What’s the Problem with Intimate Partner Abuse?

Exploring the Role of Problem Representations in the Criminal Law in the UK and Australia

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ABSTRACT

Every criminal offence contains within it a diagnosis of the 'problem' to be solved by that offence: its 'problem representation'. This representation is not *the correct* definition of the proscribed conduct and what is wrong with it, but one of many possible interpretations. Nevertheless, the problem representation given credence informs the language of an offence, and affects its application. Representations of the nature of criminal acts, and what is wrong with them, inform the message we send to the community about offenders and their behaviour, and the experiences and suffering of victims. It is therefore vital to interrogate our laws to uncover their implicit problem representations, and to challenge those representations which produce undesirable outcomes.

This thesis considers the various problem representations of Intimate Partner Abuse (IPA) that are implicit in the language of the criminal law in the UK and Australia, as well as competing representations. It aims to find a representation of IPA which, when vested in a criminal offence, appropriately conveys the experiences and circumstances of victims.

Using Carol Bacchi's 'What's the Problem Represented to be?' methodology, I consider how IPA has been described, defined, and discussed by academics and activists, criminal law reformers, and criminal justice officials (such as police, prosecutors and judges) in the UK and Australia. I show how these people have used their positions of influence to shape the construction of criminal law solutions to IPA. I also consider how the language of criminal offences shapes public perceptions of IPA, its perpetrators and victims. In particular, I consider the effect of highlighting or obscuring the gender of victims and perpetrators on how the experience of IPA is portrayed. Finally, I propose an alternative representation of IPA, and consider whether a specific offence of IPA informed by this representation could produce better outcomes for victims. This alternative represents IPA as

an abuser's repeated or continuous exploitation of the victim's vulnerability to restrict their freedom of action.

For a crime as tormenting and destructive as IPA, it is all the more important to be conscious of the impact of problem representations on any solutions offered by the criminal law. It is vital to examine and challenge the problem representations which lodge in criminal offences of IPA, because the way the problem is represented has serious consequences for victims.

DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint award of this degree.

I give permission for the digital version of my thesis to be made available on the web, via the University's digital research repository, the Library Search and also through web search engines, unless permission has been granted by the University to restrict access for a period of time.

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Signature:

Date: 9 July 2018

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List of Abbreviations

BME	Black, minority-ethnic
BWS	Battered Woman Syndrome
IPA	Intimate Partner Abuse
LGBTIQ	Lesbian, Gay, Bisexual, Transgender, Intersex, Queer
MCCOC	Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General
NSW	New South Wales
OED	Oxford English Dictionary
PTSD	Post-Traumatic Stress Disorder
SA	South Australia
UK	United Kingdom
US	United States of America
VAWG	Violence against Women and Girls
VLRC	Law Reform Commission of Victoria
WA	Western Australia
WPR	What's the Problem Represented to be?

CHAPTER 1: INTRODUCTION

In 1991, revered criminal law scholar Glanville Williams wrote *The Problem of Domestic Rape* in response to the UK Law Commission's working paper on rape within marriage.[1] Despite the impression given by the title, Williams did not view marital rape as a problematic social issue. Women, he believed, could not find rape by their husbands 'nearly so traumatic' as that committed by a stranger.[2] He deplored the provisional conclusion of the Law Commission (influenced as Williams saw it by feminist pressure-groups, whom he somewhat maliciously termed 'dragons') that the marital rape immunity should be abolished.[3] He feared that innocent men would suffer from the stigma of being cast as criminals for having sex with women who had implicitly acquiesced when they walked down the aisle. Williams accepted that through marriage, women do not give 'permanent and unqualified consent' to sex, and that a man who assaults his wife in the process of forced coition ought to be punished for that assault.[4] But that a man might be stigmatised for raping his wife, and regarded no differently from a man who lurks in the shadows to ensnare unsuspecting women, was to Williams a fearful prospect.

So too was the idea of giving women power to destroy their husbands' lives. Women could be a capricious lot in Williams' eyes. Elsewhere, he encouraged instructing juries to distrust female rape victims, saying that these 'cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed'.[5] He worried that a woman who refused her husband's advances following 'a tiff' might resort to the criminal law in response to his forcing himself upon her, only to later be reconciled with

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[1] Glanville Williams, 'The Problem of Domestic Rape' (1991) 141(6491) *New Law Journal* 205; Law Commission, *Rape Within Marriage*, Working Paper No 116 (1990).
[2] Williams, above n 1, 206.
[3] Ibid 205; Law Commission, above n 1, 3 [1.6].
[4] Williams, above n 1, 205.
[5] Glanville Williams, 'Corroboration – Sexual Cases' [1962] *Criminal Law Review* 662, 159.

him.[6] Women's changeable nature made them, in his opinion, unequal to the privilege of using the criminal law. Williams believed that a 'charge of rape is too powerful (and even self-destructive) a weapon to put in the wife's hands'.[7]

Williams' article provoked understandable outcry from the 'dragons'.[8] Commentators deplored Williams' assumption that 'real' rape is committed by a stranger, and questioned how a man had any right to speculate about women's experience of sexual assault.[9] As Zedner noted, perpetrators of rape are frequently known to their victim, and the existence of a prior relationship between the victim and offender 'does not mitigate, and may in fact exacerbate, the severity of the trauma caused, not least because rape in such circumstances constitutes a betrayal of trust'.[10] Naffine suggested that Williams' argument rested on a false assumption that inequality in marriage no longer existed – an assumption she noted obscures 'the social conditions that shape women's consent'.[11] Rejecting Williams' suggestion that rape within marriage constitutes a 'trivial misdemeanour' resulting from a quarrel, commentators instead argued that such conduct is 'commonly a manifestation of a long-term abusive, often violent relationship'.[12]

Nevertheless, Williams' views about 'real' rape were influential, especially among certain members of the judiciary.[13] In *R v M*, for example, Lord Taylor expressed the notion that:

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[6] Williams, above n 1, 206.
[7] Ibid.
[8] Melisa J. Anderson, 'Lawful Wife, Unlawful Sex – Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland' (1998) 27(1) *Georgia Journal of International & Comparative Law* 139, 159.
[9] See, eg, Claire Glasman, 'Women judge the courts' (1991) 141(6496) *New Law Journal* 395; Margaret Anderson, 'Domestic rape' (1991) 141(6495) *New Law Journal* 336.
[10] Lucia Zedner, 'Regulating Sexual Offences within the Home' in Ian Loveland (ed), *Frontiers of Criminality* (Sweet & Maxwell, 1995) 173, 191.
[11] Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57(1) *Modern Law Review* 10, 22, quoting Vanessa Laird, 'Reflections on *R v R*' (1992) 55(3) *Modern Law Review* 386, 392.
[12] Zedner, above n 10, 191; Joanna Bourke, *Rape: A History from 1860 to the Present Day* (Virago, 2007) 320.
[13] Theresa Fus, 'Criminalizing Marital Rape: A Comparison of Judicial and Legislative Approaches' (2006) 39(2) *Vanderbilt Journal of Transnational Law* 481, 494.

> there is a distinction between a husband who is estranged from his wife and is parted from her and returns to the house as an intruder … and a case where, as here, the husband is still living in the same house and, indeed, with consent occupying the same bed as his wife. We do not consider that this class of case is as grave as the former class.[14]

This was not a universal attitude amongst the UK judiciary. A series of cases in the early 1990s concluded that the exemption was an outdated legal fiction.[15] Nevertheless, even after the exemption was abolished in 1994,[16] some members of the judiciary continued to embrace Williams' attitudes. Rumney's analysis of rape sentencing in the UK Court of Appeal between 1986 and 1997 shows that, even after the exemption was abolished, men convicted of raping their wives continued to receive lower sentences than those who committed stranger rape.[17] Lord Justice Lawton, who chaired the Criminal Law Revision Committee during its 1980s revision of sexual offences,[18] insisted at the time that marital rape ought not to be criminalised due to the inevitable 'floods of women' who would approach police for assistance, thus doing irreparable damage to multitudes of marital relationships.[19] Five years after the exemption was abolished, Lord Justice Lawton maintained his views, despite the fact that only 12 cases of alleged marital rape had been brought in the UK.[20]

That Williams' attitudes prevailed for so long, and were so influential, is attributable to his position as a leading criminal legal theorist and law reformer.[21] Williams was a widely respected criminal law teacher, and was viewed as the UK's foremost legal scholar. His

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[14] (1995) 16 Cr App R (S) 770, 772.
[15] *R v R* [1991] 1 All ER 747; *R v R* [1992] 1 AC 599, 611; *R v C* [1991] 1 All ER 755. See also *R v J* [1991] 1 All ER 759, 768.
[16] *Criminal Justice and Public Order Act 1994* (UK) c 33, s 142. This Act clarified that rape can be committed by any man against any woman, regardless of the relationship between them.
[17] Philip N.S. Rumney, 'When Rape Isn't Rape: Court of Appeal Sentencing Practice in Cases of Marital and Relationship Rape' (1999) 19(2) *Oxford Journal of Legal Studies* 243, 258–60.
[18] Criminal Law Revision Committee, *Fifteenth Report: Sexual Offences*, Cmnd 9213 (1984).
[19] Sue Lees, *Ruling Passions: Sexual violence, reputation and the law* (Open University Press, 1997) 119, citing Thames Television, 'The Right to Rape', *World in Action*, 25 September 1989 (Lord Justice Lawton).
[20] Lees, above n 19, 119.
[21] Zedner, above n 10, 191–2; Lord Herbert Edmund-Davies, 'Foreword' in P.R. Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (Stevens & Sons, 1978) vii.

position on the Criminal Law Revision Committee gave him a commanding voice among academics, practitioners and reformers.[22] His wide influence over the criminal law explains how he was in a position to have his assumptions about how women experience rape so readily accepted.

This thesis is not intended to uncover the right and wrong sides of the argument between Williams and his critics. Nor does it focus exclusively on marital rape. Rather, I use the example of Williams' article to demonstrate my focus on problem representations. Williams' article betrays his understanding of the problem of rape as the sexual exploitation of a woman of high moral virtue by an opportunistic and depraved stranger.[23] This is a profoundly different representation of the problem to that held by feminist commentators – that it constitutes an encroachment on women's right to sexual autonomy.

The competition between various problem representations is the focus of this thesis. A problem representation that is given credence shapes the language and outcomes of our criminal laws. Language choice informs the message we send to the community about the behaviour of offenders, and the experiences of victims. An influential problem representation, such as Williams' representation of marital rape, can become so ingrained in popular understanding that recognition of alternative representations, and reform of the law, is delayed or prevented. It is therefore vital to be aware of problem representations implicit within the criminal law, and challenge them when they produce undesirable outcomes.

