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Competing conceptions of victims of domestic violence within legal processes

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Abstract

Victims of crime are often measured against an idealised standard of victimhood, typically to the detriment of those who are seen to depart in significant ways from notions of the ideal. In this paper we develop this issue further by reference to the multiple and competing conceptions of the victim of domestic violence that emerge in different domains of legal practice. We focus on victims of domestic violence who are mothers as being more likely to be subjected to particular scrutiny and to competing and often conflicting requirements and obligations. We examine three particular legal sites that demonstrate that the battered woman of legal discourse is subject to multiple renderings that reconfigure, reinterpret and re-value her experiences in different legal domains: child protection, criminal law and proceedings for protection orders, and family law.

Introduction

It is well established that victims of crime are often measured against an idealised standard of victimhood, typically to the detriment of those who are seen to depart in significant ways from notions of the ideal. However, as Paul Rock noted (2002, p. 17), we need to give more attention to the ways in which various framing discourses are deployed and give shape to our understandings of victimisation. There is 'interpretative work done at every level in bringing the categories victim and offender into play' (Rock 2002, p. 21). Laws and legal practices are significant in how matters are framed and in constituting the subjects and objects of law. In this chapter we examine this further by reference to the multiple and competing conceptions of the victim of domestic violence that emerge in different domains of legal practice. We focus on victims of domestic violence who are mothers as being more likely to be subjected to particular scrutiny and to competing, and often conflicting, requirements and obligations (Jaffe et al. 2003; Hester 2010; Douglas and Walsh 2010; Kaye, Stubbs and Tolmie 2003).

We move from law as a single entity to examine multiple sites in which women victims seek a response to the gendered harm of domestic violence. How do women make sense of the differing constructs and demands placed upon them by these different and often competing discourses presented by each area of law? In so doing we are not suggesting that there is, or should be, some 'static or singular' identity for women victims of domestic violence (Comack and Brickey 2007, p. 26), rather we recognise that there is a 'diversity of subject positions' within and across these legal domains (Comack and Brickey 2007, p. 26). Positioning women's lives 'at the centre' rather than in terms of legal categories (Graycar and Morgan 2002, p.1) allows a focus on the ways in which the same harms and the same parties are subject to different questions, legal requirements, positioning and construction. At the same time it is difficult to find a way to effectively discuss these constructions and their contradictions without also deploying legal categories. This presents a continuing limitation of how to speak about domestic violence within the language of law. Like Hester (2011), we examine three particular legal sites that demonstrate that the battered woman of legal discourse is subject to multiple renderings that reconfigure, reinterpret and re-value her experiences in different legal domains: child protection, criminal law and proceedings for protection orders, and family law. Further complexity is added to these multiple conflicting (legal) renderings through the recognition of the ways in which women experiencing domestic violence are also socially located (in terms of race, age, disability, culture, sexuality, poverty, and immigration status) (Laing 2013). In this chapter we raise particular concern about the experiences of Indigenous women victims of domestic violence in their engagement with, or absence from, these legal domains. Not only do discourses and practices within these different domains reshape a woman's experiences of violence, they also demand that she 'perform her self' differently in different forums to gain entitlement to legal redress intended to secure safety for herself and her children (Merry 2003).

Why focus on law?

For some time critical feminist scholars have problematised the emphasis on law as a way of dealing with violence against women. Diane Martin (1998), Laureen Snider (1998) and others cautioned against feminist engagement with criminal law on the basis that it empowers the state and not women. We have also seen the negative

consequences of criminalisation strategies such as zero tolerance policing and mandatory arrest in the increased arrest of women victims of domestic violence, and an apparent net widening in which minor offences by juveniles within families are becoming criminalised resulting in more young people being brought within the criminal justice system (on the growth in arrest of girls related to domestic violence assault see contributors to Zahn 2009 on the US, and Holmes 2010 on NSW). Kristin Bumiller (2008) and Beth Richie (2012) each offer a compelling analysis of how progressive feminist programs for dealing with violence against women have been re-shaped and appropriated within neo-liberal and neo-conservative political contexts in ways that have done more to promote criminalisation than women's autonomy and freedom. Law and law reform are unlikely to be adequate and sufficient means by which to bring about genuine social change which will ameliorate violence against women. However, law remains a means, and a context that many women engage with whether through choice, however constrained that might be, or compulsion. While it is necessary and desirable to consider alternative modes of responding to violence against women and to advocate strategies to enhance women's safe and fair engagement in public and private domains, it remains important to challenge law and legal practice. The feminist project to transform law and legal practice in this area is an ongoing one, albeit one which faces enormous challenges.

The battered woman of legal discourse

Scholars working in the area of violence against women have long recognised that law is constitutive; for instance, it is gendered and gendering. Carol Smart's (1992) article *The Woman of Legal Discourse* made a significant, enduring contribution to the development of feminist theory and praxis, in particular in identifying how law functions 'as a process of *producing* fixed gender identities rather than simply as the application of law to previously gendered subjects' (Smart 1992, p.34);[1] that '[w]oman is a gendered subject position which legal discourse brings into being' (Smart 1992, p. 34). Kathy Daly (1994) extended the analysis to law as raced and constitutive of race –which Smart recognised in her article but did not develop. Theoretical work on the intersection of categories of social relations (Crenshaw 1991) and the performance of identity (Butler 1990), are now well established in critical race theory, feminist legal theory and within

some forms of criminology (Daly and Stephens 1995) and have been used to analyse violence against women (Stubbs and Tolmie 1995; Cunneen and Stubbs 2004; Mason 2002; Sokoloff and Dupont 2005).

