

# A THORN IN THE FLESH THAT CANNOT FESTER: HABERMAS, THE DULUTH MODEL, DOMESTIC VIOLENCE PROGRAMMES

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This paper will look the relevance of the ideas of the German sociologist and philosopher Jurgen Habermas to domestic violence, with particular reference to the debate about the causes of domestic violence, and to the programmes offered for perpetrators of domestic violence. The first part of this paper will outline the Habermasian concepts of communicative action, with a particular focus on the ways that conventionally non-rational forms of communication are compatible with Habermasian discourse. There will be a focus on the idea that critiques that occur in communicative actions can be what Habermas calls “thorns in the flesh of social reality.” The second part of the paper will look at the feminist movement around domestic violence and how, from a Habermasian point of view, feminist discourse appears to have been effective in making domestic violence an important issue in the public sphere. Specific emphasis will be placed on the “Duluth Model” of domestic violence analysis and its efficacy. The final part will look specifically at the offender programmes offered at the Waitakere Family Violence Courts and whether or not these programmes can cure the thorns in the flesh of domestic violence.

In the Habermasian model of social relations, individuals live in what is called a “lifeworld.” This lifeworld comprises our taken for granted definitions and understandings of the world that give coherence and direction to our everyday actions and interactions. Habermas states that our lifeworld is so unproblematic that we are “...simply incapable of making ourselves conscious of this or that part of it at will.” Put simply, we cannot step outside our lifeworld.<sup>1</sup>

Lifeworlds meet in what Habermas calls “the public sphere.” The public sphere is defined as:<sup>2</sup>  
...first of all a realm of our social life in which something approaching public opinion can be formed...  
Citizens behave as a public body when they confer in an unrestricted fashion—that is, with the guarantee of freedom of assembly and association and the freedom to express and publish their opinions about matters of general interest...the expression ‘public opinion’ refers to the tasks of criticism and control which a public body of citizens informally practices...vis-à-vis a ruling class.

Habermas further refined his ideas on the public sphere in what he calls “formal pragmatics.” Formal pragmatics allows the identification and explication of normative conditions of argumentation presupposed by participants engaged in communicative interaction.<sup>3</sup> Formal pragmatics aims to unearth the general structures of action and understanding that are intuitively drawn upon in everyday communicative practice.<sup>4</sup> Formal pragmatics are “formal” in the sense of attempting to

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1 A Honneth “The Dialectics of Rationalisation: An Interview with Jurgen Habermas” 49 *Telos* 4, cited in M Pusey *Jurgen Habermas*, (Tavistock, London, 1987 at 58.

2 Jurgen Habermas “The Public Sphere: An Encyclopedia Article.” (1974) 1(3) *New German Critique*, 49.

3 Lincoln Dahlberg “The Habermasian Public Sphere: Taking Difference Seriously?” (2005) 31(2) *Theory and Society* 111 at 112.

4 *Ibid*, at 131.

reconstruct the conditions of possibility of communicative action,<sup>5</sup> and it is “pragmatic” to the extent that it focuses on the *use* of language and hence, on speech acts or utterances.<sup>6</sup> The conditions of formal pragmatics include: thematization and reasoned critique of problematic validity claims, reflexivity, ideal role taking (impartiality and respectful listening), sincerity, formal inclusion, discursive equality, and autonomy from state and corporate interests.<sup>7</sup>

It is clear that Habermas is trying to envisage, through the public sphere, the ideal conditions under which discussion, debate and decision-making can occur in a democratic society. This concept of the public sphere has been criticised for being overly rational, and therefore negating aesthetic forms of communication.<sup>8</sup> These aesthetic modes of communication include rhetoric, myth, metaphor, poetry, theatre and ceremony.<sup>9</sup> This privileging of “rational” discourse is seen as marginalising the voices of women and non-Western persons.<sup>10</sup> As one writer points out, women and non-Western people employ aesthetic styles of speaking; their speech is more embodied, more valuing of emotion, includes more use of figurative language, changes in tone and voice, and hand gestures.<sup>11</sup> According to this critique, the only way for these marginalised voices to be heard in the public sphere is by adopting the rational, critical style of discourse used by the privileged mode of communication.<sup>12</sup>

Defenders of the Habermasian public sphere argue that the above critique is a somewhat narrow interpretation of the public sphere. As Dahlberg points out, the concepts that are central to the public sphere and that are seen by its critics as exclusionary – those of reflexivity, impartiality and the reasoned contestation of validity claims – are not only complemented by requirements that embrace difference (inclusion, equality, mutual respect), but in themselves do not exclude

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5 Ibid.

