Prosecution Strategies in Domestic Violence Felonies:

Anticipating and Meeting Defense Claims

Final Report

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1. PROJECT DESCRIPTION

1.1 Background and Purpose

The criminal justice system has only recently begun to respond to domestic violence as a public offense. Under common law, a man could lawfully beat his wife because he was legally responsible for her actions and therefore could "correct" her behavior through chastisement.[1] Although wife beating was declared illegal in all states in 1920,[2] domestic violence was largely ignored.[3] Domestic violence historically has been viewed as a family matter, out of the purview of the criminal justice system. It was dealt with primarily through attempts at mediation or reconciliation, rather than through punishment.[4]

Attention to battered women in the U.S. did not become widespread until 1975 and early 1976, with the beginning of the Battered Women's Movement.[5] The roots of the movement saw the establishment of the first shelters for battered women in St. Paul, Minnesota and Boston, Massachusetts. Since that time, services for battered women have expanded through the establishment of additional support organizations such as state and national coalitions against domestic violence and court advocacy programs.

Police response to domestic violence has changed dramatically. From 1984 to 1988, policing moved from a view of domestic violence as a family dispute that did not justify arrest, to mandatory arrest laws in a dozen states.[6] Police have been increasingly educated and trained to treat domestic violence as a public offense similar to violence between strangers.[7] Although there is some disagreement about the effectiveness of mandatory arrest policies,[8] there is little doubt that the number of arrests have increased -- to between two and eight million arrests each

year.[9] In addition to increased arrests, the definition of domestic violence has broadened to include not only serious assaults, but also physical attacks that do not result in any injury.[10] A higher number of arrests have naturally increased pressure on prosecutors and judges to process those criminal defendants through the court system. In turn, this increased pressure has resulted in a dramatic rise in prosecutions in some jurisdictions, and strong resistance toward prosecution in other jurisdictions.[11] And despite these various policy changes, many police officers and prosecutors still believe that intervention in domestic violence is warranted only in cases of extraordinary violence.[12]

Prosecuting attorneys possess almost complete discretion to set priorities for the use of court resources to try criminal cases.[13] While some prosecutors may make their decisions about charging based on the likelihood of conviction,[14] attorneys are bound by their ethical obligation to file only those charges, which can reasonably be substantiated by admissible evidence at trial.[15] To date, studies of the prosecution of domestic violence cases are limited to charging decisions. No study has examined prosecution or defense strategies in domestic violence cases. Thus, the purpose of this study was to conduct an in-depth, qualitative analysis of the trial strategies used by both the prosecution and defense in domestic violence-related felony cases.

1.2 Difficulties Prosecuting Domestic Violence-Related Cases

Domestic violence-related cases are often viewed as notoriously difficult to prosecute.[16] This is in part because our criminal justice system is not structured to respond well to domestic violence-related crimes. Some of the reasons for this difficulty in responding have to do with: (1) how our laws and rules of evidence are written; (2) a lack of understanding of domestic abuse

dynamics of the part of fact finders; and (3) the perceived lack of credibility of women as witnesses.

1.2.1 Limitations in Our Laws and Rules of Evidence

Our legal system is based on charging individuals for "discrete events." A batterer may abuse a partner for years, but is often charged for only one abuse event. Thus, the legal process takes the assault out of the context of the larger abusive relationship. Our criminal justice system is not geared to the presentation of evidence about relationship violence. In presenting evidence of the context of a violent relationship, prosecutors must comply with the rules of evidence. For example, the judge may limit the type and amount of evidence of previous violence between the domestic partners, or may disregard the reputation for violence by the defendant or victim. However, many domestic violence experts and prosecutors agree that evidence of prior domestic violence plays an important role in the prosecution of these cases.[17]

1.2.2 Specific Evidentiary Constraints in Domestic Violence Cases

The primary limitation to presenting evidence of prior relationship violence is Rule of Evidence 404(b),[18] which limits evidence of "other acts" to "proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evidence about prior violence may influence the jury's decision and therefore be "prejudicial" to the defendant. However, social science research suggests that the ongoing violent relationship is essential to understanding an individual event of violence. Thus, the history of violence in the abusive relationship may be necessary to prove that a given assault occurred and to support the seriousness of that assault. This context or history may be highly "probative" evidence. Under the rules of evidence, the judge at trial must decide whether evidence is more probative than

prejudicial. More specifically, Rule of Evidence 403 provides that a judge must decide whether the "probative value" of the evidence outweighs "the danger of unfair prejudice, confusion of the issues, or misleading the jury."

Evidence of a defendant or a victim's violent nature is also limited under Rule 404(a). This rule provides that first, evidence about a defendant's character trait can be presented only if it is put in issue by the defendant; and second, evidence about a victim's character trait can be presented only if the defendant puts it in issue or if the victim has died and the victim's nonviolent or peaceful character is relevant. The limitations on other-act and character evidence can have a significant impact in domestic violence prosecutions. Jurors may not be able to hear the evidence that gives context to the violent relationship.

1.3 Fact Finder's Lack of Understanding of the Dynamics of Domestic Violence

Prosecutors report anecdotally that in using the traditional measures of "success," *conviction on the offense as charged*, domestic violence cases often are not "successful."[19] There are several likely reasons for this lack of success. One of the most important seems to be a lack of understanding of the dynamics of domestic violence on the part of the fact finders. In our legal system the fact finder is usually the jury, although, in some cases the judge sits as fact finder. The jury makes all decisions about the nature of the evidence presented and the credibility of witnesses. Thus, it is the jury's responsibility to evaluate the evidence presented and determine if the prosecution has successfully proven the elements of a given crime.[20]

Many prosecutors have emphasized the need to understand the dynamics of an abusive relationship both when setting prosecution policies for domestic abuse cases, and when providing

training for police.[21] Just like police,[22] prosecutors[23] and others,[24] courts have begun to recognize the need for a multi-disciplinary approach to domestic violence.[25] Recently, educational efforts have targeted criminal justice system participants (police, judges and prosecutors).[26] None of this training, however, addresses the misconceptions held by individuals who are selected as jurors in domestic violence cases.

Myths and misconceptions about domestic violence abound in the general population.[27] Domestic violence victims are perceived as weak women who "seek out" batterers, or are responsible for the abuse (i.e., "She must have done something to provoke him"). Many people have a very difficult time understanding why battered women do not leave the relationship when the violence begins. Those unfamiliar with the dynamics of domestic violence are unable to comprehend the power and control a batterer exerts over his victim. In addition to a lack of understanding of the victim's plight, batterers typically seek and are given sympathy by the uninformed. A batterer's violence sometimes is seen as justified force (i.e., his wife was nagging him, so he had a right to hit her), or as something out of the batterer's control (i.e., caused by stress or brought on by alcohol and drug use). Often, judges and jurors uneducated in the underlying theories of domestic violence misperceive the seriousness of the assault, or excuse the abuser's behavior because the victim remained in the relationship.[28] Also, the public often misconstrues the ongoing nature of domestic violence. They fail to understand that a single incident of abuse is one part of a longstanding pattern of psychological control and physical violence.[29] In general, individuals without personal experience with domestic violence have a very difficult time conceiving of violence by intimate others. In addition, many people still hold traditional values of the privacy and primacy of individual family members over family matters.[30]

It is from this uninformed group of individuals that a prosecutor will seat a jury. In fact, any potential juror who has personal knowledge of or experience with domestic violence, and therefore has some understanding of the dynamics of domestic violence, is often struck for cause. The defense counsel also may use a peremptory strike to remove that juror. Thus, jurors selected in a domestic violence trial may have traditional attitudes about family relationships or misconceptions regarding domestic violence that may interfere with their ability to decide the case.[31]

1.4 Witness Credibility

Assessing witness credibility is an important part of the trial process. The term "credibility" encompasses many meanings: truthful, believable, trustworthy, convincing, someone to be taken seriously.[32] Yet women, who make up the majority of domestic violence victims, are often seen as "less credible" witnesses in the criminal justice system.[33] According to Schafran,[34] women lack credibility in three arenas. Women lack *collective credibility*, meaning that they belong to a group that society generally perceives as less credible. For example, women are less likely to be used as 'authority figures' in the media or advertising. Society in general admires male role models more than female role models.

Women, and domestic abuse victims in particular, lack *contextual credibility*, which Schafran describes as "credibility that depends upon understanding the context of the claim."[35] Contextual credibility depends on being able to put oneself in the other person's shoes. When a specific domestic assault is taken out of the context of the larger abusive relationship, fact finders are in the position of evaluating the victim's testimony in a vacuum. Domestic violence victims

indicate, anecdotally, that a person who has not been a victim of domestic abuse often has difficulty conceiving that such violence occurs. They also underestimate the devastating impact of the abuse and dismiss the victim's fear of her abuser as unreasonable or unwarranted.

Finally, women lack *consequential credibility*. According to Schafran, "part of having credibility is being seen as someone of consequence, someone who matters, someone to be taken seriously. Part of being taken seriously is having your harms and injuries taken seriously -- not devalued and trivialized."[36] Domestic violence victims' injuries are typically trivialized. Often heard justifications include "he only hit her once;" or " he only hit with an open hand, never a fist." Abuse victims' experiences often are minimized or they are somehow blamed for the abuse -- "if she would just stop nagging him, he wouldn't have to hit her."

The jury, or judge sitting as fact finder, evaluates the credibility of witnesses.[37] Factors to be used in assessing credibility include "whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness's appearance, conduct, memory and knowledge of facts, and the witness's interest in the trial."[38] Assessing victim/witness credibility in domestic violence-related cases presents a difficult challenge. Domestic violence typically is a hidden crime. Batterers often isolate their victims from others, and are not likely to batter the victim in front of witnesses. Because of this isolation and manipulation, victims are unlikely to have told anyone else about the abuse. Therefore, the victim's testimony about abuse would be inconsistent with testimony of others who did not witness any violence in the relationship. Coping behaviors of abuse victims, such as not resisting when the batterer forces sex, when taken out of context, or when evaluated by someone who does not understand the dynamics of domestic abuse may appear strange or unexplainable. Thus, the

credibility of the victim's testimony is likely to be significantly undermined when presented without the context of the larger abusive relationship and an understanding of abuse dynamics.

A woman's credibility as a witness can also be called in to question if she is reluctant to cooperate in the prosecution of her offender. Women are less likely to cooperate in the prosecution process if still in a relationship with the abuser.[39] There may be a host of legitimate reasons why a woman is reluctant to testify, but probably the most compelling is fear of further abuse at the hands of the batterer. However, conclusions drawn by the prosecutor or jury might be that if she is reluctant to cooperate, or recants her allegation of abuse, then the abuse must not have really happened.

1.5 Summary and Objectives

The evidentiary constraints of prosecuting domestic violence cases, myths and misconceptions about domestic violence in the general population and women's perceived lack of credibility all present significant challenges in the prosecution of domestic violence related cases. The original purpose of this study was to identify prosecution strategies of domestic violence related felony cases through a qualitative analysis of trial transcripts. The actual findings of this study encompass strategies used by both the prosecution and the defense, and therefore can be considered an analysis of *trial strategies* in domestic violence cases. Trial strategies were identified by examining the trial transcripts of a sample of 40 domestic violence-related murder[40] and non-murder felonies in the state of Iowa. Cases were analyzed to determine general prosecution and defense strategies. Also examined was the extent to which prosecutors were able to present evidence of the context of the abusive relationship and history of prior

violent acts, in helping the fact finders understand the current charge. An original objective of this grant was to analyze the outcomes of prosecution by comparing cases convicted on original versus lesser charges, and cases with cooperative and uncooperative witnesses. These comparisons were not made because of an insufficient number of cases with lesser charge convictions or uncooperative victims.

The research objectives addressed in the study were to:

1. Identify the evidentiary constraints in domestic violence related cases, specifically the types of character evidence and prior acts of the defendant allowed during trial.
2. Describe how the prosecution presents its case in domestic violence trials by identifying the key prosecution themes and strategies.
3. Identify the specific evidence used by the prosecution to prove the elements of the case.
4. Identify and describe the themes and strategies used by the defense to counter the prosecution's case.

1.6 Significance of this Study for the Criminal Justice System

Criminal cases are tried not as an academic exercise, but in an effort to adjudicate guilt and thereafter mete out appropriate punishment to the guilty. The adjudication of guilt involves a "search for the truth," with disputes about the facts resolved by the jury or judge sitting as fact finder. Thus, the prosecution and defense focus their efforts on persuading fact finders to accept a particular portrayal of the events that occurred.

Most of the work related to trial strategies has not been academically based, but rather is purely anecdotal, practice-oriented "tips" on how to prosecute. Many prosecutors have

developed trial techniques based on this anecdotal information or training, or based on simple "trial and error" techniques. Trial advocacy[41] has long been viewed as an "art" rather than as a "science" by many trial lawyers, including prosecutors.[42] No systematic research has been conducted on trial strategies in domestic violence cases.[43] Some prosecutors suggest that research on strategies is non-existent, because true strategies have not yet been formulated. Many social scientists have conducted research on jurors and jury decision making that may be helpful to prosecutors in developing effective prosecution strategies. An in-depth examination of trial strategies can combine the findings of jury research with practical applications in the context of domestic violence. To date, no such study has been done.

Domestic violence advocates also may find information provided in this study useful. Advocates play an important role in supporting and assisting battered women through the criminal justice system. The descriptions of the prosecutorial process provided by this study can assist advocates and victims in better facilitating this process.

1.7 Focus on Felony Cases

Many scholars have been critical of prosecutorial charging decisions, arguing that prosecutors minimize the violence if the victim is a battered woman. This disparity in charging has been attributed to sexist views by criminal justice officials.[44]

Sexist views may play a role in criminal justice decision making. Police or prosecutors who accept stereotypical views of women as complainers, prevaricators or malingerers may minimize the violence. Certainly, abusers minimize the violence they inflict on their victims, and refuse to take responsibility for the actions that have caused harm. Victims also may

minimize the violence, either because they are habituated to accepting the abuser's view of the world as a survival technique or because they find the reality of their injuries too traumatizing to acknowledge.

This may explain why, a decade ago, Langen and Innes found that one third of domestic violence cases that were classified as misdemeanors, if committed by strangers, would have been classified as felonies.[45] Langen and Innes further found that many of the domestic simple assaults, classified as misdemeanors, actually involved relatively serious injuries. Injury to the victim in the misdemeanor cases occurred almost as frequently as injury in the felony cases classified as rape, robbery and aggravated assault, and "in terms of actual bodily injury, as many as half of all incidents of domestic violence that police would classify as misdemeanors are as serious as or more serious than 90% of all the violent crimes that police would classify as felonies."[46]

In addition to the possibility of sexism in decision making, however, criminal statutes also may make it difficult for a prosecutor to charge a felony offense in a domestic violence case. In Iowa, for example, a simple misdemeanor assault involves no injury; a serious misdemeanor assault involves intentional infliction of bodily injury, which means "physical pain, illness or any impairment of physical condition."[47] An aggravated assault involves the use of a dangerous weapon or assault with intent to commit serious injury, which results in a bodily injury.[48] "Serious" injury is defined as "disabling mental illness, or bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ, and includes but is not limited to skull fractures, rib fractures, and metaphyseal fractures of the long bones of children under the

age of four years."[49]

Only when "serious injury" occurs is an assault elevated to a felony offense (called "Willful Injury") in Iowa.[50] This is a high threshold of proof of injury, and often, domestic violence cases do not rise to the level of a felony assault as it is defined in Iowa.

Previous research suggests that prosecutors take into account a wide variety of factors in making charging decisions, including the physical evidence available, the number of witnesses who can testify, the offender's prior record, the gender of offender and victim, victim characteristics (including both credibility and the victim-offender relationship), whether the offender is out on bail, whether the defendant was apprehended at the scene, and the potential for harm to the victim or others.[51] In a study of domestic abuse cases, the primary reasons for rejecting a case included the victim's wishes, victim provocation issues, whether the offender was being held on another case, and whether the evidence was sufficient to result in a conviction.[52]

2. SCOPE AND METHODOLOGY

2.1 Overview of Methodology

This study involved a qualitative analysis of domestic violence-related trial transcripts. The study was exploratory in nature, emphasizing the identification of patterns in prosecution and defense strategies. The study entailed an analysis of felony trials in Iowa, occurring between 1989 and 1995, in which the defendant and victim were involved in a domestic relationship. Although we anticipated that many of the cases would involve prior incidents of violence, it was not a requirement of case selection. The goal was to identify and catalogue trial strategies used in these cases with a specific focus on the admission of evidence of other acts of violence, or "context" evidence about the violent relationship between the defendant and victim.

2.2 Focus on Iowa

The study focused on criminal trials occurring in Iowa between 1989 and 1995. There were several reasons for selecting cases from a single jurisdiction. First, each jurisdiction has different laws, making equivalent comparisons between jurisdictions difficult. Thus, an exploratory study of prosecution strategies is most valuable if it focuses on a single jurisdiction. Second, Iowa prosecutors developed the first prosecution manual on domestic abuse prosecutions in the country in 1990. Since then, Iowa prosecutors have received regular training on domestic violence. Third, Iowa is a relatively homogenous jurisdiction, with a tight-knit prosecutor organization.[53] All Iowa prosecutors receive unified training through the Prosecuting Attorney Training Coordinator's office in the Iowa Department of Justice. Finally, it is a

challenging task to identify and to obtain all of the necessary documents for a study of domestic violence felonies, which generally are not separately identified in court records. Roxann Ryan has been an Iowa prosecutor for 17 years and was able to solicit the cooperation of prosecutors and court officials.

2.3 Qualitative Research

Academic study of domestic violence has included both quantitative and qualitative research. This study involved primarily qualitative research. The decision to employ qualitative techniques was motivated by a number of considerations. First, there is a theoretical basis for the use of qualitative analysis in the context of domestic violence. The predominant theory about domestic violence, with its feminist basis, suggests that quantitative research is of limited value because of the hidden nature of the phenomenon. Most domestic violence victims are isolated from others and reluctant to report their experiences out of fear of retaliation from the abuser, making it difficult to measure a hidden phenomenon. Thus, qualitative study of domestic violence has shaped the understanding of domestic violence in important ways.[54]

Second, quantitative research may have a limited impact on the lawyers and judges involved in criminal prosecutions. Trial lawyers insist that each case stands on its own merit, and that individual cases cannot be compared. Even sophisticated quantitative information may not be persuasive to the court. For example, research on capital cases demonstrates that, regardless of the rigorousness and vitality of an empirical, quantitative study, the courts may reject the conclusions of these studies out of hand.[55]

Third, few systematic studies of trial strategies in domestic violence have been

undertaken. This is an exploratory study of these cases. Systematic review of felony trials, which generate more issues and more difficult issues than simple misdemeanor cases, can reveal patterns that were not recognized in anecdotal discussions of domestic violence prosecutions. Prosecutors dealing with misdemeanor domestic violence prosecutions opined that the study of felony trials might be more useful, because felonies are treated more seriously within the system. More issues are litigated fully in felony trials, and felonies carry more severe consequences.[56] According to Marshall and Rossman, "the qualitative approach to research is uniquely suited to uncovering the unexpected and exploring new avenues."[57] Qualitative research also can help isolate variables for further study.

One form of qualitative research involves archival studies, based on written records of proceedings.[58] In a criminal trial the proceedings are reported and transcribed when a criminal defendant appeals a conviction. It is possible, therefore, to systematically examine the proceedings at a trial and analyze the content of the proceedings. The transcript of a criminal trial is a relatively good measure of the evidence made available to jurors in the case. It also reflects the formal arguments presented by the prosecution and defense, as well as the judge's rulings regarding the evidence made available to the jurors.

2.4 Identification and Selection of Cases

One of the greatest challenges in researching domestic violence trials is the difficulty in identifying domestic violence-related cases. In this study, only felony cases were studied. However, there is no crime specifically designated as "felony domestic violence" in the Iowa Criminal Code. Police do not routinely note whether a case involves a domestic relationship.

The Uniform Crime Report (UCR) does not require such a designation, nor does the Iowa Department of Public Safety, the agency that gathers UCR statistics.[59] In addition the record-keeping limitations of Iowa courts made it difficult to obtain court transcripts. Only about 40% of the 99 Iowa counties were automated at the time of this study.[60]

2.4.1 Rationale for Case Selection

The decision to study only felony cases was based on the assumption that criminal justice officials and jurors treat felony cases more seriously than misdemeanor domestic violence cases. In addition, felony cases are likely to yield trial strategies that are more defined and more complex than misdemeanors. Murder cases are likely to be the most complex cases.

The rationale for studying only cases in which convictions were obtained was based on several factors. First, there is no centralized repository to search to identify cases, either convictions or acquittals. Given the difficulty in identifying cases in which convictions were obtained (discussed below), it is even more difficult to identify cases involving acquittals. Most felony convictions are appealed, meaning that two prosecutorial offices (the county attorney and the attorney general) and one of the two appellate courts are involved in the case, increasing the likelihood that a case could be identified. The cost of obtaining transcripts of trials involving acquittals generally is substantially greater than the cost of transcripts of trials involving convictions.[61]

2.4.2 Identifying Cases

Identification of cases involved a multi-step process. Initially, a description of a "qualifying" case was developed. The case had to meet all of the following criteria to qualify: (1) the crime was charged as a felony, as defined in Iowa law[62]; (2) involved a "domestic"

relationship[63] between a male offender and a female victim; (3) a trial occurred between 1989 and 1995 in Iowa; (4) a conviction was obtained; and (5) the transcript of the trial was prepared. Since the purpose of the study was to explore strategies used to prosecute batters, and given the qualitative nature of the study, we chose to look only at cases involving a male offender and a female victim, as these constitute the majority of domestic violence related cases. We did not consider cases where the victim was male and the defendant female, same-sex relationships, or cases where the battered woman killed her partner.

The first step in identifying cases involved the Crime Victim Assistance Division (CVAD) of the Attorney General's office. This office maintains computerized information about crime victims seeking victim compensation.[64] The CVAD tracks cases based on whether they involve a domestic relationship, and also maintains a list of murder victims killed by an intimate partner. CVAD information is readily accessible, and the staff provided a printout of felony cases classified as domestic, sorted by county.

The second step was to send the county-based CVAD list to every county attorney (99 counties in Iowa), asking them to note whether the cases listed were appealed or whether a transcript was prepared. The attorneys also were asked to identify any other qualifying domestic cases not included on the CVAD list. In addition, cases were solicited from prosecutors at one of their regular training sessions in 1995. About half of all prosecutors, representing 80-90% of all county attorney offices in the state, attend these training sessions.

The third step was to review all official case summaries issued by the Iowa Supreme Court and the Iowa Court of Appeals from 1990 to 1995. This review was done to identify any cases that appeared to involve domestic violence. Because few cases were identified in this step,

the search was expanded to include cases from 1989.

The fourth step was to write to each court reporter in the state, providing them with a list of cases already identified, and asking them whether they were aware of any other cases that might fit the criteria. Court reporters were told that this request was being made in connection with a federal grant, which included funding to pay for copies of transcripts. Finally, appellate attorneys identified several additional cases that qualified for the study.

2.4.3 Gathering Transcripts

Gathering transcripts was more complicated than anticipated. After identifying cases that qualified as "domestic violence felonies," it was necessary to identify the court reporter from whom a transcript could be ordered. Cooperation of the Iowa Attorney General's office was essential. In Iowa, the Attorney General has sole jurisdiction to litigate *all* appeals of criminal cases. The Attorney General's office, therefore, is a central repository of information about cases appealed. Staff at the Attorney General's office provided assistance, allowing us access to records to identify county court numbers for the qualifying cases. The county clerks of court were then contacted to find out the name of the court reporter for the cases.

Once the court reporter for a case was identified, the court reporter was contacted to order the transcript. When available, transcripts on a computer diskette were requested. If the transcript was not available on a diskette, a paper copy was ordered. Some court reporters provided a diskette of the transcript at no charge, or for a nominal fee. Others charged the maximum cost per page of a transcript.

If there was no paper copy of the transcript available from the district court, or if it was a particularly long transcript, the Attorney General's office was contacted to see whether the

prosecution's copy of the transcript could be located. Again, the cooperation of the Attorney General's office was critically important. About 20 transcripts were borrowed from the Attorney General's office, with an estimated total length in excess of 25,000 pages. A total of 45 transcripts were obtained, however only 40 cases were analyzed. The five cases dropped either had incomplete transcripts, or after further review, were determined to not involve a domestic relationship as defined for the study.

2.4.4 Preparation of Transcripts

Paper transcripts were scanned into computer files and saved in an ASCII format. All computer files of the transcripts were then edited to meet the requirements for the HyperResearch™ qualitative text analysis program.[65]

2.5 Focus Groups

While identifying cases and gathering transcripts, we conducted several focus groups, two with prosecutors, and two with domestic abuse victims. The original intent of these focus groups was to use the findings solely for the purpose of developing analysis strategies for the court transcripts. However, the findings from these groups proved to be very rich and informative. Thus, a summary of these findings is presented in the Detailed Findings section of this report.

2.5.1 Focus Groups with Prosecutors

Two focus groups, with a total of 13 Iowa prosecutors were conducted. The focus group members attended by invitation and the discussions lasted 90 minutes. The goal of the focus group was to ask prosecutors about their experiences with domestic violence prosecutions, with an emphasis on the introduction of "other acts" evidence. Also included was a discussion of

prosecution strategies and themes, and frustrations that prosecutors experience in prosecuting domestic violence cases.

Participants were chosen on the basis of a combination of factors, including geographic area (judicial districts), years of experience, gender, and population of the county. Other factors included, number of employees in the prosecutor's office, employment of a victim-witness coordinator in the prosecutor's office, and whether the prosecutor was the elected county attorney or an appointed assistant.[66]

The intentional mixture of these factors was designed to gather a cross-section of Iowa prosecutors in each of the focus groups. There are variations among judicial districts as to prevailing procedures and, to some degree, substantive law. Many prosecutors in Iowa are "career" prosecutors, with many years of experience, but some prosecutors are relatively inexperienced. Legal resources vary across counties by the number of prosecutors and available support staff and victim services. A secondary selection consideration was the availability of victim services. The judicial districts in Iowa vary widely as to the availability of a battered woman's shelter or a domestic violence program. Finally, selection also took into consideration individualized experiences of counties, including disputes between prosecutors and victim services agencies; public criticism of police or prosecution policies; and personalities of the prosecutors in each group.

The discussion began by asking prosecutors to describe the themes they used in domestic violence prosecutions, including strategies and techniques for making opening statements and introducing evidence. Prosecutors were then asked to address the issue of witness order, how they dealt with victims who do not want to testify and strategies they used to introduce evidence

of "other acts" or to explain the context of the violent relationship. They were also asked about their experiences using expert witnesses, how the defense commonly responded to their case, and about the reactions of judges and jurors to the evidence presented. The prosecutor focus groups were tape recorded and transcribed for later analysis.

2.5.2 Focus Groups with Victims

Two focus groups involving victims were conducted. The victim focus groups were convenience samples. The first focus group consisted of a group of battered women who belonged to an established support group that met weekly at a domestic violence shelter. The second focus group consisted of a group of women who were charged as perpetrators and were attending a weekly "batterer program" sponsored by the local domestic violence shelter. Although they were classified as perpetrators, this group of women had been repeatedly victimized by their partners. Their experiences were similar to the women in the first focus group.

