

Narratives of Domestic Violence

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Abstract

Second wave feminists in Australia brought the social issue of domestic violence out of the suburban shadows and into the activist and policy spotlight in the 1970s. Subsequent feminist-inspired law reforms around domestic violence included the introduction of state domestic violence order regimes in the 1980s, and amendments to the *Family Law Act 1975* (Cth) in 1995 to specify family violence as one of the matters to be taken into account by the Family Court in determining the best interests of the child. These laws were generally underpinned by a particular analysis of domestic violence developed by feminist advocates and activists working with battered women.

Laws related to domestic violence, however, are implemented not by feminist reformers, but by lawyers and judges who do not necessarily share these understandings of violence. Indeed, they are more likely to share understandings derived from the media, popular culture, and social and institutional discourses which are often at odds with the feminist account.

The article explores the 'knowledge' about violence manifested by magistrates and judges in domestic violence order and Family Court proceedings, drawing upon observations and other empirical data from a study of women's experience of speaking about violence in civil courts. The study found that the provision of venues to hear women's stories about domestic violence did not result in any general revision of traditional conceptions and myths about the definition, causes or effects of violence. Rather, women's stories tended to be heard, filtered, and interpreted through non-feminist social and legal narratives about domestic violence. The article argues that feminist reforms need to attend explicitly to legal culture as well as legal rules, and considers what interventions might help to produce an epistemological shift in the legal system in relation to domestic violence.

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1. Introduction

This article investigates different stories about domestic violence, and their impact in civil proceedings concerning domestic violence. It argues that while feminist-inspired law reforms in the 1980s and 1990s were based on feminist understandings of domestic violence, the implementation of those reforms has been impeded by various non-feminist discourses about domestic violence that continue to circulate in legal culture.

The article begins with an outline of the prevalence and cost of domestic violence in Australia, the feminist reforms designed to address domestic violence, and the 'implementation problem' that feminist law reform efforts often encounter. It then sets out the elements of a feminist understanding of domestic violence, supplemented by accounts of domestic violence provided by women speaking from positions of 'difference', such as women from non-English speaking backgrounds, lesbians, women with disabilities and Indigenous women. This is followed by an exposition of non-feminist understandings of domestic violence found in social and legal texts, which are systematically contrasted with the feminist account.

The article then examines judicial knowledge about domestic violence, as manifested primarily in intervention order proceedings in the Magistrates' Court of Victoria, but also in proceedings for parenting and property orders in the Family Court of Australia. It shows that judicial understandings of domestic violence tend to accord far more with non-feminist than feminist accounts, in a catalogue of ways. It concludes by arguing for the need to expand the knowledge base of magistrates and judges in relation to domestic violence, so that the facts and evidence presented in each case may be appropriately analysed.

The article draws upon theoretical and advocacy literature, the findings of recent empirical studies of protection order¹ and family law² proceedings, and my

1 These include Rosemary Wearing, *Monitoring the Impact of the Crimes (Family Violence) Act 1987* (1992); Rosemary Wearing, *Monitoring the Crimes (Family Violence) Act 1987: A Study of Those Who Do Not Proceed* (1996); Jennifer Hickey & Stephen Cumines, *Apprehended Violence Orders: A Survey of Magistrates* (1999); Lily Trimboli & Roseanne Bonney, *An Evaluation of the NSW Apprehended Violence Order Scheme* (1997); Jessamy Babbel, 'Balancing the Act: Survivors of Family Violence, Intervention Orders and Victorian Magistrates' Courts' [2002] *DVIRC Newsletter* (Winter) 12; Hanna Assafiri & Maria Dimopoulos, 'The Legal System's Treatment of NESB Women Victims of Male Violence' (1995) 6(4) *Criminology Aust* 20; Belinda Carpenter, Sue Currie & Rachael Field, 'Domestic Violence: Views of Queensland Magistrates', paper presented at the Australian & New Zealand Society of Criminology Annual Conference, 21–23 Feb 2001.

2 These include John Dewar & Stephen Parker, 'The Impact of the New Part VII Family Law Act 1975' (1999) 13 *AJFL* 96; Helen Rhoades, Regina Graycar & Margaret Harrison, *The Family Law Reform Act 1995: The First Three Years* (2000); Kathryn Rendell, Zoe Rathus & Angela Lynch, *An Unacceptable Risk: A Report on Child Contact Arrangements Where There is Violence in the Family* (2000); Helen Rhoades, 'The "No Contact Mother": Reconstructions of Motherhood in the Era of the "New Father"' (2002) 16 *Int'l J Law, Policy and the Family* 71; Miranda Kaye, Julie Stubbs & Julia Tolmie, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence* (2003); Rae Kaspiew, 'Violence in Contested Children's Cases: An Empirical Exploration' (2005) 19 *AJFL* 112.

own empirical study of women's experience of making claims about domestic violence in intervention order proceedings under the *Crimes (Family Violence) Act* 1987 (Vic) (hereafter *Crimes (Family Violence) Act*) and in the Family Court in Melbourne. The field work was undertaken in 1996–7, and consisted of court observations, a review of Family Court files, and interviews with lawyers, support workers and women litigants. I observed 100 intervention order applications in nine suburban and city Magistrates' Courts,³ and talked informally to magistrates and domestic violence court support program workers.⁴ I also reviewed 124 Family Court files of cases listed for hearing during the observation period, and followed 20 cases involving allegations of domestic violence to conclusion, whether by court decision or consent orders. When attending court, I sat at the back of the courtroom and took notes on a standardised form which, among other things, included a running sheet, on which I recorded all speaking roles in the proceedings and summarised the content of the speech. I conducted interviews with 18 practitioners chosen for their particular expertise or profile in the domestic violence field.⁵ And I interviewed 13 women litigants who were survivors of violence, and who had applied for an intervention order and/or been through the Family Court.⁶ The interviews were semi-structured, and were generally conducted face to face at a location of the interviewee's choosing. Three of the interviews with litigants were conducted by telephone at the request of the interviewee, and eight were conducted in the form of two focus groups, one of which consisted of non-English speaking background women, with support workers present who acted as interpreters. A support worker was also present at the second focus group.

The fieldwork occurred at a time when the *Crimes (Family Violence) Act* 1987 had been in place for almost 10 years, and the *Family Law Reform Act* 1995 (Cth) (hereafter *Family Law Reform Act*) had just come into force. For reasons of space, the following discussion focuses on intervention order proceedings, however some of the specific findings, and my overall argument, are also relevant to the Family Court. Subsequent empirical studies,⁷ and a recent review of the *Crimes (Family Violence) Act* by the Victorian Law Reform Commission,⁸ confirm the continuing salience of my observations in both fora.

3 Where individual matters are discussed, they are referred to by code, location and date, such as MC22 (Suburb Magistrates' Court, 5 January 1996).

4 Notes from these informal discussions are referred to in footnotes as 'Field notes', together with the relevant location and date.

5 Eleven of the practitioners were solicitors, four were barristers and three were support workers. Where these interviewees agreed to be identified, they are referred to by name; where they wished to remain anonymous, I have assigned codes such as S1 (solicitor), B2 (barrister), and SW1 (support worker).

6 Women litigants were guaranteed anonymity, and are identified by code such as WL3 (woman litigant).

7 In relation to the Family Court, see above n2. In relation to the Magistrates' Court: Babbel, above n1. See also Jenny Nunn & Marg D'Arcy, 'Legal Responses to Family Violence: The Need for a Critical Review' [2001] *DVIRC Newsletter* (Spring) 17.

8 Victorian Law Reform Commission, *Review of Family Violence Laws: Consultation Paper* (2004).

2. *The Prevalence and Cost of Domestic Violence*

The fact that domestic violence is a serious and ongoing social problem has been well recognised since the women's movement turned the hitherto private experience of violence against women in the home into a political issue in the 1960s and 1970s. In Australia, a major national prevalence study of violence against women conducted by the Australian Bureau of Statistics in 1996 found that 23 per cent of women who had ever been married or in a de facto relationship – 1.1 million women – had experienced violence from their partner at some stage during the relationship.⁹ Of women who were currently married or in a de facto relationship, 2.6 per cent or 111 000, had experienced violence from their partner during the previous 12 months.¹⁰ Half of the women reporting violence in a current relationship and three quarters of those reporting violence in a previous relationship said they had experienced more than one incident of violence.¹¹ Twelve per cent of women who had experienced violence from a current or previous male partner – 41 700 women – currently lived in fear as a result of the violence.¹² A more recent prevalence survey based on a smaller, randomly selected sample of women aged 18–69 across Australia found that 34 per cent of those who had a current or former intimate partner (spouse, de facto or boyfriend) had experienced at least one form of physical or sexual violence from that partner at some stage – 4 per cent in the last 12 months.¹³

In 2004, Access Economics produced a report commissioned under the Federal Government's Partnerships Against Domestic Violence program, which estimated that, in 2002–3: there were 408 100 victims of domestic violence in Australia, 87 per cent of them women, with 98 per cent of perpetrators being male; 263 800 children lived with victims of domestic violence and 181 200 children witnessed domestic violence; and the total cost of the violence was \$8.1 billion.¹⁴ This figure included an estimated \$3.5 billion in pain, suffering and premature mortality, and \$4.6 billion in costs to health care, production, consumption, administration, second generational costs and costs of transfers.¹⁵ The bulk of the cost of domestic violence (\$4.1 billion) was borne by its victims, but \$1.3 billion of the cost fell upon federal and state governments, and a further \$1.2 billion fell upon the general community.¹⁶

9 Australian Bureau of Statistics, *Women's Safety Australia*, Cat no 4128.0 (1996) at 42, 50. 'Violence' was defined as 'any incident involving the occurrence, attempt or threat of either physical or sexual assault': id at 2. For a discussion of definitional and methodological issues in prevalence surveys of violence against women, see Holly Johnson, 'Rethinking Survey Research on Violence Against Women' in Rebecca Emerson Dobash & Russell Dobash (eds), *Rethinking Violence Against Women* (1998).

10 Australian Bureau of Statistics (ABS), id at 50.

11 Id at 51.

12 Id at 42.

13 Jenny Mouzou & Toni Makkai, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey (IVAWS)* (2004) at 44.

14 Access Economics, *The Cost of Domestic Violence to the Australian Economy* (2004) at vi–vii.

15 Id at vii.

16 Ibid.

3. *Feminist Law Reform and the 'Implementation Problem'*

Second wave feminism's initial activism around domestic violence in Australia focused on the establishment of women's refuges and the achievement of justice for battered women who had killed violent partners.¹⁷ Attention also turned to the inadequate policing of domestic violence, although unlike in the US, the aggressive criminalisation of domestic violence has never formed part of Australian feminist strategies. Rather, civil protection orders became the centrepiece of Australian responses to domestic violence, with protection order regimes being enacted by state and territory governments during the 1980s.¹⁸ In the early 1990s, academic commentators, women's advocacy groups and the Australian Law Reform Commission began to express concerns about the way in which domestic violence was dealt with (or rather was ignored) in family law cases.¹⁹ In response, the *Family Law Reform Act*, which came into force in mid-1996, for the first time specified that any history or future risk of family violence affecting a child was to be taken into account in determining the best interests of the child in residence and contact proceedings.²⁰

Feminist engagements with the state to achieve legal rules and policies that respond to women's harms have, however, repeatedly been dogged by what might be termed the 'implementation problem'. In the words of Betsy Stanko:

The most important part of any legislation is how decision makers put the provisions of the statutes into practice. Unfortunately, once legislation is passed, it is mistakenly credited with solving the problem.²¹

Unfortunately, too, studies of the outcomes of feminist law reform efforts have persistently demonstrated that decision makers are often highly resistant to putting the provisions of the statutes into practice, and that much-heralded legal interventions may have little or no impact in practice. Numerous commentators,

17 See, for example, Ann Genovese, 'The Battered Body' (1997) 12 *Australian Feminist Studies* 91; Ann Genovese, 'The Politics of Naming: 70s Feminisms, Genealogy, and "Domestic Violence"' in Ruth Walker, Kylie Brass & John Byron (eds), *Anatomies of Violence: An Interdisciplinary Investigation* (2000); Lesley Laing, *Progress, Trends and Challenges in Australian Responses to Domestic Violence* (2000) at 3.

18 *Domestic Violence Act* 1986 (ACT); *Crimes Act* 1900 (NSW) Part 15A; *Domestic Violence Act* 1992 (NT); *Domestic Violence (Family Protection) Act* 1989 (Qld); *Domestic Violence Act* 1994 (SA); *Family Violence Act* 2004 (Tas); *Restraining Orders Act* 1997 (WA).

19 See, for example, The Family Court Lobby Group of South Australia, "In Whose Best Interest?" *A Report of the South Australian Phone In on Women, Domestic Violence and the Family Court* (1990); Juliet Behrens, 'Domestic Violence and Property Adjustment: A Critique of "No Fault" Discourse' (1993) 7 *AJFL* 9; Australian Law Reform Commission, *Equality Before the Law: Justice for Women* Report 69, Part I (1994); Regina Graycar, 'The Relevance of Violence in Family Law Decision Making' (1995) 9 *AJFL* 58.

20 *Family Law Act* 1975 (Cth), former ss68F(2)(g), (i) and (j); see also former ss68J and 68K.

21 Elizabeth Stanko, *Intimate Intrusions: Women's Experience of Male Violence* (1985) at 165.

for example, have documented the failure of feminist rape law reforms,²² and the ways in which battered woman syndrome evidence has been twisted out of its intended shape.²³

Various diagnoses of the implementation problem have been offered. Lawrence Friedman's theory of legal culture argues that if reforms are out of step with prevailing 'legal culture' (that is 'people's ideas, attitudes, values, and expectations with regard to law'),²⁴ they are 'doomed to failure'.²⁵ Legal culture imposes limits on the scope of changes that can be made in practice; it is impossible to 'cut against the grain'.²⁶ While recognising that legal culture will not be uniform across the whole of a society, the important culture from the perspective of implementation is the 'internal' legal culture of the judges, lawyers and other legal actors who are called upon to put new legislation into effect.²⁷ If there is a disjunction between the legal culture of (feminist) reformers and that of (non-feminist) enforcers, then dismal results are inevitable.

The ability for internal legal cultures to persist and thrive in opposition to legislative mandates may be attributed to the relative autonomy of legal decision makers and the scope of the discretion they possess. Thus, according to Horney and Spohn:

The chronic failure of reforms aimed at the court system suggests that reformers have misperceptions about the nature of the judicial process. Most reform proposals assume that we have a hierarchic, centralized, obedient system of courts that will automatically and faithfully adhere to new rules. These misperceptions cause reformers to overestimate the role of legal rules in controlling the behavior of decisionmakers and to underestimate the role of discretion in modifying the legal rules Numerous studies have demonstrated limited impact of reforms

22 See, for example, NSW Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996); Melanie Heenan & Helen McKelvie, *Rape Law Reform Evaluation Project, Report No 2: The Crimes (Rape) Act 1991 – An Evaluation Report* (1997); Patricia Eastaer (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998); Mary Heath & Ngaire Naffine, 'Men's Needs and Women's Desires: Feminist Dilemmas about Rape Law "Reform"' (1994) 3 *Aust Feminist LJ* 30.

23 See, for example, Elizabeth Sheehy, Julie Stubbs & Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations' (1992) 16 *Crim LJ* 369; Julie Stubbs, 'Battered Woman Syndrome in Australia: A Challenge to Gender Bias in Law?' in Julie Stubbs (ed), *Women, Male Violence and the Law* (1994); Julie Stubbs & 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; Terry Threadgold, 'Performativity, Regulative Fictions, Huge Stabilities: Framing Battered Woman's Syndrome' (1997) 3 *Law Text Culture* 210; Julia Tolmie, 'Pacific-Asian Immigrant and Refugee Women Who Kill Their Batterers: Telling Stories that Illustrate the Significance of Specificity' (1997) 19 *Syd LR* 472; Therese McCarthy, "'Battered Woman Syndrome': Some Reflections on the Invisibility of the Battering Man in Legal Discourse, Drawing on *R v Raby*' (1995) 4 *Aust Feminist LJ* 141.

