Victimisation, Moral Panics and the Distortion of Criminal Justice Policy: A Reply to Richard Harding

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Introduction

I have been asked by the editors of the journal to write a commentary responding to Richard Harding's review article on the book *Towards a Critical Criminology* by Ezzat Fattah. I am reluctant to do so for three reasons. I fear that my commentary will inspire others to write further reviews or commentaries on my commentary of Harding's review of Fattah's book thus generating a forest destroying cycle of commentaries upon commentaries. Secondly although Professor Harding's review is only 8000 words in length, it would require a book to respond adequately to the range of issues raised in his sweeping and controversial critique of "the victimisation industry". Finally, I am reluctant to enter into a public debate with Professor Harding, whose work I have admired over many years.

I have, however, been stung into writing by the sheer scope and provocativeness of some of the claims made. I have been deliberately selective in choosing only certain issues upon which to comment. There are issues raised in the review not addressed here that others are better qualified tc discuss.

I share Professor Harding's concerns in relation to many of the issues discussed and the arguments presented in the review essay. He quite properly draws attention to some of the deficiencies and dangers that may accompany the growth of victimology and the growth of the victim's movement. Ineffectual and harsh penal laws have been introduced in several Australian jurisdictions on the grounds that the criminal justice system is too soft, biased in favour of offenders and does not give the victims of crime adequate protection. He cites the recent example of the laws introduced in Western Australia to deal with recidivist juvenile offenders. Harding also correctly points out that most offenders and victims come from similarly disadvantaged backgrounds and that effective criminal justice policies must deal with this disadvantage in order to have any impact on levels of crime.

However the lack of specificity in his analysis does not enable the recognition of some of the valuable findings arising out of victim oriented research and thus his account of current trends in research and debate in criminology is ultimately limited. In particular the lack of specificity leads him to the unsustainable conclusion that attention to the victim perspective distorts debate on crime and aspects of the criminal justice system. One of the major themes of his review is that the victims of crime have not been properly identified and that has distorted our understanding of offending and victimisation. He argues that a

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false, straw victim has been created by the victimisation industry: "middle class/middle aged", "worthy citizens who may be consumers, householders, members of service clubs or Neighbourhood Watch groups", "the elderly and the victims of child, female and sexual abuse". The true victims of crime are "socially disadvantaged", "lower class minorities", "the elderly and the victims of child, female and sexual abuse are not [the most victimised]." Furthermore he argues that most victims of crime see crime as simply a hazard of modern life: "one of many risks to which people are daily and constantly exposed", "the social risks we must all endure". Most victims of crime do not report crime incidents because "the incident was too trivial or unimportant; that it was a private matter or that the police could not do anything about it anyhow" and "most ...just want to get over the incident, move to the next stage of their lives, and leave the set back behind". Victims should "accept responsibility" rather than engage in "blame and fault finding".

I attempt to demonstrate in the first sections of this commentary that victim oriented research has had a positive influence on both the popular and academic debate and led to some important breakthroughs in our understanding of the causes of crime. I further argue that a detailed understanding of victimisation is an essential prerequisite for the formulation of effective and just criminal justice and crime prevention policies. The final sections of the commentary examine Harding's analysis of domestic violence.

The Specificity of Crime

Firstly Harding's analysis takes as unproblematic the category of crime. It lumps together all kinds of crime and thus cannot accommodate the specificity of crime incidents and the specificity of the impact of different types of crime on different types of victims. At the most trivial and obvious level there is a vast difference between the loss of a video recorder in a break enter and steal and a serious assault and robbery committed at a railway station after dark. On the one hand, the victim may lodge an insurance claim, buy a new (and perhaps better) video recorder and "move to the next stage of their lives and leave the set back behind". On the other hand the victim may be hospitalised and lose time off work in the short-term, and in the long-term suffer permanent physical and psychological disabilities including a paralysing fear of crime which permanently affects the quality of his or her life.

