

Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence

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In this article it is suggested that the appropriate conceptual model to use when investigating, presenting and interpreting facts involving intimate partner violence is an understanding of intimate partner violence as a gendered pattern of harm that operates as a form of social entrapment. The concept of entrapment is explained, an understanding of entrapment is contrasted with traditional approaches to thinking about intimate partner violence in the criminal justice context, and why the conceptual framing of intimate partner violence matters when applying the law to primary victims who are also offenders is discussed. The defence of self-defence for primary victims who kill their abusers and the criminal prosecution of mothers for neglectful parenting are used as case examples in this discussion.

“Fundamentally, because social reality cannot be delineated from social thought, by changing some of the meanings we assign to social phenomena, it may become possible to then transform the social world.”¹

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1 Simran Dhunna, *Transforming the Social Reality of Young Maori Mothers Experiencing Intimate Partner Violence*, unpublished research paper, 20 November, 2016, 24.

I Introduction

Women's² criminal offending frequently takes place in the context of violent victimisation by their intimate partner.³ Women (who may be in fear for their own and their children's lives) can, for example:

- offend because their abusive partner has demanded that they do so;⁴
- offend in response to a dangerous situation that has arisen as a result of their partner's violence;⁵
- use physical violence to resist their partner's violence and/or defend themselves and/or their children;⁶
- assist or encourage their violent partner to offend because it may be unsafe for them to do otherwise;⁷
- claim Work and Income support that they are not entitled to in order to pay for rent and food when their abusive partner refuses to financially support them and their children and/or undermines their own capacity to provide that support;⁸
- commit neonaticide or kill their children whilst in a state of extreme trauma or dissociation as a result of violent victimisation;⁹
- know that their partner is also abusing their children but be unable to stop them from doing so;

2 The language used in this article reflects the fact that women are the primary group affected as intimate partner violence [IPV] victims whilst, in most cases, the person using violence is male. However, it is recognised that men can be victims from their female and male partners, and that IPV occurs in heterosexual and LGBTIQI (lesbian, gay, bisexual, transgender, queer or questioning, and intersex) partnerships. See World Health Organization *Violence prevention: the evidence* (WHO Press, Geneva, 2010) at 79–94.

3 Suzanne C Swan and David L Snow “The Development of a Theory of Women’s Use of Violence in Intimate Relationships” (2006) 12 *Violence Against Women* 1026; and Susan L Miller and Michelle L Meloy “Women’s Use of Force: Voices of Women Arrested for Domestic Violence” (2009) 12 *Violence Against Women* 89.

4 The defence of compulsion is set out in s 24 of the Crimes Act 1961. See *Accident Rehabilitation and Compensation Insurance Corp v Tua* DC Auckland, 18 February 1999.

5 For a discussion of the common law defence of necessity see *Police v Kawiti* [2000] 1 NZLR 117 (HC).

6 Self-defence is set out in s 48 of the Crimes Act 1961.

7 This raises the issue of party liability under s 66 of the Crimes Act 1961. See, for example, *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 where a female offender was convicted of murder for driving the car on the night her gang-affiliated partner committed murder.

8 See, for example, *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA).

9 See the “defence” of infanticide in s 178 of the Crimes Act 1961.

- be impeded in their ability to parent¹⁰ because they are suffering from trauma or other mental health issues as a result of their partner's violence;
- offend in order to spend time in prison as a break from the violence; or
- breach sentence conditions for low-level offending (for example, shoplifting) because of their highly coercive circumstances, with the consequence that these are escalated to higher-tariff sentences.

How women's criminal culpability is assessed will depend on whether the legal framework that is applied to them provides room to consider the circumstances of coercion in which their offending takes place. It also depends, far less visibly, on how their coercive circumstances are understood or not understood by the many decision-makers in the criminal justice system. In this article we, as members of the Family Violence Death Review Committee (FVDRC), use findings from death reviews and information on the public record to suggest that the coercive social context within which female primary victims' offending occurs is often not correctly investigated and interpreted by decision-makers.

When outdated and inaccurate conceptual models are used to understand intimate partner violence (IPV), then the factual context within which offenders who are primary victims are located, and the meaning of their behaviour in response to that context, is misunderstood by those involved in the case. This includes the investigating police officers who are gathering evidence; lawyers (both for the prosecution and the defence); psychiatrists, psychologists and other specialists such as alcohol and other drug (AOD) counsellors providing expert testimony; restorative justice practitioners; judges and juries; probation officers writing pre-sentence reports; corrections officers managing home detention and community-based sentences; and parole boards assessing whether the offender should be released from prison.

Similar issues also arise when the predominant aggressor is charged with IPV offending. Those responding to such an offender may fail to understand that the primary victim's responses as the complainant and/or a witness are likely to be taking place in the context of ongoing coercion. For example, recanting an original statement may be a symptom of social entrapment rather than an indication that the victim's earlier statement was false or that the violence has stopped.¹¹

In this article we suggest the appropriate conceptual model to use when investigating, presenting and interpreting facts involving IPV is an

10 See Crimes Act 1961, s 152; and *R v Tukiwaho* [2012] NZHC 1193.

11 Amy E Bonomi and others "“Meet me at the hill where we used to park”: Interpersonal processes associated with victim recantation" (2011) 73 Soc Sci Med 1054.

understanding of IPV as a gendered pattern of harm¹² that operates as a form of social entrapment. First, we set out the concept of social entrapment and provide factual examples to illustrate how it operates.¹³ Secondly, we contrast an understanding of social entrapment with traditional understandings of IPV in the criminal justice context. Finally, we explain how the manner in which IPV is understood could potentially make a difference in the application of the law to primary victims who are also offenders. We use the defence of self-defence in response to homicide charges and the criminal prosecution of mothers who are victims of IPV for neglectful parenting as illustrative case examples.¹⁴

In recognition of the fact that the offender on any particular occasion may be either the aggressor or the victim in their intimate partnership, the FVDRC distinguishes between offenders who are predominant aggressors (where violent offending may be one episode in their ongoing pattern of aggression) and those who are primary victims (where their offending may be a response to an ongoing experience of victimisation).¹⁵ This article is addressing the issues raised in respect of the latter.

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- 12 The New Zealand Court of Appeal has acknowledged that IPV is a pattern of harm: *SN v MN* [2017] NZCA 289, [2017] 3 NZLR 448.
- 13 “Entrapment” in the criminal justice context traditionally refers to the practice of law enforcement agents tricking someone into committing an offence that they otherwise would not have committed in order to prosecute and convict them. This is not the issue being examined in this article. Rather, the article is using the term “entrapment” to suggest a more realistic conceptual framework for understanding the operation of IPV.
- 14 Not addressed in this article is whether IPV entrapment should be recognised as a discrete criminal defence for primary victims and/or a specific mitigating factor at sentencing. This article is instead premised on the notion that it is not law reform but reform of the underlying understanding of the social phenomenon to which the law is being applied that will produce the most significant improvements in the criminal justice response.
- 15 See Family Violence Death Review Committee *Fifth Report Data: January 2009 to December 2015* (Health Quality and Safety Commission, Wellington, 2017) at 112–120. The Family Violence Death Review Committee [FVDRC] is dealing with IPV that escalates to homicide and it is suggested that there may be types of IPV that do not involve the dynamics of coercive control described in this article and observed in the death reviews. For example, situational couple violence, in which the violence is not motivated by control but is used in response to a particular conflict. Situational couple violence may be used equally by men and women, is likely to be infrequent and involve minor violence but may infrequently involve more serious violence and will still have a gendered impact in that women are more likely to be injured and left in fear of their partner as a consequence: Joan B Kelly and Michael P Johnson “Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions” (2008) 46 *Fam Ct Rev* 476. The notion that there are typologies, however, or that they are transferable out of the United States context, is controversial: Jane

II Social Entrapment as a Conceptual Framework

As explained in previous FVDRC reports, IPV operates as a form of social entrapment that has three dimensions:¹⁶

- (a) the social isolation, fear and coercion that the predominant aggressor's coercive and controlling behaviour creates in the victim's life;
- (b) the indifference of powerful institutions to the victim's suffering; and
- (c) the exacerbation of coercive control by the structural inequities associated with gender, class, race and disability.

This definition, originally developed by James Ptacek,¹⁷ asks us to render visible the predominant aggressor's pattern of abusive behaviour and understand how it constrains the primary victim's resistance and ability to escape the abuse, while simultaneously considering the wider operations of power in her life. Because the practical configurations of entrapment show up differently in each victim's life, careful inquiry into the particular facts of each case across these three dimensions is required: What are the coercive and controlling behaviours employed by the predominant aggressor and how have these specifically limited the primary victim's ability to be self-determining over time? How have informal networks and agencies responded to her (or others') help-seeking endeavours? How have any intersecting structural inequities (for example, those produced by experiences of poverty,

Wangmann *Different Types of Intimate Partner Violence — An Exploration of the Literature* (Australian Domestic and Family Violence Clearinghouse, Issues Paper 22, October 2011). Assuming that such typologies do exist, Michael Johnson has proposed, based on his analysis of different data sets, that situational couple violence will be more common amongst general population samples, whilst types of IPV like coercive controlling violence and violent resistance (which are closer to Evan Stark's description of coercive control) will be more commonly found in samples from refuges, hospitals and courts: Michael P Johnson *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance, and Situational Couple Violence* (Northeastern University Press, Lebanon, 2008) at 20–21. This suggests that offending that results in criminal charges against the primary victim is unlikely to take place in response to situational couple violence. Of course, one of the problems with the typology literature is that it is confined to examining the motivations for the perpetrator's use of violence. Such a focus fails to capture the other dimensions of social entrapment described in this article, such as the impact of institutional responses to IPV and broader structural inequities.

