

Re-framing prosecutorial perceptions of ‘justice’: Towards the goal of ‘thrivership’

‘It was extremely stressful. It was my word against his. It was going to be court. It was going to be a trial. It was going to be an appeal. I couldn’t stand another year of that. It didn’t seem fair on me. It didn’t seem fair on my children.’¹

Introduction

The Crown Prosecution Service (CPS) launched its Domestic Abuse Delivery Programme 2022 – 2023 squarely pronouncing domestic abuse as ‘a crime that will not be tolerated’.² The Programme aims to operationalise the most recent CPS policy statement on domestic abuse and is the latest in a line of CPS initiatives that spotlight the offence as a primary concern for the service.³ The latest policy iteration and accompanying programme vow to ‘increase the volume and quality of domestic abuse prosecutions and improve criminal justice outcomes.’⁴ This central ambition responds to declining numbers of domestic abuse referrals from the police in recent years.⁵ Yet despite being somewhat at the mercy of the number of police referrals, the CPS nonetheless aims to increase the *volume* of prosecutions. This will be done by increasing public confidence in the system which, it is hoped, will encourage more victims to report the abuse in the first instance⁶ and to discourage victim withdrawal thereafter.

The policy is silent on the thorny question of what amounts to ‘justice’ (the presumption is that convictions are tantamount) and why *criminal* justice will improve victim safety. At the same time, it is well documented that survivors who seek redress through the criminal justice process are at best ambivalent about it and, at worst, can find the process destructive.⁷ This chapter interrogates the CPS policy claim that improvements to prosecutions and victim safety will be achieved when ‘justice’ is secured ‘in every possible domestic abuse case’.⁸ It does so by drawing on original empirical research carried out by the author and others. In an endeavour to unpick the CPS logic that striving for convictions is the same as striving for justice - presented in its policy as immutable common sense - this chapter uncovers how the modern liberal democratic state harnesses criminal justice

¹ Jen, survivor, in Antonia Porter, *Prosecuting Domestic Abuse in Neoliberal Times: Amplifying the Survivor’s Voice* (Palgrave Macmillan, 2020) 174.

² Crown Prosecution Service, ‘Domestic Abuse: Foreword by Kate Brown, CPS lead for domestic abuse’ (2022) available at <www.cps.gov.uk/crime-info/domestic-abuse> accessed 1 June 2023

³ For example: the first CPS Domestic Violence policy statement in 1993; the policy restatement in 2005 (alongside service-wide training delivered nationally between 2005 – 2008); Domestic Abuse Guidelines in 2014 (and their subsequent updates).

⁴ Crown Prosecution Service, ‘Domestic abuse: Context and challenges’ (2022) available at <www.cps.gov.uk/domestic-abuse-context-and-challenges> accessed 3 June 2023.

⁵ Though the charge *rate* – following CPS advice - has remained broadly consistent at 70%: Crown Prosecution Service, ‘Domestic Abuse: Policy Statement’ (2022) available at <www.cps.gov.uk/publication/domestic-abuse-policy-statement> accessed 3 June 2023.

⁶ The CPS will also rely on increased partnership working with the police to boost the volume of referrals. Partnership working with the police now includes Chief Crown Prosecutors engaging with Chief Police Constables at local board meetings to encourage improvements to casework quality; joint Operational Improvement Meetings in every CPS area; joint domestic abuse action plans with the police in ‘some areas’; and scrutiny panels that dip into discontinued cases. See Her Majesty’s CPS Inspectorate, ‘The service from the CPS to victims of domestic abuse: A thematic inspection of the handling by the CPS of Domestic Abuse cases in the magistrates’ courts’ (HMCPSI, 2023) 126-7.

⁷ Heather Douglas, ‘Battered Women’s Experience of the Criminal Justice System: Decentring Law’ (2012) *Feminist Legal Studies* 121.

⁸ CPS (n 4).

rationales that rest on 'desert' theory.⁹ Desert theory is foundational to the 'punitive' and 'preventive turns' of contemporary civil society and the chapter reveals how those rationales emerge in the CPS literature.¹⁰ However, if 'justice' is limited to being equated with achieving a criminal conviction against the perpetrator, then important and genuine safety and autonomy enhancing opportunities for the survivor may be lost. It will be argued that the CPS conception of 'justice' is blinkered and narrow and consequently the chapter urges prosecutors to conceive of 'justice' more broadly, including outside of criminal justice paradigms where appropriate.

The chapter begins by tracing the contemporary landscape of CPS domestic abuse policy and CPS culture. It identifies how the term 'justice' has become yoked with the obtaining of convictions due to, inter alia, the CPS use of performance indicators that measure 'successful' prosecutions accordingly. The chapter then examines the prosecutorial role and considers where there might be scope for instrumentalising alternative 'justice' or parallel 'public interest' theorisations as they pertain to domestic abuse. Crucially, the chapter situates this prosecutorial confidence in the criminal law as a means of obtaining 'justice' and 'safety' for victims in the context of the modern (neo)liberal democratic state and the 'punitive' and 'preventive turns'.¹¹ It seeks to uncover the logics that have led to this 'cruel optimism'¹² and probes alternative conceptions of 'justice' that prosecutors might consider for survivors.

It is argued that 'justice', instead, might require taking the victim's perspective; from this positioning, receiving support, validation and having opportunities to assert self-determining agency are vital.¹³ If prosecutors were permitted and supported to be more alive to these alternative measures of 'justice' - which might necessitate signposting women to support outside of the crime complex and discontinuing the criminal case where victims, advocates and police deem it appropriate - then far from failing survivors and the public interest, holistic progress for survivors could be achieved and public confidence in the system augmented.

Taking Domestic Abuse Seriously: The CPS culture

Prosecutors reviewing domestic abuse prosecutions face a notorious challenge; namely that the rates of complainant retraction are high as compared to other offences and that, due to the private nature of the offence, complainant evidence is often decisive. In the absence of a supportive complainant witness, prosecutors must decide whether to terminate the case,¹⁴ pursue a victimless prosecution where other corroborating evidence allows or summons the complainant to come to court against her stated wishes.¹⁵ Yet, taking the decision to discontinue a domestic abuse prosecution as a result of complainant retraction will go against the CPS cultural grain. It may also be

⁹ 'Desert theory' - meaning that the perpetrator receives their 'comeuppance' or punishment, in contrast to, for example, a rehabilitative or restorative response.

¹⁰ See e.g. Henrique Carvalho, *The Preventive Turn in Criminal Law* (OUP, 2017); David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (OUP, 2002).