At a less obvious level, there is a major difference in the impact of the same crime depending on the circumstances and the relationship between the victim and the offender. An assault of a given seriousness may have a different effect depending on the relationship between the victim and the offender. This has been eloquently described by Young, when referring to the meaning of a punch:[1]

> If we take an objective approach to assault we can imagine a punch delivered with a given velocity and causing a certain level of bruising. We would then draw up tables which would show how such assaults were differently distributed across the population and relate this, perhaps, to fear of crime. Of course, something of the sort already occurs in present victimization studies, although the level of objectivity is scarcely as exacting. The problem with this approach is that the "same" punch can mean totally different things in different circumstances: it can be the punch between two adolescent boys — of absolutely

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1 Young, J, "Risk of Crime and Fear of Crime: a realist critique of survey based assumptions" (1988) in Maguire, M and Pointing, J (eds), *Victims of Crime: A New Deal* at 165–177.

> no significance on the level of victimization. It can be the punch of a policeman on a picket line or the punch of the picket against the police. It can be the drawn-out aggression of a violent man towards his wife. It can be the sickening violence of a parent against a small child.
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> Violence, like all forms of crime, is a social relationship. It is rarely random: it inevitably involves particular hierarchies of power. Its impact, likewise, is predicated on the relationship within which it occurs. We should continue to create our tables of victimization, but we would be wrong to believe that we can have a science of victimology which ignores the offender. For the very impact of the offence depends on the relationship between the victim and the offender.[2]

The Specificity of the Impact of Crime

The second major problem with Harding's formulation is the lack of specificity with regard to the differential impact of crime on different victims. Young[3] referred to this misconception as the myth of the equal victim. Hogg and Brown discussed the issue in these terms.

> It is pointed out that crime and particularly violence disproportionately affects the poor, the elderly, Aborigines, woman and children, not simply because these groups often suffer the highest rates of victimization but because they are the most vulnerable in a whole range of other respects. Without specifically invoking left realism, this up-front recognition of the damaging effects of traditionally defined crime is a clear break with both the civil libertarianism which tries to play down the extent or significance of increasing crime rates and the leftist tradition which immediately points elsewhere to other sources of social harm sponsored by the state or by the powerful.[4]

The point is that different victims are more or less vulnerable in several key respects: crime may have a greater economic impact on certain types of victims (for example a pensioner), it may have a greater physical impact (for example the elderly, children, women) and it may have a greater long term psychological impact (for example children). The ability of victims to withstand these effects, to recover, and to prevent further victimisation is also different. How does a child victim of physical or sexual assault "leave the set back behind" and "[accept] individual responsibility" as encouraged by Professor Harding?

Different victims differ in their vulnerability to crime, they differ in the extent to which they become multiple or "compounded" victims[5] and they differ in the ability to prevent further victimisation.

The Specificity of the Response

The third problem with Harding's formulation is that it fails to recognise the impact of the specificity of the response of the various criminal justice agencies to different types of crimes and different victims. The research abounds with examples. The most well documented

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2 Above n1 at 174.

3 Above n1.

4 Brown, D and Hogg, R, "Law and Order Politics: Left Realism and Radical Criminology: A View from Down Under" (1992) Matthews, R and Young, J (eds), *Issues in Realist Criminology* at 161.

5 Genn, H, "Multiple Victimization" (1988) in Maguire, M and Pointing, J (eds), *Victims of Crime: A New Deal.*

example occurs in the area of domestic violence. The reluctance of the police to intervene and invoke the criminal process in the private sphere of the family has been repeatedly demonstrated in every jurisdiction in Australia and in most Western countries.[6] In contrast, over-policing of Aboriginal communities has been documented by Cunneen,[7] Goodall,[8] and many others.

The reluctance of victims to report and the reluctance of the police to intervene in incidents of homophobic violence are also well documented.[9] Harding alludes to the fact that victims may not report to the police because they perceived that "the police could not do anything about it" but he does not assess the significance of differential police response to different types of victims, different types of crime, and different relationships between victims and offenders.

The specificity of crime, the vulnerability of different victims and the differential response of the agencies are of considerable importance in understanding the impact of crime on a community in order to formulate the most appropriate criminal justice and crime prevention policies. Victim oriented research cannot be categorised as uniformly reactionary and regressive. A concern about and interest in victim's issues is not the exclusive preserve of the right-wing law and order lobby groups and does not necessarily support and justify the calls for harsh, punitive and ineffectual laws. It enables the formulation of policing strategies appropriate to the needs of the community, and the provison of a whole range of social programmes to deal with the needs of both victims and offenders.