6 Maeve Cooke *Language and Reason: A Study of Habermas's Pragmatics*. (Cambridge; MIT Press, 1994) at 3.

7 Dahlberg, above n 3, 112; Lincoln Dahlberg, “The Habermasian Public Sphere: A Specification of the Idealized Conditions of Democratic Communication.” (2004) 10(2) *Studies in Social and Political Theory* 3; Jurgen Habermas *Theory of Communicative Action, Vol I, Reason and the Rationalization of Society* T McCarthy (trans) (Beacon Press, Boston, 1984); Jurgen Habermas *Moral Consciousness and Communicative Action* C Lenhardt and SN Weber (trans) (MIT Press, Cambridge, 1990); Jurgen Habermas *Between Facts and Norms* (Polity Press, Oxford, 1996); Jurgen Habermas “From Kant’s “Ideas” of Pure Reason to the “Idolizing” Presuppositions of Communicative Action: Reflections on the Detranscendentalized “Use of Reason” in W Rheg & J Bohman (eds) *Pluralism and Pragmatic Turn: The Transformation of Critical Theory* (MIT Press, Cambridge, 2001).

8 Jodi Dean “Civil Society: Beyond the Public Sphere” in D Rasmussen (ed) *The Handbook of Critical Theory*. (Blackwell, Oxford, 1996); Jane Flax “Is Enlightenment Emancipatory? A Feminist Reading of ‘What is Enlightenment’” in F Barker, P Hulme and M Iversen (eds) *Postmodernism and the Re-reading of Modernity* (Manchester University Press, Manchester, 1992); C Mouffe “Democracy, Power, and the ‘Political’” in Seyla Beuhabib (ed) *Democracy and Difference* (Princeton University Press, Princeton, NJ, 1996).

9 Dahlgren, above, n 3; Flax, above n 8, 246; Jane Mansbridge “Self-interest and Public Transformation” in G Marcus and RL Hanson (eds) *Reconsidering the Democratic Public*. (Pennsylvania State University Press, University Park, PA, 1993) at 99; Iris Young, “Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory” in S Beuhabib S and D Cornell (eds) *Feminism as Critique: Essays on the Politics of Gender in Late-Capitalist Societies*. (Polity Press, Cambridge, 1987); Iris Young, *Justice and the Politics of Difference* (Princeton University Press, Princeton, NJ, 1990) at 118; Iris Young *Inclusion and Democracy*. (Oxford University Press, Oxford, 1990) at 39.

10 Dahlberg, above n 3, at 114.

11 Iris Young, “Communication and the Other: Beyond Deliberative Democracy” in Margaret Wilson and Anna Yeatman (eds) *Justice and Identity: Antipodean Practices* (Bridget Williams Books, Wellington, 1995).

12 Eyal Rabinovitch “Gender and the Public Sphere: Alternative Forms of Integration in Nineteenth-Century America” (2001) 19(3) *Sociological Theory* 344.

aesthetic-affective dimensions of interaction.<sup>13</sup> Reflexivity includes aesthetic dimensions such as intuition and imagination, which draws on feeling.<sup>14</sup> Similarly, impartiality indicates an ethic of fairness, as opposed to non-empathetic, disembodied judgement.<sup>15</sup> Impartiality also demands that participants put themselves in the position of the “concrete other”, and assess the situation from their point of view.<sup>16</sup> To take the position of the “concrete other” is an attempt to make judgement *more* impartial and is not bereft of feeling.<sup>17</sup>

An example of an aesthetic-affective mode of communication participating in, and indeed enhancing, validity claims in the Habermasian public sphere, is storytelling. Storytelling contributes to communicative rationality in several ways. Storytelling enhances the understanding among different members of a polity with very different experiences or assumptions about what is important;<sup>18</sup> it helps to make claims visible as significant concerns for public debate where they may not be visible due to a particular hegemony in the discursive order about what is important;<sup>19</sup> it can give an account of why a particular issue constitutes an injustice needing public attention;<sup>20</sup> and in regards to this contribute to a shared language that allows a previously un-named injustice to be spoken.<sup>21</sup>

The goal of formal pragmatics in the public sphere is communication and decision making that is both moral and democratic. When people seek to establish understanding and consensus, in conditions where power is kept in check, moral communication can occur.<sup>22</sup> Part of what gives communicative rationality its legitimacy is that it involves negotiation between equally entitled participants who can agree on a course of action, which includes a process of public participation, and that the law is a medium through which this can be done.<sup>23</sup> The references here to keeping power in check and equally entitled participation are important, as they imply that Habermas is attempting to address power imbalances that may distort communication and consensus.

