



Victorian  
Law Reform  
Commission

## **Who Kills Whom and Why: Looking Beyond Legal Categories**

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Published by the Victorian Law Reform Commission.

The Victorian Law Reform Commission was established under the *Victorian Law Reform Commission Act 2000* as a central agency for developing law reform in Victoria.

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The publications of the Victorian Law Reform Commission follow the Melbourne University Law Review Inc *Australian Guide to Legal Citations* (2000).

Note: Unless otherwise stated, all references to legislation in this Occasional Paper are to Victorian legislation.

Designed by Andrew Hogg Design.

National Library of Australia  
Cataloguing-in-Publication

Morgan, Jenny, 1954—.

Who kills whom and why: looking beyond legal categories.

Bibliography.

ISBN 0 9579678 6 1.

1. Homicide - Research - Australia.
  2. Homicide - Australia - Statistics.
  3. Homicide - Law and legislation - Australia.
- I. Victorian Law Reform Commission. II. Title.

364.1520994

# Contents

<b>PREFACE</b>	v
<b>ABBREVIATIONS</b>	vi
<b>INTRODUCTION: THE BROAD APPROACH</b>	1
<b>THE EMPIRICAL DATA: AN OVERVIEW</b>	
<i>Introduction</i>	4
<i>Basic incidence data</i>	6
<i>Basic relationship data</i>	9
<b>EXPLAINING THE DATA: THE CIRCUMSTANCES OF HOMICIDES</b>	
<i>Confrontational homicides</i>	13
<i>Homicides originating in other crimes</i>	15
<i>Conflict resolution homicides</i>	16
<i>Homicides originating in family intimacy</i>	16
<i>Homicides in the context of sexual intimacy</i>	21
<i>Homophobic killings</i>	30
<i>Other</i>	32
<b>IMPLICATIONS OF THE DATA FOR LEGAL DEFENCES</b>	
<i>Confrontational homicides</i>	33
<i>Homicides originating in other crimes</i>	34
<i>Conflict resolution homicides</i>	35
<i>Homicides in the context of family intimacy</i>	35
<i>Homicides in the context of sexual intimacy</i>	37
<i>Homophobic killings</i>	43
<b>CONCLUSION</b>	45
<b>APPENDIX</b>	47
<b>BIBLIOGRAPHY</b>	49
<b>OTHER PUBLICATIONS</b>	54



## Preface

This is the Victorian Law Reform Commission's first Occasional Paper. It is published as part of the Commission's work on defences to homicide. Occasional papers provide background information relevant to particular areas of law reform, but are not intended to reflect the Commission's views and do not contain policy recommendations.

The Occasional Paper was prepared by Associate Professor Jenny Morgan, of the Law School at the University of Melbourne, on behalf of the Commission. It brings together statistical and other material on the victims of homicide, the characteristics of people who kill others and the contexts in which homicide occurs. This is essential information in assessing the effect of the current Victorian laws on defences to homicide and in making recommendations for change.

The Commission has also published an Issues Paper, *Defences to Homicide*, which sets out the present law and describes how it operates in practice. The Commission will be undertaking community consultations on proposed law reforms in this area. Those wishing to understand the facts about homicide will find it useful to read this Paper. Others may only want to read the Issues Paper. Some of the detailed findings in this Occasional Paper are set out more briefly in Chapter 2 of the Issues Paper.

## Abbreviations

AC	Appeal Cases (United Kingdom)
A Crim R	Australian Criminal Reports
AIC	Australian Institute of Criminology
ALR	Australian Law Reports
AVO/DVO	apprehended violence order/domestic violence order (Qld)
Cal 3d	California Reports, Third Series (United States of America)
cf	compare with
CLR	Commonwealth Law Reports
eg	for example
et al	and others
ibid	in the same place (as the previous footnote)
J	Justice (JJ plural)
LRCV	Law Reform Commission of Victoria (predecessor of the Victorian Law Reform Commission)
n	footnote
NHMP	National Homicide Monitoring Program
NSW	New South Wales
NSW LRC	New South Wales Law Reform Commission
SIDS	sudden infant death syndrome
VR	Victorian Reports
VLRC	Victorian Law Reform Commission
VSCA	Supreme Court of Victoria—Court of Appeal

## Introduction: The Broad Approach

This Occasional Paper summarises much of the available Australian data on the phenomenon of homicide. The Paper is not authored by the Victorian Law Reform Commission, and does not necessarily represent its views, but it is published by the Commission in order to encourage consideration of the law of defences to homicide within the social context in which they arise.

The Paper arises from the premise that social problems rather than legal categories best inform our thinking about the law reform we need or want. In commending an approach to law reform that focused on people's lives rather than legal categories, Nathalie Des Rosiers argued that an approach to law reform that was oriented toward the social (and economic) context of people's lives, and used 'reality as a starting point' was 'extremely productive since it helps to ensure that we do not take for granted abstract legal categories that may obfuscate rather than clarify the resolution of a legal problem'.<sup>1</sup> This Paper aims to challenge the 'taken-for-grantedness' of legal categories by emphasising social 'facts' rather than legal categories.

In *The Hidden Gender of Law*, Reg Graycar and I placed women's lives, rather than legal categories, as the central focus of our study.<sup>2</sup> Our aim was to 'challeng[e] the categories that have been used to define legal problems since those categories themselves may have played a role in the relegation of women's concerns to the margins of the legal terrain and...the subordination of women'.<sup>3</sup> We organised our material by reference to experiences that seemed central to women's lives rather than in categories relevant to the way law school courses and texts are usually organised.

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\* Thanks to the Commissioners and staff of the Commission and Reg Graycar and Peter Rush who read and commented on drafts of this Paper.

1 Nathalie Des Rosiers, 'Reforming or Rethinking the Law? Canada's Experience of Law Reform', Notes for a speech to be delivered at the Rencontre internationale des juristes d'expression française (Montpellier, 29 June–2 July 2000), 25 June 2000, <<http://www.lcc.gc.ca/en/pc/speeches/20000629.html>>. Des Rosiers was at the time Vice-President and President designate of the Law Commission of Canada.

2 Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1<sup>st</sup> ed, 1990; 2<sup>nd</sup> ed, 2002).

3 *Ibid* (2<sup>nd</sup> ed) 2.

We noted, however, that the questioning of the utility of legal categories for thinking about legal problems was not unique to feminist scholars. Practising lawyers have always recognised ‘that people’s lives do not readily fit into legal categories’.<sup>4</sup> Thus, while women’s lives may be particularly excluded from traditional legal categories—given that women did not participate in their development as lawyers, judges or legislators, and were rarely legal subjects or litigants—these legal categories may also not respond well to the lives of men.

Hence, it may be more useful for both women and men who are subject to the laws of homicide if law reform initiatives start from the social problems that require addressing, rather than from the legal categories traditionally used to address them. I argue that if our examination of defences to homicide is driven by an understanding of the contexts in which killings occur, rather than the legal categories that have traditionally been used to respond to such killings, we may be more likely to consider fully the sorts of situations that *should* be subject to partial or complete defences. That is, we are more likely to reconsider both whether we want to encompass all the circumstances currently included as raising justifications or excuses to murder, and whether there are other common circumstances which should be included in any defences. By focusing on the social circumstances of homicides, we are encouraged to rethink two traditional questions of law reform. First, are the current categories and definitions over-inclusive—that is, do they include situations which, on reflection, should not amount to a partial or full defence to murder? And secondly, are they under-inclusive—are there common situations excluded from the traditional defences that should be included?

The remainder of this document provides an overview of the most comprehensive Australian empirical research on criminal homicide, organised according to the common contexts in which homicide occurs.<sup>5</sup> Despite my interest in, and emphasis upon, the relationships in which homicide occurs, I commence by including very basic data on the incidence of homicide, and on the gender and race of perpetrators. I go on to consider

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4 Ibid.

5 My focus has been almost solely on Australia, because of the wealth of data here, and the very different patterns overseas, especially in the United States. See Margo Wilson and Martin Daly, ‘Who Kills Whom in Spouse Killings? On the Exceptional Sex Ratio of Spousal Homicides in the United States’ (1992) 30 *Criminology* 189 for a comparison of the gender of spouse killers in the United States, Canada, Australia and Great Britain, and note that in the United States ‘the number of women who kill their husbands relative to the number of men who kill their wives (the spousal SROK [Sex Ratio of Killing or homicides perpetrated by women per 100 perpetrated by men] is exceptionally high’: at 190. So in the United States the SROK was 75, but 31 in New South Wales (NSW) and Canada, and 23 in England and Wales: at 191, Table 1.



a variety of relationships in which homicide occurs (or might be thought to occur), indicating the Australian data that is available to elucidate these patterns. I also briefly raise questions about some defences to homicide in relation to the data;<sup>6</sup> these legal questions are only touched on here, and are covered in more detail in the Commission's Issues Paper, *Defences to Homicide*.

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6 I discuss self-defence, provocation and infanticide. I do not discuss diminished responsibility, duress, necessity, excessive self-defence, mental impairment, intoxication or automatism (or indeed the *mens rea* or *actus reus* for homicide).

## The Empirical Data: An Overview

### INTRODUCTION

Alison Wallace's *Homicide: The Social Reality*,<sup>7</sup> was the first published Australian study to map the legal category of homicide in a detailed sociological fashion.<sup>8</sup> In doing so, Wallace pointed out the gendered and frequently domestic nature of lethal violence. In his preface to Wallace's study, Adam Sutton stated: 'The typical homicide, if there is one, occurs in the home, on weekends and during the Christmas holidays.'<sup>9</sup> This, he suggested, contrasted with the stereotypical image of the perpetrator of a homicide as a madman killing strangers. He went on to say that homicide 'is the outcome, in most cases, of a society whose interpersonal relationships deserve a thoroughgoing reanalysis'.<sup>10</sup> Sutton's comments remind us that understanding and preventing homicide require a focus on (re)analysing personal relationships. Such a focus will also assist in understanding the ways in which defences to murder have been, and could be, used.<sup>11</sup>

Wallace's study focused on criminal homicide,<sup>12</sup> which—given the Victorian Law Reform Commission's current reference on defences to homicide—is also emphasised in this Paper. But it is worthwhile considering what this focus will underestimate. Obviously, it does not concern itself with those deaths not classified as homicide, and thus severely underestimates deaths caused by industrial negligence (but not classified as murder or

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7 Alison Wallace, *Homicide: The Social Reality*, NSW Bureau of Crime Statistics and Research (1986). Note that this study was about homicide in NSW.

8 However, see Peter Grabosky et al, *Homicide and Serious Assault in South Australia* (1981).

9 Wallace, above n 7, ix.

10 Ibid.

11 Marvin Wolfgang, in his 1958 United States study, was probably the first to identify homicide as being 'about relationships' rather than (just) about the individual: *Patterns of Criminal Homicide* (1958).

12 See also Law Reform Commission of Victoria, *Homicide Prosecutions Study*, Appendix 6, Report No 40 (1991).

manslaughter).<sup>13</sup> A focus on criminal homicide may also exclude cases of murder-suicide—that is, situations where perpetrators kill their partner and then kill themselves.<sup>14</sup>

The three major Australian studies are: Alison Wallace's, the Australian Institute of Criminology study, reported here largely through the work of Jenny Mouzos,<sup>15</sup> and Ken Polk's work.<sup>16</sup> The following discussion relies

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- 13 On this topic, see eg Ken Polk, Fiona Haines and Santina Perrone, 'Homicide, Negligence and Work Death: The Need for Legal Change' in Michael Quinlan (ed), *Work and Health: The Origins, Management and Regulation of Occupational Illness* (1993). This chapter documents the changes in Victoria since the introduction of the *Occupational Health and Safety Act 1985*. At the time they were writing, Polk et al observed that there had been no prosecutions for manslaughter in relation to workplace death. However, there had been nine completed prosecutions under the *Occupational Health and Safety Act 1985* for workplace death. The authors note that tracking workplace death is extremely difficult. The question of what is classified as a workplace death is complex and there is no central data collection agency for workplace deaths, even if these could be defined with some clarity: at 243. This study examined all deaths reported to the Victorian Coroner in 1987, supplemented by data from the agencies, eg Department of Labour, which investigate such deaths. It identified 57 workplace deaths which occurred in 1987. The authors conclude that the very low rate of prosecution for workplace death is not just a function of the absence of employer negligence but rather a function of a series of factors including the complexity of workplace organisations and the [presumed] attitudes of the judiciary to workplace death: at 244–6. See also Ken Polk, Fiona Haines and Santina Perrone, 'Work Death in Victoria, 1987-1990: An Overview' (1994) 28 *The Australian and New Zealand Journal of Criminology* 178. Mouzos has also described four categories of unreported homicides: those undertaken by professional criminals which do not come to the attention of the police; a small proportion of those people reported missing each year who are in fact murdered; some child deaths where the cause of death is described as unknown or accidental but in fact death has been intentionally inflicted; and those of older people in similar circumstances: Jenny Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1999*, Australian Institute of Criminology, Research and Public Policy Series No 28 (2000) 6.
- 14 Whether these are included or excluded depends on the focus of the study and the source of data used. The previous Law Reform Commission of Victoria study concerned itself with homicide *prosecutions*, and thus excluded murder-suicide, estimated as 18% of reported homicides (some 485) over the period of the study (1980–6): Law Reform Commission of Victoria, above n 12, 2. (As the Commission then recognised, this meant that their detailed data underestimated the incidence of domestic homicide, the most common situation where murder is followed by suicide of the perpetrator: between 1984–8, 90% of murder suicides were domestic: Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991) 4, note 6.) The National Homicide Monitoring Program (NHMP), described further below, does include murder-suicide: Carlos Carcach and Peter Grabosky, *Murder-Suicide in Australia*, Australian Institute of Criminology, Trends and Issues Paper No 82 (1998), reports on all homicides in the NHMP between 1 July 1986–30 June 1996. Some 6.5% (of 2226 incidents) were classified as murder-suicides. Broadly, jurisdictions with high rates of homicide show low rates of murder-suicide: *ibid* 2; 91.4% of murder-suicide perpetrators were men and 43% involved a partner killing his/her partner or former partner, 14% a parent killing his or her child, and 6% involved both partner and children: *ibid* 3.
- 15 Jenny Mouzos, *Homicidal Encounters*, above n 13. Other studies by Mouzos, and other studies by a variety of authors using this data are noted in Appendix 1 to *Homicidal Encounters*. See now Jenny Mouzos, *Homicide in Australia 2001–2001, National Homicide Monitoring Program (NHMP) Annual Report (2002)*, Australian Institute of Criminology, Research and Public Policy Series No 40. See generally Australian Institute of Criminology publications at <<http://www.aic.gov.au>>.
- 16 See, especially, Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994) and Christine Alder and Ken Polk, *Child Victims of Homicide* (2001).

particularly on Mouzos as it is a relatively recent, comprehensive and largely quantitative Australia-wide study, and on Polk, *When Men Kill*, and Polk and Alder, *Child Victims of Homicide*, as these are Victorian qualitative studies. Wallace's work, though central conceptually, has received somewhat less emphasis here because of when it was undertaken (covering homicides between 1968–91) and where—patterns in New South Wales, while similar to those in Victoria, are also different.

