PROSECUTING DOMESTIC ABUSE IN ENGLAND AND WALES: FEMINISM, NEOLIBERALISM AND THE SURVIVOR'S VOICE

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ABSTRACT

The Crown Prosecution Service (CPS) regards domestic abuse offences as 'particularly serious' and prosecutors are told that it will be rare that criminal proceedings will not be in the 'public interest'. But intimate partner abuse has not always enjoyed such prosecutorial commitment. Criminal justice responses in the past tended to reflect norms that sought to preserve the family unit and prosecutorial pursuit was consequently infrequent. Now that prosecution is invariably expected, this thesis is particularly concerned with the situation when a victim expresses her wish for its discontinuance.

Using empirical research with prosecutors, the thesis explores current CPS working practices in these circumstances. It identifies a 'tenacious' CPS 'working practice'[1] in relation to domestic abuse. Seeking to unpick some of the discourses and perspectives that may have contributed to the current commitment to prosecutions, the thesis sets the case study within the context of the women's movement and an era of neoliberalism. It identifies key values, philosophies and ideologies of the two theoretical frameworks - feminism and neoliberalism - that inform and shape the prosecutorial approach.

The thesis proposes a foundation for theoretically informed prosecutorial praxis in the area of domestic abuse by reconceiving the legal subject, based on vulnerability theory, relational autonomy and the capabilities approach. Moreover, through thematic analysis of a sample of interviews with women who have experienced domestic abuse, it considers the consequences of the apparent turn to criminalisation. By uncovering women's varied and evolving legal consciousness as they encounter their abusive relationship, the thesis demonstrates the need for sensitive and nuanced prosecutorial responses on a case-by-case basis (in line with a 'survivor-defined' approach). Thus, the qualitative work identifies occasions when criminal prosecution meets women's needs, falls short or even merits abandonment thereby challenging criminal law as the pre-eminent solution to intimate partner abuse. Finally, by exposing the ways in which criminal prosecutions impact female victims of domestic abuse, the thesis reveals how criminal law and its processes can play a part in gendering subjectivities and limiting women's status.

[1] I refer here to how prosecutors perform their role and decision-making responsibilities, interpreting policy and managing case-loads, from day to day.

LIST OF ABBREVIATIONS

APF	Adaptive Preference Formation
CJS	Criminal Justice System
CND	Campaign for Nuclear Disarmament
CPS	Crown Prosecution Service
DA	Domestic Abuse
DASH	Domestic Abuse Stalking and Harassment
DPP	Director of Public Prosecutions
DV	Domestic Violence
IPA	Intimate Partner Abuse
NPM	New Public Managerialism
ONS	Office for National Statistics
PTSD	Post-Traumatic Stress Disorder
QC	Queen's Counsel
SDT	Self-Determination Theory
TJ	Therapeutic Jurisprudence
The Code	The Code for Prosecutors
UK	United Kingdom
US	United States
VAW	Violence Against Women
VAWG	Violence Against Women and Girls

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INTRODUCTION

Introduction: Motivations and Objectives for the Thesis

As a practising criminal prosecutor, I find intimate partner abuse (IPA) cases discernibly prevalent and the predominance of female victims striking. In fact, last year, according to Crown Prosecution Service (CPS) figures, domestic abuse accounted for nearly one in five CPS prosecutions and women were the victim[2] in 83% of such cases.[3] Having previously been a defence advocate, I joined the CPS in 2007 at a time when new 'domestic violence'[4] policy and guidance,[5] paired with mandatory training across the service was being implemented.[6] It marked the service's hitherto-fore commitment to dealing with domestic abuse 'within a gendered framework'[7] and as a 'particularly serious'[8] crime. Improving the conviction rate and bringing 'more perpetrators to justice'[9] became the organisation's priority.

This thesis has been inspired by my experience of that policy implementation and subsequent delivery of prosecuting intimate partner abuse, particularly at the point a

[2] Use of the term 'victim' in this thesis reflects its usage in the criminal justice system. In no way do I intend to totalise women's experiences or overlook empowered agency of women who have experienced domestic abuse.

[3] Office for National Statistics, 'Domestic Abuse in England and Wales: Year Ending March 2017' (2017) available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2017> accessed 28 January 2018.

[4] Here, I use the term 'domestic violence' and not 'domestic abuse' because this reflects CPS terminology in 2007.

[5] Crown Prosecution Service, 'Policy for Prosecuting Cases of Domestic Violence' (CPS HQ 2005) and Crown Prosecution Service, 'Domestic Violence: Good Practice Guidance' (CPS HQ 2005) available at <http://webarchive.nationalarchives.gov.uk/+/http:/www.crimereduction.homeoffice.gov.uk/domesticviolence/domesticviolence51.pdf> accessed 31 August 2017.

[6] Crown Prosecution Service, 'Evaluation of the national domestic violence training programme 2005-2008' (2008) available at <https://www.cps.gov.uk/publications/equality/evaluation_of_national_domestic_violence_training_programme.html> accessed 29 June 2017.

[7] Crown Prosecution Service, 'A Consultation on the CPS Violence Against Women Strategy and Action Plans- A Response to Consultations' (2012) available at <https://www.cps.gov.uk/publication/consultation-cps-violence-against-women-strategy-and-action-plans-response-consultation> accessed 6 February 2018.

[8] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' available at <https://www.cps.gov.uk/legal-guidance/domestic-abuse-guidelines-prosecutors> accessed 9 February 2018.

[9] This is the message reiterated in Crown Prosecution Service, 'Delivering Justice: Violence Against Women and Girls Report, 10th Edition' (2017) 1 available at <https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2017.pdf> accessed 28 January 2018.

woman withdraws her support for the criminal prosecution. On the one hand I have observed CPS policy and guidance that ostensibly sets out to serve the state's 'self-consciously feminist agendas'[10] and, on the other, execution of the policy which bows to neoliberal stratagems and New Public Managerial (NPM)[11] demands. By probing and excavating narratives and discourses that underpin CPS policy and practice, this thesis considers domestic abuse prosecution in the context of the potentially strained union between 'feminism' and 'neoliberalism'. This I set against the vocalised concerns and exigencies of women.

The structure of this Introduction is as follows: I start by setting out my two research questions. I then introduce the two theoretical frameworks – feminism and neoliberalism – and explain the reasons each were chosen. Then, I present three differing approaches to the prosecution of domestic abuse, noting their respective advantages and disadvantages and enabling us to locate the identified 'working practice'. Next the benefit of a criminal justice response is assessed, followed by discussion of the thesis methodology, contribution to knowledge and argument and chapter outline.

1 Two Guiding Research Questions

Crown Prosecutors are tasked with implementing the 'prosecutive power of the state'.[12] They prosecute on behalf of the 'public' and not for individual victims.[13] The Code for Prosecutors (The Code) sets out the two stage test that must be met before prosecutions are pursued; the first is to consider whether there is a 'realistic prospect of conviction' on the available evidence -the 'evidential test'- the second is to ask whether the public will be best served by bringing the prosecution - the 'public interest test'.[14] Where a victim of domestic abuse is supportive of criminalisation and, evidentially, there is a realistic prospect of conviction, the prosecutor's decision to charge or proceed is straightforward; the victim's

[10] Vanessa Munro, 'Violence Against Women, 'Victimhood' and the (Neo)Liberal State' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013) 234.
[11] What I mean by New Public Managerialism is described in Chapter Four. Succinctly, it describes an ideology usually associated with the private business sector (but found here in the public sector) that strives for systems efficiency and economy, typically overseen by an expanded management structure.
[12] Francis Bennion, 'The New Prosecution Arrangements' (1986) CLR 3- 15, 3.
[13] Crown Prosecution Service, 'The Decision to Charge' available at <https://www.cps.gov.uk/cps-page/decision-charge> accessed 1 March 2018.
[14] Crown Prosecution Service, 'The Code for Prosecutors' (2013) available at <https://www.cps.gov.uk/sites/default/files/documents/publications/code_2013_accessible_english.pdf> accessed 1 March 2018.

wants ostensibly align with the 'public interest' which almost invariably expects domestic abuse to be prosecuted. Indeed, CPS policy confirms that, '[i]t will be rare for the public interest not to be met' in domestic abuse cases.[15]

However, victim retraction and non-attendance at trial represents a significant obstacle to convictions in domestic abuse cases as compared to other types of criminal offence. One third of unsuccessful domestic abuse prosecutions come as a result of victim retraction, non-attendance or due to witnesses turning 'hostile', as compared to 1 in 10 unsuccessful prosecutions generally.[16] The reasons that women request termination of proceedings against their current or former partner are myriad and diverse.[17] They will include both practical and relational considerations that do not apply to other general offences.[18] Prosecutors must therefore regularly confront the sensitive question of how to reconcile CPS 'evidential' and 'public interest' tests with the wishes of the reluctant or unwilling domestic abuse complainant.

Prosecutors can either accede to her request to discontinue proceedings[19] or decide to pursue the prosecution, absent her support. 'Victimless' prosecutions can be achieved where a realistic prospect of conviction exists without requiring the victim to give evidence. This might be feasible if additional corroborative evidence such as police 999 calls, third party testimony, medical evidence of her injuries or police body-worn video footage is available. It might also be possible to make a successful hearsay application to have the complainant's evidence read at trial.[20] However, the opportunity to prosecute intimate partner abuse absent the victim, where other corroborative evidence allows,[21] is an uphill

[15] Domestic abuse, or domestic violence, is defined across government as, 'any incident of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members, regardless of their gender or sexuality' in Crown Prosecution Service (n 8).
[16] Crown Prosecution Service, 'Violence Against Women and Girls Crime Report 2015-16' (CPS 2016) 31. Available at <https://www.cps.gov.uk/sites/default/files/documents/publications/cps_vawg_report_2016.pdf> accessed 17 April 2018.
[17] See for example, Sarah Buel, 'Fifty Obstacles to Leaving, aka, Why Abuse Victims Stay' (1999) 28 Colorado Lawyer 1. Citing reasons victims stay such as finances, stress of legal proceedings, child care, housing and love.
[18] Lisa Goodman and Deborah Epstein, *Listening to Battered Women: A Survivor Centred Approach to Advocacy, Mental Health and Justice* (American Psychological Association 2009) 97.
[19] A Crown Prosecutor has discretion to discontinue a case under s23 Prosecution of Offences Act 1985.
[20] A hearsay application may be made under s116(2)e Criminal Justice Act 2003 if the victim is in fear or under s114(1)d if it is considered 'in the interests of justice' to do so.
[21] The 'realistic prospect of conviction' or 'evidential' test is met when impartial assessment of all admissible evidence concludes that a court would be 'more likely than not to convict the defendant of the charge alleged'. See Crown Prosecution Service, 'The Code for Prosecutors' (n 14).

challenge. So, alternatively, as a 'last resort',[22] prosecutors may request the court issue a summons to secure the victim's attendance at trial against her stated wishes.[23]

My motivating and anecdotal observation was, and remains at the time of writing, that the CPS' commitment to taking domestic abuse 'seriously'[24] is frequently being achieved, where the victim retracts, by habitually or routinely summonsing her to court.

Increased prosecutorial commitment to intimate partner abuse appears to have been triggered by revised policy and guidelines in 2005, and mandatory service wide training between 2005- 8, which I myself undertook. Based on evidence from qualitative primary research with prosecutors in 2017 (as examined in Chapter Four), this thesis finds support for the hypothesis that prosecutors routinely summons. The practice appears to have emerged since 2008 (the date service-wide training concluded). However, the primary research also indicates that the preference for summons may be beginning to wane following further training which was delivered by the service in 2016- 17. This training promoted evidence-led (or victimless) prosecutions where the victim is no longer supportive.[25] Victimless prosecutions are arguably less controversial because the victim is not coerced into court attendance but they are not without implications for women's autonomy. In any event, both strategies describe what I refer to as the 'tenacious' prosecution of domestic abuse and this, I argue, characterises prosecutorial praxis.

Flowing from the observations and findings outlined, the thesis is guided by two motivating research questions. The first is concerned with exploring *how* the CPS 'working practice' of tenacious prosecutions might have emerged, specifically in the context of two key discourses in the modern Violence Against Women (VAW) agenda: 'feminism' and 'neoliberalism'? The second asks what consequences might arise for women from the state's commitment to criminalising the social problem of domestic abuse? The next two sections of this Introduction explain why the two frames – feminism and neoliberalism – are under scrutiny.

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[22] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).

[23] The court has power to issue a summons under Serious Organised Crime and Police Act 2005, s169 where the court deems it is in the interests of justice to secure the material evidence of the witness at trial.

[24] Crown Prosecution Service, 'Policy for Prosecuting Cases of Domestic Violence: 2005' (n 5).

[25] In spring 2017, the CPS introduced four new mandatory domestic abuse e-learning modules. Crown Prosecution Service, 'Crown Prosecution Service Annual Report and Accounts 2016-2017' (2017) available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/628968/CPS_annual_report_2016_17.pdf> accessed 13 March 2018.

2 Why Feminism? The Gendered Nature of Domestic Abuse

The prevalence of intimate partner abuse in England and Wales has remained broadly unchanged since 2009[26] and gender continues to be a significant causal pathway to its commission.[27] Women are the predominant victims of intimate partner abuse with 26% of women and 15% of men having experienced 'some form of domestic abuse' on at least one occasion since the age of 16.[28] The gendered nature of abuse becomes more notably marked when one considers who is most frequently abused.[29] Of those who have experienced four or more incidents of intimate partner abuse, the overwhelming majority are women; 89% compared to only 11% of men.[30] Moreover, not only is men's abuse likely to be more recurrent, it is also likely to be more physically injurious.[31] Even Murray Straus, the controversial 'family violence' sociologist whose work sought to expose the extent of violence perpetrated by women in intimate relationships, concedes that 'because of the greater physical, financial and emotional injury suffered by women, they are the predominant victims'.[32]

It follows that it was feminists who took on the subject of intimate partner abuse and set themselves up as the leading authority on both its causes and solutions. A focus on structural patriarchy[33] in society being at the root of power imbalances within intimate

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[26] Sylvia Walby, Jude Towers and Brian Francis, 'The Decline in the Rate of Domestic Violence has Stopped: Removing the Cap on Repeat Victimisation Reveals More Violence' (2014) Violence and Society 1. Walby et al's report reveals that once the Crime Survey for England and Wales cap of 5 repeat incidents is removed, rates of victimisation have not incrementally reduced as headlined in the ONS report year ending March 2017. Office for National Statistics, 'Domestic Abuse: Findings from the Crime Survey of England and Wales' (2017) available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabusefindingsfromthecrimesurveyforenglandandwales/yearendingmarch2017> accessed 26 February 2018.

[27] Office National Statistics, 'Focus on Violent Crime and Sexual Offences, In England and Wales: Year Ending March 2016' (2016) available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/yearendingmarch2016/> accessed 10 May 2017.

[28] Office for National Statistics (n 26).

[29] Repeat victimisation accounts for 66% of all 'domestic violence' see Alison Walker, John Flatley, Chris Kershaw, and Debbie Moon, 'Crime in England and Wales 2008/09. Volume 1: Findings from the British Crime Survey and police recorded crime' (Home Office 2009).

[30] Sylvia Walby and Jonathan Allen, 'Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey' (Home Office 2004) vii.

[31] Michael Kimmel, '"Gender Symmetry" in Domestic Violence: A Substantive and Methodological Review' (2002) Violence Against Women 1332, 1348.

[32] Murray Straus, 'Yes, Physical Assaults by Women Partners: A Major Social Problem' in Mary Walsh (ed), *Women, Men and Gender: Ongoing Debates* (Yale University Press 1997) 204, 219.

[33] For a fuller discussion of 'patriarchy' as unjustified inequality in both its structural and ideological sense see Chapter One.

relationships dominated the conversation. Houston describes this 'radical' thesis as an understanding of domestic abuse as 'patriarchal force'.[34] CPS policy in the area of violence against women now plainly adopts this 'radical' feminist understanding of the dynamic of abuse where 'violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over … women by men'.[35] The CPS VAW strategy adopts the United Nations position, which references the work of 'radical' feminist Michelle Madden-Dempsey (who later became a CPS expert adviser),[36] to urge prosecutorial pursuit to combat intimate partner abuse as a means of 'characteris[ing] the state as having values that lessen patriarchy'.[37]

Manifest here in the area of domestic abuse is Halley's claim that feminism has come to 'walk the halls of power' by virtue of a breed of 'governance feminist' who has effectively influenced government strategy.[38] 'Governance feminists' combine the ostensibly liberal feminist strategy of targeting state institutions and legal reform to achieve equality with the highly emotive and charged discourse of 'radical' and 'dominance' feminism.[39] This recipe has proved highly influential in the VAW field and, in England and Wales, has largely been achieved through feminist engagement with the frequently deployed mechanism of government consultations with interested parties. This thesis explores how 'radical' feminist discourses frequently deployed by 'governance feminists' have found successive neoliberal governments particularly hospitable to their account and demands. Neoliberal cordiality to the 'radical' feminist discourse advanced by 'governance feminists' may be due, in part, to neoliberalism's commitment to shoring up individual freedoms and its commitment to

[34] Claire Houston, 'How Feminist Theory became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases' (2014) Modern Law Review 217. For a fuller discussion of 'radical' feminism see Chapter One.

[35] United Nations, '15 of the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences: A Critical Review (1994- 2009)' (2009) available at <http://www.ohchr.org/Documents/Issues/Women/15YearReviewofVAWMandate.pdf> cited in Crown Prosecution Service, 'Violence Against Women and Girls Report, 10th Edition, 2016-17' (2017) A1 available at <https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2017_0.pdf> accessed 23 March 2018.

[36] See below for a fuller discussion on Madden-Dempsey's work.

[37] United Nations (n 35) 27.

[38] Janet Halley, Prabha Kotiswaran, Rachel Rebouché and Hila Shamir, *Governance Feminism: An Introduction* (University of Minnesota Press 2018) 31.

[39] 'Radical' and 'dominance' feminisms both describe structural male domination as causational to women's oppression. 'Dominance' feminism, according to Halley, is a branch of 'radical' feminism that melds 'cultural' and 'power' feminism (the latter exemplified by Catherine MacKinnon's work); where male domination reveals itself respectively in 'the false superiority of male values and male *culture,* and in the domination of all things F by all things M *as sexuality.'* In ibid 31- 34.

facilitating 'expressive justice'.[40]

The 'patriarchal force' thesis, however, has been rightly criticised for its 'heavy determinism' and for 'being over-prescriptive in its claims about causes and solutions'.[41] Moreover, the movement's collaboration with the neoliberal state and its 'penal turn' has led to concerns that 'feminism' is no longer in total command of the violence against women agenda.[42] Halley has therefore urged that feminists must 'strive toward an ethic of responsibility in confronting the[ir] punitive [and carceral] ambitions'.[43] Hoyle observes that (radical) feminism's VAW discourse has become an 'ideological straitjacket', marginalising alternative explanations that might recognise perpetrator offending due to individual pathology or psychiatry (including misuse of substances), social structural theories of stress or social learning theories. Moreover, post-modern or 'third-wave' feminists point to the 'patriarchal force' thesis as failing to recognise the non-homogeneity of either the abused or abuser based on, amongst other things, class, race or sexuality.[44]

The danger is that, in a desire to motivate the state into action, a universal female victim has been conceived, displacing intersectional or post-intersectional accounts of what it is to be someone experiencing domestic abuse. This has paved the way, I argue, for feminist theories of domestic abuse as 'patriarchal force' to become interpreted by the state as a need for tenacious and committed criminal justice interventions (where criminalisation carries the symbolic value of condemning male power, dominance and control over women). This thesis contemplates the corollaries for feminism's partnership with a state that may itself be accused of perpetrating coercive practices in the pursuit of protecting women and advancing their freedoms.[45] This next section considers the nature of domestic abuse and the differing ways women and men experience it.

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[40] See for example Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence* (Duke University Press 2008). See Chapter Three for an exploration of what is meant here by 'expressive justice'.

[41] Carolyn Hoyle, 'Feminism, Victimology and Domestic Violence' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Taylor and Frances 2012) 146.

[42] Bumiller (n 40) 2.

[43] Halley (n 38) 31.

[44] Hoyle, 'Feminism, Victimology and Domestic Violence' (n 41) 162.

[45] An accusation Mills makes about the state in the United States in Linda Mills, *Insult to Injury: Rethinking our Responses to Intimate Abuse* (Princeton University Press 2003).

3 (i) Typologies of Domestic Abuse and Gender

Arguably 'motivated by a desire to undermine or dismantle initiatives that administer to female victims [of domestic abuse]',[46] scholars, particularly in the field of men and masculinities, have asserted equivalent rates of men's and women's violence in intimate relationships. Their contention has invariably been based on the 'Conflict Tactics Scale' (CTS), a questionnaire designed by 'family violence scholar', Murray Straus, to assess the issue.[47] His assertions of gender symmetry in domestic abuse prompted sociologist, Michael Johnson, to conduct his own empirical research. His work provides a compelling analysis about the existence of two typologies of domestic violence that explains the discrepancy between those who recognise women as the principal victims versus those asserting gender symmetry.[48]

Johnson suggests that 'family violence' empirical research drew from the general population and overwhelmingly described what he calls 'situational couple violence' (formerly 'common couple violence'). On the other hand, accounts obtained by feminists from refuges, women's groups and crime victimisation studies which highlighted higher rates of male perpetrators, were overwhelmingly describing 'intimate terrorism' (formerly 'patriarchal terrorism').[49]

'Intimate terrorism' is a system of violent behaviours that an intimate partner employs as part of a broader expression of their power and control over the other. The abuse is ongoing and pervasive and victims are likely to resist less and less as time goes on

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[46] Kimmel (n 31) 1332.

[47] Murray Straus, 'Measuring Intrafamily Conflict and Violence: The Conflict Tactics (CT) Scales' (1979) Journal of Marriage and the Family 75. These 'family violence' surveys that indicate gender symmetry, have been roundly criticised for their significant methodological problems: The Scale draws on participant recollections of violence from the preceding 12 months only. The Scale's use of retrospective recollections sees women more likely to recall their own transgressions and minimise those of her partner and does not consider context, such as whether the person was acting defensively. Finally, the Scale does not distinguish between levels of violence deployed- so a slap carries the same weight as a serious wounding. It has been contended that if gender symmetry is to be asserted at all it would be more accurate to suggest it clustered at the very lowest levels of violence (see Rebecca Dobash, Russel Dobash, Kate Cavanagh and Ruth Lewis, 'Separate and Intersecting Realities: A Comparison of Men's and Women's Accounts of Violence Against Women' (1998) 4(4) Violence Against Women 382).

[48] Research asserting gender symmetry includes: Richard Gelles, *Intimate Violence in Families* (3rd edn, Sage 1997); Murray Straus, Richard Gelles and Susan Steinmetz, *Behind Closed Doors: Violence in the American Family* (Bantam 1980); Murray Straus, 'The Conflict Tactics Scales' (1979) 40 Journal of Marriage and the Family 75.

[49] In Johnson's empirical work within a shelter, 66% of the abuse described was 'intimate terrorism' compared to only 11% of abuse in the 'general population'. Michael Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance and Situational Couple Violence* (Northeastern University Press 2008).

and the violence escalates. 'Intimate terrorism' is overwhelmingly (95%) committed by *men* to achieve domination over their *female* partners and Johnson suggests that in such cases, 'patriarchal force' explanations have traction.[50] Impulsive men 'generally accepting of violence' frequently commit the offence where their behaviour is supported by traditionally held attitudes towards women (for example attachment to gender roles) or feelings of hostility towards women generally.[51] Madden-Dempsey's description of 'strong cases' - violence tending to sustain or perpetuate patriarchy - are comparable.[52] 'Intimate terrorism' is also akin to the multiple tactics or strategies of control described in Ellen Pence's Duluth Model that also includes tactics short of physical violence; the use of emotional abuse, financial abuse, isolation, or coercive techniques which are performed within the constant threat of violence.[53]

The second and more common type of intimate partner abuse that Johnson identifies is 'situational couple violence'. Affirming Johnson's contention about the typologies of domestic violence found in feminist versus family violence samples, situational couple violence was found in 86% of Johnson's 'general population' sample but amongst only 26% of women in refuges.[54] 'Situational couple violence' does not include the element of control of one partner over the other. Rather, it is violence that erupts after a particular trigger event, argument or conflict. Situationally provoked violence may transpire to be a one-off event which is never repeated by a remorseful assailant. Or it might repeat and escalate into a chronic problem where violence is resorted to often and with increasing severity (this was the form found by Johnson in refuges). However, even in these more severe manifestations, the violence is not committed in order to reign terror as a pattern of coercive control, rather it is an effect of frustration or anger arising from given circumstances.[55] This sort of abuse tends to de-escalate over time, tends to be reciprocal and is committed, according to Johnson, by men and women approximately equally. This is analogous to Madden-Dempsey's domestic violence in its 'weak sense' which she asserts occurs not as a result of structural inequality (and the corresponding relationship feature of

[50] Michael Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance and Situational Couple Violence* (Northeastern University Press 2008) 32.
[51] Ibid 32.
[52] Michell Madden-Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (OUP 2009).
[53] Melanie Shephard and Ellen Pence, *Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond* (Sage 1999).
[54] Johnson, *A Typology of Domestic Violence* (n 50) 11.
[55] Ibid 20- 21.

power and control).[56]

It is the account of domestic abuse as 'intimate terrorism' that I argue feminists have used effectively to shape and influence government responses to violence and abuse between intimate partners. Clare's Law[57] and the Domestic Violence Prevention Order[58] are illustrative of feminism's influential alliance with the neoliberal state. Moreover, systematic coercive behaviours, including those short of physical violence, have now been reflected in the new coercive control offence (Section 76 Serious Crime Act 2015), and recognition that behaviours intended to obtain power and control need not include violence has resulted in the recent shift in terminology; from 'domestic violence' to 'domestic abuse'.

These typologies are relevant to the thesis because if feminist groups have primarily been describing 'intimate terrorism' when liaising with the CPS, CPS policies and practice will likely reflect this. Indeed, domestic abuse is recognised by the CPS 'as being committed primarily, but not exclusively, by men against women within a pattern of coercion, power or control'.[59] Further evidence that CPS domestic abuse policies are being influenced chiefly by the account of 'intimate terrorism' is visible in the CPS adoption of the United Nations position that describes domestic abuse as,

> 'a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and … violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men'.

When CPS policy describes domestic abuse, it appears to describe the 'patriarchal force' account. However, the 'patriarchal force' account and the 'radical' feminism on which it is

[56] I have not described two further typologies that Johnson identifies in his most recent work. This is because intimate terrorism and situational couple violence are far more commonly encountered. The third typology 'violent resistance' is the situation where one partner reacts violently in response to their partner's offensive action. It can represent a range of responses including instinctive retaliation, intentional retaliation or self-defence. When 'violent resistance' is performed in heterosexual relationships, according to Johnson, it is done in 85% of cases by women. Fourthly, Johnson identifies 'mutual violent control', where both partners in a relationship practice intimate terrorism. This is rarely encountered. See Johnson, *A Typology of Domestic Violence* (n 50) 12.

[57] The Domestic Abuse Disclosure Scheme was introduced in March 2014.

[58] Domestic Violence Protection Orders were introduced in March 2014.

[59] Crown Prosecution Service, 'Violence Against Women and Girls Report 2016-2017' (CPS 2017) available at <https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2017_1.pdf> accessed 27 April 2018.

based, do not describe other various intersecting factors that exist when situational couple violence occurs.

This thesis explores whether an understanding of domestic abuse as 'intimate terrorism' may have helped to drive a commitment to use criminal prosecutions for both their 'intrinsic' (expressive or symbolic denouncement) and 'consequential' (actual behaviour changing) value.[60] The thesis probes whether tenacious criminal prosecutions are being justified as part of the 'radical' feminist endeavour to render society as a whole as less patriarchal by using criminal law to set and evolve norms.[61] If the typologies of domestic abuse are being ignored and a single prosecuting 'working practice' of tenacious prosecutions has emerged, the risk is that dissimilar abuse becomes treated as comparable. This has consequences for women who experience domestic abuse in different ways. By recognising the value of the typologies, the thesis acknowledges post-modern feminist analyses that there is no one archetypal victim, nor indeed offender, requiring a uniform response. This Introduction now explains why the thesis uses neoliberalism as the second lens through which to view the current approach to prosecuting domestic abuse in England and Wales.

3 Why Neoliberalism? The 'Hegemonic Discourse of our Times'

Neoliberalism has been heralded as the 'hegemonic discourse of our times'.[62] Its nostrums and logics configure all areas of life in economic terms. Our vocabularies, habits, principles of justice and practices of rule are all framed in ideology that understands the market as the source of human freedom and where privatisation and profit-making is fundamental.[63] The hollowing out of social democratic state welfarism sees preference for the articulation of collective interests in terms of individualistic responsibility. Responsible citizenship requires individuals to self-regulate their conduct. Where they transgress, moralistic neoliberal rhetoric about individualism, responsibilisation and freedom privileges the criminal law as the primary means of addressing the behaviour. Societal failures that

[60] Discussed in Chapter Four.
[61] Discussed in Chapter Three and Four.
[62] Robert Reiner, *Law and Order: An Honest Citizen's Guide to Crime Control* (Polity 2007) 1-2.
[63] See for example Wendy Brown, *Undoing the Demos* (Zone Books 2015).

may have led to the offending are considered extraneous. Neoliberalism has thus been credited with a 'penal turn' and with the simultaneous retraction of welfare support.[64]

Harvey argues that any popular social movement that advances individual freedoms is liable to absorption by neoliberalism.[65] I argue that neoliberalism's enveloping of the VAW movement[66] is also typical of the way neoliberalism strategically navigates for retention of power, often irrespective of adherence to dogmatic neoliberal orthodoxy. Neoliberal governments gain political advantage through their embrace of feminism; enabling them to effect penal toughness 'in a benevolent feminist guise'.[67] The feminist campaign concerning domestic abuse has therefore served the neoliberal evolution of criminal justice as an apparatus to manage and control offenders. I argue that feminist ideological concepts such as 'patriarchal force' have been swept up in and immersed by neoliberal punitiveness as they serve neoliberalism's regressive techniques of managing risk through surveillance, diagnosis and social control.[68]

Neoliberalism has been shown to be spatially and temporally variable, rarely staying still long enough for its doctrines to be pinned down. Nonetheless, my thesis identifies key neoliberal values and practices as they emerge as 'governing rationality'.[69] If neoliberalism is an 'art of governance'[70] its effects infiltrate multiple strata of the state apparatus. Governance here signals 'an understanding of legal power as highly fragmented and dispersed' where agents of the state, such as the Crown Prosecutor, are complicit in carrying out the tactics of government.[71] Thus, the thesis observes the practical dissemination of neoliberal approaches, markedly via New Public Managerial priorities, within the CPS. To assist in tracing feminist and neoliberal discourses in CPS treatments of domestic abuse, the next section describes three available approaches to prosecution.

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[64] Loic Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press 2009).
[65] David Harvey, *A Brief History of Neoliberalism* (OUP 2005) 41.
[66] Bumiller (n 40).
[67] Elizabeth Bernstein, 'Carceral Politics as Gender Justice? The "Traffic in Women" and Neoliberal Circuits of Crime, Sex and Rights' (2012) 41 Theoretical Society 233, 235.
[68] See also Munro, 'Violence Against Women, 'Victimhood' and the (Neo)Liberal State' (n 10).
[69] Brown (n 63) 30.
[70] Michel Foucault, in Michel Senellart (ed), *The Birth of Biopolitics: Lectures at the College de France 1978-79* (Picador 2004) 131.
[71] Janet Halley, Prabha Kotiswaran, Hila Shamir and Chantal Thomas, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/ Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism (2006) Harvard Journal of Law and Gender 336, 341.

4 Prosecutorial Discretion in Domestic Abuse Cases: Three Approaches

Broadly speaking, prosecuting authorities might take three approaches to domestic abuse cases where the victim is no longer supportive. Firstly, there is discontinuance as requested by the victim, or what has been called 'automatic drop'.[72] This appears to have been the CPS approach prior to 2008[73] when complainant retraction in the context of prosecuting domestic abuse appeared to have 'an almost singular effect; namely, discontinuance'.[74] Secondly, there is pursuance of the prosecution irrespective of the woman's request or whether her personal interests are best met by that course. Nichols has called this 'no-drop' approach to prosecution a 'social change' approach because of its potential to challenge the social structures that permit violence against women.[75] This was the approach operating in CPS practice in 2009 immediately following revised guidelines, policy and mandatory training aimed at addressing the preceding praxis of 'automatic drop'.[76] Or thirdly, prosecutors may weigh up factors to determine whether the woman's safety and/ or sense of autonomy might be best met through either course. This third approach has variously been called a 'victim-informed',[77] 'survivor-defined'[78] or 'victim empowerment'[79] approach. The CPS has never named the approach but current domestic abuse policy most closely advocates prosecutors emulate this 'survivor-defined' way.

5 (i) 'Automatic Drop': Discontinuing Cases on Victim Request

The first approach, routinely acceding to her wishes and dropping the case accordingly, can be advantageous to the extent that it demonstrates that the criminal justice system is responsive to the wishes of the victim. Winick, founder of the therapeutic jurisprudence movement, has argued that 'being heard' in this way is 'vital to an individual's

[72] Lisa Goodman and Deborah Epstein, *Listening to Battered Women: A Survivor-Centered Approach to Advocacy, Mental Health, and Justice* (American Psychological Association 2008).
[73] Antonia Cretney and Gwynn Davis, 'Prosecuting 'Domestic' Assault' (1996) Criminal Law Review 162.
[74] Louise Ellison, 'Prosecuting Domestic Violence without Victim Participation' The Modern Law Review (2002) 834, 834.
[75] Andrea Nichols, 'No-drop Prosecution in Domestic Violence Cases: Survivor-Defined and Social Change Approaches to Victim Advocacy' (2014) 29(11) Journal of Interpersonal Violence 2114.
[76] Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing 2009) 143- 146.
[77] Lauren Cattaneo et al, 'The Victim-informed Prosecution Project: A Quasi-experimental Test of a Collaborative Model for Cases of Intimate Partner Violence' (2009) 15(10) Violence Against Women 1227.
[78] Lisa Goodman, Kristie Thomas, Lauren Bennett Cattaneo, Deborah Heimel, Julie Woulfe and Siu Kwan Chong, 'Survivor-defined Practice in Domestic Violence Work: Measure Development and Preliminary Evidence of Link to Empowerment' (2016) 31(1) Journal of Interpersonal Violence 163.
[79] Carolyn Hoyle and Andrew Sanders, 'Police Response to Domestic Violence: From Victim Choice to Victim Empowerment' (2000) 40(1) British Journal of Criminology 14.

sense of her own locus of control [and] emotional well-being'.[80] She may withdraw from the prosecution because arrest alone achieved cessation of the immediate behaviour as intended or she may have weighed up that the costs of prosecution (breakdown of the family structure, loss of financial support, increased risk of violent retaliation[81]) outweigh the potential benefit of prosecution outcomes (where probation sentences might be ineffective, fines impact the family as a whole or custody would take him away from childcare or earning responsibilities). Having her wishes actioned is likely to instil a sense that the Criminal Justice System (CJS) is not impersonal, impervious or even coercive, rather it is sensitive and respectful to the victim. Moreover, being victim reactive might forge a sense of trust in the victim to call on the CJS in the future in the knowledge that victim preference is recognised.[82]

5 (ii) 'No-Drop' Prosecution: Refusal to Discontinue Cases on Request

Unquestioningly acceding to the victim's request, however, is not without notable shortcomings. Advocates of no-drop prosecutions,[83] often cite the transfer of power to the abuser if victim withdrawal is habitually assented. He may pursue violence, intimidating tactics or 'apologetic manipulations' in an effort to coerce the victim into retracting, knowing that her retraction will have the effect of terminating his prosecution.[84] No-drop prosecution averts the potential for this power transfer to the perpetrator, ensuring that the burden of whether or not to prosecute is taken out of the victim's hands. Additionally, no-drop prosecutions which remove, or largely remove, the prosecutor's exercise of discretion to discontinue the case recognise that, often, victims cannot be relied upon to bring offenders to account; because they retract, minimise, or fail to attend court. Wills reminds us that victim reluctance to cooperate with a prosecution may be because 'many battered women fail to see that criminal intervention can assist in the shared goal of getting

[80] Bruce Winick, 'Applying the Law Therapeutically in Domestic Violence Cases' (2000) 69 UMKC Law Review 33, 64.
[81] For a comprehensive account of the myriad reasons women stay in abusive relationships see Sarah Buel, 'Fifty obstacles to leaving a.k.a., Why Abuse Victims Stay' (1999) 28 Colorado Lawyer 1.
[82] Eve Buzawa and Carl Buzawa, 'Domestic Violence: The Criminal Justice Response' (3rd edn, Sage 2003).
[83] Donna Wills, 'Domestic Violence: The Case for Aggressive Prosecution' (1997) University California Los Angeles Women's Law Journal 173. Evan Stark, 'Mandatory Arrest of Batterers: A Reply to its Critics' (1993) 36(5) American Behavioral Scientist 651. Dennis Saccuzzo, 'How Should Police Respond to Domestic Violence: A Therapeutic Jurisprudence Analysis of Mandatory Arrest' (1998) 39 Santa Clara Law Review 765.
[84] Andrea Nichols, 'No-drop Prosecution in Domestic Violence Cases: Survivor-defined and social change approaches to victim advocacy.' (2014) 29(11) Journal of interpersonal violence 2114.

their abuser to stop the violence'.[85] Requiring criminal intervention therefore seeks to ensure any benefit that the victim might receive from the CJS is facilitated.

5 (iii) Survivor-defined Approach to the Exercise of Prosecutorial Discretion

However, if it is the state's responsibility or aim to keep women safe, no-drop prosecutions appear to contradict the effort. Acknowledging the potential benefits of both approaches, the third strategy recognises that inflexibly pursuing the prosecution has disadvantages in two basic forms; it might either increase the victim's risk of both lethal and non-lethal violence whilst being involved in proceedings[86] (absent protections such as safe housing or defendant remand into custody) or it might cause victims to lose confidence in criminal justice agents' ability to act in their best interests, instilling in them reluctance to call police in an emergency in the future.[87] Particularly in the United States the practice has been shown to work against non-white and poor women bearing in mind the immigration and child custody consequences of involving the state.[88]

Furthermore, the 'survivor-defined' approach recognises that no-drop prosecutions can have the effect of overlooking women's agency. Whilst acknowledging that the woman's decision may not be entirely free because it is formed in coerced circumstances, the third approach understands the decision might still be entirely considered. For that reason, a woman's wishes ought not to be immediately discounted as arising from perpetrator manipulations on the one hand or 'learned helplessness'[89] on the other. The decision may be formed by someone acting with astute awareness or wisely in the circumstances bearing in mind personal, practical or safety factors, particularly if she intends to maintain the relationship. The victim's request and reasons should therefore, ordinarily, form part of the prosecutor's determination, bearing in mind the autonomy enhancing potential of effecting them. This third way or 'victim-informed' approach, which

[85] Wills (n 83) 178.
[86] Linda Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention* (1999) Harvard Law Review 550, 585.
[87] Lauren Catteneo, Lisa Goodman, Deborah Epstein, 'The Victim-Informed Prosecution Project: A Quasi-Experimental Test of a Collaborative Model for Cases of Intimate Partner Violence' (2009) Violence Against Women 1227, 1229-30. Eve Buzawa and Carl Buzawa, 'Domestic Violence: The Criminal Justice Response' (3rd edn, Sage 2003).
[88] Holly Maguigan, 'Wading into Professor Schneider's "Murky Middle Ground" between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence' (2003) Journal of Gender, Social Policy and the Law 427, 433.
[89] Lenore Walker, *The Battered Woman Syndrome* (4th edn, Springer 2016). Ruth Jones, 'Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser' (1999) 88 Geo IJ 605.

takes each offence on a case by case basis, is what the CPS ostensibly adopts in its policy[90] and guidelines.[91] CPS Guidelines for Prosecutors confirm that before deciding whether or not to summons an unsupportive victim, '[f]ull consideration should be given to the specific facts of the case and impact on the complainant's safety and wellbeing'.[92] The extent to which it is deployed in practice is examined in Chapter Four, bearing in mind the influences on prosecutors of both feminist expectations and the present neoliberal climate.

5 Criminal Versus Non-Criminal Justice Responses

The 'survivor-defined' approach sits within Elizabeth Schneider's 'murky middle ground' between acceptance and dismissal of preferring a state criminal justice response to intimate partner abuse.[93] Like this project, Schneider's 'feminist law-making' project, interrogates the widely assumed benefit of a criminal justice response. Whilst acknowledging that criminalisation is likely to be an appropriate strategy in many contexts, 'it is only one of many strategies we ought to be considering'.[94] I share Schneider's reticence in over-relying on criminalisation. As Maguigan urges, until we know the real effect of current practices that emphasise criminal responsiveness,[95] there is value in drawing attention to the pitfalls of engaging the penal state, acknowledging its limitations and the opportunities that may be lost by treating the social problem of domestic abuse primarily as crime.

Such ambivalence towards criminal justice is not unique to violence against women campaigners. The traditional liberal adversarial model of criminal justice can be a cause of dissatisfaction for critical legal scholars generally. Though not writing explicitly as a feminist legal scholar, Norrie, just as Schneider, expresses reticence in embracing the CJS. His unease is associated with the (neoliberal) 'penal equation', a formula which requires that 'crime plus responsibility equals punishment'.[96] Norrie observes that if criminal justice fails to deliver adequately, society appears to call for more of the same as part of the 'law and

[90] Crown Prosecution Service, 'Violence Against Women and Girls' Report' (2017) Available at <http://www.cps.gov.uk/publications/docs/cps-vawg-report-2017.pdf> accessed 1 March 2018.
[91] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).
[92] Ibid.
[93] Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (Yale University Press 2000) in Maguigan, 'Wading into Professor Schneider's "Murky Middle Ground" (n 88) 427- 445.
[94] Schneider, *Battered Women and Feminist Lawmaking* (Yale University Press 2000) 5.
[95] Maguigan, 'Wading into Professor Schneider's "Murky Middle Ground" (n 88) 428.
[96] Alan Norrie, *Law and the Beautiful Soul* (Glasshouse 2005) 75.

order' paradigm. What become neglected are reparative, conciliatory or mediation-based strategies (or relational justice) that might see greater use of diversion or community intervention. Criminal justice is criticised by Norrie as part of society's set of 'stock responses' to social problems where 'justice', 'responsibility' and 'desert'[97] sidle up to regressive-looking notions of revenge and payback,[98] the likes of which are unpalatable to left-leaning critical and feminist legal scholars alike.

Norrie's appraisal will likely be sympathetically received by feminists who express reticence in entrusting the state to end domestic abuse. The first reason for their reticence might be due to the grass-roots nature of the original refuge movement which achieved dynamism precisely because it worked through informal networks without state involvement. In that vein, Martha Fineman has suggested that a renewed era of feminism might begin 'with the realization that mounting fundamental challenges to systems of social control means working outside of the existing institutional structures of the state'.[99] Feminist reticence in relying on criminal justice may, secondly, be to do with a cautious regard some feminists have for the potential of the criminal law to deliver neutral arbitration. For these feminists, calling upon the criminal law supports and legitimates a legal tradition steeped in precisely the sort of social ordering they seek to eradicate. For them, law is not considered gender-free or neutral,[100] law itself might even be characterised as violent or abusive.[101] Thirdly, by treating social problems as crime, domestic abuse campaigners unwittingly participate in the depoliticisation of a social movement, crowding out alternative potentially effective practical responses or conceptual reimaginings that might overhaul the structural status quo to end violence against women.[102]

By contrast, endorsing criminal justice involvement recognises the value of criminal justice's condemnatory power and legitimacy in seeking justice for victims.[103] It also addresses a sense of historic inadequacy for past prosecutorial treatment. Madden-

[97] 'Desert', meaning to receive appropriate and deserved punishment for one's behaviour.
[98] Norrie (n 96) 75.
[99] Martha Fineman, book endorsement at the rear of Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence* (Duke University Pres 2008).
[100] Joanne Conaghan, *Law and Gender* (OUP 2013).
[101] See Linda Mills provocative stance in Linda Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention* (1999) Harvard Law Review 550, 585.
[102] Mimi Kim, 'Challenging the Pursuit of Criminalisation in an Era of Mass Incarceration: The Limitations of the Social Work Response to Domestic Violence in the USA' (2013) 43 British Journal of Social Work 1276.
[103] Schneider, *Battered Women and Feminist Lawmaking* (n 94).

Dempsey is a key proponent of engaging the state through committed prosecution of intimate partner abuse, thereby 'reconstituting a society as less patriarchal through habituated [domestic abuse] prosecutorial action'.[104] She demonstrates confidence in the criminal justice system to create a just society and fends off critique that criminal justice is a 'blunt instrument'.[105] Her confidence in relying on prosecutorial pursuit, in preference to, for example, community restorative justice or community declaratory denouncements is borne from confidence in the ability of legal rules to guide norms and conduct. She therefore urges us to treat criminal prosecution as a viable feminist project to end intimate partner abuse and, indeed, patriarchy generally.[106]

This thesis is an engagement with the criminal law and the criminal process. Its critical approach is not taken to discredit criminal law's moral strength nor to dismiss its potential to set and evolve norms.[107] Rather, my intention is to reflect upon criminal law's confidence in itself to produce superior ameliorative outcomes. By exposing shortcomings where they exist and drawing attention to any limiting discourses, I also seek to develop theoretically informed prosecutorial practice.

Therein lies the shared aims and methods of feminist, socio-legal and critical legal scholarship of the type this thesis emulates; the disruption of the commonly acquiesced imperative of the vertical or hierarchical structure of law in favour of the horizontal or flat.[108] Meaning that, as discussed in the following section about methodology, values of contingency, relationality, non-essentialism, polycentricity and intersubjectivity replace legal positivism's self-confidence and coherently defined, essentialist projection.[109] This thesis thus plays its part in the discursive unsettling of the (neoliberal) penal equation and troubling the notion of law's uncompromisingly high regard for its power to end domestic abuse. Let us now consider the methods used to achieve this.

[104] Madden-Dempsey, *Prosecuting Domestic Violence* (n 52).
[105] Ibid 215.
[106] Ibid 222.
[107] Cass Sunstein, 'Social Norms and Social Roles' (1996) Columbia Law Review 903, 909.
[108] Margaret Davies, 'Feminism and the Flat Theory of Law' (2008) 16(3) Feminist Legal Studies 16(3) 281.
[109] Ibid 288.

6 Methodology

This thesis employs two methodologies: a socio-legal methodology and an empirical methodology.

7 (i) Socio-Legal Research

In the legal positivist account, law claims to be separated from society and is therefore able to provide 'natural' or 'rational' outcomes and determinations. This has been the dominant mode of understanding the nature of law. Socio-legal scholars, however, recognise that legal ideas and practices can be understood as the effect of social, historical, cultural, political or professional consequences and conditions.[110] If criminal prosecutions can be expected when the criminal law has been unequivocally breached, positivists might argue this is reflective of the legitimacy and authority of the law. Socio-legal scholars might also reflect upon, for example, how late modern politics and culture has seen an expansion of criminalisation.[111]

A sociological perspective of law exposes how 'law is produced by society' whilst examining ways in which '"society" is produced by law'.[112] This thesis takes sociology as its method, but does not restrict itself to sociological theory; 'sociology' is an orientation. A socio-legal orientation signals a *transdisciplinary* understanding of law and legal practices that includes, inter alia, psychology, criminology, political economy and history.[113] I use legal consciousness, a tributary of socio-legal scholarship, as a means of analysing my empirical research in Chapter Five. In so doing, the case study in Chapter Five evidences the ways in which 'legality is a social structure actively and constantly produced in what people say and in what they do'.[114] This method signals a disruption in law's professed validity as a 'superior norm'.[115] My use of legal consciousness in Chapter Five particularly assists in answering the second research question (what consequences of the current approach for women?). For, through its process of revealing how people make sense of their experiences of law, Chapter Five shows how law and justice holds or does not hold legitimacy for the people whose lives

[110] Roger Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) Journal of Law and Society 171, 173.
[111] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (OUP 2001).
[112] Cotterrell (n 110) 175.
[113] Ibid 175.
[114] Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998) 223.
[115] Davies, 'Feminism and the Flat Theory of Law' (n 108) 289.

law touches. The method necessarily, therefore, invites normative reflection.

The contention that prosecutorial decision-making is affected by forces external to legal doctrine, statutory offence considerations and available evidence can plainly be made. Perhaps surprisingly however, this contention has little to do with the 'public interest' test contained within the Code for Crown Prosecutors (The Code). For, whilst the requirement that prosecutors consider the 'public interest' might conjure prosecutors reflecting upon public opinion and societal norms, the test in fact remains largely constrained to matters dealing with the gravity of the offence and any aggravating or mitigating features. The 7th and current edition of The Code, published in 2013, indicates that where there is sufficient evidence, prosecution is ordinarily merited 'unless there are public interest factors against tending to outweigh those tending to favour'.[116] The Code outlines the factors that prosecutors must weigh up in the 'public interest'; the seriousness of the offence and the harm caused to the victim; whether the offence was premeditated or demonstrates a pattern of behaviour; whether the offender was in a position of trust or the victim was otherwise vulnerable; and the proportionality of bringing a prosecution bearing in mind the cost of prosecution versus the likely penalty to the suspect. These factors are largely concerned with the seriousness of the offending behaviour in context and the defendant's antecedent offending. They do not invite the prosecutor to consider whether a criminal justice response best meets the needs of the public or society as a whole.

Aside from The Code however, prosecutors also exercise their discretion by consulting specific CPS domestic abuse guidance and policy. It is here that the overlap between public opinion, shifting societal expectations and decisions of legal professionals is plain. CPS policy and guidance is imbued with sociological influence because the CPS openly carries out consultation exercises with interested parties in the formative stages of policy production, prior to publication and as an ongoing process. The CPS must take into account a range of people, business and voluntary bodies affected by the policy and may contact specific groups affected by the policy if appropriate.[117] In the case of domestic abuse policy for example, consultation took place with feminist groups such as the Fawcett Society, Women's Aid, Refuge and the UK Network of Sexwork Projects as well as other non-explicitly feminist groups such London Probation and the British Association of Social

[116] Crown Prosecution Service, 'The Code for Prosecutors' (n 14).
[117] 'CPS Consultation Principles 2015' emailed to the author by CPS Policy Directorate. See Appendix 1.

Workers. Herein lies the most direct way that current public, expert and feminist discourses affect the direction of CPS working practices and also where the value of socio-legal method is patent.

Further evidence that the CPS does not function within a vacuum and must be sensitive to cultural-societal changes is that the Director of Public Prosecutions is accountable to parliament for CPS performance each year when she appears before the Justice Select Committee.[118] Moreover, 'lines of communication' with the academic community were opened by former Director of Public Prosecutions (DPP), Sir David Calvert Smith.[119] In this way, the CPS is again seen to openly interact with public opinion. So, whilst Crown Prosecutors must act on individual cases fairly, independently and objectively in the interests of justice,[120] it would be a foolhardy prosecution service that failed to reflect in policy shifting societal opinions and political priorities lest it lead, ultimately, to undermining the legitimacy of this public service.

This thesis is concerned, therefore, with an examination of the discretionary decision-making of prosecutors in practice not through a closed analysis of the laws[121] or rules and norms[122] set up to guide the prosecutor. Rather, the thesis uses socio-legal analysis to explore the extent to which discourses and practices of both 'feminism' and 'neoliberalism' are visible and play out in domestic abuse prosecutorial 'working practice'.

7 (ii) Qualitative Research and Thematic Analysis

By conducting two qualitative case studies - one exploring prosecutorial decision making (Chapter Four) and the other exploring abused women's legal consciousness (Chapter Five) - the thesis provides a fuller and multi-faceted contemplation of the research questions than a purely theoretical or philosophical analysis.[123] This is the great potential of

[118] The 'independence' of the CPS is discussed more fully in Chapter Three.
[119] Andrew Ashworth, 'Developments in the Public Prosecutor's Office in England and Wales' (2000) European Journal of Crime, Criminal Law and Criminal Justice 257, 261. Calvert-Smith was DPP in 1998- 2003.
[120] Crown Prosecution Service, 'The Code for Prosecutors' (n 14).
[121] For example the Criminal Procedure Rules 2015, Prosecution of Offences Act 1985 or case law concerning judicial review of prosecutorial decision-making.
[122] For example Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8) and Crown Prosecution Service, 'The Code for Prosecutors' (n 14).
[123] Pamela Baxter and Susan Jack, 'Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers' (2008) The Qualitative Report 544, 544.

empirical work. Empirical case studies[124] that use thematic analysis as my work does, offer great advantages in answering the type of 'how' questions my project contemplates.[125]

Having obtained ethical approval from Kent Law School,[126] I conducted a sample of nine semi-structured interviews with prosecutors. The sample was built by writing individually to Crown Prosecutors inviting them to take part, anonymously, in the research. As the project became known locally, prosecutors I had not approached directly volunteered themselves and gave me contact details of other potential interviewees. The sample thus grew from my initial local knowledge of prosecutors, networking and the effect of 'snowballing'. Due to the relatively small scale of the sample and the limited geographical scope, caution must be exercised before suggesting the potential for national generalisability. The value of the sample is not to suggest a definitive state of affairs, rather it is to stimulate and animate institutional and theoretical reflection.

The sample of eleven women analysed in Chapter Five grew after I approached three separate charities working with abused women in South East England. One woman, not accessing such support, approached me to volunteer herself for interview having become aware of the project. Interestingly, I identified that all ten of the women accessing support from the three charities had all experienced 'intimate terrorism'. The woman who approached me directly described 'situational couple violence' albeit violent and repeated. I make the cursory and broad observation that this seems to accord with Johnson's findings about the predominance of 'intimate terrorism' found amongst women accessing support services. As most women interviewed had experienced 'intimate terrorism' and also because the sample was small in scale, again care needs to be exercised when interpreting the data before asserting generalisability.

Both sets of interviewees - women and prosecutors - were drawn from the South East region of England. The reason for this was purely pragmatic, taking into account time and resource constraints allowed for by the project. Interviews typically lasted an hour and

[124] What distinguishes a case study from 'qualitative research' appears to be varied in answer. Many apply the use of the terms synonymously. Given that the defining features of a case study are the 'multiplicity of perspectives which are rooted in a specific context' (Jane Ritchie and Jane Lewis, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage 2004) 52) the description of my project as two distinct yet interrelated 'case studies' seems appropriate.

[125] Robert Yin, *Case Study Research: Design and Methods* (3rd edn, Sage 2003) xiii.

[126] I ensured that all data was collected and stored anonymously in password protected files, that participant consent forms were completed and that participants knew that they could withdraw their support for the project at any time.

were audio recorded and transcripts were prepared for analysis. Transcripts were sent by email for participant comment and/ or amendment. On two occasions I sought clarification with respondents by email. During the thematic analysis, I familiarised myself with the data before coding and identifying themes.[127] Using Nvivo qualitative research software, key themes emerged based on frequency and recurring patterns. Reviewing each key theme allowed me then to refine both the specific theme and consider broader overarching patterns based, again, on frequency and also significance for the participants. In this way, for example, it became clear from the prosecutors, that managerialism was a factor that was often playing an unacknowledged part in prosecutorial decision-making.

Central to the project is the perspective of the women affected. My intention is to 'unsilence' these women and I see the project as part of feminist 'consciousness raising'.[128] By telling their stories, I highlight shared perspectives and oppressions, mindful that the effect of any collective recitation can be criticised as essentialist which is not my objective. By 'asking the woman question'[129] I expose subverted narratives whilst not acquiescing to a pretence of homogeneity. Chapter Five's legal consciousness framing reinforces the *variety* of ways these women 'use and think about law' in their daily lives.[130] Marking a move away from simply extracting women's *attitude* towards the law, legal consciousness enables us to see the variant and contradictory ways women position themselves in relation to the criminal law through their engagement with it, their understanding of it and the way they imagine the law operates.

Both sets of empirical work in this project were guided by the use of separate semi-structured interview schedules.[131] This had the following benefits: schedules acted as a 'topic guide',[132] prompting me to cover the target areas of enquiry but allowing flexibility in terms of sequencing the questions. Referring to a schedule also allowed some latitude to

[127] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology (2006) 3(2) Qualitative Research in psychology 77.
[128] Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish 1998) 19.
[129] Ibid 21.
[130] Rosie Harding, ''Dogs are 'registered', people shouldn't be': Legal Consciousness and Lesbian and Gay Rights (2006) 15(4) Social and Legal Studies 511, 512.
[131] Also referred to as 'guided' or 'focused' interview schedules in Judith Bell, *Doing your Research Project: A Guide for First-time Researchers in Education, Health and Social Science* (4th edn, Open University Press 2006) 161. See Appendix Three for the interview schedule with prosecutors and Appendix Four for the interview schedule with women.
[132] Ibid 161.

explore each topic in depth[133] where responses were felt to be significant.[134] The questions were largely open questions which invited extended or rich[135] responses from the participant, thus permitting the respondent to answer in their own terms not being directed or influenced by me. A further advantage of open questions is that they can invite unexpected answers which may not have been predicted thereby developing the research findings and, in this project, had potential to contribute to the theoretical framework in unanticipated ways. Open questions were particularly useful as 'respondent's levels of knowledge and understanding [were] tapped [and] the salience of issues for respondents [was] also explored'.[136]

Interviews with prosecutors employed, what Roulston has called, a neo-positive[137] approach. A neo-positivist conception of the semi-structured interview technique assumes that the prosecutor being interviewed 'has an inner or authentic self, not necessarily publicly visible, which may be revealed through careful questioning by an attentive and sensitive interviewer who contributes minimally to the talk'.[138] As an interviewer, I endeavoured to adopt a neutral role which minimised the risk of bias and researcher influence. Conversely, adopting Roulston's 'romantic'[139] approach to the interviews with women, I was able to express empathy or interest in what was being said so that 'genuine rapport and trust'[140] could be built between myself and the participant. Playing such an active role in the interviews with women required me to be particularly reflexive about my own involvement in the process.[141] For example, I was mindful that when women spoke to me (as an academic researcher come criminal prosecutor), they may have done so in a way that they hoped might assist me in proposing ameliorations to the system.

As an active researcher, I acknowledge my own theoretical and lived position in relation to the data,[142] particularly as a former employee and current freelance agent of the

[133] Yin posits that a case study can be exploratory, explanatory or descriptive in Robert Yin, *Case Study Research: Design and Methods* (3rd edn Sage 2003) 1.
[134] Alan Bryman, *Social Research Methods* (4th edn, Oxford University Press 2012) 212.
[135] Karl Weick, 'The Generative Properties of Richness' (2007) 50 Academy of Management Journal 14.
[136] Bryman (n 134) 247.
[137] Kathryn Roulston, 'Considering quality in qualitative interviewing' (2010) Qualitative Research 199, 205.
[138] Ibid 204.
[139] Ibid 206. The approach is equated with 'emotionalist' approaches.
[140] Ibid 205.
[141] Ibid 218.
[142] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology (2006) 3(2) Qualitative Research in Psychology 77.

CPS and as a white, middle class, heterosexual woman. Reflexivity is essential as it forefronts not only biases that may guide and motivate, but also draws out what one may be inhibited from seeing.[143] Assumptions, motives and pre-existing hypotheses may not ever be shaken off, but recognising them and making personal experience known might then become an asset for the research.[144] For example, I sensed that prosecutors felt able to speak candidly with me because they assumed that I would understand their perspective. Being aware of my own 'political and intellectual autobiograph[y]'[145] means, therefore, that I acknowledge my role in formulating the interview process and the end product. Despite this, throughout the data gathering process and interpretative analysis, I have endeavoured to apply objective 'art, rigor and creativity' to uncover the 'qualities, meanings and implications of the themes'.[146]

7 The Thesis Contribution

The area of criminal prosecutions and the role of the criminal prosecutor remains a 'relatively under researched' field.[147] The reasons for the comparative lack of scholarly attention in this area stands in contrast to the pivotal role that prosecutors play:

> 'Important boundaries are crossed with the decision to prosecute. Private troubles become public affairs… the mode of law enforcement switches abruptly from private … in which compromise outcomes are… possible … to public adversarial debate in which legal justice is delivered in a binary verdict of guilty or not guilty.'[148]

This thesis therefore contributes to addressing the current paucity of literature that engages with how Crown Prosecutors carry out their effective 'veto on prosecution'.[149] The project assesses CPS working practices in the area of domestic abuse not simply based on official

[143] Diane Watt, 'On Becoming a Qualitative Researcher: The Value of Reflexivity' (2007) 12(1) The Qualitative Report 12(1), 82, 82.
[144] Ibid 94.
[145] Natasha Mauthner and Andrea Doucet, 'Reflections on a Voice-centred Relational Method' in Jane Ribbens and Rosalind Edwards (eds), *Feminist Dilemmas in Qualitative Research: Public Knowledge and Private Lives* (Sage 1998).
[146] Simon Watts, 'User Skills for Qualitative Analysis: Perspective, Interpretation and the Delivery of Impact' (2014) 11(1) Qualitative Research in Psychology 1-14.
[147] Lucia Zedner, *Criminal Justice* (2nd edn, Oxford University Press 2010) 146.
[148] Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (Oxford University Press 2002) 422.
[149] Nicola Padfield, *Text and Materials on the Criminal Justice Process* (4th edn, Oxford University Press 2008) 162.

policy or quantitative appraisal of CPS performance (as contained within readily accessible CPS annual reports on Violence Against Women). Rather, it furnishes rare insight from prosecutors who offer personal reflection into how they approach decision-making. Carried out in 2017, my qualitative work is also timely as it updates past empirical work carried out with prosecutors about their working practices conducted prior to the introduction of government and CPS Violence Against Women Strategies in 2010.[150]

In answering the first motivating question - how has the working practice of tenacious prosecutions emerged? - the thesis explores forces external to the law,[151] rules[152] and guidance[153] intended to direct prosecutorial discretion. Prior to the late 1960s, the lexicon of 'domestic violence' was not even a part of legal vocabulary,[154] but since that time, the phenomenon has been well aired, considered and debated by a steady procession of activists, policy makers and academic commentators. Legal academic analysis about domestic abuse has already included detailed considerations of legal practice in its doctrinal sense,[155] socio-legal scholarship assessing discretionary decision-making of police,[156] commentary relating to policy,[157] feminist law-making,[158] matters of criminal evidence[159] and even philosophical feminist appraisals of the prosecutor's role.[160] This thesis contributes to this body of scholarship by providing a socio-legal tracing of the influences of 'feminist' and 'neoliberal' discourses within state responses to domestic abuse. Using this methodology in relation to CPS policy and working practices in the area of domestic abuse is distinctive and unique in the English and Welsh context.

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[150] Antonia Cretney and Gwynn Davis. 'Prosecuting Domestic Assault: Victims Failing Courts, or Courts Failing Victims?' (1997) The Howard Journal of Crime and Justice 146, Carolyn Hoyle, *Negotiating Domestic Violence: Police Criminal Justice and Victims* (Oxford University Press 1998); Mandy Burton's analysis depends upon Hoyle's 1998 work in Mandy Burton, *Legal Responses to Domestic Violence* (Routledge Cavendish 2008); and most recently Matthew Hall, 'Prosecuting Domestic Violence: New Solutions to Old Problems?' (2009) 15(3) International Review of Victimology 255.

[151] E.g. Criminal Procedure Rules 2015, Prosecution of Offences Act 1985.

[152] E.g. Crown Prosecution Service, 'The Code for Prosecutors' (n 14).

[153] E.g. Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).

[154] Schneider, *Battered Women and Feminist Lawmaking* (n 94) 3.

[155] E.g. Roger Bird, *Domestic Violence: Law and Practice* (Jordan Publishing 2003).

[156] E.g. Carolyn Hoyle, *Negotiating Domestic Violence: Police, Criminal Justice and Victims* (Clarendon Press 1998).

[157] E.g. Mandy Burton, *Legal Responses to Domestic Violence* (Routledge Cavendish 2008).

[158] E.g. Schneider, *Battered Women and Feminist Lawmaking* (n 94).

[159] E.g. Charlotte Bishop and Vanessa Bettinson, 'Evidencing Domestic Violence, Including Behaviour that Falls under the New Offence of 'Controlling or Coercive Behaviour'' (2017) International Journal of Evidence and Proof; Louise Ellison, 'Prosecuting Domestic Violence without Victim Participation' (2002) 65(6) The Modern Law Review 834-858.

[160] E.g. Madden-Dempsey, *Prosecuting Domestic Violence* (n 52).

Benefitting from the preceding body of legal scholarship focussed on intimate partner abuse, the thesis also owes a considerable interdisciplinary debt to scholars in the fields of sociology,[161] psychology,[162] political economy,[163] criminology[164] and social history.[165] Through use of its case study - the prosecution of domestic abuse - this thesis contributes to debates about the presence of feminism in neoliberal governance[166] on the one hand, and the so-called 'neoliberalism-as-penality'[167] thesis on the other. The thesis shows how the state, and specifically the Crown Prosecution Service, has responded to the demands of social and political movements through the committed criminalisation of intimate partner abuse and considers the ramifications for abused women.

Lastly, the thesis is unique in offering insight into both sides of the same issue, that is the perspective of both prosecutor and the female victims whose decisions they effect. As a feminist project, the second research question invites consideration of the consequences for female victims of domestic abuse informed by primary empirical data. Whilst some work already assesses victim's use of criminal law,[168] my work uniquely uses legal consciousness to assess how women both engage and experience the criminal law vis-à-vis their abuse. In evaluating women's legal consciousness, I reveal aspects of the criminal justice system's gendered nature, its role in perpetuating women's disadvantage and its part in 'gendering subjectivity'.[169] The thesis thereby contributes to feminist legal theory's exposure of law's implication in the production and perpetuation of gendered power, in this instance, for abused women.

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[161] E.g. Johnson, *A Typology of Domestic Violence* (n 50).
[162] E.g. Lenore Walker, *The Battered Woman* (4th edn, Springer 2016).
[163] E.g. Emma Bell, *Criminal Justice and Neoliberalism* (Palgrave MacMillan 2011); David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005).
[164] E.g. Garland, *The Culture of Control* (n 111).
[165] E.g. Martin Pugh, 'Women and the Women's Movement in Britain, 1914-1999' (Macmillan 2000).
[166] E.g. Janet Halley, Prabha Kotiswaran, Rachel Rebouché and Hila Shamir, *Governance Feminism: An Introduction* (University of Minnesota Press 2018) 23- 54.
Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence* (Duke University Press 2008).
[167] Nicola Lacey, 'Punishment, (Neo)Liberalism and Social Democracy' in Jonathan Simon and Richard Sparks and Richard Sparks, *The Handbook of Punishment and Society* (Sage 2012).
[168] E.g. David Ford, 'Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships' (1991) Law and Society Review 313 and Ruth Lewis, Rebecca Dobash, Russel Dobash and Kate Cavanagh, 'Protection, Prevention, Rehabilitation or Justice? Women's Use of the Law to Challenge Domestic Violence' (2000) 7(1-3) International Review of Victimology 179.
[169] Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law (2000) 27(3) Journal of Law and Society 351, 363.

8 Argument Overview and Chapter Outline

I argue that past inattentive treatment by state criminal justice agencies in relation to domestic abuse is now being self-consciously reversed by neoliberal governing agendas intent on denouncing crime and holding offenders to account. Feminists have worked in tandem with governing neoliberals, providing additional political fuel and theoretical justification for the apparent reliance on criminal justice as a primary means of addressing domestic abuse. In response to feminist calls, to eradicate differing treatment of public and private violence and by framing abused women as vulnerable subjects in need of protection, a 'tenacious' commitment to achieving prosecutions has emerged. This, combined with neoliberal and managerial requirements to attain convictions efficiently, renders thorough case-by-case prosecutorial decision-making compromised when individual women express their wish for discontinuance.

The consequence for victims is that they are considered in terms of their risk of future harm (as assessed by check-lists) and their ability to act with considered agency is overlooked due to the abuse they have experienced. This conception of the female legal subject is inadequate but criminal law priorities foreclose alternative ways of conceiving her. She becomes framed as vulnerable[170] and with limited agency.[171] Instead, I advocate re-conceiving the legal subject grounded in vulnerability theory[172] and relational autonomy.[173] Moreover, if prosecutors were to act as therapeutic agents,[174] they might look to enhance women's capabilities (where safety considerations allow) providing her with options from which she has freedom to choose her life path.[175] Reliance on criminal justice as the antidote to domestic abuse shuts down such alternative and theoretically informed ways of thinking about victims. It also renders law and legal processes the preeminent 'solution',

[170] All domestic abuse cases must flag up that the victim is vulnerable/ intimidated. See Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).
[171] See, for example, Matthew Hall, 'Prosecuting Domestic Violence: New Solutions to Old Problems?' (2009) 15(3) International Review of Victimology, 255, 262.
[172] Vulnerability theory is outlined in Chapter Two. In brief it recognises vulnerability as an inherent human condition to which the state must be responsive.
[173] Relational autonomy is also described in Chapter Two. In brief, it recognises self-determining individuals are socially situated and interconnected and do not exist in isolation.
[174] As promoted by therapeutic jurisprudential scholars in e.g. David Wexler and Bruce Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press 1996).
[175] Martha Nussbaum and Amrtya Sen's 'capabilities approach' is elaborated on in Chapter Two. It is an approach to human well-being that emphasises the state role in facilitating options from which people can choose to function.

when in fact women are frequently disappointed by criminal justice outcomes. At the same time, other strategies to support women in the community to effect her genuine safety become ancillary whilst alternative discourses about the structural causes of and solutions to gendered intimate violence receive insufficient attention.

The thesis comprises five chapters; the first three outline the thesis' theoretical frameworks in which feminist and neoliberal literatures inform and illuminate the problematic. The final two chapters consider the impacts on prosecutors and women by way of empirical insight. Evident from these first three chapters is the way that both feminist discourses and neoliberal emphases have worked in concert to augment the priority paid by criminal justice agents to domestic abuse. These theoretical chapters are about showing how 'tenacious prosecutions' (identified by way of qualitative interviews, in Chapter Four) have come about. The theoretical chapters also situate and illuminate women's experience of criminal justice responses as analysed through qualitative thematic analysis in Chapter Five.