The ideas of free and equal participation, and discursive deliberation and decision-making, may sound utopian. However, this view fails to take into account that these concepts are “immanent”. Immanent here means that these concepts are real presuppositions and assumptions made by actual persons engaged in everyday social and political life.<sup>24</sup> Habermas does concede that power imbalances can occur. Non-democratic subsystems such as those driven by money, bureau-

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13 Dahlberg, above n 3, at 116.

14 Scott Lash “Reflexivity and its Doubles: Structures, Aesthetics, Community.” in Ulrich Beck, Anthony Giddens and S Lash (eds) *Reflective Modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Polity Press, Cambridge, 1994).

15 Seyla Benhabib “Towards a Deliberative Model of Democratic Legitimacy” in Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, Princeton, NJ, 1996) at 82.

16 Simone Chambers *Reasonable Democracy: Jurgen Habermas and the Politics of Discourse*. (Cornell University Press, Ithaca, NY, 1996) at 101.

17 Dahlberg, above n 3, at 117.

18 Young, above, n 9, 71.

19 Dahlberg, above n 3, at 118.

20 Ibid.

21 Young, above n 9, at 72.

22 D Hayes and S Houston “Lifeworlds, ‘System’ and Family Group Conference: Habermas’s Contribution to Discourse in Child Protection.” (2007) 37 *British Journal of Social Work* 987 at 988.

23 Jurgen Habermas and William Rehg “Constitutional Democracy: A Paradoxical Union of Contradictory Principles?” (2001) 29(6) *Political Theory* 766 at 772.

24 Robert Shelly “Institutionalising Deliberative Democracy” (2001) 26(1) *Alternative Law Review* 36 at 37.

cracy and power, can influence lifeworlds from outside, and he describes the intrusion of these non-democratic subsystems as being like “colonial masters coming to a tribal society and forcing a process of assimilation on it”.<sup>25</sup> However, it seems that even when non-democratic subsystems are operating, there is still a “push” for communication and understanding that is not controlled by these subsystems. Critiques of democracy go on all the time in news media and the internet, to cite two examples. Such ability (and the assumption of an ability) to critique comes from the belief that such a critique is possible within the practice of democracy. Habermas refers to these critiques as “thorns in the flesh” of social reality.<sup>26</sup> These “thorns in the flesh” can only be ignored at the cost of a terrible festering, which takes the form of social, cultural and psychological pathologies that occur when a political and/or economic crisis is avoided by displacing it onto the lifeworld.<sup>27</sup> This suggests that when there is distorted communication, there must be something wrong with the pattern of social relations in which we are forced to live. This does not exempt us from being responsible for our lives; the point is that systemically distorted communication points back to systemically distorted social structures and so to the effects of power on individual life histories.<sup>28</sup> Lifeworlds are reinterpreted by the powerful. For Habermas, the way to stop this festering is to press these democratic thorns so far and wide into the social reality, that they are able to compete with, and in a specific way govern, the many counter-discursive tendencies that had the better of them.<sup>29</sup>

One area in which these “democratic thorns” have been pressed to such an extent that they have produced debate and changes in public opinion is the area of domestic violence. As Nancy Fraser explains:<sup>30</sup>

...until quite recently, feminists were in the minority in thinking that domestic violence against women was a matter of common concern and thus a legitimate topic of public discourse. The great majority of people considered this issue to be a private matter between what was assumed to be a fairly small number of heterosexual couples (and perhaps the social and legal professionals who were supposed to deal with them). Then, feminists formed a subaltern counterpublic from which we disseminated a view of domestic violence as a widespread systemic feature of male-dominated societies. Eventually after sustained contestation, we succeeded in making it a common concern.

This “counterpublic” that Fraser talks about has added weight because of another aspect of the Habermasian analysis of communication: that of epistemic privilege. Epistemic privilege holds that only the people involved or affected by a particular issue have the lived experience of their own particular situation;<sup>31</sup> and means that only they can make sure all the problems, needs and values that they consider relevant are introduced into the discursive process.<sup>32</sup> Epistemic privilege can therefore have a transformative function, allowing citizens to adopt the perspective of all others, and in doing so subject their own preferences, interests and interpretations to critical examina-

25 Jürgen Habermas “The Theory of Communicative Action” *A Critique of Functionalist Reason* (Polity Press, Cambridge, 1987) Vol 2 at 85.