In this thesis, I consider the various problem representations of Intimate Partner Abuse (IPA) that are revealed in the language of the criminal law in the UK and Australia, as well as competing representations that are not present in the criminal law. Using Bacchi's 'What's

[22] Edmund-Davies, above n 21, vii.
[23] Williams, above n 1, 206.

the Problem Represented to be?' (WPR) methodology,[24] I consider how IPA has been defined, described, and discussed by academics, activists, criminal law reformers, and criminal justice officials (i.e. police, prosecutors and judges) in the UK and Australia.[25] I show how these people have used their positions of influence to shape the construction of criminal law solutions to IPA. I also consider how the language of criminal offences shapes public perceptions of IPA, its perpetrators and victims. Finally, I propose an alternative representation of IPA, and consider whether a specific offence of IPA informed by this representation could produce better outcomes for victims. It is vital to examine and challenge problem representations implicit within criminal law solutions to IPA, because the way the problem is represented has serious consequences for victims.

1.1. METHODOLOGY

There is a multitude of social conditions that exist in society, some of which may be distressing or harmful for people who experience them. But the moment a social condition is identified as a problem, the person who identifies it as such puts an interpretation on the problem – both what causes it and what is concerning about it. This person shapes and constructs the problem. Others may challenge this interpretation, and locate the cause and concern of the condition elsewhere. However, once the condition has been given 'problem' status, we cannot analyse it without interpretation. The solutions we create in response to a problem will reflect our interpretation.

This is the reality uncovered by Bacchi's WPR approach to policy analysis. It is based on the assumption that the way we perceive an issue affects what we think should be done about it.[26] Every criminal offence contains a diagnosis of the 'problem' to be solved by that

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[24] Carol Bacchi, *Analysing Policy: What's the problem represented to be?* (Pearson, 2009) 2.
[25] References herein to 'criminal justice officials' refer to police, prosecutors and judges.
[26] Carol Bacchi, *Women, Policy and Politics: The Construction of Policy Problems* (SAGE Publications, 1999) 199.

offence, which Bacchi calls its 'problem representation'.[27] This problem representation is not *the correct* definition of the social condition, but one of many possible interpretations of it. Various interpretations will benefit or harm the parties affected by the social condition in different ways.[28] In this thesis, I am primarily concerned with how the criminal law represents victims and their experience of IPA. It will therefore be necessary to identify, and analyse the effects of, implicit problem representations in criminal law responses to IPA. Bacchi argues that it is ill-advised to assess policy proposals without analysing their implicit representations since, if the 'problem' is diagnosed in a manner which has harmful effects, the solution is unlikely to be helpful.[29]

Therefore, in this thesis, I adopt Bacchi's WPR methodology to probe criminal offences in the UK and Australia dealing with IPA to uncover the effects of their implicit representations of the problem of IPA. The common law roots of these jurisdictions make their offences suitable for comparison. I do not intend to conduct a comprehensive analysis of all criminal offences associated with IPA in each jurisdiction.[30] Rather, I will be selective in the material for analysis to compare the effects of various problem representations. I will refer to those reformers, practitioners and activists whose work was fundamental to the development of criminal law solutions to IPA in each country, and will uncover the impact of their assumptions and motivations on the representations of IPA ultimately bound up in the law. Close attention to problem representations in legal responses to IPA provides insight into the effects of certain framings.[31]

[27] Ibid.
[28] Bacchi, above n 24, 34.
[29] Bacchi, above n 26, 199.
[30] I primarily focus on English laws in the UK.
[31] Bacchi, above n 26, 179–80.

The 'What's the Problem Represented to be?' approach

Bacchi introduced the WPR method of policy analysis in her 1999 book *Women, Policy and Politics: The Construction of Policy Problems*.[32] This political science approach is based on social and contextual constructionism – the study of historical and social factors allowing constructions of 'real' problems to be made, as well as those people who make claims about problems and have those claims heard.[33] The constructionist approach acknowledges that social problems do not arise spontaneously, but are attributable to a combination of historical, institutional, cultural and political factors. The focus is therefore not on social problems as 'objective conditions to be studied and corrected',[34] but 'the processes of social problems claims-making'.[35]

WPR is not used 'to seek out the "real problem" in order to develop "appropriate" "solutions"'.[36] Rather, it facilitates 'critical interrogation' of the implicit claims made in laws.[37] It begins with 'the premise that what one proposes to do about something reveals what one thinks is problematic'.[38] Thus, each criminal offence contains within it a representation of the problematic nature of the proscribed conduct. This representation may highlight or obscure the interests of various parties who engage in, or are victims of, the proscribed conduct. The representation will also reveal the social vision that the law is intended to reflect and maintain.[39] As Bacchi notes, we must consider 'competing social

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[32] Ibid.
[33] Ibid 55–7.
[34] Gale Miller and James A. Holstein, 'Reconsidering Social Constructionism' in James A. Holstein and Gale Miller (eds) *Reconsidering Social Constructionism: Debates in Social Problems Theory* (Aldine De Gruyter, 1993) 5, 6.
[35] Bacchi, above n 26, 55.
[36] Carol Bacchi 'Introducing the "What's the Problem Represented to be?" approach' in Angelique Bletsas and Chris Beasley (eds), *Engaging with Carol Bacchi: Strategic Interventions and Exchanges* (University of Adelaide Press, 2012) 21, 23.
[37] Ibid 21.
[38] Ibid.
[39] Bacchi, above n 26, 62.

visions and … discuss how particular problem representations … contribute to or undermine visions we support'.[40]

This powerful analytical method has been applied in diverse fields.[41] The emphasis on critically evaluating problem representations makes the approach well-suited to the analysis of criminal laws. To apply the WPR approach, one must examine laws to identify how the 'problem' (e.g. of IPA) is represented, and then analyse this representation. Bacchi uses the following set of questions to guide her analysis:

1. What's the 'problem' … represented to be in a specific policy?
2. What presuppositions or assumptions underlie this representation of the 'problem'?
3. How has this representation of the 'problem' come about?
4. What is left unproblematic in this problem representation? Where are the silences? Can the 'problem' be thought about differently?
5. What effects are produced by this representation of the 'problem'?
6. How/where has this representation of the 'problem' been produced, disseminated and defended? How could it be questioned, disrupted and replaced?[42]

These are not a rigid set of queries. Rather, they prompt consideration of the people who talk about the problem and the social context in which it is identified and discussed as a problem. To tease out an implicit representation (question 1), we can consider those who have played a role in the development of the law (e.g. researchers, activists and law reformers) and determine the effect of their assumptions on how the problem has been represented (question 2). We can also consider the historical and social context within which the problem representation arose (question 3). Question 4 prompts scrutiny of the representation's gaps

[40] Ibid.
[41] See, eg, Amber Bastian and John Coveney, 'The responsibilisation of food security: What is the problem represented to be?' (2013) 22(2) *Health Sociology Review* 162; Lisa Carson and Kathy Edwards, 'Prostitution and Sex Trafficking: What Are the Problems Represented To Be? A Discursive Analysis of Law and Policy in Sweden and Victoria, Australia' (2011) 30(1) *Australian Feminist Law Journal* 63.
[42] Bacchi, above n 24, 2.

and limitations, and permits consideration of alternative representations. Questions 5 and 6 encourage assessment of the effects of the representation on the application of the law under scrutiny, and whether alternative representations would produce different results.

It is not the purpose of this thesis to engage in debate purely on the success or failure of criminal law solutions to IPA. Rather, WPR is used to identify problem representations of IPA which have the potential to produce useful solutions. What counts as useful will invariably be coloured by the analyst's 'social vision', as Bacchi calls it, which is informed by their 'institutional and cultural' location, and 'position in discourse'.[43] I elaborate my own social vision in chapter 2, following an examination of the various problematisations of IPA made by different influential scholars and activists. Put briefly, however, my intention is to identify a representation of IPA which better recognises the experiences of victims.

In this abstract form, the WPR approach may be somewhat bewildering. To clarify the method, let us return to marital rape. To understand how it became a problem for the criminal law, it is useful to consider the social and historical context before it gained problem status. The UK Criminal Law Revision Committee's 1984 report on sexual offences was one of the last official declarations that marital rape was not problematic.[44] One of the Committee's primary arguments echoed Williams' opinion that forced sex in marriage cannot be nearly as traumatic as 'real' rape because the couple is likely to have had regular sexual intercourse.[45] Another key factor was the anticipated detriment to the institutions of marriage and family.[46] The Committee noted the frequency with which domestic violence victims withdrew charges against abusers, and suggested that police intervention in domestic disturbances only drove couples further apart. This, they supposed, would be the result of

[43] Bacchi, above n 26, 62.
[44] Criminal Law Revision Committee, above n 18.
[45] Ibid 19–20 [2.64].
[46] Ibid 20 [2.66].

police intervention in cases of forced sex in marriage. The Committee was also concerned that intervention 'would be detrimental to the interests of any children of the family'.[47] Marital rape was not considered a criminal problem, because to recognise it as such would invite interference in, and cause damage to, the family unit. As Bacchi explains, when we adopt a social vision that idealises the nuclear family, we will ignore harm to one member in order to maintain the whole.[48] Thus, when one member of a family experiences violence at the hands of another, we are likely to adopt 'strategies aimed at "restoring" family harmony' rather than address violent behaviour.[49] Thus, the Committee felt it best to prevent marital discord by retaining the marital rape immunity.

For marital rape to be recognised as a criminal problem, it had to be perceived more seriously than the potential threat to family life posed by state intervention. In the 1992 case of *R v R*, in which the immunity was declared an outdated legal fiction, Lord Keith acknowledged that 'marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband'.[50] He opined that 'the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim'.[51] Lawyers and academics also increasingly began drawing links between domestic violence and marital rape – arguing that marital rape was symptomatic of domestic violence, rather than a distinct issue.[52] Domestic violence, by this time, had been accepted amongst legal scholars as highly problematic, so drawing parallels between domestic violence and marital rape helped promote the latter to problem status. As Freeman, a family law expert, noted, '[t]here is nothing more domestic and

[47] Ibid.
[48] Bacchi, above n 26, 167.
[49] Ibid.
[50] [1992] 1 AC 599, 616.
[51] Ibid 611.
[52] See, eg, MDA Freeman, '"But If You Can't Rape Your Wife, Who[m] Can You Rape?" The Marital Rape Exemption Re-examined' (1981) 15(1) *Family Law Quarterly* 1.

nothing more violent than marital rape'.[53] Thus, marital rape came to be represented in law as problematic. While the nuclear family remained a prominent social vision, judges, scholars, and eventually the UK Parliament, came to recognise that the safety and autonomy of individuals within the family unit ought to be protected in preference to maintaining the unit as a whole.

Materials for analysis

When criminal law theorists analyse offences, they tend to question how well those offences deal with the problematic behaviour they criminalise. Theorists rarely interrogate the construction of the problematic behaviour. They take the problem as a given. A criminal offence is viewed simply as a more or less successful attempt to deal with *the* problem, which itself precedes legal analysis. Therefore, the offence itself, and cases in which it is applied, are usually the main focus of analysis. This is not so for WPR.

