Resolution in the Family Court*, R 82, (2003) [540]. The offence of 'male assaults female' under s 194 of the *Crimes Act 1961* is used as a proxy for domestic violence assaults in official

perpetrators of homicide by a factor of approximately 9:1,¹⁰⁰ and when current or estranged adult intimate partners are killed, men are overwhelmingly the offenders.¹⁰¹ Red flags for dangerousness/lethality are also profoundly gendered. Repeat acts of male violence are a risk factor for intimate femicide and a catalyst for the majority of lethal violence by women toward men. Cultural myths of the scorned woman who stalks the beleaguered male intent on revenge¹⁰² are belied by the social reality that '[m]en in all racial groups are much more likely to kill a woman after the couple have separated than are women.'¹⁰³

Since the present study dealt with violence which comes to the attention of police and the courts, and crime studies reveal this violence is typically perpetrated by men, it was expected that males would predominate as perpetrators of lethal and sub-lethal assaults. This proved to be the case. Large scale annual crime surveys in the US also show high rates of male violence against intimate partners. Data from the US Bureau of Justice Statistics' National Crime Victimization Surveys (NCVS) in which around 50,000 households are surveyed annually consistently reports about 85 per cent of victimisations by intimate partners are perpetrated against women.¹⁰⁴ The National Violence Against Women Survey, sponsored by the US National Institute of Justice and the Center for Disease Control and Prevention, used a nationally representative sample of 8,000 women and 8,000 men, representing 16,000 households and found:

Women are significantly more likely than men to report being victims of intimate partner violence

statistics on crime: See, eg, Philip Spier, *Conviction and Sentencing of Offenders in New Zealand: 1989:1998* (1999); Sue Triggs, *Sentencing in New Zealand: A Statistical Analysis* (1999).

¹⁰⁰ Ian Miller and Nestar Russell, *Homicide in New Zealand 1988-94: Patterns and Relationships* (Paper presented at the 11th Annual Conference of the Australian and New Zealand Society of Criminology, Victoria University of Wellington, 29 January-1 February 1996) 12.

¹⁰¹ See, eg, Janet Fanslow, David Chalmers and John Langley, 'Homicide in New Zealand: An Increasing Public Health Problem' (1995) 19 *Australian Journal of Public Health* 50; Ministry of Health, above n 84, 37, citing Janet Fanslow, J Kotch and David Chalmers, *Partner Homicide in New Zealand 1978-1987*, Unpublished; Polk, above n 56, 7.

¹⁰² Graeme Coss, 'Provocation, Law Reform and the Medea Syndrome' (2004) 18 *Crim LJ* 133, 136 fn 23, notes that 'when Hollywood tackled a succession of films about homicidal stalkers, oversexed serial killers and crazed sexual harassers, in all instances Michael Douglas was the victim of Medea-like women: Glenn Close in *Fatal Attraction* (1987), Sharon Stone in *Basic Instinct* (1991) and Demi Moore in *Disclosure* (1994). Well, they would, wouldn't they?' Frances Dolan, 'Battered Women, Petty Traitors, and the Legacy of Coverture' (2003) 29 *Feminist Studies* 249, 250 notes these films do something other than document reality: 'If you relied only on newspapers, t.v. movies of the week, true crime fiction, novels, and films, you would think that women commit murder constantly. Yet women who kill their husbands or partners are relatively rare, despite the fact that they dominate the popular imagination'.

¹⁰³ Garth Fletcher, *The New Science of Intimate Relationships* (2002) 244.

¹⁰⁴ Callie Rennison and Sarah Welchans, *Intimate Partner Violence*, (2002); Callie Rennison, *Intimate Partner Violence and Age of Victim 1993-1999* (2001).

whether it is rape, physical assault, or stalking and whether the timeframe is the person's lifetime or the previous 12 months.¹⁰⁵

In comparison, 'family conflict' research reveals higher rates of assault than crime studies, and gender symmetry in perpetrators.¹⁰⁶ These studies, which are based on a model of domestic violence as a normal, everyday response to conflict between intimate partners, usually employ the Conflict Tactics Scale (CTS) developed by Murray Straus and his colleagues as their unit of measuring assaults by partners.¹⁰⁷

The CTS has been much criticised for analyses of domestic violence that are devoid of consequences (whether injuries were caused) context and meaning to the parties.¹⁰⁸ The oft-noted fact that women are much more likely than men to be injured in violent clashes between partners requires careful analysis of claims that the sexes are identically motivated to initiate assaults when the predictable consequences are far more damaging for women.¹⁰⁹ Failure to acknowledge men's greater physical strength and social conditioning in use of force can also produce misleading generalisations. For example, research which equates a slap from a female with a push by a male partner under the rubric of 'minor physical violence'¹¹⁰ may be a poor reflection of the reality of many violent relationships. Cases in the present study show women are seriously injured and even killed following a 'push' by a male partner.¹¹¹ Other research found abused women 'perceived the injuries to be more severe when they imagined falling from a push...than when they imagined that their partners attempted to hit them or had struck their faces several times.'¹¹² The disjunction between crime and family conflict research is further evident in a family conflict operationalisation of verbal aggression which equates 'crying' and 'sulking' with such incongruent behaviours as

¹⁰⁵ Patricia Tjaden and Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence* (2000) iii-iv.

¹⁰⁶ Murray Straus, 'The Controversy over Domestic Violence by Women: A Methodological, Theoretical, and Sociology of Science Analysis' in Ximena B Arriaga and Stuart Oskamp (eds), *Violence in Intimate Relationships* (1999) 17.

¹⁰⁷ Straus, Gelles and Steinmetz, above n 97.

¹⁰⁸ See, eg, Russell P Dobash, et al, 'The Myth of Sexual Symmetry in Marital Violence' (1992) 39 *Social Problems* 71; Martin Schwartz and Walter S DeKeseredy, 'The Return of the "Battered Husband Syndrome" Through the Typification of Women as Violent' (1993) 20 *Crime, Law and Social Change* 249; Michael Kimmel, "'Gender Symmetry" in Domestic Violence' (2002) 8 *Violence Against Women* 1332.

¹⁰⁹ Dobash, et al, above n 108, 84.

¹¹⁰ See, eg, Lynn Magdol, et al, 'Gender Differences in Partner Violence in a Birth Cohort of 21-Year Olds: Bridging the Gap Between Clinical and Epidemiological Approaches' (1997) 65 *Journal of Consulting and Clinical Psychology* 68.

¹¹¹ See, also *R v McLeod* [1994] CA 112/94, 27 May 1994.

¹¹² Loretta Stalans and J Arthur Lurigio, 'Public Preferences for the Court's Handling of Domestic Violence Situations' (1995) 41 *Crime and Delinquency* 399.

'throwing, smashing, or hitting objects'.¹¹³ This operationalisation of aggression will not capture criminal law distinctions.

New Zealand research has revealed how different conceptualisations of violence and different methodologies produce findings of gender symmetry on the one hand, and alarming accounts of male violence against women on the other. The longitudinal Dunedin Multidisciplinary Health and Development Study (the Dunedin Study) found perpetration rates of 21.8% for males and 37.2% for females.¹¹⁴ However, using the same research sample, the director of the Injury Prevention Unit at the University of Otago and his colleagues found approximately four times as many women as men reported having been assaulted by a partner at least once in the preceding 12 months. A disproportionate number of partner incidents resulted in treatment: 13% of the assaults against women resulted in hospital, medical or first aid treatment; none of the assaults reported by men did.¹¹⁵ Describing claims of gender symmetry in the Dunedin Study as 'misleading', these researchers concluded that research confirms 'just how much more dominant partner abuse is in a woman's life compared to a man's'.¹¹⁶

As a leading exponent of family conflict research, Murray Straus suggests that the gender controversy is the outcome of a failure by some analysts to distinguish between the different types of violence and different groups of people represented in crime and family conflict studies. Different prevalence rates and gender analyses are explicable as a result of the different contexts in which survey questions are asked. The NCVS and similar studies are described to respondents as *crime*, personal safety, injury or violence surveys, whereas the CTS is expressed to respondents in terms of family problems and conflicts. Since family conflict researchers collect data on 'the most minor and "harmless" slap'; 97 to 99 per cent of respondents report no injury was caused. Given that assaults which result in injury are more likely to be experienced as a crime, and much of the abuse in family conflict studies is not 'experienced as a crime or as a threat to personal safety or violence', this helps explain the lower prevalence rates in crime studies. Furthermore, since police officers as well as survey respondents are likely to view assaults resulting in injury as a crime, and

¹¹³ Magdol, et al, above n 110.

¹¹⁴ Ibid; Terrie Moffitt, et al, *Sex Differences in Antisocial Behaviour: Conduct Disorder, Delinquency, and Violence in the Dunedin Longitudinal Study* (2001).

¹¹⁵ J Langley, J Martin and S Nada-Raja, 'Physical Assault Among 21-Year-Olds by Partners' (1997) 12 *Journal of Interpersonal Violence* 675.

¹¹⁶ Otago Daily Times, *Report Findings that Men are More Bashed than Bashing 'Misleading'*, 2 November 2000; Sunday Star Times, *Victims of Violence*, 9 November 1997.

injury is more likely to occur when a male is the offender, it follows that men will predominate as perpetrators in statistics based on crime surveys or crime reports.¹¹⁷

Johnson's analysis also posits two distinct non-overlapping populations of domestic violence victims to account for the contradictory research findings.¹¹⁸ The first pattern involves 'common couple' violence in which there is no general pattern of power and control, but in which specific arguments sometimes escalate to use of violence by either the male or female partner. The second population is characterised by 'patriarchal terrorism' which, in addition to physical abuse, involves economic subordination, extreme coercion and intimidation, isolation and a variety of other control tactics. This violence is perpetrated by men against women in order to subdue and dominate women partners.¹¹⁹ Broad support for Johnson's discussion of two distinct subgroups of perpetrators has recently emerged from a British study.¹²⁰

However, Johnson's typology, in which the majority of domestic violence is low level or 'minor' violence which shows almost no tendency to escalate,¹²¹ is controversial. Sylvia Walby and Andrew Myhill note the proposition that much of the violence between women and men is symmetrical, while not denying the existence of a small group of severely battered women, contradicts other studies indicating that 'there is a pattern of escalation and that any level of violence is a risk factor for escalation to severe and frequent violence'.¹²²

Dobash and Dobash (1979) in a study of a sample of battered women from Scottish refuges described a process of escalation, in which, if there was no successful intervention low levels of violence from a man would inexorably build into more severe violence. Their current research is investigating the circumstances in which there is a homicide (Dobash et al, 1999). Feld & Straus (1989) find that while desistance is possible, nonetheless, minor violence is a risk factor for an escalation to major violence. Woffordt et al, (1994) found that though half of their sample showed

¹¹⁷ Straus, above n 106, 23-29.

¹¹⁸ Johnson, above n 95, posits a domestic violence typology consisting of the following three types of violence: (a) violence enacted in the service of taking general control over one's partner (intimate terrorism); (b) violence utilised in response to intimate terrorism (violent resistance) and (c) violence 'that is not embedded in a general pattern of power and control, but is a function of the escalation of a specific conflict or series of conflicts' (situational couple violence).

¹¹⁹ Michael Johnson, 'Intimate Terrorism and Common Couple Violence: Two Forms of Violence Against Women' (1995) 57 *Journal of Marriage and the Family* 283, 284.

¹²⁰ Nicola Graham-Kevan and John Archer, 'Intimate Terrorism and Common Couple Violence: A Test of Johnson's Predictions in Four British Samples' (2003) 18 *Journal of Interpersonal Violence* 1247.

¹²¹ Johnson, above n 119, 286.

¹²² Walby and Myhill, above n 84, 314.

desistance over a three year period, a prior act of violence is one of the best predictors of future violence. While it is difficult to predict in individual cases, previous assault is a risk factor for further assault. It is probable that assaults are likely to increase unless there is a change of circumstances. The robustness and simplicity of this risk factor make it especially suitable for use in many professional contexts.¹²³

A 1994 study of sub-lethal domestic assaults found that while husbands and wives used verbal abuse and threats during escalation of an argument, only the women were fearful. '[W]ife violence was largely reactive to husband violence, whereas husband violence seemed to self-escalate, often reaching a point at which there was nothing the wife could do to stop it'.¹²⁴

Straus' contention that some researchers and analysts have erroneously conflated the disparate findings of crime and family conflict research is deeply concerning. As previously discussed, red flag indicators of serious violence and lethality are profoundly gendered. A mistaken assumption that the majority of domestic violence crime is perpetrated by mutually antagonistic parties who engage with each other on relatively equal terms would compromise risk assessment and endanger the safety of abused women who turn to the legal system for help.

IV THE IMPORTANCE OF A POWER AND CONTROL ANALYSIS

The most common misunderstandings about the nature of violent relationships include failure to recognise the interrelationship between domestic violence and intimate femicide; a view of violence as a discrete series of incidents; and failure to recognise the theme of control.¹²⁵ While a recent US national survey found support for 'the theory that much of the violence that is perpetrated against women by male partners is part of a systematic pattern of dominance and control',¹²⁶ the criminal law stereotype of spontaneous male violence by perpetrators who 'crack' or 'snap' and lose self-control inverts the power and control dynamics of abusive relationships. Although research also reveals masculine control to be the dominant theme underpinning the red flag of separation, legal narratives continue to equate masculine proprietariness with romantic love and male passion.

¹²³ Ibid 315.

¹²⁴ Angela Browne, Kirk Williams and Donald Dutton, 'Homicide Between Intimate Partners: A 20-Year Review' in M Dwayne Smith and Margaret Zahn (eds), *Homicide: A Sourcebook of Social Research* (1999) 149, 158-159, citing N Jacobson, et al, 'Affect, Verbal Content and Psychophysiology in the Arguments of Couples with a Violent Husband' (1994) 62 *Journal of Consulting and Clinical Psychology* 982.

¹²⁵ See, eg, Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) 194.

¹²⁶ Tjaden and Thoennes, above n 105, 34.

Victim blaming discourses of female infidelity at trial and mitigating narratives of male passion at sentencing ignore the reality that separation

attacks take place when the batterer feels his control is eroding. The most dangerous moment may come when a woman makes a decision to leave, at the moment she actually walks out, or shortly after she has left. Because the key issue is control, flight might even create a temporarily enhanced sense of power in the batterer, which would turn to loss of control (and acts of violence to reassert control) later, when the woman refused to return and began building a new life.¹²⁷

Although repeat victimisation is also a well recognised risk factor for future violence and a red flag for dangerousness/lethality, absent an understanding of power and control, mitigating legal narratives of repeat victimisation have rendered this red flag benign. Despite research showing risk is elevated when women seek formal and informal interventions, the recent introduction of a blanket rule of compellability was not accompanied by safety provisions in recognition of this red flag for dangerousness/lethality. Failure to acknowledge these primary red flags undermines the ability of the legal system to promote the safety of women and children.

V DOMESTIC VIOLENCE: A WOMEN'S RIGHTS ISSUE

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Monitoring Committee expressed concern at the prevalence of gender-based violence in New Zealand, including rape, sexual and domestic violence within the family. The Committee called upon the government 'to create public awareness of violence against women as an infringement of women's human rights that has grave social costs for the whole community'.¹²⁸ However, Deborah Rhode observes that while political theorists have traditionally viewed physical security as citizens' most basic demand from the state; virtually never, apart from feminist work, has that demand been seen as encompassing women's protection from physical and sexual violence.¹²⁹ In a society in which most serious domestic violence is perpetrated against women,¹³⁰ and almost half of murders are 'family violence-related',¹³¹ there is an urgent need to distinguish

¹²⁷ Mahoney, above n 8, 79.

¹²⁸ United Nations Committee on the Elimination of Discrimination Against Women Monitoring Committee, Fifth Periodic Report of New Zealand, CEDAW/C/NZL/5, 625th and 626th sess, (CEDAW/C/SR.625 AND 626) 14 July 2003 [416].

¹²⁹ Deborah Rhode, 'Feminism and the State' (1994) 107 Harv.L.Rev. 1181, 1193.

¹³⁰ Taskforce for Action on Violence within Families, above n 35, 4.

¹³¹ Ibid 18.

minimum norms of intimate relationships, such as a right to be protected against physical harm, that warrant legal intervention no matter what competing demands we may endorse.¹³² Intimate partner violence violates women's right to bodily integrity, and if children are also injured or witness the violence, their right not to be subjected to physical or psychological abuse is also violated.¹³³

There is also strong evidence that the cost of legal protection is prohibitive for some victims of violence.¹³⁴ Accordingly, conceptualising violence as a human rights issue draws attention to a resiling by the state from its duty to protect its citizens, and the injustice of requiring women to pay to protect themselves from domestically violent men. Framing domestic violence as an issue of human rights also offers a political strategy which encompasses protection of a woman's right to *leave* as well as form intimate relationships. Although the former fundamental right remains largely unrecognised in criminal law, as demonstrated by the current research, its assertion is central to an understanding of the power and control dynamics of intimate partner violence and the need for broad economic, legal and social change.¹³⁵

VI CONCLUSION

The paramount goal of victim safety and commitment to abuser accountability in New Zealand Family Violence Prevention Strategy,¹³⁶ contrasts with the failure of the legal system to achieve either of these goals. While the risk of retaliatory violence toward women who seek criminal justice intervention is well established,¹³⁷ the above theoretical dichotomies and disagreements have inhibited principled intervention, obscured failures of intervention, monitoring, and accountability, and deflected attention from injury and harms to victims.

¹³² Martha Minnow, 'Words and the Door to the Land of Change: Law, Language, and Family Violence' (1990) 43 *Vand.L.Rev.* 1665, 1693, n 145, makes this point in relation to tolerance for cultural differences in attitudes to domestic violence.

¹³³ Elizabeth Schneider, 'The Dialectic of Rights and Politics: Perspectives from the Women's Movement' in D Kelly Weisberg (ed), *Feminist Legal Theory: Foundations* (1993) 507, discusses the advantages and the limitations of a political and legal strategy that utilises rights.

¹³⁴ *Legal Costs Hit Women Seeking Safety*, New Zealand Herald, 4 June 2002. Additional costs associated with the violence, such as housing, medical and relocation costs must also be met by victims, whose ability to pay may be compromised by loss of employment and other disadvantages accruing from the abuser's use of violence.

¹³⁵ See also, Diane Polan, 'Toward a Theory of Law and Patriarchy' in D Kelly Weisberg (ed), *Feminist Legal Theory: Foundations* (1993) 419, 425.

¹³⁶ Ministry of Social Development, above n 3, 12.

¹³⁷ See, eg, Carolyn Block, et al, *The Chicago Women's Health Risk Study: Risk of Serious Injury or Death in Intimate Violence A Collaborative Research Project* (2000); David Ford and Mary Jean Regoli, 'The Criminal Prosecution of Wife Assaulters: Process, Problems and Effects' in N Zoe Hilton (ed), *Legal Responses to Wife Assault: Current Trends and Evaluation* (1993) 127; Bennet, Goodman and Dutton, above n 12.

Kristian Miccio urges feminists to commit to legislative action and legal strategies that compromise neither women's bodies nor women's personal security.¹³⁸ A complainant-reliant intervention strategy fails to acknowledge that it is women who are overwhelmingly the victims of domestic violence crimes. Consequently, it is *women's* rights to lead their lives free from violence and intimidation that are being subjugated to the interests of the family relationship.¹³⁹ Since the right to physical security is one of the basic goals that feminists generally agree upon¹⁴⁰ and 'the concept of human rights is one of the few moral visions subscribed to internationally',¹⁴¹ a woman's rights analysis offers a useful strategy to ensure that the state is held accountable for protecting its citizens, monitoring and evaluating its responses from the standpoint of victim safety, and the ongoing development of initiatives to eradicate male violence toward women.

¹³⁸ Miccio, above n 92, 172.

¹³⁹ Dame Silvia Cartwright, 'Thoughts on Women and Violence, and Women and the Law [1993] CJQ 2, 2, notes that protecting the family will often mean women's right to live violence-free lives are 'seen as less important than the need to ensure children are raised in a unit that will give them financial security and fit our culture's image of an intact, nurturing environment, suited to the needs of children'.

¹⁴⁰ Deborah Rhode, above n 129, 1193.

¹⁴¹ Dame Silvia Cartwright, 'Violence and Water: Women's Issues and the Law' (1993) 8 OLR 1, 8, citing Charlotte Bunch and Roxanna Carillo, *Gender Violence, A Development and Human Rights Issue*, Centre for Women's Global Leadership, 7.

CHAPTER ELEVEN: RESEARCH SUMMARY

[I]t is time to admit that our criminal laws and evidentiary rules carry with them gender-biased views originating at a time when women's lives were devalued and the typical male perspective on domestic femicide was that the victim provoked her husband by her words and deeds. Therefore, in order to redress the results of a long-term belittlement of the appalling domestic violence problem in this country, concerns of gender fairness must be factored into the policy mix.¹

I INTRODUCTION

Feminists in the 1960s and 1970s broke the silence surrounding violence against women and children in the home. However, 'a new kind of silence is rooted in the institutional methods of processing these cases'.² The many women who were beaten, seriously injured and killed following criminal justice interventions with abusers, and silence surrounding this casualty toll, strongly indicate that whatever the state priority in domestic violence intervention during the term of the present research, it was not victim safety.

The compartmentalised legal response to domestic violence overlooks the interconnectedness of various categories of abuse and their cross-over implications for victims. Criminal law stereotypes of lethal male violence toward female intimates, which manipulate the two primary red flags of repeat victimisation and separation violence for the benefit of abusers, are inconsistent with social science research and illustrate the failure of the legal system to ground its responses to intimate partner violence in women's concrete, social reality. Aggressive and proprietary legal images of romantic love also compete with new visions of equality in heterosexual relationships.³ This ongoing contest is evident in legal analyses in which men have dominion over women; while national domestic violence policy seeks healthy gender roles, and non-violent concepts of masculinity.⁴

Domestic violence experts warn that when the reform effort shifts from a critique of the legal system's ability to hold an offender accountable, to a critique of the domestic violence victim,

¹ Myrna Raeder, 'The Admissibility of Prior Acts of Domestic Violence: *Simpson* and Beyond' (1996) 69 S.Cal.L.Rev. 1463, 1465.

² Dennis Falk and Nancy Helgeson, 'Building Monitoring and Tracking Systems' in Melanie Shepard and Ellen Pence (eds), *Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond* (1999) 89, 90.

³ See, also, Victoria Nourse, 'The "Normal" Successes and Failures of Feminism and the Criminal Law' (2000) 75 Chi-Kent L.Rev. 951, 951, making this point in relation to commentary which asserts that the 'abuse excuse' of battering threatens the legal system.

⁴ Ministry of Social Development, *Te Rito: New Zealand Family Violence Prevention Strategy* (2002) 14.

'[i]neffective intervention strategies and structural problems with the law fade from view as objects of inquiry'.⁵ The following summary of recommendations addresses 'ineffective intervention strategies and structural problem with the law' identified in the present research.

II INCONSISTENT POLICIES AND PRINCIPLES IN DOMESTIC VIOLENCE INTERVENTION

The Taskforce for Action on Violence within Families highlights victim safety and batterer accountability as the twin aims of criminal justice intervention.⁶ However, as discussed below, a number of competing ideologies and practices militate against this principled response.

A Victim Safety/Batterer Accountability versus Rehabilitation and Preserving the Family Relationship

While members of the judiciary sometimes assert that intimate partner violence will not be treated less seriously than other forms of violent offending,⁷ there is good evidence that when these cases survive dismissal for lack of evidence they are sentenced more leniently than crimes between strangers.⁸ This reality that 'rehabilitation of domestic violence offenders is a much more predominant response than punishment' is frequently misrepresented by caricaturing criminal justice interventions 'as punitive and stigmatizing of offenders'.⁹ A tendency to portray legal intervention as unduly punitive despite the present focus on rehabilitation is also evident in the widely reported remarks of a specialist domestic violence court judge that New Zealand's hard line approach to domestic violence 'flies in the face of reality',¹⁰ and jail is not always the best option for men who beat their partners.¹¹ Since this analysis may obscure an unprincipled focus on

⁵ Ellen Pence and Coral McDonnell, 'Developing Policies and Protocols in Duluth, Minnesota' in Jalna Hanmer and Catherine Itzen (eds), *Home Truths About Domestic Violence: Feminist Influences on Policy and Practice A Reader* (2000) 249, 249.

⁶ Taskforce for Action on Violence within Families, *The First Report* (2006) 2.

⁷ See, eg, *White v Police* (Unreported, High Court, Auckland, Barker J, 17 December 1991); *Sheen v Police* (Unreported, High Court, Auckland, Lang J, 3 February 2006) [11].

⁸ See, discussion above, at p 361.

⁹ John Braithwaite and Heather Strang, 'Restorative Justice and Family Violence' in John Braithwaite and Heather Strang (eds), *Restorative Justice and Family Violence* (2002) 1, 17. See, also, discussion of the gendered victim/agent dichotomy above, at p 359.

¹⁰ *Jail 'Not For All Violent Husbands'*, Hawkes Bay Today, 12 October 2005, notes the judge also angered women's groups and some media by granting an All Black permanent name suppression after he pleaded guilty to beating his pregnant wife. The player was discharged without conviction.

¹¹ *Judge Fuels Controversy*, Waikato Times, 12 October 2005, reports the judge as informing the conference that '[j]ailing men who beat their partners is not always the best option and some should be let off without conviction'.

rehabilitation,¹² chronically violent offenders - the category whose recidivism poses a high risk of dangerousness/lethality - may be repeatedly court-ordered to attend treatment programmes without ensuring offenders are held accountable for attending/completing programmes¹³ or providing meaningful sanctions for non-compliance. Thus all the responsibility and danger passes to women victims.¹⁴

In comparison, the purpose of the New York specialist domestic violence court is not rehabilitation or treatment. 'Without research showing that rehabilitation of batterers was possible, the court decided to focus on protecting victims and holding defendants accountable for their actions.'¹⁵ This intervention approach apparently recognises that opportunities to prevent abuse narrow as patterns of behaviour become established.¹⁶ Recidivist abusers and those who cause bodily injury to their partners are likely to be resistant to rehabilitation and have an elevated propensity for further violence.¹⁷ Repeat offenders are especially difficult to rehabilitate as many believe they have a right to use violence as a means of control.¹⁸ An unprincipled focus on rehabilitating habitually violent men is therefore likely to prove counter-productive to national prevention goals of victim safety and batterer accountability.

It has become the established orthodoxy to preface discussions of victim safety and batterer accountability with the qualification that intervention will respect women 'who want violence in the relationship to stop but who do not want the relationship itself to end'.¹⁹ In practice, this has translated into policies which focus on the victim, without any real acknowledgement that the decision to use violence is within the abuser's control, and not within the control of the victim - no matter how heroically women endure repeated acts of abuse.

¹² Helena Barwick, Alison Gray and Roger Macky, *Domestic Violence Act 1995: Process Evaluation* (2000) found judges, court staff, lawyers and police overwhelmingly approved of the rehabilitative focus of New Zealand legislation.

¹³ Ibid 103, finding attendance at programmes was remarkably low, with only about a third of those who were referred to a programme and not excused, actually completing them.

¹⁴ The Taskforce for Action on Violence within Families, above n 6, 21, undertakes to ensure abusers who breach court orders will be held accountable and to enhance the ability of the police to take effective action if offenders fail to attend therapeutic programmes. However, accountability also requires a meaningful response from the courts.

¹⁵ Robert V Wolf, Liberty Aldrich and Samantha Moore, *Planning a Domestic Violence Court: The New York State Experience* (2004) Center for Court Innovation, US Bureau of Justice Assistance, Washington DC.

¹⁶ Taskforce for Action on Violence within Families, above n 6, 9.

¹⁷ See, eg, Richard Johnson, 'Intensive Probation for Domestic Violence Offenders' (2001) 65 *Federal Probation* 36; Jeffrey Fagan, *The Criminalization of Domestic Violence: Promises and Limitations* (Adaptation of Paper presented at the 'What to Do About Crime?' Conference on Criminal Justice Research and Evaluation, Washington DC, 10 July 1995) (1996) 18-19.

¹⁸ See, eg, Johnson, above n 17.

¹⁹ Taskforce for Action on Violence within Families, above n 6, 20.

When courts and police defer to the wishes of battered victims that their abusers escape arrest, imprisonment, or be released on bail, they have neither the resources nor the expertise to ascertain the extent to which women's choices are shaped by the interaction of power and control, domination and subordination in battering relationships.²⁰ A battered woman may value her 'own keen decision-making under pressure, yet continue to deny the cumulative harm to her self esteem and her safety wrought by the betrayal of trust and incidents of violence in her relationship'.²¹ Consequently, her assessment of risk may be an unrealistic appraisal of her circumstances.²² Recent research also reveals that battered women are not necessarily safer by being permitted to choose the extent, if any, of criminal justice intervention. The study found nearly one-half of abused women who experienced an attempt on their lives by current or estranged male partners did not realise the level of danger they faced.²³ Thus while the aim of complainant-reliant intervention may be family solidarity, a focus on protecting the relationship has the potential to perpetuate a system of domination and expose women to further danger.