¹¹ Carvalho (n 10).

¹² Laurent Berlant, *Cruel Optimism* (Duke University Press, 2011).

¹³ Diane Crocker et al, 'Engaging (In) Justice Stories' (2022) CLARI, 28

¹⁴ A Crown Prosecutor has discretion to discontinue a case per s.23 Prosecution of Offences Act 1985 or they may withdraw the charge or 'offer no evidence' in court. In the Crown Court, the prosecutor may apply for the count be left to 'lie' on the indictment, apply for a motion to quash the count or invite the Attorney General to enter *nolle prosequi*.

¹⁵ The court has power to issue a summons per the Serious Organised Crime and Police Act 2005, s.169 wherever it is in the interests of justice to secure the material evidence of the witness at trial. For a fuller appreciation of the options available to prosecutors when a victim retracts see Antonia Porter 'Prosecutorial Discretion in Domestic Abuse Cases: Three Approaches' in (n 1) 6- 10.

in tension with the reality that the CPS bring the prosecution on behalf of the state and the public and not in the interests of any individual victim.¹⁶

It is right that even a cursory evaluation of available CPS domestic abuse policy literature leaves the reader in no doubt that the CPS equates 'justice' with higher conviction rates. Indeed, the success of the 2016 CPS 'Domestic Abuse Best Practice' pilots in London, Nottingham and Yorkshire was cited as being the 10% increase in the conviction rate.¹⁷ Following the pilot, the subsequent 2018 'Best Practice Framework', now rolled out nationally, advocates the ways that prosecutors can best support witnesses through the criminal process thereby reducing witness retraction rates and securing more convictions.

Supporting complainants by advocating for their interests throughout the process targets improvements to what has been called 'procedural justice'.¹⁸ Where there is procedural justice, complainants perceive the procedure to be fair and greater levels of complainant satisfaction are reported which may then correspond with increased public trust in the system.¹⁹ Crucially, when a witness experiences procedural justice, their continued support for the prosecution is more likely which carries the added benefit for the CPS that prosecutions and convictions can be pursued.²⁰ Accordingly, the Framework recommends taking simple steps to support victims to visit and familiarise themselves with the court environment in advance of trial; to ensure defendants and victims are able to use separate entrances to the court house on the day of trial; to facilitate childcare for witnesses where needed; to ensure that Independent Domestic Abuse Advisors are available to advise court lawyers; and to enable witnesses to give evidence in court from behind screens where appropriate.²¹

Yet where such steps to improve procedural justice prove insufficient and the complainant nonetheless withdraws their support for the prosecution, the 2022- 23 CPS Programme reminds prosecutors to 'driv[e] forward evidence-led' [or victimless] prosecutions.²² Evidence-led prosecuting is required in all domestic abuse cases from the outset, meaning that the case should be built robustly so that the victim need not be relied upon at all.²³ At both the pre-charge and review stage, prosecutors are required to outline a strategy for proceeding with an evidence-led prosecution.²⁴ The strategy might include relying on statements from third party witnesses, closed circuit television (CCTV) evidence, police body-worn video footage and 999 recordings.²⁵ It is also possible that a

¹⁶ CPS, 'victims and witnesses care and treatment' available at www.cps.gov.uk/legal-guidance/victims-and-witnesses-care-and-treatment accessed June 12 2023.

¹⁷ CPS, 'Domestic abuse prosecutions supported by new Framework' (2018) available at www.cps.gov.uk/cps/news/domestic-abuse-prosecutions-supported-new-framework accessed 1 June 2023

¹⁸ Tom Tyler, 'Procedural justice, legitimacy, and the effective rule of law' (2003) *Crime and Justice*, 283.

¹⁹ *Ibid*, 283.

²⁰ Porter (n1) 103.

²¹ Complainants of domestic abuse were named as eligible for special measures in January 2023 if the court is satisfied that the quality of their evidence is likely to be diminished by reason of fear or distress; see s.62 Domestic Abuse Act 2021 which inserts ss.4A into s.17 Youth Justice and Criminal Evidence Act 1999.

²² CPS (n 4).

²³ CPS, 'Domestic Abuse Guidelines for Prosecutors' (2022) available at www.cps.gov.uk/legal-guidance/domestic-abuse accessed 10 June 2023. The rationale for preparing an evidence-led prosecution from the outset is that if the prosecution case is evidentially strong overall with or without the complainant, the defendant is less likely to contest the case to trial.

²⁴ Criminal Justice Joint Inspection, 'Evidence led domestic abuse prosecutions' (Crown Copyright, 2020) available at www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2020/01/Joint-Inspection-Evidence-Led-Domestic-Abuse-Jan19-rpt.pdf accessed 5 June 2023.

²⁵ *Barnaby v DPP* [2015] EWHC 232 (Admin)

prosecutor might rely on hearsay provisions to permit them to read the complainant's statement²⁶ or to play the complainant's first account as recorded by the police on their body-worn cameras.²⁷ The CPS also emphasise the importance of 'joint working' with the police and other partners including victims' groups, to 'ensure the effective and efficient delivery of justice' even where the victim is unsupportive.²⁸

However, it is common that the evidence in a domestic abuse case will not provide a realistic prospect of conviction without the complainant themselves attending the trial. In deciding whether or not the complainant should be summonsed to court to give evidence against her wishes (where the complainant's failure to attend court could render her liable to arrest for non-attendance), the prosecutor's decision will be made in conjunction with an assessment of risk.²⁹ Where complainants are unsupportive of the prosecution and their risk is assessed by the police as 'low', prosecutors may be more amenable to case discontinuance. Conversely, where the complainant's risk is assessed as 'high', a prosecutor may be more inclined to proceed regardless.³⁰ An assessment of greater 'risk' might also prompt lawyers to apply for a Restraining Order at the conclusion of matters³¹ to 'reduce the risk of repeat offending'.³² Reasoning like this indicates how the CPS places confidence in the criminal justice system to effect positive outcomes and reductions in risk for the complainant through continued prosecution.

What can be overlooked when a prosecutor's only means of achieving 'justice' is the conviction, is that there can be detrimental safety implications for some survivors if the case is *not* discontinued as requested or if a 'protection order' is imposed; the author's empirical research shows that some will face partner retaliation for continuing to involve the state. For example, Danielle described that continuing to involve the criminal justice system after the initial police call out 'actually makes him worse... he gets let out and then it makes him really violent'.³³ In addition or in the alternative, for some survivors, there are autonomy compromising implications from ongoing prosecution. The prosecution and associated bail conditions could act as an obstacle to the ongoing intimate relationship (and to the financial, emotional or childcare support available from the relationship) or the survivor may perceive that intimate partner coercion is simply being replaced by State coercion

²⁶ For example, s.116(2)e and s.116(4) Criminal Justice Act 2003 might be relied upon in circumstances where the victim is in fear of giving evidence (and special measures would not allay that fear) or s.114(1)d where the court otherwise considers that it would be in the interests of justice to have the statement read as an exception to the hearsay rule.

