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CRIMINOLOGY

INTIMACY AND VIOLENCE: EXPLORING THE ROLE OF VICTIM-DEFENDANT RELATIONSHIP IN CRIMINAL LAW

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A review of the sociological and criminological literature on victim-defendant relationship and violence reveals common perspectives or assumptions about intimate violence. A careful examination of these assumptions reveals that they support another common assumption—that the courts treat (and should treat) intimate violence more leniently than violence between those who share more distant relationships. However, criminal justice researchers have yet to systematically examine the validity of these assumptions or the role they play in determining outcomes in violent crime. Using the focal concerns framework, ten perspectives are described and linked to various explanations for criminal justice leniency in cases of intimate violence. An exploratory analysis of one assumption highlights the need for future research to examine the validity of common assumptions as well as their impact on court outcomes in cases of violence.

* Please direct all comments to Myrna Dawson, Department of Sociology and Anthropology, University of Guelph, Guelph, Ontario N1G 2W1 (e-mail: mdawson@uoguelph.ca). Special thanks to the anonymous reviewers and the editorial staff at the Journal of Criminal Law and Criminology for their helpful comments and feedback. Myrna Dawson is an Associate Professor in the Department of Sociology and Anthropology at the University of Guelph, Ontario. Her research focuses on trends and patterns in violence as well as social and legal responses to violent victimization, specifically intimate partner violence. Some of her recent publications appear in *Law & Society Review*, *The British Journal of Criminology*, *Social Problems*, *The Sociological Quarterly*, and *Justice Quarterly*. Her current research examines how three decades of social change experienced by Canadian women may be contributing to changing patterns in violent victimization and how the implementation of specialized or “problem-solving” courts may be transforming the organizational culture of legal and service professionals in the Canadian criminal justice system.

I. INTRODUCTION

The degree of intimacy that exists between victims and defendants has traditionally been seen as a major explanatory variable in determining criminal justice outcomes in cases of violent crime.¹ Typically, it is argued that intimate violence and, in particular, violence between intimate partners, is treated more leniently by the courts than crimes between those who share more distant relationships.² Even though numerous legislative and policy changes have occurred in recent decades to respond to intimate violence, it is still commonly assumed that these acts are treated more leniently than non-intimate violence by criminal justice actors. This belief has persisted despite the lack of consistent empirical support for an association between intimacy and law.³ As a result, one might argue, as Hagan and O'Donnel

¹ DONALD BLACK, *THE BEHAVIOR OF LAW* 40-48 (1976); MICHAEL R. GOTTFREDSON & DON M. GOTTFREDSON, *DECISION MAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION* (Law, Society, and Policy Series vol. 3, 2d ed., Joel Fienberg et al. eds., 1988).

² See, e.g., BLACK, *supra* note 1, at 40-48; DONALD BLACK, *THE SOCIAL STRUCTURE OF RIGHT AND WRONG* 70-72 (1993); ALLAN V. HORWITZ, *THE LOGIC OF SOCIAL CONTROL* (1990); Elizabeth Rapaport, *The Death Penalty and the Domestic Discount*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 224, 235-43 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994) [hereinafter Rapaport, *The Domestic Discount*]; Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 *LAW & SOC'Y REV.* 367, 378 (1991) [hereinafter Rapaport, *Gender Discrimination*].

³ For a review of literature, see Myrna Dawson, *Rethinking the Boundaries of Intimacy at the End of the Century: The Role of Victim-Defendant Relationship in Criminal Justice Decisionmaking over Time*, 38 *LAW & SOC'Y REV.* 105, 106-09 (2004). Some bivariate studies have found that victim-defendant relationship is associated with criminal justice outcomes leading to leniency in cases of intimate violence. See GOTTFREDSON & GOTTFREDSON, *supra* note 1; HENRY P. LUNDSGAARDE, *MURDER IN SPACE CITY: A CULTURAL ANALYSIS OF HOUSTON HOMICIDE PATTERNS* 143-67 (1977); VERA INST. OF JUSTICE, *FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS* (1977). On the other hand, some findings in multivariate analyses have not consistently supported such a relationship. For example, some studies support the bivariate research. See, e.g., Kristen M. Williams, *The Effects of Victim Characteristics on the Disposition of Violent Crimes*, in *CRIMINAL JUSTICE AND THE VICTIM* 177, 204 (William F. McDonald ed., 1976); Edna Erez & Pamela Tontodonato, *The Effect of Victim Participation in Sentencing on Sentence Outcome*, 28 *CRIMINOLOGY* 451, 464, 467 (1990); Terance Miethe, *Stereotypical Conceptions and Criminal Processing: The Case of the Victim-Offender Relationship*, 4 *JUST. Q.* 571, 589 (1987). Yet, Julia Horney and Cassia Spohn found no association between victim-defendant relationship and the allocation of criminal sanctions. Julia Horney & Cassia Spohn, *The Influence of Blame and Believability Factors on the Processing of Simple Versus Aggravated Rape Cases*, 34 *CRIMINOLOGY* 135, 150 (1996); see, e.g., Celesta A. Albonetti, *An Integration of Theories to Explain Judicial Discretion*, 38 *SOC. PROBS.* 247, 258, 260 (1991); Martha A. Myers, *Offended Parties and Official Reactions: Victims and the Sentencing of Criminal Defendants*, 20 *SOC. Q.* 529, 537 (1979); Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 *LAW & SOC'Y REV.* 781, 793 (1979); Leonore M.J. Simon, *Legal Treatment of the Victim-*

have with respect to gender and sentencing, that the perceived criminal justice leniency toward intimate violence has become part of conventional criminological and sociological wisdom.⁴ In other words, it may be that sociologists and citizens alike *assume* that those who victimize intimates are less cold-blooded, less rational, less dangerous, and, in sum, less blameworthy, for example, than those who victimize non-intimates. These assumptions may also lead one to believe that defendants who victimize intimates are, and *should* be, treated more leniently by the courts than those who share more distant relationships with their victims. This may also explain the lack of systematic and empirical research that has focused on the association between intimacy and law, compared to the abundance of research that has examined the effect of other variables on criminal justice outcomes such as gender, race and age.⁵

Focusing on intimate partner violence, this paper addresses three key research questions that follow from the above: (1) Do commonly-held assumptions, beliefs, or stereotypes distinguish between intimate partner and non-intimate partner violence?⁶ (2) Can these assumptions, beliefs, or stereotypes be used to justify more lenient treatment of intimate partner compared to non-intimate partner violence by criminal justice actors? (3) If assumptions, beliefs, or stereotypes do exist about intimacy and violence, are they valid? From this point forward, I will refer to each of the assumptions, beliefs, or stereotypes discussed as “perspectives,” which

Offender Relationship in Crimes of Violence, 11 J. INTERPERSONAL VIOLENCE 94, 104 (1996). In addition, conclusions are difficult because studies vary in the type of crime examined (violent or non-violent) and the stage of the criminal process that is focused upon.

⁴ John Hagan & Nancy O’Donnel, *Sexual Stereotyping and Judicial Sentencing: A Legal Test of the Sociological Wisdom*, 3 CANADIAN J. SOC. 309, 310 (1978).

⁵ For reviews, see MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995); Kathleen Daly & Rebecca L. Bordt, *Sex Effects and Sentencing: An Analysis of the Statistical Literature*, 12 JUST. Q. 141 (1995); Darrell Steffensmeier, John Kramer & Jeffery Ulmer, *Age Differences in Sentencing*, 12 JUST. Q. 583 (1995) [hereinafter Steffensmeier, Kramer & Ulmer, *Age Differences*]; Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763 (1998) [hereinafter Steffensmeier, Ulmer & Kramer, *Interaction of Race*].

⁶ Intimate partner violence is defined as acts that occur between victims and defendants who were or are legally married, common-law partners or dating. Non-intimate partner violence includes acts between other family members, friends, acquaintances and strangers. It is acknowledged that both categories—“intimate partner” and “non-intimate partner”—include a variety of relationships. However, the small sample size precludes further comparisons. For the purpose of this analysis, though, I argue that intimate partner violence comprises acts that are the most closely associated with violence commonly typified as “crimes of passion” and, thus, comparing these cases with other relationship types will be informative.

refers to an individual's mental view of facts, ideas, etc., and their interrelationships.⁷ My primary objective is to address the first two questions. In the next section, I outline the dominant perspectives that can be found in the literature about intimacy and violence, demonstrating how each can be used to support the belief that criminal justice actors *should* treat defendants who victimize intimate partners more leniently than other types of defendants. As a second objective, I examine one perspective to assess whether this characteristic does actually differentiate between intimate partner and non-intimate partner violence. In short, my aim is to assess its validity. The decision to focus on one particular perspective was largely due to the availability of data, often an obstacle when attempting to capture measures that will allow for a systematic examination of prevailing perspectives on violence. It is hoped that this brief, exploratory examination and the description of how it was conducted will serve as an impetus for future research. Such research can begin to collect the more detailed data required to assess the validity of other perspectives about intimacy and violence that are outlined in detail below.