One focus of work using this approach has been on identifying the gendered and racialised assumptions inherent in allegedly neutral constructs such as the 'reasonable man' or the 'ordinary person'. Legal discourse not only draws on gendered and racialised assumptions about 'the battered woman' (Allard 1991; Crenshaw 1991; Stubbs and Tolmie 1995) or 'the rape victim', but actively constructs them (Merry 1995; Nicolson 2000), particularly through valuing and endorsing some forms of femininity and devaluing others.

For instance, Sally Engle Merry has written of how gender identities are produced through law and legal practice:

> the court offers a form of interpretive talk …this is authoritative talk legitimated by the state and backed by penalties and disciplinary systems…how domestic violence cases are handled, what is said, and what the parties hear about gender relations can play a part in redefining gender identities and contesting implicit ideas of gender inequality (Merry 1995, p. 52)

However, legal discourse offers many women false hopes:

> By endowing women with autonomous selves who can choose to stay or leave a violent man, but by failing to provide economic means to leave such men, the discourse of the courts reconstructs women who fail to leave as undeserving of help (Merry 1995, p. 49).

Thus, women who are victims of domestic violence who turn to law 'encounter conditional help' (Merry 2003, p. 353) in accordance with whether they are considered to be deserving or undeserving, innocent or complicit (Bumiller 1990; Stanko 2000). While the standards against which they are judged are not fixed, 'the changing cultural construction of the good victim defines the privileged subject of legal assistance and excludes others as unworthy of help' (Merry 2003, p. 355). Binary oppositions such as those of 'innocent' victims and 'wicked' offenders are entrenched in adversarial legal

practice, political discourse and media accounts (Rock 2002, p. 15) and disadvantage many battered women, especially those who fight back, have a criminal history, abuse alcohol or other drugs or are seen as less than ideal parents. Feminist scholars have also drawn attention to limitations of other binaries such as victim/agent (Maher 1997; Miller 2005). For battered women '[v]ictimization and agency are false dichotomies; both fail to take account of women's daily experiences of oppression, struggle, and resistance within ongoing relationships' (Schneider 1992, p. 549; Mahoney 1991).

In Australia, Aboriginal women experience high levels of violence (Memmott et al. 2006) but are unlikely to be 'privileged subjects of legal assistance'. Indeed Aboriginal women have been found to be the most disadvantaged group in Australia in terms of access to justice (HREOC 2004, p. 184). Research about the legal needs of Indigenous peoples and the provision of legal aid has tended to focus almost entirely on the criminal justice system, with very little attention paid to Indigenous peoples' needs in relation to civil law, including family law and child protection matters (areas where Indigenous women's needs predominate) (Cunneen and Schwartz 2009a). Importantly Cunneen and Schwartz draw connections between the lack of engagement with civil law and the risk of engagement with the criminal law system (Cunneen and Schwartz 2009b). The position of Aboriginal women with respect to the law's response to domestic violence further emphasizes the need to be attentive not only to gender and race, but the colonial context which frames and underpins legal and policy responses. As Kyllie Cripps has argued, responding effectively to family violence[2] in Indigenous communities requires attention to two groups of factors. The first concerns factors associated with colonization (i.e. dispossession and forced relocation, historical practices and policies such as removal of children) and the second is the continuing marginalization, disadvantage and discrimination faced by Indigenous peoples in Australia (as cited in Murray & Powell 2011, p. 63).

While engaging with law may be used as a strategy by some victims to seek to re-define gender identity, for instance, through asserting their autonomy from the abuser and to seek validation (Merry 2003), dominant legal narratives of domestic violence have often resulted in women not recognising themselves in the account that is told (Mahoney 1991). In part this is because legal narratives are constructions which cannot ever hope

to capture the complexities, the nuances and the ambiguities of women's lives. The cases of domestic violence most likely to gain coverage in the media are those which are most extreme or unusual (Minow 1990). For instance, the small number of cases in which women kill an abuser attract a disproportionate amount of public attention. Both legal narratives (Schneider 2000) and media accounts commonly depict violence against women in an individualised way, with an incident-based focus which gives little acknowledgement to the wider context of the offence (Morgan and Politoff 2012, p. 32).