## BASIC INCIDENCE DATA

The Australian Institute of Criminology (AIC) has, since 1989, maintained the National Homicide Monitoring Program (NHMP). This collects data on an annual basis from police forces in all States and Territories on incidents classified as homicides,<sup>17</sup> gathering data on 77 variables, including the relationship between the victim and the offender.<sup>18</sup> Between 1 July 1989–30 June 1999, there were 3150 incidents classified by the police as homicides, with a relatively steady rate across the ten years.<sup>19</sup> Victoria is in fact under-represented in the homicide data: 25% of Australia's population is resident in Victoria, but only 16.8% of the homicide incidents occurred in Victoria.<sup>20</sup> Some 60% of the homicide incidents occurred in residential premises, and in 80% of these it was the home of the victim.<sup>21</sup>

17 These are all those where an offender is charged with murder or manslaughter, murder-suicides, and other deaths classified by police as homicides even where no-one has been apprehended: Mouzos, *Homicidal Encounters*, above n 13, 8.

18 Ibid 5. Note that the data collected include location of the homicide, the alleged motive and the weapon used. Since 1996, the program also collects data on the consumption of alcohol, and/or illicit drug use, relying on coronial files. See also Jenny Mouzos, *Femicide: The Killing of Women in Australia 1989–1998*, Australian Institute of Criminology, Research and Public Policy Series, No 18 (1999) and *Femicide: An Overview of Major Findings*, Australian Institute of Criminology, Trends and Issues Paper No 124 (1999); Marianne James and Carlos Carcach, *Homicide in Australia 1989–1996*, Australian Institute of Criminology, Research and Public Policy Series No 13, (1997); Carlos Carcach and Marianne James, *Homicide Between Intimate Partners in Australia*, Australian Institute of Criminology, Trends and Issues Paper No 90 (1998); Jenny Mouzos, *Indigenous and Non-Indigenous Homicides in Australia: A Comparative Analysis*, Australian Institute of Criminology, Trends and Issues Paper No 210 (2001) 2. A list of all publications arising out of the NHMP is included as Appendix 1 to *Homicidal Encounters*.

19 Mouzos, *Homicidal Encounters*, above n 13, 16: an incident 'is defined as one single, distinct event, regardless of the number of victims and offenders'. Most homicides (80.8%) involve a single offender and a single victim, with 14.3% involving a single victim and multiple offenders, 4.3% involving a single offender and multiple victims, and only 0.6% involving multiple offenders and victims: at 24.

20 Ibid 17. The Australian Capital Territory (ACT) is also under-represented (1.6% of the population, 0.6% of the homicide incidents). The Northern Territory (NT) is over-represented: 1% of the population, yet 5.2% of the homicide incidents occurred there.

21 Ibid 19. Some 22% occurred on the street or in parks, bushland etc, and 5% in a pub, club or disco.

## Gender

Men are overwhelmingly the perpetrators of homicide: '[s]even out of 8 homicide offenders are male'.<sup>22</sup> The AIC data shows a slight increase in the proportion of female offenders in the years 1996–9 (14.7%), compared to 1989–96 (12.1%); Mouzos suggests that this does not necessarily indicate that there are more women offenders. 'Rather, it may indicate a higher proportion of females are being apprehended than are males, considering females are more likely to kill an intimate partner, or to a lesser extent, their children'.<sup>23</sup>

In Wallace's NSW study (relying on police files, and covering homicides between 1968–81), 85% of those charged with a homicide offence were men.<sup>24</sup> Wallace also comments that when international comparisons are made, Australia has a 'particularly low' rate of female offending.<sup>25</sup> In Polk's study, relying on Victorian Coroner's files between 1985–9, 'in 11% of the cases a woman was involved in the killing as offender or accomplice, while women alone were offending in 9% of the lethal violence'.<sup>26</sup>

Men are also more likely than women to be the victims of homicide. So, for example, in the AIC study, 63.2% (of the 3386 victims where gender was identified) were male.<sup>27</sup> And 'almost 9 out of 10 victims, irrespective of gender were killed by males'.<sup>28</sup>

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22 Ibid 51. Note that 3481 offenders were identified by police; in 11% of incidents no offender was identified: *ibid*. In Wallace's study of all homicide offences in NSW between 1968–81, 15% of perpetrators were women: 29. Wallace reports on two earlier (unpublished) studies of homicides in NSW which indicate a drop in female offending from 19.7% in 1933 to 15% in 1981: at 31.

23 Mouzos, *Homicidal Encounters*, above n 13, 51.

24 Wallace, above n 7, 29.

25 *Ibid*.

26 Polk, *When Men Kill*, above n 16, 145. See also Kenneth Polk and David Ranson, 'Patterns of Homicide in Victoria' in Duncan Chappell, Peter Grabosky and Heather Strang (eds), *Australian Violence: Contemporary Perspectives* (1991). This examined the Victorian Coroner's files from 1985–6. See also Kenneth Polk, 'Lethal Violence as a Form of Conflict Resolution' (1994) 28 *The Australian and New Zealand Journal of Criminology* 93.

27 Polk, *When Men Kill*, above n 16, 30. Mouzos notes that this gender pattern has remained constant since 1982: above n 13, 31.

28 *Ibid* 33.

## Race

Indigenous people<sup>29</sup> are over-represented in the AIC figures:

On average, during the 10 year period, the homicide victimisation rate for Indigenous persons (where race was known) was 12.9 per 100,000 population, compared to an average rate of 1.6 per 100,000 for non-Indigenous persons in Australia.<sup>30</sup>

Put another way, Indigenous people make up some 2% of the total population, but some 13% of homicide victims.<sup>31</sup> Note also that homicide is primarily an intra-racial crime.<sup>32</sup> Some 16.6% of homicide offenders in the AIC study were Indigenous.<sup>33</sup>

## Race and Gender

In the AIC data, for Caucasian offenders, women made up 12% of homicide offenders (where race and gender were known), whereas for Indigenous offenders, women made up some 19% of offenders.<sup>34</sup>

29 Note that racial identification—and the NHMP divides people into four racial groups (Caucasian, Indigenous, Asian and Other)—is based on subjective assessments made by police and mainly based on appearance: Mouzos, *Homicidal Encounters*, above n 13, 34. This categorisation is thus likely to underestimate Indigenous Australians. Where an attempt is made by researchers to explore the ethnicity of homicide victims or perpetrators, the data is often unavailable and thus conclusions as to ethnicity may be unreliable. So, for example, in Eastal's examination of spouse or intimate homicide between 1988–90, in 34% of the sample of NSW and Victorian killings, the ethnicity of the offender was unknown: Patricia Eastal, *Killing the Beloved: Homicide between Adult Sexual Intimates* (1993) 45.

30 Mouzos, *Homicidal Encounters*, above n 13. Mouzos states that in all States and Territories, except Tasmania and the ACT, Indigenous people are over-represented as victims of homicide: at 36. Individual State-based figures are not given, but are presented graphically: at 36, Figure 25. See also Mouzos, *Indigenous and Non-Indigenous Homicides in Australia*, above n 18, where it is suggested that over-representation is particularly acute in the NT, Western Australia and Queensland.

31 Mouzos, *Homicidal Encounters*, above n 13, 34.

32 Mouzos, *Indigenous and Non-Indigenous Homicides*, above n 18, 5.

33 Mouzos, *Homicidal Encounters*, above n 13, 55.

34 *Ibid.*

## Employment Status

In the AIC study, victims of homicide were more likely not to be working at the time of the killing. Victims were classified as either 'working' (including part-time work) or 'not working' (including those who were unemployed, and those outside the paid labour force receiving a pension or benefit, or engaged in domestic work).<sup>35</sup> The study stated that 'almost three-quarters of male offenders and just under 9 out of 10 female offenders were not working at the time of the incident'.<sup>36</sup>

## Other

Other information presented by Mouzos includes data on the marital status of perpetrators and victims, the type of weapon used, the extent to which perpetrators and victims had used alcohol or drugs and the alleged motive of the perpetrators.<sup>37</sup>

## BASIC RELATIONSHIP DATA

The data presented in the previous section focused on a variety of characteristics of the perpetrators and victims of homicide. While this information is interesting, a focus on the relationship between victims and offenders is of even greater interest. The AIC has classified the relationships between offenders and victims in the following way:

- *Intimates*: including spouses, ex-spouses in both married and heterosexual de facto relationships, partners and former partners of same sex relationships, current or former boy/girlfriends, and extra-marital lovers (21.4% of homicides in Victoria between 1989–99 were between intimates; 20.9% in Australia);
- *Family*: children, including step-children, parents including step-parents, siblings and other family relationships (13.0% of Victorian homicides were between family members; 14.3% in Australia);
- *Friends and acquaintances*: close friends and acquaintances including neighbours (29.3% of Victorian homicides fell into this category; 27.6% in Australia);

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35 Ibid 39.

36 Ibid 57. Mouzos notes that the NHMP does not provide adequate data on income: Mouzos, *Femicide: The Killing of Women in Australia 1989–1998*, above n 18, 25. She notes however that only 11% of the femicide victims in that study were in employment at the time of their death.

37 These issues are not further explored here.

- *Strangers*: ‘includes those victim-offender relationships in which the victim is relatively unknown to the offender at the time of the incident (18.4% in Victoria; 19.3% in Australia);
- *Other relationships*: ‘includes sex rivals, gang members, prostitute–client, fellow inmates in a correctional facility/mental health care facility, business relationships, and where the victim and offender are known to each other but the type of relationship is unknown (9.1% in Victoria; 9.8% in Australia); and
- *Unknown*: where the police have not determined what the relationship is (8.7% in Victoria, 8.1% in Australia).<sup>38</sup>

This analysis confirms Sutton’s observations that patterns of homicide are about patterns of relationships: only some 18% of homicides occurred between strangers. Homicide is clearly gendered: between 1989–99, ‘female victims were most likely to be killed by an intimate partner’ and ‘male victims were more likely to be killed by a friend or an acquaintance’.<sup>39</sup>

The basic data on relationships between homicide victims and offenders also has limitations. Polk, who examined files relating to deaths between 1985–9 held in the Victorian Coroner’s Office,<sup>40</sup> argues ‘there are important limits to what can be explained from the use of such terms as “stranger”, “friend/acquaintance” or “family” to describe the bond between offender and victim’.<sup>41</sup> Instead, after an extensive qualitative study of homicides in Victoria, concentrating on the contexts in which the killings occurred, he inscribed the following categories:<sup>42</sup>

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38 Ibid 65. The figures come from Table 5, 68.

39 Ibid.

40 Kenneth Polk, *When Men Kill*, above n 16. At the time he was writing, Polk states that all deaths which were apparently ‘unexpected, unnatural or violent’ (at 12) had to be reported to the coroner (thus including workplace deaths). Mouzos, *Homicidal Encounters*, above n 13, includes data on the variability over time of homicide data: since the 1980s the rate of homicide has remained relatively stable. Data from 1915 on is included in her study.

41 Polk, *When Men Kill*, above n 16, 4. Note also that, as can be seen from the AIC definitions (noted above) of ‘stranger’ (defined as those where the victim is *relatively* unknown to the offender) and ‘friend or acquaintance’ (defined as *close* friend or acquaintance) (emphasis added), the referent of these terms is not immediately transparent, and what is included in the definition will vary from study to study.

42 Ibid, 23, Table 1. This may overstate the difference between Polk and Mouzos: Mouzos, *Homicidal Encounters*, above n 13, includes in her study a chapter on homicide in the course of other crime, which has very interesting data on homicide in the course of robbery and sexual assault, and a chapter on mass and serial murders. The categories used by Mouzos described above are about *relationships* between victim and offender, rather than purporting to describe all aspects of homicide. Polk’s categories, as described, are constructed to hint at an explanation for homicide.