To clarify, then, this is not an examination of how perspectives about intimacy and violence *do* affect criminal justice decision-making; rather it is a study of how they *may* be central to criminal justice decision-making, warranting further examination by social science researchers. I argue that examining their validity is important given that, during the past several decades, increasing attention has been paid to the integral role of "stereotyping" in criminal justice decision-making and the subsequent consequences it may have for case dispositions.⁸ Few scholars, however, have assessed the validity of the varying perspectives that might underscore stereotypical thinking. Avenues for future research that examine the actual role played by these perspectives in criminal justice decision-making are discussed in the conclusion. Below, I use the focal concerns framework to organize the discussion.

⁷ Ethnethodologists refer to them as "folk typifications" that are used by people, regardless of their level of education or occupational training. For example, using such a classification process, Lundman found that police tend to categorize situations in the following way: cases that require real police work and pose a significant threat, and those that do not. RICHARD J. LUNDMAN, *POLICE AND POLICING: AN INTRODUCTION* (1980); see also David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255, 275 (1965) (discussing "normal" crimes).

⁸ Miethe, *supra* note 3, at 571-72.

II. FOCAL CONCERNS, INTIMACY AND VIOLENCE

The common perspectives about intimacy⁹ and violence highlighted in this paper are organized around three focal concerns emphasized by judges and other criminal justice decision-makers when responding to criminal behavior: (1) defendant culpability; (2) protection of the public; and (3) the practical constraints of the criminal justice system.¹⁰ In the next several sections, I describe these focal concerns and discuss the perspectives that relate to each. While one perspective may be applicable to more than one concern, each is couched within a particular category. Despite some overlap, the perspective is sufficiently distinct to justify a separate discussion, drawing from a particular body of literature. Each perspective is then linked to a specific explanation for criminal justice leniency in cases of intimate partner violence.¹¹ While this discussion may not provide an exhaustive list, it does comprise the dominant perspectives that exist in the literature about intimacy and violent crime.

⁹ The terms “intimacy” and “victim-defendant relationship” are used interchangeably in this paper. I acknowledge that intimacy may be perceived as a more affective trait while victim-defendant relationship may be perceived as a variable that is more structural in nature. I use the terms here to refer to the degree of “closeness” that is perceived to exist between victims and defendants. Drawing from work by Black and others, I consider intimate partner relationships to be “closer” than other family relationships; other family relationships to be closer than friends; friends to be closer than acquaintances; and, finally, acquaintances to be closer than strangers. See BLACK, *supra* note 2, at 40-47; HORWITZ, *supra* note 2; ROBERT SILVERMAN & LESLIE KENNEDY, *DEADLY DEEDS: MURDER IN CANADA* 65-105 (1993); Scott H. Decker, *Exploring Victim-Offender Relationships in Homicide: The Role of Individual and Event Characteristics*, 10 JUST. Q. 585, 595-96 (1993); Robert A. Silverman & Leslie W. Kennedy, *Relational Distance and Homicide: The Role of the Stranger*, 78 J. CRIM. L. & CRIMINOLOGY 272, 273 (1987). I recognize that there may be variations within these broader categories as well. See Myrna Dawson, *The Cost of ‘Lost’ Intimacy: The Effect of Relationship State on Criminal Justice Decision Making*, 43 BRIT. J. CRIMINOLOGY 689, 694 (2003).

¹⁰ For a more detailed discussion of these focal concerns, see Steffensmeier, Ulmer & Kramer, *Interaction of Race*, *supra* note 5, at 766-69.

¹¹ See *infra* Table 1 for perspectives and related hypotheses.

Table 1

Perspectives about intimacy and violence, and hypotheses about their effect on criminal justice decision-making

General Perspective	
<i>Hypothesis:</i> Violence that occurs between victims and defendants who share an intimate relationship are treated more leniently than victims and defendants who share more distant relationships because of assumptions, beliefs, or stereotypes associated with intimate violence that are adhered to by criminal justice officials.	
<hr/>	
Focal Concern	
<hr/>	
1. Defendant Culpability	<p><u>Perspective 1—Mitigating emotions</u> <i>Hypothesis:</i> Intimate partner violence may be treated more leniently than other types of violent crime because such acts are perceived to be motivated by strong emotions that may act to reduce defendant culpability.</p> <p><u>Perspective 2—Victim provocation</u> <i>Hypothesis:</i> Intimate partner violence may be treated more leniently than other types of violence because such acts are assumed to involve some degree of victim responsibility, which may mitigate defendant culpability.</p>
2. Protection of the Public	<p><u>Perspective #3—Deterrence</u> <i>Hypothesis:</i> Intimate partner violence may be treated more leniently than other types of violent crime because those defendants who kill intimate partners are believed to be beyond the deterrent message of the criminal law.</p> <p><u>Perspective 4—Future dangerousness</u> <i>Hypothesis:</i> Intimate partner violence may be treated more leniently than other cases of violence because criminal justice officials believe offenders who victimize intimate partners pose little future dangerousness to the public at large.</p> <p><u>Perspective 5—Maintaining social order</u> <i>Hypothesis:</i> Intimate partner violence may be treated more leniently than other types of violent crime because intimate partner crimes are perceived to pose less threat to the maintenance of social order than crimes that occur between victims and defendants who share more distant relationships.</p>

Perspective 6—Horizontal crimes

Hypothesis: Intimate partner violence may be treated more leniently than cases of non-intimate partner violence because intimates often share similar social ranks and, thus, are perceived as less serious than crimes by offenders against victims of higher social ranks (i.e., upward crimes).

3. PracticalityPerspective 7—Frequent crimes

Hypothesis: Intimate partner violence may be treated more leniently than non-intimate partner violence because the former are encountered more frequently by the courts than the latter, leading to their classification as “normal” incidents that are less serious, allowing for more expedient processing of these cases.

Perspective 8—Informal versus formal controls

Hypothesis: Intimate partner violence may be treated more leniently than other types of violence because criminal justice officials perceive informal controls to be more available in intimate disputes, thereby precluding the necessity of formal controls.

Perspective 9—Legacy of patriarchal norms

Hypothesis: Intimate partner violence may be treated more leniently than other types of crimes because of the legacy of patriarchal legal doctrines that reflect the belief that intimate violence is inappropriate for legal intervention.

Perspective 10—Preserving the family unit

Hypothesis: Intimate partner violence may be treated more leniently than non-intimate partner violence because criminal justice officials believe they are preventing further disruption of intimate or familial relationships, which is not a concern with victims and defendants who share more distant relationships.

A. FOCAL CONCERN 1: DEFENDANT CULPABILITY

The first focal concern emphasizes that the severity of punishment should increase according to the degree of defendant culpability and is usually associated with the retributive philosophy of punishment. Research generally shows that offense seriousness, measured in terms of the defendant’s culpability and the harm caused by his offense, is the most significant factor in sentencing.¹² Factors that may affect perceptions of

¹² See, e.g., GOTTFREDSON & GOTTFREDSON, *supra* note 1; W.S. Wilson Huang et al.,

defendant culpability are biographical factors, such as prior criminal history (the existence of which may increase culpability); prior victimization of the defendant (the existence of which may mitigate culpability); and the centrality of the defendant's role in the crime (such as whether he was a leader, an organizer, or a follower). Below, I describe two perspectives about intimacy and violence that may be linked to assessments of defendant culpability.

Perspective 1: Mitigating Emotions

One explanation for the association between intimacy and law draws from the theory of relative culpability inherent in the law of homicide, and relies on the distinction between "hot-blooded" and "cold-blooded" crimes. Briefly, killing out of anger or some other strong emotion tends to decrease the degree of moral and legal blameworthiness attributed to the defendant and, consequently, reduces the degree of offense seriousness assigned to the defendant's crime.¹³ The rationale for this practice recognizes that strong emotion can undermine or destroy a defendant's rational capacity to deliberate and plan his actions, thereby precluding premeditation or intent. In such situations, the passion or emotion as well as the circumstances that incite that passion or emotion may reduce the defendant's agency and self-restraint. Thus, when anger causes a defendant to lose control of his actions, the degree of moral culpability is reduced. The role of mitigating emotions in law, then, relies on the distinction that calculated and unprovoked violence is generally more reprehensible than violence that arises due to loss of emotional control.

In the past several decades, various criminal typologies have been developed that distinguish between types of violent crime and, in particular, homicide. For example, violent behavior has frequently been classified as instrumental (cold-blooded) or expressive (hot-blooded).¹⁴ Instrumental violence refers to those events in which offenders seek to improve their position through some rational calculation or plan that involves minimizing risk, increasing gain, or both.¹⁵ Robbery is often cited as an example of an

Individual and Contextual Influences on Sentence Lengths: Examining Political Conservatism, 76 PRISON J. 398, 413 (1996).

¹³ Rapaport, *The Domestic Discount*, *supra* note 2, at 238-39.

¹⁴ *See id.* at 240-41.