Over recent decades both adversarial criminal justice and other initiatives such as restorative justice have sought to recognize victims' needs and to integrate victim participation within legal processes for instance, by giving victims 'a voice', acknowledging the harm they have suffered, treating them fairly and with respect and offering the chance of an apology (Strang and Sherman 2003). However, some scholars have noted the individualizing effect of such developments; 'recounting one experience of victimization reinforces the victim experience as an individual harm' (Goodey 2000, p. 23) and 'serves to make the victim experience apolitical (Goodey 2000, p. 22; Stubbs 2002). Similarly Sandra Walklate (2006) has noted that positivist victimology and some restorative justice scholarship tends to hold an undifferentiated view of the crime victim, which suggests that victims are 'just like us' and masks patterns in victimization and offending, and the relationship of crime to marginalisation and subordination. These features are at odds with progressive feminist scholarship which seeks to situate violence against women with reference to the subordination of women; viewing violence against women through an individuated lens is indeed depoliticising, and consistent with the appropriation of feminist concerns to other political agendas including responsibilising of both victims and offenders in ways described by commentators on late modern penality (Bumiller 2008).

Legal discourse about domestic violence also interacts with wider cultural understandings both reflecting and reinforcing stereotypical views of violence against women (Maguigan 1991; Bumiller 1990). For instance, it is now well recognised that feminist self defence work which sought to challenge myths about domestic violence through the introduction of evidence of the 'battered woman syndrome' too often has been counter-productive when legal discourse has re-written stories of women's

resilience to conform to cultural stereotypes of pathology, incapacity or lack of reason (Allard 1991; Comack 1987; Schneider 1986, 1992). Indigenous women and others who do not meet stereoptypes of '*the* battered woman' typically have not benefited from attempts to extend legal defences to battered women (Stubbs and Tolmie 1995, 1999; Douglas 2012).

Merry (2003, p. 353) has argued that victims of violence involved in legal processes need to 'perform a self' that 'conform[s] to the law's definitions of rational and autonomous reactions to violence' and thus, demonstrate that they are 'entitled' to help. For instance, a woman is commonly required to be 'the rational person who follows through, leaves the batterer, cooperates with prosecuting the case, and does not provoke violence, take drugs or drink, or abuse children' (Merry 2003, p. 353). However, different domains of legal practice not only use different ways of framing domestic violence, and give different emphasis to the facts and circumstances of individual cases, they also constitute ideas about the 'entitled victim' specific to their domain of practice which impose performative requirements on victims. For the victim of domestic violence caught up in multiple domains of legal practice, and especially mothers, this often imposes competing requirements on victims whereby performing in a way necessary to be deemed 'entitled' in one domain may undermine their entitlement in another legal domain. The remainder of this chapter examines this issue more fully.

Multiple legal domains, competing professional discourses and inconsistent demands

Australia's constitutional arrangements and forms of legal ordering have created a complex network of courts and processes to be negotiated by women dealing with domestic violence and child contact issues. Where there are child protection issues the complexities are compounded. The pursuit of legal responses to domestic violence necessitates not only women 'stradd[ling] the constitutional division of power' (ALRC and NSWLRC 2010, para [2.69]), but also an array of judicial settings (magistrates courts, district and county courts, supreme courts, tribunals, family courts, children's courts) as well as a variety of non-judicial dispute resolution processes. As such, women

commonly find themselves dealing with more than one court, in different jurisdictions with different rules and procedures, and with a critically different focus. Significantly women are often navigating these disparate systems simultaneously (Laing 2013, p. 51). The various legal settings offer ambiguous and ambivalent messages about domestic violence. The women are subject to competing professional discourses and demands upon them which may be inconsistent and irreconcilable (Hester 2010; Douglas and Walsh 2010).

The recent work of the ALRC and NSWLRC did much to expose and discuss this fragmented legal landscape for women and children in Australia. The terms of reference for this inquiry included family law, criminal law, civil protection orders, victim's compensation, child protection legislation, as well as rules of evidence (ALRC and NSWLRC 2010). A subsequent ALRC inquiry addressed the way in which domestic violence emerges and is responded to in federal laws, such as social security, child support and family assistance, employment, superannuation and migration (ALRC 2012).

One of the key recommendations of this inquiry (2010) was the development of a common interpretative framework to apply across these legal domains. This was in recognition of the different legal definitions applicable across legal domains and jurisdictions, as well as the different definitions adopted by 'disciplines other than law' such as 'social sciences, health and welfare providers' and hence the 'desirability of attaining a common understanding of what constitutes family violence across family violence legislation' (ALRC and NSWLRC 2010, para [5.2-5.3]). As a result the Commissions recommended an interpretive framework which acknowledges the context in which acts of family violence take place (i.e. behaviour that 'coerces or controls' a person or 'causes' that person to be 'fearful'). This is accompanied by a non-exhaustive list of the types of acts and behaviours that might fall within the purview of this definitional framework (Recommendation 5-1).[3]

Such a common interpretative framework is an important measure to address the fragmentation that results not only from the Australian federal system, but is also inherent in law's doctrinal categories. We argue, however, that even if a common definitional framework was implemented across the Australian jurisdictions and legal

domains, women's experience of legal responses to address domestic violence would remain conflictual and confused because the 'victim' is conceptualised and constructed differently for the purposes of each legal domain.