16 Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality and Safety Commission, Wellington, 2014); and Family Violence Death Review Committee *Fifth Report: January 2014 to December 2015* (Health Quality and Safety Commission, Wellington, 2016).

17 James Ptacek *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, Boston, 1999) at 10.

historical trauma, colonisation, racism and disability) exacerbated these other dimensions?

A Documenting the predominant aggressor's pattern of coercive and controlling behaviours

First and foremost, what needs to be identified and described in detail is the predominant aggressor's pattern of harmful behaviour. Evan Stark has suggested that IPV is about coercive control.¹⁸ According to Stark, it is a misrepresentation of the true operation and harm of IPV to frame it primarily as a crime of assault because it is a liberty crime — in other words, an ongoing attack on a victim's autonomy or personhood.¹⁹

... coercive control targets a victim's autonomy, equality, liberty, social supports and dignity in ways that compromise the capacity for independent, self-interested decision-making vital to escape and effective resistance to abuse.

What needs to be documented by all those involved in the case is *how* the predominant aggressor has hurt, intimidated and frightened the primary victim and her children, isolated her from potential support, undermined her relationships with those around her, punished her acts of resistance, undermined her stability and independence and fostered a dependence on him.

It is not just the behaviour but the instrumental effect of the behaviour that has to be understood. For example, burning down a victim's home is not simply an act of violence. It is a way of destabilising her and rendering her more vulnerable — terrifying her, removing her safe place, depleting the resources she has to provide for herself and her children and making her dependent on those around her. As an act of retaliation it may communicate his capacity for further destruction should she continue to resist his control.

An example of where the predominant aggressor's coercive control is rendered visible is provided by Katz J in *R v Chase*.²⁰ Her Honour did not

18 See Evan Stark *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, New York, 2007).

19 Evan Stark "Re-presenting Battered Women: Coercive Control and the Defense of Liberty" (paper presented to Violence Against Women: Complex Realities and New Issues in a Changing World, Quebec, 2012). Another way of expressing this is to say that IPV is an attack on the victim's mana by undermining their personal sovereignty.

20 *R v Chase* [2017] NZHC 244.

simply describe the physical details of a violent kidnapping and assault by a predominant aggressor. She noted:²¹

It was a carefully orchestrated attack designed to terrorise and intimidate the complainant, in order to ensure she never attempted to escape your control or reported your behaviour to authorities *again*.

Whilst this example involved extreme physical and sexual violence, predominant aggressors can employ a range of tactics to isolate, intimidate, frighten and regulate. Some of these behaviours can be subtle — only having meaning to that particular victim. The predominant aggressor may use non-violent tactics, such as emotional manipulation, when these are likely to be more effective in the particular circumstances. Of course non-violent tactics “take on a violent meaning through their implicit connection with potential physical harm”.²² It is important to note that these tactics are developed over time by trial and error by the aggressor, and are uniquely tailored for the individual victim. This means that, regardless of the severity or otherwise of the physical violence involved, they are designed to be equally effective in constraining the victim’s exercise of autonomy and agency. Furthermore, they are designed to constrain her even when she is not in his presence.

The FVDRC has tabled examples of coercive and controlling behaviours evidenced in the New Zealand death reviews. These include threatening to kill the primary victim and the children and strangling her to unconsciousness so she knew that he meant it, repeatedly raping her, keeping one child with him whenever she left the house so that she had to return, responding with such extreme jealousy every time she went out that she found it safer not to leave the house, destroying her relationship with all of her friends and providing detailed lists of how she could improve herself in order to be a better partner.²³ In the United Kingdom, the Home Office has provided a non-exhaustive list of coercive or controlling behaviours.²⁴ These include:

- depriving a person of their basic needs;

21 At [25] (emphasis added).

22 Elizabeth Sheehy *Defending Battered Women on Trial: Lessons from the Transcripts* (UBC Press, Vancouver, 2014) at 236 (citing Lisa Goodman and Deborah Epstein *Listening to Battered Women: A Survivor Centred Approach to Advocacy, Mental Health and Justice* (American Psychological Association, Washington DC, 2008)). See, for example, *Liyanage v Western Australia* [2017] WASCA 112, (2017) 51 WAR 359 at [171] where the Court gave undue significance to the fact that the predominant aggressor did not *threaten* the victim in order to force her to re-enter the relationship.

23 Family Violence Death Review Committee, above n 15, at 39.

24 Home Office *Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework* (December 2015).

- monitoring their time;
- monitoring them via online communication tools or using spyware;
- taking control over everyday aspects of their life, such as where they can go, who they can see, what to wear and when they can sleep;
- depriving them of access to support services, such as specialist support or medical services;
- repeatedly putting them down, such as telling them they are worthless;
- enforcing rules which humiliate, degrade or dehumanise them;
- forcing them to take part in criminal activity such as shoplifting, or neglect or abuse of children to encourage self-blame or prevent disclosure to authorities;
- threatening to reveal or publish private information; or
- preventing them from having access to transport or work.

As some of these examples suggest, advances in technology open up new scope for abuse. Bridget Harris speaks of the “spaceless element of technology-facilitated violence”, which means that the “concept of feeling safe from an abuser no longer has the same geographic and spatial boundaries it once did”.²⁵ This is because “women can be exposed to violence anywhere they access a device, account or profile, creating a sense of perpetrator ‘omnipresence’”.²⁶

How a “relationship” is entered into is highly significant in understanding what takes place within it subsequently. A number of the “relationships” between the predominant aggressor and primary victim in the death reviews were forced from their inception, as, for example, when an adult patched gang member decided he will be in a relationship with a teenage girl who was not offered any choice in the matter.²⁷ In *R v Wang* the victim was stalked and assaulted by the predominant aggressor who threatened to kill her family if she did not marry him and, when she left him and fled to another country after being hospitalised for her injuries, he pursued her and forced her to remarry him using the same tactics.²⁸ These facts describe hostage-

25 Bridget Harris “Violence, Women’s Security and Spaciality” (paper presented to Intimate Partner Violence, Risk and Security: Securing Women’s Lives in a Global World, Prato, 2017) at 17 citing Tammy Hand, Donna Chung and Margaret Peters *The Use of Information and Communication Technologies to Coerce and Control in Domestic Violence and Following Separation* (Australian Domestic and Family Violence Clearinghouse, 2009).

26 At 17.

27 *R v Chase*, above n 20.

28 *R v Wang* [1990] 2 NZLR 529 (CA); and see Lexie Kirkconnell-Kawana and Alarna Sharratt “Commentary on *R v Wang*: Finding a Plausible and Credible Narrative of Self-Defence” in Elisabeth McDonald and others (eds) *Feminist Judgments of Aotearoa New Zealand — Te Rino: A Two-Stranded Rope* (Hart Publishing, Portland, 2017) 497.

taking and rape, rather than an intimate relationship predicated on choice and desire. Wang killed the predominant aggressor in response to his threats to kill her and her family on a particular occasion if they did not provide him with money — threats which must be understood for the purposes of assessing her claim to self-defence as coming from a person who is her hostage-taker and rapist, rather than her chosen partner.

Stark makes the point that coercive control often exploits gender roles, targeting women's default roles as mothers, home-makers and sexual partners. He says that, “[b]y routinely deploying the *technology* of coercive control, a significant subset of men ‘do’ masculinity in that they represent both their individual manhood and the normative status of ‘men’”.²⁹

Because women's roles as wives and mothers involve a measure of unpaid servitude, even in otherwise egalitarian relationships, this can make some coercive and controlling behaviours “invisible in plain sight”.³⁰ The predominant aggressor simply looks like an old-fashioned man in his expectations of how his partner should behave and how his house should be run. Traditional community values around marriage, family and motherhood can therefore be used to reinforce his control. Perpetrators can also use children. For example, they can deliberately impregnate their partner; threaten to take the children if she leaves; make the children unsafe so that she has to stay to monitor their safety in his company; exploit the children's feelings for him to manipulate her; and use access handovers as an opportunity to abuse her. Women may be forced to compromise their own personal safety in order to provide food and shelter for their children or continued contact with the predominant aggressor.

It is crucial to examine what a predominant aggressor has done *in response* to the primary victim's attempts to resist his control.³¹ What retribution has been taken? What does the victim think is likely to happen in the future? Without an investigation of his retaliatory responses, practitioners and juries are not able to properly comprehend the primary victim's behaviour (for example, why she may have only called the police once). They are also at risk of underestimating the level of danger she faced from seeking help. For example, in one death review, the primary victim reported her partner's violence to the police and went to court after he was charged with assault. She reported to a supportive person afterwards that she was terrified of him and he “was going to kill her”. She did not believe she would “ever get into

29 Evan Stark “Coercive Control” in Nancy Lombard and Lesley McMillan (eds) *Violence Against Women: Current Theory and Practice in Domestic Abuse, Sexual Violence and Exploitation* (Jessica Kingsley Publishers, London, 2013) 17 at 21 (emphasis in original) (citation omitted).

30 Stark, above n 18, at 14.

31 See Sheehy, above n 22, at 64–67, 235.

court again” as he “would not let her live to testify” and she “would never leave him alive”.