As one New Zealand judge has observed, conceptualising the family in terms of the adult relationship and affective privacy misses the crucial social function that families perform. The inter-generational and multi-generational effects of violence within families point to an overriding public interest in conceptualising the family as a social, as opposed to emotional unit.²⁴ Recognition of this public interest is essential to protect children living with violence and to prevent battering from escalating to lethality.

²⁰ See, eg, Tony Ward, et al, 'Explaining Some Characteristics of Battered Women: A Cognitive Deconstructionist Approach' (1995) 24 *New Zealand Journal of Psychology* 26; Paula Nurius, et al, 'Contextualizing Depression and Physical Functioning in Battered Women: Adding Vulnerability and Resources to the Analyses' (2003) 18 *Journal of Interpersonal Violence* 1411; Randy Semple, 'Psychological Abuse in Intimate Relationships: A New Zealand Perspective' (2001) 30 *New Zealand Journal of Psychology* 60.

²¹ Martha Mahoney, 'Victimization or Opression?: Women's Lives, Violence and Agency' in Martha Fineman and Roxanne Mykituk (eds) *The Public Nature of Private Violence* (1994) 59, 62.

²² Antonia Cretney and Gwynn Davis, 'The Significance of Compellability in the Prosecution of Domestic Assault' (1997) 37 *Brit.J.Criminol.* 75, 87, cite Anne Viney, Assistant Director of Victim Support, HACDV 1993, vol 2, 125, that very often a desire for reconciliation is assumed to be the reason for victim non-cooperation with prosecution, when the real reason may be something like fear of the court experience, fear of threats from the alleged perpetrator, or fear that the man may go to prison.

²³ Amy Karan and Lauren Lazarus, 'A Lawyer's Guide to Assessing Dangerousness for Domestic Violence' (2004) 78 *F.B.J.* 55.

²⁴ Judge David Harvey, 'Spousal Non-Compellability' [1997] *NZLJ* 115, 117.

B Failure to Acknowledge the Interrelationship between Woman and Child Abuse

Although empirical and clinical evidence of the trauma to children caused by exposure to batterers²⁵ has contributed to better coordinated policy and intervention, there remains a pervasive tendency to view child and woman abuse as separate, discrete categories of offending. Consequently, discourses of child abuse seldom acknowledge the correlation between child and women abuse, harms to children who witness violence against their primary caregivers, and the barriers to escape that women, and therefore their children face. Cultural and legal messages which increasingly stress children's need for stability and relationships with both biological parents²⁶ also create a tension between mothers' right to protection from violence, and children's right to contact with both parents. This social reality may increase battered women's vulnerability to violence by conveying the message that failure to acquiesce to fathers' demands is wrong and contrary to the welfare of children.²⁷ In Australia, this situation has apparently translated into 'a greater tendency for the non-resident parent to expect contact, even when domestic violence is an issue and...pressure on resident parents to agree to contact despite safety concerns'.²⁸

The Victorian Law Reform Commission notes that '[w]omen with children are often placed in a "no win" situation. They are often judged bad mothers by the community if they stay in a violent relationship, but bad mothers if they leave and take the children with them'.²⁹ The present research found women who remain in abusive relationships may be subject to prosecution,³⁰ or have their

²⁵ Janine Moss, 'World Conference on Family Violence Sharing Solutions. Changing the World' [1999] *Social Policy Journal of New Zealand* 172, 173, notes 'there is growing evidence to suggest that witnessing adult violence may be a greater risk factor [for children] than suffering physical child abuse'. Peter Jaffe, 'Foreword' in Lundy Bancroft and Jay Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002) viii, ix, supports a shift in terminology from 'children exposed to domestic violence' to 'children exposed to batterers' as the latter term 'serves to underline batterers' accountability and responsibility for the effects of domestic violence in a way that impersonal terms such as 'violent homes' or 'conjugal abuse' do not'. In addition, the term draws attention to the fact that 'the parenting of batterers can bring multiple sources of trauma to children's lives in addition to the terror of violence toward their mothers'.

²⁶ See, eg, Ministry of Social Development, <<http://www.msd.govt.nz/work-areas/families-whanau/families-commission.html>> at 2 March 2004, noting the role of the Families Commission is to 'raise public awareness and promote better understanding of family issues, including the importance of stable relationships (inclusive of marriage) and of the parenting role'.

²⁷ See, eg, Pauline Tapp, 'Family Law' [1994] NZRL Rev 140, 146.

²⁸ Linda Debenham, 'Addressing Domestic Violence in Family Law' (Paper presented at the Conference on Women, Feminism and the Law, Brisbane, October 2004) 2, citing Chief Justice Nicholson, Managing Family Violence in a Family Court Context: Lessons Learned and Challenges to be Faced' Columbia Pilot launch and Symposium 9/11/01. See, also, Wendy Davis, 'Gender Bias, Fathers' Rights, Domestic Violence and the Family Court' [2004] BFLJ 299.

²⁹ Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004) 166.

³⁰ See, eg, *R v Emery* [1993] 14 Cr.App.R 394; *R v Lunt* [2004] 1 NZLR 498.

children removed.³¹ On the other hand, criticisms by politicians, child advocates³² and Father's Rights Groups³³ of 'fatherless families', and the supposed deprivation of fathers' relationships with children arising from practices under the *Domestic Violence Act 1995*,³⁴ put pressure on women, especially women with young children, to remain in abusive relationships.³⁵ Although studies indicate that, if consulted, many children would tell their mothers not to stay in abusive relationships for their sake,³⁶ cultural messages that the 'good' wife remains with her husband and children, and the 'good' mother should 'keep the family together for the sake of the children',³⁷ send the message that women ought to stay or return 'for the sake of the family'. This social pressure clearly contributed to the deaths of battered women and their children in the present study.³⁸

Punitive responses to battered mothers who 'stand by' while children are abused, and removal of children who are exposed to domestic violence, require a reciprocal obligation by state and community agencies to commit to strategies that support women's attempts to leave abusive men. The Domestic Purposes Benefit (DPB) recognised the value of women's unpaid work and its availability made it possible for women to escape violent relationships with their children.³⁹ However, women's economic dependence is perpetuated by stigmatising sole parent (mainly women-headed) families on welfare. Researchers note that the constant identification of 'sole mothers' in public debates as to blame for much social malaise requiring severe deterrence against

³¹ See Part I.

³² See, eg, Laurie O'Reilly, 'The Child's Best Interests: Balancing the Right to Parental Relationships with the Right to Protection' in Jon Patrick, Helen Foster and Brian Tapper (eds), *Successful Practice in Family Violence in New Zealand* (1997) 34, 53, the then Commissioner for Children, who described the issue of 'fatherless families' as one of the most vital social issues facing New Zealand.

³³ *Fathers Victims of Gender Politics*, Evening Post, 11 May 2001, suggesting the most dangerous situation for children is the solo mother household.

³⁴ O'Reilly, above n 32, 53.

³⁵ Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 Mich.L.Rev. 59.

³⁶ Audrey Mullender, et al, *Children's Perspectives on Domestic Violence* (2002) 170.

³⁷ Richard Gelles and Murray Straus, *Intimate Violence: The Causes and Consequences of Abuse in the American Family* (1988) 82.

³⁸ In *Case Study P/98/3* the sister of the victim who was killed by a habitual batterer told the media that the deceased woman always put her children first and stayed in the violent relationship for their sake. In *Case Study H/01/9(S)* in which the offender killed his partner's two daughters shortly after she told him to leave the family home, the mother stated that despite the offender's violence toward her throughout the relationship she felt it was important for her children to have a positive relationship with a father figure. The offender's former partner, who had been seriously injured and hospitalised by the offender, stated she also remained in the relationship because she 'felt my kids had the right to a father. I look back now and realise I made the wrong decision'.

³⁹ Ann Else, *False Economy: New Zealanders Face the Conflict Between Paid and Unpaid Work* (1996) 106, notes the focus on irresponsible teenage mothers belies the reality that these mothers make up less than 3 per cent of all solo parents.

moral impropriety and financial irresponsibility ignores the reality that most sole parents are not 'young unmarried mothers'.⁴⁰

Research published by the Anglican Family Centre indicating that 46 per cent of all single-parent families live below the poverty line provides stark evidence that the state is failing to ensure the welfare of mothers and children.⁴¹ Strategies aimed at the safety and healing of battered women will impact positively on the welfare of their children.⁴² By contrast, increasingly punitive responses to sole parent mothers - including, but not limited to, cutting benefit levels - not only devalue women's unpaid child caring work,⁴³ but also add to the barriers to exit from violent relationships that women face.⁴⁴

C Misconstructions of Victim Autonomy: Shifting the Focus to Victim Safety

Notwithstanding incontrovertible evidence of the debilitating physical, social, emotional and psychological effects of battering,⁴⁵ resistance to images of abused women as victims has resulted in equally misleading portrayals of battered women as freely-choosing, autonomous agents.⁴⁶ The practical consequences of this victim/agent dichotomy are apparent in research on judicial responses to persons (usually women) who seek to discharge, or withdraw protection order applications soon after they are made. Some judges and courts adopt a cautious approach, particularly where children are involved, while others are inclined to the position that overriding an abused woman's choice is an abusive act of power, especially where there are no issues relating to children. The latter position may be maintained even where the judge believes further violence is likely to lead to a fresh protection order application. The researchers call for a broadened debate about the merits of each of these positions.⁴⁷

⁴⁰ Ian Pool and Kim Johnstone, 'Family Demographic Change: 2. Sole Parent Families' [1996] BFLJ 41, 42.

⁴¹ *Single Parent Families Worst Off, Study Finds*, Evening Post, 9 March 1996, noting that '[b]ecause more than 90 per cent of single-parent households were women-led, poverty was rising among New Zealand women.'

⁴² Lundy Bancroft and Jay Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002) cite various studies which illustrate that the behaviour of battering men sends a set of destructive ripples through the lives of families that are far more complex than is commonly recognised.

⁴³ See, eg, Marilyn Waring, *Counting for Nothing: What Men Value and What Women are Worth* (2nd ed, 1992); Marcia Neave, 'From Difference to Sameness - Law and Women's Work' (1992) 18 MULR 768, 771.

⁴⁴ Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (2000) 197-198, notes the fact that governments can eliminate welfare payments to battered women while simultaneously proclaiming an end to domestic violence reflects the contradictions of feminist engagement with the state.

⁴⁵ See, eg, Victorian Law Reform Commission, above n 29, 180; Ward, et al, above n 20; Nurious, et al, above n 20; Semple, above n 20.

⁴⁶ Mahoney, above n 21, 62. See, also, Joan Williams, 'Deconstructing Gender' in Patricia Smith (ed), *Feminist Jurisprudence* (1993) 531, 546.

⁴⁷ Barwick, Gray and Macky, above n 12, 126.

Principled intervention would eschew this dichotomous opposition. To respond to stereotypical depictions of battered women as pathologically helpless victims by propounding an equally false stereotype of abused women as free-wheeling agents deflects attention from the importance of risk assessment in domestic violence cases. Research suggests respondents of multiple domestic violence order applications are especially dangerous offenders.⁴⁸ By the time the batterer appears in court, there is likely to have been prior contact with police and fruitless attempts to hold him accountable.⁴⁹ Faced with batterers who refuse to accept the relationship has ended, and/or whose violence persists despite resort to the law for help and protection, women may see little alternative but to attempt to placate the abuser.⁵⁰ However, the present study found that even in cases where victims have endured gross and repeated acts of violence the judicial response may be muted as a result of victims' requests for leniency at sentencing.⁵¹ This approach undermines the goals of victim safety and batterer accountability in national domestic violence policy.

D *The Culture of Victim Blaming*

Although the question: 'Why Didn't She Leave?' continues to plague domestic violence discourses, it is disingenuous for members of the public and professionals to assert the existence of some 'common sense' understanding that a reasonable woman would leave a violent relationship when the assumption that the abusive relationship should be ended has been strenuously resisted in other contexts. Given the present legislative focus on batterer rehabilitation and treatment it would be surprising if abused women did not internalise the message that 'staying' is appropriate if the batterer gets counselling.

While the present focus on rehabilitation may encourage women to reconstitute their relationships with batterers who engage (however half-heartedly) in some level of treatment,⁵² when court-ordered batterer treatment fails, women who have staked their well-being and even their lives on

⁴⁸ Anna Stewart, 'Who Are the Respondents of Domestic Violence Protection Orders?' (2000) 33 ANZJ Crim 77, 87.

⁴⁹ Raeder, above n 1, 1468 n 22, cites a body of research, including one study showing ninety per cent of women killed by their batterers previously called the police. Fifty per cent called the police five or more times.

⁵⁰ Heather Cochrane, 'Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence' (1997) 7 Tex.J.Women & L. 89, 100, cites research suggesting victims hesitate to help prosecute batterers as their past experiences with the criminal justice system have shown them that police and courts cannot keep them safe.

⁵¹ See, examples of these cases above, at p 103.

⁵² Ruth Busch and Neville Robertson, "'What's Love Got To Do With It?' An Analysis of an Intervention Approach to Domestic Violence' (1993) 1 Waikato L.Rev. 109, 130, note anecdotal evidence that some abusive men who attend programmes seem less interested in changing their behaviour, than in convincing their partners that they have changed.

this legal response are likely to be blamed/and or treated as dysfunctional.⁵³ Perversely, battered women who *do* seek safety for themselves and their children are also blamed for depriving their children of fathers and for provoking their own deaths by: limiting abusive men's access to their children; attempting to protect themselves and their children by seeking structured access arrangements; and/or temporary protection orders.⁵⁴ A chillingly ironic expression of victim blaming is manifest in courtroom submissions that habitual batterers who kill women following their attempts to escape should have their sentences mitigated because their victims *chose not to leave*.⁵⁵

III PRINCIPLED INTERVENTION: SHIFTING THE FOCUS TO VICTIM SAFETY

The terrible social reality that women are killed despite legal interventions with abusers prompted Kenneth Polk to conclude that law can provide 'little real protection from the jealous rage of a male determined and set on the course of homicide'.⁵⁶ However, Patricia Easteal's research found that '[i]n many instances one felt strongly that the homicide or homicide-suicide did not have to be an inevitable outcome; that it was preventable'.⁵⁷ The Ontario Domestic Violence Death Review Committee also found domestic violence deaths 'are not isolated incidents of violence, but rather a reflection of broader social and systemic issues that render women and children vulnerable and allow them to be targets of violence'.⁵⁸ Research commissioned by the London Metropolitan Police Service (MPS) similarly concludes that structured criminal justice interventions can assist in preventing violence escalating to lethality and help to disrupt established patterns of abuse.⁵⁹

A *Adoption of a Corporate Domestic Violence Risk Assessment Tool*

Although courts, probation officers and prosecutors routinely make decisions concerning the dangerousness of domestic violence offenders, the process is not consistent, transparent or standardised. As demonstrated by the present research, constructions of male sexual proprietariness in terms of romantic love and of batterers as routinely assessing the level of

⁵³ Mahoney, above n 21, 77, notes that '[w]omen who "succeed" in stopping violence without permanently leaving the relationship have made decisions that are not treated as legitimate or intelligent in women who "fail" to halt the violence of their lovers'.

⁵⁴ See, eg, *Case Study G/01/7* discussed above, at p 164.

⁵⁵ See, eg, *Case Study D/00/7* discussed above, at p 157.

⁵⁶ Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994) 37.

⁵⁷ Patricia Easteal, *Killing the Beloved* (1993) 182-183.

⁵⁸ Domestic Violence Death Review Committee, *Annual Report to the Chief Coroner: Case Reviews of Domestic Violence Deaths, 2002 (2004)* 39.

⁵⁹ Metropolitan Police Service, *Findings from the Multi-agency Domestic Violence Murder Reviews in London: Prepared for the ACPO Homicide Working Group* (2003) 16.

violence they may inflict without the risk of lethality have rendered the two primary risk markers of separation violence and repeat victimisation benign. Beliefs that battered women are free to seek help and leave abusive relationships and failure to acknowledge the interrelationship between sub-lethal and lethal assaults undermine the ability of the legal system to assess and manage risk. Since batterers differ in their willingness or ability to desist from violent behaviour and responses to rehabilitative treatment,⁶⁰ systematic assessment tools, based on an articulated theory of lethality/dangerousness offer a means of standardising diagnostic procedures and referral protocols.

Routine deployment of a domestic violence risk assessment tool that is grounded in domestic violence research would ensure consistency in risk assessment by criminal justice personnel, social workers, health professionals and other persons dealing with domestic violence. Agencies who deal with domestic violence may therefore work together to safeguard domestic violence victims.⁶¹ Such instrument would also counter the tendency to treat each violent incident as unconnected to a pattern of abusive and controlling behaviours. Criminal justice agencies would therefore respond to the context of violent incidents, enhancing opportunities to ameliorate potentially lethal conditions of risk. While consistent application of national risk assessments standards would in some cases be a life saving institutional response,⁶² knowledge of red flags for dangerousness/lethality would also enable abused women and those close to them to make more informed choices in high risk situations (such as leaving an abusive partner).⁶³

It is not unusual to find discussions of risk by age group in terms of a rapidly increasing risk up until the mid-thirties, and then a slow decline in risk.⁶⁴ However, the present and Australian research supports the need to adjust risk assessment protocols to take into account the increased risk of intimate femicide for elderly women, particularly those who are physically or mentally

⁶⁰ See, eg, Desmond Ellis and Walter DeKeseredy, 'Rethinking Estrangement, Interventions and Intimate Femicide' (1997) 3 *Violence Against Women* 590, 593, noting sociopathic and antisocial batterers exhibit a recurring and increasingly serious pattern of violence toward their partners. Unless these men receive comprehensive residential care, including substance abuse and mental health treatment, as well as severe restraint for their criminality, change is unlikely. J Arturo Silva, et al, 'The Dangerousness of Persons with Delusional Jealousy' (1998) 26 *J Am Acad Psychiatry Law* 607, 618, notes batterer treatment may be an ineffective response to persons with obsessive jealousy: 'In many patients, it may become necessary to institute a "geographic" treatment (i.e., physical separation of the delusional individual from the target of the delusion, generally the spouse'. See, also, Kerry Healey, Christine Smith and Chris O'Sullivan, *Batterer Intervention: Program Approaches and Criminal Justice Strategies* (1998).

⁶¹ Metropolitan Police Service, above n 59, 42.

⁶² See, especially, Chapter Three.

⁶³ Neil Websdale, Maureen Sheeran and Byron Johnson, *Reviewing Domestic Violence Fatalities: Summarizing National Developments* (1998) 26, *Violence Against Women Online Resources*, <http://www.vaw.umn.edu> at 15 November 2005.

⁶⁴ See, eg, Julie People, 'Trends and Patterns in Domestic Violence Assaults' [2005] *Crime and Justice Bulletin* 1, 6.

disabled. Recent US research also warns against age bias when considering older women's risk of serious/lethal violence.

At many points in the 'process of violence' the CWHRS found that older women (age 41 and above) were at equal or greater risk of serious violence or homicide. Women who were homicide victims, and especially those who were homicide offenders were much more likely to be older than age 40 than clinic/hospital women...This suggests two things for clinicians who are screening women for high risk of serious injury or death. First, make every effort to interview older women at greater length and with sensitivity to their situation. Second, explore with women why they say they are afraid of their partner, even if they have not experienced recent violence.⁶⁵

Risk assessment is a work in progress. The MPS anticipates that a risk assessment tool 'based on acknowledged risk factors identified from previous patterns and characteristics' for use by officers investigating domestic violence will eventually become electronic, and an automatic part of the crime reporting system.⁶⁶ The Ontario Domestic Violence Death Review Committee notes that a risk assessment tool in a yes/no format should be accompanied by a contextually-based questionnaire.⁶⁷ As previously discussed, risk assessment procedures should not be conducted in close proximity to the alleged perpetrator.

B Prioritising Victim Safety

'Safety for women must be at the core of all activities in responding to situations in which domestic violence has occurred.'⁶⁸ There is indisputable evidence that the legal system presents abused women with considerable obstacles to participation. These obstacles include profound confusion when navigating the process and understanding how it works; frustration at the slow speed of the system when women are relying on it for their personal safety and the safety of their children; paralysing fear and increased vulnerability between the batterer's arrest and disposition of the case (contact with the court seldom leaves women feeling protected); and feelings of conflict over

⁶⁵ Carolyn Block, et al, *The Chicago Women's Health Risk Study: Risk of Serious Injury or Death in Intimate Violence A Collaborative Project* (2000) 278.

⁶⁶ Metropolitan Police Service, *Enough is Enough*, Domestic Violence Strategy (2001) 3-4, <http://www.met.police.uk/enoughisenough/strategy.htm> at 25 February 2005.

⁶⁷ Domestic Violence Death Review Committee, above n 58, 9. See, also, Appendix IV.

⁶⁸ Falk and Helgeson, above n 2, 90.

incarceration.⁶⁹ Domestic violence advocates also report that even when the prosecution successfully persuades a battered woman to testify, threatening looks from the accused to the victim are sometimes sufficient to silence her story in the courtroom.⁷⁰

Since the increased risk of violence faced by women who are making active efforts to obtain formal interventions such as contacting the police, getting a protection order, and testifying in court is well established,⁷¹ rather than blaming abused women,⁷² the state must acknowledge and respond to this elevated risk when victims of domestic violence turn to the criminal justice system for help. When a battered woman enters the legal system, she requires support through the court process, risk assessment, safety planning,⁷³ and where necessary, access to witness protection. Since '[o]ver half of the murders in New Zealand are the result of domestic violence',⁷⁴ and around ninety percent of partner homicides are perpetrated by men against current or estranged female partners,⁷⁵ battered women are clearly among those who are most in need of witness protection. Given the numbers of women in New Zealand who are beaten and killed following interventions, the state has a responsibility to ensure such programmes are accessible, well resourced and well advertised.

Many court systems in the US have established victim advocate programmes in which trained advocates provide support for victims.⁷⁶ At least one US University has developed a domestic violence course with an accompanying practicum to provide a steady stream of volunteer advocates to the courts.⁷⁷ The Hamilton Abuse Intervention Project (HAIP) found the role of the court advocate to be a crucial factor in supporting a woman to give evidence against an abusive partner.⁷⁸ As noted by a Victims Task Force Report, '[w]ell treated victims will be better

⁶⁹ See, eg, Lauren Bennet, Lisa Goodman and Mary Ann Dutton, 'Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective' (1999) 14 *Journal of Interpersonal Violence* 761, 766-769; Cochran, above n 50.

⁷⁰ Cochran, above n 50, 92.

⁷¹ See, eg, Block, et al, above n 65, 277.

⁷² See, eg *Case Studies F/02/1* above, at p 153 and *T/97/5* above, at p 211. See, also, *Judge Issues Warning After Charged Dropped*, Evening Standard, 21 December 1996.

⁷³ See Appendix V.

⁷⁴ *The Country's Top Family Court Judge Says New Zealand's High Rate of Domestic Violence Means we can no Longer Boast of Being the Best Country in the World to Bring Up Children*, New Zealand Herald, 28 March 2006.

⁷⁵ Ministry of Health, *Family Violence Intervention Guidelines: Child and Partner Abuse* (2002) 37.

⁷⁶ Cochran, above n 50, 92 n 24, citing the Quincy Massachusetts intervention programme.

⁷⁷ Bennet, Goodman and Dutton, above n 69, 771.

⁷⁸ Busch and Robertson, above n 52, 134.

witnesses, improving the quality of justice and the likelihood of conviction'.⁷⁹ Court advocacy, risk assessment and safety planning by well-trained domestic violence victim advocates should be institutionalised on a national basis.⁸⁰

C Monitoring and Accountability for Victim Safety

The treatment response to habitual batterers in the absence of monitoring and meaningful sanctions for non-compliance constitutes strong evidence that victim safety has not been the guiding ethic of legal intervention. Silence surrounding the numbers of women, other family members and children who are harmed following legal interventions with batterers further demonstrates the importance of systematic monitoring and evaluation of agency responses. Although the recently announced decision to implement domestic violence fatality reviews is an important step toward accountability,⁸¹ it is not sufficient to monitor intervention at the extreme end of the violence continuum. Monitoring of sub-lethal assaults from the standpoint of victim safety is critical to ascertain where gaps are occurring and to adjust approaches accordingly. The MPS multi-agency murder review recommended a review should always be considered 'where a victim sustains a potentially life-threatening injury or serious and permanent impairment of health and development, or has been subjected to a particularly serious sexual assault'.⁸²

Dennis Falk and Nancy Helgeson describe the information sharing and monitoring systems developed by the Duluth Abuse Intervention Project (DAIP) and note these systems promote women's safety in two ways. First, by sharing relevant information among the various agencies and practitioners the offender can be held accountable, and the risk to women of escalating violence can be minimised. Second, women's safety can be promoted by holding the criminal justice system accountable. 'By addressing problems of the system, it is more likely that interventions in domestic violence will be effective, leading to increased safety for women.'⁸³

Visitors to Duluth are amazed at the extent to which agencies have been open to having their handling of cases be scrutinized by others. The attitude among agency directors in Duluth is that

⁷⁹ Ruth Wilkie, 'Victims Task Force Final Report' [1993] CJQ 8, 9.

⁸⁰ The Washington State Coalition Against Domestic Violence, *Every Life Lost is a Call for Change: Findings and Recommendations from the Washington State Domestic Violence Fatality Review* (2004) 8, recommends the employment of well-trained domestic violence advocates by prosecutors and probation offices.

⁸¹ Taskforce for Action on Violence within Families, above n 6.

⁸² Metropolitan Police Service, above n 59, 7.

⁸³ Falk and Helgeson, above n 2, 90-91.

such scrutiny improves their services rather than hinders their ability to operate. A good system is refined by scrutiny; an ineffective system is replaced by it.⁸⁴

Victim-blaming responses to domestic violence and widespread misunderstanding of patterns of violence in intimate relationships require independent monitoring of agency interventions.⁸⁵ Since this monitoring is essential to ensure that the state fulfils its core responsibility to victims it is concerning that the Taskforce for Action on Violence within Families makes no reference to funding for independent monitoring of agency interventions when discussing agency systems and processes.⁸⁶

IV CRIMINAL JUSTICE INTERVENTIONS

A *Police*

Ministry of Health intervention guidelines and legal materials suggest that where sufficient evidence exists, police may arrest and charge the abuser without requiring the victim to lay a complaint.⁸⁷ This proposition is supported by police domestic violence policy which states that '[v]ictim protection is best attained by stopping the violence, and implementing a process that brings the offender into the criminal justice system'.⁸⁸ However, the observations of staff at WINZ in *Case Study T/00/6*,⁸⁹ and senior police personnel in *Case Study F/02/1*,⁹⁰ that action could not be taken without the victims' cooperation may indicate a return to complainant-reliant intervention which holds the victim responsible for bringing the offender into the criminal justice system. Since this intervention strategy focuses public and legal attention on the battered victim, the question becomes 'Why didn't she leave?' rather than why men batter women and whether domestic violence law and policy might facilitate their ability to do so.

As previously discussed, police may have encountered judicial resistance to prosecuting domestic violence cases in the absence of victim cooperation.⁹¹ A Ministry report also indicates that police may be encountering increased difficulties finding enough evidence to prosecute and convict

⁸⁴ Pence and McDonnell, above n 5, 253.

⁸⁵ See, eg, Falk and Helgeson, above n 2, for a detailed discussion of the benefits of independent monitoring and tracking of agency interventions.

⁸⁶ Taskforce for Action on Violence within Families, above n 6, 21-22.

⁸⁷ Ministry of Health, above n 75, 51; Dick Webb, et al, *Family Law in New Zealand* (11th ed, 2003) vol 2, 1431.

⁸⁸ Dick Webb, et al, *Family Law in New Zealand* (11th ed, 2003) vol 2, 1513.

⁸⁹ See, discussion of this case above, at p 143.

⁹⁰ See, discussion of this case above, at p 153.

⁹¹ See, discussion above, at p 156.

domestic violence offenders.⁹² However, the enhanced investigative techniques used in overseas jurisdictions to facilitate successful prosecutions were missing in some cases in the present study. This absence was particularly acute in *Case Study F/02/1*. US jurisdictions have set up special squads trained in domestic violence intervention to assist police officers in gathering all the necessary evidence. 'They may tape victim and witness statements at the scene and photograph the bruises, smashed furniture, and torn clothing to document the assault.'⁹³ Prosecutors may 'use recordings of 911 calls, police observation of injuries, and defendant's admissions to police (comments like "What do you mean, I can't beat my wife?") as evidence'.⁹⁴ Maryland drew on a form developed by San Diego which police officers fill out when responding to a domestic violence call-out.⁹⁵

The San Diego form has been called 'a revolutionary sheet of paper', as its use by police in collecting evidence has 'resulted in prosecutors winning 90% of their cases and...a 62% decline in domestic homicides'.⁹⁶

In an attempt to be more proactive, some police departments in the US screen incoming cases to determine whether there is a threat of danger to the victim. The Colorado Springs Police Department takes referrals from advocates for battered women, specially trained police and prosecution personnel, judges and citizens. Criteria for high risk cases include: perpetrator's previous history of domestic violence; multiple law enforcement interventions; stalking behaviour; threats to kill; access to weapons; and separation or divorce. A Domestic Violence Enhanced Response Team

focuses on the preliminary investigation, immediate and aggressive intervention for all victims (adults, children, and pets), and containment of the perpetrator. The victim benefits from 'vertical victim advocacy' in which she is assigned one advocate who addresses any emotional, housing, financial, or other concerns with which she is struggling. The team provides ongoing legal and

⁹² Ministry of Justice, *Responses to Crime: Annual Review 1999* (1999) [6.2.2].