Daryl Higgins and Rae Kaspiew (2011) have examined similar concerns in relation to parents who raise allegations of child abuse. Agencies with whom they come in contact differ in their focus, and parents face an array of different questions: Are they a protective parent? Does the behaviour that is of concern meet the statutory threshold for intervention? (child protection); Are they an adequate parent with capacity to ensure the child is safe? (children's court); Do they maintain and encourage ongoing parental relationships with the child following separation (family law); Is the child safe in a particular household unsupervised? Is there a need to supervise the time a child spends with a parent? (family law); Is the act defined as a crime and is there sufficient evidence to support a successful prosecution? (criminal law) (Higgins and Kaspiew 2011, p.7). This array of questions positions the parent in starkly different and often contradictory ways. Furthermore, many of these questions have quite a different tenor when gender and race are considered. Statistics indicate that the vast majority of parents subject to these questions are women, and that Indigenous families and women frequently face more scrutiny and intervention than non-Indigenous women (Nixon and Cripps 2013). The history of state intervention, especially the removal of children from Indigenous families as part of the 'Stolen Generations' (HREOC 1997), and Aboriginal deaths in custody have left enduring legacies which means that some Indigenous women are unwilling to engage with law when experiencing violence from their partners.

Hester (2011) characterises the inconsistent and irreconcilable legal responses to women's and children's needs for safety from domestic violence as arising from different 'planetary' regimes. She describes a 'three planet model' comprised of:

- the 'domestic violence planet' - that is, criminal law and civil protection orders and associated support structures and agencies directed towards this legal conception of domestic violence;
- the 'child protection planet' – that is, the various state child protection regimes directed towards ensuring child safety

- the ‘child contact planet’ – that is, the family law system, in which continuing parental relationships with children post-separation tend to be emphasised.

The ALRC and NSWLR similarly referred to these areas of law as separate ‘silos’ (2010, p. 52). In this chapter we build on Hester’s work in the context of the Australian legal response to domestic violence.

Criminal Law & Quasi-criminal Protection Orders

One of the key ways in which domestic violence is addressed in Australia (and other jurisdictions) is through the criminal justice system. The message that ‘domestic violence is a crime’ has been an integral feature of the initial work of the women’s movement to highlight violence in the home and it remains a critical message even as the need for integration with services other than law are emphasised. One notable characteristic of the Australian approach to domestic violence is the strong focus on protection orders (Hunter 2008, p. 5); these are commonly described as quasi-criminal in that the order itself is based on the civil standard but the breach constitutes a crime. Some commentators have argued that protection orders are ‘trumping’ the operation of the criminal law (Douglas and Godden 2002). Criminal law and civil protection orders should not be seen as alternative responses; rather both are required to provide different and potentially complementary responses to the harm of domestic violence. In this section we explore the problems created for women through the criminal law’s focus on incidents, the relegation of women to the role of witness, and the dominant characterisation of women in this sphere as passive, rather than agents in proceedings, or as active victims who may also respond with violence. Many of these concerns extend to civil protection orders.

Despite the long standing emphasis on criminal law as a response to domestic violence there has been sustained criticism of that response. One of the key critiques has been the fact that it relies on an incident-based account of violence. Norrie (2001, p. 224) has described the ‘psychological individualism’ of the criminal law as shaping how evidence is received at every stage of the criminal justice process. This reinforces the tendency for an incident-driven account of domestic violence to prevail (Stubbs and Tolmie 2005, p. 197). Other criticisms have centred on its tendency to focus on physical harms (although in the last decade this has been redressed somewhat through the creation of

the offences of stalking and intimidation in many jurisdictions, and in some jurisdictions the creation of offences of economic abuse and emotional abuse[4]), the high burden of proof, a punishment focus rather than future protection, rules of evidence and other matters (Tuerkheimer, 2004, pp. 971-74; Hunter 2008, p. 1; Buzawa and Buzawa 2002; Schneider 2000, esp ch 7). The development of protection order regimes in Australia, as elsewhere, was seen as directly responding to these criticisms (Hunter 2008, p. 1; ALRC and NSWLRC 2010, para [4.6]), as having the potential to prevent future harm arising from domestic violence and to be tailored to the needs of each victim and thus act as an important adjunct to the criminal law. However, questions remain about the extent to which the protection order system has retained an emphasis on incidents, and particularly on acts of physical violence (Wangmann 2012).

While there has been some progress within aspects of criminal law to define domestic violence within a contextual rather than incident based framework (for example in Victoria legislative endorsement of the admissibility of social framework evidence in family violence related homicide cases[5]), in the various Australian legislative schemes for civil protection orders (Wangmann 2012) and in family law[6]– the legal process itself necessitates incidents as the way in which the narrative about violence can be conveyed in a manner understood by law. Mahoney has argued:

> This [the focus on incidents and the number of incidents] makes it possible to bring a woman and her history into court with objective indicia of her status as battered woman. (Mahoney 1991, p. 28).

At the same time the focus on incidents allows the perpetrator of the violence to explain his behaviour as 'isolated', not as a pattern of behaviour, where '[t]he decontextualized examination of disaggregated incidents can leave a case in shreds' (Hunter 2008, p. 41). As Evan Stark has effectively argued, the focus on acts of violence rather than the context in which such acts are perpetrated has meant that the various services, particularly law, has failed to adequately define or respond to the harm of domestic violence (2007).