- homicides in the context of sexual intimacy;
- homicides originating in the context of family intimacy;
- confrontational homicides;
- homicides originating in other crimes;
- conflict resolution homicides;
- victims of mass killers;
- unsolved and unclassifiable homicides;
- special cases; and
- mercy killings.

While I rely on Polk's classifications, and indeed often on his data, for the remainder of my analysis I also draw on other analyses to illuminate a scenario. The AIC study is, of course, of central importance because of its comprehensive nature. Wallace's study is of particular interest because of the emphasis it places on homicides within a domestic context. However, the different aims of the various studies mean that some of the data are not directly comparable. For example, on Polk's data, 27% of killings were in situations of sexual intimacy, compared with 21.4% of killings described in the AIC study as occurring between 'intimates'.<sup>43</sup> It is not entirely clear whether this higher rate of 'intimate homicide' in Polk's study is an artefact of a difference in classification or a difference in the primary data (or, indeed, both). There do appear to be some differences in the classifications used in each study. For example, Polk includes the killing of a sexual rival as one 'arising out of sexual intimacy' whereas the AIC classification, as it is focused on the relationship between offender and victim, is unlikely to classify sexual rivals under the sexual intimates category. Wallace's more detailed study of homicides in NSW between 1968–81 (relying on police files) showed that 23.2% of all homicides in that State occurred between spouses.<sup>44</sup>

The difference in data becomes even more marked if one further level of generalisation is imposed—that is, the proportion of homicides that can be classified as 'domestic'. This is the term used by Wallace, who states that 42.5% of the homicide victims in her study were killed by a member of their family.<sup>45</sup> Assuming a comparability between the AIC categories of 'intimates'

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43 Polk, *When Men Kill*, above n 16, 23.

44 Wallace, above n 7, 83.

45 *Ibid* 72–3.

and 'family' and Wallace's domestic or family category, the equivalent proportion would be 35.2% for Australian data, and 34.4% for Victoria on the AIC data. In Polk's study, 34.7% of homicides analysed occurred in circumstances 'originating in family intimacy' or arising out of the context of sexual intimacy.<sup>46</sup>

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<sup>46</sup> One possible reason for the variation in the data, other than the variable classification of particular homicide scenarios, might arise from the fact that the NHMP is counting (in these figures) *incidents* of homicide (such that if one assailant kills three victims, that is counted as one incident), whereas Wallace is counting *victims* and would count the posited scenario as three homicides. See also the previous Law Reform Commission's detailed comment on variability in different sources of data and methods of presentation of it: Law Reform Commission of Victoria, *Homicide*, above n 14, 4, note 6.

## Explaining the Data: The Circumstances of Homicides

Polk undertook an extensive qualitative piece of research, and developed detailed explanatory categories to analyse his data. His approach is a useful way to understand homicide in Victoria, and I have used his categories to order the remainder of my discussion.<sup>47</sup> His basic categories and sub-categories are reproduced in Appendix 1 (together with the numbers in each category and sub-category). Note that the total number of homicides analysed by Polk is 380.

The following discussion places greatest emphasis on Polk's category of killings in the context of sexual intimacy, due to the controversial nature of these killings legally. However, I also briefly explain some of what Polk found in relation to other categories of killings, especially where it is not self-explanatory. Where it is useful (and especially in relation to killings in the context of sexual intimacy) I include data from other relevant Australian studies. Towards the end of the Paper, I also briefly canvass ways in which the sociological categories used by Polk might illuminate the legal categories of defences.

### CONFRONTATIONAL HOMICIDES

In Polk's study 'confrontational homicides', which made up 22% of all killings, typically

emerged quickly out of some exchange, often involving insults, sometimes nonverbal gestures. ... Virtually all of the individuals engaging in this scenario were male, but there were four examples...where this pattern involved women as both offender and victim.<sup>48</sup>

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47 Note that over the years an increasing amount of qualitative data is collected in the NHMP. For example, since July 1996, information is collected on whether the killing was preceded by 'arguments of a domestic nature'. However, often this information is not recorded—indeed in 72.5% of cases it is not. Where that information was known, in some 21% of cases the fight was over 'the offender's jealousy or possessiveness' (21% consumption of drugs): Mouzos, *Homicidal Encounters*, above n 13, 117.

48 Polk, *When Men Kill*, above n 16, 24: 80 of the 84 cases in this category (95%) involve men killing men; 2 cases are of women killing men, and 2 of women killing women. They account for 10% of the cases in which women are offenders: at 84-5. Polk notes (at 59) that his confrontational homicides seem similar to Wallace's category of 'interpersonal disputes': at 59.

Polk points out that most of these homicides start from some quite trivial incident. For example, in Polk's first case study in this category, a (drunk 32 year old male) train passenger attempted to take a particular seat on the train; another male passenger ordered him 'offensively' to take another seat; when the first passenger refused, the second jumped up and hit him; after a struggle and threats, the second passenger stabbed and killed the first.<sup>49</sup> In relation to these sorts of disputes, Polk suggests that '[a] fundamental characteristic of such confrontations is that initially the intent is to defend masculine honour by means first of words, then the fight'.<sup>50</sup>

Note also that in almost all (90%) cases of so-called confrontational homicide one or more parties had been drinking (or had taken drugs).<sup>51</sup> Polk points out that a classification of the social relationship between the victim and the offender in these cases (they divide fairly evenly into strangers, and friends/acquaintances), tells us very little about the dynamics in these cases, and indeed about the similarity in the dynamics whether the relationship was one of stranger or one of friendship. He continues:

What is fundamental to the confrontation scenario is that it is the altercation itself which defines the relationship between the parties. The two have come together, and become known to each other, through the fight itself. Whether they are friends, acquaintances or strangers, the dynamics of male confrontation are played out within a set of mutually recognised expectations regarding how the encounter is to proceed. In these accounts (except those few where the ultimate victim truly was an innocent bystander) the victim as well as the offender was actively involved in the encounter. In many the victim actually initiated the violence. In most of the remainder, the victim was a willing participant in the encounter.<sup>52</sup>

In short, confrontational homicides arise, as the name suggests, out of a confrontation between the victim and offender. The social relationship between the parties can be one of strangers, acquaintances, friends, neighbours etc—that relationship is not the important one in explaining these homicides. Rather, the important relationship is the one arising in and from the confrontation. The confrontation often arises over something

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<sup>49</sup> Polk, *When Men Kill*, above n 16, 60.

<sup>50</sup> *Ibid* 61.

<sup>51</sup> *Ibid* 68. The issue of alcohol and drug use is also canvassed in Mouzos, *Homicidal Encounters*, above n 13. As I have noted, I have not included the impact of the 'defence' of intoxication or the mental state defences in this Paper.

<sup>52</sup> Polk, *When Men Kill*, above n 16, 90.

extremely trivial and the perpetrator and/or the victim have often been drinking and/or taking drugs. These homicides almost invariably involve men as both perpetrators and offenders. Approximately one fifth of homicides are 'confrontational'.

### **HOMICIDES ORIGINATING IN OTHER CRIMES**

Polk's fourth category, 'homicides originating in other crimes', makes up 16% of the crimes in his sample.<sup>53</sup> The sub-category 'double victims' refers to those who were the victim of both the initial crime (eg armed robbery) and the homicide. The sub-category 'reverse victims' refers to situations where the victim of the initial crime (or a police officer) kills the offender. Polk argues:

[I]t is suggested that in thinking about the 'relationship' between victim and offender in situations where the killing results from the course of other crime, the category that is developed should refer explicitly to that pattern of criminal activity. The relationship which produces the death is the crime itself. In some cases the individuals know each other, in other cases they do not. ... It is not the relationship of friend, acquaintance, or stranger which defines [the] social dynamics that result in the killing. It is, in fact, the criminal behaviour. As such, that criminal behaviour should provide the central focus of attention in the way these homicides are classified, and in the theorising about this risk-taking behaviour.<sup>54</sup>

Again, 'homicides originating in other crimes' may arise in a variety of social relationships but, as Polk emphasises, in terms of understanding them the focus must be on the criminal behaviour rather than on the particular social relationship between the parties. Some 16% of homicides occur in this context.

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53 Polk, *When Men Kill*, above n 16. In 56 of the 61 cases, men were the perpetrators of this type of killing: at 111.

54 Polk, *When Men Kill*, above n 16, 112.

## CONFLICT RESOLUTION HOMICIDES

Polk's fifth category, 'conflict resolution homicides', is outlined by him in the following way:

[T]he killing resulted from the planned and rational intention to employ violence to resolve some form of interpersonal dispute, over such issues as debts, shared resources or the like, between victim and offender. Most often this pattern ... involved persons well at the boundaries of conventional society, such that their close ties to a criminal way of life closed off any possibility of the use of conventional conflict resolution procedures.<sup>55</sup>

Again, this form of homicide is overwhelmingly committed by men; indeed, in Polk's sample there were no situations in this category where a woman was the sole offender (though Polk concedes that in a larger sample it is likely that a few would be found).<sup>56</sup>

## HOMICIDES ORIGINATING IN FAMILY INTIMACY

As described above, the AIC data indicate that 13% of Victorian homicides (1989–99) occurred in family relationships (other than those arising in intimate relationships). And in Polk's study, 40 (of 380, or 10.5%) originated in family intimacy. In Wallace's sample, 149 victims were children or step-children and 102 victims were other family members (ie, other than partners, eg parents or siblings).<sup>57</sup>

## Killings Where the Victim is Not a Child

Considering first the non-child family killings, Polk argues that they were so rare in his sample (9, or 2%) there was little he could say about them, except to emphasise their rarity (and to note that they were all committed by men). Polk comments:

[W]hile it may be true that there is an unacceptably high level of violence within the circle of the family, lethal violence tends to be restricted to particular bonds, namely those involving marital partners, or perhaps to children who become victims of parental violence. Outside these two specific dyads, homicide is, in fact, so rare within the family circle that this fact itself is worth mention.<sup>58</sup>

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<sup>55</sup> Ibid 25.

<sup>56</sup> Ibid 134.

<sup>57</sup> See Wallace, above n 7, 79, Table 7.6.

<sup>58</sup> Polk, *When Men Kill*, above n 16, 140.

## Child Killings: An Overview

When it comes to the child killings, one of the most striking features, as Polk notes, is that women are as likely to be the perpetrators as men, a pattern not seen in any other type of homicide.<sup>59</sup>

Christine Alder and Ken Polk have published a book-length study of child homicides, relying again on data from Victorian Coroner's files (from 1985–95), which will be the main focus of the discussion below.<sup>60</sup> In that period, there were 90 cases of homicide involving a victim under the age of 18 (though they suggest that there were likely to have been more such killings: child deaths, especially of young children, can often be mischaracterised as accidental or as cases of SIDS).<sup>61</sup> Fifty-eight of these killings were by parents or step-parents, and 32 by non-carers.<sup>62</sup>

Although the major focus of this part of the Paper is on homicides originating in family intimacy, it is worth briefly canvassing Alder and Polk's data on non-family child killings. In relation to the non-parental cases, the reasons for the killings show many similarities to those Polk developed to explain adult killings (including confrontational homicides, honour contests, jealousy and control etc) and will not be further analysed here.<sup>63</sup> However, two categories of these latter child killings Alder and Polk have identified should be mentioned: deaths resulting from accidental shootings (2) and deaths from sexual exploitation (4); in the two 'accidental' shooting cases, Polk notes there was 'aggressive use of the weapon which goes beyond a simple tragic accident'<sup>64</sup> and in each case both victim and offender were young men and the offender was 'playing' aggressively with a gun. In relation to the four cases of homicides arising out of situations of sexual exploitation, in three out of the four cases the perpetrator was an older man known to the family of the child; the homicide arose out of an attempt to suppress knowledge of the sexual exploitation. The fourth case concerned an abduction and sexual assault by a stranger.

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59 Ibid, 141. See also Wallace, above n 7, where 55% of those who killed children were women: at 114.

60 Alder and Polk, above n 16. See also Martin Daly and Margo Wilson, *The Truth About Cinderella: A Darwinian View of Parental Love* (1998).

61 Alder and Polk, above n 16, 19–26; in relation to SIDS they refer to an Australian study examining cases where the initial diagnosis was SIDS, but later autopsy findings suggested a non-accidental death: see Kenneth L Armstrong and David Wood, 'Can Infant Death from Child Abuse Be Prevented?' (1991) 155 *Medical Journal of Australia* 593.

62 Alder and Polk, above n 16, 29, Table 2.1.

63 However, note that Alder and Polk suggest that while these were similar to those discussed in Polk's earlier study, in this sample of cases involving young victims there was less likely to be prior violence: 103–4.

64 Ibid 102.

In relation to killings of children within the family, even though women are as likely to kill children as are men, Alder and Polk suggest that once again homicide is gendered. Men committed 24 of these within-family child homicides and women 22,<sup>65</sup> but the circumstances of the killings were different. They analyse separately neonaticide (where the mother kills her child in the first 24 hours of its life),<sup>66</sup> other killings of children by mothers, and then killings of children by male family members. The first two of these are discussed together here.