¹⁵ *Cf.* Dean G. Rojek & James L. Williams, *Interracial vs. Intra-racial Offenses in Terms of the Victim/Offender Relationship*, in HOMICIDE: THE VICTIM/OFFENDER CONNECTION 249, 257 (Anna Victoria Wilson ed., 1993) ("Instrumental homicides occur primarily between strangers, and the primary intent is the forceful acquisition of money or property. There is also a certain degree of planning or premeditation, although the homicide is often not the primary goal.")

instrumental crime. In contrast, violent behavior that is expressive is perceived to lack rational consideration, stemming instead from "character contests,"¹⁶ retaliation or revenge,¹⁷ or "righteous slaughter," in the case of lethal violence.¹⁸

Among the various typologies, intimate partner violence is typically perceived to be the archetype of expressive crime because of the intensity of intimate partner unions and the accompanying interactions.¹⁹ In contrast, killings that occur among strangers are more often presumed to be instrumental in character because they are believed to occur primarily in the context of violence committed for gain.²⁰ For example, robbery homicide—a frequent example used to illustrate instrumental violence—is more likely to occur among strangers or acquaintances.²¹ While some researchers have begun to question the tendency to associate specific relationship types with particular violent typologies,²² expressive violence continues to be associated with intimate partner relationships and instrumental violence continues to be associated with more distant relationships.

In summary, the instrumental/expressive distinction often parallels differences between planned (premeditated) and spontaneous ("crimes of passion") offenses. Moreover, the instrumental/expressive dichotomy

¹⁶ David F. Luckenbill, *Criminal Homicide as a Situated Transaction*, 25 SOC. PROBS. 176 (1977).

¹⁷ Richard B. Felson, *Aggression as Impression Management*, 41 SOC. PSYCHOL. 205 (1978).

¹⁸ JACK KATZ, *SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL* 12-51 (1988).

¹⁹ See, e.g., Rojek & Williams, *supra* note 15, at 264; Colin Loftin, *Assaultive violence as a contagious social process*, 62 BULL. N.Y. ACAD. MED. 550 (1986); Michael G. Maxfield, *Circumstances in Supplementary Homicide Reports: Variety and Validity*, 27 CRIMINOLOGY 671, 680 (1989); Robert N. Parker & M. Dwayne Smith, *Deterrence, Poverty and Type of Homicide*, 85 AM. J. SOC. 614, 615-16 (1979); Robert J. Sampson, *Personal Violence by Strangers: An Extension and Test of the Opportunity Model of Predatory Victimization*, 78 J. CRIM. L. & CRIMINOLOGY 327 (1987); M. Dwayne Smith & Robert N. Parker, *Type of Homicide and Variation in Regional Rates*, 59 SOC. FORCES 136, 139 (1980).

²⁰ Rojek & Williams, *supra* note 15, at 257; Richard Block, *Victim-Offender Dynamics in Violent Crime*, 72 J. CRIM. L. & CRIMINOLOGY 743, 751-52 (1981); Marc Riedel, *Stranger Violence: Perspectives, Issues, and Problems*, 78 J. CRIM. L. & CRIMINOLOGY 223, 251 (1987).

²¹ Riedel, *supra* note 20, at 248.

²² Kenneth Polk & David Ranson, *Homicide in Victoria*, in AUSTRALIAN VIOLENCE: CONTEMPORARY PERSPECTIVES 53 (Duncan Chappell et al. eds., 1991); Terance D. Miethe & Kriss A. Drass, *Exploring the Social Context of Instrumental and Expressive Homicides: An Application of Qualitative Comparative Analysis*, 15 J. QUANTITATIVE CRIMINOLOGY 1, 18-19 (1999).

continues to be perceived as synonymous with the stranger/intimate distinction by social science researchers and criminal justice actors. Therefore, because calculated and unprovoked acts are more reprehensible in law than spontaneous acts, and instrumental violence is believed to occur most often among strangers, these defendants will be (and should be) treated more seriously than other types of defendants, such as intimate partners. The role of mitigating emotions in law, then, leads to the expectation that criminal justice responses to violent crime between intimate partners will be, and possibly should be, more lenient than responses to violence between other types of victims and defendants.

Perspective 2: Victim Provocation

A second explanation for the association between intimacy and the law that relates to defendant culpability emphasizes the role of the victim in the incident. Judgments about victim provocation in violent incidents have been shown to significantly affect decisions about charge reductions, dismissals, and sentences.²³ Moreover, juries and, to a lesser extent, judges have been found to consider the contributory actions of the victim in the incident during their deliberations.²⁴ Victim provocation, however, can be viewed both in the narrow and the broad sense. In the narrow sense, the term "victim precipitation"²⁵ is applied to those violent acts in which the victim makes a direct, positive contribution to his own victimization. Typically, this means that the victim was the first to use or threaten to use physical violence against the defendant, to show or use a weapon, or to strike out at another in a dispute.²⁶ In short, victim precipitation is closely linked to the legal notion of self-defense. In the broader sense, victim "participation" may parallel legal notions of provocation defined in Canadian law as "[a] wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control."²⁷ While the defense of provocation is exclusive to homicide, defendants in cases of non-lethal violence may receive more lenient treatment depending on the victim's perceived degree of responsibility. And, while victim provocation is never a sufficient legal basis for case dismissal, it can lead to charge reductions (such as from murder to manslaughter).

²³ Williams, *supra* note 3, at 186-97; see also Marvin E. Wolfgang, *Victim Precipitated Criminal Homicide*, 48 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 1, 2 (1957).

²⁴ HARRY J. KALVEN & HANS ZEISEL, *THE AMERICAN JURY* (Phoenix 1971).

²⁵ Wolfgang, *supra* note 23, at 2-3.

²⁶ *Id.* at 252.

²⁷ Canada Criminal Code, R.S.C., ch. C-46, § 232(2) (1985).

The role of victim provocation also supports the belief that criminal justice responses to intimate violence will be more lenient because these cases are often perceived to involve some degree of victim responsibility. For example, research has shown that crimes between intimate partners are more likely to generate images of victim provocation than crimes involving strangers.²⁸ In such cases, some may feel that the victim possessed some degree of control over the circumstances of her victimization. The victim may even be seen as somehow responsible for her own victimization by remaining in an intimate, and obviously threatening, relationship. For example, Rapaport states:

The victim is regarded as having assumed a measure of the risk of victimization simply by remaining in an intimate relationship with the killer whom he or she may have known to be disposed to violence. We assume that the victim possessed some degree of control over the circumstances of his or her victimization, which puts the homicide in a less frightening light and diminishes the degree of punishment that appears appropriate.²⁹

As a result, criminal justice officials may be more likely to question the motives and doubt the allegations of a victim who knew the defendant prior to the incident, particularly a victim who was the sexual partner or spouse of the defendant.

According to this perspective, then, defendants who victimize intimate partners may be perceived as less culpable than defendants who victimize non-intimate partners because victim provocation in a violent act generally decreases defendant culpability, and cases that involve defendants and victims known to each other are often assumed to involve some form of victim provocation. Therefore, criminal justice responses to violent crime between intimate partners will be less severe than to violent acts between non-intimates. This assumption would also lead to the expectation that in cases where victims and defendants were estranged, the response to the crime may be more severe than in those cases where the defendant and victim were still in a relationship at the time the violence occurred. This expectation stems from the perception that a victim who is estranged from her abuser tried to diminish her risk of victimization by exiting the relationship, and, thus, the extent that she contributed to her own victimization is perceived to be minimal. For example, elsewhere I have demonstrated that defendants who killed estranged intimate partners were treated more severely by the courts than those who were still with the victim, providing some support for the above hypothesis.³⁰

²⁸ Riedel, *supra* note 20, at 256.

²⁹ Rapaport, *Gender Discrimination*, *supra* note 2, at 380.

³⁰ See Dawson, *supra* note 9.

B. FOCAL CONCERN 2: PROTECTION OF THE PUBLIC

A second concern for criminal justice actors is the protection of the public, which typically focuses on the need to incapacitate offenders or to deter would-be offenders. More specifically, the concern is with calculating the risk of recidivism or predicting future dangerousness of offenders. The following four perspectives demonstrate how notions of dangerousness and the likelihood of recidivism may differ depending on the type of victim-defendant relationship, thereby affecting criminal court outcomes.

Perspective 3: Deterrence

Broadly speaking, law is concerned with two types of deterrence: general deterrence and specific deterrence. General deterrence is the symbolic effect of punishment that causes people to desist from offences when they see others being punished. Specific deterrence is the effect of punishment on the offender achieved through his actual experience of punishment. Chambliss argues that the deterrent influence of punishment depends, however, on two things: (1) whether crimes are expressive or instrumental; and (2) whether offenders have a high or low commitment to crime as a way of life.³¹ Under the deterrence doctrine, the threat of legal sanction is considered to be most effective in deterring instrumental crimes by persons with low commitment to a criminal lifestyle.³² Expressive crimes, in contrast, are often viewed as “undeterrable” by legal sanctions. In short, instrumental crimes and offenders are more susceptible to legal threats than expressive crimes and offenders and, thus, more appropriate targets for punishment.