Criminal law tends to emphasise incidents of violence (rather than their pattern and cumulative effect); it also focuses on individuals, primarily the defendant (unlike other areas of law discussed in this chapter where the perpetrator may be absent or barely

recognised). As Hester has argued, on this 'planet' it is the male perpetrator (has he committed a criminal offence, what punishment should be imposed) and the female victim (as a witness, and as a person requiring the protection of a civil protection order) that are the foci (2011, p. 841) – 'children are not so prominent' (2011, p.842). This can adversely affect women who are mothers, where the interconnected nature of the parental relationship cannot be separated (Mahoney 1991, p. 19) and women who experience gender based harms such as domestic violence (where the harm might also affect other family members, friends or new partners). Furthermore the focus on the individual tends to deny, or play out in a particular way with, other integral characteristics such as race, culture, socio-economic status and sexuality.

The emphasis on incidents as the defining criterion for domestic violence has also led women who retaliate to or defend themselves against the violence that they experience to be liable to be charged with a domestic violence offence or have a civil protection order sought against them. Women who are defendants in domestic violence criminal proceedings or civil protection order proceedings do not comply with the stereotype of a 'deserving' victim (Fitzroy 2001, p. 11), clearly disrupting the victim/ offender binary. They are seen to have performed contrary to the narrative of domestic violence that is expected and understood within criminal law and civil protection order schemes (and arguably other legal domains). While research indicates that women actively respond to the violence that they experience in multiple, strategic ways (Dutton 1993; Littleton 1989; Campbell et al. 1998), this is not widely recognised in popular conceptions of 'a victim of domestic violence' which tend to continue to position victims as passive, submissive, downtrodden and unable to 'leave', yet conversely also expect separation – an action of considerable agency.

Protection order schemes are predicated on the need to protect – that the victim requires the protection of an order. As Alesha Durfee (2010, p. 243) has argued, this tends to emphasise 'powerlessness and …helplessness' rather than strength or agency. This presents a paradox for women seeking a protection order – they must have sufficient agency to seek an order but at the same time

> To be considered legitimate victims of domestic violence, petitioners must be seen as powerless, fearful, unable to resist their abusers, and helpless enough to merit legal intervention. Women

> who are not passive, helpless, and/or fearful are not considered 'legitimate' victims and their motivations for filing a protection order are questioned.
>
> Yet, these same characteristics that legitimate a woman's claim to the status of victim can also be used to discredit her claims entirely. Victims must also be seen as agents of active (albeit unsuccessful) resistance. Victims who do not leave their abusers are often portrayed as masochistic, pathological, and/or mentally ill. (Durfee 2010, pp. 244-245)

Within criminal and civil protection order discourse, a woman's credibility is likely to be called into question if she failed to 'leave' or create sufficient distance and separation between herself and her violent partner (Harrison 2008, p. 395). The heightened attention to questions of 'leaving', or not, is at odds with the extensive literature demonstrating the many obstacles women face in trying to end a violent relationship, that some women leave only to be forced to return and that leaving may not be safe or effective in ending domestic violence (Buel 2003; Mahoney 1991; Stark 2007). In the past decade, scholars and activists have highlighted the role that coercive control plays in entrapping women in violent relationships (Stark 2007; Ptacek 1999). However, with rare exceptions, the criminal law continues to emphasise discrete incidents of largely physical violence, and not coercive control, which means that the risks faced by many women victims of domestic violence are not well understood within the criminal justice system.

Over the last decade, pro or mandatory arrest and prosecution policies have been introduced in many jurisdictions, especially in North America. While Australia has tended not to adopt a mandatory approach, favouring instead a pro arrest and or pro prosecution approach (Hunter 2008, p. 5), there are some mandatory aspects within the quasi-criminal domestic violence protection order schemes.[7] The mandatory policies characteristic of the North American response have attracted considerable debate amongst feminist advocates (Schneider 2000, p. 184; Bumiller 2008; Richie 2012) and continue to be controversial. While such approaches may assist women who do not want the burden of deciding whether or not a perpetrator faces criminal consequences, they also limit women's autonomy and decision making when they engage with the criminal justice system. What should be done to assist women who are reluctant to engage with the criminal justice system in the prosecution of their current or former partner? These policies may be particularly fraught for (some) racialised women (Richie 2012). For instance, Indigenous women in Australia may have little faith in the criminal

justice system born out of their historical experience of both the under-policing of crimes against Indigenous people and the over-policing of offences by Indigenous people resulting in very high incarceration rates and deaths in custody (Cunneen 2001; Nancarrow 2006).

In recent years greater attention has been focused on the increasing number of women defendants in domestic violence matters (WLS 2014; NSW Legislative Council 2012) amid concerns that many of these women are also victims of domestic violence undeservedly affected by pro-arrest policies. These cases highlight additional concerns such as how to assist police and courts to fairly appraise a victim who fights back (in circumstances not defined by the narrow concept of self-defence) and to identify who is a genuine victim deserving of protection.