An example of where this aspect of coercive control was overlooked is found in *Cash v Police*, a decision involving the sentencing of a predominant aggressor.³² In *Cash* the defendant had been issued with a police safety order to protect his pregnant partner and later that day dragged her by the arm down the street, only desisting upon police intervention.³³ Two months later, whilst on bail in respect of this assault, he was issued with a protection order and several days later sent more than 50 violent text messages to the victim threatening to drive a car into her house, forcibly abort her foetus and send gang members after her, in addition to phoning her more than 50 times over a six-hour period.³⁴ A few weeks later he again phoned her to threaten her, before showing up in person and, when he was prevented from entering the property by other people, threw a rock through a window.³⁵

The judge failed to see that this was a pattern of retaliation and intimidation in response to the victim’s attempts to protect herself, which did not escalate to more serious violence only because she had a protective community on hand to intervene. Instead, the Court said that, whilst the assault involved “extremely poor judgment” in light of the police safety order issued early that day, it was “relatively minor; it involved no more than Mr Cash taking hold of the victim’s arm and propelling her in a direction in which she did not wish to go”.³⁶ The threats, whilst “frightening”, did not involve “face-to-face confrontation”; further:³⁷

They were made in the context of a volatile relationship in which the victim herself had not always behaved well, and at a time when Mr Cash was under some emotional pressure.

In this account, as well as overlooking the strategic impact of the defendant’s behaviour, the judge minimised and excused the abuse and apportioned blame to the victim. The cumulative intensity of the abuse was also overlooked. Phoning and texting a victim 100 times in breach of a protection order is, in fact, 100 breaches of that order.

32 *Cash v Police* [2016] NZHC 2748.

33 At [3].

34 At [4].

35 At [5].

36 At [22].

37 At [23]. For a critique of mutualising language see Denise Wilson and others “Becoming Better Helpers: rethinking language to move beyond simplistic responses to women experiencing intimate partner violence” (2015) 11(1) PQ 25.

Whilst itemised lists of potential behaviours serve a useful purpose, they fail to capture the cumulative and compounding effect of being subjected to a suite of such behaviours over the passage of time. Primary victims are not responding to individual *incidents* of abuse (that is, the immediate events surrounding their offending), rather their responses to escalating threats or attacks on their dignity are informed by their cumulative experiences of the predominant aggressor's abusive behaviour (and sometimes prior abusive partners). Evan Stark comments:³⁸

... the single most important characteristic of woman battering is that the weight of multiple harms is borne by the same person, giving abuse a cumulative effect that is far greater than the mere sum of its parts. ... a victim's level of fear derives as much from her perception of what *could* happen based on past experience as from the immediate threat by the perpetrator.

It follows that there is an element of imaginative empathy required on the part of decision-makers who must put themselves in the shoes of the primary victim for the purposes of assessing this impact. Clark J in *R v Kirk* made visible the predominant aggressor's pattern of harm by detailing his past behaviour and considering how this shaped the defendant's perception of him.³⁹ His Honour stated the deceased "was and always had been the primary aggressor".⁴⁰ He had:

- chased the defendant with a screwdriver;
- held a knife to her throat;
- assaulted two of her boyfriends (opened up the top of one's head and bloodied the other's face);
- beaten a woman with an axe handle, which the defendant had witnessed;
- stabbed his own friend in the face with a knife, which the defendant knew about;
- attacked a 17-year-old friend of the defendant's and punched her in the face at a party; and
- been violent and abusive towards the defendant's mother.⁴¹

38 Stark, above n 18, at 94 (emphasis in original) citing Liz Kelly *Surviving Sexual Violence* (Polity Press, Cambridge, 1987).

39 *R v Kirk* [2016] NZHC 1249.

40 At [62].

41 At [62].

The judge noted that, from the defendant's point of view, the deceased "was exceptionally aggressive and unpredictable. On the day of your offending, he was once more being menacingly and dangerously violent."⁴²

It is also crucial to understand how the predominant aggressor's various strategies operate to narrow the victim's sphere of autonomy so that her life choices become constrained by his will. For example, in *R v Chase* the judgment extracted the victim impact statement of the complainant who had survived 16 years of horrific physical abuse.⁴³ She said:⁴⁴

I am going to stop sleeping with a knife under my pillow out of fear. I am going to get my self-esteem and confidence back. I will wear my hair down whenever I want to. I will wear tights every day. I am going to be late when I want to be. I am going to work wherever I want to work. I will talk to whoever I please and make all the friends in the world. I am going to love my family unconditionally. I am going to play sport.

What is telling about this statement is that being free of the abuse for her is deeper than being free of the physical abuse — it is being free to *be a person who makes her own choices* in the everyday minutiae of life.

Separation from the predominant aggressor is often thought of as the means by which primary victims can keep themselves and their children safe.⁴⁵ However, as the proportion of New Zealand women who are killed in the time leading up to or after a separation demonstrates, separation from a predominant aggressor does not mean separation from the abuse unless agencies are effective in curtailing his continued abuse post-separation.⁴⁶ For these predominant aggressors the homicide occurred because the man "changed the project" from attempting to keep the primary victim in the relationship and control her to destroying her.⁴⁷

For many primary victims separation is also not an option. In the death reviews some women who left the relationship were pursued by their partner who simply reinstated the relationship. Some predominant aggressors terrorised the primary victim's support networks so that she was in fear for the lives and safety of her family and friends (including elderly parents)

42 At [63].

43 *R v Chase*, above n 20.

44 At [28].

45 Sheehy, above n 22, at 80.

46 Family Violence Death Review Committee, above n 15, at 38. Of the 66 New Zealand female primary victims who were killed in 2009–2015, 33 were separated, 11 were planning separation and six were attempting or had a history of separating.

47 Emerson Dobash and Russell Dobash *When Men Murder Women* (Oxford University Press, New York, 2015) at 43.

so long as she was living apart from him. For women in dangerous social situations it was also not safe to separate for other reasons. For example, a gang-affiliated woman felt safer when her abusive partner (a patched gang member) was at home because she was under threat from multiple men in his social network and his presence provided a *partial* check on the violence she was experiencing from these other men.

Often it can be difficult to find a detailed account of the predominant aggressor's coercive and controlling behaviours in agency records. Because the focus tends to be on the victim and what she is doing or not doing to keep herself safe from his violence, practitioners frequently fail to investigate and document the predominant aggressor's behaviours. The tragedy is that these behaviours often are not documented until the predominant aggressor kills the victim and are then itemised in the details of the death event. Retaliatory domination is evident in common features of such killings — for example, the perpetrator often uses lethal violence in response to attempts by the victim to leave the relationship or re-partner,⁴⁸ frequently uses violence far in excess of what is necessary to cause death, sometimes kills or hurts others who get in the way and frequently plans the act in advance — arming themselves, taking restraints, travelling distances, breaking into her home, and/or implementing strategies to avoid detection.⁴⁹

In summary, accurate descriptions of the predominant aggressor's coercive and controlling behaviours are the first step in making sense of the facts for the purposes of understanding the primary victim's offending behaviour. These descriptions should include the actions of the predominant aggressor in committing violence and enacting coercive control, and the primary victim in resisting violence and control. Because IPV is unilateral, involving actions by one person against the will and well-being of another, descriptions of IPV should reflect the unilateral nature of violence and should not “mutualise” it.⁵⁰

B *Documenting institutional responses*

An analysis of entrapment must also document the institutional and social responses to the predominant aggressor and primary victim, and, in turn, their reactions to these institutional and social responses. Institutions charged with assisting victims can be ineffectual or, worse still, escalate the danger

48 Real or imagined.

49 Family Violence Death Review Committee, above n 15, at 48.

50 Cathy Richardson and Allan Wade “Islands of Safety: Restoring Dignity In Violence-Prevention Work with Indigenous Families” (2010) 5(1) *First Peoples Child & Family Review* 137.

victims face.⁵¹ When this happens victims may reasonably conclude that further engagement will be unhelpful and/or unsafe⁵² and perpetrators may feel vindicated in continuing their abuse.

The FVDRC's reviews demonstrate that while primary victims are proactive help-seekers, they often do not receive the help they need. Primary victim offenders sought help from District Health Boards (for example, making disclosures in the emergency department when they were brought in by ambulance after an assault or to mental health, addictions and primary health-care services in the course of treatment); family violence services; care and protection services; and the Department of Corrections (with whom they had ongoing involvement as a result of their partner's violence). Many of these services are not currently part of an integrated family violence safety system and their responses to victim help-seeking often did little to facilitate victim safety.⁵³

For primary victims belonging to socially marginalised groups, what might appear to be simple help-seeking might involve extraordinary effort. Attending an appointment might mean managing their children's care, pooling limited resources to access public transport, and making long journeys linking different forms of transport, only to be confronted with complex referral pathways and people working in the services they are approaching for help who are judgemental.

Examples from the FVDRC reviews where agencies compounded the entrapment experienced by primary victims include:

- a victim being told upon reporting an assault by her abusive partner that, if she pursued her complaint, she will most likely be arrested as well for her use of minor physical force on that occasion;
- a victim being told that if there is another police family violence report then Child, Youth and Family (CYF)⁵⁴ will become involved again (her children had previously been removed by CYF from her care). This effectively meant that calling the police for help again was not an option. Women are aware that if their children are removed into state care, they may be placed in unsafe situations;

51 See, for example, the analysis of the police and justice responses to the Bonnie Mooney case in Sheehy, above n 22, at 70–87.

52 Sally Engle Merry “Rights Talk and the Experience of Law: Implementing Women’s Human Rights to Protection from Violence” (2003) 25 *Hum Rts Q* 343.

53 For this reason, the FVDRC has proposed the development of an integrated family violence safety response: see Family Violence Death Review Committee *Fifth Report*, above n 16, at ch 4.