²⁷ This evidence might be played as an exception to the hearsay rule; s.118(4)a Criminal Justice Act 2003; see also *R v Morgan* [2017] ACD 67(23).

²⁸ Criminal Justice Joint Inspection (n 22) 11

²⁹ There is evidence from the Joint Inspectorate that whilst police officers dealing with domestic abuse cases, more often than not, complete a risk assessment, this is typically provided to the CPS at the point of the charging referral to assist in the charging decision but is often not subsequently updated as the case progresses. Moreover, the quality of the completion of the checklist requires improvement, and the risk assessment is not always provided: see Criminal Justice Joint Inspection (n 24) 1.9

³⁰ Antonia Porter, 'Prosecuting domestic abuse in England and Wales: Crown Prosecution Service 'working practice' and new public managerialism' (2019) 28(4) *Social and Legal Studies* 493, 501.

³¹ Upon conviction under s.360 Sentencing Act 2020 and on acquittal under s.5A of the Protection from Harassment Act 1997.

³² CPS (n4). Additionally, following the Domestic Abuse Act 2021, new Domestic Abuse Prevention Orders (DAPOs) and Notices (DAPNs) will replace Domestic Violence Prevention Orders (DVPOs) and Notices (DVPNs). Prosecutors will be permitted, once Part 3 of the Act comes into force, to apply for DAPOs and DAPNs whereas, hitherto, only the police could apply through the magistrates' court for a DVPO or DVPN.

³³ Antonia Porter (n 1) 183.

thereby undermining her belief in her ability to be self-determining.³⁴ The question about whether ‘justice’ has been achieved for these complainants through tenacious prosecutions becomes live.

Finally, the CPS culture which aims to demonstrate the seriousness with which the offence is considered, is shaped through CPS performance indicators. The CPS measures the success of domestic abuse cases through statistical analysis of its digital files in what they call the ‘Performance Management Framework’.³⁵ The 13 CPS areas are ranked on their performance and in the area of domestic abuse the conviction and discontinuance rates are key.³⁶ Poor domestic abuse conviction rates not only receive service-wide attention (prompting individual case file scrutiny by managers or even service-wide training) but also concerned media attention.³⁷ The rates also receive careful analysis from the Justice Select Committee who holds the service to account on behalf of the taxpayer. The safety or autonomy enhancing effects that might be gained from adhering to the victim’s wishes to discontinue a case are not measured.

Within an organisation where confidence in the criminal legal system is unmistakable, and a conviction for domestic abuse appears to be a *sine qua non*,³⁸ the prosecutorial attachment to measuring the success of these cases in terms of convictions functions as an optimistic bind.³⁹ In this context, ‘optimistic bind’ refers to the service’s attachment to the present state of affairs which carries the expectation that, provided lawyers adhere to the modes of working endorsed by CPS policy, existential improvements will follow. I argue that the cluster of promises implicit in the CPS literature are fantasies of ‘the good life’ and are precisely the type of ‘stuckness’ that Berlant has termed ‘cruel’.⁴⁰ When CPS policy promises that increased convictions will deliver ‘justice’ and safety, the claims demand interrogation and require us to underscore the occasions when the criminal law might not deliver ‘justice’ and ‘safety’ for survivors as promised. By flagging this reality, prosecutors might more readily acknowledge the ways in which the criminal law can represent an obstacle to some survivors’ flourishing and thus open up a space to consider alternative conceptions of what ‘justice’ might mean.

The Prosecutorial Role

This next section explores to what extent there is scope within the prosecutorial role to effect alternatives to the ‘domestic abuse convictions deliver justice’ trope. Prosecutorial decision-making is quasi-judicial. Prosecutors decide whether or not a person is cautioned or charged with an offence, whether a case will be discontinued,⁴¹ whether an application to remand a defendant into custody is made or whether to invite a judge to determine that an offence falls under the most

³⁴ Donna Coker, ‘Crime Control and Feminist Law Reform in Domestic Violence Law’ (2001) 4(2) *British Columbia Law Review* 80.

³⁵ CPS, ‘Key Measures’ available at <www.cps.gov.uk/publication/key-measures> accessed 5 June 2023.

³⁶ *Ibid*

³⁷ Jamie Grearson, ‘Domestic Abuse Conviction Rates Halved since 2015, while Offences Doubled’ *The Guardian* (London, 27 January 2023) <https://www.theguardian.com/society/2023/jan/27/domestic-abuse-charges-in-england-and-wales-halved-since-2015-while-offences-doubled> accessed 5 June 2023

³⁸ His Majesty’s CPS Inspectorate confirm that any prosecution which does not result in a conviction is recorded in CPS data as an ‘unsuccessful outcome’; HMCPSI, ‘The service of the CPS to victims of domestic abuse: A thematic inspection of the handling by the Crown Prosecution Service of domestic abuse cases in the magistrates court’ (2023) 169 available at www.justiceinspectors.gov.uk/hmcpsi/wp-content/uploads/sites/3/2023/04/2023-03-27-Domestic-abuse.pdf accessed 12 June 2023

³⁹ Lauren Berlant, *Cruel Optimism* (Duke University Press, 2011) 1-2.

⁴⁰ *Ibid*.

⁴¹ That prosecutors have these powers is set out in the Prosecution of Offenders Act 1985.

serious category for sentencing purposes.⁴² As such, prosecutors have been called ‘the most powerful officials in the criminal justice system’.⁴³ It is important, therefore, to uncover the guiding principles, which both shape and bind their decision-making so that the manoeuvrability of their discretion can be probed.

Unpicking the role and professional obligations of the Crown Prosecutor receives relatively little academic attention. Prosecutors must turn to primary legislation, the CPS Codes of Practice and CPS policies and Guidelines to understand how they are bound to exercise their discretionary decision-making in domestic abuse cases. In doing so, what is revealed is the space within these doctrinal sources that might permit prosecutors to demonstrate that they take domestic abuse seriously whilst simultaneously justifying a decision not to charge a domestic abuse case or to discontinue proceedings where that would represent ‘justice’ for the unsupportive survivor.