26 Jürgen Habermas *Postmetaphysical Thinking* (MIT Press, Cambridge, 1992) at 47.

27 Habermas, above n 25, cited in Shelley, above, n 24, at 37.

28 M Pusey *Jürgen Habermas* (Tavistock, London, 1987) at 58.

29 Shelly, above n 24, at 37.

30 Nancy Fraser “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy.” (1990) 25/26 *Social Text* 56 at 71.

31 Sarah Sorial “Habermas, Feminism, and Law: Beyond Equality and Difference?” (2011) 24(1) *Ratio Juris* 25 at 31.

32 Stefan Rummens “Democratic Deliberation as the Open-Ended Construction of Justice.” (2007) 20 *Ratio Juris* 335 at 346.

tion and assessment, enabling citizens to have an enlarged understanding, and perhaps, correct or revise their views.<sup>33</sup> As Habermas states:<sup>34</sup>

...the moral point of view calls for the extension and reversibility of interpretative perspectives so that alternative viewpoints and interest structures and differences in individual self-understandings and world-views are not effaced but are given full play in discourse.

So what, specifically, was the content of the “thorn in the flesh” that feminism wanted to press home about domestic violence? For feminism, domestic violence is not a private matter that goes on behind closed doors, but is a matter to be brought into the public sphere and debated. Domestic violence is not dealt with by changing the character of the perpetrator, or the victim’s response to the violence. For feminism, domestic violence is prevented and changed by the response of public agencies to the violence, to the perpetrator and to the victim.<sup>35</sup> A significant part of this analysis is what has come to be known as the “Duluth Model” of domestic violence. The Duluth Model reflects the paradigm shift away from placing the responsibility for stopping the violence on the victim, and towards how agencies respond, as well as confronting the perpetrator.<sup>36</sup>

A central element of the Duluth Model is the Power and Control Wheel, which highlights the various ways in which domestic violence can occur.<sup>37</sup>

The Duluth Model can be characterised as a gender-based, cognitive-behavioural approach to counselling and/or educating men arrested for domestic violence and mandated by the courts to domestic violence programmes.<sup>38</sup> The use of the term “men” is deliberate. The Duluth Model does use a historical analysis of male privilege which gave men supremacy over women; institutional rules that required female submission; the objectification of women that made male violence acceptable; and the right of men to use violence to punish with impunity.<sup>39</sup> To use the Habermasian term, the Duluth Model presents the lifeworlds of victims of domestic violence as characterised by power and control, and male privilege.

It needs to be said at this juncture that there is some debate about the dynamics involved in domestic violence. Joan Kelly and Michael Johnson state that the kind of domestic violence portrayed by the Duluth Model is only one of several kinds of intimate partner violence.<sup>40</sup> Kelly and Johnson refer to the kind of violence in the Duluth Model as “Coercive Controlling Violence”.<sup>41</sup> The authors then talk about “Violent Resistant”, behaviour which they refer to as an immediate reaction to an assault, often referred to as self-defence.<sup>42</sup> They then talk about what they call the most common form of violence, which is “Situational Couple Violence”, where an argument es-

33 Sorial, above n 31, at 31.

34 Jurgen Habermas *Justification and Application: Remarks on Discursive Ethics* C Cronin (trans.) (MIT Press, Cambridge, MA, 1995) at 58.

35 Ruth Busch and Neville Robertson “I Just Didn’t Know How Far You Could Fight: Contextualising the Bristol Inquiry” (1994) 2 Wai L Rev 41.

36 Domestic Abuse Intervention History” <[www.theduluthmodel.org/batteredwomenhistory.php](http://www.theduluthmodel.org/batteredwomenhistory.php)>.

37 Power and Control Wheel <[www.theduluthmodel.org/pdf/PowerandControl.pdf](http://www.theduluthmodel.org/pdf/PowerandControl.pdf)>.

38 Edward Gondolf “Theoretical and Research Support for the Duluth Model: A Reply to Dutton and Corvo.” (2007) 12 *Aggression and Violent Behaviour* 644 at 645.

39 Michael Paymer and Graham Barnes “Countering Confusion About the Duluth Model” The Battered Women’s Justice Project <[www.bwjp.org](http://www.bwjp.org)>.

40 Joan B Kelly and Michael P Johnson “Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions.” (2008) 46(3) *Family Court Review* 476.

41 *Ibid*, at 481.

