'[F]or the sake, in effect, of 30 pieces of silver'[1]

THEMES IN JUDGES' SENTENCING REMARKS OF MALE AND FEMALE DOMESTIC MURDERERS

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This thesis is presented for the Honours degree of Bachelor of Laws of Murdoch University 2011

I declare that this is my own account of my research

[1] *R v Willard* [2004] NSWSC 402 (28 April 2005) [42] (Whealy J).

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Themes in Judges' Sentencing Remarks of Male and Female Domestic Murderers

('R v Willard [2004] NSWSC 402 [42] (Wheeler J)

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ABSTRACT

The aim of this study was to compare judges' sentencing remarks when males kill females and females kill males in the context of domestic murder. This included a literature search to identify research from a historical, legal and criminological perspective, which was consistent or inconsistent with the results, emanating from the themes, identified in the analysis of those remarks. To undertake a qualitative analysis, the methodology of grounded theory was used, and the data emanating from the judges' sentencing remarks identified nine themes.

Broadly speaking the data reflects that women are viewed more harshly than men and receive higher sentences. In addition, judges are distancing male offenders from their responsibility for their violent conduct, rendering them potential candidates for more lenient treatment in terms of sentence. The analysis also reveals that judges frequently rely on stereotypes and traditional notions of marriage, family and femininity in determining an offender's sentence. These assumptions are embedded in the different set of descriptors used by judges to describe male and female offenders within the sentencing remarks.

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1. INTRODUCTION

1.1 OVERVIEW

The aim of this study was to compare judges' sentencing remarks when males kill females and females kill males, using a qualitative analysis. The purpose of this literature search was to identify research from a historical, legal and criminological perspective, which was consistent or inconsistent with the results emanating from the themes identified in the analysis of judges' sentencing remarks. In a traditional research methodology, the literature review forms the basis of a study. In most cases, a literature review will generate a series of hypotheses which are then tested. Grounded theory methodology reverses this approach. In this approach, the data speaks for itself and the researcher then reviews the literature to find if the results are consistent or inconsistent with previous research. Therefore, this literature review has been driven by the results which have emanated from the themes identified in the analysis of the judges' sentencing remarks.

1.2 HOMICIDE

Homicide, like violence in general, is gendered. Men are more likely to kill and be killed, and women are more likely to be a victim rather than a perpetrator of homicide.[1] As perpetrators, women account for less than 15% of homicides in Australia.[2]

[1] Jenny Mouzos, 'Femicide: The Killing of Women in Australia 1989-1998' (Research and Public Policy Series No 18, Australian Institute of Criminology, August 1999) 3.
[2] Jenny Mouzos, 'Homicidal Encounters A Study of Homicide in Australia 1989-1999' (Research and Public Policy Series No 28, Australian Institute of Criminology, June 2000) 51.

Homicides between intimate partners account for approximately 21% of homicides Australia wide.[3] Research shows that, whether they are a current or former spouse, married or de-facto, female homicide victims are killed by their male partners in 77.4% of cases, and males by their female partners in 22.6% of cases.[4] Studies also consistently show that women are more likely to be convicted of manslaughter, and men are more likely to be convicted of murder.[5] It will be argued that the circumstances and motives which drive men and women to kill their partners are fundamentally different.

1.3 MEN AND MURDER

Daly and Wilson argue that male violence is a fundamental aspect of evolution, and that a male sense of proprietary drives men to kill.[6] While current studies recognise that cultural and social factors also contribute to male homicide, the underlying proposition that men kill as a result of their predisposition to violence still exists.[7] From this perspective, violence is considered 'natural' and 'instinctive' for men.[8]

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[3] Ibid 115.
[4] Carlos Carach and Marianne James, 'Homicide between Intimate Partners in Australia' (Trends and Issues in Crime and Criminal Justice No 90, Australian Institute of Criminology), July 1998) 2.
[5] Patricia Easteal, *Killing the Beloved: Homicide Between Adult Sexual Intimates* (Australian Institute of Criminology, 1993) 115; Wendy Chan, *Women, Murder and Justice* (Palgrave, 2001) 43-45; Rebecca Bradfield, *The treatment of women who kill their violent male partners within the Australian criminal justice system* (Phd Thesis, The University of Tasmania, 2002) 25.
[6] Martin Daly and Margo Wilson, *Homicide* (Aldine De Gruyter, 1988) 1.
[7] Deborah Kirkwood, 'Female Perpetrated Homicide in Victoria between 1985 and 1995' (2003) 36 *Australian and New Zealand Journal of Criminology* 152, 153.
[8] Ibid.

Polk states that because men feel compelled to compete for resources, status and the control of their sexual partner, men will ensure their success by using violence.[9] Specifically, Polk suggests that men kill women as a result of their possessiveness and sexual jealousy of women as well as their own depression.[10]

Not only do men and women kill with different frequencies, it will be argued that men and women have different motivations to kill their domestic partner. [11] Men kill their female partners in response to female actions such as when the women challenge their authority, leave or threaten to leave the relationship, or form, or are suspected of forming a new relationship. In contrast, for women, possession is rarely a motivating factor in killing their male partners. [12] Women are more likely to commit spousal homicide as a result of self-preservation. [13]

1.4 WOMEN AND MURDER

There is comparatively little information available on women who kill,[14] and in the relatively small number of cases where the offender is female, the victim is usually a family member.[15] When the primary motivation for a woman to kill in a domestic environment is self-preservation, the killing usually follows prolonged

[9] Kenneth Polk, *When men kill* (Cambridge University Press, 1994) 188, 189.
[10] Ibid.
[11] Rebecca Bradfield, 'Women Who Kill: Lack of Intent and Diminished Responsibility as the Other 'Defences' to Spousal Homicide' (2001) 13 *Current Issues in Criminal Justice* 143, 145.
[12] Kenneth Polk and David Ranson, 'The Role of Gender in Intimate Homicide' (1991) 24 *Australian and New Zealand Journal of Criminology* 15, 21-23.
[13] Ibid.
[14] Kirkwood, above n 7, 154.
[15] Mouzos, above n 1, 10.

exposure to physical abuse by her male partner.[16] In the context of self-preservation, as will be noted further, women are usually found guilty of manslaughter.

Conventional thinking positions female criminality in the idea that crime is a 'masculine activity', and as such, is essentially foreign to the core nature of a woman.[17] Partially relying on the fact that female offenders are statistically rare, traditional criminologists argue that women are more law abiding than men,[18] and by their nature are essentially conformist, and therefore non-criminal.[19]

As a result, women are viewed as passive, only killing to protect their children or themselves from life-threatening male violence; alternatively, they are suffering from an abnormal physiological or psychological condition at the time of the killing.[20] Consequently, as Morrissey states, when women commit murder their rejection by society is even more extreme than when men do the same. Both in law and in the media, accounts of female murderers demonstrate that when compared to their male counterparts, the act of killing by a woman is more shocking for a male dominated society.[21]

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[16] Rebecca Bradfield, *The treatment of women who kill their violent male partners within the Australian criminal justice system* (Phd Thesis, The University of Tasmania, 2002) 21.
[17] Carolene Gwynn, 'Women and Crime: the Failure of Traditional Theories and the Rise of Feminist Criminology' (1993) 19 *Monash University Law Review* 92, 92.
[18] Ibid.
[19] Terese Henning, 'Psychological Explanations in Sentencing Women in Tasmania' (1995) 28 *Australian and New Zealand Journal of Criminology* 298, 299.
[20] Kirkwood, above n 7, 153.
[21] Belinda Morrissey, *When Women Kill* (Routledge, 2003) 2.

Chan states that because women rarely kill, their treatment in the criminal justice system is determined by long standing myths and stereotypical views of women, rather than the circumstances surrounding their offence. [22] Research shows that amongst other things, a woman's treatment in the legal system is dependant on her domestic capabilities, both as a wife and a mother.[23] Nicholson suggests that for a woman to be domestically successful, she is required to be a competent housekeeper, a loyal and supportive wife, and a good and caring mother.[24] Keenan states that because society views crime as a masculine, rather than a feminine trait, constructing a female offender as a 'normal woman' diminishes her criminality.[25]

Heidensohn argues that due to their infrequent appearance before the courts, female offenders are viewed as deviant, abnormal women for breaking social rules. He further argues that when women break away from their traditional roles, they are considered to be 'unfeminine' and 'unnatural'.[26] As a result, while facing the usual penalties within the criminal justice system, Heidensohn believes women may be treated more harshly because they are 'deviant women who are deviant as women'.[27] Ultimately, the lack of knowledge and

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[22] Wendy Chan, *Women, Murder and Justice* (Palgrave, 2001) 22.
[23] Rebecca Bradfield, Women who kill, above n 11, 145.
[24] Donald Nicolson, 'Telling Tales: Gender Discrimination, Gender Construction and Battered Women who kill' (1995) 2 *Feminist Legal Studies* 185, 188.
[25] Caroline Keenan, 'The Same Old Story: Examining Women's Involvement in the Initial Stages of the Criminal Justice System' in D Nicholson and L Bibbings (eds), *Feminist Perspectives on Criminal Law* (Cavandish Publishing, 2000) 31, 31-32.
[26] Frances Heidensohn, 'Women and Crime: Questions for Criminology' in Pat Carlen and Anne Worrall (eds), *Gender, Crime and Justice* (Open University Press, 1987) 16, 20.
[27] Ibid.

understanding of women who kill, leads to their stigmatisation in the criminal justice system.[28]

In conclusion, as leading criminological theories are based on male homicide, little consideration is given to either the apparent deviance or conformity of women. Due to the infrequency with which women kill, they remain ignored as a sociological problem.[29]

1.5 THE LAW OF HOMICIDE AND THE DEFENCE OF PROVOCATION: A HISTORICAL PERSPECTIVE

In the sixteenth century the formal categories of murder and manslaughter developed within the law of homicide, and in order to distinguish between murders that were premeditated and unpremeditated, the defence of provocation arose.[30] Murder was an intentional killing with 'malice aforethought' whereas manslaughter was a provoked killing which took place in the 'heat of passion'.[31] At this time, sample categories of provocation included an assault preceded by angry words, and a man bearing witness to his wife in the act of adultery with another man.[32] While provocation was originally based on indignation, the focus moved towards a loss of self-control by the eighteen century. By the nineteenth

[28] Kirkwood, above n 7, 155.
[29] Mary Eaton, *Justice for women?* (Open University Press, 1986) 5.
[30] Bradfield, *The treatment of women who kill their violent male partners within the Australian criminal justice system,* above n 16, 61, 62.
[31] B Brown, 'Emergence of the Physical Test of Guilt in Homicide' (1959) 1 *Tasmanian University Law Review* 231, 238-239 quoted in Rebecca Bradfield, *The treatment of women who kill their violent male partners within the Australian criminal justice system* (Phd Thesis, The University of Tasmania, 2002) 62.
[32] *Mawgridge* (1707) 84 ER 1107, 1114-1115 (Hold CJ).

century the defence of provocation came to include other categories of conduct including men reacting angrily in matters concerning their honour, and murder in response to infidelity.[33]

Currently, the defence of provocation excuses individuals who temporarily loose self control as a result of overwhelming emotion, and yet do not have the requisite intent to kill.[34] As a defence, provocation has expanded to take account of killings against a background of infidelity, sexual jealousy and rejection.[35] Presently the academic debate leans towards the abolition of the defence of provocation as its 'masculinist history' arguably hinders its legitimacy in criminal law today.[36] In recent times Tasmania, Victoria and Western Australia have abolished the partial defence of provocation, [37] however, as a partial defence to murder, provocation is still available in five Australian jurisdictions.[38]

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[33] Bradfield, *The treatment of women who kill their violent male partners within the Australian criminal justice system,* above n 16, 63.
[34] Steven Yannoulidis, 'Excusing fleeting mental states: Provocation, involuntariness and normative practice' (2005) 12(1) 23, 23.
[35] Bradfield, *The treatment of women who kill their violent male partners within the Australian criminal justice system,* above n 16, 88.
[36] Ibid 89.
[37] Andrew Hemming, 'Provocation: A totally flawed defence that has no place in Australian Criminal Law irrespective of sentencing regime' (2010) 14 *University of Western Sydney Law Review* 1, 2. Tasmania in May 2003; Victoria in November 2005; Western Australia in August 2008.
[38] *Crimes Act 1900* (NSW) s 23; *Crimes Act 1900* (ACT) s 13; *Criminal Code 1899* (QLD) s 304; *Criminal Code Act 1983* (NT) s 158; South Australia is governed by the common law.

1.6 WOMEN WHO KILL: A HISTORIC PERSPECTIVE

Historically, women who killed their husbands were always treated harshly.[39] While the law of homicide did not concern itself with controlling women's behaviour, the crime of 'petit treason',[40] which operated in England between 1351 and 1828, was a form of murder considered more serious than other unlawful killings.[41] Indeed, when a man killed his wife it was 'only murder'.[42]

The offence of petit treason was justified on the grounds of the duty of obedience and subjection wives owed to their husbands. This was an extension of the position of married women at law. Upon marriage, a man and woman became 'one', and society recognised the 'one' as the husband.[43] Breaching a duty owed to one's husband, resulting in the husband's death was an act of treachery. While the penalty for treason was to be drawn and quartered, women were burnt at the stake, out of respect for their gender.[44]

In Ballinger's study of women executed for murder in 20th century England, she found that when compared to men, women were executed more frequently for

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[39] Bradfield, *The treatment of women who kill their violent male partners within the Australian criminal justice system,* above n 16, 60.
[40] Peter Alldridge, *Relocating Criminal Law* (Ashgate, 2000) 91.
[41] Bradfield, *The treatment of women who kill their violent male partners within the Australian criminal justice system,* above n 16, 63.
[42] Edward Hyde East, *A Treatise of the Pleas of the Crown* (Strachan, 1803) 336 quoted in Shelley A M Gavigan, 'Petit Treason in Eighteenth Century England: Women's Inequality Before the Law' (1989) 3 *Canadian Journal Women and Law* 335, 347.
[43] Shelley A M Gavigan, 'Petit Treason in Eighteenth Century England: Women's Inequality Before the Law' (1989) 3 *Canadian Journal Women and Law* 335, 341.
[44] Ibid 336.

murdering adults.[45] Ballinger also found that this was more probable when women failed to conform to traditional expectations surrounding domesticity, motherhood, sexuality and respectability.[46] Ballinger's findings appear to reaffirm themes in earlier feminist social control theories which argued that female offenders were judged more for their conformity to traditional roles rather than on the seriousness of their crime.[47]

Gavigan's research on women indicted for petit treason found that almost half were executed for poisoning their victims.[48] Pollak suggested that within their domestic roles as cook and nurse, it was expected that women may turn to a weapon such as arsenic in order to kill.[49] Gavigan also found that in various commentaries, women were consistently portrayed as 'wicked hearted fiends bent on the destruction of kindly husbands'.[50]

In Knelman's study of female killers in the 19th century she found that women have always killed in a number of difficult circumstances. Knelman also discovered that when women did kill, rather than viewing them as living ordinary

[45] Anette Ballinger, *Dead woman walking: Executed women in England and Wales 1900-1955* (Ashgate, 2000) 2.
[46] Ibid 329.
[47] Kirkwood, above n 7, 156.
[48] Gavigan, above n 43, 353-354.
[49] Otto Pollak, *The Criminality of Women* (Barnes & Co, 1961) 13-17 quoted in Shelley A M Gavigan, 'Petit Treason in Eighteenth Century England: Women's Inequality Before the Law' (1989) 3 *Canadian Journal Women and Law* 335, 353.
[50] Gavigan, above n 43, 369.

lives, the public perception was that female killers were 'wicked, oversexed and highly emotional women'.[51]

1.7 JUDICIAL DISCRETION

Five common sentencing goals are frequently identified: (a) punishment and retribution; (b) rehabilitation; (c) removing the offender from society in order to protect the community; (d) general deterrence; and (e) specific deterrence to discourage the offender from committing future crimes.[52]

Within the context of these sentencing goals, judicial discretion allows sentencers to ensure penalties imposed fit both the offenders and the nature and gravity of the offences they commit.[53] However, this discretion is not completely 'unfettered', as common law and legislative principles have been developed to maintain consistency and where necessary, limit the choice of sentence imposed.[54] The principles demand that the sentencing discretion be applied in line with specific criteria relative to both the offender and the offence.[55] A judge cannot therefore sentence an offender in a manner inconsistent with a jury's verdict[56] or a plea.[57] In addition, the penalty should not: outweigh the gravity of

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[51] Judith Knelman, *Twisting in the wind: The murderess and the English press* (University of Toronto Press, 1998) 14.
[52] John S Carroll et al, 'Sentencing Goals, Causal Attributions, Ideology, and Personality' (1987) 52(1) *Journal of Personality and Social Psychology* 107, 107.
[53] *Hoare v The Queen* (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey, McHugh JJ).
[54] S N Casey and J C Wilson, 'Discretion, Disparity or Discrepancy? A Review of Sentencing Consistency' (1998) 5 *Psychiatry Psychology and Law* 237, 238.
[55] Ibid 238.
[56] *R v Webb* [1971] VR 147.
[57] *Chow v DPP* (1992) 28 NSWLR 593; *R vOlbrich* (1999) 199 CLR 272.

the offence; or adversely affect the offender and where applicable their family; and should reflect parity in offenders' sentences where offenders are jointly charged.[58]

In a study of Canadian judges,[59] Hogarth concluded that 'one can explain more about sentencing by knowing a few things about a judge than by knowing a great deal about the facts of the case'.[60] Indeed, sentence variation can be attributed to a number of factors involving decision makers' individual differences, such as their penal philosophy or sentencing goals, attributions made concerning the causes of crime, their personality and their beliefs generally.[61]

Hogarth noted that depending on the case, judges differed substantially in the goals they advocated.[62] Forst and Wellford found that this occurred even when the cases were identical.[63] Hogarth established that judges favouring incapacitation handed down longer sentences, when compared to judges preferring rehabilitation, who gave more supervised time.[64]

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[58] Casey and Wilson, above n 54, 238.
[59] Hogarth's comprehensive study involved the sentencing behaviour of the magistrates of the province of Ontario, Canada. In Canada, provinces have jurisdiction over the administration of justice in their territory as set out in the *Constitution Act 1867* s 92(14). At the time Hogarth wrote this text, a provincial magistrate's sentencing extended through from fines, suspended sentences, probation and imprisonment for a term up to and including life. This is highlighted at page 36 of Hogarth's text which states that 'no lower court judge sitting alone in any other country is given this power'. The judiciary in provincial courts are known as judges and addressed as 'Your Honour'. In his discussions of the provincial court of Ontario, Hogarth consistently describes the judicial decision makers as 'judges'.
[60] John Hogarth, *Sentencing as a human process* (University of Toronto Press, 1971) 350.
[61] Carroll et al, above n 52, 107.
[62] Hogarth, above n 60, 91.
[63] B Forst and C Wellford, 'Punishment and sentencing: Developing sentencing guidelines empirically from principles of punishment' (1981) 9 *Hofstra University Law Review* 799, 799 quoted in John S Carroll et al, 'Sentencing Goals, Causal Attributions, Ideology, and Personality' (1987) 52(1) *Journal of Personality and Social Psychology* 107, 107.
[64] Hogarth, above n 60, 332.