As already discussed, one assumption about offenders who commit violent acts against intimate partners also relates to the likelihood of deterrence³³—that of the out-of-control killer whose emotions or passion undermine his ability to act rationally (as noted in Perspective 1). This underscores the perception that offenders who kill intimate partners are primarily expressive actors with low intent and little commitment to crime as a way of life. In responding to these killings, then, criminal justice officials may believe they are relatively powerless to deter such acts,³⁴ justifying the more lenient treatment of intimate killings. In other words,

³¹ William J. Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703, 712 (1967).

³² See Charles W. Thomas & J. Sherwod Williams, *Actors, Actions and Deterrence: A Reformulation of Chambliss's Typology of Deterrence*, in TREATING THE OFFENDER: PROBLEMS AND ISSUES 35 (Marc Riedel & Pedro A. Vales eds., 1977).

³³ Rapaport, *The Domestic Discount*, *supra* note 2, at 237.

³⁴ LUNDGAARDE, *supra* note 3, at 173-98.

they are perceived to be isolated events prompted by a loss of emotional control and, therefore, neither general nor specific deterrence are appropriate goals.

Perspective 4: Future Dangerousness

A second explanation for the association between intimacy and law highlights how criminal justice officials explicitly or implicitly evaluate the potential future dangerousness posed by defendants when allocating sanctions. Because criminal justice officials are responsible for protecting the public and reducing the volume of crime, events that they perceive to be isolated "crimes of passion" with little probability of re-occurring may not be considered deserving of severe sanctions.³⁵ In contrast, offenders who prey on strangers in public places are feared most by society³⁶ and, thus, tend to attract more severe criminal justice responses. The belief is that the courts need to concentrate on violence by strangers because such offenders are perceived to pose the most danger to the public.³⁷ The future dangerousness assumption, then, leads to the perception that violent offenders unlikely to re-offend pose little danger to the public and, thus, do not warrant severe sanctions.

As noted previously, offenders in cases of intimate violence are sometimes perceived to be otherwise peaceful individuals who responded to some type of provocation (see Perspective 2). As a result, devoting valuable court time to these defendants is believed to create an additional burden on an already overtaxed criminal justice system that should be focusing on punishing more dangerous criminals who prey on strangers.³⁸ Consistent with this, Miethe found that the source of disparate treatment based on degree of intimacy between victims and defendants actually stemmed from differential conceptions of "dangerousness."³⁹ His study showed that factors indicative of "dangerousness" such as being male, black, and using a weapon, were important when sentencing offenders who victimized strangers, but had no effect on sentences for offenders who knew their victims.⁴⁰ Miethe concluded that it was not images of culpability and

³⁵ *Id.*

³⁶ Joann L. Miller, Peter H. Rossi & Jon E. Simpson, *Felony Punishments: A Factorial Survey of Perceived Justice in Criminal Sentencing*, 82 J. CRIM. L. & CRIMINOLOGY 396 (1991).

³⁷ Robert C. Davis & Barbara E. Smith, *Crime Between Acquaintances: The Response of Criminal Courts*, 6 VICTIMOLOGY: INT'L J. 175, 176 (1981).

³⁸ *Id.*

³⁹ Miethe, *supra* note 3, at 590.

⁴⁰ *Id.* at 584-85.

provocation that lead to varying outcomes; rather, differential treatment arose from varying conceptions of “dangerousness.”⁴¹ The “future dangerousness” perspective, then, leads to the expectation that criminal justice responses to violent crime among intimates will be less severe than violent crime among non-intimates. While this perspective may appear similar to the previous discussion about deterrence, it has to do with perceptions of danger to the public, while the previous discussion pertains to perceptions about an offender’s susceptibility to deterrence.

Perspective 5: Maintaining Social Order

Also stemming from a concern for public protection, an explanation for the lenient treatment of intimate partner violence may draw from the overriding concern of any society (and, thus, its systems of formal social control) to maintain social order. According to this explanation, the state negatively sanctions violent acts that directly threaten overall public welfare or that interfere directly with the individual’s right to enjoy property. According to Lundsgaarde, how serious violence is perceived to be depends on the degree of threat posed to the social order.⁴² For example, homicides that involve police officers, firemen and public officials as victims generally and symbolically threaten the social order, so therefore, public sanctions against these killers may be particularly severe. Whether or not an act of violence is perceived to threaten the social order often depends, in large part, on the social distance between the victim and the offender. Sanctioning agents often see violence among intimate partners as posing less of a threat than killings among strangers. Lundsgaarde explains: “This is true in part because intimates form symmetrical social relationships that insulate them within a series of obligations subject to enforcement by social and psychological sanctions. The robber, rapist, killer, or even the self-styled terrorist is not restrained in his behavior by anything other than criminal sanctions.”⁴³

Thus, violence that arises from unsatisfactory interpersonal relationships is not perceived as dangerous to the maintenance of social order. Rather, such acts, which often take place primarily in the privacy of the victim’s or offender’s home, are commonly perceived to arise as a result of life’s stressful events. Therefore, defendants who victimize intimates are more likely to escape legal sanctioning or to be treated more leniently by the courts.

⁴¹ *Id.* at 590.

⁴² LUNDSGAARDE, *supra* note 3, at 140-41, 148-49.

⁴³ *Id.* at 141.

In contrast, “[t]he killer who chooses a stranger as his victim overtly threatens the preservation of social order.”⁴⁴ Therefore, violence by strangers is treated more seriously by legal officials because defendants in these cases are perceived to be more dangerous, unpredictable, and indiscriminate in their selection of victims.⁴⁵ Moreover, it is these types of offenders that members of society fear most, in part because of the perceived public nature and randomness of such crimes.⁴⁶ For example, as already noted, robbery homicide is more likely to be committed among strangers and in public places.⁴⁷ This type of crime interferes directly with an individual’s right to enjoy property. The belief that intimate partner violence does not threaten the social order leads to the expectation that criminal justice responses to violent crime among intimates will be more lenient than violent crime among non-intimates.

Perspective 6: Horizontal Crimes

A final explanation for the lenient treatment of intimate violence that stems from a concern for public protection also emphasizes the law’s purpose in maintaining social order. However, the emphasis is on the role of social stratification in determining both the threat posed to social order and, in turn, the severity of the criminal justice response. As Black has pointed out,⁴⁸ and others have documented,⁴⁹ crimes committed among victims and defendants with similar social ranks in society (i.e., horizontal crimes) are not viewed as seriously by legal officials as acts committed by defendants of lower social rank than their victims (i.e., upward crimes). This assumption about horizontal crimes leads to the expectation, then, that crimes among those of similar, or more particularly in lower, ranks will be treated more leniently because they are not perceived as a serious threat to the social order.

The relationship between defendants and victims may be associated with whether or not violent acts are perceived to be horizontal or upward crimes. That is, violence between intimate partners is more often perceived as horizontal because intimate relationships tend to be established among people of the same social and racial backgrounds. In fact, Ferraro and

⁴⁴ *Id.* at 140.

⁴⁵ *Id.* at 150.

⁴⁶ Jennie McIntyre, *Public Attitudes Toward Crime and Law Enforcement*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 34 (1967).

⁴⁷ Philip J. Cook, *Robbery Violence*, 78 J. CRIM. L. & CRIMINOLOGY 357, 365-66 (1987); see Riedel, *supra* note 20, at 248.

⁴⁸ See BLACK, *supra* note 1, at 13-31.

⁴⁹ See, e.g., AUSTIN T. TURK, CRIMINALITY AND LEGAL ORDER (1969).

Boychuk argue that it is the similarity in social rank of the victim and the defendant more than the intimate nature of their relationship that leads to the lenient treatment of these crimes.⁵⁰ They argue that this social and racial homogeneity is more important in law than the sexual hierarchy highlighted by many feminist legal scholars.⁵¹ As such, Ferraro and Boychuk argue that the law tends to maintain a patriarchal authority with distinct race and class boundaries.⁵² Violence that does not disturb these boundaries is less threatening to the dominant social order than violence that crosses them and, consequently, is less likely to be negatively sanctioned. They state that:

The purpose of this system is to maintain the social order. Crime that does not threaten this order will be treated leniently if at all. The vast majority of crimes of interpersonal violence vent anger and frustration at those closest at hand, rather than at structural sources of unemployment, poverty, and pollution. Rather than threaten the status quo, they keep it safe.⁵³

In contrast, the state is particularly concerned with stranger violence because this type of victimization is generally believed to be upward crime and feared most by members of the public.⁵⁴ Consequently, defendants who victimize intimate partners may be treated more leniently than those who victimize non-intimate partners because horizontal crimes are believed to pose little threat to the social order, and such crimes are assumed to involve defendants and victims who are closely related by blood or sexual ties and who share social, economic, and racial links.

C. FOCAL CONCERN 3: PRACTICAL CONSTRAINTS

The practical constraints of the criminal justice system, both at the organizational and individual level, also come into play in criminal justice decision-making. For example, organizational concerns of criminal justice

⁵⁰ Kathleen J. Ferraro & Tascha Boychuk, *The Court's Response to Interpersonal Violence: A Comparison of Intimate and Nonintimate Assault*, in DOMESTIC VIOLENCE: THE CHANGING CRIMINAL JUSTICE RESPONSE 209, 223 (Eve S. Buzawa & Carl G. Buzawa eds., 1992).