In general terms, the prosecutor’s role carries contradictions and often requires them to wear different hats.⁴⁴ Prosecutors must push to build the police case in the strongest possible terms, yet as the case gathers momentum, it can be difficult to accept the insurmountable weakness of the case that ought to lead to case discontinuance.⁴⁵ They must reconcile an adversarial expectation (that they are in opposition to the defence) whilst simultaneously acting as an independent officer of the court who presents the police case in the public interest. They act for the Crown (the State and the public) whilst presenting the evidence of individual victims against whom the harm has been perpetrated. Such competing professional identities shape and consume prosecutorial praxis. The particular difficulty that prosecutors must reconcile in domestic abuse cases was described by the Court of Appeal in the following terms; ‘To describe “the victim” conceals the truth of these cases, namely that the public are the victim. These cases are prosecuted not just in the interest of the particular person concerned who has been visited with violence, but in the interests of all of us’.⁴⁶ Thus, even where the decision not to proceed may appease and assist the individual victim and their family, the prosecutor must consider the *public* interest. To that end, prosecutors will be mindful of the symbolic and norm shifting potential arising out of committed denunciation of the offence, as discussed further below.⁴⁷

More specifically, the powers of the Crown Prosecutor to institute and have conduct of any criminal offence are set out in the Prosecution of Offenders Act 1985. S.10 of the Act details that the Director of Public Prosecutions shall issue a Code for Crown Prosecutors with the purpose of giving prosecutors guidance on the general principles that should be applied by them when carrying out their role. The 8th and current edition of the Code reminds prosecutors that it is their job ‘to make assessments about whether it is *appropriate* [my emphasis] to present charges for the criminal court to consider’.⁴⁸ There is some limited further assistance within the Code as to when it might be ‘appropriate’ to bring a case; Part 2.5 asserts that it is the *duty* of the prosecutor ‘to bring offenders to justice wherever possible’ - it does not elaborate on what ‘justice’ is (but, again, the inference is that this means bringing the perpetrator to face the court). ‘Wherever possible’ appears to mean

⁴² Prosecutors are expected to refer to the requisite Sentencing Guidelines, available at <www.sentencingcouncil.org.uk> accessed 15 June 2023.

⁴³ Speaking in relation to the US system; Angela Davis, ‘The Prosecution of Black Men’ in Angela Davis (ed) *Policing the Black Man: Arrest, Prosecution and Imprisonment* (Vintage Books, 2018) 178- 9.

⁴⁴ Patricia Hodgson, *The metamorphosis of criminal justice: A comparative account* (Oxford University Press, 2022) 132.

⁴⁵ *Ibid*, 132.

⁴⁶ *R v C* [2007] EWCA Crim 3463, para 13.

⁴⁷ Michelle Madden-Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (Oxford University Press, 2009).

⁴⁸ Crown Prosecution Service, ‘Code for Crown Prosecutors’ (Crown Copyright, 8th edn, 2018) 3, 2.2

where the two-stage test set out in the Code is met; namely that there a realistic prospect of conviction on the evidence and that it is in the public interest to prosecute.⁴⁹ The public interest is narrowly defined as being: where the offence is serious; where the defendant's actions are particularly culpable; where harm was caused to the victim; where the defendant is not too young (or perhaps too old); where the seriousness of the offence impacted a community; or where prosecution costs would be high as compared to the likely sentence. The Code confirms that the only disposal options available to prosecutors include caution (a pre-charge out of court police disposal), charge or discontinuance.

The Code itself provides no appraisal of what 'justice' is but Part 2.7 of the Code reads that, 'Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction'. It seems clear that a distinction is being made here between what might secure 'justice' and the act of obtaining a conviction. Herein, the scope for prosecutorial interpretation that conceives of 'justice' as an alternative to 'conviction'. Finally, the Code reads that in discerning the 'interests of justice', prosecutors must act fairly, objectively and must not be 'motivated by political considerations'.⁵⁰ It is assumed this refers to the potential for prosecutors to come under political pressure to act in particular ways in respect of individual cases, rather than any suggestions that Guidelines and Policies – such as the domestic abuse Guidelines⁵¹ - that may have emerged in a particular political climate can be ignored. Certainly, the Domestic Abuse Guidelines indicate that should complainants no longer be supportive, prosecutors should consider the 'appropriateness' of proceeding with a case bearing in mind the content of the retraction statement, the reasons for withdrawal, the original allegation and the realistic prospect of conviction test.⁵²

The prosecutor is therefore trained (and constrained) to evaluate their options within the narrow confines of the criminal justice paradigm, where 'thinking about justice [is] synonymous with thinking in legal terms'.⁵³ The prosecutor is under no illusions that domestic abuse must be treated with due seriousness and there is, in essence, one tool in their armoury to demonstrate this; namely conviction and sentence. Without a criminal legal system that is fully integrated with alternative out of court community disposals and support networks, then the prosecutor remains stuck. The 'stuckness' of the prosecutorial response to and treatment of domestic abuse - the draw to equating justice with convictions - exemplifies how modern liberal democratic states treat matters of social justice and social imperative. The 'cruel optimism' associated with habituated and constricted ways of thinking and doing are again in evidence.

Using criminal justice as a means of addressing domestic abuse

To have the criminal justice system treat domestic abuse as a non-trivial crime has been a battle hard won by feminist groups.⁵⁴ Whilst the safety implications for abused women from receiving a committed police response in an emergency situation are clear, this section considers the values generally understood to underpin the criminal law that feminists have harnessed in pushing for State responsiveness, whether intentionally or not. In exposing some of the aims and purposes of criminal

⁴⁹ Ibid.

⁵⁰ Ibid 2.7

⁵¹ CPS (n19).

⁵² CPS, 'Domestic Abuse Guidelines for Prosecutors' (2022) available at <www.cps.gov.uk/legal-guidance/domestic-abuse> accessed 10 June 2023

⁵³ Daniel Medwed, *Prosecution Complex: America's race to convict and its impact on the innocent* (New York University Press, 2012) 169

⁵⁴ See, for example, Felicity Kanganas, 'The First Women's Refuge' in Erika Rackley and Rosemary Auchmuty (eds) *Women's Legal Landmarks: Celebrating 100 Years of Women and Law in the UK and Ireland* (Hart, 2019); Rebecca Emmerson Dobash and Russel Dobash, *Women, Violence and Social Change* (Routledge 1992).

law generally, we expose some of the reasons why the neoliberal political environment of recent decades may have been particularly amenable to invoking the criminal law as a primary means of tackling violence against women and girls.⁵⁵ Further, in considering the political theory that has embraced the approach, we gain a better understanding of the type of 'justice' the prosecutor is expected to deliver in these cases.