In his study, Hogarth found that judges repeatedly identified society's declining morality and the poor quality of family life as causes of crime, along with, to a lesser extent, socioeconomic factors such as alcoholism and poverty.[65] Consistent with this finding, in relation to judges, Hogarth identified that a judge's individual penal philosophy also correlated with their belief about the causes of crime.[66] Therefore, a judge advocating rehabilitation tended to believe many offenders were suffering from a mental illness, and, generally, attributed crime more frequently to socioeconomic factors.[67] In contrast, judges more in favour of punishment, tended to view crime as a result of an offender's lack of intelligence or alcoholic tendencies. These judges identified mentally ill offenders less frequently, and diminished the relevance of socioeconomic factors upon the offender's offending.[68]

Furthermore, Hogarth found that judges in favour of rehabilitation took more factors about the offender into account; placing an emphasis on their expressed remorse, matters arising out of their background or personal history, including a need for treatment, a lack of premeditation, and probation officers' recommendations, as well as minimising the seriousness of the crime.[69] On the other hand, Hogarth found that judges in favour of punishment concentrated more

[65] Hogarth, above n 60, 92.
[66] Carroll et al, above n 52, 108.
[67] Ibid.
[68] Ibid.
[69] Hogarth, above n 60, 152.

on the offender's criminal record, lack of remorse and factors concerning the offence generally, including culpability.[70]

In addition, Hogarth found that judges believed other judges concurred with their sentencing goals, so judges favouring rehabilitation believed most judges were rehabilitative, and that punitive judges believed most judges were punitive.[71] Carroll et al states this research demonstrates that judges can justify significantly different analyses of the same case simply by concentrating on different information.[72]

1.7.1 SENTENCING DISCRETION AND GENDER

There is a tension reflected in the criminological literature surrounding the propositions that women are treated more leniently or more harshly than their male counterparts. In terms of judicial discretion, individual penal philosophies as well as gendered perceptions can come into play.[73]

One argument suggests that the rarity of women in the criminal justice system is not because they are less deviant in nature, but rather, that the legal system accepts various cultural, psychological and biological misconceptions about women, and reacts accordingly.[74] The chivalry theory posits that male officials in

[70] Hogarth, above n 60, 152.
[71] Ibid 184.
[72] Ibid 91-92.
[73] Marie Fox, 'Judicial Discretion and Gender Issues in Sentencing' in Sean Doran and John D Jackson (eds), *The Judicial Role in Criminal Proceedings* (Hart Publishing, 2000) 323, 326.
[74] Gwynn, above n 17, 95.

the legal system find it both difficult and impractical to impose harsh sanctions on female offenders given their traditional role in society as housewife and mother.[75] However, subsequent studies have disproved this theory by demonstrating that lesser sentences for female offenders are largely due to the different circumstances in which men and women usually appear before the court.[76] Further, it appears from studies which search for a causal link between penalty outcomes and an offender's race, class, gender or level of physical attractiveness,[77] that an offender's race and gender have the most significant impact on the sentence given.[78] Additionally, Gwynn states that when women commit serious 'non-female' crimes such as armed robbery, or murder, their criminality will generate a more negative response than a male committing the same crime.[79]

In relation to gender, even allowing for the fact that women commit fewer crimes and often different types of crimes, studies show that women and men are processed differently by the courts.[80] In particular, a significant number of British studies demonstrate that when all other factors are controlled, and female offenders are compared to male offenders, female offenders receive lighter penalties.[81] It should be noted that the data in these studies relate to the magistrates court, and contrasts with Ballinger's study which indicates a greater

[75] Gwynn, above n 17, 95.
[76] Fox, above n 73, 328.
[77] Casey and Wilson, above n 54, 240.
[78] Ibid.
[79] Gwynn, above n 17, 95.
[80] Fox, above n 73, 329.
[81] Casey and Wilson, above n 54, 240.

severity of punishment for women when men and women were indicted for murder.

Some arguments suggest that male and female offenders may be sentenced according to the traditional roles they play in society. Accordingly, men are viewed as breadwinners and women as 'dependent domestics'. When sentencers take this approach, it is contended that gender inequality is intensified.[82] Thus the view that women commit more extreme and violent homicides than men may well be a stereotypical argument whereby violent women are considered to be 'worse' than violent men; as their acts may be unforeseen and perceived as unnatural.[83] This is more likely to be the case for women who, for example, do not fit the stereotypical image of the 'battered woman'.[84] When women do conform to acceptable notions of women's violence, namely as an immediate response to male violence, or resulting from a psychological disorder, courts appear to understand their actions. [85] Morrissey argues that as the law is responsible for carrying out society's response to murder, the law may see a need to contain the perceived threat posed by non-conforming female murderers.[86]

[82] Casey and Wilson, above n 54, 240.
[83] Kirkwood, above n 7, 167.
[84] Ibid 155.
[85] Ibid 169.
[86] Morrissey, above n 21, 2.

1.7.2 REMORSE

Remorse is an important sentencing consideration in all Australian jurisdictions.[87] As a discretionary variable, remorse can act to significantly reduce the severity of an accused's punishment.[88] However, as a mitigating factor, it is often difficult to distinguish remorse from expedience and self-pity.[89] Edney and Bagaric argue that remorse is perhaps the easiest mitigating factor to allege, as 'it requires no tangible exertion or demonstrable behavioural change, and being purely subjective it is almost impossible to rebut'.[90] Highlighting the difficulties associated with identifying a true expression of remorse, Chief Justice Asche in *Jabaltjari* remarked, '[t]he difference between being sorry for what one has done and sorry for being caught is a difference which judges may not always wish to investigate thoroughly'.[91]

According to Edney and Bagaric, the main reason remorse is given weight in the sentencing calculus is that judges assume contrite offenders accept their wrongdoing, and, are therefore less likely to re-offend.[92] However, Edney and Bagaric argue that there is no justifiable reason to give offenders a discount for being remorseful for their criminal behaviour. Edney and Bagaric also state that there is no evidence to suggest that repentant offenders are less likely to re-

[87] *R v Shannon* (1979) 21 SASR 442, 452 (King CJ); *R v Thomson & Houlton* (2000) 49 NSWLR 383, [118] (Spigelman CJ).
[88] *Neal v R* (1982) 149 CLR 305, 314 (Gibbs CJ, Murphy, Wilson, Brennan JJ); *R v Starr & Smith* [2002] VSCA 180, [25] (O'Bryan AJA); *R v Murphy* [2000] TASSC 169, [18] (Slicer J).
[89] *R v Whyte* (2004) 7 VR 397, 403 (Winneke P).
[90] Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 175.
[91] *R v Jabaltjari* (1989) 64 NTR 1, 10 (Asche CJ, Martin and Angel JJ).
[92] Edney and Bagaric, above n 90, 176.

offend. Additionally, they point out that, with sentencing sanctions being principally punitive in nature, there is no evidence to support the effectiveness of sentencing to rehabilitate offenders.[93]

Despite the current weight attributed to remorse in Australian jurisdictions, Edney and Bagaric suggest that, until there is empirical evidence to show that rehabilitation is attainable as a sentencing goal, remorse should be discarded as a sentencing consideration.[94]

1.8 GENERAL DETERRENCE

A principal objective of sentencing is deterrence.[95] Broadly, there are two forms of deterrence, specific and general. Specific deterrence aims to punish the offender for their behaviour in a way that will convince them that 'crime does not pay'.[96] However, in addition to an offender's sentence being commensurate with the seriousness of the offence they have committed, the purpose of general deterrence is to deter others from following a similar course of conduct by demonstrating the consequences of offending.[97] In *DPP v El Karhani*,[98] the court notes that general deterrence is a fundamental principle of sentencing.[99] It is also considered to be particularly important where the offence is prevalent.[100] However, the Australian Law Reform Commission has rejected general

[93] Edney and Bagaric, above n 90, 178.
[94] Ibid 178, 179.
[95] *R v Radich* [1954] NZLR 86, 87 (Fair, Stanton and Hay JJ).
[96] Edney and Bagaric, above n 90, 54.
[97] Ibid 54.
[98] (1990) 21 NSWLR 370.
[99] *DPP v El Karhani* (1990) 21 NSWLR 370, 378 (Kirby P, Campbell and Newman JJ).
[100] *R v Williscroft* [1975] VR 292, 299 (Fair, Stanton and Hay JJ).

deterrence as an appropriate rationale for sentencing. Their argument is that to impose punishment on a person while making reference to the 'hypothetical crime' of another, goes against the overriding principle of sentencing that a person's punishment must be linked to their crime.[101]

Edney and Bagaric also argue that general deterrence does not work.[102] They state that because punishment involves inflicting pain on offenders, in order for general deterrence to be justified, the community needs to receive an 'ascertainable' benefit from that punishment.[103]

As an example, offenders who are suffering from a psychiatric or psychological illness at the time of the offence may have the illness treated as a mitigating factor in sentencing.[104] Edney and Bagaric point out that given offenders' reduced 'moral capacity and understanding,' the impact of general deterrence has little or no significance for this group of offenders.[105] It is also recognised that the mitigating consequence of psychiatric or psychological illness must be linked to the proper purpose of punishment.[106]

In conclusion, despite the academic arguments to the contrary, for the judiciary, general deterrence remains a fundamental principle of sentencing.

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[101] Australian Law Reform Commission, *Sentencing* Report No 44, Canberra (1988) 18.
[102] Edney and Bagaric, above n 90, 55.
[103] Ibid 55.
[104] *R v Porter* (1933) 55 CLR 182, 186-187 (Dixon J).
[105] Edney and Bagaric, above n 90, 164.
[106] R v *Porter* (1933) 55 CLR 182, 186-187 (Dixon J).

1.9 THE LANGUAGE OF THE COURTROOM

Social scientists believe that language does more than merely reflect the reality of the world we live in; language is the principal means for the construction of our social reality.[107] Not only can language influence what we see, and how we relate to our surrounding world;[108] language can and does create, maintain and change our social relations.[109] Language can also shape the way people understand and respond to certain behaviours.[110] For example, 'battered wife syndrome' not only describes a victim's behavioural pattern in response to being beaten by their partner, it creates an understanding of the effects of battering behaviour. As the syndrome conforms to conservative notions of 'heterosexual femininity', women who are aggressive, capable and sexually active do not readily correspond to society's image surrounding battering, namely 'learned helplessness'. Therefore, these women may be viewed in an unsympathetic light by courts for violating society's expectations of this type of victim.[111]

Easteal notes in her analysis of the interaction between females and the legal system, that legal thinking is a reflection of male values. Easteal suggests that the concepts represented in the courtroom, and the legal system in general, continue in some respects, to present a significant hurdle for women.[112]

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[107] Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (Butterworths, 2001) 4.
[108] Ibid.
[109] Kathleen J Ferraro, 'The Words Change, But the Melody Lingers : The Persistence of the Battered Woman Syndrome in Criminal Cases Involving Battered Women' (2003) 9 *Violence Against Women* 110, 125.
[110] Ibid.
[111] Ibid 125, 126.
[112] Easteal, Less than equal, above n 107, 39.

In relation to the powerful role language plays in the legal system, Easteal observes that there is a fundamental difference in the speech style of men and women. Women are more likely to speak and hear language in terms of 'connection and intimacy'. This empowers the listener to ascertain what the speaker means to say. On the other hand, Easteal points out, that men speak and hear language in terms of 'status and independence', which conveys their authority and power to make 'truthful statements about the world'.[113]

Research has also identified the power that language has to influence trial outcomes.[114] Coss maintains that judicial remarks based on a judge's assessment of, for example, an individual's credibility can act as a powerful trigger, and communicate a broader message to the community.[115] Writing extra-curially, Justice Margaret Beazley, a judge of the Court of Appeal, Supreme Court of New South Wales makes the following observation:

> For my part, I undertake the judicial task from the perspective that there should be no difference in judicial style, or more importantly, outcome depending upon whether one is male or female...[T]here undoubtedly are differences in both judicial style and outcome depending upon the individual judge, but that is a different thing altogether.[116]

[113] Easteal, Less than equal, above n 107, 10.
[114] Nicolson, above n 24, 185-206.
[115] Graeme Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006) 18 *Current Issues in Criminal Justice* 51, 70.
[116] Justice Margaret Beazley, 'Women on the Bench' (2003) 83 *Reform* 20, 21.

Eaton makes the observation that 'familial ideology' is dominant in the language of the court room, and that this reflects the family's role in the socialisation and social control of the community.[117] Eaton states that with the responsibility for enforcing society's prescribed rules relating to law and order, courts can also impose unwritten rules which regulate the social relationships between the sexes.[118] Therefore, courtroom language can both reflect and strengthen social order, and the courtroom can serve as a platform to convey the viewpoints and suppositions of those who create justice in society.[119] Eaton found in her British study on the language used in the courtroom and the model of the family revealed by that language, that contextually, significant courtroom discussion centred round the defendant's family.[120] Not only did court officials describe a defendant's household arrangements, their comments revealed their own beliefs about how a family should be organised as well as their expectations arising from that organisation.[121] Eaton concluded that these assumptions were embedded in the language used by magistrates, lawyers and expert witnesses alike.[122]

In her analysis of pleas of mitigation, Eaton found that the family was a key place where a defendant could discharge their social responsibility, and through their actions as an appropriate family member, they could demonstrate dependability and respectability to the court.[123] Defence counsel would highlight the

[117] Mary Eaton, *Justice for women?* (Open University Press, 1986) 95.
[118] Ibid.
[119] Ibid 43.
[120] Ibid 93.
[121] Ibid 93, 94.
[122] Ibid
[123] Ibid 94.

appropriate role played by the defendant, such as partner or parent, and stressed the responsibilities and duties undertaken by the defendant to emphasise their normality, and that their current offending was an aberration. [124]

Eaton found that the perceived stereotypical gender roles, played by men and women in society, were regularly presented to the court. For example, for male defendants, children were a responsibility requiring the provision of an adequate income; while household responsibilities and children's care and appearance were viewed as the female defendant's domain.[125]

While paid employment was interpreted as a way of contributing to the family, a defendant's continuous employment record, and employer trust were also presented as evidence of fidelity and diligence, helping to build a 'non-criminal identity'.[126] Importantly, Eaton noted that a defendant's conservative life-style was tendered to demonstrate sufficient socialisation, the absence of which was utilised to deny full criminal responsibility on the part of that defendant.[127]

In drawing her conclusions, Eaton established that within the boundaries of her study, the court did treat men and women equally, that is, when they appeared in similar circumstances, they received similar sentences. However, Eaton argued that by endorsing the inequalities experienced by women in other parts of society,

[124] Ibid 46.
[125] Ibid 94.
[126] Ibid 49.
[127] Ibid 44.

the court continued to define women differently and in particular, subordinate to men. [128] In that respect Eaton concluded men and women remained unequal in the courtroom.[129]

1.10 REDUCING CULPABILITY[130]

While maintaining their self-image, offenders can evade moral blame for an offence by telling themselves and others that they were not responsible for their actions, their actions were not serious, or that their behaviour was, in some way, justified. Therefore, an individual who accepts the law's authority can remove its restrictions by justifying their actions.[131] Sykes and Matza call this process neutralisation.[132] While offenders predominantly use neutralisation prior to violating the law, they can also utilise the process after the crime is committed, particularly if someone questions their behaviour or characterises them as a criminal.[133]

Offenders neutralise their offending by refusing to hold themselves personally responsible for their criminal actions. In these circumstances, offenders frequently claim that, rather than being in command of their lives, their behaviour results from factors beyond their control. These factors include; drug addition,