In Chapter One, I show how 'feminism' and its closely associated activist sister, the women's movement, uncovered intimate partner abuse and rendered it an undeniable social problem. Second-wave 'radical' feminists posited the aetiology of intimate partner abuse in structural patriarchy or what Houston has called 'patriarchal force'.[176] Largely rejecting psychological[177] or family violence non-gendered 'social causes' theories,[178] the target for VAW activists and scholars alike became societal and structural gender inequality. 'Radical' feminists initially deployed 'outsiderism'[179] or a refusal to turn to the state for solutions. It was only in the early 1980s that 'radical' feminists consciously adopted moderate or 'liberal' feminist strategies that sought remedies through legal recognition, equality rights and crime control. This new breed of 'governance feminist'[180] turned its focus to criminal law enforcement as a means of challenging accepted norms of intimate partner

[176] Houston (n 34) 217.
[177] The work of Donald Dutton, *Rethinking Domestic Violence* (UCB Press 2006) outlines factors such as psychiatry, psychology and personality contributing to 'bilateral complicity' between partners.
[178] The work of Murray Straus, Richard Gelles and Suzanne Steinmetz, *Behind Closed Doors: Violence in the American Family* (Doubleday 1980) is illustrative. They contend that social norms and economic arrangements that perpetuate gender inequality may play some part in family violence but point to a multitude of other risk factors such as poverty, unemployment, stress, witnessing/ receiving violence in childhood, multiple children and early marriage.
[179] Halley, Kotiswaran, Rebouché and Shamir (n 166) 32.
[180] Ibid.

violence as a private matter beyond state interference. The consequence of treating the 'personal as political' has been that the criminal law now considers 'society' or the 'public' as the victim. Thus, when a woman expresses her personal view that proceeding with the prosecution is not what she wants, her opinion has the potential to become secondary to that of the 'public' interest and what emerges is 'tenacious prosecutions'.

Conceived now first and foremost as crime, the second part of Chapter One considers how well equipped the criminal law is to meet the victim's needs. Criminal law's claim to be a 'gender-free zone'[181] where neutrality, fairness and 'truth' will prevail becomes a legitimate target for scrutiny. Chapter One therefore describes how second-wave feminist jurisprudential scholars exposed the inherent 'maleness' of the liberal legal subject and the flawed notion of the atomistic logically rationalising actor. I suggest that the CPS and its prosecutors sensitively reacted to the critique but, in re-assessing women's 'victimhood' as part of their reassessment of the legal subject, have erred. No longer dismissing unsupportive victims as unknowing irrational actors (as a liberal conception of the legal subject might previously have provoked) the thesis asks whether prosecutors now use the archetypal liberal legal subject as a benchmark to assess her vulnerability; how far short of expected norms has she fallen? How in need of protection is she? I suggest that 'tenacious prosecutions' are the CPS response to 'vulnerability', motivated by a need to protect her from further harm which risks overlooking, inter alia, her agency.

Not satisfied with how common use of the term 'vulnerable' has an 'othering' effect, in which the 'helpless' victim becomes requiring of state intervention in the form of tenacious penal solutions, Chapter Two theorises an alternative legal subject. Recognising the ontologically 'vulnerable subject',[182] the state has a responsibility to respond. A presumption to prosecute appears to meet the expectation as far as the criminal justice system is concerned. However, when a woman withdraws her support, a prosecutor must decide whether or not the presumption is appropriate. A prosecutor, I argue, should strive to facilitate a woman's resilience by enabling autonomy understood in its relational sense.[183] Building on this foundation, I propose that prosecutors be guided by decisions

[181] Conaghan (n 100) 246.
[182] Martha Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory LJ 251.
[183] Catriona Mackenzie, Wendy Rogers and Susan Dodds, *Vulnerability: New essays in Ethics and Feminist Philosophy* (Oxford University Press 2014) and Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) Yale Journal of Law and Feminism 1.

designed to enhance the victim's 'capabilities'[184] on one hand and therapeutic outcomes[185] on the other. Recognising self-determination theory and the strong correlation between effecting choice (or sense of choice) and well-being, prosecutors would be encouraged to use empathy to support positive mental health and emotional outcomes. Guided in this way, and taken together, a theoretically informed survivor-defined praxis can emerge, which in short-hand, might be referred to as recognising the 'lived subject'. Working with a presumption to prosecute yet considering the reconceived 'lived subject' would sharpen prosecutors' regard for occasions when prosecution may not be preferable. It is proposed that this is an approach that would both challenge existing social norms that tolerate abuse whilst encouraging genuine case-by-case decision-making when a woman expresses reluctance to proceed.

If neoliberalism, broadly conceived, has been the dominant political ideology of recent times, in Chapter Three, I show how its constraining logic has foreclosed alternative ways of conceiving women who have experienced domestic abuse such as the re-conceiving the 'lived' legal subject explored in Chapter Two. I show how neoliberalism stifles non-penal solutions that might tackle structural inequality in line with materialist and early radical 'outsider' feminist goals. Neoliberalism's alignment with 'governance feminists' has affected the movement's depoliticisation by treating this social problem as crime.[186] In the wake of the professionalisation and standardisation that a criminal justice response inevitably produces, the thesis explains how and why conceiving domestic abuse as crime has been signalled as 'a betrayal of … emancipatory roots'.[187] Fraser, for example, has accused feminists of privileging a politics of symbolic recognition over a politics of redistribution[188] thereby failing to target the structural and gendered inequalities that are at the foundation of domestic abuse. Neoliberalism's withdrawal from structural explanations for the causes of crime and replacement with individualistic volitional rationalisations, has contributed to a crime control culture in which, I argue, the prosecution of domestic abuse has been caught. Chapter Three thus draws out the paradoxical 'success' of feminism's cooperation with the

[184] See, for example, Martha Nussbaum, *Women and Human Development* (CUP 2000) and Amartya Sen, 'Capabilities, Lists, and Public Reason: Continuing the Conversation' (2004) 10(3) Feminist Economics 77-80.
[185] See, for example, David Wexler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 TM Cooley Law Review 125.
[186] Annette Ballinger, 'New Labour and Responses to Violence Against Women. Lessons for the Coalition: An End of Term Report on New Labour and Criminal Justice' (2011) 38.
[187] Kim (n 102) 1277.
[188] Nancy Fraser, *Feminism, Capitalism and the Cunning of History* (2009) 56 New Left Review 97.

neoliberal state.

Having explored motivating feminist agendas, together with the prevailing neoliberal political climate and culture, the thesis turns its focus in Chapter Four to the effect on Crown Prosecutors handling cases of intimate partner abuse. The chapter traces the approach that prosecutors took in relation to victim retraction in domestic abuse cases from CPS inception in 1986, where victim withdrawal was invariably assented. It notes that the first domestic abuse policy in 1993 paid lip service to the service's intention to tenaciously prosecute domestic violence but notes that the key shift only took place between 2005- 8 with the advent of revised policy and mandated training. Chapter Three identified that successive neoliberal governments promoted economic ideologies in state institutions even where monetary profit is not considered the end goal. Chapter Four observes, through qualitative research, how in practice this sees political and business idiolects converging and shaping everyday conduct. Observing the effects of New Public Managerialism (NPM) on prosecutorial decision-making, Chapter Four shows how managerialism frames needs in terms of administrative outcomes and organisational targets, specifically in the CPS by expecting increased conviction rates. The chapter shows how the tendency for prosecutors to fall back on the use of summonsing victims can be attributed, at least in part, to NPM.

In answering the second motivating question - what consequences for women from tenacious prosecutions - Chapter Five again uses primary empirical research, this time conducted with women who have experienced intimate partner abuse. The chapter explores these women's legal consciousness; that is how they consider, behave and relate to criminal law in daily life. Using the frame of legal consciousness allows me to probe the justice *possible,* if not consistently attained*,* through legal intervention. On the other hand, the chapter exposes how women's experiences of the criminal law and justice process may not always be wholly positive. The qualitative interviews therefore lend support to Smart's call to de-centre law;[189] where law might be considered only one aspect of a range of social responses to meet women's needs.

I conclude by contemplating the consequences of feminism's alliance with neoliberal penal responses to this social problem. I note the practical implications are evident in CPS policy and working practice and how successful prosecutions have been rendered the most

[189] Carol Smart, *Feminism and the Power of the Law* (Routledge 2002).

proactive and powerful tool in any prosecutor's armoury. Prosecutors have been able to justify the use of summons, because it expresses state condemnation of domestic abuse as required by policy objectives on the one hand and obtains 'justice' for victims on the other. I acknowledge that prosecutorial pursuit has the potential to be part of public education about domestic abuse,[190] to rehabilitate offenders through sentencing and to support victims by recognising perpetrator culpability. However, I also pay heed to Smart's cautionary analysis of the 'power of the law' and note how criminalisation heralds the depletion of other practical and conceptual remedies to end intimate partner abuse, chiming once again with Fraser's lament.[191] Crucially, neoliberalism's penal response to domestic abuse has potential to misjudge abused women's subjectivities and fails to conceive them as 'lived subjects' in the manner Chapter Two advocates. Finally, I reflect upon the project's contribution to the feminist legal project.

[190] Schneider, *Battered Women and Feminist Lawmaking* (n 94) 199.
[191] Fraser (n 188) 97.

CHAPTER 1

The Past: The Women's Movement and Feminist Discourse Surrounding Domestic Abuse

Introduction

> **'Feminism, as a political and theoretical movement, is committed at its most fundamental level to highlighting the historical and contemporary sites of women's exclusion and/ or subordination, to exploring the material, structural and ideological conditions that create and perpetuate this condition, and to making demands for their eradication.'[192]**

This chapter examines some of the feminist frames and discourses concerning intimate partner abuse that have arisen throughout history through women's activism and through feminist scholarship. The legacy of past treatment of female victims of domestic abuse might be summarised as the criminal justice system's failure to effectively intervene, and the genealogy in the first part of this chapter contextualises[193] the present tenacious prosecutorial approach suggesting its emergence as an attempt to right past wrongs. The chapter identifies key moments in the history of the women's movement showing how feminists uncovered domestic abuse as widespread, gendered and largely ignored by the state. Exposed here, is how a male perpetrator's belief in his right to coerce his partner is rooted in legal, political and social history. The analysis also traces how feminists have navigated their relationship with the state initially as campaigners, then as grass-roots outsiders and more recently as active consultants and academics. The account of many second-wave feminists, who describe historically grounded patriarchal structures as producing systemic male dominance, power and control over women in both public and private arenas, is also explored. 'Tenacious prosecutions', I suggest, reflect and

[192] Vanessa Munro, *Law and Politics at the Perimeter: Re-evaluating Key Debates in Feminist Theory* (Hart 2007) 11.

[193] Historical analysis, such as in this chapter, forms the basis of a 'context specific' approach promoted by many feminist scholars, such as Dobash and Dobash and Del Martin. See Kersti Yllo, 'Political and Methodological Debates in Wife Abuse Research' in Michelle Bograd and Kersti Yllo (eds), *Feminist Perspectives on Wife Abuse* (Sage 1990) 28-50.

instrumentalise such radical feminist analysis[194] to the extent that the state can claim that criminal law targets the norms said to produce gendered Intimate Partner Abuse (IPA).[195]

The second part of this chapter considers two central second-wave feminist themes that offer potential insight into modern prosecutorial treatment of abused women; the public/ private divide and the liberal legal subject. The public/ private divide as a liberal philosophical construction contends that private life (paradigmatically the family) is something over which legal intervention and regulation is not justified. The public sphere denotes the opposite.[196] By identifying the public/ private divide as the facilitator of patriarchy that produces social inequality for women, feminists have argued for the distinction to be eradicated. The effect of this for abused women is that by treating privately occurring IPA just as any other 'general' crime committed in public - where society as a whole is considered the victim - the value of privacy is passed over. I caution that instead of bulldozing the dichotomous construction entirely, prosecutors might consider recognising and retrieving the 'affirmative potential'[197] that privacy can offer women. I do not suggest that recognising the value of privacy is of itself a solution to better prosecutorial evaluations. Rather, its consideration by prosecutors, in conjunction with a re-analysis of the legal subject, would necessarily lead to a therapeutic and emotional engagement with victim needs (on a case-by-case basis) that lawyers and the law traditionally avoid.[198]

Next, a feminist critique of the liberal legal subject is explored because I suggest the mythologised, autonomous, independent and self-sufficient subject, remains a standard way that prosecutors assess DA victims. Current prosecutorial efforts appear to have responded to feminist critique of the legal subject and now recognise DA victims' vulnerability. However, the liberal legal subject acts as a benchmark that is used to measure

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[194] For example Rebecca Dobash and Russell Dobash, *Violence Against Wives: A Case Against the Patriarchy* (Free Press New York 1979), Michelle Madden-Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (OUP 2009) Susan Schecter, 'Women and Male Violence: The Struggles of the Battered Women's Movement' (Southend Press 1982) and Michael Johnson, *A Typology of Domestic Violence: Intimate Terrorism, Violent Resistance, and Situational Couple Violence* (Upne 2010).

[195] For example an 'effective criminal justice response to VAWG' will target 'deep rooted social norms, attitudes and behaviours that discriminate and limit women' in Her Majesty's Government, 'Ending Violence Against Women and Girls: Strategy 2016- 2020' (HMSO 2016) 9 available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/505961/VAWG_Strategy_2016-2020.pdf> accessed 10 May 2016.

[196] Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart 1998) 29-30 and 57-60.

[197] See Schneider, *Battered Women and Feminist Lawmaking* (n 94) 89-90.

[198] Susan Bandes and Jeremy Blumenthal, 'Emotion and the Law' (2012) 8 Annual Review of Law and Social Science 161, 162.

just how vulnerable a woman is, how far short of the 'expected norm' she has fallen and how much she would benefit from the state acting on her behalf. Such assessment speaks to the false dichotomy of victimhood or agency which is inadequate for understanding abused women but which, I argue, contributes to the tenacious approach to DA prosecutions.

PART ONE

1 Domestic Abuse: Key Moments in Women's History

1 (i) Feminism's First Wave

In the latter part of the 18th century, enlightenment scholar, Jeremy Bentham, wrote about his long-held disquiet at the unequal treatment of women in his *Introduction to the Principles of Morals and Legislation.*[199] Highlighting women's virtual slavery in many countries, he called not just for an end to it but to women's deliverance. He advocated giving women the vote in theory but stopped short of promoting it outright in practice because the time was not right.[200] He suggested that women held sufficient capacity to vote but that it was men's opposition that rendered the idea impractical. He did not, therefore, go as far as to suggest that women should expect equal treatment and political rights, rather that their abilities merited it.

Writing ten years after Bentham, it is Mary Wollstonecraft who is frequently credited with codifying English feminism for the first time. Wollstonecraft's *A Vindication of the Rights of Woman*[201] overtly called for equality between the sexes and 'it has remained the text of the [women's] movement ever since'.[202] Wollstonecraft had 'a profound conviction that the neglected education of [her] fellow creatures [wa]s the grand source of the misery [she] deplore[d]'.[203] If only women could access the same social and educational opportunities, women's equal status with men could be achieved; women having the same mental and reasoning capacities as men.

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[199] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (New York Press 1965). First published in 1789.
[200] Miriam Williford, 'Bentham on the Rights of Women' Journal of the History of Ideas (1975) 167, 169.
[201] Mary Wollstonecraft, *A Vindication of the Rights of Woman* (Penguin 2007).
[202] Ray Strachey, "*The Cause": A Short History of the Women's Movement in Great Britain* (Bell and Sons Ltd 1928) 12.
[203] Wollstonecraft (n 201) 00b.

By the mid-1800s, there was still no recognisable or organised women's movement and any preceding lone feminist voices had done little to affect the social and political order. The law offered little legal protection for wives as English common law at this time emphasised the importance of family autonomy and privacy.[204] For most of the nineteenth century, men were afforded control over their wives; 'he had the right to force her to live with him and his conjugal rights entitled him to have sexual intercourse'.[205] Women up to this time are perhaps remembered less for their overt feminism in the political arena than for their strong presentation of women's restricted, confining and unequal status in novels.[206]

Caroline Norton was unique in combining a literary reputation with that of a political pioneer for women's rights in the areas of child custody, divorce and matrimonial property settlements. She did not overtly set out to campaign against violence between spouses; rather she highlighted how the law systematically restricted women's ability to resist men's privilege. Ian Ward's literary jurisprudential examination of Norton's *Lost and Saved* highlights how the heroine of Norton's novel is shaped substantially by probate and marital law. Ward suggests, '[t]hough the medium is very different, the critique of marriage presented in *Lost and Saved* is just as urgent as that engaged in Norton's more famous political essays.'[207]

Norton's drive to be part of 'the cause' politically was determined by her own experiences. Following one episode of physical abuse at her husband's hand she ran away but returned later to the family home. Further 'painful scenes'[208] followed until, when Caroline was visiting her sister, Richard took the three children to live with his cousin and she was refused access. It was then that Caroline became aware of the appalling situation that the law subjected women to. She was not entitled to see her children until they were of age, should Richard decree, and her earnings as a writer were all his. In a further blow, Richard brought an unsubstantiated action against Lord Melbourne for 'criminal conversation' with his wife which sought to damage her reputation. Caroline was not

[204] Schneider, *Battered Women and Feminist Lawmaking* (n 94) 14.
[205] Mary Turner, *The Women's Century* (The National Archives 2003) 5.
[206] In Shirley Foster, *Victorian Women's Fiction: Marriage, Freedom and the Individual* (Croom Helm 1985), Foster examines the work of novelists Dinah Craik, Charlotte Bronté, Anna Sewell, Elizabeth Gaskell, and George Eliot and exposes their discomfort at the pressure of pervading matrimonial ideologies of the time and suggests the alternative life of a spinster and professional perhaps held more appeal to them.
[207] Ian Ward, 'The Case of Beatrice Brooke: Fictions of Law and Marriage in Caroline Norton's Lost and Saved (1863)' (2012) Journal of Victorian Culture 206, 206.
[208] Strachey (n 202) 34.

entitled to be party to the trial because she was a married woman and could not therefore be sued nor sue. Following their separation, Richard retained all matrimonial property which had been hers.[209]

The restoration of her children became Caroline's fervent focus and in 1836 she resolved to change the country's laws.[210] She wrote and distributed pamphlets, the copyright of which Richard, ironically, legally owned. These outlined the horrors that befell mothers whose 'suckling infants[s]' had been 'carried away'.[211] Following a working partnership with a male Member of Parliament[212] and specifically the production of a pamphlet which she addressed to each member of the house under a man's pen name, the Infants' Custody Act 1839 was passed. The Act permitted the courts discretion to award mothers the custody of their children up to the age of seven. The inroads into the law that this 'timid and hesitating measure'[213] made should not be underestimated. The Matrimonial Causes Act 1857 which followed, permitted separated wives access to their children under the age of ten, retention of their income following separation, maintenance and, moreover, the use of physical cruelty as a ground for separation, though not for divorce. Norton's campaign thus saw the beginnings of the long road to women's full and equal parental custody rights of children almost a century later, by way of the Infants' Custody Act 1925.

Whilst Norton did not directly campaign to end domestic abuse, her activism indirectly alleviated, at least in part, some of the constraints that may have forced women to remain within violent relationships. Violence, at this time, was therefore targeted obliquely and abuse was considered exceptional and particular.[214] The campaigning work of Frances Power Cobbe however was different and in 1878 she directly addressed the issue. Up until Cobbe, any acknowledgement of violence against wives cited male brutality, rather than male tyranny.[215] Cobbe's struggle however suggested that *violence* was both the cause

[209] Ibid 35.
[210] Ibid 36.
[211] Caroline Norton, 'The Natural Claim of a Mother to the Custody of her Child as Affected by the Common Law Right of the Father, Illustrated by Cases of Peculiar Hardship' (Caroline Norton 1837).
[212] Mr Taulford, Member of Parliament for Reading.
[213] Strachey (n 202) 39.
[214] Schneider, *Battered Women and Feminist Lawmaking* (n 94) 16.
[215] Linda Gordon, 'The Heroes of our Lives: The Politics and History of Family Violence' (1988) Family in Transition 68. This American perspective is, I suggest, consistent with English campaigns at the same time.

and the effect of women's subjugation.[216] In this way, Cobbe highlighted marital abuse as reflective of the broader problem of men's superior status within the family and 'the notion that a man's wife is his PROPERTY.'[217]

The political strategy employed by Cobbe was effective.[218] She published *'Wife Torture in England'* in 1878 which told an account of working class distress, both moral and physical. She saw relief through legislative reform. Whilst she highlighted violence as a male phenomenon, she was careful to paint domestic violence as a problem confined to the working class. She was tactical in her appeal to 'chivalrous, civilised' male members of parliament to act to protect disadvantaged women's lives.[219] As she depended on male members of parliament to amend the law she was perhaps wise not to suggest the problem permeated their strata of society lest it caused offence.[220] She used social-scientific statistical analysis of this working class suffering to provide the most comprehensive and authoritative study into domestic violence at that time.[221] Schroeder suggests these became 'moral numbers'[222] and they garnered political attention. By using newspaper extracts, police reports and court cases detailing graphic descriptions of women's injuries sustained by men '*private,* domestic harm carried out to women's bodies, when articulated into *public* language, with all its accompanying emotional impact, can and did have *political* effect'.[223]

The effect of Cobbe's publication and political campaigning was to redefine this everyday occurrence, treated up to that point with 'half jocular sympathy'[224] by the middle classes, into a social concern. The national crisis soon translated into statutory recognition in 1882. In that year, her campaign produced the Wife Beaters Act which permitted magistrates courts to imprison offenders for up to four hours for a first offence and longer

[216] Catherine Euler, 'The Irons of their Fetters have Eaten into their Souls: Nineteenth Century Feminist Strategies to get our Bodies onto the Political Agenda' in Shani D'Cruze and Ivor Crewe (eds), *Everyday Violence in Britain 1850-1950: Gender and Class* (Pearson 2000) 199.
[217] Frances Cobbe, 'Wife Torture in England' (1878) Contemporary Review 55, 62.
[218] Like Norton, Cobbe challenged the law's unequal treatment of women following separation and in this way sought to lift some of the constraints on leaving that abused women felt they had. She targeted reforms to the Matrimonial Causes Bill 1878 advocating that women be permitted separation orders on the grounds of men's cruelty. She also pressed for a mother's entitlement to custody of her children until their age of 10, for entitlement to her own income following separation and to maintenance payments.
[219] Euler (n 216) 200.
[220] Euler (n 216) 200.
[221] Janice Schroeder, '"Narrat[ing] Some Poor Little Fable": Evidence of Bodily Pain in "The History of Mary Prince" and "Wife-Torture in England"' (2004) Tulsa Studies in Women's Literature 261.
[222] Ibid 273.
[223] Ibid 202 emphasis in the original.
[224] Ibid 133.

sentencing and even whipping for a second. However, Cobbe was concerned that the Act, which handled only the most serious infractions in practice, had in fact set a precedent of toleration for low level abuse. Thus the apparent benevolence of the criminal law had in fact reframed the problem as opposed to ending it.[225] Cobbe felt that as 'wife torture' was rooted in the subordination of women nothing less than full political and economic equality could end it.[226] Cobbe may have been the first, but she was not the last feminist to experience that in regulating women's treatment, inequality was in fact extended.[227] Legal bias against women was 'transformed' rather than 'terminated'.[228] This phenomenon of social policy and legal intervention aimed at improving a person's situation actually resulting in contradictory outcomes - experienced as exacerbated or transferred vulnerability by the person designed to be protected - is explored further in Chapter Two.[229]

Despite the Wife Beaters Act 1882, there was then a persisting belief in the 'right' of a husband to beat and confine his wife and, though the right may not have been written in statute or common law, there was a 'national conviction' that wife-beating was legal.[230] In 1891 the case of *R v Jackson*[231] was heard in the Court of Appeal. Jackson was required in court due to his wife's family applying for a writ of *habeus corpus*, a remedy available for her wrongful imprisonment by him. The police had previously failed to intervene in the matter because it involved Jackson's 'conjugal' rights. Emily's imprisonment on the top floor of the marital home became protracted, attracting the attention of neighbours and eventually *The Times*. Jackson's barrister, Henn Collins QC, argued that Jackson had a common law right to the custody of his wife. The Judges in the High Court had agreed with this proposition indicating that husband and wife should be left alone to settle their differences. The Court of Appeal 'emphatically repudiated this proposition'[232] and held he had no right to confine his wife. Jackson's behaviour was dismissed as based on an

[225] Evan Stark and Anne Flitcraft, *Women at Risk: Domestic Violence and Women's Health* (Sage 1996) 45.
[226] Ibid 44.
[227] Ibid 46.
[228] Sheilah Martin, 'Women as Lawmakers' (1992) Alberta Law Review 738, 740 in Susan Edwards, *Sex and Gender in the Legal Process* (Blackstone 1996) 6.
[229] This is termed 'pathogenic vulnerability' by Catriona Mackenzie, Wendy Rogers and Susan Dodds, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014) 9.
[230] Maeve Dogget, *Marriage, Wife-Beating and the Law in Victorian England* (Butler and Tanner 1992) 43. Perpetuated by the mythology of Sir Francis Buller (or Judge Thumb) who, in 1782, purportedly announced that a man could beat his wife with any implement no fatter than his thumb.
[231] [1891] 1 QB 671.
[232] Dogget (n 230) 42.

anachronism. Dogget suggests that to characterise this attitude as anachronistic was far from the truth.[233] The decision caused a sensation precisely because it marked a significant change in the personal liberty of married women. Legal textbooks had to be revised following the decision which had hitherto claimed that a husband was entitled to 'coerce his wife into domestic habits'.[234]

To summarise, first-wave feminists were understandably attentive to and preoccupied by women's direct exclusion from full (legal) personhood. They demanded equality through equal treatment and the breaking down of legal disqualifications which operated against them. The campaigns highlighted here that did not expressly target domestic abuse did so indirectly by enabling options to 'trapped' abused women. Identifying these campaigns also exposes and describes the historic legacy of husbands' political, legal and social privilege over their wives. These social constructions of male privilege and their relationship with domestic violence become especially pertinent during the second wave of feminist activism which I describe next. It was Cobbe however who began to expose domestic violence as a manifestation of men's superior position, albeit her explanations were restricted to men's role in the family hierarchy. She resisted the assertion that domestic violence took place in the broader context of male power and control within society which second-wave feminists openly claimed.

This genealogy of first-wave feminism has allowed us to trace the persisting beliefs that some men still hold in their right to coerce their partners and the acceptability of their violence. It has also demonstrated the relationship between law and social movements and shows how even when the experiences of women are brought to the attention of public consciousness and embraced by the state, change does not always produce entirely positive outcomes; change can also engender alternative, non-envisaged and potentially negative results. For first-wave feminists this could be seen through the toleration of abuse that did not result in serious physical injury following the Wife Batterers Act 1882. The chapter now moves on to uncover how second-wave feminists campaigned to end domestic abuse.

[233] Ibid 42.
[234] Joseph Bridges Matthews, *A Manual of the Law Relating to Married Women* (1892) 235 in ibid 42.

1 (ii) Feminism's Second Wave

The 50th anniversary of women's suffrage in 1968 brought into focus the reality that so many feminist goals had yet to be achieved in practice; equal career access with genuine equal pay, access to university education,[235] freedom of sexual choice, an end to role stereotyping, sexual violence and violence against women. If the women's movement had dwindled since the achievements of the suffragettes in 1918 by virtue of the intervening war periods, some have suggested that the women of the 1970s had to 're-discover it'.[236]

In Britain, women's liberation groups now took on the challenge of raising awareness of and seeking solutions to violence against women. Previously, the Campaign for Nuclear Disarmament (CND) had seen women organising sit-ins and pram-pushing demonstrations but in 1963, due to a much-reduced fear of international conflict, CND membership had fallen off. Consequently, women peace activists diverted their attention. Pugh describes it thus: for women who had been involved in the peace movement, women's liberation redefined the question of violence; the focus transferred from the global concern about nuclear weapons to women's personal experiences as victims of male physical and sexual violence.[237]

In 1971 a group of women, children and one cow (!), led a march in Chiswick, London to protest about rising food costs and the proposed School Milk Bill which would take away free milk in schools.[238] Following the demonstration, the group were able to secure a building from the council and protestors came together to discuss other concerns and issues that affected their day to day lives. It became a place for women to share experiences and what unfolded was the revelation that many women suffered brutally at the hands of their husbands. As the issue of greatest concern, domestic violence became the sole focus of the group and the group became known as Women's Aid.[239]

Erin Pizzey established the first women's refuge for battered women in Chiswick that same year. This Women's Aid Centre was one example of the way the women's movement began to take matters into their own hands in the 1970s, rather than relying on institutions,

[235] Only 1 in 4 graduates were women in the 1960s see Pugh (n 165) 314.
[236] Ibid 316.
[237] Ibid 318.
[238] Caroline Charlton, 'The First Cow on Chiswick High Road' (1972) Spare Rib 24.
[239] Rebecca Dobash and Russell Dobash, 'Love, Honour and Obey: Institutional Ideologies and the Struggle for Battered Women' (1977) Contemporary Crisis 403, 403-404.

politicians or legislative change to do it for them. The Chiswick centre's policy was to never turn away an abused woman and her family. The overcrowded conditions, however, only sought to highlight the issue and the extent of male violence; in turn it inspired the formation of other such centres.[240]

Pizzey was vociferous about her cause. Her first book, *Scream Quietly or the Neighbours will Hear* highlighted the poor and inadequate support battered women received. She wrote of poor legal advice for women in crisis and poor police practice which treated domestic assault less seriously than assaults that took place in public. She noted that the law paid lip service to domestic assault noting that there was a gap between 'what the law says and what the law will actually do'.[241] Pizzey noted the difficulties of prosecuting abusers and balked at the common situation which found the abuser living back in the marital home awaiting trial. She also lamented the ineffectiveness of injunctions due to their non-arrest provisions for breach.[242] By 1976 however the Domestic Violence and Matrimonial Proceedings Act 1976 offered some protection against husbands and partners in the form of grants of civil injunctions, powers to arrest for breach, and the right to apply for the house on separation.

At the same time as the refuge movement was developing in Britain, feminists in the United States were marshalling an anti-rape movement. Rooted in the radical wing of feminism, their founding ideology was oppositional not reforming. They argued that violence against women was fundamental to understanding society's control of women and that the solution lay in the complete overhaul of men's and women's relationships.[243] Susan Griffin wrote about '*Rape- the all American Crime'* and argued that rape was a social act, an act expressing male power and aggression that underpinned the social subordination of women.[244] Her references to the use of rape as a power tool in Vietnam and by white men over black women shifted the perception of rape as a problem limited to the individual

[240] An additional 90 centres had been established by 1976.
[241] Erin Pizzey, *Scream Quietly or the Neighbours Will Hear* (Penguin 1974) 116.
[242] Pizzey later courted controversy by suggesting that many abused women were 'addicted to violence' and that men who recreated the violence of their childhoods derived a 'perverse kind of pleasure'. By simultaneously shifting blame onto the abused woman and excusing the actions of violent men, Pizzey was accused of perpetuating abusive relationships for women who blamed themselves and refused to leave. See Mary Turner, *The Women's Century* (The National Archives 2003) 147.
[243] Marie Gottschalk, *The Prison and the Gallows: The Politics of Incarceration in America* (Cambridge University Press 2006) 122.
[244] Susan Griffin, Rape: The All-American Crime (Women Against Rape 1971).

rapist provoked by the individual woman. Rather, she described rape 'as the symbolic expression of the white male hierarchy, rape is the quintessential act of our civilisation'.[245] She also noted that oppressive attitudes about women find themselves affirmed and institutionalised within the family.

In 1971 in a 'speak out on rape', New York feminists 'self-consciously maintained a distance from law enforcement'[246] as a solution. They did not wish to accept state funding, lest it lead to conservative co-opting which they did not perceive was the solution. Consequently, their provision of therapeutic services for raped women mirrored the grassroots independence of Britain's refuge movement, but perhaps for differing reasons which will be examined below. However, despite its initial foundation in radical feminist thought which did not seek change through pre-existing political and legal structures, Women Against Rape (WAR) came to include women with diverse ideologies with different modes of activism.

I have been cautious of assuming a singular understanding of 'feminism' and 'feminists' in this chapter. The diversity of 'feminist' activity in the United States (US) in the 1970s illustrates why. Ryan describes two 'distinct sectors of the [second-wave feminist] movement' in the United States;[247] the 'revolutionary' or 'radical women's liberation branch' and the 'reformist' or 'moderate women's rights sector'. While there may be a common tendency to refer to the dissimilarity of the groups, by pitting the two sectors in opposition, Jo Freeman's work has sought to draw out their commonalities. An emphasis on the two sectors' quarrels overlooks, Freeman cautions, the obvious shared radical departures of both groups from prevailing norms and the reason why they might both properly be considered 'feminist'.

Reformists, often associated with the 'limited goals'[248] of the National Organisation of Women, still held a 'platform that would so completely change our society it would be unrecognizable'.[249] Rather than citing distinct ideologies between the groups, Freeman suggests their differences were 'primarily structural and stylistic, and, secondly strategic and

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[245] Ibid.
[246] Gottschalk (n 243) 124.
[247] Barbara Ryan, *Feminism and the Women's Movement: Dynamics of Change in Social Movement Ideology and Activism* (Routledge 1992) 40.
[248] Ibid 40.
[249] Jo Freeman, *The Politics of Women's Liberation: A Case Study of an Emerging Social Movement and its Relations to Policy and Process* (Longman 1975) in Ibid 41.

methodological'.[250] While 'radicals' averted co-opting with the state, reformists' (or liberal) aims were more modest and achievable. Incremental improvements to a pre-existing system were not seen as falling short. 'Radicals' were concerned that working with the state would undermine their attempts at dismantling the pre-existing patriarchal system through revolution.[251] The possibility that feminist aims are best served by turning away from the law is discussed in this chapter below.

Therefore the inclusion of 'reformist' feminists in Women Against Rape, left this initially radical pressure group and its previous tactics open to compromise. As such, reformists (or liberals) started to take on the fight for legislative amendments, to improve criminal conviction rates and to ensure proportionate punishment of offending men. Yet the movement remained reluctant to criticise police, prosecution and court practices due to concerns that such noises would be counter-productive in their attempts to encourage victim reporting to those criminal justice agencies. If women thought there were problems with the criminal justice system they would be more reluctant to rely on it. My project takes a different stance, not least because my work is less likely to reach women who have experienced domestic abuse directly than the campaigning work of Women Against Rape. I want to encourage improvements to the system by highlighting that a system that does not sufficiently consider how and why the law is invoked by female victims of domestic violence is a system that will not be called upon again. At the same time, I am mindful, just as Women Against Rape are, of the potentially damaging effect on victim confidence any criticism of the criminal justice system may create.

Perhaps as a result of the tangible goals of the more moderate members of Women Against Rape and perhaps to divert attention away from radical calls for structural ideological dismantling, federal states in the US were now quick to adopt and envelop the movement. In so doing, the state reframed the rape issue, not as one of a societal, structural or political problem, but rather as a concern for individual victims. Through appropriate care of victims, the state could be seen to be taking the issue seriously. The government took over the independent rape centres and absorbed them into the state's

[250] Ibid 41. However, see also Ryan's comment that in fact ideological differences were vehemently debated between the sectors and whether or not these differences existed, it was ideology that was used to distinguish one activist group from another.
[251] Freeman in Ibid 41.

hierarchical bureaucracy.[252] By ensuring adequate service provision for these women, the state intended to increase the woman's willingness to participate in the successful prosecution of her case which was seen as an appropriate response to demonstrate condemnation of rapists.

The anti-rape movement in the United States was followed swiftly by the Battered Women's Movement. Though its inspiration clearly derived from the US anti-rape movement and the British Refuge Movement whose women's refuges it replicated,[253] the US Battered Women's Movement was distinctive for a number of historical and political reasons. Whereas Britain's National Women's Aid Federation, responsible for the vast majority of refuges, was entrenched in British socialist and radical feminist traditions, the US Battered Women's Movement had less coherent drivers. Its rationale could be said to be based in feminism, in service provision, or both. While the anti-rape movement can be said to have drawn from feminist membership, albeit a diverse range of feminisms, the Battered Women's Movement drew not only from feminist groups but also from other groups such as church groups, alcoholics anonymous, chambers of commerce and self-help groups. In 1980 fewer than half of 175 identified shelters were headed by professed feminist groups.[254] Even members of the National Coalition Against Domestic Violence movement were concerned that by displaying openly feminist motivations, they risked alienating membership in more conservative parts of the country.

Gottschalk distinguishes the British women's refuge approach from the US approach as follows: feminists in Britain were less committed to penal solutions to the problem and more concerned with permanent housing provision or social solutions to alleviate women's situations. The reasons for this are twofold. Firstly, Britain's welfare tradition was more developed than in the United States. A government report commissioned in 1981, for example, cited housing as the primary obstacle for women wanting to escape abusive relationships.[255] Secondly, the British government and Home Office refused to acknowledge

[252] Gottschalk (n 243) 125.
[253] It made extraordinary progress in a short period of time with some 500 shelters for battered women being founded by the early 1980s. Ibid 136.
[254] Gottschalk (n 243) 136.
[255] Val Binney, Gina Harkell and Judy Nixon in conjunction with Women's Aid Federation/ Department for Environment, *Leaving Violent Men: A Study of Refuges and Housing for Battered Women* (King's English Book Printers 1981).

failures in criminal law enforcement and kept feminist groups at a distance.[256]

Extensive media coverage about domestic abuse in Britain proliferated as a result of the refuge movement and caused a resurfacing of domestic violence as a public issue.[257] As such, a Select Committee on Violence in the Family reported in 1975 describing domestic violence as a social problem and urged that abused women needed welfare assistance. They did not call for more criminal prosecutions. Throughout the gathering of evidence, the British government and Home Office were reluctant to acknowledge any failures in criminal law enforcement to take on the problem. Evidence given by the Association of Chief Police Officers asserted that officers were doing the best they could given that,

> 'in the majority of cases the role of the police is a negative one. We are, after all, dealing with persons 'bound in marriage', and it is important for a host of reasons to maintain the unity of the spouses. Precipitate action by the police could aggravate the position to such an extent as to create a worse situation than the one they were summonsed to deal with. The 'lesser of two evils' principle is often a good guideline in these situations'.[258]

It is clear therefore that domestic violence for the police was largely considered a private civil matter between husband and wife and only when obvious and serious infractions had occurred would it be necessary to remove the perpetrator through arrest.

Despite the police downplaying the inadequacy of their response to domestic abuse during the 1974 Select Committee, the 1975 report did suggest that police invocation of the law was unsatisfactory; 'If the Criminal Law of assault could be more uniformly applied to domestic assault there seems little doubt that it would give more protection to the battered wife.'[259] Persisting beliefs concerning the integrity of family and property together with deficient married women's rights situated in a structurally unequal society had been significant in determining the redress available to abused women.[260]

Conversely, by virtue of the strong civil rights tradition in the US, the police through

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[256] Gottschalk (n 243) 136.
[257] Jalna Hanmer, 'Violence to Women: From Private Sorrow to Public Issue' in Georgina Ashworth and Lucy Bonnerjea (eds), *The Invisible Decade: UK Women and the U.N. Decade for Women, 1976-1985* (Gower 1985) 145.
[258] House of Commons Select Committee, 'Report on Violence in the Family' (1975) 366.
[259] Ibid xvi.
[260] Kathryn McCann, 'Battered Women and the Law: The Limits of Legislation' in *Women in Law: Explorations in Law, Family and Sexuality* (Routledge & Kegan Paul 1985).

the courts, were being held accountable to battered women whose rights had been violated. A succession of lawsuits was brought by women against police and criminal justice agents for their mishandling of domestic violence incidents. If potential violations of civil rights for failure to protect abused women could be so costly, they acted as a catalyst to improve police responses.[261] The US Battered Women's Movement did not oppose holding the state to account in this way. Whether or not they saw ameliorations to law enforcement as an interim measure whilst the long-term (radical) remedy of social re-structuring ran parallel is not clear. Either way, it seems their energies predominantly lay in demanding legal interventions.

Thus, as outlined, the Women's Movement enjoyed a renaissance in the 1960s and 1970s in the US and in the UK. The effects of this 'rediscovery' of 'the cause' represented a 'lasting shift in society's perceptions and values'.[262] Women's liberation entered mainstream public consciousness and became relevant in political debate. In the UK some improvements to the police exercise of discretion to arrest DA perpetrators were observed and there was a reduction in police perception of complainants 'wasting their time'. Nonetheless calls often ended only in advice being given to the complainant and there was still much work to be done in breaking down persisting assumptions that 'other agencies' and civil courts were best placed to handle disturbances.[263] Similarly, prosecutors all too often acted with indifference and inaction, treating these infractions of the criminal law as a personal matter undeserving of a judicial response.[264]

As a part of the renaissance in the Women's Movement, married couple and academic pairing, Rebecca and Russell Dobash began their seminal analysis of 'Violence Against Wives' in the UK in 1977.[265] Their analysis spoke of the contribution that patriarchal structures, buttressed by hierarchical ideology, played in the institutionalised subordination of one half of the population.[266] They argued that abused women's struggles were not only with their violent husbands but also with the systemic social structures and ideologies that served to subordinate them. Here we see the extension of Cobbe's claim that male

[261] In Bruno v Codd 90 Misc.2d 1047 (1977), a victim was awarded substantial damages for police mishandling of her violent domestic situation.
[262] Pugh (n 165).
[263] Dobash and Dobash, *Violence Against Wives* (n 194) 210-211.
[264] Ibid 218.
[265] Ibid.
[266] Dobash Russell Dobash, 'Love Honour and Obey' (n 239) 403.

authority in the family manifested as violence against wives with the contention that domestic violence is an expression of wider societal gender inequalities. Moreover, the Dobash's declaration that the 'foundations of wife battering are written into the marriage contract'[267] was clear reference to their belief that the historic legacy of a husband's right to castigate his wife[268] persisted in society's cultural norms.[269]

Their concern too was that, superficially, support and sympathy were being offered as solutions to abused women but those very offerings of help were not challenging the overall system that contributed to the cause of the assault. In failing to challenge patriarchy structurally and ideologically, the principles that guided and directed helping agencies were a product of those ideologies. The Dobashes cited examples of counsellors that worked with abused women to identify behaviours that triggered their partner's violence (and in their search for what provoked the abuser, implied his violent behaviour was understandable in the circumstances). They highlighted lenient sentences as indicative of the tiny inroads being made into the problem and considered how ongoing police failures prevented condemnation of the behaviour.[270] They perceived patriarchal attitudes at their most blatant at the point of law enforcement (or obvious lack of it).[271]

Most significantly, the problem of the power patriarchy conferred on men was not being challenged in the privacy of the home. For them, '[t]he family is the cornerstone of the patriarchal society' and a 'model upon which other social institutions are based'.[272] Its order becomes morally guiding for family members who enter other social institutions. The failure to challenge this 'sacred hierarchy' in the home replicates and perpetuates the structural and ideological inequalities found in wider society. The Dobashes further suggested that the inadequacy of the criminal justice response was down to the state's interest in perpetuating the subordinate position of women for the benefit of the prevailing economic order.

Despite the 1980s seeing a number of government interventions aimed at improving

[267] Ibid 403.
[268] Bradley v Wife (1663) ER 83 1157.
[269] Susan Edwards cites the case of Meacher v Meacher [1946] P216 as a salutary reminder of pervading judicial opinion as late as 1946. In this case, the decision of the court of first instance was to accept that a husband was justified in assaulting his wife when she refused to stop visiting her sister in Susan Edwards, *Sex and Gender in the Legal Process* (Blackstones 1996) 191.
[270] Dobash and Dobash, 'Love Honour and Obey' (n 239) 406.
[271] Ibid 410.
[272] Ibid 408.

equality for women by way of legislation, the 1980s saw an ambivalent response from agencies tasked with implementation of the law.[273] The decade appears to have suffered a stalemate. On one hand the 1970s had raised awareness of domestic violence not just as a private but also as a social concern and legislation had been passed in recognition. On the other, the 1980s endured the effects of previous generations' commitment to the inviolability of family. The family still represented the dominant pervading ideology within the state with its actors still insisting on the importance of its preservation even at the expense of perpetuating the existence of the unhappy, intolerable and even violent family. The treatment of domestic violence once the CPS came into being in 1986 is examined in Chapter Four.

What is characteristic of the second-wave 'women's movement' is that it held two interconnected parts. One urged change through action and direct campaigning, highlighting the extent of the problem and calling for support for women. By marching, picketing and engaging the public through press campaigns, Women against Violence against Women, (supported by Women's Aid and the Rape Crisis movement), was political and sought to garner welfare support for women by having domestic violence recognised as a crime as any other. The other part of the movement was more analytic and academic, uncovering the character of domestic violence, law's responsibility to engage and law's failure to do so with consistency and commitment. Academics also sought to posit theories about the causes of the problem, both from feminist perspectives and from 'family violence'/ cognitions perspectives.[274]

This part of the chapter has furnished an understanding of the current prosecution approach to domestic abuse that is context specific, not ahistorical or abstracted from social facts.[275] I recognise that at least some violence against women exists as part of historical

[273] Kathryn McCann, 'Battered Women and the Law: The Limits of Legislation' in Julia Brophy and Carol Smart (eds), *Women in Law: Explorations in Law, Family and Sexuality* (Routledge & Kegan Paul 1985) 71.
[274] Family violence scholars do not see male power and control in society as the critical component of domestic violence. Rather they focus on 'social forces' such as poverty, poor education and employment to explain the incidence of violence in families. Broadly speaking, they contend the more social disadvantage, the more social stress and the increased likelihood of violence. Whilst they acknowledge that sexism can contribute to social stress, this is to be considered only one factor as it cannot explain violence against husbands or children. Whilst their focus is on structural stress and socialisation experience, they proffer that 'it takes two' and victim behaviour is seen as playing a 'central role'.
[275] Dobash and Dobash see this methodology broadly chiming with Weber and Marx who also sought to get beneath the 'surface manifestations' of the social problem under study, Dobash and Dobash, *Violence Against Wives* (n 194) 26.

and social constructions of men's domination and control over women. This genealogy has shown how social, cultural and political relationships between men and women generated an ideology that sanctions some men to use violence against their female partners. Past gender dynamics fostered a moral order that affirmed a hierarchy in which men are entitled to use force and women ought to submit. Such an examination also offers potential insight into current prosecutorial policy and working practice. Government VAW strategy and CPS policies aim to dismantle assumptions that tolerate intimate partner abuse. Strong prosecution indicates societal condemnation. Moreover, if preceding criminal justice responses demonstrated reticence to intervene, does the CPS now promote a response that aims to remedy past failings?

PART TWO

2 The Public/ Private Divide and Feminist Demands for its Eradication

The second part of this chapter interrogates the public/ private divide as a 'prelude' to understanding the production of gender inequality (in society and in law) and patriarchal structures.[276] In broad terms, what is traditionally considered 'public' (male) includes state activity, the values of the market place, the work place and activities that are regulated by law. That which is said to be 'private' (female) includes the family, personal relations or behaviour unregulated by law.[277] By identifying the public/ private divide as a social phenomenon that produces inequality for women, feminists have traditionally argued for the distinction to be eradicated. As 'privacy' was previously used to justify a lack of state intervention in abusive partnerships, it is now a concept that garners little rhetorical support, not least from DA prosecutors. The public/ private divide and its associated discourses therefore offer a parallel rationale for the treatment of domestic abuse by prosecutors both past and present. I argue, however, that 'privacy', bound up as it is in notions of 'dignity' and 'freedom', is not a concept that should be entirely disregarded by prosecutors as it holds value for some women.

[276] Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson 1985) 1.
[277] Ibid 3.

2 (i) Origins of the Public/ Private Divide

Traditionally, liberal political theorists considered the existence of one's private realm to be central to the enjoyment of the autonomous self. The private sphere ought to be experienced with freedom, unencumbered by the prying eyes of the state. In this liberal conception, the family is 'unproblematically private'.[278] By consequence, the private life of home and family became synonymous with the unregulated.[279] The public and private dualism thus carries the idea that the private space buffers the private self (or family) from the outside world.[280]

Western intellectual tradition has not only made the distinction between the private from the public but has placed more value and regard on the public over the private. The superior status of the public sphere is characterised by its affiliation with the rational, the intellectual endeavour, the cultural and, undoubtedly, 'the masculine'. The private sphere by contrast is associated with nature, nurture, non-rationality, corporeality, the 'constellations of values associated with reproduction'[281] and, by default, the feminine.

Classical liberals defended the confidentiality of the private sphere. Rousseau, for instance, reasoned that the family should be distinct from wider society and its systems of justice regulating and making accountable its members. The public sphere necessitates regulation because it is here that self-interest is pursued and because '[t]he legally regulated subject of the public realm [is]… a rationally instrumental being.'[282] This account of the civil subject does not apply to the familial subject, Rousseau argued, because of the family's unique foundation, love. Husbands, he argued, are guided by their hearts and can properly represent their wives' interests both in family and political life. Whilst the public sphere thus sees calculating, economic and rational self-interest, the private sphere gives way to fairness according to love.

In this liberal vision, women are simultaneously ruled in the home and denied participation in public politics without prejudice to their well-being because their husbands

[278] Margaret Thornton, 'The Cartography of Public and Private' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press 1995) 4.
[279] O'Donovan (n 276) 7.
[280] Thornton (n 278) 6.
[281] Ibid 14.
[282] Jean-Jacques Rousseau, *Discourse on Political Economy (translated from Oeuvres Completes)* (Plaiade 1959-1969) Volume 3, 241-242.

represent their best interests.[283] The liberal assumption that generosity emulating from unconditional affection results in the fair sharing of the benefits and burdens of life ignores how freedoms enjoyed in public raise the status of the man both intellectually and pragmatically. When the male role is elevated, the danger is that this supremacy becomes manifest in male dominance in the home. Feminist academics have therefore frequently urged recognition of the part that women's social, economic and political disadvantage has played in violence committed against them.[284] This classical liberal reasoning is unlikely to meet with approbation today, least of all with those who actively seek gender equality.

The other obvious danger of classical liberalism's ardent defence of civil liberties contained within the public/private dualism is the resulting concealment of what takes place in the domestic context. A shroud comes to surround not merely the dynamics of family relationships but may also come to mask power struggles, coercive abuse and physical violence. Despite these shortcomings, '[t]he [liberal] myth of family bliss and security' remained virtually intact up until the women's movement challenged it with overwhelming evidence to the contrary.[285]

2 (ii) The Relationship between Privacy, Patriarchy and Abuse in the Home

Deepening 'public' and 'private' spheres first evolved with the rise of capitalist production and wage labour between the 16th and 18th centuries. Up until as late as the seventeenth century, the basic unit of production had always been the household unit.[286] However, the distinction between economic and domestic life became more starkly drawn thereafter because mercantilism and the factory system saw men go out to work and women experience growing confinement to the home.[287] Women's mounting social isolation saw domestic labour increasingly devalued as it did not play a part in the wage economy.[288] Furthermore, it entrenched gendered delineations between men's and women's lives, and their respective value or worth.

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[283] Susan Okin, *Justice, Gender and the Family* (Chicago Press 1989) 26-27.
[284] Neil Websdale and Meds Chesney Lind, 'Doing Violence to Women: Research Synthesis on the Victimisation of Women' in Lee Bowker (ed), *Masculinities and Violence* (Sage 1997).
[285] Dobash and Dobash, *Violence Against Wives* (n 194) 7.
[286] Ibid 50.
[287] In presenting this sketch of the evolution of men's and women's roles I do not wish to overlook that the narrative ignores that working class and immigrant women frequently took on paid roles outside of their home, albeit often they took work as domestic workers in other peoples' homes. Nonetheless, in broad terms the evolution of the spheres can be traced as described.
[288] Dobash and Dobash, *Violence Against Wives* (n 194) 5.

Prior to the 1960s and 1970s, few questioned many women's consequent confinement to family and domestic life, accepting it as natural and inevitable.[289] It was only with the rise of second-wave feminism that this essentialist construction began to be challenged. Feminists during this period exposed how the demarcation of the 'public' and 'private' spheres perpetuated society's different treatments of men and women. They drew society's attention to the divide as being an effect of and contributor towards 'patriarchy' in both its structural and ideological sense.[290]

Structurally, 'patriarchy' comprises the hierarchical organisation of social institutions and social relations, the inevitable consequence of which is the subordination of certain individuals, groups or classes (women) to those with power, privilege and leadership (men).[291] Those that accrue power are able to build yet more privilege. Patriarchy's 'wrongful structural inequality' thus 'systematically limits women's access to options that are critical to the success of their lives'.[292] By confining women to the private sphere, women experienced restricted public opportunities to challenge the order and the institutions that subordinated them. The maintenance of this disadvantage was sustained not only by this inhibiting structural loop but also by the *ideological* acquiescence of the many;[293]where challenges to it were seen as troublesome or even immoral.

That 'patriarchy' is the basis of 'male supremacy' and of women's inferior status in both society and the home formed the basis of much second-wave feminism. Davies contends that most Western feminism would concede that feminism takes place within the 'horizon of patriarchy'.[294] For 'liberals' the root of patriarchy lay in a failure to include women in pre-existing public institutions as equals. For 'difference' feminists it lay in a conscious devaluing of women's unique offerings by giving precedence to men's ways of doing.[295] Then for 'radical' feminists ''difference' is the velvet glove on the iron fist of [male] domination',[296] meaning that, for radicals, patriarchy emerges as an effect of male

[289] Okin (n 283) 125.
[290] Susan Hirsch, 'Introduction' in Martha Fineman and Roxanne Mykitiuk (eds), *The Public Nature of Private Violence* (Routledge 1994) 5.
[291] Dobash and Dobash, *Violence Against Wives* (n 194) 43.
[292] Madden-Dempsey, *Prosecuting Domestic Violence* (n 52) 139.
[293] Dobash and Dobash, *Violence Against Wives* (n 194) 43.
[294] Margaret Davies, *Asking the Law Question* (3rd edn, Thomson 2008) 264.
[295] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1993).
[296] Catherine MacKinnon, *Toward a Feminist Theory of State'* (Harvard University Press 1989) 219.

domination after which gender differences are constructed only to maintain and rationalise the power gained.

From their radical perspective, Dobash and Dobash vociferously argue that this subordination 'forms the foundation of wife beating'.[297] They group together what they consider an immutable progression from male dominance leading to female oppression and in turn to physical chastisement of women in the home. Violence by men, furthermore, is used as a way of securing and maintaining male dominance over women which is key to patriarchal social order.[298] Thus 'coercive control' which is 'primarily purposeful behaviour'[299] both expresses the patriarchy and is a concerted effort to perpetuate it. Moreover, violence against intimate partners endures because it is 'socially condoned'.[300] Houston convincingly argues that it was the Dobashes' (radical) explanation of domestic abuse that was harnessed by feminists seeking stronger criminal justice interventions.[301] The patriarchy that produces and facilitates domestic abuse for Dobash and Dobash is historically and socially constructed. Just as key events outlined at the start of this chapter, they gathered a wealth of evidence, historical and contemporary, that they assert, firmly places male dominance in the aetiology of violence. They suggest that this should not come as any surprise given that 'systems of power and authority are ultimately based on the use or threat of force'.[302] For Schecter too, 'violence against women is the underlying ever-present force that maintains male power and domination'.[303]

Violence for MacKinnon as well is 'a paradigmatic symbol and strategy of patriarchy' and cannot be reduced to individual explanations because it is a systemic invocation of men's position of power and privilege over women.[304] Links can clearly be made to the explanations the Rape Movement made of rape[305] and MacKinnon connects the two crimes due to their location in the family (or locus of privacy): 'when women are segregated in

[297] Dobash and Dobash, *Violence Against Wives* (n 194) 45.
[298] Rebecca and Russell Dobash, *Rethinking Violence Against Women* (Sage 1998) 228.
[299] Dobash and Dobash, *Violence Against Wives* (n 194) 24.
[300] Ibid 24.
[301] Houston (n 34) 247.
[302] Rebecca and Russell Dobash, 'Research as Social Action: The Struggle for Battered Women' in Michelle Bograd and Kersti Yllo (eds), *Feminist Perspectives on Wife Abuse* (Sage 1990) 57. See also Kate Millet, *Sexual Politics* (Virago 1970) who similarly asserts that patriarchy relies on the use of force for its maintenance.
[303] Susan Schecter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (Southend Press 1982) 20.
[304] Munro, 'Violence Against Women, 'Victimhood' and the (Neo)Liberal State' (n 10) 237.
[305] Schecter (n 303) 34 and Houston (n114) 238.

private, one at a time, a law of privacy will tend to protect the right of men *to be let alone* to oppress [women] one at a time'.[306] This radical explanation of structural patriarchy playing out in individual lives sees women depicted as the victims whilst men are constructed as the oppressors in what is, I suggest, an overly simplistic binary of victim/ oppressor.[307] However, by drawing attention to the effect that structural inequality has on shaping our lives, 'radical' feminists correctly require us to reconsider what we may have thought as particular or discreet events that deny women's options. Considered collectively, women's experiences 'reveal a net of restricting and reinforcing relations'[308] and are thus best understood as systemic.

Madden-Dempsey, a 'radical' feminist like the Dobashes and MacKinnon, observes the patriarchal nature of individual relationships is situated in and reflects the broader social structure. She asserts that DV prosecution is ripe for feminist action because in targeting cases of domestic violence that tend to sustain and perpetuate patriarchy (or what she terms 'strong' cases) prosecutors have the power to improve the moral character of the state, realise values that will reduce patriarchy and in turn reduce the incidences of 'strong' domestic violence. She accords with the UN Special Rapporteur on Violence Against Women, Yakin Erturk who observes the consequential effects of DA prosecution as leading to a shift in socio-cultural norms. She also concurs with Erturk that the intrinsic effects of prosecutors being a 'mouthpiece', strongly condemning gendered violence, will lead to a less patriarchal society.[309]

Post-modern feminists however suggest that there cannot be a single version of women's experience of subordination or violence. So far as 'patriarchy' can be identified, it should only be so in as much as it is recognised as a matter of power operating in a multiplicity of ways depending on context and perspective. There is no one unified and

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[306] Catharine MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) Signs 635, 657.

[307] Though see Joanne Conaghan's suggestion that radical feminism, which draws upon marxism 'never has entailed an assertion that all individual capitalists/ men oppress all individual workers/ women or that workers/ women lack political agency' in Joanne Conaghan, 'Book Review: Vanessa Munro *Law and Politics at the Perimeter: Re-evaluating Key Debates in Feminist Theory*' (2009) Feminist Legal Studies 229, 230.

[308] Iris Young, *Inclusion and Democracy* (OUP 2002) 92.

[309] Yakin Erturk, 'Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women' Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, to the United Nations Commission on Human Rights E/CN.4/2006/61 20 January 2006' in Michelle Madden-Dempsey, 'Toward a Feminist State: What does 'Effective' Prosecution of Domestic Violence Mean?' (2007) 70(6) Modern Law Review 908, 909.

collective experience of male supremacy and thus post-modernism develops a nuanced understanding of power; rejecting a straight correlation between it and domination.[310] It follows that from this perspective, these feminists are less likely to promote the radical no-drop policies[311] aimed at changing the social and cultural normalisation of DA and of patriarchy itself; rather they will prefer 'survivor-defined'[312] or 'empowerment'[313] approaches to prosecution that are focused at a more individual level allowing for 'individual choice' over 'greater good'.[314]

The 'radical' account is useful insofar as it anchors and connects what might otherwise have been divergent contexts and experiences of women's violence in an overarching structural analysis. However, the radical feminist explanation has the potential to minimise the 'complex ways in which violence is structured along axes other than gender'[315] and this thesis recognises that intersectional discourses about how race, class and sexuality also create structural disadvantage are clearly relevant as well. Moreover, alternative explanations such as psycho-pathology, that might prompt violence are compelling and draw into question the overly deterministic narrative of 'radical' feminism. That said, violence should not be reduced to an inter-personal level alone where victim or batterer psycho-pathological explanations are preferred.[316] Rather, I suggest, it should be understood in conjunction with its situation within broader institutional contexts and structural orders of power.

Domestic abuse, I accept therefore, does not take place in a social vacuum.[317] So whilst it may seem that it occurs following a particularly personal occurrence, for example, in response to childcare, domestic chores, money or sex, in fact it is 'infused at every point with notions… that are socially derived from a broad array of experiences in the community,

[310] Munro, *Law and Politics at the Perimeter* (n 192).
[311] See Introduction for description of 'no-drop' policies.
[312] Nichols (n 75) 2116.
[313] Hoyle and Sanders (n 78) 14.
[314] In her article, Nichols describes these two approaches as either 'radical' or 'liberal', here I have preferred to distinguish 'radical' v 'post-modern'. Nichols (n 75).
[315] Munro, 'Violence Against Women, 'Victimhood' and the (Neo)Liberal State' (n 10) 238.
[316] That explanations based on the exceptional mental health of victim/ offender were preferred prior to the battered women's movement prompted a 'structural turn' is outlined in Houston (n 34).
[317] Kersti Yllo, 'Political and Methodological Debates in Wife Abuse Research' in Michelle Bograd and Kersti Yllo (eds), *Feminist Perspectives on Wife Abuse* (Sage 1990).

economy and wider society'.[318] Gender roles that emerge from societal institutions and expectations of men and women produce dominant and dependent gender norms respectively.[319] Johnson too assesses that if a man harbours 'traditional' attitudes towards women's roles, it renders him more likely to abuse his partner.[320] Aligning with Johnson, Yllo points out, there is broad 'consensus amongst feminists that sexism in our society and families is fundamentally linked to violence'.[321] If patriarchal structures and relations and/or patriarchal attitudes have been shown to play a part in some instances of DA, let us return to the question of how the public/ private divide is said to perpetuate societal inequalities.

2 (iii) The Fallacy of the Public/ Private Divide

When second-wave feminists exposed the problem of 'patriarchy', they noted that its effects transgressed both the public and private spheres and accordingly argued that private and public life was less than distinct. That 'the personal is political' became the key feminist contention, denoting that our personal lives reflect and are embedded in political decision-making and vice-versa. Pateman argued that challenging the fiction of the public/private dichotomy 'is, ultimately, what the feminist movement is about'.[322] She suggested that the dichotomy needed to be challenged because it both serves as a function of patriarchy and sustains it. It has therefore been in the interests of the persisting status quo to leave the distinction intact. The dichotomy, she continues, is misleading because it fails to properly describe the lived activities of women in their daily lives who pass freely from private to public and back again. More than that, the distinction is false because contemporary theories of politics and justice assume the existence of family and, whilst never directly addressing family, they depend on it. Finally, the distinction is damaging because the dichotomy devalues women's labours and sustains a hierarchy whereby 'public' or

[318] Evan Stark and Anne Flitcraft, *Women at Risk: Domestic Violence and Women's Health* (Sage 1996) 31. Though these assertions linking patriarchal structures and violence in homes have been made by way of explanation for male perpetrated domestic violence by feminists, 'scant attention has been paid to the interplay of these macro-events (such as sexual inequality) and micro-dynamics of male domination' Stark (this footnote) 25.
[319] Del Martin, *Battered Wives* (Volcano Books 1976).
[320] Johnson, *A Typology of Domestic Violence* (n 50) 32 interprets research by David Sugarman and Susan Frankel, 'Patriarchal Ideology and Wife-Assault: A Meta-Analytic Review' (1996) Journal of Family Violence 13-40.
[321] Kersti Yllo, 'Political and Methodological Debates in Wife Abuse Research' in Michelle Bograd and Kersti Yllo (eds), *Feminist Perspectives on Wife Abuse* (Sage 1990) 28.
[322] Carole Pateman, 'Feminist Critiques of the Public/ Private Dichotomy' in Stanley Benn and Gerald Gaus (eds), *Private and Public in Social Life* (Croom Helm 1983).

traditionally 'male labours' are esteemed.[323]

My aim here is to consider Pateman's final critique of the distinction (that the dichotomy devalues women's labours) and look at the ways in which the distinction sustains male privilege said to be at the heart of domestic abuse. I also consider how the dichotomy traps abused women into staying in abusive relationships due to an absence of a preferable alternative. Firstly, inequality arises from the expectation that women are and will be the primary child carers. Women's assumption of the 'maternal role' means that many women anticipate, pre-empt and accommodate this *in advance* of children and marriage and from as early as adolescence.[324] Marriage, as a gender structured institution, thus heavily influences women's psychologies and occupational aspirations before they have even left full time education.[325] This has a cyclical effect because women go on to experience reduced promotions and seniority at work which renders a wage gap. Thus, when the time comes for husband and wife to decide who will take on the child care, their 'rational' decision is made for them because invariably the husband's career is more lucrative and has potential to be even more so. For this reason, the cycle of inequality is perpetuated; traditional expectations combined with socialisation work together to reinforce sex roles and female disadvantage in the workplace.[326]

In the United Kingdom (UK) today, it is possible to see how women's expected role as the primary child carer affects their presence in the workplace. Numbers of full time stay at home mothers are, however, in decline and have fallen by 850 000 in the last 20 years to the current, though not insignificant, level of 2.06 million.[327] This is equivalent to one in eight working-age women staying at home to care for children full time. The Office for National Statistics report, *Women in the Labour Market,* shows that having children renders women *less* likely to work and men *more* likely.[328] Women with older children find it 'easier to return to work' and their employment rate almost matches that of women with no children.[329] The ONS report also shows that women are more likely to earn less, attain fewer

[323] Ibid.
[324] Okin (n 283) 139.
[325] Ibid 142.
[326] Ibid 5.
[327] Office for National Statistics, 'Full Report- Women in the Labour Market' (Crown Copyright 2013) 11 available at <www.ons.gov.uk/ons/dcp171776_328352.pdf> accessed 12 January 2016.
[328] Ibid 8. Having children does not appear to impact the level of skill involved in the job (whether the woman is a graduate or not is most determinate).
[329] Ibid 9.

senior roles and are (arguably as a consequence) more likely not to work following childbirth.[330] Nonetheless women are increasingly considered to be equally responsible for the financial well-being of their families.[331] Whilst this may be so, they are working fewer hours than men. 42% of female workers work *part-time* (a number which has remained broadly consistent for 30 years) compared to only 12% of men. Even when women work full-time, their average full-time week is 40 hours compared to men's 44 hour week.[332] A likely explanation for the fewer hours that women work is that, 'children are still overwhelmingly seen as mothers' responsibility and it is women who tend to put their careers on hold to look after them'.[333] Equally hard to ignore when considering the reason for high numbers of part-time female workers, is empirical data revealing the unequal distribution of domestic chores. According to recently conducted research, women are still performing more than 70% of the housework.[334] Do these figures suggest that many women are working part-time, or full-time with fewer hours, because they are combining remunerated work with a disproportionate share of unpaid childcare and domestic responsibilities? Or, conversely, is it that men are not performing as many of the domestic tasks due to the time they spend in the public sphere of work?

Systematic injustices that role expectations can bestow on women are at the root of internal inequalities in the family.[335] Economic and social vulnerability in marriage renders the family the locus of injustice even where it may appear that rational, considered and independent decisions have been made by the parties to organise their lives in a particular

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[330] The Office for National Statistics confirms that in 2013 women occupied only 33% of managerial and senior officials' roles. Men tend to work in the professional occupations associated with higher levels of pay than women. The most common profession for men was programmers and software developers and for women was nursing. Programmers and software developers earned on average £20.02 per hour while nurses earned £16.61 in ibid 11.

[331] Martha Fineman and Roxanne Mykitiuk, *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (Routledge 1994) xiv.

[332] Office for National Statistics (n 328) 1.

[333] Justine Roberts, co-founder of Mumsnet reported by Louisa Peacock and Sam Marsden, 'Rise in stay-at-home-fathers fuelled by growing numbers of female breadwinners' *The Telegraph* (London 23 January 2013) available at <www.telegraph.co.uk/women/9822271/Rise-in-stay-at-home-fathers-fuelled-by-growing-numbers-of-female-breadwinners.html> accessed 13 January 2016.
Mumsnet is a website for mothers that pools mothers' experiences of motherhood in peer-to-peer forums, product information, advice and information. It is considered one of the most influential women's sites in the UK see Neil Hendersen, *BBC News,* 'When mumsnet speaks, politicians listen' (London 20 January 2011) available at <http://www.bbc.co.uk/news/uk-12238447> accessed 13 January 2016.

[334] Giulia Maria and Dotti Sani, 'Men's Employment Hours and Time on Domestic Chores in European Countries' (2014) Journal of Family Issues 1023, 1034.

[335] Ibid 1023.

way. Vulnerability in marriage is therefore asymmetric and women's economic and social disadvantage is caught by a cycle of social causes and expectations.

Economic dependence of women on their partners, can impact on their physical security. Where work is paid the rewards are not just concerned with material well-being. They include psychological, physical and intellectual well-being.[336] Not only is unpaid housework and childcare de-valued by society and the market place (even the ONS refer to stay at home child carers as 'economically inactive'[337]), it is often considered 'unproductive' even at a personal level and may have the effect of undermining a person's own perception of their capabilities. Furthermore, where one partner in a relationship earns (or earns more) and the other does not (or earns significantly less) money can become a source of conflict. Moreover, a distinct impact on the distribution of power can emerge through coercive control of finances.