A further concern about criminal justice discourse and practice concerning domestic violence is that sexual violence is commonly absent from other legal domains that address domestic violence. It would appear that there remains a bifurcation of responses to sexual violence and other acts/ behaviours that form IPV (i.e. physical violence, verbal abuse, property damage). Whilst sexual violence is explicitly included within definitions of domestic violence in legislation and policy statements in Australia, it is rarely acknowledged in legal narratives or practice concerning domestic violence, with sexual assault and domestic violence commonly treated as distinct, rather than overlapping, areas of policy and practice. Intimate partner sexual violence remains primarily seen as the province of criminal law and is not raised to any great extent in protection order proceedings or in family law matters (Durfee 2010, p. 243; Moloney et al. 2007, p. 69; Wangmann 2010, p. 958). There are numerous reasons why sexual violence may not be raised within other legal settings, but this must raise questions about the extent to which women are likely to be adequately served by legal responses that have a partial and or distorted understanding of the violence that they face.

Family Law

Family violence in the form of intimate partner violence (IPV) and child abuse has long been recognised in Australia, and elsewhere, as a central concern of the family law system (Brown et al. 2001). Over the last two decades there have been a number of progressive developments (in court decisions, legislative amendments, and policy

change) but tensions remain and some of the reforms adopted have failed to translate in practice. So despite progressive change there is continued, and at times intense, criticism. For example, reforms introduced in 2006 stipulated the need to balance two primary considerations in determining the best interests of the child when making a parenting order - 'the benefit to the child of having a meaningful relationship with both …parents' and the 'need to protect the child' from harm including family violence. These provisions came to be seen in direct conflict with each other (Kaspiew et al. 2009, pp.347-350). Other changes made in 2006 required (as one of the additional considerations going to the best interests of the child) that a parent demonstrate a willingness to facilitate relationships with the other parent (this was known as the 'friendly parent criterion') and provided that a costs order could be made by the court where an allegation or denial of family violence was found to be false. Together these provisions were seen to silence women's allegations about domestic violence particularly where they lacked independent evidence to support their allegations.

These provisions were highly criticized and were ultimately repealed or amended by the *Family Law (Family Violence and Other Measures) Act 2011* (Cth). The friendly parent criterion and the costs provisions were removed entirely, and it was made clear that greater weight is to be accorded to the 'need to protect' consideration. This is an important amendment – however we suggest that there will remain tensions for mothers who are unable to present sufficient evidence to satisfy the court that the violence 'counts' when making future parenting orders. Violence 'counts in those cases where it is presented as a 'disqualifying factor'' by meeting 'a stringent standard in relation to severity and the availability of evidential support', compared to those cases where the violence alleged is 'contextual' because it is 'less severe' and there is no evidence beyond that of the woman and her former partner (Kaspiew 2005, pp. 122-123). Furthermore, despite these recent amendments, the Australian family law regime stays firmly within a pro-contact culture which, like other jurisdictions such as the UK, 'have embraced a construction of child welfare that places co-operative parenting and contact with the non-residential parent at the centre of children's well-being' (Kaganas & Sclater 2004, p. 3).

Such legislative changes are welcome and important, however they do not address the ways in which mothers experiencing family violence face markedly different demands

within family law compared with the public law domains of criminal law, civil protection orders and child protection. In family law the emphasis is on the continuing relationships between children and their parents post separation, that parents should agree on parenting arrangements, and that the view is to the future (and not the past) (see also Hester 2011, p. 846; Rathus 2007). This *expectation* of a continuing relationship between the former intimate partners as they parent their child/ren, stands in contrast to the domains of child protection, criminal law and civil protection where, whilst separation from a violent partner is not necessarily required, it is emphasized. In this context scholars have highlighted the way in which certain stereotypes of women have become prominent in this arena. Helen Rhoades (2002), for example, has noted the rise of the 'no contact' mother, who unreasonably seeks to obstruct contact; this image persists despite being at odds with the findings of research. Within a similar character framework, Lesley Laing (2013, p. 52) has noted the extent to which women are accused of seeking civil protection orders, not for their protection from domestic violence, but rather to gain 'tactical' advantage to limit or prevent the father spending time with children post separation.

Recognition of the impact of separation on children and their continuing needs to maintain relationships with their parents - and the ongoing nature of being a parent – also has a particular impact on the way in which a mother raising allegations of IPV and/or child abuse is constructed. Whilst the spousal relationship between the parents can be 'dissolved', parenting itself is seen as indissoluble (Parkinson 2011, p. 12). Here the father is highly visible (unlike in criminal law or child protection), not as a perpetrator of violence but 'primarily as a father' (Hester 2011, p. 849). Several scholars have found that notwithstanding being a perpetrator of family violence, a father may be constructed as a 'good enough father' (Douglas & Walsh 2010, p. 494; Hester 2011, p. 849; Murray & Powell 2011, p. 92), for the purposes of a parenting order, while mothers are subject to far more scrutiny than fathers as parents, both within family law and child protection settings (discussed below).