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[128] Ibid 97-98.
[129] Ibid 98.
[130] *R v Tsiaras* [1996] 1 VR 398, 400 (Charles, Callaway JJA and Vincent AJA), *Anderson* [1981] VR 155, 159-161 (Young CJ, Jenkinson J).
[131] John E Conklin, *Criminology* (Pearson Education, 8th ed, 2004) 172.
[132] Gresham M Sykes and David Matza, 'Techniques of Neutralization: A Theory of Delinquency' (1957) 22 *American Sociological Review* 664, 664 quoted in John E Conklin, *Criminology* (Pearson Education, 8th ed, 2004) 172.
[133] Conklin, above n 131, 172, 180.

alcoholism, a dysfunctional family background, 'wayward friends', or some other force beyond their control.[134] Therefore many offenders lack a sense of guilt, because in comparison to their own hardships, they view their offences as minor.[135]

Another way offenders neutralise their behaviour is by denying that anyone was hurt by their criminal actions. Here offenders are desensitised to the effect their actions have on their victim. At times, offenders will view their victim as an object rather than a person, refusing to identify the victim as suffering as a consequence of the crime they have committed.[136]

In Shapland's study of mitigation, she found that offenders minimised their offending by denying both responsibility and wrongdoing. Shapland stated that once offenders presented expressions of guilt and remorse, they endeavoured to deny full responsibility for their offending, claiming for example, provocation, drug or alcohol addiction, or some other factor beyond their control.[137] Further, an offender's belief that they are not in fact responsible for their criminal behaviour may be further emphasised if the judge's sentencing remarks also reflect that the offender's responsibility is moderated.[138] In addition, as Coss

[134] Conklin, above n 131, 172.
[135] David Indermaur, 'Offender Psychology and Sentencing' (1996) 31 *Australian Psychologist* 15, 18.
[136] Conklin, above n 131, 173.
[137] J Shapland, *Between conviction and sentence: The process of mitigation* (Routlege, 1981) quoted in David Indermaur, 'Offender Psychology and Sentencing' (1996) 31 *Australian Psychologist* 15, 17.
[138] Indermaur, above n 135, 17.

states, any sympathy the offender obtains from the court in this regard, can lead to victim blaming, a concept regularly revealed in the course of criminal trials.[139]

For some offenders who view their offence as unacceptable, they may consider themselves as an 'object of treatment'. In constructing a belief that their offending results from a 'pathology' such as drug addiction or alcoholism, an offender can present to a psychologist for a remedy. [140] However, as Indermaur points out, viewing an offender's behaviour as a 'quasi-medical condition' may lead to a denial of responsibility on the part of the offender, and prevent them from making the behavioural changes required.[141] Although a psychiatric or psychological illness may be taken into account as a mitigating factor, courts have set 'limits' on their significance, especially in respect to serious offences where general and specific deterrence may prevail over rehabilitation.[142] Indermaur states that endeavours by a sentencer to treat an offender's perceived pathology, by using the act of sentencing as a remedy, contradicts society's meaning of both the crime and the sentence.[143]

Historically, it has been accepted that an offender with a severe mental disorder should receive different treatment in the criminal justice system.[144] Specifically, the 'medicalisation' of a condition usually releases an individual from social

[139] Coss, above n 115, 70.
[140] Indermaur, above n 135, 18.
[141] Indermaur, above n 135., 18.
[142] *MacDonald v R* [2007] NSWCCA 105 [26] (Hall J).
[143] Indermaur, above n 135, 18.
[144] Andrew Carroll and Andrew Forrester, 'Depressive Rage and Criminal Responsibility' (2005) 12 *Psychiatry Psychology and Law* 36, 36.

blame surrounding their actions.[145] One such condition can be depression. Allen describes 'reactive depression' as an extreme reaction to events and circumstances in an individual's life that they find distressing.[146] Allen states that as a mood disorder, an individual can experience abnormal feelings such as hopelessness, worthlessness and unhappiness.[147] While Carroll and Forrester acknowledge that severe depression can clearly be clinical in its diagnosis, they comment that it is not always possible to identify the point at which feelings of low self-esteem, despair and moodiness become pathological.[148]

According to Carroll and Forrester, forensic clinicians are frequently asked to give an opinion regarding an offender who, while suffering from depression, has attacked someone in a fit of rage. The offender claims leniency, arguing that their depression is a 'mental impairment' disorder and their rage, depression-related.[149] However Carroll and Forrester states that the idea that a disorder can occur merely for the duration of a violent crime presents difficulties.[150] As McEllistrem points out, most violent crimes are by their very nature 'reactive'. [151] Therefore, as suggested by Carroll and Forrest, given that most violent crimes are fuelled by rage, for an offender's criminal responsibility to be reduced on the grounds that

[145] Hilary Allen, *Justice unbalanced: gender, psychiatry and judicial decisions* (Open University Press, 1987) 94.
[146] Ibid 95.
[147] Ibid.
[148] Carroll and Forrester, above n 144, 38.
[149] Ibid.
[150] Ibid 40.
[151] J E McEllistrem, 'Affective and predatory violence:A bimodal classification system of aggression and violence' (2004) 10 *Aggression and Violent Behaviour* 1, 30.

they found self-control difficult as a result of suffering depression, would significantly widen the defence of insanity.[152]

1.11 THE STUDY

The purpose of this study was to undertake a qualitative analysis of the statements made by judges in the context of domestic murder, in order to obtain a comparison of themes present when males kill females and females kill males. The purpose of this literature research was to identify research from a historical, legal and criminological perspective, which was consistent or inconsistent with the results emanating from the themes identified in the analysis of judges' sentencing remarks. This research paper was undertaken using a methodology involving grounded theory, in which the literature review does not play a key role. Accordingly, the literature review which forms the basis of this introduction was carried out after the complete analysis of both the male and female offenders' sentencing remarks.

The literature review highlights a number of key areas related to themes present in judges' sentencing remarks within this study. In committing less than 15% of homicides in Australia,[153] women are more likely to be convicted of manslaughter, and men are more likely to be convicted of murder.[154] While men usually kill their female partners after a triggering event involving the female

[152] Carroll and Forrester, above n 144, 40.
[153] Mouzos, Homicidal Encounters, above n 2, 51.
[154] Patricia Easteal, *Killing the Beloved: Homicide Between Adult Sexual Intimates* (Australian Institute of Criminology, 1993) 115; Wendy Chan, *Women, Murder and Justice* (Palgrave, 2001) 43-45.

victim, women are more likely to kill their male partners as a result of self-preservation.[155] Given the rarity with which women kill, they are viewed as passive.[156] Consequently, when women commit murder their rejection by society is even more extreme than when men do the same.[157] Extensive research demonstrates that as a result, women's treatment in the criminal justice system is determined by long standing myths and stereotypical views of women, rather than the circumstances surrounding their offence.[158] In particular, when women break away from their traditional roles, society considers them to be 'unfeminine' and 'unnatural'.[159] This finding is supported by historical studies which found that female killers were perceived as 'wicked, oversexed and highly emotional women',[160] who when compared to men, were executed more frequently for committing murder.[161]

In relation to sentencing, variations can be attributed to a number of factors involving decision makers' individual differences, such as their penal philosophy or sentencing goals, attributions made concerning the causes of crime, their

[155] Polk and Ranson, above n 12, 21-23.
[156] Kirkwood, above n 7, 152, 153.
[157] Morrissey, above n 21, 2.
[158] Wendy Chan, *Women, Murder and Justice* (Palgrave, 2001) 22; Rebecca Bradfield, 'Women Who Kill: Lack of Intent and Diminished Responsibility as the Other 'Defences' to Spousal Homicide' (2001) 13 *Current Issues in Criminal Justice* 143, 145; Donald Nicolson, 'Telling Tales: Gender Discrimination, Gender Construction and Battered Women who kill' (1995) 2 *Feminist Legal Studies* 185, 188.
[159] Heidensohn, above n 26, 20.
[160] Knelman, above n 51, 14.
[161] Ballinger, above n 45, 2.

personality and their beliefs generally.[162] In particular, remorse remains an important discretionary sentencing consideration in all Australian jurisdictions. [163]

The family's role in the socialisation and social control of the community is dominant in the language of the court room[164] As regards pleas of mitigation, the family is a key place where a defendant can discharge their social responsibility, and through their actions as an appropriate family member, they can demonstrate dependability and respectability to the court.[165] A British study of mitigation states that an offender can minimise their offending by denying both responsibility and wrongdoing.[166] Once an offender presents expressions of guilt and remorse, they endeavour to deny full responsibility for their offending, claiming for example, provocation, drug or alcohol addiction, or some other factor beyond their control.[167] Offenders may also consider themselves as an 'object of treatment'.[168] In constructing a belief that their offending results from a 'pathology' such as drug addiction or alcoholism, an offender can present to a psychologist for a remedy. [169] However, viewing an offender's behaviour as a

[162] Carroll et al, above n 52, 107.
[163] *R v Shannon* (1979) 21 SASR 442, 452 (King CJ); *R v Thomson & Houlton* (2000) 49 NSWLR 383, [118] (Spigelman CJ).
[164] Eaton, above n 117, 95.
[165] Ibid 94.
[166] J Shapland, *Between conviction and sentence: The process of mitigation* (Routlege, 1981) quoted in David Indermaur, 'Offender Psychology and Sentencing' (1996) 31 *Australian Psychologist* 15, 17.
[167] J Shapland, *Between conviction and sentence: The process of mitigation* (Routlege, 1981) quoted in David Indermaur, 'Offender Psychology and Sentencing' (1996) 31 *Australian Psychologist* 15, 17.
[168] Indermaur, above n 135, 18.
[169] Ibid.

'quasi-medical condition' may lead to a denial of responsibility on the part of the offender, and prevent them from making the behavioural changes required.[170]

2. METHOD

Originally, the research task was to undertake a qualitative analysis of judicial sentencing remarks, on domestic homicide, in the jurisdiction of Western Australia. However, despite the sentencing remarks usually being available on the Supreme Court of Western Australia's website within 48 hours of delivery in court, they only remain on the web site for 28 days. Thereafter the sentencing remarks are removed, and, subsequently, are normally only available to legal practitioners. Other interested parties may inspect a copy of specified remarks after obtaining the permission of the Principal Registrar.[171] Such limited access would prove to be both impractical, and inappropriate to the research methodology; therefore, to proceed it was necessary to choose another jurisdiction, and by random selection, the state of Victoria was chosen.[172]

All sentencing remarks were extracted from the Australian Legal Information Institute (AustLII) database, which is a full text electronic database. While endeavouring to commence this paper from a neutral standpoint, I did have an anecdotal belief that women were treated more leniently in terms of sentencing in relation to domestic homicide. While this belief may have some merit with

[170] Ibid.
[171] Supreme Court of Western Australia, *Practice Note No 5.7 – Status of Published Written Sentencing Remarks – General Division – Criminal*, 20 January 2011.
[172] Use of the first person in the methodology section of this paper reflects that this is my research. Use of the third person is unwarranted.

women who either plead guilty to manslaughter or are found not guilty of murder, but guilty of manslaughter, those women are not within the scope of this paper. Therefore, at the commencement of the research task, I established that the category of domestic homicide was too wide a search parameter; therefore, in narrowing that parameter, the next step was to search the jurisdiction of Victoria for all cases in the context of domestic murder. For the purposes of this research, I characterised domestic murder as murder between spouses – legal or de facto, current or former. Accordingly, using several keywords, I examined and retained sentencing remarks from criminal cases involving domestic murder.

At that point, I was unable to accurately search for the offender/victim relationship using AUSTLII, therefore, I proceeded to manually examine all sentencing comments identified by the AUSTLII research. This allowed me to identify offender/victim relationships in the context of domestic murder. I then proceeded to discard all cases which did not fit that category.

In due course, 39 cases fitted within the selected criterion in Victoria. This was comprised of 36 male offenders who were convicted of murder in the Victorian Supreme Court, in respect of the death of their previous or current female partner, together with three female offenders who were convicted of murder, in respect of the death of their previous or current male partner. No male or female Aboriginal offenders were identified in this jurisdiction.

Upon completion of this initial examination, it was apparent that there were insufficient offender numbers for data analysis. Therefore, given that New South Wales is comparable in size to Victoria; this was chosen as the second jurisdiction.

Following the criterion previously described, my research in the New South Wales jurisdiction identified a further 40 cases. This included 38 male offenders, and two female offenders. Within the 38 male offenders, seven were Aboriginal male offenders. No female Aboriginal offenders were identified in this jurisdiction.

While collectively, the numbers for male Aboriginal offenders were sufficient for analysis, given that there were no female Aboriginal offenders in either jurisdiction, I was unable to analyse the Aboriginal male offenders. Furthermore, given that violent crimes tend to be intra-racial, [173] and there were no female Aboriginal offenders, all Aboriginal cases were omitted for research purposes. Finally, no statistical analysis has been undertaken in this research paper as the sample size, particularly in relation to female offenders is too small.

[173] Mouzos, Femicide, above n 1, 20-21.

2.1 RESEARCH METHODOLOGY - GROUNDED THEORY

Grounded theory is a systematic set of methods for collecting, coding and analysing data.[174] In contrast to beginning with a theory from which hypotheses are deduced, a grounded theory research project begins with either a research question, or field of study, and whatever is relevant to that project is allowed to come forward during the research process.[175] In this paper, the task was a qualitative analysis of sentencing remarks in order to gain a comparison of the themes present when males kill females, and females kill males.

In grounded theory, the first step is the collection of data. For this research, drawing upon all of the non-Aboriginal offenders extracted from the AustLII database, (n = 70), I commenced by undertaking a qualitative analysis of sentencing remarks for male offenders for themes present. Taken randomly, and one at a time, each set of sentencing remarks was analysed until the saturation point within those remarks was reached. This included one set of remarks where it was subsequently discovered that a number of paragraphs were the subject of a non-publication order, and two sets of remarks where the offender and their co-accused were sentenced simultaneously.[176] All of these remarks were included because they were randomly selected.

[174] Barney G Glaser and Anselm L Strauss, *The discovery of grounded theory: Strategies for qualitative research* (Aldine de Gruyter, 1967).
[175] Vera Bitsch, 'Qualitative Research: A Grounded Theory Example and Evaluation Criteria' (2005) 23 (1) *Journal of Agribusiness* 75, 77.
[176] *R v Raju* [2007] NSWSC 1418 (14 December 2007) [43]-[50] (Bell J).; *R v Saad and Saad* [2003] VSC 438 (12 November 2003); *R v Parsons & Stocker* [2002] VSC 161 (13 May 2002).

Beginning with the first set of sentencing remarks, key points in the judicial comments within each line were marked with a series of codes extracted from the text. Then, each key point in a judicial comment was compared to other judicial comments within that set of sentencing remarks, with respect to commonalities and differences. This constant comparison served to uncover and explain patterns and variations. Next, the codes were grouped into similar concepts; and hypotheses about the relationships between categories were developed.[177] As more data within each set of sentencing remarks was coded, the concepts were compared and categories produced. This process ultimately formed the basis for the creation and grounding of an emerging theory.[178]

When saturation point for all categories within the first set of sentencing remarks was reached, the next sentencing remark was randomly chosen. From this point onwards, I went back and forth between sentencing remarks, comparing data, and constantly modifying and sharpening the growing theory. Given the nature of the data, namely judges' sentencing remarks, I had no interaction with the data participants, therefore, I had no control over the data.

I continued to analyse male offenders' sentencing remarks until saturation point for all possible themes was achieved. A baseline was obtained upon completion of the ninth male offender's sentencing remarks. This allowed for a comparison with female offenders. Then, due to the relatively small numbers of female

[177] Bitsch, above n 175, 79.
[178] Glaser, above n 174, 5.

offenders, all five female offenders from the same Victorian and New South Wales Supreme Courts were selected, in order to identify if there were any similarities and differences in the themes, and in particular, the types of statements made about male and female offenders.

Following the rationale that pre-conceptions can get in the way of critical thinking and discovery, familiarity with previous research is not as important as, for example, the materials accessible and the level of sophistication brought to the analytical process.[179] Therefore, in grounded theory, the literature review does not play a key role. Accordingly, in this research project the literature review was undertaken after the complete analysis of both the male and female offenders' sentencing remarks.

3. RESULTS

As shown in Table 1 on page 36, the total number of cases which fitted the selected criterion for domestic murder were 77. This was comprised of 72 male and five female offenders. While collectively the numbers of male Aboriginal offenders were sufficient for analysis, given that there were no female Aboriginal offenders in either Victoria or New South Wales, the Aboriginal male offenders were unable to be analysed. Therefore for the purpose of this research paper all Aboriginal cases were discarded. For this research sample, the year of sentence ranged between 2002 and 2010.

[179] Bitsch, above n 175, 77.

Table 1: Domestic Murder – Initial results for Victoria and New South Wales

OFFENDER TYPE	ABORIGINAL		NON-ABORIGINAL		TOTAL
	Victoria	New South Wales	Victoria	New South Wales	
Male	0	7	36	29	72
Female	0	0	3	2	5
TOTAL	**0**	**7**	**39**	**31**	**77**

3.1 SENTENCE LENGTH

The sentences imposed in the 14 domestic murder cases examined in this research are detailed in Table 2, on page 38. The cases are listed according to the head sentence, highest to lowest. Where sentences are of equal length, the earliest year of sentence is recorded first.