Women's particular economic vulnerability as a consequence of marriage becomes most clear at divorce when women's financial positions can plummet while men's wealth improves.[338] Weitzman's American study *The Divorce Revolution* showed that divorced women's standard of living fell by 73% whilst divorced men's rose by 42%.[339] If women's economic situation is disadvantaged on divorce, this has consequences for women feeling trapped in unhappy or violent relationships with the potential for abuse to continue.[340]

Public structural inequalities can therefore be shown to affect family inequalities. If a man wields economic, social and psychological power as a consequence of his partner's undervalued labour, this can manifest in a power imbalance in the relationship, the consequence of which, as explored above, can be coercive control and violence.[341] If the

[336] Okin (n 283) 151-152.
[337] Office for National Statistics, 'Spreadsheet: Economically Inactive People Aged 16 to 64 Looking After the Family/Home' available at <http://www.ons.gov.uk/ons/search/index.html?pageSize=50&sortBy=none&sortDirection=none&newquery=economically> accessed 15 February 2016.
[338] Okin (n 283) 161.
[339] Lenore Weitzman, *The Divorce Revolution: The Unexpected Social Consequences of Women and Children in America* (Free Press 1985) in ibid 161.
[340] Dobash and Dobash, *Violence Against Wives* (n 194) lack of resources is cited as the primary reason many women either do not leave or, having left, return to their previously violent husbands.
[341] Michael Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women' (1995) Journal of Marriage and Family, 283.

division of opportunities rests unchallenged and unchanged, Okin argues that the long era of patriarchy and resultant violence persists.[342]

2 (iv) Retrieving the Affirmative Potential of Privacy

The public/ private dualism, as we have seen, is fragmented and when subjected to analysis, the distinction fails to be sustained. There is, as I have exposed above, an obvious blending of the two distinct spheres and consequently the purported dichotomy is overdrawn. O'Donovan advises that '[t]he whole fabric of the personal life is imprinted with colours from elsewhere. Not to acknowledge this, and to pretend that the private is free, leads to a false analysis.'[343] Not only does the public/ private distinction fall apart when scrutinised, but the danger is that any critique of the dichotomy inevitably falls prey to being framed in its very terms.[344] The 'solution' becomes one of mapping public sphere values onto the private in an attempt to eradicate the dualism.

Let us examine how this 'solution' has manifested in the area of domestic violence. Historically, as we have seen, the distinction was used to justify state inaction; privacy invoked immunity from male hegemonic practices, specifically violence in the home. It permitted what happened 'in the private sphere' to be considered wholly a concern between individuals, for which there was no social responsibility to address.[345] What we see currently in criminal justice practice however is a reversal of approach, one that, however consciously, refuses to accede to classical liberal rhetoric about the value of privacy. The danger then of modern law enforcement approaches to domestic abuse, in their concerted effort to give voice to domestic abuse victims and with their emphasis on bringing perpetrators to account, is that any concerns about encroaching into 'private lives' are ignored.

In Regina v C,[346] Lord Justice Moses in the Court of Appeal sums up the modern criminal justice approach. The following passage is indicative of a system that is valiantly seeking to reverse the inadequate criminal justice approach of previous generations:

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[342] Susan Okin, 'Gender, the Public, and the Private' in Anne Phillips (ed), *Oxford Readings in Feminism: Feminism and Politics* (Oxford University Press 1998) 136.
[343] Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicholson 1985) 15.
[344] Lacey, *Unspeakable Subjects* (n 196) 83.
[345] Elizabeth Schneider, 'The Violence of Privacy' in Martha Fineman and Roxanne Myktiuk (eds), *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (Routledge 1994) 43.
[346] [2007] EWCA Crim 3463, para 13.

> 'To describe the particular partner, be it the woman (as it usually is) or a man as "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. In that sense to describe it as "domestic violence" is an unfortunate term — it is violence, just as any other violence, and that is the concern of all of us.'

The Court's understanding of 'private violence'[347] here goes further than suggesting that domestic violence is a public *concern*. It suggests that the public are the *victim*. It speaks to not only the 'particularity' of the offence vis-a-vis the victim, but also the crime's 'generality'.[348] It signposts those tasked with decision-making in such cases. It suggests the 'public interest' is met through prosecution, irrespective of considerations of privacy and the value people place upon it.

The judgment falls short of explaining *why* the public are the victim save to say that any violence is the concern of us all. The Lord Justices did not engage with any suggestion of intimate partner abuse as a historic problem of sexism or as a residue of male ownership of women. The judgment does not speak to women's subservient status in society, in the workplace or as carers. They do not propose a solution overtly seeking to tackle societal changes at a structural level. So, whilst the Lords do not attempt a diagnosis for the prevalence of male on female domestic violence, they do prescribe their preferred way forward: a wider interpretation of the rules of evidence to assist prosecutors in pursuing criminal convictions without victim support. The effect of the judgment is to accord with the 'radical' feminist perspective that DA is a crime against the state.[349] Its effect also aligns with feminists who prescribe criminal justice intervention in domestic abuse as deterrence[350] and feminists who believe the state is best placed to act as a neutral arbiter between the violent manifestation of power imbalances, as described by the Dobashes, between men and women.[351] It falls short of Madden-Dempsey's claim that changes to patriarchal structures in society are necessary and that the prosecution of violence against women will facilitate a

[347] Domestic violence is one form of 'private violence' in Fineman and Mykitiuk, *The Public Nature of Private Violence* (n 331).
[348] Schneider, *Battered Women and Feminist Lawmaking* (n 94) 65-73.
[349] Nichols (n 75) 2114.
[350] Laurie Woods, 'Litigation on Behalf of Battered Women' (1979) Womens Rights Law Reporter 7. Woods was a lawyer in the 1977 Bruno v Codd New York Supreme Court case.
[351] Pauline Gee, 'Ensuring Police Protection for Battered Women: The Scott v Hart Suit (1983) Signs 554.

less patriarchal state.[352]

The danger of such a belief in the overriding public interest to prosecute domestic violence is that the state potentially falls into the trap that Lacey cautions against. As far as privacy is concerned, by mapping public sphere expectations and responses (the expectation of prosecution of assaults against the person) onto an event that takes place in the home, any value (or any convergent value) that privacy may be considered to have is bulldozed. Wider than privacy, the danger is that what replaces intimate partner coercion in the home is the potential for state coercion of abused women.[353]

This 'sameness of treatment' emphasis by police and prosecutors was arguably justifiable in the short term to mark the seriousness with which law enforcement agencies would now be taking domestic violence.[354] It reflected and marked the change in public perceptions regarding domestic violence on one hand and the equal treatment women could expect as victims before the criminal law on the other. However, '[n]ow that it is generally accepted that domestic violence is wrong and against the law'[355] a more sophisticated analysis to the prosecution of offences that take place in the privacy of the home is required. We must recognise that sameness of treatment of violent crime committed against women in the home 'is crude and non-discerning'.[356]

Whilst the concept of privacy has been overwhelmingly regarded as problematic for second-wave feminists as the facilitator of female oppression by allowing male domination in the home to pass with impunity, Boyd urges us to retain the ideological division if only to prevent us from falling into an abyss of indeterminacy.[357] Whilst I do not accept that this is reason enough to adhere to the notion of the dualism, I do propose that there is value in recognising the importance people place on their own privacy. Simply rejecting the idea of privacy for battered women and opting for state intervention risks failing to remodel a

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[352] Michelle Madden-Dempsey, *Prosecuting Domestic Violence* (n 52).
[353] Coker warns about the potential for state action to simultaneously empower and disempower women: Donna Coker, 'Crime Control and Feminist Law Reform in Domestic Violence Law' (2001) British Columbia Law Review 801, 801.
[354] 2006 saw the police and CPS radically alter their approach to the prosecution of domestic violence by making pro-prosecution decisions. Jacqueline Sebire, 'The Policing of Intimate Partner Violence: Understanding Data and Managing Risk' (2015) speaking at the Fighting Femicide Conference, Queen Mary University of London 6 November 2015.
[355] Home Office, 'Safety and Justice: The Government's proposals on Domestic Violence' (HMSO 2003) 8.
[356] Fineman, *The Public Nature of Private Violence* (n 331) 55.
[357] Susan Boyd, *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (University of Toronto Press 1997) 4.

'more nuanced theory of where to draw the boundaries between public and private, and a theory of privacy that is empowering'.[358] When seeking to identify how privacy can offer empowerment, it may be more advantageous to ask what, if anything, gives privacy its special value? Privacy can enable individual decision-making, opportunities for self-development and escape. More than that, privacy can facilitate autonomy, equality, liberty and bodily integrity all of which can be considered central to women's well-being and self-determination.[359] Privacy brings opportunities to develop intimate relationships, occasions for developing mental and creative capacities and to shed one's public 'role'.[360]

Schneider rightly argues therefore that there is 'affirmative potential' in the concept of privacy.[361] Lacey and Fineman too urge that its value should be recognised and protected by the state and other powerful institutions.[362] Despite its 'rhetorical potential'[363] or perhaps because of it, the public/ private dualism needs to be reconsidered and reconstituted so that privacy is valued and respected. To that extent at least, recognition of the difference between the public and private ought not to be considered a 'wrong turn on the way to an answer'.[364]

Schneider cautions that it is the *rhetoric* of privacy that has the effect of devaluing women and rendering their voice unworthy of attention or regulation. The rationale for defending the *idea* of the public and private spheres ignores its systemic effects for which the state must bear some responsibility. I am not proposing reliance on the rhetoric of the public and private spheres, rather acknowledgement that privacy can have value and that accordingly it is one aspect that, all other things being equal, prosecutors could bring into consideration.

If there is affirmative value in privacy, then prosecutors need to respect and

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[358] Elizabeth Schneider, 'The Violence of Privacy' in Martha Fineman and Roxanne Myktiuk (eds), *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (Routledge 1994) 37.
[359] Ibid 40.
[360] Susan Okin, 'Gender, the Public, and the Private' in Anne Phillips (ed), *Oxford Readings in Feminism: Feminism and Politics* (OUP 1998) 134.
[361] Schneider (n 359) 40.
[362] Lacey, *Unspeakable Subjects* (n 196) 82; and Martha Fineman, *The Autonomy Myth* (The New Press 2004) 293.
[363] Linda Kerber, 'Separate Spheres, Female Worlds, Women's Place: The Rhetoric of Women's History' (1988) Journal of American History 9.
[364] Madden-Dempsey, *Prosecuting Domestic Violence* (n 52) 26 asserts that whilst the 'dichotomy generates neat analytic categories…[it is]…at the expense of obscuring the values that underlie the distinction' and that 'given the illegitimate use the distinction has been put in the context of domestic violence [creating a category of private in which some people are left free to exploit and abuse others with impunity] I believe the price we pay for its use is simply too high.'

appreciate its significance. Privacy should not be synonymous with state inaction to the detriment of abused women, nor should a determination to treat privately occurring crime as any other publicly occurring crime mean mandatory arrest and prosecutions. Rather there needs to be a respectful consideration of privacy bearing in mind its potential to permit women agency in their own lives.[365] In determining where to draw the boundaries of privacy, it is valuable to consider that the benefits for some women of privacy are that privacy is precisely what they want.

Conceived of as the 'creation of knowledge',[366] privacy may highlight instances where superficial or 'public knowledge' is simply inferior. Rosen suggests that genuine knowledge of a person may only be ascertainable over the passage of time among a handful of close relationships. A person's complexity can only be understood incrementally out of the gaze of public scrutiny.[367] For this reason, following Rosen's logic, information provided to prosecutors may only ever reveal passing truths about people and their relationships. Such information may not reveal the entire picture. Indeed, '[a]ll public knowledge deals in stereotypes and generalizations, so that all individuals who become the subject of public knowledge risk misrepresentation.'[368] Those in the best position to know 'true knowledge'[369]about a perpetrator and their relationship with the victim are likely to be those with a complete picture.[370]

Connecting privacy with dignity also lends weight to my contention that prosecutors need to recognise the value of privacy for victims. Dignity refers to a state of being that is worthy of respect. Dignity therefore situates people within social relationships and communities and suggests that individuals owe one another the social norms that allow self-worth.[371] This is akin to decency. Post suggests that certain professions are instrumentally organised and for that reason, they evade the social norms that exist between everyday

[365] Schneider, *Battered Women and Feminist Lawmaking* (n 94) 89-90. The dualism between 'agency' and 'victimisation' is discussed below.
[366] Robert Post, 'Three Concepts of Privacy' (2001) 89(6) Georgetown Law Journal 2087, 2087.
[367] Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (Vintage Books 2001) 10.
[368] Post (n 366) 2090.
[369] Rosen (n 367) 8.
[370] Whilst I am clearly suggesting here that victims, as opposed to prosecutors, are likely to have this complete picture, discussion about when the victim may be so severely abused that she is no longer in a position to have objectivity about the perpetrator are considered more fully in Chapter Two. See Dennis Sacuzzo, 'How Should Police Respond to Domestic Violence: A Therapeutic Jurisprudence Analysis of Mandatory Arrest (1998) Santa Clara Law Review 765, 775 in which he identifies circumstances in which the victim may have become unable to voice her preferences.
[371] Post (n 366) 2092-2093.

interactions between people. Thus 'privacy does not normally obtain between surgeons and their patients' because surgeons tend to view patients as bodies to be healed (rather than as 'persons deserving of reciprocal norms of respect').[372] Similarly, historians and archaeologists view their subjects as 'objects to be understood'.[373] What then of prosecution lawyers and the victims and perpetrators they encounter? As far as perpetrators are concerned, they ought to face justice.[374] As far as victims of domestic violence are concerned I would suggest that they are viewed as potential future victims for whom prosecutors must do everything in their power to protect. By virtue of their professional responsibilities I suggest that engagement with the norms of privacy is similarly evaded by prosecutors.[375] Prosecutors need to be mindful, however, of how their role may impact on a victim's dignity.

The affirmative potential of privacy might also be equated to 'freedom'[376] as it permits individuals to carve out a space where they are permitted to define themselves.[377] The state and its agents have the potential to both enhance the freedom privacy affords and to threaten it. For some, to be left alone, not interfered with nor scrutinised could be considered the basis of freedom. For libertarians this narrow version of freedom is their central tenet. Individual freedom for liberals represents the absence of external constraints on a person's actions. Miller identifies this idea as a *negative* understanding of freedom and suggests that this conception gives liberalism its greatest weight; who could fail to be seduced by the virtues of a social order that extends the greatest freedom to the greatest number?[378] Whilst Hayek's 'absence of coercion' theory extends the idea of negative freedom to its limit, it is arguably now an untenable position (liberals would now accept that laws are necessary to ensure certain freedoms). Liberals, however, still maintain that the

[372] Ibid 2093.
[373] Ibid 2093.
[374] Where the evidential and public interest tests are met.
[375] My assertion here is, arguably, borne out in Chapter Four.
[376] My appraisal of the value of freedom here clearly sits in contrast to the type of freedom and dignity that neoliberals envisage (see Chapter Three). For neoliberals, freedom and dignity are premised on the desirability of the rule of law, private property ownership and the competitive market. Polanyi criticises the neoliberal notion of freedom as likely 'degenerat[ing] into a mere advocacy of free enterprise' to the detriment of genuine freedoms enjoyable for all in Kari Polanyi, *The Great Transformation* (Beacon Press 1954) in Harvey, *A Brief History of Neoliberalism* (OUP 2005) 37.
[377] Rosen (n 367) 223
[378] David Miller, *Market, State and Community* (Clarendon Press 1990) 23. See Chapter Three for an assessment of the way neoliberals have used 'freedom' as a concept to justify their policies- the term holds wide appeal.

basis of freedom is to be left in peace in a space which is 'not the law's business'.[379] I can therefore be said to be *negatively* free to the extent that nobody interferes with my activities and choices. History has shown us however that this negative version of freedom has not necessarily assisted domestic violence victims and this thesis does not suggest that this is a value that should be adhered to by prosecutors.

By summonsing victims of domestic violence to attend court and prosecuting their abusers, against their will, prosecutors are preventing victims from doing what they would otherwise do. By pursuing a victimless prosecution they are doing what the victim would otherwise want. To that degree the victim is unfree, they might even be said to be coerced.[380] If a person's wishes are frustrated there runs the possibility that prosecutorial action becomes oppressive (whether that is the intended effect or not). Philosophers have been prepared to put limits on freedoms in the pursuit of other valued goals; justice, happiness, culture, security.[381] For the prosecutor it seems that the 'public interest' becomes the test for whether freedom can be justifiably limited.

If negative freedom is being left in peace,[382] *positive freedom* refers to the need for the origins of actions to be rooted in personal choice. If a person is positively free they are able to identify themselves as the source of their own decisions; decisions become embodied decisions and are equivalent to self-determination.[383] This is the ability to conceive goals and strategies of ones' own and to be able to execute them. These are one's rational decisions and are identified with the dominant self as being the master of one's self. The extent to which I believe that I have self-mastery is the extent to which I feel free. Decisions are 'unfree' if they can be traced back to other agents.[384]

It is possible to justify coercion of others in their interests, to serve a greater goal and a higher level of freedom.[385] To do this assumes that the third party (in our example, the prosecutor) is more enlightened and that the subject (in our example the victim) is either blind or ignorant or corrupt (or corrupted, in our example, by the perpetrator?).[386]

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[379] Wolfenden Committee, 'Report of the Committee of Homosexual Offences and Prostitution' (1957) cmmd 247 HMSO.
[380] Coercion is 'the deliberate interference with of other human beings' in Miller (n 379) 170.
[381] Ibid 170.
[382] Lacey, *Unspeakable Subjects* (n 196) 77.
[383] Miller (n 378) 25.
[384] Ibid 24.
[385] Ibid 179.
[386] Ibid 179.

The prosecutor here is pronouncing that they, not the victim, truly know what is best for the victim (and wider society). The implication is that, if only the victim were rational, if only they understood the situation as well as the outsider, would the victim not rebel? Their empirical selves may have expressed desires and wants but this needs to be brought into line with their true self and the true person we know them to be capable of being: happy, wise, fulfilled and able to perform duties. The prosecutor can also see the value of justice for society, which your empirical self cannot. However, Miller warns that the danger of this approach is that the 'true', notwithstanding inarticulate and suppressed, self and its relationship with 'freedom' can be 'made to mean whatever the manipulator wishes'.[387]This potentially leaves huge scope for prosecutors to be able to justify any decision. What then ought to guide them?[388]

Positive freedom includes acknowledgement that there must be a provision of certain goods and facilities by the state.[389] In the context of domestic violence criminal justice intervention could be considered as the provision of goods and facilities which typically means the use of arrest and prosecution of perpetrators. *Positive freedom*, acknowledges that there must be a combination or balance of state support on the one hand and state non-intervention on the other.[390] This balancing of public responsibility and respect for private freedom through non-interference is precisely, inter alia, the balancing act that prosecutors are struggling with when pursuing prosecutions against the wishes of the abused.

With the virtue of positive freedom or 'not being decided for' comes the weight of bearing responsibility for one's own choices.[391] For prosecutors taking decisions in others' purported best interests, it follows that at least some of the responsibility for the consequences of their choices must be borne by them. It is not hard to see why it is easier for prosecutors to justify decision-making that did 'everything it could' within their powers to end the violence and hold perpetrators to account.[392] By acquiescing to victim preference

[387] Ibid 181.
[388] See Chapter Two and the 'lived subject' based on vulnerability theory, relational autonomy and the capability approach.
[389] Lacey, *Unspeakable Subjects* (n 196) 77.
[390] Ibid 77.
[391] Miller (n 378) 178.
[392] The role of prosecutors is discussed fully in Chapter Four. Here, I simply highlight that prosecutors have the power to prosecute or not (occasionally prosecutors may have the opportunity to 'sign post' victims to other agencies for support but this is not traditionally the prosecutor's role).

to drop a case, they may still feel liable should future violence erupt. To some extent, victim retraction statements have the effect of shifting responsibility to the victim for non-prosecution.[393] But prosecutors know all too well that in the event of future serious violence perpetrated by the defendant against the victim (or a new partner) there will be questions asked about why the decision was made to discontinue the original case. The responsibility for the decision rests with the prosecutor.[394] Chapter Two suggests a theoretical approach that, if followed, would support prosecutors in making well-considered decisions.

However, whilst the idea of privacy as freedom may highlight the potential cost of state regulation or interference, Post rightly assesses that it cannot resolve the difficulty of whether regulation is required or advisable; '[p]rivacy as freedom emphasises what is lost by state regulation, it does not begin to specify what is gained'.[395] To assist in this balancing exercise of intervention on the one hand and privacy on the other, I now summarise what privacy has to offer. As I have suggested, privacy can free individuals and allow them to define themselves and choose how they live their lives. Privacy can allow a space for living one's life in the way one chooses 'negotiating legitimately different views of the good life, freeing people from the constant burden of justifying their differences'.[396]

In this way, privacy affords individuals the capacity to realise their personal visions of a life worthy of a human being. Iris Marion Young calls for state (and non-state) agents to respect individual claims to this privacy. This thesis recognises the importance of her vision of re-drawing privacy not in terms of what the public excludes but rather in terms of what a person has a right to exclude others from, or chooses to withdraw from public view.[397] In formulating the concepts of public and private spheres in this way, Young accepts that there is a valid distinction to be made between the two. This is so, not in terms of any social or institutional division which has the potential to perpetuate patriarchal structures (as outlined above), but rather in terms of recognising the value privacy can offer.[398]

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[393] The quality of these statements is explored in empirical work in Chapter Three.
[394] See Chapter Four for empirical insight.
[395] Post (n 366) 2098.
[396] Rosen (n 367) 24.
[397] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 120.
[398] Here I am thinking of the potential for secondary victimisation as a result of the public court process, rather than the benefits that might be obtained for some women through, for example, counselling, one to one victim support or working with a housing lawyer to increment changes discretely out of the gaze of the perpetrator.

PART THREE

3 The Legal Subject and its Failure to Describe Abused Women's Subjectivities

Feminist legal scholars' critique of the liberal legal person offers further insight into how victims of domestic abuse have come to be viewed and understood by criminal prosecutors and sheds light on why prosecutors may prefer to proceed in cases where a victim is no longer supportive. Their examination of the legal subject challenged law's claim to neutrality and genderlessness, and observed its inherent masculinity.[399] They exposed that in seeking to treat everyone equally under the umbrella of the 'universal person', legal actors abstract individuals from social context.[400] By ascribing universal qualities to the legal subject, the effect is the marginalisation of, inter alia, women.[401] The critique resonates with the previous discussion of the public and private spheres because the liberal subject mirrors the public, to the detriment of recognising qualities associated with the private.

Naffine has suggested that such analysis has started to look like 'old style feminism' in which it was alleged that men were the social and legal norm while women were excluded and exceptional.[402] Modern legal personhood, she suggests should be understood in a more multifaceted way than this simple critique of the liberal legal subject. However, of the 'cast of legal persons' that can now be identified, the legal person that most resembles the liberal legal subject, 'the rationalist's person', 'has had the strongest purchase in criminal theory'[403] and remains the 'paradigmatic legal person'.[404] Of the other three categories of legal person she identifies (rationalist, legalist and religionist) Naffine concedes that they all maintain a distinctively masculine bias. For these reasons, as far as our problematic is concerned, second-wave legal feminism's early analysis of women's exclusion from the legal subject holds resonance.[405]

The rationalist's view of the person is someone who acts with rationality, intelligence

[399] 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.
[400] Ngaire Naffine, *Law and the Sexes* (Allen and Unwin 1990).
[401] Diane Polan, 'Towards a Theory of Law and Patriarchy' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books 1982) 95.
[402] Ngaire Naffine, 'Women and the Cast of Legal Persons' in Jackie Jones et al (eds), *Gender, Sexualities and Law* (Routledge 2011).
[403] Ibid 18. Naffine also identifies the religionist's person, the naturalist's person and the legalist's person in Ngaire Naffine, *Law's Meaning of Life* (Hart 2009).
[404] Ngaire Naffine, *Law's Meaning of Life* (Hart 2009) 66.
[405] Of her most recent analysis of the legal subject (or legal personhood) in Naffine (n 404) Naffine still asserts that, '[t]he current cast of legal persons all look like different types of men'.

and reason. Its lineage can be traced to liberal philosophical understandings of the person. The paradigmatic rational actor, or liberal legal subject, will be at odds with those who may not be able to reason in the way criminal law demands. Seeming to ignore difference, 'liberalism prefers to turn its face away from the diverse ways in which citizen identity is constructed'.[406] Liberals' universalistic approach tends to treat digressions from the standard as 'anomalous or imaginary'.[407]As I have shown through my exploration of the characteristics of privacy, diverse citizen identities are probably at their most broad when they are being formed, outside of the public gaze, in the home. This is relevant for DA prosecutors because it serves as a reminder that there will be more than one way of understanding domestic abuse victims and their intimate relationships.

Women, Naffine observed in 1995, had not been able to develop a distinctively female legal subjectivity because they are only ever recognised as women outside of the concept of the subject.[408] The 'public subject' had been constructed as an impersonal individual who operated with emotional distance,[409]sovereign only to himself as a self-possessing creature of reason; in other words, attributes that have traditionally been ascribed to 'the masculine'. The 'private subject' had not generally been considered by law, she noted, because, notionally, that is where the law did not encroach.[410] Nonetheless, Naffine contested that the 'unofficial private subject of law, once again… transpires…[to be] a man..' with the woman being denied status as a legal subject.[411] She identified the legal subject as sexed and male and '[i]n law the rational, knowing female subject … an oxymoron'.[412] If women are not *recognisably* women in the law, Chapter Two endeavours to reconstitute the legal subject.

Using the example of domestic abuse to examine the legal response to women, Naffine illustrated law and legal actors' failures. The conventional understanding that women and men are equal before the law meant that female and other diverse subjects were dismissed. So, for example, where abused women assert their right to remain with

[406] Margaret Thornton, 'Embodying the Citizen' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (OUP 1995) 202.
[407] Ibid 203.
[408] Ngaire Naffine, 'Sexing the Subject (of Law)' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (OUP 1995) 20.
[409] Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicholson 1985) 108-109.
[410] Naffine (n 408) 21.
[411] Ibid 21.
[412] Ibid 21.

their abusive partner 'the type of autonomy these women seek does not mesh well with the law's traditional view of the concept which is an all-or-nothing thing, developed in the public realm, where men are expected to relate to each other at a physical and emotional distance'.[413] Women in this example, in the eyes of the law and its agents, fail to meet the expected 'male' norm of acting 'reasonably'. Rather, ignoring the many social, structural, physical and economic benefits of remaining with their '(not always) violent man',[414] women find themselves being attributed at worst antiquated notions of irrationality and at least the requirement to justify their decision necessitating an exploration of *her* pathology, not his.[415] In failing to meet the law's conception of its subject, women, not law became the object of criticism.

Instead of accepting that there may be many rational reasons and legitimate explanations for a woman's decision to remain with her partner (and perhaps concomitantly withdrawing her support for a criminal prosecution) law identifies the 'problem' as the woman's failure to understand what is in her and/ or society's best interests. More than that, her actions become diagnosed through 'battered women's syndrome', 'learned helplessness' or otherwise as vulnerability through victimhood. Thus, her decision to stay becomes exceptional rather than understandable; pathological rather than considered. Women's normal responses are outside of legal subjectivity and require medical explanation. Such analysis leads Naffine to assert that women cannot be both distinctively women and, at the same time, legal subjects.[416] Naffine's analysis merits prosecutorial attention as failure to recognise the potential validity of the reasons behind the withdrawal of support for a prosecution risks elevating prosecutors into the position of asserting that they, not the woman herself, are in the best position to know what is in her best interest.

Law's conception of the autonomous individual is someone who is free to leave any situation at will in accordance with their own choice. This clear division between the way the law conceives independence on the one hand and the way women live their lives not doing what the law expects, is evidence of the legacy of women's relationship with the law as being 'other'. Thus, Naffine argues, real women and their lives need to be recognised in

[413] Ibid 31.
[414] Susan Boyd, *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (University of Toronto Press 1997) 4.
[415] Naffine (n 409) 33.
[416] Ibid 35.

the 'legal subject' and women's rights and remedies need to adequately reflect their particularity.[417] Failure to do this will mean that, as legal 'others', women will not benefit from the law in the same way as men.

Naffine's work about perceptions of the legal subject speaks to Schneider's exploration of the false dichotomy painted between women's victimisation and women's agency. Both concepts are too rigidly understood. The problem of the victim/ agency dichotomy arises because all too often women activists have achieved recognition and change through spotlighting violence against women premised on gender subordination and women's victimhood. This 'victim feminism', whilst being effective in calls for change, has the effect of fortifying the image of women as passive and fragile victims whilst at the same time failing to tackle the systemic nature of women's lesser status.[418] It is an effective rallying strategy because it piques sympathy and demands responsiveness.[419]

Conversely, the mass appeal of feminisms which promote women's agency and ability to effect change through individual will, choice and responsibility, leaves those abused women who do not exit violent relationships, to be considered 'victims by choice, despite the realities of gendered violence'.[420] The danger of emphasising abused women, particularly those who stay, as helpless or submissive is that efforts they make to implement improved safety for themselves and their children, can be dismissed as 'pathological or incompetent'.[421] The truth of the matter may be that incremental changes and the overcoming of gender based obstacles are being negotiated. This may be being done invisibly, possibly to mitigate separation assault, and may include, for example, obtaining money, seeking support, information and building options.

By recognising the complex picture of women's resilience, we can appreciate that '[n]either concepts of agency or victimisation fully take account of women's experiences of oppression and resistance in relationships'.[422] Instead we might remind ourselves that

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[417] Ibid 38.
[418] Schneider, *Battered Women and Feminist Lawmaking* (n 94) 74.
[419] Recall the way in which Frances Power-Cobbe used vivid descriptions of the physical victimhood of abused women to call for attention in (n 217).
[420] Schneider, *Battered Women and Feminist Lawmaking* (n 94) 76. However, the negative side-effects of this successful consciousness raising are the enhancing of stereotypes and the undermining of recognising female victims' individual might and facility.
[421] Martha Mahoney, 'Women's Lives, Violence and Agency' in Martha Fineman and Roxanne Mykitiuk (eds), *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (Routledge 1994) 64.
[422] Ibid 63.

agency is diverse, context specific and inconsistent. It will not always involve explicit opposition by the woman but behind the scenes she might be manoeuvring and mediating the dynamic. The 'all-or-nothing agency of liberal theory',[423] with its two polar options for DA victims; exit (exercising agency) or staying (indicating victimhood) simply do not reflect what might be going on for individual women.

A context specific approach is also called for by Lewis and colleagues in assessing abused women's relationship with law and what they want law to achieve for them.[424] Calling for an end to the perception of DA victims as 'passive recipient[s] of legal intervention'[425] they assert women as 'active agents, engaged in a complex process of active negotiation and strategic resistance'.[426] Women engage the law to fulfil objectives of protection, prevention, reform and justice and, as such, legal intervention is unlikely to be sufficient on its own to end the violence.[427] Women know this. However, invoking the law may allow women to reassert power in their relationship. By taking charge and using the law, women gain leverage and a tool for managing conflict. Ford has therefore described law and criminal prosecutions as a 'power resource',[428] where a woman can use or threaten to use arrest and prosecutions by way of deterring their partner from further incidents.[429] Moreover, withdrawing support for the prosecution may be a way of seeking some sort of 'negotiated order' on her terms.[430]

Naffine's work highlighted how the law and its legal actors failed to understand the female DA victim's commitment to her partner without questioning her lack of rationality and reason. Modern prosecutorial DA policy offers a different emphasis; prosecutors are made aware that they should not have preconceptions about what a 'perfect victim' will look like.[431] So, rather than dismissing her decision to stay as irrational or questioning her credibility because of it, prosecutors are reminded that women may stay because,

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[423] Schneider, *Battered Women and Feminist Lawmaking* (n 94) 85.
[424] 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.
[425] Ibid 179.
[426] Ibid 180.
[427] My empirical research in Chapter Five is testament to this.
[428] I borrow this phrase from David Ford, 'Prosecution as a Victim Power Resource: A Note on Empowering Women in Violence Conjugal Relationships' (1991) Law and Society Review 313.
[429] William Goode, 'Force and Violence in the Family' (1971) Journal of Marriage and the Family 624.
[430] Ford (n 428) 320.
[431] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).

'complainants will often not realise that they are in an abusive relationship'.[432] As such, '[p]rosecutors need to understand the vulnerability of domestic abuse complainants'.[433] Her decision to stay/ withdraw her support for a prosecution has been re-framed to ensure prosecutors *understand* that she may not know what is in her best (and safest) interests.[434] In this way, though the terminology may have altered and attempts at empathy have been made by the modern prosecutor, the effect is still the same. The woman's ability to form rational judgments in her own interest is potentially dismissed.

Bearing this in mind, prosecutors working on an assumption that pursuing a case of DA is in the public interest - unless certain factors indicate otherwise - need to be aware of the potential of falling into the trap of thinking of the woman *only* as a victim. If an abused woman does not leave her partner and decides to withdraw her support for a prosecution there should not be an automatic assumption that her decision has only been made due to her victimhood and inevitable vulnerability. She may well be practising active resilience. Such women are likely to be assessing how best to keep themselves and any children safe. They are likely to be assessing whether criminal prosecution will, amongst other things, anger the man further, assist her or support her in making the decision to leave, affect her children's relationship with their father, impose additional financial pressures or result in her partner being rehabilitated.[435] Prosecutors ought to be mindful that, at the point that she withdraws her support, the law may have been invoked to the extent that she required it for her own purposes.

4 Should Feminist's Turn Away from Law?

The legal subject needs to be reconceived not only to recognise 'women' but to recognise the diversity of women's lives. The ideal of the 'any personness'[436] of the legal subject is not sustainable. More than identifying the Liberal subject to be a 'man of law'[437]

[432] Ibid.
[433] Ibid.
[434] See Matthew Hall, 'Prosecuting Domestic Violence: New Solutions to Old Problems' (2009) International Review of Victimology, 255, 262 in which the Chief Crown Prosecutor stated that women who withdraw their support may have 'very very low self-esteem. So that actually that individual might not be capable of making any major decisions about their lives because they're just totally undermined, feel pretty useless and downtrodden.'
[435] Lewis et al (n 424) 191.
[436] Naffine (n 400) 148.
[437] Ibid 148.

or having 'a masculine flavour'[438] the above discussion successfully exposes how women have historically been outsiders from the law and how law can be non-inclusive despite its purported objective to 'offer a universal, all embracing service'.[439]

How to move forward? This project, at its heart, considers decision-making within the criminal justice system. I seek to assist those working within the existing legal order. By doing this, I am mindful of Smart's claim that 'in accepting law's terms to challenge law, feminism always concedes too much'.[440] Not only do I risk using the analytical parameters of patriarchal law to address (what is primarily) a feminist concern but I also accept a framework that is more and more being co-opted by neoliberal agendas. Munro cautions that neoliberalism's clear support of feminist violence against women campaigning, which sees patriarchy as the source and perpetuation of violence, strategically justifies 'punitive, carceral interventions that extend the surveillance and control to which citizens- including vulnerable women- are subject'.[441] The risk of my project focussing on the criminal responses to domestic abuse can be summarised threefold; firstly, the project risks leaving the law as it is (with women somehow being shoehorned into existing legal paradigms); secondly, it risks co-opting with potentially regressive neoliberal agendas and; thirdly, by default it might also diminish state responsibility to provide the non-legal (housing, therapeutic and economic) support that women may need to realise empowerment.

Feminists have repeatedly made the mistake, according to Smart, of resorting to law. When we recognise the coincidence in history of the creation of both law and gendered divisions in society, she argues, we come to understand that law cannot resolve these societal structures of power.[442] The greatest latitude comes from *less* regulation so that alternative relationships and solutions can be developed.[443] Contrary to Madden-Dempsey's optimistic appraisal of the criminal law's potential for creating a just society through her vision of 'feminist' DA prosecutions, Smart is sceptical. Law, she cautions, does not hold the key to unlock patriarchy. Feminist jurisprudence only serves to maintain law's place in the hierarchy of solutions and outcomes. Smart argues that '[i]n constructing a new jurisprudence, feminists [like Madden-Dempsey] give a renewed legitimacy to the power of

[438] Naffine (n 402) 16.
[439] Naffine (n 400) 154.
[440] Smart, *Feminism and the Power of Law* (n 189) 5.
[441] Munro, 'Violence Against Women, 'Victimhood' and the (Neo)Liberal State' (n 10) 242.
[442] Smart, *Feminism and the Power of Law* (n 189).
[443] Ibid 84.

law to organise and regulate our lives.'[444] Perhaps it is better, she urges, to consider the value of law for feminism is its central focus as a rallying point for emergent accounts and visions.

The law thus has the power to disqualify alternative discourse and resolutions outside of the law; the focus becomes narrow. The law can mislead us into thinking that only it holds the answer to alleviate women's oppression.[445] But non-legal alternatives may and ought to provide improved alternatives to legal solutions.[446] By relying on the pre-existing frames of law to achieve equality the solution becomes a need to change 'this' law or incorporate 'that' change,' all the time trying to wrestle the solution into pre-existing rituals, language and emphases on adversarialism and 'winning' the case rather than seeking the truth or the most beneficial outcome.[447] Polan summarises thus, 'the whole structure of law, its hierarchal organisation, its combative adversarial format; and its undeviating bias in favour of rationality over all other values- defines it fundamentally as a patriarchal institution'.[448] On this account, efforts to change the pre-existing legal order, such as this project, will be inadequate.

However, this project proceeds on the basis that women still need to be able to use the law, and as Hunter points out, often have no choice in being 'hauled' before it.[449] Sandland, like Hunter, urges less pessimism about Law's potential. He contends that reforms do not always result in a simple reconfiguration of the maleness of the law and that real improvements have and can be shown to have been made since Smart wrote her seminal work.[450] This project is illustrative of the impact feminism can have on law and of how law, contrary to past accusations, has been receptive to feminist challenge.[451] Accordingly, calling for ameliorations to criminal justice responses to domestic abuse and developing feminist theory to assist prosecutorial decision-making remain valid objectives.

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[444] Ibid 184.
[445] The danger of this perception is that it creates reactionary positivist alternatives as the only credible way to challenge it. See Carol Smart's critique of Catherine MacKinnon in Smart, *Feminism and the Power of Law* (n 189) 71.
[446] Deborah Epstein. 'Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System' (1999) 11 Yale JL & Feminism 3.
[447] Naffine (n 400).
[448] Diane Polan, 'Toward a Theory of Law and Patriarchy' in David Kairys (ed), *The Politics of Law* (Pantheon Books 1980) 301.
[449] Rosemary Hunter, 'The Power of Feminist Judgments?' (2012) 20 Feminist legal studies, 143.
[450] Ralph Sandland, 'Between "Truth" and "Difference": Poststructuralism, Law and the Power of Feminism' (1995) 3(1) Feminist Legal Studies 3.
[451] Hunter, 'The Power of Feminist Judgments?' (n 449) 135.

Conclusion

CPS domestic abuse policy recognises that 'women may… be more vulnerable [than men]' because they experience greater levels of physical violence and control, and an increased likelihood of sexual violence.[452] This chapter explored how discourses about female victims of domestic violence, both current and over time, have served this assessment. In 1878 Cobbe deliberately accentuated abused women's corporeal vulnerability to prompt the Wife Beaters Act 1882. The case of R v Jackson in 1891 was pivotal in reassessing the right of the husband to 'correct' his wife physically. These were the first signs of the state's willingness to intervene in 'private' matters previously considered beyond their reach. Misogynistic attitudes about a man's right to chastise his wife pervaded up until the 're-discovery' of domestic violence in the 1960s and 1970s and these attitudes persist amongst a disproportionate number of offenders today.[453] The first part of this chapter therefore traced the historic legacy of a man's belief in his right to chastise his wife; a belief that the CPS now actively seeks to condemn.

The chapter then mapped second-wave feminist efforts that highlighted how systemic gender inequalities contribute to the gender asymmetry of violence in the home. Houston summarises this feminist interpretation and understanding of domestic abuse in the term that recognises domestic abuse as 'patriarchal force'.[454] The chapter suggests that the move to intense criminalisation has been propelled and supported by this particular feminist explanation of intimate partner violence and the part criminal law might play in addressing it.[455]

What was formerly a private relationship problem has become a matter of public responsibility. The public/ private divide contributes to gender inequality in society and the dichotomy creates and perpetuates power and control imbalances in women's lives which make them vulnerable to exploitative abuse on the one hand and feeling trapped in abusive relationships on the other. Notwithstanding this, those assisting women who have experienced domestic abuse should have regard for the value of women's privacy. Respecting that privacy can facilitate one's dignity, self-respect and allow creation of 'true

[452] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).
[453] Ellen Pence and Michael Paymar, *Education Groups for Men who Batter: The Duluth Model* (Springer Publishing Company 1993) 1- 16.
[454] Houston (n 34) 217.
[455] Ibid.

knowledge'. Privacy ought properly to form part of prosecutorial decision-making; not least because it would prompt the prosecutor's use of empathy (a praxis I explore the benefits of in Chapters Two and Five). This awareness of the significance of privacy must be combined, I argue, not only with an appropriate future risk assessment but also with a reanalysis of the paradigmatic legal subject that recognises women's own agency and efforts toward self-empowerment.

Finally, prosecutors must be mindful of assumptions they make about female victims. Naffine cautions that in criminal law there is an expectation that the legal subject is rational, distanced from emotions and operating with a guiding objectivity (with certain stated exceptions). As such, lawyers bring this analysis to assessing the female victim of domestic abuse. Failure to act in ways that accede to this norm (such as staying with an abusive partner or not wishing to see him punished) lend merit to the prosecutor's belief that they are best placed to act, objectively, in the victim's best interest. In a similar vein, the chapter drew attention to how failure to recognise that a 'victimised' woman can have agency, sees her labelled as unable to know what is in her best interests. Chapter Two now offers further possibilities for prosecutors to develop theoretically informed praxis by approaching the legal subject with regard to vulnerability theory, relational autonomy, the capability approach and therapeutic jurisprudence.

CHAPTER 2

The Way Forward: Reconceiving the Female Victim Using Vulnerability Theory, Relational Autonomy and the Capabilities Approach

Introduction

Part Two of Chapter One was concerned with the construction of the liberal legal subject of criminal law and how it fails to adequately describe women's lives and experiences of living with an abusive partner. The chapter identified that prosecutors, faced with an unsupportive domestic abuse victim, have made commendable efforts to respond to feminist critique about the self-sufficient legal subject. Rather than conceiving her as a failed, irrational or non-credible legal subject the risk now, however, is that prosecutors identify her as a particularly vulnerable subject in need of protection. In this chapter, I develop alternative modes of analysing how best to think about and support abused women when they come into contact with the criminal justice system. A theoretically informed praxis that takes into account 'vulnerability theory',[456] 'relational autonomy'[457] and the 'capabilities approach'[458] is forwarded as a foundation for prosecutors to deploy 'therapeutic jurisprudential'[459] ways of working. Taken together, prosecutors are encouraged to recognise what I refer to in short-hand as the 'lived subject'.

Part One of the chapter begins by outlining Fineman's theory of dependency which was the genesis of her vulnerability theory. I move on to consider the claim that vulnerability is ontological, universal and embodied.[460] Accepting this, I examine how vulnerability theory asserts that the state has a duty to respond to ensure that its

[456] The work of legal feminist theorist Martha Fineman is considered typical of recent vulnerability scholarship in this regard.

[457] 'Relational individualism' was first conceived by Nancy Chodorow in Nancy Chodorow, 'Toward a Relational Individualism: The Mediation of Self through Psychoanalysis' in Thomas Heller, Morton Sosna and David Wellberry (eds), *Reconstructing Individualism: Autonomy, Individualism and the Self in Western Thought* (Stanford University Press 1986). Successive feminist ethicists have developed the concept of 'relational autonomy'. See, for example, Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (OUP 2000) and Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (OUP 2011).

[458] As advocated by Martha Nussbaum and Amartya Sen- see below.

[459] See, for example, Bruce Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (1997) 3(1) Psychology, Public Policy and Law 184, 185.

[460] See, for example, Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1.

institutions and practices do not contribute to creating structures that diminish its population's capacity to be resilient. Together, and on their own, these institutions provide us with 'assets'[461] that soften the effects of adverse occurrences. Accepting this premise, what I suggest is lacking from vulnerability theory is a comprehensive theorising of *how* 'responsive' action should be implemented by the state for individuals at a particular point of crisis.[462] What should the state be guided by in these circumstances and why? Fineman herself does not address the question directly but I suggest that institutions, such as the CPS, might be expected to refer back to the 'assets' of resilience Fineman describes generally in order to determine their direction. These 'assets' however are not offered with a comprehensive theorising or valuation.

For that reason, and not being wholly satisfied with these 'assets' as a set of guiding principles for prosecutors, Part Two of the chapter turns to ethics that contemplate the significance of an individual's autonomy in its relational sense. Whilst I reject, as Fineman does, the valorisation of libertarian autonomy, relational autonomy can be a stated and guiding aim in conjunction with, not in competition to, vulnerability theory (as adapted by Mackenzie, Rogers and Dodds[463]). Finally, building on the offerings of vulnerability theory and relational autonomy, I consider the capabilities approach and therapeutic jurisprudence as possible ways of countering incomplete (neoliberal[464]) constructions of vulnerable adults as being 'at risk', reducible to a set of criteria, such as that contained in police 'risk assessments'.[465] Such incomplete ways of assessing women's needs, are likely to overlook the importance of the internal capabilities, emotions and mental health of the women affected.

In sum, what is required, is a holistic account of vulnerability which takes into account not only the objective check-lists we see in risk-centred neoliberal protectionism (described in Chapter Three) but also a full understanding of the subjective lived

[461] 'Assets' are described by Fineman as one's 'coping mechanisms, or resources that cushion us when we face misfortune, disaster, and violence. Cumulatively… assets provide individuals with "resilience" in the face of vulnerability' in ibid 13.
[462] Although I do not suggest that women who experience domestic abuse are necessarily in 'crisis', they do become known to the criminal justice agencies following a trigger incident(s) that often requires immediate and targeted decision-making by the state upon whom she called and who is expected to respond.
[463] Catriona Mackenzie, Wendy Rogers and Susan Dodds, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014) Introduction.
[464] For an explanation of 'neoliberal' see Chapter Three.
[465] For discussion about the inadequacies of the police Domestic Abuse Stalking and Harassment (DASH) victim risk assessment see Chapter Three, section 5(iii).

experiences of women and how they ascribe value to their lives.[466] Therapeutic jurisprudence highlights how a thoughtless disregard of a woman's mental health can have a detrimental impact, not only on her autonomy and sense thereof, but also upon her actual future safety. We see in Chapter Five how supporting women's emotional and mental health needs as they interact with the CJS can significantly assist her. Bearing all of this in mind, prosecutors would be guided to contemplate what is really in the best interest of the woman thereby reducing detrimental, paternalistic or inflexible interventions which can have the paradoxical effect of increasing vulnerability whilst intending to diminish it.[467]

PART ONE

1 Using Vulnerability: Some Caveats

I have suggested that there may be potential, in an effort to demonstrate taking domestic abuse seriously, to frame the victim as 'vulnerable' and in need of protection (through prosecution). But what is meant by 'vulnerable' in the common everyday usage which populates political strategy[468] is distinct from the academic scholarship that has focused attention on a theory of vulnerability.[469] Deployed in the quotidian, vulnerability is a descriptor and equates with someone's susceptibility to affects upon them and implies an exposure to potential harm.[470] It should perhaps therefore come as no surprise that the 'vulnerability' that has pervaded public policy has been used to describe 'virtually every group facing a difficult predicament'.[471] Furedi suggests that vulnerability has become the defining condition of our time.[472] As a consequence, how the state aims to protect 'the

[466] An approach which accords with Michael Dunn, Isabel Clare and Anthony Holland, 'To Empower or to Protect? Constructing the 'Vulnerable Adult' in English Law and Public Policy' (2008) 28(2) Legal Studies 234.
[467] Or 'pathogenic vulnerability' as examined more fully below, see Catriona Mackenzie, Wendy Rogers and Susan Dodds, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014) Introduction.
[468] See, for example, Her Majesty's Government, 'Together We Can End Violence Against Women and Girls: A Strategy' (Home Office 2009); Her Majesty's Government, 'Tackling the Demand for Prostitution: A Review' (Home Office 2008) and Her Majesty's Government, 'Missing Children and Adults: A Cross Government Strategy' (Home Office 2011).
[469] See, for example, Chris Beasly and Carol Bacchi, 'Envisaging a New Politics for an Ethical Future: Beyond Trust, Care and Generosity – Towards an Ethic of 'Social Flesh'' (2007) Feminist Theory 279; Judith Butler, *Precarious Life: The Powers of Mourning and Violence* (Verso 2004) and Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law and Feminism 1.
[470] 'Vulnerability' comes from the Latin, 'to wound'.
[471] Frank Furedi, 'Fear and Security: A Vulnerability Led Policy Response' (2008) 42(6) Social Policy and Administration 645, 656.
[472] Ibid 656.

vulnerable' appears to have saturated official rhetoric and policy discourse.[473]

What is often lacking in the political rubric of 'vulnerability', however, is a comprehensive, consistent or common theoretical understanding of it. Munro and Scoular refer to vulnerability's common usage as a 'flat' understanding of vulnerability that fails to interrogate the complexity of the condition, its relations and narratives.[474] Caution should therefore be exercised in unquestioningly embracing 'vulnerability' as a legitimising call to action because the fluidity and malleability of 'flat' vulnerability terminology renders it susceptible to being applied to meet the political ends of any range of mainstream political groupings under the guise of state altruism.[475] As the everyday use of the term enjoys ethical appeal across political agendas, it has been used as a means of justifying state intervention in people's lives.[476]

The concern then is that whilst political reliance on 'vulnerability' has the encouraging potential to support social justice ameliorations by requiring state responsiveness, there is potential for its use to extend didactic neoliberal governance.[477] For example, in response to our vulnerability to terrorism, stronger surveillance policies are green lighted. In response to vulnerable sex workers and migrants, securitisation through border controls and criminalisation is assented and in response to the vulnerable victim of domestic violence the perpetrator must be brought to justice and future risk to the victim must be managed by the state (through, inter alia, criminal prosecution). Objections to using vulnerability to effect these ends are concerned with oppressive paternalism capable of expanding state control and the stigmatisation and exclusion of those so labelled.[478]

I therefore caveat what follows by acknowledging the potential for the term's commonplace use to be deployed to political ends, to evince more conservative projects and to employ 'patronising and oppressive'[479] mechanisms. I suggest, however, that vulnerability *theory* can be a productive way of conceiving the legal subject and the state's

[473] Ibid 656.
[474] Vanessa Munro and Jane Scoular, 'Abusing Vulnerability? Contemporary Law and Policy Responses to Sex Work in the UK' Feminist Legal Studies (2012) 20(3) 189, 189.
[475] Ibid 191. Similarly, Alexandra Trimmer (Utrecht University School of Law) referred to 'vulnerability' as a 'chameleon concept'- able to change to suit its surrounds at 'A Workshop on Vulnerability and Social Justice' (2016) Leeds University.
[476] Ibid 189.
[477] See Chapter Three for a full discussion of 'neoliberalism'.
[478] Kate Brown, ''Vulnerability': Handle with Care' (2011) 5(3) Ethics and Social Welfare 313, 316.
[479] Ibid 314.

responsibility to act. By approaching prosecutorial decision-making grounded in vulnerability theory, the effect is one of affiliation with victims, not branding and 'othering'.

2 Dependency: A Paradigm Shift for Conceiving the Legal Subject

The work of Martha Fineman offers a productive and transformative way of conceiving the legal subject. The foundation of her vulnerability thesis, 'The Autonomy Myth' recognised individuals' inevitable *dependency* on others. It was her first step in a move to identify a legal subject based in human experience and the human condition. In reaching a new conception of the legal subject her approach indirectly tackles gender inequality rather than confronting it head on. Her starting point, 'turn[s] the previous conversation on its head'.[480] Rather than identifying disadvantaged groups and contending that sameness of treatment will facilitate their equal status, Fineman begins by identifying 'disadvantage' in the West's dominant conception of the universal subject as self-sufficient, capable and independent and free to carve out a successful life for oneself.

However, this libertarian autonomy[481] that dominates the political arena, ignores that *dependency* is an inevitable consequence of being human; during life's course we are all dependent during childhood, sickness or old age. Society labours, therefore, under the misapprehension of the 'autonomy myth'[482] (the desirability and attainability of autonomy) and its attendant ideals of individualism, self-reliance and achievement.[483] In so doing, society fails to meet its collective responsibility to 'inevitable dependents' (the looked-after) and 'derivative dependents' (the caretakers). Dependency and its derivatives become stigmatised because they are seen to fall short of the efficient execution of an autonomous life. In fact, dependency should be regarded as normal and unavoidable and social contract theories of justice have been wrong to omit the inevitability of human dependency.[484]

> Both types of dependency [inevitable and derivative] are, according to Fineman, commonly conceived of as private matters for which the family, not the state, assumes

[480] Maxine Eichner, 'Dependency and the Liberal Polity: On Martha Fineman's Autonomy Myth (2005) 93 California Law Review 1286, 1286.
[481] 'Autonomous': Of a person, the mind, etc: free from external control or influence; able to act independently' *Oxford English Dictionary* (OUP 1989).
[482] Fineman, *The Autonomy Myth* (n 362).
[483] Pamela Anderson suggests there is 'an unachievable ideal of autonomy' in Pamela Anderson, 'Autonomy, Vulnerability and Gender' (2003) 4(2) Feminist Theory 149, 157.
[484] Eva Kittay, *Love's Labor: Essays on Women, Equality and Dependency* (Routledge 1999).

responsibility. That being so, 'the institution of family frees the market to act without consideration or accommodation for dependency'.[485] In short, with the private family raising the next generation of workers, consumers and voters without remuneration, the market and state are enabled a 'free ride'.[486] The state only steps in, grudgingly, should families 'fail' or fall short of self-sufficiency. If gender inequality arises from dependency being buried in the private sphere, with women taking on the lion's share of the care work, what should be done? For Fineman, resolution lies in the re-conceptualisation of the private family. No longer to be considered a private institution enabling other institutions to benefit from its functioning, it should be considered a ''dynamic public institution' that has been assigned a specific role for the benefit of society'.[487] That being so, social institutions should be supporting those who need and those who give care.[488] As far as the criminal justice system is concerned, this surely sets the expectation and assumption that matters of domestic abuse are matters the state must necessarily be concerned with.

However, and crucially when considering the theoretical framework offered in this thesis, in treating the family as a public institution, there should be no correlative right of society, according to Fineman, to control intimate personal decisions. Some concept of privacy is still required to resist collective control over the family. Fineman's work is therefore compatible with recognition of the 'affirmative potential' of privacy I advocate in Chapter One; that 'collective responsibility accompanied by a well-developed notion of privacy for the caretaking unit can provide autonomy for that unit'.[489]

By treating the family akin to a public body assigned the responsibility of taking care of children, the elderly and the unwell, rather than the 'natural' and discreet place to do so, Fineman rearranges preceding feminist thought about the overdrawn segregation of public and private.[490] Prior to Fineman, feminists advocated that the solution to gender inequality would be the sharing of child care responsibilities between the sexes (parental parity).[491]

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[485] Fineman, *The Autonomy Myth* (n 362) 37.
[486] Ibid 37.
[487] Eichner (n 480) 1289.
[488] It should be noted that Fineman's work is based upon insight from the United States. In the United Kingdom, governments have more readily assumed responsibility for 15 hours of free nursery childcare for three-year olds, 38 weeks per annum and for two year-old children where they are looked after by the Local Authority or where their parents are in receipt of certain income benefits.
[489] Fineman, *The Autonomy Myth* (n 482) 293.
[490] Eichner (n 480) 1290.
[491] Susan Okin's, *Gender, Justice and Family* (Chicago Press 1989) is typical of feminist work that advocates the 'parental parity' model. Others include: Jerry Jacobs and Kathleen Geerson, *The Time Divide: Work, Family and*

They encouraged employers to adopt practices to assist care-taking and urged genuine, not merely symbolic and partial attempts, at sharing household chores. These ameliorations, they asserted, would go far in reducing inherent injustices in the traditional gender-structured family and society. Fineman, however, reconceives the solution not in terms of demanding gender equality in the home and at work, rather, in terms of society recognising dependency as inevitable. If the state continues to assign the burdens of caretaking to families (as against other societal institutions) Fineman argues that the state must take responsibility to publicly support and subsidise carers.

Fineman's theory of dependency however has been criticised for failing to acknowledge that inevitable dependency is episodic (we have periods of dependency in our lives that come and go) and that 'derivative dependency' is performed by 'choice'. Consequently, recognising that people eventually transcend these periods, and that derivative dependents have chosen to care for others, critics have often failed to include dependency in their theories about justice and liberty. Furthermore, the traditional division between public and private spheres can be resistant to dismantling. Traditional legal theorists continue to assert that dependency can rightly be confined to a concern of the private sphere and that social and political theories can, indeed should, carry on without consideration of it.[492]

This is, however, an unhelpful perspective to those women who continue to suffer by feeling trapped in abusive relationships because of their derivative dependency (usually due to their care roles to children). They may feel forced to remain within the private family home until such time as the children are no longer dependent and their consequent economic dependency on their abusive partner does not feel so total. Are critics of, or those who ignore Fineman's analysis of dependency, really suggesting that abused mothers can be expected to wait until that period of their lives has passed before they are able to start financial independence? Secondly, can it be right that they are suggesting that mothers are derivatively dependent on their abusive partners through choice? Or is it possible, as Fineman argues, that through effective state subsidies for childcare (and housing) such

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Gender Inequality (Harvard University Press 2004) and Frances Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) HLR 1497.

[492] Martha Fineman, 'Equality, Autonomy and the Vulnerable Subject in Law and Politics' in Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 19.

women would be able to establish financial independence through employment? Those who fail to engage with the inevitability of dependency absolve the state of responsibility for supporting mothers/ carers with violent partners to effect life ameliorations away from their partner.

3 Vulnerability Theory: The Ontological Human Condition

Nonetheless, as a consequence of such critique of her dependency theory, Fineman developed her 'vulnerability theory'. While incorporating dependency theory, vulnerability theory recognises 'vulnerability' as a universal and *continuous* part of the human condition. It is therefore more 'theoretically powerful'[493] in the call for a more just society and re-conceptualisation of the subject. Whilst vulnerability might be universal, it is simultaneously varied and experienced and will not therefore manifest in the same way for everyone. This 'embodied difference' comes about because our 'experience of vulnerability varies according to the quality and quantity of resources we possess or can command'.[494] Vulnerable populations *can* emerge due to social and historical treatment of different human embodiments and characteristics. They can also emerge because we are not born equal, we inherit wealth and unequal social and economic advantages.

Despite this, to recognise vulnerable groups as the starting point for improvement is pernicious.[495] Groups which successfully mobilise are able to marshal change, leaving those groups who do not rally excluded. Furthermore, those who fall within an organised active group may not always benefit as differences and variance within the group are not always recognised or tailored to. By being perceived as part of a vulnerable group, individuals become stigmatised and somehow 'other' whilst the groups' shared characteristics with those outside the group become obscured. Fineman comments that such categorising is therefore either always over or under inclusive. More than that, focus on the underprivileged group (in the current example, abused women) deflects 'attention away from the institutional arrangements and systems that distribute disadvantage across people and groups'.[496]

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[493] Ibid 19.
[494] Fineman, 'The Vulnerable Subject and the Responsive State' (n 182) 251.
[495] Martha Fineman, 'What it means to be Human: Vulnerability and the Human Condition' (2013) Emory Law School Lecture available at <https://www.youtube.com/watch?v=MEgeTrzOm1o> accessed 20 June 2016.
[496] Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 460) 20.

The state should not, therefore, begin by responding to disadvantaged groups through 'sameness of treatment'. This positions discrimination as the nemesis of equality. It also suggests there is equivalence in people's abilities and possibilities. It assumes that women who have or who are experiencing domestic abuse would simply expect their partners to face justice, just as any other victim of crime. 'Sameness of treatment' is convergent with modern political ideology about autonomy and accomplishment which, as discussed, is unrealistic. We are not isolated and emotionless individuals but embodied and interconnected and fallible humans. In short, we are all vulnerable to injury, misfortune, ageing and failure. The political and legal subject built on the Western legal tradition does not sufficiently recognise this, preferring instead to segment society into those victims who are vulnerable and the remainder; the invulnerable. By replacing the traditionally conceived legal subject with the 'vulnerable subject' our potential to be less than self-sufficient becomes recognised, not stigmatised.

The 'vulnerable subject' is embodied and is therefore positioned as a site that foregrounds the fleshiness of what it is to be human; requiring nourishment, hydration and sleep and susceptible to harm or illness. It is also exposed to environmental threats such as famine, flood or fire. It is this inescapable reality that renders us ontologically vulnerable. Fineman refers to these biological processes on the one hand and external threats to the body on the other as our 'embodied vulnerability'.[497] MacKenzie, Rogers and Dodds refer to this as our 'inherent' vulnerability[498] which they specify includes vulnerabilities arising from sleep deprivation, emotional hostility, social isolation and physical harm. For Butler and Turner this is our 'corporeal vulnerability' or our individually situated vulnerability.[499] For Butler, vulnerability to violence from others is 'part of this bodily life'.[500]

Recognising the inter-relationality of humans with each other and with society, Fineman suggests that the embodied individual is also 'embedded' within institutions and relationships.[501] Our bodily vulnerability can thus be compounded by the vagaries of institutions, for example if one falls ill, social and economic disruption may follow. Butler

[497] Fineman does not use this term in her writing; she refers to 'embodied humanity' and 'bodily vulnerability' in ibid 9. However, she used this term speaking at 'A Workshop on Vulnerability and Social Justice' (2016) Leeds University.
[498] Mackenzie, Rogers and Dodds (n 467) 8.
[499] Judith Butler, *Precarious Life: The Power of Mourning and Violence* (Verso 2004) 29 and Bryan Turner, *Vulnerability and Human Rights* (Pennsylvania University Press 2006) 28- 29.
[500] Ibid 29.
[501] Martha Fineman speaking at 'A Workshop on Vulnerability and Social Justice' (2016) Leeds University.

similarly recognises 'the body is constitutively social and inter-dependent'[502] whilst Mackenzie, Rogers and Dodds' taxonomy includes 'situational' vulnerability[503] which recognises that vulnerability is context specific and can be exacerbated by social, political, economic and environmental situations. Here we see how 'embedded vulnerability' can be geographically differentiated[504] and how it might come, go or endure.[505] Vulnerability however is always experienced in the body regardless of its cause[506] and, urges Butler, we must attend to it, even abide by it when we begin political thought.[507]

In the same way that our vulnerability is universal yet variantly experienced, so too is its counterpoint, resilience. The central question that should be posed by the state is not one of 'who is more or less vulnerable' but more one of 'who is more or less resilient and how did they get that way?'.[508] Marvel suggests that the inequality of resilience, not vulnerability, is at the core of vulnerability theory. In times of crisis, such as the infliction of violence by a partner, one's accumulated resources impact one's realistic options. The extent of our agency, autonomy and freedom is dependent on our resilience. Our resilience depends, according to Fineman, on at least five resource areas or 'assets'; physical (material goods, assets affecting our economic quality of life), human (our capability to make the most of a situation, dependent on education, knowledge, resources and experience), social (our family, social networks and communities), ecological (our natural or physical environment) and existential (our beliefs, religion, culture, art, politics which allow us to see the beauty in life).[509] So whilst vulnerability is ontological, it is also particularly experienced depending on our variant resilience. Before I interrogate this proposition, I want to outline Fineman's proposed solution.

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[502] Judith Butler, *Frames of War: When is Life Grievable?* (Verso 2009) 31.
[503] Mackenzie, Rogers and Dodds (n 467) Introduction.
[504] Butler (n 499) 31.
[505] Mackenzie et al (n 497) 7.
[506] Ibid 8.
[507] Butler (n 499) 29.
[508] Stu Marvel, 'Vulnerability Theory and Sexual Assault on Campus' presented at 'A Workshop on Vulnerability and Social Justice' (2016) Leeds University.
[509] Martha Fineman, 'Equality, Autonomy and the Vulnerable Subject in Law and Politics' in Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics (Ashgate 2013)* 22- 23.

4 The Need for a Responsive State: But How for Abused Women?

As described, Fineman draws back from tackling social inequality through targeting identity-based discrimination. Her analysis of the state's obligations to citizens also, it follows, fails to promote identity-based interventions designed to target *individual* vulnerabilities. In this way, Fineman's analysis could be considered 'post-identity'.[510] Looking beyond identity and discrimination paradigms invites the state to be responsive to *vulnerability* per se. This approach differs from perceiving women as 'at risk' or as actual or potential victims of violence. It thus differs from neoliberal reductionism; rendering women 'suffering bodies in need of protection'[511] and constituting them as 'wounded subjects'.[512] This neoliberal bent is immediately evident in the key UK government 2009 domestic violence policy document *Together We Can End Violence Against Women and Girls'*[513] in which 'women and girls themselves are positioned firmly as 'victims' and hence outside the 'we' who would be acting on their behalf'.[514]

Rather than the vulnerable group, the state must be responsive to the conditions that exacerbate vulnerability. Not in ways which are authoritarian but, Fineman argues, in ways which 'empower' subjects.[515] The state's first priority in this conception is to confront its own contribution to individuals' diminishing resilience. As a foundation to prosecutorial decision-making, such an approach is laudable. Indeed, as far as the criminal justice system is concerned, such acknowledgment of state responsibility is reflected, I suggest, in both the 'presumption to arrest'[516] and ostensible 'presumption to prosecute'[517] emphases now found in England and Wales. Presumptions to arrest and to prosecute I suggest are a commendable step by the state's criminal justice system in addressing its contribution towards diminishing the resilience of abused women. As Chapter One outlined, in the past,

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[510] Fineman, 'The Vulnerable Subject and the Responsive State' (n 182) 275.
[511] Alice Miller, 'Sexuality, Violence Against Women and Human Rights: Women Make Demands and Ladies Get Protection' (2004) Health and Human Rights 17, 24.
[512] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press 1995).
[513] Her Majesty's Government, 'Together We Can End Violence Against Women and Girls: A Strategy' (Home Office 2009).
[514] Rosemary Hunter, 'Constructing Vulnerabilities and Managing Risk: State Responses to Forced Marriage' in Sharron FitzGerald (ed), *Regulating the International Movement of Women* (Routledge 2012) 25-42.
[515] Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (n 460)19.
[516] Hoyle and Sanders (n 79) 17. Hoyle and Sanders identify that there have been pro-arrest policies operating in many police services since 1993.
[517] In cases where the evidential test is met but the DA complainant withdraws her support for the prosecution, 'it will be rare for the public interest stage not to be met' in Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).

the state could be accused of enabling violence against women in the home to persist through criminal justice agencies' reluctance to intervene. Criminal prosecutions however, according to the crime control model,[518] can be educational and act as a deterrent thereby reducing incidents of violence. Additionally, as Madden-Dempsey argues, pushing for aggressive prosecution of domestic violence offences that tend to sustain and perpetuate patriarchy means that when prosecutors (representatives of the state) so act, they can re-constitute their communities as less patriarchal.[519] Madden-Dempsey's theorising thus attends to patriarchal structures that are, as explored in Chapter One, conducive to domestic violence, at least in its 'strong' sense.[520] The new presumptions towards prosecution, it could therefore be argued as far as the criminal justice system is concerned, are not *unresponsive* to domestic abuse. Indeed, the new approach goes some way to addressing the 'embedded' or 'structural' aspects of vulnerability through deterrence, education and challenging patriarchal structures and ideology.

But, as this thesis explores, whilst a presumption to prosecute might demonstrate state responsiveness to some of the conditions that produce domestic violence, there remain occasions when it may not be preferable for the presumption to be followed. Madden-Dempsey herself, committed in practice to aggressive prosecution, considered that 'upon reflection' she 'found justification lacking in many instances'.[521] It is here, I suggest, that vulnerability theory might encourage prosecutors to tailor their response and look at how they can respond to ameliorate the 'assets' of abused women. How can prosecutors address her physical, human, social, ecological and existential aspects? It is here, that I suggest a fuller understanding of how to do this does not arise from Fineman's work. Instead I encourage consideration of relational autonomy, the capability approach and therapeutic jurisprudence in supporting prosecutors to make decisions that might best 'empower' every person that has experienced domestic abuse to build on the assets that

[518] Herbert Packer, 'Two Models of the Criminal Process' (1964) University of Pennsylvania Law Review 1.
[519] Madden-Dempsey, *Prosecuting Domestic Violence* (n 52) 45-99.
[520] Domestic violence in its 'strong' sense is described as domestic violence that tends to sustain or perpetuate patriarchy. In her 'response to commentators' Madden-Dempsey indicates that these make up the 'vast majority' of cases. In tangible terms, according to Madden-Dempsey, aggressive prosecution will be justified in instances where the relationship bears the hallmarks of stereotypical gender expectations; where men control the woman's finances, where she is disempowered in her social life, and where her access to work opportunities is restricted due to caring responsibilities. In Michelle Madden-Dempsey, 'A Response to Commentators' (2010) International Journal of Law, Policy and Family 24.
[521] Madden-Dempsey, *Prosecuting Domestic Violence* (n 52) 3.

promote resilience and to help assess when prosecution may not be the most appropriate way forward.

Before leaving vulnerability theory to explore relational autonomy, capabilities and therapeutic jurisprudence, there is one further important consideration that prosecutors might heed from vulnerability theory. That is Fineman's demand that the state responds *sensitively* to the vulnerable subject. This leads to the possibility that vulnerability theory allows prosecutors to plug an 'empathy gap'[522] in their approach. Distinct from sympathy (reserved for the identity-based anti-discrimination approach where 'they' not 'us' are targeted), empathy draws out commonalities between individuals so that women who experience domestic abuse are not wholly defined by it. Rather than supressing empathy as an illegitimate response, vulnerability theory gives prosecutors permission to engage with female victims of domestic abuse by asking the following question: what would *I* want and need the state to do for me? By allowing an empathetic approach the prosecutor cannot help but engage with the question of how best to 'empower' her.[523]

Fineman's vulnerability theory can, I suggest, only take this thesis' motivating question this far. To summarise, I endorse Fineman's critique of the libertarian formulation of the self-sufficient subject. I agree that construction of the subject in those terms becomes a way of justifying minimal state intervention. Its consequence is to exacerbate societal inequalities, which particularly affect domestically abused women. This project also commends Fineman's demand that the state be responsive to the ways it can facilitate resilience to structural or 'embedded' vulnerability. Starting with the presumption to arrest and the presumption to prosecute is, for the criminal justice system, laudable in that it begins to break down ideology that supports structural vulnerability. However, in the area of domestic abuse prosecution, vulnerability theory leaves questions about how exactly the state should best respond when a woman no longer supports criminal prosecution. How best can the state address mechanisms that effect structural/ embedded vulnerability on one hand and embodied vulnerability on the other? What is the state's responsibility

[522] Michelle Alexandre, 'Toward a Vulnerability Centred Paradigm: Cross-Sectionality and Interest Convergence as Strategic Tools for Achieving Social Justice' speaking at A Workshop on Vulnerability and Social Justice (2016) Leeds University.