24 Lawrence Friedman, *American Law in the 20th Century* (2002) at 589.

25 Lawrence Friedman, 'Is There a Modern Legal Culture?' (1994) 7 *Ratio Juris* 117 at 130.

26 *Ibid.*

27 Lawrence Friedman, 'Legal Culture and the Welfare State' in Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (1986) at 269.

when officials' attitudes were at odds with reformers' goals Officials may modify or ignore reforms that threaten the status quo by impeding the smooth and efficient flow of cases or that require changes in deeply entrenched and familiar routines.²⁸

More fundamentally, some feminist critical theorists have argued that law is a two-edged sword for women, which can end up doing more harm than good. According to these theorists, law is unlikely to deliver the outcomes that feminist law reformers seek, because feminist objectives must be translated into existing legal forms and concepts, which do not adequately respond to women's concerns.²⁹ Moreover, once translated, they take on a different life and their meaning is controlled not by feminists but by legal actors with their own agendas.³⁰ Law transforms elements of experience (such as being subjected to domestic violence) into fixed, objectified and disempowering categories (such as those of 'victim', or 'battered woman'), and decisions as to whether individual women fit into these categories and therefore qualify for protection are made by unsympathetic law enforcers.³¹ Feminist interests may even be co-opted to serve other interests (such as conservative 'law and order' campaigns) that are antithetical to the original feminist intentions.³² According to this view, the real problem for women may turn out to be not lack of legal recognition, but hostile social discourses of which law is only a part. Thus, rather than accepting law's claims to be a powerful instrument for justice, feminists should focus their attack on those wider discourses, as they are manifested in law and elsewhere.³³

These different accounts of the implementation problem in law reform are perhaps not so far apart, in that they each identify ideas or discourses circulating both outside and inside the legal system which may operate in opposition to

28 Julia Horney & Cassia Spohn, 'Rape Law Reform and Instrumental Change in Six Urban Jurisdictions' in Stewart Macaulay, Lawrence Friedman & John Stookey (eds), *Law and Society: Readings on the Social Study of Law* (1995) at 525. See also Lawrence Friedman, 'The Concept of the Self in Legal Culture' (1990) 38 *Cleveland State LR* 517 at 522 (noting that '[m]any experts . . . have come to grief, because they assume that the law is a top-down command system'); Sue Lees, 'Lawyers' Work as Constitutive of Gender Relations' in Maureen Cain & Christine Harrington (eds), *Lawyers in a Postmodern World: Translation and Transgression* (1994) at 126 (observing that 'the law often constitutes gender relations in its discretionary spaces rather than in its explicit rules', which 'renders these practices virtually immune to political action').

29 See Carol Smart, *Feminism and the Power of Law* (1989) at 82; Lucinda Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame LR* 886 at 891, 909; Margaret Thornton, 'Feminism and the Contradictions of Law Reform' (1991) 19 *Int'l J of the Sociology of Law* 453 at 461; Radha Jhappan, 'The Equality Pit or the Rehabilitation of Justice' (1998) 10 *Canadian J of Women & Law* 60 at 62-64.

30 Smart, id at 164; Elizabeth Schneider, *Battered Women and Feminist Law Making* (2000) at 6; Renée Römkens, 'Law as a Trojan Horse: Unintended Consequences of Rights-based Interventions to Support Battered Women' (2001) 13 *Yale J of Law & Feminism* 265.

31 Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (1995); Reva B Siegel, "'The Rule of Love": Wife Beating as Prerogative and Privacy' (1996) 105 *Yale LJ* 2117; Susan Hekman, 'Beyond Identity: Feminism, Identity, and Identity Politics' (2000) 1 *Feminist Theory* 289 at 296-97; Römkens, id at 267, 283.

32 Thornton, above n29 at 464; Jocelyne Scutt, *The Incredible Woman*, vol 1 (1997) at 137-43; Kathleen Ferraro, 'The Dance of Dependency: A Genealogy of Domestic Violence Discourse' (1996) 11(4) *Hypatia* 77 at 79.

particular reforms. The article takes up this point in identifying legal and extra-legal discourses about domestic violence which demonstrably affect the implementation of feminist reforms relating to domestic violence.

4. *Feminist Understandings of Domestic Violence*

A. *The Mainstream Feminist Account of Domestic Violence*

Feminist domestic violence advocates and activists have developed a particular analysis of the dynamics of domestic violence which seeks to bring to light the collective accounts and experiences of survivors of violence and abuse. These accounts have generally been excluded from mainstream discourses about violence such as social work, psychology, and criminal justice. This analysis has also been tested and confirmed in a limited number of prevalence surveys that have looked beyond the incidence of physical violence. This feminist understanding of domestic violence may be represented schematically as follows:

- (1) Domestic violence is a highly gendered phenomenon. There is a substantial gender disparity in who initiates violence and who is more physically harmed by it. A woman striking back in anger or in self-defence is not engaged in mutual battering. There is also a clear gender disparity in who seeks safety from violence.³⁴
- (2) Violence is not just about physical abuse but about the exercise of power and control by one partner in a relationship (usually the male in heterosexual relationships) over the other.³⁵
- (3) Power and control is exercised in a great variety of ways, so that abusers typically display a pattern of coercive behaviours. Physical assaults and sexual abuse reinforce other tactics such as emotional abuse, isolation, minimisation, denial and blaming the target of violence, using the children to get at the target, asserting male privilege, economic abuse, coercion and threats, and intimidation.³⁶

33 Smart, above n29; Carol Smart, 'Law's Truth/Women's Experience' in Regina Graycar (ed), *Dissenting Opinions: Feminist Explorations in Law and Society* (1990) at 20; Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (1995) at 219; Mary Joe Frug, *Postmodern Legal Feminism* (1992) at 148–53.

34 Ellen Pence & Michael Paymar, *Education Groups for Men Who Batter: The Duluth Model* (1993) at 5.

35 Id, passim; Karla Fischer, Neil Vidmar & Rene Ellis, 'The Culture of Battering and the Role of Mediation in Domestic Violence Cases' (1993) 46 *Southern Methodist ULR* 2117 at 2141; Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Mich LR* 1 at 53–60.

36 Pence & Paymar, above n34 at 2–3. See also Rebecca Dobash & Russell Dobash, 'Wives: The "Appropriate" Victims of Marital Violence' (1977–78) 2 *Victimology* 426 at 438; Fischer, Vidmar & Ellis, id at 2121–22, 2141. The Women's Safety Australia study also documented emotional abuse (defined as 'manipulation, isolation or intimidation'), damage to or destruction of property, and difficulties over family finances: ABS, above n9 at 51. In the Australian IVAWS study, 37–40 per cent of women reported controlling behaviours from a current intimate partner, and controlling behaviours were found to increase the risk of physical violence by a factor of six: Mouzos & Makkai, above n14 at 48, 61.

- (4) Threats and coercion (particularly threats concerning the children) have a serious impact. Many women describe emotional abuse, 'mental cruelty' and fear as the worst aspects of domestic violence. The pain from physical injuries fades, but fear does not go away.³⁷
- (5) Women with violent partners frequently experience abuse during pregnancy and when they are caring for young children, as their partner seeks to reassert his position at the centre of her attention. Some women are hit for the first time when they are pregnant.³⁸
- (6) Children living with domestic violence are aware of the violence even if they do not personally observe it, and are 'actively involved ... in dealing with the difficult and terrifying situations which confront them'.³⁹ Children affected by violence experience trauma, behavioural and emotional problems, and effects on their social and cognitive development.⁴⁰ They may also blame themselves for the violence, or develop inappropriate attitudes towards violence.⁴¹ And they further suffer from the effects of the violence on the parenting capacity of the abused partner.⁴² In addition, there is a high degree of correlation between spousal abuse and child abuse.⁴³
- (7) Violent men routinely deny, minimise, and excuse their violence (for example by reference to anger, stress, insecurity, or alcohol), or blame their partner for provoking the violence. However, violence is a deliberate strategy designed to undermine their partner's ability to act autonomously. This includes supposedly 'out of control' behavior, which is rarely unintentional.⁴⁴

37 Liz Kelly, 'How Women Define Their Experiences of Violence' in Kersti Yllö & Michele Bograd (eds), *Feminist Perspectives on Wife Abuse* (1988); Pence & Paymar, above n34 at 155–56; Alice Bailey, 'Women's Understandings of Violence in Their Everyday Relationships' [1995] *DVIRC Newsletter* (November) 8.

38 The Women's Safety Australia study estimated that 42 per cent of the women who had been pregnant during a previous relationship had experienced violence during the pregnancy, with 20 per cent experiencing violence for the first time when pregnant: ABS, above n9 at 52.

39 Lesley Laing, *Children, Young People and Domestic Violence* (2000) at 1; Mildred Daley Pagelow, 'Justice for Victims of Spouse Abuse in Divorce and Child Custody Cases' (1993) 8 *Violence & Victims* 69 at 77.

40 Peter Jaffe, Nancy Lemon & Samantha Poisson, *Child Custody and Domestic Violence: A Call for Safety and Accountability* (2003) at 22–24; Laing, id at 10; Nicholas Bala, 'Spousal Abuse and Children of Divorce: A Differentiated Approach' (1996) 13 *Can J Fam L* 215 at 335–37; Jennifer McIntosh, 'Thought in the Face of Violence: A Child's Need' (2002) 26 *Child Abuse & Neglect* 229 at 230; Howard Davidson, 'Child Abuse and Domestic Violence: Legal Connections and Controversies' (1995) 29 *Fam LQ* 357 at 359; Stephen Doyne, Janet Bowermaster, J Reid Meloy, Donald Dutton, Peter Jaffe, Stephen Temko & Paul Mones, 'Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority' (1999) 50 *Juvenile & Fam Ct J* (Spring) 1; Amy Levin, 'Comment, Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?' (2000) 47 *UCLA LR* 813 at 833.

41 Jaffe, Lemon & Poisson, *ibid*.

42 For example, Bala, above n40 at 235–37.

- (8) Women may not initially identify their partner's behaviour as 'violence', or may initially deny it is happening to them.⁴⁵ They may then seek to rationalise or excuse the violence, blame themselves, and/or attempt to modify their behaviour so as not to provoke their partner.⁴⁶ However, a woman cannot change a violent man's behaviour by changing her own behaviour.⁴⁷ Rather, the frequency and severity of violence tends to escalate over time.⁴⁸
- (9) In addition to modifying their behaviour, women's strategies for coping with violence include dissociating themselves from the violence, 'forgetting' about abuse, retaining vague and sketchy memories of violent incidents, minimising the seriousness of the violence, vigilance, helpseeking, and attempting to leave.⁴⁹
- (10) The effects of violence are cumulative. Women understand all of their partner's actions in the context of their prior violence and controlling behaviours. They become experts in 'reading the signals' – cues that signify danger that may not be evident to anyone else. Their perceptions of danger are accurate. 'Many women describe a certain "look in the eye" that signals extreme danger', and that may precipitate an extreme response, such as killing the abuser.⁵⁰
- (11) Women who are targets of violence are 'active survivors'.⁵¹ They make frequent efforts to seek help, but these attempts may not be effective in

43 Etienne Krug, Linda Dahlberg, James Mercy, Anthony Zwi & Rafael Lozano, *World Report on Violence and Health* (2002) at 68; Adam Tomison, *Exploring Family Violence: Links Between Child Maltreatment and Domestic Violence* (2000); Jaffe, Lemon & Poisson, above n40 at 30; Lesley Hewitt, Thea Brown, Margarita Frederico & Rosemary Martyn, 'Family Violence in the Family Court' [1996] *DVIRC Newsletter* (August) 19 at 20–22; Rendell, Rathus & Lynch, above n2 at 42; Suzanne Eastwood & Kaz Phillips, 'But Was He a Good Father? Parenting and Male Violence' [1996] *DVIRC Newsletter* (March) 12; Lee Bowker, Michelle Arbitell & Richard McFerron, 'On the Relationship Between Wife Beating and Child Abuse' in Kersti Yllö & Michele Bograd (eds), *Feminist Perspectives on Wife Abuse* (1988); Bala, above n40 at 235–37; Davidson, above n40 at 357–58.

44 Pence & Paymar, above n34 at 2–3, 9–14; Kate Cavanagh, Rebecca Dobash & Russell Dobash, "'Remedial Work": Men's Strategic Responses to Their Violence Against Intimate Female Partners' (2001) 35 *Sociology* 695; Fischer, Vidmar & Ellis, above n35 at 2138; Elizabeth Schneider, 'The Violence of Privacy' (1991) 23 *Conn LR* 973 at 984; James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (1999) at 71.

45 Kelly, above n37 at 119; Fischer, Vidmar & Ellis, above n35 at 2141.

46 Lenore Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (1987) ch 3; Edward Gondolf & Ellen Fisher, *Battered Women as Survivors: An Alternative to Treating Learned Helplessness* (1988) ch 2; Fischer, Vidmar & Ellis, above n35 at 2129–30, 2141; Robin West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory' (2000) *Wis Women's LJ* 149 at 167; Bailey, above n37 at 9.

47 Pence & Paymar, above n34 at 13; Walker, *ibid.*

48 Gondolf & Fisher, above n46.

49 Kelly, above n37 at 124; Mahoney, above n35 at 18, 22; Fischer, Vidmar & Ellis, above n35 at 2141; Elaine Lawless, 'Transformative Re-membering: De-scribing the Unspeakable in Battered Women's Narratives' (2000) 57 *Southern Folklore* 65 at 73–77; Bailey, above n37 at 9; Schneider, above n44 at 984.

improving their safety.⁵² Police responses are often inadequate.⁵³ Social institutions (families, schools, churches, the welfare system, the legal system) cannot necessarily be relied upon for support. Instead, they often support violent men's beliefs that their partners should be subordinate to them and comply with their demands, and also tend to engage in denial, minimisation, excuses, and victim blaming, rather than holding men accountable for their behaviour.⁵⁴ Women's efforts to seek help may also be met with violent retaliation from their partners.⁵⁵

- (12) Women often do not wish to leave their violent partners. Some still love their partners.⁵⁶ They wish to rescue the relationship, maintain the connection between themselves, their partner and their children, and live together in safety.⁵⁷ Other women see no realistic alternative to reliance on their partner's financial support for their own and their children's well-being.⁵⁸ In response to queries as to why women remain in abusive relationships, Martha Mahoney asks, 'Do we "stay" or are we simply married?', and notes women's understandable resistance to defining their entire experience of marriage by the episodes of violence.⁵⁹ Several writers have observed that society and the legal system expect women to separate from violent partners, while paying insufficient attention to the possibilities for achieving safety within relationships.⁶⁰
- (13) Women also frequently do attempt to leave, but this can be difficult and dangerous. Practical obstacles include leaving safely without attracting a violent response, finding alternative housing, and surviving economically,

50 Mary Ann Dutton, *Empowering and Healing the Battered Woman* (1992) ch 1.

51 Gondolf & Fisher, above n46.

52 Gondolf & Fisher, *ibid*; Dutton, above n50; Mahoney, above n35 at 61; Fischer, Vidmar & Ellis, above n35 at 2136.

53 See, for example, Renata Alexander, *Domestic Violence in Australia: The Legal Response* (3rd ed, 2002) at 31–33; Wearing (1992), above n1 at 283–89; Nunn & D'Arcy, above n7 at 18–19; Hayley Katzen & Loretta Kelly, 'How Do I Prove I Saw His Shadow?' *Responses to Breaches of Apprehended Violence Orders: A Consultation with Women and Police in the Richmond Local Area Command of NSW* (2000); Trimboli & Bonney, above n1 at 58–59; Victorian Law Reform Commission, above n8 at 187; Queensland Department of Justice & Attorney-General and Office of Women's Policy, *Report of the Taskforce on Women and the Criminal Code* (2000) at 111.