42 *Ibid*, at 484.

calates into physical violence;<sup>43</sup> and “Separation Instigated Violence,” where physical acts of violence occur during the end of a relationship when there has been no previous history of violence.<sup>44</sup> There have been other critiques of the Duluth Model’s so called gender-bias that states that it is ideologically driven, rather than based on empirical research.<sup>45</sup>

Dealing with the so-called gender-bias in domestic violence analysis first, there is evidence that the Duluth Model has a sound research footing.<sup>46</sup> On the basis of this evidence, this paper flat out rejects the view that the gender-bias is ideological, but rather that it is based on empirical evidence. In regards to the work of Johnson and Kelly, this paper has two main concerns. The first is that, throughout their analysis, the authors constantly refer to violence as being an automatic reaction to so-called out of control situations, and that couples who inflict Situational Couple Violence have poor management skills. There is research that indicates that, consistent with the Duluth Model, violence against women is not anger based. Prisoners incarcerated for violent crimes showed no difference between their propensity for violence and anger.<sup>47</sup> Anger management programmes do not appear, of themselves, to be effective in curbing violent behaviour in prisoners convicted of violent crimes.<sup>48</sup> Another study concluded that the majority of partner abusive men do not present with anger-related disturbances.<sup>49</sup> The attempt by Johnson and Kelly to relate domestic violence to anger could be a result of an attempt to repackage old psychological theories to explain domestic violence in opposition to analyses that indicate that culture and socialisation shape the way men who batter think and act in intimate relationships. In this regard, attempts have been made to explain violent behaviour in terms of attachment theory.<sup>50</sup> However, these need to be seen in light of the general debate that questions attachment theory.<sup>51</sup> These same cautions need to be given in regards to psychiatric diagnoses for batterers such as “intermittent explosive

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43 Ibid, at 485.

44 Ibid, at 487.

45 Donald G Dutton and Kenneth Corvo “Transforming a Flawed Policy: A call to revive psychology and science in domestic violence research and practice.” (2006) 11 *Aggression and Violent Behaviour* 457.

46 R Bachman “A Comparison of Annual Incidence Rates and Contextual Characteristics of Intimate-partner Violence against Women from the National Crime Victimization Survey (NCVS) and the National Violence Against Women Survey (NVAWS)” (2000) 6 *Violence Against Women* 339; Bureau of Justice Statistics “National Crime Victimization Survey” (Department of Justice, Washington DC, 2004) <[www.ojp.usdoj.gov/bjs/vict.htm#vcvs](http://www.ojp.usdoj.gov/bjs/vict.htm#vcvs)> (accessed 24/05/2011); Patricia Tjaden and Nancy Thoennes “Full Report of Prevalence, Incidence and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey (NCJ 183781). (Department of Justice, National Institute of Justice and Centers for Disease Control and Prevention, Washington DC, 2000); Linda Saltzman “Definitional and Methodological Issues Related to Trans-national Research on Intimate Partner Violence” (2004) 10 *Violence Against Women* 812.

47 Wagdy Loza and Amel Loza-Fanou (1999). “Anger and Prediction of Violent and Non-violent Offenders’ Recidivism” (1999) 14 *Journal of Interpersonal Violence* 1014.

48 Wagdy Loza, and Amel Loza-Fanou “The Fallacy of Reducing Rape and Violent Recidivism by Reducing Anger” (1999) 43 *International Journal of Offender Therapy and Comparative Criminology* 492.

49 B Norlander and C Lehardt “Anger, Hostility, and Male Perpetrators of Intimate Partner Violence: A Meta-analytic Review” (2005) 25 *Clinical Psychology Review* 1119. N Jacobson and others, “Affect, Verbal Content, and Psychophysiology in the Arguments of Couples with a Violent Husband.” (1994) 62 *Journal of Counselling and Clinical Psychology* 982.

50 Donald Dutton *The Abusive Personality: Violence and Control in Intimate Relationships*. (Guilford Press, New York, 1998).

51 R Bolen “Validity of Attachment Theory” (2000) 1 *Trauma Violence Abuse* 128.

disorder”.<sup>52</sup> Whilst there may be some value in psychology of this kind that can benefit both victims and perpetrators, this paper takes the view that the cognitive-behavioural, gender-biased view of violence is still the most significant model both in terms of how violence is perceived, and what interventions should be used.<sup>53</sup> It concurs with Paymer and Barnes, who state that “...we do not see men’s violence against women as stemming from individual pathology, but rather from a socially reinforced sense of entitlement”.<sup>54</sup>

These findings have been borne out in New Zealand. As part of a review of the Waitakere Family Violence Court, victims of domestic violence who went through the Court were interviewed.<sup>55</sup> The researchers found that victims contextualised the violence, describing it as a “... pattern of economic, physical and psychological control and on-going abuse”,<sup>56</sup> as well as stating that the violence “...was an on-going pattern of psychological and social abuses, control strategies and physical assaults”.<sup>57</sup> This review of the Waitakere Family Violence Court, called *Responding Together*, stated very clearly that the responsibility for stopping violence remains with the perpetrators, “...and within social relationships that continue to support violence in the home.”<sup>58</sup> The references here to patterns of behaviour and control strategies, in this paper’s view, clearly indicate a kind of violence that is similar to the “economic abuse”, “emotional abuse”, coercion and threats”, and “intimidation”, parts of the Power and Control Wheel.