[523] 'Empowerment': 'The process of becoming stronger and more confident, especially in controlling one's life and claiming one's rights.' *Oxford English Dictionary* (OUP 1989). The question of how best to 'empower' the individual when she has withdrawn her support for the prosecution is distinct from the structural empowerment facilitated by the presumption to prosecute.

towards individual sources of vulnerability, the 'embodied' or 'inherent' vulnerability that interacts with or is embedded within social structures?

The following section argues that the state, in responding to individual calls for assistance from abused women, should be entitled to look at how best they can promote that person's individual best interests in conjunction with consideration of the way in which prosecution might impact social-structural contributions to the crime. I challenge Fineman's apparent dismissal of autonomy as a positive pursuit. Instead I present 'relational autonomy' as a helpful way of focussing prosecutorial attention and thereby reducing the potential for paternalistic and untailored criminal action. Regard for autonomy in its relational sense thus forms a crucial part of the 'empowerment' that I suggest prosecutors should be seeking to support.

PART TWO

5 Relational Autonomy: Recognising Women's Inter-Relationality and Social Embeddedness

Fineman's retreat from identifying particularly vulnerable groups within society (conceiving us all as universally vulnerable with differing levels of resilience) prompts a call to the state to action policies designed to address structural factors that reduce resilience. Yet, as outlined, vulnerability is inherent and, at the same time, the degree of one's vulnerability must also be context dependent and experienced particularly at an individual level.[524] Rogers, Mackenzie and Dodds rightly recognise that, within universal vulnerability, there can be 'greater than ordinary vulnerability' which not only appreciates that people possess different resources to counter risks but also that people experience different exposures to risk.[525] Once *particular* vulnerability is identified, *particular* moral obligations and duties of justice for the state arise.[526] Mackenzie, through a lens of relational autonomy, advocates for occasions when the state can be justified in interventions designed to ameliorate particular vulnerabilities.[527] This is, I suggest, a necessary development of

[524] Fineman, 'The Vulnerable Subject and the Responsive State' (n 182) 251.
[525] Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5(2) International Journal Feminist Approaches to Bioethics 11, 12.
[526] Ibid 12.
[527] Mackenzie, Rogers and Dodds (n 467) 41. Here Mackenzie outlines where Fineman gestures towards acknowledging autonomy as not inconsistent with goals for attaining equality.

Fineman's broader call for a state to be attentive and responsive to the ways in which *it* contributes to creating the systems and relationships that diminish resilience.

Relational autonomy offers the potential for prosecutors to be able to combine Fineman's call for responsiveness to structural inequalities together with consideration of the impact on the individual complainant. Relational autonomy is distinct from the 'hyper-individualism'[528] of traditional liberal thought about autonomy. It is a concept that now reaches beyond feminism but that could not have developed without work done by feminist scholarship.[529] Feminists had typically abandoned 'autonomy' as aspirational, charging the concept as inherently masculinist with a notion of selfhood and agency that impeded feminist aims of equality. Autonomy from a feminist perspective has often been considered 'inhospitable' to women where the pursuit of self-sufficiency is at the expense of human connection,[530] most notably at the expense of men's connection with family. The goal of autonomy has therefore been accused of being a fundamental cause of women's subjection.[531] Relational autonomy however sets out to reconfigure the West's typically individualistic model of the self into a relational one, whilst at the same time resisting submerging the individual entirely into the collective.[532]

Relational autonomy is not reference to a single account but incorporates those who see that 'persons are socially embedded and that agents' identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants such as race, class, gender, ethnicity'.[533] In this way we are both constituted and shaped by networks of relationships[534] from friendship, intimate relations, family, community, economic markets and political policies. To example this, Nedelsky draws on the readily acknowledged way in which family, and parents in particular, can impact the development and personality of their children, be that through neglectful, abusive treatment or a supportive, loving and nurturing environment. To suggest that on attaining the age of 21 we

[528] John Christman, *The Politics of Persons: Individual Autonomy and Socio-Historical Selves* (Cambridge University Press 2009) 165.
[529] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy and Law* (OUP 2011) 6.
[530] Marilyn Friedman, 'Autonomy, Social Disruption and Women' in Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxfrod University Press 2000) 35.
[531] Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press 2000) 3.
[532] Nedelsky (n 529) 19.
[533] Mackenzie and Stoljar (n 531) 4.
[534] Nedelsky (n 529) 19.

become rational, independent agents unaffected by our surrounds seems disingenuous.[535] For that reason, most contemporary philosophers of autonomy share the view that we are fundamentally and irreducibly relational.[536]

Unlike the autonomous and asocial subject of Fineman's critique, a relational approach to autonomy appreciates that our ability to exercise choice and attain self-realisation is situated within and determined by social relations and arrangements. Our success is not down to the determined individual alone. Nonetheless, just as Rawlsian liberals, relational autonomists value and promote our individual capacity to exercise self-determination. Meyers suggests that when people are able to express 'what they truly want, who they deeply care about, what they genuinely believe in and so forth, and when they are able to act on those desires, affections and values, they may attest to their own autonomy'.[537] The effect of valorising individual capacity for 'self-realisation' rather than rejecting it as aspirational, is that any just state must aim to secure an 'autonomy-supporting culture'.[538] The state in a relational vision of autonomy should, therefore, when addressing our universal vulnerability, be facilitating 'access to… resources and opportunities' and should be 'support[ing] the kinds of social relationships that promote [individual] autonomy'.[539]

Recognising the importance of relational autonomy calls for the state to effect practice that contributes to individual as well as collective flourishing. Fineman's broader call for the state to change structural inequality falls short of proposing exactly how state actors should be guided vis-à-vis decisions that must be made for individuals. I propose that, in addition to the collective support mechanisms proposed by Fineman, the state should not ignore and should be responsive to improving autonomy as far as autonomy is an inter-relational aim. This thesis describes how the capability approach and therapeutic jurisprudence can both contribute to this aim of individual flourishing in a collective context.

This highlighting of the individual and their claim to prosper may seem at first to be

[535] Ibid 20.
[536] Friedman (n 530) 40.
[537] Diana Meyers, 'Intersectional Identity and the Authentic Self? Opposites Acctract!' in Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press 2000) 151.
[538] Catriona Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP 2014) 45.
[539] Ibid 45.

at odds with the vulnerability theory outlined above which guides us away from an individualistic appraisal of self as it is the assumption of the atomistic self-determining self that is critiqued in vulnerability theory. However, this sketching of the autonomous subject within law and policy is thin and unrefined. Relational autonomists call for a 'richer, more nuanced' account of autonomy and the role it can play in affording meaningfulness and control in our lives.[540] It would be a mistake therefore to pit vulnerability as the opponent of autonomy[541] where autonomy has no place for those adhering to a theory of vulnerability. Rather, the fostering of autonomy *in relational terms* ought to be considered a key guiding principle of the responsive state. What this means in practical terms for domestic abuse prosecutors is discussed below.

When the state advances relational autonomy where possible, the damaging or unintended effects of addressing vulnerability can be minimised.[542] Despite having the aim of alleviating perceived vulnerability, state responses that fail to consider the effect of their decision-making on individual autonomy can be paternalistic, even coercive. The inadvertent bi-product of 'well intentioned' state responses is that interventions can have the paradoxical effect of increasing vulnerability. Mackenzie, Rogers and Dodds term this bi-product *pathogenic vulnerability.*[543] Pathogenic vulnerability is a subset of situational vulnerability and speaks to Munro and Scoular's reservations about state responses to 'flat' vulnerability discussed in this chapter's introduction. Most notably, paternalistic responses to abused women (state insistence on pursuing a prosecution against her wishes) can reinforce feelings of helplessness and lack of agency, they may also increase the risk of future violence. The next section outlines an approach that agents of the state (prosecutors) might utilise to produce the most favourable outcomes for those being 'decided for'.

[540] Beverley Clough, 'Disability and Vulnerability: Challenging the Capacity/Incapacity Binary' (2017) 16(3) Social Policy and Society 469, 477.
[541] Mackenzie (n 538) 33.
[542] Ibid 46.
[543] Mackenzie, Rogers and Dodds (n 467) Introduction.

6 The Capabilities Approach: Prosecutors as Facilitators of Opportunities to Flourish

Vulnerability theory assists in developing my theoretical framework to the extent that it explains why a state has obligations to endeavour to provide the social preconditions to 'equality'. I have argued that the theory, whilst persuasive and convincing to that point, (the point which translates in practice to a pro-prosecution approach or an assumption that abusers will be prosecuted) would leave a prosecutor wanting in terms of additional guidance as to how to proceed in individual cases of domestic abuse where a woman no longer wants the state to proceed in the case against her abusive partner. Looking for theoretical bolstering, I therefore argued that in applying a second lens of relational autonomy the state and its actors could think about assuaging vulnerability in ways which cultivate autonomy wherever possible, recognising that one's self-attainment is dependent on one's interconnectedness with others and one's context. The thesis now turns its attention to the capability approach (or human development theory).[544] Consideration of the approach adds a further layer to an aspiration of supporting relationally autonomous outcomes by suggesting that prosecutors could be guided by an ambition of achieving equality of 'capabilities' for victims where possible. This part of the chapter explains what this might mean for prosecutors and how they might aim to secure the 'capabilities' of women following abuse in ways which also support relationally autonomous outcomes.

The role of the state and the object of public action, according to Sen and the capability approach he articulates, is 'the enhancement of the capability of people to undertake valuable and valued 'doings and beings''.[545] This translates as the state as facilitator of options from which a person can choose a life worth living; at one end of the spectrum it may require the state facilitating basic living standards (for example, nourishment, clean water) and at the other, facilitating more sophisticated social 'doings and beings' such as participation in community life or attaining self-respect.[546]

'Capabilities' become markers of our freedom because capabilities give us options from which to make choices for ourselves and thereby facilitate our functioning (or less formally put, our lifestyles[547]). Capabilities include functionings we have realised already and

[544] See, for example, Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press 2011) and Amartya Sen, *The Idea of Justice* (Cambridge University Press 2009).
[545] Amartya Sen and Jean Dreze, *Hunger and Public Action* (Clarendon 1989) 12.
[546] Ibid 12.
[547] Amartya Sen, *Development as Freedom* (OUP 1999) 74.

capabilities to effect feasible outcomes that may not yet be attained, or indeed may never be. They are not just the abilities that reside innately within us which Nussbaum calls our *basic capabilities*- seeing and hearing can usually be considered innate.[548] They also include our *internal capabilities* (our intelligence, our emotional capacities, our personality, our fitness and our health) which then interact with our social, familial, economic and political environments to form our *combined capabilities.*

If capabilities can be conceived as the available options from which we have freedom to choose a life path, 'functionings' are the manifestations of our capabilities or the 'end goals', without which we might as well spend our lives sleeping.[549] However, just as Mackenzie argues in respect of relational autonomy, the state cannot force citizens to exercise their freedom to choose wisely, nor can it require that all opportunities are taken.[550] The capability approach, just as relational autonomy, therefore, recognises pluralism of what constitutes a valuable or valued life.[551] Let us summarise, the state's responsibility to tend to our capabilities is (usually) twofold: attentiveness to our external environments and conditions on the one hand and, on the other, attentiveness to our internal capabilities. Attentiveness to both necessarily facilitates our combined capabilities.

This recognition that our individual personalities, our health, which includes our mental health, and emotions must all be supported, within structural conditions which do the same, is crucial to my project. I have already set out an approach which advocates a presumption to prosecute DA as a starting point. This sends an important message that domestic abuse is unacceptable to the state and to society. A presumption to prosecute thus has the effect of targeting patriarchal or structural norms which tolerate and normalise male on female violence (or otherwise put, it targets ameliorations to our external conditions as part of our 'combined capabilities'). A presumption to prosecute approach also accords with a responsiveness to our 'embedded vulnerabilities' because, as Madden-Dempsey argues, denouncing patriarchy through prosecutions[552] has the consequential effect of a 'norm cascade'.[553] Societal norms shift because attitudes that oppose the 'wrong

[548] Nussbaum, *Women and Human Development* (n 184) 84.
[549] Nussbaum, *Creating Capabilities* (n 544) 25.
[550] Mackenzie (n 538) 45.
[551] Serene Khader, 'Adaptive Preferences and Procedural Autonomy' (2009) Journal of Human Development and Capabilities 169.
[552] Madden-Dempsey (n 52) 165.
[553] Cass Sunstein, 'Social Norms and Social Roles' (1996) Columbia Law Review 903, 909.

of patriarchy' become supported. A pro-prosecution approach in this way becomes part of the campaign to increase/ equalise the combined capabilities of women in society; politically, socially and, consequently, economically.

On the other hand, a capability approach also calls upon us to bear in mind how the state can impact the internal capabilities not just of the offender through sentencing rehabilitation, but also of the abused. It permits us to legitimately enquire, how prosecutorial decision-making might affect the woman emotionally. How might her health and mental health suffer and, in turn, how might this impact her future functioning should a decision go against her expressed wishes and the prosecution is proceeded with? The prosecutor of domestic abuse, I contend, has a responsibility to be responsive to victims in ways that improve her resilience through a fostering of her *internal* capabilities. Attentiveness to these will assist her ability to choose 'functionings' or outcomes more freely in ways which promote her autonomy (in its relational sense).

Sen's ambition for capability theory is that it have direct pragmatic effect. Rather than thinking about the world at an ideal, abstract level (an accusation he applies to Rawlsian theories of justice[554]). The capabilities approach encourages the state to respond to people's real needs and exigent entitlements.[555] The focus is on each person as an end in themselves and it discourages sacrificing 'some people as a means to the capabilities of others or of the whole'.[556] The approach therefore does not accord with universalising pro-prosecution policies such as that seen in the United States or indeed such as that advocated by Madden-Dempsey in 'strong cases'. In Madden-Dempsey's vision, her targeting of cases that sustain or perpetuate patriarchy thereby reconstituting the state's moral character will necessarily forfeit some women's inherent capability pool (limiting her range of choices) at the expense of her broader aim.

Vulnerability theory is imprecise as to the notion of 'equality' that is being aspired to. Nussbaum's capability approach benefits from clarity in the form of a metric that can be used to assess whether a person is enjoying a life worthy of their human dignity. The 10

[554] See David Crocker, 'Functioning and Capability: The Foundations of Sen's and Nussbaum's Development Ethic' (1992) Political Theory, 584-612.
[555] Martha Nussbaum, 'Capabilities, Entitlements, Rights: Supplementation and Critique' (2011) Journal of Human Development and Capabilities 23, 37.
[556] Nussbaum, *Creating Capabilities* (n 544) 35.

central capabilities[557] that Nussbaum cites are vital for enabling our opportunities.[558] They are more than objectives, they should be considered entitlements. It follows that just outcomes are produced when these central capabilities are met for citizens. Relevant as far as DA victims are concerned are, inter alia, not dying prematurely, having bodily integrity and living free from violence. These are all capabilities which would merit incorporation into a future physical risk assessment for the woman and which, if found to be overly compromised, might merit pursuance of the case because remand bail conditions or imprisonment would be further enforced (keeping parties apart) or because of the potential for sentencing outcomes to address recidivism. Conversely, Nussbaum's capability metric also recognises capabilities which may allow a prosecutor to argue in favour of discontinuing a case when victims retract their statements. Where risk assessments do not preclude it, these include the capability of having emotional attachments (whilst not having emotions stunted through fear), being able to play a part in the planning of one's life and having control over one's material environment.

Nussbaum's approach is particularly helpful for prosecutors in determining whether to proceed with a case against the wishes of the complainant because it names the capabilities she argues should be pursued to the extent that they meet a basic threshold for everyone. The metric and the language used is 'determinate and down-to-earth'[559] and the theory roundly alerts us to some capabilities being more important than others depending on context. Sen's approach attempts this valuational inquiry by accenting through narratives and examples rather than setting out a fixed method. Nonetheless he, too, is clear that not each of the capabilities holds the same level of importance; assessment will depend upon purpose.[560] Capabilities theorists would clearly advocate making a valuational enquiry on an individual case-by-case basis.

However, a decision cannot be made with only reference to the capability metric because capability theory is not a singular approach. To avoid inconsistent use, when balancing capabilities, one must also invoke the notion of human dignity, an ideal which, as

[557] See Appendix 1.
[558] Nussbaum's list is not accepted by all capabilities theorists who find her unilateral assessment of which capabilities reach the list undemocratic. See Ingrid Robeyns, 'Sen's Capability Approach and Gender Inequality: Selecting Relevant Capabilities' (2003) Feminist Economics 61. Nussbaum herself does not contend that the list is immutable or complete, however.
[559] Martha Nussbaum, 'Capabilities, Entitlements, Rights: Supplementation and Critique' (2011) Journal of Human Development and Capabilities 23, 30.
[560] Nussbaum, *Creating Capabilities* (n 544) 27.

Chapter One demonstrated when asserting a place for respect for privacy in DA decision-making, champions agency, self-worth and decency. Dignity, unlike the capabilities which differ in importance depending on context, is something that we all deserve equally[561] and should therefore be developed for individuals. As I explored in Chapter One, dignity as a guiding force is commendable and promotion of its use for prosecutors in the assessment of prioritising the central capabilities highlights the risk of by-passing her wishes entirely.

7 Adaptive Preference Formation: Advocating Objective Decision-Making

Nussbaum, however, cautions that decision-makers should be guided by the quality of the argument and not by 'people's existing preferences'.[562] For the purposes of this project, this means that just because a woman withdraws her support for the prosecution, the case should not automatically be discontinued. For Nussbaum, objectivity is paramount in answering the question, 'what does a life worthy of human dignity require?' She claims that in focusing on the quality of the argument, of how to balance the capabilities with an emphasis on dignity, decision makers who take decisions contrary to the expressed wishes of an individual will avoid infantilizing and rendering them 'passive recipients of benefit'.[563]

The concern about taking into account existing preferences is that it may not be reflective of an individual's best interest in terms of securing her capability set because 'preferences can be distorted in various ways'.[564] Teschl and Comim speculate that the capabilities approach was devised precisely to avoid 'adaptive preference formation' (APF) influencing outcomes.[565] APF, as understood by the capabilities approach, refers to the human ability to be able to adapt to and re-appraise circumstances when they are unfavourable or ones in which we experience domination. As a consequence of our desire to persist, humans can continue in oppressive environments with a 'cheerful endurance'.[566] However, our ability to self-evaluate in such circumstances can become distorted[567] and adaptive preference can be considered autonomy-compromising. As a consequence, Sen

[561] Nussbaum makes the exception of those in a permanent vegetative state and those who are anencephalic in ibid 31.
[562] Ibid 32.
[563] Ibid 32.
[564] Ibid 32.
[565] Miriam Teschl and Flavio Comim, 'Adaptive Preferences and Capabilities: Some Preliminary Conceptual Explorations' (2005) 63(2) Review of Social Economy 229, 230.
[566] Amartya Sen, *Resources, Values and Development* (Basil Blackwell 1984) 309.
[567] Teschl and Comim (n 565) 229.

and Nussbaum do not find subjective expressions of happiness or preference to be an adequate basis for normative appraisal. Whilst not wishing to entirely ignore individual desires, Nussbaum de-centralises their importance suggesting, as Sen, that increasing individual well-being requires objective evaluation of what will facilitate a valuable life.[568] Thus, if a woman expresses the view that she does not want her abuser prosecuted, effecting that request will have an impact on a number of her capabilities. It is this impact on her capability pool, not the wishes of the woman, that should therefore be borne in mind according to Sen and Nussbaum.

This objective analysis of capabilities has in mind diminishing the effect of APF. It guards against APF as a negative phenomenon; that is a phenomenon that prevents free exercise of a person's options. As an intuitive premise, Khader concedes that this has appeal.[569] A woman's request to end a prosecution and return to the relationship *appears* to support a decision to reproduce her domination and oppressive situation as a result of her value distortion and not out of 'real' preference. The dangers, however, of making the assumption that a woman lacks agency when articulating a desire to return to an abusive partner were discussed in Chapter One; a woman's agency may not be immediately apparent. To dismiss the woman's subjective expression of preference and what she believes is in her best interest, appears to deny that women are capable of exercising agency in sub-optimal conditions.

Khader also argues that there are deep problems with thinking of APs as non-autonomous and non-authorative about well-being. Khader criticizes Sen and Nussbaum who, she asserts, fail to consider the mechanisms of preference but talk intuitively instead of people 'coming to terms with' or 'adjusting' to their situation.[570] She queries what it is that differentiates 'genuine' and 'adaptive' preference. It is possible, she contends, that women may simultaneously experience partial value distortion alongside 'significant autonomy competencies' or that people who perpetuate their disadvantage are *not* operating with AP.[571] Sen and Nussbaum's dogmatic assumptions about APs are 'morally problematic' Khader cautions because of their potential to 'promote unjustified

[568] Ibid 237.
[569] Serene Khader, *Adaptive Preference and Women's Empowerment* (Oxford Scholarship Online 2012) 74.
[570] Serene Khader, 'Adaptive Preferences and Procedural Autonomy' (2009) Journal of Human Development and Capabilities 169, 170.
[571] Serene Khader, 'Must Theorising About Adaptive Preferences Deny Women's Agency?' (2012) Journal of Applied Philosophy 302, 315.

paternalism'.[572]

Bearing Khader's criticism in mind, it is commendable that the capabilities approach, with its commitment to attend to the dignity of the individual, aims to diminish this accusation unjustified paternalism. The approach requires an objective weighing up of how the prosecutor's decision will impact the woman's future options. In this way its objective analysis acts as a necessary check on decision-making that simply accedes to a woman's request or preference to discontinue a case (an approach which potentially encourages the abuser to assert pressure on the victim to drop the case[573] or which discourages a thorough investigation of the possible disadvantages of terminating the criminal case).

The part that the woman's preference has to play in the decision, I suggest, according to the capability approach, is an objective assessment of how adhering to her expressed wishes will impact her capability pool. Prosecutors might, for example, consider how taking the requested course of action will impact her sense of 'control over [her] environment- being able to participate effectively in … choices that govern [her] life'.[574] Prosecutors might also bear in mind another central capability; her 'emotions'. How will the decision affect her ability to have attachments to things and people outside of herself, notably her partner or father of her children? Such factors will, of course, be weighed against other central capabilities such as 'bodily integrity- to be secure against domestic violence' and 'senses, imagination and thought- being able to have pleasurable experiences and to avoid non-beneficial pain'.[575] Not only will the woman's dignity pervade these considerations but also running through this balancing exercise should be consideration of the capability of 'bodily health', which necessarily includes her mental health.

I consider the woman's mental health to be a paramount factor because the prosecutor's decision is connected to the central importance of enabling her to *choose* from a full range of capabilities. For her to be able to choose and attain her functionings, her own decision-making ought not be flawed by mental ill-health. A capabilities approach aims to facilitate the range of options available to her to choose from, not dictate outcomes. As Hoyle and Sanders point out in the area of violence against women, 'women need to be

[572] Ibid 302.
[573] Donna Wills, 'Domestic Violence: The Case for Aggressive Prosecution' (1997) University of California Los Angeles Women's Law Journal 173.
[574] Nussbaum, *Creating Capabilities* (n 544) 33-34.
[575] From Nussbaum's 10 core capabilities. See appendix 1.

empowered to make choices which are most likely to lead to an end to the violence'.[576] This type of 'empowerment' can best be achieved when a woman's mental health is optimal and she has the energy and perspective about her situation to take informed and considered action. I discuss the importance of the inherent capability of mental health through therapeutic jurisprudential considerations now. In the next section, I argue that therapeutic jurisprudential considerations connect with an affirmative notion of privacy discussed in Chapter One (the benefits of having a private life in which one may develop and 'be') and with an aspiration towards relational autonomy through enabling her capability set.

8 Valuing Therapeutic Jurisprudence: A Guide for Prosecutors

The law, specifically the criminal law and criminal justice system, has the potential to operate as a 'therapeutic agent'[577] for defendants, witnesses and victims alike. Therapeutic Jurisprudence (TJ) is a school of legal scholarship that recognises this and seeks to influence legal rules and procedures to act in ways that facilitate the law's 'healing' potential. TJ also urges law's *legal actors* to recognise their capacity to work in ways that can produce therapeutic or anti-therapeutic[578] outcomes for those who come into contact with it. The approach brings a humanising emphasis to legal practice; an approach that recognises the law can and ought to promote emotional and psychological 'well-being'.[579]

Immediately evident is the way this approach sits in stark contrast to the coercive and penal policies that have been attributed to neoliberalism's embrace of the criminal law.[580] The criminal law in the neoliberal conception has a symbolic function of crime control. Neoliberal governments, as Chapter Three explores more fully, enact law and policy that performs 'expressive justice' that conveys the outrage that crime, particularly domestic violence against women, provokes.[581] Such governments have been accused of appropriating the feminist agenda to put an end to violence against women through the concerted effort of sanctioning perpetrators and achieving convictions in the name of

[576] Hoyle and Sanders (n 79) 14, 30.
[577] David Wexler, 'Applying the Law Therapeutically' (1996) 5(3) Applied and Preventive Psychology 179, 179.
[578] Winick, 'The Jurisprudence of Therapeutic Jurisprudence' (n 459) 185.
[579] Christopher Slobogin, 'Therapeutic Jurisprudence: 5 Dilemmas to Ponder' (1995) 1(1) Psychology, Public Policy and Law 193.
[580] See, for example, Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press 2007).
[581] Garland, *The Culture of Control* (n 111).

justice for victims.[582] Therapeutic jurisprudence sits in contrast and does not focus on the ways the state can control incidence of violence through criminalisation, deterrence or the 'crime control' priority. Rather, it is concerned with how individuals who come into contact with the law can be supported through its procedures to facilitate the shift from 'victim' to 'survivor'.[583]

If the priority of TJ scholars is to enhance participant 'well-being', let us explore what this means. As a definition, 'well-being' and 'therapeutic' have been left deliberately vague by TJ's founders, David Wexler and Bruce Winick. Their background as mental health lawyers, however, is indicative of a prescriptive jurisprudence that promotes the enhancement of *psychological* 'well-being'. As far as the victim is concerned, this will include their satisfaction with the legal process, how the legal process contributes to healing following inflicted harm and how, in turn, the law and legal procedure can facilitate their human potential.[584] Slobogin raises the question of how TJ distinguishes itself from other schools of thought that are concerned with the best outcome for participants.[585] He has concerns that TJ may suffer from an 'identity dilemma'.[586] Nonetheless, this is reconciled he argues by an appreciation of TJ's *emphasis* or *focus* on law as an instrument of psychological healing, rather than on a contention that TJ carries wholly unique *content*.

TJ is an approach that recognises that legal practitioners can facilitate participant self-esteem, confidence, personal growth and welfare. Victims who have suffered violent crime are likely to experience a disruption in emotional equilibrium.[587] Feelings of 'anxiety, fear, depression, humiliation, anger, powerlessness and betrayal'[588] can all reduce the victim's self-efficacy. It is not uncommon for victims to suffer some form of post-traumatic

[582] See Kristen Bumiller, *In an Abusive State: How Neo-liberalism Appropriated the Feminist Movement Against Sexual Violence* (Duke University Press 2008).
[583] Winick, 'Applying the Law Therapeutically in Domestic Violence Cases' (n 80) 60.
[584] Edna Erez, Michael Kilching and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Carolina Academic Press 2011) xi- xii.
[585] TJ might, for example, be considered a sub-set of legal psychology. Or, as Wexler himself has indicated, the 'optimistic' outlook offered by the school of Positive Criminology is a 'near perfect fit' with TJ in David Wexler, 'What Therapeutic Jurisprudence can get from and give to Positive Criminology' (2013) Pheonix Law Review, 907, 907.
[586] Slobogin (n 579) 196.
[587] Bruce Winick, 'Therapeutic Jurisprudence and Victims of Crime' in Edna Erez, Michael Kilching and Jo-Anne Wemmers (eds), *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Carolina Academic Press 2011) 4.
[588] Ibid 4.

stress disorder (PTSD).[589] With PTSD, rather than attributing the causes of the disorder to the individual victim's pathology, the abnormal nature of the stressor (here the abuse) is blamed. Where persistent and seemingly randomly caused domestic abuse is inflicted, 'learned helplessness' may ensue where feelings of powerlessness, hopelessness and distrust akin to clinical depression manifest.[590] The emotional disruptions noted here help to explain why objective analysis of what is best for a woman's capability pool is merited (whilst taking into account her subjective expression of want and how adhering to it will impact her mental health).

Without subordinating the importance of due process and the rule of law, therapeutic jurisprudence aims to bring the additional dimension of 'psychological healing' to legal practice. Whilst any attempt to individualise the law simultaneously has the potential to undermine it and afford decision-makers too much discretion, TJ never pre-supposes that it should trump other considerations. It merely requests that therapeutic consequences be contemplated and incorporated where possible. In taking into account TJ considerations, Slobogin recognises that the [prosecutor's] decision 'is more likely to be informed, but also more painful.'[591] In an area of criminal practice where the prosecutor is already afforded substantial discretionary responsibility, TJ is a factor that can be brought to bear, all other considerations being equal.

Weighing and balancing divergent values will continue to be challenging work. There will be times, unproblematically, when therapeutic (internal, individual psychological welfare) and other normative values (external 'public interest', majoritarian or governmental interests) converge.[592] On these occasions TJ values will provide strong support for the decision. There will also be occasions where therapeutic and normative values do not harmonise. Whist TJ scholars have not developed a specific framework to assist in this balancing process, Kress argues that 'no other normative enterprise could

[589] Symptoms of PTSD might include nightmares, flashbacks, problems going to sleep, heightened startled responses and numbed effect. Lenore Walker, 'Post-Traumatic Stress Disorder in Women: Diagnoses and Treatment of Battered Women Syndrome' (1991) 28(1) Psychotherapy 21, 22.
[590] 'Learned helplessness' can impact the sense of control someone feels they have over their lives. This can result in a failure to react to stimuli (effect change). See ibid 4. See also Lenore Walker, The Battered Woman Syndrome (4th ed, Springer 2016).
[591] Slobogin (n 579) 210.
[592] Winick, 'Applying the Law Therapeutically in Domestic Violence Cases' (n 80) 79.

achieve deductive certainty' either.[593] Therapeutic jurisprudents need not agree on their core morals or politics, rather they will bring and integrate their own normative analyses with an emphasis on positive mental health outcomes as an instrumental or consequential good.[594] Any conflict in that background normative theory will demand debate and necessarily sharpen the issues as to what might best bring about positive psychological outcomes. The task of weighing and balancing is however, I would argue, made easier when judgement is made in concrete contexts where reference to individual consequences can be referred to.[595] Divergent values that need to be weighed, argues Kress, need not be incommensurable to TJ scholars and practitioners.[596]

In reality, decisions are unlikely to ever be entir*ely* therapeutic or *entirely* anti-therapeutic. It is for that reason that Slobogin advocates that 'when deciding whether a [decision] promotes individual 'well-being', proponents of TJ should be careful to define further their outcome measure'.[597] It is here that I call upon my prior consideration of the value of relational autonomy and the capabilities approach. A successful prosecutorial decision could therefore be considered a decision that objectively (taking into account the effect of adhering to her wishes) supports her psychological mental health such that a woman is best equipped to exercise choice and self-realisation (autonomy) due to facilitated access to and enjoyment of her capability pool.

Winick in particular advocates the benefits of enabling individuals' 'choice' for supporting therapeutic outcomes. Drawing from cognitive and social psychology, Winick points to the psychological value of facilitating individuals' choice, in contrast to the damaging psychological effects of state imposed decision-making.[598] Behavioural psychologists advocating self-determination theory (SDT) have found that 'deep holistic processing is facilitated by a sense of choice, volition and freedom from excessive external pressure toward behaviour or thinking in a certain way'.[599] Thus, strong intrinsic

[593] Ken Kress, 'Therapeutic Jurisprudence and the Resolution of Value Conflicts: What We Can Realistically Expect, in Practice, From Theory (1999) 17(5) Behavioural Science and Law 555, 556.
[594] Ibid 564.
[595] Ibid 566.
[596] Ibid 566.
[597] Slobogin (n 579) 193.
[598] Bruce Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 Villanova Law Review 1705, 1755.
[599] Richard Ryan and Edward Deci, 'Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development and Well-Being' (2000) American Psychologist 68.

gratification can be derived from self-determination. This positive attitude fostered from choice can mobilise 'psychic resources' that facilitate goal attainment through motivation.[600] In the context of an abused woman who has withdrawn support for the prosecution, the benefits of acceding to her request according to self-determination theory seem clear. In treating her as a competent adult, choice, which SDT ties to increased individual effort, animates the individual to self-monitor, evaluate and react to life's course following her decision. In short, choice can promote a sense of control which in turn is associated with self-efficacy and persistence. These attributes can support and empower the individual to make changes and pursue 'success' however conceived.

Contrast this with a failure to accede to victim choice. Negative psychological bi-products -pressure, resentment and frustration of goal attainment- are all associated with being directed and consequently failing to feel personally committed or responsible for events.[601] Being dictated to can contribute to a sense of helplessness, passivity and depression. Whilst starting with a presumption to prosecute, TJ calls on prosecutors to recognise that not adhering to a woman's request, can have negative psychological impact and diminish her optimal functioning.[602] On the other hand, those who are decided for often merely 'go through the motions', deriving no real or long-lasting benefit through attitudinal or behavioural change.[603]

TJ's assertion then is that affording choice to victims can lead to positive therapeutic outcomes for survivors. Survivor-defined practice,[604] argues in similar terms; that the greater sense of control abused women feel, the 'fewer depressive symptoms and greater quality of life over time, even accounting for repeat abuse'.[605] Such an approach is resonant of early grass root feminist empowerment strategies which held 'that survivors gain autonomy and protection from further abuse by controlling their own choices'.[606] Survivor defined practice is characterised by recognising the unique needs of victims and the varying

[600] Winick, 'On Autonomy' (n 598) 1760.
[601] Ibid 1756.
[602] Richard Ryan and Edward Deci, 'Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development and Well-Being' (2000) 55(1) American Psychologist 68.
[603] Ibid 72.
[604] Described in Lisa Goodman and Lauren Catteneo et al, 'Survivor-Defined Practice in Domestic Violence Work: Measure Development and Preliminary Evidence of Link to Empowerment' (2016) 31(1) Journal of Interpersonal Violence 163, 164- 166.
[605] Ibid 166.
[606] Andrea Nichols, 'Survivor-Defined Practices to Mitigate Revictimization of Battered Women (2013) 28(7) Journal of Interpersonal Violence 1403, 1404.

coping strategies they deploy. It thus argues against a one size fits all response, recognising the complexity of people's lives where culture, sexual orientation, social supports or familial situation will vary. With a sensitivity to victims differing strategies of resistance and a corresponding emphasis on victim choice, the message to prosecutors is that they can assist women to move towards victim's self-defined goals by allowing choice (where other factors do not preclude it).

When groups and individuals from an affected community are left out of decision-making designed to assist them, this can lead to disenfranchisement.[607] DA prosecution policy is formulated after a period of public consultation with concerned and relevant groups so, to that extent, policy ought to reflect the views of a collection of affected women. However, policy must also be implemented at an individual level by individual prosecutors for each victim and failure to take into account the views of the woman affected may provoke a sense of powerlessness and loss of control; personal control is strongly connected with well-being.[608] If victims are led to believe their view will be heard, because their victim withdrawal statement contains their reasons for not wishing the prosecution, and their opinion is then actively rejected, this renders a personal sense of being discounted, ignored or even disbelieved.

But it is not simply the case that actual choice is the only way a person feels control. A *sense* of control has the same effect. Respecting and responding to victim choice, rather than disengaging with women rendering them feeling coerced, is central to a *sense* of self-determination and emotional well-being.[609] A *belief* in personal control whether or not rightly held has 'an intriguing self-fulfilling nature' where people go out into the world 'in a vigorous fashion' and begin to control situations that may have previously eluded them.[610] For that reason, as part of TJ considerations, and as an extension of Fineman's invitation to plug an 'empathy gap', prosecutors have the potential to cultivate a sense of autonomy which reaps the same benefits, or at least reduces the pathogenic side-effects of by-passing victim preference. Prosecutors should try and encourage a sense of agency in victims by taking a humanistic approach to their interactions with them; explaining, discussing,

[607] Wendy Rogers, Catriona Mackenzie, and Susan Dodds*, 'Why Bioethics Needs a Concept of Vulnerability'* (2012) 5(2) International Journal of Feminist Approaches to Bioethics 11, 26.
[608] Christopher Peterson, 'Personal Control and Well-being' in Daniel Kahneman, Ed Diener and Norbert Schwartz (eds), *Well-Being: The Foundations of Hedonic Psychology* (Russell Sage 1999) 288.
[609] Winick, 'Applying the Law Therapeutically in Domestic Violence Cases' (n 80) 64.
[610] Peterson (n 608) 288.

empathising and listening. My empirical research in Chapter Five is clear that in conveying respect, courtesy and understanding[611] prosecutors have the potential to minimise the negative impacts of proceeding with a case against her wishes.

Thus, TJ urges that prosecutors reconceptualise their role to recognise its therapeutic potential.[612] Training in inter-personal and counselling skills might go some way to directing lawyers to the importance of such considerations. At a basic level, if prosecutors can display kindness and empathy to demonstrate sensitivity to victims' needs, this will go a long way to secure *feelings* of participation which is linked to victim satisfaction.[613] By explaining decisions, listening respectfully and seeking understanding of the course to be taken, 'secondary victimisation' (the damaging impacts of the legal process on the victim) can be reduced. This *sense* of control is about a subjective perception on the part of the victim and fosters the same feelings as *actual* participation, regardless of whether the decision is the preferred outcome. It is this *sense* of control that self-determination theory speaks to. From this locus, the prosecutor signals good intentions and not the coerciveness associated with victim dissatisfaction and psychological stress.[614] A TJ approach brings such considerations to the fore, improving the likelihood of the victim turning to the CJS in times of future need.[615]

Conclusion

This chapter has explored vulnerability theory, relational autonomy, the capabilities approach and therapeutic jurisprudence in its endeavour to prompt the way prosecutors might think about DA victims who withdraw their support for criminal prosecution. The framework I describe in this chapter is four-fold. Firstly, vulnerability theory calls for the

[611] Jo-Anne Wemmers, 'Victims in the Criminal Justice System and Therapeutic Jurisprudence: A Canadian Perspective' in Edna Erez, Michael Kichling and Jo-Anne Wemmers, *Therapeutic Jurisprudence and Victim Participation in Justice* (Carolina Academic Press 2011) 77.
[612] Winick, 'Applying the Law Therapeutically in Domestic Violence Cases' (n 80) 85.
[613] See Chapter Five for evidence of this from the primary research. See also, Bruce Winick, 'Therapeutic Jurisprudence and Victims of Crime' in Edna Erez, Michael Kichling and Jo-Anne Wemmers, *Therapeutic Jurisprudence and Victim Participation in Justice* (Carolina Academic Press 2011) 7.
[614] In fact, the CPS recently produced policies designed to reduce the effects of 'secondary victimisation'. Measures include timely notification to victims of hearing outcomes, applying for special measures where victims are in fear, applying for appropriate 'non-contact' bail conditions and treating victims with 'respect and sensitivity'. See Crown Prosecution Service, 'Guidance on the Care and Treatment of Victims and Witnesses', available at <http://www.cps.gov.uk/legal/v_to_z/care_and_treatment_of_victims_and_witnesses/#pledge> accessed 10 October 2016.
[615] Janine Zweig and Martha Burt, 'Effects of Interactions among Community Agencies on Legal Systems Responses to Domestic Violence and Sexual Assault in STOP-funded Communities' (2003) 14(2) Criminal Justice Policy Review 249.

state to be responsive to the ways in which it contributes to diminishing abused women's resilience. It asks the state to engage in the ways it can change the conditions that exacerbate vulnerability, recognising that we have a collective responsibility to do this. I argued that in adopting a presumption to prosecute domestic abuse, the state effectively begins to destabilise the attitudinal and structural norms that permit and, arguably, produce male on female intimate partner violence. Secondly, when deciding at an individual level to proceed or not with a prosecution with an unsupportive victim, the prosecutor might consider how their decision impacts the woman's autonomy, recognising that she is connected to people and place. Thirdly, the capabilities approach urges the prosecutor to adopt an objective analysis of how the decision will affect the woman's capability pool from which she can choose her life course. As part of that consideration I suggested that the prosecutor would have to have regard for the effect that acceding to a woman's wish to discontinue the case might have on her sense of control over her life, bearing in mind self-determination theory. Finally, I argued that the prosecutor, all things being equal, might have regard for the best therapeutic outcome for the woman. By looking to maximise psychological benefits for the woman, the prosecutor has capacity to contribute to her being able to reassert a sense of control over her life and, ultimately, assist her in reducing or ending the violence. Should the 'public interest' (based upon such careful assessment) merit proceeding with a case against a woman's wishes, then TJ advocates prosecutors taking time to listen to the woman and to respond and explain the prosecutorial reasoning. This respectful interaction can engage a sense of satisfaction with the process, despite a decision being made contrary to her stated wishes and can in turn be experienced as more empowering. This combined theoretical approach might be referred to in short-hand as recognising the 'lived subject'. The next chapter stands in contrast. It describes the existing neoliberal political climate in which prosecutors must operate and justify their decision-making.

CHAPTER 3

The Existing Climate: Neoliberalism and the Link to Tenacious Domestic Abuse Prosecutions

Introduction

Neoliberal politics have permeated culture and society in Britain since at least the advent of Thatcherism.[616] This chapter maps and considers the part played by an era of neoliberalism on domestic abuse prosecutorial practices (research question one). It explores how neoliberalism has contributed to a strengthened state commitment to tackle domestic abuse through increased criminalisation. The chapter recognises that neoliberal governments have embraced the feminist movement[617] and this chapter builds on and further contextualises the feminist discourses examined in Chapter One. That chapter examined how the women's movement demanded state commitment to the effective prosecution of abusers thereby contributing to the current 'tenacious' prosecutorial approach. Second-wave feminists exposed the prevalence of the crime and explained intimate partner violence in terms of 'patriarchal force',[618] a structural theory of men's violent offending behaviour, and its aetiology in male privilege. As increased criminal prosecutions publicly confronted women's subordination in the private sphere and challenged sexist ideologies that tolerated abuse, a criminal justice response met little resistance from the women's movement. However, this acquiescence belied the possibility that, in siding with neoliberalism's confident assertion that the CJS could effectively tackle domestic abuse, the movement might suffer latent disadvantages. I draw out these shortcomings in this chapter.

[616] Emma Bell points to Alexander Rustow, the 1930s German economist, as the person who first identified and labelled those ideologically opposed to state interventionism in Emma Bell (n 163) 39. Whilst Jock Young suggests that policies associated with neoliberal politics emerged in the 1960s in Jock Young, 'Searching for a New Criminology of Everyday Life: A Review of 'The Culture of Control' by David Garland' (2002) 43(1) British Journal of Criminology 228, 228.

[617] See, for example, Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence* (Duke University Press 2008); Nancy Fraser, 'Feminism, Capitalism, and the Cunning of History: An Introduction' (2012) FMSH-WP2012-17; and Vanessa Munro, 'Violence Against Women, 'Victimhood' and the (Neo)Liberal State' in Vanessa Munro and Margaret Davies (eds), *Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013) 234.

[618] Houston (n 34) 217.

The campaigning work of feminists was only one part in the transformation that has taken place within criminal justice in the last four decades. For, at the same time feminists were demanding strong state action in response to domestic violence, Britain saw the rise of neoliberal political ideology and, concomitantly, powerful developments within the criminal justice and penal fields. Garland has therefore meritoriously suggested that 'the feminist revolution and the changing place of women were only one thread in a denser texture of social transformation'.[619]

The field[620] of crime control in the last 40 years has experienced a perceptible shift away from the prevailing 20th century norm of penal-welfarism and its associated correctional philosophy. As Britain saw a rise in neoliberalism, what appears to have emerged is a 'new punitiveness'[621] or, as Bell prefers, an 'intensification of punitiveness'[622] where offender rehabilitation is considered a failing ideal and its emphasis downgraded.[623] Wider than penal severity, the same period saw an assertion of the criminal justice system as a vehicle to bring crime, order and people's sense of security under control. Criminal justice agents accordingly became tasked with preventing future risks of harm. Both the 'punitive turn'[624] and the crime control imperative saw, symbolically at least according to Simon, an evolution from "welfare state" to "penal State".[625] Modern state treatment of domestic abuse offences, I argue, has become part of these overarching trends towards both tougher and preventive state responses to crime.

The first aim of this chapter is to examine to what extent this penal expansion, a political focus on crime reduction and prevention and, concurrently, the state's heightened responsiveness to domestic abuse can be linked to the rise of neoliberalism. I affirm the link and demonstrate how technologies of neoliberalism have impacted the way domestic abuse is treated by prosecutors. To do this, the chapter starts by examining what neoliberalism is; the dominant values, strategies and practices of neoliberal ideology both in theory and in

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[619] David Garland, 'Beyond the Culture of Control' (2004) Critical Review of International Social and Political Philosophy 160, 178.
[620] Field here refers not to Garland's general field of crime control as observed in a wider social landscape but to a narrower understanding of the state's formal criminal and penal responses to crime. See ibid 165-168.
[621] John Pratt, David Brown, Mark Brown, Simon Hallsworth and Wayne Morrison, *The New Punitiveness: Trends, Theories, Perspectives* (Willan 2005).
[622] Bell (n 163) 119.
[623] Garland, *The Culture of Control* (n 111) 8.
[624] Ibid 142.
[625] Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (OUP 2007) 6.

practice. I explore how techniques of neoliberalism garner widespread acquiescence and approbation and come to permeate all aspects of life. I move on to pay particular attention to neoliberal valorisations of 'freedom', 'individualism' and 'responsibilisation' which are values primarily intended to encourage market competition but which I go on to explain have implications for crime rates and, in turn, for strong state responses to crime. This is because neoliberal values have been used to justify reductions in social welfare funding which have been blamed for growing social inequality and the swelling of a criminal underclass from whom 'we' (the law-abiding) need to be protected.[626] Also in line with the three tenets of 'freedom', 'individualism' and 'responsibilisation', neoliberalism heralded the replacement of 'old-style' penal-welfare criminology which understood criminal activity to be the result of collective, social and structural failures for which the state had responsibility to improve. In its place has seen what Feeley has called 'volitional' theories of the causes of crime,[627] where crime is understood to be a result of individually situated opportunities available to rationally choosing actors, deserving therefore of their 'just deserts' for transgressions.[628] In this conception, the state and criminal justice priority becomes one of ensuring individuals are both deterred from committing crime on the one hand, through consistent and committed prosecutions and sentencing, and of protecting victims from the risk of future crime on the other. These commitments to deterrence and harm reduction are manifest in prosecutorial working practices in domestic abuse cases.[629]

Having explored the relationship between neoliberalism, crime and neoliberal criminological understandings of the causes of crime, Part Two of the chapter moves on to examine the ways in which neoliberalism has encountered the violence against women's movement and draws out how the two groups have worked in concert.[630] It will always be difficult to establish the direct causal connection between violence against women as a state concern and the campaigning efforts of women's movements, but the feminist movement has been largely credited.[631] If that is so, more nuanced reflections are required about how the neoliberal crime control agenda operates on the violence against women

[626] Loic Wacquant, *Punishing the Poor: The Neoliberal Government of Insecurity* (Duke University Press 2009).
[627] Malcolm Feeley, 'Crime, Social Order and the Rise of Neo-Conservative Politics' (2003) Theoretical Criminology 111, 112.
[628] Pat O'Malley, *Risk, Uncertainty and Government* (Glasshouse 2004) 127.
[629] See Chapter Four.
[630] See also Bumiller (n 40).
[631] Clare McGlynn and Vanessa Munro, *Re-thinking Rape Law: International and Comparative Perspectives* (Routledge 2010) Introduction.

campaign. Thus, whilst recognising the two movements have shared objectives, I highlight some of the competing and contradictory rationales of the two camps. I therefore unpick the ways in which feminism and neoliberalism are perhaps unlikely bedfellows on the one hand, yet concede they are inevitable companions in practice on the other. As Chapters One and Two explored, meeting the feminist goal of 'redressing patriarchy' requires more than including women in pre-existing legal arrangements;[632] it requires us to 're-draw the institutional map of [neoliberal] society'.[633]

The third part of the chapter then examines the impact of neoliberal governance on the Crown Prosecution Service and more specifically how neoliberalism and neoliberal ways of working might be reflected in its commitment to achieving convictions in domestic abuse cases. Here, I show how the demonstrative shift in the criminal justice priority, must be considered not only in light of the neoliberal ideology that has been described in the preceding part of the chapter, but also in light of other, what I call, *quasi-neoliberal practices*; namely managerialism, risk-based discourse, the rise to prominence of the 'victim'. These practices I argue have facilitated the turn to the crime control imperative.

I conclude that neoliberal ideology, together with all of these quasi-neoliberal factors, in practice, have enveloped a women's movement that was focused on levering domestic abuse up the political agenda. The neoliberal state's response has been to move violence against women up the criminal justice agenda. The two movements have thus worked apparently in unison to address domestic abuse and their common ambitions legitimate the tenacious prosecution of abusers. As Harvey points out, '[a]ny political movement that holds individual freedoms to be sacrosanct is vulnerable to incorporation into the neoliberal fold'.[634] Both the benefits and shortcomings of this union are explored to the extent that 'self-consciously feminist agendas [have been used] in the service of neoliberal strategies'[635] of responsibilisation, risk-management and 'expressive justice'. The effect is the silencing of feminist explanations about the causes of domestic abuse and their

[632] Munro, *Law and Politics at the Perimeter* (n 192) 42.
[633] Nancy Fraser, 'Contradictions of Capital and Care' (2016) New Left Review 100, 116.
[634] Harvey (n 65) 41.
[635] Munro, 'Violence Against Women, 'Victimhood' and the (Neo)Liberal State' (n 10) 234.

demands for 'strategies with more potential to transcend criminalization and nurture transformative, counter-hegemonic change'.[636]

PART ONE

1 Neoliberalism: Values, Strategies and Practices

Neoliberalism is, broadly, a philosophy that esteems economic rather than political freedom.[637] It is not, however, a singular economic strategy. It is a political economy and a theory or way of organising political and economic activity.[638] At the fore is a commitment to market fundamentalism, unhindered by regulation, to generate maximum prosperity.[639] Its markets strive for efficiency and value for money through free-market solutions. Neoliberalism thus champions the 'superiority of individualized, market-based competition over other modes of organization [sic]'.[640] Its moral project, too, considers markets a 'necessary condition for freedom in other aspects of life'.[641]

The state's role in neoliberal theory is then to favour the institutions that facilitate the free functioning of markets and free trade. Market competition is encouraged and the state aims to honour individual freedoms by facilitating choice between competing enterprises. With the primacy of the market at the fore, it is the market that comes to shape social and political decisions. The state becomes responsive to market demands; corporations are liberated whilst trade unions are curbed.[642] In addition to its preference for markets, the neoliberal state effects the conditions or frameworks within which people operate by favouring private individual property rights and the authority or rule of law.[643] Typically, neoliberalism is associated with stripping back the welfare state to enable reduced taxation and encourage individual betterment.

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[636] Laureen Snider, 'Toward Safer Societies: Punishment, Masculinities and Violence against Women' (1998) British Journal of Criminology 1, 28.
[637] Keith Tribe, 'Liberalism and Neoliberalism in Britain' in Philip Mirowski and Dieter Plehwe (eds), *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective* (2009) Harvard University Press 68.
[638] John Campbell and Ove Pedersen, *The Rise of Neoliberalism and Institutional Analysis* (Princeton University Press 2001).
[639] Robert Reiner, 'Foreword' in Bell (n 163) ix.
[640] Stephanie Mudge, 'The State of the Art: What is Neo-liberalism?' (2008) Socio-Economic Review 703, 706-7.
[641] Marion Fourcade and Kieran Healey, *Moral Views of Market Society* (2007) 33 Annual Review of Sociology 285, 287.
[642] Susan George. 'A Short History of Neoliberalism' (1999) Conference in Economic Sovereignty in a Globalising World, Bangkok available at <https://www.tni.org/en/article/short-history-neoliberalism> accessed 20 April 2017.
[643] Harvey (n 65) 64.

However, it would be wrong to present neoliberalism as this coherent set of principles. Rather, neoliberalism ought to be considered multi-faceted and fragmented in its manifestations.[644] There may not, therefore, be a 'preconceived gospel'[645] of neoliberalism that one can neatly refer to, rather, there may be 'incongruous conclusions on specific questions in different locations'.[646] Neoliberalism in practice appears to have departed from any rigid dogmatic theory[647] and its dilution or dismemberment comes as a result of its responsiveness to particular events which tend to add unique flavour or character to its practice dependent on context. It is subject to adaptations that vary between regions and over time[648] and rarely pauses long enough to be pinned down.[649] In particular, neoliberalism, it has been argued, has been shaped and defined at moments of crisis.[650] Nonetheless, key characteristics identify neoliberal thought and practice and it is possible, I suggest, to trace its manifestations into criminal justice practice. Dominant neoliberal characteristics merit consideration because they have influenced, shaped and justified crime control priorities in Britain since '*circa* 1993'.[651]

The crisis decade of the 1970s is now widely considered the 'major axis'[652] from which the ideologies of the New Right and its associated theory, neoliberalism, were enabled to take hold. However, the ideological seeds of neoliberalism were planted before its shoots were visible in political practice. The 'thought collective' or 'self-conscious communal project'[653] known as the Mont Pelerin Society, founded in 1947 by Friedrich Hayek and Milton Friedman, is widely attributed as marking the genesis of the philosophical and political ideas and ideals of neoliberalism.[654] It is correct, therefore, that Reagan and

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[644] Philip Mirowski, 'Defining Neoliberalism' in Philip Mirowski and Dieter Plehwe (eds), *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective* (Harvard University Press 2009) 417, 433.
[645] Nicholas Gane, 'Book Review: The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective' (2012) 60(4) The Sociological Review 777, 778.
[646] Philip Mirowski and Dieter Plehwe (eds), *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective* (Harvard University Press 2009) 29-30.
[647] Harvey (n 65) 64.
[648] Ibid 70.
[649] Pat O'Malley, 'Neoliberalism, Crime and Criminal Justice' (2016) 16(10) Sydney Law School Research Paper, 6 available at <https://ssrn.com/abstract=2729627> accessed 17 May 2017.
[650] Jamie Peck, 'Zombie Neoliberalism and the Ambidextrous State' (2010) 14(1) Theoretical Criminology 104, 106 in which Peck describes neoliberalism as a 'creature of crisis'.
[651] Emma Bell identifies the British 'punitive turn' from 1993 in Bell (n 163) 8.
[652] Young (n 616) 228.
[653] Philip Mirowski, 'Book Review: A Brief History of Neoliberalism' (2008) 24(1) Economics and Philospohy 111, 112.
[654] Mirowski and Plehwe (n 646) 5. Though see Nicolas Gane's article about the history of neoliberalism which urges us to consider neoliberal thought beginning as early as the 1920s with Ludwig Von Mises; Nicholas Gane,

Thatcher did not originate the ideas of neoliberalism rather they 'took what had hitherto been minority political, ideological and intellectual positions and made them mainstream'.[655]

Neoliberal doctrine opposes Keynesian state interventionist theory and centralised state planning. It considers state decision-making to be weakened by the potential for political bias whereas market signals provide the most accurate information. Yet, as I explore later in the context of neoliberal approaches to crime, at neoliberalism's heart is a 'fundamental paradox: as [state] power becomes less restrictive, less corporeal, it also becomes more intense, saturating the fields of actions and possible actions'.[656] So, whilst neoliberalism may emphasise a rolling back of the state, there is a simultaneous desire to build a strong state within which people may operate freely. Foucault talked about this new art of governance thus:

> 'It [government] must produce it [freedom], it must organize it… The new art of government therefore appears as the management of freedom… Liberalism must produce freedom, but this very act entails the establishment of limitations, controls, forms of coercion and obligations relying on threats etcetera'.[657]

Read, too, has argued that rather than restricting behaviours directly, neoliberalism works on the conditions within which people operate.[658] In the field of crime control, I argue neoliberalism has gone further than indirectly managing the conditions of being, rather the so-called 'light touch' state impacts much more directly. It would be wrong, therefore, to conceive neoliberalism as an ideology that definitively adheres to reducing state involvement in citizens' lives. Rather, it is committed to realising the freedom of the greatest number.

Neoliberalism does not merely operate in the political and economic realm. More widely, it can also be conceived as 'the production of a particular conception of human

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'The Emergence of Neoliberalism: Thinking Through and Beyond Michel Foucault's Lectures on Biopolitics' (2014) 31(4) Theory, Culture and Society 3.

[655] Harvey (n 65) 62.

[656] Jason Read, 'A Genealogy of Homo-Economicus: Neoliberalism and the Production of Subjectivity' (2009) Foucault Studies 25, 29.

[657] Michel Foucault, 'The Birth of Bio-Politics: Lectures at the College de France' (1978-79) translated by Graham Burchell (Palgrave MacMillan 2008) 63 cited in ibid 29.

[658] Read (n 656) 29.

nature, a particular form of subjectivity'.[659] Its presence can be felt in all aspects of the way we conduct ourselves and the way social life is conducted, organised and managed. It has become the common hegemonic currency of our times which is presented in the absence of alternative possibilities. Neoliberalism, Read argues, is thus not merely a transformation *in* ideology (from its classical liberal predecessor), it is a transformation *of* ideology that pervades everyday experiences and extends across social spaces.[660] The chapter now explores three core ideals that neoliberalism promotes and identifies how these ideals have fed into common consciousness. More particularly, it explores how they have fed into criminological understandings of crime and how the state should respond to transgressions. Such an analysis has implications for the way domestic abuse offences are treated.

1 (i) Neoliberal Valorisation of Freedom, Individualism and Responsibilisation

Neoliberal valorisations of freedom, individualism and responsibilisation can be contrasted with the rehabilitative ideal in penology of the post-war era which coincided with the birth of the welfare state. Bell argues that beliefs about a 'criminal's' rehabilitative potential, together with the state's commitment to welfarism, are no coincidence. Rather, they are indicative of a state that had confidence in its ability to help and restore criminal offenders and a sense that it could also fix and remedy social disparities and misfortune.[661] The rehabilitative ideal is consistent with social democratic tenets of communitarianism, group membership and the conception of reciprocity between state and individual.[662] In Keynesian post-war Britain the state imposed limits on freedom but, by contrast, the late 1970s and 1980s saw a 'strongly articulated vision of a more individualistic society of self-reliant citizens'.[663]

Thatcher's incoming 1979 government made it plain that welfare provision would be reserved only for those who really needed it and that individuals had the responsibility to make a success of their lives because they had been afforded the market conditions to

[659] Ibid 26.
[660] Ibid 25.
[661] Bell (n 163) 65.
[662] Lacey, 'Punishment, (Neo)Liberalism and Social Democracy'(n 167) 260, 264.
[663] Ibid 262.

succeed.[664] This narrative saw the decline of state social support, particularly to those hitherto considered the most vulnerable. Neoliberalism became the antidote to state welfarism.[665] Thus, individual freedom and responsibility, as Larner points out, became the replacement strategies of rule. Neoliberals 'encourage people to see themselves as individualised and active subjects responsible for enhancing their own well- being…. We are all encouraged to "work on ourselves"'.[666] Earning becomes linked to pride, purpose, self-esteem and inclusion, whilst those who do not capitalise on opportunities and who remain financially dependent on the state lack identity, stability, commitment and purpose.[667] Welfare recipients, Rose argues. become a breed of 'failing quasicitizen'[668] because they have failed to take advantage of market freedoms and have failed to take individual responsibility for self-advancement.

The idea that hard work will reap rewards is, I argue, an example of 'common sense' rhetoric. Viewed this way, the notion renders responsibilisation the essential, even 'natural' way for social order to be arranged.[669] Harvey suggests that 'common sense thinking' like this typically grounds public consent to neoliberalism.[670] Hall agrees and traces the reason why neoliberalism has become the new ideological hegemony to political leadership which has an ability to construct 'subject positions' that make sense to people across the social spectrum.[671] Governmental discourse about responsibility is deployed not simply as rhetoric (which suggests a superficial dissemination of ideas) but more as a 'system of meaning' that shapes and comes to constitute people's practices and identities.[672] This more profound shift in belief systems, it has been argued and as I argue with respect to the impact of neoliberalism on feminist violence against women discourse, is to the detriment of critical

[664] The Conservative Party, '1979 Conservative Party General Election Manifesto' <http://www.conservativemanifesto.com/1979/1979-conservative-manifesto.shtml> accessed 13 January 2017.
[665] Bell (n 163) 140.
[666] Wendy Larner, 'Neo-liberalism: Policy, Ideology and Governmentality' (2000) 63(1) Studies in Political Economy 5, 13.
[667] Nikolas Rose, 'Community, Citizenship and the Third Way' (2000) 43(9) American Behavioral Scientist 1395, 1407.
[668] Ibid 1407.
[669] Harvey (n 65) 41.
[670] Ibid 39.
[671] Stuart Hall, 'The Toad in the Garden: Thatcherism among the Theorists' in Carey Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (Macmillan Education 1988).
[672] Larner (n 666) 12.

engagement with issues and obfuscation of people's actual problems.[673] The next section looks at how neoliberal ideology manifests in criminology.

2 Neoliberalism and Increased Punitiveness

Neoliberalism, and the associated decline of social democracy, has frequently been linked by scholars to the punitive turn.[674] Indeed there might now be considered a body of work constituting the 'neoliberalism-as-penality thesis'.[675] Before I critique and question this straightforward cause and effect paradigm, I want to outline the various ways in which the connection between neoliberalism and the punitive turn has been made.

The first link follows the above discussion about the value placed by neoliberals on freedom, individualism and responsibility. For those who do not proactively seek self-improvement and who do not exercise their freedom responsibly and commit crime, the same trumpeted tenets can be used against them to justify prosecutions and tough carceral and community penalties. For, when all citizens are given equal freedom to access resources for personal growth, any commission of crime becomes understood as a 'choice' to commit crime from a range of opportunities.[676]

This idea of a rational thinking criminal who *chooses* to violate the law was articulated by Wilson in 1975[677] and became defining in neoliberal criminology.[678] If criminals operate rationally to make some gain or profit (rather than being understood as acting from drivers of under-privilege) they must equally bear the consequences of their choice to operate illegally and face the resultant personal costs. This 'volitional theory'[679] of the cause of criminal activity as personal choice has had huge policy ramifications. It laid the foundations for the criminal justice system to increase penal severity so that the costs to the individual become high enough to have deterrent (or conforming) effect.[680] It also sets an expectation that those who commit crime should expect prosecution so that justice can be done. Thus,

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[673] Harvey (n 65) 39.
[674] O'Malley, 'Neoliberalism, Crime and Criminal Justice' (n 649).
[675] Lacey, 'Punishment, (Neo)Liberalism and Social Democracy' (n 167) 260.
[676] Pat O'Malley, 'Risk and Responsibility' in Andrew Barry, Thomas Osborne and Nikolas Rose (eds), *Foucault and Political Reason. Liberalism, Neo-liberalism and Political Rationalities* (University College London Press 1996) 197-198.
[677] James Wilson, *Thinking About Crime* (Basic Books 1975).
[678] Michael Feeley, 'Crime, Social Order and the Rise of Neo-Conservative politics' (2003) 7(1) Theoretical Criminology 111.
[679] Ibid 112.
[680] Ibid 112.

individuals will be deterred from committing crime if the potential penalty outweighs the conceivable gain of offending and prosecutions under a volitional understanding of crime become a way of targeting and controlling offending individuals or groups. In this way, O'Malley identifies that offenders, rather than victims, are required to pay for crime with the result being that victims reappear as the 'wronged party' and victimology or the centrality of the victim in crime gains prominence as I explore in more detail below.[681]

Promotion of the 'volitional theory' of the causes of crime saw the relegation of the previous consensus of 'structural theories' of the causes of crime where factors such as poor education, employment, racial or gender inequalities are cited as causational. That being so, any call by structural criminologists to eradicate those causational social inequalities (through investment in, for example, improved education, health and housing) are left wanting because they are not seen to be at the root of the criminal behaviour. Volitional approaches therefore detract criticism from neoliberalism, per se, as creating conditions in which crime is committed. Volitional theories of crime fail to recognise the vulnerable human condition, the state's responsibility to support its citizens and have the effect of shutting down alternative discourse, such as conceiving the 'lived subject' outlined in Chapter Two.

An understanding of the causes of crime as individual choice also undermines the rehabilitative ideals of the Probation of Offenders Act 1907 which had integrated social work into the penal system.[682] Rather than probation officers offering advice, support and assistance as an end in themselves, they were now tasked with monitoring offenders to manage future risks of offending.[683] In sum, 'volitional theories of crime' ascribe the commission of crime to the individual, place responsibility of offending squarely with the offender and legitimise legal sanctioning to the detriment of a rehabilitative ideal or the targeting of structural re-imaginings.[684]

Nonetheless, the punitive turn cannot be attributed solely to neoliberal ideals about freedom, responsibilisation and choice and their coherence with the volitional theory of crime. Wacquant highlights another way in which tough state responses to crime are, he argues, intrinsic to neoliberalism. Neoliberalism sees inequality as the driver of ambition

[681] O'Malley, *Risk, Uncertainty and Government* (n 628) 126.
[682] Bell (n 163) 87-92.
[683] Ibid 87-92.
[684] Pat O'Malley, 'Risk and Responsibility' (n 676) 198.

and contends that reductions in state social support can therefore be motivational.[685] With a rolling back of the welfare state and a reduction in economic regulation comes social insecurity and inequality; some individuals and groups can get left behind. Harvey has concluded that 'one of the few serious options for the poor' becomes redistribution through the commission of crime.[686] Wacquant suggests that this emergence of a failing or even criminal class means that the neoliberal movement can also be blamed for incubating and cultivating marginalising attitudes. Those who do not aspire or those who do not succeed come to be considered, what Garland terms, 'the other', the socially excluded or the poor and undeserving underclass who deserve to pay for their criminal activity.[687] Under the volitional theory of crime, those who turn to crime have no one but themselves to blame and do not require *understanding* for the purposes of rehabilitation but *managing* for the purposes of preventing future commission of crime. For these 'precariat'[688] groups or 'dangerous populations',[689] warehousing in prisons is the most expeditious way of controlling 'them' and protecting 'us'.[690] Simon refers to this penology of 'the other' as 'managing the monstrous'.[691] Prisons become a 'warehouse for the dispossessed'[692] whilst probation workers are employed, no longer as social workers who befriend and work with offenders but rather to 'ensure public protection'.[693] Wacquant concludes that harsh penal policies are therefore in fact wholly consistent with, indeed intrinsic to, neoliberal ideology.

Neoliberalism might also be said to be part of the punitive turn to the extent that its values, strategies and practices contributed to the change in social conditions which destabilised a public's moral compass. The effects of neoliberal market fundamentalism saw a shift in society's traditional hierarchies, organisation, authorities and associated norms. Privatisation, de-regulated finance and reduced labour costs were de-stabilising for a

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[685] Nikolas Rose, 'Community, Citizenship and the Third Way' (2000) 43(9) American Behavioral Scientist 1395.
[686] Harvey (n 65) OUP 48.
[687] Garland, *The Culture of Control* (n 111) xii.
[688] John Lea and Simon Hallsworth, 'Bringing the state back in: Understanding neoliberal security' in *Criminalisation and Advanced Marginality: Critically Exploring the Work of Loïc Wacquant* (Policy Press 2013) 20.
[689] Malcolm Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and its Implications (1992) 30(4) Criminology 449, 466.
[690] Wacquant (n 626) 292.
[691] Jonathan Simon, 'Managing the Monstrous: Sex Offenders and the New Penology' (1998) 4(1-2) Psychology, Public Policy, and Law 452.
[692] Wacquant (n 626) xvi.
[693] Bell (n 163) 89.

population used to 'solidaristic solutions' such as the welfare state.[694] In conjunction with this, and perhaps prompted or facilitated by a population who felt a need for principled re-anchoring, a strong neo-Conservative call for a reassertion of moral disciplines and structures emerged.[695] Social anxiety that values were waning and that modern life was unpredictable, precarious and even dangerous saw governments offer up criminal justice and penal responses to satisfy and reassure the public that society would get 'back on track'.[696]

The displacement of penal-welfarism, must therefore be considered within wider social, economic and cultural transformations connected to neoliberalism and late modernity.[697] The developed world has seen a 'distinctive pattern' of social and cultural change that has resulted in 'a cluster of risks, insecurities, and control problems that have played a crucial role in shaping our response to crime'.[698] What has emerged, argues Garland, is a culture of crime control which was based on middle class punitive urges to control one's environment and to guard against the insecurity posed by rising, or the perception of rising crime rates. Garland suggests that the crime control field had to meet public concerns and political debate which were being fanned by the flames of an animated media. Public sentiments about 'just deserts', which may have been taboo during the penal-welfare period, facilitated neoliberal 'expressive justice'.

The crime control imperative and 'decline of the rehabilitative ideal',[699] it has been argued, is integral to the neoliberal project. Firstly, this is because it is an inevitable way of managing marginalised strata of society that are subjected to insecure or poorly paid labour who turn to crime;[700] secondly, because tougher law and order responses accord with the neoliberal promotion of the authority of the state. Harvey considers the idea of the strong authorative state to be a contradiction of the neoliberal enterprise which he suggests should be affiliated with the 'light touch', non-interventionist, laissez-faire state. But Mirowski has suggested that to conceive neoliberalism as paradoxical in this way is not to

[694] Garland, *The Culture of Control* (n 111) 99.
[695] Ibid 98-102.
[696] Malcolm Feeley, 'Crime, Social Order and the Rise of Neo-Conservative Politics' (2003) Theoretical Criminology 111. The 'turn' may also have been due, in part, to a neo-Conservative rejection of the 'permissive era' that had preceded. See Garland, *The Culture of Control* (n 111) 97.
[697] Garland, *The Culture of Control* (n 111)
[698] Ibid viii.
[699] Francis Allen, *The Decline of the Rehabilitative Ideal* (Yale University Press 1981).
[700] Wacquant (n 626) 4.

appreciate that neoliberalism's market society 'must be constructed, and will not come about 'naturally' in the absence of concerted political effort and organisation'.[701] The state therefore depends on its ability to express authority because it must provide the conditions for individual freedom.[702]

Bernard Harcourt has similarly described the 'illusion of free markets'.[703] Any contention that there is a 'natural orderliness' in the economic domain which requires no intervention, he argues, is an illusory idea. Harcourt suggests that as neoliberalism is a system that relies on private ownership, it is necessary for the state to put in place structures that 'respect private property as a mode of production'.[704] Unregulated spaces or free markets do not in fact exist at all,[705] rather such apparently 'free spaces' require 'an intricate regulatory mechanism to make that space possible'.[706] If neoliberal governance has slammed the competence of the socialist 'bloated state' in providing efficient housing, government jobs and welfare programmes then it seems, ironically, to suggest the state enjoys competence (and corresponding legitimacy) in one area; the sphere of policing and criminalisation. In this way, but perhaps for different reasons to Wacquant, Harcourt also persuasively suggests that a state with strong policing, criminalisation and incarceration powers is integral to neoliberalism.