As Table 2 on page 38 shows, the highest sentence of 36 years, with a non parole period of 26 years was handed down to a female offender in New South Wales, in 2005. The lowest sentence of 16 years, with a non parole period of 12 years and 6 months was handed down to a male offender in Victoria, in 2002. Notably, the sentences handed down to all five female offenders appeared within the top ten sentences generally; spread across both jurisdictions, between 2002 and 2009. Overall, female offenders received the two highest sentences of 36 years and 23 years respectively.

In view of the small number of sentencing remarks concerned, any analysis of the range of sentences imposed is limited. This applies particularly to female offenders, of whom there were only five in the sample. In contemplating the sentencing ranges, it is also important to bear in mind that sentencing regimes and practices differ between jurisdictions, and comparisons between Victoria and New South Wales, in terms of the length of the sentence imposed are not within the scope of this paper.

Table 2: All cases

HEAD SENTENCE (Years and months)	NON PAROLE PERIOD (Years and months)	GENDER OF OFFENDER	J'DN	JUDGE	YEAR*** OF SENTENCE
36 years	26 years	Female[180]	NSW	Whealy J	2005
23 years	18 years	Female[181]	VIC	Teague J	2002
23 years	17 years and 3 months	Male[182]	NSW	Howie J	2009
22 years	18 years	Female[183]	VIC	Gillard J	2002*
22 years	18 years	Male[184]	VIC	Osborn J	2009
22 years	16 years and 6 months	Male[185]	NSW	Howie J	2004
22 years	16 years	Female[186]	NSW	Mathews AJ	2009
21 years	17 years	Male[187]	VIC	Bongiorno J	2002
21 years	16 years	Female[188]	VIC	Bongiorno J	2003*
21 years	16 years	Male[189]	NSW	Bell J	2007
19 years	16 years	Male[190]	VIC	T Forrest J	2010
18 years**	13 years	Male[191]	VIC	Teague J	2004*
18 years	13 years	Male[192]	VIC	Teague J	2007
16 years	12 years and 6 months	Male[193]	VIC	Teague J	2002

* Where sentences are of equal length, the earliest sentence is recorded first.

** Head sentence is inclusive of 4 years imposed for arson, where 1 year is cumulative on, and 3 years concurrent with a 17 year sentence for murder.[194]

*** There is no particular bias regarding sentencing policy over the time period.

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[180] *R v Willard* [2004] NSWSC 402 (28 April 2005) [55] (Whealy J).
[181] *R v Parsons & Stocker* [2002] VSC 161 (13 May 2002) [13] (Teague J).
[182] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [29] (Howie J).
[183] *R v Whyte* [2002] VSC 146 (3 May 2002) [102] (Gillard J).
[184] *R v Chalmers* [2009] VSC 251 (22 June 2009 [55] (Osborn J).
[185] *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [34] (Howie J).
[186] *R v Barrett* [2009] NSWSC 338 (30 April 2009) [50] (Mathews AJ).
[187] *R v Mizon* [2002] VSC 115 (17 April 2002) [29] (Bongiorno J).
[188] *R v Saad and Saad* [2003] VSC 438 (12 November 2003) [32] (Bongiorno J).
[189] *R v Raju* [2007] NSWSC 1418 (14 December 2007) [55] (Bell J).
[190] *R v Felicite* [2010] VSC 245 (8 June 2010) [30] (T Forrest J).
[191] *R v Wathen* [2004] VSC 354 (21 September 2004) [11] (Teague J).
[192] *DPP v Lam* [2007] VSC 307 (27 August 2007) [11] (Teague J).
[193] *R v Roesner* [2002] VSC 384 (9 September 2002) [15] (Teague J).
[194] *R vWathen* [2004] VSC 354 (21 September 2004) [11] (Teague J).

As illustrated in Table 3 below for male domestic murder offenders in respect of killing their female partner, the average head sentence was 20 years, with the highest sentence imposed on a male offender being 23 years. The lowest sentence imposed on a male offender was 16 years. In contrast, for female domestic murder offenders, the average head sentence was 24 years and 9 months, with the highest sentence imposed on a female offender being 36 years. This was imposed in *R v Willard*[195] where the offender was sentenced according to section 19A *Crimes Act 1900* (NSW), which set a maximum penalty of life imprisonment, being the term of the person's natural life.[196] The lowest sentence imposed on a female offender was 21 years.

Table 3: Sentence length - full term

OFFENDER TYPE	AVERAGE	HIGHEST	LOWEST
Male	20 years	23 years	16 years
Female	24 years 9 months	36 years	21 years

Table 4, on page 40 shows that for male offenders the average non parole period was 15 years and 6 months, with the highest non parole period for a male offender being 17 years and 3 months, and the lowest, 12 years and 6 months. Again, standing out against these sentence lengths, the average non parole period

[195] [2004] NSWSC 402 (28 April 2005).
[196] S19A *Crimes Act 1900* (NSW), s 2. Now repealed.

for a female offender, was 18 years and 9 months. Further, the highest non parole period for a female offender was 26 years and the lowest, 16 years.

Furthermore, the average sentence for female offenders both for full term and the non parole period was higher than the highest sentence handed down to male offenders.

Table 4: Sentence length – non parole period

OFFENDER TYPE	AVERAGE	HIGHEST	LOWEST
Male	15 years 6 months	17 years 3 months	12 years 6 months
Female	18 years 9 months	26 years	16 years

3.2 THEMES IN SENTENCING

3.2.1 An 'abominable crime'[197] Men, women and murder

Within the data, judges remarked that men and women killed their domestic partners for different reasons.

In eight of the male offender cases, judges indicated that these offenders killed their domestic partners as a result of a familial dispute. [198] Judges commented further that this often occurred as a result of the female victim leaving or intending to leave the relationship, and usually taking the children from the relationship with them. In this regard, judges frequently conveyed the distress and anguish suffered by the male offender:

> I am also prepared to accept that the offender was devastated when his wife left him to live with Mr Clarke and had been totally unsuspecting of the fact that his wife had been having a relationship with another man. This event was as much a shock to the two sons as it was to the offender. He was clearly in a highly distressed and disturbed state as a result of the separation.[199]

[197] *R v Whyte* [2002] VSC 146 (3 May 2002) [58] (Gillard J).
[198] *R v Naa* [2009] NSWSC 1077 (9 October 2009); *R v Goodwin* [2004] NSWSC 757 (12 August 2004); *R v Mizon* [2002] VSC 115 (17 April 2002); *R v Raju* [2007] NSWSC 1418 (14 December 2007); *R v Felicite* [2010] VSC 245 (8 June 2010); *R v Wathen* [2004] VSC 354 (21 September 2004); *DPP v Lam* [2007] VSC 307 (27 August 2007); *R v Roesner* [2002] VSC 384 (9 September 2002).
[199] *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [19] (Howie J).

> You told Dr Sullivan that when your wife, in your presence, said that she loved Dino "that hit me hard". I accept that it did, and I accept that this was the first time your wife had informed you of this.[200]
>
> That distress arose from the culmination of the events that I have earlier summarised. There had been the breaking down of communications, the news of your wife leaving, your inability to deposit the money in the children's bank accounts, your seeing your children packing their belongings and your son giving you the football plaque by which to remember him, ... the emotional excesses were extreme and you were racked by a combination of guilt, disappointment, frustration and apprehension.[201]

Conversely, for female offenders, in three cases, judges remarked that the motive for killing their domestic partner was financial gain.[202] Judicially, this motive was considered to bear a significantly high level of criminality:

> I now turn to consider and determine the object level of criminality in the murder of which the offender has been convicted. I should say immediately that the facts I have briefly stated show an extremely serious offence of premeditated murder for financial reward.[203]

[200] *R v Felicite* [2010] VSC 245 (8 June 2010) [14] (T Forrest J).
[201] *R v Roesner* [2002] VSC 384 (9 September 2002) [7] (Teague J).
[202] *R v Willard* [2004] NSWSC 402 (28 April 2005); *R v Parsons & Stocker* [2002] VSC 161 (13 May 2002); *R v Whyte* [2002] VSC 146 (3 May 2002).
[203] *R v Willard* [2005] NSWSC 402 (28 April 2005) [28] (Whealy J).

In a second instance, this criminality drew judicial repulsion:

> Turning to your motives for committing this abominable crime, I am satisfied that the financial return was one...[A]ccording to the evidence, you received approximately $14,000 in 1987 for superannuation and to you, in 1983, this represented, do doubt, a large sum and a temptation.[204]

In another instance, for Whealy J, this motive proved to be an inexplicable reason to kill:

> Ms Rigg asked during her submissions to the jury how could a woman, reasonably well liked in the community with a lot of friends and a gregarious social existence throw away the life of her husband and happiness of her children for the prospect of financial reward? I do not profess to know or understand the mind and nature of the offender that made her decide to act in the way she did.[205]

3.2.2 The 'good worker'[206] and the 'callous, heartless, wicked person'[207] The normal man and the abnormal woman

Positive judicial descriptions of male offenders' sound business acumen, work ethic and work place popularity, appeared to highlight the ordinariness of those offenders in the context of their offending, as well as demonstrating their responsible roles within the community and the respectability gained by their community spirit. Reference to offenders' community contributions was also

[204] *R v Whyte* [2002] VSC 146 (3 May 2002) [58] (Gillard J).
[205] *R v Willard* [2004] NSWSC 402 (28 April 2005) [43] (Whealy J).
[206] *R v Roesner* [2002] VSC 384 (9 September 2002) [7] (Teague J).
[207] *R v Whyte* [2002] VSC 146 (3 May 2002) [50] (Gillard J).

common place. Collectively, these descriptions recurred frequently in judicial remarks, mentioned repeatedly throughout six of the male offender cases:[208]

> You were there involved in community activities including as a volunteer with the Country Fire Authority.[209] You have been a good worker, a good provider and a contributor to community affairs.[210]
>
> Your employer regards you as an outstanding employee and you were popular in the workplace.[211] Your employer speaks highly of your work ethic.[212]
>
> You progressed rapidly in this employment until, by the time you committed this offence, you were probably earning in the region of $80,000 per year.[213] Your counsel submitted, without demur from the Crown, that you were a worthwhile, socially active and hardworking member of the community prior to the events of September 2000. I accept this submission.[214]
>
> He was undoubtedly a hard working, and well-respected member of the community.[215]

[208] *R v Felicite* [2010] VSC 245 (8 June 2010) [20], [25] (T Forrest J); *R v Roesner* [2002] VSC 384 (9 September 2002)[10], [14] (Teague J); *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [26] (Howie J); *R v Mizon* [2002] VSC 115 (17 April 2002) [19], [20] (Bongiorno J); *R v Chalmers* [2009] VSC 251 (22 June 2009 [34] (Osborn J); *R v Wathen* [2004] VSC 354 (21 September 2004) [7] (Teague J).
[209] *R v Roesner* [2002] VSC 384 (9 September 2002) [10] (Teague J).
[210] *R v Roesner* [2002] VSC 384 (9 September 2002) [14] (Teague J).
[211] *R v Felicite* [2010] VSC 245 (8 June 2010) [20] (T Forrest J).
[212] *R v Felicite* [2010] VSC 245 (8 June 2010) [25] (T Forrest J).
[213] *R v Mizon* [2002] VSC 115 (17 April 2002) [19] (Bongiorno J).
[214] *R v Mizon* [2002] VSC 115 (17 April 2002) [19] (Bongiorno J).
[215] *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [26] (Howie J).

Further, in another case, where the male offender had been less successful in his employment endeavours, Teague J conveyed the impact a lack of education had on that offender's ability to obtain gainful employment:

> You had received very little education in Vietnam. Your English-language skills were and still are poor. Effectively, your only capacity for work came from the use of your hands.[216] Your inability to earn a good income led you to join the company of people who chose to traffic illegal drugs.[217]

Notably, the concept behind this theme, namely, normalisation is carried through to the female sentencing remarks in relation to the male victims. In four instances where the female offender had killed her partner, the judge expressly promoted the work history, work ethic, work place popularity and respectability of the male victim:

> He had been elected a union representative by his workmates. This demonstrated the respect that was held of him by his 50 workmates.[218]

> The offender had no paid employment but the deceased himself had work with a local mining company.[219]

[216] *DPP v Lam* [2007] VSC 307 (27 August 2007) [2] (Teague J).
[217] *DPP v Lam* [2007] VSC 307 (27 August 2007) [3] (Teague J).
[218] *R v Whyte* [2002] VSC 146 (3 May 2002) [3] (Gillard J).
[219] *R v Willard* [2005] NSWSC 402 (28 April 2005) [5] (Whealy J).

> The evidence which was given upon your trial established that the deceased was an honest, hardworking family man who enjoyed his employment and was well liked by his work colleagues.[220]

> He was a good provider for you and for your two daughters.[221]

However, in relation to female offenders, any comments regarding their employment or community achievements were negligible.[222] Furthermore, as regards female victims, positive judicial descriptors only appeared in two cases, and were at best, limited:

> I must also take into account that the victim you murdered was well-known to you to be the loving mother of a young daughter and the supportive daughter of both her parents.[223]

> She took up the study of psychology, and was clearly doing well in her studies.[224]

Specifically in relation to female offenders, the judicial focus was on the absence of normality in female offenders' actions. This was noticeable in a number of cases where judges emphasised an offender's lack of competence in roles such as housekeeper, carer and mother:

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[220] *R V Saad and Saad* [2003] VSC 438 (12 November 2003) [4] (Bongiorno J).
[221] *R v Parsons & Stocker* [2002] VSC 161 (13 May 2002) [2] (Teague J).
[222] *R v Parsons & Stocker* [2002] VSC 161 (13 May 2002) [3] (Teague J); *R v Willard* [2005] NSWSC 402 (28 April 2005) [5] (Whealy J); *R V Saad and Saad* [2003] VSC 438 (12 November 2003) [28] (Bongiorno J); *R v Whyte* [2002] VSC 146 (3 May 2002) [83] (Gillard J).
[223] *R v Chalmers* [2009] VSC 251 (22 June 2009) [54] (Osborn J).
[224] *R v Wathen* [2004] VSC 354 (21 September 2004) [2] (Teague J).

> It may well indeed be the fact that she was always bad at managing her financial affairs. Be that as it may, there was clear evidence during the trial of her inability to pay her household debts, of continuing arrears in payment of rental, of a degree of extravagance in relation to the use of money and a generally parlous situation so far as the management of household finances was concerned. [225]

> You were nursing him, but you were not nursing him to health, you were nursing him to certain death. You were making sure that he died.[226]

> The offence of murder is serious and in this case, made more so by your premeditation, your conduct over a prolonged period, your heartlessness, your lack of concern for your children's well-being and your determination to kill your husband in the most painful way.[227]

Similarly, in three cases, judges persistently portrayed women as 'wicked',[228] 'extremely manipulative',[229]'callous',[230]or 'heartless'.[231]

> It is hard to think of a more callous, heartless, wicked person.[232]

> Your wickedness knew no bounds.[233]

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[225] *R v Willard* [2005] NSWSC 402 (28 April 2005) [5] (Whealy J).
[226] *R v Whyte* [2002] VSC 146 (3 May 2002) [49] (Gillard J).
[227] *R v Whyte* [2002] VSC 146 (3 May 2002) [53] (Gillard J).
[228] *R v Whyte* [2002] VSC 146 (3 May 2002) [50] (Gillard J); *R V Saad and Saad* [2003] VSC 438 (12 November 2003) [15] (Bongiorno J).
[229] *R v Willard* [2005] NSWSC 402 (28 April 2005) [28], [35] (Whealy J).
[230] *R v Willard* [2005] NSWSC 402 (28 April 2005) [42] (Whealy J); *R v Whyte* [2002] VSC 146 (3 May 2002) [50] (Gillard J).
[231] *R v Whyte* [2002] VSC 146 (3 May 2002) [50] (Gillard J).
[232] *R v Whyte* [2002] VSC 146 (3 May 2002) [50] (Gillard J).
[233] *R v Whyte* [2002] VSC 146 (3 May 2002) [36] (Gillard J).

> ...you chose an horrendous method indeed to carry out this wicked crime.[234]

> You had no compassion, you were heatless.[235]

> Your heartlessness and your determination to punish your husband.[236]
> I regard the offender as an extremely manipulative person who had little difficulty in manipulating Danielle Wilkinson and TJA to assist her in the carrying out of the enterprise.[237]

> I consider that her manipulative and contrived manner...demonstrates in a rather chilling manner that...she has shown no remorse whatsoever for the terrible crime she committed.[238]

Moreover, these vilifying adjectives were frequently combined, and repeated at regular intervals throughout the remarks. Particularly, within one set of remarks, Gillard J indicated that the female offender was 'heartless' on four separate occasions, and 'wicked' or possessing 'wickedness' on a further three occasions.[239] Significantly, his Honour repeated his previously expressed stance that this offender's wickedness was limitless:

> As I have said, your wickedness knew no bounds.[240]

---

[234] *R V Saad and Saad* [2003] VSC 438 (12 November 2003) [15] (Bongiorno J).
[235] *R v Whyte* [2002] VSC 146 (3 May 2002) [50] (Gillard J).
[236] *R v Whyte* [2002] VSC 146 (3 May 2002) [60] (Gillard J).
[237] *R v Willard* [2005] NSWSC 402 (28 April 2005) [28] (Whealy J).
[238] *R v Willard* [2005] NSWSC 402 (28 April 2005) [35] (Whealy J).
[239] *R v Whyte* [2002] VSC 146 (3 May 2002) [36], [50], [52], [53], [60] (Gillard J).
[240] *R v Whyte* [2002] VSC 146 (3 May 2002) [52] (Gillard J).