⁹³ Georgia Sargeant, 'Lawmakers, Cops, Courts, and Family Violence: Some Progress' (1994) 30 *Trial* 95.

⁹⁴ *Ibid.*

⁹⁵ See Appendix VI.

⁹⁶ Tonya McCormick, 'Convicting Domestic Violence Abusers When the Victim Remains Silent' (1998-1999) 13 *B.Y.U.J.Pub.L.* 427, 439.

advocacy counselling, shelter and support services to victims, coordinated by their appointed advocate.⁹⁷

The London Metropolitan Police recently adopted an offender-oriented approach to domestic violence. Since research reveals violent offenders tend to be generalist as opposed to specialist offenders,⁹⁸ this includes actively pursuing domestic violence offenders for other areas of crime in which they may be involved. Police also 'use the full range of intelligence opportunities such as medical evidence, 999 tapes and photo evidence, to prosecute those who commit domestic violence, so that we are no longer principally reliant on the testimony of the victims'.⁹⁹

New Zealand police could adopt this aggressive pursuit of domestic violence offenders:

Aggressive prosecution offers at least some hope for controlling violence against women and for ultimately reducing the physical injury and related social, economic, and personal costs caused by domestic violence. Although most women may be powerless to stop the abuse on their own, evidence suggests that prosecution of batterers can deter future violence, especially when punishment includes incarceration. Indeed, incarceration may be the most effective response because it completely incapacitates the batterer for a period of time.¹⁰⁰

Safety planning for the victim is essential.¹⁰¹ Current policy requiring the victim to outline her complaint in the presence of the offender while noting the offender's response¹⁰² lacks cognisance of the power and control dynamics of domestic violence and compromises victim safety. As illustrated by *Case Study T/00/6*,¹⁰³ police should conduct separate interviews with victims and offenders at the domestic violence scene. When conducting risk assessment, police should 'routinely ask victims about the abuser's history of making homicidal or suicidal threats'¹⁰⁴ and any

⁹⁷ Kristen Little, et al, *Assessing Justice System Response to Violence Against Women: A Tool for Law Enforcement, Prosecution and the Courts to Use in Developing Effective Responses* (1998) 28.

<http://www.vaw.umn.edu/documents/promise/pplaw/pplaw.htm> at 15 November 2005.

⁹⁸ See, also, Philip Spier, *Recidivism Patterns for People Convicted in 1995* (2001) 19.

⁹⁹ Metropolitan Police Service, 'New Approach on the Domestic Front' (2004) 37 *The Job* 1, 2.

¹⁰⁰ Cheryl Hanna, 'No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions' (1996) 109 *Harv.L.Rev.* 1849, 1887-1888.

¹⁰¹ See, eg, Cochran, above n 50, Appendix A. See, also, Appendix V.

¹⁰² Webb, et al, above n 88, 1515.

¹⁰³ See, discussion of this case above, at p 143.

¹⁰⁴ Neil Websdale, *Lethality Assessment Tools: A Critical Analysis* (2000) 31, National Electronic Network on Violence Against Women, Applied Research Forum, www.vaw.umn.edu/Vawnet/lethality.htm at 15 November 2005.

stalking activities.¹⁰⁵ Petitioners for protection orders and victims of separation assaults should be made aware of their increased danger given these threats and supported to engage in safety planning.¹⁰⁶ *Case Study T/00/6* illustrates that safety problems are particularly acute for women who own their own homes and are unable to leave them for any extended period of time without experiencing substantial financial loss. To prevent women from dying in their attempts to protect their property, domestic violence interventions must acknowledge and respond to this issue.

Police arrests of angry and self-defending victims in *Case Studies M/02/4*¹⁰⁷ and *H/00/8*¹⁰⁸ indicate the need for police training to identify the primary aggressor. Vito Ciraco notes police failure to identify the primary aggressor, resulting in dual arrests, or arrest of the woman victim acts as a tremendous disincentive for women to report domestic violence to police. Consequently, legislation in some US jurisdictions explicitly prohibits arrest of the victim if she used reasonable force in self-defence. Further, 'where both parties at the domestic violence scene exhibit signs of injury, [the legislation] requires the officer to compare "the extent of the injuries, the history of domestic violence between the parties...and any other relevant factors"'.¹⁰⁹ Negative evaluations by police of 'typical' battered victims also demonstrate the need to incorporate sensitivity training as well as training on red flags for intimate femicide in the police training curriculum.

The enhanced risk of retaliatory violence which is well-established from domestic violence research makes it essential that recidivist batterers are not granted police bail. Women should not be subject to a lesser standard of protection, simply because, for financial or other reasons, they do not have a domestic violence protection order.

B Prosecution

The 'protection provided by penal custody can be the most important element of the sentence for the victim of crime'.¹¹⁰ In the absence of appropriate sanctions, abusers are unlikely to be deterred from violent acts.¹¹¹ Effective prosecution appears to have a dramatic impact on reducing the

¹⁰⁵ Washington State Coalition Against Domestic Violence, *Tell the World What Happened to Me: Findings and Recommendations from the Washington State Domestic Violence Fatality Review* (2002) 17.

¹⁰⁶ Ibid. See also, Washington State Coalition Against Domestic Violence, above n 80, 12.

¹⁰⁷ See, discussion of this case above, at p 171.

¹⁰⁸ See, discussion of this case above, at p 175.

¹⁰⁹ Vito Ciraco, 'Fighting Domestic Violence With Mandatory Arrest, Are We Winning?: An Analysis in New Jersey' (2001) 22 *Women's Rts.L.Rep* 169, 184.

¹¹⁰ Wilkie, above n 79.

¹¹¹ See, eg, Washington State Coalition Against Domestic Violence, above n 80, 71.

escalation in repetition and severity of domestic violence and can be measured through a fall in the spousal homicide rate.¹¹² In addition to signalling that domestic violence is a crime, locating responses to domestic violence in the criminal justice sector provides the means to monitor and intervene when batterers fail to respond to rehabilitative interventions.

To interrupt patterns of repeat victimisation and escalation, society must be willing to prosecute domestic violence offenders as aggressively as it prosecutes those who use violence toward strangers.¹¹³ Simply withdrawing the charge(s) because the victim is too afraid, or for some other reason recants or refuses to testify fails to address ongoing safety issues, and is destructive to batterer accountability.¹¹⁴ The Washington State Fatality Review Panel notes that the many dismissed cases simply reinforce abusers' perceptions that violence and threats are effective tools for deterring victims from testifying.¹¹⁵ However, intervention must tailor strategies to the safety needs of witnesses. The recent abolition of spousal non-compellability without reciprocal provisions to ensure victim safety overlooks the public interest in protecting victims who testify from retaliatory violence,¹¹⁶ and fails to acknowledge the social reality that offending in this context constitutes a red flag for dangerousness/lethality.

There should be a consequence for every act of violence and incremental penalties for further acts of violence.¹¹⁷ In 1992, domestic violence researchers recommended the creation of three new offences to establish a principled framework for intervention.¹¹⁸ First, an offence of aggravated breach of a protection order should apply where the perpetrator has previously been convicted of breach on more than one occasion over the previous five year period. Second, an offence of aggravated assault on a female or child should apply where the offender has been convicted of assaulting the same female or child on more than one occasion in the previous two years. The

¹¹² Susan Edwards, 'New Directions in Prosecution' in Julie Taylor-Browne (ed), *What Works in Reducing Domestic Violence: A Comprehensive Guide for Professionals* (2001) 211, 219.

¹¹³ Raeder, above n 1, 1484, noting escalating patterns of abuse provide the reason society should overcome the urge to forgive minor incidents of abuse.

¹¹⁴ For example, in *Case Study F/08/12(S)* the woman was punched and kicked when she refused to have sex with the offender. The police prosecutor told the court that a charge of rape was withdrawn as the complainant feared for her safety and could not be relied on to give evidence; In *Case Study H/01/25(S)* a number of assault and one intentional damage charges against a defendant arising from alleged violence toward his pregnant partner and her father were dismissed after the woman recanted her original statement. At least two women in the present study were killed after withdrawing support for the prosecution of their batterers: *Case Study F/02/1*; *Case Study H/00/2*.

¹¹⁵ Washington State Coalition Against Domestic Violence, above n 80, 71.

¹¹⁶ New Zealand Law Commission, *Evidence*, Report 55, Vol 1 (1999) [346].

¹¹⁷ Ruth Busch, 'Editorial' (1996) 4 Waikato L.Rev. i, iii.

¹¹⁸ Ruth Busch, Neville Robertson and Hilary Lapsley, *Domestic Violence and the Justice System: A Study of Breaches of Protection Orders* (1992).

pattern of terrorising estranged female intimates, which the present study found the abuser is able to maintain even from within prison walls, illustrates the importance of the researchers' third proposal of an offence of Terroristic Threats. These recommendations should be adopted.

Power and control tactics operating on a systemic level can legitimise abusers' perspectives of violence and result in the further victimisation of those who look to the justice system for protection. Consequently, in 'red flag' situations, a discretion to excuse the complainant from testifying is essential. Since batterers must not be permitted to profit from their own violent behaviour, when safety considerations require exercise of the discretion, the complainant's hearsay statement of violence should be admissible as evidence against the defendant.

C Courts

Consideration should be given to legislation which eradicates the present judicial practice of crediting perpetrators who have no prior domestic violence convictions as 'first offenders'. Given extremely low reporting rates of domestic violence,¹¹⁹ the first time an abuser is prosecuted for a domestic violence crime is almost certainly not the first incident of abuse.¹²⁰

Case studies in which women were injured and killed while attempting to negotiate access with abusive fathers demonstrate the need for judges to specify safe access arrangements when granting custody or access awards and protection orders. The victim should not be exposed to further violence by permitting the perpetrator of violence to visit children at home. Some US jurisdictions specifically direct the courts to protect the child and/or the abused adult from further harm. Model guidelines recommend: 'Where there is proof of domestic violence, the court should issue very specific, highly structured custody and visitation orders. The court should leave no room for ambiguity or negotiation'.¹²¹ The protection order should clearly outline contact arrangements to assist the police to determine what behaviour constitutes a breach of the order.¹²²

¹¹⁹ The Metropolitan Police Magazine, *The Job* (2004) Vol 37, 6 August 2004, reports that '[o]n average, a victim will be assaulted more than 30 times before they seek help'.

¹²⁰ See, eg, Washington State Coalition Against Domestic Violence, above n 80, 71.

¹²¹ Minnesota Center Against Violence and Abuse, *Barbara J Hart's Collected Writings* (1990) 121, <http://www.mincava.umn.edu> at 15 November 2005,

¹²² See, eg, Victorian Law Reform Commission, *Review of Family Violence Laws*, Final Report Summary (2006) 8.

Hart notes that 'some communities have undertaken specialized domestic violence legal programs, pro bono projects or law school clinics to offer limited legal assistance and representation to abused adults seeking custody awards'.¹²³

D *Batterer Treatment*

New Zealand research revealed concern among judges and court staff regarding the lack of evaluation of treatment programmes and information about their ability to affect reoffending rates.¹²⁴ US experts suggest that

the greatest contribution batterer programs make may not be their work with individual offenders but rather their ability to bring together major actors in the criminal justice and community service sectors to work cooperatively to reduce domestic violence...cooperative efforts among criminal justice agencies, batterer interventions, victim advocates, battered women's agencies, and the community are likely to produce more significant reductions in battering than any single unit or program...Jonathan Cohen, assistant director of the Batterers Intervention Project in New City, New York, takes this line of reasoning further...According to Cohen: 'Once you realize that coordinated community response is the level at which men's violence can be changed or stopped, it's easier to let go of one's investment in individual men changing [the aim of most batterer programs]'.¹²⁵

In the context of patterns of recidivism and escalation, the legislative focus on rehabilitation and treatment requires an equivalent commitment to providing abused women with information about the potential of programmes to reform recidivist abusers. The Washington Review Panel observes that prosecutors, judges and probation officers should inform victims that the effectiveness of batterer intervention programmes is debatable and the abuser's attendance at one is not guaranteed to increase her safety.

Batterer intervention programs should be required...to give victims accurate information in plain language about the limitations of batterer's intervention and the conditions under which it is more likely to be effective, including complete citations to research literature on the topic.¹²⁶

¹²³ Minnesota Center Against Violence and Abuse, above n 121, 43 (citations omitted).

¹²⁴ Barwick, Gray and Macky, above n 12, 97-98.

¹²⁵ Healey, Smith and O'Sullivan, above n 60, 94.

¹²⁶ Washington State Coalition Against Domestic Violence, above n 105, 15.

Sentencing guidelines should be developed regarding abusers who are not amenable to, or appropriate for, batterer treatment.¹²⁷ As discussed below, a domestic violence advisory panel should develop sentencing policy and guidelines for use in domestic violence cases.

E Parole/Probation

The present policy of paroling domestic violence offenders to the homes of their former victims in the interests of rehabilitation is extremely dangerous. Too many women are being killed by abusers who have been paroled to their places of residence. The policy facilitates opportunities for batterers to continue to assault their partners while simultaneously restricting women's opportunities for escape. The apparent ease with which the batterer in *Case Study T/00/6* was able to continue to threaten and intimidate his partner from prison before being paroled to her home also indicates insufficient recognition of, and attention to issues of power and control.

Probation departments in the UK and the US have developed risk assessment tools for use when taking action on domestic violence cases.¹²⁸ Such instrument would prohibit the 'second chance' analysis employed in *Case Study T/00/6* which strips the immediate violent incident from its violent antecedents. Richard Johnson notes the need for especially strict supervision for repeat domestic violence offenders and those who have perpetrated an act which caused bodily injury.¹²⁹

V COORDINATING SYSTEM RESPONSES

Case Studies T/00/6 and *D/00/7* illustrate the importance of an integrated response to domestic violence which does not artificially sever the connection between abuse of children and abuse of their mothers. Proposed training of child protection workers¹³⁰ should include recognition of the risk to battered women and children at the point of separation and the need to craft intervention policy so as to best ensure the safety of both mother and child.

¹²⁷ Washington State Coalition Against Domestic Violence, *Honoring their Lives, Learning from their Deaths: Findings and Recommendations from the Washington State Domestic Violence Fatality Review* (2000) 13.

¹²⁸ See Appendix IV for tool in use by the Santa Clara County Probation Department.

¹²⁹ See, eg, Johnson, above n 17.

¹³⁰ Taskforce for Action on Violence within Families, above n 6, 21.

VI REFUGE FUNDING

The present research reveals the importance of state funded protection and support to women and children who are attempting to separate from abusive, controlling partners. Elizabeth Stanko points out that this should include:

The full funding of refuges, safe networks, crisis lines, women's centres, advice centres and support systems which provide options for women and children to escape violence. These women's networks should be considered crime prevention networks and given top priority for funding, even if it means diverting funds from other crime prevention efforts.¹³¹

The CEDAW Monitoring Committee recommended that the number of shelters for women victims of violence in New Zealand be increased.¹³² In response to the killing of one woman in this study, the media described the under-funding of Women's Refuge as 'a disgrace'. Significantly, the Taskforce for Action on Violence within Families has signalled an intention to ensure adequate and sustainable funding for crisis, post-crisis and prevention services.¹³³

VII FATALITY REVIEWS

A *Systems Review*

Margaret Hobart notes fatality reviews play a crucial role in refocusing public and professional attention from discourses that are critical of battered women, to critical examination of gaps, barriers, and weak points in system and community responses that continue to fail battered women.¹³⁴ The government's recently announced intention to implement fatality reviews is therefore welcome.¹³⁵ However, while the Minister of Health presently has the power to appoint one or more committees to conduct mortality reviews,¹³⁶ the current lack of commitment to data collection, reporting and monitoring of male violence toward women illustrates the importance of placing domestic violence reviews on a statutory footing.

¹³¹ Elizabeth Stanko, 'When Precaution is Normal: A Feminist Critique of Crime Prevention' in Loraine Gelsthorpe and Allison Morris, (eds), *Feminist Perspectives in Criminology* (1990) 172, 182.

¹³² United Nations Committee on the Elimination of Discrimination Against Women Monitoring Committee, Fifth Periodic Report of New Zealand, CEDAW/C/NZL/5, 625th and 626th sess, (CEDAW/C/SR.625 AND 626) 14 July 2003 [416].

¹³³ Taskforce for Action on Violence within Families, above n 6, 6.

¹³⁴ Margaret Hobart, *Advocates and Fatality Reviews* (2004) 6.

¹³⁵ Taskforce for Action on Violence within Families, above n 6, 18.

¹³⁶ Section 18 *Public Health and Disability Act 2000*.

Fatality reviews should not be regarded as simply homicide prevention projects:

A focus solely on homicide prevention can result in energy devoted to identifying women at risk for lethal violence (and while some risk assessment tools exist, all are flawed to some degree) versus generally improving response. The aim of a DVFR is to improve community response for all battered women...Panels should remember that the victim's experience is shared by many women in her community. The missteps and barriers that she encountered are encountered by battered women every day; they just haven't been killed (yet).¹³⁷

The definition of a domestic violence fatality should follow the convention in the US, as adopted in the present study, which uses control as the fundamental criterion rather than degrees of relationship between victim and perpetrator. This would ensure that the real human cost of domestic violence is acknowledged and all domestic violence fatalities are investigated.

The process for deciding when a review should take place should include a facility for citizens to instigate a review. The present research found families of deceased victims are frequently the first to raise issues of concern regarding agency interventions and investigations. The Nevada legislation provides that on receipt of a written request within a period of one year from the fatality, from a person related to the victim within the third degree of consanguinity, a review shall be conducted.¹³⁸ However, a close woman friend of the deceased victim was extremely pro-active in drawing attention to the suspicious nature of her friend's death in one case study, and advocates for battered women also highlighted the need for improved community responses in some cases. Therefore, a protocol which triggers a review at the written request of family members or citizens with particular knowledge of the victim, or the particular situation, should be adopted.

Although legislative implementation of fatality reviews can potentially improve responses to domestic violence, enhance agency accountability and even save women's lives, their effectiveness will depend upon how the review process is structured.

[S]tate agencies...operate in the contexts of institutions which have their own specific constraints, agendas and disciplinary norms which may impose debilitating limits with respect to the goals we hope to achieve with fatality reviews...institutions themselves are frequently self-protective and slow to

¹³⁷ Hobart, above n 134, 7.

¹³⁸ Websdale, Sheeran and Johnson, above n 63, 15.

embrace change. This characteristic of institutions poses a challenge to fatality reviews, which should be a tool to illuminate problems with institutional responses to domestic violence and catalyze change.¹³⁹

The US experience of fatality reviews reveals that misunderstanding the dynamics of violent relationships can result in panel members systematically underestimating the energy and commitment that abusers bring to their acts of coercion and physical violence and overestimating the responsibility of victims. Information that could re-direct attention from the behaviour of victims to institutional accountability is therefore overlooked,¹⁴⁰ and the potential for positive outcomes from fatality reviews is undermined:

We have heard from advocates in various parts of the country that in some reviews, jokes about the victim, callousness towards the violence she and her children suffered and placing responsibility on the victim for making 'bad choices' go unchallenged...A lack of respect and compassion towards the victims of domestic violence and an over-focus on the 'flaws' in her thinking short-circuit analysis and opportunities for learning: if the victim made bad choices, then we need look no further for what could be improved.¹⁴¹

The negative impact of victim blaming on the review process has serious implications for the integrity of New Zealand reviews. As discussed throughout the present research, victim blaming is an engrained institutional response to domestic violence. Hobart notes advocates for battered women have critical specialised knowledge which can counter this tendency toward victim blaming. However, when panels are heavily populated by criminal justice professionals and social service providers, with only a lone advocacy voice, that voice can easily be diluted. 'Advocates on some panels have found it challenging to be the only person to repeatedly speak up and identify problems or issues that may be "invisible" to others on the review panel. These strains can be minimized by ensuring the participation of multiple advocates on the panel.'¹⁴² The Minnesota Domestic Violence Fatality Review protocols require that three advocates sit on the panel. Other

¹³⁹ Hobart, above n 134, 7.

¹⁴⁰ Ibid 11, noting that in one fatality review, a police officer 'described the victim as "'hanging out" at a community event all weekend prior to her murder and flirting with another man, implying that she was "loose" and perhaps at fault for inciting her partner's jealousy. However, the written documentation indicated that she was in fact working at the community event, and staying away from home in the evenings because of her fear of her partner. She accepted a ride from another worker at the event after her abusive partner disabled her car. The panel would not have known this if it had relied exclusively on the law enforcement officer's version of the events'.

¹⁴¹ Ibid 8-9.

¹⁴² Ibid 14-15.

panels invite an advocate from each domestic violence programme in their area, which results in several advocates at the table.¹⁴³ Similar protocols should be adopted in New Zealand.

While the participation of domestic violence advocates on panels is crucial, Hobart suggests that the feminist consensus model of decision making may not be the most effective way to interpret findings and create recommendations.

In Washington, while members of review panels and advisory groups have extensive input into the project's findings and recommendations, the state domestic violence coalition alone ultimately takes responsibility for the recommendations. This arrangement is particularly helpful to judges who interpret judicial canons as forbidding participation in recommendation-making bodies. Since panels per se do not create the recommendations, but instead are conceived of as 'fact-finding' bodies, judges can participate in them freely.¹⁴⁴

The ultimate responsibility for interpreting the findings, refining and presenting the recommendations should be located in a body which is independent and committed to a vision of justice for battered women. As discussed below, a domestic violence advisory panel could provide the necessary leadership and knowledge to produce challenging, focused reports, and report to Parliament.

B Investigative Review

The Washington State Domestic Violence Fatality Review Panel notes current methods of tracking domestic violence cases through news accounts of homicides and official data results in undercounting domestic violence fatalities in five key areas. First, in cases where children are killed by domestic violence abusers, information that the perpetrator was also abusive to the mother and/or killed the child as an act of punishment or revenge directed at their partner is not always available or reported. Second, killings in same-sex relationships are likely to be undercounted by classifying the victim/offender relationship as 'friends' or 'other known to victim'. Far more women commit suicide than are murdered. Without more thorough examination it remains unknown how many of these women's deaths are linked to domestic violence. Since the

¹⁴³ Ibid 15.

¹⁴⁴ Ibid 20-21.

count relies on the identification of homicides by law enforcement personnel, homicides mistakenly classified as suicides or accidents will also be missed. In the US, fatality review teams

have paid less attention to sexual competitor killings, womenas suicides, (sic) family homicides, or mercy killings, but these types of case reviews are also important. Teams that form in areas with few or no intimate partner homicides might consider exploring cases such as womenas suicides. Here they might begin by exploring whether the person who killed herself had injuries consistent with prior domestic violence, or whether police had ever visited her home on a domestic disturbance call, or whether she ever was the recipient of a domestic violence injunction or restraining order.¹⁴⁵

Overseas research indicates deaths from suicide that are related to domestic violence represent a huge number of potential deaths, and this is an area in urgent need of systematic research and policy initiatives.¹⁴⁶ As illustrated in *Case Study O/98/1(I)*¹⁴⁷ improved protocols are required to enable Coroners to better identify domestic violence-related deaths and make recommendations for prevention and intervention initiatives.

Many women are reported as missing each year and it is likely that a number of these cases are domestic violence related killings.¹⁴⁸ The present research found a significant number of cases in which women died or went missing in circumstances that indicated domestic violence. Deaths categorised by the New Zealand Health Information Service as 'Injury Undetermined Whether Accidentally or Purposely Inflicted' (E980-E989; 1997-1999) or as 'Event of Undetermined Intent' (Y10-Y34; 2000) should be investigated to determine any domestic violence connection. Relevant information would include any prior domestic violence complaints, protection order filings, and statements from family and/or friends.

A significant number of women in the present study died shortly after an assault, but no homicide charges were laid. Fatality reviews should investigate this pattern of women's deaths to gain an understanding of the underlying issues involved.

¹⁴⁵ Office on Violence Against Women, United States Department of Justice, *National Domestic Violence Fatality Review Initiative* www.ndvfri.org/index.php?id=39305 at 4 December 2006.

¹⁴⁶ Websdale, Sheeran and Johnson, above n 63.

¹⁴⁷ See discussion of this case above at p 178.

¹⁴⁸ Washington State Coalition Against Domestic Violence, above n 80, 19.

In addition to the above categories, Websdale points out that if women who die from conditions that are by-products of domestic crimes were included in the official count, the actual death toll from domestic violence would be far greater than that reflected in official data. Many female deaths attributed to HIV infection or its complications may be traced to battering and the same could be said of women who die on the streets, where roughly half of homeless women report 'fleeing abuse' as the primary reason for their homelessness.¹⁴⁹ Sex workers typically experience extensive interpersonal abuse and sometimes even death at the hands of male intimates, family members, and clients.¹⁵⁰

By improving the detection of domestic violence-related deaths, investigative reviews can ensure a more accurate count of victims, increase public awareness of the problem of domestic violence, and improve understanding of the issues involved. The concerns of New Zealand pathologists that declining autopsy rates have the potential to leave homicides and suicides undetected¹⁵¹ further reinforce the importance of systematic review and monitoring.

VIII DATA COLLECTION

The CEDAW Monitoring Committee expressed concern at the lack of systematic data collection on violence against women in New Zealand, including domestic violence.¹⁵² Data is fragmented and there is no detail on each case. Consequently, it is impossible to discern patterns of offending in intimate femicide cases. Police and agencies that provide information on domestic fatalities should investigate whether or not red flags or warning signs existed prior to the fatality. 'It is crucial to be able to see clearly from a domestic violence report the history of prior violence, police involvement, injunctions, prior criminal histories, any obsessively possessive behavior, mental illness, separation pending in the relationship, etc..¹⁵³

¹⁴⁹ Neil Websdale, 'Reviewing Domestic Violence Deaths' [2003] NIJ Journal 26, 27.

¹⁵⁰ Ibid.

¹⁵¹ *Pathologists See Danger in Decline of Autopsies*, Dominion, 5 February 1999; *A Dying Profession*, Dominion, 3 May 2002. A Christchurch forensic pathologist is reported as stating the decline has 'big implications' for quality assurance in terms of why people died, and community confidence over the accuracy of death certificates. On 1 July 2005 Courts Minister Rick Barker announced the Ministry of Justice had contracted the Auckland District Health Board to provide the services of a core group of qualified forensic pathologists for use across the country: *Forensic Pathologists Go 24/7*, Press Release, New Zealand Government, 'Scoop' Independent News, 1 July 2005.

¹⁵² United Nations Committee on the Elimination of Discrimination Against Women Monitoring Committee, above n 132.

¹⁵³ Websdale, Sheeran and Johnson, above n 63, 26.

A recent New Zealand decision to suppress the name of a habitual batterer whose violence escalated to lethality on the basis that this would protect the couple's children has the potential to compound the difficulties involved in accessing legal reports and establishing patterns in intimate femicide cases.¹⁵⁴ This development is not conducive to system accountability.

IX SEPARATION VIOLENCE

Despite a wealth of social science research revealing lethal and sub-lethal attacks often take place following women's exit from violent relationships, and extensive media coverage of separation homicides, the myth that departure will bring an end to the violence remains entrenched in legal and popular culture.¹⁵⁵ Consequently, legal academics and professionals continue to assume that rather than resorting to self-defence, the battered woman could 'summon help or simply walk out the door'.¹⁵⁶

Although courts would be unlikely to accept similar claims in relation to violence between strangers, the 'crime of passion' analysis permits jealous men who invade the homes of estranged partners to claim they were provoked to use lethal violence by some words of the women whose homes they invaded.¹⁵⁷ Discourses of romantic love and male passion also facilitate courtroom constructions of elderly women as unfaithful to men they rejected over a decade before they were killed, and attributions of blame regarding younger women who leave and seek protection for themselves and their children.

¹⁵⁴ *Secrecy Stands in Way of Open Justice*, New Zealand Herald, 24 June 2006, reports that Hansen J suppressed the name of a convicted killer in an intimate femicide case because the children of the offender could be affected by having their father's name published. The report notes: 'the name these children share with their father is quite nondescript and common enough not to attract comment. They no longer live in an area where people would automatically link the crime and the convict to them...Justice Hansen says this case has unique features. Yet those he lists - that the children are of the murderer and the dead woman, they grew up in a home racked with dissension and violence, have been through the trauma of the crime, grief at the loss of a good mother and bad father and have now re-established themselves - seem all too familiar. Using his logic, isn't it now the case that every father or mother or sibling who murders in a family environment ought to have his or her name permanently kept secret because children or siblings of the same surname might be affected by publication?'