### **Mothers Killing Their Children**

In Alder and Polk's study, 11 babies were killed in the first 24 hours of life, (12% of all child homicides), and in six of these cases information was available about the circumstances of death; in all six cases the woman did not want to have the child.<sup>67</sup> In many of these, the woman denied to herself that she was pregnant and the pregnancy may not have been recognised by family members or sexual partners; the death was also apparently unplanned.<sup>68</sup>

In relation to women killing older children (who were always the biological children of the women, not step-children):

The two most common scenarios in which mothers killed their young children were, first, those in which the child was killed in a complex homicide-suicide event; and second, cases of fatal physical assault where in most instances the child was either battered or shaken to death.<sup>69</sup>

Alder and Polk suggest that the mothers in their sample who suicided usually expressed one of two themes: either they felt that there was no one else who could adequately look after the children or else they wanted to save the children as well as themselves from the oppressive circumstances they were in.<sup>70</sup> Note that in four out of the six cases, there had been prior physical

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65 Ibid 68. These figures exclude the neonaticides which, where an offender could be identified, were all committed by women. In 5 out of the 11 cases, no information on the identity of the victim or the perpetrator could be ascertained.

66 Alder and Polk note that this is a crime very rarely committed by men: 45. They also point out that this category is much narrower than the legal category of infanticide, which encompasses killings of children up to 12 months of age: at 34.

67 Ibid 34.

68 See generally, *ibid* 31–45.

69 Ibid 46.

70 Ibid 46–7.



violence from the woman's male partner.<sup>71</sup> And note also that none of the women in this study 'indicated that the killing of the children was a means of retaliating against the child's father'<sup>72</sup> for the violence, or for starting another relationship.

Some mothers in Alder and Polk's study killed their children in clear acts of violence: there were five such cases (and in two of these her male partner was also involved). (This contrasts with the 15 male parents or step-parents who killed their child or step child in this way.) Adler and Polk state that the three cases where the mother killed alone presented three different patterns. The first involved a young woman with her first child (the pregnancy having been diagnosed only 48 hours before the birth) who killed her child ten days after its birth when she was deeply depressed; Polk and Alder suggest that this follows a pattern that has been reported elsewhere in the literature.<sup>73</sup> In the second case, an older Romanian mother of five children was described as 'extremely isolated': she spoke little English and her husband worked full-time and did not assist with the children; her youngest child engaged in incessant crying. On the evening of her death

the baby was vomiting as her mother was attempting to feed her, the 2 year old was also crying to be fed and changed, and the other three children's behaviour was such that [the mother] had sent them to their rooms. Despite 'all sorts' of calming methods the baby did not stop crying.

Doctors believed that [the baby] was struck with a heavy, flat object.<sup>74</sup>

This case revealed prior violence by the mother.

And in the third case, the mother and the child were older; both the mother and her de facto partner suffered from an intellectual disability; she was known to abuse the child and she was regularly visited by Protective Services. In relation to the two women found, with their male partners, to have contributed to the death of the child, Alder and Polk note that the two women

could be depicted as extremely disadvantaged and perhaps 'damaged' women. Certainly their stories, on the one hand, elicited public sympathy. On the other hand, these women used violence as a means of coping with their situation; these were violent women, and their violence was directed towards their children over long periods.<sup>75</sup>

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71 Ibid 49. Note that in two of the cases the woman had in the past been violent towards her children.

72 Ibid 50.

73 Ibid 53.

74 Ibid 54.

75 Ibid 57.

Another group of women who killed were apparently suffering from a severe psychiatric illness: three women heard voices telling them to kill, and Alder and Polk suggest they have much in common with the murder-suicides discussed earlier.<sup>76</sup>

### **Men Killing Children Within the Family**

In a little more than half the cases in this category in Polk and Alder's study, men killed the children of their de facto partners, and in nine cases they were the biological fathers (and recall that *all* the women who killed children killed their own biological children). In over half the cases, the men committed what Alder and Polk have classified as a fatal assault—usually an assault committed with the intention of punishing the child rather than killing them.<sup>77</sup> Typically, the families in these cases were young adults with young children, often having financial problems and often with drugs or alcohol involved.<sup>78</sup> In 13 of the 15 cases of killing by fatal assault, men killed their de facto partner's child.<sup>79</sup> In 10 of the 15 cases there was also evidence of violence towards the man's partner, leading Alder and Polk to conclude 'despite the words of some to the contrary, the child murder was not an isolated incident of violent actions'.<sup>80</sup>

The filicide-suicide cases, Alder and Polk argue, are different to the assault cases: they overwhelmingly involve biological children (all but one case), and often involve 'custody' fights and separation from the mother. They argue that while they have much in common, the filicide-suicides do form again into distinct themes:

[T]he scenarios tend to be distinguishable [T]erms of the degree to which the mother is the key object of the father's actions. In the attempted suicides, the fathers tended to express concern about their children, and feelings of their own pain and loss. In most of the instances in which the fathers were successful in killing themselves and their families, feelings of jealousy, anger and rage are more dominant.<sup>81</sup>

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76 Ibid 59. The other two cases of mothers killing their children are described as distinctive, that is, not fitting into an identifiable pattern; one was the only case where postnatal depression was said to be a likely cause of the death, and another where the parents treated their 3 year old daughter's colds by placing her on a fast for 27 days: at 62–4.

77 Ibid 69. And see *R v Woollin* [1999] AC 82.

78 Ibid 70.

79 Ibid 71.

80 Ibid 73.

81 Ibid 78.

Alder and Polk describe one case of male filicide-suicide where there were clear indications of a psychiatric disturbance. They point out that women are more likely to seek medical help and have aberrant behaviour ascribed to 'madness' rather than 'badness', hence there could be overdiagnosis in women, and underdiagnosis in men, of psychiatric illness.<sup>82</sup>

### Summary

In summary, in relation to homicides in the context of family intimacy, the killing of children is by far the most common of killings in this category.<sup>83</sup> While these homicides are very unusual in being as likely to be committed by women as by men, the circumstances in which men and women kill children are different. In Alder and Polk's sample women killed only their own biological children, whereas men killed their biological children and their step-children. Only women killed their very young children (ie within the first 24 hours of life).<sup>84</sup> While both women and men killed children in homicide-suicide situations, men who did so were often acting out of sexual jealousy (ie they did so in order to 'get at' their partners); women did not kill their children in such circumstances. Rather, when women killed their children and then suicided, they seemed to do so out of despair and often in response to violence from the partner. In 14 cases men killed their children or step-children by violent attacks, while five women killed their children in such circumstances.

### HOMICIDES IN THE CONTEXT OF SEXUAL INTIMACY

Polk's first category, 'homicides in the context of sexual intimacy', is that which raises most controversy in a legal context, in particular in relation to the availability (or lack of availability) of the defences of provocation and self-defence.<sup>85</sup> Consequently, they are dealt with in some depth in this section. It is also worth emphasising that such homicides made up some 27% of Polk's sample, by far the largest category.

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82 Ibid 58–62 and 84–6.

83 Though note that killings in the context of sexual intimacy are separately analysed.

84 Though no information is available in relation to 5 out of 11 cases of neonaticide.

85 I make no mention of diminished responsibility here, though many of the factual scenarios which in Victoria are argued solely as provocation will be argued as also involving diminished responsibility in jurisdictions where that defence is available: see Hugh Donnelly, Stephen Cumines and Ania Wilczynski, *Sentenced Homicides in NSW 1990–1993: A Legal and Sociological Study*, Judicial Commission of NSW, Monograph Series No 10 (1995).

Note, however, that the pattern of homicides is different if the focus is, as it was in the previous Law Reform Commission's study, on homicide *prosecutions*.<sup>86</sup> Only some 20% of prosecuted killings were identified as involving sexual intimates (including former sexual intimates) or sexual rivals.<sup>87</sup> The much lower percentage of sexual intimate killings in the prosecutions study than in Polk's sample is likely to be a reflection of the fact that, given its focus on prosecutions, the LRCV study excludes murder-suicides.<sup>88</sup>

Even within studies whose focus is all homicides, as opposed to prosecuted homicides, the data in this category of homicides are not necessarily comparable. It is not possible to directly compare Polk's data with that in Wallace's study or Mouzos' analysis of the NHMP data, given the different way in which the relevant category is defined. The NHMP data, which focuses on intimate partner homicide and thus puts the killing of sexual rivals outside this category, can be contrasted with Polk's analysis, which includes cases of men killing their sexual rivals within the category of 'killings in the context of sexual intimacy'. While recognising that the data cannot be directly compared, it is important to note that the NHMP data Australia-wide shows:

[T]he proportion of homicides involving intimate partners has remained relatively stable at around 22%, with an average of approximately 76 homicide incidents occurring each year involving intimate partners. Just over 3 out of 5 intimate partner homicides (65.8%) occurred between current spouses or de facto partners. A further 1 in 5 intimate partner homicides (22.6%) occurred between separated/divorced spouses or de facto partners. One in ten intimate partner homicides occurred between current or former boy/girlfriends, and only 2 out of 100 intimate partner homicides occurred between persons of same sex

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86 Law Reform Commission of Victoria, *Homicide Prosecutions Study*, above n 12.

87 Ibid 16, Table 8. Despite the predicted greater difficulties in identifying and finding an offender in stranger killings, in fact these were the largest category of prosecuted homicides in the period—29.2%, followed closely by acquaintance/friend killings at 24.5%: *ibid*.

88 See above n 14.

relationships (11 male on male, and 2 female on female).<sup>89</sup>

In the NHMP data, some 77% of intimate partner homicides were men killing women, and 21% women killing men.<sup>90</sup> The vast bulk of killings in this category in Polk's study involve men killing women, with some 73% of these killings following this pattern. The next largest category is men killing men (some 13%), with women killing men in some 12% of cases and women killing women in only 3% of cases. Note that the large number of men killing men is a reflection of Polk's inclusion of the killing of sexual rivals in this category.

### Men Killing Women/Men Killing Men

I am discussing these categories together as I want to present the data in a slightly different way than Polk does, and—while not resiling from an argument that homicide is fundamentally gendered, and 'domestic' homicide gendered in particular ways—I want to argue that some instances of men killing men share much in common with some instances of men killing women and should be connected, notwithstanding the different gender of the victims.

It will be noted from the table (Appendix 1) that Polk has two sub-categories under each of these relationship categories: in relation to men killing women, these are 'jealousy/control' and 'depression/suicide' and, in relation to men killing men, 'sexual rivals' and 'homosexual killings'. I think there is an argument that one makes better sense of the data—and certainly of the way the defence of provocation is often used—if the male offender/female victim sub-category of 'jealousy/control' is joined with the male offender/male victim sub-category of 'sexual rivals'.<sup>91</sup> If these sub-categories are merged, this means that (in this sample) men killed, in the context of sexual intimacy, for jealousy/control reasons in 71 cases, whereas women killed in such

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89 Mouzos, *Homicidal Encounters*, above n 13, 115. Carcach and James note that, by contrast to Australia, the number of intimate partner homicides in the United States has fallen by about a third. They suggestively state that this declining trend 'has been linked inter alia to factors such as shifts in patterns of family formation associated with declining domesticity, the improved economic status of women, and increases in the availability of domestic violence services': Carcach and James, above n 18, 2. See also Mouzos, *Femicide*, above n 18, 25: 'the lowest likelihood of female victimisation, at least amongst intimates or family, is associated with the victim being employed... These findings suggest that access to employment opportunities and economic independence reduce the amount of time that these women would spend in or near the home, and also reduce exposure to violence from an intimate partner. A woman's improved economic status may further reduce her exposure to violence, as the financial barriers associated with exiting a violent relationship may be lessened'. Eastaál's findings are to the contrary, but note the small sample: above n 29, 75.

90 Mouzos, *Homicidal Encounters*, above n 13, 115–6.

circumstances in a maximum of seven cases (adding together the male victim/female offender control/other sub-category and the female victim/female offender sub-categories of sexual rival and homosexual killings).

Polk states:

The overriding theme that runs through these killings is masculine control, where women become viewed as possessions of men, and the violence reflects steps taken by males either to assert their domination over 'their' women, or to repel males who they feel are attempting to take control of their sexual partner.<sup>92</sup>

Polk goes on to note, in relation to his other sub-category of male offender/female victim killings, that of 'depression/suicide', that this is

no less proprietary, since in many of the accounts where the homicide is part of the male suicide plan the woman is clearly seen as a possession, or commodity, which the man must dispose of prior to his own death. In these cases as well, the killing represents the ultimate control of the man over the woman (there were no cases where a depressed woman killed her male partner as part of her suicide plan).<sup>93</sup>

In relation to his other sub-category where men kill men—'homosexual killings'—Polk here means to refer to men killing their homosexual partners out of situations of sexual jealousy: he notes that there were no such cases in the period he studied, but he suggests that 'a longer time span would be likely to produce examples of such homicides'.<sup>94</sup> However, as noted above, over the 10 years of the NHMP reported on by Mouzos, only 11 such killings (1.5% of sexual intimate homicides) occurred.

Thus there appears to be a strong pattern of heterosexual male violence directed against women partners who leave, and/or commence a relationship with another person.<sup>95</sup>

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91 This is not meant to imply that Polk fails to make that connection. Indeed, he says, for example, '[m]asculine violence in cases of sexual jealousy is not limited to females, so that in addition, there were 13 cases where males killed their male sexual rival': *When Men Kill*, above n 16, 24.

92 Ibid 56.

93 Ibid 57. This issue is returned to below where I discuss 'separation assault'—an assault made by a man on his partner when she leaves, tries to leave or has left: see below page 38.