Certainly, criminal offences will provide material for analysis, though my focus will not be on whether they can be applied to successfully attain justice. Rather, my focus will be on the effects of their language and construction. Bacchi explains that the language used to frame a problem creates parameters within which the topic can be thought of and changes can be made.[54] Consider the various discourses surrounding intimate partner abusers. If those who abuse their intimate partners are portrayed as mentally ill, medical treatment and counselling will be proposed as solutions. If we refer to abusers as alcoholics, there will be calls for temperance, and those abusers who are teetotallers are less likely to have their behaviour scrutinised. In the same way, by considering the language of criminal offences, we can uncover the limiting effects of their underlying problem representations.

[53] Ibid 3.
[54] Bacchi, above n 26, 40.

WPR prompts us to consider the wording of laws in the context in which they were made. It is important to consider what was occurring in society at the time to trigger new understandings of a problem. So too is it important to consider who was talking about the problem, and what they were saying. Therefore, debates in parliament or the media, government research and policy, law reform inquiries and academic research are all potentially useful materials for analysis.[55] Of great importance is to consider those who held the 'enunciative position' – that is, those politicians, academics or other commentators who were in a position to influence how the problem was represented.[56] Heather Maroney coined the term 'enunciative position' to explain how priests, academics and politicians in Quebec were able to use their influential social positions to encourage native Quebecer women to have more children.[57] These people (mainly men) held important positions in society, and therefore held the power to enunciate or construct a 'crisis' of falling native fertility rates. They represented fertile women as the saviours of national identity to encourage higher birth-rates.[58] Bacchi adopts the concept of the enunciative position to explain the need to consider claims-makers. She recommends identifying those people and organisations in a position to direct the rhetoric around a social problem.[59] Problem representations are moulded by those who hold the enunciative position – the rhetoric they use to discuss a problem will shape the way laws are formulated. If we return once more to the problem of marital rape, Zedner noted in her response to Williams that her rejection of his stance 'may do little to undermine the powerful resistance of those like him, to [marital rape's] effective criminalisation'.[60] Zedner recognised that Williams maintained a strong hold on his enunciative position.

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[55] Ibid 4.
[56] Ibid 55.
[57] Heather Jon Maroney, '"Who has the baby?" Nationalism, pronatalism and the construction of a "demographic crisis" in Quebec 1960–1988' (1992) 39 *Studies in Political Economy* 7, 26.
[58] Ibid 20.
[59] Bacchi, above n 26, 57.
[60] Zedner, above n 10, 191–2.

Not all those with legitimate claims will be heard, and WPR encourages consideration of representations made by people who do not hold the enunciative position.[61] It is important to consider alternative problem representations made by academics and reform activists with less enunciative power, and who, unlike politicians, are not able to impose their representations on society through the law. If various representations harm and benefit people in different ways, we must consider a variety to determine which produces the best results for the right parties. We ought to consider what would happen if others held the enunciative position.

The materials for analysis are therefore extensive. We can consider not just the wording of criminal offences, but the language and assumptions of those who played a role in enacting them (academics, law reformers, and politicians), those with alternative representations, those who demanded reform (activists, social service providers, and victims), and those enforcing the law (police and judges).

Why WPR?

WPR allows us to understand the law within its social and historical context, and thus uncover the impact of social visions underlying the institution of law. This accords with a recent movement among criminal law theorists to understand the law as the institutionalisation of social norms that have come to be viewed by society as obligations.[62] These scholars suggest that, to understand our institution of law, we must consider it as evidence of the 'habits, customs, theories and practices' which have become values inherent within society.[63] We must consider the context in which the law was created, noting the

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[61] Bacchi, above n 24, 19.
[62] Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press, 2016) 22; Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007).
[63] Farmer, above n 62, 35.

agendas 'of political parties, of government agencies, [and] of pressure groups'.[64] In so doing, we can understand the values that the institution of law purports to protect.[65]

Criminal law theorist Lindsay Farmer adopts a similar method to WPR in his account of the development of the modern institution of criminal law in England. In *Making the Modern Criminal Law*, Farmer aims to explain contemporary understanding of criminalisation theory (i.e. the principles defining legitimate state action).[66] While criminalisation has 'become one of the dominant themes of academic criminal law theory',[67] Farmer argues that this is a relatively recent development. He deplores the trend among scholars to consider criminalisation ahistorically, and present recent debates as 'part of a longer liberal tradition running from Hobbes and Locke' to Mill, Hart and Devlin, without recognition of the gaps between these commentators and the general lack of concern in the 'criminalization question' throughout much of the last three centuries.[68]

Farmer argues that criminalisation cannot be understood without an account of 'the development of the institutional conditions that underpin and make possible our contemporary understanding of criminalization'.[69] He aims to give a coherent account of the modern English criminal law which locates it in its social context. Farmer notes that 'the scope or function of the criminal law at particular points in time might depend less on moral theory than the ability of social groups or classes to harness the power of the law'.[70] Thus, to understand criminalisation, one 'must be open to this particular combination of

[64] Neil MacCormick, 'Reconstruction after Deconstruction: A Response to CLS' (1990) 10(4) *Oxford Journal of Legal Studies* 539, 557.
[65] Victor Tadros, 'Institutions and Aims' in Maksymilian Del Mar and Zenon Bankowski (eds), *Law as Institutional Normative Order* (Routledge, 2009) 83, 84.
[66] Farmer, above n 62, 1.
[67] Ibid.
[68] Ibid 2–3.
[69] Ibid 1.
[70] Ibid 22.

understanding how the law is used and enforced, the interests that it might serve, and the social functions that it might perform'.[71]

Farmer engages in analysis similar to WPR. His focus on the 'persons, acts, or events' responsible for the development of the criminal law mirrors questions 2-3 of WPR.[72] He concentrates on the evolution of the aims of the criminal law, and the influence of historical social norms. He identifies that the 'problem' of criminalisation is now represented as too much state interference in the lives of citizens, but instead of blindly proposing a 'solution', he asks the 'prior question' of how we came to frame criminalisation in this way.[73]

Although similar, Bacchi's approach offers something additional to Farmer's. In focusing on claims articulated by people who have been in a position to affect the law, Farmer neglects those have not held enunciative power. Tadros notes that such a method of analysis will tend to defend the values that the law adopts, and those who have had influence in shaping the law.[74] This does not allow us to look beyond the social vision held by those in power, and consider how alternative social visions may have altered the law's construction. It ignores claims articulated by others who held less power, arguably reinforcing inequality.[75] Tadros argues that legal theorists ought instead to engage more closely with political theory, given its capacity to comprehend competing values.[76] WPR permits analysis of the law in context, as well as competing social visions.

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[71] Ibid.
[72] Ibid 23.
[73] Ibid 1.
[74] Tadros, above n 65, 84.
[75] Susan M. Armstrong, 'Evaluating Law Reform' (2006) 10(1) *University of Western Sydney Law Review* 157, 161.
[76] Tadros, above n 65, 100.

1.2. TERMINOLOGY

A general term must be assigned to the conduct analysed in this thesis – a difficult matter when adopting the WPR approach, which insists that the choice of language employed to frame an issue is limiting.[77] While many terms, such as 'domestic violence', 'family violence', and 'wife-beating', are often used interchangeably, each represents the problem differently, suggesting various essential determinants such as 'marriage, gender, familial relationship, intimacy, or physical violence'.[78] Any term will emphasise, obscure, and exclude certain aspects and actors, and will therefore limit what can be thought about such conduct. Nevertheless, the conduct must have a label. Speaking in abstract terms is no more helpful. I therefore use the term Intimate Partner Abuse (IPA).

This term, like all others, contains a representation of the problem. While this representation will place limits on my analysis, this is unavoidable, and its implicit representation is preferable to me than those underlying other terms. Bacchi explains that policy analysis is inevitably informed by the analyst's motivations, so it is important to be explicit about those motivations.[79] I will therefore justify my terminology by comparing it with other labels in common usage, their underlying problem representations and limitations.

'Wife-beating', 'wife-battering', and 'domestic violence'

The terms 'wife-beating' and 'wife-battering' prompt us to consider violence by men against their wives, and imply that we should only be concerned about physical violence. The terms conjure an image of a submissive and timid housewife beaten by a physically imposing, degenerate, unemployed, or alcoholic husband. These were terms of choice for the 1960s

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[77] Bacchi, above n 26, 10.

[78] Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* (Yale University Press, 2000) 60.

[79] Bacchi, above n 24, 19. See also Thomas Nagel, *The View from Nowhere* (Oxford University Press, 1986) 1, 9. Similarly, Nagel aims to find a way 'to combine the perspective of a particular person inside the world with an objective view of that same world'. He argues that attempting to achieve such a transcendent world view requires acknowledgement from the particular person of their 'contingency', 'finitude', and the role that their 'containment in the world' has on limiting their capacity for objectivity.

battered women's movement, as their emotive nature and focus on physical abuse made them powerful tools in encouraging state intervention.[80] Evoking the vulnerability of victims roused the paternalistic inclination of the state, and focusing on physical violence meant that existing offences against the person were applicable.

However, these terms, along with the now more prominent 'domestic violence', are severely limiting. 'Beating', 'battering', and 'violence' limit the problem to physical assault. They prevent consideration of other behaviours such as emotional abuse, intimidation, and isolation. This is troubling given that victims frequently report that emotional abuse is more distressing than physical violence.[81] One respondent to a 1988 UK study into how women define their experiences of violence demonstrates this point: 'What he did wasn't exactly battering but it was the threat. I remember one night I spent the whole night in a state of terror … And that was worse to me than getting whacked'.[82] This account also reveals the difficulty that victims (and society) have in recognising 'battering' where abusers are not physically violent. Regardless of other abusive tactics, victims can refuse to accept that they have experienced 'battering' or 'domestic violence' if physical abuse is infrequent.[83] These terms tell victims, the community, police and judges that the sole concern is physical violence.

Feminist legal theorist Jennifer Nedelsky suggests that terms such as 'domestic violence' threaten 'to domesticate, privatize, and trivialize frightening and horrific' behaviour.[84] Such terms put the problem behind closed doors, thus discouraging intervention. They also exclude those victims who are not married to or living with their abuser, or who have

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[80] See chapter 2.
[81] Schneider, above n 78, 65.
[82] Liz Kelly, 'How women define their experiences of violence' in Kersti Yllö and Michele Louise Bograd (eds), *Feminist Perspectives on Wife Abuse* (Sage Publications, 1988) 114, 120.
[83] Ibid 127.
[84] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012) 310.

separated from their abuser. By drawing attention to marriage and the domestic sphere, they can invoke deeply gendered stereotypes of the kinds of people who can be victims. The terms suggest that the abhorrent act is limited to the physical assault of a dutiful housewife and mother who is unable to fight back. This may prevent women who do not fit the ideal image of domesticity (perhaps because they have fought back, or have a history of alcohol or drug abuse) from seeking assistance.