One's right to enjoy individual autonomy is 'one of the fundamental concepts in the justification of criminal laws'.⁵⁶ Whilst there is no single agreed conception of 'autonomy', when people are self-determining and making authentic and informed decisions about how to live their lives they might be considered to be living autonomously.⁵⁷ The right to self (autos) rule (nomos) - provided an individual does not harm the interests of others⁵⁸ - combined with responsibilising discourse concerning citizen behaviour drives the (neo)liberal state's impulse to criminalise behaviours. Thus, logics about the individual's right to exercise agency coupled with the civic duty to act responsibly, means that wilful violations of the law that compromise someone's autonomy *require* (proportionate) State punishment for the wrong committed. Though this 'penal equation' (crime, plus responsibility, equals punishment)⁵⁹ offers some preventive promise through deterrence and the perpetrator's fear of punishment, its key foundation, says Carvalho, is punitive.⁶⁰ Thus even though 'criminal law has a role in the maintenance of social order' the (neo)liberal reading of the criminal law gives primacy to censuring past wrong-doing.⁶¹

The draw to criminalisation and the demonstrative 'punitive turn' in criminal justice premised on (neo)liberal attachments to individual autonomy and responsibility is well known.⁶² Karstedt and others have also suggested that the turn is linked not only to a politicisation of the law and legal policy but also to a 're-emotionalisation' of it.⁶³ Pratt, too, has observed that the public's emotions have penetrated penal practice and notes that, as a result, criminal justice agencies, such as the CPS, bow to public pressure to exact penal toughness in what has been called penal populism.⁶⁴ As a result, criminal justice intervention may be less concerned with repairing the victim's losses and suffering than with expressive justice and meting out punishment. As a consequence, Walgrave asserts that justice procedures frequently 'conclude to the satisfaction of the professionals concerned who feel that 'justice was done', while the direct stakeholders are left with a feeling of injustice'.⁶⁵

⁵⁵ HM Government, 'Tackling violence against women and girls' strategy' (2021) HMSO available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033934/Tackling_Violence_Against_Women_and_Girls_Strategy_-_July_2021.pdf> accessed 15 June 2023; See for example Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence* (Duke University Press 2008).

⁵⁶ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (OUP, 2013) 23.

⁵⁷ Gerald Dworkin, 'The concept of autonomy' (1981) 12 *Grazer philosophische studien*, 203.

⁵⁸ John Stuart Mill, *On Liberty* (Penguin, 2010).

⁵⁹ Alan Norrie, *Law and the Beautiful Soul* (Glasshouse 2005) 73.

⁶⁰ Henrique Carvalho, *The Preventive Turn in Criminal Law* (OUP, 2017) 6.

⁶¹ *Ibid* 5; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014) 96.

⁶² David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (OUP, 2002).

⁶³ Susan Karstedt, 'Handle with Care: Emotions, Crime and Justice' in Susan Karstedt, Ian Loader and Heather Strang (eds) *Emotions, Crime and Justice* (Hart Publishing 2011) 1-22.

⁶⁴ Jonathan Pratt, 'Penal populism: The end of reason' (2017) 13 *Nova Criminis* 71, 84; Jonathan Pratt, 'Towards the 'decivilization' of punishment?' (1998) 7(4) *Social and Legal Studies* 487.

⁶⁵ Lode Walgrave, 'Emotions, Crime and Justice' (2013) 13(1) *Criminology and Criminal Justice*, 120.

In addition to the ‘penal turn’ which is concerned with securing punishment for those who offend, penal populist logics have been associated with the ‘preventive turn’.⁶⁶ Here, the criminal law and its sanctions are deployed as the preferred tool to reduce the risk of *future* harms. The precautionary and pre-emptive role the law plays, relies on punitive deterrence and retribution to deter perpetrators. ‘Delivering justice’ by the State on behalf of the victim becomes synonymous with providing security and controlling dangerous behaviour⁶⁷ and achieving convictions and incapacitating offenders through punishment, part of the criminal law’s promise to *prevent* criminal behaviour.⁶⁸

It follows that prosecutors are working within an environment which equates achieving domestic abuse convictions with both ‘desert’ and the prevention of future harms. These neoliberal logics, can further be extended to include the criminal law’s role in order maintenance to the extent that the criminal law is considered to be a tool capable of setting and evolving societal norms.⁶⁹ Michelle Madden-Dempsey, for example, has highlighted the prosecutor’s part in denouncing domestic abuse through committed prosecutions so that the moral character of the state can be improved and reconstituted as less patriarchal (thus reducing the acceptability of male violence against women and future crime).⁷⁰ Kahan explains that simply by labelling conduct as ‘illegal’ one’s ‘moral appraisal’ of the behaviour is impacted and where the criminal law and its agents progressively condemn the contested behaviour through incremental and consistent application of the law, then the effect is ‘a wave of condemnation’ which will slowly begin to break the grip of the norm.⁷¹ Similarly, Schneider refers to ‘lawmaking as education’ and the part that legal strategies play in shaping public attitudes and social perceptions.⁷² Auchmuty, too, has acknowledged the power of the law to lead public opinion and disrupt ‘normal’ gender relations.⁷³

It is hopeful promises like these that certain feminists recognised and continue to recognise when endorsing State criminal justice responses to domestic abuse; the criminal law can have condemnatory power and deterrent effect. Moreover, the criminal law’s legitimacy in holding perpetrators to account can validate the survivor’s account and may form a crucial part of their journey to living abuse-free.⁷⁴

There is no doubt that the State has sought to address violence against women and girls through an increased reliance on criminalisation and the penal state.⁷⁵ Indeed, in England and Wales the police

⁶⁶ Henrique Carvalho, *The Preventive Turn in Criminal Law* (OUP, 2017)

⁶⁷ Alan Norrie, ‘Foreword’ in Henrique Carvahlo, *The Preventive Turn in Criminal Law* (Oxford University Press, 2017) vii.

⁶⁸ Lucia Zedner and Andrew Ashworth, ‘The Rise of the Preventive State’ (2019) 2 Annual Review of Criminology 429; Henrique Carvahlo, *The Preventive Turn in Criminal Law* (Oxford University Press, 2017).

⁶⁹ Cass Sunstein, ‘Social Norms and Social Roles’ (1996) Columbia Law Review 903, 909 in which he speaks of a ‘norm cascade’; Dan Kahan, ‘Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem’ (2000) University of Chicago Law Review 607, 613.

⁷⁰ Michelle Madden-Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (Oxford University Press, 2009).