The link between neoliberalism and tough crime responses may not be, however, as irrefutable as Wacquant and Harcourt present. For example, Feeley evidences the penal turn in the United States pre-dates the actual rise in crime witnessed in the latter part of the 1980s. This challenges Wacquant's assertion that the punitive turn came on the back of a rise in crime committed by an emergent underclass. In Britain, Bell confirms that 'the turn' did not emerge until *circa* 1993 despite Thatcher's premiership commencing in 1979, suggesting that being tough on law and order is not ideologically integral to the neoliberal project. In fact, the early years of Thatcherism saw higher rates of diversions away from

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[701] Philip Mirowski, 'Book Review: A Brief History of Neoliberalism' (2008) 24(1) Economics and Philosophy 111, 113.
[702] Jason Read, 'A genealogy of homo-economicus: Neoliberalism and the production of subjectivity' (2009) Foucault Studies, 25.
[703] Bernard Harcourt, *The Illusion of Free Markets* (Harvard University Press 2011).
[704] Bernard Harcourt, 'The Illusion of Free Markets, Punishment and the Myth of Natural Order' speaking on <https://www.youtube.com/watch?v=yB1Ox9JYJgU> accessed 25 March 2017.
[705] Harcourt illustrates this point with reference to the myriad of regulation at the Chicago Board of Trade in (n 702).
[706] Ibid 11.

court, particularly for juvenile offenders. Bell's distinctly British appraisal thus calls into question Wacquant's 'incautious'[707] American hypothesis.[708] Moreover, in Britain, social spending has continued to grow and the state continues to intervene in the economic field.[709] Thus, in contrast to Wacquant, Bell asserts that the link between neoliberalism and a crime control imperative appears to be 'indirect' and less consequential.[710]

Lacey more roundly critiques the force of Wacquant's rhetoric or what she terms the 'neoliberalism-as-penality thesis'.[711] She does not accept Wacquant's neat notion of an over-arching, monolithic 'neo-liberal penal state'[712] as neoliberalism manifests differently across geographies and histories.[713] O'Malley concludes that neoliberalism may only ever exist in hybrid form, if a unified assemblage of 'neoliberalism' can ever be identified without resorting to abstraction at its highest level.[714] In addition to the problems associated with referring to 'neoliberalism' as a singular concept, there is also difficulty, according to Lacey, in generalising about an 'increased penality', varying as it does between countries, not least between American states.[715] Furthermore, Lacey notes the demonisation of lower socio-economic groups on the one hand and expressions of 'respectable fears' on the other are nothing new.[716] Referring to Wacquant's 'abstract version of conspiracy theory',[717] Lacey argues the 'neoliberalism-as-penality thesis' fails to examine how 'hyperincarceration' has been effected by state institutions *in practice*. Thus, Lacey contends that on an explanatory level neoliberalism-as-penality suffers 'institutional deficit and conceptual vagueness'.[718] Nonetheless, I do not call for the link between neoliberalism and the crime control imperative to be entirely set aside.

The remedy to Lacey's critique is to acknowledge that neoliberalism is *not* a 'uniform,

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[707] Lacey, 'Punishment, (Neo)Liberalism and Social Democracy' (n 167) 261.
[708] Albeit Wacquant purports to argue with respect not just to the US experience but to 'western countries' more broadly.
[709] Bell (n 163) 6.
[710] Ibid 7.
[711] Lacey, 'Punishment, (Neo)Liberalism and Social Democracy' (n 167) 261.
[712] Ibid 261.
[713] O'Malley, 'Neoliberalism, Crime and Criminal Justice' (n 649).
[714] Ibid 5-11.
[715] Take for example the example of the death penalty, available in some American states and not in others indicating, according to Lacey, that such policies are less to do with neoliberalism and perhaps more to do with institutional variances at a more local level.
[716] Nicola Lacey, 'Differentiating Among Penal States' (2010) 61(4) British Journal of Sociology 778, 783-784.
[717] Ibid 783.
[718] Lacey, 'Punishment, (Neo)Liberalism and Social Democracy' (n 167) 260.

universally applicable concept', rather a complex system, technique or practice[719] with multiple and contradictory aspects determined by operational context.[720] Bell acknowledges that the concept might be as ill-defined as 'late modernity'[721] but recognises that the 'penal turn' has been the pragmatic effect of the departure of mainstream politics from social democracy. I, like Bell, do not accede to an overly-expedient analysis that ties neoliberal ideology with the crime control imperative. There was a significant a delay from Thatcher's electoral victory before tough law and order policies became visible[722] and, specifically in respect of domestic violence, the first Home Office circulars that encouraged pro-arrest practices were not until 1986 and 1990.[723] Furthermore, the current rhetoric of the coalition and Conservative governments appears to support 'a rehabilitation transformation'[724] which has seen diversions away from courts[725] and a stabilisation of the prison population.[726] This suggests something other than neoliberal *ideology* is at play.

In the 1990s, neoliberalism *in practice,* played a part in the 'turn' as neo-Conservatives promoted traditional values, triggered by rising moral panics.[727] More recently, efforts to reduce prison numbers by the coalition and Conservative governments are clearly a pragmatic response to the impact of 'austerity'.[728] Furthermore, during the tenure of the coalition, despite rhetoric to the contrary, in practice 'there were few exceptions [in outcomes] to the general drift towards punitiveness and managerialism'.[729] Consequently, I concur with Bell who suggests that criminal justice reflects less neoliberal '*ideology'* (as far as this thought collective might be said to constitute a singular system) and more neoliberalism *in practice*. This analysis appears to support Peck's contention that

[719] Bell (n 163) 7.
[720] Larner (n 666) 509.
[721] Bell (n 163) 7.
[722] Ibid 6.
[723] Home Office, 'Violence Against Women' (Home Office Circular 1986) 1986/69 and Home Office, 'Domestic Violence' (Home Office Circular 1990) 1990/60.
[724] Members of Parliament Kenneth Clarke and Chris Grayling are quoted to this end in David Skinns, 'Coalition Government Penal Policy 2010-2015' (Palgrave Macmillan 2016) 1.
[725] Legal Aid and Sentencing of Offenders Act 2012, s135 saw the introduction of the youth caution and, youth conditional cautions. The reprimand and final warning scheme consequently came to an end and youths may now be diverted away from court in excess of two times.
[726] Georgina Sturge, 'UK Prison Population Statistics' (House of Commons Library 2018) 5.
[727] Increased criminalisation of juveniles is widely attributed to public concerns about 'problem youth' following the James Bulger killing in 1993. The Labour party's criminal responses to public perceptions of 'anti-social behaviour' are also well documented.
[728] For a full definition of 'austerity', see Chapter Four. Succinctly put, austerity is an economic imperative that sees a reduction in government public spending.
[729] David Skinns, 'Coalition Government Penal Policy 2010-2015' (Palgrave Macmillan 2016) 207.

neoliberalism comprises 'opportunistic searches…ameliorative firefighting, trial-and-error governance, devolved experimentation, and the pragmatic embrace of 'what works''.[730]
In this section, I have argued that Wacquant's assertion that the new punitiveness is *integral* to neoliberal *ideology* ignores how neoliberalism is affected by its operation in practice, adapting and shifting to appease its people. I have suggested that whilst there are aspects of neoliberal ideology that support a crime control imperative,[731] neoliberalism in practice has encouraged the criminalisation of domestic abuse. Chapter Four draws out how this crime control imperative is reflected in the CPS 'working practice' when a DA victim withdraws her support for the prosecution.

Bearing in mind the complexities and inconsistencies of neoliberalism, Part Two of this chapter examines how neoliberal governments have responded to public calls for 'expressive justice' by, amongst other things, embracing activist groups such as the feminist violence against women's movement. The effect of this embrace, I argue in the next section, is the silencing of what were hitherto the discordant demands of feminism. In aligning with the women's movement, neoliberalism gains itself legitimacy whilst simultaneously enjoying a second win: the diminishing of feminism as an adversary.

PART TWO

4 Neoliberalism, its Convergence with the Feminist Movement and the Implications for State Treatment of Domestic Abuse

As Houston rightly points out, one's perception of the cause(s) of domestic abuse will shape one's proposed solution(s) to the problem.[732] As Chapter One described, 'feminists' have widely posited capitalist economic systems build and re-enforce patriarchy, and domestic abuse is understood as a manifestation of the structural conditions that have evolved. Pointing to this aetiology of domestic abuse is typical of the way feminist legal philosophers identify instances where patriarchy has 'effects on the material conditions of women and girls' and the way they then propose to 'develop reforms to correct gender

[730] Jamie Peck, 'Zombie Neoliberalism and the Ambidextrous State' (2010) 14(1) Theoretical Criminology 104, 106.
[731] The 'volitional' theory of crime and the need for deterrent sentencing/ committed prosecutions are indicative here.
[732] Houston (n 34) 217.

injustice, exploitation, or restriction'.[733] However, it would be imprudent to lump all feminist approaches together with this singular understanding of gender power relations, patriarchy[734] or even with the existence of patriarchy at all.[735] Nonetheless, it may be useful, even for the post-modern feminist, to invoke the term 'patriarchy'[736] because 'this type of structural analysis usefully highlights the interconnections between divergent contexts and experiences'[737] and draws together what may otherwise have appeared discrete occurrences.

As a 'radical' or 'cultural' feminist, Madden-Dempsey calls for prosecutors to act as both feminists and representatives of the state to effect consequential and symbolic outcomes to reconstitute states and communities as less patriarchal. The United Nations Special Rapporteur on Violence against Women adopts and explains her position:

> [P]rosecutors working on cases of domestic violence have the potential and the obligation to change the prevailing balance of power [between men and women] by taking a strong stance to disempower patriarchal notions. Interventions at this level may have both consequential effects in that condemnations of patriarchy can lead to changes in socio-cultural norms, as well as intrinsic effects, in that prosecutors . . . can be considered to be the 'mouthpieces' of society, and strong statements condemning violence against women made on behalf of society through the . . . prosecutorial services will make that society less patriarchal.[738]

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[733] Leslie Francis and Patricia Smith, 'Feminist Philosophy of Law' in Edward Zalta (ed), *Stanford Encyclopaedia of Philosophy* (Stanford.edu 2015) available at <https://plato.stanford.edu/archives/sum2015/entries/feminism-law/> accessed 14 June 2018.

[734] Carol Smart, as explored in Chapter One, is reluctant to employ the term, preferring 'patriarchal relations' and 'patriarchal structures'. This is because she is resistant to invoking a rigid system with any concrete base and explanation, preferring fluidity in definitional terms in Smart, *Feminism and the Power of Law* (n 189).

[735] The approach might be considered overly deterministic and fails to recognise that institutions, practices and arrangements are not monolithic. Furthermore, as Snider has pointed out, talking in terms of 'patriarchy' or 'capitalism' can reaffirm the very arrangements we are aiming to deconstruct: 'To talk about capitalist economic systems or patriarchal relations means that certain gender identities, roles, languages, ideologies, ways of knowing and types of knowledge are reinforced, welcomed and otherwise more likely to occur.' Laureen Snider, 'Toward Safer Societies: Punishment, Masculinities and Violence Against Women' (1998) 38(1) British Journal of Criminology 1, 4.

[736] Rosemary Hunter, 'Michelle Madden-Dempsey: Prosecuting Domestic Violence: A Philosophical Analysis' (2010) 18 Feminist Legal Studies 195, 196.

[737] Munro, 'Violence Against Women, 'Victimhood' and the (Neo)Liberal State' (n 10) 237.

[738] Yakin Erturk, 'Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: The Due Diligence Standards as a Tool for the Elimination of Violence Against Women' (2006) Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, to the United Nations Commission on Human Rights, E/CN.4/2006/61 cited in Michelle Madden-Dempsey 'Toward a Feminist Sttate:

The assertion here is that the criminal law can be an effective instrument in changing societal norms. At one level, this might mean that convicted assailants, sentenced to domestic abuse community programmes, will have to confront the wrongness of their offending behaviour; or that prosecutorial pursuit will improve a victim safety or her sense of empowerment.[739] At another level, Kahan explains that simply by labelling conduct as 'illegal' one's 'moral appraisal' of the behaviour is impacted.[740] Kahan explains that if peers also denounce the behaviour, the influence on one's own moral view is significant.[741] Where the criminal law and its agents come progressively to condemn the contested behaviour incrementally over time through consistent application of the law, then the effect is 'a wave of condemnation' which will slowly begin to break the grip of the norm.[742] Ultimately, 'it might well initiate a process that culminates in the near eradication of the contested norm and the associated types of behaviour'.[743] This is the process that Madden-Dempsey relies upon when she asserts that pursuing 'strong cases' of domestic abuse will render society less patriarchal.

Despite criminal prosecutions having the potential to challenge intimate partner abuse as normatively acceptable, early second-wave feminists in England and Wales did not exploit its potential. Chapter One suggested this was in part linked to the legacy of welfarism in Britain, a tradition of mistrust of the police and criminal justice system which was staffed almost exclusively by men[744] and due to government and Home Office refusals to criticise policing practice.[745] As such, Gregory and Lees indicate that, despite the obvious failures of the police in Britain to deal with domestic violence adequately, it was not until the mid-1980s that national policing and crime policies were targeted by feminists for reform in this area.[746] Bearing the above factors in mind, it is not surprising that early second-wave domestic violence campaigners focused their energies on improving social

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What Does 'Effective' Prosecution of Domestic Violence Mean?' (2007) 70(6) The Modern Law Review 908, 909.

[739] Madden-Dempsey, *Prosecuting Domestic Violence* (n 52) 164.

[740] Dan Kahan, 'Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem' (2000) University of Chicago Law Review 607, 613.

[741] Ibid 614.

[742] Ibid 609.

[743] Ibid 609.

[744] Rebecca Dobash and Russell Dobash, *Women, Violence and Social Change* (Routledge 2003) 209.

[745] Gottschalk (n 243) 142.

[746] Jeanne Gregory and Susan Lees, *Policing Sexual Assault* (Routledge 1999) 10 refers to the work of Susan Edwards, *Policing Domestic Violence: Women, the Law and the State* (Sage 1989).

policies to find permanent solutions for women; public housing, health care and economic independence (through state benefits) were all targeted. The solution, as far as these early domestic violence advocates were concerned, was premised on directly alleviating structural factors that kept women in abusive situations. In addition to that, feminists continued to provide the context to violence against women in terms of providing a theoretical framework to explain gendered abuse.[747]

The shift in feminists' attention towards criminal responses in the 1980s, might have been sparked by reductions in refuge funding under Thatcher as part of a neoliberal rolling back of the welfare state[748] and of 'reconstruct[ing] public administration as part of the market place'.[749] The shift in feminists' focus happened despite the Home Office's 'strategic support'[750] of expanded victim support services to include domestic and sexual abuse victims and its exclusion of violent and sexual offenders from the Criminal Justice Act 1991 (which had the effect of enabling longer sentences for commission of those crimes). It has been argued that such moves were deployed as a way 'to undercut the work of feminist inspired groups'[751] and contrast with feminist agendas of more recent neoliberal governments which explicitly describe violence against women as a symbol and strategy of patriarchy.[752]

Feminists and neoliberals have common goals with respect to violent crime perpetrated against women; they both want to see its eradication. However, despite neoliberal rhetoric which adopts feminist reasoning about gender inequality and VAW, their motivational 'jumping off points' differ. For neoliberal governments intent on providing the conditions under which populations can exercise their freedom and realise their full potential, prosecuting violence against women is vital because criminal prosecutions can eradicate insecurity and the risk of future harm; 'The claim ultimately is that the criminal process is a positive guarantor of social freedom'.[753] Furthermore, I have already explored how 'volitional theories' of crime as 'individual choice', deserving of punishment, are entirely consistent with neoliberal ideas about freedom, choice, individualism and

[747] Buzawa and Buzawa (n 82) 68.
[748] Gottschalk (n 243) 155.
[749] Nicola Lacey, 'Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991' (1994) 57(4) Modern Law Review 534, 553.
[750] Gottschalk (n 243) 155.
[751] Ibid 155.
[752] Munro, 'Violence Against Women, 'Victimhood' and the (Neo)Liberal State' (n 10) 234.
[753] Packer (n 518) 10.

responsibilisation.

Feminist motivations, just as neoliberal motivations, for engaging the criminal law include protecting victims and bringing perpetrators to account. However, crucially, for feminists, treating domestic abuse as a crime challenges attitudes that can be used by some men to justify their violent behaviour. In turn, these violent and controlling behaviours have been blamed for perpetuating patriarchal structures and relations. For this reason, Houston has suggested that criminal prosecution *is* a distinctively feminist interpretation of domestic violence understood by feminist structural theory and the aetiology of domestic abuse as 'patriarchal force'.[754] Every time a man is arrested for domestic abuse, society's sexist ideals are challenged. Hoyle has asserted, therefore, that incorporation of the feminist movement into criminal justice practice is testament to the *achievements* of second-wave feminism and the way it continues to challenge mainstream thought.[755]

'Governance feminists',[756] satisfied that criminal prosecution is a preferred response because it offers protection for women and deterrence to men, have found neoliberal governance 'particularly hospitable'.[757] **'**Governance feminists' engage the state on its own terms and have exploited legal and political opportunities not only to analyse and critique the existing order but also to devise and pursue pragmatic reforming solutions. Resonant more with 'radical' feminist analysis, most notably that of MacKinnon, 'governance feminists' deem that leaving the law 'undefended' allows men to impress patriarchal norms without challenge. Moreover, failure to engage with the law underestimates its emblematic role as an indicator of collective standards.[758]

In what she terms *carceral feminism* (a derivative of governance feminism) Epstein describes how the struggles for justice and empowerment of generations past have been recast in carceral terms.[759] Not only relying on juridical means, carceral feminists more

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[754] Houston (n 34) 217.
[755] Sandra Walklate, *The Handbook of Victims and Victimology* (Taylor and Francis 2012) 122. Chantal Thomas also asserts that any account of 'governance feminism' should first and foremost acknowledge the huge strides that have been made by the movement in the face of institutional resistance in Janet Halley et al, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2016) 29 Harvard Journal of Law and Gender 335, 347.
[756] See Introduction for definition. Briefly, this describes the combination of the 'liberal' feminist strategy of engaging with the state, whilst deploying 'radical' feminist analysis of gender inequality.
[757] Ibid 341.
[758] Clare McGlynn and Vanessa Munro, *Re-thinking Rape Law: International and Comparative Perspectives* (Routledge 2010) Introduction.
[759] Ibid 236.

specifically rely on the threat of incarceration as a mode of discipline and of organising and managing behaviours. Hard pressed to find anyone who self-identifies as a carceral feminist, the term is more a 'floating signifier'[760] that encapsulates the mutual collaboration of certain practices and ambitions of governance feminists in conjunction with neoliberal criminal justice reform programmes. The terms 'governance feminist' on one hand and 'carceral feminist' on the other have been deployed readily in the literature in relation to prostitution and sex trafficking by US scholars in particular.[761] However, there are clear resonances with the development of how the state in England and Wales approaches domestic abuse.[762]

Thus, in the vein of Halley and Epstein, I suggest that a criminal justice response is not wholly consistent with feminist structural theories of intimate violent crime. If, as feminist violence against women scholars have argued, rape and male violence against women are patriarchal expressions and used as tools to maintain (sexual) dominance, then criminal law alone is unlikely to upend conventional societal arrangements and ideological norms.[763] So whilst a criminal justice response clearly begins to address the structural causes of domestic abuse to the extent that it begins to challenge *beliefs* that intimate partner abuse is acceptable, it does not directly address, for example, wage inequality, child care demands or male privilege. Nor does a criminal justice response begin to holistically address the economic or social factors in women's lives that keep women in abusive relationships or the reasons that make it substantially more difficult to live apart from him. Whilst I accept that law may serve to counter attitudinal conventions about female inferiority and subjugation, the criminal pursuit of male perpetrators of domestic abuse may only serve to silence or block feminist voices, such as Fineman's 'vulnerability and human

[760] Sune Sandbeck, 'Towards an Understanding of Carceral Feminism as Neoliberal Biopwer' (2012) Annual Conference of the Canadian Political Science Association, University of Alberta. Available at <http://www. cpsa-acsp. ca/papers2012/Sandbeck. pdf> accessed 18 May 2017.

[761] For example, Janet Halley, Prabha Kotiswaren, Hila Shamir and Chantal Thomas, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2016) 29 Harvard Journal of Law and Gender 335; and Elizabeth Bernstein, 'Carceral Politics as Gender Justice? The "Traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights' (2012) 41 Theory and Society 233.

[762] As the following extract from the Home Office Violence Against Women and Girls Policy document illustrates: 'Violence against women and girls (VAWG) are serious crimes. These crimes have a huge impact on our economy, health services, and the criminal justice system. Protecting women and girls from violence, and supporting victims and survivors of sexual violence, remains a priority of this government.' Home Office. 'Policy: Violence Against Women and Girls' available at <https://www.gov.uk/government/policies/violence-against-women-and-girls> accessed 19 May 2017

[763] See, for example, Smart, *Feminism and the Power of Law* (n 189).

condition' initiative, that seek the wholesale re-structuring of society. As Smart has argued, the greatest opportunities might actually arise from a move away from the law towards less regulation. Snider, too, recognises that by moving away from law we make space and possibility for 'creating alternative models, of envisaging different ways of seeing to counter the dead weight of hegemony, for acceptance of the status quo rests heavily on notions that it constitutes the necessary and inevitable ordering of the world'.[764]

For those reasons, some feminists have argued that the criminal justice system ought not to be considered as feminists' most preferred ally. Some violence against women feminists have expressed concern about replacing a man's domination over his female partner with state domination.[765] There are some feminists who do not see the state's place in the private lives of women[766] or at least to the extent that women do not wish it.[767] Just as the systemic male domination of the institutions of criminal justice has been held responsible for past official inaction, some feminists have been reluctant to transfer women's protection into 'men's' hands.[768] Finally, it has been argued that the criminal justice system has been seen to legitimise various groups' oppression; for example the poor, ethnic minorities and the homeless.[769] All these factors are in addition to the practical negative effects that a criminal justice response may have on a woman's safety, the impact on her finances due to imposition of fines on her partner, the disruption of parental contact with children, the referral to social services of her children and the risks associated with secondary victimisation through giving evidence in court. A strong criminal justice response, at once protectionist and interventionist, might signal that feminism has successfully engaged the state to adopt their frames of analysis as far as violence against women is concerned. However, the expansion of criminal justice in line with neoliberal agendas may not represent progress from a social democratic perspective. Furthermore, as my empirical analysis in Chapter Four reveals, even criminal prosecutors do not describe domestic abuse

[764] Snider (n 636) 27.
[765] Linda Mills, *Insult to Injury: Re-thinking our Responses to Intimate Abuse* (Princeton University Press 2003).
[766] Barbara Sanson, 'Comment, Spouse Abuse: A Novel Remedy for a Historic Problem' (1979) 84 Dick Law Review 147, 157 in Houston (n 34) 254-255. Indeed, I have suggested that all other things being equal, an affirmative conception of privacy, might inform prosecutor decision-making.
[767] See, for example Mills (n 765) 5.
[768] Houston (n 34) 254.
[769] Susan Schechter, 'Towards an Analysis of the Persistence of Violence Against Women in the Home' (1979) Aegis Magazine On Ending Violence Against Women (Feminist Alliance Against Rape) 47-48.

in terms of structural gender inequality so the extent to which it will ever be challenged through criminal prosecution is questionable.

If the underlying logic of the women's movement has been social change to end domestic abuse, then in seeking law reforms and criminal justice responsiveness, the women's movement has suffered more than unintended corollaries of joining forces with the state which could be considered 'just collateral damage in the gender war'.[770] Rather, Bumiller is right when she asserts that the 'mainstreaming' of the movement has resulted in an allegiance with a neoliberal pursuit of social control.[771] Gotell, too, refers to the atomised framing of the criminal law as detracting from violence against women as a gender equality issue. Conceived as crime, violence against women appears reconstructed as a consequence of failed responsibilisation and consequently potential for future law reform to address ongoing gender inequity is diminished. Even in the shadow of neoliberal government rhetoric which recognises violence against women as a systemic manifestation,[772] if the tendency is towards criminalisation then the effect is towards de-contextualisation and individualisation.[773]

The women's movement's partnership with neoliberalism and its volitional theory of crime sees the integration of domestic abuse into the routine business of crime control, complete with its professional language, rational categorisations and, as I explore below, managerial tendencies. Gruber sums up the position thus: 'rather than the criminal justice system adopting a feminist agenda, feminist reformers essentially adopted the criminal justice system's agenda'.[774] With criminal justice used as a primary framework to meet women's safety needs, if concepts like patriarchy or sexual domination were ever considered they would only be so as far as they were applicable to a highly rational conception of surveillance, diagnosis or social control.[775]

Annette Ballinger concurs. In her recommendations for the 2011 incoming coalition

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[770] Bumiller (n 40) 15.
[771] Ibid 15.
[772] See, for example, Crown Prosecution Service, 'Violence Against Women and Girls Report 2015-2016' (2016) 3 available at <http://www.cps.gov.uk/publications/docs/cps_vawg_report_2016.pdf> accessed 19 May 2017.
[773] Lise Gottell, 'Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist Inspired Law Reforms' in Clare McGlynn and Vanessa Munro (eds), *Re-thinking Rape Law: International and Comparative Perspectives* (Routledge 2010) 209 -223.
[774] Aya Gruber, 'A "Neo-Feminist" Assessment of Rape and Domestic Violence Reform Law' (2012) Gender, Race and Justice 583, 589.
[775] Bumiller (n 40) 13.

government, she accuses the preceding government's VAW strategies as having 'undermined the gendered nature of domestic violence… redefining [it] as gender-neutral'.[776] She asserts this is so because in tackling the gendered violence problem as crime, what becomes prioritised are police targets and criminal justice goals, not women's safety. Chapter Four of this thesis lends support to this proposition. Pro-arrest initiatives and pro-prosecution emphases are pursued by criminal justice actors as the end in themselves and VAW becomes one piece of a broader government programme to reduce crime and bring perpetrators to account. A criminal justice approach to VAW also fails women because it detracts from proper funding for refuges or rape crisis centres which have been shown to support women who may not call on the CJS at all.[777]

Furthermore, neoliberal strategies focused on assisting victims of abuse have tended to emphasise *individual* explanations of the occurrence (with the neoliberal emphasis of 'work on the self' at the fore) rather than looking for more comprehensive understandings that might counteract broader forms of discrimination in women's lives. In short, by understanding crime as the choice of individual actors, the heteropatriarchal social order is left unchallenged.[778] Through reactive criminal responses once victims make themselves known, rather than proactive preventative strategies before victimisation has occurred, there has been an emphatic failure to confront male power and its associated violence.[779] Bumiller persuasively suggests, therefore, that any stall in the progress of the social reform the women's movement seeks is as a consequence of the neoliberal 'appropriation' of the feminist movement. The next section explores the way that neoliberal strategies and priorities play out in the CPS, a self-professed 'independent' institution.

PART THREE

5 The 'Independence' of the CPS and the Influence of Quasi-Neoliberal Priorities on Domestic Abuse Prosecutions

In answering the research question, 'how might neoliberalism have contributed to the current prosecutorial approach to domestic abuse', I want now to explore the

[776] Annette Ballinger, 'Lessons for the coalition' (2011) Criminal Justice Matters 16, 17.
[777] Ibid 16.
[778] Ibid 17.
[779] Maggie Wykes and Kirsty Welsh, *Violence, Gender & Justice* (Sage 2009).

mechanisms and workings of the CPS. I draw out the factors, institutions and systems external to the organisation which play a part in its operation and show how the CPS is not an island, impervious to either direct or indirect influence from pervading neoliberal discourse and governmentality. I show that the CPS must be responsive, reactive and accommodating of various influential dynamics; from the police to public opinion. There is a link here to Fineman's vulnerability theory discussed in Chapter Two, only in this chapter, instead of highlighting the vulnerability of individuals, it is noted that institutions such as the CPS are also vulnerable to societal structuring. Moreover, the quasi-neoliberal practices and priorities described here, stand in stark contrast to the priorities advocated in the 'lived subject' of Chapter Two.

It starts by looking at how and why the CPS was formed in 1986. Its creation was recommended by the Royal Commission on Criminal Procedure 1981 (The Phillip's Report).[780] The proposal came on the back of centuries of 'notoriously ramshackle'[781] police prosecutions that were piecemeal in approach and undirected and non-uniform across geographies. The Phillips' report's motivation in recommending a single prosecution authority was to unify the standard of decision-making across regions and to reduce the numbers of weak cases that were resulting in high numbers of judge directed acquittals. The report announced that, whilst offenders needed to be brought to justice, the rights of the accused must be respected and secured; this followed criticism levied at police prosecutions that had seen errors and miscarriages of justice throughout the 1970s.[782] The Phillips' Report recommendation also recognised that the functions of investigation and the decision to prosecute should be made separate because, once invested in the investigation stage, officers 'could not be relied on to make a fair decision whether to prosecute'.[783]

The tone of the Phillips' Report was that balance needed to be restored between the rights of the defence and prosecution and also between the community and the suspect.[784] When the Police and Criminal Evidence Act 1984 was introduced, its purpose, therefore,

[780] Royal Commission on Criminal Procedure 1981 (Cmnd 8092) and its supplement The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure (Cmnd 8092-1).
[781] Francis Bennion, 'The New Prosecution Arrangements' [1986] Criminal Law Review 3, 3.
[782] JUSTICE: Criminal Justice Committee, 'The Prosecution Process in England and Wales: Report by' [1070] Criminal Law Review 668.
[783] Crown Prosecution Service, 'History' available at <https://www.cps.gov.uk/about/history.html> accessed 13 March 2017.
[784] Michael Zander, 'PACE (The Police and Criminal Evidence Act 1984): Past, Present, and Future' (2012) London School of Economics Law, Society and Economy Working Papers 1.

was to provide a framework for the fair exercise of police powers; it aimed to deliver standardised practice and make suspects aware of their rights. In fact, PACE proved controversial because the Act saw the *extension* of a number of police powers; in relation to searches, arrests and the treatment of detainees in police custody. It was for that reason, according to Sanders, that an independent prosecuting authority was required to 'counter-balance' the public perception that powers would be tipped too far in favour of the police.[785] PACE came into force the same year as the CPS was established and the CPS's initial insistence that they were to be considered *entirely* independent of the police[786] speaks to widespread public concern about increasing police powers at a time when they were particularly associated with miscarriages of justice.[787]

Initially at least, the CPS' high regard for its own objectivity and independence carried the risk that the service was isolated from police, victims and the public. Sanders pejoratively likens the CPS to a fortress at this time.[788] However, the CPS has the responsibility of implementing the 'prosecutive power of the state'[789] and it would be misleading to suggest that the CPS operates within a vacuum, unaffected by police, courts or executive action.[790] Rather, the CPS is embedded within the various agencies and institutions of the criminal justice system and at the very least 'there has to be a measure of co-ordination between the various limbs of the criminal justice system'.[791] Good co-ordination should not, however, imply some loss of proper independence cautions the 1994 Director of Public Prosecutions (DPP).[792] The CPS retains, ultimately and in principle, independence from police, courts, executive and wider public with regards to individual decisions on particular cases. Indeed, central tenets of the CPS include its impartiality, independence and fairness.[793] However, I want to illustrate some of the ways that CPS policies and 'working practices' are in fact influenced by external factors.

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[785] Andrew Sanders, 'The CPS- 30 years on' (2016) Criminal Law Review 82, 84.
[786] Ibid 84.
[787] David Rose, *In the Name of the Law: The Collapse of Criminal Justice* (Vintage 1996).
[788] Sanders (n 785) 84.
[789] Francis Bennion, 'The New Prosecution Arrangements' [1986] Criminal Law Review 3, 3.
[790] Roger Daw, 'A Response' [1994] CLR 904, 909.
[791] Ibid 909.
[792] Roger Daw in ibid 909.
[793] Crown Prosecution Service South East, 'Briefing for Police and Crime Commissioner Candidates' (2012) available at <http://www.cps.gov.uk/southeast/assets/uploads/files/PCC%20pack.pdf> accessed 14 March 2017.

Despite an alleged 'steel curtain'[794] that came down between the police and CPS during its infancy, [795] Carolyn Hoyle identified that the CPS and the police held the same 'working rule' in respect of 'unsupportive' domestic violence victims equating to 'unwinnable' cases.[796] This she surmised was because the two organisations work together to build cases and discuss the merits of cases between them. Nonetheless, concerns that CPS lawyers had insufficient say in police charging decisions[797] led the 1997 Glidewell Report to recommend closer co-operation between CPS lawyers and the police in what was termed 'joined-up working'.[798] The Criminal Justice Act 2003 finally gave the CPS statutory charging powers which have been in effect since 2006[799] and the 2009 House of Commons Justice Committee report congratulated the 'collaborative approach being taken by the police and CPS'.[800] Over time, however, there has been a gradual creeping back of police charging so that currently the CPS only deals with 28% of charging decisions.[801] The CPS now only considers charging decisions in 'more serious and complex cases'.[802] Notably for the purposes of this thesis, however, all charging decisions in domestic abuse cases enjoy an elevated status and will still be referred to a prosecutor.[803]

Despite the independence a prosecutor enjoys with regards to decision-making on individual cases, the CPS as an institution is answerable to government in various ways. Whilst the head of the CPS, the DPP,[804] 'operates independently'[805] this is qualified as she does so 'under the superintendence of the Attorney General who is accountable to

[794] Former DPP quoted in Sanders (n 786) 84.
[795] Sanders (n 785) 86. Sir Robin Auld, appointed by the Lord Chancellor to review operations of the criminal court in England and Wales, also had concerns that police 'overcharging' was resulting in court delays and recommended that the CPS be given powers to decide charges. See Robin Auld, 'Review of the Criminal Courts in England and Wales: The Report' (2001) 408.
[796] Hoyle, *Negotiating Domestic Violence* (n 156) 175-181.
[797] Sanders (n 785) 84.
[798] Iain Glidewell, The Review of the Crown Prosecution Service: A Report (1998) Cm 3960.
[799] Statutory charging was introduced by part 4 of the Criminal Justice Act 2003 (which amended s37 of PACE, inserting s37A into the Act).
[800] House of Commons Justice Committee, 'The Crown Prosecution Service: Gatekeeper of the Criminal Justice System' (HMSO 2009) 56 available at <www.publications.parliament.uk/pa/cm200809/cmjust/186/186.pdf> accessed 21 March 2017.
[801] Crown Prosecution Service, 'About Charging' available at <https://www.cps.gov.uk/about/charging.html> accessed 14 March 2017.
[802] CPS statistic, in ibid.
[803] See Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8). This is also true for 'hate crime' which similarly enjoys an elevated status.
[804] The role of DPP has existed since 1880 and was formalised in 1986.
[805] Crown Prosecution Service, 'Facts about the CPS' available at <http://www.cps.gov.uk/about/facts.html> accessed 21 March 2017

Parliament for the work of the CPS'.[806] The DPP has responsibility to appoint and remunerate staff but this is with the approval of the Treasury as to numbers. She is also required to provide an annual report to the Attorney General every April which includes a summary of the discharge of her functions in the preceding tax year and any other matters that the Attorney General may specify. This report is laid before parliament for scrutiny. In this way, and through the Justice Select Committee, parliament has the opportunity to comment upon the work of the CPS.[807]

The prosecution of domestic abuse at the CPS is directly affected by government when new acts of parliament come into force. Examples include the introduction of statutory charging, the availability of the conditional caution[808] or the passing of Serious Crime Act 2015 (s76 criminalised coercive and controlling behaviour in intimate or family relationships).

The government also has direct impact in determining the CPS budget. The CPS has seen how their budget has been heavily reduced during the recent times of austerity. Indeed, from the 2009-2010 budget of £672 million per annum, the 2015 funds fell by £185 million to £487 million.[809] The impact this has on the way that prosecutors work and carry out their daily task list is discussed by way of empirical insight in Chapter Four.

In addition to its accountability to parliament and to the impact that government has on CPS policy, the CPS strives to keep abreast of developments in public opinion. Not to be responsive and receptive to wider societal opinion would risk the CPS losing legitimacy in the eyes of the public it serves. To ignore evolving societal norms and expectations about which behaviours ought and which ought not to be prosecuted risks the CPS becoming open

[806] Crown Prosecution Service, 'Casework Quality Standards' (2014) available at <www.cps.gov.uk/publications/docs/cqs_oct_2014.pdf> accessed 9 March 2017

[807] See, for example, Justice Committee 'The Work of the Crown Prosecution Service' (2015) available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news-parliament-20151/crown-prosecution-service-evidence/> accessed 4 April 2017.

[808] Conditional cautions were introduced in PACE 1984, s37A following their inclusion in the Criminal Justice Act 2003. However, their use in domestic abuse cases is almost entirely restricted as '[i]t is unlikely that domestic abuse in intimate (whether current or previous) partner cases would ever be appropriate for Conditional Caution'. Any consideration of the use of conditional caution in domestic abuse cases will require referral to the Head Quarters Violence Against Women Strategy Manager in London. In practice this requirement inhibits their use. See Crown Prosecution Service, 'Adult Conditional Caution Guidance' available at <www.cps.gov.uk/publications/directors_guidance/adult_conditional_cautions.html#a01> accessed 21 March 2017.

[809] Hansard Online, 'Crown Prosecution Service: Funding' (Hansard Online 2017) Volume 619.

to criticism that might, ultimately, undermine the authority of the criminal law.[810] For those reasons, Sir David Calvert-Smith, former DPP, first opened up a working relationship between the CPS and the academic community to assist with keeping the CPS reflective of public expectations.[811] The Justice Committee, too, hears the views of academics about the ways in which CPS practice impacts and makes recommendations accordingly. Moreover, the CPS openly invites public consultation when they formulate prosecution policy.[812] For example, with respect to the prosecution of domestic violence cases, the CPS published a draft report and invited commentary from interested parties.[813] It is in this way that activist groups such as Women's Aid and feminist legal scholars can influence policy outcomes.

It is clear then that whilst the CPS does not accede to governmental or public influence when it comes to particular decisions in individual cases, CPS policies and ways of working are influenced by factors external to itself; specifically government priorities and public consultations. Furthermore, the CPS is accountable, through the Attorney-General, to parliament. The CPS understands that public confidence in the service it provides is critical to its legitimacy; it therefore encourages scrutiny of its work and aspires to transparency of working to improve public understanding of their priorities and role.[814] Flowing from this, it is easy to understand why the women's movement in the area of violence against women and girls may have been so well attended to; its explanations of the causes of VAW and its suggested remedies being so incorporated into CPS policy documentation and practice.[815] The chapter now examines the way the CPS comes under a different pressure - the targeting of efficiency reforms in line with the quasi-neoliberal principles of managerialism.

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[810] The CPS considered over 5000 responses from the public when determining their assisted suicide policy in 2010. Crown Prosecution Service, 'Assisted Suicide' available at <https://www.cps.gov.uk/publication/assisted-suicide> accessed 4 June 2018.

[811] Andrew Ashworth, Developments in the Public Prosecutors Office in England and Wales' (2000) 8(3) European Journal of Crime, Criminal Law and Criminal Justice 257, 261.

[812]Crown Prosecution Service, 'Consultations' available at <www.cps.gsi.gov.uk/consultations/> accessed 21 March 2017.

[813] Crown prosecution Service, 'Consultation: The Prosecution of Domestic Violence Cases' (2014) available at <http://www.cps.gov.uk/consultations/dv_consultation_14.pdf> accessed 4 April 2017.

[814] DPP Alison Saunders speaking before the Justice Committee. See Justice Committee, 'The Work of the Crown Prosecution Service' available at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news-parliament-20151/crown-prosecution-service-evidence/> accessed 4 April 2017.

[815] Indicative is: Crown Prosecution Service, 'Violence Against Women and Girls Crime Report: 2015-2016' (2016) available at <http://www.cps.gov.uk/publications/docs/cps_vawg_report_2016.pdf> accessed 1 April 2017.

5 (i) New Public Managerialism and CPS Targets

If the neoliberal state regulates all domains by the market and disseminates economic principles in all aspects of life, then economic ideologies also permeate state institutions even where monetary profit is not considered the end goal. Through the rise of neoliberal governance, political and business idiolects converge and shape everyday conduct. If neoliberalism is an 'art of governance'[816] then, in the public sector, the tenets of New Public Managerialism (NPM) are its masterpiece and the CPS is its quintessence. Chapter Four draws out how the strategies of managerialism identified here contribute to the CPS 'working practice' of the 'tenacious prosecution' of domestic abuse, often in unanticipated ways.

As neoliberal theory champions privatisation, the public sector, considered inherently inefficient, is targeted for reduction.[817] In dogmatic neoliberal doctrine competition is considered a virtue and its results are not considered negative. However, as Bell has noted, neoliberal theory rarely corresponds exactly to neoliberalism as it is actually practiced; at its most doctrinaire, neoliberalism would advance the 'privatisation of all state functions'.[818] But the CPS has not been privatised, for example by the contracting out of prosecution services to private firms. Instead, in the absence of other organisations competing for its core business, what has emerged is a way of working in line with the precepts of managerialism.[819] NPM, introduced to the English and Welsh CJS since at least the mid-1990s,[820] was heralded as a means of achieving a 'post-bureaucratic criminal justice'[821] because it demands public sector modernisation, expects productivity, value for money and the delivery of core quality standards.[822] Within this framework the CPS is effectively encouraged to compete with itself for improved conviction rates, victim

[816] Michel Foucault in Michel Senellart (ed), *The Birth of Biopolitics: Lectures at the College de France*, 1978-79 (Picador 2004) 131.
[817] Susan George, 'A Short History of Neoliberalism' (1999) Conference in Economic Sovereignty in a Globalising World, Bangkok available at <https://www.tni.org/en/article/short-history-neoliberalism> accessed 20 April 2017.
[818] Bell (n 163) 140.
[819] For a comprehensive account of New Public Managerialism see, for example, Gerry Stoker (ed), *The New Management of British Local Governance* (Macmillan 1999).
[820] Eugene McLaughlin, John Muncie and Gordon Hughes, 'The Permanent Revolution: New Labour, New Public Management and the Modernization of Criminal Justice' (2001) Criminal Justice 301, 301.
[821] Ibid 301.
[822] The CPS implemented 'Core Quality Standards' in December 2009 (renamed 'Casework Quality Standards in 2014). Crown Prosecution Service, 'Casework Quality Standards' available at <https://www.cps.gov.uk/publications/casework_quality_standards/index.html> accessed 31 March 2017.

satisfaction, efficiency and meeting reduced budgetary targets year on year. In this way, the principles of competition can be seen to operate within the four walls of the CPS.

Managerialism is not simply a 'modern management method' but an ideology or 'all-pervasive creature'[823] that uses the generic tools of management to 'establish itself systematically in organisations'.[824] Managerialism can have the consequence of depriving employees of decision-making discretion as the interviews with prosecutors in Chapter Four explore.[825] In part this de-skilling or downgrading of the skilled worker's role may have something to do with the expansion of management personnel who are tasked with overseeing operations.[826] But it may also be to do with the introduction of systems and standardised ways of working to attain its 'performance goals' or 'organizational objectives' (such synonyms conceal its profit motives or, in the case of the CPS, its money saving interests).[827] Moreover, as Managerialism, unlike neoliberalism, lacks political or democratic ambition it may feel oppressive to work under. Nonetheless it strives for legitimacy through its quest for productivity and its ideology might therefore be conceived of 'as a set of ideas constituting goals for action'.[828]

The introduction of NPM has not, I argue here, seen the reduction in the government's role in processing criminal prosecutions. A diminishing government presence in the day to day operations of the CPS might have been expected, given that managerialism itself imposes the most streamlined ways of working to achieve policy aims. A 'stepping back' of government from the business of prosecuting might be more consistent with neoliberal free market priorities that have imposed market discipline and solutions on the CPS.[829] However, the presence of an interventionist government is felt at the CPS through government target setting both in budgetary terms and performance monitoring. These operational goals, based on government evidence or 'what-works' agendas, are set against

[823] Garland, *The Culture of Control* (n 111) 18.
[824] Thomas Kilkauer, 'What is Managerialism?' (2015) Critical Sociology 1103, 1106.
[825] Ibid 1106.
[826] In the CPS Crown Prosecutors and Senior Crown Prosecutors fall into teams managed by District Crown Prosecutors overseen by Assistant Chief Crown Prosecutors managed by Chief Crown Prosecutors (CCP) who are accountable to the DPP. Area Business Managers also assist the CCPs. It is notable that managerialism is characterised by unrelenting organisational restructuring in its quest for streamlined working; the CPS has seen countless reconfigurations of its management structures and ways of working.
[827] Kilkauer (n 824) 1106.
[828] Ibid 1109.
[829] Bell (n 163) 141.

policy objectives (for example the elimination of violence against women and girls).[830] Once again we see the apparent contradictions of neoliberalism which advocates the free market on the one hand and neoliberalism in practice which promotes the strong state on the other.[831] Again visible, the shift from 'government' (and its associations with monolithic, transcendental rule[832]) to the art of 'governance' in collaboration with state actors, in this instance, criminal prosecutors.

From the outset, the recommendation to establish the CPS was triggered by 'the need for the efficient and economical use of resources'.[833] Thus, the Prosecution of Offences Act 1985 set the expectation that the CPS would make financial savings.[834] Conservatives at the time were also simultaneously wedded to the idea that sheer numbers of police officers, prosecutions and punitive sentencing would have long term deterrent effect.[835] Flowing from this premise, coupled with a drive for economy and efficiency, it is easy to draw parallels between the way managerialism has operated in the CJS since that time and Packer's Crime Control Model.[836] The Crime Control Model, according to Packer, aims to repress crime through efficiency in achieving large numbers of convictions; speed and finality are prized. By operating a conveyor belt system of justice where cases are dealt with in an efficient, routinised and even stereotyped way, the obstacles to conviction, Packer observes, are diminished. Following an initial screening process, a 'presumption of guilt' allows the Crime Control Model to proceed with high volume and, Packer comments, '[t]he model that will operate successfully on these presuppositions must be an administrative almost managerial model'.[837] The impact on prosecutorial discretion in the area of domestic abuse prosecutions is discussed at length in Chapter Four.

In the area of domestic abuse, CPS targets and achievements are recorded annually in the Violence Against Women and Girls Crime Report.[838] The report assesses CPS

[830] Ibid 177. As already mentioned, the DPP and the service her organisation delivers, is scrutinised by the Justice Committee and Parliament (the latter directly through the Attorney-General).
[831] Andrew Gamble, *Free Economy and the Strong State* (Macmillan Education 1988).
[832] Lisa Downing, *The Cambridge Introduction to Michel Foucault* (Cambridge University Press 2008) 18.
[833] Royal Commission on Criminal Procedure 1981 (Cmnd 8092).
[834] The Prosecution of Offences Act 1985.
[835] McLaughlin, Muncie and Hughes (n 821) 302.
[836] Packer (n 518) 9.
[837] Ibid 11.
[838] Crown Prosecution Service, 'Violence Against Women and Girls Crime Report: 2015-2016' (2016) available at <http://www.cps.gov.uk/publications/docs/cps_vawg_report_2016.pdf> accessed 1 April 2017.

'performance' by retrieving statistical data from CPS case management systems.[839] The report reveals that in 2016 the number of police referrals for domestic abuse was lower than the previous year but that the percentage of police referrals that resulted in a charge was at an all-time high (69.7% of police cases). This suggests a commitment on the part of charging lawyers to advance domestic abuse cases where possible. Further the report reveals the volume of convictions was the highest ever recorded and that the percentage of convictions was also at its highest ever at 75.4%.[840] This continues the steady increase in domestic abuse conviction rates witnessed over the recent past. The report, in no uncertain terms, reveals that the CPS is committed to improving and driving up conviction rates in domestic abuse cases, (it's policy objective) and considers its advances in this regard commendable.

By way of illustration, a Domestic Abuse 'Dive Deep' exercise was carried out in 2015 which analysed six courts which had achieved the highest conviction rates. The aim of the process was to identify 'best practice components' (or the 'what works' approach) that might then be rolled out to other courts. It is clear, therefore, that the CPS equates 'success' in these cases with convictions. Evident in this report is the importance placed on managerial measurements of performance through statistical goals and targets. There is no equivalent statistical information available in relation to victim satisfaction or the number of victims of domestic abuse that were kept safe following their contact with the CPS. This directly speaks to the reservations some feminists have with the women's movement's alignment with the neoliberal state-run criminal justice system in that what becomes prioritised are criminal justice goals and not the best interests of women. The next section explores the recent CJS focus on prioritising the victim and how the emphasis translates into obtaining 'justice' on their behalf.

[839] The CPS uses 'Compass Management Software' or CMS which records/ flags information such as whether the case is a domestic abuse case, the gender of the victim and perpetrator, the ethnicity of parties and the outcome of the case. The data depends upon the accuracy of data input by CPS staff.
[840] The statistics also reveal that 83.3% of victims were female.

5 (ii) The Victim-Centred Priority

The CPS prosecutes in the public interest and confirms that it 'does not act for victims or the families of victims in the same way solicitors act for their clients. [Prosecutors] act on behalf of the public and not just in the interests of any particular individual.' [841] Thus, with its stated aims of independence and fairness, the CPS brings and presents the police case before the criminal court whenever the evidential and public interest tests are met. The state is then traditionally understood to conduct criminal prosecutions on behalf of the community; the state's and prosecutor's interests considered synonymous with the victim's as, ultimately, the state's correctional policies will serve both public and offender. [842] In the past, however, the approach attracted criticism as it was perceived that, once the wheels of justice had started rolling, the criminal justice system often marginalised victims[843] and treated them as incidental and secondary to the greater pursuit. Charged with lavishing defendants the right of the presumption of innocence, procedural due process safeguards and the assessment of their needs for rehabilitation, while the 'alleged' victim's interests appeared relegated and subsumed by the greater good.[844]

Aiming to redress the balance, New Labour's political promises vowed to put victims 'at the heart' of the criminal justice system[845] and made parallel calls to 're-balance the system in favour of the victim'.[846] Since the late 1990s, the question of who properly 'owns' any particular crime[847] may have, technically, remained unchanged as far as the Crown Prosecution Service is concerned but there can be no doubt that the status of the victim has been considerably elevated within the service and the wider justice system. Victims are no

[841] Crown Prosecution Service, 'Decision to Charge' available at <www.cps.gov.uk/victims_witnesses/reporting_a_crime/decision_to_charge.html> accessed 7 April 2017
[842] Matt Matravers, 'The Victim, the State, and Civil Society' in Anthony Bottom and Julian Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Willan 2010) 1.
[843] Carolyn Hoyle, 'Victim's, The Criminal Process and Restorative Justice' in Rodney Morgan, Robert Reiner & Mike Maguire (eds), The Oxford Handbook of Criminology (7th edn, OUP 2007) 407.
[844] Garland, *The Culture of Control* (n 111) 121.
[845] The Queen's Speech (2006) full text available at <http://news.bbc.co.uk/1/hi/uk_politics/6150274.stm> accessed 10 April 2017.
[846] This 'rebalancing' was a recurring mantra throughout New Labour policy documentation see Michael Tonry, 'Rebalancing the Criminal Justice System in Favour of the Victim': The Costly Consequences of Populist Rhetoric' in Anthony Bottom and Julian Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Willan 2010) 72.
[847] I borrow this framing of the issue from Matravers (n 843) 1.

longer a 'bit part player'; they are now 'central actors'.[848]

Several CPS policies exemplify the shift. Most significantly, the 'No Witness, No Justice' project recognised that by improving support offered to victims and witnesses the 'justice gap' could be narrowed and public confidence restored.[849] Consequently, dedicated Witness Care Units in police stations became tasked with keeping victims updated with progress in the case and discussing needs such as the availability of special measures when giving evidence at court. Likewise, the Prosecutor's Pledge[850] makes clear what victims can expect from the CPS.[851] Prosecutors should now take into account the impact on the victim when making charging decisions, seek the view of the victim when considering the acceptability of pleas, communicate withdrawn or altered charges, protect victim identity in court where appropriate and explain court procedures and processes.[852] The Victims' Right to Review Scheme[853] also assists victims to challenge CPS decisions and, since its inception in 2013, provides further evidence of a transformation in the dynamic between the CPS and victim.

In practical terms, Hall notes that provision for victims at court is now well considered. He observed appropriately designated waiting rooms, clear and obvious reception desks, signage and a designated witness service at court all present in the courts he attended.[854] Taken together such developments illustrate significant ameliorations to awareness about victimhood and victims' needs. These measures do not realign the role of the CPS in adversarial proceedings as the state still conducts a public prosecution, but they do signal an adjustment in victims' participatory rights and lend merit and legitimacy to criminal justice because it aims to dispense proper treatment of victims.[855]

Changes to the status of the victim are not just evidenced in CPS policies or the physical

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[848] John Spencer, 'The Victim and the Prosecutor' in Anthony Bottom and Julian Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Willan 2010) 141.
[849] Avail Consulting, 'NWNJ Pilot Evaluation Final Report: Crown Prosecution Service and ACPO' (2004) 6.
[850] Introduced in October 2005, Crown Prosecution Service, 'The Prosecutors 10 Point Pledge to Victims' (CPS 2005) available at <www.cps.gov.uk/news/articles/prosecutor_pledge211005/> accessed 7 April 2017.
[851] Though John Spencer contends that the Prosecutors' Pledges are high on rubric but distinctly lacking redress for victims should the CPS be non-compliant in Spencer (n 852) 151.
[852] Though a report by the then Victim's Champion, Sarah Payne, indicated that victims still wanted more direct communication about their case. Sarah Payne, 'Redefining Justice: Addressing the Individual Needs of Victims and Witnesses' (2009) available at <http://www.cjp.org.uk/publications/archive/redefining-justice-addressing-the-individual-needs-of-victims-and-witnesses-05-11-2009/> accessed 21 April 2017
[853] Crown Prosecution Service, 'Victims' Right to Review Scheme' available at <http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/index.html> accessed 21 April 2017.
[854] Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan 2009).
[855] Anthony Bottoms and Julian Roberts, 'Preface' in Anthony Bottom and Julian Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Willan 2010) xix.

conditions provided to victims at court; enacted statute similarly reflects the priority. Examples include the Domestic Violence, Crime and Victims Act 2004 which made both common assault and breach of a non-molestation order arrestable offences. This, combined with a police presumption to arrest in instances of domestic violence,[856] gave police clear powers to 'step in' and act on behalf of the victim of domestic abuse. The Act also made available restraining orders for victims, even on acquittal. Prior to that, the availability of special measures for prosecution witnesses at court (but not for defendants) became commonplace[857] whilst the Criminal Justice Act 2003 saw the provision of indeterminate sentencing[858] and the duty of the adjudicator to consider compensation at sentence.[859] The Legal Aid, Sentencing and Punishment of Offenders Act 2011, may have reduced the criteria for a remand into custody by requiring a 'real prospect' of the defendant receiving a custodial sentence, but it preserved protection for victims of domestic abuse. Provision to remand a defendant into custody when there was no real prospect of a custodial sentence remains where a remand on bail is likely to cause fear or physical or mental injury to an 'associated person'.[860] This reflects awareness of the victim, even prior to a finding of guilt against the defendant. Finally, though not imposed through statutory mechanism, Victim Personal Statements, detailing the impact of the crime on the victim, are now widely referred to at sentencing hearings. This means that that the harm caused to victims can be reflected at sentence[861] and may go further in meeting victims' 'expressive needs'.[862]

In the last three decades, the CJS has thus witnessed a range of victim-centred policies, practices and laws which have mirrored a growing understanding and appreciation of victimhood. On the one hand, those practical efforts to improve the experience of victims passing through the criminal process (improved communication, special measures, adequate room provision at court) are 'at worst benign and at best to be welcomed' and for

[856] Home Office, 'Justice for All- A White Paper on the Criminal Justice System' (2002) Cm 5563, para 8.7
[857] Youth Justice and Criminal Evidence Act 1999, s23- 30.
[858] Criminal Justice Act 2003, s225 (which was subsequently abolished by LASPO 2011, s122- 128. However, I suggest this was a response to concerns about prison overcrowding and its associated costs as opposed to a diminishing of concern about victims).
[859] Legal Aid, Sentencing and Punishment of Offenders Act 2011, s63.
[860] As defined by Family Law Act 1996, s62; spouses or former spouses, civil partners, cohabitants, intimate partners or relatives.
[861] Victim Personal Statements were first announced in the Victim's Charter 1996 and were introduced in October 2001 in 'Practice Direction- Crime Victim Personal Statements' (2001) 4 All ER 640: III 28.
[862] Carolyn Hoyle and Lucia Zedner, 'Victims, Victimization and Criminal Justice' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (4th edn, OUP 2007) 461- 495

this reason have received limited academic criticism.[863] However it has been argued that not everything that has been achieved for victims has been borne of legitimate concern for them. Victim-centred approaches also play to managerialist targets; when victims are 'on board' with prosecutions, there is greater efficiency within the system and conviction rates improve. The No Witness, No Justice Pilot Evaluation report confirms this.[864] Managerialism complete with its performance focus aligns with 'meeting the needs' of victims during the course of proceedings because victim compliance secures efficient productivity in the system.

The delivery of victim-centred policies has attracted further criticism from those that perceive the focus on victim rights as 'by-products of other agendas'.[865] A less benevolent explanation about the emergence of the victim as a central figure in criminal justice is that it has done so in the 'service of severity'[866] or 'as an all-purpose justification for measures of penal repression'.[867] In the UK, victim personal statements cannot express a sentencing preference, but the detailing of the impact of the offence on the victim, arguably, legitimates a 'just deserts'[868] approach to sentencing. It seems that 'rebalancing the criminal justice system in favour of the victim' has been delivered through responding in a more authoritarian manner to offending behaviour.

I have previously outlined how neoliberalism enveloped the violence against women's movement. I argue here that neoliberalism was similarly attracted to the victim-rights movement and is another example of how, as Harvey cautions, a movement advocating individual rights is used to advance neoliberal ends. The ease with which neoliberalism adopted victim-centred practices can also be understood when we recall the 'volitional theory' of criminal offending. Neoliberal criminology draws out the contrast between the law-abiding majority from the deviant few that wilfully choose to offend. It emphasises the separation between the 'decent' versus the 'bad' and with it constructs the public at large

[863] Matt Matravers, 'The victim, the State and Civil Society' in Anthony Bottom and Julian Roberts (eds), *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Willan 2010) 2.
[864] Avail Consulting, 'No Witness, No Justice (NWNJ) Pilot Evaluation Final Report: Crown Prosecution Service and ACPO' (2004) available at <www.cps.gov.uk/publications/docs/NWNJ_pilot_evaluation_report_291004.pdf> accessed 10 April 2017.
[865] Hall (n 76) 44- 88.
[866] Matravers (n 863)) 3.
[867] Garland, *The Culture of Control* (n 111) 143.
[868] The perpetrator receives his 'comeuppance' or punishment, in contrast to a rehabilitative response.

as the 'metaphorical victim'.[869] Prioritisation of the victim thus becomes an expression of a re-balancing in favour of society and this wider emphasis of the public as victim is clear in policy rhetoric[870] and has trickled down into domestic abuse case law.[871] Victims' rights discourse can be deployed to political ends to justify determined prosecutorial practices in the pursuit of rebalancing or adequately representing victim needs and rights. The consequences for victims of domestic abuse is that if the criminal justice system can obtain a conviction, then justice has been achieved for the greater good, irrespective of whether that was the best outcome for the individual woman. Chapter Five considers whether effective prosecutions always serve women who have experienced domestic abuse. The next section considers how a third quasi-neoliberal strategy, actuarial risk-assessment, fuels the identified 'working practice'.

5 (iii) Actuarialism and Risk-based Discourse

Following on from the importance of the CJS serving the victim during the course of the criminal process, the idea of reducing the risk of future harm to the victim is also key. I outline here how this concern plays out for prosecutors. The CPS outlines its core objectives in the Code for Crown Prosecutors. At the fore is its duty to ensure that offenders are brought to justice 'wherever possible'.[872] This essential direction frames the work of the CPS but must be balanced, in domestic abuse cases where victims withdraw their support, against certain risk factors that might preclude prosecution. Sanders contends that the 'default setting' of the CPS is 'to prosecute unless there are powerful reasons not to'.[873] Yet, prosecutors taking decisions in domestic abuse cases find themselves caught between two ends of a pendulum; on the one hand they should be pursuing prosecutions 'wherever possible' and on the other they must not take a decision that risks the safety of the victim or any third parties.[874]

Neoliberals have arguably used punishment and/ or imprisonment as a way of

[869] Bell (n 163) 96.
[870] Hall (n 76) 64.
[871] Recall from Chapter One, the case of R v C [2007] EWCA Crim 3463.
[872] Crown Prosecution Service, 'General Principles: Code for Crown Prosecutors' para 2.2 available at <https://www.cps.gov.uk/publications/code_for_crown_prosecutors/principles.html> accessed 12 April 2017.
[873] Sanders (n 785) 98.
[874] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).

controlling risk through risk-reducing incapacitation or warehousing of offenders.[875] If neoliberal penology understands rehabilitation as an unattainable ambition,[876] what becomes the key organising principle of the neoliberal probation service is the management of offender risk.[877] The emphasis of the neoliberal New Right has therefore advocated a perspective of (administrative) criminology that is grounded upon goals of *preventing* crime and crime victimisation before it happens. Crime control becomes dependent on using predictive techniques.[878] Offenders become conceived as a collection of potentially harmful behaviours and are assigned a category of risk[879] whilst future victims are assessed in terms of their level of vulnerability to that potential harm. For this reason, the same period that has been associated with the 'punitive turn' has also been associated with a 'preventive turn'.[880]

In practical terms, to assess the risk of pursuing a case (particularly against the victim's wishes) prosecutors must make enquiries with the police and other agencies tasked with supporting the complainant before making a decision.[881] Most commonly, risk assessments will be provided to the CPS from the police in the DASH (Domestic Abuse Stalking and Harassment) form. The form is a risk identification checklist and questionnaire that police should routinely conduct with complainants and which concludes with an assessment of whether the victim is at 'standard', 'medium' or 'high' risk of future violence.[882] Questions are initiated by simple 'yes' or 'no' answers with follow-up probing questions requiring further details for 'yes' answers.

The CPS Domestic Abuse Guidelines indicate that these DASH questionnaires 'inform victim management decisions where necessary',[883] despite the fact that the DASH form itself professes that it 'is not a predictive process and there is no existing accurate procedure to

[875] Jonathan Simon, *Governing Through Crime: How the war on crime transformed American Democracy and created a culture of fear* (Oxford University Press 2007).
[876] O'Malley, *Risk, Uncertainty and Government* (n 628) 134.
[877] Ibid 151.
[878] Pat O'Malley, *Crime and Risk* (Sage 2010) 1.
[879] Ibid 3.
[880] Adam Crawford and Karen Evans, 'Crime Prevention and Community Safety' in Alsion Leibling, Shadd Maruna and Lesley McAra (eds), Oxford Handbook of Criminology (6th edn, Oxford University Press).
[881] These are noted as Multi Agency Risk Assessment Conferences (MARACs), Multi Agency Public Protection Arrangements (MAPPAs) or Multi Agency Safeguarding Hubs (MASH), General Practitioners or Schools.
[882] Domestic Abuse, Stalking and Harassment and Honour Based Violence (DASH, 2009) Risk Identification and Assessment and Management Model, available at <http://www.dashriskchecklist.co.uk/wp-content/uploads/2016/09/DASH-2009.pdf> accessed 12 April 2017.
[883] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).

calculate or foresee which cases will result in homicide or further assault and harm'.[884] Scherz criticises the use of this type of risk assessment tool as a ploy by contemporary modes of governance to give the impression that there is standardized and considered decision-making taking place.[885] The problem with this type of apparent actuarial science, she argues, gives the 'appearance of technocratic regularity' but in fact fails to resolve conflict values due to the lack of a clear directive to balance competing risk factors.[886] Such risk assessment tools deflect attention away from the fact that they do not specify a 'risk threshold'. This is because their very presence generates a confidence in decision-making due to an apparent air of rationality and consistency. What appears to be assumed is that prosecutors will use the DASH form as part of their 'common sense', 'reasonable' assessment of factors that will make for a 'good decision'[887] in the public interest.

Another potential consequence of risk assessment tools might be that responsibility of individual decision-makers becomes diffused and a corresponding possibility that close attention to context specific factors is reduced. Whilst the current approach carries this potential, in the context of domestic abuse cases, however, any checklist that more explicitly ordered values and designated thresholds - as Sherz appears to promote - might suffer justified accusations of inflexibility. A perfect tool to assess risk may never be achieved. As one interviewee in Scherz's work pointed out, risk is inescapable[888] and risk itself is unlikely to ever be eliminated. Furthermore, risk is likely to change, perhaps regularly. For those reasons, no tool is likely to capture the complex and nuanced factors that lead to an understanding of victim risk. Risk is likely to be best understood by the victim and those working to support her on a day to day basis and such subtlety will not be wholly reflected in a checklist. The extent to which prosecutors rely on information outside of the DASH form (for example by speaking with the officer in the case, IDVAs or witness care before making assessment about risk) is explored in Chapter Four.

For domestic abuse prosecutors carrying the burden that criminal justice might in some way contribute to violence prevention, prosecutors will be considering in what ways

[884] See Domestic Abuse, Stalking and Harassment and Honour Based Violence (DASH, 2009) Risk Identification and Assessment and Management Model, available at <http://www.dashriskchecklist.co.uk/wp-content/uploads/2016/09/DASH-2009.pdf> accessed 12 April 2017.
[885] China Scherz, 'Protecting Children, Preserving Families: Moral Conflict and Actuarial Science in a Problem of Contemporary Governance' (2011) Polat-Political and Legal Anthropology Review 33.
[886] Ibid 33.
[887] Ibid 41.
[888] Ibid 45.

their decision-making will reduce risk by reducing offender opportunity. CPS Domestic Abuse Guidelines recognise that the potential of 'risk' to the victim should be borne in mind by the prosecutor at bail hearings, when considering restraining orders and when determining the speed with which charging decisions are made.[889] The Guidelines also acknowledge that some complainants will be at 'particularly heightened risk' following reporting to police, once a charging decision is confirmed or when the case is concluded. What is lacking from the Guidelines is a breakdown of *how* the prosecutor should be guided by the risk assessment when a woman withdraws her support for the prosecution. The Guidelines simply suggest that when a woman is no longer supportive, her 'risk' is relevant when coming to the pivotal decision whether to prosecute or not. But 'risk' might play out in opposing ways here and the Guidelines appear to leave the question of how to weigh up the part 'risk' will play in the decision to individual prosecutors to assess, as long as, it would seem, they have been mindful of it. Given the uncertainty, it is possible that prosecutors will be minded to pursue a prosecution because, assuming one has faith in the CJS, it ostensibly demonstrates that the prosecutor has been pro-active in preventing future risk (see Chapter Four for further discussion).

In tangible terms, when a woman withdraws her support for a prosecution, pursuing the prosecution might reduce her risk and his opportunity because the perpetrator cannot contact the victim during the course of proceedings or he may receive a restraining order or a community rehabilitative requirement that addresses the offending behaviour at the conclusion of proceedings. Counterintuitively, however, the reality as Chapter Five outlines, is that pursuing a prosecution may *increase* her risk of harm due to the potential of increased perpetrator retaliation whether physical, emotional or financial. On the other hand, discontinuing the proceedings might, in fact, reduce her risk because the perpetrator no longer seeks to intimidate her into dropping charges or he may not seek retaliation for her supporting the prosecution. It might also reduce her risk because the victim feels that she has reasserted some power in the relationship and feels able to stand up to the abuser. Alternatively, discontinuance may increase the victim's risk (and the offender's opportunity) by bringing bail conditions/ remand to an end thereby permitting contact between parties again. When the prosecutor decides to pursue a prosecution against the victim's stated

[889] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).

wishes, it is, amongst other things, the potential for future harm following discontinuance that the prosecutor is seeking to guard against.

Conclusion

In answering the question as to what extent neoliberalism has contributed to the current prosecutorial approach to domestic abuse, this chapter described the broad modes of neoliberal strategy in which the CPS must function. The examination of 'neoliberalism' presented here describes more than just the economic and political climate in which the CPS operates. Neoliberalism, as I have described, is a far-reaching ideology, framework or way of thinking that has social, cultural and intellectual qualities which saturate day to day decision-making in all areas of life. Indicative is the way that three quasi-neoliberal priorities (managerialism, victim-centredness and risk assessments) have the potential to contribute to the institutional objective of convicting domestic abuse offenders expeditiously.

Neoliberalism's new criminology rejects social-democratic theories of criminality and unambiguously presents crime as a rational choice made by responsible actors.[890] A demonstrable 'penal turn' or crime control imperative has emerged under the neoliberal state to deter individual offenders by ensuring the relative costs of criminality outweigh the potential benefits received. The tenacious prosecutions of domestic abuse offenders must be considered in light of this overarching criminology. The neoliberal state is also highly responsive to public opinion and, it seems, less wedded to theoretical orthodoxy. There are advantages, therefore, for neoliberal governments in aligning with activist groups, such as the violence against women's movement. Affiliating with a group that ostensibly advocates individual freedoms garners legitimacy (and is theoretically justifiable). Moreover, discordant feminist demands become less urgent once the state is seen to act on them. On the other hand, (governance) feminists have played this partnership to their advantage by actively resourcing 'radical' feminist theory to appeal to and engage with state power.[891] However, the chapter also drew out how, for feminists that still seek and aspire to society's wholesale restructuring to break down gender inequality, the VAW's movement's apparent allegiance with the neoliberal state falls short.