54 Now called Oranga Tamariki — Ministry for Children.

- a victim who had concerns her partner may have hurt her child being told by a health professional that she needed to be “quite sure” before making “serious allegations”.
- a victim who rejected a house because it was not in a safe location being told she will not be offered another state-funded house if she did this again;
- a couple being provided with relationship counselling in response to violence by the predominant aggressor, during the course of which he downplayed what he had done and his use of violence was reframed as a communication problem which they both needed to work on;
- a police officer who was alerted by a third party to IPV offending, approaching the victim in public with others present to ask her if she was safe. When she said she was, he left it at that;
- a victim who had all her limited financial resources invested in the house she shared with the predominant aggressor, and who felt she had outstayed her welcome with her friends, being judged for accepting the predominant aggressor’s reassurances that she would be safe if she moved back in. No one had made an effort to get her sole occupation rights or initiate proceedings to get her money out of the house and no action had been taken (other than warnings) in respect of his reported breaches of the protection order; and
- sentencing the predominant aggressor to home detention and putting the onus on the victim to find alternative accommodation for herself and the children, despite the fact that she had no financial resources and no extended family members with whom she could safely stay.

Documenting institutional responses to IPV must be accompanied by a realistic appreciation of the limitations of the responses that are currently on offer and an understanding of what is reasonable to expect of someone in the victim’s position. Because IPV is an ongoing pattern of harm that is frequently accompanied by other complex issues, effective responses involve ongoing management of the risk presented by the predominant aggressor, addressing multiple co-occurring issues and not placing sole responsibility for achieving safety on the adult victim.⁵⁵

Instead, the current repertoire of responses — expecting the victim to call the police, get a protection order or stay in temporary refuge accommodation — require *victim initiation* and generate a *one-off reaction* to the immediate episode of violence. These are not strategies that effectively manage the *ongoing threat* that such women live with. Furthermore, it may be neither sensible nor fair to require the adult victim to repeatedly initiate strategies

55 Family Violence Death Review Committee *Fifth Report*, above n 16, at chs 2–4.

that may have little enduring effect other than to cause the predominant aggressor to escalate the abuse so that he can prevent her from engaging in similar help-seeking in the future. It is also not fair to expect the victim to initiate strategies that are realistically foreclosed to her by the circumstances that she is actually in (a point returned to below).

The FVDRC's data demonstrates that female primary victims who kill their partners have frequently called the police, sometimes repeatedly, without becoming safer. From 2009–2015, 10 of the 16 female primary victim homicide offenders had sought help from the police. One woman had contacted the police over 40 times.⁵⁶ Women living with a gang-affiliated partner may have called the police multiple times in an attempt to manage their immediate situation but be uncooperative when the police arrive, as it may be too dangerous to be seen to be cooperating with the police. For other women, calling the police was not an option at all. Many women were systematically isolated from potential help by the predominant aggressor. For example, a common dynamic noted in the death reviews was smashing the victim's phone. Women frequently did not have the resources to keep their phones in credit and some were kept in a state of financial deprivation by the predominant aggressor.

Practitioners place much emphasis on victims gaining protection orders and they are often the focus of safety plans. These are simply court orders and do not automatically generate safety. They may not be respected by the predominant aggressor, who often has a long history of ignoring orders of the court. Enforcement of a protection order requires the victim to report breaches, *before* a response may be initiated. In effect, the victim has to be threatened or harmed first. The response to a breach might simply be a further warning to the perpetrator. Protection orders can require precious resources on the part of the victim to obtain and have no effect or, worse, trigger an escalation in the abuse.

The assumption that women have effective ways of achieving safety for themselves (if only they choose to take advantage of them) is contradicted by the death reviews in which victims sought assistance from multiple sources and employed a range of safety strategies (in the knowledge that they were fighting for their lives), but were ultimately killed by the predominant aggressor.

The limitations in our current institutional responses to IPV is perhaps the most difficult aspect of entrapment for people to grasp. As Stella Tarrant, speaking in the context of allowing a primary victim the defence of self-defence, remarks:⁵⁷

56 Family Violence Death Review Committee, above n 15, at 41.

57 Stella Tarrant "Self Defence in the Western Australian Criminal Code: Two Proposals for Reform" (2015) 38 *UWAL Rev* 1 at 9–10 (emphasis in original).

It is the state's job to protect us from harm. Determining that it was reasonably necessary for an individual to protect *themselves* is to say, in some way or other, the state failed. Further, this involvement of the state in judgements about self-defence has particular significance in the context of women's reliance on the defence. Where a need to act defensively arose suddenly and without warning the state can be forgiven relatively easily for not being able to come to a citizen's aid. But where danger has existed for a while — sometimes for years — it is more difficult to come to terms with the state's failure to protect.

C Documenting intersectional inequity

The third aspect of entrapment requires an examination of the manner in which experiences of racism, sexism, poverty, colonisation, disability, and other forms of violence, disadvantage and inequity (and the intersection of these) can aggravate the two dimensions of entrapment outlined above. Intersectional inequity can be likened to a five-road intersection crash — and the faster vehicles are travelling, the greater the impact of the collision. Thus, the number and extent of inequities a victim experiences, the more scope a predominant aggressor has to isolate, control and coerce her and the less likely she is to be able to access help and safety.⁵⁸ This third aspect of entrapment affects the social and institutional responses that primary victims receive in response to their help-seeking.

For example, women who have limited financial resources, particularly when they have dependent children, are more likely to be financially dependent on their partner for survival and are less likely to be able to act independently or seek help — that is, leave the home, leave the relationship, travel to access services, or have credit on their phone. For these women the choice may be, for example, to endure what is happening in order to feed their children or leave with no means of providing for their children (no money to buy food and no safe place to stay) and a violent man in pursuit.⁵⁹

The issue is not simply a matter of personal resources and how they are managed in the particular household. These issues are compounded by location and where families can afford to live. For example, while IPV deaths are evident across the deprivation quintiles, 77 per cent of Māori female primary victims lived in neighbourhoods with the highest levels

58 Kimberle Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 *Stan L Rev* 1241; and Ursula A Kelly "Integrating Intersectionality and Biomedicine in Health Disparities Research" (2009) 32 *Adv Nurs Sci* E42.

59 See Sheehy, above n 22, at 60–64.

of deprivation, compared with 30 per cent of non-Māori female primary victims.⁶⁰ High deprivation makes accessing the appropriate services difficult because public transport networks may be limited and fragmented in these areas, whilst private transport is expensive. In addition, many deprived areas lack key services, including specialised family violence services, alternative crises accommodation and/or culturally appropriate housing.

Communities that have been decimated by historical trauma, the experience of colonisation and the intergenerational trauma that followed on are more likely to be under-resourced and experiencing multiple forms of disadvantage and discrimination.⁶¹ Women from these communities may have entire extended families who are in precarious life circumstances. This may mean that there is no one in their immediate family system who is able to act protectively or provide resources, including a safe place to stay, during a time of crisis.

It is equally relevant to know that the victim's immediate community is conservative, built around male mateship networks and does not challenge gender inequity.⁶²

It is noteworthy that six of the 16 primary victims who killed their predominant aggressor were in relationship with patched gang members; whilst a further two had previous partners who were patched gang members and their families also had numerous gang connections.⁶³ Women living with gang-affiliated men may be facing collective levels of violence.⁶⁴ These women may be dealing not just with one abusive partner but a patriarchal male collective. They may have male associates throughout their social networks who will reinforce the violence and control of their partner even when he is not physically present, or perpetrate violence on them should they lack the protection of their male partner (and sometimes despite their male partner — knowing that they will be unable to talk about what happened without being blamed or in order to extract revenge on him).

Women who are in a “relationship” with a patched gang member may be unable to access services or receive the same standard of service from agencies (for example, some women's refuges), because these agencies are concerned about the safety of other service users due to the threat of their partner's violence. Well-resourced agencies (for example, health-care facilities) may also feel the need to protect their professional staff from these men and therefore restrict services to the women with whom they are

60 Family Violence Death Review Committee, above n 15, at 27.

61 At 21–26.

62 Sheehy, above n 22, at 180.

63 Family Violence Death Review Committee, above n 15, at 54.

64 There is little written on the position of gang-affiliated women, but see Pip Desmond *Trust: A True Story of Women and Gangs* (Random House, Auckland, 2009).

in relationships. Ironically, we nonetheless expect the women concerned to be able to keep themselves and their children safe from the violence.⁶⁵

At least six of the 16 primary victims who killed their predominant aggressors between 2009 and 2015 had experienced sexual violence during their childhoods. It is relevant that the victim has past experiences of abuse (in childhood and in other adult relationships) because multiple experiences of abuse produce complex forms of trauma that make victims extremely vulnerable and deplete their resources.⁶⁶ Such experiences are frequently attended by mental health issues and substance abuse issues. Women who experience multiple victimisations are sometimes characterised as “choosing” or being “attracted to” abusive men. In fact, predominant aggressors target vulnerable women when seeking sexual partners. Some women were partnered against their will whilst they were children to older patched gang members at a point in their lives when any sexual relationship with them was, by definition, a serious sexual crime.⁶⁷

Women who have substance abuse issues because they are self-medicating untreated trauma are particularly likely to attract judgemental and punitive responses. Having a disability such as a psychotic illness, which renders the primary victim more vulnerable to IPV, can lead to multiple agencies, including criminal justice and mental health services, discounting her experiences of victimisation. Evidence also exists that institutional and interpersonal racism experienced by Māori results in inadequate and unsafe responses from agencies.⁶⁸

It follows from what we have said in the preceding section that it is important to look at what a primary victim’s experiences of services were in the past before jumping to the conclusion that a victim who does not engage with those services is not committed to their own or their children’s safety. Equally relevant is the experience of those services by others within her community because this will influence her assessment as to whether

65 See statements made by Nicola Dally-Paki in the inquest into her son’s death: Jared Savage “Moko inquest: Mother urges victims of domestic violence to get out and ‘never look back’” *The New Zealand Herald* (online ed, Auckland, 30 August 2017).