¹⁵⁵ Mahoney, above n 21, 74, notes the issue of exit from an abusive relationship colours almost every legal and social inquiry about battering.

¹⁵⁶ Charles Cato, 'Criminal Defences and Battered Defendants' [2002] NZLJ 35, 39.

¹⁵⁷ Wayne Gorman, 'Provocation: The Jealous Husband Defence' (1999) 42 C.L.Q. 478, 483, notes that in intimate femicide cases, courts appear to lose sight of the fact that a defendant who brings a weapon to the scene and forces a confrontation has provoked the incident of which he complains.

Domestic violence research and fatality reviews frequently recommend initiatives to address cultural toleration of violence in intimate relationships.¹⁵⁸ This cultural tolerance is evident in stereotypical constructions of separation assaults as spontaneous violence perpetrated in the heat of sexual passion which run contrary to social science research and mask a structural pattern of offending against women. The New Zealand government has allocated \$11.5 million in the 2006 Budget and the Families Commission is contributing \$2.5 million to fund a nationwide media campaign aimed at eliminating societal tolerance of domestic violence.¹⁵⁹ However, while separation violence continues to be trivialised in law and the media through sympathetic discourses of 'love turned to tragedy', 'love triangles gone wrong', and offenders who 'loved too much',¹⁶⁰ the social reality of these attacks as a barrier to women and children's safe escape from abusive relationships, and a threat to women's freedom and autonomy will remain unacknowledged.

The invisibility of separation violence and its ubiquitous association with the myth of romantic passion requires a legislative response. Legislative acknowledgement of separation violence would go some way toward halting the ongoing destruction of women, and in some cases their children, who are the 'inevitable' casualties of sexually aggressive and possessive constructions of masculinity. A statutory declaration that these assaults constitute especially egregious offending is also necessary to ensure justice for battered defendants. As Martha Mahoney points out, acknowledging these attacks on women's volition 'brings the ghosts of dead women - women slain by their abusers - into court to stand beside the woman accused of killing an abusive spouse'.¹⁶¹ An offence of separation assault would also facilitate monitoring of this violence which is necessary for ongoing policy development.

The definition of separation assault should extend beyond situations in which the victim had already severed the relationship with an intimate partner, or was in the process of ending the relationship when the assault occurred.¹⁶² It should incorporate attacks in response to women's

¹⁵⁸ See, eg, Geris Serran and Philip Firestone, 'Intimate Partner Homicide: A Review of the Male Proprietariness and the Self-Defense Theories' (2004) 9 *Aggression and Violent Behavior* 1, 10. See, also, Eastal, above n 57, 186-187.

¹⁵⁹ Taskforce for Action on Violence within Families, above n 6, 16.

¹⁶⁰ See, eg, *Double-Murder Trial Told of Love Triangle; Lonely, Depressed Accused Felt the Agony and Despair of Deception, Says Defence*, New Zealand Herald, 4 June 2004; *Guilty of Loving Too Much - Mum*, Waikato Times, 8 April 2004; *Court Told Killing Stemmed From Classic Love Triangle*, New Zealand Herald, 21 November 2000; *Murder Accused in 'Love Triangle'*, Waikato Times, 21 November 2000. In *Case Study T/01/2* the judge reportedly depicted the double homicide as a crime of passion in 'the eternal triangle of love and jealousy'.

¹⁶¹ Mahoney, above n 35, 83-84 (citations omitted).

¹⁶² Myna Dawson, 'The Cost of "Lost" Intimacy: The Effect of Relationship State on Criminal Justice Decision Making' (2003) 43 *Brit.J.Criminol.* 689, 694.

formal attempts to seek help (such as reporting the violence to police, and seeking formal access arrangements) and attacks in response to informal help seeking (for example, from family, friends and associates). Legislative recognition of these scenarios as aggravating domestic violence offending would send a message to courts that these contexts cannot be manipulated in support of provocation claims, or advanced as mitigating factors at sentencing. As demonstrated by the present research, once the deceased woman's alleged verbal comments are stripped of the gravitas law currently attaches to her departure the conduct complained of is likely to be revealed as transparently innocuous. A great many provocation claims presently accepted at trial and at sentencing may therefore be eliminated.¹⁶³

While on its face gender neutral, this species of assault should operate mainly in the context of male violence toward women. (Post-separation offending by a small number of women in the present study mainly involved property damage.) In cases where the sub-lethal separation assault occurs in breach of the victim's protection order, or where the offender has a prior conviction(s) for separation violence, an offence of aggravated separation assault should apply. Where separation violence results in the victim's death and the offender is convicted of murder, the *Sentencing Act 2002* should be amended to specify the context of separation as an aggravating feature of offending attracting a minimum term of imprisonment in excess of the minimum period of 10 years as provided in s 84(3) of the *Parole Act 2002*.

In cases where lethal separation violence involves unlawful entry into a woman's place of residence, and/or breach of her protection order, a separate offence of estrangement murder should apply. To be convicted of estrangement murder, the prosecution need not prove that the offender intended or foresaw the likelihood of the victim's death. Liability would require proof beyond reasonable doubt that the offender unlawfully entered his estranged partner's home, or acted in breach of her protection order, and at the time of the lethal assault, the offender intended to cause her serious bodily injury.

The decision whether to create a separate homicide offence to reflect morally and socially significant differences in degree of culpability, or whether to treat the relevant behaviour and context as aggravating the punishment, is ultimately an issue of social policy and there is no

¹⁶³ See, eg, *Case Study S/97/6* discussed above, at p 201.

criterion or test to be applied.¹⁶⁴ Although legal scholars may denounce this proposed departure from subjective constructions of intent, some form of strict liability murder survives in the statute books of many common law jurisdictions.¹⁶⁵ In New Zealand, Gerald Orchard notes that to the extent s 168 *Crimes Act 1961* allows an accused to be convicted of murder although the essential ingredient of death was neither intended, nor foreseen as likely to ensue, 'strict liability is imposed in respect of culpable homicide'.¹⁶⁶ At present, s 168 imputes murderous intent inter alia to the robber and burglar,¹⁶⁷ but not to the separation killer, or habitual batterer whose violence escalates to lethality. Rather than any quality intrinsic to the respective offences, s 168 represents a social choice to attribute greater seriousness to robbery and burglary than to victims of domestic violence crimes, who are overwhelmingly women and children. Elizabeth Rapaport notes this elevation of economic crime over domestic violence 'privileges the interests of men over those of women and children and supports patriarchal values'.¹⁶⁸ The assertion inherent in s 168 that the unintentional killing of a stranger for gain is more reprehensible than the killing of an estranged female partner arguably exemplifies the type of attitude which government domestic violence campaigns are committed to change.

An offence of estrangement murder would send a clear message to legal academics, practitioners and judges that the community regards offenders who kill women who leave or reject them as deliberately placing themselves outside the human community. Given the numbers of abusive men who pursue women who leave or reject them, care should be taken when drafting the offence to ensure battered women who use violence while in fear for their lives, and under a belief there is no other alternative, are not caught by the provisions.

X 'MERCY' KILLINGS: A FURTHER FORM OF SEPARATION VIOLENCE?

The absence of systematic monitoring of violence in intimate relationships has obscured patterns of offending in the so-called 'mercy killing' cases.¹⁶⁹ A review of the literature in Australia, Canada

¹⁶⁴ Barry Mitchell, 'Further Evidence of the Relationship Between Legal and Public Opinion on the Law of Homicide' [2000] *Crim.L.R.* 814, 827.

¹⁶⁵ See, eg, David Crump and Susan Crump, 'In Defense of the Felony Murder Doctrine' (1985) 8 *Harv.J.L.& Pub.Pol'y* 359.

¹⁶⁶ See, commentary on the section by Gerald Orchard, 'Strict Liability and Parties to Murder and Manslaughter' [1997] *NZLJ* 93, 94, noting the imposition of strict liability for murder may be thought to be wrong in principle.

¹⁶⁷ Under s 168 *Crimes Act 1961* an offender who means to cause grievous bodily injury for the purpose of facilitating a number of enumerated offences, including robbery and burglary, may be guilty of murder whether or not the offender meant to cause death or knew that death was likely to ensue.

¹⁶⁸ Elizabeth Rapaport, 'The Death Penalty and Gender Discrimination' (1991) 25 *Law and Society Review* 367, 378.

¹⁶⁹ See discussion of these cases above, at pp 77-83.

and the US on the phenomenon of homicide followed by suicide 'showed that in all three countries, the majority of those who commit suicide after a homicide are male partners or ex-partners of female victims'.¹⁷⁰ While the present study supports Kenneth Polk's research revealing this is a thoroughly gendered pattern of offending,¹⁷¹ unlike the Australian study, men in the present study who killed elderly, ailing wives were unsuccessful in their suicide attempts. As in all intimate femicide cases, the way law constructs these killings is crucially related to whether the prevailing response is outrage and demands for accountability, or resigned helplessness.

In *Case Study L/02/2* defence counsel also indicated that a provocation defence was available for the offender who killed his elderly, mentally disabled wife.¹⁷² Paul Taylor also suggests that 'in cases where the defendant sees a close relation or friend suffer extensively over a long period of time it could be argued that each sight of the "victim" is a form of provocation in itself'.¹⁷³ He notes that this 'cumulative provocation' argument has been accepted in other domestic violence contexts.¹⁷⁴ However, this proposition that men who kill ailing wives may avoid a murder conviction on the basis that the suffering of their wives constitutes provocation¹⁷⁵ should sound alarm bells for all women.

The provocation defence was successfully advanced in New Zealand on behalf of an offender who socialised and drank brandy between his attempts to kill his terminally ill mother, twice injecting her with drugs, exposing her body to the night air by opening her bedroom windows, trying to suffocate her with a pillow, and eventually strangling her with the morphine bag cord. Although the Crown argued that the purported provocation (the mother's begging her doctor son to do something about her pain) was not a request that her son kill her, but that he ease her pain with medication, the jury returned a verdict of manslaughter. The sentencing judge noted that the mother was subjected to treatment by her son that no human being in the dying stages of life should

¹⁷⁰ Myrna Dawson, 'Intimate Femicide Followed by Suicide: Examining the Role of Premeditation' (2005) 35 *Suicide and Life-Threatening Behavior* 76, 76.

¹⁷¹ Polk, above n 56.

¹⁷² See discussion of this case above, at p 81.

¹⁷³ Paul Taylor, 'Provocation and Mercy Killings' [1991] *Crim.L.R.* 111, 113. While this passage refers to a wide category of victims, the comments follow on from Taylor's analysis of the English case of *Cocker*, Unreported, CA, Transcript No 4212/G3/88, involving a husband who killed his ailing wife after taking care of her for almost 11 years.

¹⁷⁴ *Ibid.*

¹⁷⁵ See, also, *R v L* (Unreported, High Court, Hamilton, Randerson J, 29 August 2002) [26-27].

be subjected to. However, legal evaluation of the offender's culpability was reflected in the sentence of three years' imprisonment.¹⁷⁶

Although the New Zealand Law Commission rejected introduction of a partial defence of diminished responsibility,¹⁷⁷ John Dawson posits s102 of the *Sentencing Act 2002*, which provides an alternative to life imprisonment for a defendant convicted of murder where the circumstances of the offence and the offender render such a sentence 'manifestly unjust', as potentially allowing a defence of diminished responsibility to enter New Zealand law through the back door.¹⁷⁸ In England, 'mercy killing' cases are often associated with a diminished responsibility defence 'whether or not the accused's position really fits within the parameters of the defence'.¹⁷⁹ Charles Cato has criticised the Law Commission for failing to address the issue of so-called mercy killings and recommended that consideration 'be given to enacting a defence to murder of mercy killing mitigating murder to the crime perhaps of "culpable homicide - mercy killing" in cases where killing arises for compassionate reasons'.¹⁸⁰ Although this recommendation may reflect popular and legal acceptance that mercy killings constitute the least serious or heinous form of homicide,¹⁸¹ the gendered nature of this offending render the proposal problematic.

Contemporary responses to offending in this category apparently reflect widespread acceptance that it is unjust to harshly sanction offenders who kill in these circumstances as 'in many respects, [offenders] are victims themselves'.¹⁸² However, depictions of men who 'reach the end of their tether' and kill their elderly, ill wives stretch in disturbing ways the notion of a 'death pact' or 'mercy' killing.¹⁸³ Legal understandings that the chronic mental or physical illness of an elderly

¹⁷⁶ *R v Simpson*, (Unreported, High Court, Auckland, Potter J, 12 October 2001).

¹⁷⁷ New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73 (2001) [140].

¹⁷⁸ John Dawson, 'Diminished Responsibility: The Difference it Makes' (2003) 11 JLM 103, 108.

¹⁷⁹ Ibid 106, citing S Dell, 'The Mandatory Sentence and Section 2' (1986) 12 *Journal of Medical Ethics* 28.

¹⁸⁰ Cato, above n 156, 40.

¹⁸¹ Mitchell, above n 164, 817, n 22, notes research indicates the public typically perceive so-called 'mercy' killings as one of the least serious homicide offences 'on the ground that the deceased's quality of life is so poor that (s)he is not being deprived of any significant interest'. '[R]easons for regarding euthanasia as the least serious of homicides included the right of the deceased to die (with dignity).' The New Zealand Law Commission, above n 177, [114], discusses levels of seriousness in the crime of murder ranging from 'an aged pensioner assisting a spouse to gain release from an excruciatingly painful, incurable condition, to an armed robber callously killing a policeman in order to gain access to a bank vault'.

¹⁸² Taylor, above n 173, 112. See, also, *R v Albury-Thomson* (1998) 16 CRNZ 79, where the jury returned a verdict of manslaughter by reason of provocation in relation to a mother who killed her autistic daughter. The mother was sentenced to 18 months' imprisonment.

¹⁸³ In *R v L* (Unreported, High Court, Hamilton, Randerson J, 29 August 2002) [16], the sentencing judge apparently accepted the opinion of a psychiatrist that the offender's actions were 'those of a loving and devoted husband who was

wife can incite her husband's violence and that old women who struggle unsuccessfully to save themselves from murderous attacks are killed by compassionate and loving husbands arguably demonstrate the prioritising of male interests over women's safety and well-being. While the belief that such killings can properly be described as 'merciful' may stem from public feelings of compassion for all seriously ill people and fears of being similarly situated, case studies show perpetrators have sometimes refused to allow their wives to go into care, preferring instead to maintain control over the women. There is also a compelling similarity between justifications given in 'mercy killing' cases and those in relation to killings in the context of separation. Diseases such as Alzheimer's are described as 'stealing' men's wives, and offenders are depicted as bereft in the knowledge that their ailing wives are 'leaving them'.

Research has shown male homicide/suicide or attempted suicide is significantly correlated with killings of intimate partners in the context of estrangement, and killings in the context of the ageing and ill health of a female partner. In both situations, the woman victim is no longer able or willing to play the same emotional and physical caretaking role that she has in the past.¹⁸⁴ In the same way that separated women who have withdrawn their sexual, emotional and physical services from younger men may be regarded by their male partners, and by the law as provoking lethal male violence; elderly, ailing women, who can no longer perform their caretaking roles may be regarded by their male partners, and by the law as likely candidates for 'mercy' killings.

A recent review of domestic violence fatalities in the US found that so-called suicide pacts and mercy killings are not as simple as they might at first appear. Indeed, the researchers note that they found it necessary to explore the possibility that some killings in fact constituted murder and may have been preceded by physical abuse.¹⁸⁵ The US Office on Violence against Women also points out that as the proportion of the elderly in the population increases

researchers have become increasingly aware of domestic violence among their ranks. Old stereotypes die hard, and social service providers and law enforcement agencies sometimes assume that because people are elderly they are not capable of committing or being victimized by domestic

profoundly distressed at his wife's condition'. The dead woman was found with wounds to the back of her head as a result of being beaten with a mallet, and a heavily bloodstained pillow was also 'used to prevent the final struggles of the woman'.

¹⁸⁴ See, Easteal, above n 57, 108.

¹⁸⁵ Websdale, Sheeran and Johnson, above n 63, 33.

violence. This attitude sometimes translates into an assumption that homicide-suicides among the elderly usually take the form of 'mercy killings'. Police officers or others who investigate the homicide-suicide and find a note telling authorities that the couple could not live with ailing health might hastily label the death a 'mercy killing'. Upon further investigation we find it is nearly always men who commit these killings and that in a significant number of cases their female victims had expressed to other family members a desire to live not die. Indeed, Donna Cohen found that homicide-suicides involving elderly women in West Central Florida accounted for 20 percent of the total homicides of people aged over fifty-five.¹⁸⁶

Overseas, there is growing concern over the loss of women's lives in this context.¹⁸⁷ Research also indicates that many intimate femicide-suicides 'are pre-planned, purposeful acts that might have been prevented. In other words, they are events for which possible points of intervention can and should be identified'.¹⁸⁸

In New Zealand, the reporting of suicides is tightly restricted, and the public remain largely unaware of patterns of domestic violence-related suicides. The Ministry of Health review of research explaining patterns of suicide makes no reference to research on older men who kill their wives and then commit, or attempt to commit suicide, and no explanation or analysis is provided on research revealing a pattern of jealous younger men killing younger women and committing or attempting to commit suicide.¹⁸⁹ Given a steadily increasing rate of murder-suicides as a proportion of the total number of murder indictments in New Zealand,¹⁹⁰ this lack of analysis is troubling. The present tendency to trivialise male violence in the context of sexual intimacy make it essential that Parliament resist calls for a defence of mercy killing until offending in this context

¹⁸⁶ Office on Violence Against Women, United States Department of Justice, *National Domestic Violence Fatality Review Initiative* www.ndvfri.org/index.php?id=39305 at 4 December 2006.

¹⁸⁷ Dawson, above n 170, 86, noting that '[s]ince the early 1990s, the phenomenon of intimate femicide followed by suicide has become a legal, professional, and public concern'.

¹⁸⁸ *Ibid* 88.

¹⁸⁹ Caroline Maskill, et al, *Explaining Patterns of Suicide: A Selective Review of Studies Examining Social, Economic, Cultural and Other Population-Level Influences* (2005) 40, make no reference to gendered homicide/suicide patterns under the heading 'Gender'. Instead, a possible explanation for different rates of suicide among men and women is 'that in English-speaking Western societies male suicide is frequently regarded as a decisive, "strong" and calculated response to interpersonal stressors, whereas female suicide is construed as a weak, ambivalent and emotional response to personal relationship problems'. No reference is made to the role of domestic violence. No mention is made under the heading 'Suicidal Behaviour in Older Age' of the pattern of intimate femicide followed by suicide/attempted suicide among older men: at 43, 45. Under a sub heading 'Murder and Suicide' the Report notes the strongest motive for murder/suicide appears to be despair and one study found 'murder-suicides usually involve spouses, particularly spouses who have recently left their marriage. Men are usually the perpetrators of murder-suicides, first killing their wives and then going on to kill themselves'. No attempt is made to explain this gendered phenomenon: at 88-89.

¹⁹⁰ *Ibid* 87, noting rates rose from 1.5 percent over the period 1860-71, to 8.2 percent between 1899 and 1908, and to 19 percent between 1959 and 1962. Lack of data for the years 1962 to the present is concerning.

is better understood.¹⁹¹ A Domestic Violence Advisory Panel, as discussed below, should develop policy and provide guidance to Parliament and the Sentencing Council (when established) on this issue.

**XI ADDRESSING THE INTERRELATIONSHIP BETWEEN DOMESTIC VIOLENCE
AND INTIMATE FEMICIDE
PART I: A HISTORY OF BATTERING
A *A Domestic Homicide Statute***

The private nature of domestic violence coupled with myths and misunderstandings concerning its dynamics create formidable obstacles to obtaining murder convictions for batterers whose violence escalates to lethality. In most cases there are no witnesses to the killing, so only two persons know what transpired, and one of them is dead. Difficulties establishing the requisite knowledge and intent are exacerbated by the tendency to minimise the lethality potential of battering and isolate the abuser's history of violence from his final lethal attack. Consequently, there may be no adequate basis upon which the prosecution can rebut, beyond reasonable doubt, the assertions of defence counsel that death was an unexpected outcome of a routine beating. This failure to attach society's most profound condemnation to battering escalating to lethality involves an invidious subordination of the interests of women and children.¹⁹²

William Wilson argues that evidential problems associated with proving intention make it inevitable and desirable that where the evidence discloses an intention to cause someone serious injury, the fault element in murder should stretch outside its focal case of intentional/purposive killings. 'Where the criminal context is accompanied or characterized by extremely dangerous activity, it is arguably quite fair, assuming the degree of risk taken was already sufficient for manslaughter, to set this as an appropriate threshold for liability in murder.'¹⁹³ Wilson notes that it is glib to suggest that where the definition of murder is under-inclusive, such cases pose no substantial difficulty, as immediately below murder there is available a verdict of manslaughter which may attract in the discretion of the court a life sentence. 'Conviction labels are as important

¹⁹¹ New Zealand First MP Peter Brown's 'Death with Dignity' Bill was voted down in 2003 by a 60 to 57 majority. A similar Bill was rejected in 1995 by a far greater majority.

¹⁹² See, eg, Rapaport, above n 168, 378.

¹⁹³ William Wilson, 'Murder and the Structure of Homicide' in Andrew Ashworth and Barry Mitchell (eds) *Rethinking English Homicide Law* (eds) (2000) 21, 36.

as justice in the distribution of punishment. They identify a precise social obligation dishonoured in the infraction.¹⁹⁴

Minnesota has led the world in developing principled domestic violence intervention policy.¹⁹⁵ Legislators have responded to patterns of escalation in battering relationships by authorising a finding of first degree murder based on a history of battering in the relationship.¹⁹⁶ The domestic abuse statute focuses upon a specific type of actus reus - death while committing abuse. Domestic abuse is defined to include charged and uncharged physical and sexual assaults and terroristic threats. The statute does not require proof of a pattern of domestic violence convictions. Only the 'past pattern of domestic abuse' and not the acts constituting the pattern must be proven beyond reasonable doubt.¹⁹⁷ Although the minimum number of incidents which must be proven in order to find a pattern is unspecified, at a minimum the prosecution must prove more than one prior act of domestic abuse.¹⁹⁸ Since a pattern of domestic violence is required, the statute permits the final lethal assault to be evaluated in a context which transcends the isolated event. This eliminates the tendency to regard prior acts of violence as separate, discrete events, and reorients the focus to patterns of escalation and use of violence as a technique of control.¹⁹⁹

To counter the possibility that an accidental death could result in a first degree murder conviction, the statute requires the offender to have caused the death of a human being while committing domestic abuse, when the perpetrator has engaged in a past pattern of domestic abuse toward the victim, which has put the victim in fear of great bodily injury, and death occurs under circumstances manifesting an extreme indifference to human life. Since a verdict of first degree murder does not require premeditation, or specific intent to kill, even if the jury finds the killing was manslaughter pursuant to a traditional intent analysis, it may convict the offender of domestic murder. Courts have upheld the statute from constitutional challenge on the grounds of

¹⁹⁴ William Wilson, 'Doctrinal Rationality after *Woollin*' (1999) 62 MLR 448, 462.

¹⁹⁵ The philosophies and practices of the Duluth, Minnesota, Abuse Intervention Project were adopted (with some modifications to reflect New Zealand society), by the Hamilton Abuse Intervention Project.

¹⁹⁶ Min. Stat. 609.185 (a) (6) (2004).

¹⁹⁷ *State v Cross*, 577 N.W.2d 721 (Minn. 1998), affirmed US 00-2940 (Fed Cir, 2001).

¹⁹⁸ *State v Grube*, 531 N.W.2d 484, 491 (Minn. 1995). Raeder, above n 1, 1486, argues that legislatures should take care to require at least three prior domestic violence incidents to ensure that the killing merits additional punishment in the absence of a traditional finding of intent.

¹⁹⁹ Minn. Stat. 518B.01 stipulates that persons to whom the legislation applies include spouses and former spouses; parents and children; persons who are presently residing together or who have resided together in the past; persons who have a child in common, regardless of whether they have been married or have lived together; and persons involved in 'a significant romantic or sexual relationship'

vagueness.²⁰⁰ In at least two cases, the defendants had been acquitted of traditional first degree murder, but were convicted of domestic homicide.²⁰¹

Myrna Raeder notes that in 'one fell swoop' the statute has eliminated the barrier against admission of evidence of propensity or bad character.²⁰² The requirement of a pattern of abuse permits a large number of prior abusive incidents to be admitted, which would presently be excluded as unduly prejudicial under present rules. Hearsay statements by the deceased victim indicating her fear of the abuser which may presently be excluded are also admissible because the statute requires the decedent to be placed in fear of the defendant. Accordingly, the victim's state of mind automatically becomes relevant to the case.²⁰³ The habitual batterer's ability to advance a provocation defence is also negated because the homicide is regarded as the culminating event in a pattern of prior abusive acts which merits classification of the homicide as first degree murder. 'Thus the statute eliminates the advantage given to men under current law, which, while seemingly gender-neutral, benefits the violent rages more characteristic of men, particularly when "provoked" by female infidelity.'²⁰⁴

Legal commentary on the concept of indifference suggests that it does not necessarily imply recklessness in the sense that the defendant knew the risk of death, and went ahead and took it. 'Extreme indifference is an attitude which "manifests" itself in the way the defendant behaves rather than a cognitive state'.²⁰⁵ Jeremy Horder suggests that the subjective element in indifference does not lie in any necessary advertence to possible harmful consequences, but in an uncaring attitude towards the victim's relevant protected interests.²⁰⁶ This is also how Antony Duff envisages its use:

[I]n order to conclude that a defendant failed to notice an obvious risk because he did not care about it, the jury need not *infer* some hidden mental state or feeling (or some general character-trait) of indifference from his external conduct: it is rather a matter of the meaning of his particular action - the practical attitude which that action displayed. A jury could usefully ask this question: 'how

²⁰⁰ *State v Auchampach*, 540 N.W.2d 808 (Minn. 1995); *State v Robinson*, 539 N.W.2d 231 (Minn. 1995); and *State v Grube*, 531 N.W.2d 484 (Minn. 1995).

²⁰¹ Raeder, above n 1, 1485.

²⁰² *Ibid* 1486.

²⁰³ *Ibid* 1488.

²⁰⁴ *Ibid* 1486 (citations omitted).

²⁰⁵ Wilson, above n 193, 30.

²⁰⁶ Jeremy Horder, 'Gross Negligence and Criminal Culpability' (1997) 47 U.T.L.J. 495, 501.

else could a person who acted thus have failed to notice that risk if not because he did not care about it?'²⁰⁷

However, it is difficult to distinguish 'ordinary' from 'extreme' indifference²⁰⁸ and Wilson suggests evidential difficulties may arise when courts attempt to gauge the quality of indifference displayed.²⁰⁹ New Zealand legal commentary also indicates that the test of 'indifference to an obvious risk' is likely to face strong opposition:

Mens rea is not normally concerned with the *attitudes* of defendants; it is concerned with what they intended, knew, and did not know. This ...is also why, under the *Cunningham* approach to recklessness, the defendants are not to be convicted on the basis of an unworthy attitude or bad motive, for example for indifference

...if D failed to recognise a risk, it is conceivable that his failure might have happened because he did not care. But such fine nuances have no practical place in the law. If D foresaw the possibility then he can be convicted anyway; if he did not, then he should not be convicted on the basis of a hypothetical inquiry regarding what his attitude would have been if he had seen the risk.²¹⁰

However, other legal scholars argue that moral guilt need not be irrevocably linked to cognition. 'Once one has decided to inflict a harm of a given gravity one crosses a moral threshold which disables one from denying responsibility for the consequences although these may be more serious than those intended or foreseen.'²¹¹ Jeremy Horder argues that the presumed historical authority of the subjectivist contention that it is not morally justified to impose criminal liability for consequences beyond those which were intended or foreseen overlooks rival, and equally historically important, mens rea principles. The malice principle justified criminal liability for harm done as the result of the defendant's wrongful conduct directed at a particular interest of the victim, whether or not the defendant foresaw the degree of harm that resulted. Where the defendant caused worse harm than that anticipated, the proportionality principle required the harm done must not be disproportionate to the harm intended in order to justify criminal liability.

²⁰⁷ R Antony Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (1990) 166.

²⁰⁸ Wilson, above n 193, 30.

²⁰⁹ Ibid 31.

²¹⁰ AP Simester and WJ Brookbanks (eds), *Principles of Criminal Law* (2nd ed, 2002) 120 (emphasis in original).

²¹¹ Wilson, above n 193, 27.