Furthermore, over and above opining on the offender's heartlessness and wickedness, his Honour continued by scrutinising the offender's post murder sexual conduct:

> I have little doubt that when the deceased died, you were glad and within months, started out afresh in life, with a new lover...[241]

> Soon after his death, you adopted a completely different lifestyle. You dyed your hair, wore revealing clothes and brought out into the open a friendship with Bobby Whyte, whom you later married.[242]

> In my opinion, the evidence showed that the friendship was well established within two months of the death. Mr Whyte was by that time visiting nearly every night. You and he regularly disappeared for hours in his van.[243]

In another case, the perceived betrayal of a female offender, who killed her partner for financial reward, was concisely conveyed by Whealy J in biblical language:

> The offender callously and cruelly organised the execution of her husband for the sake, in effect of 30 pieces of silver.[244]

[241] *R v Whyte* [2002] VSC 146 (3 May 2002) [87] (Gillard J).
[242] *R v Whyte* [2002] VSC 146 (3 May 2002) [54] (Gillard J).
[243] *R v Whyte* [2002] VSC 146 (3 May 2002) [65] (Gillard J).
[244] *R v Willard* [2005] NSWSC 402 (28 April 2005) [42] (Whealy J).

Notably, there was no occurrence of vilification of male offenders within the sample sentencing remarks.

3.2.3 'She has shown no remorse whatsoever'[245] Remorse

In relation to male offenders, in six cases, judges accepted that the offender had, in some way, demonstrated remorse.[246] Similarly, in relation to female offenders, expressions of remorse were acknowledged, although this only occurred in one instance.[247] Regardless, without doubt, within the sample, the sentencing remarks for one female offender stood out. In this particular case, specifically within one paragraph, Whealy J repeatedly comments on the offender's lack of remorse and expressed his incredulity at its absence:

> I should make it clear however, and it was not submitted to the contrary, that the offender has not to date shown any remorse whatsoever for the offence. I consider that her manipulative and contrived manner during the various interviews with the police officers in February and March 2003 demonstrates in a rather chilling manner that, beyond feeling sorry for herself, she has shown no remorse whatsoever for the terrible crime she committed. This of course cannot aggravate the offence or lead to the imposition of a greater penalty than is otherwise appropriate. Nevertheless, it is

[245] *R v Willard* [2005] NSWSC 402 (28 April 2005) [35] (Whealy J).
[246] *R v Wathen* [2004] VSC 354 (21 September 2004) [9] (Teague J); *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [25] (Howie J); *R v Felicite* [2010] VSC 245 (8 June 2010) [21] (T Forrest J); *DPP v Lam* [2007] VSC 307 (27 August 2007) [10] (Teague J); *R vRoesner* [2002] VSC 384 (9 September 2002) [11] (Teague J); *R v Chalmers* [2009] VSC 251 (22 June 2009 [42] (Osborn J).
[247] *R v Barrett* [2009] NSWSC 338 (30 April 2009) (Mathews AJ).

> necessary for me to comment that the complete absence of remorse in the present situation is quite inexplicable to me given the apparent closeness of the family.[248]

Remarkably, despite his Honour identifying that the lack of remorse could not lead to a greater sentence than was otherwise appropriate, his Honour proceeds to sentence the female offender to the highest sentence and highest non-parole period of all the cases in the research sample. His Honour also identifies a need for deterrence in this particular case:

> Having regard to all of the matters I have detailed it is my view that an overall sentence of 36 years imprisonment should be imposed. In order to reflect and express effectively the appropriate level of punishment and deterrence in this matter, it is my view that the non-parole period should be set at 26 years. [249]

3.2.4 'Your wife was the source of the conflict'[250] Reducing culpability

Judicial neutralisation of offenders' behaviour appeared repeatedly in seven out of the nine male cases,[251] as well as in one female offender's case.[252] The sentencing remarks reveal that judges mobilized the process of neutralising offenders' behaviour in a variety of ways; including, placing judicial attention on

[248] *R v Willard* [2005] NSWSC 402 (28 April 2005) [35] (Whealy J).
[249] *R v Willard* [2004] NSWSC 402 (28 April 2005) [55] (Whealy J).
[250] *R v Roesner* [2002] VSC 384 (9 September 2002) [7] (Teague J).
[251] *R v Roesner* [2002] VSC 384 (9 September 2002); *R v Felicite* [2010] VSC 245 (8 June 2010); *R v Goodwin* [2004] NSWSC 757 (12 August 2004); *R v Naa* [2009] NSWSC 1077 (9 October 2009); *DPP v Lam* [2007] VSC 307 (27 August 2007); *R v Goodwin* [2004] NSWSC 757 (12 August 2004); *R v Chalmers* [2009] VSC 251 (22 June 2009); *R v Wathen* [2004] VSC 354 (21 September 2004).
[252] *R v Barrett* [2009] NSWSC 338 (30 April 2009).

the offender's dysfunctional family background, blaming the victim, associating a 'pathology' with the offender to explain the offending, and minimising the harm caused by the offender as a result of the offending.

Specifically, in relation to male offenders, judges frequently focused on the offenders' difficult family background, current family pressures or lack of control in their domestic situation:

> The family history is indicative of significant mood problems and alcoholism.[253]

> I am told and I accept that your relationship with your father has been a source of considerable anxiety to you, although you tended to minimise this to Dr Sullivan.[254] Given the dominant influence of your parents, particularly your father, I accept that siding with your wife against your parents would have caused you considerable anguish.[255]

> There is no doubt that he acted out of depression, frustration and anger at his wife's actions.[256]

> Your wife had already taken from you much of your capacity to exercise much control over your family. You were about to lose much of the last vestiges.[257]

[253] *R v Wathen* [2004] VSC 354 (21 September 2004) [7] (Teague J).
[254] *R v Felicite* [2010] VSC 245 (8 June 2010) [5] (T Forrest J).
[255] *R v Felicite* [2010] VSC 245 (8 June 2010) [11] (T Forrest J).
[256] *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [21] (Howie J).
[257] *R v Roesner* [2002] VSC 384 (9 September 2002) [8] (Teague J).

In addition, blaming the female victim for the male offender's actions leading up to the killing was apparent in four sets of sentencing remarks.[258]

For example:

> Once it is accepted that his wife's act in leaving him resulted in a disordered mental state in which he considered taking his own life as well as that of his wife, there seems to me to be little or no other relevance in the fact that the killings occurred as a result of her conduct.[259]

> Your wife was the source of the conflict.[260]

In a further example of victim blaming, notwithstanding the fact that the male offender killed twice; namely his wife and his wife's lover, Howie J justified the offender's behaviour on the basis that his 'abnormal mental state'[261] and subsequent offending arose from his wife leaving the relationship:

> The fact that he killed two persons must increase his criminality even though the killings arose from a single incident of violence and were both as a result of the same emotional turmoil in which he found himself after his wife left him. I accept, however, that his culpability was however diminished by his abnormal state at the

[258] *R v Goodwin* [2004] NSWSC 757 (12 August 2004); *R v Naa* [2009] NSWSC 1077 (9 October 2009); *R v Roesner* [2002] VSC 384 (9 September 2002); *R v Chalmers* [2009] VSC 251 (22 June 2009).
[259] *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [28] (Howie J).
[260] *R v Roesner* [2002] VSC 384 (9 September 2002) [7] (Teague J).
[261] *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [27] (Howie J).

> time as a result of anxiety and depression caused by his wife's separation from him.[262]

With remarks spanning 34 paragraphs, his Honour allocated 17 paragraphs to discussing the offence generally, five paragraphs to discussing points of law, and eleven paragraphs to discussing the offender's mental state, predominately at the time of the offence. Conceivably, the most significant aspect of his Honour's remarks, is that within those eleven paragraphs, the offender's emotionally disturbed state was specifically highlighted on 10 separate occasions.[263] Moreover, in seven instances, his Honour reinforced that the offender's 'abnormal state'[264] and subsequent actions were as a direct result of the offender's wife proceeding to leave the relationship.[265]

In an example of harm minimisation, Howie J deliberated on the circumstances surrounding a male offender, who, as well as killing his domestic partner, threatened a female police officer at gun point. His Honour commenced by emphasising the importance of deterrent sentences in this regard:

> Offences involving threats of violence to police officers who are acting in the course of their duties demand that deterrent sentences be imposed for the protection of members of the police force.[266]

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[262] *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [27] (Howie J).
[263] *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [18], [19], [21], [24], [27]-[29], [32] (Howie J).
[264] *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [27] (Howie J).
[265] *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [18], [19], [21], [24], [27], [28] (Howie J).
[266] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [26] (Howie J).

Nonetheless, despite the offender's violation of the law in relation to violent threats against the police officer, his Honour continued to repeatedly express that the male offender's mental state at the time of the offending gave rise to a 'very unusual case'[267] and as a result, his Honour proceeded to minimise the harm done by the offender towards the police officer:

> This was however, an unusual case. The offender was clearly threatening the police only in order that they would kill him. It was an attempted suicide. The conduct toward the police was the result of the same mental state of the offender that led him to killing the deceased. He was both homicidal and suicidal.[268]

> In this very unusual case and having regard to the fact that the offender is to be sentenced for murder, I do not intend to impose any further sentence for his conduct to the police having regard to his mental state at the time.[269]

In this final collection of examples of neutralisation, judges articulated the belief that the offending resulted from a 'pathology'[270] such as drug addiction or alcoholism, on the part of the offender. This occurred in the sentencing remarks for four offenders, three of whom were male.[271]

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[267] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [27] (Howie J).
[268] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [26] (Howie J).
[269] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [27].
[270] Indermaur, above n 135, 18.
[271] *DPP v Lam* [2007] VSC 307 (27 August 2007); *R v Felicite* [2010] VSC 245 (8 June 2010); *R v Naa* [2009] NSWSC 1077 (9 October 2009); *R v Barrett* [2009] NSWSC 338 (30 April 2009).

For example:

> But despite having convictions involving the use of alcohol, his history of alcohol-related violence and depression, and the fact that alcohol clearly played a part in the death of the deceased, the offender told Dr Nielssen that he did not believe that he had any problem with alcohol.[272] However, I am prepared to accept for the purpose of sentencing that the offender suffered from depression and a brain injury that made him less able to control himself when under the influence of alcohol.[273]

> In other words, I accept that your pre-existing difficulties with managing your anger may have been compounded by the consumption of Diazepam tablets that you have described.[274]

Notably, there was only one instance of neutralising a female offender's behaviour, and it sits within this category. Further, this is the only case where a judge remarks on the addictive behaviour of a female offender.[275] In this way, the remarks of Mathews AJ, (one of only two female judges within this research project) were not dissimilar to judicial remarks for male offenders:

> What then, motivated this bizarre series of events?[276] The answer, in my opinion, must lie in the offender's massive ingestion of drugs, particularly marijuana, as part of the substance abuse disorder suffered by the offender.[277]

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[272] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [13] (Howie J).
[273] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [15] (Howie J).
[274] *R v Felicite* [2010] VSC 245 (8 June 2010) [18] (T Forrest J).
[275] *R v Barrett* [2009] NSWSC 338 (30 April 2009) (Mathews AJ).
[276] *R v Barrett* [2009] NSWSC 338 (30 April 2009) [31] (Mathews AJ).
[277] *R v Barrett* [2009] NSWSC 338 (30 April 2009) [32] (Mathews AJ).

3.2.4.1 'I accept that you acted as a man stressed and depressed, rather than one in control'[278]
Judicial evaluation of psychological states

Judicial evaluation of a male offender's psychological state was extensive, and occurred in sentencing remarks for eight male offenders'.[279] Specifically, numerous psychological states were discussed, analysed and relied upon, to explain a male offender's behaviour in the context of his offending. These psychological states ranged from inadequacy and anxiety through to depression and severe psychological distress:

> On balance, I accept that it was not planned, although your perception was that she was treating you badly. I accept that you acted as a man stressed and depressed, rather than one in control.[280]

> You started to probe her and others about the other man. You became depressed. You also became obsessed with finding out more about the other man. You became progressively less rational. You foolishly chose to resort to the illegal drug "ice". That choice could only have worsened your emotional state.[281]

[278] *R v Wathen* [2004] VSC 354 (21 September 2004) [8] (Teague J).
[279] *R v Goodwin* [2004] NSWSC 757 (12 August 2004); *R v Felicite* [2010] VSC 245 (8 June 2010); *R v Chalmers* [2009] VSC 251 (22 June 2009; *R v Wathen* [2004] VSC 354 (21 September 2004); *R v Naa* [2009] NSWSC 1077 (9 October 2009); *DPP v Lam* [2007] VSC 307 (27 August 2007); *R v Roesner* [2002] VSC 384 (9 September 2002); *R v Chalmers* [2009] VSC 251 (22 June 2009).
[280] *R v Wathen* [2004] VSC 354 (21 September 2004) [8] (Teague J).
[281] *DPP v Lam* [2007] VSC 307 (27 August 2007) [4] (Teague J).

> It is that, at the time you killed your wife, you were suffering from severe psychological distress. That distress arose from the culmination of the events that I have earlier summarised.[282]

Table 5 on page 59 illustrates the various categories of judicial evaluation together with the frequency with which they were relied upon to explain the offending behaviour. Additionally, more than one type of malady often appeared within a set of sentencing remarks. This predominately occurred for male offenders, where by far the most recurrent categories were depression, stress or anxiety, and suicide or self harm.

[282] *R v Roesner* [2002] VSC 384 (9 September 2002) [7] (Teague J).

Table 5. Judicial evaluation of psychological states[283]

EVALUATION*	MALE OFFENDER SENTENCING REMARKS	FEMALE OFFENDER SENTENCING REMARKS
Abnormal mental state[284]	1	0
Alcoholism[285]	1	0
Depression[286] (post offence)[287]	5 plus 3 post offence**	1 post offence
Drug addiction[288]	1	1
Homicidal[289]	1	0
Inadequate/lacking self worth[290]	1	0
Severe psychological distress[291]	1	0
Stress/anxiety[292]	3	1 post offence
Suicidal/Self harm[293]	4	0

* More than one evaluation may have been made within one set of sentencing remarks.

** At time of offence and post offence may have occurred simultaneously within the one set of sentencing remarks.

[283] Table adapted from Terese Henning, 'Psychological Explanations in Sentencing Women in Tasmania' (1995) 28 *Australian and New Zealand Journal of Criminology* 298, 305.
[284] *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [27] (Howie J).
[285] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [13] (Howie J).
[286] *R v Wathen* [2004] VSC 354 (21 September 2004) [8] (Teague J); *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [21] (Howie J); *R v Felicite* [2010] VSC 245 (8 June 2010) [18] (T Forrest J); *R v Naa* [2009] NSWSC 1077 (9 October 2009) [13] (Howie J); *DPP v Lam* [2007] VSC 307 (27 August 2007) [4] (Teague J).
[287] *R v Chalmers* [2009] VSC 251 (22 June 2009 [40] (Osborn J); *DPP v Lam* [2007] VSC 307 (27 August 2007) [10] (Teague J); *R v Raju* [2007] NSWSC 1418 (14 December 2007) [42] (Bell J); *R v Whyte* [2002] VSC 146 (3 May 2002) [87] (Gillard J).
[288] *DPP v Lam* [2007] VSC 307 (27 August 2007) [4] (Teague J); *R v Barrett* [2009] NSWSC 338 (30 April 2009) [32] (Mathews AJ).
[289] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [13] (Howie J).
[290] *R v Roesner* [2002] VSC 384 (9 September 2002) [6],[8] (Teague J).
[291] *R v Roesner* [2002] VSC 384 (9 September 2002) [7] (Teague J).
[292] *R v Wathen* [2004] VSC 354 (21 September 2004) [8] (Teague J); *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [27] (Howie J); *R v Felicite* [2010] VSC 245 (8 June 2010) [5],[6] (T Forrest J); *R v Whyte* [2002] VSC 146 (3 May 2002) [87] (Gillard J).
[293] *DPP v Lam* [2007] VSC 307 (27 August 2007) [10] (Teague J); *R v Naa* [2009] NSWSC 1077 (9 October 2009) [13] (Howie J); *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [6] (Howie J); *R v Wathen* [2004] VSC 354 (21 September 2004) [5] (Teague J).

In one notable example concerning a male offender, Howie J opined that the offender's mental state carried little weight as a mitigating factor:

> The offender's mental state is a matter that has a limited mitigatory effect in an assessment of his objective criminality.[294]

Nonetheless, within the 32 paragraphs of these remarks, 13 paragraphs discussed details of the offence, seven paragraphs discussed matters of law, and yet 12 paragraphs were almost entirely dedicated to discussing and evaluating the male offender's psychological state. Notably, the offender was only ever characterised as a person of suffering. The depth and breadth of his Honour's view is revealed in the extract below:

> There had been a history of depression as a result of his relationship problems and exacerbated by chronic back-pain. There have been suicidal thoughts that have resulted on at least two occasions in serious suicide attempts one in 1996 and another in 2004, the later requiring admission to intensive care after a drug overdose. He has had admissions to psychiatric care including in May 2007, that is about 6 months before the killing. On that occasion he voluntarily sought help because of having suicidal and homicidal thoughts. He discharged himself after two days without any follow-up treatment. On occasions he has been treated with anti-depressant medications.[295]

[294] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [17] (Howie J).
[295] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [14] (Howie J).