⁷¹ Dan Kahan, ‘Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem’ (2000) University of Chicago Law Review 607, 613.

⁷² Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (Yale University, 2000) 199.

⁷³ Rosemary Auchmuty and Erika Rackley, *Women’s Legal Landmarks* (Hart, 2019) 19.

⁷⁴ Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (Yale University, 2000)

⁷⁵ Garland (n62); Nicola Lacey, ‘Punishment, (Neo)Liberalism and Social Democracy’ in Jonathan Simon and Richard Sparks, *The Handbook of Punishment and Society* (Sage 2012) 260.

have a 'presumption to arrest' policy⁷⁶ and the CPS practice 'tenacious' prosecutions to demonstrate their commitment to dealing with domestic abuse as a highest priority.⁷⁷ Yet the increased reliance on criminal law 'as an instrument of enforcement' together with its 'predilection for retributive responses',⁷⁸ has led some feminists to express concern about the unintended consequences of criminalisation.⁷⁹

For some feminists, legislative victories,⁸⁰ greater enforcement of the law, and engagement with the State all signal a 'betrayal of [feminist] emancipatory roots'.⁸¹ This is because reliance on state intervention and criminalisation represents a move away from 'empowerment-oriented services provided by grassroots advocates'.⁸² Feminist networks, campaigns and organisations such as Women's Aid and Refuge have historically responded to the lived experiences of women and supported their needs, whilst simultaneously challenging the structural societal arrangements that incubate gender based abuse.⁸³ As such, when feminists privilege a politics of symbolic recognition (through, inter alia, demanding a responsive criminal law) they do so in favour of a politics of redistribution.⁸⁴ Fraser has argued that, when neoliberal and populist governments co-opt the feminist movement (and offer 'solutions' through criminal justice), they deflect feminists from seeking genuine economic and systemic redistributive resolutions to the gender inequalities that frequently fuel domestic abuse.⁸⁵ Moreover, other structural constraints which intersect with gender – such as sexuality, disability, race and immigration status - to produce multiple inequalities and vulnerabilities for women go left untouched.

Second wave feminist legal scholars since the 1970s have challenged law's claim to neutrality, genderlessness and the notion that everyone comes equally before the law. They observed the law's inherent masculinity through an examination of the legal subject.⁸⁶ If, for example, abused women assert their right to remain with their abusive partner and to withdraw their support for the prosecution 'the type of autonomy these women seek does not mesh well with the law's traditional

⁷⁶ Home Office, 'Violence Against Women' (Home Office Circular 1986) 1986/69; Home Office, 'Domestic Violence' (Home Office Circular 1990) 1990/60.

⁷⁷ Porter (n1).

⁷⁸ Leigh Goodmark, 'The Unintended Consequences of Domestic Violence Criminalization: Reassessing a Governance Feminist Success Story' in Janet Halley et al. (eds) *Governance Feminism: Notes from the Field* (University of Minnesota Press, 2019) 124.

⁷⁹ Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (University of California Press, 2020); Leigh Goodmark, *Decriminalizing Domestic Violence: A Balanced Policy Approach to Intimate Partner Violence* (University of California Press, 2018); Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch, 'Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence through the Reform of Legal Categories' (2018) 18(1) *Criminology & Criminal Justice*, 115.

⁸⁰ For example, the introduction of a new offence of coercive and controlling behaviour in s.76 Serious Crime Act 2015; the new offence of strangulation or suffocation in s.70 Domestic Abuse Act 2021.

⁸¹ England and Wales does not practice no-drop prosecution policies as seen in many States in the United States but the rate of prosecutions resulting in a conviction is high (76.4% in 2022 per Office of National Statistics 'Domestic abuse and the criminal justice system, England and Wales: November 2022' available at <www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2022> accessed 20 June 2023).

⁸² Leigh Goodmark, 'The Unintended Consequences of Domestic Violence Criminalization: Reassessing a Governance Feminist Success Story' in Janet Halley et al. (eds) *Governance Feminism: Notes from the Field* (University of Minnesota Press, 2019) 124.

⁸³ Rosemary Auchmuty and Erika Rackley, *Women's Legal Landmarks* (Hart, 2019) 18-19.

⁸⁴ Nancy Fraser, 'Feminism, Capitalism, and the Cunning of History' (2012) HAL 2- 4.

⁸⁵ Ibid.

⁸⁶ Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal legalism' in Vanessa Munro and Margaret Davies, *The Ashgate Companion to Feminist Legal Theory* (Ashgate 2013) 13.

view of the concept which is an all-or-nothing [non-relational] thing, developed in the public realm, where men are expected to relate to each other at a physical and emotional distance'.⁸⁷ In failing to meet the law's conception of its atomistic, self-determining and logically rationalising subject, women, not law became the object of criticism.⁸⁸

In the United States, whilst acknowledging the myriad ways that criminalising violence against women has benefited some women, Goodmark and Gruber have drawn attention to the increased risks that criminalisation brings for many others. They point to the increased rates of arrest, prosecution, conviction and incarceration for *survivors* who engage the State.⁸⁹ Those not conforming to the 'ideal victim' are particularly in danger; migrant women, the economically disadvantaged, women of colour and women who fight back in defence are especially likely to be caught as suspects in the criminal matrix. Moreover, the American experience is that *men* of colour are especially susceptible to incarceration and Gruber points out the damaging impacts that their intimate partners and families can experience when men are incarcerated.⁹⁰ Elsewhere, Walklate and Fitzgibbon have suggested that only 'blameless victims' can benefit from the powerful effects of neoliberal discourse surrounding the responsible and governable subject.⁹¹

As a result, increasingly, not only are feminists expressing concerns about whether 'more law is the answer',⁹² more are demanding abolition of the penal state altogether; 'we will never incarcerate our way to gender equality and nonviolence'.⁹³ For these feminists, reforming the prosecutorial response – tweaking the Domestic Abuse Guidelines or conceiving of alternative conceptions of 'justice' for prosecutors as this next section does - will always be insufficient. Indeed, for abolitionists, work that endeavours to remedy the defects in the criminal response may simply invisibilise the draw to carcerality; moreover, the very system that is accepted as flawed is the very system that is re-energised with hope for ameliorations. For abolitionists, rejection of the penal apparatus offers prefigurative promise and should thus be sought even when the alternative holistic, community-based or restorative support is yet to be envisaged.⁹⁴ Whilst recognising the abolitionist appeal, this chapter does not pursue these conceptual re-imaginings. Instead, it proceeds by excavating the 'justice' imagined by survivors working with the existing system and aims to unbind prosecutors from the draw of prosecuting to finality 'wherever possible'.