94 Ibid 24.

## Women Killing Men: The Context of Violence

As discussed above, in Polk's study, in a minimum of 71 cases of men killing women or sexual rivals, men were killing out of jealousy or control reasons—some 70% of killings by men in the context of sexual intimacy.<sup>96</sup> In a maximum of seven cases, women killed their partner or sexual rival in such circumstances (47% of killings by women in the context of sexual intimacy).<sup>97</sup> Polk found in his study that when women killed their male intimate partner, they were most likely to do so in response to violence from them (eight out of 12 cases) (or, if all killings by women in the context of sexual intimacy are included, women clearly killed in response to violence in eight out of 15 or 53% of cases). In other words, women kill in the context of sexual intimacy for very different reasons than men do.

The prevalence of women killing in response to violence from men is a consistent finding (and there are indications that Polk's sample may overstate the prevalence of women killing men in the context of sexual jealousy). For example, Wallace reports:

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95 See also Eastaale, above n 29, and for Canada, Martin Daly and Margo Wilson, *Homicide* (1988), Chapter 9, largely reproduced in Jill Radford and Diana E H Russell (eds), *Femicide: The Politics of Women Killing* (1992). The chapter emphasises the importance of jealousy as a motive in the killing of women by their male partners in Canada. It also includes data on various anthropological studies on spouse killings in India, Uganda and the Belgian Congo.

96 I say at a minimum because Polk suggests that many of the cases in his 'depression/suicide' category are motivated by a man's desire to possess his partner and to treat her as a commodity: Polk, *When Men Kill*, above n 16, 57; see above n 93.

97 I believe that this is an overestimate. See Kenneth Polk, 'Homicide: Women as Offenders' in Patricia Weiser Eastaale and Sandra McKillop (eds), *Women and the Law*, Conference Proceedings No 16, Australian Institute of Criminology, Canberra (1993). In this chapter he reports on the two phases of his study and focuses, as is obvious, on women who kill. In the first phase (cases in 1985–6), in 6 out of the 7 cases where a woman killed a man with whom she had been involved sexually, 'the relationship has been characterised by exceptional prior violence on the part of the male': at 152. In what he calls the replication phase (1987–90) only 3 out of the 7, at most, involved such violence, and here there were 3 killings by women following the masculine model—of killing on threats to leave: at 159. Note that Polk's study, *When Men Kill*, above n 16, reports on homicides between 1985–9 and Polk's article in Eastaale (ed) says that it reports on homicides up to 1990; it seems likely that they are in fact reporting on the same period, as the total number of homicides in each is extremely close (377 in the Eastaale (ed) chapter (at 151) and 380 in the Polk book). In the article, where Polk is concentrating on women who kill rather than men who kill, he reports on 15 killings by women in the context of sexual intimacy, the same number as reported on in the book length study. In the chapter, he reports on 6 cases where it was clear women killed men in response to prior violence by them (from 1985–6), and a maximum of 3 further cases where it was likely women killed in response to violence (from 1987–90). In 3 cases Polk reports that women killed in response to threats by men to leave them—the masculine model (at 159)—and in one case a woman organised the killing of her husband in order to pursue a relationship with another. In 2 of the cases, no information is provided.

Women, in contrast, rarely killed husbands from whom they were separated and almost never killed over sexual jealousy or termination of a relationship. Most notable was the very high prevalence and degree of prior domestic violence suffered by these women at the hands of their husbands. The immediate precipitating events in husband-killings reflected this history of maltreatment: the majority of women killed in response to violence or threat of violence perpetrated on them by the victim, their husband.<sup>98</sup>

Further:

A history of physical abuse was evident...in almost half (48%) of the spouse homicides. In almost all these cases, this abuse was in one direction, i.e. by the husband against the wife. In only a few isolated cases was their [sic] evidence that women had physically retaliated in the course of a violent dispute with her husband. In some cases, violence by the husband was not only directed at the wife but also at other family members, usually children... Violence was particularly prevalent in the husband-killings; while a history of assaults was evident in 40% of the wife-killings as many as 70% of the husband killings occurred in the context of violence by the husband on the wife. Moreover, over half of the husband-killings occurred in response to an immediate threat or attack by the victim. Violence or fear of further violence was both the background and the cause of the use of force by women on their husbands.<sup>99</sup>

Easteal reports, in her in-depth sample of cases from NSW and Victoria (110 cases), that in more than 80% of the cases where there was clear information about the presence or absence of violence, violence was present (in 37 cases the information either way was not available).<sup>100</sup> And in Stella Tarrant's study of homicides in Western Australia, 'of the thirteen women who killed or attempted to kill their spouse...there was evidence that ten had been previously assaulted by their victim, at least six of them very seriously and over an extended period of time'.<sup>101</sup>

The NHMP data from 1996–9 shows that in 30% of the 193 intimate partner cases over that period, violence was present and '4 out of 5 intimate partner homicides where there was evidence of a prior history of domestic violence involved a female victim'.<sup>102</sup> On the NHMP data, in only 3% of intimate partner homicide cases had an apprehended violence order (AVO)

98 Wallace, above n 7, 103.

99 Ibid 97. Wallace also reminds us of the difficulty of identifying cases in which prior violence occurred: at 96. See also Elizabeth Hore, Janne Gibson and Sophy Bordow, *Domestic Homicide* (1996): in very close to half of the spousal homicide cases, there was preceding violence.

100 Easteal, above n 29, 73–4.

101 Stella Tarrant, 'Something is Pushing Them to the Side of Their Own Lives' (1990) 20 *Western Australian Law Review* 587; cf Wendy Bacon and Robyn Landsdowne, *Women Homicide Offenders in New South Wales*, summarised in Tarrant.



been taken out.<sup>103</sup> Mouzos suggests that this is an underestimate, and draws attention to the Queensland Police Service's Domestic Violence Homicide Project (DVHP). This shows that in relation to the 76 Queensland spousal homicide cases recorded between January 1994–December 1998, an AVO (known as DVOs in Qld) was current or applied for in 30% of cases.<sup>104</sup>

In the previous LRCV *Homicide Prosecutions Study*, in 55% of domestic homicide cases there was prior domestic violence.<sup>105</sup> In 43% of cases no mention was made in the file of previous domestic violence; the Commission noted that violence may not have been perceived as relevant and thus had not been investigated.<sup>106</sup> When women killed their partner or former partner, there was violence in 10 out of 14 of the cases. However, the Commission reported that in 3 cases the violence was from the (female) accused, and in 4 cases prior violence from both parties was reported; thus, in only 3 cases when women killed their partner did the file show previous violence solely by the accused against the victim.<sup>107</sup> This appears to contradict, or at least contrast with, the figures in, for example, the Wallace study, where it seems much clearer that in spouse homicides the prior violence is largely perpetrated by men.<sup>108</sup> The differences in the data are likely to relate to the fact that the studies are examining differently constructed samples. The prosecutions study excluded cases of homicide/suicide in spouse killings (overwhelmingly committed by men), and those cases where women killed violent partners or former partners where a prosecution was not pursued

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102 Mouzos, *Homicidal Encounters*, above n 13, 119.

103 Ibid.

104 Ibid 120.

105 Law Reform Commission of Victoria, *Homicide Prosecutions Study*, above n 12, 53, Table 38. Domestic homicide here encompasses killings arising out of a domestic context, including the killing of children as well as partners and former partners, but not killings of those in a domestic relationship where the motivation was something independent of the domestic relationship, eg a fight about drugs: at 46–7. Note also Donnelly, et al, above n 85, who found that 'most of the women who killed their sexual partners had been the victims of repeatedly violent behaviour... [E]ight of the nine female offenders were faced with physical abuse, threats or taunting immediately prior to committing the offence': at 46.

106 Ibid 54; cf Bronwyn Naylor, 'The Law Reform Commission of Victoria Homicide Prosecution Study: The Importance of Context' in Heather Strang and Sally-Anne Gerull (eds), *Homicide: Patterns, Prevention and Control*, Conference Proceedings No 17, Australian Institute of Criminology, Canberra (1993) 98.

107 Law Reform Commission of Victoria, *Homicide Prosecutions Study*, above n 12, 55, Table 39.

because the situations were clearly perceived to be scenarios of self-defence.<sup>109</sup>

One other interesting study in this context is that undertaken by the Family Court to explore the extent to which victims or offenders in domestic homicide cases had prior contact with the Family Court.<sup>110</sup> The researchers examined Victorian coronial records between 1987–90, selecting out cases where it was ‘probable’ that there had been some contact with the Family Court. Thus the researchers identified homicide cases between ‘a married or de facto couple or two adults who had parented a child and had custody or access issues arising out of the relationship’.<sup>111</sup> This produced a sample of 83 cases, which were then matched against Family Court files, giving a total of 10 cases where the pre-homicide contact with the Court was related to the case.<sup>112</sup> In 7 out of these 10 cases there had been prior violence.<sup>113</sup>

It is worthwhile emphasising that variation in the context or motivation of spouse killings depending on the gender of the perpetrator does seem to hold true internationally, including in the United States. As described by Daly and Wilson:

It is important to note that although US women kill their husbands almost as often as the reverse ... this does *not* imply symmetry in wives’ and husbands’ actions or motives. Men often hunt down and kill spouses who have left them;

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108 In relation to non-homicidal domestic violence, compare the study by Bruce Headey, Dorothy Scott and David de Vaus, ‘Domestic Violence in Australia: Are Women and Men Equally Violent?’ (1999) 2 *Australian Social Monitor* 57 (where it is argued that women and men appear to be equally violent), with the critique of this same study by Dale Bagshaw and Donna Chung, ‘Gender Politics and Research: Male and Female Violence in Intimate Relationships’ (2000) 8 *Women Against Violence: An Australian Feminist Journal* 4 (where it is argued that the measurement tool in the previously cited study is inadequate: for example, it equates offensive and defensive violence; it reduces complex interactions to singular, countable incidents, it conflates minor violent acts with severely violent acts, and excludes many instances of violence more likely to be committed by men).

109 See Polk, who reports: ‘In the two cases where the women were confronted with what could be construed as an immediate threat of bodily harm, the homicide was not deemed to be “unlawful”, and the case did not go to trial. The presumption in these cases was that the homicide was seen as a legitimate act of self-defence, and a charge of criminal homicide was not laid’: Polk, ‘Homicide: Women as Offenders’, above n 97, 161. Overall, of the 14 cases reported on by Polk in this study, only 7 went to trial (I assume he is including pleas in his go to trial category, though it is not entirely clear): at 160. See also Naylor, above n 106, 99.

110 Hore et al, above n 99.

111 Ibid 18.

112 This means that where one of the parties had had contact with the court in relation to another relationship, they were not included.

113 Though note that in this sample, and in the *Homicide Prosecution Study*, cases of adults killing children are included, not just the killing of spouses.

women hardly ever behave similarly. Men kill wives as part of planned murder-suicides; analogous acts by women are almost unheard of. Men kill in response to revelations of wifely infidelity; women almost never respond similarly, although their mates are more often adulterous. Men often kill wives after subjecting them to lengthy periods of coercive abuse and assaults; the roles in such cases are seldom if ever reversed. Men perpetrate familicidal massacres, killing spouse and children together; women do not. Moreover, it seems clear that a large proportion of the spousal killings perpetrated by wives, but almost none of those perpetrated by husbands, are acts of self-defense. Unlike men, women kill male partners after years of suffering physical violence, after they have exhausted all available sources of assistance, when they feel trapped, and because they fear for their own lives. These qualitative differences between wife killings and husband killings have been demonstrated in other Western nations.<sup>114</sup>

### **The Prevalence of Violence in Heterosexual Sexual Intimate Cases**

Although I have emphasised the Australian data on the prevalence of violence in situations where women kill men, it would be misleading to thereby imply that there is an absence of prior violence in the circumstances where men kill women with whom they have been sexually intimate. As Wallace puts it:

A clear relationship emerged between the women who became victims of marital murder and the women who killed their husbands. In terms of the issues over which conflict occurred, and the form of mistreatment, physical and mental, that women as both victims and offenders had endured, their experiences were very similar. The difference between the two appeared to be that whereas in husband-killings the women took action into their own hands and retaliated, in the wife-killings, the women did not.<sup>115</sup>

It is also important to emphasise that separation does not mean the end of violence. Wallace's study showed that in 46% 'of the wife killings, the woman had either left or was in the process of leaving her husband when she was killed'.<sup>116</sup> And Mouzos states, in relation to a separate examination of homicides in 1998–9, regarding gender and marital status:

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114 Daly and Wilson, above n 5, 206.

115 Wallace, above n 7, 103. This is confirmed by the Women's Coalition Against Family Violence in their study, *Blood on Whose Hands?* (1994). They examined the circumstances of 9 women and 3 children killed by their male partners or fathers. They state: 'domestic murder is an aspect of domestic violence: these deaths were not so-called "crimes of passion"; each was the culmination of an ongoing campaign of control and terror' at 5.

[W]omen who attempt to terminate their relationship are exposed to a relatively high risk of homicide, with the period immediately after the estrangement associated with particularly high risk.<sup>117</sup>

## Summary

The sociological studies suggest not only that women are much less likely than men to be the perpetrators of homicide in sexually intimate homicides,<sup>118</sup> but also that when women do kill, they usually do so for different reasons than men. Men are much more likely than women to kill their female partners (or sexual rivals) out of jealousy, possessiveness or control. Women are much more likely to kill their male partners in response to violence from them.