⁵¹ Compare *id.* at 223-24, with Susan Edwards, *A Socio-Legal Evaluation of Gender Ideologies in Domestic Violence Assault and Spousal Homicides*, 10 VICTIMOLOGY: INT'L J. 186 (1985).

⁵² Ferraro & Boychuk, *supra* note 50, at 223.

⁵³ *Id.* at 224.

⁵⁴ JOHN E. CONKLIN, ROBBERY AND THE CRIMINAL JUSTICE SYSTEM (1972); MARC RIEDEL, STRANGER VIOLENCE: A THEORETICAL INQUIRY (1993); McIntyre, *supra* note 46. But see Marc Ouimet & Edward J. Coyle, *Fear of crime and sentencing punitiveness: Comparing the general public and criminal practitioners*, 33 CAN. J. CRIMINOLOGY 149, 159-60 (1991).

actors may include ensuring the stable flow of cases, maintaining working relationships among courtroom actors, and being sensitive to local and state correctional crowding and resources.⁵⁵ In addition, criminal justice actors may also have individual concerns about further disruption of familial ties, the offender's ability to do time, health conditions or special needs.⁵⁶ Moreover, because judges may often be accountable for their sentencing decisions within the framework of local politics and community norms, they are likely to be sensitive to the impact of offender recidivism on the court's standing in the community.⁵⁷ The final four perspectives highlight how assumptions, beliefs or stereotypes about intimacy and violence may relate to organizational and individual concerns of criminal court personnel and, therefore, may lead to more lenient treatment for some types of offenders or offenses.

Perspective 7: Frequent Crimes

Assessments of offense or case seriousness are often made in relation to the kinds of cases that are regularly encountered in a particular social control setting. In other words, the decision to treat a particular case as an instance of something serious depends, in part, on the overall range and character of cases processed by a particular agent or agency. The composition of the total collection of cases can be thought of as a "contextual gestalt,"⁵⁸ within which there is a "sliding scale of severity."⁵⁹

⁵⁵ Steffensmeier, Ulmer & Kramer, *Interaction of Race*, *supra* note 5, at 767 (citing ROY B. FLEMMING, PETER F. NARDULLI & JAMES EISENSTEIN, *THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES* 23-26 (1992)); *see also* Jo Dixon, *The Organizational Context of Criminal Sentencing*, 100 AM. J. SOC. 1157, 1162 (1995); Steffensmeier, Ulmer & Kramer, *Interaction of Race*, *supra* note 5, at 766-69; Jeffrey Ulmer, *The Organization and Consequences of Social Pasts in Criminal Courts*, 36 SOC. Q. 587, 589-90 (1995); Jeffrey Ulmer & John Kramer, *Court Communities Under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity*, 34 CRIMINOLOGY 383, 402-04 (1996).

⁵⁶ KATHLEEN DALY, *GENDER, CRIME AND PUNISHMENT* 9-10 (1994); JOHN HOGARTH, *SENTENCING AS A HUMAN PROCESS* (1971); Darrell Steffensmeier, *Assessing the Impact of the Women's Movement on Sex-based Differences in the Handling of Adult Criminal Defendants*, 26 CRIME & DELINQ. 344, 349-53 (1980); Steffensmeier, Kramer & Ulmer, *Age Differences*, *supra* note 5, at 599.

⁵⁷ JAMES EISENSTEIN, ROY B. FLEMMING & PETER F. NARDULLI, *THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS* (1988).

⁵⁸ Robert M. Emerson, *Holistic effects in social control decision-making*, 17 LAW & SOC'Y REV. 425, 429 (1983).

⁵⁹ *See* ELIOT FRIEDSON, *PROFESSION OF MEDICINE: A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE* 257 (1970) (arguing that doctors make professional decisions about severity based on diagnostic assessments relative to other cases that they currently have under examination).

Using this hypothetical scale, criminal justice actors make judgments about particular cases that come before them. The need for such a scale may arise out of a need to deal with large numbers of cases in an expedient manner under often rigid time constraints.

In the criminal justice system, judges, lawyers, and police frequently use descriptive categories and concepts to organize their daily activities and keep the "wheels of justice" moving. As a result, in the course of routinely interacting with defendants, criminal justice officials gain knowledge "of the typical manner in which offenses of given classes are committed, the social characteristics of the persons who commit them, the features of the settings in which they occur, the types of victims often involved and the like."⁶⁰ This process of classification results in the construction of typical or "normal" crimes through which criminal justice officials perceive and respond to cases.⁶¹ Consequently, decisions made by criminal justice officials are often based on tacit understandings related to or based upon background expectancies of crimes, victims and defendants.⁶² According to this perspective, then, cases that are frequently encountered by criminal justice officials are more likely to be classified as "normal" crimes and perceived as less serious in nature than other offenses or types of offenders encountered less frequently. These "normal crime" categories may be used to facilitate the legal process and, as a result, lead to more lenient treatment of some types of defendants and some types of violent crime.

One characteristic commonly used to classify crimes is the relationship between a defendant and his victim. Waegel found, for example, that "the earliest piece of information sought out [in a case] and the feature . . . given the greatest interpretative significance [by legal actors] is whether the offense occurred between parties who were in some way known to one another prior to the incident."⁶³ One reason for this is that the relationship between a victim and a perpetrator is seen as a core feature of the routine offense pattern in criminal cases. A bar killing, for instance, may more likely be viewed as a routine homicide if the victim and perpetrator were acquainted. A "known" relationship between the parties involved elicits assumptions or stereotypes about "normal" bar fights between acquaintances as events that often do not have clearly defined victims or offenders and usually involve the consumption of alcohol, drugs, or both.⁶⁴

⁶⁰ Sudnow, *supra* note 7, at 259.

⁶¹ *Id.* at 260-63.

⁶² Edwards, *supra* note 51, at 196.

⁶³ William B. Waegel, *Case Routinization in Investigative Police Work*, 28 SOC. PROBS. 263, 270 (1981).

⁶⁴ *See id.* at 270-71.

Similarly, an agency that deals regularly with homicides not only becomes familiar with, hardened to, and less affected by such cases, but also begins to make more refined and varied distinctions among types of “serious” or “normal” homicides.⁶⁵

Because interpersonal violence generally occurs between defendants and victims who know each other,⁶⁶ and defendants who are known to their victims are more likely to be apprehended and arrested than those who are strangers,⁶⁷ the proportion of cases involving defendants and victims who know each other that enter the criminal justice system is far higher than cases among strangers. For example, in Canada in 2004, of those homicide cases that were solved (i.e., an offender was identified), only 15% of the victims had been killed by strangers.⁶⁸ According to this perspective, then, cases that involve victims and defendants known to each other may be treated more leniently because criminal justice actors encounter these cases more frequently in the daily processing of crime, resulting in descriptive categories or concepts being used to classify them as “normal” crimes.

Perspective 8: Informal Versus Formal Controls

Another perspective that emphasizes the practical constraints of the criminal justice process as a source for leniency in cases of intimate partner violence draws attention to the inverse relationship that is perceived to exist between formal and informal social controls. According to this perspective, law or governmental social control is only one form of social control.⁶⁹ Other more informal social controls also appear in social life—within families, friendships, neighborhoods, organizations, and groups of all kinds. According to Black, “the quantity of law increases as the quantity of social control of these other kinds decreases, and vice versa.”⁷⁰ As such, this assumption supports the belief that, where informal controls are more visible, formal controls will likely be minimal or absent.

⁶⁵ *Id.* at 272-73.

⁶⁶ Carolyn R. Block & Anitgone Christakos, *Intimate Partner Homicide in Chicago over 29 Years*, 41 CRIME & DELINQ. 496, 496 (1995); Sharon Moyer, *Race, gender, and homicide: Comparisons between aboriginals and other Canadians*, 34 CAN. J. CRIMINOLOGY 387, 390 (1992).

⁶⁷ SYLVAIN TREMBLAY, JURISTAT: CAN. CTR. FOR JUSTICE STATISTICS, CRIME STATISTICS IN CANADA, 1999 (2000); Davis & Smith, *supra* note 37, at 176.

⁶⁸ MIA DAUVERGNE, JURISTAT: CAN. CTR. FOR JUSTICE STATISTICS, HOMICIDE IN CANADA, 2004 1, 7 (2005).

⁶⁹ BLACK, *supra* note 1, at 2-3; HORWITZ, *supra* note 2, at 2.

⁷⁰ BLACK, *supra* note 1, at 6; *see also id.* at 107.