54 Pence & Paymar, above n34 at 15; Ruth Busch, Neville Robertson & Hilary Lapsley, 'The Gap: Battered Women's Experience of the Justice System in New Zealand' (1995) 8 *Can J Women & Law* 190 at 194; Dobash & Dobash, above n36 at 438; Mahoney, above n35 at 55.

55 Fischer, Vidmar & Ellis, above n35 at 2141; Ptacek, above n44 at 79.

56 Nan Seuffert, 'Domestic Violence, Discourses of Romantic Love, and Complex Personhood in Law' (1999) 23 *MULR* 211; Threadgold, above n23 at 222–25.

57 Mahoney, above n35 at 20; Leslie Espinoza, 'Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender' (1997) 95 *Mich LR* 901 at 901, 906, 919; Donna Coker, 'Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color' (2000) 33 *UC Davis LR* 1009 at 1019; Rosanna Langer, 'Male Domestic Abuse: The Continuing Contrast Between Women's Experiences and Juridical Responses' (1995) 10 *Can J Law & Society* 65 at 86, 88.

58 Coker, *id* at 1017–18.

59 Mahoney, above n35 at 15–16. See also Bailey, above n37 at 7–8.

and these are compounded if (as is often the case) there are children to provide for as well.⁶¹ The violent partner may be contrite, loving, beg forgiveness, and promise never to do it again.⁶² Or he may threaten to kill her and/or the children if she leaves. And he will often come after her when she does.

- (14) Abuse frequently escalates at the point of separation. This is when women are possibly in the greatest danger of being killed, as the violent partner seeks to reinstate his power and control over her.⁶³ ‘Separation assault’ names ‘the particular assault on a woman’s body and volition that seeks to block her from leaving, retaliate for her departure, or forcibly end the separation’.⁶⁴ Marital rape can be one particular form of separation assault.⁶⁵ Another can be harassment through the court system (for example in counter-applications for protection orders or repeated applications to the Family Court), and harassment and abuse surrounding counselling, mediation and court hearings.⁶⁶

B. Women’s Accounts from Positions of ‘Difference’

Although the feminist account of domestic violence as power and control is widely accepted, it has been variously extended, modified and in some respects rejected by non-white women, women with disabilities, and lesbians. The particular and different experiences of domestic violence that have been asserted by these groups may be summarised as follows:

- (1) Intra-lesbian domestic violence cannot adequately be understood in the context of patriarchal gender relations.⁶⁷ Female-female violence involves different dynamics from male-female violence, has a different social meaning, and receives different responses from male-female violence.⁶⁸ Homophobia at both institutional and personal levels plays a major role in the experience of lesbian violence.⁶⁹

60 For example, Christine Littleton, ‘Women’s Experience and the Problem of Transition: Perspectives on Male Battering of Women’ [1989] *U Chi Legal Forum* 23 at 52; Sally Engle Merry, ‘Wife Battering and the Ambiguities of Rights’ in Austin Sarat & Thomas Kearns (eds), *Identities, Politics, and Rights* (1997) at 304; Deborah Rhode, *Speaking of Sex: The Denial of Gender Inequality* (1997) at 114.

61 Ptacek, above n44 at 73.

62 Walker, above n46.

63 Ibid; Mahoney, above n35 at 5–6.

64 Mahoney, id at 6. In the Women’s Safety Australia survey, around half of the women who had experienced violence in a previous relationship had separated from the previous partner and then returned before the final separation; 35 per cent of these had experienced violence during the time of separation: ABS, above n9 at 51–52. One US study found that up to three quarters of reported domestic assaults occur after the victim has left the abuser: see Barbara Hart, ‘Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation’ (1990) 7 *Mediation Q* 317 at 324.

65 Sue Lees, *Ruling Passions: Sexual Violence, Reputation and the Law* (1997) at 129.

66 Hart, above n64; Nan Seuffert, ‘Locating Lawyering: Power, Dialogue and Narrative’ (1996) 18 *Syd LR* 523 at 536.

67 Donna Cecere, ‘The Second Closet: Battered Lesbians’ in Kerry Lobel (ed), *Naming the Violence: Speaking Out About Lesbian Battering* (1986).

- (2) Women with disabilities experience forms of abuse not experienced by able-bodied women, such as the withholding of food or medicine, the removal or sabotage of accessibility devices (wheelchairs, ramps, TTYs, etc), unnecessary institutionalisation, and chemical restraint.⁷⁰ They also experience abuse from carers and other residents in group homes, as well as from intimate partners.⁷¹
- (3) Women whose immigration status is uncertain (for example those who are applying for refugee status or for permanent residence as a spouse of a citizen) are threatened with deportation.⁷² Their limited or non-existent English language ability and lack of information sources give their abusive husbands total power to define their world, and the potential consequences of taking steps to seek help.⁷³ Filipino women sponsored as spouses or fiancées by Australian men are particularly vulnerable to domestic violence if they fail to conform to stereotyped images of Asian women as passive, subservient, domesticated, and pliable, and as a result of the racial, economic, gender and social power differences in mixed marriages.⁷⁴ Emotional abuse of immigrant women includes racist abuse of them and their children.⁷⁵
- (4) The practical difficulties of leaving a violent relationship for an immigrant woman or a woman with a disability can be enormous. Women with intellectual disabilities or psychiatric illnesses have greater difficulty in getting people to believe they have been abused.⁷⁶ At worst, it is impossible for a woman with no English, no knowledge of services available, and no family in the country, to leave her husband and live on her own.⁷⁷ Women in this situation may also be trapped by the need to provide continuing financial support to families in their homeland.⁷⁸ Similarly, women with disabilities may have no practical means of escape from a carer who is also an abuser.⁷⁹

68 Cory Dziggel, 'The Perfect Couple' in Kerry Lobel (ed), *Naming the Violence: Speaking Out About Lesbian Battering* (1986) at 67 (noting that, for example, the battered partner may not be economically dependent on the abuser, she may be bigger and stronger than the abuser, and may sometimes fight back and injure the abuser); Lee Vickers, 'The Second Closet: Domestic Violence in Lesbian and Gay Relationships: A Western Australian Perspective' (1996) 3(4) *E Law: Murdoch U Electronic J of Law* at [23], [30–31], [72] (noting that violence in lesbian relationships is seen as antithetical to the lesbian ideal of equality between partners, and hence is either assumed not to exist, or denied and silenced within the lesbian community).

69 Mary Eaton, 'Abuse by Any Other Name: Feminism, Difference, and Intralesbian Violence' in Martha Albertson Fineman & Roxanne Mykitiuk (eds), *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (1994) at 197–98, 216; Vickers, *ibid*; Wendy Bennet, 'Barriers to Support for Lesbians in Abusive Relationships' in *Out of Limbo: First National Conference on Violence in Lesbian Relationships* (1997) at 17–20.

70 Chris Womendez & Karen Schneiderman, 'Escaping from Abuse: Unique Issues for Women with Disabilities' (1991) 9 *Sexuality & Disability* 273 at 276; Keran Howe, 'Violence Against Women with Disabilities: An Overview of the Literature' (1999) 7 *Women Against Violence J* 11, at 14; Margaret Nosek, Carol Howland & Rosemary Hughes, 'The Investigation of Abuse and Women With Disabilities: Going Beyond Assumptions' (2001) 7 *Violence Against Women* 477 at 484; Carolyn Frohmader, 'Violence Against Women with Disabilities' in *Out of the Fire: Domestic Violence and Homelessness* (2001) at 28.

71 National Committee on Violence Against Women, *Access to Services for Women with Disabilities* (1993) at 14, 29; Womendez & Schneiderman, *id* at 277; Nosek, Howland & Hughes, *id* at 482; Frohmader, *ibid*.

- (5) Internalised cultural beliefs also affect immigrant women's efforts to seek help to end the violence and ability to leave an abusive relationship. These include beliefs about women's responsibility to the family and the importance of family solidarity, concerns about bringing shame on their family and community, and extreme stigma attached to marriage breakdown.⁸⁰ Thus, the possibility of leaving will be attended by a strong fear of family and community rejection. A woman may escape her partner's violence at the cost of family and community membership.⁸¹ Women also experience direct community pressures to stay and put up with the violence.⁸²
- (6) Calling the police to a domestic violence incident is far more difficult when a woman fears a homophobic or racist response towards herself and/or towards her partner, when her history of persecution in her home country has engendered a deep fear of the police, when she worries that drawing police attention to her situation may have immigration or child protection implications, and when she is unable to communicate with the police due to limited English language ability and their failure to provide interpreters.⁸³ The police are far more likely to be called by Australian-born than by overseas-born victims of domestic violence, very few victims calling the police can speak no English, police are reluctant to use interpreters when attending domestic violence calls, and some police employ racist and cultural stereotypes about non-English speaking background women, and so fail to take appropriate action.⁸⁴ Some women with disabilities may need to rely on

72 Patricia Easteal, *Shattered Dreams: Marital Violence Against Overseas-Born Women in Australia* (1996) at 117, 119; Dianne Martin & Janet Mosher, 'Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse' (1995) 8 *Can J Women & Law* 3 at 20; Tien-li Loke, 'Note, Trapped in Domestic Violence: The Impact of United States Immigration Laws on Battered Immigrant Women' (1997) 6 *Boston U Public Interest L J* 589.

73 Keys Young, *Quarter Way to Equal: A Report on Barriers to Access to Legal Services for Migrant Women* (1994) at 51; Melba Marginson, 'Increasing Access for Filipina Survivors of Domestic Violence' in Domestic Violence and Incest Resources Centre and Office of the Status of Women, *Not the Same: Conference Proceedings and a Strategy on Domestic Violence and Sexual Assault for Non-English Speaking Background Women* (1996) at 19 (hereafter *DVIRC Conference*); Martin & Mosher, id at 27; Linda Kelly, 'Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act' (1998) 92 *Northwestern ULR* 665.

74 Chris Cunneen & Julie Stubbs, *Gender, 'Race' and International Relations: Violence Against Filipino Women in Australia* (1997); Easteal, above n72 at 152, 155; Marginson, id at 18–19.

75 Easteal, id at 24, 108, 116. This was part of the evidence in one of the Family Court cases observed: FC9 Family Court of Australia, Melbourne Registry, 20–24 January, 10–11 February and 14 February 1997.

76 National Committee on Violence Against Women, above n71 at 14.

77 Easteal, above n72 at 97.

78 Id at 10.

79 National Committee on Violence Against Women, above n71 at 14.

80 Easteal, above n72 at 9, 34, 36; Marginson, above n73 at 19; Nilda Rimonte, 'A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense' (1991) 43 *Stan LR* 1311 at 1313, 1319; Martin & Mosher, above n72 at 28.

81 'A Strategy on Domestic Violence and Sexual Assault for Non-English Speaking Background Women' in *DVIRC Conference*, above n73 at 85.

a third person to contact the police on their behalf, which is difficult if that person does not believe that the woman has been abused, or thinks that police involvement is unnecessary or inappropriate. Women with psychiatric illnesses also report negative experiences with the police, which tend to discourage further reporting.⁸⁵

- (7) In general, women from non-English speaking backgrounds and women with disabilities face a lack of specialist support services, together with difficulties of communication with and/or access to most mainstream services.⁸⁶ Even where interpreters are available, it is very difficult to speak about domestic violence through an interpreter, and more so when the woman and the interpreter are known to each other as members of a small community.⁸⁷ Interpreters generally receive no training in domestic violence, and support workers have encountered many interpreters who have tried to convince the woman to reconcile with her husband, and some who have criticised the woman for going to court.⁸⁸
- (8) Australian Aboriginal women are 45 times more likely than non-Aboriginal women to be subject to domestic violence, and are more likely to be seriously injured than non-Indigenous victims.⁸⁹ Abuse of Indigenous women by their partners often takes place within a broader context of violence in Indigenous communities.⁹⁰
- (9) Indigenous women also experience particular problems with calling the police, leaving a violent relationship, and community pressures to stay. Women may be reluctant to invoke police assistance due to fear of a racist and/or abusive response, fear of retribution from their partner, pressure from the man's relatives, or unwillingness to expose their partner to possible incarceration in the context of the massive overrepresentation of Indigenous people in police and prison custody, and the high incidence of Indigenous

82 In relation to ethnic communities, see, for example, Easteal, above n72 at 124. In relation to lesbian communities, see, for example, Cecere, above n67 at 29; Vickers, above n68 at paras 23, 30–31, 72; Audrey Yue, 'Battered Homes: Some NESBian Que(e)ries', *DVIRC Conference*, above n73 at 24, 25; Denise Bricker, 'Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners' (1993) 58 *Brooklyn LR* 1379 at 1398–99.

83 Easteal, above n72 at 10, 93–94, 129; Keys Young, above n73 at 52–54; 'A Strategy on Domestic Violence and Sexual Assault for Non-English Speaking Background Women', *DVIRC Conference*, above n73 at 85; Vickers, above n68 at [36], [39], [41]; Bennet, above n69 at 23–24; Domestic Violence Resource Centre, 'Legal System – Invisibility Paradox of Same-Sex Couples and their Families within the Legal System' [2000] *DVAR Journal of the DVRC Inc* (March) at 14–15; Coker, above n57 at 1042, 1048; Zanita Fenton, 'Silence Compounded: The Conjunction of Race and Gender Violence' (2003) 11 *American U J of Gender Social Policy & Law* 271; Robert Hampton, William Oliver & Lucia Magarian, 'Domestic Violence in the African American Community: An Analysis of Social and Structural Factors' (2003) 9 *Violence Against Women* 533 at 534; Martin & Mosher, above n72 at 20, 23, 26–28; Bricker, id at 1396.

84 Easteal, above n72 at 49–50; Monique Hitter, 'Enhancing Access for Immigrant and Refugee Women', *DVIRC Conference*, above n73 at 47; Martin & Mosher, above n72 at 20, 23, 25.

85 National Committee on Violence Against Women, above n71 at 29.

deaths in custody.⁹¹ Leaving one's community is also extremely traumatic and difficult to sustain, involving dislocation from the physical and emotional support of families, from country, and from identity.⁹² Members of the woman's and the man's family, and other community members, may blame the woman for the violence, or exert pressure on the woman to stay.⁹³ As is the case with immigrant women, Indigenous women encounter excuses for violence based on (mis)representations of traditional culture, such as the notion that men are entitled under traditional law to beat (or even kill) their wives for supposed infractions, or to claim sexual services from them.⁹⁴ These excuses have been accepted by white authority figures such as social workers, police, lawyers, magistrates and judges, in purported 'sensitivity' to Indigenous culture.⁹⁵ In addition, Indigenous women experience strong cultural feelings of shame in talking about personal problems in front of a white and/or male audience.⁹⁶

- (10) Aboriginal women insist upon three points that are absent from white feminist theorising about domestic violence. First, they argue that Indigenous family violence is not a result of patriarchal domination, since Aboriginal women were not and are not economically, politically or socially subordinate to men within their families and communities.⁹⁷ Rather, they contend that violence against Indigenous women must be seen within the broader context of colonisation, dispossession and racial discrimination experienced by Aboriginal and Torres Strait Islander people, which has resulted in transgenerational cycles of trauma and violence.⁹⁸

Secondly, while mainstream feminist analysis sees men's abuse of alcohol as an excuse for violence, Aboriginal women see alcohol abuse as a symptom of and response to the rage, pain and despair engendered by the effects of

86 Easteal, above n72 at 35, 70, 75, 99, 131; Zita Antonios, 'Opening Speech: Violence Against NESB Women', *DVIRC Conference*, above n73 at 6; Maria Katsabanis, *Access and Equity Report* (1993) at 41–42, 50–51, 55, 78–79; National Committee on Violence Against Women, above n71 at 17, 23–25, 27; Maree Ireland, "'An Almost Endless List of Injustices": Violence Against Women with Disabilities' [2002] *DVIRC Newsletter* (Summer) 9; Frohmader, above n70 at 28. Lesbians may also experience homophobia and discrimination when attempting to access refuges and other mainstream services. See Bennet, above n69 at 21–22; Vickers, above n68 at paras 53–56, 90; Domestic Violence Resource Centre, above n83 at 14.