## HOMOPHOBIC KILLINGS

There is a further category of men killing men which, despite its non-appearance as a separate category in Polk's data, should be included in any analysis of defences to murder, and that is what I will call homophobic killings—where men kill men who it is claimed made a homosexual advance, and they killed in a 'homosexual panic' (or perhaps more accurately, a heterosexual panic).<sup>119</sup> Because this category of cases was not separately analysed in Polk's study, it is more difficult to describe the factual circumstances. Tomsen noted that there are three possible circumstances:

1. fictitious claims about an assault/advance to excuse murder;
2. a real sexual assault, or a real fear of one; and

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116 Wallace, above n 7, 99.

117 Mouzos, *Homicidal Encounters*, above n 13, 38. Mouzos states that this finding is consistent with previous research, citing Daly and Wilson, 'Spousal Homicide Risk and Estrangement' (1993) 8 *Violence and Victims* 3. Note that men are also vulnerable if divorced or separated with men showing a rate of homicide victimisation of 5.9 and 3.5 for women: at 38. Mouzos states that 'for males marriage may serve as a form of social control that minimises their participation in activities where the risk of homicide victimisation is relatively high... On the other hand, it appears that for females marriage or being in a de facto relationship seems to increase the risk of homicide victimisation—considering most women who are killed by men are killed by an intimate partner': at 37.

118 Though note they are more likely to kill either their partners or their children than to kill strangers or acquaintances in confrontational or other homicides.

119 See Stephen Tomsen, 'He had to be a poofter or something': Violence, Male Honour and Heterosexual Panic' (1998) 3 *Journal of Interdisciplinary Gender Studies* 44.

3. incidents in which defendants react violently to a homosexual advance.<sup>120</sup>

Mouzos and Thompson identify at least 37 male gay-hate related murders in NSW between 1989–99.<sup>121</sup> When these are compared with all killings by men of men in the NHMP study, it is revealed that perpetrators of gay male hate related homicides are more likely to be acting in a group, much less likely to kill with a gun and more likely to kill via a brutal beating, and the offenders are disproportionately young.<sup>122</sup>

There is clearly a question of whether this category of killings is most appropriately analysed under the heading ‘homicides arising in the context of sexual intimacy’, or in one of the other categories Polk has developed, perhaps most appropriately ‘confrontational homicide’.<sup>123</sup> On the one hand, it could be argued that such cases are most aptly seen as cases of (heterosexual) ‘masculine control’<sup>124</sup> and thus have much in common with the cases of men killing their women partners or former partners, or their partner’s new lover. On the other hand, there is no ongoing intimate

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120 Stephen Tomsen, in Anthony Bendall and Tim Leach, *“Homosexual Panic Defence”—And Other Family Values* (1995) 6.

121 Jenny Mouzos and Sue Thompson, *Gay Hate-Related Homicides: An Overview of Major Findings in NSW*, Issues Paper No 155, Australian Institute of Criminology (2000). I say that there were at least 37 such homicides because Mouzos and Thompson state that their figure of 37 ‘excludes seven cases where sufficient details were not available in the NHMP dataset in earlier years’: at 2. The study was undertaken comparing information in the NHMP database with data gathered by the NSW Police Gay/Lesbian Client Consultant: to be included in the latter dataset, ‘there must be a primary, though not necessarily sole, causal link between the offender’s apparent prejudice towards gay men/lesbians and their lethal act of violence’: at 1. The information on these homicides was gathered by the Consultant via ‘consultation with detectives, general duties police, witnesses and researchers who have read coroners’ files and/or court transcripts’: at 2. At the time of the report, the NSW Police was the only service that systematically gathered data on gay hate-related homicides, though Mouzos and Thompson report that other jurisdictions were establishing positions that could gather such data.

122 See *ibid.*, especially 4. Note also that Anthony Bendall and Tim Leach state that between 1990–3, there were 13 gay-hate related murders in NSW: Anthony Bendall and Tim Leach, *“Homosexual Panic Defence”—And Other Family Values*, Lesbian and Gay Anti-Violence Project (1995) 1. They refer here to the NSW Attorney General’s Committee on the Monitoring and Implementation of the Anti-Discrimination Board Report on HIV and AIDS Related Discrimination, *Fighting the Other Epidemic* (1993), and to an internal NSW Police document from May 1994 listing 17 such homicides since January 1987 (8 unsolved). See also *R v Murley*, Unreported, Supreme Court of Victoria, 28 May 1992; and Stephen Tomsen and Allen George, ‘The Criminal Justice Response to Gay Killings: Research Findings’ (1997) 9 *Current Issues in Criminal Justice* 56.

relationship between the parties, suggesting that they are inaptly described as ‘homicides arising in the context of sexual intimacy’. It may be more apt to encompass these killings under Polk’s epithet of ‘confrontational homicides’.<sup>125</sup> These homicides, as noted above, emerge quickly out of some trivial incident, ‘often involving insults’ (though often, in my view, not ‘insults’ readily classifiable as such by the outside observer). However, this may well fail to capture the homophobia in these cases. Hence, I suggest that they are analysed as a separate category.

## OTHER

Polk’s remaining categories are either self-explanatory (eg ‘victims of mass killers’) or reveal no pattern (‘special cases’) and are thus not particularly illuminating for the purposes of the present study, and/or do not raise complex questions about defences to homicide and will not be further discussed.

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123 Note that Polk does describe two possible homophobic killings in his category ‘homicide in the course of other crime’. In both cases the homicide occurred in the course of an armed robbery: in one case Polk suggests that while the major aim was the robbery, the level of violence may have been higher because the deceased was homosexual; in the second case, though there was no evidence that the deceased was homosexual, and although robbery was part of the motive, the deceased was killed at a homosexual beat, and by a group of young men who deliberately engaged in homophobic violence aimed at men perceived to be homosexual. Polk, *When Men Kill*, above n 16, 96–7.

124 As noted above, Polk suggests that the ‘overriding theme’ that runs through the cases of men killing women or men in the context of sexual jealousy is that of ‘masculine control’ (at 6): see above n 91. However, this is also described as seeing women as possessions of men—a perhaps less appropriate description in these homophobic killings.

125 And thus revisit my suggestion above that these are largely uncontroversial.

## Implications of the Data for Legal Defences

This section of the Paper raises some questions about the operation of defences to homicide in the context of the different types of homicide identified by Polk. That is, it commences from the social categories of homicide (rather than the legal categories) and asks what the data can tell us about the operation of defences. It does not aim to be comprehensive, but emphasises self-defence and provocation, the two main defences currently available in Victoria.

### CONFRONTATIONAL HOMICIDES

‘Confrontational homicides’ arise, as the name suggests, out of a confrontation between the victim and offender. The social relationship between the parties can be one of strangers, acquaintances, friends, neighbours etc: that relationship is not the important one in explaining these homicides. Rather, the important relationship is the one arising in and from the confrontation. The confrontation often arises over something extremely trivial and the perpetrator and/or the victim have often been drinking and/or taking drugs. These homicides almost invariably involve men as both perpetrators and offenders. Approximately one fifth of homicides are ‘confrontational’.

In relation to defences, some of these homicides may raise the paradigmatic self-defence scenario—the classic ‘bar-room brawl’ where the ultimate perpetrator of the killing is threatened with death or grievous bodily harm by the victim.<sup>126</sup> Whether the perpetrators do or should have self-defence available to them might depend on the nature of the struggle and the threats involved in the particular confrontation.

Some perpetrators may also raise provocation. Provocation is a partial defence to murder; it has the effect of reducing murder to manslaughter. Broadly, the test is whether the accused was provoked by the actions of the victim to lose his (or her) self-control and whether an ordinary person could have also lost self-control and acted in the way the accused did.<sup>127</sup> One legal issue raised by the defence of provocation, and relevant to at least some of these

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126 Self-defence is a complete defence, including to murder. The basic test is found in the High Court decision in *Zecevic v DPP* (1987) 162 CLR 645, which provides that a person kills in self-defence in responding to a relevant threat if he or she did what she or he believed on reasonable grounds it was necessary to do in order to preserve her or his life.

127 See *Stingel v R* (1990) 171 CLR 312; *Masciantonio* (1995) 183 CLR 58.

confrontational homicides, is whether the actions of the victim amount to provocative conduct for the purposes of the defence. For example, some confrontational homicides arise in the context of things said by the victim; one of the legal questions raised by such a context is whether the doctrine of provocation extends to ‘words alone’.<sup>128</sup> Since many confrontational homicides happen in a group setting,<sup>129</sup> some could raise the question of whether provocation is available to those who kill someone other than the provoker.<sup>130</sup> Some confrontational homicides may also raise questions of racially based ‘provocation’,<sup>131</sup> which may amount to provocative conduct for the purposes of the defence.

## HOMICIDES ORIGINATING IN OTHER CRIMES

‘Homicides originating in other crimes’ may again arise in a variety of social relationships but, as Polk emphasises, in terms of understanding them the focus must be on the criminal behaviour rather than the social relationship. Some 16% of homicides occur in this context. Many of these scenarios will not raise defence matters, though some may raise the issue of ‘constructive

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128 Though this legal issue is typically raised by the ‘sexual jealousy’ spouse killing cases. For the leading High Court authority on this issue, see *Moffa v R* (1977) 138 CLR 601. This is discussed in detail in Jenny Morgan, ‘Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them’ (1997) 21 *Melbourne University Law Review* 237. See also *Tuncay* [1998] 2 VR 19; *Parsons* [2000] 1 VR 161; *Leonboyer* [2001] VSCA 149.

129 See, for example, the case study in Polk, *When Men Kill*, above n 16, 60-1.

130 See eg *R v Kenny* [1983] 2 VR 470. However, once again this issue is raised in ‘sexual jealousy’ cases: see eg *R v Gardner* (1989) 42 A Crim R 279, a Victorian case where Gardner had killed both his former partner (Marino) and a man (Shears) who was sleeping in the bedroom next to the one Marino usually occupied. Shears had been invited to the house to give Marino some protection from Gardner. The trial judge had instructed the jury that provocation was available for the death of Marino but not of Shears; Gardner was convicted of manslaughter in relation to Marino’s death and murder in relation to Shears. On appeal, the Victorian Court of Criminal Appeal decided that provocation was available for both killings. On the night of the killings Gardner alleged that Marino had ‘taunted him, using abusive language which indicated that she and Shears had enjoyed frequent sexual intercourse during the night and denigrating the applicant’s sexual capacity. The applicant said that he became ill, angry and upset and could not control himself. He said that he struck Marino a blow with his hand and proceeded to the second bedroom where he believed Shears was sleeping. ... [He] observed Shears in bed. The upper torso of Shears was naked’: at 282. The Court concluded that ‘Marino’s provocative words implicated Shears in a sexual orgy and Shears’ proximity to Marino’s bedroom, clearly were matters the jury were entitled to take into account ... in considering the defence of provocation in relation to the killing of Shears. There was a sufficient nexus between Marino’s provocative words and the death of Shears by the proximity of Shears in a bed nearby’: at 284, O’Byran J, Gray and Beach JJ concurring. See also Morgan, above n 128.

131 See Polk, *When Men Kill*, above n 16, 73–4.



murder' currently contained in section 3A *Crimes Act 1958*—that is, killings that are not intended, but occur in the course or furtherance of a crime carrying a penalty of 10 years or more and a necessary element of which is violence. Some of these cases could raise self-defence or defence of others or killings in the course of arrests (see sections 458 and 459).<sup>132</sup> As Polk notes, some of these cases of police killing have been controversial and police have been charged with homicide offences.<sup>133</sup>

### CONFLICT RESOLUTION HOMICIDES

'Conflict resolution homicides' are those where killing is employed as a way of 'settling' a conflict between people described by Polk as at the fringes of society. Prima facie, these offences are very unlikely to raise issues of defences, and will not be further discussed.

### HOMICIDES IN THE CONTEXT OF FAMILY INTIMACY

In relation to 'homicides in the context of family intimacy', the killing of children is by far the most common of killings in this category.<sup>134</sup> While these homicides are very unusual in being as likely to be committed by women as by men, the circumstances in which men and women kill children are different. In Alder and Polk's sample women killed only their own biological children, whereas men killed their biological children and their step-children. Only women killed their very young children—ie within the first 24 hours of life.<sup>135</sup> While both women and men killed children in homicide-suicide situations, men who did so were often acting out of sexual jealousy—ie they did so in order to 'get at' their partners. Women did not kill their children in such circumstances. Rather, when women killed their children and then suicided, they seemed to do so out of despair and often in response to violence from the partner. In 14 cases men killed their children or step children by violent attacks, while 5 women killed their children in such circumstances.

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132 For a scenario which raises self-defence, see *R v Conlon* (1993) 69 A Crim R 92.

133 Polk, *When Men Kill*, above n 16, 105.

134 Though note that killings in the context of sexual intimacy are separately analysed.

135 Though no information is available in relation to 5 out of 11 cases of neonaticide.

## Mothers Killing their Children

Alder and Polk note that in none of the cases in their sample where a mother killed her child in the first 24 hours of life was a prosecution pursued for murder or manslaughter. Indeed, in only one such case did any sort of prosecution proceed: the young woman, her mother and brother were prosecuted for concealing a birth.<sup>136</sup> Some of these cases could raise either the offence or defence of infanticide.<sup>137</sup> Under this offence/defence, the woman must technically have ‘the balance of her mind...disturbed by reason of her not having fully recovered from the effect of giving birth to the child, or by reason of the effect of lactation’.<sup>138</sup> Polk and Alder note that in their sample there was only one case of a woman killing her child because of postnatal depression, suggesting that the notion that birth (or, indeed breastfeeding) leads to a severe ‘disturbance of the mind’ motivating the killing may not reflect the common circumstances of women. Instead, the data suggest that the pressures of child-rearing, a burden which overwhelmingly falls on women,<sup>139</sup> may be more likely to drive women to kill their children.<sup>140</sup>

## Men Killing Children

In relation to men killing children, Alder and Polk’s data suggest a high level of prior violence to both the children and the children’s mother.<sup>141</sup> Some of the filicide-suicide (or attempted suicide) cases appear to have much in common with the jealousy killings described under the heading of killings in

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136 Alder and Polk, above n 16, 43–4. One of the reasons for the low rate of prosecution in this context, Alder and Polk suggest, is the difficulty establishing that the child was in fact born alive.