66 Michael Salter “Multi-Perpetrator Domestic Violence” (2014) 15 *Trauma Violence Abuse* 102; Ryan B Matlow and Anne P DePrince “The Influence of Victimization History on PTSD Symptom Expression in Women Exposed to Intimate Partner Violence” (2013) 5 *Psychol Trauma* 241; and Robert F Anda and others “The enduring effects of abuse and related adverse experiences in childhood: A convergence of evidence from neurobiology and epidemiology” (2006) 256 *Eur Arch Psychiatry Clin Neurosci* 174.

67 See Crimes Act 1961, s 134.

68 Human Rights Commission *A fair go for all? Rite tahi tātou katoa? Addressing Structural Discrimination in Public Services* (July 2012); and Eugene Bingham and Paula Penfold “New Zealand’s racist justice system — Our law is not colour-blind” (18 September 2016) Stuff <www.stuff.co.nz>.

these services are likely to help her own situation. Addressing racism and the history of colonisation in the responses to Indigenous Australian disability, David Hollinsworth comments that “non-compliance” may need “to be understood as a reasonable response to insensitive and inappropriate behaviour by ... professionals rather than as dereliction by ‘incompetent’ clients”.⁶⁹ Such comments may also be applicable in New Zealand.

Gender role expectations make women particularly vulnerable when they are parents. These result in women bearing a disproportionate burden of the parenting responsibilities, facing higher expectations as parents, and — because such expectations are unquestioned and invisible — receiving little credit for, or support in, that work.⁷⁰ Living with a child but playing “virtually no part in the upbringing” of the child is an acceptable parenting response for fathers, but it is unimaginable that mothers would not be responded to punitively if they adopted similar parenting strategies.⁷¹ The operation of such gendered expectations is evident in the death review where a child was removed from their mother because she was unable to prevent the child from being exposed to the father’s violence towards her. And yet, after the mother was killed by a subsequent partner, the child was progressed into the care of their father. In this account the mother was held responsible for the father’s violence and yet the father’s violence did not disqualify him from being considered a good enough parent to be granted the care of the child.

In addition to the challenges women face generally, Māori women also live with the added oppression of ongoing colonisation, and historical and intergenerational traumas. Judgements are particularly harsh for working-class and Māori mothers whose lives and resources are such that they are simply not able to meet the standards of middle-class motherhood.⁷² The FVDRC has noted that:⁷³

Mothers, particularly Māori mothers who are socially marginalised and struggling with a raft of daily stressors, are keenly aware they risk losing the care of their children if they are not able to keep them safe. This inhibits

69 David Hollinsworth “Decolonizing Indigenous disability in Australia” (2013) 28 *Disability & Society* 601 at 610 citing Kim Humphrey and Tarun Weeramanthri with Joseph Fitz *Forgetting Compliance: Aboriginal Health And Medical Culture* (Northern Territory University Press, Darwin, 2001).

70 Julia Tolmie, Vivienne Elizabeth and Nicola Gavey “Imposing Gender Neutral Standards on a Gendered World: Parenting Arrangements in Family Law Post-Separation” (2010) 16 *Canta LR* 302.

71 *R v Neil* [2017] NZHC 1494 at [36].

72 Regarding her son’s death, Nicola Dally-Paki said, “Perhaps if I had been judged less harshly, Moko would be in my arms today”: Savage, above n 65.

73 Family Violence Death Review Committee, above n 15, at 58.

many mothers from fully disclosing to practitioners the difficulties and danger they are in and their fears for their children.

It is crucial that this third aspect of entrapment is rendered visible when examining the circumstances of primary victims who offend. Decision-makers may have had life experiences characterised by privilege. This means that they will need a clear understanding of the manner in which poverty, inequity, racism and other forms of disadvantage can exacerbate the perpetrator's ability to control and isolate the victim, as well as realistically closing off avenues for support and help.

It is also important that these aspects of entrapment are understood as features of our society, rather than as deficiencies personal to the victim herself. In other words, they should be framed as objective aspects of her circumstances, rather than subjective personal characteristics, for the purposes of applying the law to the facts. Hollinsworth makes the point that racism itself is disabling "regardless of any specific impairment" on the part of the particular individual.⁷⁴ He remarks that "[r]acism, along with ableism, has effectively disabled an entire category of Australians since colonization".⁷⁵

II When Social Entrapment is Not Understood: Individualising or Pathologising the Victim's Response to the Violence

A Incidents of harm and victim choice

Rather than using a social entrapment framework to analyse the facts, decision-makers have traditionally approached IPV as though it is a relationship issue.⁷⁶ Because adult relationships are assumed to be based on mutuality and choice, victims are held accountable for their contribution to the problems in the "relationship", including their failure to take reasonable measures to achieve safety for themselves or their children. Correspondingly, rather than understanding the abuse in the relationship as a pattern of harm that is bigger than the acts of physical violence, the abuse is understood as

74 Hollinsworth, above n 69, at 607. Racism includes long histories in which Indigenous communities have lacked basic housing, health infrastructure or proper nutrition, "leading to disastrous effects in physical and intellectual development as well as heightened susceptibility to a myriad of diseases and disabilities": at 608. In other words, social dispossession and marginalisation is written into the bodies of those who experience it as "preventable impairment", at 608.

75 At 603.

76 Family Violence Death Review Committee, above n 15, at 50.

a series of discrete violent incidents in between which the victim is free to leave or implement other safety strategies. Implicit in this approach is the assumption that the safety measures that are currently available are adequate and that it is reasonable to place the responsibility for safety on the victim.

Julia Quilter explains how “interpretative schema” are used to make sense of facts involving sexual violence.⁷⁷ Embedded in these schema are assumptions about factual relevance and the meaning of social phenomena that are not only inaccurate but are also invisible to, and unquestioned by, those using the schema. The FVDRC has observed the following victim safety interpretative schema for IPV:⁷⁸

- She has (not) called the police
- + She has (not) got a protection order
- + She has (not) gone to refuge
- + She is (not) wanting to separate

- = She is (not) seeking help; she is (not) acting protectively; she is (not) choosing to stop the violence.

The use of this schema places the focus on what the victim has done or not done. Women who have complied with the schema are judged to have been committed to their safety and the safety of their children. The employment of the schema means that victims who have not gotten a protection order, called the police repeatedly, gone into a refuge and tried to separate are understood to be choosing the abuse, contributing to the situation, and not really committed to their own or their children’s safety and well-being.

The notion that women are accountable for not taking advantage of their safety options is evident in the sentencing remarks in the case of *R v Paton*.⁷⁹

77 Julia Quilter “Re-framing the Rape Trial: Insights from Critical Theory about the Limitations of Legislative Reform” (2011) 35 *A Fem LJ* 23 at 30. Quilter, quoting Dorothy E Smith *Texts, Facts, and Femininity: Exploring the relations of ruling* (Routledge, London, 1990) at 39, explains that a schema “is used to assemble and provide coherence for an array of particulars as an account of what actually happened; the particulars, thus selected and assembled, will intend, and will be interpretable by, the schema used to assemble them. The effect is peculiarly circular, for although questions of truth and falsity, accuracy and inaccuracy about the particulars may certainly be raised, the schema itself is not called into question as a method of providing for the coherence of the collection of particulars as a whole” at 30.

78 Note that if she has done all of these things and the violence still continues, it is concluded that the violence cannot be stopped.

79 *R v Paton* [2013] NZHC 21.

In that case the defendant was convicted of manslaughter for stabbing her abusive partner once in the neck with a kitchen knife after being attacked, and then followed into the kitchen by him. Dobson J, after noting that there was a long history of severe physical violence by the deceased towards the defendant, which her entire community accepted as “natural” or “an entirely normal part of life”,⁸⁰ commented:

[6] You have never made a complaint or, it seems, sought any intervention to stop the violence in the relationship. Instead, you hit back as best you could. I am bound to say those attitudes are seriously wrong and, beyond the death and very serious criminal conviction that has now occurred, the even more serious and longer term harm those attitudes cause is the impact on the children exposed to such domestic violence. Until women in relationships like yours, and those of both sexes able to support women in your position, unconditionally reject domestic violence, sadly such situations will contribute to the continuation of utterly needless crime and to depriving your children of the more positive environment they are entitled to.

In this account, the responsibility for the violence, including the harm inflicted on her children, lies on the victim (and those who support her) because of her “choice” not to seek help or leave the situation. The deceased’s responsibility for using violence and the myriad of ways he may have acted to shut down and foreclose resistance on her part have been rendered invisible. Also unexplored are whether there were any realistic safety options in the defendant’s particular circumstances.

B *Battered woman syndrome*

In an attempt to explain why it is not unreasonable for women to remain in relationships with men who injure and kill them, including the small minority who ultimately resort to defensive violence themselves, defence counsel began to introduce expert testimony on “battered woman syndrome”.⁸¹ Battered woman syndrome testimony originally postulated that IPV is escalating and cyclical (repeating three distinct phases: tension building, acute battering and loving contrition) and that, having gone through a battering cycle several times, the ordinary human response is to develop

80 At [5].

81 See Elizabeth M Schneider *Battered Women and Feminist Lawmaking* (Yale University Press, New Haven, 2000) at ch 8.

“learned helplessness”. The victim develops the perception that the batterer is all-powerful and that she cannot escape the violence.⁸²

The introduction of battered woman syndrome evidence was originally intended to justify the primary victim’s choices and explain them as reasonable. In fact, because those choices are frequently considered “counter-intuitive” in that they seem to contradict rational decision-making in response to a “bad relationship”, the testimony has been taken as explaining the victim’s honestly held, but irrational, perceptions and choices.⁸³ This understanding is reinforced by the fact that she has a “syndrome” — in other words, her thinking, cast as reflective of a mentally abnormal state resulting from trauma, must therefore, by definition, be irrational. The key difference between these two approaches is therefore that the battered woman syndrome framework *excuses* the victim’s failure to make rational choices on the basis that she has been psychologically impacted by the abuse, rather than blaming and holding her accountable for those choices. Neither approach explains how her coercive circumstances might realistically match her perceptions of those circumstances or objectively justify her reaction to them.