> There was a considerable amount of evidence concerning the offender's mental health. All of the psychiatrists who gave evidence at the trial were of the opinion that the offender was suffering from a depressive illness that impaired his ability to control himself. However, there is little doubt that the consumption of alcohol played a significant role in the offender's depressive illness, at least on occasions when it resulted in suicidal and homicidal thoughts. But despite having convictions involving the use of alcohol, his history of alcohol-related violence and depression, and the fact that alcohol clearly played a part in the death of the deceased, the offender told Dr Nielssen that he did not believe that he had any problem with alcohol.[296]
>
> There was an issue at the trial as to whether the offender was suffering from a brain injury. A PET scan of the offender's brain revealed an abnormality of the medial aspect of the temporal lobe and which would have interacted with the use of alcohol. According to Dr Lowe this could have meant that the offender tended to be more aggressive especially when under the influence of alcohol. This did not assume any significance at the trial because the jury were obliged to ignore the effects of alcohol when considering whether the defence of substantial impairment applied. However, I am prepared to accept for the purpose of sentencing that the offender suffered from depression and a brain injury that made him less able to control himself when under the influence of alcohol.[297]

In contrast, for three female offenders, judicial evaluation of the offenders' psychological state was absent.[298] In relation to the two remaining female offenders; in both instances, judicial comments were restricted to a few brief

[296] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [13] (Howie J).
[297] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [15] (Howie J).
[298] *R v Parsons & Stocker* [2002] VSC 161 (13 May 2002); *R v Saad and Saad* [2003] VSC 438 (12 November 2003); *R v Willard* [2005] NSWSC 402 (28 April 2005).

sentences,[299] and in one instance was only directed towards post offence occurrence.[300]

3.2.5 '...the trial judge is not bound to take the most lenient view of the facts which would support the verdict'[301] Judicial discretion: a question of bias?

A total of nine judges passed sentence within the research sample, with three judges sentencing offenders in more than one case. In particular, the sentences of two judges stand out.

First, as shown in Table 2 on page 38, in 2002, Bongiorno J sentenced a male offender to 21 years with a non parole period of 17 years; and in 2003, his Honour sentenced a female offender to 21 years with a non parole period of 16 years. In sentencing both a male and female offender, Bongiorno J appeared to show no bias regarding sentence length. However within the sentencing remarks, his Honour considered the female offender to be a 'cold blooded murder',[302] and classed the crime as 'wicked'.[303] Conversely, in relation to the male offender, Bongiorno J expressed that he was unable to determine the degree or extent of pre-meditation involved in the offence.[304] Further, his Honour refrained from using vilifying language to describe either the male offender or the offending. In addition, while absenting from neutralising the male offender's behaviour, or

[299] *R v Whyte* [2002] VSC 146 (3 May 2002) [87]-[89] (Gillard J); *R v Barrett* [2009] NSWSC 338 (30 April 2009) [32], [39] (Mathews AJ).
[300] *R v Whyte* [2002] VSC 146 (3 May 2002) [87]-[89] (Gillard J).
[301] *R v Whyte* [2002] VSC 146 (3 May 2002) [7] (Gillard J).
[302] *R v Saad and Saad* [2003] VSC 438 (12 November 2003) [15] (Bongiorno J).
[303] *R v Saad and Saad* [2003] VSC 438 (12 November 2003) [17] (Bongiorno J).
[304] *R v Mizon* [2002] VSC 115 (17 April 2002) [22] (Bongiorno J).

analysing his psychological state, Bongiorno J discussed, at length, the offender's hard working nature,[305] academic achievements,[306] and sound employment prospects[307] together with his strong commitment to his mother, his children[308] and the union movement.[309] His Honour encapsulated the ordinariness of this male offender's life as follows:

> You have no prior convictions and, as I have already noted, you have lived an unremarkable life which has involved service to your fellow citizens.[310]

Second, as shown in Table 2 on page 38, Teague J sentenced one female and three male offenders between 2002 and 2007. As Table 2 shows, the three male offenders hold the bottom three positions on the sentencing table, and in terms of sentence length his Honour appeared to hold no bias. However, his Honour sentenced one female offender in 2002, and this sentence represents the second highest sentence of all sentences in the sample. Furthermore, when comparing the length of sentences handed down by his Honour over the four cases, there is a five year disparity between the sentence handed down to the female offender, and the highest sentence handed down to a male offender. This five year disparity is also replicated in the respective non parole periods.

[305] *R v Mizon* [2002] VSC 115 (17 April 2002) [19] (Bongiorno J).
[306] *R v Mizon* [2002] VSC 115 (17 April 2002) [19] (Bongiorno J).
[307] *R v Mizon* [2002] VSC 115 (17 April 2002) [19] (Bongiorno J).
[308] *R v Mizon* [2002] VSC 115 (17 April 2002) [20] (Bongiorno J).
[309] *R v Mizon* [2002] VSC 115 (17 April 2002) [17], [19], [20] (Bongiorno J).
[310] *R v Mizon* [2002] VSC 115 (17 April 2002) [27] (Bongiorno J).

Within his Honour's sentencing remarks, neutralisation of male offenders' behaviour and acceptance of their psychological state was present in all three cases:[311]

> I accept that you acted as a man stressed and depressed, rather than one in control.[312]

> Your wife was the source of the conflict.[313]

> You became depressed. You also became obsessed with finding out more about the other man. You became progressively less rational.[314] You were suffering depression at the time of the stabbing.[315]

In contrast, for the female offender, not only were his Honour's sentencing remarks significantly briefer than those of the male offenders, there was a notable absence of neutralising comments or analysis of the offender's psychological state. Nevertheless, normalisation of the male victim was present:

> He was a good provider for you and for your two daughters.[316]

[311] *R v Wathen* [2004] VSC 354 (21 September 2004) [11] (Teague J); *DPP v Lam* [2007] VSC 307 (27 August 2007) [11] (Teague J); *R v Roesner* [2002] VSC 384 (9 September 2002) [15] (Teague J).
[312] *R v Wathen* [2004] VSC 354 (21 September 2004) [8] (Teague J).
[313] *R v Roesner* [2002] VSC 384 (9 September 2002) [7] (Teague J).
[314] *DPP v Lam* [2007] VSC 307 (27 August 2007) [4] (Teague J).
[315] *DPP v Lam* [2007] VSC 307 (27 August 2007) [10] (Teague J).
[316] *R v Parsons & Stocker* [2002] VSC 161 (13 May 2002) [2] (Teague J).

3.2.6 'In that regard he is not a suitable vehicle for general deterrence.'[317]
General deterrence

Judges discussed the requirement for an offender's sentence to reflect an ongoing need to protect the community, in sentencing remarks for seven male offenders.[318]

In one case, Howie J remarked that because the offender was, at the time of the offence, affected by alcohol, and suffering from depression, he was not a suitable vehicle for general deterrence:

> He was at the time of the killing a danger to members of the community but with treatment for his depression and if he abstains from alcohol, he may not be so in the future.[319] In that regard he is not a suitable vehicle for general deterrence.[320]

However, for three male offenders, while the judges acknowledged that general deterrence must assume some weight in the sentencing process, their Honours opined that the process should, to some degree, be moderated by the offenders' mental state: [321]

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[317] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [27].
[318] *R v Mizon* [2002] VSC 115 (17 April 2002) [28] (Bongiorno J); *R v Roesner* [2002] VSC 384 (9 September 2002) [14] (Teague J); *R v Chalmers* [2009] VSC 251 (22 June 2009 [47] (Osborn J); *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [29] (Howie J); *R v Wathen* [2004] VSC 354 (21 September 2004) [8] (Teague J); *R v Felicite* [2010] VSC 245 (8 June 2010) [26] (T Forrest J); *R v Naa* [2009] NSWSC 1077 (9 October 2009) [27] (Howie J).
[319] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [23].
[320] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [27].
[321] *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [29] (Howie J); *R vWathen* [2004] VSC 354 (21 September 2004) [8] (Teague J); *R v Felicite* [2010] VSC 245 (8 June 2010) [26] (T Forrest J).

For example:

> I accept that, while general deterrence must play a part in governing the sentence that I impose, it can be sensibly moderated to a degree by reason of your mental state.[322]

Judges also made comments in relation to general deterrence for two female offenders:[323]

> Having regard to all of the matters I have detailed it is my view that an overall sentence of 36 years imprisonment should be imposed. In order to reflect and express effectively the appropriate level of punishment and deterrence in this matter, it is my view that the non-parole period should be set at 26 years. [324]

> But in determining the appropriate and proportionate sentence, I must not only manifest a denunciation of your type of conduct, but also deter others from pursuing a similar course of conduct.[325]

Notably, for this second female offender as mentioned above, in a preceding paragraph, Gillard J remarked on the offender's good character over the preceding 16 years:

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[322] *R vWathen* [2004] VSC 354 (21 September 2004) [8] (Teague J).
[323] *R v Whyte* [2002] VSC 146 (3 May 2002) [96] (Gillard J); *R v Willard* [2004] NSWSC 402 (28 April 2005) [45] (Whealy J).
[324] *R v Willard* [2004] NSWSC 402 (28 April 2005) [55] (Whealy J).
[325] *R v Whyte* [2002] VSC 146 (3 May 2002) [96] (Gillard J).

> Your counsel submitted that there were some mitigating factors. He emphasised your reputation over the last 16 years, which was supported by evidence of four witnesses and a number of character statements. I accept their evidence that over that period, you have been a good and caring person. Whilst I take those matters into account, they are concerned with a period post the death of the deceased and must be compared with your appalling conduct and the level of culpability.[326]

3.2.7 'I accept that your offending can be distinguished from, for instance, a cold blooded execution'[327] Provocation

For male offenders, a judicial finding that the killing was cold-blooded only occurred in one case,[328] with no comment regarding cold-bloodedness, or premeditation being present in another three.[329] In fact, judges differentiated male offenders' offending from a cold blooded or premeditated offence, in one form or another, in five cases.[330]

For example:

> It was argued that your crime was a spontaneous outburst of anger-related violence and there was nothing premeditated about it. I accept that your offending can be

[326] *R v Whyte* [2002] VSC 146 (3 May 2002) [84] (Gillard J).
[327] *R v Felicite* [2010] VSC 245 (8 June 2010) [23] (T Forrest J).
[328] *R v Chalmers* [2009] VSC 251 (22 June 2009 [49] (Osborn J).
[329] *R v Naa* [2009] NSWSC 1077 (9 October 2009); *DPP v Lam* [2007] VSC 307 (27 August 2007); *R v Raju* [2007] NSWSC 1418 (14 December 2007).
[330] *R v Felicite* [2010] VSC 245 (8 June 2010); *R v Goodwin* [2004] NSWSC 757 (12 August 2004); *R v Roesner* [2002] VSC 384 (9 September 2002); *R v Wathen* [2004] VSC 354 (21 September 2004); *R v Mizon* [2002] VSC 115 (17 April 2002).

> distinguished from, for instance, a cold blooded execution. I regard your offending as a grave example of unpremeditated criminality.[331]

> On balance, I accept that it was not planned, although your perception was that she was treating you badly.[332]

Notably, in two of those five cases, while the judges determined that they were not prepared to accept the presence of some kind of provocation that would cause an ordinary man to lose self-control,[333] their Honours ascertained that either they were unable to determine the degree or extent of premeditation,[334] or that the offender was mentally and emotionally disturbed at the time of the offending:[335]

> Although the offence was aggravated by the fact that it was premeditated and, committed in the home of Mr Clarke where both deceased were residing, the offender, who was of otherwise good character, was suffering from a significant mental and emotional disturbance which affected his reasoning.[336]

Conversely, for female offenders, not only was there an absence of judicial discussion pertaining to provocation; judges remarked frequently on the

[331] *R v Felicite* [2010] VSC 245 (8 June 2010) [23] (T Forrest J).
[332] *R v Wathen* [2004] VSC 354 (21 September 2004) [8] (Teague J).
[333] *R v Mizon* [2002] VSC 115 (17 April 2002) [22] (Bongiorno J); *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [32] (Howie J).
[334] *R v Mizon* [2002] VSC 115 (17 April 2002) [22] (Bongiorno J).
[335] *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [32] (Howie J).
[336] *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [32] (Howie J).

instigation, planning, cold-bloodedness and premeditation by female offenders' in all five cases.[337]

For example:

> I should say immediately that the facts I have briefly stated show an extremely serious offence of premeditated murder for financial reward.[338]

> It was a carefully calculated, premeditated, cold-blooded murder.[339]

3.2.8 'The story leading up to this killing is quite a lengthy one'[340] The language of the courtroom

Predominantly, judges utilised the process of narration within the sentencing remarks to build the story surrounding the offence. However, in the following noteworthy examples, judges appear to use the narrative of the sentencing remarks in two different ways. First, the remarks are utilised to condemn the actions of an offender by continually reinforcing the offender's action, and the affects of the offending on the victim. In a second way, the remarks are utilised to continually justify the offender's actions and reinforce the feelings of the offender at the time of the offence.

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[337] *R v Willard* [2004] NSWSC 402 (28 April 2005); *R v Saad and Saad* [2003] VSC 438 (12 November 2003); *R v Whyte* [2002] VSC 146 (3 May 2002); *R v Barrett* [2009] NSWSC 338 (30 April 2009); *R v Parsons & Stocker* [2002] VSC 161 (13 May 2002).
[338] *R v Willard* [2004] NSWSC 402 (28 April 2005) [28] (Whealy J).
[339] *R v Saad and Saad* [2003] VSC 438 (12 November 2003) [30] (Bongiorno J).
[340] *R v Barrett* [2009] NSWSC 338 (30 April 2009) [1] (Mathews AJ).

First, in relation to a female offender, in remarks spanning 108 paragraphs, Gillard J discussed points of law in 24 paragraphs, and the facts surrounding the case in the balance of the 84 paragraphs. Within those 84 paragraphs, his Honour discussed in detail the nature of arsenic poisoning and the effects on the male victim. His Honour allocated 25 paragraphs specifically to this task, 22 of which were successive.[341]

In beginning his narrative on the nature of the offending, his Honour discussed the historical uses of arsenic:

> History tells us that in the 19th and early 20th centuries, arsenic was used as a poison to kill people. Its advantage was that it was hard to detect. Evidently, it was a common method of killing unwanted persons until chemical methods of detection were developed. Poisoning may result from a single large dose, and this is known as acute poisoning, or from repeated small doses over a period of time, and this is known as chronic poisoning.[342]

His Honour continued his narrative over the next 5 paragraphs by discussing the nature and effect of arsenic poisoning on the victim.

[341] *R v Whyte* [2002] VSC 146 (3 May 2002) [27]-[48], [50]-[51], [58] (Gillard J).
[342] *R v Whyte* [2002] VSC 146 (3 May 2002) [28] (Gillard J).

For example:

> In September 1982, the deceased was again violently ill and consulted a general practitioner thirteen times between 6 September 1982 and 4 November 1982...It was thought that he may have had leptosperosis, which is a viral disease which can be caused by exposure to pigs' urine. Your husband and his workmates were slaughtering pigs at Mayfair Hams. The symptoms turned out to be classic symptoms of arsenic poisoning. He was very sweaty, especially at night, confused, suffering malaise, cramping stomach, fever, headaches, muscle soreness, sore throat, rash and cough....[343]

His Honour continued for the next fourteen paragraphs on the subject of arsenic poisoning and outlined the implications of the level of arsenic in the victim's body:

> In order to appreciate the quantity of arsenic in his body, the level of arsenic naturally occurring in the average human being is somewhere in the vicinity of four parts per million, with a top of about ten. Anything above that is potentially dangerous.[344]

In contrast to his Honour's extensive discussions about the victim, his Honour only acknowledged the 'stress', 'depression' and 'upset' experienced by the female offender in two brief sentences towards the end of the sentencing remarks.

[343] *R v Whyte* [2002] VSC 146 (3 May 2002) [32] (Gillard J).
[344] *R v Whyte* [2002] VSC 146 (3 May 2002) [46] (Gillard J).

These comments only addressed the post offence circumstances of the offender.[345]

His Honour made his opinion of the offender apparent in the following remarks:

> It is hard to think of a more callous, heartless, wicked person.[346]

Second, in relation to a male offender, T Forrest J used the narrative to reproduce, in full, a letter sent by the offender to the victim shortly before the murder took place. The letter, amongst other things, highlighted the offender's despair at the break down of the marriage, and his continued hope for their reconciliation:

> Today is the 7th of August 2009 and I don't know what the future holds for us, but it looks like there is no future...There is no excuse for the way I have treated you, but I am trying my very best to turn my life around... have destroy [sic] the most precious thing, which is Love....All I want if [sic] we can bring God back into our lives, not just because [sic] to make this marriage work, for our spiritual beings to ...For 5 [sic] years, of [sic] the way I have treated you, you stood by me. I appreciate that, although I feel I don't deserve that. Please give me a chance to prove I can change. I can be that Ron Felicite, you knew in the letters....I love you and Ronan dearly, you are my family....God bless you Juliettte [sic].

Throughout the sentencing remarks the feelings of 'anxiety', 'anguish', 'depression', 'emotional stress' and devastation felt by the male offender at his

[345] *R v Whyte* [2002] VSC 146 (3 May 2002) [87], [89] (Gillard J).
[346] *R v Whyte* [2002] VSC 146 (3 May 2002) [50] (Gillard J).

wife leaving the relationship was continually reaffirmed by his Honour. These remarks appeared in eight separate paragraphs.[347]

His Honour commented on the male offender's nature as follows:

> They speak of your passive, caring nature and your concern for your immediate and extended family.[348]

4. DISCUSSION

The research produced nine themes. Each theme will be discussed to determine if it is consistent or inconsistent with previous studies.