137 See *Crimes Act 1958* s 6(1) and s 6(2) respectively.

138 Ibid. Note also that this offence/defence applies only when a woman kills her child who is under 12 months of age.

139 See eg Michael Bittman, *Juggling Time: How Australian Families Use Their Time*, Office of the Status of Women, Department of the Prime Minister and Cabinet (1991); Australian Bureau of Statistics, *Women in Australia* (1993) and *How Australians Use Their Time* (1994); Michael Bittman and Jocelyn Pixley, *The Double Life of the Family* (1997).

140 See Kathy Laster, ‘Infanticide; A Litmus Test for Feminist Criminology Theory’ (1989) 22 *Australian and New Zealand Journal of Criminology* 151; and Bernadette McSherry, ‘The Return of the Raging Hormones Theory: Premenstrual Syndrome, Postpartum Disorders and Criminal Responsibility’ (1993) 15 *Sydney Law Review* 292.

141 Note also Wallace, above n 7, who observes that, in her sample, the women who killed children usually did not have a criminal record and none of them had been convicted of a violent offence; however, approximately one third of the men had a juvenile record, 63% had an adult criminal record, about a quarter had a record for violence and 14% had been convicted of an indictable violent offence: at 115.

the context of sexual intimacy. They might thus raise questions about the applicability of provocation as a defence: if the provocation of the children's mother is allowed to spill over to the child, it may be that provocation could be argued.<sup>142</sup> This, of course, leads us to ask whether provocation should be available in such circumstances.

## HOMICIDES IN THE CONTEXT OF SEXUAL INTIMACY

The sociological studies of 'killings in the context of sexual intimacy' suggest not only that women are less likely than men to be the perpetrators in such homicides,<sup>143</sup> but that when women do kill, they usually kill for different reasons than men do. Men are much more likely than women to kill their female partners (or sexual rivals) out of jealousy, possessiveness or control. Women are much more likely to kill their male partners in response to violence from them.

While the detail differs, the presence of prior violence in both these scenarios is clear. This has particular implications for the use of self-defence and provocation by women. I believe it also has clear implications for the use of provocation by men, although in the reported cases a context of prior violence is not often remarked upon.<sup>144</sup>

### Making Violence Visible: Using the Sociological Data

American legal academic, Professor Martha Mahoney has observed patterns of violence in the home in the United States similar to those noted above for Australia—in particular the high incidence of violence against women from their male partners after they had separated from them. She has urged that

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142 This somewhat speculative argument is based on the scenario in *R v Gardner* (1989) 42 A Crim R 279, discussed above at n 132. There the provocation of the perpetrator's former partner was said to encompass the man who was asleep in the room next door. This was because, as noted above, he was 'implicated in a sexual orgy' and was in close proximity to the person who was alleged to have provided the provocation. If emphasis is placed on physical proximity (and note that O'Bryan J said '[t]here was a sufficient nexus between Marino's provocative words and the death of Shears by the proximity of Shears in a bed nearby' (at 284)), it may be that a child who is in the same room as the provoking partner, or a room nearby, could be seen as proximate and encompassed within the provocation. Let me emphasise that I am not suggesting this *should* be the case.

143 Though note that women are more likely to kill either their partners or their children than to kill strangers or acquaintances in confrontational or other homicides.

144 See, for example, the discussion of the Vicki Cleary case in *Blood on Whose Hands?*, above n 115. Of course, in some circumstances the killing will not be preceded by prior violence; in many circumstances we just do not know.

we shift our attention from the battering incident, and the battered woman, to the attempts at power and control manifested in battering.<sup>145</sup> Mahoney has identified something she calls ‘separation assault’:

*Separation assault* is the attack on the woman’s body and volition in which the partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship. It often takes place over time.<sup>146</sup>

Mahoney goes on to argue that the identification of this social phenomenon with a clear and unequivocal name could intervene in the development of legal doctrine, and here I would emphasise the development of the doctrine of provocation.<sup>147</sup> The exercise Mahoney engaged in, in her identification of separation assault, is the kind of exercise I am suggesting should inform the Commission’s reconsideration of defences to homicide—using ‘cultural concepts’, or ‘social definitions’, or sociological discourse and data, to force us to rethink doctrinal categories.

### **Men Killing Women in the Context of Sexual Intimacy: The Provocation Defence**

The studies reported on above show a persistent pattern of men killing their sexual partners or sexual rivals in circumstances of sexual jealousy or possessiveness. In relation to the defence of provocation, the pattern of men killing women who have left them and/or developed a relationship with someone else is also a persistent theme in the leading High Court cases from

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145 Martha Mahoney, ‘Legal Images of Battered Women: Redefining the Issue of Separation’ (1991) 90 *Michigan Law Review* 1. Mahoney cites (at 65) in particular George Barnard et al, ‘Till Death Do Us Part: A Study of Spouse Murder’ (1982) 10 *Bulletin of the American Academy of Psychiatry and the Law* 271; and Franklin Zimring et al, ‘Intimate Violence: A Study of Intersexual Homicide’ (1983) 50 *University of Chicago Law Review* 910. See also Martha Mahoney, ‘Victimization or Oppression? Women’s Lives, Violence, and Agency’ in Martha Albertson Fineman and Roxanne Mykitiuk (eds), *The Public Nature of Private Violence* 1994, 59.

146 Mahoney, ‘Legal Images of Battered Women’, *ibid.*, 65.

147 Mahoney refers to ‘[n]aming separation assault’ as ‘an attempt to use a social definition, a cultural concept, to resolve doctrinal problems in law: *ibid.* 71. Mahoney identified hidden or unremarked ‘separation assaults’ in a variety of reported cases ranging across doctrinal categories—from death penalty cases, duty cases in

which the doctrine of provocation is taught to law students.<sup>148</sup> The current law on provocation accepts that it is ‘provocative’ for women to leave their partners, at least when they ‘flaunt’ their new relationship.<sup>149</sup> If Mahoney’s insights are adopted, these cases might be reinterpreted as ‘separation assaults’ or, at least, as about attempts at control rather than as about adultery. Any prior violence—or indeed any assault on separation—might be made visible if the relevant time frame is expanded beyond the actions causing death.

Mahoney describes one well-known American provocation case, *People v Berry*,<sup>150</sup> as containing a ‘hidden separation assault’. The court there decided that a long delay between the alleged provocative conduct (sexual taunts involving his partner’s relationship with another man) could be time for the ‘blood to boil’ rather than cool, thereby allowing that he was provoked when he killed her. However, Mahoney notes that ‘he did not kill her when she taunted him, but when she left him’:<sup>151</sup>

The court might have viewed the case differently had the assault on separation been as cognizable as his response to her alleged sexual taunts: it is difficult to find ‘heat-of-passion’ in a repeatedly attempted assault carried out over a period of time.<sup>152</sup>

I have argued elsewhere that a focus on ‘separation assault’ might make the claims of men using provocation somewhat less plausible.<sup>153</sup> I argued that there are many different ways to describe or think about the circumstances in which men kill their partners. An emphasis on the sociological discourses about homicide in these circumstances suggests that these killings arise out of sexual jealousy and possessiveness, that they are often preceded by other violence, and often involve elements of pre-planning.<sup>154</sup> Focus on these extra-legal discourses assists us in rethinking how our legal defences should operate.

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148 See *Parker v The Queen* (1963) 111 CLR 610, 665; *Moffa v The Queen* (1977) 138 CLR 601; *Stingel v The Queen* (1990) 171 CLR 312. There are two other central High Court authorities: *Masciantonio v The Queen* (1995) 183 CLR 58, which involves a man killing his son-in-law; and *Green v The Queen* (1997) 191 CLR 334, which involves a man killing a friend who he alleged had made a sexual advance to him. This latter case is discussed further below. However, see also *R v Tincay* [1998] 2 VR 19; *R v Parsons* [2000] 1 VR 161; *R v Leonboyer* [2001] VSCA 149.

149 See *Parker v The Queen* (1963) 111 CLR 610; *Moffa v The Queen* (1977) 138 CLR 601.

150 18 Cal 3d 509 (1976).

151 Mahoney, ‘Legal Images of Battered Women’, above n 145, 78–9.

152 Ibid 79.

153 Morgan, above n 128.

154 And see Danielle Tyson, ‘“Asking For It”: An Anatomy of Provocation’ (1999) 13 *Australian Feminist Law Journal* 66, who has argued that many of these cases construct the behaviour of the deceased as ‘insulting’, ‘the narrative of a woman “asking for it”’: at 67.

As put by Jeremy Horder:

One must ... ask whether the doctrine of provocation, under the cover of an alleged compassion for human frailty, simply reinforces the conditions in which men are perceived and perceive themselves as natural aggressors, and in particular women's natural aggressors.<sup>155</sup>

It is suggested in both the previous LRCV report<sup>156</sup> and accompanying study,<sup>157</sup> and the NSW LRC report<sup>158</sup> and related study,<sup>159</sup> that provocation is not gender-biased. The previous Victorian Commission concluded it was not gender-biased because men were more likely to raise the defence when they killed a man than when they killed a woman, and it was more likely to be rejected where a man killed a woman (36%) than where a man killed a man (12%). And when women raised provocation they were more likely to be successful (in the study, all 8 women who raised provocation in a domestic context were successful).<sup>160</sup> And for NSW, Donnelly, Cumines and Wilczynski argue that, given that 85% of the victims in provocation cases were men, there is 'little support...[for] the proposition that men use the provocation defence when they kill their female partners or ex-partners in a jealous rage'.<sup>161</sup> The NSW Law Reform Commission, relying on their data, noted that in relation to the 47 sentenced male offenders who were prosecuted for killing their female partners between 1990–3:

For five of those 47 male offenders, the defence of provocation was successfully raised ... In two of these five cases, the victim had allegedly provoked the male offender by hitting him. In the three remaining cases, the killing was the consequence of the victim leaving or threatening to leave the offender. In contrast, the study revealed that nine sentenced female offenders killed their sexual partners, eight of those nine female offenders having killed in response to physical abuse or threats by the victim immediately prior to the killing. All nine women were convicted of manslaughter, five of those nine having relied on the

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155 Jeremy Horder, *Provocation and Responsibility* (1992), 192–3.

156 Law Reform Commission of Victoria, *Homicide*, above n 14.

157 Law Reform Commission of Victoria, *Homicide Prosecutions Study*, above n 12.

158 New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997).

159 Donnelly et al, above n 85.

160 See Law Reform Commission of Victoria, *Homicide*, above n 14, 73–7 and *Homicide Prosecutions Study*, above n 12, 77, Table 55.

161 Donnelly et al, above n 85, 63. They also concluded that the data did 'not support any assertion that juries routinely accept provocation defences by males who have killed females': at 64.

defence of provocation. The Judicial Commission concluded from these findings that there was little support for the proposition that juries routinely accept provocation defences by men who kill their female partners.<sup>162</sup>

As this last quote indicates, there were still, at a minimum, 3 out of 14 cases (or 21.4%) where men were successful in arguing provocation when a woman left or threatened to leave. Should a threat to leave ever amount to provocation?<sup>163</sup> Should an assertion that she had sexual intercourse with someone else *ever* be sufficient provocation?

### Women Killing Men: Provocation and Self-defence

The previous discussion of ‘gender-bias’ in the doctrine of provocation indicates that women often successfully raise provocation when they kill their partners. But we know that women often kill their partners in response to violence from them: for example, in the Donnelly *et al* study, 8 out of 9 women were responding to violence and 5 out of 9 raised provocation. All 9 were convicted of manslaughter rather than murder (some relying on diminished responsibility, a defence not available in Victoria). But why were not at least some of these cases successfully argued as cases of self-defence?<sup>164</sup>

Julia Tolmie has suggested that there has been a tendency to associate provocation with domestic murders, and self-defence with stranger murders.<sup>165</sup> This tendency might arise because men are disproportionately the perpetrators of homicide and thus their experience tends to govern our understanding of these doctrines. When men kill their partners in a domestic context, they are often, as the data revealed, killing because of sexual jealousy, and in doing so have frequently argued that they were provoked by their partner’s behaviour. Men are rarely, as we have seen, likely to be killing their partners in response to violence from them. Hence, where they raise a

162 New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, above n 158, para 2.115. In 14 of the 47 cases, men killed because their partner was leaving or threatened to leave: Donnelly *et al*, above n 85, 46. This means that in a minimum of 3 out of 14, or 21.4%, of cases where men were provoked by sexual jealousy they successfully argued provocation.

163 See Adrian Howe, ‘Reforming Provocation (More or Less)’ (1999) 12 *Australian Feminist Law Journal* 127, 130. See also Adrian Howe ‘Provoking Comment: The Question of Gender Bias in the Provocation Defence’ in Norma Grieve and Ailsa Burns (eds), *Australian Women: Contemporary Feminist Thought* (1994); New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper No 31, (1993) para 3.98; and Morgan, above n 128, especially 255–7.