Moreover, women who have been in abusive relationships frequently avoid labelling *themselves* as 'battered women', which American feminist lawyer and scholar Elizabeth Schneider attributes to the reductive quality of the phrase – that is, it presents a woman as battered, defining her whole life experience around the fact that she has been abused.[85] She is no longer a woman, but has become a 'battered woman'. The term is not empowering, but belittling. It suggests that the victim is defenceless and defeated, and ignores her capacity to resist and move past the period in her life in which she was battered.[86]

Furthermore, drawing attention to the domestic sphere allows the abuser to disappear from analysis.[87] As Schneider notes, the focus of terms like 'wife-battering' is the victim – a woman *is battered*, and we are not prompted to consider *by whom*.[88] The perpetrator remains faceless and nameless, and his (because terms like 'wife-battering' lead one to assume the abuser is male) actions are not attributed to him. When we focus on the battered woman, she, rather than the abuse she suffers, may be viewed as the problem. We may be motivated to consider her reaction to the abuse, whether she tried to leave, and whether she tried to protect her children.

[85] Schneider, above n 78, 61.
[86] Ibid 62.
[87] Nedelsky, above n 84, 311.
[88] Schneider, above n 78, 61.

Focusing on the 'wife' or invoking the 'domestic' sphere also perpetuates the traditional notion of IPA as a man's way of establishing and maintaining power within the nuclear family unit.[89] Labels that suggest that violence occurs only within the traditional family unit as a result of, and with the intention of perpetuating, their patriarchal structure, tend to lead to solutions that silence the experience of LGBTIQ and heterosexual male victims.

'Family violence'

'Family violence' is an increasingly common term, especially in government research and reports.[90] It is a broad term, encompassing abuse against all family members, not just intimate partners.[91] The term 'domestic violence' is increasingly used in the same context to cover abuse between family members. The *Domestic Violence, Crime and Victims Act 2004* (UK), for example, applies to abuse committed by a member of the same household as the victim.[92] The justification for these expansive terms is that they permit recognition of the abuse suffered by those victims who would otherwise be silenced by terms such as 'wife beating' – especially male and LGBTIQ victims, children and the elderly.[93] As was observed during parliamentary debates on the Domestic Violence, Crime and Victims Bill,[94] widening the scope of the problem to cover all relatives enables the police to 'protect the vulnerable without discrimination'.[95] Further, the term 'family violence' is used among Aboriginal and Torres Strait Islander people to encompass an even broader concept of violent and abusive behaviours, not only between intimate partners and immediate family members, but also between kin and members of the wider cultural community.[96]

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[89] Ibid 68.
[90] See, eg, Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016).
[91] Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) 2.
[92] c 28, s 5.
[93] Susan S. M. Edwards and Ann Halpbern, 'Protection for the Victim of Domestic Violence: Time for Radical Revision?' (1991) 13(2) *Journal of Social Welfare and Family Law* 94, 99.
[94] [HL] 2003 (UK).
[95] United Kingdom, *Parliamentary Debates*, House of Lords, 15 December 2003, vol 655, col 993.
[96] Heather Rose Nancarrow, *Legal Responses to Intimate Partner Violence: Gendered Aspirations and Racialised Realities* (PhD Thesis, Griffith University, 2016) 26.

While the benefit of these terms is their expansive nature, it is also their limitation. As Reece perceptively argues, 'if domestic violence occurs everywhere then domestic violence occurs nowhere'.[97] The term 'family violence' cannot provide victims of IPA with recognition of the specific wrong done to them. The act of one partner taking advantage of the other's expectation of trust and intimacy to abuse or exploit them distinguishes IPA from abuse between relatives.[98] The term 'family violence' also obscures the distinct dynamics underlying child and elder abuse.[99] A blanket term would be inappropriate, as it would conflate victims, and trivialise and obscure the variety of distinctive wrongs each suffers.

Subcategorisation

Certain influential feminist sociologists and law reform activists have created subcategories to further differentiate between forms of abuse. Johnson differentiates between 'patriarchal terrorism' and 'common couple violence', using the former to refer to the 'terroristic control of wives by their husbands', and the latter to refer to gender-neutral conflict between partners that may include some violence, but is generally not very serious.[100] Similarly, Dempsey distinguishes 'strong domestic violence' (unjustified violent acts which tend to sustain the patriarchy) from 'weak domestic violence' (unjustified violent acts unrelated to patriarchal issues).[101] Stark suggests that 'partner assault' can occur between any intimate partners, as both men and women can be violent and aggressive.[102] 'Coercive control', however, he

[97] Helen Reece, 'The End of Domestic Violence' (2006) 69(5) *Modern Law Review* 770, 791.
[98] Ibid 790.
[99] Wini Breines and Linda Gordon, 'The New Scholarship on Family Violence' (1983) 8(3) *Signs* 490, 492; Jennifer Youngs, 'Domestic violence and the criminal law: Reconceptualising reform' (2015) 79(1) *Journal of Criminal Law* 55, 56.
[100] Michael P. Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women' (1995) 57(2) *Journal of Marriage and the Family* 283, 284.
[101] Michelle Madden Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (Oxford University Press, 2009) 115.
[102] Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford University Press, 2007) 236.

defines as the ongoing use of violence, intimidation, isolation and control 'deployed almost exclusively by men to dominate individual women'.[103]

There are advantages to dividing IPA into various categories, if one assumes that IPA is caused by, or compounded by, social conditions in which men tend to have superior power over women. If the problem is understood in this way, then there ought to be a specific term for violence used by men who have been able to exploit a power imbalance to control female victims. So too should there be a separate term for other forms of IPA which are not characterised by this power imbalance because the abuser is female, or the abuse occurs in an LGBTIQ relationship.

Johnson's and Stark's terms for more serious forms of IPA – 'patriarchal terrorism' and 'coercive control' – also have the benefit of representing the problem in a political light. 'Terrorism' and 'coercive control' make the problem more than a personal issue.[104] By focusing on the entrapment of women, and their inability to leave *because of* the abuse directed towards them, these terms direct attention to issues of autonomy, citizenship and human rights.[105] A problem labelled as 'terrorism' cannot be trivialised. It becomes a political problem, and therefore a problem relevant to all in society, not just individual victims.

My concern with subcategorising IPA is that it tends to suggest that cases of IPA are only serious when their circumstances match what some represent as the paradigmatic case; a woman being abused by her male partner. It denies the seriousness of other cases in which patriarchal privileges are not used to establish control. Subcategories that emphasise patriarchy suggest that male and LGBTIQ victims have less right to seek assistance, and do

[103] Ibid 5.
[104] Schneider, above n 78, 48.
[105] Ibid.

not acknowledge other forms of vulnerability that can lead to victimisation. Focusing on the patriarchy ignores the potential role of the victim's race, age, sex, socio-economic status, or disability in the abuser's ability to establish control. To use a term that suggests that the problem with serious IPA is the patriarchy is unnecessarily restrictive.

'Intimate partner abuse'

Let us now consider 'intimate partner abuse', and its implicit problem representation. 'Intimate partner' encompasses those people who are, or have been, in sexual or otherwise intimately companionate relationships, including married and de facto partners (and those who are divorced or separated), current or former boyfriends, girlfriends, or sexual partners, whether or not they live or have lived together. Like Nedelsky, who favours 'intimate partner violence', I value the term's capacity to encompass abuse by women and those in LGBTIQ relationships, while not preventing consideration of the role that male social privilege can play in some cases.[106] I prefer the word 'abuse' because of its capacity to invoke not just physical violence, but also the range of non-physical tactics frequently deployed in such relationships, such as economic abuse, coercion, threats and isolation.[107] Further, 'abuse' emphasises not just the tactics employed, but also the offender's abuse of a position of trust and intimacy to exert power over the victim.[108]

The term 'intimate partner abuse' has its limitations. While I regard its gender-neutrality as a positive, it obscures that which some scholars regard as the central cause of IPA – that is, men's superior power over women in society and the relationship. However, while I accept that male social dominance can be fundamental in many cases of IPA, I do not wish to minimise other sources of power on which abusers can draw to establish power over their

[106] Nedelsky, above n 84, 310.
[107] Farmer, above n 62, 258.
[108] Victor Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom Based Account' (2005) 65(3) *Louisiana Law Review* 989, 1001.

victims.[109] Further, I recognise that IPA implies that the conduct is limited to current partners, thus obscuring the additional risk of abuse post-separation.[110] However, this is a limitation shared by most terminology. While terms like 'domestic violence', 'patriarchal terrorism', and 'coercive control' make no explicit reference to former partners, their expanded definitions include former partners. Finally, Stark has rejected the word 'intimate' on the basis that there is nothing intimate about the behaviour in question.[111] However, I suggest that the emphasis of IPA is not the intimate nature of the relationship, but rather the abuse of intimacy – that is, the exploitation of a relationship of trust to more easily manipulate and control a person. There is vulnerability inherent in intimate relationships, due to the reliance that partners can develop on one another. I suggest that the victim's vulnerability due to their intimacy with their abuser ought to be emphasised.

Perhaps there is a double standard in advocating a term broad enough to include male and LGBTIQ victims, but not family members. I have suggested that the role of male privilege can make violence among intimate partners distinct from that between other relatives, but have also acknowledged that male privilege is not a determinant in all instances of IPA. I argue that it is not the exploitation of male social privilege that distinguishes IPA from other forms of family violence. Rather, it is the exploitation of intimacy. Relationships between parents and children tend to be characterised by the dependence of one party on the other, and thus one of the primary wrongs occasioned by abuse in these relationships is neglect of care. By contrast, intimate partnerships tend to be characterised by trust and intimacy, and thus the primary wrong is the betrayal and exploitation of that trust.

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[109] See chapter 5.
[110] Julie Stubbs, 'Murder, Manslaughter and Domestic Violence' in Kate Fitz-Gibbon and Sandra Walklate (eds), *Homicide, Gender and Responsibility: An International Perspective* (Routledge, 2016) 36, 41.
[111] Stark, above n 102, 105.