The outline of proposed questioning for these groups was abandoned when it became clear that the victims were interested in sharing their experiences in a narrative fashion, rather than responding to a structured set of questions. The facilitators of both groups would not permit the meetings to be tape-recorded. A research assistant took extensive notes during these discussions. Participants in both the prosecutor and victim focus groups were assured of anonymity, to protect the privacy of victims and to encourage forthright discussions by elected and appointed officials.

2.6 Data Analysis Procedures

While all of the transcripts were being prepared for the HyperResearch™ program, we developed the analysis strategies. The coding of the transcripts involved a two-step process: 1) the recording of descriptive information on a summary survey; and 2) coding each transcript using HyperResearch™ text analysis software program.[67]

2.6.1 Summary Survey

A summary survey was developed to document descriptive information about the cases. As each transcript was read and coded in HyperResearch™, various descriptive information about the case was recorded on the summary survey. The summary surveys included demographic information about the defendant and victim, such as name, age, type and length of relationship, and whether the victim and defendant were living together at the time of the offense. General information about the case, including offense date and trial date was recorded, as well as the county in which the charges were brought, the formal charges brought by the prosecutor, and the offenses for which the defendant was convicted. Also, the names of the judges, the prosecutors and the defense attorneys involved in the trial were included on the survey.

Information about the circumstances of the offense, including whether the case was a murder or non-murder case, if the incident involved property damage or theft, or physical injury was recorded. The use of a weapon was noted, along with the use of drugs at the time of the offense, and the criminal history of both defendant and victim.

Finally, the survey noted whether a case was tried to a judge or jury, included pretrial motions, and whether jury selection was reported. The survey included information about evidence of prior acts of violence, and character evidence as it related to either the defendant or

victim, as well as the number and type of witnesses who testified.

2.6.2 Procedures for Coding the Transcript Text

The trial transcripts were qualitatively analyzed using the principles of grounded theory. Data analysis in grounded theory involves generating concepts and themes that emerge directly from the data, rather than from preconceived ideas being applied to the data.[68] In keeping with the principles of grounded theory, we utilized the following data analysis procedures that allowed the major themes to emerge from the data.

2.6.2.1 Development of the coding categories. We began by reading two cases chosen at random, one murder, one non-murder, from the transcripts received. These transcripts were reviewed to get a sense of the structure and substantive content of the trials. After this review, we began to generate a list of preliminary codes to be used in the text analysis. During this preliminary stage, we had several conversations about the evolving code list, and wrote numerous and frequent memos to each other via electronic mail to discuss further refinements of the list. Once a preliminary list of codes was developed, we separately coded the two transcripts reviewed. We then met to discuss how well the code list fit the data. Some additional codes were added and others were dropped. We also discussed the definitions of the codes to be sure we were applying them in a similar fashion to the text.

The coding categories are designed to capture a flavor for the type of strategies used, not only in the prosecution's case in chief,[69] but in the prosecution's response to the defense. These categories included themes and distinctive language used by prosecutors or defense attorneys, evidence regarding the dynamics of domestic violence, evidence that contributes to the "story" that is told (elements of the crime, dynamics of abuse, prior violence, etc.), hearsay or other

evidentiary objections, and strategies to disrupt the flow of the story being presented. The final list of codes developed is described below:

- *defense language* - used to indicate any interesting use of language by the defense attorney (calling a police officer by his first name, use of language when describing the offense) or just an interesting cadence of questioning.
- *defense themes* - anything related to the defense's themes or their attempts to counter the prosecution's proof of elements.
- *dynamics of abuse* - any description by the victim or offender or other witnesses that relates to the dynamics of domestic violence.
- *elements* - any testimony that appears related to the elements of the offense, or where it is specifically stated that it is related to elements - what the prosecution brings out in an attempt to show the various elements.
- *hearsay objection defense* - all hearsay objections made by defense, including the surrounding content and the judge's ruling.
- *hearsay objection prosecution* - all hearsay objections made by prosecution, including the surrounding content and the judge's ruling.
- *interesting* - anything we found interesting in the transcripts. This was a catchall code used to mark a segment of text that did not fit in the other code areas, but that might prove interesting during later analysis.
- *judge language* - used to indicate any interesting use of language by the judge.
- *motion in limine* - used to code any pretrial motions to limit evidence, as well as motions to limit evidence that are discussed during trial.
- *objection by defense* - all non-hearsay objections by the defense.
- *objection by prosecution* - all non-hearsay objections by prosecution.
- *offender language* - any interesting language the defendant uses during his testimony.
- *past history of abuse* - testimony that directly or indirectly indicates a past history of abuse.
- *prior acts evidence defendant* - any discussion of prior acts committed by the defendant,

even if only alluded to subtly.

- *prior acts evidence victim* - any discussion of prior acts bad committed by the victim, even if only alluded to subtly.
- *prosecution language* - any use of interesting language by prosecutors.
- *relationship history* - information on past history of relationship between the victim and defendant not related to prior abuse.

2.6.2.2 Coding of the transcripts. We assigned cases randomly, dividing non-murder and murder cases roughly equally between us. Then, we coded the transcripts using the summary survey and the list of codes, comparing notes regularly to assure that cases were coded reliably. A significant amount of the text in each transcript was coded and some segments of text were assigned more than one code. For example, a block of text might involve both a defense theme and dynamics of abuse so it was assigned both codes.

2.6.3 Sorting and Summarizing the Text Data

After coding all the transcripts, HyperResearch™ was used to sort the transcripts by code word, resulting in a file for each code containing all the references for that code for all cases. For example, one file contained all the segments of text coded as *defense themes* for each case. Using this file, we were able to identify the different types of defense themes and strategies used in a particular case, then compare the themes identified across all cases. After sorting the text for each code into separate files, these files were analyzed, identifying and summarizing the major themes emerging from the data. Rather than deciding what the themes or patterns were ahead of time and looking for their occurrence in the transcripts, this coding, sorting and summarizing procedure allowed the patterns and themes to "emerge" systematically from the data.[70]

3. DETAILED FINDINGS

The research objectives addressed in the study were to: (1) identify the evidentiary constraints in domestic violence related cases; (2) describe the key prosecution themes and strategies; (3) identify the specific evidence used by the prosecution to prove the elements of the case; and (4) identify and describe the themes and strategies used by the defense to counter the prosecution's case. A summary of findings from the prosecutor and victim focus groups, and demographic characteristics of the cases are also described.

3.1 Focus Groups

Several focus groups were used to guide the research. Two focus groups with prosecutors and two focus groups with victims provided anecdotal insight into perceptions of domestic violence cases and the criminal justice system response.

3.1.1 Prosecutor Focus Groups

Thirteen prosecutors provided the following information:

3.1.1.1 Charging decisions. Most prosecutors had a presumptive no-drop prosecution policy, that is, they presumed that domestic abuse assaults would be prosecuted. However, charges could be dropped in cases in which the prosecutor deemed such action appropriate. They reported that victim input on prosecution decisions often is sought, but they do not feel bound by the victim's preference to proceed or to drop the charges. Prosecutors reported that they sought no-contact orders regularly, if not automatically.

3.1.1.2 Prosecution trial themes. Prosecutors identified several themes that they use during domestic violence prosecutions: (1) the offender controlled virtually all of the victim's

life; (2) children must be protected from violence; (3) assault is a crime, and domestic violence victims simply fall into a special category of that crime; and (4) assault is a serious crime, regardless of the severity of injuries.

Prosecutors said that in opening statements, they include only those things that they are certain they can prove during trial. Generally, they present evidence in chronological order to help "tell the story," but they try to begin and end with strong witnesses. They prove the case with the witnesses who are available (neighbors, eyewitnesses, police, children, medical personnel), or victim statements, recordings of 911 emergency calls, and weapons used during the offense. They use physical evidence, such as photographs, maps or diagrams, to hold the jury's attention and to make the case seem more real.

Prosecutors said that they try to introduce "other acts" evidence because jurors are more likely to take the case seriously if this is not the defendant's first offense. However, the experience of most prosecutors was that judges were reluctant to admit "other acts" evidence. The court typically limited the use of expert testimony to medical experts, although a few prosecutors used other experts to discuss the dynamics of domestic violence.

Prosecutors described several strategies commonly used by defendants, including:

- "she started it"
- "she was out of control"
- "I was drunk and didn't know what I was doing"
- the victim has now recanted
- the evidence is weak and there is a reasonable doubt of guilt
- the victim deserved it, often because she was drunk
- the victim fell down
- the victim is simply lying
- defendant claimed the victim could always go out in public, meaning there were no visible injuries

3.1.1.3 The victim's role in prosecution. Some prosecutors said they operate on the assumption that the victim would not cooperate with the prosecution, but they felt that victim cooperation was the key to successful prosecution. Prosecutors encouraged victim cooperation by meeting with the victim early and often, by listening to the victim's story, and by avoiding victim-blaming pitfalls. Prosecutors devised several strategies to encourage "uncooperative" victims to cooperate, including getting their statement on record as early as possible, "threatening victims about the seriousness of lying in court," talking to the victim about the impact of the violence on the children, and stating a clear expectation that she would testify.

3.1.1.4 Jurors and jury selection. Prosecutors said that they used jury selection to educate jurors about domestic violence. They tried to identify jurors who are potential "teachers" for the other jurors. Some prosecutors felt that jurors often had a certain distrust of victims, and that jurors sometimes held the prosecution to a standard of proof that was unreasonably high.

3.1.1.5 Prosecutor knowledge about domestic violence. Most prosecutors had received domestic violence training in the previous two years, and many prosecutors reported that police and judges also had received training. Prosecutors said that judges generally were fairly well educated about domestic violence statutes, but some judges did not understand the dynamics of an abusive relationship. Prosecutors generally felt jurors knew that domestic violence occurs, but like the judges, lacked an understanding of the dynamics of abuse. They also felt that jurors took severe injuries much more seriously than minor injuries.

3.1.2 Victim Focus Groups

The discussions with these victim focus groups can be summarized as follows:

3.1.2.1 Dynamics of abuse. The women in both groups described abuse dynamics that are consistent with the empirical research on domestic violence. The women in the batterer program described experiences where they were clearly the victim in an abusive relationship. Their accounts of the crimes they were charged with, for which they were ordered to batterer treatment, indicated that their assaults were in response to assaults by their partners.

3.1.2.2 Criminal justice response. The participants generally viewed the criminal justice response to domestic violence negatively, and felt powerless to use the criminal justice system effectively. Many victims felt that they were not being heard knowledgeably by police, prosecutor or judges. Victim experiences with police were mixed: generally, police responded to calls promptly, but some women felt that the police response was inadequate and that the police were intimidating or condescending; other victims, however, described police as supportive and sympathetic. A few women commented on prosecution response. They said the prosecutor did not listen to them, seemed too busy to talk with them, and failed to explain the decisions that were made. The women said that many, but not all, of the judges failed to take the case seriously, failed to listen to the victim, misunderstood the dynamics of abuse, never explained the system to them, failed to provide any type of support, and facilitated the abuser's manipulation of the system by failing to note the abuser's intimidation tactics in the courtroom. Many of the group members felt bitter and said that they would never resort to using the criminal justice system again because it was another opportunity for the abuser to manipulate the system to his advantage.

3.2 Descriptive Characteristics of the Cases

A total of 40 transcripts were analyzed in the study. Twenty-one involved a homicide/murder, 19 were non-murder felonies. Table 1 presents a summary of demographic characteristics for cases in both the murder and non-murder groups. Specific demographic information about the defendant and victim was not available in some cases. Table 2 presents information on the characteristics of the offense for both groups.

3.2.1 Description of Murder Cases

The age of the murder defendant ranged from 20 to 54, with a mean of 33.7. The age range of the murdered victim was 16 to 49, with a mean of 31.5. Nineteen defendants were Caucasian, one was African-American, and one was Hispanic.[71] The length of the relationship between the defendant and victim ranged from four months to 16 years. The majority of defendants (N=17) had lived together with the victim at the time of the offense. Only 11 (52.4%) were living with the victim at the time of the offense.

Table 1: Summary of Demographic Characteristics

	Murder (N=21)		Non-Murder (N=19)	
Age range of victim	16 - 49		19 - 43	
Mean age of victim	31.5		28.4	
Age range of defendant	20 - 54		26 - 64	
Mean age of defendant	33.7		37.4	
Length of relationship, range	4 mos - 16 years		2 mos - 20 years	
Race of defendant	N	%	N	%
Caucasian	19	90%	15	79.0%
African American	1	5%	2	10.5%
Hispanic	1	5%	2	10.5%

Table 1: Summary of Demographic Characteristics, continued

	Murder (N=21)		Non-Murder (N=19)	
Defendant/Victim Relationship Characteristics	N	%	N	%
Dated, did not cohabitate	4	19%	2	10.5%
Dated, did cohabitate	9	42.9%	10	52.6%
Married	4	19%	2	10.5%
Divorced or separated	4	19%	5	26.3%
Lived together at some point	17	80.9%	17	89.5%
Living together at time of offense	11	52.4%	8	42.1%

Nineteen of the murder defendants had been charged with first degree murder, one with second degree murder, and another with involuntary manslaughter. Three offenders were charged with an additional count of first-degree murder. In two cases the defendants killed the victim's current boyfriend, in the third case the offender killed his former girlfriend's mother. This defendant was also charged with first-degree burglary. A fourth defendant was charged with two additional counts of attempted murder against police officers attempting to apprehend him. The majority of cases (N=18) were jury trials. Half the murder defendants were represented by private counsel.[72]

Three of the defendants originally charged with first-degree murder, were found guilty of a lesser-than-charged offense, one of involuntary manslaughter, two of voluntary manslaughter.

While the majority of cases involved a physical assault during the commission of the offense, only a few of the murder offenses involved any property damage or theft of property. Eighteen of the cases involved the use of a weapon; six involved a knife, eight a gun, and three a blunt object or other type of weapon.

A little less than half of the defendants and victims had a substance abuse history that emerged at trial. Nine defendants had confirmed substance use at the time of the offense. Seven

victims were reported or alleged to have been using substances at the time of the offense as well. Nine defendants had a known criminal history that was admitted at trial. Prior-acts evidence was admitted in 14 of the 21 cases.

Table 2: Summary of Offense Characteristics

	Murder (N=21)		Non-Murder (N=19)	
Substance Abuse History	N	%	N	%
Substance abuse history defendant	9	42.9%	10	52.6%
Substance abuse history victim	8	38.1%	6	31.6%
Circumstances of Offense	N	%	N	%
Property damage	5	23.8%	12	63.2%**
Theft	2	9.5%	3	15.8%
Physical assault	14	66.7%	17	89.5%
Sexual assault	0	0.0%	7	36.8%**
Weapon used	18	85.7%	7	36.8%**
Knife	7	33.3%	3	15.8%
Gun	8	38.1%	4	21.1%
Blunt object/other weapon	3	14.3%	4	21.1%
Alcohol or drug use by defendant alleged or confirmed at time of offense	8	38.1%	13	68.4%*
Alcohol or drug use by victim alleged or confirmed at time of offense	7	33.4%	10	52.6%
Nature of Injuries Sustained	N	%	N	%
Bruises/contusions	9	42.9%	14	73.7%*
Cuts/lacerations	12	57.1%	15	78.9%
Internal injuries	4	19%	0	0.0%
Skull fracture	5	23.8%	1	5.3%
Torso injuries	3	14.3%	6	31.6%
Burns	0	0.0%	2	10.5%
Broken ribs or bones	3	19.1%	6	31.6%
Loss of limb	0	0.0%	1	5.3%
Defendant Evidence Admitted	N	%	N	%
Criminal history of the defendant admitted	9	42.9%	10	52.6%
Prior acts of the defendant admitted	14	70%	16	84.2%

* = chi-square significant at .05 level
** = chi-square significant at .01 level

3.2.2 Summary of Murder Cases

Many of the characteristics of these murder cases in this study are similar to known characteristics of cases involving murder by intimate partners. Women are at much greater risk of intimate partner homicide than men,[73] and more recent studies show that the risk for women in unmarried relationships is increasing.[74] A woman's risk of being killed may increase if she leaves or threatens to leave the relationship.[75] This increased risk was apparent in the murder cases in this study. Nine of the victim were making plans to leave the relationship, had recently left, or had recently begun a new relationship, which the defendant had learned about prior to the murder.

Several authors describe homicide in intimate partner relationships, particularly in estranged-partner homicides, as the abuser's ultimate effort to reassert power and control, often in response to the victim's assertion of autonomy.[76] Intimate partner murders differ from non-intimate homicides in other ways. Intimate partner murders are typically "expressive," meaning the offender's immediate and primary motive was to hurt the other person.[77] The majority of femicide also involves "excessive violence," wherein the offender uses a level of force (multiple gunshots or stabbings, or beating to death) that demonstrates a conscious determination to kill, rather than a momentary loss of control (a single shot or stab wound).[78] Twelve of the 21 murder cases (57%) in this study involved excessive violence, including multiple gunshot or stabbings, and manual strangulation. Femicide cases are also more likely to involve multiple victims and particularly cruel actions, including sadism, than cases where a female kills her male partner.[79] Three murder cases involved multiple victims (victim's mother, two cases were new partners of the female victim), but only one murder cases involved particularly sadistic actions (the victim

was gagged and hog tied on a bed).

3.2.3 Description of Non-Murder Cases

Table 1 also presents a summary of demographic and offense characteristics of the 19 non-murder defendants. The age of the defendant in these non-murder cases ranged from 26 to 64, with a mean of 37.4. The age range of his victim was 19 to 43, with a mean of 28.4. Fifteen defendants were Caucasian, two were African-American, and two were Hispanic. A little over half the defendants had a dating relationship with the victim, with only one third of the defendants having been married to the victim at some point. The length of the relationships varied from two months to 20 years. The majority of defendants had lived with the victim at some point, but only 42% were living with the victim at the time of the offense.

The nature of the charges in the non-murder cases varied. There were attempted murder, kidnapping, physical and sexual assault, burglary, terrorism and theft charges. Most charges involved a physical assault and 16 defendants were charged with more than one offense. The majority of defendants (89.5%) were found guilty of at least one count charged, although not all offenders were found guilty on the original charge. There were five cases involving particularly sadistic actions, including a bombing, torture, confinement, and sexual assault with a beer bottle.

Half the defendants and a third of the victims in the non-murder cases had a substance abuse history that emerged at trial. Half of both the defendants and victims had confirmed or alleged substance abuse at the time of the offense. Ten defendants had a known criminal history that was admitted at trial. While few of the murder cases involved property damage, over half (63.2%) of the non-murder cases did. Eighty-four percent of the cases involved a physical assault, 40% a sexual assault. Fifty-three percent of the cases involved the use of a weapon. The

most common injuries suffered by victims were bruises and lacerations. While prior acts of the defendant were admitted in the murder trials 70% of the time, non-murder defendants had prior acts admitted 85% of the time.

3.2.4 Case Characteristic Differences Between Murder and Non-Murder Cases

A series of Chi-square and t-tests analyses were performed to test for differences in demographic and case characteristics between the murder and non-murder cases. No significant differences were found between the two types of cases on defendant or victim age, length of relationship, whether the victim and defendant had ever been married at some point or lived together at the time of the offense. There were also no differences between cases on the substance abuse history of the victim or defendant.

Regarding the circumstances of the offense and nature of the injuries, the significant differences found were: 1) more property damage in the non-murder cases, (chi-square = 6.32, p = .012); 2) more sexual assault in the non-murder cases, there was no sexual assault apparent in any of the murder cases (chi-square = 9.38, Fisher's p = .003); 3) more bruises and contusions in the non-murder cases (chi-square = 3.88, p = .049); 4) a weapon was used more frequently in murder cases (chi-square = 5.199, p = .023); and 5) more substance abuse by the defendant was reported or alleged in the non-murder cases (chi-square = 3.68, p = .055).

3.3 Evidentiary Constraints in Domestic Violence Felony Trials

Prosecutors and defense attorneys litigated evidentiary issues before and during trial. In this study, only a few pretrial motion hearings were included with the trial transcripts, and in some cases, a reference was made to a pretrial motion. Thus, the data are not sufficiently

complete to make any conclusions regarding the frequency with which pretrial motions are filed. The data did indicate some commonalities among pretrial motions. A brief summary of evidentiary issues is presented below. The Appendix includes more detailed findings of the specific types of evidence the prosecution or defense sought to limit through both pretrial motions and objections during trial.

3.3.1 Pretrial Motions

Pretrial motions were of two types: motions to suppress and motions in limine. Under Iowa law, a *motion to suppress* is filed pretrial, when the defense challenges a search or seizure or interrogation of the defendant. In this type of motion, the defendant alleges a violation of the fourth, fifth or sixth amendments to the United States Constitution, or some related state constitutional or statutory claims. A *motion in limine* refers to a motion, made pretrial or during trial, to ask for a ruling on the admissibility of other types of evidence.[80]

When pretrial motions to suppress were mentioned in the cases in this study, they generally involved fourth amendment search and seizure issues, or fifth amendment *Miranda* or voluntariness issues. One motion to suppress was filed during trial, when the prosecution discovered, the day before trial, some poetry contained in the wallet seized from the defendant.

Defense motions in limine and prosecution motions in limine were made before and during trial, on a variety of issues. Generally, defense motions in limine sought to (1) exclude evidence about the defendant's prior convictions; (2) exclude character or other-acts evidence against the defendant, such as drug dealing, history of violence, or sexual history; (3) exclude demonstrative evidence such as 911 tapes or photographs of the victim; (4) exclude confidential or privileged information such as doctor-patient communications; (5) exclude expert witness

testimony, such as a domestic violence expert; or (6) exclude incriminating statements that the defendant made to police or to others.

Prosecution motions in limine often involved the admissibility of prior convictions or "other acts" evidence against the defendant. Evidence of a defendant's prior conviction was admitted in 9 murder cases (43%) and 10 non-murder cases (53%). "Other acts" besides prior convictions were admitted in 14 murder (70%) and 16 non-murder cases (84%). In addition, prosecutors often asked for evidentiary rulings on character evidence about the victim, such as her drug history, mental health history, sexual history, or recantations. Prosecutors also asked for rulings on the admissibility of expert witness testimony, such as domestic violence experts.

On the whole, defense attorneys filed more motions in limine on a broader range of topics than the prosecution. Often, prosecution motions dealt with other-acts issues and victim character issues. Defense motions usually dealt with other acts and character evidence issues, as well as the admissibility of physical evidence; hearsay exceptions; defendant's statements; issues of privilege or confidentiality; and the use of expert testimony. Judges often seemed willing to allow both other-acts evidence that was adverse to the defendant, and character evidence that was adverse to the victim.

3.3.2 Objections at Trial

Objections by defense counsel and prosecutors covered a range of topics that might be expected in any criminal trial. As others have noted,[81] character and other-acts evidentiary objections are likely to arise in domestic violence cases. The frequency and variety of character evidence objections was noteworthy.

3.4 Prosecution Themes

Prosecution themes fell into three general categories: (1) proof of the elements - "this was a crime"; (2) proof of identity - "the defendant is responsible"; and (3) proof of credibility - "the State's evidence is credible." To some degree, every case contained all three of these themes.

In every criminal case, the State must prove the *elements* of the crime. In addition, the State must prove *identity* in every case, that is, the prosecution must prove that it was the defendant who committed the acts constituting the elements of the crime.[82] Finally, the issue of *credibility* arises in every case. The fact finder must decide which testimony and which evidence to credit in determining whether the prosecution has proven its case beyond a reasonable doubt.

Although the prosecution must prove the elements, identity and credibility in every case, the circumstances of the offense and the type of defense presented may affect which prosecution theme to emphasize.

3.4.1 Proof of the Elements: *"This was a crime."*

In some cases, the prosecutor sought not only to prove the elements of the crime, but also to persuade the jury that these actions were worthy of traditional criminal sanctions. This theme was designed to reach those jurors who adhere to centuries-old beliefs that domestic violence is a private matter; that the government should stay out of private matters; that private violence does not have an impact on the public at large; and that victims who remain in a relationship deserve whatever comes their way. There were two variations on this theme.

3.4.1.1 Domestic violence is a significant public offense. In some cases, the victim's injuries were so severe[83] that it would be difficult to view the assault as anything less

than a public offense. In cases in which the injuries were not as severe, prosecutors sought to show that other people (neighbors, children, relatives) witnessed the events, or that other people (neighbors, children, relatives, co-workers, medical personnel, police) witnessed the aftermath of the events. In other words, the violence was not just a private matter, affecting only the two parties.

For example, in a felony assault and burglary case in which the victim was a reluctant witness, the prosecutor emphasized the impact of the crime on the neighbors who witnessed the defendant dragging the victim to the car by her hair. The prosecutor in this case argued in his closing rebuttal argument:

[PROSECUTOR] I submit to you that the victim in this case is [the neighbor] and her children. They lived up on a peaceful street. She's telling you how her kids are outside playing, she's in the kitchen. And you heard her describe the panic **when her child came in, how excited she was.** *Domestic violence affects others.* A man out in front, right out in the front lawn beating on a woman. And she goes and she's observing that. She sees the slapping. She sees the kicking. And you heard the panic -- or heard her describe her panic as **she went and tried to account for each one of her children**, make sure *The neighbor worried about the safety of her children.* they didn't get caught up in this violence. We would submit that she and her children, **people of [this] County, are the victim here.** *The people are the victims.*

Some prosecutors also sought to illustrate the significance of the offense through police officer or medical testimony. An "official" person who conveys to the jury that the case is viewed by officials as a serious offense, can thereby influence the jurors' views of the case. For example, this paramedic testimony illustrates the seriousness of the victim's condition after the offender's attack.

A. I turned my attention towards the victim and **tried to determine if there was any signs of life**. I checked her artery in her neck for a pulse. I didn't get any, and I checked her pupils to determine extent of dilation, and at that time they were not dilated.

Victim was apparently in bad shape.

Q. What does that indicate to you, the fact that her pupils were not dilated?
A. That there was still enough oxygen to the brain to sustain the muscles that constrict the pupils.

Victim might still have brain function, but her condition was serious enough that there was a need to check.

Q. How did she appear to you, [the victim]?
A. I guess basically **at that time I thought she was dead**.

Paramedic thought the victim was dead.

Q. What injuries did you notice?
A. I really didn't notice any at that time. There was blood on the side of the garage so I assumed that there was injuries, but I didn't see any initially. **When we began our efforts at resuscitation, that's when the injuries became apparent.**

The extent of the injuries became more apparent over time.