87 Easteal, above n72 at 110.

88 Sotha Sous, 'Mimosa House: A Refuge for Indo-Chinese Women', *DVIRC Conference*, above n73 at 15.

89 Anna Ferrante, Frank Morgan, David Indemaur & Richard Harding, *Measuring the Extent of Domestic Violence* (1996) at 34–35; Aboriginal and Torres Strait Islander Women's Task Force on Violence, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (rev edn, 2000) at 97; Paul Memmott, Rachael Stacy, Catherine Chambers & Catherine Keys, *Violence in Indigenous Communities* (1999). See also Audrey Bolger, *Aboriginal Women and Violence* (1991) at 4; Pam Greer, 'Aboriginal Women and Domestic Violence in New South Wales' in Julie Stubbs (ed), *Women, Male Violence and the Law* (1994) at 64–66.

90 Indigenous people use the term 'family violence' to capture the range of violence and abuse experienced in and affecting all members of Indigenous communities: Aboriginal and Torres Strait Islander Women's Task Force on Violence, id at 2; Judy Atkinson, 'Telling Stories and Healing Trauma' [1997] *DVIRC Newsletter* (Summer) 6; Laing, above n17 at 2.

colonisation, which has become a major cause of violence in Indigenous communities.⁹⁹ Some accounts of family violence in Indigenous communities refer to ‘alcohol violence’ as a separate category of violence.

Thirdly, due to their shared history of racial oppression, Indigenous women are concerned to stand alongside rather than in opposition to Indigenous men in the struggle for basic rights, including efforts to end family violence.¹⁰⁰ Indigenous men suffer high levels of unemployment, have access to few services, and have seen their position in the family and the community eroded.¹⁰¹ Combating violence involves helping men to heal, and reviving and reuniting extended families and communities.¹⁰²

The legislative response to domestic violence certainly reflects more of a mainstream feminist position than one inflected by understandings of difference. The expectation that women should go to court in order to secure safety for themselves and their children is clearly alien to some groups of women. Indeed, Indigenous women, women with disabilities, and lesbians were notably absent from my observations of intervention order proceedings. Immigrant women, on the other hand, have made use of the court system, and specialist services have developed to assist them to do so. But they still face barriers in court to having their experiences of violence and their cultural contexts heard and understood.

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- 91 Bolger, above n89 at 58–59, 68; Judy Atkinson, ‘Violence Against Aboriginal Women: Reconstitution of Community Law – The Way Forward’ (1990) 2(46) *ALB* 6 at 6–9; Pam Greer, ‘Creating Better Services for Aboriginal People’ [1997] *DVIRC Newsletter* (May) 13 at 16; Elizabeth Moore, ‘Not Just Court: Indigenous Families, Violence, and Apprehended Violence Orders in Rural New South Wales’, paper presented at Expanding Our Horizons: Understanding the Complexities of Violence Against Women: Meanings, Cultures, Difference Conference, University of Sydney, 18–22 Feb 2002 at 7–8. For a comprehensive account of police treatment of Indigenous women, including false imprisonment and rape of women in custody, see Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991).
- 92 Aboriginal and Torres Strait Islander Women's Task Force on Violence, above n89 at 59; Bolger, above n89 at 54, 62.
- 93 Bolger, id at 54–57.
- 94 Sharon Payne, ‘Aboriginal Women and the Criminal Justice System’ (1990) 2(46) *ALB* 9 at 10; John Upton, ‘By Violence, By Silence, By Control: The Marginalisation of Aboriginal Women Under White and “Black” Law’ (1992) 18 *MULR* 867 at 872.
- 95 Aboriginal and Torres Strait Islander Women's Task Force on Violence, above n89 at 59; Bolger, above n89 at 50–51, 53, 71, 80–81; Atkinson, above n91 at 6, 8; Payne, id at 10; Melissa Randall, ‘Domestic Violence’ (1995) 20 *Alt LJ* 3; Upton, id at 873.
- 96 Moore, above n91 at 8.
- 97 Pat O’Shane, ‘Is There Any Relevance in the Women’s Movement for Aboriginal Women?’ (1976) 12 *Refractory Girl* 31 at 32; Larissa Behrendt, ‘Aboriginal Women and the White Lies of the Feminist Movement: Implications for Aboriginal Women in Rights Discourse’ (1993) 1 *Aust Feminist LJ* 27 at 33; Jackie Huggins, ‘A Contemporary View of Aboriginal Women’s Relationship to the White Women’s Movement’ in Norma Grieve & Ailsa Burns (eds), *Australian Women: Contemporary Feminist Thought* (1994) at 71; Jan Pettman, *Living in the Margins: Racism, Sexism and Feminism in Australia* (1992) at 65.

5. *Non-Feminist Understandings of Domestic Violence*

In her history of family violence, Linda Gordon outlines the shifting understandings and constructions of wife beating before the 1970s, in line with shifts in institutional power to define the phenomenon between the Church, the police, social workers, and the discipline of psychology.¹⁰³ While feminism entered the struggle for definition in the 1970s, positing arguments about structural male dominance against earlier institutional views about family or individual pathology, the development of the discourse of ‘domestic violence’ by no means represented a complete ‘feminist victory’.¹⁰⁴ Other discourses about violence continue to circulate. For example, Nan Seuffert has explored the ways in which violence is entwined with romantic love in literary and popular texts, so that ‘women who are subject to physical, sexual and emotional abuse may position themselves within the sedimented layers of constructions of romantic love in order to “make sense” of their situations’.¹⁰⁵

In the context of court proceedings, the discourses most likely to shape the implementation of legislation relating to domestic violence are those that are entrenched within ‘internal’ legal culture – that is, the understandings about domestic violence commonly held by judicial officers and lawyers. This section explores social and legal stories about domestic violence that diverge from those put forward by feminists, and which, as discussed in the following section, were evident in the court proceedings observed. Again, they may be set out schematically as follows:

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- 98 Aboriginal and Torres Strait Islander Women's Task Force on Violence, above n89 at xxxi, 22–23, 25–26, 58, 60; Atkinson, above n90 at 6; Bolger, above n89 at 44; Heather Goodall & Jackie Huggins, ‘Aboriginal Women are Everywhere: Contemporary Struggles’ in Kay Saunders & Raymond Evans (eds), *Gender Relations in Australia: Domination and Negotiation* (1992) at 418; Rose Wanganeen, ‘The Aboriginal Struggle in the Face of Terrorism’ in Sophie Watson (ed), *Playing the State: Australian Feminist Interventions* (1990) at 69–70; Payne, above n94 at 10.
- 99 Aboriginal and Torres Strait Islander Women's Task Force on Violence, above n89 at xxxi, xxxiii, 28, 31, 59; Bolger, above n89 at 29, 34–5, 45.
- 100 Aboriginal and Torres Strait Islander Women's Task Force on Violence, above n89 at xxx; Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Indigenous Women and Feminism* (2000) at 160, 161–65, 177; Behrendt, above n97 at 27, 42; O'Shane, above n97 at 32–34; Barbara Flick, ‘Colonisation and Decolonisation: An Aboriginal Experience’ in Sophie Watson (ed), *Playing the State: Australian Feminist Interventions* (1990) at 66; Jackie Huggins, ‘Black Women and Women's Liberation’ in Sneja Gunew (ed), *A Reader in Feminist Knowledge* (1991) at 6; Goodall & Huggins, above n98 at 401–2.
- 101 Aboriginal and Torres Strait Islander Women's Task Force on Violence, above n89 at 193; Bolger, above n89 at 44. Bolger notes, however, that some Indigenous men who abuse their partners are not powerless and poor: they are well educated and have good jobs as teachers, bureaucrats, and so forth. However, the stories of these men and their partners more closely resemble those of violent relationships in the Anglo-Australian community: at 35–37, 44.
- 102 Aboriginal and Torres Strait Islander Women's Task Force on Violence, above n89 at 50.
- 103 Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence* (1988).
- 104 Ferraro, above n32 at 77, 83. See also Mahoney, above n35 at 27, 60 (on pre-1970s understandings of domestic violence).
- 105 Seuffert, above n56 at 216, 218–25.

- (1) 'Violence' means 'physical assault'. By contrast to the feminist understanding of violence as the exercise of power and control producing fear, social stories about violence tend to define 'violence' exclusively to mean (serious) assaults producing physical injuries. This is evident, for example, in most domestic violence prevalence studies, which measure only the incidence of physical and sexual assaults.¹⁰⁶ The focus on physical assaults diminishes the scale of domestic violence, allowing it to be seen as a relatively exceptional or rare event¹⁰⁷ rather than as the pervasive phenomenon suggested by the statistics cited at the beginning of this article.
- (2) Violence is a product of relationship conflict. A national survey of attitudes towards violence against women in 1995 found that only 6 per cent of respondents attributed the causes of violence to 'male socialisation, dominance or power'. Respondents were more likely to attribute domestic violence to factors such as financial pressures, relationship problems and alcohol abuse.¹⁰⁸ More recently, men's violence has been excused in the media as a product of frustrations engendered by the family law system.¹⁰⁹
- (3) The view that violence is a matter of relationship conflict suggests that both parties are responsible for domestic violence, a view that underpins the proposition that women are as violent as men.¹¹⁰
- (4) If violence is about relationship conflict, then the obvious way to end violence is to end the relationship. If violence is caused by the stresses of marriage, it follows that once the parties are separated, the violence will stop.¹¹¹
- (5) Women who are subjected to violence are thus *expected* to leave their relationships in order to stop the violence. Consequently, social stories about violence also seek to explain women's failure to leave abusive relationships. These include the notions that women who endure abuse are willing victims – masochists – or somehow attract abusive men.¹¹² Alternative explanations centre on the woman's lack of credibility – that is, she must be lying about or exaggerating the severity of the violence, because if it was true she would not have stayed.¹¹³
- (6) A particular manifestation of the view that violence is about relationship conflict is the belief that violence by one party in a relationship towards the

106 See above n9.

107 Langer, above n57 at 87.

108 Cited in Bailey, above n37 at 17.

109 Miranda Kaye & Julia Tolmie, "'Lollies at a Children's Party' and Other Myths: Violence, Protection Orders and Fathers' Rights' (1998) 10 *Current Issues in Crim Just* 52 at 59.

110 See, for example, Kaye & Tolmie, *id* at 57, 61; Pence & Paymar, above n34 at 14. See also Regina Graycar & Jenny Morgan, *The Hidden Gender of Law* (2nd ed, 2002) at 309–10 (critique of the use of the Conflict Tactics Scale in studies purporting to show that women and men are equally violent).

111 Ruth Busch, "'Don't Throw Flowers at Me ... (Judges) Will Say We're in Love': An Analysis of New Zealand Judges' Attitudes Towards Domestic Violence' in Julie Stubbs (ed), *Women, Male Violence and the Law* (1994) at 131–32.

112 Pence & Paymar, above n34 at 11.

other is an entirely separate matter from that party's behaviour as a parent to the children of the relationship. Violence against women (mothers) is conceptually divorced from violence against their children. Violent men can still be 'good enough' fathers.¹¹⁴

- (7) Social and legal stories about domestic violence tend rather to deny, minimise and trivialise violence than to regard it as a serious issue. There is a degree of ambivalence in social attitudes towards violence, in that while it is abhorred in the abstract, individual claims to victimhood tend to be treated with suspicion.¹¹⁵ Adrian Howe has commented on the apparent unease in media reporting at acknowledging the scale of men's violence against women:

It is as if the stark 'reality' of men's violence against women is simply too awful to contemplate. It must be hedged in with discursive strategies which have the effect of deflecting attention away from the harshness of the verdict that men are responsible for their own violence.¹¹⁶

- (8) The discursive strategies to which Howe refers include labelling feminist claims about the extent of men's violence as 'extreme', and telling stories about the behavior of women and men that obscure and provide excuses for the extent of men's violence.¹¹⁷ These include, for example, the notions that alcohol abuse is a major cause of violence against women, and that women provoke men into violence by nagging, failing to discharge their domestic duties, otherwise failing to conform to a 'normal' or conventional feminine/wifely role, sleeping with another man, or trying to leave the relationship. Rather than being held responsible for their violence or considered dangerous, violent men are often presented as objects of pity, essentially gentle or quiet, but driven to extremes, to act out of character, by marital tension, or by their partner's provocative act of leaving or becoming involved with another man.¹¹⁸
- (9) The irrelevance of domestic violence to most legal actions means that it is rarely acknowledged or described in legal judgments, thereby reinforcing its perceived exceptionality.¹¹⁹ Graycar's close reading of tort, contract, and

113 Martha Mahoney, 'Victimization or Oppression? Women's Lives, Violence, and Agency' in Martha Albertson Fineman & Roxanne Mykitiuk (eds), *The Public Nature of Private Violence* (1994) at 78; Schneider, above n30 at 104; Andrea Westlund, 'Pre-Modern and Modern Power: Foucault and the Case of Domestic Violence' (1999) 24 *Signs* 1045; Espinoza, above n57 at 915; Lees, above n65 at 137; Threadgold, above n23 at 217. In the national survey noted above, fully 77 per cent of respondents found it difficult to understand why women often stay with violent partners: Bailey, above n37.

114 Maria Eriksson & Marianne Hester, 'Violent Men as Good Enough Fathers? A Look at England and Sweden' (2001) 7 *Violence Against Women* 779.

115 Römken, above n30 at 287–88.

116 Adrian Howe, 'Notes from a "War" Zone: Reporting Domestic/Family/Home/Epidemic (Men's) Violence' in Adrian Howe (ed), *Sexed Crime in the News* (1998) at 38.

117 *Ibid.*

118 Busch, above n111 at 108–9.

119 Mahoney, above n35 at 3; Zanita Fenton, 'Mirrored Silence: Reflections on Judicial Complicity in Private Violence' (1999) 78 *OrLR* 995 at 996, 1027–8.

other civil cases involving husbands and wives, de facto partners and other family litigants disclosed many semi-suppressed histories of violence lurking in the pages of the law reports, though violence was never the central issue in the cases studied.¹²⁰

- (10) Even when violence is in issue, legal descriptions still tend to deny or minimise domestic abuse. For example judgments in family law cases where the father has been violent towards the mother, and in homicide cases where battered women have killed their partners, tend to provide distanced, detached, dispassionate descriptions of the violence, to employ passive constructions, and otherwise to obscure male agency in perpetrating violence.¹²¹ ‘In the course of the legal reproduction of the abused woman’s story ... the abuse becomes decentered, minimalised or even eliminated from the official version of the relevant facts.’¹²²
- (11) Social and legal stories also seek to deny or minimise domestic violence by deploying ‘fright’ narratives about vengeful mothers and wives, the ‘monstrous feminine’, and the woman who makes a false complaint.¹²³ The notion that women may make false allegations of domestic violence, rape and sexual harassment for purposes of revenge or tactical gain is widely held and actively promoted by some anti-feminist groups.¹²⁴ Other prominent ‘fright’ narratives in legal and popular discourse concern the overwhelming power of the state in criminal prosecutions, which has resulted in a variety of protections for defendants, and the danger posed by the stranger-rapist ‘lurking in the bushes’. By contrast, there is no strong cultural story expressing fear of men’s violence against their partners, or their abuse of power in the private sphere of the home.
- (12) Women making claims about violence may alternatively be seen as mad rather than bad. The perceived liability of women to make false claims has resulted in legal requirements for some form of corroboration of women’s accounts of violence,¹²⁵ which may include evidence of psychological injury

120 Regina Graycar, ‘Telling Tales: Legal Stories About Violence Against Women’ (1997) 7 *Aust Feminist LJ* 79. See also Lisa Sarmas, ‘Storytelling and the Law: A Case Study of *Louth v Diprose*’ (1994) 19 *MULR* 701.