What does 'justice' mean for survivors?

I have suggested here that in the context of neoliberal constructions of the autonomous life, the responsible citizen and desert theory, CPS policy that speaks of securing 'justice' where possible

⁸⁷ Ngaire Naffine, 'Sexing the Subject (of Law)' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (OUP 1995) 31.

⁸⁸ See for example; Heather Douglas, 'Battered Women's Experience of the Criminal Justice System: Decentring Law' (2012) *Feminist Legal Studies* 121, 132.

⁸⁹ Leigh Goodmark, *Imperfect Victims: Criminalized Survivors and the Promise of Abolition Feminism* (University of California Press, 2023) 2; Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (University of California Press, 2020);

⁹⁰ Gruber (n83) 1-5; in which she recounts the case of Jamal and Britney.

⁹¹ Sandra Walklate and Kate Fitz-Gibbon, 'Why criminalise coercive control?: The complicity of the criminal law in punishing women through furthering the power of the state' (2021) 10(4) *International journal for crime, justice and social democracy* 1.

⁹² Walklate et al. (n72) caution against the introduction of new coercive control offence for Australia.

⁹³ Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (University of California Press, 2020).

⁹⁴ Leigh Goodmark, speaking at a LEX seminar, 'Professor Leigh Goodmark in discussion with Professor May-Len Skilbrei' on 19 April 2023.

refers to the securing of criminal convictions. I have acknowledged that the ‘justice’ of a conviction could include the holding of the perpetrator to account through justified punishment and protection of the victim from future harm because of the criminal law’s deterrent effects and individual sanctions. However, I argue here that convictions are a narrow, outcome focussed conception of ‘justice’ and, for the CPS - an institution working within the criminal justice system - typically inward-facing. The CPS’ conception of ‘justice’ ignores how survivors perceive ‘justice’ as layered and multi-directional,⁹⁵ how survivors’ ‘justice’ targets shift over time⁹⁶ and how there might be ‘plural grounding[s]’ for justice.⁹⁷ In short, for survivors, ‘justice’ means more than convict and punish.⁹⁸

Survivors of domestic abuse are not a homogenous group. Nor are there even ‘prototypical intersectional subject[s]’.⁹⁹ Differentials in education, social capital, immigration status, class, physical abilities, race and religious identity mean that Survivors’ lives are complex, multi-faceted and messy and the abuse they have experienced myriad.¹⁰⁰ To assume a singular goal or expression of what ‘justice’ means for all of them is puerile. ‘Justice’ is a capacious, fluid and multidimensional concept, and this is particularly so once taking into account the higher rate of criminal justice attrition for women from BME communities as compared to White victims.¹⁰¹ Moreover, Holder’s longitudinal study confirms that victims of violence carry different meanings and associations of justice which ‘unfold and open in context as well as over time’.¹⁰² The author’s own qualitative research has shown that survivors will have multiple legal consciousness positionings, relationships with public authorities and differing justice goals that engage their varied concerns and viewpoints.¹⁰³ In that context, ‘justice’ becomes understood as a social construct where the criminal process ‘may not prove to be a site of refuge or resolution’.¹⁰⁴ Prosecutors should not then assume a single one-size-fits-all, monolithic institutional approach. Participants in Holder’s study expressed that when those in authority recognised their particularity the respect that was conveyed made them feel seen and that they were not “just another one”.¹⁰⁵

The CPS’ limited construction of ‘justice’ ignores the empirical reality that many survivors experience the criminal process in deleterious ways; trial waiting times can be ‘unacceptably lengthy’¹⁰⁶ leaving complainants in ‘legal limbo’,¹⁰⁷ communication with the police can be poor, notice concerning hearing dates can be short, the abusive behaviour of the perpetrator can exacerbate and, ultimately, the conclusion of proceedings simply not worth the price paid.¹⁰⁸ As a result, Crocker et al’s

⁹⁵ Robyn Holder and Kathleen Daly, ‘Sequencing justice: A longitudinal study of justice goals of domestic violence victims’ (2018) 58(4) *The British Journal of Criminology*, 787, 801.

⁹⁶ *Ibid.*

⁹⁷ Amartya Sen, *The Idea of Justice* (Belknap Press of Harvard University Press, 2009) 2.

⁹⁸ Diane Crocker et al, ‘Engaging (In) Justice Stories’ (2022) CLARI, 28.

⁹⁹ Jennifer Nash, ‘Re-thinking Intersectionality’ (2008) 89(1) *Feminist review* 1, 4.

¹⁰⁰ Geetnaji Gangoli, Lis Bates and Marianne Hester, ‘What does justice mean to black and minority ethnic (BME) victims/ survivors of gender-based violence?’ (2020) 46(15) *Journal of Ethnic and Migration Studies* 3119, 3121.

¹⁰¹ *Ibid.*

¹⁰² Robyn Holder, ‘Untangling the meanings of justice: A longitudinal mixed methods study’ (2018) 12(2) *Journal of Mixed Methods Research*, 204, 215.

¹⁰³ Porter (n1) 151-191.

¹⁰⁴ Porter (n 1) 191.

¹⁰⁵ *Ibid.*

¹⁰⁶ Michele Burman and Oona Brooks-Hay, ‘Delays in Trials: The implications for victim-survivors of rape and serious sexual assault’ (2020) *The Scottish Centre for Crime and Justice Research* 7.

¹⁰⁷ Porter (n1) 203.

¹⁰⁸ Heather Douglas, ‘Battered Women’s Experience of the Criminal Justice System: Decentring Law’ (2012) *Feminist Legal Studies* 121, 132.

Engaging (in) justice stories confirm that ‘justice’ for survivors who come into contact with the criminal system may be ‘less related to specific outcomes and more about process’.¹⁰⁹ With that in mind, both the CPS Best Practice Framework, discussed above, and the latest CPS Inspectorate report concerning CPS service to survivors should be commended for taking steps to ameliorate survivor’s experiences of procedural justice.¹¹⁰

Crocker’s *(in)justice stories* identify three central values integral for women seeking ‘justice’. Where women receive support, validation and agency through the process then they are more likely to perceive that ‘justice’ was delivered. ‘Support’ includes the need for both emotional support and having someone advocate your needs through the process. ‘Validation’ describes being believed and is linked to the victim receiving closure, resolution or at least the beginnings of progression through the healing process. Finally, ‘agency’ refers to the complainant having choices and options and being able to exercise control over them.¹¹¹ Accordingly, instead of thinking about achieving ‘justice’ as an outcome for survivors, Crocker et al indicate that we should re-frame the question by thinking about how we promote ‘justice values’ throughout the criminal process. Moreover, her findings also prompt the question about how these values might be attainable without reliance on criminal justice intervention at all.