[890] Bell (n 163) 164.
[891] Janet Halley, Prabha Kotiswaren, Hila Shamir and Chantal Thomas, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2016) 29 Harvard Journal of Law and Gender 335, 340.

I have suggested that neoliberal governments aim to meet public demands for 'expressive justice' even if the resulting criminal justice expansion is at the expense of the neoliberal ambition to roll back state presence in people's lives. Neoliberal governments are perhaps even more ready than their predecessors to heavily regulate spaces to ensure the conditions for freedom are created with the expectation that benefitting individuals will ultimately self-regulate. This strategy of the neoliberal state is revealed in the expectation that those who commit domestic abuse should face criminal conviction. Similarly, it might be expected that a 'light-touch' state would trust the principles of managerialism to evolve the preferred ordering in the CPS. However, the CPS increasingly feels the presence of an interventionist government which sets targets both in budgetary terms and monitors the performance of its policy objectives.

Two further neoliberal preoccupations - risk-based discourse and victim centrality - mean that criminal justice actors, including the prosecutor, are implicitly tasked with crime prevention and victim risk management. Chapter Four's analysis of how prosecutors form decisions in cases of domestic abuse sees these two themes, amongst others, specifically relied upon. Chapter Four now builds on the theoretical insight offered in Chapter Three. It offers in-depth empirical analysis of how neoliberalism specifically manifests and performs as a 'tactical organisation of society'[892] vis-a-vis everyday prosecutorial 'working practice' in domestic abuse cases.

[892] Lisa Downing, *The Cambridge Introduction to Michel Foucault* (Cambridge University Press 2008) 18.

CHAPTER 4

The Reality: Domestic Abuse and Crown Prosecution Service 'Working Practice'

Introduction

Feminist and neoliberal calls for committed domestic abuse prosecutions were described in Chapters One and Three. For many feminists, criminalisation meets the goal of symbolically denouncing gendered abuse, whilst for neoliberals intent on creating conditions of freedom, convictions successfully hold individual perpetrators to account. This chapter uses primary research from a sample of nine prosecutors[893] in the South of England to explore to what extent the respective priorities of feminism and neoliberalism have influenced prosecutorial 'working practice' at the point when a woman no longer supports a prosecution.

Part One of the chapter sets out how the prosecutorial approach has shifted over time. It describes that prior to 2005 prosecutors typically acceded to a woman's request to terminate proceedings against her intimate partner. Subsequently, Hall's empirical work in 2009 observed a sea-change which invariably saw prosecutors committed to pursuing convictions through, inter alia, compelling reluctant complainants by summons.[894] This significant change in approach followed revised policy and guidelines introduced by the CPS in 2005,[895] the implementation of which was completed through service-wide training by 2008.[896] My qualitative work, which was conducted in 2017, reflects on past practices and probes current ways of working. It finds that since 2008, prosecutors have remained committed to pursuing convictions frequently through the use of summons (the 'working practice'). However, the chapter reveals preliminary evidence to suggest a scaling back from its automatic use in preference for pursuit of the 'victimless prosecution' where possible.

[893] See Introduction for method of selection.
[894] Hall (n 76) 143.
[895] Crown Prosecution Service, 'Policy for Prosecuting Cases of Domestic Violence: 2005' (n 5).
[896] Crown Prosecution Service, 'Evaluation of the national domestic violence training programme 2005-2008' available at <https://www.cps.gov.uk/publications/equality/evaluation_of_national_domestic_violence_training_programme.html> accessed 29 June 2017.

Part Two of the chapter describes how neoliberal agendas, particularly through techniques of New Public Managerialism (NPM), have contributed, often in clandestine ways to the identified 'working practice' of routine reliance on summons. The principles and practices of managerialism are not new and have been evident in the English and Welsh criminal justice system since at least the mid-1990s as Chapter Three discussed.[897] NPM strategies include increased standardisation in policies and practices; modernisation, efficiency and financial prudence; and target setting, performance monitoring and managerial accountability.[898] The characteristics of NPM, I argue here, function to curb prosecutorial discretion. That is, neoliberalism and its associate, managerialism, support ways of working that contribute to prosecutorial overreliance on victim summons where it might not otherwise have been considered preferable. The primary research also reveals that, in the CPS, managerialism's dominant ideology obscures the gendered nature of IPA and contributes to insufficient contemplation of women's diverse needs.

1 'Working Practice' prior to 2008: Automatic Drop

Despite the fact that the CPS issued its first policy statement in relation to domestic violence in 1993,[899] it was not until a restatement in 2005 that, alongside it, specific domestic violence training was mandated across the service.[900] Between 2005 and 2008 the nationally implemented domestic violence training programme signalled the augmented priority assigned to the crime by the organisation which had hitherto been wanting.

Prosecutors in my study who had been with the service for sufficiently long duration, recalled the approach of prosecuting domestic violence prior to the sea-change. Their sense was that domestic violence had never previously been differentiated from other sorts of crime, '[i]t certainly wasn't flagged… They weren't called domestic violence… Sometimes you would get a conviction and sometimes you wouldn't. They weren't kind of given specialist treatment [or] looked at specifically as quite a serious statistic.'[901]

Also described was the way the CPS approach had encouraged the accused to 'play the system'. There was an expectation in the past that defendants would be advised to

[897] McLaughlin, Muncie and Hughes (n 821) 301.
[898] John Raine and Michael Willson, 'Beyond Managerialism in Criminal Justice' (1997) 1(3) The Howard Journal of Crime and Justice 80-95. See also Chapter Three for a detailed appraisal of managerialism.
[899] Burton (n 157) 98.
[900] Crown Prosecution Service (n 896).
[901] Prosecutor 6.

make no comment in police station interview and then wait to see if the complainant attended court to give evidence against him: 'The culture was very much, let's wait and see if she turns up and if she doesn't turn up it will be binned. So, if you were defending, your client wouldn't really say anything until you had gone to him [on the day of trial] and said, 'She's here'… But mostly she wouldn't ever be there.'[902] This prosecutor did not comment concretely on to what extent the approach of lawyers prior to 2008 incited perpetrators to intimidate the victim into retracting their complaint. Clearly however, if defence lawyers were giving defendants advice that the prosecution would likely drop the case if the victim was unsupportive, the risk that defendants would then pressurise the victim into submission must have been understood.

The 1993 CPS Statement of Prosecution Policy in relation to domestic violence[903] indicated that victim withdrawal *should* prompt the obtaining of a retraction statement outlining her reasons and whether she had been put under any pressure not to proceed with criminal prosecution. The policy at that time also suggested that prosecutors *ought* to consider alternative evidence and ways of proceeding with the case, absent victim support. However, Cretney and Davis' 1997 empirical research exposed that despite the policy, prosecutors frequently failed to obtain victim retraction statements or to explore pursuing the case with an unsupportive complainant, for example through summons or other corroborative evidence.[904] Rather, prosecutors would typically terminate proceedings justifying their decision on evidential grounds; because a hostile witness was unlikely to provide a realistic prospect of conviction.[905] What ran parallel therefore to the evidential sufficiency test, according to Hoyle, was the prosecutor's 'working rule' that equated 'non-cooperative' witnesses with 'unwinnable' cases.[906] An unsupportive witness became shorthand for reduction in quality of evidence; either due to her becoming a witness lacking credibility at court or because without her there was insufficient corroborative evidence capable of proving the case. As such the quality of the evidence was depleted such that a conviction was considered unrealistic and the evidential test (the first test contained in the Code for Prosecutors) was no longer satisfied.

[902] Prosecutor 8.
[903] Crown Prosecution Service, 'A Statement of Prosecution Policy: Domestic Violence' (CPS Policy Group 1993).
[904] Cretney and Davis (n 150) 146-157.
[905] Ibid 146-157.
[906] Hoyle, *Negotiating Domestic Violence* (n 156) 168.

In addition to citing evidential justifications, prosecutors in the past were persuaded to discontinue cases for 'humanitarian' reasons, which might see justifications included under the second stage of the prosecutors' code, the 'public interest' test. Such reasons included not wanting to compel unwilling witnesses against their wishes (complete with explanations of not wanting to deny a woman's autonomy or control[907]) and also of not wishing to exacerbate further violence[908] (by providing the perpetrator with a reason for vengeful action). Hoyle added that the 'working rule' seemed to be genuinely motivated by prosecutors not wishing to disempower victims by ignoring their wishes which might then discourage them from seeking criminal justice support in the future (lest their wishes be ignored again).[909] Prosecutors were also mindful that criminal proceedings might damage the parties' attempts at reconciliation. These rationalisations, in conjunction with prosecutors' assessment of the likely 'paltry sentence', seemed to weigh against prosecution. The preference for discontinuance may also have been due to a perceived lack of value or benefit that a prosecution afforded a victim who was uncommitted to pursuing the case against her partner. Burton suggests that prosecutors were not concerned with keeping abusive families together, but rather failed to see how prosecution helped the situation where partners were reconciled.[910] All these reasons taken together resulted in an approach which, according to Louise Ellison, persisted in 2002; that complainant retraction in the context of prosecuting domestic violence appeared to have 'an almost singular effect; namely, discontinuance'.[911]

This 'working rule' or informal 'automatic drop'[912] policy, therefore seems ostensibly to be based on what was requested by the victim in the *victim's* interest, despite the clear second stage of the Code for Prosecutors which required consideration of whether the case was in the wider *public* interest. Otherwise put, prior to the mandated training ending in 2008, the individual wishes of the victim frequently surpassed any 'public interest' which might consider criminal prosecution to have symbolic power or wider deterrent effect.[913] Thus, where complainants retracted, despite the policy statement's encouragement of

[907] Ibid 170.
[908] Cretney and Davis (n 150) 146-157.
[909] Hoyle, *Negotiating Domestic Violence* (n 156) 170.
[910] Burton (n 157) 100.
[911] Ellison (n 159) 834, 834.
[912] Lisa Goodman and Deborah Epstein, *Listening to Battered Women: A Survivor Centered Approach to Advocacy, Mental Health and Justice* (American Psychological Association 2008) 73.
[913] Hoyle, *Negotiating Domestic Violence* (n 156) 174- 175 and Cretney and Davis (n 150) 146.

balancing the victim's wishes with the wider public interest to prosecute perpetrators of domestic violence,[914] prosecutors invariably preferred discontinuance.[915] Burton, in affirming that complainant's personal wishes seemed to trump any wider public interest, notes that this practice was possible due to the extensive discretion afforded to prosecutors when weighing up public interest factors. Fionda and Ashworth agreed that the Code offered a paucity of guidance on the matter of how to resolve the conflict between victim and public interest.[916]

As well as frequently acceding to the victim request to discontinue proceedings, the practice of 'criming down' was also prevalent.[917] 'Criming down' domestic abuse prevailed amongst lawyers once a matter was before court and also amongst the police before the CPS became involved at all. Thus, the police frequently failed to arrest the DA perpetrator at all or there would be an arrest for breach of the peace resulting not in a conviction but a bind-over to keep the peace. Arrest might also have resulted in a police caution or a prosecution for the non-imprisonable offence of being drunk and disorderly. Women were sometimes encouraged to take out a private prosecution for common assault where the CJS would not take further action and they were serious about having the perpetrator prosecuted.[918] If a charge of assault did find its way to the criminal court, '[t]here was a lot of dealing behind the scenes… If you would accept that he smashed up her phone, isn't that good enough? It was very much brushing under the carpet, how can we just deal with this without actually acknowledging how serious it is that somebody is being violent or controlling or whatever with their partner'.[919] Prosecutor 8, who made this comment, did not suggest that this was being done in any 'untoward' way, rather she explained that the focus and priority for lawyers at court was the 'legitimate' pursuit of saving the public purse the expense of a contested hearing. She also commented that the aim was to 'save people from having to go through with it, so to speak'. Here she was presumably referring to the ordeal of the victim (and witnesses) having to testify against an intimate partner in a court room. But one wonders to what extent she may also have been inadvertently referring to

[914] Crown Prosecution Service, 'Code for Crown Prosecutors (HMSO 1992) para 6.4.
[915] Hoyle, *Negotiating Domestic Violence* (n 156) 155.
[916] Julia Fionda and Andrew Ashworth, 'The New Code for Crown Prosecutors: Part 1: Prosecution, Accountability and the Public Interest' (1994) Criminal Law Review 894, 902.
[917] Hoyle, *Negotiating Domestic Violence* (n 156) 151.
[918] Susan Edwards, *Policing Domestic Violence: Women, the Law and the State* (Sage 1989).
[919] Prosecutor 8.

lawyers seeking to short circuit contested hearings for their own benefit; of avoiding the need to stay longer than necessary and the more arduous chore of conducting contested proceedings in court?

2 'Working Practice' in 2008-9: Summons and Convict

In 2005, the CPS re-issued its Policy for Prosecuting Cases of Domestic Violence,[920] together with its Good Practice Guidance.[921] The Guidance outlined how the service was going to be taking 'a more sophisticated approach to prosecuting hate crimes such as domestic violence'.[922] The new strategy was based on a two-year project in which Specialist Domestic Violence Courts in Croydon and Caerphilly were monitored for 'improvements'. Insightfully, 'improvements' included overwhelmingly outcomes which demonstrated that the offender was being brought to justice; increased convictions, reductions in discontinuances, reductions in victim retraction and increased reporting and prosecutions of cases were all cited as ameliorations, whilst notably victim satisfaction or perpetrator recidivism did not feature. The financial implications of successful prosecutions (and belief that consequentially recidivism diminishes) were fore fronted. For prosecutors, gathering evidence and building cases absent the victim was promoted, ensuring appropriate bail conditions and information exchange between professional agencies was encouraged and witness summons was to be considered but only after full consideration of safety issues. Notably, only safety issues are noted in the Guidance as a potential bar to the appropriateness of issuing a summons. Factors such as the victim's expressed wishes or what might provide the most beneficial outcome for her were not noted as being sufficiently prohibitive.

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[920] Crown Prosecution Service, 'Policy for Prosecuting Cases of Domestic Violence: 2005' (n 5).

[921] In Crown Prosecution Service, 'Domestic Violence: Good Practice Guidance' (2005) available at <http://webarchive.nationalarchives.gov.uk/+/http:/www.crimereduction.homeoffice.gov.uk/domesticviolence/domesticviolence51.pdf> accessed 31 August 2017, '[t]he revised Domestic Violence Guidance to CPS staff provides advice on how to proceed if victims withdraw, including the use of evidence other than the victim's, when and if summonses may be required and which factors should be considered, advice on warrants and reasons to discontinue. In this Circular, police and prosecutors will be reminded of the need for effective gathering of evidence such as photographs of injuries, 999 tapes, CCTV evidence and statements from other witnesses both to strengthen the case and to enable a case to progress, even if victims withdraw their support for the prosecution'.

[922] Attorney General quoted in the foreword of Crown Prosecution Service, 'CPS Domestic Violence: Good Practice Guidance Summary' (2005) available at <https://www.cps.gov.uk/publications/docs/dv_protocol_goodpractice_summary.pdf> accessed 31 August 2017.

The new approach was to tie in with broader CPS policy objectives such as the No Witness, No Justice[923] project and the government priority of 'rebalanc[ing] the system in favour of victims, the community and the law-abiding citizen'.[924] The good practice guidance appears to frame a successful conviction as a successful outcome for the victim, save only where her safety would be compromised by pursuing the case. There is no mention of the autonomy, therapeutic or empowerment compromises that state persistence, deficient her support, might entail.

In conjunction with the new policy and guidance, all prosecution lawyers, associate prosecutors and case workers received training in relation to domestic violence between 2005- 2008.[925] The following account of the training has been compiled from recollection, having undergone the training myself, together with information provided in the CPS training evaluation report.[926] The training was coordinated across the police and CPS and was designed and delivered in person by a number of regional trainers and the national strategy was made available afterwards through the staff intranet. Each participant was also given their own copy of the training on CD Rom for future reference.

The training impressed that violence and abuse between intimate partners was a crime that must be afforded high priority by criminal justice agents. Its aims were to both explain the CPS policy on domestic violence and to impart practical and 'consistent'[927] ways of taking a proactive approach. With respect to the former, prosecutors were educated about the dynamics of abusive relationships and about how perpetrators could manipulate the system to maintain control and effect their preferred outcome. The objective of the training was to shift any permissive attitudes amongst prosecutors. With respect to the latter (how that knowledge and awareness should translate practically) prosecutors were invited to be robust with defence requests to 'crime down' or to vary bail conditions. Communication was to be encouraged between prosecutors and IDVAs or the Officer In the

[923] The NWNJ scheme saw the introduction of 165 witness care units focussed on supporting victims and witnesses through the trial process and aimed to improve relationships with witnesses to increase witness attendance at trial.
[924] Attorney General quoted in the foreword of Crown Prosecution Service (n 922).
[925] Crown Prosecution Service, 'Evaluation of the National Domestic Violence Training Programme 2005-2008' available at <https://www.cps.gov.uk/publications/equality/evaluation_of_national_domestic_violence_training_programme.html> accessed 29 June 2017.
[926] Ibid.
[927] Ibid.

Case (OIC) before agreeing to any alterations. The new approach was exampled and modelled during training through the use of case studies chosen by selected regional trainers. In short, prosecutors were encouraged to apply for bad character evidence to be admitted for like previous convictions, to apply for special measures, to use res gestae where possible, to make use of victim personal statements at sentencing and to apply for witness summonses where appropriate. The new approach sought to achieve 'improvements' to the way domestic violence was treated in the service through the attainment of convictions where possible and through the delivery of 'high quality service to victims'.[928]

The impact of the CPS training programme between 2005 and 2008 was clear; discontinuance rates fell from 37% in 2004-5 to 22.9% in 2007-8. Conviction rates for all matters charged (and flagged as a domestic violence case on the CPS system) rose from 55% to 70.7% respectively. Such a sharp increase in successful convictions illustrates the extent of the re-education in the service. Bind-overs were no longer seen as an adequate outcome and their change of use is also striking; it fell from 18.2% to 5.3% in the same period.[929] It is clear from the statistics that the new policy, guidance and training halted the hitherto working practice of 'automatic-drop' in preference for pursuance of prosecutions in the face of victim retraction.

The CPS conducted its own qualitative research with focus groups[930] to examine the cultural impact of the new training programme to address domestic violence. Those interviewed were able to attest to the seriousness with which the offence was now being taken by the CPS. Prosecutors seemed determined to achieve successful outcomes whilst showing appropriate sympathy for victims and a better understanding of how perpetrators might act to manipulate termination of the case. One prosecutor interviewed in 2008 summarised that, 'The defence now know we don't just drop DV cases because the victim doesn't wish to give evidence.'[931]

The Policy and Guidance, together with delivery of the face-to-face national domestic violence training programme, prompted Matthew Hall in 2009 to surmise that

[928] Ibid.
[929] All statistics taken from ibid.
[930] The groups comprised prosecutors and domestic violence professional partners.
[931] Crown Prosecution Service, 'Evaluation of the National Domestic Violence Training Programme 2005-2008' (n 925).

domestic violence might now be being treated as 'one on its own'.[932] He examined the way domestic violence was being dealt with in three courts in the North of England. Hall's work identified the stance or 'general thrust' adopted by the CPS immediately following the 2005-8 training,[933] which, according to one District Judge at the time, was 'prosecute every case'.[934] If that was so, the question of to what extent the 'public interest' test was being engaged with at all arose. This is because there was no need to make the assessment; the public interest, it was assumed, would always be met.

At the time of Hall's work, prosecutors were also benefitting from new changes to the way cases were investigated in line with new Association of Chief Police Officers Guidance[935] which urged officers to hold perpetrators accountable by building cases with as much supporting and corroborative evidence as possible. Thus, in the event that by the time prosecutors came to review the file the complainant had withdrawn her support, prosecutors ought also have been able to exploit res gestae 999 calls, medical evidence of her injuries, other possible witness testimony, the victims evidence read as hearsay,[936] recent complaint and/ or confession evidence to pursue the case against him. The use of alternative corroborative evidence ought to have seen a rise in the number of 'victimless prosecutions' in-line with recommendations urged by Louise Ellison in 2002.[937] However, the drive to prosecute whenever possible appears to have been achieved, at least according to Hall's work, by the summonsing of unsupportive victims. The Chief Crown Prosecutor explained to Hall that this would be the 'proper' way to proceed, in accordance with the new policy, when a woman withdrew her statement. The summons should be backed up, explained the Chief Crown Prosecutor, with the promise of a witness warrant for non-attendance. This 'threat' to issue a warrant was however rarely, if ever, being acted upon by the prosecutors interviewed but instead its potential use was being used to induce guilty

[932] Hall (n 76) 143.
[933] At least following his empirical work in one area in the North of England.
[934] Hall (n 76) 144.
[935] National Policing Improvement Agency on behalf of Association of Chief Police Officers, 'Guidance on Investigating Domestic Abuse' (2008) available at <http://library.college.police.uk/docs/npia/Domestic_Abuse_2008.pdf> accessed 24 August 2017.
[936] Following introduction of the hearsay provisions in the Criminal Justice Act 2003, prosecutors were invited to make applications to adduce the victim's evidence by way of hearsay under s116(2)e if the victim was in fear or under s114(1)d if it was in the interests of justice to do so. The defendant could also be shown to have a propensity for committing the type of offence charged, where appropriate, by making a successful application under s101(d) of the Criminal Justice Act 2003.
[937] Ellison (n 159) 834.

pleas from perpetrators who anticipated the victim's coerced attendance at trial.

A pivotal reason for the imperative to prosecute and in turn to summons appears to have arisen from an understanding of the victim as vulnerable due to her ongoing abuse. She was considered someone who could often have low self-esteem such that it impacted her ability to make decisions effectively.[938] This view supports the critique of the legal subject that I explored in Chapter One. In that chapter I suggested that the legal subject conceived of as a rational, self-determining and autonomous individual was used as a benchmark from which prosecutors could measure how far the victim had fallen and consequently to what extent prosecutors could assume the role of 'acting in her best interests'. It seems that the Chief Crown Prosecutor in the area examined by Hall justified the preference to summons on this basis; that the abused woman may no longer be able to see her situation objectively in the same way that the prosecutor could.[939] Thus, the new approach following the 2005-8 training had the effect of tipping the balance in favour of prosecuting domestic violence, even where victims had indicated their unwillingness to attend court to give evidence, through summons.[940] The approach identified by Hall marked a shift in the way that prosecutors made and justified decisions. Either there was less regard held for individual complainant wishes and an understanding that the public interest would almost always be met with determined prosecution or the best interests of the victim were now being considered something the victim themselves might not even be capable of appreciating.

3 'Working Practice' in 2017: Ingrained Habits and the Routine Reliance on Summons

Of the sample of nine prosecutors interviewed,[941] three prosecutors with sufficiently long tenure were able to identify that in the past, domestic abuse cases had indeed tended to be routinely discontinued absent the victim. However, following training in 2005-8 the

[938] Chief Crown Prosecutor in Hall (n 76) 144.
[939] Chief Crown Prosecutor in ibid 144.
[940] Whilst I have cited the CPS training programme as pivotal in impacting prosecutorial decision-making in DA cases, other factors may also have played a part in the rise in the number of convictions; IDVA support, witness care units, police commitment to the crime, Specialist Domestic Violence Courts established in 2006 and community safety partnership support for victims. The court's judgment in R v C [2007] EWCA Crim 3463 also indicates amongst the judiciary a recognition of the prevalence of the crime and the public interest in prosecuting DA cases to finality.
[941] The sample comprised six women and three men (six Senior Crown Prosecutors, one Crown Prosecutor and one Associate Prosecutor).

approach was 'just push it and push it as far as it will go'[942] meaning that prosecutors perceived that women were invariably being *required* by prosecutors to come to court to testify against their stated wishes in order to achieve a conviction against the perpetrator. The approach in practice stood in contrast to the 'victim-informed' approach ostensibly outlined in the Domestic Abuse Guidelines.[943] From my empirical research in 2017, Prosecutor 4 summed up the current position (outlined by six of the nine prosecutors), 'if she's unequivocally saying she doesn't want to attend, then I think the CPS do tend to summons'.[944]

Perhaps surprisingly, in light of this identified 'working practice', amongst those interviewed there was, largely, an awareness of the complexity pertaining to the decision to summons an unsupportive complainant. Nonetheless, whilst most prosecutors professed to employing a more detailed analysis of the advantages and disadvantages of summonsing the reluctant witness- which might merit a decision *not* to summons an unwilling complainant- there remained the sense that a significant number of cases were still often resulting in summons as a matter of routine. This suggests that even though prosecutors may be engaging with the *possibility* of not summonsing, they are reluctant to discontinue cases and frequently engaged the practice of summonsing in any event. Perhaps what can be identified here is a shift from 'automatic' summons (immediately following the training in 2005- 8) to consideration of factors resulting in 'routine reliance' on summons in any event.

Prosecutor 2 expressed concern that some colleagues still adopted, in essence, this 'no-drop' approach and habitually summonsed simply because it is 'the easy way to do it... "Let's issue a summons!" without maybe thinking about it as much as they should'.[945] Prosecutor 1 explained that when other colleagues routinely issue summonses it 'absolves their responsibility for making decisions'. For Prosecutor 2 personally, however, the matter was more finely balanced and the factors he recited as relevant when exercising his discretion were typical of those expressed by most prosecutors interviewed. The factors he weighed up fell into two broad categories. The first had to do with the seriousness of the offence; whether children were present, the extent of the injury and the whether the defendant had like previous convictions. These are features of the offence that traditionally

[942] Prosecutor 1.
[943] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).
[944] Prosecutor 4.
[945] Prosecutor 2.

aggravate the sentence and therefore aspects that are more likely to justify and require punishment and condemnation through prosecution if present. The other factors had more to do with risk assessment; whether there was a history of violence and whether parties were more likely to reconcile. The implication being that if there was a history of violence and if parties were more likely to continue a relationship the more likely it would be that the case merited prosecution because there was increased risk to the victim. This is because prosecution is seen as the best tool in the prosecutor's armoury to protect the victim from future harm. Prosecutor 6 confirmed that, 'sometimes it's because there is still [an ongoing relationship]… and they are going back to another beating; and they do. In which case you try and get a witness summons'.

Prosecutor 2's weighing up of these factors was reflective of the approach most prosecutors adopted. They were all factors that treated the woman's retraction as a trigger for considering the merits of ongoing prosecution but retraction appeared, at least in the absence of stating it expressly, not to act as a factor to be weighed into the mix. It seems that women's voices were being heard only to the limited extent that it prompted review of the case, not to the extent that acceding to what she wanted might also have been considered to have empowering value or have been the right thing to do given her unique understanding of the power dynamic between her and her abuser. The benefits of adhering to her request, as described by 'self-determination theory' outlined in Chapter Two, therefore, seem extraneous.

Prosecutors 5, 7 and 8, all women, however articulated more awareness of the victim's voice or preference and how empowerment might be dependent upon a respectful consideration of her preference. Prosecutor 7 noted that victim retraction is 'the hardest thing for us. Because at what point do you intervene and potentially overrule someone's wishes? It's a difficult balance'. Prosecutor 5 showed awareness of the fallibility of the CJS more generally and the potential for secondary victimisation. She suggested that instead of forcing victims through the 'trauma' of the court process, 'if that can be avoided and a positive outcome achieved where the victim is safe and lead a safe and positive, healthy, happy life then surely that is the better thing to do?'. This prosecutor considered whether a non-conviction restraining order in combination with a police referral to domestic abuse support agencies would be sufficient to protect the unsupportive victim, whilst affording the opportunity to adhere to her wishes. Despite themselves showing an awareness of

occasions when prosecution may not be preferable, Prosecutors 5 and 7 were more than aware that they had a number of other colleagues that did not approach DA in the same way and regularly summonsed victims and treated them as hostile witnesses at trial if necessary. Moreover, all three of these prosecutors (and six out of the nine prosecutors) were required to defer to managers before being able to discontinue a domestic abuse case.

Despite the remainder of prosecutors observing that they have or had had colleagues who defaulted to summons (or indeed, as in the case of Prosecutor 6 was a prosecutor I identified as preferring the practice herself) Prosecutors 1 and 9 spoke of how the tendency to summons is decreasing. This readjustment appears to have been prompted by recent training in 2016 which highlighted the potential problems with the use of summonsing (such as the increased risk of harm to the victim or the victim's alienation from using the CJS as a resource in the future). The training promoted the use of the 'victimless prosecution', side-lining where possible the need for the victim herself to give live testimony and preferring the use of hearsay evidence, 999 call evidence and body-worn police video footage.

Prosecutor 1 noted, 'I certainly think that 12 months ago, most prosecutors would have been, their first reaction to a withdrawal would have been to appoint a witness summons. It kind of takes the decision out of their hands. They don't need to worry. Just send the summons'. But he went on to identify that since the recent training about victimless prosecutions 'I do think there has been a change and it's not so trigger happy'. Prosecutor 9, the area domestic abuse 'champion'[946] agreed that, 'at the moment, there is a tendency to not necessarily summons. To look at cases as individual cases. Decide whether or not there is any merit in summonsing'. The third prosecutor who did not identify the 'working practice' was relatively new to the service, having worked there for just over a year. She herself observed and practiced tenacious DA prosecutions but was the only prosecutor not to identify routine summonsing had been practiced previously or still did occur. She suggested that the practice is 'not encouraged. It's very much seen as the last resort'. The latest training, undertaken by recently recruited Prosecutor 8, might provide an explanation for why she was the only prosecutor not to identify there is or ever was a

[946] As the domestic abuse 'champion', this prosecutor had enjoyed attending joint meetings with police, courts and IDVAs. These meetings were forums where best practice was disseminated and poor practice considered. She expressed disappointment that these joint meetings were no longer being held. Confirmed via email of 6 October 2017.

practice of routine summonsing and suggests that there is sensitive and positive change afoot in the service in terms of practising the 'victim informed' approach.

Despite CPS policy and guidance that clearly advocates the use of summons 'as a last resort'[947] eight out of nine prosecutors in the sample indicated that between 2008 to 2017 the practice appears to have been cultivated. Since training in 2016- 17 three prosecutors identified that they were being encouraged to draw back from assuming summons would always be the desirable way to proceed when a women withdraws her support. Nonetheless, most prosecutors in 2017 still identified that the usual 'working practice' is akin to 'no-drop' prosecutions, at least in their 'soft form'. The next section examines how neoliberal priorities and managerial pressures may have contributed to the tendency to issue a summons despite CPS guidance that cautions its use.

PART TWO

4 New Public Managerial Techniques and their Impact on Prosecutorial Decision-Making

4 (i) Policy Objectives: Taking Domestic Abuse Seriously

Recall how a preferred technique of managerialism is the deployment of organisational objectives to establish preferred and consistent modes of working. In the area of intimate partner abuse, CPS guidelines immediately establish the climate; 'domestic abuse offences are regarded as particularly serious' (CPS, 2014). More precisely, as part of broader government violence against women strategies, the CPS aims 'to bring more perpetrators to justice as well as further protect victims of [domestic] abuse' (CPS, 2017a).

There is no doubt that prosecutors in my sample thought about domestic abuse cases as a separate category of crime, distinct from other 'general crime' or assault. More than being considered distinct, domestic abuse is considered a 'priority' for the service[948] as part of the DPP's ambition to address violence against women and girls.[949] When pressed about why domestic abuse is a priority for the CPS there was consensus about the 'seriousness' of this type of offence, 'it's just commonplace for us to think of it as something

[947] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).
[948] Prosecutors 1, 3, 4, 9.
[949] Prosecutor 9 was the only prosecutor to mention domestic abuse in the context of the overarching VAWG strategy.

that's serious. Women get killed every week by men in domestic relationships. It's serious.'[950]

Several prosecutors made a link to the seriousness of the offence and the part the CPS must play in ending DA. 'Well, I mean, obviously [laughs] dare I say, right, this is serious. It happens in private when people are vulnerable. It's not the sort of thing we can have in a civilised society, is it? It has to be stamped out and prevented.'[951] Prosecutor 3 added that effective prosecution and conviction through criminal law can be a means of expressing actual and figurative condemnation of certain behaviour thereby having deterrent effect; the CPS must:

> 'put domestic violence in the public forum. It needs to try and stamp out domestic abuse. Basically, they have been identified as cases that we need to do everything we can to actually get justice and see that they are being looked at correctly and basically explore all sorts of avenues to try and stop it happening.'[952]

These claims are reminiscent of Packer's Crime Control Paradigm[953] and of analysis by Michelle Madden-Dempsey (a former expert DA consultant to the CPS) concerning the role and value of criminal prosecutions. Specifically, they mirror Madden-Dempsey's assessment of prosecutorial action having consequential value insofar as it results in *actual* consequences; for example, it might result in conviction and successive punishment of perpetrators, the reduction of crime itself or people's anxiety about crime.[954] Prosecutions also articulate prosecution's expressive value which is not consequential but intrinsic. This is akin to the symbolic value of denouncing wrong-doing and exculpating the victim. Madden-Dempsey thinks of the criminal 'charge' as having preliminary expressive value through accusatorial denouncement whereas conviction offers more finality through concrete condemnation.[955]

Both the consequential and intrinsic value of prosecuting domestic violence was iterated by Prosecutor 6, 'instead of going, oh yeah, let's get rid of this one. It's about looking at the implications of the wider community and the kind of rippling effect of how it

[950] Prosecutor 6.
[951] Prosecutor 2.
[952] Prosecutor 3.
[953] Packer (n 519) 1.
[954] Madden-Dempsey, *Prosecuting Domestic Violence* (n 52) 60.
[955] Ibid 68.

will impact society as a whole.' It is noteworthy that I identified Prosecutor 6 as favouring tenacious prosecutions by regularly summonsing reluctant women to secure convictions. For this prosecutor, convictions were invariably considered the preferable outcome in domestic abuse cases. It is quite possible that her articulation of the role of criminal prosecutions as part of a greater pursuit to challenge the acceptability of IPA in society generally has fuelled, or at least has supported her commitment to obtain convictions, through the use of the summons whenever necessary. In addition to the social value of condemning the crime, Prosecutor 6 also believed that in being seen to take domestic violence seriously, the public's confidence in the CPS as an organisation would increase. The implications of this, according to Prosecutor 6's logic, would be increased reliance on the CJS by all victims, including abused women.

4 (ii) Deferring to Management

Managerialism encourages 'effectiveness' by developing consistent working approaches to meet organisational goals. Consistency is typically achieved through the expansion of management personnel who are tasked with overseeing operations. If expectations about decision-making are clearly defined in policy, and discretion is set within restrictive parameters, decision-making can become routinised and can effectively result in a de-skilling or downgrading of the skilled worker's role (here the Crown Prosecutor).[956] Flynn describes this in terms of a shrinkage in 'work autonomy' or a 'de-professionalisation of expert labour'.[957] Where managers are ensuring reliable deployment of discretion in line with organisational objectives, their presence is likely to contribute to fewer decisions being made against the cultural grain and might be seen to have a constraining effect on the workforce.

Decision-making powers of professionals might also be curbed as a result of NPM if managers themselves make the decision. Due to the seriousness with which domestic abuse is viewed within the service, most of the prosecutors interviewed were required to consult with their line manager (the 'Level D') before taking any decision to discontinue or terminate domestic abuse proceedings. Prosecutor 5 expressed unease about the approach taken by her line managers;

[956] Kilkauer (n 824) 1103.
[957] Rob Flynn, 'Managerialism, Professionalism and Quasi-Markets' in Mark Exworthy and Susan Halford, *Professionals and the New Managerialism in the Public Sector* (1999 Open University Press) 30.

> 'I think the decisions really have to be made on a case by case basis and these kind of blanket policies, I don't think are appropriate in domestic violence cases… sometimes of course it's going to be right to pursue a prosecution even if the victim doesn't want to support, of course it's going to be. But there are cases when I think perhaps there are other options available such as referring to other agencies, non-conviction restraining orders, some kind of intervention to help people lead safer lives rather than just this kind of, "No, we've got to prosecute"'.

Some more senior and experienced prosecutors informed me that they had previously been obliged to consult with their manager but recently were told they were no longer required to do so. This apparent contradiction between expanding management personnel on one hand and yet replacing hierarchical decision making on the other[958] exposes how managerialism, just as its umbrella ideology, neoliberalism, may not enjoy rigid intransigent theory. Rather, it might be considered instrumentalist, pragmatically embracing 'what works'[959] to streamline processes and save money. Managerialism thus 'thinks on its feet'; initially insisting managers take the decision and then deciding to reduce 'hierarchical decision-making' to free-up valuable managerial time once the 'working practice' is established.

Whilst this may appear to afford individual prosecutors discretion, the change appears to have taken place because these prosecutors were trusted by their line manager to exercise their discretion in accordance with now familiar CPS policies, targets and management expectations. Confirming this, Prosecutor 3, (who now had permission to take the decision herself) commented that one's line manager still set the tone for the decision you were likely to take; 'it tends to be, well, to be encouraged to apply for witness summonses, quite often. I think it depends who is, basically, the Level D at the time as towards the sort of approach you take.'

[958] Carol Jones, 'Auditing Criminal Justice' (1993) 33(2) British Journal of Criminology 187, 188- 189.
[959] Jamie Peck, 'Zombie Neoliberalism and the Ambidextrous State' (2010) Theoretical Criminology 104, 106.

4 (iii) Streamlining Processes: Digitalisation

Streamlining processes in the interests of achieving cost efficiency and the delivery of 'core quality standards' (or organisational objectives) is another key strategy of NPM. Jones has suggested that managerialism's 'three E's'- economy, efficiency and effectiveness- are responsible for a move away from traditional guiding principles of criminal justice such as procedural justice and fairness.[960] She describes a move towards 'managerial justice' where speed and finality are valued requiring routinised ways of operating to ensure quantity can be handled proficiently.[961]

In a bid to modernise and streamline efficient processes, the CPS have, relatively recently, introduced the 'digital file' and consequently eliminated the 'paper file'. Prosecutors are now allocated a digital case load (Prosecutor 3 indicated hers included 145 files) and each prosecutor is presented with a digital task list every day (Prosecutor 3 indicated that her task list that day was 7 pages long and that many of those tasks were reviews that needed to be completed that day in readiness for the case appearing in court the following day).

Illustrating how NPM expects productivity, Prosecutor 6 had been told that there was an expectation that she would complete eight full file reviews daily and that managers were monitoring that this was achieved. She had reservations about the merits of such a demand and suggested that the system had to be 'played' for prosecutors to achieve the expected target;

> 'It's that kind of thing of, big brother is watching you. Can't be trusted. Sometimes if you've taken a long time on a file that is complex, you say, I can't put down that I spent three hours looking at this crazy nightmare. I've got to say I've done one and a half hours. Then I've got to try and do more work to fill in the hours I've got to put down on paper. It's crazy.'[962]

The same prosecutor had frustrations with the laboriousness of locating information on a digital case as compared to a physical paper file and suggested that only if she 'cut corners' could she complete the work expected on a digital file in the time allocated. She

[960] Jones (n 958) 187.
[961] Packer (n 518) 1.
[962] Prosecutor 6.

urged that more time needed to be allocated to each file if she were to ensure a proper job which would require completing a thorough file review and all the applications and communications that had to be drafted.[963] Other prosecutors appeared more accepting of, or perhaps resigned to, digital working as something they were now used to. Prosecutor 2 for instance said that digital working was 'fine, as long as things are sent properly and legibly. It can be quite irritating when it's not. To pick up a paper file and look through and everything is there is nice. [Digital working] is not something I've been completely against… Whether it's improved efficiency or not, I am not so sure'.[964]

Decisions being made in domestic abuse cases must be considered in light of the time constraints presented by the more laborious nature of working through a digital file and in light of the expectation that prosecutors must manage a significant case load and task list within the time allotted. Time pressures doubtless impact the thoroughness with which information can be collated and considered; 'There's never enough time to do anything… it sort of feels like you're working against [it] to get it all done quickly'.[965] Garland and Packer highlight how the need for efficiency in the criminal justice system evolves routinised decision-making.[966] In domestic abuse cases, the use of summons represents an efficient solution to the obstacle of victim retraction because of the time saved avoiding a thorough consideration of victim risk assessment from a variety of sources (victim retraction statements, police risk assessments, Independent Domestic Violence Advocates representations or information known to police 'witness care' officers). Summons therefore achieves two NPM demands; it is time efficient and it simultaneously espouses the organisational objective to actively condemn domestic abuse.

4 (iv) Austerity

Since 2010, the coalition and Conservative governments have governed through a political logic of austerity, a priority which, just as NPM, makes demands for 'economy'. As

[963] It should be noted that Prosecutor 6 did not suggest that she herself cut corners, just that if you did not, you had to make up the time elsewhere.
[964] Prosecutor 2.
[965] Prosecutor 2. Prosecutor 3 used the same words, 'I don't have enough time to do anything'. Prosecutor 4 said, 'There is never enough time'. Prosecutor 5, 'There just aren't enough hours in the day or enough prosecutors in the office to be doing the job that needs to be done'. Prosecutor 7, 'I don't feel I have enough time to prepare'. Prosecutor 8 stated that she did not have enough time to deal with DA. Prosecutor 9 stated that she did not always feel she had enough time to prepare for court.
[966] Garland, *The Culture of Control* (n 111) 18 and Packer (n 519) 1.

managerialism is specifically designed to facilitate cost-efficiency, NPM's methods gain particular credence in times of austerity. Austerity, a political rather than an economic concept,[967] aims to return economic stability through the seemingly common sense but arguably 'economically illiterate'[968] notion of spending within ones means. The policy has been closely linked to neoliberalism, indeed it has been argued that austerity is not a peripheral neoliberal policy but its 'most important moment'.[969] The government itself rarely prefers the term, rather it is a label that is ascribed by others to describe the 'dramatic and severe spending cuts'[970] designed to significantly reduce budgetary deficits in preference to raising funds through taxation.

The prosecutors I interviewed were under no doubt that budgetary 'cuts', attributed to austerity, contributed to the pressure they felt to undertake work expeditiously. In the last chapter, I outlined the £185 million cut to the CPS budget between 2009 and 2015.[971] Such cuts represent the opposite of the stimulus plans associated with the Blair and Brown era which saw targeted spending plans in the public sector, notably in the area of criminal justice. Prosecutor 9 traced the impact of successive government spending policies,

> 'When I first started [1995] we were quite low in staff and then a couple of years later it was as if the government was throwing money at us. We took on a lot of people. Wages went up dramatically … And then probably about 10 or 11 years ago, it was almost like they put the brakes on it. The government started to cut our money and we shed a lot of staff … a lot of older more experienced prosecutors and admin staff left. We are now in the situation where we are low on staff'.

Prosecutor 5 spoke of the reduced numbers of staff available to do the work, 'The majority of people working at the CPS are doing their absolute best. I know they are. But there just aren't enough hours in the day or enough prosecutors in the office to be doing the job that needs to be done'. Whilst Prosecutor 2 noted that, 'Lots of people have gone. It just seems to me that there is a smidgen of what was left. I mean, I know that you are told

[967] Rebecca Bramall and Jeremy Gilbert and James Meadway, 'What is austerity?' (2016) 87 New Formations 119-140.
[968] Ibid 119-140.
[969] Alpar Losonc, 'Austerity: History of a Dangerous Idea by Mark Blyth' (2014) Panoeconomicus 389, 394.
[970] Bramall, Gilbert and Meadway (n 967) 119.
[971] Hansard online, 'Crown Prosecution Service: Funding' (2017) 619 available at <https://hansard.parliament.uk/Commons/2017-01-11/debates/3CCEE460-C6B8-44B5-A7C3-677947ECEA19/CrownProsecutionServiceFunding> accessed 18 September 2017.

that there is less magistrate's work now, but it doesn't feel like it. It sort of still feels like you are working against the line to get it all done quickly'. Prosecutor 2 was correct that the numbers of cases brought to magistrates' courts nationwide declined by just over 100 000 in the period 2010- 2015, falling from 641 000 cases to 539 000.[972] Prosecutors are also likely to be accurate when they identify that they have no sense that the number of cases that must be prepared by each individual prosecutor has reduced. This is because between 2010 and 2015, 2 400 members of staff left the service, largely through voluntary redundancies, in order to meet the 40% reduction in the staffing budget in the same period.[973]

In the context of the 'whopping'[974] reduction in staff numbers, it is clear how the need to make efficient and expeditious decisions becomes more acute. Operating with a working presumption that reluctant victims will be summonsed, short-circuits the need to engage in the time intense detailed analysis of the possible merits of doing so. Prosecutors 2 and 3 provided evidence that, for a number of colleagues, there remains an assumption that the public interest is *always* met through the prosecution of DA; this automatic assessment of the public interest test being met might occur despite deficient evidence and the Code requirement to consider the evidential test sequentially first.[975] The public interest in prosecuting domestic abuse appeared to have overridden the need for detailed assessment of the full code test and DA Guidelines including considerations about the risk to her as contained in the DASH questionnaire, the views of the IDVA or OIC or the views and reasons expressed in the victim retraction statement. It is easy to understand why a prosecutor might feel more assured in assertively prosecuting and taking the decision to summons, given the CPS priority in relation to domestic abuse and the need to make expeditious decisions to get through caseloads.

In a further move, apparently motivated by a desire to reduce the amount of work both prosecutors and courts have to contend with in times of austerity, two prosecutors regularly acting as advocates in specialist domestic violence courts identified a course that District Judges in their area were taking.[976] District Judges, they reported, were unilaterally

[972] Ibid. The reduction in cases being brought to court is arguably as a result of spending cuts, in times of austerity, experienced by the police.
[973] Ibid.
[974] Karl Turner MP speaking in parliament in January 2017, Hansard online, 'Crown Prosecution Service: Funding' (n 971).
[975] Crown Prosecution Service, 'The Code for Prosecutors' (n 14).
[976] Prosecutor 7 and 9 (Prosecutor 5 alluded to the practice also- a court clerk had mentioned it to her).

and routinely issuing summonses at the first hearing in *every* contested domestic abuse case regardless of whether women had expressed reluctance. These summonses would then effectively remain on file and would then be available for service should the reviewing lawyer deem them necessary in due course. This avoided the need for a separate CPS application to the court for a summons and appears therefore to be motivated by efficiency savings by reducing the number of court hearings. Prosecutor 9 described the practice simply as a 'backstop summons'. However, Prosecutor 7 expressed more concern explaining that some prosecutors not regularly appearing in court had found the practice confusing and had, wrongly, assumed that the summons had been issued following a comprehensive prosecution review of the merits of obtaining one. She felt that its availability had encouraged its service and gave a concrete example of a senior lawyer's misunderstanding over its presence on file. The message clearly conveyed by District Judges here is that summonsing a reluctant complainant is ordinary, standard and not a-typical. Irrespective of whether District Judges are creating this climate or reflecting the CPS tendency to require victim attendance, the effect is surely one of normalising reliance by the CPS on the coercive practice.

Austerity has also had an impact on another key actor working in the criminal justice system; the Independent Domestic Violence Advocate (IDVA). The Home Office ceased direct funding of IDVAs in March 2017 and local Police Crime Commissioners will now be responsible for their provision. The IDVA is appointed to work with women from the point of crisis towards longer term goals of well-being. Working with those categorised as 'high risk', IDVAs work as a bridge between multiple agencies (including the CPS) within both civil and criminal courts. Their primary function is to ensure the victim's voice and safety is fore fronted at proceedings. Their role puts them in a unique position with regards to their knowledge of what might serve the woman best, both in terms of her safety and empowerment. Prosecutors spoke favourably of IDVA's input. Prosecutors 6, 7 and 9- the three prosecutors who regularly appeared in Specialist Domestic Violence Courts (SDVCs)- commented that IDVA knowledge of the case was valuable. IDVAs were able to advise, for example, on the appropriateness of defence representations to vary bail conditions or the proposed conditions of the restraining order. The possibility that IDVA numbers were in decline led prosecutor 7 to suggest that it would 'massively' affect the way prosecutors

could resolve cases in the SDVCs. For Prosecutor 9, the area domestic abuse lead, the presence of IDVAs in court had assisted her in developing and learning 'best practice' and Prosecutor 6 suggested such specialist knowledge set the tone in court. IDVA opinion, Prosecutor 9 offered, is also critical in deciding about whether or not to discontinue the case against the defendant or to summons and they can obviously provide nuance and individually considered information that might assure a prosecutor that summons would not be desirable. IDVAs are clearly an important information resource when it comes to deciding how best to proceed when a woman is no longer supportive of the prosecution, but only to the extent that they are available to prosecutors or that prosecutors were able to take the time to locate and consult them.

4 (v) Statistical Analysis

All prosecutors in my sample were aware that domestic abuse must be 'flagged' as such on their computer system, 'Compass Management Software', and felt confident that this was fairly consistently achieved by administrators tasked with carrying out the function. 'Flagging' a case as domestic abuse means that a coloured marker appears on the digital case file so that every time it is looked at the viewer can easily recognise that the offence meets the criteria set out by the government as constituting 'domestic abuse/violence'.[977] Prosecutor 8 emphasised that it was not simply domestic violence that is singled out, 'Well, you flag at the CPS. You flag. Flag, flag, flag, flag, flag. What is it? Flag, flag, flag. If it's a DV you might also be flagging it as rape…' If victims are otherwise vulnerable, disabled or elderly, further flags are added.[978] Offences aggravated by racial or religious hatred or offences directed at someone by virtue of their sexual orientation (otherwise termed 'hate crime') also merit the treatment.

Nonetheless, the flagging of a variety of cases did not appear to mean that Domestic Abuse flags were lost in the mix. Flags appeared to serve the purpose of marking out the case and alerting prosecutors to the fact that the case required special or particular

[977] Domestic Violence/ Abuse is considered by the CPS, who follow the Home Office definition, to be: 'Any incident or pattern of incidents of controlling coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members, regardless of gender or sexuality.' Circular 003/2013: New Government Domestic Violence and Abuse Definition available at <https://www.gov.uk/government/publications/new-government-domestic-violence-and-abuse-definition/circular-0032013-new-government-domestic-violence-and-abuse-definition> accessed 6 July 2017.
[978] Prosecutor 7.

treatment. When asked why domestic abuse cases are flagged in this way prosecutors 5, 7 and 8 recognised that victims in those cases were entitled to an 'enhanced service'. This means that domestic abuse must receive CPS pre-charge advice (the police do not have authority to charge domestic abuse), that complainants are entitled to be informed of changes and outcomes to cases within 24 hours (in standard cases victims must be informed within 5 days), that special measures must be considered, that information ought to be available about whether a restraining order is requested and that a victim impact statement would be required.[979] Here we see how digital working has been used to compliment the Home Office policy of putting victims at the heart of working practices.[980]

However, all prosecutors were also aware that 'flagging' domestic abuse cases enabled the CPS to compile statistics that could be monitored 'as a measure of success'.[981] Monitoring and surveying performance and target attainment through means of computerised bureaucracy is characteristic of NPM as explored in Chapter Three. Prosecutors largely considered statistics a concern for managers but nonetheless Crown Prosecutors described how statistics 'filter through'[982] to them. There was no one way in which this was achieved. Some prosecutors were routinely emailed statistics by line managers such as conviction rates or the number of guilty pleas at the first hearing on a weekly, fortnightly or monthly basis.[983] Some prosecutors reported that statistics were emailed for information purposes only. Others received an explanation of how 'well' the team were doing in prosecuting domestic abuse and what they needed to be aware of 'moving forward' bearing in mind, recognised Prosecutor 7, that each of the 13 CPS areas are ranked.[984] Tables are compiled comparing the 13 CPS areas for conviction rates and are readily circulated and available. Here, clearly visible, is evidence of how the CPS, in the absence of external competitors is encouraged to compete with itself for best 'output' in line with the tenets of New Public Managerialism.

For one prosecutor the culture that statistical analysis of cases imbued was not one that sat comfortably with her,

[979] Prosecutor 6.
[980] Home Office, 'Keeping Crime Down: Crime and Victims' (2009) available at <http://www.homeoffice.gov.uk/crime-victims/> accessed 6 July 2017.
[981] Prosecutor 2.
[982] Prosecutor 2. Prosecutor 5 agreed. Prosecutors 1, 2, 3, 5, 6, 7, 8 and 9 all mentioned that domestic abuse cases would be monitored through 'flagging'.
[983] Prosecutors 1, 2, 6, 7, 8, 9.
[984] Prosecutor 7.

> 'I've never been a manager, so I don't- it's one of the reasons I get so frustrated with working for the CPS, I have to say. It's all about, to me it just seems like it is all becoming about targets and statistics and not about the individuals. There's not so much focus on victims. I've never been a manager, so I don't know what goes on in these management meetings and how much it is drummed into you but I always get the impression that it is very very important that targets are met and numbers of successful prosecutions are such and such'.[985]

This seems to mirror the notion that New Public Managerialism constructs the public as consumer in the sense that what becomes prioritised is not so much meeting individual needs in an ideological or principled way so much as meeting market demands for efficient 'output'[986] and performativity. At the CPS, this is measurable through, inter alia, the conviction rate. There was a sense amongst prosecutors that the CPS are always monitoring area performance, particularly as compared to other CPS areas. Prosecutor 8 explained, 'My experience is that the conviction rate is… there is a very close eye kept on that for obvious reasons… and obviously because you are flagging DV, if there is a conviction rate falling or dropping or whatever they are able to monitor it.'

These auditing processes are the means by which parliament can hold the Crown Prosecution Service to account. The government's Chief Legal Advisor, the Attorney General, oversees the work of the Director of Public Prosecutions and her organisation and is answerable to parliament for CPS performance. Rates of CPS convictions or discontinuances are also used by the Justice Select Committee that examines CPS expenditure, administration and policy. The Committee is tasked with publishing reports that government must respond to, to explain or justify how it is spending taxpayers' money. However, if it is the CPS as an *institution* that is being held accountable to parliament for conviction rates by virtue of such statistical tracking, how are decisions of *individual* prosecutors affected? I identified two ways individual prosecutorial decision-making is impacted by the monitoring of area or nationwide statistics.

The first way is through an institutional-wide response which might be triggered if a set of statistics indicated, for instance, a slump in conviction rates. In such circumstances

[985] Prosecutor 5.
[986] Jones (n 958) 188.

Prosecutor 2 suggested that the CPS might react by rolling out compulsory training amongst prosecutors to address the issue. Such training has the potential to instil a wider cultural shift in the service, as evidenced in 2005 to 2008. This chimes with NPM's ability to set and implement organisational strategies that have the effect of controlling public servants (prosecutors) and regulating professional independence.[987]

4 (vi) Risk and Responsibility

In addition to prompting changes to institutional-wide practice and culture, the second way poor performance figures might affect prosecutorial decision-making is at individual level. Prosecutor 7 understood that a poor monthly performance might probe further investigation by managers into *particular* files. She understood that individual cases would be scrutinised and questions would be asked about why the case had been dropped. In addition to that, and in any event, a more thorough examination of prosecutorial decision- making takes place in all cases that have resulted in an 'adverse outcome'. An adverse outcome, explained Prosecutor 1, is, 'anything that doesn't result in the defendant being convicted of at least one offence [and] is an unsuccessful outcome; whether discontinued, withdrawn, offered no evidence, dismissed at half time or after full trial'.[988] All 'adverse outcomes' are studied by managers to establish the reasons for not obtaining a conviction and to see if 'improvements' could have been made.[989] Prosecutor 9 confirmed that:

> 'Adverse outcomes are particularly looked at to see why. Was it a case of a victim not coming to court and therefore we didn't have the evidence? Is it a case the victim came to court but didn't come up to proof [or] didn't give evidence very well? ... It's that aspect of things that they look at as to why cases, for want of a better word, failed. Why didn't we secure that conviction? They look to see whether we can learn any lessons from it.'[990]

That being so, prosecutors were mindful that any decision they take that might contribute to a reduction in the conviction rate, might be open to inquiry. If a case fails on

[987] See Mark Exworthy and Susan Halford, *Professionals and the New Managerialism in the Public Sector* (1999 OUP) Introduction.
[988] Prosecutor 1 by clarification email dated 28 July 2017.
[989] Prosecutor 6.
[990] Prosecutor 9.

the day of trial because a summons was not secured, then this may indicate inaction on the part of the prosecutor. Conversely, if a woman has been summonsed and fails to answer the summons then the prosecutor has done everything within their power (short of issuing a decisions warrant for her arrest) and cannot be criticised.

One area domestic abuse 'champion' suggested that if a prosecutor did not summons, it would not lead to automatic criticism because of growing awareness that summonsing may not necessarily be preferable, particularly if it discourages women from seeking help from criminal justice agencies in the future. Nonetheless, even she accepted that prosecutors realised that adverse outcome cases would be examined more rigorously than cases that resulted in conviction and that prosecutors would feel or could be held accountable for leading to acquittals. In short, if a prosecutor fails to push for a domestic abuse conviction, the decision will be one that is scrutinised and the prosecutor will at least have needed to justify the decision in their written review of the case. Managerial appraisal of files therefore contributed to a sense of professional and personal responsibility to meet organisational objectives. Here, again, is evidence of the effect of NPM, which demands compliance with policy objectives (to 'take domestic abuse seriously') and, just as Chapter Three outlined, holds those tasked with delivering standards and guidelines to account through regular monitoring and inspections.[991]

As a result, what seems to be implied here is how NPM can create a culture of fear and insecurity. Prosecutor 4 confirmed that when making the decision to summons, '[Prosecutors] will think of themselves, individually, first of all. They are all civil servants and they want to cover their backs. First rule.' Prosecutor 1 agreed that relying automatically on summons is the least 'dangerous' option for prosecutors because they have demonstrated understanding that every option must be explored to obtain 'justice' for the domestic abuse victim and criminal sanctions for the defendant. Summons, he surmised, 'absolves their responsibility for making decisions [not to prosecute]' (Prosecutor 1).

Manager repercussions were feared, not only in relation to professional criticism for inadequate decision-making. The fear also included how management would criticise them should something happen to the victim in the future where a case had been terminated 'prematurely': 'What always used to worry me was, you know, am I going to get one of

[991] Garland, *The Culture of Control* (n 111) 120.

these cases where it doesn't go ahead or we can't prosecute it properly… and then she's going to be murdered. People are going to say, sorry you were the SCP.[992] Horrendous…'[993] When asked if that meant that blame might be apportioned to the individual prosecutor if a preceding case had been dropped, she replied, 'Isn't that the CPS to a fault though? They would just hang you out to dry, wouldn't they, I think.'

Indicating that he did not prefer the practice of routine summonsing, Prosecutor 1 suggested that this was because he had had some management experience and concluded that he was probably more self-assured in his decision-making than other people might be. However, even he recognised the potential for repercussions: 'Touch wood, I haven't had one that's come back to bite me yet.' When prompted to expand, he answered:

> 'I suppose if you really sat and thought about every case, you would have this slight concern that, you know, the victim could be, I don't know, subject to a further serious or even fatal assault. But, we are dealing with so many of these cases, you know, on a daily basis that you have to kind of just get on with it.'

For this experienced and senior prosecutor, whilst being aware of the gravity of the decision he was taking, distancing himself from responsibility for any future harm that may come to the victim was the sensible and pragmatic approach to take.

As NPM demands efficiency and speed to achieve cost-effectiveness, prosecutors develop strategies of coping with the demands of heavy workloads. As domestic abuse caseloads require engagement with the cruelty and barbarity of others, one way in which productivity might be maintained is by resisting full engagement with the suffering contained in the victim's account. Prosecutors do not receive training to cope with emotional 'contagion' and must informally manage its impact.[994] By practising emotional detachment, prosecutors are able to minimise 'vicarious trauma', which allows prosecutors to step aside from feelings of guilt and responsibility,[995]perhaps evident with Prosecutor 1, cited above. Decision-makers can practice 'detachment, disbelief and denial of responsibility in order to avoid… becoming emotionally overwhelmed by the accounts of persecution and

[992] Senior Crown Prosecutor.
[993] Prosecutor 8.
[994] Louise Ellison and Vanessa Munro, 'Taking Trauma Serioulsy: Critical Reflections on the Criminal Justice Process' (2017) 21(3) International Journal of Evidence and Proof 183, 198.
[995] Ibid 184.

violence routinely encountered'.[996] This emotional detachment or disengagement with shocking occurrences is a habit that understandably evolves for the purposes of self-protection, but it inevitably means that victim accounts feel unreal and the severity or even veracity of what has been experienced by the victim is diluted.

In the context of prosecuting domestic abuse within NPM constraints, crucial coping strategies avert the need to re-live or imagine the details of a crime, but this can result in a withdrawal from engaging with the needs of the victim or from a detailed assessment of what might facilitate her 'capability set'.[997] In line with Ellison and Munro's 'trauma-informed lens', routinely summonsing allows prosecutors to demonstrate a commitment to 'taking domestic abuse seriously' whilst ensuring a measure of emotional self-preservation. Detachment also preserves and permits clarity of thought, which facilitates efficient professional decision-making and task-completion. Withdrawing emotionally from the details of the abuse therefore serves the prosecutor in effecting expeditious decisions and assists in managing the pressures of managerial targets, high workloads and the impacts of austerity.

5 The Difficulty with Victimless Prosecutions

A number of prosecutors were alert to the fact that victim summons might not always be preferable, but as discussed, six out of nine prosecutors believed summons was the typical way of proceeding following victim retraction. Concerns cited about routine reliance on summons included the potential for criminal proceedings to further endanger her,[998] the potential for secondary victimisation due to the trauma of giving evidence,[999] the damage that can be done through forcing someone to do something against their will[1000] or disincentivising the victim to call on the CJS in the future.[1001] Prosecutor 3 perceived that the 'take home' message from the training she received in 2017 was that where victimless prosecutions are possible, they are to be considered preferable to 'forcing her to come to court'. Through consideration of case studies,[1002] the training thus recognised some of the

[996] Ibid 198.
[997] Nussbaum, *Creating Capabilities* (n 544).
[998] Due to the possibility of perpetrator harassment or retaliation.
[999] Prosecutor 5.
[1000] Prosecutor 7.
[1001] Prosecutor 9.
[1002] Prosecutor 2.

problems of summons. However, the reason that victimless prosecutions may still not be relied upon is that they are notoriously difficult to prove; 'nine times out of ten, I would say, probably as high as that, the opportunity to prosecute without the victim's support is quite limited'.[1003] This is due to the offence so often being committed in the privacy of the home out of the gaze of third party witnesses or CCTV; forensic evidence being unlikely to assist given that the parties are known to each other; and the issue being tested at trial being a question of fact that must be determined between two opposing versions of events thereby requiring the victim to give her side of the story. Even though the victim may have sustained ostensibly corroborating injuries, in her absence the perpetrator may still be able to 'explain these away' by suggesting that these were suffered in the course of his legitimate self-defence. Nonetheless, with the advent of police body worn footage immediately following an incident, evidence such as damage to property, demeanour of the parties and impermanent but visible injuries sustained might all be used. This, in conjunction with 999 calls and comments made by the defendant in interview, can be used to build the case against the suspect, absent the victim. Notably, the requirement to 'case build' absent the victim is clearly going to be more labour intensive then the simple issuing of a summons. As discussed above, time pressures imposed by NPM efficiency demands may also influence the decision.

The 2016- 17 training also drew prosecutors' attention to the potential of the hearsay provisions contained in the Criminal Justice Act 2003 and the possibility of having the victim's statement read at trial, even in her absence. The disadvantage, she pointed out, is that hearsay applications are usually made on the day of the magistrates' court trial and, if unsuccessful, are likely to lead to immediate termination of the case (and an adverse outcome).

Prosecutors in the sample were far less likely to reflect on the possibility of potential drawbacks or dangers of pursuing a victimless prosecution, however. Prosecutor 8, who considered summons 'very much … a last resort' said that she was impressed that her colleagues were doing everything they could to prosecute without the victim. She commented that the 2016 training made her 'really scrutinise the evidence to make sure I can't prosecute. No stone is left unturned to try and make sure we are doing everything we

[1003] Prosecutor 1.

can'.[1004] Doubtless, victimless prosecutions carry clear advantages; there is no risk of secondary victimisation through the ordeal of the trial process; the perpetrator knows that the victim is no longer supporting the prosecution and is therefore arguably less likely to be motivated to intimidate or retaliate; and the behaviour can be condemned and punished. Nonetheless, the risk remains that a criminal sanction is not the desired outcome for the victim, perhaps particularly if parties wish to reconcile. The decision to pursue the case regardless of victim preference also has implications for the victim's sense of autonomy and may impact her decision to call on police again in the future. These risks appear to be factors that are either not considered at all or considered to be so secondary to bringing perpetrators to justice that prosecutors did not mention them. It appears that attaining organisational targets, once again, are key.

6 Domestic Abuse: Not an Issue of Gender for Prosecutors

The extent to which prosecutor decision-making was influenced by considering domestic abuse as gendered crime, as outlined in feminist discourse, was negligible. Prosecutors were all able to comment that DA victims were usually women. One prosecutor, the area lead in domestic abuse, even referenced domestic abuse prosecutions as part of the wider violence against women strategy.[1005] Some were quick to observe that men could also be victims.[1006] But there was a distinct lack of appraisal of domestic abuse as a gendered crime rooted in societal gender inequality, male privilege or permissive sexist attitudes. Prosecutors spoke of the defendant's anger, excessive drinking or the couple rowing as potential triggers to abuse. The notable absence of feminist explanations for domestic abuse speaks to Annette Ballinger's assessment that in dealing with domestic abuse primarily as crime, the effect is the undermining of the gendered nature of the behaviour.[1007] Prosecutor 8 commented that 'I do see patterns [in who are the victims] not just in DV, but just that the vulnerable in society are preyed upon'. As part of the 2016 CPS training, stereotypes about who the victims of domestic abuse are were 'blasted away'.[1008]

[1004] Tense alteration.
[1005] Area domestic abuse lead, prosecutor 9.
[1006] Prosecutors 3 and 7.
[1007] Ballinger (n 776) 16.
[1008] Prosecutor 8.

Prosecutors were reminded that domestic abuse can happen to anyone.[1009] Apparently being re-defined in gender-neutral terms, domestic abuse as a priority for prosecutors becomes part of broader aims of criminal justice, for example centring victims and achieving convictions expeditiously. Concerns about challenging patriarchy and its associated sexist ideologies were not cited by any of the interviewed prosecutors as motivational vis-à-vis summonsing reluctant complainants. Despite recent neoliberal governments' explanations, at policy level, of VAWG as a symbol and strategy of patriarchy, evidenced here is how criminal justice agents construct this crime as failed responsibilisation and not as evidence of gender inequality.

7 Discussion

The data uncovers a 'working practice', present in 2017 amongst the sample, that can be summarised as a tendency for Crown Prosecutors to routinely rely on summonsing reluctant victims of intimate partner abuse to give evidence at trial. This approach appears to have emerged since 2008. According to the majority of prosecutors interviewed the 'working practice' appears closer to soft 'no-drop'[1010] or 'social change'[1011] strategies of prosecuting domestic abuse rather than the 'victim-informed' approach advocated in CPS policy and guidelines. The potential consequences for victims of routinely relying on summons include overlooking risks to her safety during the course of proceedings or immediately afterwards,[1012] the risk that she no longer trusts the criminal justice system to act in her best interests in the future[1013] or the risk that the coercive behaviour of her abuser is simply replaced with coercive practices of the state[1014] thereby undermining her own emotional well-being and belief in her ability to have control over her life.[1015] The

[1009] The empirical research pre-dated the first public statement dated 6 September 2017 by the CPS which openly acknowledged and supported male victims of domestic abuse. Crown Prosecution Service, 'Male Victims Covered by CPS VAWG Strategy' available at <http://www.cps.gov.uk/publications/equality/vaw/public-statement-male-victims-crimes-covered-by-CPS-VAWG-strategy.pdf> accessed 12 September 2017.
[1010] Buzawa and Buzawa (n 82) 194- 203.
[1011] Nichols (n 75) 2114.
[1012] Lauren Catteneo, Lisa Goodman and Deborah Epstein, 'The Victim-Informed Prosecution Project: A Quasi-Experimental Test of a Collaborative Model for Cases of Intimate Partner Violence' (2009) 15(10) Violence Against Women 1227-1247.
[1013] Eve Buzawa, Gerald Hotaling, Andrew Klein and James Byrne, 'Response to Domestic Violence in a Proactive Court Setting: Executive summary' (2000) National Criminal Justice Reference Service 1.
[1014] Linda Mills, 'Killing her Softly: Intimate Abuse and the Violence of State Intervention' (1999) Harvard Law Review 550-613.
[1015] Winick, 'Applying the Law Therapeutically in Domestic Violence Cases' (n 80) 33.

'working practice' does not pause long enough to consider how the decision will impact the victim's options and opportunities in a manner consistent with the capabilities approach.

My findings suggest that domestic abuse prosecutions rightly find high priority amongst reviewing CPS lawyers in line with official declarations made in CPS Guidance and Policy. More specifically, in line with domestic abuse prosecutions being taken 'particularly seriously'[1016] as policy indicates, some prosecutors believed achieving a conviction would have both consequential and intrinsic value in eradicating domestic abuse. Prosecutorial analysis in this regard however remained gender-neutral and extended to an understanding that prosecutions send a 'message' that DA is wrong, and the behaviour should not be left unchallenged. Thus, whilst radical feminist analysis about the CJS's ability to challenge patriarchal inequalities in society may have been influential on CPS policy to the extent that DA is now considered a priority, 'feminism' does not expressly influence prosecutorial daily working practice. A feminist narrative about the causes of domestic abuse has not been embraced by prosecutors and they do not consciously seek to confront or destabilise pre-existing gender hierarchies. Rather, prosecutors' working commitment to pursuing domestic abuse appears to be enacted because it marries well with broader and more influential 'neoliberal', 'managerial' or 'criminal justice' flavoured ambitions.