The natural starting-point is thus that defendants ought to be held to take the rough with the smooth. Defendants ought to accept that criminal liability for their conduct may extend to the unforeseen degree, as well as to the foreseen kind, of harm that results.²¹²

Felony murder doctrine generally deemed a killing which occurred in the course of committing a felony as murder, even if there was no intention to cause death or personal injury. The rule reflected a societal judgment that an intentionally committed felony which caused the death of a human being was qualitatively more serious and more closely akin to murder than to the underlying felony.²¹³ As originally formulated, the rule implied malice when the homicide resulted from the commission of any unlawful act. The doctrine was ultimately restricted to killings in the course of violent felonies.²¹⁴ Despite centuries of scholarly denunciation, few US legislatures have repealed the doctrine,²¹⁵ and, as discussed above, the rule subsists in a modified form in s 168 *Crimes Act 1961*. However, under s 168, 'it is not enough that D kills while committing one of the specified offences...it is also essential that D meant to cause grievous bodily injury (that is, really serious bodily harm)'.²¹⁶

Wilson argues that as a matter of labelling-propriety,²¹⁷ serious injury might be defined so as to require that the injury intended posed some objective risk of death. For example, the fault element in the Indian Code is 'the intention of causing bodily injury to any person' and the bodily injury must be 'sufficient in the ordinary course of nature to cause death'.²¹⁸ However, in domestic violence cases, such requirement would be problematic. That is, categories of injuries that are sufficient ordinarily to cause death are cited as: 'a blow on the head with an iron bar', a savage

²¹² Jeremy Horder, 'Two Histories and Four Hidden Principles of Mens Rea' (1997) 113 L.Q.R. 95, 119. 'The malice and proportionality principles both presuppose that the defendant's conduct was wrongfully directed at the kind of interest that was harmed, even if the exact extent of the harm done was unintended and unforeseen.' However, where a defendant's conduct is 'wrongfully directed at one kind of interest (say, a property interest), but invaded a different kind (say, an interest in the protection of the person)...his conduct in invading that other interest is not to be regarded as malicious unless he foresaw the invasion as a possible outcome of his conduct': at 115-116.

²¹³ Crump and Crump, above n 165, 363.

²¹⁴ Gerald Orchard, 'Culpable Homicide' in AP Simester and WJ Brookbanks (eds), *Principles of Criminal Law* (2nd ed, 2002) 507, 522, citing *A-G's Reference (No 3 of 1994)* [1998] AC 245, 257, 258.

²¹⁵ Crump and Crump, above n 165, 360.

²¹⁶ Orchard, above n 214, 522.

²¹⁷ The fair labelling principle, which is widely accepted as a guiding precept of criminal law, requires that the murder/manslaughter labels reflect a moral distinction between homicides where the label of murder should be withheld, and homicides where a more stigmatic label is required to reflect the circumstances of the offending. See, eg, Chris Clarkson, 'Context and Culpability in Involuntary Manslaughter: Principle or Instinct?' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (2000) 133, 14; Horder, above n 212, 96-97.

²¹⁸ Wilson, above n 193, 37.

beating, or a knife wound to the thorax'.²¹⁹ Although this analysis acknowledges a 'savage beating' as ordinarily sufficient to cause death, legal constructions of lethal violence against female intimates have ignored the gendered 'inequality of arms', downplayed the lethality potential inherent in male violence toward women, isolated the abuser's history of violence from his final lethal assault, thereby rendering 'savage beatings' benign.

David and Susan Crump note that there are substantial policies, consistent with familiar limiting doctrines that are furthered by the felony murder rule. These include: grading offences to reflect societal notions of proportionality, or 'just desert'; reaffirming the sanctity of human life; deterrence; clear and unambiguous definition of offences and sentencing consequences; optimal allocation of criminal justice resources; and minimisation of the utility of perjury.²²⁰ Given the private nature of intimate femicide, the improbability of witnesses, and legal analyses which overlook the red flag of repeat victimisation and trivialise the lethality potential of male violence toward women, where the accused has a history of battering the deceased, allowing him to be convicted of murder where the intent was to cause serious bodily injury arguably constitutes 'just the sort of simple, commonsense, readily enforceable, and widely known principle that is likely to result in deterrence'.²²¹

A domestic murder statute would directly challenge the perception, embodied in the enumerated offences which attract liability under s 168, that domestic homicide, from which women and children suffer disproportionately, is less reprehensible than unintentional killings in the course of a burglary or robbery. While opponents of such a statute may draw attention to the role of the jury in articulating community standards,²²² in a heterogeneous society with different cultural and moral norms, the view that juries, no matter what their composition, invariably reflect universal 'common sense' norms posits a fictional homogeneity of cultural attitudes and beliefs.²²³ Pervasive cultural

²¹⁹ Ibid 38.

²²⁰ Crump and Crump, above n 165.

²²¹ Ibid 363.

²²² Cato, above n 156, 40, suggests that the New Zealand Law Commission's recommendations relating inter alia to provocation may have minimised 'the importance of the jury as a fact finder in our system of criminal justice. It is submitted that the collective intelligence of the jury is important in our system of criminal justice and this is so particularly in cases involving death. The jury is the great leveller.'

²²³ For example, in *Manslaughter Verdict Outrages Dead Woman's Mother*, Press, 20 November 2004; *Manslaughter Decision 'Right and Proper*, Press, 19 November 2004, the deceased woman's mother described herself as 'outraged' at the verdict, while her former husband, the victim's father expressed sympathy for the killer and approval of the verdict. In *Honour Killing in the Suburbs*, Melbourne Age, 6 November 2004, the successful use of the provocation defence prompted the brother of a woman who was killed by her ex-partner to inform the media that the defence was a great

myths and tolerance of domestic violence must enter into policy discussions of the role of juries in reflecting 'widely shared views on the moral differences implicit in different kinds of killings'.²²⁴

Courtroom depictions of habitual batterers as 'loving' and 'respectable', and provision of a partial excuse to batterers whose violence escalates to lethality trivialise the violence involved in beating a woman to death. A domestic homicide statute would acknowledge the interrelationship between domestic violence and intimate femicide and signal society's abhorrence of killing in the course of a battering relationship. Although gender neutral on its face, research shows murder in the context of a pattern of violence by the killer against the victim is an almost uniquely male phenomenon. The statute should be drafted to avoid its operation in circumstances where the battered woman has killed her abuser. This is not to assert that women are not responsible, moral actors, but to highlight concerns raised by this and previous research regarding problems in the criminal justice system with identifying primary abusers, and earlier research indicating a tendency to placate violent men by granting mutual protection orders.²²⁵

B Killings in Breach of the Deceased's Victim's Protection Order

Minnesota has enacted a separate statute which classifies the violation of a protection order resulting in death, as second degree murder.²²⁶ Raeder notes this statute, together with the domestic murder legislation, can be influential in transforming legal theory and cultural attitudes.

The only cautionary gender note accompanying their adoption is that judges must be careful not to routinely grant *mutual* protection orders to avoid incorrectly identifying a battered woman who kills her abuser as a previous batterer and thus subject to the domestic homicide law.²²⁷

Judicial distrust of affidavits sworn by women in support of custody applications and protection orders²²⁸ may underpin the present reluctance to accept that a protection order constitutes evidence

slur on 'the normal man'. 'We [men] are belittled by it. It stands for a form of maleness that I don't want to be a party to', he said.

²²⁴ Martin Wasik, 'Sentencing in Homicide' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (2000) 167, 172.

²²⁵ Raeder, above n 1, 1487. Busch, Robertson and Lapsley, above n 118, criticised the practice of granting mutual non-molestation orders as a means of placating violent respondents. In response, s 18 *Domestic Violence Act 1995* prohibits this approach.

²²⁶ Raeder, above n 1, 1487, citing Minn.Stat. Ann. 609.19(3) (West 1995).

²²⁷ Ibid.

²²⁸ See, eg, *R v B* (Unreported, High Court, Rotorua, Randerson J, 24 March 1998) 10, noting the need 'to take into account the possibility of exaggeration or embellishment bearing in mind that the affidavit was sworn in support of an

of previous violence by the offender toward the victim.²²⁹ Indeed, the research found a deceased woman's conduct in seeking a temporary protection order may be utilised in support of her killer's provocation defence.²³⁰ In a case from the sub-lethal assault sample, the victim's action in obtaining a protection order was described by defence counsel as 'escalating matters'.²³¹ As a result of these analyses, there may be no reference to the protection order as either aggravating the offending, or warranting consideration of a minimum term of imprisonment at sentencing.²³²

Heightened awareness of harm to children living in violent relationships and the prosecution of mothers for failing to protect their children from a male partner's violence demands a reciprocal commitment to ensuring effective protection for women who turn to the system for help. Sentencing legislation should specify killing in breach of a protection order as an aggravating feature of offending warranting a minimum term of imprisonment in excess of the 10-year period. The existence of a protection order should also be recognised as an aggravating feature of the offending in cases of sub-lethal assaults.

XII ADDRESSING THE INTERRELATIONSHIP BETWEEN DOMESTIC VIOLENCE AND INTIMATE FEMICIDE

PART II: EXCLUSIONARY RULES OF EVIDENCE

Domestic homicides form the largest category of homicide in New Zealand.²³³ However, the Law Commission Report on reform of the law of evidence does not address the operation of evidentiary rules in domestic homicide cases, or the purpose for which an accused's history of abusive behaviour may presently be considered by the jury.²³⁴ By contrast, the Victorian Law Reform Commission observes that where there is a history of violence between the accused and the deceased, existing rules of evidence may, perhaps in this context more than any other, 'unfairly

application for a protection order.' See, also, *R v H* (Unreported, High Court, Auckland, Fisher J, 15 November 2000) [15].

²²⁹ See, eg, *Case Study W/00/11(S)* discussed above at p 253. In *Case Study S/06/8(S)*, the offender who attacked his ex-wife with two knives in breach of her protection order was reportedly credited at sentencing for his lack of previous convictions.

²³⁰ See, discussion above, at p 164.

²³¹ *Case Study B/97/15(S)*.

²³² *R v G* (Unreported, High Court, Wellington, Young J, 24 October 2001).

²³³ See, eg, Ian Miller and Nestar Russell, *Homicide in New Zealand 1988-94: Patterns and Relationships* (Paper presented at the 11th Annual Conference of the Australian and New Zealand Society of Criminology, Victoria University of Wellington, 29 January-1 February 1996); Ruth Busch, "'Was Mrs Masina Really 'Lost'?": An Analysis of New Zealand Judges' Attitudes Towards Domestic Violence' (1993) 8 OLR 17, 36, citing Janet Fanslow, *The OASIS Protocol: Guidelines for Identifying, Treating and Referring Abused Women*, Injury Prevention Research Centre, Department of Community Health: University of Auckland, (1993) 13.

²³⁴ New Zealand Law Commission, above n 116.

limit the use of evidence and prevent evidence that may have a high degree of probative value from being considered.²³⁵

In circumstances in which prior statements made by the deceased are admitted as 'relationship evidence' but prevented from being considered as evidence of the truth of what the deceased asserted, the accused's version of the truth may remain largely uncontested. This is because the deceased is not available to give his or her side of the story; to borrow a phrase from Professor Jenny Morgan, 'dead women tell no tales, tales are told about them'. This may not only affect the jury's assessment of the accused's actions, but may also misrepresent what has occurred and be deeply upsetting for friends and family members of the victim.²³⁶

Given that strong evidence of motive, intention, and premeditation may be ruled inadmissible at trial, it is perhaps unsurprising that prosecutors complain they find it difficult to obtain murder convictions in intimate femicide cases. 'By forbidding the use of evidence concerning the ongoing nature of abuse within the relationship, the law denies reality and asks the jury to do the same. There is no justice in this formula.'²³⁷

A Admissibility of Propensity Evidence in Domestic Violence Cases

It is generally accepted that exceptions to existing evidentiary rules are particularly apt in cases 'where it is especially difficult to secure other evidence'.²³⁸ The private nature of domestic violence makes it difficult to ascertain the truth through direct evidence. Defence counsel may also manipulate common myths and misperceptions about the dynamics of domestic abuse²³⁹ which incline juries to regard women victims as inherently less credible.²⁴⁰ These tactics can serve as secondary victimisation of abused women.²⁴¹

²³⁵ Victorian Law Reform Commission, above n 29, [4.8].

²³⁶ Ibid [4.46].

²³⁷ Raeder, above n 1, 1504-1505, citing Stuart Baggish and Christopher Frey, 'Domestic Physical Abuse: A Proposed Use for Evidence of Specific Similar Acts in Criminal Prosecutions to Corroborate Victim Testimony' (1994) Fla.B.J. 59.

²³⁸ Donald Mathieson (ed), *Cross on Evidence* (7th New Zealand ed, 2001) 599.

²³⁹ For a discussion of these myths see, eg, Victorian Law Reform Commission, above n 29, 161-169; Lisa Sanctis, 'Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence' (1996) 8 Yale J.L. & Feminism 359, 373.

²⁴⁰ Linelle Letendre, 'Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence' (2000) 75 Wash.L.Rev. 973, 981, cites one juror study which found 57 per cent of men and 71 per cent of women believed the myth that the victim would leave the abuser if she had really experienced the alleged violence.

²⁴¹ Carolyn Copps Hartley, "'He Said, She Said": The Defense Attack of Credibility in Domestic Violence Felony Trials' (2001) 7 *Violence Against Women* 510.

A history of prior abuse by the killer toward the victim and often toward previous women partners is a persistent, recurring theme of intimate femicide. However, Raeder points out that gender biases may be buried so deeply in evidentiary policy that even those who might be open to re-evaluating present approaches do not realise the absence of neutrality in the rules.²⁴² Consequently, while the orthodoxy presently asserts that 'no one should be able to escape a conviction for murder because he had a more violent temper and lost control of himself more easily than the ordinary person',²⁴³ it is difficult to understand how jurors are to assess the defendant's violent temperament and propensity for violence when evidence of his violence toward the deceased and other female partners may be strictly limited or excluded from the inquiry altogether.

Section 43 *Evidence Act 2006* restates the probative value versus prejudicial effect test for admission of propensity evidence and sets out prerequisites for allowing this evidence. When assessing the prejudicial effect of propensity evidence judges are required to consider whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and whether the fact-finder will tend to give disproportionate weight to this evidence. This reflects the traditional view that juries, unlike judges, are unable to properly gauge the probative value of propensity evidence and may be influenced by personal bias. However, the notion that judges are immune from prevailing cultural norms has been thoroughly debunked by feminists, and by discerning judges.²⁴⁴ 'Every decisionmaker who walks into a courtroom to hear a case is armed not only with the relevant legal texts, but with a set of values, experiences and assumptions that are thoroughly embedded.'²⁴⁵

Although legal commentary on propensity evidence generally focuses on potential prejudice to the defendant, David Karp notes that this is only half the story. Inferences of probability are a distinct and important rationale supporting its admissibility.²⁴⁶ The illegitimate prejudice that may arise from admitting propensity evidence in non-domestic cases is arguably far less relevant in domestic

²⁴² Raeder, above n 1, 1498.

²⁴³ *R v Rongonui* [2000] 2 NZLR 385, 411 (CA) per Elias CJ.

²⁴⁴ Madame Justice Bertha Wilson, 'Will Women Judges Really Make a Difference?' (1990) 28 Osgoode Hall L.J. 507, 511, citing various studies including one by two male law professors who concluded that 'judges had failed to bring to sex discrimination the judicial virtues of detachment, reflection, and critical analysis which had served them so well with respect to other areas of discrimination'.

²⁴⁵ *Ibid* 510, citing Judge Abella (Chair of the Ontario Law Reform Commission).

²⁴⁶ David Karp, 'Evidence of Propensity and Probability in Sex Offense Cases and Other Cases' (1994) 70 Chi-Kent L.Rev. 15, 20.

violence cases since no crime has a higher rate of repeat victimisation.²⁴⁷ Many intimate femicide victims are prior victims of sub lethal violence.²⁴⁸ Studies also suggest that once violence occurs in a relationship, it may reoccur in as many as 63 per cent of these relationships.²⁴⁹ There is also evidence to suggest that men who are motivated by jealousy and possessiveness to commit crimes against current or former partners constitute a particular category of recidivist offenders.²⁵⁰

As Raeder observes, it is a great deal easier to recognise that the final act of control is murder when courts examine the behaviour of the batterer, as opposed to that of his victim. Research shows acts of violence ranging from physical and sexual assaults through to property damage are 'not simply unconnected episodes of rage, loss of control, or an inability to manage anger (as batterers would like us to believe), but rather...the violence is a calculated, purposeful way to control the life of an intimate partner'.²⁵¹ Lacking this insight, victim blaming has camouflaged a pattern of control as the theme which links the various acts of abuse.²⁵² It is this theme of control and instrumental use of violence which provides a compelling reason for admitting propensity evidence in domestic violence cases.

Misunderstandings about the dynamics of violent relationships can also result in the drawing of artificial distinctions between various types of domestic abuse.²⁵³ Threats and violence by the accused against members of the deceased's family are likely to be excluded under current rules,²⁵⁴ although they also form part of a pattern of controlling behaviours. While evidence of a

²⁴⁷ Nicole Hunter, 'Protecting Survivors, Holding Perpetrators Accountable' (Paper presented at the Women's Legal Service, Conference on Women, Feminism and the Law, Brisbane, October 2004) 3.

²⁴⁸ Sarah Lee, 'The Search for Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence' (1998) 20 U.Haw.L.Rev. 221, 255, citing research finding two-thirds of women who suffered death as a result of domestic violence were previously abused in an incident prior to the one causing their death. See, also, Jacquelyn Campbell, et al, 'Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study' (2003) 93 *American Journal of Public Health* 1089, noting 67%-80% of intimate partner homicides involve physical abuse of the male by the female prior to the homicide no matter which of the partners dies.

²⁴⁹ Letendre, above n 240, 977-978 citing Donald Dutton, *The Domestic Assault of Women: Psychological and Criminal Justice Perspectives* (1995) 8-9.

²⁵⁰ See, eg, Lana Muzinic, et al, 'Forensic Importance of Jealousy' (2003) 27 Coll. Antropol. 293. Cf *R v Wilson* [1996] 1 NZLR 147, 152 where the Court of Appeal reduced the sentence of an offender who killed his estranged partner citing *inter alia* the low rate of recidivism in domestic homicides.

²⁵¹ Sanctis, above n 239, 388-389 (citations omitted).

²⁵² Raeder, above n 1, 1499.

²⁵³ Letendre, above n 240, 995, noting distinctions may be drawn between verbal harassment and physical attacks, and between different triggering events such as ending the relationship and talking with a male co-worker.

²⁵⁴ See, eg, *Case Study M/02/8*. Julie Stubbs and Julia Tolmie, 'Battered Woman Syndrome in Australia: A Challenge to Gender Bias in the Law?' in Julie Stubbs (ed), *Women, Male Violence and the Law* (1994) 192, 206, note the batterer's violence toward family members limits the extent of physical protection the family can offer the battered woman, further restricting her opportunities for escape.

defendant's history of violence toward previous partners may presently be deemed irrelevant and/or unduly prejudicial,²⁵⁵ evidence that the offender has not only perpetrated serious violence against his current partner, but has also abused a former partner, can assist jurors to properly evaluate conflicting statements from the victim and defendant.²⁵⁶ Prior victims, for whom issues of power and control are no longer as acute, may also be more willing to testify. As a result, 'an additional victim may force jurors to reevaluate their biases and to give proper weight to the current victim's testimony.'²⁵⁷

Lisa Sanctis notes that evidence of the accused's violence toward previous partners may be especially reliable and probative. Extremely low reporting rates for domestic violence render the likelihood that any man would twice be the victim of false domestic violence allegations exceedingly unlikely. Thus rather than focusing upon the risk of fabrication and prejudice to the accused, the much more reasonable inference is that allegations of domestic violence by different victims flow from the defendant's actions. Indeed, since domestic violence is so under-reported, 'even one prior act of domestic violence, charged or uncharged, is quite probative of a defendant's guilt'.²⁵⁸ Without this evidence, the jury 'will be greatly uninformed concerning the circumstances surrounding the crime and society will be left unarmed against the consequences of domestic violence'.²⁵⁹

Jenny McEwan points to increasing public dissatisfaction over cases in which defendants are acquitted following exclusion of evidence that the accused was a serial offender. McEwan argues that 'there *is* reason to regard serial and sadistic offenders as abnormal, and the exclusion of evidence where the abnormal disposition is itself probative is dangerously unwise'.²⁶⁰ Similarly, Karp points out that a 'common sense' ground for admitting propensity evidence is the reasonable inference that an offender's past physical and sexual assaults provide evidence that he has the combination of aggressive impulses 'that motivates the commission of such crimes, that he lacks

²⁵⁵ See, eg, *Case Studies H/02/11; F/01/6; P/98/3; M/02/8*.

²⁵⁶ Sanctis, above n 239, 367-374 provides a comprehensive discussion of the difficulties with prosecuting domestic violence including: victim withdrawal; racial and gay and lesbian discrimination; lack of witnesses; juror belief in a 'just world'; domestic violence myths; the appearance and coherence of battered witnesses; and sexism.

²⁵⁷ Letendre, above n 240, 995-996.

²⁵⁸ Sanctis, above n 239, 390-391.

²⁵⁹ Lee, above n 248, 255.

²⁶⁰ Jenny McEwan, 'Law Commission Dodges the Nettles in Consultation Paper No. 141' [1997] *Crim.L.R.* 93, 96, citing a case in which the defendant was acquitted of causing grievous bodily harm through 'stalking' the complainant. Evidence that the accused had a previous conviction for offending against her was excluded at trial.

effective inhibitions against acting on these impulses, and that the risks involved do not deter him.²⁶¹ Nor is it unreasonable to suggest that a defendant's prior experience of violence would enhance his awareness of risk.²⁶²

Since 'people have different subjective interpretations of the probative value of evidence',²⁶³ the probative value versus prejudicial effect test creates opportunities for inconsistent evaluations of the probity of domestic violence evidence. A presumption of admissibility would therefore avoid inconsistency in decision making, as well as distortions in the law which may occur when courts bow to public pressure by stretching rules of evidence in some cases, which may be detrimental to defendants in non-domestic violence cases, where policy concerns are not the same.²⁶⁴ Allowing the prosecution to introduce this evidence in its case-in-chief would also facilitate a coherent theme for the jury to follow.²⁶⁵

Various US jurisdictions have recognised the probative value of domestic violence evidence and enacted specific rules regarding its admissibility. The California legislature has authorised admission of evidence of prior domestic violence against the same or other victims to show propensity and disposition. The legislation creates a presumption that domestic violence evidence is probative, thereby circumventing the rationale normally forbidding propensity evidence. The presumption is balanced by a judicial discretion to exclude unduly prejudicial evidence and a ten-year time limit on admissibility.²⁶⁶ The section is modelled on Federal Rules of Evidence 413-414 given effect in California Evidence Code 1108 which provides for the admission of propensity evidence in sexual assault cases. The policy arguments which persuaded Congress to deliberately bypass the strong opposition of the Judicial Conference (the body authorised by Congress to promulgate new rules of evidence) were the difficulty in successfully prosecuting rape cases, and the perception that current law disproportionately favours defendants in sexual assault prosecutions. These difficulties led to too many rape prosecutions which resulted in acquittals or reversals on appeal.²⁶⁷

²⁶¹ Karp, above n 246, 20.

²⁶² McEwan, above n 260, 99.

²⁶³ Ibid 93.

²⁶⁴ See, eg, Karp, above n 246, 35, Letendre, above n 240, 1000.

²⁶⁵ Letendre, above n 240, 1002.

²⁶⁶ Louise Ellison, 'Prosecuting Domestic Violence without Victim Participation' (2002) 65 MLR 834, 843, citing s 1109 California Evidence Code which became effective in January 1997. See, also, Letendre, above n 240, 992.

²⁶⁷ Neal Hudders, 'The Problem of Using Hearsay in Domestic Violence Cases: Is A New Exception the Answer?' (2000) 49 Duke L.J. 1041, 106. See, also, Karp, above n 246.

The California exception recognises that policy considerations which render propensity evidence especially probative in sexual assault cases are also relevant to domestic violence cases. Both crimes are overwhelming perpetrated by men against women; both have high rates of recidivism; and jurors routinely face inconsistencies between the victim's and defendant's testimonies in both types of cases. Offending in both categories is saturated with myths and stereotypes; and at trial, both unfairly fixate on the credibility of the victim.²⁶⁸

Opponents of such exception²⁶⁹ may point to 'the presumption of innocence, the asymmetry of wrongful convictions and acquittals, the defendant's right to be tried for what the indictment alleges he did, not for leading the life he appears to have led or for being the person he appears to be'.²⁷⁰ However, as Aileen McColgan observes, 'the position is somewhat different when bias is structured into the system with the effect that wrongful acquittals are returned in respect of defendants charged with a particular type of offence, which offence is committed against a particular sector of society'.²⁷¹

Sanctis points out that 'the high recidivism rate of domestic violence, coupled with the systematic, continual, escalatory nature of domestic violence, all occurring within the contours of a sexist criminal justice system, makes domestic violence an excellent candidate for a categorical exception to the general prohibition on the admissibility of propensity evidence'.²⁷² The point of this evidence is not to show the defendant's general criminal or violent propensity, but to focus on the domestic context and the unique nature of domestic violence, including its repetition, secrecy, the vulnerability of the victim and the perpetrator's attempts at control.

²⁶⁸ Letendre, above n 240, 998, noting 'the American Medical Association found that 47% of batterers who beat their intimate partners do so at least three times a year, while the recidivism rate for sexual offenders is only 7.7% within three years' (citations omitted).

²⁶⁹ See, eg, Roderick Munday, 'Handling the Evidential Exception' [1988] *Crim.L.R.* 345, 354, suggesting that the 'adverse influence' of the propensity exception in the *Theft Act 1968* (UK) was 'only contained by bold judicial contrivance'. See, also, Roderick Munday, 'The Admissibility of Evidence of Criminal Propensity in Common Law Jurisdictions' (1989) 19 *VUWLR* 223, 234.

²⁷⁰ Paul Roberts, 'The Law Commission's Consultation Paper on Previous Misconduct (1) All the Usual Suspects: A Critical Appraisal of Law Commission Consultation Paper No. 141' [1997] *Crim.L.R.* 75, 79. See, also, Roderick Munday, 'The Admissibility of Evidence of Criminal Propensity in Common Law Jurisdictions' (1989) 19 *VUWLR* 223, 248; Stephen Silber, 'The Law Commission's Work on Hearsay and Previous Misconduct' (1997) 37 *Med.Sci.Law* 125, 131, rejecting the US approach which permits evidence of the defendant's previous misconduct in sexual offence cases.

²⁷¹ Aileen McColgan, 'Common Law and the Relevance of Sexual History Evidence' (1996) 16 *OJLS* 275, 297.

²⁷² Sanctis, above n 239, 390.

Two final observations are necessary. First, it is important to recognise that allowing the defendant's history of serial or sadistic offending to be admitted in chief, does not entail an automatic conviction. Policy considerations resulted in the creation of an exception to the exclusion of bad character evidence in New Zealand receiving cases²⁷³ and the operation of this section appears uncontroversial.²⁷⁴ Second, in the absence of intervention, a batterer's propensity for continued violence against current and future partners remains high.²⁷⁵ Therefore, putting abusers on notice that their charged and uncharged acts of domestic violence may be used in evidence may also act as a deterrent to future domestic abuse.

B *Hearsay in Domestic Violence Cases*

The Law Commission cites lack of opportunity to cross-examine the declarant as the most compelling reason for limiting the admissibility of hearsay evidence.²⁷⁶ However, there is a cruel irony apparent in the exclusion of a woman's hearsay statements on the basis that the batterer who killed her will be unduly prejudiced by his victim's inability to appear in court and be subjected to cross-examination. Significant benefits accrue to batterers from policies which treat the out of court statements of battered victims as unreliable when prosecuting alleged offenders, while such statements are accorded a high degree of credibility when they express forgiveness of the batterer and appeals for judicial leniency at sentencing.

The introduction of a domestic murder statute would eliminate a number of the problems presently associated with the hearsay rule in intimate femicide cases. Since the statute requires a pattern of prior violence and the victim's state of mind is automatically relevant, evidence of her pre-death premonitions and the underlying facts which constituted the basis for those fears is admissible. However, there will be intimate femicide cases which fall outside the statute. Given the limited focus of the present research, it is recommended that the proposed Domestic Violence Advisory Panel investigate the introduction of a hearsay exception for domestic violence evidence. The following discussion is restricted to issues that appear relevant to the operation of the rule in relation to battered homicide victims.

²⁷³ Section 258(2) *Crimes Act 1961*. This exception has not been dispensed with despite scholarly criticism. See, eg, Munday, above n 269.

²⁷⁴ New Zealand Law Commission, above n 116, [176].

²⁷⁵ Letendre, above n 240, 978.

²⁷⁶ New Zealand Law Commission, above n 116, [50].

A number of US legislatures have enacted hearsay exceptions for domestic violence crimes.²⁷⁷ Some commentators argue that the need to use hearsay statements in domestic violence cases is the same whether the victim is killed or injured. Thus a single exception is preferable to separate exceptions for homicide and non-homicide situations.²⁷⁸ However, Raeder proposes a hearsay exception to admit a decedent's hearsay statements concerning the declarant's relationship with the victim where the circumstances surrounding the making of the statement indicate its trustworthiness, and on at least three occasions prior to the declarant's death, the defendant was the primary aggressor in one or more designated acts of domestic violence directed at the declarant. The requirement that the accused be the 'primary aggressor' in the previous three acts of domestic violence is designed 'to eliminate the use of statements against female defendants who kill their batterers in situations where the prosecution might argue that the battered woman's verbal conduct provoked the decedent's physical response'.²⁷⁹ This principled response would be in line with the domestic homicide statute requirement of a pattern of abuse. However, the strategy might be undermined by a general tendency to distrust the hearsay statements of deceased battered victims.