This continuing nature of parental relationships in family law has multiple effects on mothers who experience family violence. For instance, an assumption that contact with a parent is inherently good for a child leaves a mother who opposes a continuing relationship, or seeks to restrict how that relationship will take place, open to the

allegation that she is unreasonable. She may be characterized as either 'implacably hostile' or 'appropriately protective' depending upon the nature of the evidence that they can raise to support their allegations, and the views of the various professionals (family dispute resolution practitioners, family consultants, lawyers, and judges) about the extent to which the violence is relevant to the question of ongoing contact with the parent with whom the child does not live most of the time.[8] This was explicit within the now removed 'friendly parent' criterion, but it is arguable that it continues to shape decisions about shared parental responsibility, equal time or substantial and 'significant time'. How is it possible for mothers to articulate their reluctance about an ongoing relationship with the violent parent? How can a mother effectively explain this reluctance without being seen to raise notions of fault and blame and as being focused on the past rather than the future?

The focus for parenting orders on the future also means that orders agreed to, or made by a court, may downplay the risks of further violence that mothers face at times of handing over a child/ren to a violent former partner. Orders may nominate 'safe' changeover locations, or provide that parenting time is to be supervised by others. However, as Hester has argued 'the primary concern in the family courts is in getting women to overcome their fears of further abuse from ex-partners, rather than challenging the violence of men' (Hester 2011, p. 849). This is not to say that such measures are not important, nor valued by women, as the contact a father has with children post separation has been documented in many studies as a continuing site for abuse and harassment (Kaye, et al. 2003; Radford and Hester 2006; Laing 2013; Coy, et al. 2012).

In addition to assumptions about the benefits of ongoing relationships between parents and their children, the Australian family law system continues to be framed by the discourses of no-fault, and a more amicable divorce system (Rhoades, et al. 2010) and this affects the way in which violence can be raised, valued and heard. There is a continuing resonance of these discourses in the language of mutuality that imbues cases that involve domestic violence. While there has been welcome progress in the recognition and prominence placed on family violence in parenting matters, family violence cannot be heard and taken into account within family law when evidence is not available (Moloney et al. 2007) or not well understood. Given the private nature of

family violence, there may be a lack of evidence to support claims (or denials), women may not have reported the violence (Hester 2011, p. 848) or the violence may not be seen as 'violence that counts' (see Kaspiew 2005).

For Indigenous women it is not merely that their claims about violence are not heard within the family law system, but rather that they themselves are largely absent (Cunneen and Schwartz 2009a). This arises from factors such as: a lack of knowledge within some Indigenous communities about the family law system, and its relevance to separating families; questions about whether it takes account of different models of families and parenting as practiced within Indigenous communities; and, the absence of legal aid or advice about this area of law. Since 2006 there has been increasing awareness of the need to do more to enable access to the family law system for Indigenous families (Family Law Council 2012), with specific recognition of different kinship structures and the importance of children's connections with culture included in the legislation.[9] These developments and initiatives are welcome – our point here is that the lack of access to the family law system impacts on the extent to which Indigenous women are assisted in dealing with violence when they have children, and instead the focus tends to be on child protection interventions rather than family law with potentially negative consequences for Indigenous women. In this way legal responses for Indigenous women have remained centered on criminal law and child protection – two areas of law that have particularly been associated with the experience of colonization and continuing disadvantage and discrimination.

Child protection

Mothers experiencing domestic violence often encounter the child protection system regarding concerns for their child's safety. The intervention of the child protection system is not only in terms of direct abuse and neglect of the child, but also concern about the harm suffered by children living in a household in which violence takes place. In this legal arena the focus is on the child and the child's safety and protection – the woman appears in the guise of mother/parent (Douglas and Walsh 2010; Murray and Powell 2011). Women whose children are the subject of child protection proceedings are more likely to be positioned as responsible for the ongoing care of children when there has been domestic violence by the father, and thus the key question that they face is their capacity (or failure) to protect to protect the child. This may be a difficult

position for women victims of domestic violence to navigate as they struggle to protect themselves and to identify the safe options for themselves and their child(ren) (Hester 2011, p. 843).

The particular position of women in the child protection arena takes a sharper focus when we appreciate the relative absence of questions about the violent father, in contrast to the family law arena where the father is very much present and emphasized, whether he is violent or not (Murray & Powell 2011, p. 88). Overall mothers tend to be scrutinised far more within this legal domain than the perpetrator father (Douglas and Walsh 2010, p. 493). Furthermore the gender neutrality of much of the legislation and policy in this area (Murray and Powell 2011) embeds the invisibility of who is doing what to whom – and hence is another reason why mothers may experience particular limitations of their capacity to care for their children and themselves.

The child protection domain is the jurisdiction of the States and Territories in Australia and, as noted earlier, this adds to the fragmentation for mothers and children experiencing domestic violence who seek assistance from law(s). Each state has its own child protection legislative regime – clearly the focus is on the child, and particularly the 'child in need of protection'. Invariably across all jurisdictions intervention is based on concern that the child may be at risk of harm.[10] As in many other jurisdictions (Hester 2011, p. 843), the last two decades has seen increased recognition of the impact of domestic violence on children as a child protection concern (Murray and Powell 2011). In a number of Australian jurisdictions domestic violence has been included as a form of child abuse in policies mandating that specified professionals report abuse to child protection authorities (Wood 2008; Nixon and Cripps 2013). How such notification provisions operate has been questioned, particularly in relation to Indigenous women where there is concern that rather than such provisions enhancing safety for children, Aboriginal women will be dissuaded from seeking help regarding domestic violence for fear of being reported to a child protection agency and hence risk their children being removed (Nixon and Cripps 2013). In Australia the child protection system has historically been more interventionist in the lives of Aboriginal and Torres Strait Islander families leaving a legacy of the Stolen Generations and the continuing high rate of removal of children from Indigenous parents. In addition to (and because of) this important continuing historical context of colonisation, Nixon and Cripps (2013: 170)

emphasise that Aboriginal women and children ‘may be even more detrimentally impacted’ given the high rates of violence within communities, the chronicity of that violence, its often public nature and the over policing and the already pervasive levels of contact with child protection services. Perhaps more so than any other group of women in Australia, Indigenous women experience the child protection system and criminal legal system as negative and highly punitive