Today, battered woman syndrome testimony tends to include evidence about the dangers of separation and to characterise the syndrome as a form of post-traumatic stress disorder rather than learned helplessness. Despite this, it is still almost exclusively presented at trial by mental health professionals — psychiatrists or psychologists — and still tends to be understood as explaining her inaccurate (but understandable) perceptions.⁸⁴

It follows that, whilst battered woman syndrome was intended to challenge previous thinking, in fact it evidences many of the same underlying assumptions: that leaving the relationship or employing one of the other safety strategies discussed above is the victim’s choice; that these strategies would be effective in providing safety; and that it is appropriate to place responsibility for achieving safety on the victim and therefore appropriate to focus on her failure to meet that responsibility. The underlying premise is therefore that it is necessary to explain or excuse the victim’s choices (as the manifestation of a syndrome) rather than explain her coercive circumstances (including the abusive person’s pattern of violence) because any explanation

82 Lenore Walker *Terrifying Love: Why Battered Women Kill and How Society Responds* (Harper & Row, New York, 1989).

83 See *R v Oakes* [1995] 2 NZLR 673 (CA) at 676; and Julie Stubbs and Julia Tolmie “Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome” (1999) 23 MULR 709.

84 Elizabeth Sheehy, Julie Stubbs and Julia Tolmie “Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R v Falls*” (2014) 38 MULR 666; and see *Liyana v Western Australia*, above n 22.

for the continuation of abuse is to be found in the former rather than the latter.⁸⁵

Battered woman syndrome testimony has been criticised for its ineffectiveness as a defence strategy, as well as for its lack of scientific support.⁸⁶ For example, there is no evidence that battering has three discrete cyclical phases or that battered women suffer from learned helplessness.⁸⁷ The death reviews suggest that the abuse that primary victims are subject to is larger than the perpetrator's physical violence and that escalation in this abuse is frequently in response to the primary victim's attempts to resist it, rather than an independent abuse "cycle". The death reviews also demonstrate that primary victims are proactive help-seekers⁸⁸ but frequently receive unhelpful and unsafe responses. And that, whilst primary victims resist the violence that they are experiencing, their acts of resistance are deliberately thwarted by their abusive partner.

It has also been suggested that battered woman syndrome testimony sets up a stereotype of primary victims that does not match the realities of their lives. This means that it can be used to invalidate their experiences of violence — for example, if they are victims of IPV, why do they not satisfy the stereotype of being passive and helpless?⁸⁹ Decision-makers can assume that women who have professional qualifications, who are articulate, or who use physical force to fight back, are not really victims⁹⁰ or have their experiences of victimisation ameliorated.⁹¹

C *Contrasting the three approaches*

Imagine a situation where a 16-year-old with a history of severe childhood neglect and abuse "partners" with a man who is 10 years older and who is

85 For an excellent discussion see Sheehy, above n 22, at 109–113.

86 See Ian Leader-Elliott "Battered But Not Beaten: Women Who Kill In Self Defence" (1993) 15 Syd LR 403.

87 "The helplessness is in the public agencies which have failed to provide the appropriate responses to violence, not with the women who have been in those relationships." Karen Fletcher "Domestic violence: how the law fails women" *Green Left Weekly* (online ed, Sydney, 9 September 1992) quoting lawyer Zoe Ratus.

88 Jan Breckenridge and Kerrie James *Thinking about Homicide Risk: A Practice Framework for Counselling* (Australian Domestic and Family Violence Clearinghouse, Stakeholder Paper 9, November 2010) at 4.

89 Elisabeth McDonald "Defending Abused Women: Beginning a Critique of New Zealand Criminal Law" (1997) 27 VUWLR 673 at 676–677.

90 See *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775; and Elisabeth McDonald "Battered Woman Syndrome" [1997] NZLJ 436 at 436–437.

91 See *Liyana v Western Australia*, above n 22, at [165].

highly controlling — including using physical violence and intimidation towards her. She is not employed and spends the next decade raising their children. They live in an isolated rural area surrounded by his family who does not acknowledge his abuse of her. He and his family have high standing in their small community, whilst she is hardly known to anyone and her family is viewed with distaste. The nearest police officer is a 25-minute drive away.

Her siblings and father attempt to confront her partner multiple times about his abuse of her but are beaten up and threatened with guns by her partner. One of her female friends who attempts to intervene during one beating is also badly hurt by her partner.

The victim repetitively travels significant distances to seek medical care and, beyond noting that she may be suffering from depression, it is observed that her numerous symptoms have no obvious biological explanation. There is no inquiry into her life experiences or provision of social support by the health-care service.⁹²

A traditional understanding of IPV would view much of this history as irrelevant to the victim's use of violent resistance on a particular occasion. Evidence about this background may not even be presented at trial. She would be understood as having had multiple opportunities to leave or call the police and choosing, instead, to stay in a bad relationship. By way of contrast, framing of IPV through a battered woman syndrome lens would focus on the manner in which her trauma and fear prevented her from leaving or calling the police and made her think that no one could assist her.

An entrapment framing would shift the focus from her “personal deficiencies” and “choices” to understanding her coercive circumstances, including the manner in which her perpetrator isolated her and systematically closed down resistance, and the inadequate responses to her attempts to seek help.⁹³

III Could an Understanding of Social Entrapment Make a Difference to Outcomes in the Criminal Justice Context?

In this section we suggest that a proper understanding and application of the concept of entrapment could potentially make a difference to the legal outcomes for primary victim offenders. Essentially this is because

92 Evan Stark and Anne Flitcraft *Women at Risk: Domestic Violence and Women's Health* (Sage Publications, Thousand Oaks (Calif), 1996).

93 See, for example, Kirkconnell-Kawana and Sharratt, above n 28, who place an entrapment lens on the facts of *R v Wang*, above n 28, in contrast to the trial judge and Court of Appeal.

entrapment focuses on explaining the objective realities of the circumstances in which primary victims are located at the time of offending, as opposed to making unwarranted assumptions about those realities or pathologising but excusing the victim's perspective. We use self-defence in respect of the use of defensive violence and prosecutions for neglectful parenting, as examples to illustrate this point.

An understanding of the coercive circumstances in which the primary victim offender was located when they offended arguably should be relevant in some situations where the current legal framework does not permit consideration of it, such as in relation to the defence of necessity.⁹⁴ In other instances, for example the defence of compulsion, the legal requirements are defined in such a manner that primary victims who are offenders will rarely be able to satisfy those requirements.⁹⁵ The predominant aggressor's pattern of coercive control should also arguably be considered in contexts where the current legal framework does not easily facilitate that, such as considering victim safety in sentencing the predominant aggressor for interpersonal violence offences.⁹⁶ A proper understanding of the coercive circumstances a primary victim is located within should also undermine the notion that she has chosen to assist or encourage her partner's criminal activities or "joined" a common unlawful purpose in terms of the law on party liability under s 66 of the Crimes Act 1961.

It is worth noting that entrapment will also affect the primary victim's ability to defend themselves legally within the criminal justice system once they have been charged. This may result in victims who have used lethal force against the predominant aggressor, for example, pleading guilty to manslaughter in exchange for murder charges being dropped, rather than mounting a case for self-defence (even when there is a strong factual foundation for this defence).⁹⁷ In Canada, Justice Ratushny has recommended that the prosecution counter this trend by realistically appraising the primary victim's coercive circumstances at the time of offending for the purposes

94 See *Police v Kawiti* [2000] 1 NZLR 117 (HC).

95 Shevan Nouri "Critiquing the Defence of Compulsion as it Applies to Women in Abusive Relationships" (2015) 21 Auckland UL Rev 168.

96 Julia Tolmie "Considering Victim Safety When Sentencing Intimate Partner Violence Offenders" (forthcoming); and see infanticide, under s 178 of the Crimes Act 1961, which requires proof of a mental health issue that is caused by lactation or childbirth, rather than the experience of trauma.

97 Of the 16 primary or suspected primary victims who killed their partners between 2009 and 2015, 12 were charged with murder and four with manslaughter. Of the 15 who were fit to stand trial, nine proceeded to trial (two were convicted of murder, four of manslaughter and three were acquitted) and six were resolved by guilty pleas (five pleaded guilty to manslaughter and one to murder).

of charging decisions.⁹⁸ She urges prosecutors to charge at the level of manslaughter, not murder, if the prosecution is prepared to accept a guilty plea to manslaughter in light of these coercive circumstances.⁹⁹

A *Self-defence*

Section 48 of the Crimes Act 1961 sets out the legal criteria for self-defence. It provides:

Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

Typically the defence is distilled into three jury questions:¹⁰⁰

- (a) What were the circumstances as the accused honestly believed them to be?
- (b) In those circumstances was the accused acting in defence of herself or another?
- (c) Was the force used reasonable in those circumstances?

To answer these questions, it is necessary to assess the nature of the threat that the defendant honestly (even if unreasonably) thought she was facing, the options she had to deal with that threat and whether her particular response in those circumstances was both defensive and reasonable.