3.4.1.2 The defendant's actions constitute a crime. Some prosecutors emphasized the seriousness of the offense by presenting circumstantial evidence of the seriousness of the crime. This included testimony regarding details about the events, the victim's response to the violence, or the victim's injuries. For example, a victim who testifies that she went to the emergency room for treatment of her injuries may convey to the jury that she deemed this to be a serious offense. Similarly, a doctor who testifies about the severity of the injury or the force required to inflict such an injury, helped to demonstrate that the defendant's actions were serious. In one such case, the prosecutor sought to show that the victim's injuries were serious in direct examination of the physician who attended the victim in the emergency room:

Q. Is there any correlation, do you find, between the amount of force used and the amount of bruising to soft tissue?
A. **Amount of force and/or number of repetitions; both would be factors.**

Amount of force and number of repetitions affect

seriousness of injury

Q. You indicated that [the victim] gave you a history and then showed you injuries to her head and neck area, is that right?
A. Correct.
Q. Is there any greater risk on a long-term basis to a person if they sustain soft tissue injuries to that part of their body as compared to an arm or a leg?
A. There's a much greater risk.
Q. Why is that?
A. Because of the sensitivity of the facial bones. Even a mild blow to the face, if properly placed, can result in eye damage. And any blow to the head and neck area could result in a concussion or brain injury. It's not necessarily related to the severity.

Greater risk of long-term effects from facial injuries

3.4.2 Proof of Identity: *"The Defendant is responsible for this."*

Often in domestic violence cases, there is no question that the defendant was present at the time the injuries occurred, and many times there is no dispute that the defendant is the one who inflicted the injuries. Nonetheless, the defendant often tries to deflect blame to the victim. This deflecting is consistent with the usual pattern of abusers to blame victims for "causing" their violent behavior. In the cases analyzed, some prosecutors emphasized that it was the *defendant*, not the victim, who was responsible for the injuries inflicted. There were four variations of this theme.

3.4.2.1 The defendant committed the acts. When the defendant did not admit the commission of the acts, circumstantial evidence was used to point to the defendant as the perpetrator. More often, the defendant claimed that the crime was not planned or was an accident. In response, prosecutors introduced testimony about statements or threats the defendant made before the crime, indicating his intent to commit the offense. In addition, some prosecutors proved through circumstantial evidence or by the defendant's own testimony that the defendant

deliberately or knowingly took each and every step necessary to put him in a place where he could commit the crime.

In a case where the defendant claimed that his actions were either accidental or unintended the prosecution, in its case in chief, provided considerable circumstantial evidence about the crime. Then on cross-examination of the defendant, the prosecutor took the defendant, step by step, through the entire crime. The questioning technique forced the defendant to describe, in minute detail, how he loaded his car with numerous firearms and ammunition; drove to the victim's home; parked his car 100 yards down the road; changed his clothes and shoes; climbed over a fence; walked up to the house through a field; shot the victim's boyfriend in his car; ran around the house to the back door; shot through the glass patio door; entered the home; and shot the victim to death. The clear implication in this cross-examination was that the defendant's actions were intentional, not inadvertent or accidental.

Some prosecutors also proved intent through the victim's testimony, specifically showing how the defendant isolated the victim from others or created in the victim a fear of the defendant's wrath. In the example below, the victim testified that earlier in the day, the defendant had blamed her when his fishing pole fell over and the bobber broke, and hit her in the head during the altercation. As a result of this interaction, she knew that more violence was imminent:

Q. He hit you for staring at him?	*Sequence leading up to further violence*
A. Yes. **He did not like that look on my face.**	
Q. Did he say anything else to you other than he didn't like your look?	*Defendant's wrath - making victim fearful, defendant's intent do further harm.*
A. He pointed his finger at me and told me **not to give him any reason to kick my ass.**	

To further support the argument that the defendant committed the offense, the prosecutor might portray the defendant as simply making excuses after the fact to justify his violence. In one felony assault prosecution, the defendant admitted that he may have called the victim in violation of a no-contact order, but it was accidental:

Q. So if there is a mechanical computer listing that shows that a phone call was made to a specific time and place and the operator identified you as the caller of [the victim], that's just insanity? That couldn't happen?

Prosecution has proof that the defendant dialed the victim's number

A. **Well, if there is, if I ever dialed her number, it wasn't on purpose.** There is more than -- all the numbers I know in that jail I know by heart. You know, 'cause we don't have a phone book. And I push numbers. Like I have called [friend's] house accidentally when trying to call my dad's house 'cause I called her house one time, and then as soon as I hung up the phone talking with her, I turned around and dialed her number right back, and I was trying to call my dad's house. **So if I ever did dial [the victim]'s number, it wasn't intentional.**

Defendant's excuse was that it was accidental, not intentional.

Q. What you are telling the Court now is there is a possibility you did dial that number?

A. I might have dialed it. I never talked to her, and I never meant to dial her number. If I did, it was on accident. I don't even recall ever dialing her number.

Defendant's excuse - he called the victim but he did not mean to.

In another case, the prosecution portrayed the defendant as a dangerous liar who would do anything to avoid responsibility for his actions. The prosecution focused on the changing accounts the defendant gave police as each piece of incriminating evidence was discovered, and the prosecutor called several of the defendant's friends, who all said that they specifically did not ask the defendant about the killing or they told him not to talk about it, because they did not want him to tell them.

3.4.2.2 The defendant was uncaring. The prosecution would sometimes try to

prove that, although not demented or evil, the defendant nonetheless was uncaring about the victim. This was proven through testimony about the defendant's derogatory remarks towards the victim, or his minimization of obviously serious injuries, which showed his potential for violence against the victim. The following example shows how the defendant minimized the incident when he was asked to describe it on cross-examination by the prosecutor:

Q. Sir, you're not denying that [the victim] was hurt that evening; is that correct?	
A. Well, she obviously got hurt from falling down, you know, her arm. She bumped into something with her arm.	*Defendant minimizing what occurred.*
Q. Well, sir, you were the cause of her going to the floor; is that correct?	
A. Well, we both fell to the floor.	*Further minimization - "We both fell to the floor."*
Q. This was caused because you ran up and tackled her; is that right?	
A. Yes.	
Q. And [the victim] was hurt as a result of your actions; is that right?	
A. That's correct.	
***	
Q. Now, sir, when you were on the floor with [the victim], you knew that -- you knew that she was hurt; is that right?	
A. No.	
Q. Well, you said you heard her screaming; is that right?	*Minimizing victim's injury or the possibility that she could be injured.*
A. She was yelling at me.	
Q. Well, you had tackled her and taken her to the floor, but you didn't think she was hurt?	*Tackling the victim did not cause injury.*
A. No.	

In some cases, the prosecution simply proved the depraved nature of the acts. For example, in a kidnapping and willful injury case, the defendant had tortured the victim over a 12-hour period. The prosecution introduced testimony describing the motel room where the offense occurred as covered in blood. The prosecution also had an experienced police officer who

investigated the case, describe the motel room as "the worst crime scene he had ever encountered."

In another kidnapping case, the prosecutor summarized in opening statements the systematic, on-going torture of the victim:

The on-going torture and abuse of the victim began.

And they go inside and talk and basically **at that moment began the hell that [the victim] would experience at the hands of [the defendant].** [The defendant] became incredibly angry; he became violent: he became aggressive. He was incensed over the fact that [the victim] had cheated on him and slept with other men, men he knew. And at that point in time, **he began choking her; he threw her up against a wall.** He put his hands around her neck. He was angry.

The first incident of physical abuse.

Prosecutor summarizes all the abuse the victim suffered the first day.

And during the course of that day after receiving the letter [about her sleeping with other men], **he would choke her; he would hit her with a rope and cause welts on her body; he would hit her with a belt causing more injuries on her body; he would at some point in time knock her down to the floor and then put cigarettes on her body and hold her down and take lit cigarettes and extinguish them on her body, all over her legs and her feet. And at the same time while holding her down, he would take those same lit cigarettes and put them in her vagina while they were lit and burn her skin.**

The sadistic nature of the abuse.

He would also take those lit cigarettes and put them in her mouth and put them out while they were burning inside her mouth. He would also on occasion that night take cigarettes -- **take matches and hold those lit matches against her body and burn her skin. He would burn her pubic hair with those lit matches** and on one occasion he basically said something to the effect when he had her down on the floor, **"You're never going to use your vagina again," and took hot chili powder and inserted that in her vagina causing incredible burning and pain.** And she begged him to let her go to the bathroom and rinse it off and he said, "No, you're just going to have to take it."

More examples of torture.

The defendant's torture grew more sadistic.

That night he would choke her to near unconsciousness, so that she passed out. She would try

to defend herself by putting her arms up and keeping him from hitting her, but that would do no good. He would continue to hit her and just her arms would get hit then if that was all she put up. **She tried to fight back, but she couldn't. She was smaller than him. She was also terrified.** [The victim] will tell you that night was probably the worst abuse she suffered at [the defendant's] hands, **but it wasn't the last thing or the last night.**

The victim could not fight back

The abuse continued after that first night.

The only thing that became clear that day was that [the defendant] was mad that she had cheated on him and he was going to take care of one thing, **he was going to keep her from ever being able to cheat on him again. And if that meant he had to keep her under his observation, under his control, under his thumb, that's what it was going to take.** And it also became clear that any time he thought about the fact that she had cheated on him, he got mad again and at that point in time he would abuse her again and he would hurt her in a multitude of ways.

He punished her by controlling her.

And it continued on over a several-week period, day in and day out, mind games, telling [the victim] that she had cheated on him, that she had done him wrong, that she had violated him and she deserved to be beat like she was being beat; and on top of those mind games and mind tactics, the physical abuse went on.

The abuse continued for weeks.

3.4.2.3 The defendant was in control. The prosecution attempted to show the power and control that the defendant exerted over the victim in a variety of ways. Prosecutors described the differential size and strength of the parties to demonstrate that it was the defendant who was in control and the victim who was controlled; the fact that the defendant had a gun or other weapon and showed it to the victim in order to coerce compliance; or the victim's genuine fear of the defendant. The following example illustrates how the prosecution showed the size differential between the victim and defendant.

Q. Mr. [defendant] **what's your height and weight**?
A. About five 10, 165.
Q. And you're right-handed; is that right?
A. Yes, sir.
Q. You were a **wrestler in high school**? A. Yes, sir.
Q. **Pretty good wrestler**?
A. Yes, sir.
Q. You're able to, I take it -- through wrestling, you're **able to control people** pretty well through moves, aren't you?
A. Yes, sir.
Q. What **weight** did you wrestle at?
A. One hundred fifty-five.
Q. Did you **wrestle against people about 155 pounds**; is that right?
A. Yes, sir.

Defendant's height and weight (victim's height and weight had been established earlier)

The defendant had the ability to physically "control people."

Defendant could easily restrain a person weighing less than him.

In another case, the prosecutor asked several witnesses to describe the relative size and strength of the defendant and the victim he murdered. The victim was described as "very slender" or "frail" by some witnesses. The defendant's friends minimized the size disparity, so the prosecutor took a different tact:

Q. At any time **did you feel afraid for [defendant]**?
A. No.
Q. Why not?
A. Because **he was big**.
Q. How big?
A. **Big enough**.
Q. Was he **bigger** than [the victim]?
A. Yeah.

The defense had alleged that the victim would attack the defendant.

Defendant was not at risk on injury by the victim.

In those cases in which the victim did not seek help immediately, the prosecution would show that she sought help when it was safe for her to do so, that is, when the defendant's control was reduced or when she was around people that she felt she could trust to help her. A victim held hostage for weeks described the following:

Q. At that point in time, **did you try to get out of the house to run away from him** when he was doing those things to you?
A. No.
Q. Why not?
A. 'Cuz I was afraid he would hurt me more if I tried to run for it like -- 'cuz he had the doors locked. He had both --
Q. Don't trail off at the end of your sentence there, keep talking loud.
A. Well, I was -- like **if I made a run for it, he could catch me. I mean, he could catch me before I unlocked the doors. I didn't have -- I wouldn't have enough time, I knew that.**

The victim did not attempt to escape because she feared further abuse.

The victim did not try to escape because she believed an attempt would be unsuccessful.

When the defense sought to show that the victim had several opportunities to escape but did not (implying that the offense never happened), the prosecution countered, showing that she told someone about her abduction only when she felt safe to do so.

3.4.2.4 Verbal provocation is not enough. Under Iowa law, the defendant cannot use physical force in response to only verbal provocation. In cases where the defendant was arguing self-defense, the defense was required to show that the defendant faced an immediate threat of physical harm. In these cases then, the prosecution sought to prove that the victim did not strike any blows, that she only responded to violence initiated by the defendant, or that the defendant's actions were truly unprovoked.

In a case where the defendant raised a claim of self-defense to an assault on his ex-girlfriend that resulted in her hospitalization, the prosecutor tried to show on cross-examination that the defendant's actions were neither self-defense nor an accident, but rather were the result of an intentional, vicious attack:

Q. So it's basically your position, **if you can't control her, that entitles you to do whatever it takes to get her out of the house**?

Defendant feels he had a right to "get her out of his house."

A. Out of my house, yes.
Q. If you'd had a gun, would you have shot her?
A. No. Q. Why?
A. Well, I don't know. **She ain't that big**, you know.

Prosecution attempts to show that the defendant had no reason to fear the victim.

Q. You weren't scared of her, were you?
A. Oh, yeah. **She's been known to throw ashtrays, huge ashtrays and stuff at me in my house and bust my things up in my house. She's come close to causing me some bad injuries, you know**.

Defendant claims that the victim had been violent in the past.

Q. She's come close to causing you injuries?
A. That's right.
Q. She's never injured you, has she?
A. No. I've been lucky.

Prosecution shows that the defendant was never injured; or if he was, the injuries were not serious.

Q. In all the years you've been with her, she's never injured you, has she?
A. I can't say that.
Q. Well, you just did. You said you've been lucky.
A. **She never injured me seriously that** I've had to go to the hospital or anything.
Q. Nothing that required any medical attention?
A. No.
***
Q. In terms of your testimony today, wouldn't it be in your best interests to say that [the victim] fell and hurt herself?
A. **I ain't saying she fell and hurt herself**.

Defendant admits the victim's injuries were not accidental, but claims his actions were in self-defense.

Q. What are you saying?
A. **I'm saying I was trying to get her out of my house, and I fell on her, and I hit her a few times to try to get her to let go of my hair. I I took her out the door, and I gave her a shove off my porch, and she fell over the bicycle and landed on a log out there on my yard.**

The defendant describes actions that appear in excess of his claim of self-defense.

***
Q. Did you ever kick her?
A. Not that I recall. I don't believe so.
Q. Ever kick her in the head?
A. No.
Q. Ever kick her in the chest?
A. No.
Q. Okay. No, or you don't recall?

A. No, I never kicked her in the head or the chest. **The only time I would have kicked her would be when -- like, when I had her down, she had a hold of my hair. I was trying to get her to let go. She was kicking at me. I might have kicked her to keep her from kicking at me. I know I never kicked her in no upper parts of her body.**

The defendant is continuing to claim self-defense.

Q. Never have?

A. No.

Q. She's just dreaming that?

A. Yes.

Q. Like she's dreaming up the other assaults that you had on her?

A. No, I didn't say she was dreaming them up.

Prosecution gets the defendant to admit to prior assaults against the victim.

3.4.3 Proof of Credibility: *"The State's evidence of guilt is believable."*

In domestic violence cases, it is especially important for the prosecution to show that the State's evidence is credible. More than in almost any other type of case (except perhaps acquaintance rape) domestic violence cases involve a challenge to the victim's credibility. This is especially true when the existence of an ongoing relationship seems to blur distinctions between consent and coercion.

3.4.3.1 The victim is credible. When the victim's credibility was attacked, the prosecutors responded by providing corroboration of the victim's testimony with other physical evidence and statements. For a victim who was an exotic dancer with a history of substance abuse, the prosecution presented strong testimony from the examining physician about the victim's injuries and her statements regarding the injuries. Also presented was testimony from others who heard the victim's account of the events after they happened.

In another case, the prosecutor established during cross-examination of the defendant that most of the victim's account was consistent with the defendant's own testimony. The prosecutor

used the cross-examination technique of leading questions that the defendant regularly answered, "Yes, sir," without further explanation. This served to bolster the victim's account of the events.

Q. You wanted to hurt her. That's what you just said?
A. Yes, sir.
Q. You wanted to punish her; is that right?
A. Yes, sir.
Q. For what you believed she did the night before?
A. Yes, sir.
Q. And that was your motivation for doing that?
A. Yes, sir.

Defendant admits he wanted to hurt the victim, or punish her.

Q. And you just testified to the jury that you don't recall whether you stuck your hand inside [the victim's] vagina; is that right?
A. Yes, sir.

Defendant disputes this portion of the victim's testimony.

Q. But you've also testified about a great number of details, very specific details. Do you still specifically recall hearing a button fall on the floor?
A. No. I said I felt them. When I pulled her shirt, I felt the buttons come at me from me grabbing the shirt.
Q. You felt that?
A. Yeah, one hit me right here.
Q. I believe you said that when you yanked on her pants, you heard the button from her pants fall on the floor.
A. Yes, I did.
Q. You remember that specific detail?
A. I remember it because I heard them when I yanked them.

The prosecution shows that the defendant's testimony is very similar to the victim's testimony about this portion of the assault.

Q. Sure. But you don't remember whether you stuck your hand inside her vagina?
A. No, sir, I did not.

He remembers very specific detail about this part of the assault, but does not recall the more serious part of the assault, the sexual assault.

Q. Do you agree with that one exception your statement that you're giving us here is almost virtually entirely consistent with what [the victim] has testified to?
A. I don't understand what you mean.

3.4.3.2 The Defendant is lying. Some prosecutors focused on inconsistent statements from the defendant, or produced physical evidence to rebut the defendant's claims of what occurred, or presented other evidence to show that the defendant was not a truthful person.

This prosecutor impeached the defendant's claim of intoxication and substance abuse by showing that the defendant did not disclose this history when asked at the jail:

Q. Now, it's my understanding that you believe that **you have, on this date, a serious and long-term alcohol problem**.

Defendant claims long-term alcohol and drug abuse.

A. From the last three years I've gotten one, yes.

Q. And on this date **you think you have a serious and long-term drug problem**?

A. Been involved all my life, yes.

Q. Do you remember when you were checked in, signed in over at the jail you were asked, "Have you ever taken narcotics", and you said "No"?

Defendant denied substance abuse when booked at the jail.

A. I don't recall that question, no.

Q. Do you recall being asked if you had ever had any problems with dizziness or fainting and you said no?

A. I've never been dizzy or fallen down if I wasn't on drugs or alcohol.

Q. **Do you recall being asked if you had alcoholism and you said, "No?"**

Defendant does not recall question about alcoholism

A. I don't remember that question either, no.

(Whereupon, State's Exhibit Number 11 was marked for identification.)

BY [PROSECUTOR]:

Q. Let me show you what I've just had marked State's Exhibit 11. Is that your signature down there at the bottom left?

A. Yes, and he asked -- he says, "I want to go over your history." And I said, "Well, if you are going to ask me if I've had heart attacks and stuff like that, you can mark them all." And that's what he done.

Q. **You were given an opportunity to right then say that you had a problem with drugs and alcohol.**

A. He didn't ask me that question. He says, "Have you had emphysema, stomach trouble," and stuff like that. I said, "You can mark them all: no," and he did.

Defendant had the opportunity to report

Q. Did you read it before you signed it?
A. **No, because I just assumed he was asking those questions.**
Q. Big assumption, isn't it?
A. Yes. It is just a standard practice that you do when you go to jail.

substance abuse and did not - the defendant lied about his substance abuse history.

3.5 Specific Evidence Used to Prove the Elements of the Case

Prosecutors and defense attorneys certainly must address the adequacy of proof for every element of the crime. Thus, it is of only limited use to examine the specific statutory elements of the crimes involved in the cases in this study. Rather, it is more instructive to examine themes and strategies used to prove the cases.

3.5.1 Telling the Story of Domestic Violence

In proving the elements of the crime, prosecutors generally seemed to "tell the story" of the violence. Sometimes the story included a history of abuse; other times the story involved only the incident of violence that was charged. Regardless of the scope, however, prosecutors used storytelling techniques to present the evidence.

The "story" often began with a witness who could give a graphic account of the events surrounding the crime charged. Sometimes it was the victim, sometimes it was an eyewitness, sometimes it was an investigating officer, and occasionally it was an examining physician. The witnesses who followed then filled in more details about the story. In having the witness "tell the story," prosecutors followed a pattern. They began by *setting the scene*, by establishing the physical setting: the location, the time of day, the type of weather, the lighting.

Then prosecutors elicited a *step-by-step replay of events*, rich in detail, about what

occurred. The prosecutors asked a series of questions that drew out the story of the events: what the witness saw, heard and felt, including the witness's emotional reaction to the events. In this step-by-step replay of events, many prosecutors focused on the *language used* by the witness. If the witness used a particularly graphic or descriptive word or phrase, the prosecutor reinforced the testimony by repeating the words when asking another question, or by making reference to the powerful description later in the testimony. For example, in one case, the prosecutor elicited the following testimony from the victim:

Q. During the course of the marriage, besides what we are here for today, but just during the course of the marriage, how many times was he **physically abusive**, approximately?

Prosecution establishes that the defendant had physically abuse the victim in the past.

A. **Four times**.

Q. What sorts of physical abuse did he inflict on you?

A. He would **punch** me or **kick** me. He has **grabbed me by my neck and held me down**. He's **sexually assaulted** me.

Descriptions of abuse - punched, kicked, grabbed by neck, held down, sexually assaulted

Q. All right. When he **kicked** you, where did he **kick** you?

A. He has **kicked** me in the back and he has **kicked** me in the leg.

Prosecution elicits specifics about one type of abuse.

Q. All right. And describe what happened when he **grabbed you and put your face in the pillow**?

A. He -- That was after he had kicked me. He had left the room. And I was crying and I said I hated him. And he came back in the room and **jumped on top of me and grabbed me by the back of the neck and shoved my face into a pillow**.

Prosecution asks victim to elaborate on another incident of physical abuse.

Many prosecutors focused on descriptive terms like "jerked," "slammed," "punched," "back-handed," "throbbing," "saturated with blood," "terrified," or "hysterical." They also elicited testimony to describe the weapon that was used in the assault and how it was used; whether blows were struck with an open hand or closed fist; the types of injuries that were

inflicted and the pain the victim felt. Also elicited were statements that the defendant made to the victim or others, before, during or after the crime; how the victim felt before, during and after the crime; and what the victim did to seek help after the assault.

In addition, prosecutors often "illustrated" the testimony with *physical evidence*. For example, when the witness described the weapon used, the prosecutor produced the weapon as an exhibit and asked the witness to identify it and describe or demonstrate how it was used. Prosecutors also brought the story to life by using photographs of the victim or the scene, diagrams of the scene, and tangible objects, like bloody clothing, seized at the scene or from the defendant or victim.

Many prosecutors would use these "illustrations" to tell the story a second time. First, a witness would describe the story in words, then the prosecutor would lead the witness through the story again, using physical evidence to bring the story to life or to corroborate the witness's account. Some prosecutors would ask the witness to tell the story of violence several times, using the various types of physical evidence to illustrate the story differently with each telling.

The stories also included discussion of *motives*. Usually, the prosecutor tried to show what motivated the defendant to act -- jealousy, rage, or a need to control. Sometimes the prosecutor would address the victim's motive in telling the police, or the victim's decision to report the incident regardless of any adverse reaction by the defendant.

Several of these concepts were illustrated in a closing argument in a murder case in which the prosecutor summarized the testimony and illustrated it with the physical evidence that had been admitted. The prosecution began by describing the course of the relationship between the defendant and the victim, focusing on the defendant's motive to kill the victim; then, the

prosecutor recapped the eyewitness testimony and circumstantial evidence that linked the defendant to the crime:

And then **she told the defendant about [the new boyfriend]**. [The victim's son] told you it was shortly before she was killed, within a few days or the weekend before. **She told him that there was another man in her life**. And it was at that moment -- **common sense tells us** -- it was **at that moment this man who was willing to verbally abuse her before, lost control because he knew [the victim] was out of his life now and she was with somebody else.**	*Motive: The victim found a new boyfriend and defendant was angry* *The defendant lost control over the victim*
And that's when his loss of control and his anger begin to reach a crescendo. **He began with the calls.** And [the victim's son] told you about that. Again, the **continuous calling**, the **abusiveness.** She wouldn't take the calls. **His rage builds**. **His frustration builds**. She won't deal with him.	*The defendant's behavior began to escalate from harassment to stalking.*
She won't acknowledge him until finally on the night of Wednesday, [date] he is **needing to control her to the degree that he goes to her home** and he parks back here sometime before 9:00, because that is what [an eyewitness] tells us. And he goes through the alley. And it is at that point, **he watches and stalks her and he watches**.	*Stalking*
And I submit to you it is **at that moment that he saw her with [the new boyfriend] and that is when he realized [the new boyfriend] was black**. That was the **straw that broke that camel's back**. It pushed him off the cliff because **at that very moment he decided he was going to go home, get his gun, go to his storage locker, get his ammunition and come back and kill her. And kill him if he needed to**.	*Further motive: inter-racial relationship "pushed him off the cliff."* *Defendant's intent - he made the decision to kill the victim.*

The prosecutor then goes on to describe the physical evidence and testimony presented at trial that supports the prosecution's story of the crime: the defendant was seen near the victim's residence 13 minutes before the shooting; the defendant had time to get from his storage locker (where he kept his ammunition) to his home to get his gun, to the location where the shooting

occurred; a box of ammunition was found in his home with 20 missing rounds, along with an empty gun case; the defendant was known to own the type of gun believed to have been used in the shooting; the cigarettes found at the scene are the kind of brand the defendant smokes; the victim had defensive injuries which indicates she knew her attacker; the defendant was stopped for speeding shortly after the shooting; and there was time to drive the distance he drove at the time he was stopped by police. This closing argument presented to the jury a plausible story, which explained the events surrounding the murder, as well as the defendant's motivations, and wove together the bits of evidence provided by a wide variety of witnesses during the trial. It is a "story" that the jury can believe.

Sometimes the prosecutor also tried to show the victim's motive in reporting the abuse. Highlighting the victim's motive usually was in response to or in anticipation of a defense strategy painting the victim as a liar who was out to get something (often, the claim involved gaining an advantage in a child custody or divorce action), or a vengeful person. Many prosecutors tried to establish that the victim had little to gain from the criminal justice system, or that the victim's primary motivation was simply to see justice served through the court system.

3.5.2 Corroboration of the Victim's Account

Most prosecutors sought to present some form of *corroboration* of the victim's account. This corroboration might come through physical evidence consistent with the victim's account, through the accounts by other witnesses, or through other statements that the victim made shortly after the encounter. Obviously, corroboration of the victims account in murder cases was not possible. There were, however, cases where the prosecution attempted to corroborate a murder victim's reports of threat or past history of violence by the defendant through witness testimony.

3.5.3 Physical Evidence

Physical evidence comes in many forms, from many sources. In most cases analyzed, identification technicians gathered physical evidence at the scene, including photographs or diagrams of the scene, or the area surrounding the scene. Weapons used during the attack, fingerprints, fiber or hair found at the scene that would link the defendant to the scene, and clothing worn by the victim or the defendant at the time of the assault also were offered as evidence. The quality and quantity of evidence varied widely. Generally, the more serious the offense, the greater the amount and the better the quality of the physical evidence that was gathered and analyzed.