The Overlap Between Victims of Offenders

A final problem with Harding's argument that the current interest in victims has distoted our understanding of crime, victimisation and "aspects of the criminal justice systems" lies in his analysis of offenders. He concentrates on class to the exclusion of other powerful divisions in society. As noted previously, he correctly points out that both victims and offenders tend to come from similarly socially disadvantaged backgrounds. He fails, however, to note the role played by the other two most powerful structural causes of crime in Australia, race and gender. He also fails to explore the interactions between these facors and the important differences between offenders and victims that are revealed by an analysis of these interactions.

The enormous contribution made to our understanding of crime, in particular violent crime, by feminist research and politics is not fully recognised and is ultimately relegated to the status of an "ideological agenda" which is "antagonistic towards men — all men, not just men proven to be violent". In fact, feminist research has recast our understanding of violent crime in so far as it has led to the recognition of the gendered nature of most violence in society. The private violence perpetrated in the private sphere of the family

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6 Stubbs, J and Wallace, A, "Protecting victims of domestic violence?" (1988) in Findlay, M and Hogg, R (eds), *Understanding Crime and Criminal Justice* at 52–77; Hamner, J, Radford, J and Stanko, E, *Women, Policing and Male Violence: International Perspectives* (1989).

7 Cunneen, C, *Aboriginal Police Relations in Redfern with Special Reference to the "Police Raid" of 8 February 1990*, Report commissioned by the National Inquiry into Racist Violence, 1990.

8 Goodall, H, "Policing in whose interest: local government, the TRG and Aborigines in Brewarrina, 1987–88" (1990) 3 *J Soc Just Stud* at 19–30.

9 Mason, G, "Violence Against Lesbians and Gay Men" (1993) 2 *Violence*.

has been recognised and redefined as public violence of major proportions in terms of both prevalence and harm inflicted. Policy related research has repeatedly demonstrated the failure of the legal remedies to provide effective protection to women and children and the reluctance of the police to intervene and invoke the criminal process in cases of domestic violence. Masculinity has been identified as central to the question of violence. The empirical evidence from official statistics, victims surveys and research studies provides unchallengeable evidence of the relationship between masculinity and violence. Heather Strang found that male homicide offenders in Australia outnumbered females by a factor of nine. The disproportionate involvement of male offenders was evident in all age groups and across all jurisdictions.[10] It is simply not enough to say that offenders and victims "are homogeneous and overlap to a large extent". The overwhelming preponderance of violence in Australia is perpetrated by men against women, children and other men.

The deconstruction of masculinity, the understanding of the forms of masculinity which are dangerous to both women and other men, the interactions between masculinity and other structural and situational causes of crime (for example race, poverty, marginality, firearm possession, alcohol) are questions which are vital to our understanding of violent crime and the development of effective crime prevention strategies.

The special role played by race in Australia is also not alluded to in Professor Harding's brief analysis of victims and offenders. Although the term social disadvantage is used to describe the background shared by the majority of victims or offenders, no special mention is made of the vast over-representation of Aboriginal people as both offenders and victims. Strang[11] found that Aboriginal people were more than eight times more likely to be the victims of homicide than non-Aboriginal people and fourteen times more likely to be a homicide offender. The position of Aboriginal people cannot be reduced to simple social disadvantage. It incorporates social disadvantage and more: marginality, racial discrimination, colonisation, the dispossession of land, the destruction of the traditional economy and culture, and the devastation caused by the introduction of alcohol.

My objection is not that Harding is wrong to emphasise social disadvantage amongst the majority of victims and offenders but that this is only part of the story. At the very least, race and gender must also be considered to adequately describe broad patterns of offending and victimisation in Australia. An examination of the interactions between these factors demonstrates that the overlap between victims and offenders is less than complete.

I have taken issue with Harding's major thesis: that attention to the victim's perspective has distorted public debate on crime and aspects of the criminal justice system. I have attempted to show that a consideration of the victim's perspective is not only essential in order to understand the impact of crime on a community as a matter of social justice, but it has led to some important developments in our theoretical understanding of the causes of crime.

Professor Harding further develops his thesis by reference to three areas of crime: child sexual assault, domestic violence and sexual assault. For reasons of space, I will only deal in detail with the domestic violence section. This does not, however, imply an agreement with the analysis provided of child sexual assault and sexual assault.