Whether formal or informal social controls are present is determined by various social structural characteristics.⁷¹ For the purpose of this paper, the key dimension is social morphology or “the distribution of people in relation to one another.”⁷² Morphology can be defined by interaction networks, relational intimacy, and integration with others in society.⁷³ Black argues that law will be most visible where there is little interaction, intimacy, or integration; that is, where informal social controls are weakest.⁷⁴ Despite the growing presence of law among intimates, those who share more distant relationships are still subject to more legal control because such relationships involve greater relational distance. Black argues that the closer the relational distance in crimes of interpersonal violence, the less severe the response by formal social control agencies.⁷⁵ For example, in the midst of strangers, law will reach its highest level because informal social controls are absent. In contrast, little law enters the domain of intimate partner relations, where informal social controls are perceived to be dominant. In some cases, Black argues, intimacy may provide immunity from law.⁷⁶

Furthermore, when intimate disputes do enter the legal realm, what happens may depend upon the *degree* of intimacy that exists between the parties. For instance, Black argues that when a man kills or beats his wife, the longer they have been married, the less serious his crime will be perceived within the legal system. In short, the longer their relationship, the closer their relational distance, and so less law is required.⁷⁷ In contrast, if a man is not bound by the legitimacy of a marriage license, his crime may be seen as more serious. In summary, this perspective leads to the expectation, then, that criminal justice responses to violent crime among intimates will be less severe than violent crime among non-intimates. This, again, supports the argument that men who are estranged from their female partners will be treated more strictly than those offenders who are still in a relationship with the victim because the former can no longer hide behind the legitimacy of marriage.⁷⁸

⁷¹ For review, see *id.*

⁷² *Id.* at 37.

⁷³ *Id.*

⁷⁴ See *id.* at 37-59.

⁷⁵ *Id.* at 40-44.

⁷⁶ *Id.* at 42.

⁷⁷ *Id.* at 44.

⁷⁸ Rapaport, *The Domestic Discount*, *supra* note 2, at 238.

Perspective 9: Legacy of Patriarchal Norms

Another perspective that highlights the constraints of the criminal justice process suggests that these “constraints” are only *perceived* to exist by criminal justice officials because of the legacy of patriarchal legal doctrines that contained an inherent sexual hierarchy. Early feminist researchers argued that the law’s presence (or absence) in the domestic sphere stemmed from traditional beliefs about the nuclear family and its role and function within larger society.⁷⁹ The home was viewed as an enduring, loving, protective environment that shielded its members from the evils of the outside world. Within this environment, nineteenth-century legal doctrines subordinated a wife to her husband, whose responsibility it was to keep the family in order. Historically, under common law, the legal existence of a woman was suspended when she married. This meant that she could not appeal to the law for protection from acts by her husband that would otherwise be criminal. As a result, “a husband had a right to force sexual intercourse upon his wife, to beat her, and to confine her.”⁸⁰ In the nineteenth-century, the Married Women’s Property Act was meant to improve the civil status of women; however, the criminal law continued to defer to the authority of men in the domestic sphere.⁸¹

Today, feminists argue that the rhetoric of marital equality conceals how similar attitudes, beliefs, and practices continue to exist.⁸² Assumptions about hierarchy and control in marriage and other types of intimate unions continue to reinforce entrenched cultural notions that support or ignore the use of violence between intimate partners.⁸³ These cultural notions are, in turn, perpetuated through the language of law. As a result, despite the increasing recognition that domestic violence is a serious crime, the privacy of the home continues to operate within the legal system as an ideological rationale for refusing to protect abused women.⁸⁴ This perspective argues that the historical separation of public and private (or domestic) spheres and the varying role of law in each served, and continues

⁷⁹ Martha A. Fineman, *Preface* to *THE PUBLIC NATURE OF PRIVATE VIOLENCE*, *supra* note 2, at xi, xiii.

⁸⁰ Rapaport, *The Domestic Discount*, *supra* note 2, at 238 (quoting WILLIAM BLACKSTONE, 2 *COMMENTARIES* (1809)).

⁸¹ *See id.* (discussing the Married Women’s Property Act).

⁸² Fineman, *supra* note 79, at xiv-xv; Isabel Marcus, *Reframing “Domestic Violence”*: *Terrorism in the Home*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE*, *supra* note 2, at 11, 22-23.

⁸³ Fineman, *supra* note 79, at xi-xvii.

⁸⁴ Elizabeth M. Schneider, *The Violence of Privacy*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE*, *supra* note 2, at 36, 36.

to serve, as the mechanism through which criminal justice officials downplay the seriousness of intimate violence as a social problem.

Perspective 10: Preserving the Family Unit

Related to the previous discussion, a final perspective contends that the increasing reliance on the criminal justice system to deal with violence between intimate partners actually contradicts what legal actors perceive to be their mandate. This contradiction arises because criminal justice officials believe they should try to preserve the familial unit when responding to cases of intimate violence that come before them. As such, the increasing role of the courts in dealing with intimate violence may not be perceived by criminal justice actors as appropriate, despite the increasing number of intimate disputes that are entering the system. While research examining this issue is limited, interviews with criminal justice officials suggest that they are reluctant to proceed with cases when they stem from arguments between partners or lovers.⁸⁵ Some judges indicate that they often feel imprisonment would serve no purpose and might, in fact, disrupt relationships further if a defendant was severely sanctioned for what is often perceived to be an overreaction to personal or intimate grievances.

Therefore, based on this belief, intimate partner violence may be treated more leniently because legal actors do not want to disrupt familial relationships further by responding to disputes that they feel are not appropriate for legal intervention in the first place. Thus, when cases involving intimate partners are not dismissed altogether (which is increasingly difficult with the implementation of pro-arrest and pro-prosecution policies), these cases often receive lighter (or non-custodial) dispositions than cases that involve victims and defendants who share more distant relationships. In fact, it has been argued that the major pattern of responses to crimes between intimate partners is a preference to keep such cases out of the legal system.⁸⁶

III. HOW VALID ARE PERSPECTIVES ABOUT INTIMACY AND VIOLENCE?

The ten perspectives described above highlight various assumptions, beliefs, or stereotypes about the relationship between a defendant and his victim and characteristics about violent events. These perspectives also identify how the cues prompted by these assumptions, beliefs, or stereotypes might lead to more lenient criminal justice treatment of intimate

⁸⁵ E.g., GOTTFREDSON & GOTTFREDSON, *supra* note 1, at 123; VERA INST. OF JUSTICE, *supra* note 3, at 19-20.

⁸⁶ GOTTFREDSON & GOTTFREDSON, *supra* note 1.

violence and, more specifically, intimate partner violence. All of them lead to the expectation that a defendant who victimizes an intimate partner will (and possibly should) be treated more leniently than a defendant who victimizes a non-intimate partner. While it is important to examine whether adherence to such perspectives do actually affect criminal justice decision-making, it is equally important to determine whether such views are valid in the first place, or whether they stem from conventional criminological or sociological wisdom that has not been supported empirically. To date, however, the lack of case detail often required for such an analysis and the lack of any consistent measures for some of the variables that capture these perspectives have prevented such an examination.

To begin to address this gap in the research, I briefly explore the validity of the first key perspective related to the role of mitigating emotions. Recall that research has shown that intimate partner violence is often portrayed as arising from a loss of control or the presence of strong emotion—the typical “crime of passion” or “hot-blooded” crime. I argue that, if this assumption is valid, cases of intimate partner violence are less likely to have evidence of premeditation or intent than cases of non-intimate partner violence because the ability to preplan and deliberate has traditionally been perceived to preclude the presence of strong emotion or loss of control.

Using 108 cases of homicide, I assess the validity of the mitigating emotions perspective by examining whether the existence of premeditation does actually differ across the two relationship types—intimate partner and non-intimate partner.⁸⁷ This data was drawn from a larger dataset documenting all homicides that were resolved by the courts in Toronto, Ontario, between 1974 and 1996.⁸⁸ In this larger dataset, information was gathered from coroner’s files, police records, crown attorney files, and newspaper archives for close to one hundred variables, including victim and offender characteristics, the circumstances surrounding the crime, and the criminal justice outcome. The use of more than one data source allowed for the cross-referencing and validation of information between sources,

⁸⁷ Recall that I define intimate partner homicide as those killings that occur between current or former legal spouses, common-law partners or dating couples. Non-intimate partner homicide is defined as those killings that occur between family members (not including spouses), friends, acquaintances and strangers. See *supra* note 6. I acknowledge that both categories—“intimate partner” and “non-intimate partner”—include a variety of relationships; however, for the purpose of this analysis, I argue that intimate partner homicides are most closely associated with those killings that are typified as “crimes of passion.” Thus, comparing these cases with other types of killings should be the most informative.

⁸⁸ See Dawson, *supra* note 3, at 111-12.

leading to more confidence in the coding process. However, because files vary in the amount and type of detail (as is often the case with criminal justice records), the ability to collect detailed information for some variables was limited. For this reason, a smaller sample was used to examine the existence of premeditation.

The 108 cases examined in this paper comprise what Daly refers to as a “deep-sample” of cases.⁸⁹ In this paper, a deep-sample of cases are those selected according to criteria of similarity for which more detailed information is collected and compared. Using this sample, I compare the relative frequency of “evidence of premeditation” in the fifty-four cases of intimate partner homicides to the fifty-four cases of non-intimate partner homicides. Before describing how “evidence of premeditation” is measured, I discuss how the 108 cases were selected for analysis from the larger dataset.