In many cases, a medical expert provided physical evidence through the physical examination of the victim. Testimony by examining physicians also varied greatly. Some physicians documented the type, number, location, estimated age and likely cause of injuries, as well as the amount of force required to sustain such an injury. Often, medical professionals took X-rays, MRI's or CAT scans of serious injuries. Some doctors also documented any preexisting injuries, and whether they were aggravated or affected by the more recent abuse. Some health care providers took photographs (or arranged for photographs to be taken) of the victim's injuries at the time of the medical examination.

One example of testimony by an examining physician illustrates how the medical testimony can be used to "tell the story" of violence.

Q. Did you have a chance to observe [the victim]'s state of mind and demeanor?
A. Yes.
Q. What was it?
A. I would characterize it as being **upset, in pain,** but

Physician reports that the victim was distressed.

composed and appropriate.

Q. Did she seem, in the broad sense of the word, **sober and in control of her faculties** and aware of where she was?

Victim's complaints seemed authentic, she was not under the influence of any substances.

A. Yes.

Q. Why was she there to see you?

A. She indicated that she had been **physically assaulted** and wished to be evaluated for any **potential injuries**.

Victim reported that she had been assaulted.

Q. Did you see injuries on her?

A. Yes.

Q. What did you see?

A. She had **multiple areas of swelling** and **black and blue marks** about her eyes and face, neck, and some on the lower back.

The physician observed injuries.

The doctor's testimony also was "illustrated" with diagrams and photographs. The medical testimony was used to rebut claims by the defense that the victim, an exotic dancer with allegations of drug abuse, was exaggerating the injuries.

Generally, autopsies were the most thorough and best documented medical examinations. Autopsy reports detailed all relevant information about the victims and their injuries. The medical examiner provided an opinion regarding cause of death, and also gave opinions about the force necessary to cause such an injury; the presence or absence of defensive wounds; the angle of entry of a knife wound or a gunshot wound; and whether a wound was fatal or non-fatal. Some cases included physical evidence seized from the possession of the defendant that either corroborated the victim's account or matched the evidence found at the scene of the crime.

3.5.4 Statements

Another common method of corroboration involved using statements that bolstered the victim's account of the events. This would show that her account was consistent, or indicate why her account of events may have changed.

3.5.4.1 Eyewitnesses. Eyewitnesses gave graphic accounts of what they saw or heard. The "story" of the violence came to life when they provided details that matched or explained the victim's account of the assault, or expressed the concern or fear they felt in watching the events. Both the prosecution and defense focused on the motivation of the eyewitness to testify, primarily by emphasizing whether the eyewitness was a biased or unbiased observer. Also, they carefully tested the details of the eyewitness account.

Q. Describe for us what you saw.
A. Just **two people fighting, wrestling**.

Witness saw a two people fighting.

[eyewitness describes locations of cars and vehicles]
Q. All right. Now, you said **wrestling**. At any point in time, did you see **blows** struck?
A. Yes.
Q. All right. Tell us about those.
A. Well, just like when you see a **fight**. You see somebody **hitting** or just like that (indicating), or this here, or another one going like this (indicating) with the other hand, what have you.
Q. Both participants were swinging **blows?**
A. No. I only saw **one**.

Only one person was assaulting the other.

[witness describes participants]
Q. **How many blows** did you see struck?
A. Well, probably may have been **five or six**.
Q. Can you tell us anything about the **forcefulness** of those blows? How they appeared?
A. Well, they were **hitting hard**. That's all I could say.

The attack involved a series of blows that appeared forceful.

***
[witness describes positions of persons who were in the fight]
Q. How long did this go on?
A. Oh, maybe **five minutes**, four or five minutes.
Q. And I take it you could not see the **other person on the ground** during any portion of this?

Assailant was standing, victim was on the ground.

The assault went on for a period of time. The victim was on the ground, not fighting back.

***
[witness describes going over to the victim]
A. Well, after the cars left, we had finally got into--

almost, in the parking lot space, and my husband was saying that **this person was still on the ground**, and I know that when you're fighting or if you're just wrestling around, usually one goes and then the other one goes, you know, and no one is still laying on the ground, you know. But at that time, I realized this person hadn't gotten up, so we went up to **see what was wrong**.

The witness believed the victim was injured because she remained on the ground.

Q. What did you see?
A. Well, I realized it was a girl, and she **wasn't moving too much**. By then other people had started to gather. [witness describes position of the victim's body]

The witness's observation of the victim's physical condition indicated that she was badly hurt.

Q. What observations did you make of her at that point?
A. Well, she looked like she was **hurt pretty bad**.
Q. What marks did you see?
A. I could see a **cut** or something on her wrist. I noticed that there was **blood** on her hair.
Q. What was she doing at this time?
A. Just **making a funny noise**.
Q. Did anybody attempt to render aid or assistance?
A. Not right at the time.
Q. What happened?
A. Well, I don't know much about nursing, but I just **checked her pulse** here (indicating) to see if she was really okay or something, you know, maybe just knocked out. But she still had some pulse. I'm not one to know, but she just appeared to be still alive at that time.

3.5.4.2 Victim statements. Another common way to corroborate a victim's account was to use other witnesses to testify about the victim's statements about the events. Generally, these statements were admitted through the excited utterance exception or the present sense impression exception to the hearsay rule.[84] Excited utterance statements included statements the victim made to an investigating officer, a friend, or some other person that she encountered during or after the assault.

In a case where the victim was uncooperative and did not testify favorably to the prosecution at the time of trial, the prosecutor used her excited utterances to police officers as a

way to tell the story of the violence. In direct examination of the officer who responded to the emergency call, the prosecutor elicited this story:

Q. And sir, can you tell us who you met when you arrived at that location?

A. I met [the victim] who **told me that she was assaulted by her live-in boyfriend** who they have a child with, and I asked where he was, and she didn't know where he was. She said **she had ran from the house**. She tried to make a phone call to the police. **He had ripped the phone out,** and so she got assaulted by being **knocked down to the floor several times** and **slammed her head into the floor**. I could see a **cut on her left arm**. So I asked again where he was at, and she says, "Well, I left to go to the neighbor's house to call. I don't know where he's at, but **I think he's in the room in the basement that is locked."**

Victim specifically told the police her boyfriend assaulted her.

The victim admitted she ran from the house because of the assault.

The police observed physical injuries.

The victim told the police where the defendant was.

Victim statements to a treating physician or nurse were also admitted under the hearsay exception for statements made in the course of medical treatment.

3.5.4.3 Offender statements. Corroboration of the victim's account also came through the defendant's own statements to police, to other persons, or to the victim. This defendant gave the following account when arrested by police: "We had an argument. I pushed her down a couple times, but no problem." The victim had told police that the defendant had pushed her down and injured her.

Often, offenders testified in their own defense at trial and gave accounts that corroborated the victim's account in many material respects. A defendant in a trespassing case corroborated the victim's testimony that he arrived at her home, cut the telephone wires outside the house and entered the victim's home. Where their stories differed was with the defendant's claim that he entered the home with the victim's permission and that he did not physically assault her.

The following defendant actually admitted assaulting his wife, but was claiming that the assault was not serious. In questioning by his own attorney, the defendant testified:

Q. [Defendant], as you will recall, we were -- you were testifying and you were at your mother's house and -- at your house with [the victim], and you had just gone outside. Start from the point when [the victim] left the house. What happened?

A. We were still arguing and she was facing me in the driveway, and I was inside the house. And when she said that if she wanted to look at someone else's dick that she would have, if she had -- something to that effect -- she looked -- if she wanted to look at somebody's dick she would, something to that effect, and **that's when I snapped and that's when I run out to the driveway. And she kind of turned her back towards me to cover up, and I slammed her into the pickup.**

Defendant admitted being angered by victim comments.

Defendant admitted that he "snapped."

Defendant admits initiating the assault.

***

Q. Then what happened?

A. She rolled over onto her hands -- her knees and covered up like she was in the fetal position, and I jumped on the behind of her and was hitting her.

Q. Describe how you were doing it.

A. With my open hand.

[Defendant demonstrates assault]

Defendant admits hitting the victim, but only with an "open hand."

Q. When she was on the ground, did you kick her?

A. No, I didn't.

Q. She testified that you kicked her in the stomach and that you kicked her in the butt.

A. No, I didn't.

Q. How do you suppose that she got the bruise on her butt?

A. When I swung her to the ground.

Defendant denies some elements of the victim's story, claiming there is another cause for the injuries.

3.5.5 Anticipating Defenses

Part of an effective trial strategy is to anticipate likely defenses by presenting evidence that undercuts or contradicts the anticipated defense.[85] Prosecutors often learn about the defense

before trial, by formal or informal methods. Defendants' statements to police, either written or oral, recorded or unrecorded, provide the prosecutor some warning about what "story" to expect from the defense. The rules of criminal procedure require the defendant to file a written notice of certain defenses, such as insanity, diminished responsibility, intoxication, alibi, entrapment or self-defense.[86] In addition, formal procedures, like *reciprocal discovery rules*,[87] apply in some situations. Under reciprocal discovery, the defense must give the prosecution advance notice, in some circumstances, of the anticipated witnesses and evidence for the defense, so that the prosecution can prepare for trial.[88] Similarly, Iowa rules of criminal procedure give the prosecution the right to depose[89] witnesses before trial, if the defense has deposed any of the prosecution's witnesses.[90]

In addition to these formal methods of discovery, there are also informal methods for the prosecution to find out about the defense. The informal methods vary according to the various court communities and individual attorneys involved in the case. The victim, another witness, or the police officer that investigated the crime may tell the prosecutor what defense to expect based on what the defendant has said about the case. If victim advocates are involved in a case, they may provide the prosecutor with insight as to the defense likely to be raised, based on their interactions with the defendant.[91] In addition, prosecutors and defense attorneys often are well acquainted and discuss cases that they have in common, either in connection with pretrial matters such as bail, or in furtherance of plea bargain discussions, or in their regular professional interactions.[92] In small communities in Iowa, much of the information about domestic violence cases becomes "common knowledge" when local residents discuss the cases and the police or prosecutors hear those discussions.[93]

The prosecution strategy is likely to be based, at least in part, on the defense they expect to be presented. Although we did not interview the prosecutors involved in the cases in this study, the trial transcripts suggest that prosecutors generally were aware of the likely defenses, and structured their prosecution strategies in anticipation of those defenses. Thus, when discussing the defense themes and strategies, we will include examples of prosecution strategies that appeared to anticipate or respond to the defense theme or defense strategies used in the cases.

3.6 Defense Themes

Since the burden of proof lies with the prosecution in criminal trials, technically the defendant does not need to put on any evidence, other than to challenge the prosecution's evidence to establish reasonable doubt. Defendants charged with a domestic violence-related offense might raise one of a variety of defenses. Two common defense themes seen in domestic violence cases are self-defense (justification) and diminished responsibility or capacity.

In Iowa, self-defense is known as a "justification" defense. The elements of the justification defense are: (1) the defendant was not the provocateur, instigator or cause in either initiating or continuing the difficulty; (2) the defendant believed that he or she was in imminent danger of death or serious injury and that the use of force was necessary to save himself or herself; (3) the defendant had reasonable grounds for such belief; and (4) the force used was reasonable.

The defendant must actually believe there is an apparent danger of injury or death and that belief must be a reasonable belief. A defendant may act on apparent danger. It is not necessary

for the defendant to prove that a danger did in fact exist, or to prove that an assault had actually occurred. This defense may not apply in every domestic violence situation, yet the police are required to arrest only the "primary physical aggressor," who may or may not have a legitimate self-defense claim as part of the assault.

The diminished responsibility defense is based on emotional or mental disability that makes it impossible for the defendant to formulate the specific intent required for a specific intent crime. Diminished responsibility can include an intoxication defense, which is based on severe intoxication of the defendant. An insanity defense is used in rare instances and requires that the defendant prove that he did not understand the nature and quality of his acts, and that he did not know right from wrong. Although a successful diminished responsibility defense results in conviction on a lesser charge, a successful insanity defense results in an acquittal.

The primary type of defense or defense theme for each case in this study was identified during the analysis. Each case was grouped into one of four different theme categories: 1) self-defense or provocation; 2) going-for-a-lesser charge; 3) diminished responsibility; and 4) didn't do it. In most of the murder cases, the defense was not arguing that the defendant did not commit the crime, but rather that there were extenuating circumstances such that the defendant should be held less responsible for the crime (See Table 3 for a summary of defense themes).

Table 3: Defense Themes by Case Type

Defense Strategy	**Murder**		**Non-Murder**	
	N	%	N	%
Self-defense or provocation	3	14.3%	3	15.8%
Going-for-a-lesser-charge	4	19.0%	5	26.3%
Diminished capacity	8	38.1%	2	10.5%
Didn't do it	6	28.6%	9	47.4%
TOTAL	21	100%	19	100%

3.6.1 Self-defense or Provocation

As described above, *self-defense* was an attempt to show that the defendant's behaviors were the result of defending himself against attack. For example, in one of the non-murder cases the defendant argued self-defense by alleging that the victim came in to his home and started hitting him. In the course of defending himself, the victim fell and hit her head, causing the skull fracture and head lacerations.

Q. And what did you say, if anything?
A. I said I didn't know. I was asleep till now until she woke me up.
Q. Okay. And did she say anything else?
A. Yeah. **She asked me if I was screwing [another woman].** *Victim was jealous.*
Q. And what did you tell her?
A. I said I would if I could.
Q. Okay. And did she make any other comments?
A. No. **She grabbed a hold of my hair.** *Victim attacked defendant first.*
Q. Where was it that she grabbed a hold of your hair, as far as the part of your house?
A. When I was laying in the bed, she grabbed a hold of the back of my hair and started pulling my hair backwards.
Q. Was she saying anything when she did that?
A. No.
Q. What did you do when she started pulling your hair?
A. **I reached back, and I smacked her** in the side of the head and knocked her off the bed, and she hit her head on the floor or the dresser or something and hit her head. *Defendant was defending himself when victim hit her head.*
Q. Okay. **So in terms of your testimony, you are saying that this business about you attacking her and ripping her clothes off and all this is just not true?** *Defendant denies victim's account of events.*
A. No. I never took her clothes off.
Q. Did you kick her at any time when you were trying to get her out the door?
A. I don't believe so.
Q. **Do you believe you have a right to see her out your door if she attacks you in your own home in the middle of the night?** *Defendant had a right to defend himself.*

A. Yes.
Q. Did you invite her to come down to your house that night?
A. No.
Q. Did you expect her to show up after you went to bed?
A. No.
Q. **Has she attacked you in the past physically?**
A. Yes.
Q. How many times?
A. Oh, probably half a dozen times.

Victim has physically assaulted the defendant in the past.

Provocation was connected to this notion of self-defense. The defense used this theme to show that, particularly in the murder cases, the defendant lacked the intent required for the crime. The crime occurred in the heat of the moment, was not planned, or "things got out of hand." About fifteen percent of both the murder and non-murder cases argued self-defense or provocation.

Although as a legal matter, a successful self-defense/justification defense should result in an acquittal, defendants sometimes used this justification defense as an attempt to go for a lesser charge rather than an acquittal. In essence, the defendant argued that he was justified in responding with force to an attack, but that he got carried away and used too much force, or used more force than he realized he was using. He therefore asked the jury or judge to find him guilty of a lesser offense. As a technical legal matter, this scenario does not constitute self-defense, but as a practical matter, that is how the jury may view it.

Some prosecutors appeared to anticipate the self-defense or provocation claims by the defense by presenting evidence to refute the claim. For example, in several cases, the prosecution asked witnesses to describe or compare the relative size of the defendant and the victim, pointing out that the defendant was physically bigger than the victim. Or they asked

witnesses whether they had ever been concerned about the defendant's safety when they had witnessed prior violence between the defendant and the victim. In some cases, prosecutors showed, typically through medical examiner testimony, that the injuries the victim suffered were so numerous and/or severe that they had to have been intentionally and maliciously inflicted.

Q. Now, with regard to the external examination, could you briefly describe to the jury the significant findings you observed with regard to that portion of your autopsy?A. [MEDICAL EXAMINER] Yes. The -- There were a **number of significant findings** relative to the external examination. Principally there were multiple stab wounds, and in fact, **there were 26 such stab wounds**. These were found on the neck where I found one, on the thorax which includes the chest, both front, side, and rear. There were nine such stab wounds on the thorax. I found multiple stab wounds of the left upper arm. **Seven of these appeared to be wounds of entry, two appeared to be a continuation wound of exit.** I found a -- a single stab wound on the left elbow. I found five actual stab wounds on the abdomen and an additional stab wound on the back of the left upper -- upper shoulder. . . . Also generally I found evidence of what we call peripheral or appendicular or external trauma apart from the stab wounds. These consisted of a number of bruises or contusions. Many appeared to be recent in terms of their color.

There was substantial evidence to support the conclusion of the cause of death

There were many stab wounds.

Some of the wounds were created using substantial force.

Q. Were those bruises associated with any particular thing?
A. All I can say is they appeared to be consistent with the application of blunt force trauma, not cutting, non-patterned injury. They were just bruises. I also found some old bruises on the thigh and the lower legs.
*****
Q. Did you find any significant findings with regard to your internal examination?
A. Yes, I did. Internally the findings were significant insofar as -- as indicated the amount of hemorrhage associated with these multiple stab wounds. . . . She actually bled much more than that into the lungs. And interestingly, she also had a large collection of blood in the pericardium, the sack that surrounds the heart, and **closer**

examination of the pericardium shows there was in fact a perforated, not just penetrated, a perforated, that is to say through-and-through knife wound of the pericardium that went right through the heart front to back and exited on the back side.

The knife went straight through the heart, indicating substantial force.

Q. So in other words, she had a stab wound that went through the heart?
A. Right. Exactly right through the right ventricle of the heart. That's correct.
*****
Q. Now, Doctor, based on your autopsy, were you able to form an opinion as to the cause of death of [the victim]?
A. Yes, sir. My opinion is the cause of the death of [the victim] was multiple stab wounds.
Q. And what was the basis of that opinion?
A. The basis of that opinion was the results of an internal and an external autopsy conducted on the decedent.
Q. Were you able to form an opinion as to the manner of her death?
A. Yes. **In my opinion the manner, of course, in medical terms is a homicide. Which by medical terminology means a non-accidental death at the hands of someone other than the decedent.**

The cause of death was not accidental.

Q. And you discovered a total of 26 wounds; is that correct?
A. That's correct.

3.6.2 Going-for-a-Lesser-Charge

The going-for-a-lesser-charge defense typically found the defense challenging various elements of a specific charge. The defense did not deny that the defendant did something – he physically assaulted her, but did not sexually assault her; he killed her but he did not premeditate the crime – just that it was not as serious as charged. Roughly one third of both the murder and non-murder cases attempted to win the defendant a conviction on a lesser charge.

Prosecutors who appeared to anticipate a lesser charge defense emphasized the evidence that showed the specific intent. In one case, the defendant stabbed his estranged wife in a parking lot during a custody exchange across from the police station. He claimed that he simply

lost control when he saw his wife with another man. The prosecution elicited testimony from a family member of the defendant's to show that, several days earlier, the defendant said, "It's going to happen here" [meaning he planned to stab his wife in that store parking lot].

Q. Go ahead and describe what happened, then, Mr. [witness].
A. We were standing in the parking lot talking back and forth. Sometime through the conversation, [the defendant] was looking up towards the police station and he said, **"It's going to happen here,"** but he wasn't talking to anybody that I could tell. He wasn't talking to me. He was looking right at the police station. So I didn't think anything of it. [The victim] came, and they made the exchange with the baby. Words were said, but I couldn't understand because the baby was crying at the time. I started to pull away, because [the victim] had gone back to the car, and I seen [the defendant] back up. So I stopped to see what was going on. Then, finally, he just come on ahead and left, so then I left and went on.
Q. What tone of voice did he use when he said, "It's going to happen here?"
A. It was just barely audible, you know. Enough that I heard it.

Statement used to show defendant's intent.

This testimony served to undercut his claim of "loss of control" and spoke instead to his premeditation of the murder. In the case quoted in the previous section, the prosecutor asked a medical doctor to describe the great force necessary to cause the severity of injuries that the victim suffered, as well as the number of individual blows needed to generate the bruises and lacerations found. The description was an effort to show that the defendant specifically intended serious injury.

3.6.3 Diminished Responsibility

Diminished responsibility defenses can be thought of as a specific type of going-for-a-

lesser-charge defense. In diminished responsibility, the defense typically tried to show that the defendant was either not responsible or less responsible for his actions because he was incapacitated in some fashion at the time of the offense. The types of diminished responsibility defenses included incapacitated due to alcohol or drug intoxication, incapacitated due to a psychological disorder, or both. For example, in one of the murder cases, the defense argued that the defendant suffered from Post Traumatic Stress Disorder (PTSD) as a result of his military service in Vietnam. They attempted to show that the defendant was suffering from a PTSD-related flashback at the time that he shot his wife. They also argued that the onset of these flashbacks was aggravated by the defendant's alcohol use that day. Close to forty percent of the murder cases put forth a diminished responsibility defense.

In the cases in which a diminished responsibility or intoxication defense were used, a pretrial notice was filed. Often, prosecutors anticipated the diminished responsibility defense by asking various prosecution witnesses who had seen the defendant immediately after the crime to describe his demeanor and to give an opinion regarding whether he appeared to be functioning normally. Most often, the questions were posed to police officers (after establishing that the police were trained to look for signs of drug or alcohol intoxication) or family members (after establishing that they recognized when the defendant was intoxicated).

Q. In your experience as a police officer for six and a half years, and I believe you said something even about another agency before that, **have you had occasion to deal with intoxicated persons**?
Police officer has had contact with intoxicated persons.
A. Yes, I have.
Q. Have you arrested intoxicated persons?
A. Yes, I did -- have.
Q. Drunk drivers?

A. Correct.
Q. People in taverns?
A. (Witness nods.)
Q. **Are you trained in fact in making observations on intoxication?** *Police officer has been trained to identify signs of intoxication.*
A.. Yes, I am.
Q. Have you transported intoxicated people in your squad car before?
A. Numerous times, yes.
Q. And gone through the booking procedure with intoxicated persons?
A. That is correct.
Q. From your observations of [the defendant] on that night, do you have any opinion as to whether he was intoxicated at the time you arrested him? *The defendant did not appear intoxicated at the time of the offense.*
A. I don't believe he was intoxicated.
Q. Did he do anything in the squad car that would be to you an indication of an intoxicated person, the kind of thing you were trained to observe?
A. No, he did not.
Q. Did you observe any smell associated with intoxication that you can recall?
A. No, I did not.
Q. Would it be part of the process that you're trained to do when you arrest someone to make observations about their condition whether they're intoxicated or not intoxicated? *Checking an arrestee for signs of intoxication is normal police procedure.*
A. Yes.

3.6.4 "Didn't Do It"

The final defense theme, used in six of the murder and nine of the non-murder cases was an attempt to maintain the defendant's innocence by establishing sufficient reasonable doubt about whether the defendant committed the crime. Almost half of the non-murder cases employed the theme that the defendant was innocent. One defendant claiming innocence argued that the victim sustained her injuries, not from him kicking her in the ribs, but from jumping

through his car window as he was attempting to drive away from her home. Six of the murder cases attempted to prove the defendant's innocence. In these cases, the defense speculated that some "unknown person" could have perpetrated the crime.

The prosecution seemed to anticipate these defense themes, as well. Often, the "didn't do it" defenses fell into two categories: "it wasn't me," or "it didn't happen." If the defendant denied that he committed the crime, the prosecution focused on evidence of the identity of the perpetrator. In one case, for example, a victim who was partially paralyzed from the assault was brought into court in a wheelchair. On direct examination by the prosecution, she was asked to identify her attacker and she pointed to the defendant.

A. **[The defendant] came in the door, and I can't be for sure, but he said, "If that's the way you want it, bitch," or, "That's the way you want it, bitch,"** and I remember being grabbed and thrown to the floor and that's where I don't remember what happened after that.
Q. Do you remember where he grabbed you?
A. My arm, I believe.
Q. Miss [name], do you remember falling down?
A. Yes.
Q. What's the next thing you remember?
A. Waking up and calling for my son.
Q. Do you remember talking to your son?
A. Yes, I do.
Q. What do you remember about that?
A. He was coming down -- I heard him coming down the steps and he was standing there and I asked him to go to my grandmother's house and get my grandmother, who lived about a block and a half away.
Q. What's the next thing you remember?
A. I remember being told I was being lifted on a helicopter.
Q. Lifted on a helicopter?
A. To go to [hospital].
Q. He speaks with a Hispanic or Spanish accent?

Defendant came to the door, made threats towards victim.

A. Yes, he does.
Q. And you heard the person that attacked you speak?
A. Yes, I did.
Q. And that voice you heard belonged to?
A. [The defendant].
Q. And you saw the person that attacked you?
A. Yes, I did.
Q. And who was the person that attacked you?
A. [The defendant].
Q. It wasn't [name of a friend]?
A. No.
Q. Any doubt in your mind as to who attacked you?
A. No.
Q. [Victim's name], for the record I'm going to have to ask you to identify [the defendant], and I don't know if I can turn your chair around so you can look at him, so with the Court's permission could I have someone who can operate that come forward and turn her?
(An aide turned the witness's wheelchair.)
Q. Is the person who attacked you on November 14th in court?
A. Yes, he is.
Q. What's he wearing?
A. A black shirt with gold designs on it.
Q. Is that [the defendant]?
A. Yes, it is.
[PROSECUTOR]: Your Honor, the record should reflect that the witness has identified the defendant.
Thanks, [victim's name].
A. Thank you.

Victim recognized defendant's voice.

Victim saw the person who attacked her, it was the defendant.

Victim is certain who attacked her.

Victim identifies the defendant as her attacker for the record.

In another case, the prosecution presented elaborate circumstantial evidence that connected small pieces of wrapping paper and tape that were found at the bombing scene with wrapping paper and tape dispensers found in the defendant's home.

Q. In addition to examining the comparative items of paper, did you do an examination for matching a number of items?
A. Yes, I did.
Q. What other items were you -- did you compare?

Criminologist describes the nature

A. I compared -- I was given two rolls of tape, two rolls of tan colored tape [taken from defendant's house], and also a cardboard tube with attached wires [part of the bomb found at the scene].

of the comparison done.

Q. If I may approach the witness, Your Honor. Let me show you what's been marked State's Exhibit 70(l) and ask if you can identify that?
A. Yes, I can.
Q. And what is that please?
A. This is a roll of box -- what I would call box tape, tan in color, with my initials, case number and my exhibit designation on it. And how does that relate to the examination you're about to discuss?
A. There was on one of the exhibits that I was given for examination, there was a tape on that exhibit, and I was given two rolls of tape to compare to the tape that was on the exhibit to see if I could match -- physically match the end of the roll of this tape to any of the tape that was on the other exhibit that was submitted to me.
[witness displayed and discussed a series of slides of the tape pieces being examined]
Q. Agent [name], based upon your evaluation -- strike that please. Is this method of examining for interlocking pieces, does that have a generic term?
A. We just call it physical match.

Criminologist states his opinion that the evidence found in the defendant's home is linked to evidence found at the crime scene.