It is important that the term IPA invokes the context of the relationship in which the abuse occurs. Farmer observes that violence is made harmful due to the context in which it takes place, rather than because of the act itself.[112] A punch thrown during a bar brawl is not comparable to a man hitting his wife, although they may cause comparable physical injury. The context of the relationship between the abuser and victim also allows for recognition of non-physical violence. Again, Farmer observes that an 'act of violence need not be violent in itself (an attack), but conduct which can be … capable of producing violent effects'.[113] In the context of an intimate relationship, coercive or intimidating but non-physical conduct is capable of harming the victim. Consider that a man who prevents his wife from interacting with strangers may harm her by isolating her, while a parent who refuses to let his child talk to strangers is appropriately protective. Thus, the context of the relationship between victim and offender is crucial – it is this context which gives IPA its distinctive character.[114]

Farmer suggests that we are able to problematise various types of violence in different ways because of our understanding of the person at law. He argues that the person is understood not just as a 'body susceptible to injury', but in the context of their 'relationships and their sense of identity or self'.[115] I aim to emphasise the rights of the person, not just to physical wellbeing, but to mental wellbeing, integrity, and autonomy. The right to wellbeing cannot be secured without considering the relationships in which people engage, because it is through relationships with others, intimate or otherwise, that people develop self-identity.[116] Where someone unfairly takes advantage of their intimacy with another person to establish unreasonable power over them, the state ought to intervene.[117]

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[112] Farmer, above n 62, 262.
[113] Ibid.
[114] Ibid 258.
[115] Ibid 262.
[116] Tadros, above n 108, 1001.
[117] Ibid; Farmer, above n 62, 258.

Adopting the WPR approach requires conceding that my chosen term is coloured by my own assumptions, and that these assumptions will inevitably influence my analysis. 'IPA' is an abstraction from a vastly more complex social condition. Nevertheless, I must inevitably make an investment in a particular way of characterising the problem. A challenge throughout this thesis will be to remain aware of this dilemma, and the influence of my own assumptions and biases on my analysis.

1.3. Structure

Chapters 2–4 of this thesis consider various aspects of the criminal law to uncover how IPA has been represented, and the effects of those representations. Chapter 2 provides a contextual background for the thesis, explaining when and how IPA became a problem in society and at law, and how that problem has evolved over time. Chapter 3 explores the significance of criminal labels in sending a message to the public about how IPA should be understood. Further, it challenges the idea that there can be a 'fair' and 'accurate' criminal label for social problems like IPA. It also promotes the WPR method as an alternative way to settle on appropriate criminal labels. Chapter 4 considers how the victim and abuser in an intimate relationship are defined and discussed in the criminal law. Having uncovered the effects of representations of IPA, its victims and its perpetrators, bound up in the criminal law in the UK and Australia, chapter 5 uses this to inform a new offence based on an alternative representation of IPA. Using this alternative representation, I aim to create a criminal offence of IPA that better serves the interests of victims. Using WPR, it will be shown that it is vital to examine and challenge the way IPA is represented, because representations have serious consequences for victims.

CHAPTER 2: THE CONTEXT OF IPA

> The modern history of family violence is not the story of changing responses to a constant problem, but, in large part, of redefinition of the problem itself.[118]

Much of the discussion about IPA in the media, politics and academia is conducted without reference to the historical and social context within which it was identified as a problem. It is often assumed that the wrong of IPA is self-evident. Yet IPA, like any social problem, 'has been historically and politically constructed'.[119] Unlike a disease, for example, which has an unchanging pathogen which can be identified and eradicated, constructions of IPA 'developed and then varied according to … the force of certain political movements'.[120] At the outset of this analysis of representations of IPA lodging in criminal laws, it is vital to consider the context in which IPA was first identified as a problem, and the political and social climate in which subsequent representations arose. Changes in how we have constructed IPA – what we consider to be its cause, and what we find concerning about it – are inextricably linked to changing social norms and conditions.[121] To gain a richer understanding of how IPA is dealt with in the criminal law, we need to consider the forces that have contributed to its construction as a problem.

In conducting this review of how IPA became a problem – and the people and social conditions that prompted changes in its representation – I am primarily addressing question 3 of WPR. This question prompts consideration of the historical context within which representations arise, and the people, events and political movements that influenced their evolution.[122] It also directs attention to 'the power relations that affect the success of some

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[118] Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence – Boston, 1800–1960* (Penguin, 1988) 27–8.
[119] Ibid 3.
[120] Ibid.
[121] Mark Findlay, *Problems for the Criminal Law* (Oxford University Press, 2001) 6–7.
[122] Bacchi, above n 24, 10.

problem representations and the defeat of others'.[123] As discussed in chapter 1, this approach is similar to analysis undertaken by Farmer, who investigates the development of the modern criminal law in England by considering how it was used as a tool in securing civil order.[124] He draws on the work of social commentators, judges, members of political movements and researchers in a variety of fields at various points during the last four centuries to show their influence on the construction of the criminal law.

I focus on these same actors where they have shaped representations of IPA. Uncovering their motivations and assumptions can provide valuable insight into representations of IPA lodging within our criminal laws. It is important to be aware of what has been said about IPA, and by whom, since it became a 'problem'. Equally, it is useful to examine those periods in which discussion of IPA fell silent, and the factors which prompted re-agitation of the issue.[125] As Gordon argues, the 'ebb-and-flow pattern of concern about family violence' over the last century proves 'the necessity of an historical approach to understanding it'.[126]

The following discussion is not intended to be a comprehensive historical survey. I consider very generally the process by which IPA became a problem in Australia and the UK, and will jump between countries and time periods to highlight significant moments in time that permitted change to how IPA is represented. To do so, I draw upon some of the major commentaries and histories of criminal law, written by influential criminal law theorists and social historians. Farmer's recent monograph on English criminal law will be fundamental, and should be consulted for an expanded analysis.[127]

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[123] Ibid 11.
[124] Farmer, above n 62.
[125] Bacchi, above n 26, 206.
[126] Gordon, above n 118, 2.
[127] Farmer, above n 62.

2.1. Creating a 'Problem'

Making violence a problem: 18th– 20th centuries

Most historical accounts of IPA begin by identifying the 1960s feminist movement as the source of current concern about IPA.[128] However, this misses a shift in attitude towards violence in the mid-18th century which allowed IPA to be constructed as a criminal problem. Farmer claims that, prior to the mid-18th century, violence was common in public and private. Dominance and authority were indicators of a man's social standing. Duels and fist-fights were seen as legitimate ways for men to settle disputes and assert masculinity.[129] Within the home, men subjected wives, children and servants to physical 'correction',[130] allowing them to maintain 'male dominance and privilege'.[131] Although women were more frequently victims than perpetrators, social acceptance of violence as a tool for maintaining power meant women were 'relatively free' to use force against servants and children.[132] Whether it occurred in public or private, interpersonal violence prior to the mid-18th century was generally regarded as a personal matter between individuals. Authorities rarely intervened in 'legitimate' acts of violence. Only when violence became a 'threat to social order' (rioting, for example) was it deemed illegitimate, and intervention deemed necessary.[133]

Farmer characterises the period from 1750 to 1900 in England as one of an intensifying 'civilizing offensive'.[134] During this period, social commentators redefined appropriate interpersonal relations. 'Civilized' communities were heralded by commentators as paragons

[128] Carolyn B. Ramsey, 'Domestic Violence and State Intervention in the American West and Australia, 1860–1930' (2011) 86(1) *Indiana Law Journal* 185, 199. See, eg, Elizabeth M. Schneider, 'Domestic Violence, Citizenship, and Equality' in Linda C. McClain and Joanna L. Grossman (eds), *Gender Equality: Dimensions of Women's Equal Citizenship* (Cambridge University Press, 2009) 378, 378–9.
[129] Farmer, above n 62, 246–7.
[130] Ibid 237.
[131] J. Carter Wood, *Violence and Crime in Nineteenth Century England: The Shadow of our Refinement* (Routledge, 2004) 61.
[132] Ibid.
[133] Farmer, above n 62, 237.
[134] Ibid 235.

of virtue and enlightenment, set apart from unrefined nations by the establishment of co-operative, secure and non-violent society.[135] Writing in 1836, J.S. Mill explained that civilization 'distinguishes a wealthy and populous nation from savages or barbarians'.[136] As part of this civilizing offensive, Farmer notes that interpersonal violence came to be viewed as a public concern. Violence was no longer merely an immediate threat to social order. Rather, interpersonal violence, particularly that occurring in public, was considered 'uncivilized and barbaric and not an appropriate standard of conduct for members of a modern commercial society'.[137]

The criminal law was central to the civilizing process. Mill argued at the time that rules of law needed to replace the dominant 'eye for an eye' mentality.[138] Criminal law reforms codified 'new understandings of violence, laying down expectations of proper conduct, and establishing the standards of self-control and foresight which were to be expected of a civilized modern man'.[139] Practices such as duelling were outlawed, and while organised fights were often undertaken covertly, they were 'routinely broken up by the police, and participants (including spectators) could potentially be prosecuted'.[140]

Wood observes that 19th century social commentators who drove this civilizing offensive were '*inventing* violence: developing a new set of beliefs as to the nature of physical aggression, debating and redrawing the boundaries of legitimate interpersonal behaviour and seeking explanations for violence in the structures of social life'.[141] Since violent behaviour was more common among men, civilizing efforts concentrated on redefining masculinity as

[135] Ibid 49.
[136] John Stuart Mill, 'Civilization' in Gertrude Himmelfarb (ed), *Essays on Politics and Culture: John Stuart Mill* (Doubleday, 1962) 51, 51.
[137] Farmer, above n 62, 238.
[138] Mill, above n 136, 52–3.
[139] Farmer, above n 62, 235.
[140] Ibid 247.
[141] J. Carter Wood, 'A Useful Savagery: The Invention of Violence in Nineteenth-Century England' (2004) 9(1) *Journal of Victorian Culture* 22, 22 (emphasis in original).

being a productive and active citizen, and a supportive and attentive father and husband.[142] As Ramsey notes, a man's 'capacity to provide for one's family and treat one's wife as a "sacred partner" and guardian of morality supposedly divided respectable from unrespectable'.[143]

The social commentators who drove this movement were largely clustered among the middle-class in the UK. As members of the middle-class curbed their outwardly violent behaviour to maintain their status, these commentators located the problem of violence among the lower-class. They used their enunciative position to suggest links between violence and 'the specific social conditions of lower-class life'.[144] For instance, Joseph Fletcher, a prominent English barrister, argued in 1849 that the most violent peoples were found in rural areas, where they were the 'furthest removed from every civilising influence'.[145] Commentators who rejected the practice of state-administered corporal punishment as contrary to the 'feelings' of the 'humane public', observed that members of the lower-class – 'the vulgar rabble' – would watch such spectacles 'with brutal curiosity'.[146] Newspapers reporting on violent crime noted that 'the most brutal, the most cowardly, the most pitiless, the most barbarous deeds done in the world, are being perpetrated by the lower classes of the English people'.[147]

While civility became an aspiration in colonial Australia, the civilizing offensive took longer to gain traction, due to the strength of values ingrained in the predominantly male population. Ramsey observes that the concept of mateship 'emerged from the brutal convict era as an