A. SELECTING THE DEEP-SAMPLE

One advantage of quantitative analyses of large data sets is the ability to discern patterns among a large number of cases while holding constant the effects of other factors relevant to the outcomes being examined. However, in-depth details about the circumstances that surround a crime are often not available in large datasets because of the time required to gather such information for a large number of cases. As a result, it is often not possible to consider the effect of a number of important variables that may be relevant to criminal justice outcomes in cases of interpersonal violence. For example, while evidence of premeditation does affect the severity of the criminal justice response to violent crime, this legal factor is seldom captured in studies that examine determinants of case outcomes. In contrast, because qualitative (or case-based) analyses generally focus on a smaller number of cases, the researcher can gather greater detail on the crime, the defendant, the victim, and the criminal justice process. These qualitative studies can bring depth and complexity to the meaning of crime and punishment by considering the effect of factors that have traditionally not been available for analyses in larger datasets. It is important, though, that similar cases are compared, and this comparison can be achieved using the deep-sample approach.

To select the deep-sample, I had several considerations. I wanted to match “similar” cases that varied only by the relationship between the defendant and his victim. Therefore, drawing from Daly,⁹⁰ I designed and

⁸⁹ KATHLEEN DALY, *GENDER, CRIME AND PUNISHMENT* 22-23 (1994).

⁹⁰ *Id.*

implemented a decision protocol to select the deep-sample cases systematically. First, I determined the number of potential pairs of cases—comparing intimate partner to other relationship types—whose charges at arraignment and conviction were the same, suggesting that similar circumstances surrounded the killing, at least on the surface. Because there were fewer cases involving intimate partners, the maximum number of potential pairs was equivalent to the number of available cases involving intimate partners for each charge-conviction combination (i.e., murder charge-manslaughter conviction in both cases or murder charge-murder conviction in both cases and so on).

According to the above statutory charge-conviction criteria, I devised the following selection-decision protocol to achieve a matched sample of cases: (1) gender of defendant; (2) gender of victim; (3) mode of conviction (guilty plea versus trial); and (4) the time period in which the case was resolved through the courts (1984 and earlier; 1985 and later).⁹¹ Once cases were matched using these criteria, I selected cases in which the defendants' prior criminal record and age were similar. For example, when intimate partner or other relationship pairs had identical statutory charges and convictions, I then picked those in which the gender of the defendant and the victim, the mode of conviction, and the year of disposition were the same. From these cases, I attempted to match according to the remaining two factors: the defendant's prior record and age.⁹² Throughout the process of selecting cases, I did not know the sentence that a defendant received. After selecting the deep-sample cases, I collected additional, more detailed information that would allow a determination of whether there had been evidence of premeditation in each case. I turn to a description of the measure of premeditation below.

⁹¹ Because significant changes have taken place during the past several decades in North America with respect to the treatment of intimate partner violence by the courts, similar cases needed to be selected from similar legal and social environments for valid comparisons. While this break period may seem somewhat arbitrary, the early 1980s witnessed the beginning of significant legal and policy changes with respect to intimate partner violence.

⁹² I also attempted to make sure that victims' ages were similar, i.e., that one victim was not a child and the other victim an adult, even though this factor was not included in the original criteria because killings in which children are the victim are often treated severely by the courts. After matching based on the selected criteria, I noticed that various pairs were exact matches, but that the victims differed substantially in age. For example, in one matched pair, the victims were both female, but one was thirty-five years old and one was two years old. Because of the different dynamics involved in child killings, I decided to use victim age as an additional criterion for matching. Also, because one case in each pair always involved sexual intimates, there were no victims under age seventeen and no defendants under the age of sixteen years in the deep-sample.

B. DETERMINING THE EXISTENCE OF PREMEDITATION

The existence of premeditation or intent has historically been seen as a factor that makes a murder more serious.⁹³ The rationale is that there is an added “moral culpability to a murder that is planned and deliberate which justifies a harsher sentence . . . by virtue of planning and deliberation with relation to the taking of a human life.”⁹⁴ However, the meaning of the term has been the subject of extensive discussion in case law and has not yet been discussed to any extent in criminal justice research. Inherent in the notion of premeditation is the notion of intent or *mens rea* that distinguishes between murder and manslaughter. For example, if it can be proven that the defendant intended to kill the victim, the defendant’s culpability is sufficient to warrant a murder conviction. However, as described in the discussion around the role of mitigating emotions,⁹⁵ killing out of anger or some other strong emotion can mitigate a defendant’s culpability because his emotion is perceived to undermine the rational capacity required for planning and deliberation.

Drawing from work by Wallace,⁹⁶ I use a modified version of indicators that signify varying degrees of premeditation or intent. The existence of one or more of these indicators in a homicide suggests that the act may have been a “cold-blooded” rather than a “hot-blooded” crime thereby precluding the presence of mitigating emotions. The indicators are as follows: (1) the offender followed or laid in wait for an opportunity to kill the victim; (2) the offender broke into the victim’s home; (3) the victim was sleeping when killed; (4) the offender made previous attempts or threats to kill the victim; (5) the offender brought a gun to the home or location of the victim; (6) the offender purchased a gun or weapon immediately prior to the killing; (7) the offender had written a suicide note indicating intent to kill himself and the victim; and, finally, (8) other indicators, not including the above, that occurred only once or twice (such as, changing a will, making funeral arrangements, taking out a life insurance policy, or contracting out the killing).⁹⁷ Using the 108 deep-

⁹³ ISABEL GRANT, DOROTHY CHUNN & CHRISTINE BOYLE, *THE LAW OF HOMICIDE* 4-31, 4-32, 4-34, 4-35 (1998).

⁹⁴ Canada Criminal Code, R.S.C., § 214(2) [§ 231(2)] (2000); GRANT, CHUNN, & BOYLE, *supra* note 93, at § 7, 8.

⁹⁵ *See supra* Table 1.

⁹⁶ ALISON WALLACE, *HOMICIDE: THE SOCIAL REALITY* 168-70 (1986).

⁹⁷ *See infra* Appendix A for sample crime narratives that illustrate how each indicator demonstrates some degree of premeditation and/or intent. It could be argued that some of the above indicators would be more common in cases of intimate partner violence (i.e., victim sleeping when killed, previous threat to kill the victim). However, it is equally likely that other indicators would be more common among those with little to no prior relationship

sample cases, I coded whether there was evidence of premeditation or intent and what type(s) of evidence existed based on these indicators.⁹⁸

C. RESULTS

Contrary to the view that intimate violence is the typical “crime of passion,” evidence of premeditation and intent was *more* frequent among those cases that involved intimate partners (twenty-two of fifty-four cases or 41%) than among non-intimate partner homicides (seventeen of fifty-four cases or 31%) in this sample of cases. While this difference is not statistically significant, it does challenge the traditional view that acts of intimate violence are primarily hot-blooded events.⁹⁹ In addition, despite the greater evidence of premeditation in cases of intimate partner violence, Table 2 shows that those defendants who killed intimate partners were *more* likely to receive shorter sentences in the majority of pair-wise comparisons (44% of the cases) than defendants who killed other types of victims or similar sentences to such defendants (32% of the cases). Simply put, evidence of premeditation—recognized as a legal variable in criminal justice decision-making—did not appear to lead to more serious sentences for many of the intimate partner offenders in this exploratory analysis; in fact, more serious sentences resulted for intimate partner killers in less than one-quarter of the cases. While I recognize that this finding is based on a small number of cases, it still challenges the view that intimate partner killings are primarily spontaneous crimes of passion, but shows that shorter sentences still result.

(i.e., followed/laid in wait, victim lured to their death). The underlying point, however, is that many actions that signify premeditation by offenders who kill intimate partners have traditionally not been perceived as such and have served to support the assumption that these crimes usually arise out of a loss of emotional control.

⁹⁸ I recognize that assessing the offender’s intent or documenting the existence of premeditation in homicide cases is difficult given that the victim and, sometimes, the offender are dead (as in the case of homicide-suicide). As a result, suppositions about the underlying motivations and circumstances leading up to the event are *post facto* and often speculative. As such, the protocol adopted for classifying “evidence of premeditation” was conservative. If the information available clearly demonstrated evidence of premeditation as outlined by the various indicators, the case was classified as having “evidence of premeditation.” If there was no mention of evidence indicating premeditation, the case was classified as having “no evidence of premeditation.” If available information suggested that premeditation may have existed, but the evidence was inconclusive, it was coded as having “possible evidence of premeditation.” This coding process resulted in a three-category variable that was later collapsed into a dichotomy by combining “no evidence of premeditation” with “possible evidence of premeditation” and comparing these cases to those in which there was clear evidence of premeditation.

⁹⁹ The lack of statistical significance is not surprising given the small sample size.