Q. Okay. Based upon your examination of this physical match, do you have an opinion as to whether or not the tape on State's Exhibit 46 and the tape on State's Exhibit 70(l) were ever of one piece?
A. Yes, I do.
Q. What is that opinion?
A. It was my opinion that the end of the tan piece of box tape was at one time a continuous piece from the dispenser to the piece that was on the cardboard tube.
Those were at one time one continuous piece that I had shown in the slides.

An example of a "it didn't happen" was a kidnapping case in which the defendant abducted the victim at knifepoint, drove to another town and sexually assaulted the victim in a motel. The defendant argued that he and the victim simply took a trip together, that there was no

coercion or assault. In these cases in which the defendant argued that a crime did not occur, the prosecution seemed to focus either on the victim's injuries, if they were serious; or the victim's credibility, if the injuries were less serious. For example, in a case in which the victim was held hostage and tortured over a period of time, medical experts testified about the seriousness of the injuries inflicted, and opined that they were not self-inflicted wounds. In another case, in which the defendant was charged with raping his ex-wife, the prosecution bolstered the victim's testimony by presenting several witnesses who heard the victim's account immediately after she escaped, and also presented physical evidence that corroborated the victim's account.

3.6.5 Summary of Defense Themes

What is described above are the primary defense themes for each case. There is some obvious overlap among defense themes. For example, self-defense and diminished responsibility defenses often have the intent of trying to get the defendant convicted on a less serious charge. It is difficult to speculate on why the defense might choose a different theme, but it appears that in cases with poor physical evidence or no witnesses, a "didn't do it" theme was likely. Cases where the defendant had a substance abuse or mental health history often focused on a diminished capacity, and cases in which the defense was alleging that the victim was violent involved a provocation theme.

3.7 Defense Strategies

The defense used a variety of different strategies to create or support the above-mentioned defense themes (see Table 4 for a summary). These various defense strategies are divided into

four categories:

3.7.1 The Relationship was Fine

In many of the cases the defense spent a considerable amount of time trying to establish that the relationship between victim and defendant was fine. They produced testimony by friends and family members who perceived the relationship as normal, happy, or status quo.

Q. **Did you have occasion to see [the victim] on Christmas Eve?**
A. Yes, I did.
Q. Okay. What were the circumstances of that?
A. She came with my son.
Q. She came with him?
A. Yes.
Q. What had you been doing at home when they came over?
A. Well, we was getting ready to have our family Christmas on Christmas Eve.
Q. Who else was present?
A. My other son, my daughter was home from Georgia, and my husband.
Q. Okay. And do you remember what time [the defendant] and [the victim] arrived at your house?
A. I really can't say. I really don't know. I mean it was Christmas Eve.
Q. After five o'clock in the afternoon?
A. I would say so.

Defendant's mother saw the victim and defendant together several days before the offense.

Q. **Okay. Had you invited [the victim] to come over that day?**
A. Not personally. I was just figured she was coming because [the defendant] would invite her as boyfriend, girlfriend thing.
Q. Okay. Were you expecting to see [the defendant] that night?
A. I was expecting to see [the defendant] and I more or less expected to see her. I purchased gifts because I thought she might be there.
Q. Okay. Now, the night before Christmas Eve, was [the defendant] home that night?

Victim had testified that she and the defendant had ended their relationship several months before the offense.

A. I can't recall that.
Q. Okay. Did the fact that they came over together on Christmas Eve give you any additional clues as to where [the defendant] might have been that previous week?
A. I figured that he was staying with her.
Q. **Okay. How did things go Christmas Eve? Were there any problems?**
A. While they were at my house, everything was just normal. She was lovey, dovey, kissy, kissy, girlfriend, boyfriend type thing.
Q. What happened after they left? How did they leave?
A. They were leaving to go to church. **As far as I know, they left good.**

The relationship between the defendant and the victim seemed fine.

In some cases, the defense attempted to discredit the victim's testimony by pointing out discrepancies between her testimony about the offense, and other's perceptions of the "happy relationship." The purpose of these strategies was to establish that either the offender did not commit the offense or, in going for a lesser charge, the offense was out of character given all the other positive aspects of the relationship. The defense would also show that the relationship was fine through omission. If there was no evidence that the victim had told someone about problems in the relationship or about the defendant's abusive behavior, then the conclusion to be drawn was that the relationship was fine.

Prosecutors who appeared to anticipate this defense strategy focused on the private nature of the violence. When defense counsel elicited testimony that "the relationship seemed fine," the prosecutor responded by asking the witness whether the witness lived with the couple, was with them constantly, or knew what happened between them when the witness was not present. The following is an example of a prosecutor's cross examination of a next-door neighbor called by the defense to testify that "the relationship seemed fine":

Q. You mentioned that you could see what went on next door at their house by looking out the windows. You **weren't able to see in the painted windows in the basement**, were you?
A. No.
Q. So you could never see what happened inside the basement, could you?
A. No.

Could not see through painted windows.

Q. As a matter of fact, there's **generally drapes pulled around the windows, so you weren't able to see what happened inside the first floor of the house either, were you?**
A. No.

Generally, it was not possible to see inside the house.

Q. As a result, you have no idea whether [the defendant] ever locked [the victim] in the basement of that house, do you?
A. No.
Q. You have **no personal knowledge** as to whether [the defendant] would have burned [the victim] with cigarettes on various parts of her body, do you?
A. No.
Q. You have **no personal knowledge** as to whether [the defendant] would have choked [the victim] at any point in time either, do you?
A. No.
Q. You **don't know whether [the defendant] ever beat [the victim] inside that house** either?
A. No.
Q. You would have **no knowledge** as to whether [the defendant] would have ever cut [the victim] with a knife inside of that house, do you?
A. No.

Neighbor would have no personal knowledge of what the defendant was doing to the victim inside the home.

Q. For all you know, **that type of behavior could have gone inside the house next door and you wouldn't have known it the way it's locked up and closed up, right?**
A. Right.

It is unlikely that the neighbor could have known what was going on inside the house.

In addition, some prosecutors presented testimony about possible "cracks in the wall" of happiness, such as a victim's statement to someone about the defendant's temper, or the victim's

concern about not upsetting the defendant. The defendant's intemperate statements about the victim, or the victim's decision to leave the relationship are other examples of "cracks in the wall". Expert witnesses on domestic violence also testified about how commonly they see battered women whose relationships appeared to be fine by outside observers, but were in fact violent.

3.7.2 Character Enhancement of the Abuser

A second strategy of the defense was to show the good character of the defendant. The intent of this character enhancement was to imply that the defendant was unlikely or unable to abuse because of his good character. Defendant character enhancement was done in a variety of ways to support the different defense themes.

3.7.2.1 Defendant was a "good guy." One type of character enhancement was to bring in general testimony about the defendant being a "good guy." The testimony focused on describing the defendant as "happy-go-lucky," a good friend, trustworthy, a member of the school board, a good father, etc. This "good guy" approach also focused on nice things the defendant did for the victim. One defendant sent the victim a "nice note" shortly before her death, another participated in the victim's alcohol rehabilitation treatment, and a third voluntarily checked himself into an alcohol treatment center after a prior incident of abuse against the victim.

Prosecutors anticipating this strategy generally focused on the brutal nature of the attack on the victim, or the circumstances of the offense that showed the seriousness or maliciousness of the crime. In some cases, prosecutors elicited testimony from the victim about how the defendant was sometimes nice and sometimes nasty, and how the victim could "read" his moods

and adjust her behavior accordingly. Several victims described how the defendant "had this look in his eye," and testified that they knew violence would follow.

A. And he told me that he drove by at 4:30 and my car wasn't out front.
Q. What did you say to that?
A. I told him that I probably got home right after he drove by.
Q. **Was he angry?**
A. He wasn't yelling at me. He was very calm. And he -- His eyes looked like they were just kind of -- I don't know. It could have been tired, I guess, but they just looked like he wasn't really there.
Q. What happened next?
A. He accused me of making up the whole party and that I had really been out with somebody else. And I told him that that was crazy. That -- That I went to a party and we went out dancing afterwards. And I told him -- He said, "Well, the bars close at two. Where were you?" And I said, "Well, we went out to breakfast and, you know, I came home." **And I didn't tell him about running into John because I could tell that something wasn't right. That he wasn't right.**
Q. How?
A. Just like I said, just the look in his eye.

Victim could tell something was wrong with the defendant.

Expert witnesses also testified about an abuser's facade of goodness, and about an abuser's ability to manipulate the victim by kindness mixed with violence.

3.7.2.2 Defendant loved the victim. The defense demonstrated the defendant's caring for the victim through both defendant and family and friend testimony describing the defendant as affectionate with the victim or professing his love for her.

Q. What was your life at home with [the victim], your own apartment, like?
A. Well, except for when she would be mad about something, I mean I thought it was great. I mean **I was**

Despite the victim's behavior, the

with the girl that I loved. I thought I was going to spend the rest of my life with her.

defendant loved her.

Telling others he wanted to spend the rest of his life with her, treating the victim like a queen, looking past her bad behaviors, and doing anything to "please this very difficult to please woman" were other attempts to show this "love."

Prosecutors who seemed to expect this defense strategy focused on the nature of the injuries the victim suffered. They asked medical experts to describe the amount of force necessary to cause the injuries, the amount of time it would take for the injuries to heal, and the victim's expression of pain when she was examined. Witnesses who saw the victim shortly after the crime described her physical and emotional appearance. Prosecutors used photographs of the victim, taken shortly after the crime, to emphasize the brutal nature of the injuries. In one case, the defendant's theme was that he loved the victim and never intended to harm her when he killed her. In cross-examining the defendant, the prosecutor asked a series of questions about previous abuse, interjecting several questions about whether the defendant "loved" the victim on those previous occasions when he had abused her. Then, the prosecutor asked the defendant to describe, in painstaking detail, each and every step involved in killing her, again injecting several questions about whether he "loved" the victim as he was doing those things. The following are selected excerpts from that cross examination:

Q. Let's talk about January 1994. **You loved her so much** in January of 94 that you pushed her, causing marks to her back and marks to her face, didn't you?
A. As I was trying to leave, yes. . . .

Prosecution is challenging defendant's claim that he loved the victim by highlighting his abusive behaviors.

*****

Q. And then, Mr. [defendant], **you testified that you loved**

Defendant had abused the victim in

[the victim], but you've tied her up in the past before April 19th?
A. Yes, ma'am.
Q. And the circumstances by which you had to tie her up in the past were what? What happened that day?
A. She was just going into one of her fits. . . .
*****
Q. **And how long did you leave her tied up then, because you loved her?**
DEFENSE COUNSEL: Okay. I am going to object. Now, that's badgering the witness. She can ask the questions without the sarcasm, your Honor. That's inappropriate cross examination.
THE COURT: You may answer the question if you remember the question.
A. Around 15 to 20 minutes.
Q. **And that was because you loved her, is that right?**
A. Yes, ma'am.
Q. And when did that happen in relation to the day when you loved her so much you killed her?
A. It was probably about a half a year earlier.

a similar fashion in the past.

3.7.2.3 Defendant was cooperative with police. In many of the cases the defendant offered no resistance to police after the offense. In these cases, the defense highlighted the fact that the defendant made no attempt to leave the scene, voluntarily turned himself in to police, was generally cooperative and appeared truthful with police.

Prosecutors expecting this defense strategy attempted to show that the defendant had no opportunity to flee the scene, or that other people were present and could identify the defendant. One prosecutor asked the investigating officer whether the defendant was cooperative when the officer arrived on the scene, and then asked the officer if he was in uniform and carrying a gun.

3.7.2.4 Defendant did not intend for something bad to happen. The defendant's lack of intent was usually illustrated through statements the defendant made to others

after the offense. The defendant told others he "did not mean to do it," he did not intend to kill her when he tied her up, he was intoxicated and did not know what he was doing, he snapped, was in a daze, and/or did not consider the consequences. The defendant's actions after the offense were also used as examples of lack of intent: the defendant called police, or a family member or a priest or tried to get help for the victim after the assault.

Prosecutors who seemed to respond to this defense strategy focused on the injuries the victim suffered, as well as the relative physical sizes of defendant and victim. One prosecutor asked the defendant whether he struck the victim with closed fists, and how many times he struck her. After obtaining these admissions, the prosecutor asked the defendant whether, as his fists were making contact with her head, the defendant meant to hurt her. Another prosecutor asked the defendant whether he intended to hurt the victim when he plunged the knife, up to its hilt, into her stomach.

3.7.2.5 Defendant never threatened the victim. When applicable, the defense would attempt to establish that the defendant never made any specific threats toward the victim. As was the case with demonstrating that the relationship was fine, the defense would often show a lack of threats by omission, questioning witnesses about whether they heard the defendant make any threats. In some cases the defense was also hoping to prove that the defendant had never been physically violent in the past.

Q. But then they would get in a fight and he would yell; is that right?
A. Yes.
Q. Would he, from what you saw yourself, what you actually observed, **was he ever physically violent with her?**
A. I never saw him be physically violent.

Victim's son never saw the defendant be physically violent towards the victim.

Q. He just yelled at her; is that right?
A. Yes.
Q. Were these one-sided fights where he is the only one fighting?
A. No.
Q. So **these were verbal arguments the two of them were engaged in, right?**
A. Yes.

The verbal arguments between the defendant and victim were mutual.

****

Q. And basically what you are telling us today is you feel that she was threatened because he called her names like slut and whore, bitch, et cetera, things like that; is that correct?
A. Just from the way he was talking and his behavior.
Q. **Not because he had ever threatened her; is that right?**
A. No.
Q. Because you never heard him threaten her; is that right?
A. No.

The victim's son never heard the defendant threaten the victim.

As with the "relationship was fine" defense strategy, prosecutors who responded to the lack of threats claim focused instead on the nature and circumstances of the offense, the private nature of domestic violence and outsiders' lack of knowledge about that relationship. They also focused on an occasional reference to the defendant's bad temper or "the look" that family or friends sometimes saw in the defendant's eyes.

3.7.2.6 Defendant was remorseful after offense. A great deal was made of the defendant's remorseful behavior after the offense. The defendant was distraught, crying, suicidal, concerned about the victim, somber, very sorry for what he did, or asked the police to "shoot him."

Some prosecutors anticipating this defense strategy focused on the defendant's actions after the crime, to question whether the defendant was remorseful at all, or whether he was

simply feeling sorry for himself for being in the predicament of being charged with a crime. For example, in a murder case in which the defendant said that he felt badly about killing his girlfriend, the prosecutor emphasized that the defendant made no efforts to get help when he realized the victim was dead, and in fact he and a friend had discussed the possibility of disposing of her body in a farm field.

Q. And so then [your friend] goes home, and it's shortly after that that **you discover that [the victim] is dead?** *Defendant realizes the victim is dead.*
A. Yes, ma'am.
Q. And then it's your testimony that you untie [the victim]?
A. Yes, ma'am.
Q. And how is it that you untie her?
A. I cut the ropes.
Q. And her eyes are looking at you and there's stuff coming out of her mouth?
A. Yes, ma'am.
Q. **And so do you call a medic? Do you run upstairs and use the phone?** *Defendant does not try to get help for the victim.*
A. No, ma'am.
Q. For help? No, you don't, do you?A. No, ma'am.
Q. Instead, you put her head in a plastic bag with the shirt and the sock and you go to [your friend's] house, right?
A. Yes, ma'am.
Q. **And at [your friend's], you and [your friend] put your plan together to dispose of [the victim's] body?** *Defendant considers disposing of the body.*
A. It come up in conversation, yes, ma'am.
Q. How did it come up?
A. We were -- I was sitting on his bed and we were both, you know, just freaking out over the situation that I had just told him about, that I had found her dead. And we were trying to decide what I should do.
Q. And so did you call the police?
A. No, ma'am.
Q. **Did you call an ambulance?**
A. No, ma'am.
Q. Did you ever go back to even check on [the victim's] welfare? *Defendant never tried to get help for the victim.*

A. Later.
Q. Instead, you and [your friend] decide that you're going to bury [the victim]? Or you're going to put her on their family farm in [name of town]?
A. It was brought up, yes, ma'am.

When the defendant claimed that he decided that it was a bad idea and would be unfair to the victim's family to dump her body, the prosecutor asked him whether the fact that he saw police cars at the scene helped to change his mind about disposing of her body. In some cases, the prosecutor acknowledged that the defendant expressed remorse, but asked the jury in closing argument to hold the defendant accountable for his actions because they were so egregious.

3.7.3 Evidence Presented in Trial was Faulty, Misleading, or Inconclusive

In cases where the defense strategy was to go for a lesser charge or to argue that the defendant did not commit the crime, the defense spent a considerable amount of time challenging the prosecution's evidence. This attack of the prosecution's evidence focused on four particular areas:

3.7.3.1 No witnesses. In a little over half of the cases, there were no witnesses to the offense. In these cases, the defense was careful to establish this fact. In one case, the defense called 25 witnesses (neighbors, store clerks, acquaintances) to testify that they never observed the defendant abusing the victim in any way. The defense would also try to establish that there were no witnesses to any prior abuse, threats or injuries made by the defendant toward the victim.

Prosecutors whose cases did not include eyewitnesses generally focused on circumstantial evidence. Many prosecutors discussed the concept of circumstantial evidence during their

closing arguments. In one case when the defense produced witnesses who said they never saw or heard any abuse, the prosecutor emphasized that the witnesses had no personal knowledge of what occurred in the defendant's household, or that witnesses would be unlikely to hear any arguments or physical altercations.

3.7.3.2 Poor physical evidence. Only a fourth of the cases actually had poor or no physical evidence linking the defendant to the crime. Nonetheless, the defense spent a considerable amount of time challenging the physical evidence. In some cases they tried to establish that there could be another cause or explanation for the presence of that evidence. In the bombing case mentioned previously, the defense argued that the defendant had possession of a mercury switch (similar to the one found in the bomb) in order to perform a home maintenance task.

Q. I want to ask you about another item that's come up; it's **a mercury switch**. You heard the testimony of [defendant's co-worker] the other day, correct?	*Bomb material defendant was known to have possession of.*
A. Yes, sir.	
Q. **Indicated he gave you a mercury switch?**	*Defendant admits he had possession of the switch.*
A. Yes, sir, he did.	
Q. He did?	
A. Yes, sir.	
Q. All right. Why?	
A. I had requested that if he had one, I'd appreciate it. **I had a problem with a sump pump in [town] with a rental house I had and I was going to try to make a float switch to fix this situation.**	*Defendant gives an alternative explanation for why he obtained the mercury switch.*
Q. Did you?	
A. **I replaced the sump pump with a brand new one.**	*Defendant explains why investigators could not find the switch on the sump pump.*
Q. So the testimony -- I believe it was [the investigator] -- that there was no switch on that sump pump is correct?	
A. That is correct.	
Q. **What happened to the switch?**	
A. The switch that [co-worker] gave me?	

Q. Yes?
A. I broke it apart to get the mercury out of it.
Q. Why?
A. I wanted to show my son a scientific experiment. We do things like that, like building model airplanes.

Defendant provides an alternative explanation for why the switch was not found in his home.

Prosecutors who seemed to expect this defense took two different tacks. One was to focus on the circumstantial evidence that pointed toward the defendant. The other was to do a pre-emptive strike, by bringing out the shortcomings of the evidence before the defense could do so. In one case, for example, the prosecution brought out evidence that ammunition seized from the defendant's home did not appear to match the shell casings found at the scene. The prosecution then provided a great deal of other evidence collected that did tie the defendant to the scene.

3.7.3.3 Physical injuries were not obvious. As one would expect, the physical injuries in the murder cases were all apparent. However, in the non-murder cases the nature of the offense sometimes did not involve obvious physical injuries. The defense challenge of the seriousness of injuries seemed focused on contesting the elements of a given charge. For example, in a willful injury case, the prosecution has to show that the injuries or their effects are longstanding, or will take a long time to heal. The defense countered by arguing that the injuries were not that serious or were not likely to cause a permanent disability.

Prosecutors responding to this defense strategy asked the victim to describe the pain associated with the injuries, or by asking medical personnel to describe what happens when a person suffers those types of injuries. Prosecutors also asked victims what they were thinking about and feeling at the time of the assault.

3.7.4 Police Botched the Investigation

Although a poor police investigation was evident in only a handful of cases, when there were police procedure problems, the defense was meticulous in their attack of the investigation. These attacks included accusing the police of contaminating the crime scene, failing to collect certain evidence, and challenging the chain of custody of the evidence.

When the defense tried to put the police on trial, the prosecution generally responded by presenting the evidence thoroughly and meticulously. They also asked police officers to describe their training and experience, to emphasize that the police were competent. The prosecutor also elicited testimony from the police that, like other mortals, they are not perfect and do occasionally make mistakes, which they promptly correct as soon as possible.

3.7.5 Attacking the Victim's Character

One of the most common and aggressive strategies used by defense attorneys in 71% of the murder cases and 37% of the non-murder cases involved some sort of attack on the victim. These attacks took the form of either a general character assassination of the victim, or more specifically turning behavior that the victim engaged in during the relationship or during the abuse against her.

3.7.5.1 General character assassination.[94] Character assassination involved attacking overall victim character by dredging up any negative behavior from the victim's past, such as mental health history, emotional problems, and/or substance abuse. This character disparagement of victims varied, with the defense asserting such claims as: the victim was a "strong willed person who wasn't easily pushed around," the victim had emotional problems, she could not control her temper, she had sex with other men, or she drank or used drugs.

Prosecutors expecting a character attack generally tried to litigate the issue pretrial, to severely limit the types of victim character evidence that would be admitted. In one case, the prosecutor diligently made objections throughout the trial, in an effort to force compliance with a pretrial ruling that a victim's character could not be attacked. In several cases, the prosecutor did not object strenuously to the introduction of unfavorable testimony about the victim. This may have been because the judge was ruling in favor of the defendant, and the prosecution did not want to offend the presiding judge or damage the prosecutor's credibility with the jury by having a series of objections overruled.

3.7.5.2 Turning the victim's behavior against her. Another strategy for attacking the victim's character was to turn the victim's behavior in the relationship or during the abuse against her. If she did not attempt to leave the violent relationship, or "call for help" during the offense, her credibility or motives were questioned. In one case, the defense challenged the victim's claim that she was genuinely fearful of the defendant by asking the victim why she let the defendant move in with her if she was so afraid of him.

Q. And it's my understanding that one of the reasons you tried to kill yourself is because you found out that [the defendant] was getting released from prison, is that correct?
A. Correct.
Q. And yet several months **later you allow him to move into your house**, is that correct?
A. I never gave permission. He just did it. I asked him several times to leave --
****
Q. One last question. **This man that caused you so much fear** that you tried to kill yourself about his release from prison in 1993, **why did you let him back into your house** in September of 1993? Can you tell us?
A. I didn't let him. I just wasn't strong enough to stop him.

Defense implies that victim let the defendant move in and this contradicts her claims of being afraid of defendant.

The character assassination in the non-murder cases seemed to have the intent of attacking the overall credibility of the victim's testimony through showing that the victim had emotional problems or possibly some motive for bringing false charges against the defendant. The victim was shown to have poor judgment in general or an inability to function appropriately. The overall point was -- "don't believe her."

In the murder cases, the character assassination seemed to have two different motivations. In some cases, the victim's character was brought into question in an attempt to establish that the victim may have provoked the offense. The victim was described as aggressive, could not control her temper, or was at times physically abusive. Another motivation was to establish a lesser charge conviction, that the victim's character was so low that her death should not be taken so seriously. Here, the victim was painted as mentally disturbed, liked to cause trouble, was a hard person to be friends with, was "whoring" around, spent a lot of time in the bars, or was "always drunk, skunkin' drunk."

Prosecutors anticipating this defense strategy focused on the "story of violence" from the victim's viewpoint. For example, in one case involving a victim whose character had been impugned, the prosecutor asked a series of questions about the victim's behavior during the offense, which might appear strange to many jurors. These questions specifically dealt with why the victim did not try to get away from the defendant, and why she "agreed" to have sex with the defendant during the kidnapping. The victim's explanation for most of her seemingly inexplicable actions was that she did whatever she needed to do "to survive." This became a primary theme of the prosecution.

Q. Jane [pseudonym], did you want to have sex with him?
A. No.
Q. Why did you?
A. **To survive.**

Prosecution introduces the "survival theme."

Q. What made you agree to have sex with him at that point? What were the things that you were thinking?
A. **That I wouldn't survive if I didn't.**
Q. Was there anything that he had told you that caused you to have sex with him at that point? Was there anything that you knew about him?
A. **I knew he had told me he had killed these three people in prison. And I knew that he had been violent in the past.** And when he told me how lucky I was that he didn't take me in the bathroom and drown me, I agreed with him.

Victim knew the defendant was capable of killing her, this is why she needed to survive.

Q. What, if anything, did you think about what he had told you about the teenage girl that he had raped and kidnapped in Arizona?
DEFENSE COUNSEL: Objection, leading question, Judge.
THE COURT: Sustained.
Q. Did you think about anything else?
A. I was thinking -- **I was thinking to survive**. And I was thinking that it was -- that I really was lucky that he wasn't going to take me in the bathroom and drown me.
Q. Jane, what things about his past influenced your decision to go ahead and have sex with him that night? What things about his past that he had told you influenced that decision? DEFENSE COUNSEL: Objection, asked and answered.
THE COURT: Overruled.

Another woman victimized by the defendant in a similar fashion had survived.

A. **Well, Tanya Hill [pseudonym] had survived.**
Q. And who was Tanya Hill?
A. She was the girl that he had raped and kidnapped in Arizona. She was the one he went to prison for. And she survived.
Q. What other things that he had told you about his past, Jane, affected your decision?
A. And the fact that he killed three people in prison.
Q. What else?
A. And I was trying to survive. All the things he had told me and --

Q. All the things that he had told you?
A. And I just thought that if I go along with this and I'm

nice to this man and I tell him whatever he wants to hear,

he will let me live.

Table 4: Summary of Defense Strategies Used

	Murder (N=21)		Non-murder (N=19)	
Relationship was Fine	9	42.8%	5	26.3%
Character Enhancement of Abuser				
Good guy	5	23.8%	3	15.8%
Loved the victim	9	42.9%	2	10.5%*
Cooperative with police	6	28.6%	3	15.8%
Did not intend for bad to happen	8	38.1%	6	26.3%
Never threatened victim	10	47.6%	8	42.1%
Remorseful after offense	12	57.1%	2	10.5%**
Evidence Presented at Trial was Faulty				
No witnesses	11	52.4%	12	63.2%
Poor physical evidence	2	9.5%	8	42.1%*
Physical injuries not obvious	2	9.5%	9	47.4%**
Police botched investigation	6	28.6%	7	36.8%
Attacking the Victim's Character				
General character assassination	12	57.1%	7	36.8%
Turning victim's behavior against her	5	23.8%	10	52.6%

* = chi-square significant at .05 level
** = chi-square significant at .01 level

3.8 Summary of Defense Themes and Strategies

The murder and non-murder cases did not differ significantly on the types of defense themes used in the cases. Diminished capacity and arguing the defendant's innocence were used most often in the murder trials. A "didn't do it" defense was used in almost half the non-murder cases, with going-for-a-lesser-charge being the next most common defense.