Although murder by itself has not traditionally been perceived as grounds to lower the bar to decedent hearsay, the fact that the defendant procured the death of his partner or estranged partner might be sufficient to support the waiver of hearsay objections in intimate femicide cases. However, where identity is in issue, this would usurp the jury's function in determining the extent and nature of the accused's culpability. Another solution would be to specify the type of hearsay evidence concerning the declarant's relationship with the defendant that may be admitted at trial as proof of the facts asserted. Thus legislation could stipulate structural risk factors for femicide, including victims' fears for their safety as expressed through their pre-death premonitions, which have been well established by domestic homicide research. These red flags for intimate femicide would be consistent with the corporate risk assessment instrument which is recommended as a means to establish and manage risk in sub-lethal domestic assault cases.

There are a number of advantages to this approach. First, it would provide statutory recognition of the interrelationship between domestic violence and domestic homicide. Second, the legislation would allow common, reoccurring patterns of behaviour in intimate femicide cases, which are

²⁷⁷ See, eg, Karleen Murphy, 'A Hearsay Exception for Physical Abuse' (1997) 27 *Golden Gate U.L.Rev.* 497; Hudders, above n 267, 1072-1073.

²⁷⁸ See, eg, Hudders, above n 267, 1072-1073.

²⁷⁹ Raeder, above n 1, 1517.

presently concealed by a focus on individual cases in isolation, to be widely revealed. Public and legal attention would thereby be deflected from a focus on victim blaming to a focus on the batterer, and on battering as a pattern of behaviours designed to maintain or regain control over the victim. Media reporting of the cases would ensure risk factors for intimate femicide remained at the forefront of public consciousness. Emphasising risk factors for intimate femicide, and shifting public and professional attention to the batterer's quest for power and control, would also give effect to the twin domestic violence intervention goals of victim safety and batterer accountability.²⁸⁰

In the interim, there is a need for reform to address a previously identified and potentially dangerous situation which arguably constitutes a further example of 'the cultural facilitation of violence'.²⁸¹ The decision in *R v Goldberg*,²⁸² that batterers imprisoned for domestic violence offences who harass their victims from prison in breach of their protection orders may use the criminal justice system to further victimise estranged partners lacks cognisance of the dangers of separation violence, and the power and control tactics at the heart of domestic abuse. Therefore, a statutory response to this decision is recommended.

XIII THE PROVOCATION DEFENCE AND A DOMESTIC VIOLENCE ADVISORY PANEL

The case for abolition of the provocation defence appears overwhelming. The defence has been rightly criticised for encouraging killers to defame the deceased person's character,²⁸³ and for promoting a victim-blaming culture.²⁸⁴ Contemporary understandings that responsibility for male violence may be sheeted home to women victims simply replaces old myths that 'women who are beaten are invariably drunken nags, incompetent housekeepers and spendthrifts',²⁸⁵ with slightly less overt theories of victim blaming. As noted by the Victorian Law Reform Commission, the implication of the provocation defence that women are somehow responsible for their own deaths,

²⁸⁰ See, eg, Taskforce for Action on Violence within Families, above n 6, 2.

²⁸¹ Busch and Robertson, above n 52, 116, citing Ellen Pence, *The Justice System's Response to Domestic Assault Cases: A Guide for Policy Development* (1986) 1-8.

²⁸² (Unreported, High Court, Rotorua, Baragwanath J, 30 May 2003).

²⁸³ See, eg, Celia Wells, 'Provocation: The Case for Abolition' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* 85, 101.

²⁸⁴ See, eg, Victorian Law Reform Commission, above n 29, [2.29].

²⁸⁵ Martin Schwartz and Walter De Keseredy, 'The Return of the "Battered Husband Syndrome" Through the Typification of Women as Violent' (1993) 20 *Crime, Law and Social Change* 248, 249.

and men's violent loss of self-control is partly excusable, is a position which the community should no longer tolerate.²⁸⁶

It is counter-productive to government attempts to reduce society's tolerance of domestic violence and protect women and children²⁸⁷ for the state to reinforce, at an institutional level, the perspective of many batterers that women incite the violence committed against them. Since the right of the state to punish women who respond to battering with lethal force is inseparable from the duty of the state to ensure that alternatives such as departure are not more hypothetical than real²⁸⁸ the state can no longer condone the provision of a partial excuse for men who pursue and kill estranged partners.²⁸⁹

A number of legal commentators have expressed concern that following abolition of the defence, the outdated norms of relationship that it endorses may simply be eliminated from the trial and transposed to the realm of sentencing. Accordingly, the less publicly available sentencing process may become 'the new vehicle for the playing out of "gender politics"'.²⁹⁰ The Victorian Law Reform Commission's recommendation to abolish the provocation defence was therefore accompanied by recommendations that the newly established Sentencing Advisory Council monitor sentencing trends; establish processes for ensuring the availability of up to date sentencing information to judges; provide judicial education, in consultation with the Judicial College on sentencing in homicide cases; and provide public education on sentencing.²⁹¹ The New Zealand Law Commission's recent recommendation that a Sentencing Council should be established with a mandate to draft sentencing guidelines is therefore timely.²⁹²

The New Zealand Commission acknowledges that guideline sentencing judgments by higher courts have significant limitations, including their dependence upon the quality and nature of the

²⁸⁶ Victorian Law Reform Commission, above n 29, xxviii.

²⁸⁷ See, eg, Taskforce for Action on Violence within Families, above n 6, 16.

²⁸⁸ See, eg, Cato, above n 156, 39.

²⁸⁹ Wendy Chan, 'A Feminist Critique of Self-Defense and Provocation in Battered Women's Cases in England and Wales' (1994) 6 *Women and Criminal Justice* 39, 45, citing C Boyle, *A Feminist Review of Criminal Law* (1985) Ministry of Supply and Services, Canada, noting that 'the moral right to punish a woman for responding violently to violence is premised upon the provision of the protection of the law in reality as well as on paper. To do otherwise is to impose the standards of a "civilised" society on someone who is literally living in a lawless world'.

²⁹⁰ Jenny Morgan, 'Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 *MULR* 237, 275-276.

²⁹¹ Victorian Law Reform Commission, above n 29, xlii-xliii.

²⁹² New Zealand Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006).

information provided by counsel in individual cases.²⁹³ This method of formulating sentencing policy is idiosyncratic and unrepresentative. In particular, it has impeded recognition of structural patterns of offending and the development of principled sentencing policy and guidelines in domestic violence cases. Although the establishment of a Sentencing Council may be criticised for allowing a 'politically charged body' to wrest control over sentencing from judges,²⁹⁴ the English experience has shown a specialist public body can operate as a useful buffer between the courts, the government and the public which helps to alleviate public criticism of judges.²⁹⁵

The New Zealand Commission proposes a Council consisting of ten members, which in order to be more representative and thus more democratic would not be dominated by judges. The Committee would be comprised of four judges (two from the District Court, one from the High Court, and one from the Court of Appeal). Since the functions of the Council would include drafting parole guidelines, the Chair of the Parole Board, who is also a judge, would be included. The remaining five non-judicial members would have expertise in several designated areas, including the impact of the criminal justice system on Maori and minorities. However, gender issues are not designated by the Commission as an area of expertise. This is a grave oversight.

It is essential that sentencing and parole guidelines reflect knowledge and understanding of the dynamics of domestic violence, structural patterns of offending, and the interrelationship between domestic violence and domestic homicide. Thus a specialist Domestic Violence Advisory Panel should be appointed to provide advice and guidance to the Council. The Advisory Panel should be represented on the Sentencing Council to ensure gender issues are acknowledged and addressed. By serving as a comprehensive repository of sentencing data, the sentencing council could provide invaluable information to the Advisory Panel to assist the Panel to formulate recommendations. As discussed below, a Court Watch programme would also provide invaluable information. This cooperative exchange of information will help bridge philosophical and political differences in approaches to domestic violence and ensure policy recommendations are well grounded. The Panel should report to Parliament and, where appropriate, the Law Commission.

²⁹³ Ibid [39].

²⁹⁴ *Sentencing Council on the Cards*, New Zealand Press Association, 15 June 2006, citing Richard Worth, National Member of Parliament.

²⁹⁵ Ian Caplin, *Making Sense of Sentencing*, New Zealand Herald, 3 July 2006.

Since the Panel would have the necessary expertise to ensure fatality reviews do not focus disproportionately on the victim and evaluation of her choices, it would appear best placed to take a leadership role in refining the recommendations of proposed review panels²⁹⁶ and reporting the findings to Parliament. The Advisory Panel would also have the expertise necessary to address present inconsistent and incoherent responses to domestic violence. The Panel should make policy recommendations and develop sentencing guidelines which address the following issues identified from the present research:

- Achievement of accurate recording and reporting of intimate partner homicide and sub-lethal domestic violence assaults.²⁹⁷ This includes consideration of a separate offence of intimate partner violence (as opposed to the s 194 offence of male assaults female)²⁹⁸ to better monitor sub-lethal assaults on intimate partners;
- Assess whether the seriousness of offending is trivialised by over-use of s 194 *Crimes Act 1961* assault by a male on a female. (See case studies, including *Case Study S/01/2(S)*²⁹⁹ in which the judge described the violence as one of the worst cases of a male assaulting a woman he had seen for many years);
- Establishment of a domestic violence data base to assist researchers and legal professionals operating in this area. The Panel to also consider the effect on transparency and accountability of the recent judicial decision to suppress the name of a habitual batterer whose violence escalated to lethality so as to protect the couple's children;
- Monitoring to assess patterns of violence and evaluate safety issues;
- Policy recommendations and sentencing guidelines which delineate the parameters of the present rehabilitative response. This includes consideration of policy in relation to abusers who are not amenable to, or appropriate for, batterer treatment;

²⁹⁶ Taskforce for Action on Violence within Families, above n 6, 18.

²⁹⁷ At least one US state (Missouri) has legislation mandating domestic violence homicide reporting.

²⁹⁸ As previously discussed, the offence category of male assaults female under s 194 *Crimes Act 1961* operates as a proxy for violence against female intimate partners.

²⁹⁹ See, discussion of this case above, at p 251. See, also, *Case Study M/02/8* above, at p 303.

- Whether s 8(f) *Sentencing Act 2002* which requires the court to take into account the effect of the offending on the victim should be interpreted as requiring courts to mitigate offending according to the wishes of domestic violence victims. Whether different approaches should apply according to the severity of violence; the presence of children in the family; the circumstance of repeat victimisation;
- How to give effect to domestic violence risk assessment tools in sentencing, probation and parole decisions. This includes monitoring to ensure judicial typologies of batterers conform to social science risk assessment research;
- Whether the assumption that male violence against women is inherently less dangerous if body force as opposed to a weapon is used; together with the nomination under s 9(1)(a) *Sentencing Act 2000* of actual or threatened use of a weapon as an aggravating factor at sentencing, constitute gender discrimination
- Whether assumptions in domestic violence cases that the red flag of attempted suicide is: (a) indicative of the offender's remorse and (b) evidence from which an offender's intention may be inferred at trial, constitute gender discrimination;
- Whether remorse as a mitigating feature of offending under s 9(2)(f) *Sentencing Act 2002* is appropriate in domestic violence cases. Given the centrality of remorse to the cycle of violence, this includes the element of remorse in judicial typologies of batterers; and whether the statutory provision constitutes a form of gender discrimination;
- Whether requiring women to pay the state for protection from male violence constitutes a form of gender discrimination. (A number of women in the present study were gravely injured while trying to serve trespass notices on estranged partners);
- Whether a domestic violence offence should be created in relation to violence and threats of violence aimed at deterring victims from testifying, persuading victims to withdraw complaints, or retaliating for criminal justice intervention. (The research found little recognition of this offending as a risk factor for dangerousness/lethality and an impediment

to successful prosecution of domestic violence offending. Indeed, in one case the victim's conduct in reporting the violence to police was accepted as supporting a provocation defence for her killer;

- Consideration of the policy, sentencing tariffs and principles that should apply:
 - (a) to a structured system of sanctions to reflect patterns of repeat offending and escalation;
 - (b) to the proposed 'estrangement murder' legislation;
 - (c) to habitual batterers convicted under the proposed domestic murder legislation;
 - (d) to offenders who have been convicted of separation assault and aggravated separation assault;
 - (e) when sentencing an offender who has been subjected to abuse by the deceased;
 - (f) when sentencing an offender who has been convicted of an offence in the nature of 'mercy' killing of an intimate partner;
 - (g) when sentencing an offender who has perpetrated an assault in breach of the victim's protection order;³⁰⁰ including whether the sentence for breach of the order should run cumulatively with the sentence for the act which constituted the breach;

- Promotion of research examining patterns of homicide/suicide and homicide/attempted suicide; suicide in the context of domestic violence; and unexplained deaths which may presently be hidden within the official category of 'deaths where no finding could be made whether injuries were accidentally or purposefully inflicted'. Such research should encompass charged and uncharged incidents of so-called mercy killings and suicide pacts involving intimate partners. These homicides have been identified in Australian research and in the present study as a structural pattern of offending and fatality reviews should investigate deaths in this context. This research is urgently required to guide substantive law and sentencing policy;

- Introduction of social framework evidence in domestic homicide cases when the battered woman is victim and defendant;

³⁰⁰ The *Domestic Violence, Crimes and Victims Act 2004* (UK) makes breach of a non-molestation order a criminal offence punishable by up to five years' imprisonment.

- Whether s 9(2)(c) *Sentencing Act 2002* which stipulates that 'the conduct of the victim' is a mitigating feature of offending is appropriate in domestic violence cases. The type of conduct which should be excluded (see following point);
- Legal scholars suggest that whether or not provocation is abolished, 'there must be legislative guidelines to judges spelling out that certain instances of "provoked" killings must not be considered in mitigation of sentence'.³⁰¹ Thus the Panel should consider the principles that should apply when sentencing an offender who has perpetrated a lethal or sub-lethal act of violence against a person with whom the offender has a past or present domestic relationship³⁰² in the following circumstances:
 - (a) the victim had left, attempted to leave or threatened to leave the relationship;
 - (b) the offender suspected, discovered, or the victim confessed infidelity;
 - (c) the offender alleges the conduct was precipitated by a non-violent sexual advance (a past or present domestic relationship is not required);
 - (e) the offender alleges the victim taunted him about his or her sexual prowess or attributes;
 - (f) the conduct relied on by the offender as mitigating the offending consisted of a challenge to the offender's authority;
 and how these circumstances should be taken into account at sentencing.³⁰³
- How the 'significant overlaps between male violence against female partners and child abuse and neglect'³⁰⁴ should be reflected in sentencing policy and guidelines. This includes how to give effect to the principle in New Zealand domestic violence legislation that violence in the presence or in the hearing of a child constitutes violence against the child.³⁰⁵ The sentencing tariffs and principles that should apply in the following situations:

³⁰¹ Graeme Coss, 'Provocation, Law Reform and the Medea Syndrome' (2004) 18 Crim LJ 133, 139.

³⁰² See, eg, s 4 *Domestic Violence Act 1995*.

³⁰³ Graeme Coss, above n 301, 137-38 credits Helen Brown, 'Provocation as a Defence to Murder: to Abolish or Reform?' (1999) 12 A Fem LJ 137, 140 for articulating the first three circumstances; and attributes the fourth to Adrian Howe, "Submission to Law Commission Consultation Paper No 173: Partial Defences to Murder" (2004) 6; and the fifth to himself.

³⁰⁴ Taskforce for Action on Violence within Families, above n 6.

³⁰⁵ Section 3 *Domestic Violence Act 1995*.

- (a) when intimate partner violence takes place in the presence of a child;
- (b) when children are secondary victims of assaults directed at an intimate partner;
- (c) when the victim is pregnant;
- (d) when sentencing an offender who has been convicted of an offence involving violence toward a child, where the offender has also been the victim of violence;

Given the well established association of child and woman abuse, the Panel should also consider the extent, if any, of the courts' duty when put on notice of the co-occurrence of child and mother abuse.

XIV PROFESSIONAL DEVELOPMENT AND EDUCATION PROGRAMMES

Values clarification is a common practice in many professions³⁰⁶ and the present research illustrates its importance for legal professionals.³⁰⁷ Earlier New Zealand research noted the need to redefine paradigms about domestic violence shared by some judges, police, psychologists, and members of the public. Beliefs that one can be a killer yet remain a good father, beliefs that women 'provoke' further understandable violence by seeking protection from the legal system, and the notion that one is less of a murderer if one limits one's homicides to family members were of particular concern.³⁰⁸ The present study confirms the on-going relevance of these observations. Sexist attitudes, victim blaming and failure to recognise power and control issues may dissuade women who encounter these responses from further attempts to seek help, thereby jeopardising women's safety, and placing lives at risk. Issues of gender bias should therefore be addressed as an integral part of the law school curriculum.³⁰⁹

³⁰⁶ Bergen County Commission on the Status of Women, 'Community Court Watch II: A Study of Bergen County Family Court System and the Enforcement of the State of New Jersey Prevention of Domestic Violence Act' (1995) 17 *Women's Rts.L.Rep.* 79, 91.

³⁰⁷ See, eg, *Case Study K/00/21(S)* in which the sentencing judge noted defence counsel's depiction of a severely battered woman who had experienced repeated episodes of brutality, including attempts by the offender to cause permanent damage to her face, as a 'broken-down alcoholic' who felt confident to drink behind the offender's back and 'give him lip' when she was drunk implied the victim 'deserved what she got'. In *Case Study C/03/1* defence counsel described the woman victim who was killed by her jealous boyfriend when she attempted to end the relationship as 'two-timing' and deceptive and the offender who killed her as 'tender and passionate' whose love for the victim was 'unconditional'. This offender also killed the deceased woman's male friend and attempted to kill another male friend as they waited for the victim to pick up her clothes from the offender's home.

³⁰⁸ Ruth Busch and Neville Robertson, 'I Didn't Know Just How Far You Could Fight: Contextualising the Bristol Inquiry' (1994) 2 *Waikato L.Rev.* 41, 42-43.

³⁰⁹ Donna Martinson, *Lavallee v R - The Supreme Court of Canada Addresses Gender Bias in the Courts* (1990) 24 *UBC Law Rev.* 381, 395.

New Zealand Family Violence Prevention Strategy calls for an integrated, co-ordinated response to domestic violence. However, courtroom constructions of domestic violence are profoundly inconsistent with national prevention policy. Pervasive misunderstandings about the dynamics of violent relationships and red flags for dangerousness/lethality have the potential for serious failures of risk assessment and consequent harms to victims.³¹⁰ The Ontario Domestic Violence Death Review Committee concluded professional training must deal with two issues. First, there must be training to recognise domestic violence in all its forms, including emotional, psychological and physical abuse. Second, there must be training to identify risk factors for intimate femicide and how to respond to them.³¹¹ This 'should include examples of appropriate action for varied roles (e.g., attorney, judge, commissioner, advocate)'.³¹²

Although the Taskforce for Action on Violence within Families advises that the Law Society will provide professional support and training programmes for lawyers working in the area of domestic violence,³¹³ it is counterproductive to train lawyers and criminal justice personnel on issues of power and control,³¹⁴ while judges simultaneously reject this analysis,³¹⁵ or invert it by depicting perpetrators of separation violence as 'out-of-control'. If courts ignore or downplay the risks of repeat victimisation and violence in the context of separation, this will impact on the way police carry out their duties of protecting persons and property from domestic violence.³¹⁶ Since judges have a strong leadership role to play, there is no justification for exempting the judiciary from domestic violence training.³¹⁷ Training of judges and lawyers should therefore be mandatory.

³¹⁰ Karan and Lazarus, above n 23, detail the actions lawyers should take once a risk assessment has been undertaken. The authors note that risk assessment should be reviewed periodically throughout the case, and coupled with personalised safety planning, legal advocacy, and appropriate referral to community resources.

³¹¹ Domestic Violence Death Review Committee, above n 58.

³¹² Washington State Coalition Against Domestic Violence, above n 80, 12, 61.

³¹³ Taskforce for Action on Violence within Families, above n 6, 23.

³¹⁴ *Ibid* 4.

³¹⁵ See, eg, *Calls for Change as Domestic Violence Act turns 10*, NZLawyer, 41 2 June 2006 citing one judge's criticism that the power and control focus in domestic violence legislation is inapposite in many cases. However, the example chosen to support this argument was that of violence in the context of separation, which reinforces the importance of training for legal professionals.

³¹⁶ See, eg, Jocelyne Scutt, 'The Battered Woman Reality - Taking Women's Lives Seriously' in Jon Patrick, Helen Foster and Brian Tapper (eds) *Successful Practice in Family Violence In New Zealand* (1997) 67, 72. The Washington State Coalition Against Domestic Violence, above n 80, 71, also points to the potential for the work of prosecution and police officers aimed at holding abusers accountable to be undermined by judges who may disregard bail recommendations and fail to conduct appropriate risk assessment, or impose significant sanctions on abusers.

³¹⁷ Victorian Law Reform Commission, above n 29, [4.154], noted the need for a proper understanding by police, legal practitioners and judges of the interrelationship between domestic violence and use of a fatal force and recommended ongoing development of domestic violence awareness and education programmes for legal practitioners and judges. See, also, Metropolitan Police Service, above n 59, 12.

Education should also be targeted to professionals outside the justice system.³¹⁸ Since the best way to protect children is to protect their mothers,³¹⁹ staff at supervised visitation centres should receive specialised training on domestic violence 'including the potential for abusers to use visitation centres to stalk and control their intimate partners, and the risk to children when a parent has a history of perpetrating domestic violence'.³²⁰ While health professionals also have an important role to play in identifying women at high risk of serious violence and lethality, the present research found that when commenting publicly upon red flag behaviours such as stalking, obsessive jealousy, homicide/suicide threats, health professionals rarely adverted to the specific danger these behaviours pose to separating women. Thus crucial educative opportunities were missed.

Following intimate femicide, it generally transpires that friends, family and neighbours knew about the abuse but underestimated the abuser's potential for danger, or were unwilling or unable to support the victim and help her obtain safety. Thus fatality reviews emphasise the importance of education strategies aimed at the friends and families of domestic violence victims. The present tendency to equate obsessive jealousy and possessiveness with romantic love may also impede recognition by battered women of this red flag for homicide, thereby endangering their safety. Education campaigns aimed at increasing public awareness of risk factors for serious violence and lethality should also ensure that especially vulnerable groups of women, such as women with disabilities have access to this information and know how to report abuse.³²¹ Public and professional training must not simply highlight lethality indicators, but also provide information on what to do if the lethality risk seems high and examples of appropriate action.³²² Such education would also help to inure domestic violence law reforms from ill informed attacks by political groups.³²³

³¹⁸ Domestic Violence Death Review Committee, above n 58.

³¹⁹ Websdale, Sheeran and Johnson, above n 63, 27.

³²⁰ Washington State Coalition Against Domestic Violence, above n 80, 15.

³²¹ Miriam Ticoll, Family Violence Prevention Division, Health Canada, *Violence and People with Disabilities: A Review of the Literature* (1994) citing an unacceptably high degree of victimisation of people with disabilities and cultural toleration of this violence.

³²² See, eg, Washington State Coalition Against Domestic Violence, above n 80, 6.

³²³ See, eg, Davis, above n 28, 309 noting that: '[o]ne of the most striking aspects of fathers' rights groups internationally is their success in influencing the direction of family law, despite the almost complete absence of empirical data or reliable research to support their family law policies and their claims of Family Court gender bias.'

XV MONITORING JUDICIAL RESPONSES

'Judges are a critical link in the chain of protection for battered women, yet they are the weakest link because they are largely unaccountable for their decisions.'³²⁴ Victoria Nourse notes that since feminism contests powerful social norms about intimate relationships its insights are often resisted. When this resistance is overcome by legal reform, it 'is likely to remain embedded in reform efforts, albeit in ways that are difficult to see, helping to perpetuate that which the law openly disavows.'³²⁵ Since courts are among the most potent reinforcers of dominant ideologies,³²⁶ it is recommended that New Zealand implement a national court monitoring system.

In the US, court monitoring is a relatively new systems accountability strategy: most court monitoring programmes were formed after 1995. Programmes are present in at least 21 separate US states and two provinces in Canada.³²⁷ Court monitoring aims to promote the safety of victims and children, counter strategies which discredit, blame and re-victimise battered women, ensure courts are more consistent, effective and accountable for their handling of domestic violence cases and create a more informed and involved public through individual and systemic monitoring and public education. Programmes focus on domestic violence, restraining order and sexual assault cases. After training seminars, volunteers observe in the courtroom and take notes on their perceptions which are collated and recorded in annual reports. Repeat offenders' interactions with the criminal justice system are recorded. Although some judges and defence counsel complained that court monitoring to achieve accountability would disrupt courts and intimidate judges, these programmes have made significant changes within the court system. 'Advocates, prosecutors and judges in Minneapolis routinely say that the presence of WATCH volunteer court monitors makes a difference, and that their research and reporting prompts change.'³²⁸

The Bergen County Community Court Watch programme evolved out of a desire among those who worked with domestic violence to be proactive and was established to:

³²⁴ Lynn Hecht Schafran, 'There's No Accounting for Judges' (1995) 58 Alb.L.Rev. 1063, 1068-1069.

³²⁵ Nourse, above n 3, 952.

³²⁶ See, eg, Susan Atkins and Brenda Hoggett, *Women and the Law* (1984) 138.

³²⁷ Suzanne Elwell, *Report on 2002 Court Monitoring Survey* (2002) www.watchmn.org/PDF/cm-survey.pdf at 4 December 2006.

³²⁸ Legal Momentum, *Legal Resource Kit: A Guide to Court Watching in Domestic Violence and Sexual Assault Cases* (2005) 8 www.legalmomentum.org/issues/vio/courtwatching.pdf at 4 December 2006.

- compile data on the handling of domestic violence cases which could be used to strengthen enforcement of the relevant domestic violence legislation;
- make those involved in the judicial process aware of the public interest and concern about how domestic violence cases are handled;
- provide feedback to legislators regarding the effectiveness of the statute;
- report Court Watch findings to the general public.³²⁹

Community volunteers were recruited through advertising to participate in the project as monitors. By the completion of the training sessions a pool of monitors ranging in age from 20 to 85 was activated.

Monitors documented demographics, judicial conduct, the nature of the abuse and case dispositions. The monitors also recorded their subjective comments and assessments...Comments from monitors ranged from direct quotes to interpretations, from descriptions of outcomes to descriptions of process, from observations of values to expressions of values and from positive to negative commentary and reflections.³³⁰

The Project is reported as having 'a profound effect on the handling of domestic violence cases' including 'legislative initiatives which have broadened the application of the law and strengthened protection'.³³¹ Mandatory training was implemented by the judiciary following the first Court Watch Report and monitors in the second Court Watch project reported judges were more knowledgeable about domestic violence and made a greater effort to protect victims.³³²

The Washington State Domestic Violence Fatality Review recommends that domestic violence advocacy programmes seek resources to set up domestic violence Court Watch Programmes.³³³ Lynn Hecht Schafran, the Director of the National Judicial Education Program to Promote Equality in the Courts observes that

³²⁹ Bergen County Commission on the Status of Women, above n 306, 83.

³³⁰ Ibid.

³³¹ Ibid 92.

³³² Ibid 90.

³³³ Washington State Coalition Against Domestic Violence, above n 80, 13.

every community needs trained court watchers who can monitor the trial process in spousal abuse and murder cases to ensure fairness....Advocates from domestic violence shelters are the obvious candidates for this task, but there are too few of them and they are needed in many places.³³⁴

The state should provide funding to ensure effective, independent, court watch programmes can be established nation wide. These programmes are essential to increase understanding of the local judiciary's approach to domestic violence offending, identify problems in the system, and evaluate the impact of legal reforms. Monitoring should include the following issues:

- Issues relevant to the abolition of spousal non-compellability, including:
 - (a) Whether police are pursuing domestic violence prosecutions in the absence of victim cooperation;
 - (b) Whether uncooperative testifying witnesses are frequently declared hostile;
 - (c) Whether there is a tendency to dismiss charges in these cases.
- Judicial responses to victims' views of the appropriate sentence. To promote public awareness and enhance accountability, the nature of the violence, charges and sentencing should be monitored.
- Judicial approaches when violence involves children and pregnant women.
- Judicial responses to violence aimed at dissuading victims from testifying or in retaliation for criminal justice involvement.
- Patterns of repeat victimisation.
- Victim blaming during the substantive hearing and at sentencing;

The present research found suspended sentences were used in high risk cases. The Justice and Electoral Committee report on the Sentencing and Parole Reform Bill noted that suspended sentences were relied on to deter offenders from further offending and to reduce the growth in the

³³⁴ Schafran, above n 324, 1079.

prison population, thus producing savings. However, subsequent research found deterrence had not been achieved and the prison population had increased due to the number of suspended sentences which were subsequently activated.³³⁵ The Committee drew attention to the alternative sentencing options of home detention; community based sentences; order to come up for sentence if called on; and adjournment.³³⁶

A Home Detention

Where the Court sentences the offender to a term of imprisonment of not more than two years, it must consider granting the offender leave to apply for home detention.³³⁷ When determining whether or not to grant leave, the court must consider: (a) the nature and seriousness of the offence; (b) the circumstances and background of the offender; (c) relevant matters in the victim impact statement; (d) any other factors that the court considers relevant.³³⁸ Since victim forgiveness is a not uncommon feature of domestic violence prosecutions, and offending in the context of 'domestic difficulties', or a 'domestic crisis' has traditionally been viewed sympathetically,³³⁹ courts may perceive home detention as especially relevant in domestic violence cases.