121 Regina Graycar, ‘Telling Tales: Legal Stories About Violence Against Women’ (1996) 8 *Cardozo Studies in Law & Literature* 297; Stubbs, above n23 at 193; Busch, above n111 at 107; Martha Minow, ‘Words and the Door to the Land of Change: Law, Language, and Family Violence’ (1990) 43 *Vand LR* 1665 at 1673.

122 Lori Beaman-Hall, ‘Abused Women and Legal Discourse: The Exclusionary Power of Legal Method’ (1996) 11(1) *Can J Law & Society* 125 at 132. See also Langer, above n57 at 66.

123 See, for example, Barbara Creed, *The Monstrous-Feminine: Film, Feminism, Psychoanalysis* (1993); Threadgold, above n23 at 228; Renee Heberle, ‘Law’s Violence and the Challenge of “The Feminine”’ (2001) 22 *Studies in Law, Policy & Society* 49; Schneider, above n30 at 121; Stubbs, above n23 at 193–94.

124 See, for example, Kaye & Tolmie, above n109 at 54; Kim Lane Scheppelle, ‘“Just the Facts Ma’am”: Sexualized Violence, Evidentiary Habits, and the Revision of Truth’ (1992) 37 *NY Law Sch LR* 123 at 149–50.

provided by a qualified expert. Expert evidence of ‘battered woman syndrome’ is the most obvious example of this form of corroboration. But while expert testimony may render women’s claims of violence more believable, it also tends to present being a victim of domestic violence as a disabling, individual psychological condition, further deflecting attention from the responsibility of the perpetrator for the consequences of his violence.¹²⁶

- (13) Finally, social stories may represent domestic violence as a feature of certain ethnic communities. According to Howe:

when it reports family violence, the press... appears to be more comfortable if it is located in conveniently racialised ethnic minority families, far removed from the sanctity of the Australian (read: non-racialised Anglo-Celtic) family.¹²⁷

Domestic violence in non-western cultures is often understood in the west as being a product of religion or tradition, and as a sign of the inferiority of the culture in question compared with western culture.¹²⁸ The association between culture and violence means, in turn, that immigrant women seeking to escape violence are expected to reject their ethnicity and tradition and adopt modern, western values – or may be accused of doing so by their own communities.¹²⁹

6. *Judicial ‘Knowledge’ About Domestic Violence*

Apparently there is a huge gap between what magistrates and what support workers see as evidence, as proof of violence and risk of harm.¹³⁰

The article now turns to the understandings of domestic violence observed in intervention order and some Family Court proceedings. This section begins with an outline of the legislative framework for intervention orders operating in Victoria, which serves to invite and shape judicial statements and assumptions about domestic violence.

125 See Joan Meier, ‘Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions’ (2003) 11 *American U J of Gender, Social Policy & Law* 657 at 683–84.

126 See, for example, Anne Coughlin, ‘Excusing Women’ (1994) 82 *Cal LR* 1; Rosemary Hunter, ‘Gender in Evidence: Masculine Norms vs Feminist Reforms’ (1996) 19 *Harv Women’s LJ* 127 at 153–54; Rhode, above n60 at 116.

127 Howe, above n116 at 53.

128 Marnia Lazreg, ‘Feminism and Difference: The Perils of Writing as a Woman on “Women in Algeria”’ in Marianne Hirsch & Evelyn Fox Keller (eds), *Conflicts in Feminism* (1990) at 327, 329; Uma Narayan, ‘The Project of Feminist Epistemology: Perspectives from a Nonwestern Feminist’ in Alison Jaggar & Susan Bordo (eds), *Gender/Body/Knowledge: Feminist Reconstructions of Being and Knowing* (1989) at 259.

129 See, for example, Trinh Min-ha, *Woman, Native, Other: Writing Postcoloniality and Feminism* (1989) at 104, 106; Antonios, above n86 at 6.

130 Janet Hall, ‘“The Court is Not a Sausage Machine”: Learning About Intervention Orders in a Mock Court’ [1999] *DVIRC Newsletter* (Winter) 10 at 11.

A. The Legislative Framework

The task of the magistrate in intervention order proceedings is to determine whether the legal requirements for an intervention order have been made out. Under the *Crimes (Family Violence) Act*, this involves making a finding that there has been an assault, property damage, harassment, molestation and/or offensive behaviour, and there is a likelihood of repetition of that behaviour; or that there has been a threat to assault or cause property damage, and a likelihood of that threat being carried out. Thus, the legislative definition of violence focuses on specific behaviours by the perpetrator, but is not limited to physical assaults.¹³¹

In an early (and distinctly non-feminist) decision on the legislation, the Supreme Court of Victoria also held that intervention orders should not be made 'as a matter of course', but rather should be treated as a species of injunction. Thus, in addition to the legislative grounds for an order, the magistrate should also consider the balance of convenience in deciding whether or not to make an order.¹³² The questions of likelihood of repetition and balance of convenience open up a field of discretion in intervention order proceedings, which is liable to be filled with magistrates' own understandings about domestic violence.

Many of my interviewees made the point that there was considerable variation among magistrates in their approaches to determining intervention order applications.¹³³ Interviewees noted that the same allegations of violence would be dealt with quite differently before different magistrates.¹³⁴ Some magistrates would pass judgement – for example asking why the applicant had stayed with her abuser and not complained about his behaviour previously; others were very sympathetic.¹³⁵ Some magistrates were affirming of women, while others were not.¹³⁶ Some would minimise the violence they were hearing about; others were supportive and helpful.¹³⁷ Among this variety, there were some themes in magistrates' understandings of violence that emerged more or less strongly from the interviews and court observations. These included participation in and endorsement of some of the non-feminist narratives about violence identified above.

B. Emphasis on (Recent Indicators of) Physical Violence

Encouraged by the provisions of the legislation, magistrates tended to see violence in terms of isolated, decontextualised 'incidents' rather than as a pattern of coercive behaviour involving the ongoing exercise of power and control over

131 For a critique of the definitions of violence in state and territory protection order legislation, see Rosemary Hunter & Julie Stubbs, 'Model Laws or Missed Opportunity?' (1999) 24 *Alt LJ* 12.

132 *Fisher v Fisher* [1988] VR 1028 at 1035. In the context of the particular case, this comment was strictly *obiter*, but it has been followed in the Magistrates' Courts.

133 See also Victorian Law Reform Commission, above n8 at 177.

134 Interview with NESB Focus Group, Melbourne, 23 December 1997; Field notes, Broadmeadows Court Support Program, 25 October 1996. The same observation was made by Babbel, above n1 at 16.

135 Interview with Flora Culpin, Melbourne, 17 March 1997; Interview with S1, Melbourne, 16 January 1997; Field notes, Broadmeadows Magistrates' Court, 11 July 1997.

136 Interview with Angela Palombo, Melbourne, 1 April 1996.

137 Interview with Sue Macgregor, Melbourne, 1 March 1996.

another.¹³⁸ Consequently, lawyers noted that magistrates were looking for a recent incident, the most current acts or threats, in order to grant an order, rather than wanting to hear about the history of violence in the relationship.¹³⁹ The focus on recent incidents and the lack of a power and control analysis, however, made it more difficult to prove likely repetition. Magistrates did not see that a long history of violence (including different forms of abuse) necessarily established this element, and were more likely to be persuaded by a series of recent incidents, ideally including a breach of the interim order.¹⁴⁰

Magistrates' general focus on incidents rather than patterns of abusive behaviour was clearly associated with a focus on physical violence, which was considered more serious and compelling than other forms of abuse. Lawyers and support workers consistently noted that magistrates wanted to hear about (recent incidents of) physical violence, and that other forms of abuse (verbal, emotional, financial, manipulation using the children, harassment) had a lower priority and required much stronger advocacy if they were relied upon as the basis for an order.¹⁴¹ If incidents of abuse were seen in isolation from each other, then incidents of physical violence were easier to prove and corroborate (by means of photographs, hospital visits, or the visible evidence of a black eye, cut face or split lip in court).¹⁴² Likewise, threats would be taken seriously if they had been heard by a witness.¹⁴³

A further consequence of magistrates' understanding of violence in terms of decontextualised physical incidents was that they often did not understand why

138 See also Helen Spowart & Rebecca Neil, 'Stop in the Name of Love' (1997) 22 *Alt LJ* 81; Ptacek, above n44 at 8.

139 Interview with Flora Culpen, above n135; Interview with Denyse Dawson, Melbourne, 5 June 1996. See also Wearing (1992), above n1 at 48–49; Hall, above n130 at 10–11. The Magistrates' Court of Victoria, *Family Violence and Stalking Protocols* (rev ed, 2003) now encourage registrars to include in the complaint a 'brief description of [the] past relationship', and a description of the 'incident that brought the person to the Court for an order': at [4.6]. The form that applicants are asked to complete prior to their interview with the registrar (Form 1) asks them to provide details of the most recent incident, including the date on which and the place at which it occurred, and also asks 'have there been other incidents in the past, if so when and where?' Seven lines are provided for the most recent incident, and only six lines are provided for previous incidents. Notably, too, the form asks about previous *incidents* rather than the history of the relationship.

140 For example, MC42 (Williamstown Magistrates' Court, 31 October 1997). See also Spowart & Neil, above n138 at 83. The Magistrates' Court *Family Violence and Stalking Protocols* require registrars to include in a complaint 'stated reasons why there are concerns the behaviour would continue unless an order is made': id at [4.5]. Form 1 asks the applicant to specify 'Why do you fear such incidents are likely to occur again? Explain and give details' (emphasis in original). In both cases, however, fears for the defendant's future behaviour are structurally disconnected from the account of the defendant's past behaviour.

141 Interview with Karyn Anderson, Melbourne, 8 March 1996; Interview with Hana Assafiri, Melbourne, 24 June 1997; Interview with Flora Culpen, above n135; Interview with NESB Focus Group, above n134; Interview with Angela Palombo, above n136; Interview with Judith Peirce, Melbourne, 21 August 1997; Interview with S1, above n135; Interview with S2, Melbourne, 28 October 1997; Interview with SW1, Melbourne, 23 December 1997. See also Victorian Law Reform Commission, above n8 at 83; Wearing (1992), above n1 at 49, 157–58.

women continued to be fearful of the defendant even after they had separated from him and may not have seen him for some time.¹⁴⁴ For example, when one of the women interviewed applied for an intervention order after suffering intimidation, emotional abuse, isolation, economic abuse and physical assaults during a 15 year marriage, she was asked by the magistrate why she was now scared of her ex-husband. She said: 'it seemed like a strange question!'¹⁴⁵ The ex-husband of another interviewee had subjected her to the full gamut of power and control tactics in the 12 years they were married, and had criminal convictions for assaults against her. She had had three 12 month intervention orders, however the last of these had expired, and she was unable to obtain another one. Because her ex-husband had not breached the order or assaulted her in the last 12 months, and she was living at a secret address, he was considered no longer to be a threat to her.¹⁴⁶

Magistrates also generally failed to appreciate something that abusive men appeared to appreciate very well – that a serious physical assault had ongoing psychological effects. One severe beating could terrorise a woman for life, without the need for the perpetrator ever to lift a finger again. Yet fear arising from a long-ago incident was not sufficient to ground an intervention order.¹⁴⁷ As one interviewee put it: 'In court sometimes, if they haven't hit you, it doesn't count as violence. Mine doesn't hit me; he hasn't for seven years. But he doesn't need to. What they do to your head is worse; bruises heal'.¹⁴⁸ This woman had spoken about her experiences of violence at a magistrates' conference, and the magistrates had been very impressed, and said they had not heard the issues put like that before. The point was that women with similar experiences had appeared before them numerous times, and they had either not wanted to hear or had not listened.¹⁴⁹

142 Interview with Karyn Anderson, *ibid*; Interview with Judith Peirce, *ibid*; Interview with SW1, *ibid*. Similarly, most of the lawyers interviewed said that, despite the broad definition of family violence in s60D(1) of the *Family Law Act*, the Family Court was more interested in evidence of physical violence than in other forms of violence, both because it was considered more serious, and because it was easier to corroborate and was thus more believable: Interview with B1, Melbourne, 17 October 1997; Interview with B2, Melbourne, 22 October 1997; Interview with Barbara Phelan, Melbourne, 29 October 1997; Interview with S1, above n135; Interview with S2, *ibid*; Interview with Jane Trickey, Melbourne, 20 March 1996; Interview with Denyse Dawson, above n139; Interview with Margaret Mann, Melbourne, 8 March 1996.

143 Interview with SW1, above n141.

144 Wearing (1996), above n1 at 152; Interview with Sue Macgregor, above n137. See also Kim Lane Scheppele, 'Manners of Imagining the Real' (1994) 19 *Law & Social Inquiry* 995 at 1014–15.

145 Telephone interview with WL7, 28 October 1997.

146 Telephone interview with WL2, 18 December 1997. Likewise, NSW magistrates responding to a Judicial Commission survey demonstrated a lack of understanding of fear, and considered a hypothetical applicant's fear of her ex-husband not to be genuine or reasonable in a scenario in which there was a history of violence in the relationship, including assaults during pregnancy, but in which the couple had been separated for two months and there had been no recent incidents of assault: Hickey & Cumines, above n1 at 74.

147 Interview with SW1, above n141.

148 Interview WL5, Geelong, Geelong Focus Group, 19 December 1997.

149 Interview with Geelong Focus Group, Geelong, 19 December 1997.

C. *Relationship Conflict as the Source of Violence*

A second set of understandings that magistrates frequently brought to their hearing of intervention order applications was the notion that violence was a product of spousal conflict arising from the stresses of a marriage or de facto relationship. It followed that both parties were likely to be responsible for the violence, and that violence would stop once the parties separated.¹⁵⁰ This, in turn, gave rise to something of an obligation to separate (or otherwise to overcome the conflict) if a party no longer wished to tolerate violence in their relationship.

(i) *Dysfunctional Couples*

One magistrate explained to me that intervention order cases involved ‘very dysfunctional people’ who did not ‘know how to deal with their problems rationally’ and used violence instead.¹⁵¹ Another lamented that:

[p]eople never tell you the truth They won’t just say they’re having a brawl
.... Sometimes you want to take people out the bush and make them walk home.
They’d have sorted it out by the time they get there.¹⁵²

This understanding was well illustrated in one of the cases I observed. A young woman applied for an intervention order against her ex-boyfriend. She alleged that he had subjected her to frequent verbal abuse, pushed her around, pushed her out of a car, harassed her parents, and pursued her. As a result she had become fearful, had lost self-esteem and confidence, and had received counselling to try to recover from the effects of the abuse. The defendant appeared in person, and was sufficiently argumentative and obstructive for the magistrate to exclaim, ‘what I’ve seen of you has convinced me that the allegations are true’. Nevertheless, the magistrate allowed the defendant simply to make an undertaking not to have any further contact with the applicant, and also decided that it would be fair that the applicant should make a similar undertaking not to go near the defendant.¹⁵³ Thus, the magistrate converted a proven pattern of abusive conduct on the part of one party into a matter of mutual avoidance. The issue of mutual orders is discussed further below.

Relationship stress and conflict was the dominant framework employed by magistrates in the small number of contested intervention order cases observed. In three of these cases in particular, the separation had been quite recent and there were ongoing disputes as to who should retain possession of the matrimonial home. In each case, there was clear evidence of a history of abusive and controlling behaviour on the part of the husband, both before and after separation. The magistrates, however, analysed the violence in terms of mutual responsibility and provocation.