There were some significant differences between the two types of cases on the defense strategies used. In the murder cases, the defense was more likely to show that the defendant loved the victim (42.9% versus 10.5%; chi-square = 5.23, p = .022) and that he was remorseful after the offense (57.1% versus 10.5%; chi-square = 9.53, p = .002). In the non-murder cases, the defense more often attacked the lack of physical evidence linking the defendant to the crime (42.1% versus 9.5%; chi-square = 5.65, Fisher's p = .028) and argued that the physical injuries to the victim were not obvious (47.4% versus 9.5%; chi-square = 7.17, p = .007).

These significant differences are not surprising given the nature of the offenses and elements of the charges in the murder and non-murder cases. Showing that the defendant loved the victim may have been an attempt by the defense to garner some sympathy for the defendant as well as an attempt to challenge the malice aforethought requirement in the first degree murder cases. It is also not surprising that a fair number of murder defendants were remorseful after the offense. When the stark reality of the consequences of his actions sinks in, one would expect the defendant to feel some remorse. The defense's highlighting of this remorse may have been an attempt to show that the defendant did not premeditate the crime, otherwise why would he be sorry for what he did.

The attack of physical evidence and a lack or injuries in the non-murder cases also fit the nature of these cases. In murder cases, the physical evidence is typically quite good because these cases are investigated more thoroughly and the victim's body victim provides substantial physical evidence. It is also more difficult if not impossible to argue that the physical injuries to the victim were not obvious in the murder cases since the victim is dead. For victim's in the non-murder cases, the injuries are usually healed by the time of trial, there may have been poor

documentation of the injuries at the time of the offense, and the victim may have difficulty describing her injuries due to the trauma of the abuse. Arguing that the injuries were not obvious is also a challenge to the elements of some assault charges, such as willful injury in which the injuries or their effects must be longstanding take a long time to heal.

4. ANALYSIS AND DISCUSSION

4.1 Introduction

This study is the first comprehensive qualitative content analysis of the trial strategies used in domestic violence felony cases. The findings are based on a systematic analysis of trial transcripts, rather than on the most common method of trial advocacy training: anecdotal advice about how to try a case. Many of the characteristics of these trials are similar to procedures used in most criminal prosecutions. These similarities are no doubt due to the fact that Iowa courts use the same rules of evidence in all criminal prosecutions, domestic and non-domestic related. What was particularly notable in these domestic violence-related cases was the manipulation or exploitation of abuse dynamics and myths about domestic violence used as strategies by the defense.

4.2 Defense Strategies, Abuse Dynamics and Myths About Domestic Violence

Contained in these defense strategies are a manipulation of many of the abuse dynamics and myths about domestic violence. Although there is no such thing as a "typical" case of domestic violence, there are recognized common dynamics that occur in abusive relationships: 1) domestic violence often occurs in private; 2) the batterer typically isolates his victims from friends and family; 3) batterers commonly deny or minimize their abusive behavior; and 4) batterers often blame their victim for the abuse.

Some of the most common myths about domestic violence include: 1) much of domestic violence is mutual combat, in which both parties who engage in violence are equally matched; 2)

domestic violence is a problem of anger control, or results from the use of alcohol or drugs or from the abuser's mental illness; 3) violence and love are incompatible; and 4) the abuse is not that bad or the victim must like the abuse, or she would have left the relationship.

Described below are some specific examples of the defense manipulations of abuse dynamics and myths.

4.2.1 The Social Isolation Dynamic: No Corroboration of the Victim's Story

Kirkwood describes how in many abusive relationships the victim is typically extremely social deprived. The impact of this social deprivation is intense isolation. The isolation serves to cut women off from contact with others or the opportunity to develop intimate relationships. A consequence of this isolation is that the abusive partner is ensured protection from the influences of others who might help the woman see an outsider's perspective of what the abuser is doing.[95] An additional consequence is that there are likely to be few if any witnesses to the abuse, and the woman is very unlikely to have disclosed the history of abuse to others. In many cases the defense capitalized on this isolation dynamic in their claims of no witnesses to the offense, no evidence of prior abuse, claims that the relationship was fine, and no evidence that the defendant had threatened the victim.

The defense also attempted to capitalize on situations where the victim *was* having contact with family and co-workers but did not disclose any problems or abuse in the relationship. Kirkwood would explain this lack of disclosure by women as the result of the abuse as well. In her interviews with abused women, they described situations where their subjective reality was continually attacked by the abuser. This "constant irreconcilability between what women perceived and what their partners maintained eventually led to women questioning the

validity of their own subjective reality."[96] Thus, even if a woman were having social contacts, she would be unlikely to share her perceptions of the relationship with others, once again leaving no corroboration of the victim's accounts of the abusive relationship.

4.2.2 The Myth that Violence and Love are Incompatible: Showing That the Relationship Was Fine

The defense strategy showing that "the relationship was fine" uses the myth that violence and love are incompatible; that is to say, if the relationship is fine, then there must be no violence in the relationship. The "relationship is fine" strategy also capitalizes on the common dynamic of domestic abuse occurring in private, with few if any witnesses to the batterer's abusive behavior. The social isolation discussed above also serves to maintain the notion that the "relationship was fine." The combination of the abuse occurring in private and the victim being isolated from others, assures there will be no witnesses who can testify about problems in the relationship, with the further assumption being that "the relationship was fine."

4.2.3 The Batterer's Denial or Minimization of the Abuse

Batterers use a variety of tactics to avoid responsibility for their abusive behavior. These tactics range from outright denying the abuse ("it didn't happen," "she's lying") --- to minimizing the abuse ("I never punched her, I just slapped her") or its impact on the victim ("it didn't hurt that much") --- to blaming the victim ("she was nagging me"), drugs or alcohol ("I was drunk"), or other life circumstances ("I had a bad day") for the abuse.[97]

4.2.3.1 Denial and minimization in the defense themes. The four defense themes identified in this study: 1) self-defense or provocation; 2) going-for-a-lesser charge; 3) diminished capacity; and 4) didn't do it; all fall within the common denial or minimization

tactics used by batterers. Self-defense or provocation involves attributing the violence to the behavior or characteristics of the victim ("I was provoked," "I was defending myself"). The going-for-a-lesser charge defense can be seen as minimizing the impact of the abuse on the victim. In these cases, the defense was arguing that the defendant did something, it just was "not that bad." Blaming the abuse on alcohol or drugs or other life circumstances ("I have PTSD from serving in the military") were common topics in the diminished capacity defenses. In these cases, the defendant was denying personal responsibility for the abuse because of some sort of incapacitation.[98] The "didn't do it" defense involved an outright denial of the offense.

4.2.3.2 Character enhancement of the abuser. Character enhancement of the abuser can be seen as a minimization or denial of the abuser's behavior. This strategy attempts to show that the abuse either did not occur or was an aberration, because the abuser is generally a "good guy" or not violent in other aspects of his life. But again, when the abuse occurs in private and is only directed at the victim, the defendant's actions visible to those outside the relationship are at odds with his treatment of the victim in the privacy of their home.

4.2.3.3 No witnesses, weak evidence and poor police procedure. Attacking weaknesses in the prosecution's case also can be seen as a denial, minimization or justification claim by the defense. Highlighting a lack of witnesses or physical evidence tying the defendant to the crime was an attempt by the defense to argue that either the abuse did not happen or the defendant was not responsible for the abuse. While a lack of witnesses might be the result of the abuse dynamic of social isolation, jurors unaware of this isolation dynamic, and subsequent lack of witnesses to any abuse, may find a "reasonable doubt" about the prosecution's case.

Defense arguments that the physical injuries were not obvious or very serious minimizes

the abuse as well. Batterers commonly trivialize the effects of their abuse on their victims. In fact, batterers who minimize severity also tend to minimize the frequency and effects of the abuse, regardless of who they viewed as responsible for the abuse.[99]

Attacking police procedure during the investigation and collection of evidence also can be seen as an attempt at denial or minimization. One defense attorney went so far as to argue that, if the police had not engaged his client in a high speed chase after he shoplifted food at a grocery store and threatened store employees with a gun, the defendant would not have shot his wife in the head when finally stopped by police.

4.2.4 Attacking the Victim's Character

The defense manipulation of abuse dynamics was particularly apparent in the victim character assassination. The victim's weaknesses were maximized in an effort to undermine her credibility and challenge the prosecution's evidence. In murder cases, this character assassination was easier to accomplish because the victim was not available to rebut these claims.

Batterers commonly attack their victim's character as a way of maintaining their power and control.[100] Batterers use a combination of emotional and physical abuse on their victims. Battered women describe how the physical abuse committed by the partner carries the emotional message that the victim is of such low value as to be considered useless.[101] The defense sometimes used character assassination to suggest that the crime was not as serious (a lesser charge should be considered) simply because of the victim's shortcomings. Sometimes character assassination was used in connection with a self-defense -- exploiting the mutual combat myth -- but character assassination was used regardless of the defense theme. The defense seemed to

seek a "discount" by the jury, if the victim's low stature were established. This is consistent with previous research on rape prosecutions, in which charging decisions were based on the "worth" of the case, and adverse victim characteristics lowered the "value" of a rape case.[102] The general character assassination of victims during the trial is a sad parallel to the abuse the women already experienced at the hands of their abusers.

Parallels between the women's experiences during the abuse and the defense's attack of the victim's behavior at the time of the offense also are apparent. In many of the cases, the defense challenged the victim's lack of self-defense or protective action taken before or during the offense; the assumption here being, if she were really in such danger, she would have tried to escape or call for help. The abuse dynamic being manipulated and distorted in these cases is the victim's fear of her abuser. Abused women describe how the shock of the first assault, and the unpredictability and un-preventability of subsequent assaults creates an atmosphere of continual danger, anxiety and fear.[103] The reason an abused woman might not try to escape is that she was experiencing real fear not necessarily based on what the abuser *was doing at the moment*, but on what she knew he was *capable* of doing. As Kirkwood points out, "the commonly raised question of why a woman does not leave an abusive partner during periods in which she is not physically restrained defines the issues in physical terms and ignores broad dimensions of control enacted through emotional or mental means."[104] Most people fail to understand the sum total of the abuser's power brought to bear in controlling the victim. The abuser may use his powers of persuasion, his sensitivity to her vulnerabilities, his physical strength, as well as other personal resources, such as access to family income, greater economic opportunities for men, to exert control.[105]

4.3 Jury Decision Making

To understand the potential implications of this exploitation of abuse dynamics by the defense, one needs to consider these findings in light of research on how jurors make decisions about guilt or innocence in criminal trials. Researchers have developed a number of theories about decision making by individual jurors and by juries as a whole. Although many researchers do not specifically explicate the decision theory underlying the jury model, it is instructive to discuss general decision making theory before addressing particular juror decision making theories.[106]

4.3.1 Formal Decision Making Theory

Decision making is the process involved when a problem is presented, identified, and resolved. Decision making is not always a conscious process. We are not always aware of the *decision making point* at the time the decision is made. Sometimes hindsight, or reflecting back on a major decision, shows the point at which a determining decision was made.[107]

Decisions often flow from a decision-making "tree," with many branches representing the range of *alternative decisions* that are made in a given situation. Individuals cannot consider every possible alternative, because of cognitive limitations and, often, time limitations. When faced with a host of alternatives, a decision maker uses a *value system* to rank the relevant attributes of each decision alternative. Different values are ascribed to each attribute according to the decision maker's value system.[108] Thus, a decision maker's value system does appear to play a role in the decision making process.

4.3.2 The Role of Values in Individual Decision Making

Svenson suggests that the importance of values varies with the type of decision made, the decision maker's earlier experience, and the importance of the decision being made.[109] In straightforward, simplistic decisions involving a problem similar to a once resolved problem (what to have for dinner tonight, for example) the decision maker usually makes no explicit reference to his or her value system. As the complexity of the decisions to be made increases, the decision maker will begin to evaluate the attributes of a problem in light of how he or she usually values those attributes, at times creating new decision alternatives.[110] At the highest or most complex level of decision making, the decision maker faces a "new and unfamiliar decision problem in which the alternatives have to be elicited or created," in which the decision maker has to go "beyond the immediate present in terms of values and facts."[111]

Decision makers engage in all these levels of decision making, according to the type of problem presented and the decision maker's experience. In summary, the more frequent and routinized the decision, the less likely it is that the decision maker will assess the decision in light of his or her value system.[112]

4.3.3 Juror Decision Making

Formal decision making theory is instructive in understanding how decisions are made. However, it may not account for all of the variables in juror decision making, in part because of the constraints on decisions to be made by jurors (a dichotomous choice of guilty or not guilty) and in part because of the group nature of the juror decision making process.[113] Many scholars have studied the process of juror decision making, including overall models of decision making, as well as studies of potential influences on juror decisions.

Pennington and Hastie identified the various components of a jury's decision making task based on the progression of a trial. They point out that jurors come to the task without knowledge of what they will be asked to decide, or what information they are provided in making the decision. Jurors are presented with bits of information in various forms, at different times, with differing degrees of formality and varying amounts of explanation. The jurors must take all of the information they receive in the trial and, using their internal value systems to interpret and understand the information, they must make a decision about guilt or innocence.[114]

In analyzing juror decision making, then, the theory must take into account the various forms in which information is presented, as well as the means used by jurors to interpret the information and arrive at a decision. The criminal procedures of a trial constitute "external" sources of data or information presented to jurors. These procedures include: (1) the *indictment* or formal charging document read to the jury at the beginning of a trial; (2) the *defendant's plea* to the charge; (3) the *opening statement by the prosecution*, which summarizes the testimony the prosecution expects to introduce at trial; (4) the *opening statement by the defense*, which serves the same purpose of summarizing expected defense evidence or responding to the prosecution's case; (5) the *testimony by witnesses* generally comprises the largest portion of the trial; (6) the *closing argument by the prosecution*, which includes the initial closing argument and any rebuttal argument made after the defense closing argument; (7) the *closing argument by the defense*, which provides the defense arguments regarding the evidence presented and the inferences that might be drawn; (8) the *jury instructions regarding procedure* to be used during jury deliberations which instruct the jury regarding the presumption of innocence, the prosecution's burden of proof, the consideration of evidence that was admitted at trial, the assessment of

credibility of witnesses, and the application of the standard of proof; and (9) the *jury instructions regarding verdicts* which outline the possible verdicts and instruct jurors that the verdict must comport with evidence about identity, intent, and actions of the defendant.[115]

Characteristics of individual jurors provide the "internal" sources of data in criminal trials.[116] The jurors will consider the external sources of data in light of their internal thought processes when they make a decision about guilt or innocence.

4.3.4 The Story Model in Jury Decision Making

The "story model" of decision making in the trial procedure is the most well developed model of jury decision making.[117] It suggests a way in which jurors may absorb a large quantity of information and organize it in a way that allows them to reach a verdict at the close of the case. Pennington and Hastie posit that jurors construct a story, based on both the evidence presented *and* the juror's own life experience.[118] That is, jurors "fill in the blanks" of the story, consciously or unconsciously, based on their own life experiences.

In their story model, Pennington and Hastie summarize the process by which an ideal juror obtains and uses information in making a decision.[119] They describe the process by listing the various "tasks" of jurors in reaching a decision.

First, jurors must *encode the trial contents*. Jurors are asked to suspend judgment and evaluation until after all of the evidence is in and the trial judge has given the jury instructions. This is unlikely to occur in reality, because jurors cannot retain all of the information presented, they may give different weight to the various pieces of evidence, and they may find it difficult to organize the evidence in a meaningful way.[120]

Second, jurors must *establish judgment categories* based on the legal principles set out in

the court's jury instructions. The categories can be defined as identity, mental state, circumstances and actions. This complex task may be even more difficult because jurors may be influenced by their preconceived (and often erroneous) assumptions based on media portrayals of criminal trials.[121]

Third, jurors must *select only the evidence that was actually admitted at trial.* Again, jurors are instructed to consider only the admissible evidence presented at trial, rather than the fact that the charge was brought, the opening statements and closing arguments of both parties, the behavior of the attorneys or the judge at any time during the trial, and any evidence deemed to be inadmissible.[122]

Fourth, jurors must *construct a plausible sequence of events.* Jurors will simultaneously construct a sequence of events, evaluate credibility and evaluate the implications. In essence, Pennington and Hastie posit that the juror constructs a plausible sequence of events (a story), evaluates the story for believability, and tests whether the story supports a finding of guilt of the defendant.[123]

Construction of a sequence of events, according to Pennington and Hastie (1981) is essentially fitting the evidence into a story model:

> In constructing the story, the ideally thorough juror would (a) include each piece of evidence in appropriate temporal or causal sequence, coordinating appropriate observations made at the time of the trial with behavior that occurred at the time of the events reported; (b) give equal regard to evidence throughout the trial (evaluation for credibility will result in discounting some evidence, but no evidence should be discounted because of the particular time in the trial period at which it occurs); c) include alternative event representations when ambiguities are created by the nature of the event reported, by information that is left out, or by contradictory information; and (d) make use of appropriate world knowledge to construct a reasonable and causally coherent account of the events in question.[124]

Fifth, jurors must evaluate the evidence for credibility, at the same time that the juror is constructing the sequence of events and drawing inferences. This is based on two witness attributes: "credibility of the statement (how likely it is that it is true) and the probity of the statement (its implications for guilt in terms of mental state, identity, actions, or circumstances)."[125] Probity and credibility are closely related, and a juror's evaluation of credibility is closely tied to the juror's assessment of inferences.[126]

Several factor bear on a finding of credibility: (1) *opportunity* (for the witness to know about the subject of the testimony); (2) *bias*, either a personal interest in the outcome, or a general attitude; (3) *consistency* of a particular witness's testimony; (4) *character* of a witness that bears on the ability to tell the truth; (5) *plausibility*, that is, whether it is expected or unexpected in the context in which the events occurred; and (6) *inter-witness consistency*, either direct or indirect.[127] The inference of credibility, based on these factors, should lead a juror to believe or disbelieve testimony presented, and is done in conjunction with the evaluation for implications and simultaneously with the construction of a story.[128]

Sixth, the juror must evaluate the story for implications of the evidence. This task is what Wigmore referred to as evaluation of probity, that is, what impact the evidence has on the decision regarding guilt. Pennington and Hastie cite four dimensions bearing on guilt: "identity, mental state, actions, and attendant circumstances."[129]

> Evaluation for implications involves inferential processing to interpret the story events with respect to the overall plans, goals, intentions, and motivations of the principal participants. These interpretations serve as a backbone, giving the story causal and thematic coherence.[130]

Thus, the juror constructs what seems to be a plausible story, based on the juror's life experience

and the evidence introduced at trial, and then reassesses that story in a more formal fashion, taking into account the legal standards that are set out during the trial.

Seventh, the juror must make a judgment about guilt, in light of the presumption of the defendant's innocence and the prosecution's burden of proof beyond a reasonable doubt. It is, in essence, a test of hypotheses.[131]

Using this overall framework of analysis, then, Pennington and Hastie posit that jurors construct a story, based on the evidence presented and the juror's own life experience. They provide this example:

> "Billy went to Johnny's birthday party. When all the children were there, Johnny opened his presents. Later, they sang Happy Birthday and Johnny blew out the candles." Many listeners will infer spontaneously, and most will agree when asked, that there was a cake at the birthday party. Yet, no cake is mentioned in the sentences above; indeed, it is not certain that there was a cake. The cake is inferred because we share knowledge about birthday party traditions and about the physical world (the candles had to be on something)."[132]

The "story" is evaluated in two very different ways. First, the juror evaluates the story based on the juror's personal life experiences. Second, the juror evaluates that personal interpretation based on the legal standards set out by the judge in the instructions.

In the personal evaluation phase of decision making, the juror combines the evidence admitted at trial with the juror's knowledge and experience with similar events and, using the juror's ability to construct stories based on common life experiences, constructs various "stories" of what may have occurred.[133] The juror will assess whether the stories appear to be true, based

on whether the story is plausible (makes sense, based on the juror's experience and the witness's explanations) and complete.[134] The juror then tentatively accepts the version of the story that seems most complete and most plausible, and tests it based on legal standards.

The second phase of decision making involves this application of legal standards to the story that the juror has tentatively accepted as true. The governing legal standards are established by the judge's instructions, as well as on the juror's prior notions of what constitutes a crime.[135] That is, the juror interprets the judge's instructions through the lens of life experience. The juror uses the verdict categories provided in the instructions to evaluate the story that had been tentatively accepted as true. The juror examines the various verdict categories that are possible, taking into account the proof of identity, mental state, actions and circumstances, and tries to match the story that the juror tentatively accepted with the legal principles. If the story does not match, then the juror will either re-examine the story or re-examine the governing legal principles and re-evaluate. If the story that the juror has constructed is consistent with one of the verdict categories set out by the judge in the instructions, then the juror will conclude that the verdict is appropriate in the circumstances.[136]

Thus, if the juror constructs a story that is consistent with the legal requirements for the identity, mental state, actions and circumstances necessary for a guilty verdict, the juror will accept that verdict and find the defendant guilty. Similarly, if the juror constructs a story that is at odds with the elements of the crime, then the juror will conclude that the verdict category that most closely approximates the juror's view of events is the verdict of acquittal.[137]

Various stories might be constructed by the juror, and the particular story accepted may depend on three "certainty principles": (1) "*coverage,*" or the "extent to which the story accounts

for evidence at trial"; (2) "*coherence*," or the "consistency, plausibility and completeness" of the story; and (3) "*uniqueness*," or the juror's conclusion that only one story is coherent.[138]

After the juror has constructed a story and comprehended the verdict categories, the juror must make a decision. Pennington and Hastie suggest that this is done by "either (A) construct[ing] a single 'best' story, rejecting other directions as they go along or (B) construct[ing] multiple stories and pick[ing] the best," or, if neither applies, then picking a default verdict.[139]

4.3.5 Testing the Story Model

Pennington and Hastie tested their story model and found support for it.[140] They interviewed 26 adult subjects who were sampled from a pool of volunteers called for jury service in Massachusetts. The subjects were shown a videotaped enactment of a simulated trial based on the following account of events:

> [The defendant, Frank Johnson], and the victim, Alan Caldwell, had a quarrel early on the day of Caldwell's death. At that time, Caldwell threatened Johnson with a razor. Later in the evening, they were again at the same bar. They went outside together, got in a fight, and Johnson knifed Caldwell, resulting in Caldwell's death. The events under dispute include whether or not Caldwell pulled a razor in the evening fight, whether Johnson actively stabbed Caldwell or merely held his knife out to protect himself, how they got outside together, whether or not Johnson intentionally went home and got his knife, whether Johnson went back to the bar to find Caldwell or went to the bar because it was his habit, etc.[141]

The subjects were told that an actual jury had decided the case, and they were asked to "be one of the jurors" and reach a decision on the verdict. The jurors could choose from four verdicts: not guilty, guilty of manslaughter, guilty of second-degree murder or guilty of first-degree murder. The jurors were then interviewed at length about their decision making processes. They were

asked to articulate events and relationships based on the evidence presented, and their responses were coded to show whether the jurors' responses resulted from evidence presented or from inferences from the evidence. Then their responses were graphed to show how the evidence was analyzed and linked.[142]

They found that jurors' accounts of events were more in the form of a story ("Johnson was angry and so he decided to kill him") rather than in the form of an argument ("Johnson was a violent man. That makes me think he intended to kill him.") Moreover, about 55% of the references to important facts were to events included in the testimony, while fully 45% of the references were to inferred events -- "actions, mental states, and goals that 'filled in' the stories in episode configuration."[143]

In addition, jurors who reached the same verdict generally agreed on the underlying story. In fact, agreement reached 80% for some verdicts. Jurors who reached the same verdict adopted similar stories, and jurors who reached different verdicts relied on different stories. There was no indication that jurors who reached different verdicts forgot important legal principles that would affect their verdicts; instead, it appeared that they relied on different stories.[144]

In another set of studies, jurors were given written summaries of the same cases presented in the first study and then subjects were given a memory recognition test, to see what information they recalled from the case. The materials were developed from the content analysis of the first study, and included some sentences that were unique to each verdict story in the first study (e.g., the sentence "Johnson stabbed Caldwell" was present in the first-degree murder story but not in the not-guilty verdict story). The memory recognition test included some sentences that were not part of the evidence presented but were inferences made as part of the verdict stories in the first

study.[145]

The subjects were more likely to recognize evidence consistent with their verdict -- whether it was a true statement of the evidence presented, or a false lure based on inferences consistent with the story. Pennington and Hastie concluded that the subjects not only constructed stories in their decision making process, but that they did so spontaneously rather than as a result of the interview process.[146]

In another set of experiments, Pennington and Hastie varied presentation order and witness order so that it would be easier to construct a story that favored either the defense or the prosecution. In the "story order" presentation, jurors heard the evidence "in a temporal and causal sequence that matched the occurrence of the original events," whereas the "witness order" presentation was based on "the sequence of evidence as conveyed by witnesses in the original trial."[147] Mock jurors heard a tape recording of a 100-item version of the case (50 prosecution statements and 50 defense statements) and a judge's charge to find guilty or not guilty verdict.[148]

These studies also supported the story model theory. The mock jurors found the defendant guilty in 78% of the cases when they heard the prosecution evidence in story order and the defense evidence in witness order. Only 31% found the defendant guilty when the prosecution evidence was presented in witness order and the defense evidence was presented in story order.[149] Pennington and Hastie conclude that "the *uniqueness* of the best-fitting story is one important basis for confidence in the [jury] decision."[150] Moreover, jurors who heard both the prosecution and the defense case in story order were more confident of their verdicts, no matter what those verdicts were. Pennington and Hastie concluded that "completeness, coherence, and uniqueness of the best-fitting story would predict confidence in the correctness of

the verdict."[151]

Finally, another set of studies indicated that an algebraic equation that weighted evidence consistent with the story model was a significantly better predictor than a Bayesian model or an algebraic anchor-and-adjust model for decision making. Although the anchor-and-adjust algebraic model predicted item-by-item judgments, global judgments were better predicted by the story model.[152]

4.4 Juror Decision Making and the Dynamics of Abuse

The general principles of decision making theory and the more specific principles of the story model of juror decision making have important implications for domestic violence-related prosecutions. These theories suggest that jurors' decisions in domestic violence cases depends on jurors' preconceived notions about domestic violence. Their knowledge about domestic violence affects their assessment of the decision alternatives. Thus, if jurors accept the commonly held myths about domestic violence, they may "fill in the blanks" with an unrealistic view of the violent relationship, and their evaluation of the evidence (the decision alternatives) may be skewed.

Consider again the example of the birthday party. Suppose the jury is told the "birthday party story":

> "Billy went to Johnny's birthday party. When all the children were there, Johnny opened his presents. Later, they sang Happy Birthday and Johnny blew out the candles."

Given this story, most jurors will infer that there was a cake at the birthday party. But very different conclusions might be drawn if jurors were told that Billy and Johnny practiced animal abuse, including a birthday ritual in which animals in cages were surrounded by burning

candles, then lit afire as the "Happy Birthday" song was sung.

What would appear to be a description of an ordinary event may take on very different meaning if jurors were given the context of the events. The same may be true for violent domestic relationships, with outward manifestations of normality that take on very different meaning when the private violence is described.