Although it was originally believed that the two year threshold for home detention 'clearly' signalled seriously violent offenders would not be eligible for home detention,³⁴⁰ the research found home detention was available to offenders who perpetrated serious violence in red flag contexts. Since this sentencing option has the potential to provide extended opportunities to offenders to re-assault and harass current or estranged partners, and may also convey the message that 'domestic' assaults are not taken seriously, its use should be carefully monitored.

B Order to Come Up for Sentence if Called On³⁴¹

The Select Committee envisaged this sentencing option would be used in cases involving 'comparatively minor offences, or where implementation of a restorative justice programme cannot

³³⁵ Geoffrey Hall and Stephen O'Driscoll, *The New Sentencing and Parole Acts* (2002) 6. The extent to which domestic violence offending featured in this pattern of activating suspended sentences is unknown.

³³⁶ *Ibid* 7.

³³⁷ Section 97 *Sentencing Act 2002*.

³³⁸ Section 97(3) *Sentencing Act 2002*.

³³⁹ Geoff Hall, 'Sentencing (II): Matters of Aggravation and Mitigation' [1985] NZLJ 184, 184, 188.

³⁴⁰ *High Tech Ball and Chain*, The Dominion, 6 February 1999; *Safety First*, The Press, 20 October 2000, stating: 'The idea that dangerous offenders might be sentenced to stay at home would be offensive. Yet for those at the lighter end of the offending scale the scheme makes good sense'.

³⁴¹ Section 110 *Sentencing Act 2002*.

take place through a community-based sentence'.³⁴² Given that intimate partner violence which is subject to criminal justice intervention is generally of a serious nature, this sentencing option may be inappropriate. Monitoring of this sentencing option in domestic violence cases is therefore necessary.

XVI CONCLUSION

Contemporary legal responses to domestic violence lack awareness of structural patterns of offending, the relationship between various categories of abuse, and the interrelationship between domestic assaults and domestic homicide. The extensive taxpayer resources committed to domestic violence education campaigns may amount to little more than window-dressing if courts continue to operate without reference to national domestic violence policy and red flags for dangerousness/lethality.

Valerie Bryson points out that the traditional model of heterosexual relations in which men are dominant and women are submissive has little meaning in contemporary society. 'Some men have reacted to these changes with a "backlash" against feminism and a reassertion of misogyny and violence.' Others have changed in positive ways, 'with the result that a "diversity of masculinities" jostle to present themselves as the acceptable face of the new male order'.³⁴³ In this social context, the legal system plays a pivotal role in reflecting to society an egalitarian, non-violent model of heterosexual relationships. However, the tenacity of old legal norms to withstand decades of law reform and feminist activity illustrates the importance of Safety Audits³⁴⁴ and systematic monitoring to ensure that the legal system is held accountable for its responses to domestic violence. As demonstrated by the present research, unambiguous condemnation of habitual batterers and offenders who perpetrate separation violence would not only save the lives of battered women, but also those of their male abusers.³⁴⁵

³⁴² Hall and O'Driscoll, above n 335, 7.

³⁴³ Valerie Bryson, *Feminist Debates: Issues of Theory and Political Practice* (1999) 209.

³⁴⁴ See, eg, Ellen Pence and Dorothy Smith, 'The Safety and Accountability Audit' 5, prepared for the National Institute of Justice and Office on Violence Against Women 26 October 2004. www.ojp.usdoj.gov/nij/wawprog/safety_audit_background.pdf at 6 December 2006.

³⁴⁵ See, eg, *Case Study S/01/1/F* discussed above, at p 132. See also, Aileen McColgan, 'In Defence of Battered Women who Kill' (1993) 13 OJLS 508, 529.

CHAPTER TWELVE: RECOMMENDATIONS

! RECOMMENDATION(S)

1. The proposed government campaign to change attitudes and behaviour¹ should aim to achieve public and professional consensus on the principles of domestic violence intervention, including:

(a) domestic violence is both an issue of women's individual and women's collective rights;

(b) the state has a responsibility to improve women and children's ability to safely exit abusive relationships. Safe exit requires state resourcing of financial support; safe, decent, long and short term housing for battered women; supervised access centres;² court advocacy; and a fully resourced domestic violence witness programme;

(c) Victim safety and batterer accountability as the twin pillars of principled domestic violence intervention should not be undermined by a competing focus on protecting the violent relationship.

(d) The Domestic Violence Advisory Panel (see below) to develop national sentencing guidelines for domestic violence offences and consult with the Sentencing Council (when established) on this issue.

! RECOMMENDATION(S)

2. A risk assessment tool based on a thorough understanding of domestic violence fatality reviews, domestic homicide research and research on sub-lethal domestic violence offending should be utilised by all agencies in the criminal justice sector including police, the probation service, lawyers, judges, and court staff.

To ensure consistency, this instrument should also structure and inform mental health and other state and community agency responses in domestic violence cases.

3. Risk assessment should not be carried out in close proximity to the alleged perpetrator.

¹ Taskforce for Action on Violence within Families, *The First Report* (2006) 16.

² See, eg, Alison Chetwin, Trish Knaggs and Patricia Te Wairere Ahiahi Young, *The Domestic Violence Legislation and Child Access in New Zealand* (1999) xii.

! RECOMMENDATION

4. Domestic violence victims to be provided with court/witness advocacy by trained domestic violence advocates. Support should include risk assessment, safety planning, assistance with support needs, access to witness protection, and pro-active follow up.

! RECOMMENDATION

5. The system of independent monitoring of agency and practitioner interventions implemented by HAIP should be reinstated and made standard national practice.

! RECOMMENDATION(S)

6. Domestic violence intervention should be offender-oriented. Victims should not be responsible for arrest/prosecution of offenders. Responses should prioritise victim safety and be highly proactive in implementing a process that brings the offender into the criminal justice system.

7. Police should be trained in the use of enhanced evidence gathering techniques and funding made available for purchase of the equipment necessary to conduct high quality investigations.

8. Risk assessment and safety planning protocols to be built into police policy.

9. Police must conduct separate interviews with alleged perpetrators and victims at domestic violence scenes.

10. Victims of domestic violence must be eligible for witness protection programmes when it becomes apparent that their lives may be in danger.

11. Police should receive training on the dynamics of violent relationships, and the heightened risk to women and children at, or following, separation.

12. Police training should include criteria for identifying the primary aggressor.

13. Police practice and interventions should be externally monitored.

! RECOMMENDATION(S)

14. A person charged with an offence in relation to a person with whom that person is, or has been, in a domestic relationship,³ who has been convicted within the previous five years of assaulting or threatening the same complainant, must not be released on bail by a member of the police during the 24 hours immediately following the arrest.

³ See, s 4 *Domestic Violence Act 1995*.

! RECOMMENDATION

15. The creation of new offences of:
- (a) Aggravated Breach of a Protection Order;
 - (b) Aggravated Assault on a Female or Child;
 - (c) Terroristic Threats.

(As recommended in the Victims Task Force research 1992, the definition of Terroristic threats should follow the wording of the *Minnesota Domestic Abuse Act*)⁴

! RECOMMENDATION

16. Amend the *Sentencing Act 2002* to prohibit the practice of crediting domestic violence offenders on the basis of absence of prior domestic violence convictions.

! RECOMMENDATION(S)

17. (a) Amend the *Evidence Act 2006* to provide that persons in a domestic relationship with the defendant may be excused by the Judge from giving evidence for the prosecution in that proceeding where the giving of that evidence would endanger the safety of the witness.
- (b) Any person excused from giving evidence under (a) above, must be treated as unavailable as a witness.⁵

! RECOMMENDATION(S)

18. When domestic violence offenders are ordered to attend stopping violence treatment, victims must be provided with accurate information about the limitations of treatment and the optimum conditions for success. This information should include citations to research literature.

! RECOMMENDATION(S)

19. Probation personnel should receive training on established risk markers for dangerousness/lethality. An appropriate risk assessment tool should be adopted for use when taking action on domestic violence cases.

⁴ Ruth Busch, Neville Robertson and Hilary Lapsley, *Domestic Violence and the Justice System: A Study of Breaches of Protection Orders* (1992) 271.

⁵ The New Zealand Law Commission, *Evidence*, Report 55 Vol 1 (1999) [344], notes that battered women should not be required to argue in front of the abuser that giving evidence would expose her to further violence. Such prohibition on questioning the woman in the presence of the abuser is equally applicable to completion by the victim of risk assessment protocols.

! RECOMMENDATION(S)

20. A person imprisoned for an offence in relation to a person with whom that person is, or has been, in a domestic relationship,⁶ who has been convicted within the previous five years of an offence against the same victim should not be paroled to the victim's place of residence.

! RECOMMENDATION(S)

21. Training for Child, Youth and Family staff who work with victims, offenders and their families should incorporate identification of red flags for dangerousness/lethality, including separation, and how to respond. Training should also emphasise that the safety of the abused parent is an integral component of the welfare and best interests of the child.

! RECOMMENDATION(S)

22. Where there is evidence of domestic violence, judges must craft access arrangements so as to protect the child and the abused adult from further harm. To assist police to determine what behaviour constitutes a breach of the order, contact arrangements must be unambiguous and leave no room for negotiation.

RECOMMENDATION(S)

23. Women's Refuge should receive top priority funding commensurate with its double role of crime prevention and crisis intervention.

! RECOMMENDATION(S)

24. Domestic violence fatality reviews should be placed on a statutory footing;

25. The definition of a domestic violence fatality should be based on control, and not on degrees of relationship between victim and offender;

26. Review panels should include an advocate from each Women's Refuge in the area in which the fatality occurred, with a minimum of three Refuge advocates on the Panel;

27. Reviews should be undertaken upon receipt of a written request by family members or persons closely associated with the deceased; or persons with particular knowledge of the victim and/or the circumstances of the fatality;

⁶ See, s 4 *Domestic Violence Act 1995*.

28. Deaths for which no finding can be made whether accidentally or deliberately inflicted should be investigated to determine any domestic violence connection.

29. Deaths following an assault in relation to which only assault charges are laid require further investigation and reporting.

30. Protocols should be established to assist Coroners to ascertain any domestic violence connection to the deceased.

RECOMMENDATION(S)

31. The government must take immediate action to implement the CEDAW recommendation that it devise a structure for systematic collection of data on all forms of violence against women.

32. Collection of data on intimate partner homicides should be on a detailed case-based analysis to provide information on trends and patterns of offending. Such mechanism for collecting information is feasible given the relatively small number of cases involved. This information should be accessible to the public.

! RECOMMENDATION(S)

33. (a) A separate offence of separation assault with sanctions commensurate with the gravity of this offending;

(b) A separate offence of aggravated separation assault where:

i) the offence takes place in breach of the victim's protection order; or

ii) in the context of home invasion; or

iii) where the defendant has previously been convicted of separation assault aimed at the present victim.

! RECOMMENDATION(S)

34. Amend the *Sentencing Act 2002* to provide that when sentencing an offender for murder, the court must make an order imposing a minimum period of imprisonment where the killing occurs in the context of the victim's decision to end a domestic relationship with the offender.

! RECOMMENDATION(S)

35. Creation of an 'estrangement murder' offence where the killing occurs in the context of separation; and

- (a) involves home invasion; or
 - (b) breach of the victim's protection order;
- and;

the offender means to cause serious injury, whether or not he means death to ensue, or knows or does not know that death is likely to ensue.

! RECOMMENDATION(S)

36. (a) Domestic violence fatality reviews should investigate homicides of elderly women designated as 'mercy killings' or 'suicide pacts'.

(b) The development of legal and social policy on euthanasia in the context of an intimate relationship must be informed by the gender implications of these killings.

(c) Further research should be undertaken on charged and uncharged incidents of so-called mercy killings and suicide pacts involving intimate partners.

(d) The Domestic Violence Advisory Panel to develop policy and provide guidance to Parliament and the Sentencing Council on this issue.

! RECOMMENDATION(S)

37. A domestic homicide statute creating an offence of murder where the killing occurs in the context of a violent relationship, which has led the victim to fear serious bodily injury, and either;

(a) the homicide occurred in circumstances manifesting an extreme indifference to human life, or;

(b) in the course of committing the final act of domestic abuse, the offender intended to cause the victim serious bodily harm.

! RECOMMENDATION(S)

38. Amend the *Sentencing Act 2002* to provide that:

(a) when sentencing an offender who has been convicted of murder, the court must make an order imposing a minimum period of imprisonment where the killing occurs in breach of the victim's protection order;

(b) when sentencing offenders for sub-lethal domestic assaults, the fact the assault occurred in breach of the victim's protection order is an aggravating feature of the offending.

! RECOMMENDATION

39. In any criminal case in which the defendant is accused of a crime of domestic violence, evidence of the defendant's commission of another act of domestic violence against the same or another victim shall be deemed admissible as relevant to propensity.

Domestic violence includes sexual and physical assault, threats of sexual or physical assault, stalking, property damage and other harassment committed upon any of the following persons, their family members, or their property:

- (a) a spouse or former spouse;
- (b) a cohabitant or former cohabitant;
- (c) a person with whom the defendant is having or has had a dating or engagement relationship, irrespective of that person's age, sex, or sexual orientation;
- (d) a person with whom the defendant has engaged in sexually intimate activity;
- (e) a person with whom the defendant has a child in common.

To ensure the probative value of the propensity evidence, admissibility should be limited to acts occurring within a period of ten years' prior to the current alleged offence unless the court determines, in the interests of justice, that the probative value of the evidence outweighs its prejudicial effect.⁷

! RECOMMENDATION(S)

40. (a) In any proceeding before a Visiting Justice in respect of an alleged disciplinary offence which relates to breach of a protection order or other misconduct directed by a prison inmate at a person against whom the inmate has been charged with, or convicted of, a domestic violence offence, the complainant shall be excused from giving evidence at that proceeding.

(b) Any person excused from giving evidence under (a) above, must be treated as unavailable as a witness.

⁷ See, eg, Lisa Sanctis, 'Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence' (1996) 8 Yale J.L. & Feminism 359, 401-402; Myrna Raeder, 'The Admissibility of Prior Acts of Domestic Violence: *Simpson* and Beyond' (1996) 69 S.Cal.L.Rev. 1463, 1505; Linelle Letendre, 'Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence' (2000) 75 Wash.L.Rev. 973, 997.

! RECOMMENDATION

41. The Sentencing Council (when established) should consult with, and take advice from, a specialist Domestic Violence Advisory Panel on sentencing policy and guidelines in domestic violence cases.

! RECOMMENDATION(S)

42. Establishment of a Domestic Violence Advisory Panel which will:

- (a) develop consistent, coherent, domestic violence intervention policy, monitor trends and institute a data base to track legal responses to domestic violence;
- (b) provide guidance to Parliament, the Law Commission and the Sentencing Council;
- (c) formulate recommendations following fatality reviews and ensure lessons learned from lethal assaults feed back into and inform responses to sub-lethal domestic violence;
- (d) provide advice where required to the community-based Court Watch programme (see below);
- (e) provide public and judicial education on sentencing in domestic violence cases in consultation with the Sentencing Council;
- (f) provide judicial and public education on legal responses to domestic violence.
- (g) promote domestic violence research, including research on the interrelationship between domestic violence and suicide.

! RECOMMENDATION(S)

43. The proposed domestic violence education campaign⁸ should include resources to educate professionals and the public about red flag situations for dangerousness and potential lethality and the interrelationship between domestic violence and domestic homicide

44. This knowledge should be incorporated in school curricula.

! RECOMMENDATION(S)

45. Training on domestic violence and gender bias in the law should be incorporated in the law school curriculum.

⁸ Taskforce for Action on Violence within Families, above n 1, 16.

! RECOMMENDATION(S)

46. Mandatory training of judges and legal practitioners dealing with domestic violence should aim to provide:
- (a) better understanding of the dynamics of domestic violence and
 - (b) its interrelationship with domestic homicide;
 - (c) training on assessing danger and lethality;
 - (d) understanding the effects of domestic violence on children; the correlation between child and partner abuse; and the need to provide protection against violence to the custodial parent.

! RECOMMENDATION(S)

47. The establishment in selected areas in New Zealand of Court Watch Projects to monitor and report on criminal justice responses to domestic violence.

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Parole Act 2002

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Sentencing Act 2002

APPENDIX I

HOMICIDES: OFFENDERS AND VICTIMS

APPENDIX II: METHOD OF KILLING AND LEGAL OUTCOME

METHOD OF KILLING BY MALES IN SPOUSAL* HOMICIDE AND LEGAL OUTCOME 1995-2002, NEW ZEALAND

<u>Method</u>	<u>Murder</u>	<u>M/Slaughter</u>	<u>Homicide Lesser Offence</u>	<u>Insanity</u>	<u>Sub Total</u>	<u>% Murder</u>	<u>Acquitted</u>	<u>Suspect Committed Suicide</u>	<u>Outcome Unknown</u>	<u>Prosec. Stayed</u>	<u>Grand Total</u>
Weapons											
Sharp ins.	18	2		4	24	75%		6			30
Blunt ins.	4	1			5	80%				1	6
Shooting	6				6	100%		4			10
Sub total	28	3		4	35	80%		10		1	46
Body Force											
Hit/Kicking	4	9			13	31%			2		15
Strangulation	5				5	100%		2			7
Drowning		1			1	0%					1
Sub total	9	10			19	47%		2	2		23
Other methods											
Suffocation		1			1	0%				1	2
Burning	3	1			4	75%		2			6
Poison/drugs	1	2	1		4	25%					4
Motor vehicle	2	1	1		4	50%					4
Unknown	1				1						1
Sub total	7	5	2		14	50%		2		1	17
Grand Total	44	18	2	4	68	65%		14	2	2	86

* includes heterosexual spouses, ex-spouses, partners and ex-partners

METHOD OF KILLING BY FEMALES IN SPOUSAL* HOMICIDE AND LEGAL OUTCOME 1995-2002, NEW ZEALAND

<u>Method</u>	<u>Murder</u>	<u>M/Slaughter</u>	<u>Homicide Lesser Offence</u>	<u>Insanity</u> -	<u>Sub Total</u>	<u>% Murder</u>	<u>Acquitted</u>	<u>Suspect Committed Suicide</u>	<u>Outcome Unknown</u>	<u>Prosec. Stayed</u>	<u>Grand Total</u>
<u>Weapons</u>											
Sharp ins.	1	3			4	25%	4				8
Blunt ins.	n/a	n/a	n/a	n/a	0						0
Shooting			1		1	0%					1
<u>Sub total</u>	1	3	1		5	20%	4				9
<u>Body Force</u>											
Hit/kicking	n/a	n/a	n/a	n/a	0						0
Strangulation	n/a	n/a	n/a	n/a	0						0
Drowning		1				0%					1
<u>Sub total</u>		1			1	0%					1
<u>Other methods</u>											
Suffocation	1				1	100%					1
Burning	n/a	n/a	n/a	n/a	0						0
Poison/drugs	n/a	n/a	n/a	n/a	0						0
Motor Vehicle		1			1	0%					1
Unknown	n/a	n/a	n/a	n/a	0						0
<u>Sub total</u>	1	1			2	50%					2
<u>Grand Total</u>	2	5	1		8	25%	4				12

* includes heterosexual spouses, ex-spouses, partners and ex-partners

APPENDIX III

CASE STUDIES: SUB-LETHAL ASSAULTS

APPENDIX IV
RISK ASSESSMENT INSTRUMENTS

APPENDIX IV

ONTARIO DOMESTIC VIOLENCE DEATH REVIEW COMMITTEE

APPENDIX A
RISK MARKERS*Primary risk markers*

Prior history of domestic violence
Pending or actual separation/estrangement
Escalation of violence
Threats to kill/threats with a weapon
Threats of suicide or attempted suicide
Obsessive behavior, including stalking
Access to or possession of firearms
Excessive alcohol or drug use

Other common risk markers

Depression or other acute mental health or psychological problems;
Common-law unions;
Isolation of victim;
Child custody and access issues;
New partner in victim's life;
Perpetrator's unemployment;
Presence of stepchildren in the home
Forced sexual acts

Less commonly cited, but potential risk markers

Hostage-taking

Destruction of victim's property

Violence against family pets

Extreme minimization or denial of spousal assault history

Attempts to isolate the victim

Controls most or all of victim's daily activities

Assaulted victim while pregnant

Chokes victim

Youth of couple

Perpetrator witnessed domestic violence as child

APPENDIX IV

MPS Risk Assessment Model for Domestic Violence Cases

Guidance

**Domestic violence is a serious crime.
Do not be short-sighted. Re-focus. Use SPECSS.**

Risk Assessment

Separation: victims trying to leave relationships are frequently murdered. Many incidents happen as a result of child contact or disputes over custody.

Pregnancy / new birth: domestic violence can start or get worse in pregnancy.

Escalation: There is a very real need to identify repeat victimisation and escalation. Victims of domestic violence are more likely to become repeat victims than any other type of crime: as violence is repeated it gets more serious.

Cultural Issues / sensitivity: needs may differ with ethnic minority victims. This might be in terms of issues of perceived racism, language, culture, insecure immigration status and accessing relevant support services. Domestic violence may take on different forms within specific communities. For example women and girls may even be killed for their actual or perceived immoral behaviour in some communities. This is sometimes termed an 'honour killing', whereby the family/community try to restore their honour and respect by killing the woman or girl concerned. Immoral behaviour may take the form of perceived or actual infidelity, refusing to submit to marriage, separating, flirting with men or 'allowing herself to be raped'.

Stalking: Persistent and consistent calling, texting, sending letters, following, etc. Stalkers are more likely to be violent if they have had an intimate relationship with the victim. Furthermore, stalking and physical assault, are significantly associated with murder and attempted murder.

Sexual Assault: Analysis of domestic sexual assaults for the first four months of 2001 in London show that those who are sexually assaulted are subjected to more serious injury. Those who report a domestic sexual assault tend to have a history of domestic abuse whether or not it has been reported previously. ONE IN TWELVE of all reported domestic sexual offenders were considered to be very high risk and potentially dangerous offenders.

.....

Risk Management

A crucial part to risk assessment is risk management. Officers should refer to the Intervention Options document and in doing so to adhere to the RARA model when compiling safety plans for victims:

Remove the risk: By arresting the suspect and obtaining a remand in custody.

Avoid the risk: By re-housing victim / significant witnesses or placement in refuge / shelter in location unknown to suspect.

Reduce the risk: By joint intervention / victim safety planning, target hardening and use of protective legislation.

Accept the risk: By continued reference to the RA Model, continual multi-agency intervention planning, support and consent of the victim and offender targeting within Pro-active Assessment and Tasking Pro forma (PATP) and Multi-agency Public Protection Panel (MAPPP) format.

MPS Risk Assessment Model for Domestic Violence Cases

Notes for Guidance

A crucial part to risk assessment is risk management. Officers should refer to the Intervention Options document and in doing so to adhere to the RARA model when compiling safety plans for victims:

- Remove the risk:** By arresting the suspect and obtaining a remand in custody.
- Avoid the risk:** By re-housing victim / significant witnesses or placement in refuge / shelter in location unknown to suspect.
- Reduce the risk:** By joint intervention / victim safety planning, target hardening and use of protective legislation.
- Accept the risk:** By continued reference to the Risk Assessment Model, continual multi-agency intervention planning, support and consent of the victim and offender targeting within Pro-active Assessment and Tasking pro forma (PATP) and Multi-agency Public Protection Panel (MAPPP) format.

Definitions

Based on the OASys (Offender Assessment System developed by the Prison and Probation Services, currently in pilot) definitions of what constitutes standard, medium, high risk:

Standard	no significant current indicators of risk of harm.
Medium	there are identifiable indicators of risk of harm. The offender has the potential to cause harm but is unlikely to do so unless there is a change in circumstances, for example, failure to take medication, loss of accommodation, relationship breakdown, drug or alcohol misuse.
High	there are identifiable indicators of risk of serious harm. The potential event could happen at any time and the impact would be serious.

Factor Definitions and Rationale

This is based on research and analysis conducted by the Understanding and Responding to Hate Crime Team, 2001 and on SARA (Spousal Assault Risk Assessment) developed by R. Kropp.

High Risk Factors

1 Separation (child contact)

Research and analysis shows that victims who try to terminate relationships with men are frequent homicide victims. Notions of *'if I can't have her, then no-one can'* are recurring features of such cases and the killer frequently intends to kill themselves too (Wilson and Daly, 1993; URHC Murder Review Analysis, 2002).

Threats that begin with *"if you were to ever leave me..."* must be taken seriously. Victims who stay with the abuser because they are afraid to leave may correctly anticipate that leaving would elevate or spread the risk of lethal assault. The data on time-since-separation further suggest that women are particularly at risk within the first two months (Wilson and Daly, 1993; URHC Murder Review Analysis, 2002).

Further, many incidents happen as a result of discussions and issues around child contact or disputes over custody (URHC 2001). Children should also be considered in the assessment process.

2. Pregnancy / new birth

Pregnancy is often a time when abuse begins or intensifies (Mezey, 1997). About 30% of domestic violence starts in pregnancy. Gelles (1988) found that pregnant women had a

MPS Risk Assessment Model for Domestic Violence Cases

greater risk of both minor and severe violence than non-pregnant women. Domestic violence is associated with increases in rates of miscarriage, low birth weight, premature birth, foetal injury and foetal death (Mezey 1997).

Victims who are assaulted whilst pregnant or when they have just given birth should be considered as high risk. This is in terms of future harm to them and to the child. The Violence Research Programme also found that 2.5% of pregnant women (892 women took part in the research) had experienced an assault during the current pregnancy and the lifetime prevalence of assault was 13.4%. Further, women were ten times more likely to experience domestic violence in the current pregnancy if they had also experienced domestic violence during the last 12 months (Mezey, 2002).

Pregnancy was seen as an opportune time to ask women about domestic violence as some women commented that it made them think seriously about their future and how their children might be affected in the long-term (Mezey & Bewley 2000). Women say they would not voluntarily disclose domestic violence to a health professional without routine screening.

3. Escalation: The attacks becoming worse and happening more often

Previous domestic violence is the most effective indicator that further domestic violence will occur. 35% of households have a second incident within five weeks of the first (Walby & Myhill, 2000).

There is a very real need to identify repeat victimisation and escalation. Victims of domestic violence are more likely to become repeat victims than any other type of crime. Research indicates that general violence tends to escalate as it is repeated. Analysis indicates that the time between incidents seems to decrease as the number of contacts escalate. (URHC 2002). Men who have demonstrated violent behaviour in either past or current intimate relationships are at risk for future violence (Sonkin, 1987).

4. Cultural issues and sensitivity

There is a need for cultural awareness and sensitivity when dealing with ethnic minority victims. Organisations often make assumptions about victims from minority ethnic communities based on their lack of understanding around cultural issues. This can lead to an unwillingness to intervene in cases of domestic violence. Police must increase the trust and confidence in policing amongst minority ethnic victims. There may be an issue of perceived racism, which is preventing the victim from seeking help. Victim's needs may also differ and centre around language, cultural, immigration and/or structural issues. Police should be culturally refined when dealing with victims, but racially and ethnically blind when dealing with perpetrators.

*For example*², if an Asian victim leaves her partner then he, friends, family and the community at large may exclude her or force her to return home. This means she may face being ostracised, or in extreme cases, tracked by bounty hunters or family members via networks in the widespread yet tight-knit Asian Community. Issues of shame and honour, the total acceptance of patriarchy and rigid gender roles can combine lethally to *raise unique risks and barriers* for Asian women. In 'honour cultures', sexual assault and failed marriages are seen to dishonour not just the woman or girl but the family as well (Hayward 2000).

~~Some women even today would rather take their own lives than live with the shame, stigma and pain of their past (Women against Violence, 1999). Hence, in some cases there are high costs involved in reporting domestic violence in some Asian homes. Threats that she will be killed or that she will never see the children again are very real and persistent. The chances that they will be carried out are high, either in this country or outside it (URHC 2002; Huisman, 1996).~~

² This is solely an example to depict the context and meaning of cultural issues. However, it is not unique to the Asian community but can also apply to many communities, for example, Turkish, Kurdish, African, Middle Eastern, Afghani and Eastern Communities.