This psychologising of violence leads to this paper’s second concern with Johnson and Kelly’s analysis, namely, that it will not deal with the thorn in the flesh that feminism created in regards to domestic violence. From a Habermasian perspective, feminism brought the matter of domestic violence into the public sphere because it was seen as a matter for public concern about societal values and attitudes. Making domestic violence a matter of individual psychology turns this public matter private again. A woman who was part of the “Responding Together” review mentioned above, has a lifeworld full of violence that is part of a societal concern about gender and violence, but Johnson and Kelly’s analysis reinterprets her lifeworld as being a matter of her abusive partner’s psychological issues, or tells her that the issue is about “the relationship,” thereby implicating her in the violence and the responsibility for it.

This negating of the perceptions of victims of domestic violence is a serious issue for two further reasons. The first is that, from a Habermasian point of view, victims of domestic violence have an epistemic privilege when it comes to their experience. The other reason, borne out in

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52 Edward Gondolf “Cautions about Applying Neuroscience in Batterer Interventions” (2008) 43(3) Court Review 178.

53 Edward Gondolf “The Weak Evidence for Batterer Program Alternatives” (2011) 16 Aggression and Violent Behaviour 347.

54 Paymer and Barnes, above n 39, at 7.

55 Mandy Morgan and others *Responding Together: Report Evaluating the Aims of the Waitakere Family Violence Court Protocols* (Ministry of Justice, Wellington, 2008).

56 *Ibid*, at 75.

57 *Ibid*, at 76.

58 *Ibid*, at 121.

research, is that the woman's own perception of danger is the best predictor for future risk of violence.<sup>59</sup>

An important point needs to be made here. Proponents of the Duluth Model who reject a central causal relationship between domestic violence and anger also reject such a relationship between domestic violence and issues such as substance abuse and psychiatric disorders. As Gondolf states, the Duluth Model is not opposed to identifying possible factors that may compound domestic violence. However, services and programmes that deal with these issues should only be used in conjunction with, as opposed to replacing, counselling under the Duluth Model that deals specifically with the power and control dynamics that underpin domestic violence.<sup>60</sup> In a more general sense, attempts to explain domestic violence by saying it is due to "multiple factors" that may not involve power and control, have been unconvincing. Studies have shown that these "multiple factors" are few and their predictive power is weak.<sup>61</sup>

The Duluth Model emphasises power and control. Beliefs among batterers about male privilege are central to understanding domestic violence. Men who batter think that they are "the man of the house...Men should be in charge...and just like children, she needs to be disciplined too".<sup>62</sup>

The foundation of the Duluth Model is as relevant as it has always been. As Paymer and Barnes point out, although it is desirable to change the attitudes of men who batter, the ultimate goal of the Duluth Model is to ensure that victims are safer by having the state intervene to stop the violence and address the power imbalances inherent in relationships where one partner has been systematically dominated and subjugated by another.<sup>63</sup>

From a Habermasian point of view, the legal system has a critical part to play in domestic violence. This is because, for Habermas, the mechanism for achieving the goal of making these democratic thorns cure the festering that could take place, is the law. Modern law relies on the rationality of its binding force,<sup>64</sup> and legitimacy depends on the communicative agreement between those who participate.<sup>65</sup> It is a responsibility of law that, firstly, the communicative conditions are met, and secondly, that its own rules of rationality are met.<sup>66</sup> Systems of rights and principles

59 Neville Robertson and others *Living on the Cutting Edge: Women's Experiences of Protection Orders: Volume 2. What is to be Done? A Critical Analysis of Statutory and Practice Approaches to Domestic Violence* (Ministry of Women's Affairs Mintatanga Mo Nga Wahine, Wellington, 2007); LA Goodman, MA Dutton and MA Bennett "Predicting Repeat Abuse among Arrested Batterers: Use of the Danger Assessment Scale in the Criminal Justice System" (2000) 15(1) *Journal of Interpersonal Violence* 63; AN Weiss, RM Tolman and DG Saunders "Assessing the Risk of Severe Domestic Violence: The Importance of Survivors' Predictions" (2000) 15 *Journal of Interpersonal Violence* 75; Jacquelyn C. Campbell "Helping Women Understand the Risk in Situations of Interpersonal Partner Violence" (2004) 19 *Journal of Interpersonal Violence* 1464.