We would argue that jurors need information about the context of the abusive relationship. This is because domestic violence is not a commonly understood phenomenon that calls for routine decision making. Rather, it may be necessary to explain how violent relationships differ from non-violent relationships, how cycles of violence affect interactions, and how victims put in a powerless position may respond differently from persons in a more egalitarian relationship. Given that many of the attributes of a violent relationship are unlike those of a non-violent relationship, jurors may be asked to assess evidence that they genuinely believe that they understand, but that they actually do not.

For example, evidence about "other or prior acts" helps put the violence in perspective. Jurors who know that an abuser was previously convicted of domestic abuse assault may be less willing to dismiss the current charge as an aberration, or they may be better able to understand why a victim acted in the way that she did. Sometimes victims act in what appears to be an irrational way, but when they describe their thought processes, it becomes clear that the victim was interested in survival. For example, a victim who is held hostage may not ask for help at the first opportunity because she is uncertain that she will be believed or that she can escape successfully. Instead she may choose to wait for another opportunity to escape when she feels that it is safer for her to leave. An understanding of the previous acts of violence in the

relationship may put that victim's actions in context. The jury may conclude that, rather than evidencing a lack of fear of the abuser, the victim's actions evidenced a legitimate fear of him.

Similarly, evidence about a victim's character may be misleading in the context of a violent relationship. For example, a victim uses illicit drugs because the abuser has coerced her to use them, with an implied threat of violence if she does not comply. Then at trial, the abuser presents evidence that the victim was a drug user who lied about the abuse in order to gain some benefit, and therefore is not a credible witness.

4.5 Prosecution Strategies, Telling the Story, and the Dynamics of Abuse

What is commonplace experience for domestic violence victims may not be commonplace for jurors who hear the evidence. Therefore, it is up to the prosecution to assist the juror's understanding of these dynamics through "telling the story" of domestic violence.

Criminal prosecutions focus on a specific incident, rather than on an ongoing relationship between the offender and victim. This means the use of "relationship" or "context" evidence generally is viewed with skepticism in a criminal prosecution. Motive is not an element of the crime that must be proven, although it may be relevant to the case. Often the story told is a limited story about an isolated incident. In cases where the offender is a stranger, this is an accurate story, because the crime is an isolated incident. In domestic violence cases, however, the incident by itself is not an adequate unit of information. Context information about the relationship or prior abuse completes the story and can dispel some myths about domestic violence.

Given the likelihood that jurors may misunderstand a violent relationship, evidence about

other acts helps put the violence in context. However, courts are reluctant to allow "other acts" evidence. This judicial reluctance, combined with an often-hostile attitude toward domestic violence cases means that prosecutors face an uphill battle in having other acts evidence admitted, according to the prosecutors in the focus groups. Prior acts or relationships often are viewed as irrelevant to the incident charged, and are admitted only in limited circumstances.[153] In contrast to most criminal cases, context is critically important in domestic violence cases. A victim's decisions and actions are strongly influenced by the ongoing violent relationship. Even when the abuser makes no explicit threat, the victim often is fearful nonetheless, based on prior experiences with the abuser. "Other acts" evidence also has the potential to be legally detrimental to a domestic violence victim when it is used against her. Some victims fight back, some are charged with criminal offenses themselves, and the "mutual combat" defense is a very real possibility. In addition, "other acts" evidence may be relevant in the context of character evidence which can be used to the benefit of either the prosecution or the defense.

Despite the perceived reluctance of courts to admit "other acts" evidence, many judges in the cases analyzed allowed evidence of the prior abuse. Sometimes the prior abuse was admitted through proof of prior convictions, but often the abuse was shown by direct or indirect reference to a pattern of abuse. Direct references included descriptions of specific prior incidents (generally admitted as "other acts" evidence under Rule 404(b)). Indirect references to prior abuse were made by the description of the abuse "this time" or by referring to the victim's previous bruises or other injuries.

"Telling the story" by explaining the context of the violence during the prosecution can serve to educate jurors about abuse dynamics and dispel the common myths about domestic

violence that jurors may hold. It can make the prosecution's "story" more plausible than the defense "story" of events.

4.6 Other Methods of Education Used by Prosecutors

Prosecutors in the focus groups reported that they attempted to educate the jury about domestic violence during the jury selection process. Very few jury selection procedures were transcribed in the cases in this study, so it is not possible to test that assertion. However, most reported jury selection proceedings demonstrated only limited "education" components by the prosecution, and somewhat more "education" components on the part of defense counsel. Prosecutors attempted to challenge myths and preconceived notions about domestic violence, whereas defense attorneys reinforced myths through their questioning of jurors. The nature of the jury selection process (questioning of jurors) provides only limited opportunities to change attitudes, beliefs or values. In fact, jury selection is better suited to the identification and reinforcement of existing attitudes, beliefs or values. Moreover, any education during the jury selection process is limited by time constraints and often by judicial constraints.

4.7 The Role of Expert Witnesses in Educating Jurors

The use of expert testimony would be the most direct method for "educating" jurors about the dynamics of domestic abuse.[154] In order to admit expert testimony on domestic violence, the prosecution must first show the qualifications of the expert. Then the information on which the expert's opinion is based must be established. The prosecution also would need to show that: (1) the subject is beyond the understanding of the average lay person because it is distinctly related

to some science, profession, business or occupation[155] and (2) the expert witness has such skill, knowledge or experience in that field that their opinion probably will assist the jury.[156]

Decisions about the admissibility of expert opinion evidence lie within the discretion of the trial court.[157] In 1997, the Iowa Supreme Court for the first time approved the use of expert testimony on battered woman syndrome. In *State v. Griffin* the victim was the common law wife of the defendant. On the night of the assault/kidnapping, she and the defendant had gone to a motel room and smoked crack cocaine. The defendant ordered the victim to remove her clothing, so that she would not run away. He held her in the motel room overnight and repeatedly raped and physically assaulted her. She made several attempts to have her sister come to the motel room to help her escape, but the defendant prevented it. After the event, the victim was taken to the hospital, where she gave a statement about the kidnapping and assault. She later recanted that statement, but testified for the prosecution at trial, consistent with the statement she gave at the hospital.

The prosecution called an expert witness to explain battered women's syndrome, and the effect that it may have on a victim's reluctance to testify against her abuser, which was relevant to explain the victim's recantation. The *Griffin* court found that the expert testimony on battered women's syndrome was appropriate because: (1) the testimony was relevant to explain why a domestic abuse victim might recant; and (2) the expert gave no opinion on the victim's credibility. The *Griffin* court found that the testimony helped to explain a matter that might not be within the realm of understanding of jurors. Iowa has a tradition for "liberal" admission of opinion testimony "if it will aid the jury in screening the properly admitted evidence to ascertain the truth."[158]

The presentation of expert testimony about the dynamics of domestic violence occurred in only two cases analyzed in the study. The expert testified about domestic violence dynamics generally, and did not provide an opinion regarding the particular victim in either case This type of evidence is important because the experience of domestic violence may be beyond the experience of the typical jurors who hear the evidence. Thus, jurors may mistakenly consider some evidence to involve a routine decision, when in fact, their lack of knowledge about this type of relationship means that the evidence requires a more in-depth analysis of an unfamiliar decision problem. The expert testimony of domestic violence advocates helps the jury to understand the context of the victim's actions. Because only two cases involved the use of a domestic violence expert, it is difficult to draw any solid conclusions about the benefits of expert testimony. In one of the cases, the defendant was convicted as charged (with a class A felony, a serious crime); in the other case, the defendant was convicted of a misdemeanor assault rather than a low-level felony offense.

5. CONCLUSIONS AND IMPLICATIONS OF FINDINGS

This section addresses the implications of the findings, limitations of the research, and implications for future research.

5.1 Implications for Criminal Justice and Domestic Violence Fields

The study identified categories of trial strategies and themes used by prosecutors and defense attorneys who try domestic violence felonies. The findings of this in-depth, qualitative analysis of 40 domestic violence related felony trials have important implications for the criminal justice and domestic violence fields.

5.1.1 Use of Expert Testimony

As described above, we would suggest that the use of expert witnesses in domestic violence related trials should be seriously considered. We are suggesting a use of expert testimony similar to the use of Rape Trauma Syndrome (RTS) by the prosecution in rape trials. RTS is typically used to support the victim's claim of rape by showing that her behaviors and reactions are consistent with her claim.[159] In the cases in this study, defense counsel routinely attempted to exploit the jurors' misunderstanding of domestic violence by presenting defenses that took advantage of, or even promoted, typical myths and misperceptions of violent relationships. Although prosecutors in the focus groups said that they attempted to educate the jurors during the jury selection process, the educational potential is very limited in that setting. To undo centuries of societal acceptance of domestic violence in a short period of questioning of prospective jurors is asking the impossible.

Based on the theory behind the "story model" of juror decision making, expert testimony

about domestic violence challenges jurors to rethink their decision making processes. Jurors may realize that, if their experience and orientation is based on non-violent relationships, they may not be able to apply their own knowledge of the world to the "story" of a violent relationship. Instead of basing their decisions on "domestic violence stories" that are steeped in myth and misperception, they usually will reformulate their own view of the world and better understand and accept the "story" of violence that is presented by the prosecution.

Iowa courts have adopted liberal standards for the admission of expert testimony, and have approved the use of expert testimony by a domestic violence victim advocate. However, the same result may not occur in other jurisdictions with a stricter standard for admissibility. Jurisdictions applying either a *Frye* standard[160] or a *Daubert* standard[161] may require a much stronger scientific basis for the expert's qualifications or basis of knowledge. Many battered women's advocates cannot satisfy this exacting criteria, because their expertise is based on experience rather than on scientific study.

The use of expert testimony to explain a crime victim's actions actually constitutes a "second wave" of expert testimony about domestic violence. The "first wave" of expert testimony came in the form of experts who testified about the effects of "battered woman syndrome" on women accused of killing their abusers.[162]

Reliance on expert testimony about battered woman syndrome was criticized for several reasons. First, the testimony was seen to encourage "sex stereotypes of female incapacity" by focusing on "the passive, victimized aspects of battered women's experiences."[163] Courts that relied on women's "handicaps" to excuse their behavior were "shaped by patriarchal solicitude."[164] Moreover, the "typical" battered woman syndrome fails to account for the

experiences of African-American women who are battered.[165]

Even more fundamental, traditional self-defense law requires that the defendant's lethal blow occurs only when the defendant is faced with an "imminent" or "immediate" threat of death or serious injury. This narrow view of self-defense, with the implicit assumption that defendant and victim are equally matched, fails to account for the experience of women in a violent relationship. The typical physical stature of men and women suggests that women and men are not evenly matched. Some research suggests that "physical power is an important factor in violent disputes."[166] Weapons help to balance the power, and women tend to use weapons when they inflict injury on an intimate.[167] But many battered women lack easy access to weapons, so they do not have the opportunity to equalize power with their abusive intimate without advance planning or preparation.

Most courts, in adopting the battered woman syndrome defense, essentially carved out an exception to traditional self-defense law. This was because women's "handicaps" made them different from men. The result was to reinforce traditional stereotypes of female criminals as "crazy or helpless or both."[168] The focus was not on justification of the battered woman's actions, but on an "excuse" for her actions, not on the "complex experiences of battered women," but on the woman's defects or incapacity.[169] In short, the "battered woman syndrome" defense was criticized because it was not a good "fit" in self-defense law, and was based in part on stereotypical views of women.

The second wave of expert testimony is not fraught with the same problems. The second wave of expert testimony is designed to provide general information about the violent relationship, not to provide any psychological assessment of a particular battered woman. The

focus is not solely on the battered woman, but rather on the dynamics of the relationship. Rather than addressing only the negative effects of the abuse on the victim, the expert focuses on the abuser's purposeful actions and their logical consequences.[170] One advocate who has provided expert testimony in a number of cases reported that abusers are strongly opposed to the use of expert testimony. This is because "they know that I understand what they are doing to control the woman in the relationship, and they do not want me to name their behavior in front of the judge or the jury."[171] As contemplated by the Iowa Supreme Court in *Griffin*, the expert testimony is designed to provide background or context to the violent relationship, not simply to assess the victim's state of mind. This limited use of expert testimony may reduce, though not necessarily eliminate, the risk of victim blaming.[172]

In addition, expert testimony contemplated by the court in *Griffin* does not include testimony by a domestic violence advocate who has a client relationship with the battered woman. Rather, the expert is unrelated to the case and obtains all information about the case from the prosecutor, not the victim. This reduces the likelihood that a battered woman's confidential relationship with an advocate would be compromised.

The use of expert testimony, however, is not without danger. Courts allowed testimony about battered woman syndrome, but justified the admission based on negative stereotypes about women.[173] Therefore, it is possible that expert testimony on the dynamics of abuse could be used to promote negative stereotypes about women, or to portray women as psychologically unbalanced, or to further victimize battered women by blaming them for the violence. That is not the use that is intended by the language of the Iowa Supreme Court's opinion in *Griffin*, or by the *Griffin* prosecution's use of the expert testimony in that case. In *Griffin*, for example, the

expert testimony enhanced the victim's testimony that her seemingly inexplicable actions were in fact the result of her interest in surviving at the hands of a violent partner. It appears that the use of the expert in *Griffin* answers Walker's plea to use her research on battered women as a tool to empower battered women rather than to blame them for responding to their abusers' violence.[174]

Walker points out that despite the gender-biased law on self-defense, many battered women who killed their partners were successful in avoiding prosecution altogether. Instead, they got acquittals, or received probation or shorter prison sentences.[175] Her statistics support the story model of juror decision making. When judges and jurors heard the explanations of the circumstances surrounding the crime, they understood the "story of violence" and were less punitive. This bodes well for the use of expert testimony in the second wave. Now experts can rely on even more experience and even more research about domestic violence relationships to help the jury to understand the story of domestic violence. They can focus attention on the abuser, and can help to make prosecution an opportunity to empower the woman rather than to portray her as a helpless or hapless victim.

5.1.2 Refining Prosecution Strategies and Trial Techniques

The findings of this study can be used to develop trial advocacy training for prosecutors. Trial advocacy training focuses on practice tips for trial lawyers, and generally includes performance exercises that allow the trial lawyers to "try out" the new techniques while experienced trial lawyers watch and critique the performance.

The findings can inform prosecutors about potential avenues for argument and may help them to refine their trial strategies by identifying themes. Also, understanding the significance of the story model, thereby telling the story more effectively, and anticipating likely defenses can be

helpful. An effective trial advocacy training course should include suggestions for prosecutors to develop trial themes that can be introduced during jury selection. Also included should be presentation of the theme in a story fashion during opening statement, presentation of evidence in a story fashion, consistent with the trial theme, and using the theme to tell the story of violence during closing arguments.

The frequent use of victim character assassination in these cases also illustrates the need to train prosecutors about character evidence issues, as well as techniques to combat adverse character evidence that is admitted at trial.

5.1.3 Police Training

The study findings also support additional police training on investigation techniques in domestic violence cases. Victim character assassination seemed especially intense and appeared to take on greater significance in those cases in which the investigation was incomplete, or there was a lack of physical evidence. Prosecutors in the focus group suggested that some police who were resentful of mandatory arrest in misdemeanor assault cases might make the arrest, but fail to follow through with a thorough investigation. Even in some felony cases in the study, police initially charged only misdemeanor offenses, indicating that they discounted domestic violence cases. In addition, some police witnesses evidenced a lack of understanding of the dynamics of abuse, or a negative attitude toward a particular victim or toward domestic violence in general. Because a prosecution is only as good as the underlying investigation, additional police training on domestic violence investigations is recommended.

5.1.4 Judicial Training

Prosecutors in the focus groups felt that many judges did not understand the dynamics of

a violent relationship and were not sensitive to victims. The victims in the focus groups echoed the same view. This study did not refute those perceptions. Judicial attitudes were most evident in rulings that liberally permitted character assassination of the victim.

Prosecutors and police have received intensive training since the institution of mandatory arrest in Iowa, including one-day seminars, multi-day seminars, and training publications. The training has included information about domestic violence dynamics, investigative techniques and prosecution techniques, and has been held at regularly scheduled conferences as well as specialized training sessions.[176]

Judicial training did not follow the same pattern during the time period in which the cases in this study were tried. Judicial training on domestic violence generally occurred less often, on a more limited array of topics, and for shorter time periods.[177] Although judges often were invited to police or prosecutor training sessions, they seldom attended because of their concern that they may appear to be biased toward the prosecution.[178]

Since 1995, training opportunities for all criminal justice officials, including judges, has increased. The Iowa Law Enforcement Academy and the Iowa Prosecuting Attorney Training Coordinator Office each added a full-time instructor to their staffs in 1996, using Violence Against Women Act funds.[179] The Iowa Judicial Department added a Domestic Violence Intervention Coordinator in 1996, to implement a recommendation by the Iowa Supreme Court's Equality in the Courts Task Force.[180] Training on domestic violence issues has increased since then. However, the findings in this study suggest that judges could benefit from training in several areas, including evidentiary issues such as character evidence and other-acts evidence; trial strategies in domestic violence cases; and the story model of juror decision making.

5.1.5 Victim Advocate Training

Aside from victim advocates who serve as expert witnesses, other advocates can benefit from this research as well. Victims in the focus groups expressed great frustration with the criminal justice system, and often felt victimized by this system as well. Given the common defense tactics that parallel the abuse dynamics -- victim-blaming, minimization or denial of the injuries or the abuse, surprise attacks -- the victims' characterization appears to be valid. Advocates who understand the common themes and strategies used in domestic violence cases can better prepare the victims for what they may face in court. Victims who understand the process better are more likely to be stronger witnesses and to feel empowered by participating in the criminal justice process. They also can provide other information to prosecutors that may be helpful in rebutting defenses or making the prosecution's case.

5.2 Limitations of This Research

The findings of this study must be considered in light of its limitations. The data in this study are limited in several ways. First, all the cases analyzed were felony cases involving domestic violence situations. Many domestic abuse assaults are misdemeanor offenses. The strategies used in felony trials may not translate directly to misdemeanor offenses. This may or may not affect a juror's view of a case, or the prosecutor's choice of strategy.

Second, only cases involving convictions in which a transcript was prepared were considered. This was due in large part to pragmatic considerations, specifically the difficulty identifying domestic violence related cases and the substantial cost differential between transcripts for convictions and acquittals.[181] Thus, the trial strategies found in this study were

developed from felony cases that were *successfully prosecuted.* We do not know whether the same strategies are employed by either the prosecution or the defense in unsuccessful prosecutions. In the case of the prosecution, we can say that these strategies did work in these cases. Further analyses of acquitted cases in needed to examine similarities and differences in strategies used in successful and unsuccessful prosecutions. Such analyses might also allow us to compare whether differences in physical evidence, motive, or level of violence or seriousness of injury appear to impact successful outcome as well.

Third, the study contains no comparisons between domestic-relationship cases and non-domestic-relationship cases. Such comparisons may be valuable[182] however, these comparisons cannot be done with this data set.

Fourth, all cases are from Iowa, and therefore are limited in their applicability to other jurisdictions. The practices, statutes and rules of evidence in Iowa may not be typical of other jurisdictions. Limiting the research to a single state, however, enhances internal validity. Iowa prosecutors are a close-knit group, with a centralized training agency that also operates an independent organization for county attorneys. This organization consistently includes all but one or two of the 99 county attorneys as members. Nonetheless, trial practices and individual experience vary widely across the state, as is true virtually everywhere.

Fifth, all cases were tried between 1989 and 1995. It is quite possible that attitudes about domestic violence among police, prosecutors, defense counsel, judges and jurors may have changed during that time period. Recent high profile cases, such as the Anita Hill sexual harassment hearings, and the O.J. Simpson murder trial have brought increased information and awareness to the general public about issues of abuse against women. These potential changes

are offset by several factors.

First, Iowa adopted the federal rules of evidence at the time that all of these cases were tried. Therefore, evidentiary rules are probably similar to those of other states. Although Iowa statutes do not directly track the Model Penal Code, they are similar. The felonies involved in this study generally are common law types of crimes and the general criminal law standards in Iowa are similar to those in other jurisdictions. Second, domestic violence had generated considerable interest in Iowa before 1990. Mandatory arrest laws were passed in 1984, and police and prosecutors received regular training from that time to the 1989-95 period.

Third, prosecutors received intensive training on domestic violence prosecutions in 1989-1990, in conjunction with the publication of the first prosecution manual devoted to domestic violence prosecutions. Fourth, in early 1990, the Iowa Attorney General launched a massive public information campaign about domestic violence, including public service announcements on television and radio and print ads in newspapers, magazines and billboards, as well as many public speeches about the topic. The Attorney General also held meetings at 30 locations around the state to discuss the issue with local elected officials, police, prosecutors, clergy and business persons.

Sixth, the number of cases is limited to 40 felony trials, comprising approximately 50,000 pages of transcript. This data set is more than sufficient for valid qualitative analysis, and we believe that saturation was reached on key concepts and findings. However, the sample size is insufficient for more sophisticated quantitative analysis.

Seventh, the data set consists of transcripts of trials. Some researchers have been critical of such text analysis, because it does not capture the "sights, sounds, smells, intonations, and

emotional tensions of the original event."[183] Nonetheless, the findings provide valuable information about the prosecution and defense strategies.

Eighth, the data set does not include information about jurors deciding the cases, nor does it include feedback from jurors about what entered into deliberations. Only the final verdict is available.

Finally, we have a bias in favor of the prosecution. Roxann Ryan has been a prosecutor for 17 years, and trained hundreds of police officers about domestic violence issues during the time that the cases involved in this study were being tried. Carolyn Hartley is a professor of social work at the University of Iowa, with a strong pro-victim orientation.

We have made a conscious effort to identify personal biases in making assessments, and to include specific coding information that will convey the defense perspective in the trial. For example, the survey form includes objective information about what evidence was considered, what types of witnesses appeared for the prosecution and the defense, and other demographic information about the trial and its participants. In addition, by coding particular segments of text, it is possible to compare our subjective assessments with actual text of what occurred at the trial.

5.3 Implications for Future Research

We would offer several suggestions for future research to build on the findings of this study.

5.3.1 Comparisons of Felony and Misdemeanor Prosecutions

This study involved only felony charges involving domestic violence. This means that the crimes involved the most serious offenses, and therefore is taken more seriously by

prosecutors, judges, defense attorneys and jurors. Often, the charges prosecuted in the cases were deemed more serious because of the severity of the injuries to the victim, the serious nature of the acts committed, or the offender's prior record of assaults. All of these factors can affect the charging response to the crime, regardless of whether it involves a domestic assault.[184] Similarly, the seriousness of the offense can affect the jurors' response. It was for these reasons that only felony cases were chosen for study. The investigations were potentially more thorough, the attorneys were more likely to prepare the cases and refine the trial strategies more precisely. Lastly, judges and jurors were more likely to examine and analyze the cases more diligently. Prosecutors also echoed these views during the focus groups. The assumption was that patterns would be easier to discern in felony cases.

One recommendation for future research is to compare the strategies used in felony cases with those used in misdemeanor cases, and especially simple misdemeanor cases. If the investigations are weaker, the attorneys are not as thoroughly prepared, and judges and jurors attribute less significance to the case, then the experience in misdemeanor court may be different from that in felony court. The findings of such a study could have implications for future training of criminal justice officials, for changes in the procedures used to investigate and prosecute cases, and for advocates' responses to battered women and their work with criminal justice officials.

5.3.2 Comparisons of Domestic and Non-Domestic Crimes

This study was limited to domestic violence cases. Some prosecutors have argued anecdotally that domestic violence related assault cases are similar to non-domestic assault cases in which the victim and defendant are merely acquainted with each other (i.e., a bar fight). We

would argue that there is a difference between these cases because of the power and control inherent in domestic abuse relationships that is not a part of an acquaintance relationship.

Further research should compare the trial themes, trial strategies and types of evidence that are presented in non-domestic assault cases in which the victims are acquainted but not intimate. This would be done in an effort to determine whether the distinguishing factor in domestic violence cases is the nature of the intimate relationship, rather than the fact that there is a relationship history available to present.

5.3.3 Victim Credibility Issues

Victim character assassination was so prevalent in the cases in this study that it would be valuable to conduct further research on the issue of victim credibility. Schafran suggests that credibility issues are important in a variety of contexts.[185] Criminal justice researchers also suggest that gender stereotyping can affect decision making. Some research was conducted regarding prosecutorial views of credibility in the area of domestic violence,[186] and more recently in the area of sexual violence.[187] Some research has been done regarding whether police response is influenced by gender.[188] In addition, some researchers have examined juror attitudes about credibility based on gender.[189] In addition, traditional sex role views may affect not only the partners involved in the violent relationship, but also the perceptions of criminal justice officials who respond to the violence, and jurors who hear the evidence.[190]

Previous research suggests that victim character assassination in domestic violence cases is based, at least in part, on gender biases. Further studies could examine how perceptions of domestic violence are influenced by gender stereotypes, and how those gender stereotypes affect decision makers in the criminal justice system, from police to prosecutors to defense attorneys to

judges to jurors.

5.3.4 Mock Jury Research

Pennington and Hastie tested their "story model" of juror decision making through the use of vignettes presented to mock juries. [191] The same type of research could be conducted to test the use of the story model in "telling the story of violence" in a domestic relationship. Vignettes could be constructed consistent with the themes and strategies identified in this study, with special emphasis on the use of victim character evidence and other-acts evidence. In addition, mock jury research could be conducted to test victim credibility issues, based on the types of evidence and the types of themes used in the hypothetical cases.

5.4 Closing Remarks

This is the first study that has examined the content of trial prosecutions in domestic violence felonies. The primary conclusion to be drawn from the study is that prosecutors and defense attorneys have a common repertoire of strategies and techniques that are used in these trials. Some strategies and techniques may be unique to domestic violence cases, others may be common to all criminal cases. The nature of the intimate relationship between victims and defendants is likely to result in parties who know each other well. The depth of knowledge may affect the "stories" told by both the prosecution and the defense.

In constructing its strategy, the prosecution often emphasized the public nature of the private violence, and the need to take the violence seriously and to hold the abuser accountable for the violence. The prosecution commonly sought to dispel or de-emphasize myths about domestic violence and preconceived notions about the nature of the violent relationship or the

characteristics of the battered woman.

Trial techniques used in defending against a felony charge of domestic violence seemed to parallel the abusive thinking patterns generally observed in abusers. These techniques provided some support for victims' perceptions that the criminal justice system simply served as another way for the abuser to victimize the battered woman. The jurors' knowledge about violent relationships -- either from their personal experiences or from evidence presented at trial -- is likely to affect the assessment of the competing stories told by the prosecution and the defense.

Notes

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1. William Blackstone, *Commentaries on the Law of England (* Philadelphia, PA.: J. B. Lippincott, 1885).

2. Isabel Marcus, "Terrorism on the Home," in *The Public Nature of Private Violence: The Discovery of Domestic Abuse,* ed. Martha Fineman Albertson and Roxanne Mykitiuk (New York: Routledge, 1994), pp. 11-35.

3. Elizabeth Pleck, *Domestic Tyranny* (New York: Oxford University Press, 1987).

4. Ibid.

5. Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (Boston, MA.: South End Press, 1982); Mildred D. Pagelow, *Family Violence* (New York: Praeger, 1984), pp. 261-263.