Herman’s work also explores justice from the survivor’s perspective. It exposes the myth of the vengeful victim and notes that justice goals for survivors are not primarily punitive. Instead, if survivors describe their visions of justice in retributitional terms at all, they express a desire for offenders to be exposed and disgraced¹¹² or at least for the perpetrator to show remorse and admit their wrong doing.¹¹³ Survivors restorative justice ambitions – where, for example, the offender aims to make amends to the victim – do not fit with conventional notions of restorative justice either. Rather, survivors seek restorative approaches to the extent that they want ‘vindication from the community as a rebuke to the offenders’ display of contempt for their rights and dignity’.¹¹⁴ Victims thus consider restoring their honour in the community paramount.¹¹⁵ To that extent, survivors’ vision of ‘justice’ spoke little to a ‘prosecution-oriented agenda of “getting tough on crime”’¹¹⁶ and aligned more with victim rights movements that understand the victim’s wish to be honoured in (and beyond) the procedures of criminal justice.

Whilst criminal justice has potential therefore to publicly hold the defendant to account and to validate the survivor’s experience, the path to ‘justice’ need not require a conviction. The author has argued elsewhere that achieving ‘thrivership’ for survivors should be foremost.¹¹⁷ It follows that in thinking beyond the criminal conviction as a means of achieving ‘justice’, thrivership might be considered synonymous. ‘Thriving’ might be characterised as having moved beyond merely surviving. At a basic level, thriving means that a victim lives in safety, but, more than that, thriving means that survivors have been through the process of recognising the abuse that they were subjected to and have taken steps to prioritise themselves, to build their confidence and to effect

¹⁰⁹ Diane Crocker et al, ‘Engaging (In) Justice Stories’ (2022) CLARI, 28.

¹¹⁰ CPS (n 17) and HMCPSI (n38).

¹¹¹ Ibid.

¹¹² Judith Herman, ‘Justice From the Victim’s Perspective’ (2005) 11(5) *Violence Against Women*, 571, 597.

¹¹³ Katherine Daly and S Curtis-Fawley, ‘Justice for victims of sexual assault: Court or conference?’ in Karen Heimer and Candance Kruttschnitt (eds) *Gender and crime: Patterns of victimization and offending* (New York University Press, 2006) 230.

¹¹⁴ Herman (n99) 597.

¹¹⁵ Ibid, 597.

¹¹⁶ Ibid, 599.

¹¹⁷ Porter (n 1) 209.

healthy relationships with others.¹¹⁸ Domestic abuse support workers have also reported that a survivor's sense of self-determination and control over their life is essential to thrivership.¹¹⁹

The prosecutor might therefore look for opportunities in their decision-making and throughout the court process to support victims to regain a sense of control over their lives in order to afford victims healthy psychological and behavioural functioning and a sense of meaningful purpose. This might translate into facilitating aspects of procedural justice already discussed but it may also require that prosecutors take the harder decision to terminate the legal intervention in accordance with the victim's expressed wishes. Prosecutors need to be particularly mindful of how abusers frequently use the protracted legal process as a means of expanding their repertoire of coercive and controlling behaviours;¹²⁰ in these circumstances, termination of proceedings could therefore represent a release for the victim from this type of psychological abuse, enhance her safety or sense of safety and improve her agency with regards to her own life choices.

Conclusion

One of the paradoxes of neoliberal rhetoric is that discourses about domestic abuse and the need to end gender-based violence can have the effect of expanding *State* violence against women precisely through its invocation and development of an anti-violence rhetoric.¹²¹ Faced with victim recalcitrance, the effect of pursuing evidence-led prosecutions or summoning the victim to come to court against her wishes, is to produce a form of 'gender regulation along with or even instead of gender justice'.¹²² Whilst this chapter recognises that a criminal justice intervention and conviction *can* contribute to survivor safety and quality of life, it has urged prosecutors to re-frame conceptions of achieving 'justice' not simply in terms of measurable outcomes but also in terms of process.¹²³

CPS efforts to improve the victim's experience of the criminal process are commendable. Where the survivor feels supported, validated and has agency, the risk of re-victimisation by the system is reduced and, where survivors experience important *procedural* justice outcomes of the kind the CPS Framework promotes, survivor satisfaction improves. If survivors experience a sense of agency in the process – where their importance in the process is recognised and their views treated respectfully – this may have important healing benefits for them. However, when 'justice' is measured in terms of convictions and satisfaction with the process itself, when a victim expresses their wish to terminate the prosecution, it has been argued here that there is a potential for prosecutors to overlook the 'justice' that might be possible for them outside of the criminal matrix.

The preceding examination of the historical and political contingencies that fuel the CPS professional culture help to explain why prosecutors remain 'stuck' with the cruelly optimistic promise that more convictions will equate to ending intimate partner abuse. Yet the chapter has highlighted how prosecutors should not lose sight of the agency of survivors as they engage, navigate and use the law. For some, invocation of the law is a strategic process of challenge and resistance and the point at which they express their desire for termination of proceedings is the point at which the law has

¹¹⁸ Isobel Heywood et al, 'A qualitative exploration of "thrivership" amongst women who have experienced domestic violence and abuse' (2019) 19 BMS Women's Health 106, 106.

¹¹⁹ Porter (n1) 210.

¹²⁰ Heather Douglas, 'Legal systems abuse and coercive control' (2018) 18(1) Criminology & Criminal Justice 84.

¹²¹ Elizabeth Bernstein and Janet Jakobsen, *Paradoxes of Neoliberalism: Sex, Gender and Possibilities of Justice* (Routledge, 2022) 2.

¹²² Elizabeth Bernstein and Janet Jakobsen, *Paradoxes of Neoliberalism: Sex, Gender and Possibilities of Justice* (Routledge, 2022) 2.

¹²³ Crocker (n 101).

been deployed to meet their needs.¹²⁴ It follows that justice must not be confined to a single set of outcome or performance measurements, justice might include the way that decisions and allocations are arrived at¹²⁵ and, ultimately, whether the survivor has been supported in their journey towards healing and thrivership.

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¹²⁴ Ruth Lewis et al, 'Protection, prevention, rehabilitation or justice? Women's use of the law to challenge domestic violence' (2000) 7(1-3) *International Review of Victimology* 179.

¹²⁵ Holder (n 98) 204.

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