In *R v Wang* the New Zealand Court of Appeal held that if the attack the defendant was responding to was not “imminent”, then using defensive force could not be considered “reasonable”.¹⁰¹ According to the Court, this is because in such circumstances the defendant has other non-violent means of protecting herself from the threat she faced — for example, leaving the house or calling the police. This is a gloss on the requirements of s 48 that is clearly informed by an incident-based analysis of IPV and the assumption that the safety options currently available for IPV are effective so long as

98 Lyn Ratushny *Self-Defence Review: First Interim Report — Women in Custody* (Department of Justice (Canada), 1997); and see Elizabeth Sheehy “Review of the Self-Defence Review” (2000) 12 CJWL 197.

99 See Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) at [9.12]–[9.19].

100 *R v Bridger* [2003] 1 NZLR 636 (CA) at [18]; and *Fairburn v R* [2010] NZSC 159, [2011] 2 NZLR 63.

101 *R v Wang*, above n 28.

the primary victim is not actually under physical attack and is therefore in a position to implement them. It also locates the threat that the victim is facing in one particular attack, rather than the ongoing danger presented by the person with whom she is in relationship.

Whilst the additional requirement for an imminent threat¹⁰² set out in *Wang* could present a barrier to self-defence for those victims who make pre-emptive strikes before their violent partners can attack them,¹⁰³ the FVDR's data suggests that the majority of primary victims who use lethal violence in New Zealand are responding in a spontaneous manner to a situation of escalating threat from the predominant aggressor at the time they use defensive force.¹⁰⁴ In other words, the requirement for an imminent threat should not present a barrier to successfully raising self-defence for most of these women.

What may present a barrier, on the other hand, are the outdated and inaccurate understandings of IPV that decision-makers use to make sense of the facts in such cases. For example, if the primary victim offender is viewed as someone who has made the decision not to leave the relationship or take other safety measures in between violent incidents when she was free to do so, then using violence to defend herself may be viewed by the jury as inherently unreasonable. The jury may feel that she is accountable, at least partially, for choosing to remain in a position where defensive force became necessary.¹⁰⁵ This is, of course, tantamount to imposing a *de facto* duty to retreat on primary victims, extended so that it becomes not just a duty to exit once it is apparent that violence is impending, but a duty to avoid situations that could be dangerous in the future.¹⁰⁶

If IPV is not understood as a pattern of harm then primary victims who are in situations of escalating threat in which they have already been physically attacked are wrongly understood as *having just been* attacked (past tense),

102 Note that there is also a requirement for a *specific* threat: *R v Richardson* CA450/02, 25 March 2003 at [25].

103 In an attempt to address the difficulties that primary victims appear to have in arguing self-defence, the Law Commission has recommended, amongst other things, that s 48 of the Crimes Act 1961 be modified so that it is clear that a person can raise the defence even where they are facing a threat that is not imminent. Law Commission, above n 99, at [28] and [R5].

104 Family Violence Death Review Committee, above n 15, at 55–56.

105 Elisabeth McDonald raises a deeper issue — a failure on the part of decision-makers to accept women's reality: McDonald, above n 89, at 681–684. See also Fran Wright "The Circumstances as She Believed Them to Be: A Reappraisal of Section 48 of the Crimes Act 1961" (1998) 6 *Wai L Rev* 109.

106 See Martha R Mahoney "Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings" (1992) 65 *S Cal L Rev* 1283 at 1288; and Nan Seuffert "Battered Women and Self-Defence" (1997) 17 *NZULR* 292 at 313–316 and 323–325.

rather than as *being under attack* (present tense). In other words, they are not understood to be located in a situation of escalating and ongoing danger that involves the use of physical violence against them. For example, in *R v Paton* the defendant was followed into the kitchen by her violent partner after being assaulted (and injured) in the hallway outside. She could be understood on these facts as either “having been attacked” or, more accurately, as being “under attack” at the time that her partner followed her into the kitchen.

If IPV is understood as a series of incidents then the history of violence experienced by victims is not appreciated to be crucial in understanding the threat they were facing at the time they used defensive force. This history informs what the victim knew their partner to be capable of, any predicted escalation in abuse following an attempt to stand up for themselves and what alternatives (other than physical resistance) might realistically be open. For example, if a partner who has repeatedly raped or hurt her when she refused “sex”, demands “sex”, then this request will be experienced as the threat of rape or physical violence. Declining “sex” raises the reasonable expectation of violent reprisal. If calling the police has been effective in operating as a check on her partner’s violence in the past, then the fact that he has disabled the telephone is a clear communication that this time there will be no check.

As noted above, battered woman syndrome was developed in order to address some of the problems primary victims have in explaining why their defensive force was reasonable. Section 48 makes it clear that the use of defensive force is to be assessed in the context of the defendant’s circumstances *as they personally understood them to be* — rather than as those circumstances might be understood by others.¹⁰⁷ It follows that if the primary victim develops a syndrome that causes her to believe herself unable to leave the relationship or avoid the abuse, then whether her defensive force is objectively reasonable should be assessed on the basis that that understanding of her circumstances (however mistaken) is true.

Nonetheless, juries, viewing the facts through the prism of battered woman syndrome, may struggle to see how the defendant’s defensive violence can be understood as “reasonable” when she suffers from a syndrome that makes her own perspective necessarily irrational.¹⁰⁸ Furthermore, battered woman syndrome testimony suggests that there is an excuse rather than a justification for the use of defensive force in the circumstances,¹⁰⁹ making it

107 See *McKay v Police* [1997] 3 NZLR 199 (HC).

108 Martha Shaffer “The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R v Lavallee*” (1997) 47 UTLJ 1.

109 See Donald L Creach “Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why” (1982) 34 Stan L Rev 615.

consistent with a diminished responsibility defence rather than an acquittal.¹¹⁰ Such a defence would provide a defendant, who would otherwise be guilty of murder, with a manslaughter conviction on the basis that their culpability was diminished at the time of offending because of an abnormality of the mind. Although the defence of diminished responsibility does not exist in New Zealand, acquitting a primary victim of murder on the basis that they lack the mens rea, but convicting them of manslaughter on the basis of an unlawful and dangerous act, may be operating in these cases as a de facto diminished responsibility defence. Providing the defendant with the defence of self-defence, on the other hand, requires finding that her actions were justified in the circumstances, and entitles her to an acquittal if successful. Juries who blame the victim for her circumstances or view her as someone with a distorted perspective on those circumstances may be unwilling to go this far.

This might explain why in New Zealand between 2009 and 2015 just over half of the primary victims who used lethal defensive force were convicted of manslaughter. This is despite the fact that the use of force by primary victims had strong defensive characteristics in many instances.¹¹¹ For example, the FVDRC found that between 2009 and 2015 most of the primary victims killed their abusive partners did so in response to an escalating threat from a person whom they knew from past experience was capable of hurting them very badly.¹¹² The weapon, typically a kitchen knife,¹¹³ in most cases was readily at hand and picked up in response to the escalating threat. Typically one (at most two) wounds were inflicted.¹¹⁴ In a significant minority of cases the primary victim offender was not intending to contact the body of the predominant aggressor or they were aiming for a part of the body where injury was unlikely to be fatal.¹¹⁵ In a number of instances they had been prevented from seeking help by being backed into a corner, having

110 See Rebecca Bradfield “Women Who Kill: Lack of Intent and Diminished Responsibility as the Other ‘Defences’ to Spousal Homicide” (2001) 13 CICJ 143.

111 See Law Commission, above n 99, at 8, 48 and 129–130.

112 Nine women had just been physically assaulted and still felt under threat, whilst five had been threatened or were in a situation of escalating threat: Family Violence Death Review Committee, above n 15, at 55 (note that one case has been resolved since publication).

113 Twelve used a kitchen knife and one used a kitchen implement: Family Violence Death Review Committee, above n 15, at 55.

114 Ten involved only one stab wound, whilst two involved two: Family Violence Death Review Committee, above n 15, at 55.

115 Three women had picked up the knife defensively and he had walked onto it; three were aiming for a part of his body that should not have been fatal; two were simply swinging the weapon in his general direction whilst under attack; and several had no memory of inflicting any injury.

their phone destroyed or being prevented from leaving the house.¹¹⁶ These features suggest that such offenders are acting defensively.¹¹⁷

Despite this, of the 16 cases in which primary victims killed their predominant aggressors, in only two instances did the jury clearly hold that the primary victim's use of defensive force was "reasonable" in the circumstances that they believed they were facing and in both of these cases an independent third party (unusually) witnessed their partner physically assaulting them just prior to the homicide.¹¹⁸ Of the 15 cases in which the defendant was fit to stand trial, nine were convicted of manslaughter and/or other offences instead and three of murder.¹¹⁹

The difficulty in getting a jury to accept that a woman's use of violent resistance was reasonable in self-defence is illustrated by *R v Hokianga*.¹²⁰ In this case a woman was convicted of assault with intent to cause grievous bodily harm after she stabbed her partner in the chest. Her partner, who was the predominant aggressor and who had survived the attack, testified at trial that his numerous convictions for using violence against her over the years were only a small number of the countless other incidents for which he had never been convicted. He said he had assaulted her on the night in question and she was terrified of him and had only presented the knife in order to defend herself. He said he had accidentally lunged onto it when he went to strike her again. Despite this testimony the jury rejected the notion that she was using reasonable defensive force.

An understanding of entrapment might result in different outcomes. It is not possible to accurately assess whether the primary victim's defensive force was reasonable if the predominant aggressor's pattern of abuse is not set out in detail and an attempt is not made to understand how the immediate events prior to the death event might have looked to a person who has survived those experiences. If the jury appreciates that the primary victim is in relationship with someone who has (over time) isolated her, intimidated

116 Three women had just had their phones disabled; one had been brought back into the house after she tried to leave; one had tried to lock the predominant aggressor out but he had forced his way into the house; and a number were backed into a confined space in the kitchen by their angry partner.