There is one claim in the sexual assault section that requires correction. The new Canadian legislation does not, as is suggested, reverse the burden of proof by requiring that the

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10 Strang, H, *Homicides in Australia 1990–91* (1992).

11 Ibid.

accused person must prove that he had an honest and reasonable belief in consent. Section 272.2 is a complex provision worthy of further examination. It does not overrule the *Morgan*[12] decision: under Canadian law an honest belief in consent negates the mens rea for sexual assault. The Act provides, however, that the accused cannot rely on the "defence" of consent, unless he took reasonable steps in the circumstances known to the accused at the time to ascertain that the complainant was consenting. This provision goes some way to meeting the criticisms made on both sides of the *Morgan* debate. It retains subjectivity in relation to the belief in consent and in relation to the circumstances known to the accused at the time. It introduces objectivity in relation to the steps taken to ascertain consent. This, and other features, makes the new Canadian law of considerable interest to the Australian common law states.

The Victimisation of the Victims

In the area of domestic violence Professor Harding argues that, although many of the reforms were necessary and indeed worthy of "praise", they have now resulted in a situation where "the balance of justice is under threat". Amongst his concerns is the failure of the "workers" to listen to the woman to ascertain what she "preferred as an outcome to her violent situation". Their objective is "the termination of the relationship in question, rather than its possible repair or rehabilitation". The victims of domestic violence are regarded as "a potential recruit in the battle to correct supposed power imbalances between the sexes" and their time at a refuge "becomes a form of secondary victimisation".

Simply as a description of criminal justice and social policy this account cannot be regarded as accurate. No jurisdiction in Australia has introduced legislation allowing for the views of the victim to be overridden. In all states and territories neither an assault charge nor an apprehended violence order application can succeed without the co-operation of the victim. A presumptive arrest policy has not been introduced by any police force in Australia. Victims are able to withdraw an application or decline to participate in a prosecution at any stage. It is true that in some states (for example New South Wales) the law has been changed to make spouses compellable against each other in domestic violence proceedings but this merely has the effect of requiring the victim to state in open court her wishes and to allow the court to ascertain that her decision is not due to duress, undue influence, or threat. Furthermore I am unaware of any research conducted in Australia which demonstrates that domestic violence victims regard their experiences at refuges "as a form of secondary victimisation". The little research that is available on this topic suggests the opposite. For example, a New South Wales study which asked domestic violence victims to respond to a questionnaire published in a major Sunday newspaper found that refuges were by far the most positively viewed of all agencies.[13] This study of 451 victims of domestic assault found that 71.3 per cent of the victims who had used a refuge described the experience as helpful (as compared to 27.0 per cent for the police and 37.1 per cent for medical practitioners). The comments provided by the women explained the reasons for these positive views. As one woman wrote, "[u]ntil I went to the refuge and spoke to the women there, I thought I was being beaten because of some deficiency in myself.

12 *R v Morgan* [1976] AC 182.

13 Cranchcr, J, Egger, S J and Bacon, W, "Battered Women" (1983) in Findlay, M, Egger, S J and Sutton, J, *Issues in Criminal Justice Administration* at 43–52.

Realising that this was not true and that I was not alone was an important step towards independence for me".[14]

There is indeed a suggestion in this response that she was introduced to some of the values underlying a feminist analysis of domestic violence at the refuge but the perspective appears to have helped her to gain some control over her life and encouraged her to take decisions in her own interest. It is difficult to portray this as a form of secondary victimisation.

Provocation

Professor Harding also offers a critique of attempts to modify the homicide defences to accommodate the experiences of women who kill their spouses in the context of prior domestic violence. In this article his critique is directed at the use of the battered woman syndrome as a means of meeting the existing reasonableness requirements of the defences of provocation and self defence. He has previously applied a similar critique to attempts to modify the requirements themselves.[15] I will not deal with the issue of the battered woman syndrome here. Harding does not acknowledge that the most effective and detailed critiques of the battered woman syndrome in Australia are provided by feminist legal scholars.[16] To my knowledge there are very few supporters of the battered woman syndrome amongst Australian feminist academics, researchers, lawyers and other practitioners. I would like to deal with the broader issue: whether the requirements of the defences such as provocation and self-defence should be modified so as to apply to the circumstances under which women typically kill or whether this development will lead to one law "for women and another for men".