The primary research therefore affirms how managerialism's common-sense language (who could be against efficiency and improved conviction rates?) can depoliticise relevant issues[1017] and de-centre the status of the victim. In the case of intimate partner abuse, I argue that managerialism obscures CPS substantive commitments to consider intimate partner abuse as a gendered crime. As such, prosecutors fail to consider how routinised decisions to summons disproportionately affect the lives of women and err in failing to consider female victims of violence on a case-by-case basis. This lays bare managerialism's shortcomings and contradictions; on the one hand the organisational objective asserts its awareness of the gendered nature of the crime, on the other a proper theoretical and grounded understanding of post-modern feminism is lost within the daily demands and pressures of NPM. Prosecutorial working practice appears inadequately sensitive to the post-modern feminist account of women's diverse experiences and needs. The 'working practice' of 'tenacious prosecutions' is consistent with and fortified by the

[1016] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).
[1017] Lacey, 'Government as Manager, Citizen as Consumer' (n 749) 553- 554.

dominant cultural effects of the managerialist paradigm; effectiveness, efficiency and economy.

The belief in the criminal justice system as a force for good and the consequent commitment to achieving perpetrator convictions also appears to support the decision to summons. Such faith in the criminal justice system seems to confirm Ford's assessment of 'prosecution ideology'[1018] or prosecution attachment to Packer's 'Crime Control' model.[1019]

Regular manager reviews of conviction rates also feed prosecutor confidence and support the idea that success equates with guilty verdicts. I have suggested that target setting and statistical analysis to monitor service delivery is symptomatic of New Public Managerialism. The impact of key NPM strategies on prosecutorial working practice is a curbing of the decision-making autonomy of criminal prosecutors. Here, again, we see how prosecutors and the CPS as an institution are vulnerable too in the sense that they are susceptible to external constraints and dominant neoliberal conceptions about the responsible subject. What becomes compromised is the role of the CPS to assist in the production of opportunities (capabilities) for victims in favour of their role in complying with neoliberal stratagems and priorities.

The chapter has uncovered how NPM strategies often have a concealed, tacit and unacknowledged part in the prosecutor's exercise of discretion; notably here, their reliance on summons. At its core NPM seeks efficiency and service delivery in line with organisational objectives and targets. As achieving high rates of convictions in domestic abuse cases is celebrated, the chapter reveals that the routine use of summons serves as an expeditious yet effective way of meeting managerial demands for efficiency whilst, ostensibly, effecting CPS policy objectives. Digital working practices aimed at producing expeditious ways of working have in fact seen prosecutors assigned individual targets and case-loads that further demand speed. The impacts of austerity, a neoliberal political imperative, further harness the attraction of NPM practices. The evolution of efficient decision-making through the use of routinised ways of working seems inevitable.

If the primary research reveals a prosecutorial practice that has been habitually disinclined to adhere to a victim's request to terminate proceedings, the sample also reveals

[1018] David Ford, 'Coercing Victim Participation in Domestic Violence Prosecutions' (2003) 18(6) Journal of Interpersonal Violence 669, 679.
[1019] Packer (n 518) 1.

preliminary indications that the 'working practice' may not enjoy wholehearted support from many prosecutors. Moreover, following recent training in 2016- 17, three out of nine prosecutors were reluctant to accept that routine summons persisted in the service. Instead, they suggested that 'victimless prosecutions' were being encouraged and each case was being reviewed on its own terms. Whilst there remained a presumption in favour of prosecuting domestic abuse cases, they indicated a nuanced balancing exercise based on information provided from victims, police and third parties was beginning to take place where complainants were unsupportive. Thus, there is some evidence from the research that positive and sensitive change- towards a more nuanced or 'survivor-defined' approach to prosecuting domestic abuse- is afoot. This marks a move towards the stated CPS approach to prosecuting domestic abuse[1020] and appears to be taking place, albeit at a preliminary stage, despite the pressures and demands of NPM.

Conclusion

This chapter has shown the extent to which feminist and neoliberal demands for committed criminal justice responses to violence against women have played out in prosecutorial working practices. Whereas in the past, uncooperative victims equated with unwinnable cases,[1021] uncooperative victims, in 2017, present an obstacle easily surmounted by the use of summons. I have suggested that aside from feminist agendas finding their way into CPS VAW policy which has shifted prosecutorial appreciation about the seriousness of the crime and its unacceptability in broad terms, feminist explanations of IPA were not articulated by prosecutors when speaking about their daily working practices. That is, criminal justice is not understood as a tool for confronting gender inequality nor is the gendered nature of domestic abuse a factor, according to the sample, when prosecutors make decisions in DA cases. Rather, the 'working practice' revealed by this sample of prosecutors indicates that prosecutorial priorities stem appreciably from the demands of New Public Managerialism. NPM, it is argued, is an ideology which is not only compatible with but has been deployed as a tool of neoliberal governance.

There was however preliminary evidence from the sample that following training in 2016 and 2017 prosecutors may be drawing back from the default use of summons in

[1020] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).
[1021] Hoyle, *Negotiating Domestic Violence* (n 156) 168.

preference for the ‘victimless’ prosecution. Prosecutors were less likely to reflect upon the autonomy reducing potential of the victimless prosecution (as compared to the use of summons). The consequences for abused women from such prosecutorial thinking and working practices are considered in the final chapter.

CHAPTER 5

The Consequences: Women Survivors and Legal Consciousness

Introduction

Recall that Chapter One traced the feminist account of domestic abuse and the nature of criminal law using *theoretical* foundations. Without ever having adopted an essentialist conception of 'women' or 'law', Chapter One's 'move to generality'[1022] highlighted the part that systemic gender subordination, the pervasive privileging of men's interests over women's, has been said by feminists to play in the causes of violence against women. I argued in Chapter Three that governance feminists have incrementally and successfully installed themselves and their radical feminism into legal-institutional power.[1023] Neoliberal governments' narratives and policies thus conspicuously mirror 'governance feminism's' emphasis on the part that criminal law enforcement must play in challenging violence against women, thereby meeting abused women's needs.[1024] Chapter Four illustrated how this has manifested in practice, via policy emphasis, in a prosecutorial commitment to achieving convictions. The risk of this approach is enacting a totalising account of what women who have been abused require.

This chapter now turns its attention to 'particularity'[1025] and the empirical insights offered by eleven women who have experienced domestic abuse. A focus on 'particularity' allows us to 'describe the complexity of women's experience non-simplistically, accurately and in greater detail.'[1026] The chapter draws together commonalities to lend weight to women's individual voices, but examination of the 'particular' will reveal contradictions and incongruities. These tensions lend support to the post-modern feminist conception that

[1022] Schneider, *Battered Women and Feminist Lawmaking* (n 94) 59.
[1023] As argued also by Janet Halley, Prabha Kotiswaren, Hila Shamir and Chantal Thomas, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2005) 29 Harvard Journal of Law and Gender 335, 340.
[1024] Elizabeth Bernstein, 'Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Anti-trafficking Campaigns.' (2010) 36(1) Signs: Journal of Women in Culture and Society 45-71.
[1025] Schneider, *Battered Women and Feminist Lawmaking* (n 94) 59.
[1026] Elizabeth Schneider, 'Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse' (1992) 67 New York University Law Review 520.

there is no one way to be a woman, resonant with intersectional[1027] and post-intersectional[1028] theorisations. Identity is messy and, as Nash warns, there are not even 'prototypical intersectional subject[s]'.[1029] Rather, women's lives are diverse with myriad truths, roles and realities which means that women's legal consciousness is equally varied. However, in the same way that Munro is reluctant to assume that difference precludes collectivity, this thesis recognises that a 'blurred concept' of women's commonality 'purchases considerable flexibility and attention to concrete experience'.[1030] Deploying the collective category of 'women', in the sense that women's unity can be discerned from complex networks of criss-crossing, intersecting and overlapping likenesses, also facilitates political strategy.[1031] By doing this, the chapter is able to draw out how prosecutors might be more attentive and responsive to the textured and multi-faceted lives revealed by this sample of women. Nonetheless, in examining and being alert to the 'particular', recurrent strands overlay to produce 'a thread of considerable strength'.[1032] These repeating themes must, in turn, be considered within the 'general'[1033] or 'contextual'[1034] dimensions that link domestic abuse within wider societal gender subordination. My ambition is not therefore to ignore broader or general contexts in which these experiences are positioned or situated.

Deploying a legal consciousness lens, the chapter explores how women who have experienced intimate partner abuse consider, understand and make sense of (criminal) law in their lives.[1035] This enquiry will supplement the question of how prosecutors approach decision-making in cases of domestic abuse as examined in Chapter Four. It will develop

[1027] Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1994) American Psychological Association 1241.
[1028] To displace the notion that identity is merely a neat intersecting or formulaic grid which produces stable and predictable identities Kwan speaks not in terms of 'intersectionality' but in terms of 'cosynthesis' in Peter Kwan, 'Complicity and Complexity: Cosynthesis and Praxis' (2000) 49 DePaul University Law Review 673- 690. Hutchinson speaks of 'multi-dimensionality' in Darren Hutchinson, 'Identity Crisis: 'Intersectionality, Multidimensionality, and the Development of an Adequate Theory of Subordination' (2001) 6 Michigan Journal of Race and Law 28- 50. Whilst Valdes considers 'interconnectivity' in Francisco Valdes, 'Sex and Race in Queer Legal Culture: Ruminations of Identities and Interconnectivities' (1995) 5 Southern California Review of Law and Women's Studies 32- 46.
[1029] Jennifer Nash, 'Re-thinking Intersectionality' (2008) 89(1) Feminist Review 1, 4.
[1030] Munro, *Law and Politics at the Perimeter* (n 192) 127.
[1031] Ibid 130.
[1032] Ibid 128.
[1033] Schneider, *Battered Women and Feminist Lawmaking* (n 94) 71- 73.
[1034] Rebecca Dobash and Russell Dobash, 'The Context-Specific Approach' in David Finelhor et al (eds), *The Dark Side of Families: Current Family Violence Research* (Sage 1983) 261- 276.
[1035] Patricia Ewick and Susan Silby, 'Conformity, Contestation, and Resistance: An Account of Legal Consciousness' (1992) 26 New England Law Review 731, 731.

understanding about how prosecutorial culture and working practices interact with women's everyday lives and highlight how decisions made quickly, based on frequently scant and second-hand information may lack the detailed scrutiny required to know the complexity of women's constraints. Following Silbey,[1036] this chapter goes beyond standard approaches to legal consciousness that interrogate how specific laws (or decisions made by legal actors) are functioning for ordinary people. This legal consciousness project aims to unpick the more theoretical question of how law is able to sustain its hegemony and institutional power despite its frequent failure to live up to its liberal promises.[1037] What is it that gives law 'legitimacy'? A legal consciousness study which focuses on how, why and by whom the law is used thus brings the potential to understand the way the law sustains cultural norms and structures of power and inequality. Moreover, by exposing the gap between the law as intended and the law in action, legal consciousness has the potential to reveal 'the justice possible through law'.[1038]

The chapter also draws parallels between legal consciousness and feminist legal theory as both have the potential to destabilise law's claim to legitimacy. In the same way, as Chapter One outlines, Carol Smart sought to de-centre law and the belief that ameliorations to existing laws could advance women's status,[1039] this feminist legal consciousness study draws out the shortcomings of a resort to law by exposing that women's legal victories are often pyrrhic. Furthermore, both frameworks (feminism and legal consciousness) challenge law's assertion that it is a bordered system, separated from the 'everyday' or from intrinsic social inequality.[1040] The project therefore contributes to scholarship that challenges legal positivism's assertion that law is closed, sealed or self-referential and that its reasoning leads to predetermined 'correct' decisions. Nor can it be assumed, therefore, that law is a neutral or gender-free space; law is distinctly masculine.[1041] Socio-legal scholarship of the kind entered into in this chapter offers the possibility to challenge law's patriarchal inheritance. By blurring the boundaries between law in its 'splendid isolation' and what lies beyond- in people's homes, lives and relations- the gendered nature of law and legal processes becomes visible.

[1036] Susan Silbey, 'After Legal Consciousness' (2005) 1 Annual Review Law and Social Science 323.
[1037] Ibid 323.
[1038] Ibid 325.
[1039] Smart, *Feminism and the Power of Law* (n 189).
[1040] Lacey, *Unspeakable Subjects* (n 196) 1-15.
[1041] Joanne Conaghan, *Law and Gender* (OUP 2013).

In more concrete terms, I begin by outlining legal consciousness as a technique of socio-legal scholarship. Having identified Ewick and Silbey's three broad schemas of legal consciousness (people who appear positioned *before, with* or *against* the law[1042]), I deploy these groupings to thematically analyse the qualitative research.[1043] The chapter notes that women who have experienced domestic abuse do not expect, want or need the same things from law, if they want anything from it at all. As far as criminal prosecutors are concerned, women positioned *with* the law are likely to prove least 'problematic' in terms of their continued support for the prosecution. The challenge for criminal justice agents is being able to nurture women into this positioning whilst accepting that it may not always be attainable or, indeed, desirable. I reflect how women's varied legal consciousness often results in their differing expectations of the criminal justice system (for example those *against* the law expect little and consequently resist intervention, whilst those *with* the law expect ameliorative results but find themselves frequently disappointed). The chapter highlights that CJ agents owe a duty to every woman, regardless of her expectations and subsequent legal consciousness presentation, to assist her in recognising her victimhood whilst simultaneously respecting the ways in which she may be exercising agency. Therapeutic jurisprudential considerations repeatedly emerge as a theme that can be deployed by CJ practitioners in pragmatic terms to meet women's needs. At the same time, perhaps in less visible or concrete ways, the chapter affirms the value of prosecutorial decision-making being guided by the frameworks outlined in Chapter Two – vulnerability theory, relational autonomy and the capabilities approach.

PART ONE

1 What is Legal Consciousness?

Law pervades everyday life.[1044] This is perhaps especially obvious for women who experience intimate partner abuse in relation to *criminal* law. For even where invocation of criminal law is resisted, its possibility is ever present. Law has meaning, even in its absence, in abused women's lives. As Ewick and Silbey have described in relation to their study of the place of law in everyday life, 'we need to discover not only how and by whom the law is

[1042] These three positionings are discussed in detail below.
[1043] See thesis Introduction for clarification about my empirical methodology.
[1044] Ewick and Silbey, *The Common Place of Law* (n 114) xi.

used, but also when and by whom the law is not used'.[1045] In collecting the stories and reflections of a group of 11 women who have experienced intimate partner abuse, the chapter questions the place of law and, specifically, *criminal* law for abused women. It asks what the criminal law represents for these women and how they situate themselves in relation to it. This is more than the simple process of extracting women's attitude towards the law, rather the chapter uncovers their understanding of it, their engagement with it and the way they imagine the law operates.[1046] Legal consciousness is thus a way of tracing 'the ways in which law is experienced and interpreted by specific individuals as they engage, avoid, or resist the law and legal meanings'.[1047]

A project of this kind carries importance because the collected empirical data, designed to extract the participants' legal consciousness, also follows the feminist tradition of using empirical evidence as a way of correcting 'legal myths' or the 'declarative truths' law makes about itself.[1048] It enables us to analyse the gendering effects and symbolism of law evident in all the women's stories, regardless of their legal consciousness. The project therefore has the potential to contest law's self-asserted assumption that, due to its authority, it can define what is 'true', 'natural' or 'inevitable'.[1049] Rather, the chapter forms part of the feminist project to recognise that subjectivity and knowledge often evolve in practical ways within the private sphere (as I emphasised in Chapter One).[1050] The project therefore has the potential to show that law is not a closed or bounded system, rather 'law reflects, reproduces, expresses, constructs and reinforces power relations along sexually patterned lines'.[1051] It therefore has the potential to challenge Madden-Demspey's confidence in law to act in ameliorative ways for women and challenges her assumption about law's legitimacy. Instead, the project's feminist endeavours show that law might be

[1045] Ibid 34.
[1046] Two articles that explore domestic violence victim's use of the law go some way to exploring aspects of their legal consciousness. David Ford, 'Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships' (1991) Law and Society Review 313; and Ruth Lewis, Rebecca Dobash, Russell Dobash and Kate Lewis, 'Protection, Prevention, Rehabilitation or Justice? Women's Use of the Law to Challenge Domestic Violence' (2000) 7(1-3) International Review of Victimology 179. However, no studies directly use legal consciousness to understand how abused women experience the criminal justice system and prosecutorial decision-making in their lives.
[1047] Susan Silbey 'Legal Consciousness' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press 2008).
[1048] Margaret Davies, 'Law's Truths and the Truth about Law: Interdisciplinary Refractions' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013) 71.
[1049] Smart, *Feminism and the Power of Law* (n 189).
[1050] Davies, 'Law's Truths and the Truth about Law' (n 1048) 65.
[1051] Lacey, *Unspeakable Subjects* (n 196) 7.

considered problematic as a hierarchically gendered institution or as an institution that adversarially produces 'objective' rational outcomes in preference to the maintenance of relations.[1052] If law does not produce outcomes, in a manner that women seek then they may be discouraged from seeking assistance from criminal law.

Legal consciousness understands law as a structural component of society in the sense that legality forms part of social relations and is at the interface of social interaction.[1053] Legal consciousness might therefore be considered a type of social practice which not only reflects but also evolves social structures incrementally over time.[1054] In this way, the study is less one of law *and* society in an instrumentalist sense, and more one which presents law *in* society as constitutive.[1055] The task of the researcher becomes one of locating the place of law in women's lives, considering it even (or, perhaps especially) in its absence. If legal consciousness is understood as an individual's participation in the construct of legality, this might offer a better way to understand what gives law 'legitimacy'. By understanding women's legal consciousness, a better grasp of how the law and legal actors, and specifically prosecutors, might better operate on women's behalf emerges. Taking lessons from the stories told, prosecutors might respond to women's subjectivities and preconceptions about the role of criminal prosecution sensitively and better understand what abused women need, want and expect it to achieve for them.

In drawing out the legal consciousness of those interviewed, my thematic analysis uses as its starting point the three interpretive frames of legal consciousness that Ewick and Silbey identify as representing and shaping how people experience legality.[1056] Here legality is understood as 'an internal and emergent feature of social life'[1057] meaning that formal legal events need not be the focal point. By describing and analysing legal consciousness as *before* the law, *with* the law or *against* the law (see below), we begin to understand how each woman positions herself in relation to the law and her understanding of what the law can achieve for her. When identifying *before, with* or *against* the law conceptions, forms of legal consciousness do not correspond to the actors themselves, instead legal consciousness

[1052] Carol Gilligan, *In a Different Voice* (Harvard University Press 1982).
[1053] Ewick and Silbey, *The Common Place of Law* (n 114) 43.
[1054] Ibid 44.
[1055] Harding (n 130) 513.
[1056] Susan Silbey and Patricia Ewick, 'The Rule of Law- Sacred and Profane' (2000) Society 37(6) 49, 50.
[1057] Ewick and Silbey, *The Common Place of Law* (n 114) 23.

describes an 'analytic language of *relationship*' to the law.[1058] In this way most of the women interviewed indicated that their relationship to law, before their abuse, broadly fell within the frame of being *before* the law. In this conception, law is considered separate to one's social life. People *before* the law indicate a sense of deference to a set of institutions, rules and practices that are considered both authoritative and impartial.[1059] Law and legal constructions are reified and accepted as rational and ordered offering the promise of just arbitration in a sphere that is 'majestic'[1060] and objectively fair. This conception of law embodies the same qualities that liberal law asserts for itself. Woman 5 indicated her position being *before* the law in plain terms, 'I abide by the law and I am going to do as I am told. And I am just going to swallow it [the outcome]'. Later on, she indicated her belief that law provides moral judiciousness: 'If you tell a lie, if you don't tell the truth, you will face the consequences and you could go to prison'. For others describing a *before* the law conception, the law represented the possibility of validation or an alternative moral order to that expressed by those around them,

> '[Law] is basically someone standing up and saying, look, your behaviour is not on… If I was to say something about his behaviour, he denies it. He's told [our son] that he hadn't done anything wrong… I think it's an authority isn't it. Somebody is there if your family is not standing up to him. Who else have you got? It's the law. I think it was the law that really kind of put the nail in the coffin [of the abusive relationship]'.[1061]

The law here is described as an objective and impartial arbiter that presides over those in its jurisdiction. However, if people conceive law as hierarchical, unfailing and steady in the way Woman 9 above describes, then people may begin to feel powerlessness, frustration or even anger at their own perceived insignificance in relation to it.[1062] Woman 3 illustrated this sense when she confirmed: 'I would still report [future abuse], but it's just you wonder what the effect of it is going to be and whether it's actually going to make you feel slightly undermined'. The law here seems to be described as being distant,

[1058] My emphasis. Ibid 50.
[1059] Ewick and Silbey, *The Common Place of Law* (n 114) 47.
[1060] Susan Silbey and Patricia Ewick, 'The Rule of Law- Sacred and Profane' (2000) Society 37(6) 49, 50.
[1061] Woman 9.
[1062] Ewick and Silbey, *The Common Place of Law* (n 114) 47.

impenetrable or inert; something that will 'happen' to the woman and over which she has little control. Being *before* the law, therefore, does not mean that individuals are unaware of law's downside.[1063] Specifically, with regards to the criminal law, the downsides may include disappointing outcomes, complicated and unexplained procedures, the intimidating theatrics of a trial or the use of impenetrable technical legal language. Such aspects all contribute to law's remoteness and impersonality and can offer insight into why those who identify as *before* the law might not call upon it for their own assistance. This tension between reification and disenchantment with the law is more fully explored in the subsequent thematic analysis.

To employ the term 'legal consciousness' is to label individuals' contribution to the process of shaping legality.[1064] This process of legality construction is perhaps most plainly in evidence through the *with* the law identification. For a *with* the law conception recognises that whilst law and legal rules pre-exist, they can also be moulded and manipulated to suit one's ends.[1065] Described as a game, an individual who plays *with* the law understands that 'the boundaries thought to separate law from everyday life are… relatively porous'.[1066] The law becomes a 'terrain of contest',[1067] utilised by the individual to serve specific ends and achieve specific goals. Law is not considered lofty or revered for its power per se, but its facility is understood and deployed for self-interest. For Woman 4, the law was considered a resource constantly available to her, it was important that the law was on her side and aware of all events pertaining to her then separated husband: 'I just phone the police all the time now. Every time something happens… I need to tell them what's going on because unless I tell them then it's not all recorded'. For this woman, her concrete knowledge and experience of the criminal justice system meant that she knew how best to build the evidence against her violent ex-husband to prove his harassment of her. Woman 4 thus described being *with* the law; using or directing the law to her own ends.

This means that, unlike those *before* the law who accept law's claim as a natural, inevitable and determinant phenomenon, those *with* the law recognise that its actors, organisations, rules and procedures can be engaged and manoeuvred. Moreover, in

[1063] Ibid 71.
[1064] Ibid 45.
[1065] Ibid) 48.
[1066] Ibid 48.
[1067] Harding (n 130) 514.

recognising the law as a resource, those *with* the law consciously position themselves in relation to it and in so doing assert culturally identifiable markers about themselves. Perhaps for Woman 4, in actively reporting every transgression of her now separated partner, she was asserting a number of things; firstly, 'I am being victimised and harassed', secondly, 'I will not accept this anymore' and thirdly and perhaps most powerfully, 'I know how to call upon the law to hold you to account'. Recognising that the law can be engaged for her benefit, Woman 4 is able to make identity claims pertaining to herself and her agency. Woman 4 described invoking the law in this way as a way of moving on from 'years of someone putting you down or hitting you or telling you that you ain't no good, you start to believe it yourself'. Being *with* the law becomes an enabler and intrinsic to her sense of empowerment as she endeavours to move on from her relationship.

The third and final variety of legal consciousness, being *against* the law, describes people's sense of being caught within the law or being in opposition to it.[1068] Law is not something to be trusted and legality is a dangerous consequence of law's seemingly arbitrary power.[1069] Those *against* the law often describe being unable to keep a distance from law in their everyday life and they oppose its reach and potential for disciplinary power. They recognise that society is structured and often consider themselves the 'underdog' up against a socially, economically and legally privileged adversary. Not wishing to engage *with* the law strategies, they often use initiative in an attempt to subvert law and ordered systems to their advantage;[1070] methods used include minor deceptions, failures to say or do things, reticence, deliberately 'acting up' or making light of the seriousness of the situation.[1071] The key characterisation here is resistance to the law and the sense that law's rules cannot be played by them. Woman 7 most clearly expressed herself as situated *against* the law,

> 'I come from a background where there is kind of a lot of interaction with the Criminal Justice System. We are multi-generational prison people… But we don't have much faith in it in as much as you don't really expect it to do anything for you…

[1068] Ewick and Silbey, *The Common Place of Law* (n 114) 48.
[1069] Ibid 192.
[1070] Susan Silbey and Patricia Ewick, 'The Rule of Law- Sacred and Profane' (2000) Society 49, 54.
[1071] Ibid 53.

> can you imagine if I go to court for anything? They would rip me apart. I can never rely on it. It's let me down when I was young and it continues to let me down now'.

The aims and purposes of resistance to or defiance of the law can be various; attempts at maintaining one's dignity, self-preservation or perhaps to preserve separation between oneself and the law. For Woman 7 there was a clear sense that the law would not help her, and her motivation for not engaging the law appeared to be the avoidance of being disbelieved, judged, treated badly and ultimately let down,

> 'I don't think there is a big enough recognition that people who have committed crimes can also be the victims of crime… When I think about like [my] arrest for soliciting and stuff like that, it was a relatively minor crime. But because of that crime, I don't feel like I can ever access the Criminal Justice System [as a victim].'

Later on she confirmed that, 'The system is not set up to help me'. As a consequence, and as discussed in more detail below, woman 7 developed her own ways of policing her violent intimate relationships that demonstrated skilful negotiations and adroit insight into how best she might keep herself and her children safe.

Finally, it is important to recognise that individuals' relationships with the law are not fixed or static. Legal consciousness describes the ongoing construction of 'legality' and it therefore describes a fluid process of social practices and structural production.[1072] Nor need a single 'type' of legal consciousness be described in a single narrative; there is no requirement for mutual exclusivity and an individual might express all three relationships with the law in one story. Having potential for plural and variable legal consciousness is inevitable according to Ewick and Silbey and the contradictions in accounts are seen as both inevitable and unproblematic in the complex formation of social structures.[1073] Bearing in mind the potential for fluid legal consciousness locations, the next section situates women's narratives within the three types of legal consciousness and draws out themes arising from those positions. In particular I note that experiences of and treatments by the criminal justice system can play a part in shaping and shifting her legal consciousness and the way she considers the place of criminal law in her life.

[1072] Ewick and Silbey, *The Common Place of Law* (n 114) 50.
[1073] Ibid 224-5.

PART TWO

2 How Women think About the Law: A Thematic Analysis

The next part of the chapter uses the three legal consciousness standpoints developed by Ewick and Silbey to interrogate how discourses of being *before, with* or *against* the law ultimately impact how abused women use the criminal law. All eleven women in the sample, with one exception, came to my attention because of contact they had had with three different domestic abuse charities.[1074] All, without exception, had had interaction with the police as a result of their abusive partners. Seven out of the eleven women had supported prosecutions on at least one occasion and all of these now had partners or ex-partners with criminal convictions for offences committed against them. Of the four women whose partners had not been prosecuted in court, three had not wanted to press charges from the outset and, for one, a police harassment warning, pre-charge, had proved sufficient deterrent thereby circumventing the need for court proceedings. Only one perpetrator had been convicted as a result of a victimless prosecution whilst three women had had to attend court to give evidence at trial following a not guilty plea. Ultimately, I suggest that if the Crown Prosecution Service wishes to engage victims of domestic abuse in the prosecution of their abuser, in line with their Violence Against Women strategy, then assisting women to feel *with* the law is key. Therapeutic jurisprudential considerations are central to this enterprise. Nonetheless, particularly highlighted in the narrative of those women positioned *against* the law, caution must be exercised before assuming that prosecution and conviction will be in her best interest.

3 Women '*Before*' Law: Preferring to 'Go it Alone'

For abused women, being *before* the law carries with it the risk that, as the law is seen as something distant and separate to oneself, it is conceived as existing for the benefit of other people. This conception carries the potential for women not to call upon it, even at times of crisis. Woman 9 grew up in a family in which her father was physically abusive, mainly to her mother but sometimes she too would be beaten. She observed how her own mother never engaged the criminal justice system and for her, law and those who knew the law, appeared to operate in a sphere that dealt with matters more important than her own

[1074] The reader is referred to the thesis Introduction for methodology.

troubles. There was an assumption that the coercive, controlling and aggressive strategies that her own husband employed against her should or would be of no concern to legal professionals and, prior to leaving her husband, she had never once called police regarding his treatment of her. The way she spoke about the law, combined with her actions in failing to invoke the criminal law or in failing to take family legal advice regarding child contact arrangements, paint a *before* the law positioning. When eventually her child's school called police on her behalf and subsequently directed her to a family solicitor for advice, Woman 9 described how 'the turning point was knowing that I was going to get support from the law, the lawyer, and the police as well. My God any support from the law is good'. Highlighting the way she held 'the law' in lofty esteem, she spoke of how shocked she was that her now separated husband, whom she described as 'a pillar of society', had been so irreverent to the family lawyer: 'He spoke disrespectfully. And I am thinking, he's a lawyer. [My husband] might have two parts of a degree but what has he done with it? The lawyer has a degree. He's put it to good use. It's just disrespectful… you have to listen to the lawyer'. The reverence and regard for the lawyer's standing and his legal professional education seemed to render him superior to those not versed in the law. Her deference to law and legal knowledge was exemplified when she explained why she had not called the police herself, 'I heard that the law changed from whatever it was. I didn't call police'. There was a sense from Woman 9 that even if she could recall why she thought the law had changed, it would not be something she would expect to understand. Law was something produced and practised by an elite group with specific and inaccessible knowledge.

Having always considered the law something which helped other more creditable people with meritorious claims, Woman 9 reified law. She appeared to accept law's own imposing claims to neutrality and fairness. By not wishing to bother the police, she played her part in constructing law as something that is detached from everyday life. The law was described 'as having ontology and authority that is severed from the multiple concrete practices and relationships that enact it'.[1075] When finally calling upon law to assist her, the law and its agents on this occasion did not let her down. She felt the police had been 'really really good' and had supported her by issuing an informal harassment warning which her husband had acceded to. On this occasion, 'Law' lived up to its promise and successfully

[1075] Ewick and Silbey, *The Common Place of Law* (n 114) 75.

intervened to secure her safety.

Another woman who, during the period of her abusive relationship, appeared positioned *before* the law was Woman 5. She conceived the law as an authority to be complied with and whose decisions were determinative. Woman 5's relationship with her now ex-husband had been characterised by his drink and drug misuse. His behaviour ranged from angry tirades, verbal aggression, criminal damage, threats made to her with a kitchen knife and marital rape,[1076] to sincere apologies, heart-to-hearts and promises to change.[1077] In ordinary life, Woman 5's most evident characteristic was her proactive agency. She was self-employed and the chairwoman of a local charity. In her typically resourceful way, Woman 5 had sought relationship counselling services from Relate, had been to the Citizen's Advice Bureau and had familiarised herself with 'the domestic violence leaflet'. She had also made her mother aware of her situation: 'I was trying to like put safety things in place. The safeguarding training that I had delivered in the charity - I was resourcing it. It was just like, I've got a problem here and I need to do something. I need to make myself safe and I need to know what to do if… because it had escalated that much.' When asked why she had not contacted police during the time of the abusive relationship, she indicated, 'I didn't want to trouble police. What was I going to tell them? I had no proof. I had no evidence. I had nothing to show them. Even that night [the violent night that proved to be the end of the relationship] when I knew that I was in big serious trouble… I phoned my friend.'

Three points arise from this. The first is the link to what Nielsen has termed the 'impracticality paradigm' of law. This speaks, inter alia, to the difficulty people recognise in legal enforcement in the absence of proof. The paradigm is particularly associated with acts committed in the private sphere.[1078] The second is that Woman 5, like Woman 9, demonstrated that in being *before* the law, law became a nebulous entity so distant, so aloof that it is felt law should not to be bothered by their self-perceived trivialities. This view of law as something which exists for others, is perhaps borne from the way in which law

[1076] Liz Kelly defines all forms of violence against women and girls perpetrated by men and boys as 'sexual violence'. She notes that studying 'battering' or 'rape' separately denies the continuum of elements and events – be they physical assaults, verbal abuse or sexual coercion- that characterise men's abuse of women. Liz Kelly, 'How Women Define their Experiences of Violence' in Kersti Yllo and Michele Bograd (eds), *Feminist Perspevctives on Wife Abuse* (Sage 1990) 114- 115.

[1077] Andrea Nichols has also called these latter behaviours 'apologetic manipulations' in Nichols (n 75) 2114.

[1078] Laura Beth Nielsen, 'Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment' (2000) 34 Law and Society Review 1055, 1081.

presents itself as transcending the immediate and particular; 'law houses itself in monumental buildings of marble and granite and arranges its agents behind desks, counters and benches. It expresses itself in a language that is arcane and indecipherable to most citizens'.[1079] The perceived immensity, impersonality and complexity of the law gives rise to a sense that the law is something too serious and weighty to invoke in one's own life. Involving the law means that one's intimate relationship has reached a point that requires third party intervention, determinations about one's life will be made and consequences will follow with little scope, according to the *before* the law conception, for one's own input or negotiation as to strategy.

The third point is that these women *before* the law may have failed to engage the criminal law due to anxiety about not being believed by criminal justice agents, 'Why was anybody else going to believe what was happening? … This was the stuff of movies.'[1080] This fear about not being believed, according to the *before* the law schema may have been, in part, to do with a sense of insignificance in relation to the law or the perceived impenetrability and impersonality of it.

3 (i) The Importance of Therapeutic Jurisprudence for Women *'Before' Law*

As legal consciousness methodology seeks to extricate a deeper and more situated understanding of the origins of individuals' relationships to law,[1081] it would be incomplete to suggest that these women's concerns about not being believed were only to do with their perceived insignificance in relation to law's grandeur. These women's fear of not being believed may also have had something to do with profound matters of self-identification and the impact of their abusive relationship on their mental health as described in the second Part of Chapter Two. Women in abusive relationships have often sustained a reign of terror, been subjected to subordination and repeated episodes of physical violence or isolation. The consequences of this for the victim of domestic abuse might be shame, a diminished sense of self-esteem or self-efficacy and depression.[1082] Victims often make accommodations to stay in the relationship; these are understandable mechanisms for

[1079] Ewick and Silbey, *The Common Place of Law* (n 114) 106.
[1080] Woman 5.
[1081] Dave Cowan, 'Legal Consciousness: Some Observations' (2004) 67(6) Modern Law Review 928, 938.
[1082] Winick, Applying the Law Therapeutically in Domestic Violence Cases' (n 80) 60.

coping.[1083] Strategies might include denying to oneself that the abuse is occurring or minimisations[1084] that seek to normalise the abusive experiences. Even where the level of danger appears to be rising (as Woman 5 described), that abusers have told them they are 'crazy' or blameworthy, can lead women to self-doubt.[1085]

It is for that reason that when Woman 5's friend called the police on her behalf that pivotal night, the police's ability to communicate to Woman 5 that they understood and accepted what they were being told formed a crucial part of the evolution of Woman 5's life journey and, in turn, legal consciousness. Woman 5 described the night she hid in the bedroom with her 3 and 5 year old children whilst her husband 'went berserk' outside. When he saw from the window that police had arrived, he went out to meet them.

> R: Then someone come upstairs and I was just literally 'like that' and frozen. The [police]man said, just come out a minute and just leave the children there a minute. I just need to come and speak to you. He literally put his hands on me like that [gets upset].
>
> I: It's really hard isn't it.
>
> R: It was a key moment. And he said, 'You do understand this is domestic violence, don't you?' I was like, 'Yeah'. I am so glad he did that. Literally, he just stopped me like that, because I was bouncing off the walls. He just put his hands gently on either side of me. He said, 'You do know?' and I am like, 'Yeah, I get it'.

The policeman here, in a single gesture, perhaps through the tone of his voice and with explicit recognition of the victim's situation demonstrated compassion and understanding, not blame. He effectively conveyed that he believed her. Such a response is consistent with that advocated by therapeutic jurisprudential scholars who insist that legal professionals tasked with dealing with victims should be animated by concern for her.[1086] Criminal justice agents are in a position to offer 'law's healing potential'[1087] by focusing on the needs of the victim. Woman 5 explained that the policeman's colleague played with the children whilst she completed a risk assessment in another room. By acting with kindness

[1083] Lenore Walker, *The Battered Woman Syndrome* (4th edn Springer 2016) 291.
[1084] Liz Kelly, 'How women define their experiences of violence' in Kersti Yllo and Michele Bograd, *Feminist Perspectives on Wife Abuse* (Sage 1990) 124- 128.
[1085] Walker (n 1083) 291.
[1086] Winick, Applying the Law Therapeutically in Domestic Violence Cases' (n 80) 60.
[1087] Ibid 33.

and sympathy criminal justice agents can help contribute to the process of improving psychological functioning and emotional well-being.[1088] Psychological and emotional strength, I argued in Chapter Two, might be considered critical for building a long term sense of empowerment. Sensitive responses from criminal justice agents that 'do not perpetuate her sense of discontrol'[1089] might contribute to a reduced sense of being *before* the law and may encourage a woman to feel that she might be *with* the law. For Woman 5 above, this interaction with police led her to terminate the relationship.[1090] She was telephoned daily from a victim support charity and she was prompted into obtaining a civil non-molestation order and engaging the family courts regarding the separation and child contact arrangements.

For those *before* the law, reluctance to bring one's private family life, ordinarily secreted behind closed doors, into the public legal domain is common and the decision to change that can be a significant turning point. It is for that reason, that the assessment in Chapter One of the need for respectful consideration of a woman's privacy is paramount. Acknowledging that CJ involvement pierces the boundary behind which families create and build identities - even if the sphere is unsafe - remains vital. The intrusion into private life must then be handled with particular sensitivity, recognising that norms that exist following public violence need to be modified. Woman 4 explained why it was particularly difficult for her to make the transition from her abusive relationship being a private matter to a public one.

> 'And also, do you know what else, it's embarrassment. This is what people don't understand, like so many people go through it, but no-one will tell you. If you see me day to day walking down the street, you would never have been able to tell what my home life was like… but it's embarrassing to tell people like, oh yeah, well, my life is crap and every time I go home I don't know whether he's going to beat the shit out of me or not. He takes my money and he takes everything I've got and I just have to get on with it.'

[1088] Ibid 69.
[1089] Ibid 62.
[1090] Woman 5 did not recall the police taking a statement following this incident but she explained that she felt they achieved what she needed them to, namely to make her and her family safe that night.

Hirshmann similarly describes how women are often ashamed of their abuse because they have been made to feel responsible for the success of their relationships. She, like Woman 4 immediately above, suggests that is why they do not seek help from third parties. [1091] Once called upon, criminal justice agents are in a unique position to minimise her embarrassment and signpost additional support. With appropriate empathy, the intrusion into privacy can be felt less keenly and appreciation that a woman need not feel shame and that she is not the only one suffering in this way, can be fostered. Moreover, by acting therapeutically, CJ agents can diminish reluctance to call upon the law in the future should that be the right thing for that woman to do.

The following two extracts are indicative of the ways that sensitive, therapeutic treatment of victims by criminal justice agents during the court process can assist the woman to feel that the law is *with* her and not too imposing or remote and distanced to be concerned with the particulars of her life. Instead, the following examples show how, by treating women respectfully, compassionately and courteously criminal justice agents can reduce a woman's sense of being *before* the law, operating in a sphere separate to herself and for the benefit of other people.

Having already been through a magistrates' court trial, Woman 1's ex-partner appealed his conviction for his harassment of her. Woman 1 found herself warned to attend the Crown Court for an appeal hearing de novo, 'It is daunting. I mean, especially when you get to Crown Court and the barristers and with the wig'. She explained that despite the fact that the prosecution barrister was clearly busy, he had been able to sit with her and show her his 'human side';

> 'They have to be a certain person to do that job, obviously. They must be very, they are very tough. It was seeing that other side… and I know it was ridiculous in the scheme of things… but he was going through all [the papers- Woman 1 indicates that the barrister sighed and shook his head in disbelief]. You could see he actually felt something about the situation rather than, 'I am here. This is just another case. Just another job'.'

[1091] Nancy Hirschmann, 'Freedom, Power and Agency in Feminist Legal Theory' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013) 61.

By connecting with Woman 1 in this simple but personal way, 'a little bit of empathy or something, it goes a huge way… I felt confident in him'.

Woman 4 described a very similar experience in the witness room waiting to give evidence,

> 'She [the woman at court from victim support] was good. She was sort of like, she was having a bit of a laugh about it with me, actually. [The prosecutor] was a gentleman which he said to me, like, "Are you okay if it's a gentleman?" I am like, "Yes, that's fine". So they do think about those things. And he was really funny as well… had a laugh. They said, "We've read his history. Jesus. Poor you, you have had to deal with this all over the years". I am like, "God, I know". They just made … me feel like it wasn't a bad thing. You didn't feel judged. You felt it was humanised.'

Similarly, another woman spoke of her affirmative experience of giving evidence, via live-link, at trial. She did not dwell on the potentially unpleasant process of giving evidence but rather her recollection focused on how the witness support staff at court had been 'absolutely fantastic'. I asked why she had thought they had been so good and she simply stated, 'Conversation. Not necessarily all about the court hearing. It was just general conversation… and they were prepared to give their time. Offered drinks all the time. It was just a nice experience… to walk in there and not feel like I was being judged… they made you feel comfortable and welcome'. This focus on how comfortable she had been made to feel waiting to give evidence seemed to dominate the event. She contrasted this positive experience with that of the appeal in the same case where there were no victim support staff/ volunteers, only court ushers. She felt that there had been 'massive problems' that day; 'It was awful… I don't feel like the people I spoke to at court were supporting me, they were just doing a job… If I had to give evidence from anywhere again, I would travel. I would go to [town A police station, despite the distance]. I would never do it from [local town B court] again.' Had her only experience of giving evidence been like that of the appeal hearing, one wonders if Woman 11 would have ever agreed to give evidence again.

If criminal justice agents are to assist women to feel that the law is *with* them, then being aware that they can play a part in transforming victims into survivors is key. Notably for Women 1, 4 and 11 above, recalling the respect and thoughtfulness with which they were treated by criminal justice agents was poignant not only for the way it facilitated their experience of the criminal procedure and the likelihood of their using the criminal courts in

the future but also, more broadly, for the way that it contributed to their forward journey. Having objective 'outsiders' treat them as credible witnesses, respectfully and with understanding assisted these women to re-draw their narratives about what had happened and allowed them to move towards feeling that the law, and perhaps society generally, was with them.

4 Women *'With'* the Law: Law as a 'Power Resource'

The following section considers those *with* the Law. It exposes how charities set up to assist victims of domestic abuse encourage women to position themselves to work *with* the law because law can help to 'bring about satisfactory arrangements for managing conjugal violence'.[1092] However, in doing so, it is clear from the primary research that any promise that law will achieve a conclusive and beneficial end result for those who position themselves *with* the law can often lead to disappointment. For that reason, it has been argued that, 'it is a mistake to resort to the law as a panacea' and that instead 'the law must be seen as just one of the other available services'.[1093] For Carol Smart, going straight to feminist support networks and cutting out the legal 'middle man' holds appeal as she considers law as unable to keep pace with women's lived realities.[1094] Moreover, if legal intervention fails to cease the abuse as promised, consequences for both women's healing and their safety follow. Whilst the exposure in the primary research of law's failings for abused women inherently carries with it demands for ameliorations, it also carries with it a cautionary lesson about the need to temper expectations and be realistic about what law might be able to accomplish. These findings appear to be in line with Smart's assessment that the risks of going to law can be worthwhile only if the risks are 'acknowledged and weighed in the balance'.[1095]

It can be recalled how Ewick and Silbey's model of being *with* the law described the 'law as a game' that can be played to secure one's end goals. This legal consciousness

[1092] David Ford, 'Prosecution as a Victim Power Resource: A note on empowering women in violent conjugal relationships' (1991) Law and Society Review, 303.
[1093] Susan Maidment, 'The Law's Response to Marital Violence: A Comparison Between England and the USA" in John Eekelaar and Sanford Katz (eds), Family Violence: An International and Interdisciplinary (Butterworths 1978) 110.
[1094] Carol Smart, 'Reflection' (2012) Feminist Legal Studies, 161, 162.
[1095] Smart, *Feminism and the Power of Law* (n 189) 161.

articulation presents law as a 'positive framework with rules, tactics and positions'[1096] that individuals play to win. There are two problems that arise for abused women from the 'law as a contest' schema. First, the analogy brings with it the danger that the 'playing' is done for sport or to enjoy the upper hand in a dispute and consequently Cooper cautions that this representation can decentre law's substantive legitimacy.[1097] The characterisation risks playing to discourses of female victims as incredible complainants who only involve the law unmeritoriously, out of spite or by way of pay back.[1098] It seems particularly unfitting within the context of the domestic abuse victim who is not 'playing' for personal amusement; for her, her ongoing safety is paramount and her meaningful quality of life is in the balance.

The second problem of this understanding of being *with* the law is that it sets an expectation that strategic engagement with the law is likely to produce a benefit or end result. For abused women encouraged to engage the law, the reality is that frequently it will not. Whilst those *before* the law often anticipate law's potential to frustrate- proceeding in an impersonal way or making decisions without due consideration of their specific needs- those *with* the law often expect ameliorations and results from the law. The challenge for women positioned *with* the law then is not to become disillusioned should the law not produce the desired outcome and to recognise that law might only be part of the process solution they seek.

For that reason, this project suggests a modified way of conceiving Ewick and Silbey's *with* the law paradigm in a move towards applying legal consciousness theory to intimate partner abuse. A better understanding of the *with* the law legal consciousness typology in this context, I urge, is to conceive of law as 'facilitator and resource'.[1099] This still describes a *with* the law schema, akin to law as game, but without invoking suggestions of foul play or gaming for personal entertainment. It suggests that participants appreciate the value of the law insofar as it has both normative and strategic capacities, without invoking suggestions of

[1096] Davina Cooper, 'Local Government Legal Consciousness in the Shadow of Juridification' (1995) 22 Law and Society 506, 513.
[1097] Ibid 513.
[1098] It is noteworthy here that the CPS only provides for guidance in how to deal with false allegations in two types of offences, both concerning predominantly female victims of male violence; rape and domestic abuse. In doing this, it appears that the 'problem' of the incredible complainant, according to CPS policy, is gendered. Crown Prosecution Service, 'Guidance for Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Allegations of Rape and/ or Domestic Abuse' (2017) available at <https://www.cps.gov.uk/legal-guidance/guidance-charging-perverting-course-justice-and-wasting-police-time-cases-involving> accessed 7 February 2018.
[1099] Cooper (n 1096) 515.

'winning' the game (or ending the abuse) being the end of the matter. Considering law as *a* resource also expresses law's potential to support those who seek it without suggesting it is all. It suggests law's role in educating parties both morally and in practical terms and ultimately its role in *beginning* a shift in the balance of power in the relationship.

Women in the sample had experience of 3 different charities set up to assist abused women and each appears to encourage women to see the law as *with* them; law both as facilitator and resource. The entry point for women accessing these domestic abuse charities was often the 'one stop shop'[1100] weekly facility. This is a drop-in service that is free and, in one place, offers advice, information and support from various agencies such as housing representatives, family solicitors, IDVAs, Citizen's Advice and the police. For four of the women interviewed, the police had become involved because the woman had accessed their local 'one-stop-shop'.

Woman 6 was one such woman and her story illustrates how domestic abuse charities encourage women to reposition their legal consciousness to be *with* law. Prior to attending the one stop shop, Woman 6 had only called upon police once before and that was during an emergency situation; a particularly violent assault where she had just received a serious head injury. She had been able to get away from her husband, lock the door of the bathroom and recalls, 'I was that upset. I thought, well I've got no-one else to phone. I will ring the police. That is what I did.' Despite her husband pleading guilty at court and being sent to prison, when he assaulted her after his release she did not call the police but reported the matter at the hospital. She explained, 'I knew that I wanted that action on record, just in case it ever happened again' but that she did not think to involve the police at that time because it was not an emergency. Woman 6 was someone typically *before* the law who had only chosen to call the police on the one occasion she found herself in acute danger. Being *before* the law, Woman 6 stated that even after receiving ongoing persistent coercive controlling and aggressive behaviour, instead of reporting it to the police, 'in the end, I went to the one-stop-shop … he kept threatening to stab me and they were quite concerned… they passed me on to talk to a policeman that was there'.[1101] Despite being persuaded that providing an eight page statement to police would likely result in prosecution, no prosecutions were brought because the evidential test was not met; 'It was

[1100] Woman, 1, 2, 3, 5, 6 and 11 spoke of accessing various 'one stop shop' facilities.
[1101] Woman 6.

just insufficient evidence. That's what I was told'. So, whilst criminal law came down as a barrier to her aid, she was then assisted by the family lawyer at the one-stop-shop to obtain a non-molestation order which her husband consistently breached. In repositioning Woman 6 to use the law to her advantage in an attempt to end his persecution of her, she was advised to report to the police every infraction of the order; 'I record everything. I've been told to report everything, so I have.'[1102]

The three domestic abuse charities referred to in the sample all appeared to encourage women to see law and the criminal justice system as available to them. By encouraging women to see the accessibility of law, battered women's charities continue a longstanding tradition of demanding that the state provides 'pragmatic responses' to confronting violence against women motivated by 'a wider philosophy of feminist inspired social change'.[1103] Law's potential as a normative system that expresses standards of behaviour is important here as well as law's superior authority[1104] to condemn domestic abuse through delivery of sanctions.[1105] Great strides have been made by the state, in terms of pro-active criminal justice intervention, which recognises that women deserve protection and empowerment. However, in line with MacKinnon's observation that 'equality is valued nearly everywhere but practised almost nowhere',[1106] the following section highlights how legal interventions have frequently, for the women in my sample, disappointed and failed to live up to their promise. In so doing, we see how liberalism's assertion that law can provide determinacy and solutions by offering principled delivery of legal rules can fall short for women, as they ultimately did for Woman 6.

4 (i) Limitations of Being *'With'* the Law

The following section draws from the experiences of the seven women who had supported at least one prosecution and their experience of being *with* the law. It examines

[1102] Similarly, Woman 1 confirmed that the charity supporting her had told her to 'report it, just to be on the safe side'.
[1103] Dobash and Dobash, *Women, Violence, and Social Change* (n 774) 1.
[1104] Ewick and Silbey, *The Common Place of Law* (n 114) 148.
[1105] Munro, *Law and Politics at the Perimeter* (n 192) 42.
[1106] Catherine MacKinnon, *Women's Lives: Men's Laws* (Harvard University Press 2005) 45.

the criminal justice system's treatment of them and whether it met, partially met or failed to meet their expectations.[1107]

Of the women who had supported criminal proceedings, none were identifiably positioned *against* the law, nonetheless all spoke without exception about aspects that disappointed. It is known that victim satisfaction with the criminal justice system can impact emotional well-being and victims' treatment by the criminal justice system can be 'an important pathway between victimisation and emotional recovery'.[1108] Whilst poor experiences can notably increase stress or even be experienced as secondary victimisation, improved participation and satisfaction can assist healing.[1109] Ensuring that women enjoy positive experiences of the criminal justice system is paramount to enhance emotional well-being on the one hand and on the other to ensure that women situate themselves *with* the law so that they feel able to call on it in the future should safety considerations require. A poor experience of the criminal justice system may not only result in dissatisfaction for the victim but may be more damaging both therapeutically and in terms of future safety. More widely, poor experiences might also lead to a loss of confidence in the system for other future users and have the effect of undermining law's legitimacy. From a legal consciousness perspective, the effect of a poor experience can have the effect of turning a woman *against* the law.

4 (ii) The Importance of Good Communications

Receiving inaccurate, unreliable or insufficient information and communications from criminal justice agents was a recurring theme. Communications with victims and witnesses have been described as an example of victims' 'passive' participations in criminal procedure[1110] and have been an area that has been particularly targeted for improvement since 2005. This is when witness care units were established and witness care officers allocated to every victim or witness 'to support and guide them through the court

[1107] Two of the women who did not support prosecutions were clearly positioned against the law and their experiences and reflections are developed in the following section.
[1108] Maarten Kunst, Lieke Popelier and Ellen Varekamp, 'Victim Satisfaction with the Criminal Justice System and Emotional Recovery: A Systematic and Critical Review of the Literature' (2015) 16(3) Trauma, Violence and Abuse 336. See also Lauren Bennett Cattaneo and Lisa Goodman, 'Through the Lens of Therapeutic Jurisprudence: The Relationship between Empowerment in the Court System and Well-Being for Intimate Partner Violence Victims' (2010) 25(3) Journal of Interpersonal Violence 481.
[1109] Kunst, Popelier and Varekamp (n 1108) 336.
[1110] Ibid 337.

process'.[1111] Moreover, keeping victims and witnesses informed of the progress of their case is included as part of the 'overriding objective' of the criminal procedure rules.[1112] Whilst some women in the sample expressed satisfaction with communication from their witness care officer with respect to information received leading up to giving evidence at trial, Woman 4 explained that when, 'you live every day not knowing if it's going to be your last, if today is the day they are going to kill you. And then you try and do something about it and…when you are not listened to… or no-one is there to support you, it's really really difficult… Some people just need a phone call once a week to say, right, this is where we are at with this- even if you have made no progress at least you know someone is there trying for you.' She explained that she experienced months of no communication from police or witness care and then 'all of a sudden people want to talk to you'. A lack of information relayed from witness care was also experienced by Woman 1. She recalled how she had not been informed about the possibility of an appeal against conviction and the fact that this would require her to give evidence a second time: 'He appealed. But again, I was never told, I thought, once he was convicted… had I known he could appeal, I would have prepared myself, because I knew he would have done'.

Other women found themselves disarmed when not being informed immediately about a defendant's release on bail[1113] or release from custody.[1114] Woman 6 thought that Witness Care were, 'very very good until he was prosecuted and then they didn't want to know. I got nothing once he'd [received a custodial sentence]. He was released and nobody told me. I got a knock on my door and it was him'. Woman 6 had clearly been unprepared for her husband's re-appearance and chided herself about her response, 'They all said I was really stupid for having him back. I am a sucker for a sob story, aren't I? I can't help myself'. Had she been told in advance of her perpetrator's release date, one wonders what protections she might have been able to put in place in readiness.

The sample also drew out a number of examples where police officers had erred in communicating with victims. These centred on a tendency to set overly high expectations about what could be achieved from supporting a prosecution. Having been 'talked round' by

[1111] Crown Prosecution Service, 'Victims and witnesses' available at <http://www.cps.gov.uk/southwest/victims_and_witnesses/> accessed 8 December 2017.
[1112] Rule 1.1(2)(d) of The Criminal Procedure Rules 2015 available at <https://www.legislation.gov.uk/uksi/2015/1490/article/1.1/made> accessed 11 December 2017.
[1113] Woman 4.
[1114] Woman 5.

police into making a statement about the offences committed against her, the police told Woman 3 that charges of Assault Occasioning Actual Bodily Harm would be brought against her husband. However, no prosecution was ever brought because the charging lawyer assessed that the physical abuse amounted to a series of common assault level offences and the complaint had been being made outside of statutory charging time limits for summary proceedings.[1115] Woman 3 explained that when she realised no action would be taken against her abuser, 'It was just really disappointing… to have that assurance from an officer to say that, "Tell us everything and we will get him" to then not have anything [charged] really put me in a really vulnerable situation. So yes, I did find that quite difficult because I did feel let down'.

Another woman recalled making a statement to police because she had been told by an officer at the one-stop-shop that '"I'm fairly sure we can arrest him and we can put him in prison for what he is doing to you"'.[1116] Whilst the perpetrator was duly arrested and interviewed he was released the same day on bail pending further enquiries which she had not been anticipating. Whilst there were police bail conditions in place not to contact her, he proceeded to text her 'like 50 times a day' and whilst he was brought before the court for breach of bail, he was quickly readmitted to bail. Ultimately no charges were brought because 'it was basically his word against mine and he denied it… but they [had] told me that they actually could [prosecute]'. It is clear that overpromising by the police can leave women in a weakened position as they are given a legitimate expectation that a certain course of action will follow. Without proper awareness of the possibility that 'no further action' can be taken by police, women may fail to take alternative action to keep themselves safe.

Instead, as outlined in Chapter Two, by recognising that we are all vulnerable and that, as agents of the state, police must be responsive in ways that build resilience,[1117] a more realistic and sensitive dialogue might be encouraged. Moreover, it has been shown that a thoughtless initial response by police can make a difference to the victim in terms of

[1115] Magistrates Court Act 1980, s127 imposes the statutory limitation of 6 months from incident to charge. This experience occurred prior to the availability of Serious Crime Act 2015, s76 (an either-way offence) which legislated against controlling or coercive behaviour amongst intimates. A series of common assault offences might now be chargeable after the statutory 6 month time limit under the new offence.
[1116] Woman 6.
[1117] Fineman, 'The Vulnerable Subject and the Responsive State' (n 182) 251.

developing a negative emotional state.[1118] Charities wishing to encourage use of law and a *with* the law positioning must therefore pay heed to the impact of such overpromising on women, ensuring that sufficient caveats are put in place when explaining what might happen. Poor advice in this regard could play into her legal consciousness positioning and move her towards being *against* the law. The consequences of being *against* the law are discussed in detail below but they might include deterring women from engaging emergency protection, contributing to a sense that she is alone and cannot change the status quo or missed opportunities for state actors to assist women in recognising victimhood and making steps towards safety. From the perspective of the 'lived subject' described in Chapter Two, being *against* the law diminishes her range of options (capabilities) from which to choose a life path.

4 (iii) Experiencing the Court Process

'Secondary victimisation' describes how victims can be affected by the ways in which others respond to them.[1119] Specifically, the phrase captures the notion that 'poor treatment within the criminal justice system may constitute a revictimisation'.[1120] If it is a humanitarian duty of the state to effectively protect its people,[1121] ensuring a better treatment of witnesses by what is called 'procedural justice'[1122] is key. Fair and respectful processes can enhance perceptions of law's legitimacy and public trust. The following section outlines victim satisfaction of court procedure showing how poor CJ responses can mean victims try to avoid the process because of perceptions that the process is a nuisance or, more seriously, traumatic.[1123]

Aside from the concerns relating to communications with victims described above, women reported other factors about the court process that took its toll on them. These ranged from the anxiety associated with waiting for proceedings, the apparent complexity of the process to the strain of providing a victim personal statement.

[1118] Maarten Kunst, Lieke Popelier and Ellen Varekamp, 'Victim Satisfaction with the Criminal Justice System and Emotional Recovery: A Systematic and Critical Review of the Literature' (2015) 16(3) Trauma, Violence and Abuse 336, 355.
[1119] Rob Mawby and Sandra Walklate, *Critical Victimology* (Sage 1994) 33.
[1120] Hall (n 76) 5.
[1121] Jan Van Dijk and Marc Groenhuijsen, 'A Glass Half Full or a Glass Half Empty?: On the Implementation of the EU's Victim's Directive regarding Police Reception and Specialized Support' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Routledge 2018) 281.
[1122] Tom Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 Crime and Justice 283.
[1123] Mawby and Walklate (n 1119) 33.

It was clear from the sample that minimising delays in proceedings would have the effect of reducing associated stress. For Woman 1, proceedings had been lengthy due to a double booking at court on the day of trial, due to an appeal and due to the defendant's failure to attend court on two occasions. She described the process as, 'Extremely stressful. It's all the waiting. Like I said, you get yourself all psyched up, as you can ever be, and then it doesn't happen'. Woman 1 decided that, despite having just achieved a successful conviction on appeal, when a further incident took place whilst awaiting sentence, not to report the matter to police. 'I thought, here we go. It's my word against his again. It's going to be court. It's going to be a trial. It's going to be an appeal. I can't stand another year of this. It didn't seem fair on me. It didn't seem fair on my children, because however much you try and hide it and carry on as normal, you can't, because it is affecting you. I wasn't sleeping. I was really teary. I was on anti-depressants.'

This woman commented that she was also confused about what had happened to conclude the criminal proceedings. She understood that her perpetrator had been sent to prison but she did not know why, 'as I say I don't know if he was found guilty. I don't know if he pleaded guilty. I don't actually know whatever happened. And that's a bit strange. I wasn't even 100% what they meant about the sentence.' Giving proper information about the offence charged, how the defendant pleaded and why they were sent to prison would assist in understanding unfamiliar processes. It could also be crucial for the victim in terms of understanding what behaviours had been punished and how. This type of information would assist her in making sense of the abuse, support her in reporting future criminal behaviours thereby building her resilience, as understood by vulnerability theory, for the future.

Finally, women spoke of the demands of providing a victim personal statement. Of the women who had provided a statement, all could appreciate the merits of doing so (giving the sentencing judge insight into the impact of the offending). However, two spoke of how the statement was hard to write because it was draining and upsetting',[1124] because it forced one to 're-live'[1125] the abuse again. Woman 4 explained that she felt able to write the statement because over the years she had grown strong, 'but for other people a personal statement can also be embarrassing. You are giving the person the knowledge that

[1124] Woman 4.
[1125] Woman 1.

they have ruined you. Some people [perpetrators] get a kick out of that and that's the problem'. On balance however, those in the sample who provided a victim personal statement felt that the opportunity had been positive. One woman had even chosen to attend court to read out her victim personal statement in person at the sentencing hearing and described the experience as an opportunity to show her abuser that she was strong enough to stand up to him.[1126] For this woman, a beneficial mental health outcome resulted because she felt that both her wish to read the statement and the contents itself had been heard. The strength she gained from this speaks to self-determination theory outlined as part of the 'lived subject' in Chapter Two.

4 (iv) Sentencing Outcomes: A Victim's Perspective

Women in the primary research expressed dismay with the probation service. Specifically, there was concern about the effectiveness of the Integrated Domestic Abuse Programme (IDAP) run by the probation service. The course had been undertaken by four of the perpetrators in the sample. Officially, the programme reportedly delivers a 13.3% reduction in recidivism in the following 2 years.[1127] All 4 of the women in the sample whose partners had undergone the order however reported that the programme had done nothing to change their perpetrator's behaviour. Woman 1 also expressed upset and disappointment with the probation service when the probation service contacted her asking her to take part in restorative justice in respect of the man who had obsessively stalked her. She felt on that occasion there had been a lack of attention paid to the particulars of the case, and that she found, 'not appropriate at all' and which had clearly caused her distress.

For others, more generally, there was a perceived leniency in sentencing outcomes, 'how many times does a person have to be given a community order before someone says, "no, you've had your chance and enough is enough now"?'[1128] Woman 2 was of the view that her perpetrator repeatedly escaped prison because he had a mortgage and a good job. She suggested that for someone like him (someone who might ordinarily be considered

[1126] This was 'Woman 12' whose audio recording failed but about whom brief notes had been taken by the researcher.
[1127] National Offender Management Service, 'An Outcome Evaluation of the Integrated Domestic Abuse Programme (IDAP) and Community Domestic Violence Programme (CDVP)' (HMSO 2015) available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/449008/outcome-evaluation-idap-cdvp.pdf> accessed 12 December 2018.
[1128] Woman 2.

before the law) a custodial sentence would serve as a wake-up call and future deterrent. However, of the four women interviewed whose partners were imprisoned as a result of their domestic abuse offending, all four men had, on release, continued their abuse. Pertinently perhaps, all four of those men had a history of involvement, as defendants, with the criminal justice system and all four had previously served custodial sentences for other matters. This suggests that these men, described by their partners in terms of being positioned *against* the law, did not consider imprisonment something to fear or to seek to avoid, more it was seen as an inevitable part of life. This observation is discussed more fully below.

Another outcome available at sentencing is the restraining order.[1129] An order typically includes a condition prohibiting the defendant from contacting the victim directly or indirectly. Breach of such an order carries with it a maximum sentencing option of five years imprisonment.[1130] Exasperation was overwhelmingly expressed by the seven women in the sample whose partners had received a criminal restraining order (or who had earlier obtained a civil non-molestation order[1131]). 'What's the point [of an order]? It's a piece of paper and I might as well put it in the bin'.[1132] The way that the order's imposition and subsequent breaches impacted women's sense of helplessness was marked and ran counter to the intended effect of affording her protection and a reassertion of control in the relationship.[1133] There were three reasons why court orders seemed to exacerbate women's sense of vulnerability or powerlessness. First, for a minority of the women there was a sense that action would not be taken by police in relation to breaches for want of evidence. Woman 6 described the police response to the breaches as being, 'Naff all, really, 'there's nothing [we] can do' is basically what I am getting… It's really getting me down.' Woman 6 described the ways in which the associated stress of feeling powerless was significantly impacting her physical health. For another woman, her concern was less about police

[1129] A restraining order is available on conviction, or equally on acquittal where it is deemed 'necessary': Protection from Harassment Act 1997, s5.
[1130] Domestic Violence, Crime and Victims Act 2004, s1(5)a.
[1131] Civil orders can be obtained by virtue of Family Law Act 1996, s42(2) or s45(1) (ex parte applications).
[1132] Woman 4.
[1133] Woman 1, 'He just totally ignored the orders'; Woman 2, 'He was kind of harassing me, breaching the order'; Woman 3, 'I ended up getting a non-molestation order and that was breached several times.. so he got a restraining order.. he's never served any time': Woman 4 , 5 and 6 confirmed repeated breaches, whilst Woman 11 said, 'I've got a non-molestation order in place and a restraining order in place but they are both useless'.

inaction due to lack of evidence and more that police would fail or had previously failed to take breaches seriously.[1134]

The second reason court restraining orders caused distress to women was the sense that any actioned breach would result in or, in their experience, had already resulted in the perpetrator being released without consequence to him. Woman 4 suggested that, 'even when you've got that restraining order, they break it once, they are still released. They break it twice, they are still released… and someone can, you know, beat the crap out of you and they are still released… Then they [the perpetrator] knows how vulnerable you are. You are the vulnerable one who is like, "where does it end?"'. Woman 11 agreed that her ex-partner breached the order because, 'he knows he can get away with stuff… [once convicted of breaching the order twice] all he got was a restraining order to stay in place and a court fine'.

The third reason that court orders had the effect of making women feel disempowered was that for a significant number of the women, reporting any breach of the order would have the anticipated effect of aggravating the ex-partner, putting herself at increased risk,

> 'If they went round and said to him, we've had a report that you've breached the order, they don't do anything except a slap on the wrist, "don't do it again". He would go mad and god knows what he would do. It was easier not to report it to police, because nothing was going to happen.'[1135]

Women 4, 6 and 11 also suggested that more than the order merely being ineffectual (and therefore the harassment continuing as before) its imposition had the counter effect of antagonising their assailant's behaviour. The risks associated with being either *before* or *with* law are clearly evidenced here.

Despite the order having identifiable problems of enforcement, ineffective penal outcomes and the possibility of triggering aggressive behaviour, women found themselves in a quandary, 'Breaking a non-molestation order is nothing to him. I am really worried

[1134] The view that the police would not take the breach seriously was expressed only by Woman 2 who recounted her experience from some 7/8 years previously. She was also someone identified as being situated '*against'* not '*with'* the law, as discussed in detail below.
[1135] Woman 2.

about when it runs out.'[1136] On the one hand the non-molestation order had been systematically breached and had even, for this woman, ostensibly exacerbated her partner's harassment of her, but on the other hand she could not imagine being without it. Women felt they had nowhere else to turn but the CJS in their ongoing struggle to end the abuse, short of moving out of the area.[1137] Having the order, despite its shortcomings, gave her moral assuredness that his behaviour was not acceptable and that the state was, at least in principle, on her side. To that extent at least, restraining orders contributed to her ongoing journey to empowerment.

We have seen that even when a woman has done everything in her power to work *with* the CJS - she has reported the offence, she has supported the prosecution, the defendant has been sentenced and she has obtained a restraining order- women still report being unsafe, harassed or intimidated. Despite imposition of non-contact orders, perpetrators often violate the court order and harass the victim,[1138] convictions are appealed,[1139] and sentences do not change the defendant's behaviour.[1140] Any encouragement to turn to the law must then be qualified by recognition that it may not be a 'quick fix' solution and must be considered only part of the process of moving towards living abuse-free. Once persuaded that law *can* be a facilitator, managing women's expectations about its potential to solve problems and conceiving law as only one part of an evolving situation is crucial. If women are being encouraged to use law because of any promise of a *with* law positioning to 'provide closure' or 'the final solution',[1141] we see from the sample that a turn to the law frequently disappoints. Ultimately, for some men according to Woman 1, 'court orders, court, prison doesn't stop him. The worst thing is, I think the only thing that would stop him is finding somebody else'.

[1136] Woman 6.
[1137] Woman 8 felt that moving away was the only way the abuse would ever stop and had done so. Woman 3 felt the same but could not face leaving her support network of family and friends.
[1138] Women 1, 2, 3, 4 and 11 all described having non-molestation or restraining orders in place that were being ignored by the perpetrator. 'He would breach everything. All the time' (Woman 2).
[1139] Woman 1 and 11 had to go through the trial process a second time on appeal.
[1140] Woman 4 told me that the effect of her husband attending the probation service Integrated Domestic Abuse Programme was, 'Nothing as far as I am aware. He never stopped'. Woman 2 told me that, 'Probation, prison- nothing changed' and Woman 3 said of the probation order, 'It didn't really change anything, I don't think'.
[1141] Ewick and Silbey, *The Common Place of Law* (n 114) 148.

5 Women '*Against*' Law: The Myth of the 'Superman Police'

Standing in contrast to the with the law schema, being against the law often sees individuals endeavouring to keep law at a distance. It does not necessarily describe an active opposition to the law but can describe one's sense of being unable to keep a comfortable separation from the presence of law in one's life. Those that sense law's omnipresence consequently often seek to avoid law and its effects.[1142] Those women who described an *against* the law positioning were in the minority within the primary research, with only Woman 2 and 7 consistently falling within this final typology. For Woman 2, who frequently called upon the police in emergencies, this manifested in consistently failing to support a prosecution. For Woman 7, her reluctance to engage police at all meant that the police and the CJS never became involved at her instigation. This section uncovers some of the shortcomings of a criminal justice response exposed by the stories of these two women positioned *against* the law. The deficiencies of the CJ response can be split into two broad themes.