150 See also Hickey & Cumines, above n1 at 59 (54 per cent of NSW magistrates responding to the Judicial Commission survey agreed with the proposition that ‘it takes two to tango’); Carpenter, Currie & Field, above n1 at 5 (42 per cent of Queensland magistrates in a matching survey agreed that ‘it takes two to tango’, although a number of respondents qualified their agreement by noting that this was sometimes, but not always, true).

151 Field notes, above n135.

152 Field notes, Preston Magistrates’ Court, 4 July 1996.

153 MC38 Preston Magistrates’ Court, 4 July 1996.

In one of these cases, the defendant had subjected the applicant and their children to frequent, shouted verbal abuse during the marriage, including a threat to burn down the house. The parties had separated and 'reconciled' on a number of occasions. After the first separation, the defendant had abducted two of the children, and the applicant had agreed to resume living with him if he brought the children back. In the most recent incident, the defendant had kicked in the front door of their house, and the police had been called.¹⁵⁴ The magistrate described the relationship between the parties as 'turbulent' and concluded that most of the trouble was caused by lack of money. He specifically noted that it was not a physically violent relationship. He accepted, however, that there had been violent verbal confrontations, and that the defendant did lose his temper 'out of frustration'. His primary reason for granting an order was to protect the four children (as opposed to their mother) from the defendant's angry outbursts.¹⁵⁵

In another of the contested cases, the defendant had assaulted the applicant when she was pregnant, and more recently dragged her out of bed and severely bruised her arms, kicked in the door of her new partner's car, been verbally abusive and made abusive phone calls to the applicant, set rules that the applicant was supposed to observe, and let himself in and out of the house as he pleased after he had moved out, including tampering with window locks and leaving notes to signal his presence. The defendant also made it abundantly clear that he was planning to move back into the family home, and into the master bedroom, because he had a 'right' to do so. The applicant argued that she would not be safe if this occurred.¹⁵⁶ The magistrate excused the incident in which the defendant had dragged the applicant out of bed on the basis of the defendant's 'remorse', and thus found there had been no recent physical violence. In relation to harassing or offensive behaviour, she found there was emotional volatility on both sides. While the applicant requested a sole occupancy order, the magistrate concluded that 'separation under one roof may be no more stressful than the current situation', and while she did make an order restraining the defendant from assaulting, harassing, molesting, threatening or intimidating the applicant for 12 months, she refused to make the sole occupancy order. She also urged the parties to attend mediation, reach a property settlement, and go their separate ways, so that there would be no need for further orders after the 12 month period had elapsed.¹⁵⁷

(ii) *Obligation to Leave*

Merry argues that women applying for protection orders are made into autonomous, liberal legal subjects, for whom the price of legal rights is separation and isolation.¹⁵⁸ In one of the cases I observed, the woman had applied for an

154 MC52 Dandenong Magistrates' Court, 4 November 1996. The evidence about abduction of the children was not actually introduced in court, but I was privy to discussions between the applicant and her barrister before and after the hearing: Field notes, Dandenong Magistrates' Court, 4 November 1996.

155 MC52, *ibid.*

156 MC101 Frankston Magistrates' Court, 27 June 1997.

157 *Ibid.*

158 Merry, above n60 at 304.

interim order the previous week, but had withdrawn her application because the defendant undertook to change his behaviour. Instead, his abuse had worsened, and she had returned to court to renew her application. The magistrate specifically stated that equivocation about their relationship would not be held against any applicant.¹⁵⁹ This is consistent with an understanding of separation from a violent partner as a process rather than an event, which may involve several steps over a period of time.¹⁶⁰ By contrast, in another matter, the applicant had had a 12 month order that had recently expired, and the defendant had taken the opportunity to assault her again. They had lived together for five years and he had a history of jealousy and possessiveness. As well as physical violence, his 'separation assaults' had included kidnapping the children in order to persuade her to return to him, and he had been fighting her application for custody in the Family Court for two years. In making a new interim order, the magistrate suggested that the applicant had been indecisive about ending the relationship, ignoring both her attempts to do so, and the defendant's attempts to prevent her.¹⁶¹

(iii) *Encouragement of Reconciliation*

At the same time, some magistrates appeared very keen on the idea of couples overcoming their 'differences' and keeping their families intact, or, if they had separated, of reconciling. This was an alternative option for ending violence; that is, relationship conflict and its associated violence could be dealt with either by terminating the relationship, or by mending it. The reconciliation option was especially encouraged when there were children involved.¹⁶²

In one matter, the applicant wanted her order varied so that she could facilitate greater contact between the defendant and their child. She noted that the defendant had been attending counselling and that this had been very beneficial. The magistrate granted the variation, observing that the relationship seemed to be improving, and that that was good for their son.¹⁶³ Similarly, in another case, the applicant sought a variation of the order so the parties could discuss the welfare of their child. The magistrate responded that of course they could talk about matters relating to the welfare of their child, and exhorted the parties to see if they could resolve their troubles and keep away from the courts.¹⁶⁴

159 MC26 Sunshine Magistrates' Court, 2 July 1996.

160 Karla Fischer & Mary Rose, 'When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection' (1995) 41 *Crime & Delinquency* 414 at 427.

161 MC55 Dandenong Magistrates' Court, 4 November 1996. A family law barrister also noted that if a woman had separated from and gone back to her partner several times before making the final break, the returns tended to be interpreted by the Family Court as reconciliations, and as an indication that the violence had not been particularly serious, rather than as evidence of the difficulty of separating from an abusive and controlling partner: Interview with Barbara Phelan, above n142.

162 See also Hickey & Cumines, above n1 at 17 (30 per cent of NSW magistrates who responded to the Judicial Commission survey considered that their role in domestic violence order proceedings included the mediation and resolution of disputes).

163 MC13 Melbourne Magistrates' Court, 11 June 1996.

164 MC39 Williamstown Magistrates' Court, 31 October 1996.

A third matter was an application for a final order, involving serious allegations of assault. The applicant had suffered occasional physical assaults in seven years of marriage, but alleged that over the last seven to eight months the violence had become more frequent, including pushing, punching, threats to kill, destruction of property, and hitting their son. She stated that she could no longer cope with the defendant's behaviour, that her son had become fearful of his father, that she did not want her son to see his father behaving aggressively and to copy that behaviour, and that the defendant needed to deal with his behaviour problem. At the magistrate's suggestion, the (unrepresented) defendant consented to an order for two months, while denying the allegations. The applicant had asked for the order to include a ban on contact by phone, but the magistrate removed that clause, explaining that 'you two need to talk to each other, you need counselling, help with your marriage'.¹⁶⁵ Thus, the magistrate constructed the 'problem' as being the marriage rather than the defendant's behaviour, which could be remedied by a brief, physical separation accompanied by discussion and counselling, rather than the defendant taking responsibility for and changing his behaviour.

Magistrates' faith in reconciliations was also evident in their approach to applications for revocation of intervention orders, which was generally to grant the revocation without question (particularly as to its voluntariness), and sometimes with a commendation that the parties were sorting out their relationship.¹⁶⁶ In only one of the six revocation cases observed did the magistrate evince concerns about the applicant's safety and attempt to protect her from potential future violence. While agreeing to revoke the clauses of the order that would prevent contact with the defendant, she left in place the clauses prohibiting the defendant from harassing or molesting the applicant or damaging her property.¹⁶⁷

(iv) *Mutual Orders*

Mutual orders stem from and reinforce the view that violence is caused by conflict and stress in relationships, with both parties being equally capable of violence against the other, and each party bearing equal responsibility for the violence. This ignores power differentials in the relationship, the difference between attack or aggression and self-defence or retaliation, men's greater strength and the fact that men's violence inflicts far more severe injuries on women than vice versa, and the differential effects of violence on each party (creating fear and compliance or attacking the woman's autonomy, as opposed to creating annoyance or supposed 'provocation').¹⁶⁸

165 MC18 Preston Magistrates' Court, 18 June 1996.

166 For example, MC17 Preston Magistrates' Court, 18 June 1996; MC64 Broadmeadows Magistrates' Court, 21 February 1997.

167 MC86 Frankston Magistrates' Court, 27 June 1997.

168 Pence & Paymar, above n34 at 5–6; Mahoney, above n35 at 65; Spowart & Neil, above n138 at 82–83; Melinda Walker, 'Interpreting the Figures: Increases in Women's Violence or Just More Masculinist Legal Tactics?' (1995) 5 *Aust Feminist LJ* 123 at 124–25. Vickers argues that because these distinctions are even less likely to be drawn in cases involving same sex partners, same sex domestic violence is always conceived of as 'mutual violence': above n68 at [47].

Moreover, mutual orders trivialise women's suffering, because the grounds on which orders are granted against them (if, indeed, any exist at all), are usually far more minor than the grounds they have for obtaining an order against the defendant.¹⁶⁹ In circumstances where the defendant consents to an order against him only on the basis that the applicant agrees to a tit for tat order against her, he effectively obtains an order without making a formal complaint and without producing any substantiating evidence.¹⁷⁰ Orders are never made in favour of women on this basis. Mutual orders also have serious repercussions if the police are called to a subsequent domestic violence incident, as they are likely to find both parties to be in breach of their orders, and to be equally at fault, or the defendant may allege or engineer breaches on the part of the applicant as a further form of harassment.¹⁷¹ In effect, obtaining mutual orders fails to ensure the applicant's safety, and continues and reinforces the defendant's power and control over her.¹⁷²

Although mutual orders were trenchantly criticised by my interviewees, they occurred relatively infrequently in my observation sample. Mutual consent orders were made in only three of the cases I observed. In addition, there were three cases in which the defendant consented to an order without admissions and the applicant also made an undertaking to the court, and two further cases in which the parties made mutual undertakings to the court without an order being made. Although undertakings by the survivor of violence not to be violent towards the perpetrator have the same damaging, symbolic effect of suggesting equal propensities to violence, they do not give rise to the risk of criminal prosecution for alleged breach. Where mutual undertakings are made however, clearly the survivor of violence goes away from the court unprotected.¹⁷³

A notable feature of the cases involving mutual orders or undertakings was that they often involved a self-represented applicant opposing a legally represented defendant (in five of the eight cases). It appears that defence lawyers 'persuaded' unrepresented applicants to make undertakings, and in one case mutual consent orders, as the price for the defendant consenting to an order or undertaking, even though there was no cross-application by the defendant.¹⁷⁴ In one of these cases, the allegations of violence against the defendant were sufficiently serious for the applicant to have police protection present, but the applicant was still coerced by

169 Spowart & Neil, above n138 at 83; Babbal, above n1 at 14; Interview with Flora Culpén, above n135; Interview with SW1, above n141.

170 Interview with Angela Palombo, above n136; Susan Blashki, 'Family Law: Some Issues Following Recent Legislative Amendments' [1997] *DVIRC Newsletter* (February) 4 at 8. See also Nunn & D'Arcy, above n7 at 20.

171 Spowart & Neil, above n138 at 84; Interview with Susan Borg, Melbourne, 17 October 1997; Interview with Clare McNamara, Melbourne, 14 June 1996; Interview with SW1, above n141.

172 Nunn & D'Arcy, above n7 at 20; Spowart & Neil, above n138; Walker, above n168 at 125; Interview with Flora Culpén, above n135; Interview with S1, above n135; Interview with SW1, above n141.

173 Victorian Law Reform Commission, above n8 at 105; Babbal, above n1 at 14; Nunn & D'Arcy, above n7 at 21.

174 MC53 Dandenong Magistrates' Court, 4 November 1996; MC85 Sunshine Magistrates' Court, 17 June 1997; MC91, MC98, MC110 Frankston Magistrates' Court, 27 June 1997.

the defence lawyer into agreeing to mutual orders.¹⁷⁵ Despite the unequal representation status of the parties in most of these cases, there was never any interrogation by the magistrate of the freedom or fairness of the applicant's consent. Nor, in cases where there was no cross-application, did the magistrate seek to determine whether there was any evidence to support an order or undertaking for the benefit of the defendant.

(v) *Duration of Orders*

Final intervention orders were made in 54 of the cases observed. The largest group were made for 12 months, followed by those of indefinite duration.¹⁷⁶ While some magistrates asked applicants how long they wanted their order to last (without giving them any idea of the options available), others indicated their view of the seriousness of the case or the merits of the application by means of the duration of the order (12 months, or longer), while others simply would not make orders for more than a limited period, regardless of the evidence presented to them. Consistent with magistrates' views of the causes of violence and the dynamics of violent relationships, a 12 month order seems to have been considered an appropriate length of time for the parties to sort out their differences and/or to go their separate ways,¹⁷⁷ although in one regional court, magistrates had adopted the practice of making intervention orders for only three months, to 'take the heat out of the situation', on the assumption that married or de facto couples only needed to be kept apart for a brief period in order to calm down and work things out rationally.¹⁷⁸

Yet given the evidence of long-term stalking, harassment and physical abuse engaged in by some men, 'courts cannot presume that a batterer's attempts to control and injure the abuse victim will end in a month, a year, or ten years'.¹⁷⁹ Women interviewed complained about the problem of having to go back to court to renew their orders every year,¹⁸⁰ and as discussed earlier, some were told they no longer had grounds for an order. One of the women interviewed had been unable to get an order for any longer than five months, despite multiple breaches by the defendant. She had at one stage requested an indefinite order, but the magistrate had said he did not feel he had the power to restrict the defendant to that extent. Yet, she pointed out, her life was completely restricted by the defendant's ongoing harassment of her, and by the need to go back to court continually to seek renewed protection.¹⁸¹

175 MC85, *ibid*.

176 Twenty-one orders (38.9 per cent) were made for 12 months, while 16 (29.6 per cent) were made indefinitely.

177 See Wearing (1992), above n1 at 108–09, 178–79. This was also the view of the majority of clerks Wearing interviewed.

178 Interview with Geelong Focus Group, above n149.

179 Catherine Klein & Leslye Orloff, 'Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law' (1993) 21 *Hofstra LR* 801 at 1086–87.

180 Interview with NESB Focus Group, above n134.

181 Interview with WL5, above n148.

In mid-1997, the *Crimes (Family Violence) Act* was amended to clarify that magistrates could make orders of unlimited duration, which would obviate the problem of continual returns to court.¹⁸² Yet this provision seems subsequently to have been little relied upon. In contrast to my observation sample, in 1999–2000 only 16.3 per cent of final orders were made for more than 10 years or indefinitely, and this figure declined to 11.5 per cent in 2002–3, while over half of final orders made in that year were for 12 months or less.¹⁸³ The larger proportion of indefinite orders in my sample may be attributable to differences between metropolitan and statewide practices, but even so, it appears that magistrates' preference for orders of limited duration may have hardened over the years.

D. Conceptual Separation Between the Interests of Mothers and Children

The various ways in which children may be harmed by exposure to domestic violence in their households have been noted above. Consequently, magistrates had the power, in the course of making an intervention order, also to make a contact order under the *Family Law Act*, or to suspend or vary any Family Court contact order so as to avoid inconsistency between the two orders.¹⁸⁴ This provision was never used in my observation, however, and other research has confirmed that it is virtually a dead letter.¹⁸⁵

Rather, magistrates' preferred means of avoiding inconsistency between intervention orders and any present or future Family Court orders was to insert – usually of their own initiative and without consulting the applicant – into every intervention order where children were involved an exception to allow for the exercise of child contact, either by agreement between the parties or pursuant to Family Court orders. Such an exception, of course, reduced the protection provided to the aggrieved family member, and potentially compromised her safety and that of her children during contact and contact handovers.¹⁸⁶ It also made the intervention order more difficult to enforce, as defendants could argue that they were simply trying to arrange or exercise contact and therefore had not breached the order.¹⁸⁷ But the use of such exceptions was a long standing and consistent practice among magistrates.¹⁸⁸

182 For this reason, Klein & Orloff argue that all orders should be made indefinitely: above n179 at 1087.

183 Victorian Law Reform Commission, above n8 at 107–8 (57.3 per cent of orders made for 12 months or less in 2002–3).

184 *Family Law Act* former s68T. Note, however, that the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) removed magistrates' powers to make contact orders, although they may still suspend or vary such orders: *Family Law Act* new s68R.