In families in which there has been domestic violence, child protection agencies often ‘encourage’ women to seek a civil protection order which excludes the father from the home, thus providing protection to the mother and child(ren).[11] Thus ‘separation [is seen]… as the favoured approach’ despite what is known about separation being a particularly dangerous time for women escaping domestic violence (Hester 2011, p. 843). Even if women do ‘leave’ their violent partner, the violence may not stop, and they may be further scrutinized concerning their capacity to care for their children post separation for instance, in terms of accommodation, financial capacity and their own mental health (Murray and Powell 2011). Mothers engaging with the child protection system frequently fear the removal of their children because of their ‘failure’ to protect their child (Douglas and Walsh 2010, p. 489). It is their capacity to ‘protect’ the child – rather than their own need for protection – that is most under scrutiny, and yet they may both be at risk due to domestic violence.

As noted by Douglas and Walsh, non-violent mothers are positioned by many child protection workers as being ‘responsible for ending the violence’ by leaving or ending the relationship (2010, p. 490). The violent parent is largely absent from the question of ‘responsibility’. Mothers ‘walk a tightrope’ (Wilcox 2000 as cited in Douglas and Walsh 2010) in that if they admit they need assistance, they may jeopardise the perception they can care for their children. Child protection discourses simultaneously construct mothers ‘as oppressed by men, as responsible for child protection, and as making choices about their children’s care. These discourses sit uneasily together…’ (Scourfield 2001, as cited by Douglas and Walsh 2010, p. 503).

Concluding comments

Examining the different ways in which mothers experiencing domestic violence are framed, and the competing performative requirements that they face across legal

domains challenges conventional understandings of crime victims in several ways. First it demonstrates that singular, undifferentiated conceptions of crime victims are flawed both conceptually and for policy purposes. It draws our attention to the more complex and nuanced work required to bring about progressive reforms to legal practices. While refining legal rules continues to be important, it is unlikely to be sufficient to ensure that victims of domestic violence receive the best possible outcome. One common response to the fragmentation and dissonance across the systems has been the notion of integration. However, integration alone, particularly if viewed merely as the facilitation of movement from one legal domain to another, will not address the competing ways in which domestic violence victims are required to perform to gain the attention (or perhaps in some instances inattention) of the law but rather we need to ask questions about the way in which the law itself constructs women victims of domestic violence in ways that work against integration. Since law and legal actors do not just respond to some pre-figured construct of a victim, but actively constitute what it means to be a victim deserving of a legal response, the understanding of domestic violence that they bring to bear in this work is crucial. Making transparent the conflicting constructions and competing demands faced by mothers who are also victims of domestic violence may be a necessary first step in beginning to bring about cultural change across the legal system in support of giving meaning to the aspirations of a common interpretative framework.

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[1] Note though Smart's concern not to treat law as singular, nor to privilege it, see also Smart 1989.

[2] 'Family violence' is the preferred term used by Indigenous communities to describe a wide range of forms of violence that take place within the familial setting and that have wide ranging familial impacts. It is however also a contested term as it is seen to obfuscate the gendered nature of violence within Aboriginal communities: see discussion in Murray & Powell 2011: 60-62.

[3] A definition based on this recommendation was inserted in the Family Law Act by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth). There has also been some work in NSW to adopt an 'shared policy definition' of domestic and family violence that draws on many of the elements recommended by the ALRC & NSWLRC but also recognising the diversity of victims who are subject to domestic violence and the particular legislative responses in NSW that recognise a very broad definition of relationships: NSW Government, *It Stops Here: Standing Together to End Domestic and Family Violence in NSW – The NSW Government's Domestic and Family Violence Framework for Reform* (2014), 11-12.

[4] For example see *Family Violence Act 2004* (Tas) s 8 and s 9.

[5] *Crimes Act 1958* (Vic), s9AH.

[6] See for example the definition of family violence introduced into the *Family Law Act 1975* (Cth) by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth).

[7] See for example *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 27 and s 49

[8] Since 2006 the *Family Law Act 1975* (Cth) refers to which the child lives, and with whom the child spends time (previous terminology had been residence and contact from 1995; and custody and access from 1975).

[9] See *Family Law Act 1975* (Cth) s 60B(3), s 60CC(3)(h), and s 61F.

[10] See for example Douglas and Walsh discussion of the child protection legislative regime in Queensland (2010: 491).

[11] It is interesting to note that this practice has been shared across jurisdictions: in the UK see Hester 2011: 843