4.1 Sentence length

The highest sentence imposed on a female offender in respect of killing her male partner was 36 years with a non parole period of 26 years.[349] This was imposed in *R v Willard*[350] where the offender was sentenced according to *Crimes Act 1900* (NSW) s 19A which set a maximum penalty of life imprisonment, being the term of the person's natural life.[351] This was the highest recorded sentence in the sample. In this case the offender had planned and organised the contract killing of her husband in order to receive financial benefits in excess of $200,000.[352]

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[347] *R v Felicite* [2010] VSC 245 (8 June 2010) [5], [6], [11], [14], [17], [18], [23], [25] (T Forrest J).
[348] *R v Felicite* [2010] VSC 245 (8 June 2010) [20] (T Forrest J).
[349] *R v Willard* [2004] NSWSC 402 (28 April 2005) [55] (Whealy J).
[350] [2004] NSWSC 402 (28 April 2005).
[351] *Crimes Act 1900* (NSW) s 19A now repealed.
[352] *R v Willard* [2004] NSWSC 402 (28 April 2005) [6], [28] (Whealy J).

Whealy J reasoned that given the objective seriousness of the crime together with the degree of planning and organisation, there was no doubt that this was a 'cruel and callous killing'.[353]

The lowest sentence imposed on a female offender was in the case of *R v Saad and Saad.*[354] In this case the offender was sentenced to 21 years with a non parole period of 16 years for the murder of her husband.[355] Together with her male lover, the offender had sedated her husband with a quantity of narcotic drugs and set fire to his car while he slept in it. In sentencing the offender, Bongiorno J opined that '[t]his was not a crime of passion committed on the spur of the moment. It was a carefully calculated, premeditated, cold-blooded murder.'[356]

In comparison, the highest sentence imposed on a male offender was 23 years with a non parole period of 17 years and three months.[357] This was imposed in *R v Naa*[358] and was the third highest sentence in the sample. The two preceding sentences in the sample were imposed on female offenders, both of whom killed for financial gain.[359] In *R v Naa,*[360] following a domestic argument where the male offender had stabbed his ex-partner in the stomach, the offender pulled back

[353] *R v Willard* [2004] NSWSC 402 (28 April 2005) [42] (Whealy J).
[354] [2003] VSC 438 (12 November 2003).
[355] *R v Saad and Saad* [2003] VSC 438 (12 November 2003) [32] (Bongiorno J).
[356] *R V Saad and Saad* [2003] VSC 438 (12 November 2003) [30] (Bongiorno J).
[357] *R v Jason Robert Naa* [2009] NSWSC 1077 (9 October 2009) [29] (Howie J).
[358] [2009] NSWSC 1077 (9 October 2009).
[359] *R v Willard* [2004] NSWSC 402 (28 April 2005) [55] (Whealy J); *R v Parsons & Stocker* [2002] VSC 161 (13 May 2002) [13] (Teague J).
[360] [2009] NSWSC 1077 (9 October 2009).

the victim's head and slit her neck with a knife.[361] In this case Howie J devoted more than one third of the sentencing remarks to discussing and evaluating the offender's mental state at the time of the offending. Notably, the offender was only ever characterised as a person of suffering. In addition, his Honour commented on the offender's depression as a result of his relationship problems as well as his physical ailments including chronic back-pain.[362] Howie J remarked that in relation to the objective seriousness of the offence, taking the offender's mental state into account, the offence was slightly below mid range.[363]

The lowest sentence imposed on a male offender was in *R v Roesner*[364] In that case the offender was sentenced to 16 years with a non parole period of 12 years and six months. This sentence was the lowest sentence imposed in the research sample. In this case, the offender was convicted for murdering his wife who was planning to leave the relationship on the day of their 30th wedding anniversary, taking the children of the marriage with her.[365] In carrying out the killing, the offender went to the sofa bed where his wife was sleeping with their son, and struck his wife ten times to the head with a hammer. In sentencing the offender, Teague J remarked that the offender's wife was the source of the conflict between them, and that the offender was suffering from severe psychological distress at

[361] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [9] (Howie J).
[362] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [14] (Howie J).
[363] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [20] (Howie J).
[364] [2002] VSC 384 (9 September 2002).
[365] *R v Roesner* [2002] VSC 384 (9 September 2002) [3] (Teague J).

the time he killed his wife, as a result of that conflict.[366] The objective seriousness of the offence was not discussed.

While the small numbers in the sample prevent a statistical analysis, it is also possible to note that when comparing the average sentence length for female offenders, it is higher than the highest sentence handed down in *R v Naa.*[367] This is also the case for non parole periods, where the average non parole period for female offenders, was again higher than the highest non parole period handed down to a male offender, which was also in *R v Naa.*[368]

It relation to the highest and lowest sentences for male and female offenders as discussed above, judges' remarks for female offenders are emphasising the cold blooded, premeditated nature of the crime, with no mention of mental illness on the part of the offender. In comparison, for male offenders, judges' remarks emphasise the anguish and psychological distress experienced by the offender at the time of the killing, focusing more on the socioeconomic factors affecting the offender. These remarks and corresponding sentences are consistent with Hogarth's study which states that a judge advocating rehabilitation tends to believe many offenders are suffering from a mental illness and give more supervised time.[369] On the other hand Hogarth states that judges favouring incapacitation, identify mental illness less frequently and diminish the relevance

[366] *R v Roesner* [2002] VSC 384 (9 September 2002) [7] (Teague J).
[367] [2009] NSWSC 1077 (9 October 2009).
[368] [2009] NSWSC 1077 (9 October 2009).
[369] Hogarth, above n 60, 332.

of socioeconomic factors on the offender's offending, handing down longer sentences.[370] Therefore, the results of the sample show that in the context of domestic murder, when women kill, especially for financial gain, women are viewed more harshly than men and receive higher sentences. These findings are entirely consistent with Ballinger's study which indicates that when men and women are found guilty of murder, women receive a more severe punishment.[371]

4.2 Men, women and murder

In the sample, the number of males compared to females is consistent with statistics which show that homicide is gendered. Specifically, the relatively small number of women in the sample is consistent with statistics which also show, that as perpetrators, women account for less than 15% of homicides in Australia.[372]

The research also shows that men and women kill in different circumstances and for different reasons. Consistent with Daly and Wilson's argument that men's sense of proprietary drives them to kill,[373] the results show that in a number of male cases, judges remark on this sense of proprietary and specifically the offender's reaction to any threat the male offender feels in this regard. The judges' remarks are also consistent with Polk's observations that men kill their female partners in response to female actions such as when the women challenge

[370] Ibid.
[371] Ballinger, above n 45, 2.
[372] Mouzos, Homicidal Encounters, above n 2, 51.
[373] Daly and Wilson, above n 6, 1.

their authority; or form, or are suspected of forming a new relationship.[374] Polk further suggests that men also kill women as a result of their own depression.[375] This is also represented in the data as in eight cases judges comment extensively on the male offender's psychological state and the relationship of that psychological state to the offending.

In relation to women who kill, the majority of literature points out that the primary motivation for a woman to kill in a domestic environment is self-preservation, and the killing usually follows prolonged exposure to physical abuse by her male partner.[376] Studies consistently show that these women are more likely to be convicted of manslaughter, and men are more likely to be convicted of murder.[377] In contrast, in the research sample, the female offenders were convicted of murder and the judges remark in four cases that the female offender killed their male partner for financial gain, and, or for the promise of a new relationship.

Literature also suggests that women are viewed as more passive in nature, and only kill their male partner to protect themselves from domestic violence, or alternatively if they are suffering from an abnormal physiological or

[374] Polk and Ranson, above n 12, 21-23.
[375] Polk, above n 9, 188, 189.
[376] Bradfield, *The treatment of women who kill their violent male partners within the Australian criminal justice system,* above n 16, 21.
[377] Patricia Easteal, *Killing the Beloved: Homicide Between Adult Sexual Intimates* (Australian Institute of Criminology, 1993) 115; Wendy Chan, *Women, Murder and Justice* (Palgrave, 2001) 43-45; Rebecca Bradfield, *The treatment of women who kill their violent male partners within the Australian criminal justice system* (Phd Thesis, The University of Tasmania, 2002) 25.

psychological condition at the time of the killing.[378] In the data judicial remarks regarding killing under these conditions is absent. Further in two cases judges remark that they are unable to understand why the female offenders had killed.[379] These judicial remarks are consistent with the literature which says that there is a lack of knowledge and understanding as to why women kill.[380]

4.3 The normal man and the abnormal woman

In the sample, judges consistently use a different set of descriptors for male and female offenders.

Judges frequently remark that female offenders are poor housekeepers, mothers and wives, emphasising the offenders' lack of success in their domestic role. These remarks support Nicholson's suggestion that for women to be domestically successful, they are required to be competent housekeepers, loyal and supportive wives, and good and caring mothers.[381] The judicial emphasis on female offenders' domestic incompetence is also consistent with Chan's findings that women's treatment in the criminal justice system is determined by long standing myths and stereotypical views of women, rather than the circumstances surrounding their offence.[382]

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[378] Kirkwood, above n 7, 153.
[379] *R v Willard* [2004] NSWSC 402 (28 April 2005) [43] (Whealy J); *R v Whyte* [2002] VSC 146 (3 May 2002) [60] (Gillard J).
[380] Kirkwood, above n 7, 155.
[381] Nicolson, above n 24, 188.
[382] Chan, above n 22, 22.

In contrast, the judges use positive descriptions to describe male offenders. These descriptions portray male offenders as hardworking, well respected individuals who are good providers to their family and possess a strong community spirit. Arguably normalising the overall behaviour of male offenders diminishes their criminality and contextualises their offending as an aberration. Notably the concept of normalisation is also present for male victims, where their strong work history and ethic, workplace popularity and the respectability in the community is acknowledged. This suggests that as offenders or victims of crime, men receive more recognition and are valued highly for their contribution to the family and society.

In the sample, judges remark on the abnormality of female offenders through the use of vilifying language. Continuous and repetitious use of words such as 'wicked',[383] 'manipulative',[384] 'callous'[385] and 'heartless'[386] are dominant in judges' remarks. The judicial use of vilifying language arguably diminishes the value of female offenders in the criminal justice system, effectively rendering them as worthless. This notion is consistent with historical studies which point out that the act of a woman killing has always been considered more serious than other unlawful killings,[387] including a man killing his wife.[388]

[383] *R v Whyte* [2002] VSC 146 (3 May 2002) [50] (Gillard J); *R V Saad and Saad* [2003] VSC 438 (12 November 2003) [15] (Bongiorno J).
[384] *R v Willard* [2005] NSWSC 402 (28 April 2005) [28], [35] (Whealy J).
[385] *R v Willard* [2005] NSWSC 402 (28 April 2005) [42] (Whealy J); *R v Whyte* [2002] VSC 146 (3 May 2002) [50] (Gillard J).
[386] *R v Whyte* [2002] VSC 146 (3 May 2002) [50] (Gillard J).
[387] Bradfield, *The treatment of women who kill their violent male partners within the Australian criminal justice system,* above n 16, 63.

Knelman found in her study of 19th century killers that the public perceived female killers as 'wicked, oversexed and highly emotional women'.[389] This historical theme is consistent with judges' remarks in the sample where women are still considered to be wicked and oversexed. For example, in one case, a female offender systematically and regularly poisoned her husband with arsenic over an extended period of time. In the sentencing remarks, Gillard J scrutinises the offender's post offence sexual conduct by remarking on the offender dyeing her hair, wearing revealing clothes[390] and alluding to her sexual conduct with a lover in his van.[391] Further, his Honour discusses at length the historical background to the use of arsenic as a poison to kill people, the nature and dangers associated with arsenic poisoning and the effects on this particular victim. His Honour persistently portrays the female offender as 'wicked',[392] 'callous'[393] and 'heartless',[394] and expresses the viewpoint that the offender's wickedness was limitless.[395] This judicial stance is consistent with Gavigan's[396] findings that women frequently used arsenic to poison their victims, and in this regard, as most other cases in which women killed their partners, the women were consistently portrayed as 'wicked hearted fiends bent on the destruction of kindly

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[388] Edward Hyde East, *A Treatise of the Pleas of the Crown* (Strachan, 1803) 336 quoted in Shelley A M Gavigan, 'Petit Treason in Eighteenth Century England: Women's Inequality Before the Law' (1989) 3 *Canadian Journal Women and Law* 335, 347.
[389] Knelman, above n 51, 14.
[390] *R v Whyte* [2002] VSC 146 (3 May 2002) [54] (Gillard J).
[391] *R v Whyte* [2002] VSC 146 (3 May 2002) [65] (Gillard J).
[392] *R v Whyte* [2002] VSC 146 (3 May 2002) [50] (Gillard J).
[393] *R v Whyte* [2002] VSC 146 (3 May 2002) [50] (Gillard J).
[394] *R v Whyte* [2002] VSC 146 (3 May 2002) [50] (Gillard J).
[395] *R v Whyte* [2002] VSC 146 (3 May 2002) [52] (Gillard J).
[396] Gavigan, above n 43, 353-354.

husbands'.[397] Consistent with this historical theme, the data reflects that, in some aspects, judicial opinions surrounding woman who kill their partners has remained unchanged since 1351.

4.4 Remorse

As the data shows, judges frequently remark on remorse. This is consistent with judicial discourse which highlights remorse as an important sentencing consideration in all Australian jurisdictions.[398] In addition, judicial discourse also highlights that remorse can act to significantly reduce the severity of an offender's sentence.[399] In particular, for male offenders judges remark on their acceptance of a male offender's remorse in six cases.[400] While remorse is also acknowledged for female offenders, it is notable that while in *R v Willard*[401] Whealy J comments that the perceived lack of remorse by the female offender could not lead to a higher penalty, his Honour handed down the highest sentence from all the sentences in the sample.[402]

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[397] Ibid 369.
[398] *R v Shannon* (1979) 21 SASR 442, 452 (King CJ); *R v Thomson & Houlton* (2000) 49 NSWLR 383, [118] (Spigelman CJ).
[399] *Neal v R* (1982) 149 CLR 305, 314 (Gibbs CJ, Murphy, Wilson and Brennan JJ); *R v Starr & Smith* [2002] VSCA 180, [25] (O'Bryan AJA); *R v Murphy* [2000] TASSC 169, [18] (Slicer J).
[400] *R v Wathen* [2004] VSC 354 (21 September 2004) [9] (Teague J); *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [25] (Howie J); *R v Felicite* [2010] VSC 245 (8 June 2010) [21] (T Forrest J); *DPP v Lam* [2007] VSC 307 (27 August 2007) [10] (Teague J); *R v Roesner* [2002] VSC 384 (9 September 2002) [11] (Teague J); *R v Chalmers* [2009] VSC 251 (22 June 2009 [42] (Osborn J).
[401] [2004] NSWSC 402 (28 April 2005).
[402] *R v Willard* [2004] NSWSC 402 (28 April 2005) [55] (Whealy J).

4.5 Reducing culpability

Reduction of offenders' culpability is pervasive in judges' sentencing remarks for male offenders. Judges place significant emphasis on offenders' dysfunctional background, current family pressures or their inability to control their lives. These actions are consistent with the process of neutralisation as described by Sykes and Matza.[403] By neutralising male offenders' behaviour judges are preventing these offenders from taking full responsibility for their criminal actions. In this way the judges are validating the notion that when male offenders kill their female partners, they are not responsible for their actions; their actions are not serious; or their behaviour is in some way justified. Ultimately, judges are distancing male offenders from their offending. Further, judges are using neutralisation to minimise an offender's guilt, and by deflecting responsibility away from a male offender, judges are allowing both the offender and society to acknowledge him as a worthy citizen, in spite of his offending.

The results of the research sample are also consistent with Shapland's study of mitigation. Shapland states that once a plea of remorse is accepted by a judge, then denial of full responsibility is claimed by an offender in their plea of mitigation.[404] This is consistent with judges' remarks for male offenders, where once a judge accepts a plea of remorse, the judge supports the offender's denial of

[403] Gresham M Sykes and David Matza, 'Techniques of Neutralization: A Theory of Delinquency' (1957) 22 *American Sociological Review* 664, 664 quoted in John E Conklin, *Criminology* (Pearson Education, 8th ed, 2004) 172.
[404] J Shapland, *Between conviction and sentence: The process of mitigation* (Routlege, 1981) quoted in David Indermaur, 'Offender Psychology and Sentencing' (1996) 31 *Australian Psychologist* 15, 17.

full responsibility in order to explain the behaviour. This is generally done by reference to a variety of factors, perceivably beyond the offender's control. As previously mentioned acknowledgement of remorse on the part of male offenders in the sample is extensive.[405] The data is also consistent with Coss's observation that sympathy for the offender can lead to victim blaming.[406] Judicial remarks blaming the female victim for the male offender's actions at the time of the killing are evident in four sets of male offender sentencing remarks.[407] In each case a causal relationship is created between the female victim's actions and the male offender's behaviour leading up to, and at the time of the killing. In three of these cases, judges remark that the male offender's behaviour is a direct result of the female victim leaving the relationship, and the effect of the victim's actions on the male offender attracts a considerable amount of judicial analysis.