Until the 1980s, provocation at common law required that the killing be provoked by the conduct of the victim (a blow, or grossly insulting language or gestures, not mere words and it must be seen or heard by the accused). The killing must have occurred in immediate response to the provoking conduct: suddenly, in the heat of passion. The time limit set by the Australian cases was about 15 minutes.[17] The provoking conduct must be such that the ordinary person would have been deprived of the power of self-control and the accused's retaliation must have been proportionate.

A killing under these circumstances is partially excused or justified by the law. Provocation has been regarded as both an excuse defence and a justification defence.[18] A value judgement has been made as to the circumstances under which the use of lethal violence is to be regarded as excusable or justifiable. There is however nothing inherently rational or logical in the choice of these requirements as the essential elements of the defence of provocation as opposed to any others. The choice is a moral choice and one that is based upon the attitudes in a given society to human conduct, emotion, and frailties. Furthermore the view of human behaviour underlying these legal requirements is a view of male behaviour, a crude theory of typical and understandable male passions and reactions. It is

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14 Id at 51.

15 Harding, R, "Not murder she quoth" *The Bulletin* 29 August at 40 1989.

16 For example, Sheehy, E A, Stubbs, J and Tolmie, J, "Defending Battered Women on Trial: The Battered Women Syndrome and its Limitations" (1992) 16 (6) *Crim LJ* at 369–394.

17 *Parker v R* [1964] AC 1369.

18 Goode, M, "The Abolition of Provocation" (1991) in Yeo, S (ed), *Partial Excuses to Murder* at 37–60.

informed by a deeply embedded cultural acceptance of a particular form of masculinity. One of the first recorded cases of the defence of provocation was Manning's case.

> In 1672 one John Manning was indicted in Surrey for murder for the killing of a man and upon not guilty pleaded, the jury at the Assizes found that the said Manning found the person killed committing adultery with his wife, in the very act, and flung a joint-stool at him and with the same killed him; and resolved by the whole court that this was but manslaughter; and Manning had his clergy at the bar and was burned in the hand. The court directed the executioner to burn him gently, because there could be no greater provocation than this.[19]

The requirements for the common law defence of provocation until the 1980s were still largely those described in Manning's case. He saw, with his own eyes, an act which would cause the ordinary person (man) to lose self control and kill. He killed suddenly, in the heat of passion and his act of flinging the joint-stool was not greatly disproportionate to the terrible act that he witnessed since "there could be no greater provocation". Today, this is known as male-to-male confrontational violence. Ken Polk has described the patterns of male violence which lead to homicide. Polk and Ransom[20] found that the two most common forms of male homicide in Victoria were killings in the context of sexual intimacy which arose out of an attempt to control the life of his partner, and male confrontational killings. In later research Polk[21] found that male confrontational violence was one of the most common forms of homicide, that it conformed to a particular pattern or scenario, and that it most often involved status contests, challenges to the honour of the offender. He described the sources of provocation as follows:

> At times, it is a simple and direct challenge to the masculinity of another male. Sometimes the provocation results from an insult to the woman friend of a male. A reasonably common scenario in the multicultural environment of Victoria is that ethnic tensions or slurs may provide the spark for the violence ... In general, then, while masculine "reputation", "status" or "honour" is at the heart of most confrontations, the specific form of the provocation in individual cases may be difficult to determine.[22]

Polk also found that the time frame from the start of the encounter to the killing was remarkably brief. Over half of the confrontational homicides involved events that took place within half an hour or less.

The common law defence of provocation has long recognised and partially excused this type of male confrontational homicide and male homicides in the context of sexual intimacy. The typical characteristics of these killings have been identified and enshrined as the legal elements of the defence. A brief analysis of some of the reported Australian cases demonstrates the overlap between the legal requirements and the patterns described by Polk. The defence of provocation was held to apply to the circumstances of *Parker v R.*[23] Parker killed a man named Kelly approximately 15 to 20 minutes after Kelly had taunted Parker about his size and Kelly's enjoyment of sexual relations with Parker's wife and then departed with Parker's wife. "He had been insulted, taunted, he had listened to

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19 Stephen, J F, *A History of the Criminal Law of England*, (1883), vol 3 at 63.