185 Kearney McKenzie & Associates, *Report: Review of the Operation of Division 11 of the Family Law Reform Act* (1998); Miranda Kaye, 'Section 68T Family Law Act 1975: Magistrates' Powers to Alter Family Court Contact Orders When Making or Varying ADVOs' (2003) 15(1) *Judicial Officers' Bulletin* 3; Family Law Council, 'Letter of Advice to the Attorney-General on the Operation of Division 11 in Part VII of the Family Law Act 1975', 17 November 2004.

186 Victorian Law Reform Commission, above n8 at 170; Wearing (1992), above n1 at 29; Wearing (1996), above n1 at 121–22; Nunn & D'Arcy, above n7 at 23–24.

187 Kaye, Stubbs & Tolmie, above n2 at 97; Victorian Law Reform Commission, id at 171; Nunn & D'Arcy, id at 23.

Two of the women interviewed referred to their experience in this regard. One noted that the Magistrates' Court had insisted on inserting an exception into her intervention order giving her ex-husband the right to contact her in relation to seeing the children.¹⁸⁹ The other had an intervention order containing the standard exception and was clearly confused by it. The order stated that her ex-husband was not to contact or approach her except to have access to their child as agreed with her or pursuant to court order. Since she did not have a Family Court order relating to contact, she was not sure whether the exception meant that she had to agree to contact if her ex-husband demanded it.¹⁹⁰

Exceptions for child contact were also included in a number of the intervention orders made during the course of my court observations.¹⁹¹ For example in one of the cases discussed above, the applicant explained that she was seeking an order so that her son would not be exposed to her husband's violence. Her son was fearful of his father, but had also started behaving aggressively in imitation of him. Despite these concerns, the magistrate automatically made the order with an exception to enable the father to exercise agreed or court ordered contact.¹⁹² In another case, the allegations specifically concerned the defendant's harassment of the applicant over the telephone, but the magistrate refused to make an order restraining the defendant from telephoning the applicant, in order to enable 'necessary' contact between the parties in relation to their children.¹⁹³ No magistrate canvassed the possibility of structuring contact so as to maintain the applicant's protection from further violence, for example, by providing for handover via a third person so that the parties did not have to meet.

188 See, for example, Kearney McKenzie & Associates, above n185 at [3.9]; Renata Alexander, 'New Mantras in Family Law' (1996) 21 *Alt LJ* 276 at 279. Similarly, the Magistrates' Court of Victoria's *Family Violence and Stalking Protocols*, above n139, offer no encouragement to use former s68T of the *Family Law Act*. Rather, registrars are advised that they should always check with an aggrieved family member if any contact orders are in place, and if so, 'the order providing exception for contact with the aggrieved family member for the purposes of child contact should be selected for consideration of the Magistrate': at [27.1].

189 Interview with WL2, above n146.

190 Interview with WL8, Melbourne, 7 November 1997.

191 For example, MC46 Dandenong Magistrates' Court, 4 November 1996; MC50 Dandenong Magistrates' Court, 4 November 1996; MC110, above n174.

192 MC18, above n165.

193 MC93 Frankston Magistrates' Court, 27 June 1997. In the Family Court, too, the view that wife abuse did not necessarily harm the children, that a violent father could still be a good parent, and that the needs of women and children subjected to domestic violence were different, also predominated, and was encouraged by the provisions of *Family Law Reform Act*. See Kaye, Stubbs & Tolmie, above n2 at 101–2; Laing, above n39 at 21; Hewitt, Brown, Frederico & Martyn, above n43 at 23; Kaspiew, above n2 at 121–22, 131, 137–38; Kathryn Rendell, 'Current Responses to Children and Young People Affected by Domestic Violence: Beyond Dichotomies' [1999] *DVIRC Newsletter* (Autumn) 3; Rhoades, above n2 at 82. Also Interview with Jane Trickey, above n142; Interview with Margaret Mann, above n142; Interview with Sue Macgregor, above n137; Interview with Denyse Dawson, above n139; Interview with WL2, above n146; Interview with WL5, above n148.

E. Denial and Minimisation of Violence

As noted earlier, much of the feminist literature on violent men has observed their tendency to minimise and deny their violent actions, to deny responsibility and blame their victims for those actions, and to see themselves as victims.¹⁹⁴ Rather than confronting defendants' neutralisation techniques, magistrates tended to take men's accounts of violence at face value. Consequently, when faced with accounts from defendants that conflicted with the evidence given by women in interim intervention order applications, they tended to conclude that women were lying, or at least exaggerating. One magistrate stated that often, the story given at the interim order stage 'turns out to be completely false' when the other side is heard on the return date.¹⁹⁵ The possibility that the other side's story might be false was apparently not considered.

At the same time, magistrates themselves sometimes participated in the minimisation and denial of violence, and the shifting of blame, through their reactions to women's stories. A study of protection order applications in the Northern Territory observed magistrates ascribing defendants' behaviour to emotional difficulties experienced after separation from their wives, and urging women to take responsibility for defendants' behaviour and to handle them better.¹⁹⁶ A support worker interviewed noted that magistrates' theories of violence often included a prominent role for alcohol, so they tended to ask questions of applicants about whether alcohol was involved in the defendant's behaviour.¹⁹⁷

In the Family Court, the tendency to minimise violence was evident in two particular ways. First, it was found in family reports, which played an influential role in determining the best interests of the child in contested cases. Family reports were written by social workers, psychologists or psychiatrists, whose disciplinary backgrounds did not necessarily include feminist views on violence against women.¹⁹⁸ Their analysis could construct the interests of the children and their mother as entirely separate, have a bias towards at least preserving, and in some

194 See also Ptacek, above n44 at 71; Lenore Simon, 'A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases' (1995) 1 *Psychology, Public Policy & Law* 43 at text accompanying notes 48–56.

195 Field notes, above n135.

196 Spowart & Neil, above n138 at 82. See also Elizabeth Gilchrist & Jacqueline Blisset, 'Magistrates' Attitudes to Domestic Violence and Sentencing Options' (2002) 41 *The Howard J* 348 at 359.

197 Interview with SW1, above n141.

198 See, for example, Kaye, Stubbs & Tolmie, above n2 at 44–45, 83; Rendell, Rathus & Lynch, above n2 at 98–101; Toni Dick, 'She Gave as Good as She Got? Family Violence, Interim Custody/Residence and the Family Court' (1998) 14 *QUTLJ* 40 at 64; Jaffe, Lemon & Poisson, above n40 at 28. The Family Court's *Family Violence Strategy 2004–2005* (2004) now states that '[t]he Family Court aims to ensure that the evidence of independent experts designed to assist in the decision making process is of the highest quality and, in the context of family violence issues, that expert evidence be underpinned by an awareness of the dynamics of violence and its impact upon parents and children': at 12.

instances maximising, contact between children and both their parents, and as a consequence, minimise or disregard the mother's concerns about violence.¹⁹⁹

Secondly, the fact that issues of violence were listed as only one of a number of factors to be taken into account in s68F(2) of the *Family Law Act* had an inherent tendency to minimise the issue of violence. So long as a mother's proposals for the children included some form of unsupervised contact with the father (which occurred in most cases), she effectively conceded that he was an adequate parent, and thus, concerns about his violence were inevitably subordinated to other considerations. As a result, evidence of domestic violence was usually peripheral to the exercise of judicial discretion about the best interests of the child, and this had the further consequence that the court rarely made affirmative findings about the violence alleged. This practice was reinforced by concerns that making findings about violence would have an adverse impact on the parties' future parenting relationship.²⁰⁰ Thus, Family Court judgments were more likely to minimise than to acknowledge the incidence of violence.

F. Feminine Fright Narratives

(i) Bad Mothers

In the contested intervention order proceedings observed, women complaining about domestic violence were sometimes constructed as bad mothers or vindictive ex-wives, either as an alternative to a 'relationship stress and conflict' analysis, or in conjunction with it. For example, in one of the contested cases, the woman (who was the defendant) alleged that her ex-husband had assaulted her repeatedly during their 14 years of marriage, including during her pregnancies, and now refused to abide by Family Court orders regarding contact with their son. Rather, he exercised contact only at times of his own choosing, making it impossible for her to organise her own life.²⁰¹ She was alleged to have physically attacked him during contact handovers, verbally abused him while he was exercising contact, and left abusive messages on his answer machine. The magistrate responded to the defendant's catalogue of the abuse she had experienced during their marriage by describing her as 'a very bitter woman' who was 'prepared to exaggerate things'.²⁰²

In another contested case, discussed earlier, the defendant supported his opposition to the wife's application for a sole occupancy order with the argument that the applicant was a bad mother and he was concerned for the welfare of the children. He cited two instances in which the applicant had allegedly left one or

199 For example, Kaye, Stubbs & Tolmie, above n2 at 44–45; Rendell, Rathus & Lynch, above n2 at 98, 101; Kaspiew, above n2 at 125, 128; FC1 Family Court of Australia, Melbourne Registry, 20–21 March and 24 March 1996; FC5 Family Court of Australia, Melbourne Registry, 2–6 December 1996.

200 See Tom Altobelli, 'Family Violence in Children's Cases: Implications in Practice: Part I' (1998) 13(1) *Aust Family Lawyer* 6 at 10; Patricia Easteal, Juliet Behrens & Lisa Young, 'Relocation Decisions in Canberra and Perth: A Blurry Snapshot' (2000) 14 *AJFL* 234 at 246; FC1, above n199.

201 MC45 Williamstown Magistrates' Court, 31 October 1996.

202 *Ibid.*

other of their teenage children unsupervised for a period of time. She disputed his account of one of these incidents and gave a different version of events. At the same time, the applicant provided evidence of the effect on the children of the defendant's campaign of terrorisation against her since he had moved out of the house. In deciding not to grant the sole occupancy order, the magistrate gave considerable weight to the evidence of the applicant's supposedly negligent parenting, but appeared to ignore the evidence of the effect on the children of the defendant's behaviour.²⁰³

A particular version of the 'bad mother' in the family law context is the alienating parent – that is, the mother who seeks to gain revenge against her ex-partner by turning the children against him. Kaspiew has noted the gendered nature of this figure and the apparent double standard whereby fathers' criticism, or even vilification, of mothers is tolerated to a much greater degree than mothers' criticism of fathers.²⁰⁴ Although so-called 'parental alienation syndrome'²⁰⁵ was not argued in any of the cases I observed, some of the family reports I read did interpret children's fear of their father as the product of parental alienation by the mother, while the mother attributed that fear to the father's violence.

(ii) *The Strategic Use of Intervention Orders*

Many magistrates subscribed to the 'fright' narrative that women make false allegations of violence and apply for intervention orders only in order to gain a tactical advantage in family law proceedings – either by depriving men of contact with their children or gaining exclusive possession of the matrimonial home, and thereby establishing a 'status quo' that is difficult to dislodge in the Family Court.²⁰⁶ Women always had to contend with the suspicion that their primary goal in applying for an intervention order was to punish or persecute their ex-partner rather than to secure their own safety, despite empirical evidence to the contrary.²⁰⁷ This concern also operated as a disincentive for lawyers to make applications for intervention orders on behalf of their family law clients in cases that may clearly have warranted an order.²⁰⁸

The issue of ulterior motives for intervention order applications arose in several ways in my Magistrates' Court observations. In one of the contested cases, the defendant's barrister managed to extract an admission from the applicant that her motivation for seeking an order was to get the defendant out of the house for the purposes of their family law property dispute. The magistrate picked up on this

203 MC101, above n156.

204 Kaspiew, above n2 at 136.

205 See, for example, Sandra Berns, 'Parents Behaving Badly: Parental Alienation Syndrome in the Family Court – Magic Bullet or Poisoned Chalice?' (2001) 15 *AJFL* 191.

206 For example, Interview with SW1, above n141. See also Hickey & Cumines, above n1 at 35, 37 (90 per cent of magistrates surveyed in NSW agreed with the proposition that domestic violence protection orders are 'used by applicants in Family Court proceedings as a tactic to aid their case and deprive their partner from access to children', with around two thirds of these agreeing that this happened 'often'); Kearney McKenzie & Associates, above n185 at [3.19]; Miranda Kaye & Julia Tolmie, 'Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law' (1998) 12 *AJFL* 19 at 53–59; Kaye & Tolmie, above n109 at 54.

admission and queried the applicant further on her motivations, noting that the recently enacted *Family Law Reform Act* demonstrated the potential for intervention order proceedings to affect outcomes in the Family Court – although this was in fact true only in relation to children’s matters, not property matters. During the lunch break in this case, the defendant’s solicitor and barrister took the opportunity to tell me about how intervention order proceedings were being abused ‘all the time’ in order to gain advantage in family law property cases, although the solicitor conceded that he did not have much personal experience of this occurring, as he did not usually practise in the family law field.²⁰⁹

In another case, the application for an intervention order was refused because the magistrate believed the applicant was merely seeking a strategic advantage in the Family Court.²¹⁰ The applicant was the children’s grandmother, and she claimed that since her daughter and son-in-law had separated, he had constantly rung her house and harassed her with threats and abuse. The daughter already had an intervention order against her ex-husband, but it contained the usual exception for child contact, and named the grandmother as intermediary. The magistrate pointed out that if the grandmother obtained an intervention order, the father would not be able to make arrangements to see the children, which he considered ‘would be unfortunate’. Consequently, he decided that it would be inappropriate to grant the order.²¹¹

Outside the hearing room, the magistrate explained to me that there had been another agenda at work in the case. In his view, the application was a power play against the father. They were trying to cut off all his contact with his children so as to get sole custody. They had, however, forgotten that the *Family Law Reform Act* said that children have rights to see both parents.²¹² This reasoning misrepresented both the *Family Law Reform Act*²¹³ and the Family Court process. Yet if the defendant had been concerned about seeing his children, he could have appeared

207 Both Australian and US research indicates that the majority of women applying for intervention orders experience repeated violence before first approaching the court. See, for example, Julie Stubbs & Diane Powell, *Domestic Violence: Impact of Legal Reform in New South Wales* (1989) at 43; Trimboli & Bonney, above n1 at 30; Wearing (1992), above n1 at 363; Wearing (1996), above n1 at 133; Fischer & Rose, above n160 at 416. While this evidence does not establish that women never apply for orders for strategic reasons, it does suggest that applicants are far more likely than not to have genuine need of an order, and supports Jaffe & Crooks’ contention that underreporting of partner violence and false denials by perpetrators are far more likely to occur than false allegations by women: Peter Jaffe & Claire Crooks, ‘Partner Violence and Child Custody Cases: A Cross-National Comparison of Legal Reforms and Issues’ (2004) 10 *Violence Against Women* 917 at 920.

208 Interview with Judith Peirce, above n141.

209 MC21 Prahran Magistrates’ Court, 27 June 1996.

210 MC104 Broadmeadows Magistrates’ Court, 11 July 1997.

211 Ibid.

212 Field notes, above n135.

213 The magistrate was referring to s60B of the *Family Law Act*, which provides that children have a right of ongoing contact with both parents, *unless that would be contrary to the best interests of the child*.

to defend the order. Here, then, the magistrate showed more concern about the absent defendant's contact with his children than about the present applicant's concerns about harassment.