MPS Risk Assessment Model for Domestic Violence Cases

Further questions should be asked of victims who are particularly vulnerable or socially isolated in terms of:

- ❖ Disability (physical or mental)
- ❖ Difficulties speaking/reading English
- ❖ Isolated from friends and/or family
- ❖ Living in an isolated community (rural, ethnic, traveller, gay/lesbian/transgender for example)
- ❖ Does not work outside the home
- ❖ Insecure immigration status

Stalking

Most female victims know their stalker. Stalking commonly occurs after the relationship but can also occur before the relationship ends (McFarlane, Campbell, Wilt, Sachs, Ulrich & Xu, 1999). Stalkers are more likely to be violent if they have had an intimate relationship with the victim. Furthermore, stalking is revealed to be related to lethal and near lethal violence against women and, coupled with physical assault, is significantly associated with murder and attempted murder. The information available suggests that stalkers are worthy of attention because they are a potentially very dangerous group. Stalking behaviour and obsessive thinking are highly related behaviours. Stalking must be considered a high risk factor for both femicide and attempt femicide, and abused women should be advised accordingly (Campbell et al. 1999; Sully Cold Case Murder Reviews, 2001).

6. Sexual assault

The analysis of domestic sexual assaults for the first four months of 2001 (January to April) demonstrates that those who are sexually assaulted are subjected to more serious injury. Further, those who report a domestic sexual assault tend to have a history of domestic abuse whether or not it has been reported previously. ONE IN TWELVE of all reported domestic sexual offenders were considered to be very high risk and potentially dangerous offenders (URHC 2002). Further, Browne (1987) reported that over 75% of the abused women who killed their abuser were raped by him, while only 59% of the non-homicidal abused women were similarly sexually assaulted.

Men who have sexually assaulted their partners and / or have demonstrated significant sexual jealousy are more at risk for violent recidivism (Stuart and Campbell 1989).

Other factors:

1. Child abuse

There is compelling evidence that both domestic violence and child abuse can occur in the same family. Child abuse can therefore act as an indicator of domestic violence in the family and vice versa. Young children are adversely affected by witnessing violence between adults in their homes and many develop behavioural problems.

Adult partners who are violent toward each other are also at increased risk of abusing their children. Behavioural problems in children in turn predict later partner violence. Hence a cycle of violence can occur whereby aggressive behaviour becomes highly stable across the life course of individuals, and is transmitted from generation to generation within families (Moffit & Caspi, 1998).

2. Past physical assault of intimate partner

Reports of physical assault, actual or attempted, against past or current partners. Men who have demonstrated assaultive behaviour in either past or current intimate relationships are at risk for future violence (Sonkin, 1987).

3. Past use of weapons and / or credible threats of death

Use of weapons or threats which victim believes to be credible. Spousal assaulters who have used a weapon on intimate partners or others, or have threatened to use a weapon, are at increased risk of violent recidivism (Sonkin, Martin & Walker, 1985).

MPS Risk Assessment Model for Domestic Violence Cases

4. Extreme minimisation or denial of spousal assault history

Perpetrator denies acts of violence, blames the victim and / or trivialises it. More serious and persistent offenders engage in minimisation and / or denial of their criminal and antisocial behaviour.

5. Past assault of stranger, acquaintances, family, and/or police officers

Actual or attempted physical / sexual assault, or any use of weapon.

Offenders with a history of violence are at increased risk of spousal violence, even if the past violence was not directed towards intimate partners or family members (Stuart & Campbell, 1989): Research has shown that generally violent men engage in more frequent and more severe spousal violence than other wife assaulters.

6. Animal abuse

Experts increasingly recognise a disturbing correlation between cruelty to animals and domestic violence (Cohen and Kweller, 2000 <http://www.pcrm.org/issues/Commentary/commentary0010.html>). For families suffering domestic violence or abuse, the use or threat of abuse against companion animals is often used for leverage by the controlling/violent member of the family to keep others in line or silent. The violence may be in the form of spousal abuse, child abuse (both physical and sexual), or elder abuse. It is estimated that 88% of pets living in households with domestic abuse are either abused or killed. Of all the women who enter shelters to escape abuse, 57% have had a pet killed by their abuser (http://www.healthypet.com/Library/animal_bond-14.html).

Common types of cruelty include torture, shooting, stabbing, drowning, burning, and bone-breaking. The main reason for animal abuse within a domestic relationship is control. Threatening, harming, and killing companion animals can powerfully demonstrate someone's power over a partner or child (http://www.vachss.com/guest_dispatches/ascione_1.html).

7. Recent employment problems

Currently unemployed with unstable work history within past year. Unemployment is associated with an increased risk for general recidivism. Low income and financial stresses are also a risk factor for involvement in spousal assault (Campbell, 1986). A sudden change in employment status, such as being fired / made redundant, may be associated with increased risk for violence (McNeil, 1987).

8. Recent substance abuse / dependence

Serious problems in the past year with illicit drugs, alcohol or prescription drugs that leads to impairment in social functioning (health, relationships etc.). Substance abuse is related to criminality and recidivism in general. Recent substance abuse is associated with risk for violent recidivism among wife assaults (Stuart & Campbell, 1989).

9. Issues of control / unpredictability

Men who believe that men 'should be in charge' are more likely to use violence against their partner. Complete control of the woman's activities and extreme jealousy have both been associated with severe battering (Richards, unpublished 2001; Campbell, 1986).

Both sub-lethal assaults and threats to kill can be interpreted as coercive tactics to terrorise wives and thus keep them under their husband's control (Wilson and Daly, 1993). Violence against wives functions to deter wives from pursuing alternative relationships or opportunities that are not in the interests of the husband (Wilson and Daly, 1993). A credible threat of violent death can very effectively control people. However, evidence suggests that such threats to estranged wives by husbands are more often than not sincere.

10. Recent suicidal or homicidal ideation / intent

Suicidal is evidenced by history of suicide attempts, self-harm or thoughts about it. Homicidal is evidenced by the same. There is a link between dangerousness to self and dangerousness to others; that is the two factors co-exist more often than expected on the basis of chance (Menzies, Webster & Sepejak, 1985).

MPS Risk Assessment Model for Domestic Violence Cases

"Men perpetrate familicidal massacres, killing spouse and children together; women do not. Men commonly hunt down and kill wives who have left them; women hardly ever behave similarly. Men kill wives as part of planned murder-suicides; analogous acts by women are almost unheard of. Men kill in response to revelations of infidelity; women almost never respond similarly" (Dobash et al. 1992).

The homicide victims in such cases are almost always female. The person who usually kills, cannot let the victim go. Homicide-suicide rarely involves strangers. The most common factor in homicide-suicide is that the male needs to control the relationship. If a wife or girlfriend tries to leave, the man will often threaten to kill himself. This is a manipulative move and one that needs to be taken seriously. He should be assessed not just for suicide but possibly homicide-suicide.

11. Background of violence / criminal career

Partner violence does not appear to be a 'special problem' arising from the dynamics of an intimate relationship between two adults. Rather, research shows that it tends to be part of a perpetrator's pattern of repeated aggression toward other persons persisting over the life course, with a series of victims from siblings to schoolmates to dating partners to strangers to spouse (Richards, unpublished 2001; Fagan, Stewart & Hansen, 1983).

When histories of violent people are examined, a consistency begins to emerge in their approaches to interpersonal relationships (Richards, unpublished 2001; Toch 1969). They learn, probably in childhood, that violence works for them. They used violent responses effectively to obtain positive and avoid negative reinforcement. They got what they wanted or avoided unpleasant situations by being violent and this behaviour continues over the life course.

12. Violation of contact & non-contact orders

Arrests for violating the contact or non-contact provisions of a civil or criminal court order. Previous violations of contact or non-contact orders may be associated with an increased risk of future violence.

APPENDIX IV

**SANTA CLARA COUNTY PROBATION DEPARTMENT
Domestic Violence Lethality Risk Assessment**

Name:

Docket #:

PFN #:

Domestic Violence is a serious offense which has great impact on family members and society. The potential for endangering life exists whenever violence is used to control another. Although the existence of certain risk factors in greater number and intensity, are suggestive of potential for life threatening violence, their absence or presence cannot be relied upon as an accurate predictor of lethality. However, any recommendation made to the Court, or actions taken on a case, must consider the existence of risk factors, and the potential for continued violence and a lethal outcome.

Pursuant to Penal Code Section 1203.097, the Probation Department has assessed the defendant utilizing risk factors which, when identified as present are known to increase the potential for dangerousness and/or lethality.

After review of the following criteria, and information available at this time, the Probation Officer determines this defendant presents _____ out of 21 known risk factors for dangerousness, further violence or lethality.

Date:

Probation Officer Signature:

Risk Factors	Information Source						
	Defendant	Victim	Probation File	Criminal History	Police Reports	Collateral Agency	Other (Specify)
Age at First Offense ____ Age at Current Offense ____							
1. Extreme focus on victim/partner A. Ownership B. Centrality C. Dependence							
2. Violence at threat of separation							
3. History of Violence against A. Victim/partner B. Children C. Other(s)							
4. Recent escalation of violence							
5. Suicide Risk A. Threats B. Ideation/Plan							
6. Homicide Risk A. Threats B. Ideation/Plan							

Risk Factors	Information Source						
	Defendant	Victim	Probation File	Criminal History	Police Reports	Collateral Agency	Other (Specify)
7. Weapons A. Use B. Possession C. Access							
8. History of drug/alcohol use							
9. Escalation of Risk Taking A. Violating Restraining Orders B. Disregard or Violation of Probation or other court orders							
10. History of Police Calls							
11. Extreme Emotional Response(s) A. Depression B. Rage C. Emotional/Behavioral Instability							
12. History of Sexual Abuse							
13. History of prohibiting victim/partner movement A. Hostage taking B. False Imprisonment							
14. Access to victim/partner A. Shares residence B. Knows whereabouts							
15. Criminal History A. Violence B. Alcohol/Drugs C. 2 or more convictions							
16. Victim/Witness of violence as a child							
17. Denial of extreme minimization							
18. Attitude which condones/supports violence/spousal abuse							
19. History of threats/ acts of pet abuse							
20. History of trauma/ blows to head, stroke, Heart attack or nerve disease							
21. History of mental illness, anti-psychotic medication or psychiatric hospitalization							

APPENDIX V
PERSONALISED SAFETY PLAN

Extract: Heather Cochran, 'Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence' (1997) 7 *Texas Journal of Women and the Law* 89.

PERSONALIZED SAFETY PLAN¹⁸⁸

The following steps represent my plan for increasing my safety and preparing in advance for the possibility for further violence. Although I do not have control over my partner's violence, I do have a choice about how to respond to him/her and how to best get myself and my children to safety.

Step 1: Safety during a violent incident. Women cannot always avoid violent incidents. In order to increase safety, battered women may use a variety of strategies.

I can use some or all of the following strategies:

A. If I decide to leave, I will _____.
(Practice how to get out safely. What doors, windows, elevators, stairwells, or fire escapes would I use?)

B. I can keep my purse and car keys ready and put them _____ (place) in order to leave quickly.

C. I can tell _____ about the violence and request they call the police if they hear suspicious noises coming from my house.

D. I can teach my children how to use the telephone to contact the police and the fire department. (Be careful about placing responsibility on children.)

E. I will use _____ as my code word with my children or my friends so they can call for help.

F. If I have to leave my home, I will go _____.
(Decide this even if I do not think there will be a next time.) If I cannot go to the location above, then I can go to _____
or _____.

G. I can also teach some of these strategies to some/all of my children.

H. When I expect we are going to have an argument, I will try to move to a space that has fewer risks, such as _____.
(Try to avoid arguments in the bathroom, garage, kitchens, near weapons, or in rooms without access to an outside door.)

I. I will use my judgment and intuition. If the situation is very serious, I can give my partner what he/she wants to calm him/her down. I have to protect myself until I/we are out of danger.

188. Adapted from *Personalized Safety Plan* (City of Austin, Tex.), 1997.

Step 2: Safety when preparing to leave. Battered women frequently leave the residence they share with the battering partner. Leaving must be done with a careful plan in order to increase safety. Batterers often strike back when they believe that a battered woman is leaving a relationship.

I can use some or all of the following strategies:

A. I will leave money and an extra set of keys with _____ so I can leave quickly.

B. I will keep copies of important documents or keys at _____.

C. To increase my independence, I will open an individual savings account by _____ (date), or I will find a safe place to hide cash.

D. Other things I can do to increase my independence include:

E. The domestic violence program's hotline number is _____. I can seek shelter by calling this hotline. I will call ahead of time to find out the procedure for admission to the shelter.

F. I can keep change for phone calls on me at all times. I understand that if I use my telephone calling card after I leave, the following month the telephone bill will tell my batterer those numbers that I called. To keep my telephone communications confidential, I must either use coins or get a friend to permit me to use his/her telephone calling card for a limited time when I first leave.

G. I will check with _____ and _____ to see who would be able to let me stay with them or lend me some money.

H. I can leave extra clothes with _____.

I. I will sit down and review my safety plan every _____ (no more than six weeks) in order to plan the safest way to leave the residence. _____ (domestic violence advocate or friend) has agreed to help me review this plan.

J. I will rehearse my escape plan and, as appropriate, practice it with my children.

Step 3: Safety in my own residence. (If he chooses or is forced to leave, or if I am in a new home.) There are many things that a woman can do to increase her safety; these measures can be added step-by-step. **NEVER ASSUME THAT HE WILL NOT FIND ME!!!**

Safety measures I can use include:

A. I can change the locks on my doors and windows as soon as possible.

B. I can replace wooden doors with steel/metal doors.

C. I can install security systems including additional locks, window bars (not generally recommended due to fire escape hazards), poles to wedge against doors, an electronic system, etc.

D. I can purchase rope ladders ("fire ladders" are available from hardware and discount stores) to be used for escape from second floor windows.

E. I can install smoke detectors and purchase fire extinguishers for each floor in my house/apartment.

F. I can install an outside lighting system that lights up when a person is coming close to my house (motion detectors).

G. I will teach my children how to use the telephone to make a collect call to me and to _____ (friend/minister/other) in the event that my partner takes the children.

H. I will tell people who take care of my children which people have permission to pick up my children and that my partner is not permitted to do so. Some will require a court order. The people I will inform about pick-up include:

- _____ (school),
- _____ (day care staff),
- _____ (baby-sitter),
- _____ (Sunday school teacher),
- _____ (teacher), and
- _____ (others).

I. I can inform _____ (neighbor), _____ (pastor), and _____ (friend) that my partner no longer resides with me and that they should call the police if they observe my partner near my residence.

Step 4: Safety with a Protective Order. Many batterers obey protective orders, but no one can ever be sure which violent partner will obey and which will violate protective orders. I recognize that I may need to ask the police and the courts to enforce my Protective Order.

The following are some steps that I can take to help the enforcement of my Protective Order:

A. I will keep my Protective Order (and/or probation orders or other such legal documents) _____ (location). (Always keep it on or near my person. If I change purses, that is the first thing that should go in it.)

B. I will give my Protective Order to police/sheriff's departments in the community where I work, in those communities where I usually visit family or friends, and in the community where I live. (I will make sure it is filed properly with the district clerk.)

C. The telephone number for the district clerk and local law enforcement agency is _____. (The district clerk should contact all law enforcement agencies in my area. I should follow up and check to see if they need a certified copy of the Protective Order for enforcement.)

D. For further safety, if I often visit other counties in _____ (state of residence), I will file my Protective Order with the police in those counties. I will register my Protective Order in the following counties: _____, _____, and _____. (If I move, I will get a modification to my Protective Order. Again, I will check with local law enforcement agencies. I may need to include my family/friends in my protective order.)

E. I can call the local domestic violence program if I am not sure about B, C, or D, above, or if I have some problem with my Protective Order. The number to call is _____.

F. I will inform my employer, my minister, my closest friend, and _____ (other) that I have a Protective Order in effect. (I may give them copies, too.)

G. If my partner destroys my Protective Order, I can get another certified copy from the courthouse by going to the District Clerk located at _____.

H. If my partner violates the Protective Order, I can call the police and report a violation, contact my attorney, call my advocate, and/or advise the court of the violation. (Make sure it gets documented!!!)

I. If the police do not help, I can contact my advocate or attorney to file a complaint with the chief of the police department. My advocate's

name is _____ and phone number is _____.
 My attorney's name is _____
 and phone number is _____.

Step 5: Safety on the job and in public. Each battered woman must decide if and when she will tell others that her partner has battered her and that she may be at continued risk. Friends, family, and co-workers can help to protect women. Each woman should consider carefully which people to invite to help secure her safety.

I might do any or all of the following:

- A. I can inform my boss, the security supervisor, and _____ (other) at work of my situation.
- B. I can ask _____ to help screen my telephone calls at work.
- C. When leaving work, I can _____.
- D. When driving home, if problems occur, I can _____.
- E. If I use public transit, I can _____.
- F. I can use different grocery stores and shopping malls to conduct my business and shop at hours that are different from those hours in which I shopped when I resided with my battering partner.
- G. I can use a different bank and take care of my banking at hours that are different from those hours in which I banked when I resided with my battering partner.
- H. I can also _____.
- I. I will always remember to be careful and watchful. I must always "look over my shoulder" and be cautious of any person or car that might be following me.

Step 6: Safety and drug or alcohol use. Most people in this culture use alcohol. Many use mood-altering drugs. Much of this use is legal and some is not. The legal outcomes of using illegal drugs can be very hard on a battered woman, may hurt her relationship with her children, and put her at a disadvantage in other legal actions with her battering partner. Therefore, women should carefully consider the potential cost of the use of illegal drugs. Beyond this, the use of any alcohol or other drugs can reduce a woman's awareness and ability to act quickly to protect herself from her battering partner. Furthermore, the

use of alcohol or other drugs by the batterer may give him/her an excuse to use violence. Therefore, in the context of drug or alcohol use, a woman needs to make specific safety plans.

If drug or alcohol use has occurred in my relationship with the battering partner, I can enhance my safety by doing some or all of the following:

- A. If I am going to use, I can do so in a safe place and with people who understand the risk of violence and are committed to my safety.
- B. I can also _____.
- C. If my partner is using, I can _____.
- D. To safeguard my children, I might _____
and _____.

Step 7: Safety and my emotional health. The experience of being battered and verbally degraded by partners is usually exhausting and emotionally draining. The process of building a new life for myself takes **MUCH COURAGE AND INCREDIBLE ENERGY.**

To conserve my emotional energy and resources and to avoid hard emotional times, I can do some of the following:

- A. If I feel down and ready to return to a potentially abusive situation, I can _____.
- B. When I have to communicate with my partner in person or by telephone, I can _____.
- C. I can try to use "I can . . ." statements with myself and to be assertive with others.
- D. I can tell myself " _____ " whenever I feel others are trying to control me.
- E. I can read _____ to help me feel stronger.
- F. I can call _____, _____, and _____ as other resources to be of support to me.
- G. Other things I can do to help myself feel stronger are _____

_____.
- H. I can take care of myself by _____.

 I. I can attend workshops and support groups at the domestic violence program or _____, or _____ to gain support and strengthen my relationships with other people.

Step 8: Items to take when leaving. When women leave partners, it is important to take certain items with them. Beyond this, women sometimes give an extra copy of papers and an extra set of clothing to a friend just in case they must leave quickly.

These items might best be placed in one location, so that if we have to leave in a hurry, I can grab them quickly. When I leave, I should take:

Identification for myself	Work permits
My birth certificate	Green Card
Children's birth certificates	Passports
Social security cards	Medical records (all family members)
School and vaccination records	Insurance papers
Driver's license and vehicle registration	Welfare identification
Money	Marriage/divorce certificates
Checkbook, ATM card	Address book
Credit cards	Pictures
Keys: House, car, office	Jewelry
Medications	Small saleable objects
Children's favorite toys and/or blankets	Items of special sentimental value

Telephone numbers I need to know:
 Police Department—home

 Police Department—school

 Police Department—work

 Battered Women's Program

 District Clerk (for registry of protective orders)

Work number

Supervisor's home number

Minister

Attorney

School/Daycare

Doctor

Family member

Friend

Other

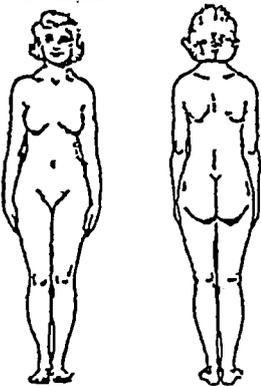
APPENDIX VI

DOMESTIC VIOLENCE SUPPLEMENTAL SHEET

APPENDIX VI

Extract: Tonya McCormick, 'Convicting Domestic Violence Abusers When the Victim Remains Silent' (1998-1999) 13 *Brigham Young University Journal of Public Law* 427.

MARYLAND DOMESTIC VIOLENCE SUPPLEMENTAL				
VICTIM'S NAME (L, F, M)		DATE OF BIRTH	SEX/AGE (if F)	
VICTIM'S HOME/WORK NUMBERS:		ATTORNEY CONTACT (close blood relative) Name, address, phone:		
I found the victim		The victim displayed the following emotional and physical conditions:		
ORIGIN / CRIME DESCRIPTION	VICTIM <input type="checkbox"/> ANGRY <input type="checkbox"/> SCUFF OF FAN <input type="checkbox"/> ACCIDENTAL <input type="checkbox"/> BURNED(S) <input type="checkbox"/> CRYING <input type="checkbox"/> ABRASION(S) <input type="checkbox"/> FEARFUL <input type="checkbox"/> MINDA OUT(S) <input type="checkbox"/> HYSTERICAL <input type="checkbox"/> LACERATION(S) <input type="checkbox"/> CALM <input type="checkbox"/> FRACTURE(S) <input type="checkbox"/> AFRAID <input type="checkbox"/> CONCUSSION(S) <input type="checkbox"/> RATIONAL <input type="checkbox"/> OTHER EXPLAIN <input type="checkbox"/> NERVOUS ALWAYS explain <input type="checkbox"/> THREATENING dependent on narrative <input type="checkbox"/> OTHER EXPLAIN		NAME OF SUSPECT _____ AGE OF SUSPECT _____ DATE OF BIRTH OF SUSPECT _____ PRIOR HISTORY OF DOMESTIC VIOLENCE? <input type="checkbox"/> YES <input type="checkbox"/> NO PRIOR HISTORY OF VIOLENCE DOCUMENTED? <input type="checkbox"/> YES <input type="checkbox"/> NO PRIOR HISTORY HANDLED BY WHAT POLICE DEPARTMENT/AGENCY: _____	
	SUSPECT <input type="checkbox"/> ANGRY <input type="checkbox"/> SCUFF OF FAN <input type="checkbox"/> ACCIDENTAL <input type="checkbox"/> BURNED(S) <input type="checkbox"/> CRYING <input type="checkbox"/> ABRASION(S) <input type="checkbox"/> FEARFUL <input type="checkbox"/> MINDA OUT(S) <input type="checkbox"/> HYSTERICAL <input type="checkbox"/> LACERATION(S) <input type="checkbox"/> CALM <input type="checkbox"/> FRACTURE(S) <input type="checkbox"/> AFRAID <input type="checkbox"/> CONCUSSION(S) <input type="checkbox"/> RATIONAL <input type="checkbox"/> ADMISSIONS <input type="checkbox"/> NERVOUS <input type="checkbox"/> OTHER EXPLAIN <input type="checkbox"/> THREATENING ALWAYS explain <input type="checkbox"/> OTHER EXPLAIN		NUMBER OF PRIOR INCIDENTS: _____ <input type="checkbox"/> MINOR <input type="checkbox"/> SERIOUS CASE NUMBER(S): _____ INVESTIGATING AGENCY: _____	
	RELATIONSHIP BETWEEN VICTIM AND SUSPECT NAME ALL THAT APPLY <input type="checkbox"/> SPOUSE LENGTH OF RELATIONSHIP <input type="checkbox"/> FORMER SPOUSE _____ Year(s) _____ Month(s) <input type="checkbox"/> COHABITANTE <input type="checkbox"/> FORMER COHABITANTS <input type="checkbox"/> DATING / ENGAGED <input type="checkbox"/> FORMER DATING <input type="checkbox"/> SAME SEX <input type="checkbox"/> EMANCIPATED MINOR <input type="checkbox"/> PARENT OF CHILD FROM RELATIONSHIP		ALCOHOL OR DRUGS INVOLVED? <input type="checkbox"/> YES <input type="checkbox"/> NO IF YES, INDICATE TYPE: _____	
	MEDICAL TREATMENT <input type="checkbox"/> NONE <input type="checkbox"/> WILL SEEK OWN DOCTOR <input type="checkbox"/> FIRST AID <input type="checkbox"/> PARAMEDICS <input type="checkbox"/> HOSPITAL <input type="checkbox"/> REFUSED MEDICAL AID		PARAMEDICS AT SCENE: <input type="checkbox"/> YES <input type="checkbox"/> NO FIRE DEPARTMENT PERSONNEL: <input type="checkbox"/> YES <input type="checkbox"/> NO UNIT NUMBER: _____ NAME(S) ID#: _____	
HOSPITAL: _____ ATTENDING PHYSICIAN(S): _____				
EVIDENCE	EVIDENCE COLLECTED: FROM: <input type="checkbox"/> Crime Scene <input type="checkbox"/> Hospital <input type="checkbox"/> Other: Explain PHOTOS: <input type="checkbox"/> Yes <input type="checkbox"/> No Number: _____ TYPE: <input type="checkbox"/> 35mm <input type="checkbox"/> Polaroid 911 Type: <input type="checkbox"/> Yes <input type="checkbox"/> No TAKEN BY: _____		Follow Up: <input type="checkbox"/> 6 Hours <input type="checkbox"/> 12 Hours <input type="checkbox"/> 48 Hours <input type="checkbox"/> Other Miranda Rights Given: <input type="checkbox"/> Yes <input type="checkbox"/> No Case: <input type="checkbox"/> Open <input type="checkbox"/> Closed Action Taken: <input type="checkbox"/> Arrest If no arrest, give reason: _____ Number of hours / days since incident: _____	
	DESCRIBE ALL PHOTOGRAPHS Photo's of victim(s) injuries: <input type="checkbox"/> Yes <input type="checkbox"/> No Photo's of suspect(s) injuries: <input type="checkbox"/> Yes <input type="checkbox"/> No Weapon used during incident: <input type="checkbox"/> Yes <input type="checkbox"/> No Photos of crime scene: <input type="checkbox"/> Yes <input type="checkbox"/> No Follow-up photos of victim's injuries: <input type="checkbox"/> Yes <input type="checkbox"/> No Type of weapon used: <input type="checkbox"/> Yes <input type="checkbox"/> No Weapon(s) impounded: <input type="checkbox"/> Yes <input type="checkbox"/> No Firearm(s) impounded for safety: <input type="checkbox"/> Yes <input type="checkbox"/> No			
	REPORTING OFFICER: _____ ID NUMBER: _____ DATE & TIME: _____ APPROVED BY NAME & ID: _____			

WITNESSES	CHILDREN PRESENT DURING DOMESTIC VIOLENCE? <input type="checkbox"/> YES <input type="checkbox"/> NO NUMBER PRESENT? <u> </u> AGE(S) <u> </u> STATEMENT(S) TAKEN? <input type="checkbox"/> YES <input type="checkbox"/> NO	
	NAMES: _____ AGES: _____ _____ _____	
RESTRAINING ORDERS: <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> CURRENT <input type="checkbox"/> EXPIRED		Victim's Contact: _____ _____ _____
TYPE: <input type="checkbox"/> EX PARTE <input type="checkbox"/> ORDER OF PROTECTION ISSUING COURT: _____ ORDER OR DOCKET NUMBER: _____		
VICTIM WILL BE AT TEMPORARY ADDRESS? <input type="checkbox"/> YES <input type="checkbox"/> NO ADDRESS: _____		
To be completed by victim: Mark and Initial in the Diagram below the area(s) where you were struck.		
HT. _____ WT. _____		HT. _____ WT. _____
I have physically pointed out to the officer: a. On the diagram where I was struck <input type="checkbox"/> Yes <input type="checkbox"/> No b. On my person where I was struck <input type="checkbox"/> Yes <input type="checkbox"/> No c. The person who struck me <input type="checkbox"/> Yes <input type="checkbox"/> No d. The object used to strike me <input type="checkbox"/> Yes <input type="checkbox"/> No I understand all the questions <input type="checkbox"/> Yes <input type="checkbox"/> No Signature _____	Suspect Comments/Threats: _____ _____ _____ _____ _____ _____ _____	
I affirm that the information I have given is true and correct. I hereby grant release of my medical records concerning this or other domestic violence cases to law enforcement agencies personnel investigating this incident. Yo aseguro que la información que he dado es verdadera y correcta. Y por medio de la presente doy permiso para que mis registros médicos, concerniente a este caso y otros casos de violencia doméstica, sean entregados a las autoridades de policía y a cualquier otra entidad interesada en investigar este caso.		Property Damaged: _____ Estimated Value: _____ _____ _____
Case(s) _____ Signed _____ Date _____		