6. Lawrence Sherman, *Policing Domestic Violence* (New York: Free Press, 1992).

7. Maryann Syers and Jeffery L. Edelson, "The Combined Effects of Coordinated Criminal Justice Intervention in Woman Abuse," *Journal of Interpersonal Violence* 7 (1992): 490-502.

8. Sherman (n.6 above), Experiments with domestic arrest policies have produced divergent results. Arrests were effective in reducing recividism in experiments in Minneapolis, Colorado and Metro-Dade, but seemed to increase recividism in experiments in Milwaukee, Charlotte, and Omaha (p. 3). The differing results might be attributed to differences in demographics, socio-economic status, and variables in the intimate relationship (p. 4).

9. Ibid., pp. 5-6.

10. Ibid., p. 8.

11. David Ford, "Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships," *Law & Society* 25 (1991): 313-334.

12. Eve S. Buzawa and Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response, 2nd ed.* (Thousand Oaks, CA: Sage Publications, 1996), p. 33.

13. Linda McGuire, *Domestic Abuse Prosecution Handbook* (Des Moines, IA: Iowa Prosecuting Attorneys Council, 1994).

14. Jane W. Ellis, "Prosecutorial Discretion to Charge in Cases of Spousal Assault: A Dialogue" *Journal of Criminal Law & Criminology* 75 (1984): 56-99; Eve S. Buzawa and Carl

G. Buzawa, *Domestic Violence: The Criminal Justice Response, 2nd ed.* (Thousand Oaks, CA: Sage Publications, 1996), p. 86. The authors discuss an "organizational imperative" in prosecutors' offices to achieve high rates of convictions. The number of cases successfully prosecuted helps jurisdictions evaluate performance, show efficiency, and negotiate for limited resources. Given the difficulty prosecuting these cases, there may be a bias against moving them forward.

15. McGuire (n.13 above) citing Iowa Code of Professional Responsibility, DR 7-103 and *National Prosecution Standards*, Standard 9.1 *et seq.* (NDAA 1977).

16. Lisa G. Lerman, *Prosecution of Spouse Abuse: Innovations in Criminal Justice Response* (Washington D.C.: Center for Women Policy Studies, 1981); Margaret A. Rosenbaum, "The Prosecution of Domestic Violence: An Overview," *The Florida Bar Journal* 68 (1994): 52-55; Stuart H. Baggish & Christopher G. Frey, " Domestic Physical Abuse: A Proposed Use for Evidence of Specific Similar Acts in Criminal Prosecutions to Corroborate Victim Testimony, " *The Florida Bar Journal* 68 (1994): 57-61.

17. Rosenbaum (n.16 above), p. 68.

18. Iowa has adopted the Federal Rules of Evidence with a few modifications. The citations here will be to the Iowa Rules.

19. Personal communication, meeting of an ad hoc task force of the Iowa County Attorneys Association, November, 1993.

20. The *elements of the crime* refer to the components of the crime that are set out by the criminal statute. In proving the elements of a crime, the prosecution has to show that the act is prohibited by law, that it involved criminal intent, and that any injuries sustained were the result of the defendant's actions.

21. McGuire (n.13 above), "More than prosecution of any other criminal offense (with the possible exception of adult sexual abuse), prosecuting domestic assault requires a special understanding of the unique and complex dynamics operating in the context of the crime -- an intimate relationship." (p. 3-1).

22. Sherman (n.6 above); Jacob Clark, "Where to Now on Domestic Violence? Studies Offer Mixed Policy Guidance," *Law Enforcement News* 19 (1993): 1-17.

23. David Rubin, "Leading the Fight for Battered Women and Children in Massachusetts," *Young Lawyers Division Section News* 10 (1993): 12-13.

24. AMA Council on Ethical and Judicial Affairs, "Physicians and Domestic Violence," *Journal of the American Medical Association* 267 (1992): 3190-3192.

25. Iowa Supreme Court, *Final Report of the Supreme Court Task Force on Courts' and Communities' Response to Domestic Abuse* (1994); Sylvia Law, "Every 18 Seconds a Woman is Beaten," *The Judges Journal* 12 (1991): 12-15, 40-41.

26. *See, e.g.*, Tit. IV, Violence Against Women Act, Subtitle D., ch. 1 & 2 (education and training for judges and court personnel recommended); Iowa Supreme Court *Final Report of the Supreme Court Task Force on Courts' and Communities' Response to Domestic Abuse*, (1994) (recommended training for police); National Council of Juvenile and Family Court Judges, *Courts and Communities: Confronting Violence in the Family* 33 (1993) (judicial education).

27. Mildred D. Pagelow, *Family Violence* (New York: Praeger, 1984), pp. 301-324.

28. Ibid.

29. See Catherine Kirkwood, *Leaving Abusive Partners* (London: Sage, 1993) for an excellent discussion of the pattern of physical and emotional abuse and its impact on women.

30. Iowa Judicial Department, *Iowa Domestic Abuse Benchbook* (1994).

31. Ibid.

32. Lynn Hecht Schafran, "Credibility in the Courts: Why is There a Gender Gap." *The Judges Journal 34* (1995): 5-9, 40-42.

33. Elizabeth Anne Stanko, "Would You Believe This Woman? Prosecutorial Screening for "Credible" Witnesses And a Problem of Justice," in *Judge, Lawyer, Victim, Thief: Women, Gender Roles, and Criminal Justice*, eds. Nicole Hahn Rafter and Elizabeth Anne Stanko (Northeastern University: Northeastern Univeristy Press, 1982), pp. 63-82.

34. Schafran (n.32 above).

35. Ibid.

36. Ibid.

37. *State v. Thornton*, 498 N.W.2d 670 (Iowa 1993); *State v. Phansouvanh*, 494 N.W.2d 219 (Iowa 1992); *State v. Frake*, 450 N.W.2d 817 (Iowa 1990).

38. *State v. Frake*, 450 N.W.2d 817 (Iowa 1990).

39. Maureen McLeod, "Victim Noncooperation in the Prosecution of Domestic Assault." *Criminology* 21 (1983): 395-416.

40. Technically, the term *murder* refers to a type of homicide case in which the defendant

had malice towards the victim when committing the crime. Not all the cases in this study met this legal definition of murder. We chose to use the term *murder* rather than *homicide* because this term would be more familiar to the non-legal reader.

41. Trial advocacy is a portion of training for trial lawyers that often includes performance exercises that allow the trial lawyers to "try out" new trial techniques.

42. Frances L. Wellman, *The Art of Cross-Examination, 4th ed.* (New York: Collier Books, 1962).

43. Buzawa and Buzawa (n. 12 above). The authors point out that research on what works in the judiciary is less advanced than the research on police response, in part because issues of prosecutorial and judicial performance have not yet captured the attention of the public or state legislatures.

44. Ibid.

45. Patrick A. Langan and Christopher A. Innes, *Preventing Domestic Violence Against Women.* (Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, 1986).

46. Ibid.

47. *State v. McKee*, 312 N.W.2d 907, 913 (Iowa 1981) Iowa Code § 708.2A (1997).

48. Iowa Code § 702.18 (1997).

49. Ibid.

50. Iowa Code § 708.4 (1997).

51. Battelle Memorial Institute of Law and Justice Study Center, *Forcible Rape: A National Survey of the Response by Prosecutors* (Washington, D.C.: National Institute on Law Enforcement and Criminal Justice, 1977).

52. Schmidt, Janelle and Ellen Hochstedler Steury, "Prosecutorial Discretion in Filing Charges in Domestic Violence Cases." *Criminology* 27 (1989): 487-509.

53. Most Iowa prosecutors are members of the Iowa County Attorneys Association. This Association holds regular meetings and training sessions.

54. Kersti Yllö, "Political and Methodological Debates in Wife Abuse Research," in *Feminist Perspectives on Wife Abuse*, ed. Kersti Yllö and Michele Bograd (Newbury Park, CA.: Sage, 1988), pp. 28-50.

55. Samuel R. Gross, Robert Mauro, *Death and Discrimination: Racial Disparities in*

Capital Sentencing (Boston, MA.: Northeastern University Press, 1989), pp. 212-214.

56. These opinions were shared by prosecutors from the focus groups conducted in this study.

57. Catherine Marshall and Gretchen Rossman, *Designing Qualitative Research* (Thousand Oaks, CA.: Sage, 1995), p. 23.

58. Ibid., p. 26.

59. *Iowa Crime Reports*. (Des Moines, IA.: Department of Public Safety, 1995).

60. Thus, even misdemeanor domestic assault cases that can be readily identified were relatively inaccessible in Iowa. This study involves only felony prosecutions, but the challenges in obtaining that information were even greater than obtaining information regarding domestic abuse assaults, classified under Iowa Code section 708.2A.

61. Because most convictions are appealed, a transcript has been prepared, so that a copy can be obtained at relatively low cost. According to Iowa Supreme Court Rule 10(b), the cost of a *copy* of a transcript cannot exceed 25¢ per page, but the cost of an *original* transcript cannot exceed $2.75 per page. Some court reporters waived fees when they provided a computerized copy of a transcript; they would be unlikely to waive any fees in preparing an original transcript. Most non-murder felony transcripts are 500-700 pages, and most murder transcripts are 1,000-2,000 pages, so the cost differential is notable.

62. These included crimes classified as class A, B, C, or D felonies, with sentences ranging from five years to life without parole.

63. A domestic relationship was defined as an intimate relationship between a man and a woman, whether or not they were married or had ever lived together.

64. The Crime Victim Assistance Division (CVAD) of the Attorney General's office provides compensation to victims of violent crimes that are statutorily entitled according to Iowa Code, chapter 912.

65. HyperResearch™ is a text analysis computer software program. In order for the program to read a file of text material, the file must be edited manually to include page breaks (a "~" sign) every 16,000 words.

66. All prosecutors who participated were white. The racial mixture of prosecutors in Iowa is roughly 99.5% white, so the focus groups were representative of Iowa prosecutors. At the time of the focus groups, there were no non-white prosecutors who specialized in domestic violence prosecutions, nor were any elected county attorneys non-white.

67. HyperResearch™ is available from ResearchWare, Inc. P.O. Box 1258, Randolph, MA 02368-1258. Phone: (781) 961-3909; e-mail: researchwr@aol.com; web: http://members.aol.com/researchwr.

68. Kathy Charmaz, "'Discovering' Chronic Illness: Using Grounded Theory," *Social Science and Medicine* 30 (1992): 1161-1172; Barney G. Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies For Qualitative Research* (New York: Aldine de Grutyer, 1967).

69. The prosecution's case in chief refers to the process of the trial in which the prosecution gets to present its evidence first. The prosecution's case in chief is then followed by the defense case in chief, wherein the defense presents its evidence. The prosecution then has the opportunity to present rebuttal evidence, followed by surrebuttal by the defense.

70. Barney G. Glaser, *Basics of Grounded Theory Analysis* (Mill Valley, CA.: Sociology Press, 1992).

71. Race is assumed in some cases. Since the majority (93%) of the population in Iowa is white, it is not surprising that the majority of defendants are white. Race was determined in some cases through a witnesses description of the defendant. For some defendants, race was determined by their last name (e.g., Hispanic defendants). In one case, the defendant's mother testified through a Spanish interpreter. Race was also known in some cases by our personal familiarity with the case. Many of the murder cases were high-profile media events in Iowa.

72. We cannot tell from the trial transcripts whether private counsel were retained or court-appointed.

73. Margo Wilson and Martin Daly, "Spousal Homicide Risk and Estrangement," *Violence and Victims* 8 (1993): 3-16.

74. Angela Browne and Kirk R. Williams, "Gender, Intimacy, and Lethal Violence: Trends from 1976 Through 1987," *Gender and Society* 7 (1993): 78-98; Michael R. Rand, Diane Craven, Patsy A. Klaus, Craig A. Perkins, Cheryl Ringel, Greg Warchol, Cathy Matson, and James Allen Fox, *Violence Between Intimates* (Washington, D.C.: Bureau of Justice Statistics, 1998).

75. Jacquelyn C. Campbell, "If I Can't Have You, No One Can:" Power and Control in Homicide of Female Partners," in *Femicide: The Politics of Women Killing*, eds. J. Radford and D.E.H. Russell (New York: Twayne Publishers, 1992), pp. 99-113; Margo Wilson and Martin Daly, "Spousal Homicide Risk and Estrangement," *Violence and Victims* 8 (1993): 3-16; Carolyn Rebecca Block and Antigone Christakos, "Intimate Partner Homicide in Chicago Over 29 Years," *Crime & Delinquency* 41 (1995): 496-526.

76. Angela Browne and Kirk R. Williams, "Gender, Intimacy, and Lethal Violence: Trends from 1976 Through 1987," *Gender and Society* 7 (1993): 78-98; Jacquelyn C. Campbell, "If I Can't Have You, No One Can:" Power and Control in Homicide of Female Partners," in *Femicide: The Politics of Women Killing*, eds. J. Radford and D.E.H. Russell (New York: Twayne Publishers, 1992), pp. 99-113; Margo Wilson and Martin Daly, "Spousal Homicide Risk and Estrangement," *Violence and Victims* 8 (1993): 3-16.

77. Carolyn Rebecca Block and Antigone Christakos, "Intimate Partner Homicide in Chicago Over 29 Years," *Crime & Delinquency* 41 (1995): 496-526.

78. Campbell (n.75 above).

79. Ibid.

80. Many judges and practitioners use the term "motion in limine" broadly to encompass all motions regarding the admissibility of evidence, including motions made under Iowa Rule of Evidence 104 (seeking preliminary rulings on evidentiary matters) even though as a technical legal matter such motions are not motions in limine. The Iowa courts will consider the merits of evidentiary issues, regardless of how the parties label the motion.

81. McGuire (n.13 above), p. 6-1.

82. In most domestic violence cases, the defendant is the *principal* (main actor), rather than an *aider or abettor* (assistant) to the offense. Unlike many non-domestic cases, in most domestic violence cases, the identity of the perpetrator is not in issue.

83. The use of the term *severity* is based on a legal definition of the seriousness of the injuries. The more serious the injury, the more serious the charge that can be made against the defendant. This term is not intended to imply that some injuries sustained by a victim are "less important or significant" than other injuries.

84. An *excited utterance* is defined as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Iowa Rule of Evidence 803(2). A *present sense impression* is defined as "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Iowa Rule of Evidence 803(1).

85. McGuire (n.13 above).

86. *Insanity* refers to the defendant's mental state at the time of the crime and requires that the defendant prove that he did not know right from wrong, nor did he understand the nature and quality of his acts at the time that he committed the crime. *Diminished responsibility* refers to some defect in the defendant's mental capacity that would make it impossible for the defendant to form specific intent required under the criminal statute with which defendant has

been charged. *Intoxication* is a related to the diminished responsibility defense, wherein the defendant claims that he was too intoxicated to have the capacity to form the specific intent required by the criminal statute with which he was charged. *Alibi* refers to a defense in which the defendant claims that he was somewhere else when the crime was committed, and he provides witnesses to his whereabouts. *Entrapment* refers to the defendant's claim that he was enticed or induced by government agents to commit a crime he was not otherwise contemplating. *Self-defense* or *justification* refers to the legitimate use of force against someone who instigated the violence. Iowa Rule of Criminal Procedure 10(11) sets out the specific requirements for these notices of defense. The sanction for the defendant's failure to comply with the rules may include exclusion of witnesses other than the defendant (who always can testify in his own defense as to any defense).

87. *Discovery* refers to the process during litigation by which one side is required to reveal information that it intends to use at trial, when the other side makes an appropriate request for that information. *Reciprocal discovery* means that when one side reveals information, the other side also has an obligation to reveal information.

88. Iowa Rule of Criminal Procedure 13 governs discovery procedures, and requires that the defense disclose certain evidence once the defense employs discovery techniques to find out about the prosecution's evidence. Under the Iowa rules of evidence, the defense may be required to allow the prosecution to examine documents, tangible objects, statements of persons other than the defendant, photographs, reports of mental or physical examinations, or scientific tests or experiments. Iowa R. Cr. P. 13(3).

89. A *deposition* is testimony, taken under oath but not during a trial in open court. Under the Iowa rules, depositions are to be taken before trial, although in some circumstances, a recess may be taken during trial so that a party can depose a witness in order for the attorney to prepare for that witness's trial testimony.

90. Iowa R. Cr. P. 11(3).

91. Personal Communication with Prosecutor, November, 1997. Advocates' communications with victims are confidential under Iowa Code chapter 236A. This limits the advocates' ability to share information obtained from the victim, unless the victim gives a waiver or partial waiver of the counselor-client privilege.

92. Personal communication with prosecutor, November 1997.

93. Personal communication with prosecutor, November 1997.

94. The term *assassination* may be seen as too strident, however we chose to use this term because we think it best captures the essence of this defense strategy.

95. Catherine Kirkwood, *Leaving Abusive Partners* (London: Sage, 1993).

96. Ibid., p. 56.

97. Kerry Healey, Christine Smith, and Chris O'Sullivan, *Batterer Intervention: Program Approaches and Criminal Justice Strategies* (Washington, DC: U.S. Department of Justice, Office of Justice Programs, 1998).

98. Donald G. Dutton, *The Domestic Assault of Women: Psychological and Criminal Justice Perspectives*, (Vancouver: UBC Press, 1995).

99. Ibid.

100. Lenore Walker, *The Battered Woman* (New York: Harper & Row, 1979), p.74.

101. Kirkwood (n.95 above), p. 44.

102. Estrich describes prosecutorial assessments of "real" (aggravated) rape cases and "technical" (simple or non-aggravated) rape cases, noting that the victim's characteristics have an impact on the prosecutor's assessment of the case. Susan Estrich, *Real Rape.* (Cambridge, Massachusetts: Harvard University Press, 1987). Similarly, Spohn and Horney found that rape reform laws had little impact on criminal justice officials' views regarding the admissibility of evidence of the victim's prior sexual history. Cassia Spohn & Julie Horney, *Rape Law Reform.* (New York: Plenum Press, 1992).

103. Kirkwood (n.95 above).

104. Ibid., p. 64

105. Ibid.

106. Terry Connolly, "Decision Theory, Reasonable Doubt, and the Utility of Erroneous Acquittals," *Law & Human Behavior* 11 (1987): 101-112.

107. Ola Svenson, "A Psychological Process Perspective on Decision Making" in *Computer-Aided Decision Analysis*, ed. Stuart S. Nagel. (Westport, CT.: Quorum Books, 1993): pp. 69-71.

108. Ibid., p.72.

109. Ibid., pp.75-76.

110. Ibid., p.77.

111. Ibid., p.78.

112. Ibid., p.78.

113. Jonathan Casper, Kennette Benedict and Jo Perry, "Juror Decision Making, Attitudes and the Hindsight Bias," *Law & Human Behavior* 13 (1989): 291-310; Nancy Pennington and Reid Hastie, "Juror Decision-Making Models: The Generalization Gap," *Psychological Bulletin* 89 (1981): 246-287.

114. Pennington and Hastie (n.113 above).

115. Ibid., p. 248.

116. Ibid., p. 248.

117. Reid Hastie, *Inside the Juror* (New York: Cambridge University Press, 1993).

118. Nancy Pennington and Reid Hastie, "The Story Model for Juror Decision Making" in *Inside the Juror,* ed. Reid Hastie (London: Cambridge University Press, 1993), p. 192.

119. Pennington and Hastie (n.113 above), p. 249.

120. Ibid., p. 249.

121. Ibid., pp. 249-252.

122. Ibid., p. 252.

123. Ibid., pp. 252-253.

124. Ibid., p. 253.

125. Ibid., p. 253.

126. Ibid.

127. Ibid., pp. 253-254.

128. Ibid.

129. Ibid., p. 254.

130. Ibid., pp. 254-255.

131. Ibid., p. 255.

132. Pennington and Hastie (n.118 above), pp. 194-195.

133. This formulation is consistent with what Cicourel describes as "social facts," that is, generalizations on a macro-level that are based on individualized, routine experiences in

everyday life. Aaron V. Cicourel, "Notes on the Integration of Micro- and Macro-Levels of Analysis," in *Advances in Social Theory and Methodology: Toward an Integration of Micro- and Macro-Sociologies* ed. K. Knor-Cetina and A. Cicourel (Boston: Routledge and Kegan Paul, 1981).

134. Pennington and Hastie (n.118 above), pp. 198-199.

135. Ibid., pp. 199-200.

136. Ibid., p. 200.

137. Ibid., p. 201.

138. Ibid., pp. 198-199.

139. Ibid., p. 201.

140. Ibid., p. 209.

141. Ibid., p. 204.

142. Ibid., p. 204.

143. Ibid., pp. 205-206.

144. Ibid., p. 206.

145. Ibid., p. 209.

146. Ibid., p. 210.

147. Ibid., pp. 210-211.

148. Ibid., p. 211.

149. Ibid.

150. Ibid.

151. Ibid., pp. 211-212.

152. Ibid., p. 217. Vinson reaches similar conclusions about the effectiveness of "telling the story" to the jury. Donald Vinson, *Jury Persuasion.* (Englewood Cliffs, New Jersey: Prentice Hall, 1993).

153. Iowa Rule of Evidence 404(b).

154. Susan Murphy, "Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome," *Columbia Journal of Law and Social Problems* 25 (1992): 277-312. "If expert testimony is not admitted, it is possible that a jury, left alone, will decide issues based upon misconceptions and prejudices disproved by modern scientific study." pp. 281-282.

155. *State v. Johnson*, 219 N.W.2d 690 (Iowa 1974)

156. *State v. Martin*, 217 N.W.2d 536 (Iowa 1974).

157. *State v. Gartin,* 271 N.W.2d 902 (Iowa 1978)*; State v. Nowlin* 244 N.W.2d 591 (Iowa 1976).

158. *State v. Myer,* 382 N.W.2d 91 (Iowa 1986)..

159. Murphy (n.153 above).

160. The *Frye* standard refers to the standards adopted in *Frye v. United States*, 54 U.S. App. D.C. 46, 293 F. 1013 (1923), which held that the subject of the expert testimony must be a matter that has met with "general acceptance" in the relevant scientific community.

161. The *Daubert* standard refers to the standards adopted by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *Daubert*, the Court interpreted Federal Rule of Evidence 702, and held that expert testimony based on scientific evidence must meet three criteria: (1) the testimony is based on "scientific" evidence, that is, knowledge based on the use of the scientific method, or research that is subject to peer review, or research having a very low error rate, or research that is generally accepted in the scientific community; (2) the testimony "will assist" the trier of fact in understanding the issues in the case; and (3) the expert is qualified to render an opinion based on scientific evidence.

162. Elizabeth Schneider, "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering," *Women's Rights Law Reporter* 9 (1986): 195-222.

163. Ibid., p. 198.

164. Ibid., p. 214

165. Linda L. Ammons, "Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome," *Wisconsin Law Review 5* (1995): 1003-1080.

166. Richard B. Felson, "Big People Hit Little People: Sex Differences in Physical Power and Interpersonal Violence," *Criminology* 34 (1996): 433-452.

167. Ibid., p. 447.

168. Schneider (n.162 above), p. 214.

169. Ibid., p. 215-216.

170. Myrna S. Raeder, "The Double Edged Sword: Admissibility of Battered Woman Syndrome By and Against Batterers in Cases Implicating Domestic Violence," *University of Colorado Law Review* 67 (1996): 788-816; Myrna S. Raeder, "The Role of Batterers' Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence," *University of Colorado Law Review*, 68 (1997): 147-187.

171. Personal Communication with Advocate, April 1998.

172. The Iowa court's approach may not translate well to other jurisdictions, because the Iowa courts have a long tradition of liberal admission of expert testimony. Rules on the admission of expert testimony in other jurisdictions may not allow similar rulings.

173. Schneider (n.162 above).

174. Lenore Walker, "A Response to Elizabeth M. Schneider's "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering," *Women's Rights Law Reporter 9* (1986): 223-225.

175. Ibid., p. 224.

176. Personal communication with Iowa Law Enforcement Academy and Iowa Prosecuting Attorney Training Coordinator Office, November 1996.

177. Personal communication with Iowa Judicial Department, November 1996.

178. Personal communication with Iowa Judicial Department, November 1996.

179. Personal Communication with ILEA and PATC, June 1996.

180. Personal Communication with Iowa Judicial Department, November 1996.

181. As stated earlier, all trials are court reported, but a transcript of the trial is typically only prepared in the case is appealed. In trials where the defendant is acquitted, there is no cause for an appeal.

182. David Brereton, "How Different are Rape Trials?" *British Journal of Criminology* 37 (1997): 242-261.

183. Philip J. Stone, "Thematic Text Analysis: New Agendas for Analyzing Text Content" in *Text Analysis for the Social Sciences: Methods for Drawing Statistical inferences From Texts and Transcripts,* ed. Carl W. Roberts (Mahway, NJ.: Lawrence Erlbaum Associates, 1997), p. 37.

184. Janelle Schmidt and Ellen Hochstedler Steury, "Prosecutorial Discretion in Filing Charges in Domestic Violence Cases," *Criminology* 27 (1989): 487-509.

185. Schafran (n.32 above).

186. Ellis (n.14 above).

187. Lisa Frohmann, "Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections," *Social Problems* 38 (1991): 213-226; Julius A. Gylys and John R. McNamara, "Acceptance of Rape Myths Among Prosecuting Attorneys," *Psychological Reports* 79 (1996): 15-18; Cassia Spohn and Julie Horney, "Rape Law Reform and the Effect of Victim Characteristics on Case Processing," *Journal of Quantitative Criminology* 9 (1993): 383-409.

188. Eve Buzawa, Thomas L. Austin and Carl G. Buzawa, " Responding to Crimes of Violence Against Women: Gender Differences Versus Organizational Imperatives," *Crime & Delinquency* 41 (1995): 443-466; Daniel J. Bell and Sandra L. Bell, "The Victim-Offender Relationship as a Determinant Factor in Police Dispositions of Family Violence Incidents: A Replication Study," *Policing and Society* 1 (1991): 225-234; James J. Fyfe, David A. Klinger and Jeanne M. Flavin, "Differential Police Treatment of Male-on-Female Spousal Violence," *Criminology* 35 (1997): 455-473; Alice M. Home, "Attributing Responsibility and Assessing Gravity in Wife Abuse Situations: A Comparative Study of Police and Social Workers," *Journal of Social Service Research* 19 (1994): 67-84.

189. Peter Hahn and Susan Clayton, "The Effects of Attorney Presentation Style, Attorney Gender, and Juror Gender on Juror Decisions," *Law & Human Behavior* 20 (1996): 533-554; Stephanie Riger, Pennie Foster-Fishman, Julie Nelson-Kuna, and Barbara Curran, "Gender Bias in Courtroom Dynamics," *Law & Human Behavior* 19 (1995): 465-480.

190. J. Finn, "The Relationship Between Sex Role Attitudes and Attitudes Supporting Marital Violence," *Sex Roles* 15(5/6) (1986): 234-244: Gwendolyn L. Gerber, "Gender Stereotypes and Power: Perceptions of the Roles in Violent Marriages," *Sex Roles* 24 (1991): 439-458.

191. Pennington and Hastie (n.113 above).