G Domestic Violence as Psychological Harm

A notable feature of the Family Court's approach to domestic violence was that abused women needed experts to speak for (or about) them. They could make allegations of violence, but could not themselves establish that the violence affected the child's best interests. As one barrister put it, if a mother wanted to deny contact to the father, she needed a high standard of proof: not just her word, but some sort of expert evidence.²¹⁴ Another barrister noted that if a wife was running an argument about the overall effect of the violence on her parenting, she would need psychological or psychiatric evidence.²¹⁵

Only one of the cases in my observation sample that proceeded to hearing actually involved the introduction of expert psychological evidence on behalf of the mother.²¹⁶ This was one of the two cases in which the mother was seeking to deny contact altogether, and hence her violence-induced psychological state was directly relevant. In another case, however, the child psychologist who wrote the family report recommended an interim shared residence arrangement, in circumstances in which the relationship between the parties had completely broken down. It was clear that the mother (who was from a non-English speaking background and had limited English language skills) had been the children's primary carer, but the psychologist diagnosed her on the basis of very limited evidence as having a personality disorder, which then appeared to account for all the problems in the relationship.²¹⁷ Thus, the problems could be solved and a shared arrangement made to work by means of therapy for the mother. Thankfully, this diagnosis and recommendation were not adopted by the judge, who formed a different view of the parties after seeing them in the witness box.²¹⁸

H Violence, Ethnicity and Class

Assafiri and Dimopoulos have argued that when 'ethnic' women apply for intervention orders, 'the victim's behaviour and her culture [are positioned] as the appropriate arena for scrutiny, rather than the adjudication of the violence of the perpetrator'.²¹⁹ The belief that culture causes violence meant that some magistrates were all too willing to believe stories of violence told by women from

214 Interview with B2, above n142.

215 Interview with Barbara Phelan, above n142. Also Interview with Jane Trickey, above n142.

216 FC16 Family Court of Australia, Melbourne Registry, unreported judgment, 19 November 1996.

217 FC9, above n75. Other studies have also observed psychological assessments of battered women as 'hysterical', 'histrionic', paranoid, and personality disordered. See, for example, Rendell, Rathus & Lynch, above n2 at 38; Jaffe, Lemon & Poisson, above n40 at 45–46. See also *T v S* (2001) 28 Fam LR 342.

218 FC9, above n75, unreported judgment (undated) at 18–21.

219 Assafiri & Dimopoulos, above n1 at 20.

particular cultures, especially those from the Middle East and former Yugoslavia.²²⁰ For example, magistrates explained to me in conversation that some Muslim women are terrified of their husbands. They creep into court, and slowly tell a horrendous story. These men are frightening, primitive peasants. It is ingrained in them that women are to be treated like packhorses, and if they do not obey, they get beaten. And despite terrible abuse, the women are still reluctant to leave their husbands because of their upbringing.²²¹ A lawyer noted that if she could get into evidence the fact that the defendant was Muslim, Turkish or Yugoslav, she knew this would help to get the order, while a support worker also observed that it was possible to play on magistrates' desire to rescue women from patriarchal men.²²²

'Cultural' arguments could cut both ways, however, and represented an uncertain and unreliable source of protection for immigrant women who were survivors of violence. Magistrates could decide that since violence was a part of their culture, they should put up with it, or work within their community to address its patriarchal elements.²²³ While some cultures were seen as violent, women from Asian backgrounds had difficulty convincing magistrates of their need for protection, because of the physical stereotype of Asian men as relatively small and weak, and/or because of the stereotype of Asian women as passive and compliant, and thus seeking legal intervention when they should have been doing more to help themselves.²²⁴ Further, men from some cultures might be excused on the basis that protection for women against domestic violence was not a familiar concept in their countries of origin, and thus they were unaware of the implications of their behaviour in Australia.²²⁵ In these circumstances, the magistrate appeared to believe that a lecture to the defendant would be sufficient protection for the applicant, rather than the order that she sought. Alternatively, defence lawyers might argue that given his cultural background, the defendant had in fact been very restrained in limiting the extent of his violence towards the applicant, and thus should be given credit for that.²²⁶

Ethnic/cultural stereotypes in the disposition of intervention order applications were also accompanied by class stereotypes. While, as one interviewee put it, magistrates tended to expect that 'working class women should be roughed up a bit', they were less likely to accept stories of domestic violence in middle-class families.²²⁷ Again, though, class position could cut both ways. It might be easier

220 Id at 21.

221 Field notes, above n135.

222 Interview with Sue Macgregor, above n137; Interview with Hana Assafiri, above n141.

223 Assafiri & Dimopoulos, above n1 at 21; Interview with NESB Focus Group, above n134. The attitude that women from some cultures should put up with violence from their husbands also seemed to be implicit in the magistrate's response in MC42, above n140, in which both parties were from the former Yugoslavia.

224 Interview with Sue Macgregor, above n137; Assafiri & Dimopoulos, above n1 at 21.

225 Assafiri & Dimopoulos, id at 22.

226 Comment from the Floor, 'Silencing Those Who Will Not be Silenced Forum', Footscray Arts Centre, 16 August 1996.

227 Interview with Hana Assafiri, above n141; Interview with Margaret Mann, above n142.

to establish violence by a man who was unemployed or an unskilled labourer than by a professional man, but a working class woman might also be expected to put up with more, or be considered more likely to have provoked or deserved the violence.²²⁸ Violence against middle-class women might be considered more shocking, but on the other hand, a lawyer noted that it was difficult to get an intervention order for a well-dressed, articulate, well-presented woman in full-time employment, since there was an expectation that such a woman should be able to look after herself rather than turning to the courts for assistance.²²⁹

In the intervention order applications observed, class played a particular role in the contested matters. In one of these, the working class status of both parties enabled the magistrate to conclude that most of their 'disputes' had been about money. It was also assumed that the applicant would be given priority for public housing, so that she could move out of the matrimonial home with the children.²³⁰ By contrast, the middle class wife who was denied a sole occupancy order in the case discussed previously was simply given a short period to decide what she wanted to do and to make arrangements to move out if necessary. It appears to have been assumed that she would have the resources to make alternative living arrangements. In this case, too, the parties' middle-class status appears to have contributed both to an understanding of the defendant's dogged attachment to what he perceived to be *his* property (in fact the house was jointly owned and the applicant was currently paying the bills), and to the very high standard of parenting to which the applicant was held, as noted earlier.²³¹

In two of the contested cases there was a class disparity between the parties, which worked to the benefit of the (middle-class) husband in each case. In one of these, the applicant's working class origins were highlighted, and in the witness box she appeared tough and hard-bitten, while the defendant came across as plausible and innocent.²³² In the other, the defendant's credibility was boosted by his genteel manner. He appeared as upright, bemused, regretful, unhappy, and reluctant to repeat the swear words allegedly left by the applicant on his answering machine – quite different from the picture painted of him by the applicant. By contrast, she was somewhat forceful and self-righteous, making it easier to believe in her violence than in his.²³³

7. Conclusion

The empirical evidence clearly demonstrates the dominance of non-feminist narratives in magistrates' responses to the intervention order applications coming before them. Those narratives also had an influence in Family Court proceedings in various ways. This did not mean that women's claims were discounted

228 Interview with Sue Macgregor, above n137; Interview with Karyn Anderson, above n141.

229 Interview with Sue Macgregor, *ibid.*

230 MC52, above n154.

231 MC101, above n156.

232 MC21, above n209.

233 MC45, above n201.

altogether. Indeed, the great majority of women applying for intervention orders in the cases observed were successful, as were the majority of women whose cases went to trial in the Family Court. Yet the extent to which these outcomes achieved safety for the women involved was questionable, especially when intervention orders were made for a limited duration and with wide exceptions for child contact. And in the Family Court, many of the consent orders arrived at in cases that did not go to trial clearly perpetuated rather than prevented the father's future control and abuse of the mother.²³⁴ The discursive effect of these cases was to minimise or deny violence, and/or to endorse and maintain non-feminist understandings of domestic violence.

The study reinforces the point that feminist law reformers cannot take implementation for granted or ignore the importance of existing legal cultures. It also provides support for the argument of critical feminist theorists that feminist reformers should not invest too much faith in legal solutions, but should be concerned to challenge non-feminist narratives, both within law and wherever else in society they appear. We cannot expect feminist counter-narratives to be created simply through legislative change alone.

It might be asked, however, why feminist understandings of domestic violence *should* be incorporated into relevant court proceedings. Can it be said that these understandings are epistemologically superior to the non-feminist narratives identified? Some of those narratives (for example relating to couple conflict, the disjunction between the interests of mothers and children, and the individual pathology of battered women) have established groundings in the disciplines of social work and psychology. Why should they be rejected in favour of the feminist account of the dynamics of violence?

One possible answer to this question is provided by feminist standpoint epistemology – that is, the notion that knowledge about women derived from women's own experiences is inherently superior to 'top down' knowledge derived only from supposedly 'detached' observations.²³⁵ This argument, in turn, draws on the Marxist argument that the perspective of the oppressed in society is necessarily more complete than that of the dominant/ruling class, because the latter never experience domination, while the former do have that experience, while being made all too aware of the views of the ruling class.²³⁶

I do not advocate this position, however. First, it relies upon a coherent, agreed upon content of 'women's experience', which does not empirically exist. The accounts of violence provided by women speaking from positions of difference,

234 See also Kaye, Stubbs & Tolmie, above n2; Rhoades, above n2.

235 Nancy Hartsock, 'The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism' in Sandra Harding (ed), *Feminism and Methodology: Social Science Issues* (1987). See also Sandra Harding, 'Rethinking Standpoint Epistemology: "What is Strong Objectivity?"' in Linda Alcoff & Elizabeth Potter (eds), *Feminist Epistemologies* (1993).

236 Catharine MacKinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982) 7 *Signs* 515.

identified earlier in this article, suggest that 'women's experience' of violence is diverse rather than singular, and it is necessary to be attentive to these differences in individual cases. Secondly, poststructuralist feminists have also questioned the possibility of access to an authentic and stable 'women's experience', pointing out that subjectivity is fractured, performative, and interpellated at various moments by cross-cutting social discourses.²³⁷ Thus, the feminist account of violence cannot claim to be a 'true' representation of women's experience, but rather has the status of a discourse presenting arguments about that experience.²³⁸ Thirdly, it is not necessarily empirically true that all domestic violence matters coming before the courts fit the 'power and control' paradigm rather than the 'couple conflict' paradigm, for example.

In light of these considerations, I would not propose that any particular narrative about domestic violence be taken to be universally correct or adopted as the ruling narrative. Rather, I would advocate a more contextual and evidence-based approach. The analysis of violence adopted in any given case should be the one that best fits the evidence in that case. This requires, however, that the 'power and control' analysis, and variations on or alternatives to that analysis developed in relation to lesbians, women with disabilities, immigrant women and Indigenous women, must become *an essential element of the knowledge base* of judicial officers making decisions in cases involving allegations of domestic violence. This knowledge would not replace or supplant non-feminist understandings of violence in all circumstances, but neither should it be ignored or repressed.

The notion that the analysis of violence in any given case would depend upon the evidence available in that case also requires that evidence not be precluded or foreclosed so as to fit one view or another. This would mean, for example, that considerations of violence should not be confined to (recent incidents of) physical violence, but should take into account the history of the relationship and any evidence of other forms or patterns of intimidating and controlling behaviour, including separation assaults. Does the evidence point to a relationship of mutual conflict, or does it point to the exercise of power and control by one partner over another? Were 'reconciliations' genuine or coerced? Can any children involved really be protected from future violence and the effects of violence without also protecting their mother? Moreover, decisions should never be based on the denial or minimisation of violence, or excuses and victim-blaming. Neither should they be based on stereotypes of bad mothers, lying/vindictive ex-wives, mad women, or propensities for violence among particular classes or ethnic groups. These intellectual shortcuts are simply unacceptable in any court purporting to deliver justice to the parties before it.

Three different kinds of interventions would assist to expand the knowledge base of legal decision makers in relation to domestic violence, in order to ensure

237 This is a very brief summary of a set of complex arguments. For some elaboration, see Rosemary Hunter, 'Deconstructing the Subjects of Feminism: The Essentialism Debate in Feminist Theory and Practice' (1996) 6 *Aust Feminist LJ* 135 at 142–44.

238 See Genovese (2000), above n17; Ferraro, above n32.

fully informed and appropriate decisions in individual cases. First, legal education at both undergraduate and continuing levels could specifically address the nature of domestic violence and the varying understandings of violence set out in this article. This could occur in both family law and criminal law courses, in continuing education programs for practitioners, and in training programs for judicial officers.

Secondly, legislative amendments incorporating a 'power and control' analysis could serve to direct attention to a different way of thinking about domestic violence. Examples might include revising the grounds for an order in state and territory protection order legislation to reflect the various ways in which power and control may be exercised,²³⁹ and amending the *Family Law Act* to provide for specific consequences where violence is found to have occurred. Family law legislation in other jurisdictions, for instance, includes a rebuttable presumption that a parent found to have perpetrated violence not be awarded residence or unsupervised contact, or specifies that in such cases, the best interests of the child require the court to give absolute priority to ensuring the safety of the child and their other parent.²⁴⁰

Thirdly, specialised domestic violence courts or domestic violence lists in state and territory magistrates courts²⁴¹ provide a means of concentrating the necessary expertise and commitment to a full and proper consideration of allegations of violence, through their exclusive focus on issues of violence, specialised staffing, and substantive goals of violence reduction and prevention.²⁴² Specialised courts can also operate as a 'one stop shop' for survivors of violence, as they are able to

239 For example as recommended by the Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006) at 105–7, 113.

240 See, for example, Jaffe & Crooks, above n207 at 921, 927; Juliet Behrens, 'The Form and Substance of Australian Legislation on Parenting Orders: A Case for the Principles of Care and Diversity and Presumptions Based on Them' (2002) 24 *J Social Welfare & Fam L* 401 at 413; Nancy Lemon, 'Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?' (2001) 28 *William Mitchell LR* 601; Maureen Sheeran & Scott Hampton, 'Supervised Visitation in Cases of Domestic Violence' (1999) 50 *Juvenile & Family Court J* 13; Laing, above n39; Rendell, Ratus & Lynch, above n2 at 121–22; Eriksson & Hester, above n114 at 793. By contrast, the 2006 amendments to the *Family Law Act*, while specifying that the need to protect children from (exposure to) abuse, neglect or family violence is a primary consideration in determining the best interests of the child, do not specify how this should occur, other than stating that if there are reasonable grounds to believe that a parent has engaged in family violence, there should be no presumption of equal shared parental responsibility: ss60CC(2), 61DA(2). At the same time, the amendments perpetuate fright narratives about false allegations of violence by tightening the definition of 'family violence' and providing that the court must make a costs order against a party found to have knowingly made a false allegation or statement in proceedings: ss4(1), 117AB.

241 Domestic violence courts are currently in place or being piloted in the ACT, South Australia, Western Australia, NSW and Victoria.

242 See, for example, Julie Stewart, *Specialist Domestic/Family Violence Courts Within the Australian Context* (2005); Rekha Mirchandani, 'What's So Special About Specialised Courts? The State and Social Change in Salt Lake City's Domestic Violence Court' (2005) 39 *Law & Society Rev* 379; Victorian Law Reform Commission, above n239 at 165–232.

exercise state/territory criminal, protection order and crimes compensation jurisdictions, while also having power to make interim orders and consent orders, and to vary contact orders, under the *Family Law Act*.²⁴³ Given adequate resources, such a model could ensure consistent decision making in domestic violence matters, careful consideration of the evidence in each case, and appropriate responses drawing upon the full range of knowledge about domestic violence available.

Since not all survivors of violence will have access to a specialist court, however, this intervention cannot be relied upon alone. Instead, informed rather than partial and unreflective decision making should be an objective and a hallmark of the legal system wherever it encounters survivors of violence.

243 Note, however, that of the schemes currently in place, only the Victorian model aims to be a 'one stop shop'. The ACT court deals only with crime, while the South Australian, Western Australian and NSW models deal with crime and protection orders but not family law.