The first has to do with the importance of recognising and responding to victimhood even where it is not immediately disclosed by victims as was the case for both Woman 2 and 7. Professionals need to be able to understand the dynamics, patterns and strategies of DA and accordingly treat victims with requisite TJ considerations. Professionals must be particularly sensitive and attuned to recognising abuse even where it is not disclosed, remembering that victims will present in diverse ways. In recognising victimhood, professionals would speak with victims in ways that have the potential to empower and not to affront the victim. Every interaction has the potential to have a therapeutic outcome. The second CJS deficiency that emerges from these women's stories, is a failure to explore and understand that, even where a woman is exercising autonomy in ways that are not, objectively, congruent with attaining her capabilities, women may be best placed to know what will keep her safe in her particular circumstances. This means that CJ professionals should not dismiss, ignore or even deride a woman who appears to be exercising her agency in ways which do not mesh well with notions of one-size-fits-all 'rationality'.

[1142] Ibid 48- 49.

5 (i) Recognising Victimhood whilst Understanding Agency

Woman 2's abuse was both extensive and shocking. She described the slow crescendo of abuse that, at the start of the relationship, was infrequent but towards the end of the relationship became a daily occurrence. The behaviours were often triggered by what she described as 'binge drinking' and ranged from anger and physical beatings, kickings and woundings with knives - and on one occasion knocking her off a ladder (breaking her arm) - to what she described as 'tortuous' behaviour such as throwing objects at her while she slept, putting oil on stairs so that she slipped, smearing sheets with tomato sauce and mayonnaise and throwing boiling or freezing cold water over her in bed. This abuse is consistent with Johnson's 'intimate terrorism' typology of domestic violence which is defined by violent, highly controlling behaviour that is likely to become more frequent and severe over time.[1143] Overwhelmingly perpetrated by men, this undertaking to control one's partner is often supported by traditional attitudes towards women and role expectation and, for Woman 2, her partner appeared to 'rank high on measures of emotional dependency and jealousy'.[1144] She explained that, 'I didn't have any idea that what was happening was domestic abuse at the time'. She explained that though family and friends knew about police attendances at the home, they could not believe her husband would be capable of such behaviour because he always managed to be a 'charmer' around them.

At the beginning of her abusive relationship, Woman 2 was not someone likely to have identified her relationship with law as oppositional. However, as her abusive relationship progressed and the police were called out to assist in moments of crisis (she estimated 'well over' 50 police call outs during the course of her 12 year relationship terminating in 2011), her legal consciousness became more and more entrenched in an *against* law conception. It seems that the more the police and criminal justice system were becoming involved, the less desire she had to engage them and, indeed, the more she feared and resented their involvement.

Before examining particular events and recollections that contributed to Woman 2's evolving resistance to legal intervention, I want to recall the shortcomings of the victim/

[1143] Johnson, *A Typology of Domestic Violence* (n 50) 26.

[1144] Johnson distinguishes 'dependent intimate terrorists' (as in the case of Woman 2's perpetrator) and 'anti-social intimate terrorists' who are not emotionally obsessed with their partners but simply need to have things done their way. Ibid 32.

agent dichotomy, discussed in Chapter One, as they appear to have contributed to Woman 2's growing disillusionment with law's professed ability to serve. Laced throughout the account of Woman 2 (and, as I explore later, Woman 7), are deficiencies in the way the dualism functions through criminal justice agents' treatment of abused women.[1145] The dichotomy is overdrawn, with 'victims' being perceived as women who are 'harmed' and without strength due to a one-way exercise of power.[1146] The woman becomes defined solely through her victimhood. On the other hand, women acting proactively with agency are considered self-determining, competent individuals capable of operating in an atomistic way. The dichotomy therefore obscures the ways in which women can both be simultaneously subjected to domestic abuse (as a 'victim') and yet remain within the relationship practising acts of resistance (as 'agent'). When women do not immediately respond to criminal law's intrusion into their private life as grateful victims and recipients of state help, they must not be written off as lacking victimhood. Legal actors ought not consider them 'unreasonable' agents, unmeritorious of future state assistance. Recognising that we are autonomous in relational ways means accepting that intimate partner violence occurs complexly 'in the context of love, responsibility, work and obligation, commitment and uncertainty'.[1147] When women are functioning with both traits of victimhood and agency, the need to reconceive the liberal 'legal subject' arises so that the complexity of their situation can be reflected. The decision to stay within an abusive relationship should not therefore be considered incompetent, irrational or pathological, rather a decision made within her constrained and particular material, relational and emotional existence. Hirschmann has suggested that women can be considered to be making 'movements to create freedom within a context of oppression'.[1148]

What becomes important for criminal justice agents coming into contact with abused women is acknowledgement that both 'victimhood' and 'agency' can co-exist. Woman 2 presented a number of examples where police either failed to acknowledge her victimhood at all or acknowledged it, only to assume that her desire not to bring a

[1145] Two authors that draw out the problems of the dichotomy are Martha Mahoney, 'Victimization or Oppression? Women's Lives, Violence and Agency 'in Martha Fineman and Roxanne Mykitiuk (eds), *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (Routledge 1994) and Elizabeth Schneider, 'Feminism and the False Dichotomy of Victimization and Agency' (1993) 38 New York Law School Law Review 387.
[1146] Mahoney (n 1145) 62.
[1147] Ibid 60.
[1148] Hirschmann (n 1091) 59. See also Mahoney ibid.

prosecution meant that she was an atomistic agent not requiring a therapeutic response. Recalling the first police callout and the first time she had felt let down by police failure to recognise her vulnerability, Woman 2 considered they had done nothing to assist her, 'They didn't do a risk assessment. They didn't ask what was going on. It was just they were called to this incident. The incident was dealt with. And then they went away and left you'.

More than merely failing to acknowledge Woman 2's vulnerability, in 2008 police openly blamed her for an incident. Police handling on this occasion was typical, explained Woman 2, in that it lacked empathy, sensitivity and constructive handling of the situation. It occurred one night when her husband was drunk and hammering on the back door to be let in, making threats to hurt her. Woman 2 called police believing that the disturbance would prompt neighbours to call the police anyway. On arrival, having spoken to both parties, police suggested that the disturbance had been caused by her because she should have unlocked the door and let him into the property. They understood that he only wanted to collect some beer from the fridge and some clothes to take to a friend's. The police's solution was to tell the perpetrator to leave and not return until the morning:

> 'They let him out of the back gate and as they were walking out of the front door, he was already at the back door, kicking off, going absolutely mad. And I thought at that time - and I got really badly hurt that night - I remember thinking, what is the point in me phoning the police. What is the point? They came out and said it was *my* fault'.

We know that when women feel respected and heard by professionals who are expected to help them, women can feel more empowered.[1149] Trust, bonding and support assist in healing from trauma.[1150] Even when the abuse was becoming more regular, Woman 2 recounted that, 'I didn't think that what was happening was wrong. Because they [police] never said to me, "this is really bad and [you] need to do something". On two occasions a 'domestic abuse unit' had telephoned her the following day, but she felt that they were simply carrying out a tick box exercise and were audibly relieved when she told them that everything was 'fine'. The salutary lesson for criminal justice agents from Woman 2's deepening resistance to law - developed through repeated police and CPS contact- sits in

[1149] Linda Mills, *Insult to Injury: Re-thinking Our Responses to Intimate Abuse* (Princeton University Press 2003) 119- 120.
[1150] John Wilson, *Trauma, Transformation, and Healing: An Integrative Approach to Theory, Research and Post-Traumatic Therapy* (Brunner/ Mazel 1989) 212- 16 cited in Ibid 120.

contrast to the experience of Woman 5 who found the police's empathetic response pivotal in terms of her being able to recognise her own victimhood. Woman 2 developed an *against* the law positioning because on the one hand she did not recognise that she was being abused, and on the other, police interventions played no part in supporting her to identify that she was a victim of abuse.

Despite providing two witness statements towards the beginning of the relationship, no charges were ever brought due to insufficient evidence which further reinforced her understanding of her situation. Before 'no further action' was taken by police, the defendant was released on bail pending enquiries with conditions not to contact her, but his total disregard for bail conditions left her exposed to hugely exacerbated threats and physical violence as a result of her involving the CJS.[1151] On the third (and final) occasion she provided police with a statement, she quickly withdrew her support out of fear about what he might do but also because she felt that the prosecution would come to nothing in any event. She was never asked the reason why she was withdrawing her support.[1152] Unsurprisingly, after these initial experiences of supporting a prosecution, Woman 2 stated that on the next and subsequent occasions she thought, 'there is no way I am doing this… it doesn't do anything. And actually it makes him worse… nothing is going to happen to him and he gets let out and then it makes him really violent'. In this way, she manoeuvred within the constraints of her freedom 'to produce a slightly less bad outcome, an outcome that she dislike(d) a little less than the alternative on offer'.[1153]

Nonetheless, Woman 2 continued to resource the criminal justice system to the extent that she required it. In calling the police in emergencies but in never supporting a prosecution, she simultaneously assured her immediate safety, diminished the risk of exacerbating her partner's violence whilst fulfilling her inclination to maintain the relationship. On this basis her agency, within the confines of her situation, becomes clear. Woman 2 was able to use the police as a 'power resource', but in acknowledging the costs of continued prosecution to her, her only way to assert self-determination and control was

[1151] This speaks to her *pathogenic* vulnerability- discussed in Chapter Two- that is vulnerability that results when interventions intended to assist situational vulnerability has the counter effect of augmenting it. Mackenzie, Rogers and Dodds (n 467) 9.
[1152] This was in 2003.
[1153] Hirschmann (n 1091) 59.

through non-cooperation.[1154] The net benefit of prosecution was not worth the cost.[1155] Woman 2's objective victimhood should not therefore preclude acknowledgement of her agency or any dismissal that she did not act with 'reason'.[1156] Whilst the sort of autonomy she sought to exercise might fail to meet her entitlement to the core capability of bodily integrity and, objectively, living a life worthy of human dignity,[1157] this only serves to highlight how police treatment of her was plainly inadequate. Only when the central capabilities are attained and, objectively, one has dignity, can society assert that it has discharged its responsibility. As discussed above and in Chapter 2, police were in a unique position to respond to Woman 2's real needs and entitlements and ought to have been reflective about how their behaviour impacted on her internal capabilities; her mental health and future functioning. The police's reflectivity should have acknowledged both her vulnerability and yet also the difficulties that contributed to her predicament due to considerations to do with relational autonomy (her intimate connection to her partner, him being her child's father, her housing situation and her identity as part of the community in which they lived together as a couple).

This thesis has sought to draw out how the benefits of prosecution and achieving a criminal conviction cannot always be presumed. Woman 2 for instance found that criminal justice involvement provoked and escalated her partner's violence which was exacerbated by his indifference to the CJS and its sanctions. She felt that her perpetrator's familiarity with the CJS meant that he knew what to say in police interview and how to manipulate the situation to his advantage. Any threat of sanctions did not present a deterrent as, 'He's not scared of police. He's not scared of being interviewed. He's not scared of going to court. He's not scared of any of that'. Her story highlights the difficulty of assuming that if only a conviction could be achieved through the cajoling of the witness to give evidence, a net benefit for the victim will be achieved. In fact, poor criminal justice interventions can diminish a woman's safety in tangible terms and increase her vulnerability.

[1154] David Ford, 'Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships' (1991) 25(2) Law and Society Review 313, 319-320.
[1155] Many *against* the law expressed that they felt invocation of the law was 'not worth it' in Ewick and Silbey, *The Common Place of Law* (n 114) 197.
[1156] The inadequacy of the victim/ agent split was discussed in Chapter One.
[1157] Recall from Chapter Two that Martha Nussbaum sets out the core capabilities in Nussbaum, *Women and Human Development* (n 184).

Woman 2's ignorance of her situation and the danger she was in appears to have persisted in part due to police failure to recognise that her agency did not preclude her victimhood. Mahoney has also explained that '[a] woman's belief in herself as an actor in her own life can prevent her from identifying her experiences as similar to that of other women who experience oppression'.[1158] In fact, the following year, Woman 2's perpetrator received a custodial sentence for Grievous Bodily Harm to her by way of a victimless prosecution (the serious photographed injuries and state of the house on that occasion provided the requisite corroborative evidence) yet the relationship continued on his release. It was only after a visit from a health visitor and social services in which they spoke to her about the situation and the unacceptability of bringing up a child in a violent home did Woman 2 seek advice from the one stop shop with the intention of obtaining strategies for protecting her son.[1159] Finally, after speaking with professionals there she recognised her victimhood and chose to terminate the relationship and move out of the family home. She described her contact with the one stop shop becoming, 'Much more than I thought it would be'. This was clearly because professionals were available, able and willing to listen, support and give advice about her relationship. This appears to have been the first time that someone spoke with Woman 2 effectively about her situation with sensitive and practical suggestions about amelioration. Following their separation, he continued to harass her but, despite now having support from the domestic abuse charity, she remained resolute in her *against* the law positioning, that there would be no CJ involvement because no good would come of it.

Woman 2 was keen to impress that she felt she had been part of the reason that the CJS had achieved little for her (aside from the immediate emergency protection that sparked her frequent calls to the police) as she had failed to support prosecutions and to tell them details of what was happening. However, she was clear that although she didn't blame anyone and that it was always her decision to stay, 'I think there were loads of opportunities for somebody to recognise that something wasn't right, really with the relationship… not one of them spoke to me about it'. The police appear to have disregarded her victimhood and preferred to conceive her as an independently operating agent who refused to accept

[1158] Mahoney (n 1145) 62.

[1159] On reflection Woman 2 commented that her health visitor encouraged her to go to the one-stop-shop under the auspices of helping her son but with the clear hope she would obtain support for herself.

criminal justice intervention. She described how she felt that the police were not on her side, 'I just had this real fear of them and I didn't want to talk to them about anything at all. I knew that he was good at making me look [a liar]… no evidence and no witnesses… and then they wouldn't believe me anymore. I think that was the fear'. Police responses appear to have been guided by her reputation as someone who did not support the prosecution (her 'agency'). A therapeutic response, which did not 'emphasise Woman 2's agency to the point of implicitly holding [her] responsible for [her] victimisation,[1160] could have shifted both her legal consciousness positioning and self-awareness about her vulnerability.

Unlike Woman 2, Woman 7's resistance to the law was well developed prior to her three abusive marriages. Her presentation as someone *against* the law appears to have meant that when in contact with the police, they consistently failed to acknowledge her victimhood. Growing up in a 'traveller'[1161] family and community where, she reported, intimate partner abuse was pervasive, Woman 7 understood that as soon as police left, 'You are going to get the hiding you were going to get anyway, plus another one for phoning police, because that's not what you do'. Throughout her interview, Woman 7 repeatedly expressed her relationship with police and the criminal justice system in uncompromisingly hostile terms.[1162] What becomes clear from Woman 7's story, however, is how, in the absence of CJS recognition of her victimhood, due to her presentation as a strong woman exercising agency, she learned to navigate her safety in ways that did not depend on 'superman police' (her ironic and therefore denigrating description). Just as Ewick and Silbey describe in their *against* the law schema, Woman 7's resistance to the law manifested through her seeking to avoid it. For her, law was a product of arbitrary power and it was therefore unsafe to invoke.[1163] Consequently, Woman 7 was typical of those *against* the law in that she deployed self-help strategies and used her own initiative to keep herself safe. Her resistance also clearly 'inhere[d] in the telling of the story and passing on the message that legality can be opposed'[1164] and even spilled into recounting how she was able to create her own remedies and, on occasion, exact revenge for her protection.

[1160] Hirschmann (n 1091) 59.
[1161] This was how Woman 7 self-identified her childhood community.
[1162] Woman 7 described, 'They [the police] weren't my friend.' 'I didn't really expect the police to do anything for me.' 'You don't assume that they [police] are going to be helpful.'
[1163] Ewick and Silbey, *The Common Place of Law* (n 114) 192.
[1164] Ibid 49.

In contrast to Woman 2, Woman 7's agency manifested in a failure to call on the CJS for assistance. Being married as a teenager to a man who sold her services as a sex-worker, her 'killer pimp'[1165] would regularly deliver 'serious beatings' for the purposes of controlling her and keeping her 'in line'. Woman 7 lamented that, during her time as a prostitute in the mid-1980s she did not present as an archetypal 'victim' and that consequently, 'a couple of times I can remember getting arrested and I was visibly bruised. Nobody asked me about the bruises. They were charging me for soliciting… but also showing signs of, like, physical abuse. There was quite a lot of opportunity there for people to intervene and nothing was done.' Throughout the interview she repeatedly reflected that '[police] were not my friends… they weren't helping me'. She reflected that she was not received sympathetically as a victim of intimate partner abuse because of the nature of the work she was doing and the way she presented. It was only when her then husband (and pimp) was imprisoned for a serious assault on a male in a public place (and this irony was not lost on Woman 7) that she 'skipped' and was able to leave.

The importance of Woman 7's story, is not just her reflections about her victimhood, police failure to recognise it and their antipathy towards her as a result of her status as a low-level offender. It reminds us that there is no one way to present as 'vulnerable'. Woman 7 had complex and intersecting identities. The rest of her story, relating to her second and third husbands, is also key because it overtly highlights that criminal justice intervention will not always be the most appropriate way to proceed for victims of intimate partner abuse. Moreover, just because a woman does not engage the CJS, it does not mean that she is not exercising agency in other ways. On leaving her second husband, Woman 7's decision not to involve the police following his serious assault of her, was not solely due to distrust of police and her lack of belief in the effectiveness of criminal justice outcomes. Nor was it just her sense that she would not be believed due to her previous convictions and her failure to present as a vulnerable and compliant victim. It was also motivated by an astute strategy. Having 're-invented' herself, putting her previous convictions behind her, she did not want to bring her new family to the attention of children's social services or provoke her partner in such a way that he would withdraw the 'decent' maintenance they had agreed in advance.

[1165] A term Woman 7 used to describe her then husband.

For very different reasons, involving the CJS during her third marriage would also have been deleterious. Woman 7's third husband was an exceptionally violent man who operated within criminal networks. His friends were similarly so. When he started to exert violence towards her at moments of anger, Woman 7 immediately knew that she would not continue the relationship. When the police became involved following a public display of anger, she was told that there could be no prosecution of him without her support. She reflected, 'In a way, them not prosecuting—it's kind of unforgiveable [there had been witnesses] but it's worked out better for me. In a way, them not prosecuting [P] made me realise how vulnerable I was' and this motivated her to exercise 'damage limitation' and take steps to protect herself.

Whilst he was recalled to prison on licence (prompted by police involvement following the public assault) Woman 7 recorded her perpetrator threatening her on the telephone in order to serve a civil injunction on him (which she reflected offered her *some* protection). Furthermore, she began to spread rumours amongst his fraternity so that they began to lose sympathy with him (thereby limiting the likelihood they would take action against her on his behalf). She reported his stashing of illegal items at her home, via her probation officer, and was relieved that when police attended and 'kicked the door in' this provided evidence that she was not complicit in reporting to police (this was her hope when she reported indirectly to her probation worker). When a police-issued panic alarm was retrieved only a week after the assault, she installed a private security alarm which would prompt immediate security staff attendance. Furthermore, 'Not long after that, I went into recovery. And I started [a new career]. On some level, I made the decision that I was never going to let myself be vulnerable again. And now I am passionate about it.' The consequences of a prosecution, even if victimless, would have been to put her safety at very real risk due to the threat of retribution by either 'P' or his network. The difficulty for a prosecutor to appreciate the complexity of Woman 7's situation is obvious.

6 Discussion: Implications for Feminists and Prosecutors

Recalling the CPS 'working practice' of routinely preferring summons in domestic abuse cases, with the intention of meeting overriding policy objectives of taking violence

against women 'seriously', [1166] and further, how 'success' equates to 'bringing more perpetrators to justice',[1167] this chapter has endeavoured to sensitively appraise what women experience and what they need. Consequently, these policy objectives might now appear crude 'headlines' in what requires careful handling and nuance. Leaving sweeping policy objectives aside, this chapter draws out how in fact the details of CPS domestic abuse guidance (which in fact mirrors 'survivor-defined'[1168] approaches that weigh up decisions on a case-by-case basis) is well founded. The guidance urges prosecutors to 'consider the impact on the complainant if they are to be compelled, [as] compelling attendance at court may cause the complainant further distress'.[1169] The chapter has not suggested that the current police presumption to arrest and CPS policy to prosecute are not the correct starting points but what is most clearly exposed by the narratives in this chapter is that criminal prosecution and subsequent summons will not always be the most appropriate way to proceed for women due to autonomy enhancing and/ or safety considerations.

The accounts presented here do not present any unified narrative of what course of action is in the best interest of women who have experienced domestic abuse. Rather, they highlight the need for prosecutorial caution. For a woman situated *before* the law, interactions with the criminal justice system must emphasise her importance and centrality. The danger of imposing a summons to attend court for a woman positioned *before* the law is that it serves to confirm her reservations that the law orbits without sufficient regard for the individuals concerned. The risk of alienation is clear as is the potential for the state to replace the coercive strategies of the abuser. For women positioned *with* the law, expectations must be set and women encouraged to conceive law as only part of the journey to living abuse free. If the law disappoints it may only serve to make her feel that she has lost the 'game'. A woman *with* the law is least likely to withdraw her support for the prosecution but if she does, therapeutic explorations of her reasons for withdrawal may assist prosecutors in deciding whether to proceed is what she wants. Again, TJ interactions are more likely to foster her trust in being able to call upon the CJS in future emergencies. For a woman *against* the law, criminal justice agents are encouraged to recognise her

[1166] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).
[1167] Crown Prosecution Service, 'Violence Against Women and Girls' Report 2016-17' (2017) available at <https://www.cps.gov.uk/publications/docs/cps-vawg-report-2017.pdf> accessed 22 January 2018.
[1168] Nichols (n 75) 2114.
[1169] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).

victimhood and speak with her appropriately. But, particularly for women *against* the law, recognising that the woman might be best placed to navigate her future safety and consideration of her agency is necessary before deciding whether summons would best serve her.

If a key advantage of a criminal justice response centres around the availability of individuals trained to recognise a woman's specific needs, then, as Smart questions, need she rely on law at all?[1170] It is accepted that when women feel heard and visible during the court process they can enjoy emancipatory benefits; however, it is also contended here that 'life changing effects are often little to do with the result of a prosecution'.[1171] Rather, as Heather Douglas suggests, the benefit of a criminal justice response might be that women gain access and referral to feminist agencies and networks. Such organisations, she posits, have the potential to construct an alternative reality to the one presented by law (which can serve and support violent men's narratives whilst undermining women's statements and the significance of the harm caused) and assist women to leave violent men. If the result of going to law sees women going to feminism in the form of being able to access support organisations such as the three charities used by women in this project then, Douglas persuasively contends, that is the law's value.

Current legal approaches to prosecuting domestic abuse have undergone significant change and improvement following the second-wave feminist activism described in Chapter One, and this thesis does not deny the deterrent value of criminal law and its norm producing potential. However, this chapter has drawn out some of the problems and even dangers that might still be encountered by women when engaging the criminal justice system. These empirical insights accord with feminist academics who have drawn attention to how male perpetrators might be better at navigating the 'masculine requirements of law'[1172] and legal process; or that involving the CJS might 'create distress, disadvantages and disillusionment for women that overrides hope or safety that might be gained'.[1173] Unsympathetic responses, dashed legitimate expectations, inconsequential sentences, orders that are ignored and abuse that continues or exacerbates are all reasons to pay heed

[1170] Smart, 'Reflection' (n 1094) 160.
[1171] Heather Douglas, 'Battered Women's Experience of the Criminal Justice System: Decentring Law' (2012) Feminist Legal Studies, 121, 132.
[1172] Smart, 'Reflection' (n 1094) 160.
[1173] Douglas (n 1171) 121.

to Smart's assessment that law's self-proclaimed 'truths' may not accord with women's experience and that sometimes victories may not be worth the price paid. Nonetheless, the chapter has also shown that, despite some obvious shortcomings of a criminal justice response, when a woman considers her voice to be heard, her narrative to be truthful and her centrality to be key (in line with TJ), emancipatory progress can be made for her.[1174]

Conclusion

Placing 'women's experience, and the perspective from within that experience, at the center [sic]'[1175] is arguably the ambition of feminist legal study. Undertaking this endeavour, the empirical work of this chapter has exposed the absence of a unified account of how women think about criminal law and how they expect it to act on their behalf. Nonetheless, by identifying women's broad positionalities in relation to law (legal consciousness), layers of commonality surface and implicitly call attention. Within the narratives of the individual or groups of individuals, Schneider urges that the 'general' is not forgotten and that the 'particular' be situated in the 'general'. In doing this, 'the particular illuminates the general, and the general provides context and depth to our understanding of the particular,'[1176] meaning that the seemingly individual experiences of women's violence are always situated and operating as an aspect of women's subordinate position in society. Moreover, the inadequacy of law to discursively construct feminist knowledge and subjects is underlined.[1177] This chapter has sought to outline how legal consciousness methodology has parallels with feminist legal scholarship which both effectively unsettle law's declaratory truths and reveal law as constitutive and representative of unequal societal gender divisions. More narrowly however, from a prosecutorial perspective, the presumption to arrest and prosecute domestic abuse perpetrators would appear to address the 'general' (violence against women is wrong). Moreover, CPS policy that urges weighing up the benefit

[1174] See also Lauren Bennett Cattaneo and Lisa Goodman, 'Through the Lens of Therapeutic Jurisprudence: The Relationship between Empowerment in the Court System and Well-being for Intimate Partner Violence Victims' (2010) 25(3) Journal of Interpersonal Violence 481; Carol Smart, 'Law's Truth/Women's Experience' in Regina Graycar (ed), *Dissenting Opinions: Feminist Explorations in Law and Society* (Allen and Unwin 1990) 1–20; and Heather Douglas, 'Battered Women's Experience of the Criminal Justice System: Decentring Law' (2012) Feminist Legal Studies 121.
[1175] Catherine Mackinnon, *Towards A Feminist Theory of the State* (Harvard University Press 1989) 38.
[1176] Schneider, *Battered Women and Feminist Lawmaking* (n 94) 5.
[1177] Hunter, 'Contesting the Dominant Paradigm' (n 399) 25; and Smart, *Feminism and the Power of Law* (n 189) 88.

of summons on a case-by-case basis, provided it translates into working practice, emulates sensitivity to individual circumstances – the 'particular'.

Through this exploration of women's legal consciousness, aspects of the criminal justice system that remain damaging or seem futile for female victims of domestic abuse have been revealed. Through empirical narrative, the chapter has shown that law may not prove to be a site of refuge or resolution for women who have experienced domestic abuse. The chapter therefore challenges Madden-Dempsey's philosophical appraisal that effective prosecutions of domestic violence offences would be a sound feminist strategy[1178] and responds to Hunter's critique that Madden-Dempsey's abstract work fails to consider lives lived.[1179] As such, this chapter adheres to 'a more modern version [of feminist jurisprudence], taking the form of a complex, tentative, questioning engagement with law as a continuous process'.[1180] Smart's post-modern feminist project of de-centring law was never intended to mean that feminists and women should ignore law or write it off.[1181] Rather, instead of 'colluding with law's overinflated view of itself' Smart encouraged feminists to concentrate on the law in practice.[1182] From this, she encouraged, a valuable 'discursive struggle' would ensue. The conclusion of this thesis responds to her call.

[1178] Michelle Madden-Dempsey, 'Toward a Feminist State: What Does 'Effective' Prosecution of Domestic Violence Mean?' (2007) 70(6) The Modern Law Review 908.
[1179] Rosemary Hunter, 'Michelle Madden Dempsey: Prosecuting Domestic Violence: A Philosophical Analysis' (2010) 18(2) Feminist Legal Studies 195.
[1180] Smart, 'Reflection' (n 1094) 164.
[1181] Ibid 162.
[1182] Smart, *Feminism and the Power of Law* (n 189) 25.

CONCLUSION

Introduction

From the outset, this thesis was inspired by questions I had about the Crown Prosecution Service's approach to intimate partner abuse. At the time I joined the service (2007), it was clear that every effort was being made to make good on past reluctance by criminal justice agents to intervene in intimate partner abuse. Even at that time, it was apparent that a significant and meaningful shift was taking place for the service and I felt positive about being part of a concerted strategy to reverse the practice of automatic discontinuance on request. I felt this because, as a defence solicitor, I too had found myself advising defendants to simply enter not guilty pleas and to wait and see whether the victim 'turned up' for trial. The case would inevitably be dropped if she failed to attend. However, as the new policy began to play out, as characterised by prosecutors' daily working practices, my confidence that I was always part of progressive and affirmative action on behalf of victims was regularly being challenged. Faced with a concerted management commitment to demonstrate the new priority, I frequently found myself concerned that pursuing the prosecution in the face of victim requests to have the matter terminated should not always be considered preferable. Moreover, I found that where my own assessment was that a case should be discontinued, my view was invariably being overridden by my line managers who preferred to summons. I began to question the reason for these occasions of divergence between myself and my managers and wanted to understand what drivers were steering the service's ambitions. I also wanted to know how prosecutorial decision-making was affecting the women whose lives it touched and if the priority to convict was always meeting her needs and interests.

Thus, the following motivating questions arose: what priorities were driving the CPS approach? More specifically, how might the CPS 'working practice' of tenacious prosecutions have emerged, specifically in the context of two key discourses in the modern violence against women agenda: 'feminism' and 'neoliberalism'? Secondly, what are the consequences for women from such commitment to criminalisation and convictions? This thesis has endeavoured to probe and answer these research questions using socio-legal theory and empirical methodology.

I summarise the findings here: Chapter One traced how the women's movement and feminist explanations of the prevalence of violence against women directly and implicitly demanded state responsiveness. The state's response has been to treat domestic abuse primarily as crime. In so doing, I argued that, firstly, the affirmative qualities of the private sphere are in danger of being overlooked and, secondly, that female victims came to be measured against the archetypal legal subject (initially being dismissed as irrational and non-credible when they did not meet the legal subject's standard, and more latterly by being compared against the legal subject to assess how vulnerable and in need of [state] protection she is). Chapter Two outlined an alternative legal subject in what, for ease, might be referred to as conceiving the 'lived subject' (arising from vulnerability theory, relational autonomy, the capabilities approach and therapeutic jurisprudence). I suggested that this reconceived legal subject might better guide prosecutorial decision making in domestic abuse cases. Chapter Three considered how neoliberal discourses and strategies, working in collaboration with feminism, appear to have augmented state responsiveness to DA in criminal justice terms, foreclosing alternative ways of thinking about women who have experienced domestic abuse such as that envisaged in Chapter Two. Chapter Four then described, through qualitative analysis, the ways in which neoliberalism and 'radical' feminism has contributed to the priority paid to domestic abuse prosecutions in practice. Feminists see their structural analysis of gender inequality grounding government VAW policy, neoliberal crime control priorities justify holding perpetrators to account but it was the quasi-neoliberal practice of NPM that most significantly seemed to impact prosecutors' 'working practice'. Obtaining convictions demonstrated the policy objective of taking DA seriously whilst evidencing the effectiveness of the system. At the time of writing, the prosecutorial 'working practice' is characterised as 'tenacious', specifically due to the habitual use of summonsing reluctant domestic abuse victims to trial. Finally, Chapter Five drew attention to women's myriad presentations and consequent expectations of the law, cautioning prosecutors that criminal convictions will not always serve female victims of domestic abuse and may even negatively impact her safety. The advantages that Chapter Two's proposed 'lived subject' could offer for theoretically informed prosecutorial praxis were drawn out.

Section One of this Conclusion outlines the broad findings of the case study, which of themselves contribute to existing literature pertaining to the prosecution of domestic abuse

in England and Wales. Section Two then steps back from the problematic to consider the thesis' wider contribution. This relates to the thorny question that has frequently divided feminists; to what extent might feminism's collaboration with the state have produced not only notable gains for abused women, but also losses? Finally, Section Three considers the thesis' contribution to the feminist legal project and its part in the discursive unsettling of legal positivism's account of the power of law to effect 'just' and positive outcomes. Having considered the thesis' contribution to knowledge in the preceding three sections, I finish by proposing the direction of further research.

1 Findings from the Case Study: Feminist and Neoliberal Influences in CPS Domestic Abuse Policy and 'Working Practice'

This thesis has made plain the CPS policy commitment to prosecuting intimate partner abuse. As part of the wider government strategy to end violence against women and girls, the CPS domestic abuse policy openly seeks 'justice' for victims and prosecutions are invariably considered to be in the 'public interest'. When women are no longer supportive of the prosecution, prosecutors are encouraged to assess whether special measures might support her in giving evidence. Failing that, prosecutors are encouraged to proceed with victimless prosecutions where possible, or to give full consideration to 'the impact on the complainant's safety and wellbeing'[1183] before deciding to issue a summons as a last resort. Discontinuance should only take place when the complainant's account was the '**only** evidence available, and a summons would not be appropriate'.[1184]

The presumption to prosecute described here forms part of the UK government's appetite for dealing with intimate partner abuse through criminalisation. Chapter One explored how the approach responds to a distinctly feminist account of the causes of domestic abuse as 'patriarchal force', [1185] as described in the CPS VAW strategy. This is the 'dominance' or 'radical' feminist account that understands that male privilege in the public sphere translates into private family dynamics where the domination of women by men manifests in violence. It thus mirrors ('radical' feminist) Michelle Madden-Dempsey's assessment of the role and value of criminal prosecutions. Specifically, that prosecutorial action has consequential and intrinsic (or expressive/ symbolic) value in condemning social

[1183] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).
[1184] Original emphasis in Ibid.
[1185] Houston (n 34) 217.

norms that permit intimate partner abuse.[1186] Indeed the CPS affirms the United Nations special rapporteur on violence against women report which details that '[f]or a state action to realize… intrinsic value [of prosecutions], it must not be a one-off instance of condemnation, but in fact it must systematically engage with domestic violence and condemn it'.[1187] Thus, from Madden-Dempsey's 'radical' feminist perspective, the criminal law offers the potential to challenge patriarchal structures by consistently denouncing societal attitudes and norms that support them.

'Tenacious' prosecutions also reflect and reinforce second-wave feminist analysis that domestic abuse is not a private matter but a public crime (a crime against us all) and should be condemned through the courts accordingly. Current policy addresses the past charge that the CJS suffered 'institutional indifference'[1188] to matters of intimate partner abuse in the private sphere. The current commitment is then, ostensibly, a victory for the feminist and community groups that took part in the CPS policy consultation process and who sought strong state condemnation of the crime.

From a neoliberal perspective, as explored in Chapter Three, the presumption accords with an understanding of society as individualistic in which citizens are increasingly held responsible for their successes, failures and criminal transgressions because they have been afforded the free market conditions to prosper. In this context, bringing the perpetrators of intimate partner abuse to justice sits within the overall expansion and 'hardening of the criminal law' witnessed in recent neoliberal decades.[1189] The traditional redistributive efforts of a leftist feminist movement might not once have been welcomed by governments of the right. However, the issue of gender-based violence holds appeal to neoliberal criminological values of freedom, individualism and responsibilisation through its championing of victims' freedom (from abuse) whilst holding perpetrators individually responsible. VAW feminists have thus seen their ambition of ending domestic abuse addressed through a melding with neoliberal goals that seek to obtain social control of offenders through the tool of criminalisation.

[1186] Madden-Dempsey, *Prosecuting Domestic Violence* (n 52) 60.
[1187] Yakin Erturk, '15 Years of the United Nations Special Rapporteur on Violence Against Women (1994- 2009)- A Critical Review' (United Nations 2009) 27 cited in Crown Prosecution Service, 'Violence Against Women and Girls' Report' (10th edn, CPS 2015-16).
[1188] Dobash and Dobash, 'Love, Honour and Obey'(n 239) 410.
[1189] Bell (n 163) 1.

The neoliberal approach to intimate partner abuse illustrates the neoliberal paradox; in its desire to roll back state presence in people's lives in preference for market ordering, the state simultaneously manoeuvres to create the conditions of freedom through an enhanced state presence in the criminal justice field. Further motivated by harm risk prevention, intimate partner abusers are 'managed' through the criminal law in preference to more rehabilitative models of justice typically associated with social democratic governments. Genuine preventative measures, through education, are also side-lined. Moreover, the approach comes at the expense of state provision for female victims (where solidaristic notions of reciprocity between communities, individuals and the state might see greater investment in women's shelters, refuges and support services). If neoliberalism is the antidote to state welfarism, feminism's alliance with the neoliberal state sees its discourses shaped and absorbed into that political hegemony.

The presumption to prosecute is mitigated when a woman retracts her support, it is then that prosecutors must sensitively weigh up the safety and well-being costs of proceeding. They must be mindful not to engage 'in any conduct which supports the position that the complainant is complicit in perpetrating the abuse they are suffering',[1190] meaning that the financial, social and physical abuse must not be reinforced by discontinuance and that undue pressure from the perpetrator upon the victim ought not dissuade prosecution. Such pressure cannot be condoned. Men must not be able to manipulate the prosecution outcome through threats or intimidation of the victim. However, in practice prosecutors know that a woman's safety cannot be assured through prosecution. Alternative accommodation cannot be offered to victims nor, as Chapter Five showed, can prosecutors ensure perpetrators adhere to bail conditions or orders not to contact her. Until sufficient safeguarding can be assured either within or outside the CJS, then a woman's request to terminate proceedings needs to be taken very seriously by prosecutors on a case-by-case basis. This is the unsatisfactory reality prosecutors find themselves in.

If the overall presumption to prosecute addresses the 'radical' feminist thesis about the causes of male intimate partner violence and the part criminal justice can play in addressing that, then the policy at the point a woman withdraws appears to mirror post-

[1190] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).

modern feminism's recognition of the diversity and difference between women's experiences. It is hard to see how the CPS policy, on paper, could better try and meet the demands of both radical and post-modern feminists alike. The policy also appears to satisfy Schneider's call to recognise that the particular dimensions of intimate partner abuse, unique to individual women, are situated within the general picture of women's subordination in society and the larger problem of societal violence.[1191] This policy is, I suggest, a testament to the careful consultation processes that the CPS undertakes with affected groups.

Nonetheless, Chapter Four uncovered how a sample of nine prosecutors in South East England are deploying the policy day to day. The analysis revealed a tendency for prosecutors to rely on summons and suggested that the reasons for this were, often, rooted in New Public Managerial demands, a technique, I argued, of the neoliberal state (not least as a means of effecting the current government strategy of austerity). My work supports the contention that managerialism can have the effect of producing routinised decision-making within the confines of acceptable institutional objectives. More specifically, the research supports Garland's assertion that the effect of 'performance indicators and management measures [has been the narrowing of] professional discretion [within] tightly regulated working practice'.[1192] Whilst the targeting of resources into proactive domestic abuse prosecutions appears to run counter to the money saving imperatives of managerialism, in fact it supports the contention that managerialism in criminal justice strategically focusses resources onto key crime 'hotspots' in the interests of long-term cost savings.[1193] This allies with neoliberalism's confidence in penal responses as a means of crime control.[1194]

There are of course limits to Chapter Four's empirical findings in terms of the generalisability of the prosecutor sample. Despite the region in question being typical, geographically, of many CPS areas (with rural areas and urban and coastal conurbations) and the CPS organisational structure being representative of the institution as a whole, caution must be exercised in suggesting the potential for national generalisability of the primary research. I am mindful in particular of the sample's small scale and the possibility that the 'working practice' identified in the sample might have evolved within local offices

[1191] Schneider, *Battered Women and Feminist Lawmaking* (n 94) 59.
[1192] Garland, *The Culture of Control* (n 111) 18.
[1193] Ibid 19.
[1194] As per Packer's 'crime control' model in Packer (n 518) 1.

and subsequently re-enforced between proximate colleagues. Given the limitations of the sample due to its size and geographic confines, the value of the work is not to assert a conclusive state of affairs or definitive 'working practice'. Rather, as the sample reveals an area tendency for prosecutors in 2017 to rely on summons, its contribution is to stimulate and animate CPS institutional reflection on one hand and to contribute to literature that explores neoliberal and managerial influences on professional decision-making on the other. Moreover, the prosecutorial failure to speak about intimate partner abuse as gendered crime, uncovered in Chapter Four, also serves as a salutary reminder about the possible limitations of feminists working with the (neoliberal) state as I now discuss.

2 Feminism's Collaboration with the Neoliberal State: Gains and Losses

Feminists have long been divided over the extent to which the state should be called upon for ameliorations. The thesis' case study illustrates why. On the one hand feminists have successfully contributed to a policy that is drafted in terms that denounce male violence against women and hold perpetrators to account. On the other hand, clear efforts to respect the *individual* circumstances of women may not have played out in 'working practice' as intended in the policy. This highlights the dangers that Halley and others refer to in their analysis of 'governance feminism'. They refer to governmentality in the Foucauldian sense, rightly recognising that governmentality is not simply a top-down apparatus but a rich complex of micro-powers or procedures of government. Even the carceral state relies on professionals to apply and interpret central policy.[1195] These criminal justice professionals, as my thesis shows, may be indifferent or oblivious to feminist ideals.

Feminists might have been able to 'walk the halls of power' by influencing and guiding policy,[1196] but if professionals in the corridors of practice are blind to tackling IPA as gendered crime (and not simply as 'serious' crime) then feminists' work is not done. A project such as mine *could* then support Halley's call to 'defitishize [sic] the state as the sole

[1195] Halley, Kotiswaran, Rebouché and Shamir (n 166) 5.

[1196] Here I am referring to the access to government consultations feminist and women's groups have as both 'experts' and members of the public. For example, the government has actively consulted in the following areas: victim experience, the definition of forced marriage, local health services for victims, policing, definition of stalking in the Protection from Harassment Act 1996, best methods of communication and support for victims, Clare's Law and definitions of domestic abuse to include younger victims. See Her Majesty's Government, 'Call to End Violence Against Women and Girls: Taking Action- The Next Chapter' (HMSO 2012) available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97901/action-plan-new-chapter.pdf> accessed 12 June 2018.

source of governmental power'.[1197] However, for the purposes of this thesis, I do not suggest taking this to Halley's conclusion which is to prefer 'efforts to resist taking the state on its own terms'.[1198] Instead, if the result of feminist influence at the upper echelons of government power (exemplified by feminism's presence in the VAWG strategy or CPS domestic abuse policy) is feminist complacency that their goals have been realised, the challenge for contemporary feminists, working on project's such as mine, is to remain vigilant to the ways that governance is deployed by, inter alia, criminal justice professionals. Moreover, as Munro urges, feminists need to remain attentive to the ongoing implications for individual women; their agency and safety.[1199]

When gendered violence becomes treated primarily as crime, Chapter Four supports the argument that it is swept up in and gender-neutralised by the routine work of criminal justice.[1200] Even the ready claim in CPS policy that domestic abuse is a gendered crime- recognising the prevalence of male perpetrators and female victims- is followed swiftly by urging recognition that men can also be victims.[1201] This is evidence that supports Wykes and Welsh's assertion that the criminal law speaks in terms of ungendered victims and thus, 'even as the state takes on gendered violence, it has done so in a manner that has failed to see the violence as gendered'.[1202] The practical effect, for individual women, of channelling complaints through the police and prosecution process is that what becomes prioritised is not women's immediate or ongoing protection (such as through the extended provision of shelters and refuges) but pro-prosecution initiatives that prioritise criminal justice targets, such as conviction rates and expeditious processing of cases. My work is another example of this playing out. Crown prosecutors in my sample failed to acknowledge gender inequality as either the cause of domestic abuse or a reason why particular attention needs to be paid when routinised decision-making that disproportionally affects women takes hold. My work also reminds us that any victory feminists might claim for the apparent emancipatory turn towards survivor centredness, needs to ask why that should have resulted in a turn to criminalisation at the expense of community-based support.[1203]

[1197] Halley, Kotiswaran, Rebouché and Shamir (n 166) 4.
[1198] Ibid 4.
[1199] Munro, 'Violence Against Women, 'Victimhood' and the (Neo)Liberal State' (n 10) 244.
[1200] Ballinger (n 776) 16.
[1201] Crown Prosecution Service, 'Domestic Abuse Guidelines for Prosecutors' (n 8).
[1202] Maggie Wykes and Kirsty Welsh, *Violence, Gender and Justice* (Sage 2009) 86.
[1203] Kim (n 102) 1276.

The danger for feminists working with the (neoliberal) state is that the union garners legitimacy for an ideology that prefers criminalisation over welfare solutions. By including 'the opposition', neoliberals are strategically astute; it acquires approval and consequential authority to proceed with their project of social control and management of rationally choosing and responsible offenders. Feminist state 'entryism'[1204] has marked a turn away from economic and systemic redistributive resolutions towards the management of social problems via crime control.[1205] Perpetrators are considered individuals that have failed to self-monitor or who have failed to conduct themselves in responsible ways. The pursuit of responsibilising (ungendered) individuals who have caused harm by bringing them to justice becomes the legitimate and focussed target, irrespective of the disproportionate impact on women's lives. By including the opposition, the effect then is a discursive co-optation between feminism and neoliberalism with the effect of diluting further feminist efforts to improve women's structural disadvantage. By including the opposition, fighting VAW becomes couched in neoliberal rhetoric as the following Home Office quote illustrates:

> 'Violence against women and girls (VAWG) are serious crimes. These crimes have a huge impact on our economy, health services, and the criminal justice system. Protecting women and girls from violence, and supporting victims and survivors of sexual violence, remains a priority of this government.'[1206]

The integration of neoliberal rationales and logics into the VAW movement here is evident. Perpetuation of VAW represents and risks financial losses and puts additional burdens on state institutions. The pledge to protect women from violence appears to derive from economic imperative and is illustrative of the 'interweaving of feminist ideas into rationalities and technologies of neoliberal governmentality'.[1207] If the priority is to protect and support women from abuse, the recent erosion of refuge funding[1208] (a service

[1204] This describes the feminist decision to join the state in Janet Halley et al, *Governance Feminism* (University of Minnesota Press 2018) 62.
[1205] Nancy Fraser, 'Feminism, Capitalism, and the Cunning of History' (2012) HAL 2- 4.
[1206] Home Office, 'Policy: Violence Against Women and Girls' available at <https://www.gov.uk/government/policies/violence-against-women-and-girls> accessed 4 May 2018.
[1207] Elizabeth Prugl, 'Neoliberalising Feminism' (2015) 20(4) New Political Economy 614, 617.
[1208] Sally Lipscombe, Wendy Wilson and Alex Bellis, 'Funding for Domestic Violence Refuges' (House of Common Library December 2017) available at <file:///C:/Users/User/Downloads/CDP-2017-0250.pdf> accessed 17 May 2018.

recognised as key in supporting women who do not report to the police[1209]) seems at once antithetical, yet also in keeping with neoliberalism's rolling back of the state. When feminist discourses become gender neutralised in this way, when women's bodies, capabilities and mental health become monetised and when domestic abuse victims are constructed as 'particularly vulnerable' in a bid to provoke attentiveness in the criminal justice system, opportunities are lost.

The hegemonic view- that a turn to law and prosecutions diminishes victim risk and represents a victory- was not wholly borne out in the accounts offered by women in Chapter Five. The primary research revealed how law and legal procedures might be experienced by women who have suffered domestic abuse at best as a targeted (often short-term) intervention but also as merely perfunctory or even damaging. For some, the law's presence was not worth the cost to their future risk of harm- which either increased or remained the same. As such, convictions for them might only be considered a 'pyrrhic victory'.[1210] This research indicates that the risks, problems and potential disappointments associated with engaging the law should be made known to women so that women can make informed decisions and manage expectations.

The turn to criminalisation also crowds out alternative theorisations of citizen subjectivity of the type contemplated in Chapter Two. The key theme running through all the women's accounts in Chapter Five, is the potential for Chapter Two's alternative frames to guide and improve the support that can be offered to women who find themselves within the criminal justice system. Fineman's vulnerability theory encourages actors to see others as themselves and thus sets the ball in motion to practice therapeutic jurisprudential interactions to facilitate women's 'resilience' where possible. By understanding autonomy relationally (recognising our connectivity to others) a woman's decision, for example to stay in an abusive relationship, that might not otherwise appear 'rational' can be more easily understood. Social relations are both constitutive of the individual and a precondition for autonomy; a woman's experience of state actors can foster her autonomy provided the inherent quality of relationality is understood.[1211] Chapter Five also urges a move away from the victim/ agent dichotomy recognising that victims of domestic abuse might be practising

[1209] Ballinger (n 776) 16.
[1210] Smart, *Feminism and the Power of Law* (n 189) 49.
[1211] Hunter, 'Contesting the Dominant Paradigm' (n 399) 16- 17.

agency in incremental ways to keep themselves safe; making micro 'movements to create freedom within a context of oppression'.[1212] If, having been guided by the above sensitivities, the prosecutor still finds the question of whether to proceed with an unsupported case in the balance, then Chapter Two urged the prosecutor to consider how their decision might best 'extend the agency of its citizens by guaranteeing individual freedoms and capabilities'.[1213] Meaning that prosecutors should strive to facilitate a range of options (or capabilities- see Appendix Two) for women from which she may choose, exercising self-determination, how to live her life. Prosecutors should be simultaneously guided by her dignity; respecting her circumstances and her moral agency. Each person should be regarded as an end in themselves and no-one merely as a tool for the ends of others[1214] (in contrast to soft no-drop style practices).

In drawing out here the potential limitations of feminism's allegiance with the state's 'constraining logic of criminalisation',[1215] I do not wish to undersell the great achievements of the women's movement in raising the profile of female victims of domestic abuse. Recall the automatic drop practices of the early CPS which gave scope to offenders to manipulate women into retracting.[1216] The current presumption to prosecute must be considered a great advance in terms of reducing the expectation that perpetrators can affect case outcomes. In practical terms, the presumption to prosecute secures safety for some women when their assailant is remanded or sentenced to custody. This is because the separation enables her to make arrangements to leave, conceal her location or reach out to support. Her victimhood, as outlined in Chapter Five, is acknowledged and this may form part of a crucial path to her own awareness of the acceptability of the behaviour and the offender *may* benefit from probation intervention. Women may also find their way to feminist groups and organisations by engaging criminal justice.[1217] Nor do I seek to undermine the norm producing potential of consistent and committed denunciation of intimate partner abuse. Indeed, as a result of this, the presumption, as far as the CJS is concerned, is commendably consistent with Fineman's call to the state to be more responsive to the ways

[1212] Hirschmann (n 1091) 59.
[1213] Else Bonthuys, 'Equality and Difference: Fertile Tensions or Fatal Contradictions for Advancing the Interests of Disadvantaged Women?' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013) 87.
[1214] Nussbaum, *Women and Human Development* (n 184) 5.
[1215] Kim (n 102) 1278.
[1216] Cretney and Davis (n 150) 146-157.
[1217] Douglas (n 1171) 134.

in which it can support citizen resilience as Chapter Two discussed. Moreover, whilst my empirical research indicates that summons appeared the preferred method of proceeding with a case where the victim withdraws, the research also revealed promise, from a survivor-defined perspective, that the CPS might be drawing back from this as a habitual practice.[1218] Thus, the concern that that one type of patriarchal domination (the perpetrator's) might simply be replaced with another (the state through criminal justice) is potentially being addressed within the Service.

3 Thesis Contribution to the Feminist Legal Project and Future Directions

The project of feminist jurisprudence has long been to excavate the gender-neutral assumptions that law claims and to reveal the gendered content of law and its processes. Thus, contesting the ungendered nature of law by revealing the way that law and legal procedures differentially impact men's and women's lives is the feminist legal scholar's task.[1219] This is not purely academic folly- though of course a project of this sort contributes to the feminist presence in the academy. Projects such as mine also contribute to feminism as a political movement and which, by exposing how law often fails to live up to its own standards as applying equally to all in a neutral way, has inherent normative ambition.[1220] Despite being framed in terms that do not suggest normative aspiration, my thesis implicitly calls for transformation to effect improvements for women who have experienced domestic abuse by means of theoretically informed praxis. In this way the thesis self-consciously places women and their unique yet shared experiences at the fore and, as a feminist theoretical undertaking, necessarily invokes the question of how things *could* be. As far as my case study is concerned, Chapter Two's 'lived subject' offers suggestions for prosecutors.

Throughout the thesis and particularly in Chapter Five, I have been mindful of the critique of essentialism and of not wishing to overstate how 'women' as a category should be thought about by prosecutors. I use women's standpoint and diverse material realities as a way to unsettle how prosecutors have routinely come to think about victims of intimate partner abuse; as particularly vulnerable women in need of protection through prosecution.

[1218] As Chapter Four revealed, three prosecutors identified a shift followed training in 2016/17 that promoted use of the victimless prosecution in preference for summons wherever possible.
[1219] See Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 Journal of Law and Society 351, 359- 363.
[1220] Ibid 351.

To that end, I answer Conaghan's call to 'reinstate women-centredness as a political strategy'[1221] and use woman centred epistemology to displace and destabilise an identified 'working practice'. Mindful of the critique of essentialism, I am also concerned with the dangers associated with deconstructionism- that it sacrifices feminism's political energy because of its focus on women's diverse characteristics rather than shared subordination. To overcome this 'blackmail of essentialism'[1222] - the either you are 'for' or 'against' it-[1223] my work has attested to the strength of Munro's Wittgensteinian adoption of 'family resemblances'[1224] and Schneider's encouragement to recognise that the particular exists within the general.[1225] To that end, Chapter Five's analysis of women's particular and unique legal consciousness recognises difference but also intersecting and overlapping similarities between women *before, with* and *against* the law (the Wittgensteinian approach), whilst all the time appreciating broader structural aspects that render their disadvantage contextualised according to gender (Schneider's feminist law-making). This is a distinctive contribution to knowledge.

My approach stands in contrast to Madden-Dempsey's essentialist philosophical knowledge claims about women and patriarchy's part in the commission of 'strong cases'. For Madden-Dempsey and other 'radical' feminists like her, feminist motivations expressly lie in the goal of reconstituting the state as less patriarchal thereby eradicating the means of female oppression. Whilst Madden-Dempsey purports to accept the impact of intersectionality on women's disadvantage, she rejects post-modern deconstruction of womanhood 'because there are always other aspects to women's identity and bases other than sex for their oppression'.[1226] Madden-Dempsey's grand ambition - to eradicate 'patriarchy' or as she describes 'wrongful structural inequality'- arises from the grand or meta narratives that are foundational to her understanding of the part played by women's systematic limitations in intimate partner violence. Her ambition, based on an essentialist construction of structural patriarchy, risks overstating the role patriarchy plays in IPA and accordingly the role that criminal law should play in eradicating gender inequality and VAW.

[1221] Ibid 384.
[1222] Vanessa Munro, 'Resemblances of Identity: Ludwig Wittgenstein and Contemporary Feminist Legal Theory (2006) Res Publica 137, 145.
[1223] Ibid 145.
[1224] Ibid 145.
[1225] Schneider, *Battered Women and Feminist Lawmaking* (n 94) 5.
[1226] Madden-Dempsey, *Prosecuting Domestic Violence* (n 52) 131.

In this thesis I have argued that the 'patriarchal force' theory is present in government strategy and CPS policy to end VAW. This presupposes a singular understanding of men's domination of women and ignores other social and psychological factors that may cause either 'intimate terrorism' or 'situational couple violence'.[1227] I have suggested that the 'radical' feminist account has spurred on the use of the criminal law as a means of addressing IPA and have observed the advantages and shortcomings of criminal law working practices on individual women. I accept that much has been gained by deploying a readily understandable and charged account of 'patriarchal force'; the state now actually, figuratively and systematically condemns domestic abuse. To that extent, 'radical' feminism has utilised essentialism in a strategic way[1228] to motivate the state into action.

However, the thesis draws out how for some women, enacting essentialist discourses carries the danger of totalising the experience of victimhood and overlooking agency. The thesis shows how the resulting tenacious approach to prosecutions has potentially harmful outcomes vis-à-vis some women's safety and relational autonomy. Thus, whilst essentialism offers seductive political gains it also carries potential dangers.[1229] Making generalisations about women and the causes of their subjugation, while merely qualifying with statements about the additional differences of some women, risks instrumentalising - in the case of domestic abuse - 'dominance' or 'radical' feminist theory. Moreover, it panders to a uni-dimensional account of gender inequality based on patriarchy, ignoring how intersectional factors such as race, ethnicity, disability or sexuality contribute. As my project has shown, the effect of strategic essentialism in the area of intimate partner abuse is that only some women's norms and experiences have been privileged. The empirical work in Chapter Five plays a part in dismantling a paradigmatic female victim by offering legal consciousness as a means of acknowledging that victims of domestic abuse need to be approached sensitively, recognising their multiplicity. This forms part of a resistance to monolithic groupings, a 'disruption of legal and social categories that define

[1227] Johnson, *A Typology of Domestic Violence* (n 50).
[1228] Gayatri Spivak, 'In a Word: Interview' in Naomi Schor and Elizabeth Weed (eds), *The Essential Difference* (Indiana University Press 1994) 151184.
[1229] Rosemary Hunter, 'Deconstructing the Subjects of Feminism: The Essentialism Debate in Feminist Theory and Practice' (1996) Australian Feminist Law Journal 135, 156.

and limit women's possibilities, that seek to pin us down, crowd us together and divide us from each other'.[1230]

Finally, I want to position this thesis with reference to the work of Carol Smart who, in 1989, notoriously cautioned feminists against the siren call of the law to end women's inequality because feminism would always concede too much.[1231] I have shown how current prosecutorial approaches to intimate partner abuse have in fact adapted to social changes and consequently have offered women recognition and progressive reform to a degree not witnessed or anticipated when Smart wrote her seminal work.[1232] Nonetheless, taking the case study of prosecuting intimate partner abuse, this thesis has responded to Smart's original appeal for feminists to engage with the way that law operates in practice[1233] and continues to influence our personal lives.[1234] Through a careful questioning of the ideas and values that underpin prosecutorial working practices, the thesis sheds light on the ways feminism and neoliberalism have colluded to bring more perpetrators to justice whilst sometimes ignoring real safety and therapeutic ameliorations for women. The effect of my work is clearly to encourage a de-centring of law and to contemplate non-legal strategies for abused women in the manner Smart contemplated. However, Smart never wanted feminists to abandon law as a profitable site of discursive struggle. This thesis has therefore been an engagement with the complex and continuous processes of criminal law and prosecutorial practices in order to make theoretically informed suggestions - in line with the 'lived subject'- that might assist women in achieving positive outcomes, as understood by them.

This thesis has therefore explored prosecutorial practices in matters of intimate partner abuse in England and Wales. Proposals for future research might include extending the reach and scope of the empirical work, making recommendations for prosecutor training in a manner consistent with the 'lived subject' and working with the CPS so that they remain attentive to how CPS domestic abuse policy is actually being implemented in practice. The thesis also sought to unpick the ways in which discourses and strategies of feminism and neoliberalism have shaped the current approach and preference for criminalisation. Future directions might also endeavour to meet the question of how the

[1230] Ibid 162.
[1231] Smart, *Feminism and the Power of Law* (n 189) 5.
[1232] Rosemary Auchmuty and Karin Van Marle, 'Introduction: Special Issue: Carol Smart's Feminism and the Power of the Law' (2012) 20(2) Feminist Legal Studies 65-69.
[1233] Smart, *Feminism and the Power of Law* (n 189) 5.
[1234] Smart, 'Reflection' (n 1094) 161- 165.

state might challenge domestic abuse outside of the existing commitment to criminalisation; for example, through education. However, future (feminist) legal scholarship might re-engage at a theoretical level to offer an alternative to the 'penal equation'[1235] as the preferred theoretical paradigm. As a heuristic, I argued that Fineman's vulnerability theory could not satisfy the practical question of how prosecutors, embedded within the criminal justice system as they are, should exercise their discretion when a woman withdraws her support. However, Fineman's invitation to consider vulnerability as the defining human condition may require us to think beyond particular problems, pre-existing conceptual analyses, structures and ways of doing. Norrie, too, has invited us to 'move beyond' our established social control practices through an engagement with what he has called 'relational justice'.[1236] It may only be through a fundamental re-conceptualisation of our responsibilities to one another and the state's legal, political and moral obligations to its citizens that the opportunity to challenge the pervading (neoliberal) culture of social control through crime comes about.

[1235] This is the 'crime plus responsibility equals punishment' equation described by Norrie (n 96) 75.
[1236] Alan Norrie, 'The Limits of Justice: Finding Fault in the Criminal Law' (1996) 59(4) The Modern Law Review 540, 540.

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APPENDIX 1

(CPS) Consultation Principles 2015

A. Consultations should be clear and concise

Use plain English and avoid acronyms. Be clear what questions you are asking and limit the number of questions to those that are necessary. Make them easy to understand and easy to answer. Avoid lengthy documents when possible and consider merging those on related topics.

B. Consultations should have a purpose

Do not consult for the sake of it. Ask departmental lawyers whether you have a legal duty to consult. Take consultation responses into account when taking policy forward. Consult about policies or implementation plans when the development of the policies or plans is at a formative stage. Do not ask questions about issues on which you already have a final view.

C. Consultations should be informative

Give enough information to ensure that those consulted understand the issues and can give informed responses. Include validated assessments of the costs and benefits of the options being considered when possible; this might be required where proposals have an impact on business or the voluntary sector.

D. Consultations are only part of a process of engagement.

Consider whether informal iterative consultation is appropriate, using new digital tools and open, collaborative approaches. Consultation is not just about formal documents and responses. It is an on-going process.

E. Consultations should last for a proportionate amount of time

Judge the length of the consultation on the basis of legal advice and taking into account the nature and impact of the proposal. Consulting for too long will unnecessarily delay policy development. Consulting too quickly will not give enough time for consideration and will reduce the quality of responses.

F. Consultations should be targeted.

Consider the full range of people, business and voluntary bodies affected by the policy, and whether representative groups exist. Consider targeting specific groups if appropriate. Ensure they are aware of the consultation and can access it. Consider how you might access groups such as the elderly, or young people or those with disabilities that may not respond to traditional consultation methods

G. Consultations should take account of the groups being consulted

Consult stakeholders in a way that suits them. Charities may need more time to respond than businesses, for example. When the consultation spans all or part of a

holiday period, consider how this may affect consultation and take appropriate mitigating action.

H. Consultations should be agreed before publication

Seek collective agreement before publishing a written consultation, particularly when consulting on new policy proposals. Consultations should be published on gov.uk.

I. Consultation should facilitate scrutiny

Publish any response on the same page on gov.uk as the original consultation, and ensure it is clear when the government has responded to the consultation. Explain the responses that have been received from consultees and how these have informed the policy. State how many responses have been received.

J. Government responses to consultations should be published in a timely fashion

Publish responses within 12 weeks of the consultation or provide an explanation why this is not possible. Except in exceptional circumstances, where consultation concerns a statutory instrument, publish responses before or at the same time as the instrument is laid. Allow appropriate time between closing the consultation and implementing policy or legislation.

K. Consultation exercises should not generally be launched during local or national election periods.

If exceptional circumstances make a consultation absolutely essential (for example, for safeguarding public health), departments should seek advice from the Propriety and Ethics team in the Cabinet Office.

This document does not have legal force and is subject to statutory and other legal requirements.

APPENDIX 2

A list of Martha Nussbaum's 10 Central Capabilities which appear in Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press 2011) 33-34.

10 Central Capabilities

1. *Life.* Being able to live to the end of human life of normal length, not dying prematurely, or before one's life is so reduced as to not be worth living.
2. *Bodily Health.* Being able to have good health, including reproductive health; to be adequately nourished, to have adequate shelter.
3. *Bodily Integrity*. Being able to move freely from place to place; to be secure against violence assault, domestic violence; having opportunities for sexual satisfaction and for choice on matters of reproduction.
4. *Senses, Imagination and Thought*. Being able to use the senses, to imagine, to think and reason- and to do these things in a 'truly human' way, a way informed and cultivated by an adequate education, including but by no means limited to literacy and basic mathematical and scientific training.
5. *Emotions*. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial to their development).
6. *Practical Reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance).
7. *Affiliation (A*) Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another (protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.) (B) Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste. Religion, national origin.
8. *Other Species*. Being able to live with concern for and in relation to animals, plants and the world of nature.
9. *Play.* Being able to laugh, to play, to enjoy recreational activities.
10. *Control over one's environment (A) Political*. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protection of free speech and association. (B) *Material*. Being able to hold property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

APPENDIX 3

Interview Schedule for Prosecutors:

Open and Introductions

Seek permission to record interview. Establish interview may be stopped by participant at any time.

Begin Recording

Participant information sheet. Consent Form.

Preliminary Questions

Can you tell me a little bit about yourself? What is your job title and role?

Approximately how long have you worked in that role?

Experience of Domestic Violence/ Abuse Cases

1. In your role, do you work on domestic abuse cases? If so, how regularly? What constitutes 'Domestic Abuse' for the CPS?

2. Have you prosecuted any cases of coercive control? Why might you not have?

CPS and Domestic Violence/ Abuse

3. DV cases must be recorded on 'compass', is this done? Why? Does this recording of DV cases make you feel differently about DV, as opposed to other violent crime?

4. What training have you received about domestic violence cases? When? What did you take away from that training?

5. In your experience, is DV treated differently to other crimes you deal with, or is it just like other crimes? If it is different, how?

Exploring Victimhood

6. Do you see any trends in the type of DV cases you encounter or is each case entirely unique? What sort of case is commonly encountered in your experience?

7. Is there a predominant type of victim in your experience? If so, what is that victim like? What is a prosecutor's responsibility towards the victim?

8. Are complainants of domestic abuse always supportive of the case? If not, how commonly do they withdraw their support in your experience? Why do they withdraw their support?

CPS Working Practice

9. Talk me through how you decide what you do when a woman decides to withdraw her support for the prosecution.

Prompts:

- Consider the Code for Prosecutors? Refer to evidence/ seriousness of the case/ public interest? Specifically, what weighs into the public interest consideration?

-Victim withdrawal statement?

-Speak to a colleague/ senior?

-Refer to past experience?

- Consult domestic abuse guidance? Violence against women and girls strategy?

10. Are there any other factors that you personally are considering when the IP withdraws her support that you have not mentioned?

11. Are conviction rates monitored? Do you think about this when making decisions in cases?

12. When the Injured Party (IP) has withdrawn her support, and there is insufficient evidence without her giving evidence at trial, what do you do practically? What factors do you consider?

13. When the IP is unsupportive, and if the case can be proved without her attending trial, what do you do? Why?

14. How useful do you find victim withdrawal statements? The DASH questionnaire? Police assessment of risk? Do you ever consult with the person who took the withdrawal statement/ DASH/ Risk assessment? If not, why not?

15. Do you ever consult directly with victims who have withdrawn their support? If not, why not? If yes, what difference does it make? How often to you arrange a meeting to talk to the witness about the court procedure prior to trial?

16. Are complainant withdrawals dealt with in the same way in DV cases, as opposed to say violence committed in a public place between non-intimates?

If not, why not? Is there anything distinctive about DV victim as opposed to any other victim/ any differences in CPS policy/ procedure?

16. Do you feel you have sufficient time and resources to consider DV cases when victims withdraw their support?

If not, why not? – case load, access to case law/ statute, POD system of working?

If yes, why? Experience, time to research policy guidance, advice from more senior colleagues?

17. Since joining the CPS, has the prosecution of domestic violence changed/ stayed the same? If changed, how? Why?

APPENDIX 4

Interview Schedule for Women:

Open and introductions Thanks. Seek permission to record interview. Place recorder in sight and establish she may press the stop button at any time.

Begin recording Participant information sheet. Consent Form.

Preliminary Questions

Tell me a bit about yourself? Age? Born locally? Job? Family?

I've been able to speak with you because you access the services of X.[1237] What services have you been able to use since being in contact with them?

Details of relationship and use of criminal justice system

1. Can you tell me a bit about your relationship with your partner? (Typical prompts might include: Where and when did you meet? How was the relationship at the beginning? What happened during the course of the relationship? Is the relationship at an end now? How aware were children/ family members/ friends/ others at the time it was happening? How did the relationship effect you personally/ emotionally? How aware at the time were you of what was happening? Is your awareness of what was happening to you different in hindsight than it was at the time?)

2. Have you had any direct experience of the criminal justice system; police, prosecution, defence, Courts, judges, probation service and prisons?

3. Specifically now, thinking about your relationship with your partner, have you had any experience of the criminal justice system? If yes, go to 4. If no, go to 15.

4. Can you tell me a bit about how the CJS first become involved? (Typical prompts might include: When did they become involved? What was your understanding of the CJS before it became involved? What did you think would happen if police were called? What did you want to achieve by involving the CJS?)

6. When the CJS was first involved, had other people been aware of the abuse or were the police first to know? (Prompt: Did you seek assistance elsewhere before contacting the police?)

7. Can you tell me a bit about why the CJS became involved? How did you feel about involving them? Could they have been involved sooner? (Prompts: Why weren't they? If you called on them, what did you want to happen? What did you expect to happen? What did happen? Were you happy with the CJ outcome? Were you listened to? Did that matter? Did you develop a relationship with those conducting your case?)

[1237] Amend as appropriate

8. Think about the last time the CJS became involved? Did you need the same thing from the CJS as the first time? What was the outcome? Was it helpful to you? Would you involve the CJS again?

9. If you have ever called the police, why? How do you feel about the police?

10. If you supported a prosecution, to finality (sentence/ trial) why did you? If not, what factors did you bear in mind when making your decision?

11. Have you ever withdrawn your support for a prosecution, why? What happened? How do you feel about that now? What factors did you consider when you withdrew your support? (Prompts: Were there material/ financial/ social/ emotional/ safety considerations for withdrawing support? How did your withdrawal of support effect you/ your relationship/ finances/ social life?)

12. Were there any risks in involving the CJS? How did your partner react to the involvement of the CJS? Did it change your relationship? How?

13. What's your experience of the Crown Prosecution Service? How do you feel about them now? Anything they could have done better?

14. In hindsight how did the CJS work for you? Did the CJS achieve anything for your partner/ you/ your family?

If there has been no CJ involvement

15. Is there any reason the CJS did not become involved?

Everyone

16. Have you ever threatened to call police/ prosecute but not followed through? If so, why did you do this?

Close Thanks for taking the time to talk to me today…

Is there anything I left out that you think I should have asked you about? Is there anything you would like to ask me about the project or about our interview?

What will happen to the recording… email transcript to respondent for approval… happy to send you a summary of findings at conclusion of project…