Table 2

Punishment outcomes in pair-wise analysis of crime seriousness in deep-sample data: Toronto, Ontario, 1974-1996

Punishment outcome	# of Pairs	% Sample	Mean sentence length (years)		
			Total	Intimate partner	Other
Same sentence received	17	32	16.12	—	—
Sentence shorter for intimate partners	24	44	10.35	8.21	12.49
Sentence longer for intimate partners	13	24	8.60	10.46	6.73
Total	54	100			

V. DISCUSSION AND CONCLUSION

The primary purpose of this paper was to document existing perspectives about intimacy and violence and to describe how these various perspectives, including assumptions, beliefs, or stereotypes, might serve to justify criminal justice leniency in cases of intimate partner violence compared to the treatment of other types of violent crime. As a secondary objective, I wanted to provide an example of how one might assess the validity of these perspectives by focusing on the role of mitigating emotions. With respect to the first objective, using the focal concerns framework, I demonstrated that there are a number of perspectives about intimacy and violence that can lead to particular expectations about how and why these crimes occur. I have also shown how these perspectives can be used to justify differential treatment that might lead criminal justice actors and the general public alike to believe intimate violence *should* be treated more leniently than other types of crimes.

With respect to the second objective, I began to address a gap in the research that has yet to systematically examine the validity of the common assumptions that surround intimacy and violence. My exploratory analysis demonstrated that we need to be cautious about adhering to the criminological or sociological wisdom that assumes certain case characteristics are present (or absent) when violence occurs between victims and offenders who share specific relationship types and, in particular, an intimate partner relationship. Contrary to expectations about intimate partner violence, my analysis showed that premeditation or intent

occurred with greater frequency in cases that involved intimate partners compared to those that involved non-intimate partners. Despite the greater evidence of premeditation, however, those who killed intimate partners received more lenient sentences than the comparison group in the majority of cases. While my sample is small, it does provide more case detail than larger datasets and is, therefore, able to examine a variable—premeditation—for which information is rarely available. My finding leads to the question of why, given the greater role of premeditation in intimate partner homicides, do more lenient sentences result compared to cases of non-intimate partner homicide, keeping in mind that similar cases were matched and compared.

With an exploratory analysis such as this, concrete conclusions are not possible, but my goal here is to underscore the need for future research that assesses the validity of this and other assumptions while, at the same time, examining their impact on criminal justice decision-making. If, for example, one or more of the assumptions described above are valid and found to play a role in criminal justice decisions on punishment outcomes in cases of violent crime, then we have partially explained and supported what has been “sociological wisdom” to date—the differential legal treatment of violent offenders who share various types of relationships with their victims. If, however, the validity of one or more assumptions is challenged, as was the case in this analysis, and it is found that these same assumptions affect criminal justice responses to these crimes, it becomes increasingly important that we begin to question their role in the criminal justice processing of violent crime.

To date, few studies have systematically examined whether there have been changes in criminal justice attitudes during a period of significant social change in response to intimate partner violence. In other words, we have yet to examine whether traditional assumptions about intimacy and violence—whether valid or not—continue to reign in the criminal justice system despite three decades of social and legal change prompted by feminists as part of the domestic violence movement. Criminal law recognizes that there are different degrees of seriousness in cases of violent crime as emphasized by the focal concerns framework. Determining how to assess whether violence is similar in both a social and a legal context (warranting similar punishments) and what factors may be important when making such comparisons remains an issue that needs to be explored. While this study was able to consider the role of one factor that may determine different degrees of defendant culpability, it can be considered only a first, tentative step in understanding the role of various legal dimensions that may be important when assessing culpability and how it

relates to other characteristics of the crime (in this case, victim-defendant relationship).

If, as Lundsgaarde argues,¹⁰⁰ the way in which criminal justice actors differentiate between lawful and unlawful violence stems from the custom or culture within which such legal decisions are made, so too do “cultural” images of what is a premeditated crime, what constitutes victim provocation, and so on. The questions that need to be addressed in future social science research, then, are what represents reliable indicators of these variables and how can this data be systematically collected in future studies. Traditionally, as noted above, data on these legal factors have been largely absent from empirical research on the criminal justice process despite the recognition that they play an integral role in the processing of violent crime. There may be two related reasons for this absence. First, there is little guidance about how we should measure these variables (i.e., should social science indicators adhere to legal notions of what is meant by these factors and, if not, what are some valid indicators that can be used by social scientists). A second reason may stem from the number of obstacles often faced when attempting to collect information about these variables, including the amount of time required to collect detailed information for individual cases. Whatever the reason, social science researchers need to begin to search for more systematic ways to collect these data, not only because of the legal relevance of these factors in determining punishment for crimes, but because of the way in which these elements may have become associated with common assumptions about interpersonal violence that have yet to be supported by empirical research.

¹⁰⁰ LUNDSGAARDE, *supra* note 3, at 147-48.

Appendix A¹⁰¹

Indicator #1: *The offender followed or laid in wait for an opportunity to kill the victim.*

The victim and offender had been married but were separated for some time. The offender had previously threatened and pestered the victim and her boarders. A restraining order was in effect, prohibiting the offender from coming near the victim or telephoning her at home. Police were in the process of investigating a breach of this order at the time of the killing. On the morning of her death, as the victim left for work, the offender was waiting outside her home with a gun. He chased her down and shot her in front of several witnesses, mostly children waiting for a school bus. The offender then turned the gun on himself. (Case 9113)

Indicator #2: *The offender broke into the victim's home.*

The victim and the offender were married but separated about eighteen months prior to the killing. The offender continually confronted, harassed and threatened to kill the victim and was charged and convicted for his actions. Later, the offender threatened to kill the victim's new partner, and this threat was also reported to the police. The police were investigating this incident at the time of killing. On the night of the incident, the victim and her new common-law partner were asleep when the offender broke into their home by shooting through the door. The offender entered the bedroom and shot both the victim and her new partner. The offender's son witnessed the shootings. The offender left a suicide note and a will. (Case 9203)

Indicator #3: *The victim was sleeping when she was killed.*

The victim and the offender were separated and in the process of divorcing at the time of the homicide. The offender sometimes stayed at the victim's home. On the night the victim was killed, the offender did not stay the night, but entered the house unheard after the victim and her children went to bed. He killed the victim while she was asleep. The children ran into the victim's bedroom after they heard two shots. They found both parents dead. (Case 7558)

¹⁰¹ As discussed *supra* note 97, these crime narratives illustrate how each indicator demonstrates some degree of premeditation and/or intent. This is true despite that in each case, the offender eventually commits suicide: a fact pattern that does not apply to the actual cases analyzed in this study.

Indicator #4: *The offender made previous attempts or threats to kill the victim.*

In this case, both the victim and the offender died in a house fire. The fire was extensive and destroyed everything, including their bodily remains. Investigators determined that this was a homicide-suicide. The offender killed the victim, set fire to the house, and then killed himself. Some family members said the offender caught the victim with another man some time before the incident and was obsessed about this event. He allegedly told a friend he was going to end it all, take the victim with him and make sure nobody got the house. Police reports indicate that friends and neighbors felt the offender was an alcoholic, had a bad temper and physically abused the victim in the past. The victim's mother saw bruises on the victim on several previous occasions. (Case 8749)

Indicator #5: *The offender brought a gun to the home or location of the victim.*

The victim and the offender had been separated for about nine months. The victim was at a local bar with the second victim of the crime (a male). The offender came into the bar and, shortly after, the victims left. They drove a friend home and then the female victim drove her male friend to his father's farm. The offender followed them there. When they stopped, the offender walked up to the vehicle and ordered the victims out of the vehicle. When they refused to get out, he shot them through the window. Two hours later, he shot himself. The offender was reported to be both jealous and possessive and had threatened to kill the female victim if he could not have her. (Case 8243, see also scenario for Indicator #1)

Indicator #6: *The offender purchased a gun or weapon immediately prior to the killing.*

The victim in this case had been missing for three days before her body and that of the offender, her boyfriend, were found. She and her boyfriend had gone on a picnic and failed to return. The boyfriend had been depressed, having morbid thoughts and suicidal notions, primarily because of school and family pressures. The victim had given notice to her employer that she was quitting her job because she and her boyfriend were to be married soon. The offender had purchased a gun two days before the bodies were found. He killed her and then turned the gun on himself. (Case 7804)

Indicator #7: *The offender had written a suicide note indicating intent to kill himself and the victim.*

On the afternoon of the killing, the victim's ex-husband received a message on his answering machine that his ex-wife was dead. The voice was muffled, and he did not recognize who the caller was. At the same time, the victim's daughter returned home and found a suicide note. Her natural father, the victim's ex-husband, called while she was there, telling her of the message he received and ordered her to leave the house immediately. The offender, who was the second husband of the victim, had left a note indicating that his decision to commit suicide was the result of debts, bills and financial problems. He wrote that he had to kill his wife because her health would suffer if he killed only himself. It was reported that the offender had called the victim at work, told her he was having a hernia attack (later determined to be non-existent), picked her up at work, brought her home, shot her and then himself. (Case 8834)

Indicator #8: *There were other indicators, not including the above, that occurred only once or twice (such as changing a will, making funeral arrangements, taking out a life insurance policy, or contracting out the killing).*

Witnesses claimed that the victim and the offender fought like "cats and dogs." They were in the process of getting a divorce when the homicide occurred. The offender had made several comments in the weeks prior to the incident regarding "it being all over." He also saw a lawyer and made a new will. The offender told a friend that there would be no court case (with respect to divorce and/or property settlement), but only two pine boxes. The offender strangled the victim with a vacuum cleaner cord and then stabbed himself. The victim's son found her body. (Case 8538)