117 Only one of these women was separated from the deceased at the time of the death event. This is significant in light of the fact that "[i]f women's IPH [intimate partner homicide] perpetration is self-defensive, this would explain why men are more at risk of IPH victimization while in intact relationships": Li Eriksson and Paul Mazerolle "A general strain theory of intimate partner homicide" (2013) 18 *Aggress Violent Behav* 462 at 463.

118 Note that there was a third acquittal, possibly on the grounds of involuntariness.

119 Family Violence Death Review Committee, above n 15, at 57.

120 "Woman found guilty of stabbing partner" *The Gisborne Herald* (online ed, Gisborne, 19 August 2016).

her and used violence to close down her opportunities for resistance, and that her attempts to seek help have been unsuccessful or have escalated the situation, then they are less likely to see her use of defensive violence as an unreasonable over-reaction in the circumstances.

B *Prosecutions for failure to protect/neglectful parenting*

Section 152 of the Crimes Act 1961 provides:

Every one who is a parent, or is a person in place of a parent, who has actual care or charge of a child under the age of 18 years is under a legal duty—

- (a) to provide that child with necessities; and
- (b) to take reasonable steps to protect that child from injury.

A parent will be in breach of the duty set out in s 152 when they have failed to either protect a child who is in their care from injury, or to supply them with food, shelter or medical care, in circumstances where that failure is a “major departure” from the standard of care we would expect of a reasonable parent.¹²¹ What is required is proof of “gross”, “wicked” or “criminal” negligence — simple carelessness will not be enough.¹²²

Primary victims have been prosecuted for their failure to protect their child from their abusive partner.¹²³ They have also been prosecuted for neglectful parenting — for example, a failure to provide safe sleeping¹²⁴ or bathing¹²⁵ conditions — in circumstances where they are being abused by their intimate partner and are in a state of considerable trauma (including where they are self-medicating with alcohol or drugs to help them live with that trauma). These breaches have formed the basis for liability under a range of criminal offences — including criminal nuisance¹²⁶ when the child does not die as a result of the breach, or manslaughter when they do.

The English and Welsh Court of Appeal in *R v Khan*¹²⁷ made it clear that what is reasonable to expect of someone under the duty provisions has to be

121 Crimes Act 1961, s 150A(2).

122 AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at 580 citing *R v Bateman* (1925) 19 Cr App R 8 at 11.

123 See, for example, *R v Witika* [1993] 2 NZLR 424 (CA); and *R v Harris* HC Wellington CRI-2004-078-1816, 26 August 2005.

124 See, for example, *R v Tukiwaho*, above n 10.

125 See, for example, *E v R* [2010] NZCA 13, (2011) 25 CRNZ 411.

126 Crimes Act 1961, s 145. Note that a lesser standard of negligence might be required in relation to this offence: see *Vanner v R* HC New Plymouth CRI-2005-021-191, 21 July 2006.

127 *R v Khan* [2009] EWCA Crim 2, [2009] 1 WLR 2036.

assessed in the context of the circumstances that they are actually in. What is reasonable to expect of someone who is being abused, for example, will be different from what is reasonable to expect of someone who is not. Speaking in that instance of the mother and sisters of the predominant aggressor, who were living in the same household as the couple but did not take steps to protect the primary victim, the Court said:¹²⁸

In the present case, for example, if either of the female defendants had herself been subjected by [the accused] to serious violence of the kind which engulfed [the deceased], the jury might have concluded that it would not have been reasonable to expect her to take any protective steps, or that any protective steps she might have taken, even if relatively minor, and although in the end unsuccessful to save the deceased, were reasonable in the circumstances.

Whilst similar authority is not available in New Zealand, it must also be the case that any assessment of what is reasonable behaviour has to be undertaken in context. The point being made in this article is that how one conceptualises IPV will determine how one assesses the facts and may make a difference to deciding whether a parent was grossly careless or simply doing the best that could be realistically expected of them in their circumstances.

If IPV is conceptualised as a series of individual incidents in between which a primary victim is free to take (what are assumed to be effective) steps to achieve safety for herself and her children, then it is relatively easy to arrive at the conclusion that her failure to take such steps is a gross departure from the standard of care that we would expect of a reasonable parent and that she can be held accountable for harm that occurs in consequence. This was the conceptualisation of IPV that was adopted in *R v Witika*. In that case the Court of Appeal endorsed the directions of the sentencing judge. The judge, commenting on the liability of a woman for failing to protect her child from her violent partner who had also severely abused her, remarked:¹²⁹

... if the opportunity presents itself to that person to take steps to prevent the wrongdoing of the other, if there is a failure to remove the child from the dangerous environment or to call for help when it is open to the accused whom it is sought to make a party to do so, then the offence is complete at that point. For example, if the other party, the wrongdoer, is away from the house, there is nothing to prevent the persons sought to be made a party picking up the child and going for help next door, to the police, wherever,

128 At [33].

129 *R v Witika*, above n 123, at 431.

going next door and using the telephone and the intention to encourage the continuation of the wrongdoing might be inferred from the failure to take steps at that point

On the other hand, if an understanding of entrapment shapes the evidence that is gathered and presented, and also colours the interpretative lens that is placed over this evidence, then the conclusion may well be quite different.¹³⁰ And even if the same conclusion is reached then at least the question has been assessed in a more realistic manner because implicit and inaccurate assumptions about the facts of the case have not determined the outcome.

An entrapment model renders visible what the perpetrator has done to undermine the primary victim's capacity to parent, as well as her capacity to resist the abuse. It realistically appraises the limitations in the support currently on offer for parents who are also primary victims. The FVDRC has made the point that a parent who is subject to serious abuse is "parenting under siege".¹³¹ Entrapment enables the jury to realistically assess the nature of that siege for the purposes of asking what is realistic to expect of the defendant in those circumstances — what is a simple non-criminal departure and what is a "major departure" from reasonable expectations.

IV Conclusion

Quilter argues that the interpretative schema used to make sense of facts explains why reforms to the law often do not produce the improvements expected.¹³² This is because they fail to change how we think about the underlying social phenomenon to which the law is applied and thus the practices of those laws. Recognising this, the Law Commission has also strongly supported the need to update common understandings about the nature of IPV when assessing the criminal liability of primary victim offenders.¹³³

Presenting evidence of entrapment in court does, however, involve numerous challenges. Understanding the entrapment of any particular victim requires accessing and telling a larger story than simply a story about the

130 See Evan Stark "A Failure to Protect: Unravelling 'The Battered Mother's Dilemma'" (2000) 27 W St UL Rev 29.

131 Family Violence Death Review Committee *Fifth Report*, above n 15, at 100.

132 Quilter, above n 77.

133 Law Commission, above n 99. The Law Commission recommended training for judges, criminal lawyers and police. Of equal significance is the need for juries to have their thinking around family violence updated. For this reason the FVDRC also supports the use of jury directions in cases involving IPV.

particular occasion on which the primary victim offended, or even a story that is limited to recounting the physical assaults that she endured over the years from her abusive partner. Furthermore, simply testifying that the defendant suffers from a “one size fits all” syndrome will not be sufficient. Coercive control is not generic but “evolves through a process of trial and error based on how a victim responds”.¹³⁴ Perpetrators use “special knowledge” of their partner in evolving these tactics.¹³⁵

It follows that entrapment requires introducing a detailed evidentiary base that is specific to the defendant’s particular circumstances and experiences. Evidence about the past history of the relationship is required — including details of the history of coercive and controlling behaviours by the predominant aggressor, acts of resistance by the victim, retaliatory violence, institutional responses, and victim vulnerabilities and resources. Furthermore, a sense of the cumulative and compounding operation of these factors over time must be conveyed.

Recognising the complexity of the task, the FVDRC has developed a practical guide to assist in asking questions to develop the narrative detail of entrapment in any particular case and to determine whether any corroborating evidence is available.¹³⁶ These questions are directed at the social context in which the relationship was originally formed; the predominant aggressor’s coercive and controlling behaviours and how these limited the victim’s ability to be self-determining over time; how these behaviours affected her capacity to parent; aspects of his lifestyle that reinforce his entitlement to use violence; the primary victim’s trauma and mental health history in the context of IPV; how agencies have responded to help-seeking in the past; and the manner in which structural inequities have exacerbated these other dimensions.

Much of this information may be within the particular knowledge of the defendant. It follows that greater reliance may be placed on the testimony of the defendant on matters that may go back quite some time and in relation to which they may have experienced considerable trauma. If the defendant has head injuries or has been self-medicating their trauma, then they may have additional difficulties in remembering and accurately recounting such details. As Caroline Counsel remarks:¹³⁷

It is often the case that the victims of violence are terrible witnesses, they are so incapacitated by the violence that has been inflicted upon them

134 Stark, above n 18, at 207.

135 At 206–207.

136 This tool can be found on the FVDRC’s website.

137 *Witness Statement of Caroline Marita Anne Counsel* (Royal Commission into Family Violence (Victoria), 5 August 2015) at [99].

that they are paralysed when giving instructions and are unable to share their narrative. It is like dealing with a person that has been tortured or brainwashed, their capacity to function at that point is just so compromised. For example, when she seemed like she was dismissive, it was instead because she was disassociating. She was just trying her best to cope.

Expert testimony may be required to rehabilitate the testimony of the defendant, to challenge the interpretative framework that may otherwise be placed over this testimony and to draw out and make sense of the narrative detail that is relevant to how entrapment operated in the unique circumstances in issue.¹³⁸ Clearly it will be essential to have an expert with an up-to-date understanding of contemporary approaches to IPV that have been outlined in this article.

138 Sheehy, Stubbs and Tolmie, above n 84.