[142] Ibid 32.
[143] Ramsey, above n 128, 194.
[144] Wood, above n 141, 34. See, eg, Frances Power Cobbe, 'Wife-Torture in England' (1878) 32 *Contemporary Review* 55.
[145] Joseph Fletcher, 'Moral and Educational Statistics of England and Wales' (1849) 12(2) *Journal of the Statistical Society of London* 151, 171.
[146] Elizabeth Heyrick, *Observations on the Offensive and Injurious Effects of Corporal Punishment; on the Unequal Administration of Penal Justice; and on the Pre-eminent Advantages of the Mild and Reformatory over the Vindictive System of Punishment* (Hatchard and Son and Hurst, Chance & Co, 1827) 11, 18. See also Mill, above n 136, 64.
[147] *The Daily Telegraph* (London), 17 December 1874, 5.

exclusively male form of camaraderie that reinforced patriarchy and perpetuated the sexual objectification of women'.[148] The gold rush and booming wool trade of the mid-19th century saw an influx of single men into NSW and Victoria, who prized self-interest, physical prowess, and independence. These were not the 'civilized' men held up as exemplars of national refinement among the English middle-class. Colonial governments, seeking to establish respectability, encouraged marriage as a method of taming their fiercely self-interested and violent male citizens. Policies were implemented to encourage women to migrate from the UK to become 'moral police' for colonial men, and companionate marriage became 'the dominant social aspiration in Australia'.[149]

Discovering IPA

The changing attitude towards violence meant that from the late 18th century in England, and the mid-19th century in Australia, cruelty within the home was deemed uncivilized and illegitimate.[150] Historian John Beattie argues that, whereas the ideal man had been constructed as respectable, rational, and non-violent, the civilizing offensive had established the ideals of middle-class femininity as fragility, meekness and submissiveness, and created a heightened sense of domesticity and companionship within marriage.[151] While the man was still the master of his household, 'the legitimacy of his imposing his will by physical means was to some extent undermined by a growing hostility toward excessive violence'.[152] Men maintained dominion over their wives, and the limited use of physical force to 'correct' them was condoned, particularly where wives were seen as lacking feminine qualities, for example because of licentiousness or habitual drunkenness.[153] However, in both countries, men who misused their authority to exert excessive violence over their helpless wives were

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[148] Ramsey, above n 128, 186, citing John Braithwaite, 'Crime in a Convict Republic' (2001) 64(1) *Modern Law Review* 11, 42.
[149] Ramsey, above n 128, 190, 193.
[150] Farmer, above n 62, 249.
[151] J. M. Beattie, *Crime and the Courts in England: 1660–1800* (Clarendon Press, 1986) 136.
[152] Ibid.
[153] Farmer, above n 62, 250. See, eg, 'Wife Murder', *The Argus* (Melbourne), 19 December 1862, 7.

widely condemned.[154] Beattie notes that English courts began imposing stiffer penalties for wife and child abuse in the late 18th century.[155] By 1891, it was established in the landmark UK case of *R v Jackson* that the supposed right of a husband to physically chastise his wife was 'quaint and absurd dicta' that had no place in a 'civilized country'.[156] From the mid-19th century, police officers in Australia arrested abusive husbands regardless of whether the victim complained.[157] Although the courts in both countries were sometimes criticised for imposing insufficient penalties,[158] Ramsey notes that 'judges usually exercised their authority in ways that revealed their contempt for wife-beaters'.[159]

Along with legal authorities, social commentators and the media condemned IPA. Mill expressed despair that '[t]he vilest malefactor has some wretched woman tied to him, against whom he can commit any atrocity except killing her, and, if tolerably cautious, can do that without much danger of the legal penalty'.[160] The press reported on non-lethal wife-assaults as 'shameful' and 'a brutal outrage'.[161] One reporter noted with anguish that in both England and Australia '[t]here are hundreds who suffer uncomplainingly, but the small proportion of cases that are made public, are sufficient to show that wife beating is sufficiently prevalent to form a horrible blot on our social escutcheon'.[162]

Women who killed abusive husbands in self-defence were sometimes looked upon sympathetically by the courts and society. For example, in 1854, Englishwoman Jane Colbert killed her husband after he drunkenly struck her. Her son gave evidence that the deceased

[154] Farmer, above n 62, 250; Ramsey, above n 128, 198.
[155] Beattie, above n 151, 136.
[156] [1891] 1 QB 671, 679.
[157] Ramsey, above n 128, 199–200.
[158] See, eg, *The Argus* (Melbourne), 9 May 1868, 5, in which a police magistrate is sarcastically described as 'the brilliant genius who inflicted [a] disgracefully inadequate penalty' on a man who assaulted his wife while she was in labour.
[159] Ramsey, above n 128, 202–3.
[160] John Stuart Mill, *The Subjection of Women* (Source Book Press, 2nd ed, 1869) 63–4.
[161] Ramsey, above n 128, 202, citing *The Argus* (Melbourne), 17 June 1864, 5; 'The Warrenheip Outrage', *The Argus* (Melbourne), 27 July 1860, 5.
[162] 'Wife Beating', *Ovens and Murray Advertiser* (Beechworth), 9 January 1875, 7.

frequently beat his mother, and the deceased's mother gave evidence that Jane was otherwise a 'very good mother, and a very good wife'.[163] While the jury found Colbert guilty of manslaughter, it 'strongly recommended her to mercy', and she was sentenced to imprisonment for only one week.[164] Similar cases were reported in Australian newspapers as 'a wife's fight for life' and 'justifiable homicide'.[165]

Activist approaches to IPA

Two distinct activist approaches to IPA emerged in the late 19th century, and both capitalised on the civilizing offensive. Women aligned with the temperance movement spoke about IPA in connection with alcoholism, and drew on the image of the battered wife as 'the indirect victim of drink'.[166] They argued that IPA was not a problem of the entire male sex. Rather, the problem was located among exceptional, depraved and brutal alcoholic men.[167] The momentum of the civilizing offensive meant that the image of the drunken layabout who beat his wife and children was especially potent in their calls for prohibition.

The women's rights movement was primarily concerned with agitating for women's rights to vote, own property and gain an education.[168] As with the temperance movement, these first-wave feminist activists avoided representing IPA as a problem of women's inequality within marriage. Rather, they drew on the ideals of masculinity and femininity established by the civilizing offensive to promote intervention in cases of IPA. Activists represented female victims as vulnerable, weak, and defenceless, bound by duty and financial necessity

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[163] Old Bailey Proceedings Online, *Trial of Jane Colbert, 18 September 1854* (March 2015) <https://www.oldbaileyonline.org/browse.jsp?id=def1-1011-18540918&div=t18540918-1011>.
[164] 'Central Criminal Court, September 1', *The Times* (London), 22 September 1854, 8–9.
[165] Ramsey, above n 128, 241, citing 'The Narrabri Tragedy: Inquest on the Victim', *The Argus* (Melbourne), 4 February 1910, 7; 'Justifiable Homicide: Wife Shoots Husband', *The Argus* (Melbourne), 29 April 1910, 6.
[166] Linda Gordon, 'Women's Agency, Social Control, and the Construction of "Rights" by Battered Women' in Sue Fisher and Kathy Davis (eds), *Negotiating at the Margins: The Gendered Discourses of Power and Resistance* (Rutgers University Press, 1993) 122, 128.
[167] Jo Aitken, '"The Horrors of Matrimony among the Masses": Feminist Representations of Wife Beating in England and Australia, 1870–1914' (2007) 19(4) *Journal of Women's History* 107, 119–20.
[168] Gordon, above n 166, 129; Aitken, above n 167, 108, 118–9.

to abusive men, who were depicted as 'monstrous and depraved, lacking in true manhood'.[169] They claimed that the civilized men of the criminal justice system ought to assist women who were subject to abuse from uncivilized men.[170] Thus, the problem was set up in a hierarchical way. Men were positioned as superior to their wives and therefore bound by the social demand for civility to not bring harm to their social inferior. When a man was violent towards his wife, society deemed criminal intervention the civilized thing to do.

By framing women as vulnerable, feminist activists in England were able to agitate for divorce rights for women in abusive relationships.[171] In 1878, notable first-wave feminist Frances Power Cobbe suggested that punishing wife assault by imprisoning and flogging the abuser only led to an escalation of abuse when he returned home 'full of fresh and more vindictive cruelty'.[172] Cobbe insisted that judicial separation provided a better solution, allowing women and their children to legally live apart from their husbands.[173] Lord Penzance inserted Cobbe's judicial separation scheme into a bill on divorce procedure,[174] which passed with little contention. Thus, as a result of feminist activism, magistrates were empowered to grant women orders of non-cohabitation where they had been subject to aggravated assault by their husbands.

Activists tended to avoid constructing IPA as a problem of inequality within marriage, and thus did not align themselves with Mill – an influential, if controversial, social commentator of the time, who connected women's inequality with abuse in marriage.[175] This may have been because a more prominent stance among social commentators, such as distinguished judge and criminal law scholar James Fitzjames Stephen, was that, while problematic,

[169] Gordon, above n 166, 129.
[170] See, eg, Matilda M. Blake, 'Are Women Protected?' (1892) 137 *Westminster Review* 43, 47.
[171] Gordon, above n 118, 254.
[172] Cobbe, above n 144, 80.
[173] Ibid 82.
[174] George Behlmer, 'Summary Justice and Working-Class Marriage in England, 1870–1940' (1994) 12(2) *Law and History Review* 229, 241.
[175] Mill, above n 160.

marital violence was not an issue of inequality between men and women.[176] The civilizing offensive had firmly reinforced man's superiority over women in the home and society.[177] I suggest that feminist activists recognised the power of this dominant stance, and chose not to work against it. Had activists adopted Mill's problematisation, men with enunciative power over social issues such as IPA may have found feminist arguments unpalatable and so ignored them. Rather, activists appealed to men's desire for dominance, and implored them to use that power to protect vulnerable and meek women. Using Bacchi's words, activists spoke 'in language that would be heard'.[178]

The silence of the 20th century

During the first half of the 20th century, there seems to have been a low-point in public and scholarly discussion of wife-beating.[179] This low point in public consciousness of IPA has been attributed by legal historian Colin James to the 'personal and cultural disruptions' of war and the depression.[180] The family was viewed as a source of stability, contentment and civility that could heal the damage of war.[181] However, this safe haven was increasingly under threat. First-wave feminist victories in attaining divorce rights, and opportunities for women to undertake paid work during and post-war, afforded women some independence.[182] This threatened the ideal construct of domesticity, and the male prerogative of being master of the household. Concern for family welfare led to a period of ambivalence towards abusive behaviour in UK and Australian courts and society.[183] According to Walker, men were excused for abuse 'in the face of challenge to traditional sex roles afforded by women's

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[176] James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Liberty Fund, first published 1873, 1993 ed) 142–3.
[177] Farmer, above n 62, 249.
[178] Bacchi, above n 26, 176.
[179] Elizabeth Pleck, *Domestic Tyranny: The Making of Social Policy against Family Violence from Colonial Times to the Present* (Oxford University Press, 1987) 182.
[180] Colin James, 'A History of Cruelty in Australian Divorce' [2006] *Australia & New Zealand Law & History E-Journal* 1, 26; Gordon, above n 118, 23; Ramsey, above n 128, 234.
[181] James, above n 180, 26.
[182] Ramsey, above n 128, 234.
[183] Stark, above n 102, 144.