20 Polk, K and Ransom, D, "Patterns of Homicide in Victoria" (1991) in Chappel, D, Grabosky, P and Strang, H, *Australian Violence: Contemporary Perspectives* at 53–118.

21 Polk, K, "A Scenario of Masculine Violence: Confrontational Homicide" (1993) in Strang, H and Gerull, S (eds), *Homicide: Patterns Prevention Control* at 35–52.

22 Id at 40.

23 (No 2) (1963) 111 CLR 665 [1964] AC 1364.

his children's prayers to his wife not to depart with his adulterous rival." Applying a legal analysis to *Parker's* case one would conclude that the requirements of the defence of provocation were met. Applying a criminological analysis to *Parker's* case one would conclude that this was an exemplary case of male to male confrontational homicide as described by Polk and others. My argument is that the characteristics of these most typical forms of male homicide and the legal requirements respected in the defence of provocation are one and the same.

Other cases illustrate the same point. In *Johnson v R*[24] two brothers killed their father after he had attacked one of them whilst trying to evict them from the house. In *Moffa v R*[25] the defence was also held to be available. Moffa killed his wife after she taunted him sexually, showed him nude photographs of herself (taken by another man) and threw a telephone at him. The defence was also held to be available in *Dincer v R.*[26] Dincer killed his 16 year old daughter after a confrontation between Dincer and his daughter in her boyfriend's bedroom. He was upset that his daughter had commenced a sexual relationship with the young man.

These killings conform to a pattern: a provocative incident (which may be a blow, a challenge to the offender's honour or sexual potency, or a threat to the offender's control over the victim); a loss of self-control in circumstances where the ordinary man would also lose self-control, a sudden and violent reaction in the heat of passion, and killing either by bashing with fists or a blunt instrument or a readily available knife.

The narrow scope of the law of provocation was described recently by Gleeson CJ in *R v Chhay*:[27]

> One common criticism was that the law's concession to human frailty was very much, in its practical application, a concession to male frailty ... The law developed in days when men frequently wore arms, and fought duels, and when, at least between men, resort to sudden and serious violence in the heat of the moment was common. To extend the metaphor, the law's concession seemed to be to the frailty to all those whose blood was apt to boil, rather than those whose blood simmered, perhaps over a long period, and in circumstances at least as worthy of compassion.

Prior to the statutory and common law modifications to the defence of provocation in Australia in the 1980s, the law did not recognise that there was also a pattern of killing by women that may be excusable, understandable or justifiable. Killings by women, if they failed to conform to the pattern of male homicides respected in the elements of the defence of provocation (and other defences did not apply) were regarded as murder. They could not be excused or forgiven. Empirical research into killings by women also reveal a gender specific pattern.

Women rarely kill: only 10 per cent of homicide in Australia are committed by women.[28] When they do kill, they most often kill within the family: 81.2 per cent of homicides committed by women are within the family as compared to 36 per cent of homicides committed by men.[29] The family member most likely to be killed by a woman

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24 (1976) 136 CLR 619.
25 (1977) 138 CLR 601.
26 [1983] IVR 460.
27 [Unreported] 4 March 1994, NSWCCA.
28 Above n10.
29 Wallace, A, *Homicide the Social Reality*, (1986).

is the spouse: 50.6 per cent of homicides by women within the family are committed against spouses.[30] The majority of spouse killings by women occurred in the context of a history of serious domestic violence by the man against the woman (70 per cent).[31] Many of these killings occurred in response to an immediate threat or attack by the violent husband (52 per cent), whilst others occurred in the context of a fear of continuing and imminent violence. The overwhelming majority of women who killed their husbands used a weapon (40.5 per cent used a firearm, 45.6 per cent used a knife or other stabbing instrument). The research reveals a pattern of homicide by women which is not readily accommodated by the common law defences of provocation or self-defence.