60 Edward Gondolf "Theoretical and Research Support for the Duluth Model: A Reply to Dutton and Corvo" (2007) 12 *Aggression and Violent Behaviour* 644 at 650.

61 Alex Heckert and Edward Gondolf "Battered Women's Perception of Sanctions on Batterer Program Outcomes" (2004) 19 *Journal of Interpersonal Violence* 778; Alex Heckert and Edward Gondolf "Do Multiple Outcomes and Conditional Factors Improve Prediction of Domestic Violence?" (2005) 20(1) *Violence and Victims* 3.

62 Carolyn Tubbs and Oliver Williams "Shared Parenting after Abuse: Battered Mothers' Perspectives on Parenting After Dissolution of a Relationship" in Jeffrey Edelson and Oliver Williams (eds) *Parenting By Men Who Batter*. (Oxford University Press, New York, 2007) 19 at 32.

63 Paymer and Barnes, above n 39, at 4.

64 Habermas *Between Facts and Norms*, above n 7, at 110.

65 *Ibid*, at 103-104.

66 Shelley, above n 24, at 38.



of the constitutive state accomplish these responsibilities.<sup>67</sup> In this way governmental power and popular sovereignty are intertwined with individual rights in such a way that all governmental power derives from the people.<sup>68</sup>

There have been legal responses to domestic violence in New Zealand that attempt (if we take a Habermasian view) to cure the thorn in the flesh created by domestic violence. One of these was the passing of the Domestic Violence Act 1995. The provisions of the Domestic Violence Act 1995 that refer to psychological abuse, which can take the form of intimidation, harassment, damage to property and threats of violence,<sup>69</sup> and those referring to domestic violence being “a number of acts that form a pattern of behaviour”,<sup>70</sup> both appear, in my view, to support a Duluth Model way of viewing domestic violence.

Another more recent initiative was the establishment of specialist family violence courts in Waitakere and Manukau. The Waitakere and Manukau family violence courts are a judicial initiative operating within the criminal jurisdiction, and follow an international trend towards implementing problem-solving courts for specific social problems.<sup>71</sup> In the case of the Waitakere Family Violence Court, a central role was played by the Waitakere Anti-Violence Essential Services (WAVES), which became a family violence network operation. This emphasis on a collaborative, co-ordinated response to family violence was derived from the Duluth Model.<sup>72</sup> With regards to the Manukau Family Violence Court, the efforts of Judge Russell Johnson and a subsequent working group were responsible for setting up the Manukau Family Violence Courts.<sup>73</sup> Both of these Family Violence Courts have objectives that involve reducing delays in processing cases, increasing safety for victims and holding perpetrators responsible for their actions.<sup>74</sup> The key question this paper would like to ask is: to what extent do the Waitakere and Manukau family violence courts deal with the underlying causes of domestic violence, in light of the discussion regarding Power and Control and the Duluth Model? Or, to put it in a Habermasian context: Do the family violence courts cure the “thorn in the flesh” created by the storytelling and academic discourses around domestic violence?

The short answer, in this writer’s view, is no. According to *Responding Together*, an evaluation of the Waitakere Family Violence Court, there are twelve community-based offender services that the Court refers offenders to.<sup>75</sup> Of these twelve community-based services, four were relationship/counselling services; three were specific alcohol, drug and addiction services; two were services that deal with anger; two were mental health services; and one provided legal advice. The only service that even mentions the word “violence” is the “Living Without Violence Man Alive” service provider. But even here it appears that “violence” is seen in the context of “anger”

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67 Habermas *Between Facts and Norms*, above n 7, at 308.

68 *Ibid.*, at 135.

69 Domestic Violence Act 1995, s 3(2)(c).

70 *Ibid.*, at 3(4)(b).

71 “Establishment of Family Violence Courts in New Zealand” in *The Waitakere and Manukau Family Violence Courts: An Evaluation Summary* (Ministry of Justice, Wellington, 2008) <[www.justice.govt.nz/publications/global-publications/t/the-waitakere-and-manukau-family-violence-courts-an-evaluation-summary-august-2008/2-establishment-of-family-violence-courts-in-new-zealand](http://www.justice.govt.nz/publications/global-publications/t/the-waitakere-and-manukau-family-violence-courts-an-evaluation-summary-august-2008/2-establishment-of-family-violence-courts-in-new-zealand)>.