increasingly independent behaviour'.[184] Protecting women from their violent husbands became a secondary concern to the breakdown of marriage.[185] Courts in England even went so far as to recognise a wife's nagging as a form of cruelty against her husband,[186] which James suggests was linked to fear of women's increasing bids at independence.[187] During this period, a wife's 'failure to be nurturing and faithful', particularly towards a veteran husband, went some way to legitimising his violent or controlling conduct.[188]

The battered women's movement and second-wave feminism

This brief period of silence about IPA, and the staunch defence of the conventional family unit, was brought to an end with 'the emergence of the rights-oriented movements in the 1960s'.[189] Civil-rights, anti-war, and second-wave feminist movements (including the battered women's movement) brought about a new understanding of the problem of violence in the UK and Australia. Driven by these rights movements, society in the latter half of the 20th century altered its understanding of violence once more.[190] Violent behaviour was no longer seen as an indication that society had fallen to savagery, as it was in the previous century. Rather, evolving standards of interpersonal interaction allowed for violence to be seen as problematic if it impaired the 'individual freedom of a person to control their own body'.[191] Feminist activists framed their campaigns against IPA around this conception of violence, arguing that women's capacity for self-determination was constrained by domineering and controlling husbands. Schechter explains that activists came to understand that the 'fear of violence robs women of possibilities, self-confidence, and self-esteem … [V]iolence is more than a physical assault; it is an attack on women's dignity and

[184] Gillian A. Walker, *Family Violence and the Women's Movement: The Conceptual Politics of Struggle* (University of Toronto Press, 1990) 32. See, eg, *Anderson v Anderson* (1927) 44 WN (NSW) 9.
[185] James, above n 180, 18.
[186] *Atkins v Atkins* [1942] 2 All ER 637; *Usmar v Usmar* [1949] 1 All ER 76; *King v King* [1953] AC 124.
[187] James, above n 180, 15.
[188] Ramsey, above n 128, 234.
[189] Stark, above n 102, 145.
[190] Farmer, above n 62, 255.
[191] Ibid.

freedom'.[192] This understanding of violence, as preventing a person from existing as an autonomous member of society, eventually brought IPA back out of the private realm.

The second-wave feminist movement generally, and the battered women's movement in particular, condemned men's elevated status in society and the home. A number of feminists represented IPA, or 'wife-beating', as a manifestation of the disparity of power and control between men and women.[193] They noted that men tend to be physically stronger, have better education and employment opportunities, have greater earning potential, are unfettered by childbirth or child-rearing responsibilities and are generally viewed as less emotional and passive.[194] Some activists argued that men's elevated power and status meant they were acculturated to expect supremacy over women.[195] Advancements in women's equality over the previous decades were therefore something of a culture shock to men who expected deference from women. Feminist historian Linda Gordon theorised that some men in the early 20th century were prone to aggressive responses to women's newfound resistance to male power.[196] Thus emerged in the public consciousness the archetypal wife-beater – a man who uses violence, intimidation and physical supremacy over a protracted period to control his wife, thereby securing the benefits of sex, domestic work, love, companionship and family which were threatened by her newfound equality.[197] In the struggle for power and control between men and women, activists argued that these men adopted ongoing violent and controlling tactics to reinforce their position as 'boss'.[198] In so doing, they restricted

[192] Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (Pluto Press, 1982) 317.
[193] There is no *one* feminist representation of IPA. The feminist movement has always consisted of diverse activists, and encompassed broad and often competing representations of social issues such as IPA. I document here a prominent representation among feminist activists of the time. However, consider the rift between heterosexual and lesbian feminists regarding the significance of gender inequality. Lynne Segal, *Is the Future Female? Troubled Thoughts on Contemporary Feminism* (Virago, 1987) 65–6.
[194] Schneider, above n 78, 22.
[195] Gordon, above n 118, 286.
[196] Ibid.
[197] Ibid 286–7.
[198] Gordon, above n 118, 286–7.

their wives' autonomy, preventing them from engaging fully in their own lives.[199] Therefore, feminists of the battered women's movement represented the cause of IPA as not just abusive husbands, but also the gendered dynamics of society that permitted and even encouraged abuse. The consequence was deprivation of liberty, which left wives isolated and entrapped.

The second-wave feminist movement was viewed as a liberating force that allowed women to speak about the formerly taboo topic of partner abuse.[200] Activists who had never experienced such violence became aware of its prevalence, and of the ambivalence of police and social services.[201] In recognition of the fact that victims had nowhere to go to escape violence, feminist activists began establishing refuges in the 1970s.[202] Refuges not only gave women and their children a place to go to escape violence, but, as Schechter notes 'also inspire[d] women to organize together and help one another'.[203] Refuges empowered women and restored their liberty.[204] The provision of safe spaces where women could meet, share their stories, and understand 'their experiences as political ones', allowed the issue to emerge in public discourse.[205] This was furthered when, in 1974, Erin Pizzey, founder of the first English refuge, published a book on battered wives based largely on observations from the refuge.[206] Women who ran and used shelters emerged as passionate and vocal campaigners

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[199] Schechter, above n 192, 317.
[200] Wendy Weeks and Kate Gilmore, 'How violence against women became an issue on the national policy agenda' in Tony Dalton et al (eds), *Making Social Policy in Australia: An Introduction* (Allen & Unwin, 1996) 141, 142.
[201] Ibid 143.
[202] Jan Pahl, 'Introduction' in Jan Pahl (ed), *Private Violence and Public Policy: The needs of battered women and the response of the public services* (Routledge & Kegan Paul, 1985) 1, 7; Anne Summers, *Damned Whores and God's Police* (Penguin, 2nd ed, 1994) 518.
[203] Schechter, above n 192, 315.
[204] Ibid 59–60. This was achieved by making residents responsible for activities such as cooking, cleaning and child-care, and by providing women with legal advice, assistance in finding long-term accommodation, and counselling.
[205] Ibid 314; Kimberly D. Bailey, 'Lost in Translation: Domestic Violence, "The Personal is Political," and the Criminal Justice System' (2010) 100(4) *Journal of Criminal Law & Criminology* 1255.
[206] Erin Pizzey, *Scream Quietly or the Neighbours Will Hear* (Penguin, 1974).

for the recognition of IPA, thus making it possible to speak in public about the harms of IPA. Their work 'began to shape public debate'.[207]

A major target of feminist campaigning was the assumption that had re-emerged at the beginning of the 20th century that IPA was a 'private' matter, and by implication less serious than public violence. Bacchi notes that activists clearly comprehended the power of problem representations – a problem represented as 'private' will tend to be ignored by the public and the state.[208] Through tireless campaigning, activists revealed as false the notion that 'the family is always a safe haven from a brutal world'.[209] Removing the 'private' label allowed the public to view IPA as akin to public violence, and therefore deserving of police intervention.[210] However, to encourage stronger criminal intervention, activists had to engage with the state.

From outsiders to insiders

The feminist strategy altered from the 1980s. Where once they had campaigned exclusively *outside* the state, feminists increasingly sought to establish influence *within* government.[211] In Australia, feminists lobbied state governments to conduct research into IPA, and ensured that activists and refuge staff were on steering committees for such projects.[212] For example, the Victorian Premier's Department convened a Domestic Violence Committee in 1981, which produced a report on 'Criminal Assault in the Home'.[213] Similarly, in response to campaigning by feminist organisation Women's Aid, the UK Government established the Select Committee on Violence in Marriage in 1974.[214] The Committee recommended the

[207] Schneider, above n 78, 22.
[208] Bacchi, above n 26, 172.
[209] Schechter, above n 192, 318.
[210] Weeks and Gilmore, above n 200, 143.
[211] Marianne Hester, 'Transnational influences on Domestic Violence Policy and Action – Exploring Developments in China and England' (2005) 4(4) *Social Policy & Society* 447, 449.
[212] Weeks and Gilmore, above n 200, 143.
[213] Victorian Domestic Violence Committee, 'Criminal Assault in the Home: Social and Legal Responses to Domestic Violence' (Department of Premier and Cabinet, 1985).
[214] Reece, above n 97, 781.

introduction of new powers to impose injunctions and wider arrest powers.[215] As a result, two Acts were introduced: the *Domestic Violence and Matrimonial Proceedings Act 1976*,[216] and the *Domestic Proceedings and Magistrates' Courts Act 1978*.[217]

The 1980s and 1990s saw an influx of feminists into policy positions in the Australian government.[218] These women translated 'external pressure' from feminists into government policy.[219] Feminist influence in the 1983–96 Labor Hawke/Keating government put IPA on the national agenda, and both Prime Ministers made public statements regarding 'domestic violence' which drew on the feminist representation of the problem.[220] Similarly, when the UK Labour party returned to office in 1997, the number of female MPs had risen from 37 to 101.[221] Many of these new MPs 'had been active in the feminist movement of the 1970s and several had links to the refuge movement and wider violence against women sector'.[222] IPA was a feature of the UK Labour Party election manifesto,[223] and following the party's 1997 election, there was 'rapid development in policies and initiatives to counter domestic violence'.[224]

A shift in representation

While feminist activism put the spotlight on IPA, Pleck argues that it became clear that for IPA to be taken more seriously by criminal justice officials, 'feminism – a controversial

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[215] Rebecca Dobash and Russell Dobash, 'Violence Against Women in the Family' in Sanford N. Katz, John Eekelaar and Mavis MacLean (eds), *Cross Currents: Family Law and Policy in the US and England* (Oxford University Press, 2000) 495, 501–2.
[216] (UK) c 50.
[217] (UK) c 22.
[218] Ruth Phillips, 'Undoing an activist response: feminism and the Australian government's domestic violence policy' (2006) 26(1) *Critical Social Policy* 192, 202.
[219] Weeks and Gilmore, above n 200, 153.
[220] Phillips, above n 218, 204.
[221] Jill Lovecy, 'Framing claims for women: from "old" to "new" Labour' in Claire Annesley, Francesca Gains and Kirstein Rummery (eds), *Women and New Labour: Engendering Politics and Policy?* (The Policy Press, 2007) 63, 63.
[222] Nickie Charles and Fiona MacKay, 'Feminist politics and framing contests: Domestic violence policy in Scotland and Wales' (2013) 33(4) *Critical Social Policy* 593, 594; Gill Hague, 'Domestic violence policy in the 1990s' in Sophie Watson and Lesley Doyal (eds), *Engendering Social Policy* (Open University Press, 1999) 131, 138.
[223] Hague, above n 222, 138.
[224] Hester, above n 211, 449.