164 See Howe, ‘Reforming Provocation (More or Less)’, *ibid*, 130.

165 Julia Tolmie, ‘Provocation or Self-Defence for Battered Women Who Kill’ in Stanley Yeo (ed), *Partial Defences to Murder* (1992).

defence in killings in the context of sexual intimacy, men rely on the defence of provocation rather than self-defence, and provocation has come to be associated with domestic murder. By contrast, when men kill strangers, it may be in situations of confrontation when it can, and is, argued they were killing in self-defence. Hence, when women kill their sexual partners, the domestic nature of that context could lead to a focus on provocation for women who kill, even where, as we have seen suggested in the sociological studies, self-defence might be a more appropriate defence. Such an analysis does not imply that judges, or indeed defence counsel, are consciously and actively biased against women. Rather, it reminds us that our conceptual frameworks are limited by what we are familiar with, that we are governed by habit;<sup>166</sup> these patterns are institutional habits reproduced over time. Furthermore, Tolmie argues that ‘the tendency to characterise homicides by battered women as raising the defence of provocation is part of the process by which violence against women in the home is privatised and legitimated. ... To recognise that women may be trapped and justified in fighting for their lives within their most intimate relationship validates many women’s experiences in a way which threatens the ideology of familiness’.<sup>167</sup>

When we fail to see a woman’s killing in response to violence from her partner as self-defence, we are clearly denying her a chance of acquittal: self-defence is a complete defence, while provocation is only a partial defence, reducing murder to manslaughter. Where women do kill in response to violence, the adoption of a provocation paradigm may also misrepresent the centrality of the role of violence when women kill men. As Stella Tarrant has argued:

[D]omestic violence is conceptualised differently in a claim of provocation from its conceptualisation in a claim of self-defence. In a claim of self-defence the danger in which a woman finds herself as the result of violence by her spouse is addressed directly. The violence—and the danger—is the aberration in normal existence which invokes the application of the defence. In a claim of provocation the violence functions to enable a consideration of the woman’s loss of control. The aberration conceived by the law of provocation is not danger but the woman’s loss of control. ... [T]he very concept of provocation, however available the defence is to women, and whether it is successful in a particular case or not, fails to address directly the issue of marital violence. In particular, it fails to

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166 See Pierre Bourdieu, *Practical Reason: On the Theory of Action* (1998) for an exploration of the concept of ‘habitus’.

167 Tolmie, ‘Provocation or Self-Defence for Battered Women Who Kill’, above n 165, 66.



address the danger and violation which that abuse involves.<sup>168</sup>

The data indicating that women may be particularly vulnerable on separation, and the visibility given to this phenomenon by Mahoney's inscription of 'separation assault', might influence the way in which women's claims to self-defence are understood.<sup>169</sup> The identification of 'separation assault' might, for example, diminish the relevance of the perennial question of 'why didn't she leave?' in considerations of claims of self-defence, by reminding us of the vulnerability of women when they do leave. The prevalence of prior violence in so many of these homicides might lead to a different perspective on women who kill their sleeping partner—it might be 'reasonably necessary'<sup>170</sup> to do this, given the risk of violence. While the basic common law test of self-defence is broad, and should be able to encompass the circumstances of women who kill their violent partners, even when there is no immediate threat, the relative under-utilisation of self-defence where women kill their partners raises questions about whether further codification of the defence is required. Placing the social phenomenon—women killing men in response to violence—as our central focus, encourages a consideration of the separate legal categories of provocation and self-defence as connected categories, requiring examination together.

## HOMOPHOBIC KILLINGS

In relation to 'homophobic killings', the notion that a person responded to a homosexual advance and killed in a 'homosexual panic' (more accurately described as a homophobic or heterosexual panic) can be raised in relation to an argument of diminished responsibility, provocation, or self-defence.<sup>171</sup> In one NSW study, in 13 of the 16 trials of gay-hate killings the allegation was

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168 Tarrant, above n 101, 591. See also Tolmie 'Provocation or Self-Defence for Battered Women Who Kill', above note 165, who argues: 'Recognising that many women find the family life threatening also necessitates examining deep societal structures and attitudes by which violence against women is institutionalised throughout our society. The courts are not prepared to enter into such an examination via the route of self-defence. Provocation does not necessitate addressing these issues because it deals with private passions and emotions running wildly out of control': at 66–7.

169 This Paper has not assessed the function of battered woman syndrome evidence in either self-defence or provocation. For a recent comparative assessment, see Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709.

170 See *Zecevic v DPP* (1987) 162 CLR 645.

171 See Peter Johnston, '“More than Ordinary Men Gone Wrong”: Can the Law Know the Gay Subject?' (1996) 20 *Melbourne University Law Review* 1152; Adrian Howe, 'More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses—Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)' (1997) 19 *Sydney Law Review* 336.

made that the deceased had made a sexual advance or assault; in 2 of 13 cases there was a complete acquittal, and in 6 cases there was a finding of manslaughter.<sup>172</sup> The issue has been very controversial,<sup>173</sup> with much of that controversy focused on the High Court decision in *Green*.<sup>174</sup> In this case, a majority of the High Court decided that provocation should have been left to the jury where a man killed a friend who he alleged had made a sexual advance, arguing that the sexual advance reminded the accused of the sexual and other abuse he had been told his father had perpetrated on the accused's sisters. Kirby J, in dissent, stated:

If every woman who was the subject of a 'gentle', 'non-aggressive' although persistent sexual advance, in a comparable situation ... could respond with brutal violence rising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and undesirably extended. ... Any unwanted sexual advance, heterosexual or homosexual, can be offensive. It may intrude on sexual integrity in an objectionable way. But this court should not send the message that, in Australia today, such conduct is objectively capable of being found by a jury to be sufficient to provoke the intent to kill or inflict grievous bodily harm. Such a message unacceptably condones serious violence by people who take the law into their own hands.<sup>175</sup>

Some commentators have seen some of the judges in the majority as contributing to homophobia;<sup>176</sup> others have disagreed.<sup>177</sup>

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172 Stephen Tomsen and Allen George, 'The Criminal Justice Response to Gay Killings: Research Findings' (1997) 9 *Current Issues in Criminal Justice* 56, 62. See also See NSW Attorney-General's Department, *Discussion Paper: Review of the "Homosexual Advance Defence"* (1996), Appendix 1.

173 See NSW Attorney-General's Department, *ibid*.

174 *Green v The Queen* (1997) 191 CLR 334. Compare Graeme Coss, 'Editorial: Revisiting Lethal Violence by Men' (1998) 22 *Criminal Law Journal* 5 and 'A Reply to Tom Molomby' (1998) 22 *Criminal Law Journal* 119 with Tom Molomby, ' "Revisiting Lethal Violence by Men"—A Reply' (1998) 22 *Criminal Law Journal* 116. And see Adrian Howe, '*Green v The Queen*. The Provocation Defence Finally Provoking its Own Demise?' (1998) 22 *Melbourne University Law Review* 466 and David Marr, *The High Price of Heaven* (1999) 53–71.

175 *Green v The Queen* (1997) 191 CLR 334.

176 See Howe, 'More Folk Provoke Their Own Demise, above n 171, 364 (where, in commenting on the dissenting judgment in the NSW Court of Appeal, he stated: 'Thus is the ordinary man judicially inscribed as a violent homophobe'). Coss quotes Howe's epithet, to describe Brennan CJ's judgment in the High Court, and states that, while the other two majority judges (McHugh and Toohey JJ) approach the question somewhat differently, 'their belief that it was so serious as to be ultimately for the jury to decide also gives cause for concern': 'Editorial: Revisiting Lethal Violence by Men', above n 174, 5, 7.

177 Molomby, above n 174, who acted for Green, states: 'It is both unfortunate and unfair that the case of Malcolm Green should be represented, as in your editorial as having anything to do with homophobia, let alone encouraging it.

## Conclusion

The preceding discussion of the circumstances in which homicide occurs is directed towards ensuring that any reconsideration of the defences to homicide is fully informed by the contexts in which people are killed. The emphasis has been placed on describing and analysing those contexts, in the hope that readers are encouraged to return to those contexts when considering the more directly ‘legal’ questions of when a homicide should be justifiable or excusable. I have also alluded to some aspects of the legal rules of defences to homicide, in some of the controversial circumstances in which they arise. While a discussion about law reform which arises totally from, and operates within, a strictly legal framework can and does tell us much about how law operates and, in turn, how law reform might operate, many other discourses could and should also inform the way we think about how law operates, and thus about law reform.

Rod McDonald, when President of the Law Commission of Canada, argued that the goal of the Canadian Commission’s research was

to investigate the law and the legal system as part of a broader social and economic environment. ... [I]ssues for study should be defined as much by disciplines other than law as by the law itself. ... [O]ur research programme is organized around general themes that reflect problems as experienced by Canadians, regardless of how (or even whether) these problems are actually dealt with in ... legislation’.<sup>178</sup>

It is this approach which has informed this Paper.

In criticising the somewhat lukewarm enthusiasm expressed by the Law Reform Commission of Canada (the predecessor to the Law Commission), for its consideration of a particular population—indigenous peoples—and their interaction with the criminal justice system,<sup>179</sup> Macklin commented:

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178 Roderick A McDonald, ‘In Search of Law’, 1998, <<http://www.lcc.gc.ca/en/speeches/s011098.html>>, 11 Jan 2002. See also Roderick A McDonald, ‘Recommissioning Law Reform’ (1997) 35 *Alberta Law Review* 831.

179 Law Reform Commission of Canada, *Aboriginal Peoples and Criminal Justice*: Report 34, Ottawa, 1991. Macklin cites the following statement of the Commission: ‘Throughout our work we have extolled the virtues of a uniform, consistent and comprehensive approach to law reform. This Reference calls for us to examine, in specific detail, one group of persons and its interaction and unique difficulties with the criminal justice system... While we remain committed to the principles of uniformity and consistency, distinct treatment might be constitutionally justified on the basis of sections 25 and 35 of the *Canadian Charter of Rights and Freedoms*, which put Aboriginal peoples in a unique constitutional position with pre-existing legal rights, or else under the affirmative action clause of the *Charter’s* equality provision.’

One would think that one had to seek permission under the Constitution to use a real group of people and their real life experience as the organizing principle for inquiry as opposed to an ostensibly genderless, raceless, faceless doctrine.<sup>180</sup>

The preceding discussion is designed to encourage a gendered and raced reconsideration of defences to homicide so that the circumstances in which killings occur, a sociological discourse, becomes an important source of law reform.

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180 Audrey Macklin, 'Law Reform Error: Retry or Abort' (1993) 16 *Dalhousie Law Journal* 395, 403.

## Appendix

The following table has been constructed from Ken Polk, *When Men Kill*.<sup>181</sup> I have added percentage calculations.

### How to read the table

For example, 101 or 26.6% of all homicides in the sample were committed in the context of sexual intimacy. Of these, 72.3% involved a female victim and a male offender. This group of 73 offenders can then be further broken down according to the reason or motivation for the offence—either jealousy/control (58) or depression/suicide (15).

<b>Homicides in the context of sexual intimacy</b>	<b>26.6% (N=101)</b>
<i>Female victim/male offender</i>	72.3% (N=73)
Jealousy/control	n=58
Depression/suicide	n=15
<i>Male victim/male offender</i>	12.9% (N=13)
Sexual rivals	n=13
Homosexual killings	n=0
<i>Male victim/female offender</i>	11.9% (N=12)
Provoked by violence	n=8
Control/other	n=4
<i>Female victim/female offender</i>	3.0% (N=3)
Sexual rival	n=2
Homosexual killing	n=1

*continued over...*

<sup>181</sup> Polk, above n 16, 23.

<b>Homicides originating in family intimacy</b>	<b>10.5%</b> <b>(N=40)</b>
<i>Children victims</i>	77.5% (N=31)
Victims of trauma	n=13
Battered children	(n=7)
Victims of shooting, other	(n=6)
Victims of parental suicide	n=9
Neonaticides	n=8
Victims of neglect	n=1
<i>Other family victims</i>	22.5% (N=9)
Sister victim/brother offender	n=2
Parent victim/son, step-son offender	n=5
Other (in-law, grandparent victim)	n=2
<b>Confrontational homicides</b>	<b>22.1%</b> <b>(N=84)</b>
<b>Homicides originating in other crime</b>	<b>16.1%</b> <b>(N=61)</b>
<i>Double victim</i>	50.8% (N=31)
<i>Reverse victims</i>	29.5% (N=18)
Killed by police	n=11
Killed by citizen	n=7
<i>Professional killings</i>	8.2% (N=5)
<i>Police killed</i>	8.2% (N=5)
<i>Prison killings</i>	3.3% (N=2)
<b>Conflict resolution homicides</b>	<b>10.0%</b> <b>(N=38)</b>
<b>Victims of mass killers</b>	<b>3.9%</b> <b>(N=15)</b>
<b>Unsolved (and unclassifiable)</b>	<b>5.8%</b> <b>(N=22)</b>
<b>'Special' cases</b>	<b>4.7%</b> <b>(N=18)</b>
<b>Mercy killing</b>	<b>0.3%</b> <b>(N=1)</b>

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*Disputes Between Co-owners: Report* (March 2002)

*Criminal Liability for Workplace Death and Serious Injury in the Public Sector: Report* (2002)

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