In particular, the provoking incident may not be a single, isolated act on the part of the victim but the protracted infliction of serious domestic violence over many years. The proximate act of provocative conduct may be a mere verbal threat that "I'll thrash you when I get back from the pub", a physical assault several hours before the victim retired to bed, or the disclosure by a daughter some 12 hours previously that the victim had sexually assaulted the offender's five daughters over many years. Secondly, the killing may not occur "suddenly, in the heat of passion". Many hours may have elapsed between the most proximate provoking act and the killing. In some cases the victim may be asleep at the time of the killing. There is no confrontational violence, the killing is committed in quiet despair. It is not committed for reasons of honour or status but out of an overwhelming sense of fear and hopelessness. In the metaphorical language adopted in this area of the law and discussed critically by Gleeson CJ in *R v Chhay*[32] "the blood simmered, perhaps over a long period of time". Finally a weapon is used in almost all cases. There is no attempt to bash the physically larger and stronger victim with bare fists. The two Australian cases which led to the modifications to the common law defence of provocation provide an illustration of the typical circumstances under which women kill.

In *Hill v R*,[33] the accused, Georgina Hill, was tried for the murder of her de facto husband. The victim was a violent alcoholic who, over many years, had seriously assaulted Hill, a small slight woman. They lived in an isolated farmhouse and previous attempts to escape the violent relationship and previous calls to the police had failed to stop the violence. Some hours prior to the killing he had threatened to bash her and said "It's a good job I haven't been drinking now or I would throw you straight through that window". When he returned from the pub several hours later, drunk and abusive, Hill loaded a rifle and warned him not to approach her. He advanced across the kitchen and she shot and killed him. The provocation for the killing was not a single incident but included the many years of violence and the threat made several hours previously as he departed to the pub. She did not react suddenly in the heat of passion. There was an interval of several hours between the last threat and the killing. Finally, her response was not proportional. She was armed with a rifle.

In *The Queen v R*,[34] the killing occurred late at night. On the morning of the killing one of R's five daughters revealed to R that the victim (R's husband of 27 years) had sexually assaulted all the daughters over many years. That evening the same daughter said that the

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30 Ibid.
31 Ibid.
32 Above n27.
33 (1981) 3 A Crim R 397.
34 (1981) 28 SASR 321.

father had tried to rape her again. Later that night the victim made overtures to R and told her "that they would be one big happy family". After he fell asleep R took an axe from the garden and killed him with several blows. The difficulties in meeting the requirements for defence of provocation are obvious. There had been a period of a some 12 hours between the disclosure of the sexual assault and the killing, thus R did not kill suddenly in the heat of passion. Furthermore, the daughter's disclosure of sexual assault could not constitute legal provocation. It was mere words: the assaults were not seen by R. Finally, the victim was asleep and unarmed.

Common law and statutory developments in the 1980s have partly modified the requirements of provocation so as to make the defence available under these circumstances. The unique characteristics of killings by women have at least been partly recognised. In New South Wales there was a statutory repeal of the suddenness and proportionality requirements in provocation.[35] The new section 23 now allows the provoking conduct to have occurred "at any previous time" and it may be "any conduct by the deceased ... towards or affecting the accused".[36] Prior to these reforms, the law regarded these killings as inexcusable murders. This is still the case in England as a matter of fact if not law.[37] Professor Harding concluded his analysis with the statement that:

the danger with this aspect of the victim perspective is that it seems to differentiate between acceptable and unacceptable occasions for lethal violence, creating potentially one law of murder for women and another for men.

However the law has always differentiated between acceptable and unacceptable occasions for lethal violence and created one law of murder for men and another for women. For over 300 years the requirements of the defence of provocation have been such that there was one law for men and another for women. The provocation reforms in the 1980s were designed to address precisely the problem. There is no inherent logic nor indeed justice in a law which excuses the male to male confrontational homicides described by Polk[38] and exemplified by *Parker's* case but does not apply to the circumstances under which women typically kill to excuse homicides committed in cases like *Hill* and *R*.

In conclusion, I disagree with Harding's argument that attention to the victims of crime has a distorting influence on research and policy. It does not necessarily lead to a naive, repressive and punitive approach to criminal justice policies. In contrast, it has furthered our understanding of the causes of crime, it has led to the development of a range of policies designed to protect victims from further harm and it provides a basis for the development of effective crime prevention programs.

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35 *Crimes Act*, s23(3)(a) and (b).
36 Section 23(2).
37 *Reg v Ahluwalia* [1993] Cr App R at 133.
38 Above n21.