Notably neutralising a female offender's behaviour is only present in one case where the female offender was affected by drugs at the time of the killing.[408] The comments by that judge (one of only two female judges in the sample) are not dissimilar to judges' remarks for male offenders. As neutralising behaviour appears in all male offender cases where the offender was affected by drugs at the

[405] *R v Wathen* [2004] VSC 354 (21 September 2004) [9] (Teague J); *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [25] (Howie J); *R v Felicite* [2010] VSC 245 (8 June 2010) [21] (T Forrest J); *DPP v Lam* [2007] VSC 307 (27 August 2007) [10] (Teague J); *R v Roesner* [2002] VSC 384 (9 September 2002) [11] (Teague J); *R v Chalmers* [2009] VSC 251 (22 June 2009 [42] (Osborn J).
[406] Coss, above n 115, 70.
[407] *R v Goodwin* [2004] NSWSC 757 (12 August 2004); *R v Naa* [2009] NSWSC 1077 (9 October 2009); *R v Roesner* [2002] VSC 384 (9 September 2002); *R v Chalmers* [2009] VSC 251 (22 June 2009).
[408] *R v Barrett* [2009] NSWSC 338 (30 April 2009) [32] (Mathews AJ).

time of the killing, it may be that drug taking is synonymous with neutralising behaviour, even though drug taking is not a mitigating factor.[409]

4.5.1 Judicial evaluation of psychological states

Evaluation of male offenders' psychological states is extensive in the judges' remarks.[410] Specifically, numerous psychological states are discussed, analysed and relied upon by judges to explain male offenders' behaviour, in the context of their offending. This data is consistent with Hogarth's study of the Canadian judiciary which shows that when a judge believes an offender is suffering from a mental illness, the judge generally attributes crime to more socioeconomic factors.[411] In the case of the Canadian judiciary, Hogarth states that where a judge favours rehabilitation, that judge will prefer to give more supervised time rather than hand down longer sentences.[412] Hogarth's observations are consistent with the data. From the sample, where judges extensively discuss the mental state of the male offender, that judge also appears to attribute the offender's crime to more socioeconomic factors. When compared to the female offenders in the sample, none of whom are considered mentally ill, the male offenders appear to receive more lenient treatment in the course of sentencing discretion.

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[409] *R v Henry* (1999) 46 NSWLR 346, 385 (Spigelman CJ).
[410] *R v Goodwin* [2004] NSWSC 757 (12 August 2004); *R v Felicite* [2010] VSC 245 (8 June 2010); *R v Chalmers* [2009] VSC 251 (22 June 2009; *R v Wathen* [2004] VSC 354 (21 September 2004); *R v Naa* [2009] NSWSC 1077 (9 October 2009); *DPP v Lam* [2007] VSC 307 (27 August 2007); *R v Roesner* [2002] VSC 384 (9 September 2002); *R v Chalmers* [2009] VSC 251 (22 June 2009).
[411] Hogarth, above n 60, 92.
[412] Ibid 332.

The data also shows that, particularly in relation to male offenders, judges remark on an extensive range of psychological states ranging from inadequacy and anxiety through to depression and severe psychological distress. Again, this is consistent with Hogarth's findings where he states that judges in favour of rehabilitation take more factors about the offender into account, placing an emphasis on expressed remorse and matters arising from their background or personal history, including a need for treatment.[413] Indermaur points out that viewing an offender's behaviour as a 'quasi-medical condition' may lead to a denial of responsibility on the part of the offender, and prevent them from making the behavioural changes required.[414]

In relation to the data, in exercising the sentencing discretion, and by constructing male offenders' actions in terms of neutralisation and pathology, the judges are distancing male offenders from their responsibility for their violent conduct, and rendering them potential candidates for more lenient treatment in terms of sentence.

4.6 Judicial discretion: a question of bias?

It is possible that a bias towards female offenders exists within the data. The following three examples highlight this possibility.

[413] Ibid 152.
[414] Indermaur, above n 135, 18.

In relation to one judge, who sentenced both a male and female offender, there appeared to be no bias in terms of sentence handed down to either the male or female offender. However, in *R v Saad and Saad*[415] the female offender had, together with her male lover, killed her husband for the promise of a new life with her lover who was also her brother-in-law. In the course of the sentencing remarks Bongiorno J uses vilifying language such as 'wicked'[416] to describe the female offender's crime and labels the female offender as a 'cold blooded murder'.[417]

In contrast, in *R v Mizon*[418] the male offender was found guilty of stabbing his ex-lover who was seven months pregnant with his child. In this case there is an absence of vilifying language to describe the male offender. Further, Bongiorno J remarks that he is unable to determine the degree or extent of pre-meditation involved in the offending.[419] However, his Honour also remarks at length on the many successes in the male offender's life. Specifically, his Honour remarks on the hardworking nature of the offender's parents, how the offender inherited his interest in left wing politics from his father and how as a result, the offender had spent most of his adult life engaged in selfless acts for the benefit of the union movement.[420] His Honour also remarks on the offender's commitment to his

[415] [2003] VSC 438 (12 November 2003).
[416] *R v Saad and Saad* [2003] VSC 438 (12 November 2003) [17] (Bongiorno J).
[417] *R v Saad and Saad* [2003] VSC 438 (12 November 2003) [15] (Bongiorno J).
[418] [2002] VSC 115 (17 April 2002).
[419] *R v Mizon* [2002] VSC 115 (17 April 2002) [22] (Bongiorno J).
[420] *R v Mizon* [2002] VSC 115 (17 April 2002) [17], [19], [20] (Bongiorno J).

mother and children, and provides a lengthy narrative on the offender's intellectual achievements, strong work ethic, and popularity in the workplace.[421]

These judicial remarks affirm Eaton's British study which shows that presentation of a defendant's continuous employment record and employer trust help to build a 'non-criminal' identity[422] and demonstrate sufficient socialisation on the part of the defendant.[423] In comparing the sentencing remarks for the male and female offender, it appears that despite the fact that the male offender killed a woman who was seven months pregnant, he continues to be portrayed as a worthy individual while on the other hand, the female offender who killed her husband in order to live with her brother-in-law, is regarded as worthless.

In a second example, there is a five year sentencing disparity between three male offenders and one female offender who were all sentenced by Teague J. In the case of the three male offenders, whose sentences fall in the bottom three sentences in the sample overall (see Table 2 on page 38), Teague J remarks that at the time of their offending all three male offenders were depressed,[424] and in relation to two offenders, that they were stressed and not in control of themselves at the time of the offending.[425] In contrast, for the female offender sentenced by Teague J, while there is no vilifying language, his Honour's comments are

[421] *R v Mizon* [2002] VSC 115 (17 April 2002) [19] (Bongiorno J).
[422] Eaton, above n 117, 49.
[423] Ibid 44.
[424] *DPP v Lam* [2007] VSC 307 (27 August 2007) [4] (Teague J); *R v Roesner* [2002] VSC 384 (9 September 2002) [7] (Teague J); *R v Wathen* [2004] VSC 354 (21 September 2004) [8] (Teague J).
[425] *R v Wathen* [2004] VSC 354 (21 September 2004) [8] (Teague J); *R v Roesner* [2002] VSC 384 (9 September 2002) [7] (Teague J).

notably brief and to the point.[426] The tone reflected in his Honour's remarks has some similarity with Easteal's observation that men speak language in terms of 'status and independence' which conveys their authority and power to make 'truthful statements about the world'.[427] While any comparison to female judges in the sample is severely limited due to the numbers, the tone of Teague J's sentencing remarks appear to run parallel to Easteal's findings.

In this final example, an observation can be made in terms of the possible judicial value placed on moral worth between victims. In making this comparison it should be noted that each of the four offenders described here were sentenced by a different judge. In the case of *R v Mizon,*[428] as previously mentioned, the male offender was found guilty of murdering his ex-girlfriend. At the time of the offence, the female victim was seven months pregnant with the offender's child. In this case the offender was sentenced to 21 years imprisonment, with a minimum non parole period of 17 years.

In contrast, the three women who killed for financial gain received both a higher head sentence and higher non parole period than *Mizon.* In *R v Whyte*[429] the female offender who killed her husband in 1984, (although not brought to justice until 2002), stood to gain $14,000 from his superannuation.[430] *Whyte* was

[426] *R v Parsons & Stocker* [2002] VSC 161.
[427] Easteal, above n 107, 10.
[428] [2002] VSC 115 (17 April 2002).
[429] [2002] VSC 146 (3 May 2002).
[430] *R v Whyte* [2002] VSC 146 (3 May 2002) [58] (Gillard J).

sentenced to 22 years with a non parole period of 18 years.[431] In *R v Parsons & Stocker*[432] the female offender who killed her husband in 2000 was entitled to receive approximately one million dollars from his estate as his sole beneficiary.[433] *Parsons* was sentenced to 23 years with a non parole period of 18 years. Both *Parsons* and *Whyte* were sentenced in the same jurisdiction and in the same year as *Mizon* (see Table 2 on page 38). In *R v Willard*[434] the female offender who killed her husband in 2003 was to receive in excess of $200,000 from her husband's life insurance policies upon his death.[435] *Willard* was sentenced to 36 years.

In comparing the male offender's victim who was seven months pregnant, with the female offenders' victims who were killed for financial gain, there is room to argue that the moral worth of the male victims is attached to their economic worth, and these sentencing remarks appear to reflect that the worth of male victims is highly valued, and in stark contrast to the perceived value placed on the life of a female victim who is a pregnant woman.

4.7 General deterrence

In the case of one male offender, Howie J remarks that, given that the offender was suffering from depression and the affects of alcohol at the time of the

[431] *R v Whyte* [2002] VSC 146 (3 May 2002) [58] (Gillard J).
[432] *R v Parsons & Stocker* [2002] VSC 161.
[433] *R v Parsons & Stocker* [2002] VSC 161 (13 May 2002) [2] (Teague J).
[434] [2004] NSWSC 402 (28 April 2005).
[435] *R v Willard* [2004] NSWSC 402 (28 April 2005) [6] (Whealy J).

offence, he is not a suitable vehicle for general deterrence.[436] This approach is consistent with Edney and Bagaric's view that the impact of general deterrence has little or no significance for offenders who are suffering a psychiatric or psychological illness at the time of the offence.[437] However in three other male offender cases, judges remark that while general deterrence is to carry some weight in the sentencing process, it is to be moderated in relation to that male offender's mental state.[438] Based on Edney and Bagaric's viewpoint, these remarks raise the question about the impact general deterrence would have on this group of offenders.

Further, in relation to female offenders, judges specifically remark on the need for deterrence in two cases. In both cases the female offenders had killed their husbands for financial gain. In *R v Whyte,*[439] Gillard J sentenced the female offender to 22 years imprisonment with a non parole period of 18 years. This represents the fourth highest sentence in the sample (see Table 2 on page 38). In *R v Willard,*[440] Whealy J sentenced the female offender to 36 years imprisonment with a non parole period of 26 years. This represents the highest sentence in the research sample. This judicial approach is in contrast to Edney and Bagaric's viewpoint that general deterrence does not work.[441] Edney and Bagaric's argument is that because punishment involves inflicting pain on offenders, in

[436] *R v Naa* [2009] NSWSC 1077 (9 October 2009) [27] (Howie J).
[437] Edney and Bagaric, above n 90, 164.
[438] *R v Goodwin* [2004] NSWSC 757 (12 August 2004) [29] (Howie J); *R v Wathen* [2004] VSC 354 (21 September 2004) [8] (Teague J); *R v Felicite* [2010] VSC 245 (8 June 2010) [26] (T Forrest J).
[439] [2002] VSC 146 (3 May 2002).
[440] [2004] NSWSC 402 (28 April 2005).
[441] Edney and Bagaric, above n 90, 55.

order for general deterrence to be justified, the community needs to receive an 'ascertainable' benefit from that punishment.[442] Statistics show that in the context of domestic homicide males killing females is more prevalent than females killing males, and is almost always in the context of a domestic break-up.[443] Given that female offenders account for less than 15% of homicides in Australia, the 'ascertainable' benefit to the community from the application of general deterrence to female offenders seems out of place.

In conclusion, if deterrence is a judicial argument in homicide sentencing, then it seems logical that given the prevalence of male offenders in domestic murder, they should be sentenced more punitatively.

4.8 Provocation

In the sentencing remarks for male offenders, judges frequently set out a background of jealousy, betrayal and infidelity to explain the offenders' behaviour. As previously discussed, this leads to male offenders being excused from their conduct when they kill their female partner. In this respect, the data is consistent with the historical literature which shows that by the nineteenth century the defence of provocation came to include categories of conduct including men reacting angrily in matters concerning their honour, and murder in response to infidelity.[444] This defence has now expanded to take account of

[442] Ibid.
[443] Carach and James, above n 4, 2.
[444] Bradfield, *The treatment of women who kill their violent male partners within the Australian criminal justice system,* above n 16, 63.

killings against a background of sexual jealousy and rejection.[445] In relation to this sample, where male offenders are concerned, the offence of murder may still be seen as a hot blooded crime rather than a cold blooded one, even though provocation is either not pleaded by the defence or accepted by the jury. Notably in the data, Osborn J was the only judge to remark on the killing being cold blooded in the case of a male offender.[446]

In relation to five male offenders judges differentiated male offenders' offending, from a cold blooded or premeditated offence in one form or another.[447] In relation to these five cases, one was decided in New South Wales, and the other four were decided in Victoria. New South Wales still maintains the provocation defence today, and at the time of sentencing for three of the four Victorian cases the provocation defence was still in place. This was abolished in Victoria in November 2005.[448]

In contrast, for female offenders, the historical literature shows that women have always been considered devious, and their crimes more heinous than when committed by men.[449] The judges' remarks referring to female offenders as wicked, callous and heartless are consistent with Knelman and Gavigan's

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[445] Ibid 88.
[446] *R v Chalmers* [2009] VSC 251 (22 June 2009 [49] (Osborn J).
[447] *R v Felicite* [2010] VSC 245 (8 June 2010); *R v Goodwin* [2004] NSWSC 757 (12 August 2004); *R v Roesner* [2002] VSC 384 (9 September 2002); *R v Wathen* [2004] VSC 354 (21 September 2004); *R v Mizon* [2002] VSC 115 (17 April 2002).
[448] Hemming, above n 37, 2.
[449] Shelley A M Gavigan, 'Petit Treason in Eighteenth Century England: Women's Inequality Before the Law' (1989) 3 *Canadian Journal Women and Law* 335, 369; Judith Knelman, *Twisting in the wind: The murderess and the English press* (University of Toronto Press, 1998) 14.

historical research which shows that society viewed women who killed their husbands as wicked, oversexed, and highly emotional.

4.9 The language of the courtroom

Judges utilised the process of narration within the sentencing remarks to build the story surrounding the offence, and create a picture of the offender and their behaviour leading up to, and at the time of the killing. In relation to female offenders, judicial use of vilifying language served to condemn female offenders for their actions. This data is consistent with Morrissey's observations that when women commit murder their rejection by society is even more extreme than when men do the same. Morrissey also states that legal accounts of female murderers demonstrate that when compared to their male counterparts, the act of killing by a woman is more shocking for a male dominated society.[450] Further, this data is consistent with Hogarth's findings that when judges favour punishment they concentrate more on the offender's criminal record, lack of remorse and factors concerning the offence generally, including culpability.[451]

In relation to male offenders judicial remarks which frequently convey the distress and anguish suffered by the offender, are used to explain the actions of male offenders and reduce their culpability. This data is consistent with Hogarth's findings that when judges favour rehabilitation, they will take more factors about the offender into account; placing an emphasis on their expressed

[450] Morrissey, above n 21, 2.
[451] Hogarth, above n 60, 152.

remorse, matters arising out of their background or personal history, including a need for treatment, a lack of premeditation, as well as minimising the seriousness of the crime.[452]

Consistent with Eaton's study on courtroom language,[453] the judges' remarks appear to reflect their own beliefs about the roles men and women play within the family and society generally, as well as their own expectations arising from those roles.[454] Consistent with Eaton's conclusion that these assumptions are embedded in the language used by all courtroom officials including lawyers and magistrates,[455] the data unequivocally reflects these assumptions are embedded in the language used by judges in the sentencing of male and female domestic murderers.

4.10 Limitations

There are six key limitations relating to this research study. First, the restriction of the study to two jurisdictions raises caution with regard to drawing conclusions about other jurisdictions. Second, this sample only covers domestic murder where offenders were found guilty of murder rather than the manslaughter pleas in the wider context of domestic homicide. Next, in relation to sample numbers, the small numbers arise out of the nature of the research methodology, namely grounded theory, where, once saturation point was reached concerning male

[452] Ibid 152.
[453] Eaton, above n 29, 93.
[454] Ibid 94.
[455] Ibid.

offenders, I then moved on to analyse the women who were, by their pleas, also restricted in numbers. When the results were combined the sample remained statistically too small for analysis. Next, apart from the limitations arising out of the methodology, the complexity of the sentencing process generally makes it highly improbable that any one factor, taken on its own, is responsible for the ultimate penalty. Next, some of the cases may have gone to appeal, and accordingly, some of the sentence lengths discussed in the sample may have been reduced as a result of the appeals process. Finally, the limited amount of literature in relation to female offenders in the context of domestic murder may prevent the presentation of a more comprehensive view of their offending.

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LEGISLATION

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Supreme Court of Western Australia, *Practice Note No 5.7 – Status of Published Written Sentencing Remarks – General Division – Criminal*, 20 January 2011