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

75 Mandy Morgan and others, above n 55, at 54.

when, as has been discussed in this paper, violence and anger are not related. Also, according to the Duluth Model researchers, programmes for mental health, drug and alcohol issues can only be useful alongside programmes that deal directly with the violence. The “relationship/counselling” services wish to put violence into individualistic, therapeutic paradigms that overlook (or indeed, ignore) the societal beliefs that underpin domestic violence. In fact, programmes for offenders that promote “communication skills” and “assertiveness” may in fact produce a better educated batterer.<sup>76</sup> So, although the Waitakere Family Violence Court may espouse to follow the Duluth Model, in this writer’s view the kinds of programmes offered in Waitakere do not appear to have any reference to the Duluth Model in their service delivery.

There are other concerns raised about the Waitakere and Manukau Family Violence Courts that indicate that victims’ needs are not heard and that perpetrators are not taking responsibility for their offending. *Responding Together* reports that victims believe that the only reason the men went to the programmes provided was to get a lighter sentence.<sup>77</sup> Some services associated with the Waitakere Family Violence Court have a “common sense” understanding of violence that ignores the specific understanding of domestic violence that is required.<sup>78</sup> This is in a context of findings in *Responding Together* that indicate that victims saw little positive change as a result of their partners attending a treatment or intervention programme.<sup>79</sup> Victims of domestic violence did not believe that the Waitakere Family Violence Court successfully held offenders accountable to victims for changing their violent behaviour.<sup>80</sup>

Reasons why behaviour is not changed go beyond simply the nature of the programmes that perpetrators are referred to. Often offenders who go to programmes do not complete them.<sup>81</sup> Robertson and colleagues tell of an experienced co-ordinator of one large stopping violence programme who could not recall a single instance in which a man completed a programme.<sup>82</sup> This is not helped by Courts that do not prosecute men who attend a programme for a few sessions and then stop, because “at least they were making an effort.”<sup>83</sup> Further, the introduction of the Waitakere Family Violence Court has had no significant impact on reoffending, as measured by one-year reconvictions.<sup>84</sup>

None of the above concerns give comfort in terms of dealing with the heart of domestic violence: male privilege and societal beliefs. Only when this occurs will the “thorn in the flesh” created by the storytelling and academic discourses around domestic violence, be a real attempt to cure the festering that is created when these issues are ignored.

The point of communicative action, and of creating “thorns in the flesh”, such as, in the writer’s view, those made by domestic violence discourses:<sup>85</sup>

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76 Neville Robertson “Stopping Violence Programmes: Enhancing the Safety of Battered Women or Producing Better Educated Batterers.” (1999) 28 *New Zealand Journal of Psychology* 68.

77 Mandy Morgan and others, above n 55, at 75.

78 *Ibid.*, at 57.

79 *Ibid.*, at xix.

80 *Ibid.*, at xx.

81 Neville Robertson and others, above n 59, at 252-253.

82 *Ibid.*, at 248.

83 *Ibid.*, at 252.

84 Trish Knoggs and others *The Waitakere and Manukau Family Violence Courts: An Evaluation Study* (Ministry of Justice, Wellington, 2008) at 36.

85 Jurgen Habermas, above n 25, at 372.

...is to protect areas of life that are functionally dependent on social integration through values, norms, and consensus formation, to preserve them from falling prey to the systemic imperatives of economic and administrative subsystems growing with dynamics of their own, and to defend them from becoming converted over, through the steering medium of law, to a principle of sociation that is, for them, dysfunctional.

The victims of domestic violence have come a long way. They have brought their lifeworlds into the public sphere; they have created a strong counterpublic that has made domestic violence an issue for everyone; they have a substantial amount of research and academic support; they have highlighted the causes and dynamics that underlie domestic violence; they have created a thorn in the flesh that the law, at first glance, has responded to. But it appears that the gains made by victims of domestic violence need to be protected, and by failing to match up victims' perceptions of domestic violence, as well as the dynamics of domestic violence, with the programmes that espouse to treat offenders, the Family Violence Courts are failing to respond. In this paper's view, the festering will continue unless domestic violence is seen for what it is, and until the legal system, in terms of the programmes offered to perpetrators, responds appropriately. Ever-present in this discussion, in this paper's view, is Habermas, who reminds us about the importance of addressing power imbalances; of a possible reconciliation between expert, empirical evidence and the stories and experiences of those with less power; and the law's role in continuing to press home the thorns in the flesh until the festering stops. It is hoped that this paper is a contribution to such an endeavour.