ideology – had to be tamed'.[225] Bailey suggests that feminists recognised that re-establishing victim autonomy was 'not the chief goal of the criminal justice system', so speaking about IPA as an issue of autonomy was 'simply not translatable' within the criminal law.[226] The law could only comprehend tangible, concrete harms.[227] Therefore, to improve criminal intervention, feminists (especially those within government) 'simplified the problem'.[228] Rather than focus on the diminution of autonomy caused by ongoing abuse, feminists reduced the problem to physically violent acts.[229] They adopted the term 'wife assault' in preference to 'wife-battering', because the word 'assault' placed the problem within a criminal legal framework. By changing their representation of the problem, feminists were able to demand that the law treat intimate partner abusers the same way it treated those who assault strangers.[230] In so doing, they were 'framing the issue in language that would be heard' by the criminal justice system.[231] According to Hague, this change in problem representation encouraged increased police intervention.[232] Police in the UK increasingly adopted 'pro-arrest, pro-prosecution policies' for IPA, and established domestic violence units 'to support abused women and children and to assist in policing domestic violence'.[233]

Some commentators have lamented this strategic simplification of IPA. Stark has argued that the emphasis on physical assault has made the problem about individual violent people, rather than a consequence of inequality between men and women.[234] Currie notes that what began as a movement to expose inequality, and redistribute social power, became a movement by the state to impose its power to protect (what were now represented to be)

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[225] Pleck, above n 179, 183.
[226] Bailey, above n 205, 1257.
[227] Stark, above n 102, 367.
[228] Linda MacLeod, *Battered But Not Beaten: Preventing Wife Battering in Canada* (Canadian Advisory Council on the Status of Women, 1987) 6.
[229] Schneider, above n 78, 65.
[230] Walker, above n 184, 47.
[231] Bacchi, above n 26, 176.
[232] Hague, above n 222, 134.
[233] Ibid.
[234] Stark, above n 102, 27. See also Leigh Goodmark, 'Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal' (2009) 31 *Washington University Journal of Law & Policy* 39.

weak and defenceless women.[235] It has also meant that, although conduct such as emotional abuse, stalking, harassment and threats were eventually recognised as IPA, police have tended to focus primarily on cases of IPA involving physical violence.[236]

2.2. Alternative Representations of IPA

Although feminists were largely responsible for putting IPA on the public agenda, and were involved in establishing government policy, they were not the only actors attempting to define, understand, and 'fix' IPA. Once it was recognised as a problem, professionals from a variety of fields stepped in to claim it.[237] Some aligned with or even advanced the second-wave feminist representation, while others acknowledged alternative causes and consequences of IPA. To understand how IPA is represented in the criminal law, it is important to consider the influence of these other fields. There is an immense body of literature on IPA from various disciplines, and here I give only a brief outline of some of the more influential representations from certain leading scholars. I will identify some major trends in the problematisation of IPA in various fields, rather than giving a complete account of developments within these fields over the last century.

The psychology of victims and offenders

Psychological analysis of IPA predated the second-wave feminist analysis, though became more prominent after feminists had made IPA a public issue.[238] Mental health researchers in the mid-20th century tended to attribute male violence and aggression to mental illness or psychiatric disorders.[239] Abusive husbands were labelled as 'sick' or 'emotionally

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[235] Dawn H. Currie, 'Battered Women and The State: From The Failure of Theory to a Theory of Failure' (1990) 1(2) *Journal of Human Justice* 77, 88–9.
[236] Schneider, above n 128, 380.
[237] Schechter, above n 192, 107.
[238] Schneider, above n 78, 23.
[239] M. Faulk, 'Men Who Assault Their Wives' (1974) 14(3) *Medicine, Science, and the Law* 180; Donald G. Dutton, Andrew Starzomski and Lee Ryan, 'Antecedents of Abusive Peronality and Abusive Behaviour in Wife Assaulters' (1996) 11(2) *Journal of Family Violence* 113.

disturbed'.[240] Some researchers also focused on the pathology of victims. In 1944, psychoanalyst Helene Deutsch theorised that all women possess three essential traits; passivity, masochism, and narcissism.[241] Her claim that these traits cause women to desire rape, violation and humiliation led to the conclusion among some mental health researchers that women either consciously or unconsciously provoked their husbands into beating them.[242]

While less emphasis has been placed on attributing IPA to the victim's provocation, more recent psychological representations of IPA also focus on the pathology of the victim. Notably, in 1984, feminist psychologist Lenore Walker developed the concept of Battered Woman Syndrome (BWS) to explain how a woman who has been subject to repeated physical force or psychological manipulation by a man can become immobilised, and incapable of self-help.[243] Walker used BWS to explain why some victims of violence do not leave their abusers, and may continue to feel affection towards them. This clinical explanation of women's responses to IPA was adopted by UK and Australian courts in the 1990s to support established defences such as self-defence and provocation to exonerate women who killed their long-term abusive partners.[244] However, the effect of BWS evidence, in pathologizing the IPA victim, and obscuring the behaviour of their abuser, has been extensively criticised by feminist commentators.[245]

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[240] Schneider, above n 78, 23; Martha R. Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90(1) *Michigan Law Review* 1, 27.
[241] Helene Deutsch, *The Psychology of Women* (Grune & Stratton, 1944) 255–278.
[242] Pleck, above n 179, 182. See, eg, Anthony Storr, *Human Aggression* (Penguin, 1970) 177.
[243] Lenore E. Walker, *The Battered Woman Syndrome* (Springer, 1984) 118.
[244] Elizabeth A. Sheehy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations' (1992) 16(6) *Criminal Law Journal* 369, 380; *R v Thornton* (1996) 1 WLR 1174; *R v Kontinnen* (1991) 56 SASR 114.
[245] See, eg, Sheehy, Stubs and Tolmie, above n 244; Julie Stubbs and Julia Tolmie, 'Race, Gender, and the Battered Woman Syndrome: An Australian Case Study' (1995) 8(1) *Canadian Journal of Women and the Law* 122.

While earlier psychological representations of IPA tended to assume that men are the likely abusers and women and children their victims, more recent psychological studies have questioned this gender paradigm. For example, Dutton suggested in 2012 that IPA is caused by 'couples with dysfunctional conflict management styles or psychopathology'.[246] Alternatively, Capaldi, Kim and Shortt argue that IPA is a problem of violent couples, suggesting that aggressive females seek out similarly aggressive males, and both partners may contribute to physical aggression.[247]

Psychological framings thus tend to assume that the psychopathology of victims and offenders is fundamental to the perpetration of IPA. They therefore tend to represent IPA as a problem of unhealthy individuals or relationships. Such representations discourage criminal intervention, and instead invite the treatment of victims and abusers through counselling or psychotherapy.[248] For example, when intervention orders were first introduced in SA in the 1980s, courts were empowered to order that abusers attend psychiatric treatment, or to require both the abuser and victim to attend counselling.[249]

Various sociological representations

The 'Family Violence' approach

By the early 1980s, IPA had attracted the attention of sociologists, who disputed claims by some psychological researchers that abusive conduct was confined to the mentally unstable.[250] Interest in IPA was piqued among sociologists by the publication of US survey data in 1977 which asked respondents about the tactics used in their family to deal with

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[246] Donald G. Dutton, 'The case against the role of gender in intimate partner violence' (2012) 17(1) *Aggression and Violent Behaviour* 99, 100.
[247] Deborah M. Capaldi, Hyoun K. Kim and Joann Wu Shortt, 'Women's involvement in aggression in young adult romantic relationships' in Martha Putallaz and Karen L. Bierman (eds), *Aggression, Antisocial Behaviour and Violence among Girls* (The Guilford Press, 2004) 223.
[248] Bacchi, above n 26, 168.
[249] Reg Baker, 'Domestic Violence: Legal Considerations' (1984) 8 *Criminal Law Journal* 33, 38.
[250] See, eg, Richard J. Gelles, 'Family Violence' (1985) 11 *Annual Review of Sociology* 347, 349–50.

conflict.[251] Although this publication showed that, in one year, 3.8 per cent of wives in the US were subject to physical abuse by their husbands, it also indicated women's capacity for violence towards male partners.[252] This sparked fierce debate about the role of gender in IPA that persists today.

Leading American sociologists Straus, Gelles and Steinmetz theorised in 1980 that women are as violent, if not more violent, than men in intimate relationships.[253] For them, IPA must be contextualised as part of the normalisation of violence in society and the family – hence, this branch of sociological research was labelled the 'family violence' approach.[254] Under this view, which remains influential today, 'the institution of the family is set up to allow and even encourage violence among family members'.[255] Further, social stressors such as poverty, alcoholism, and unemployment have been pointed to as contributing to violent behaviour among family members.[256] 'Family violence' researchers do not represent the cause of the problem as misogyny or poor mental health, but as learned violence and anti-social behaviour, as well as 'the norms which legitimate and glorify violence in society and the family'.[257] This representation of IPA leads to calls for counselling – to unlearn anti-social behaviour and manage dysfunctional anger – as well as social policies aimed at reducing poverty and unemployment.[258] This representation has led to the requirement that

[251] Murray A. Straus, 'Wife Beating: How Common and Why?' (1977) 2(3–4) *Victimology* 443. The survey method (the Conflict Resolution Techniques scale) has been extensively critiqued for its inability to appreciate the repetitive and coercive nature of IPA, and for being unable to distinguish between violence and self-defence. See, eg, Russell P. Dobash and R. Emerson Dobash, 'Women's Violence to Men in Intimate Relationships: Working on a Puzzle' (2004) 44(3) *British Journal of Criminology* 324.
[252] Straus, above n 251, 445.
[253] Murray A. Straus, Richard J. Gelles and Suzanne K. Steinmetz, *Behind Closed Doors: Violence in the American Family* (Anchor Press, 1980).
[254] Dobash and Dobash, above n 251, 326.
[255] Schneider, above n 78, 24.
[256] Anthony Morgan and Hannah Chadwick, 'Key issues in domestic violence' (Research in Practice Summary Paper No 7, Australian Institute of Criminology, December 2009) 7.
[257] Walker, above n 184, 81.
[258] Ibid.

some abusers attend behavioural change counselling programs as a term of intervention orders made against them.[259]

The 'Violence Against Women' approach (feminist sociology)

While some 'family violence' researchers accept that sexual inequality has a role in patterns of violence,[260] critics argue that the 'family violence' approach obscures the role of the disparity of power between men and women.[261] The 'violence against women' approach to sociological research emerged in the 1980s in response to this perceived oversight, and is strongly aligned with the second-wave feminist activist representation of IPA. As Breines and Gordon explain, feminist sociologists argue that IPA ought to be analysed independently from other forms of 'family violence' (i.e. child abuse, elder abuse), because there are 'patterns to violence between intimates which only an analysis of gender … can illuminate'.[262] Central to the feminist sociologist representation is that IPA is gendered – that is, it is more commonly committed by men against women in the context of a society which provides greater benefits to men.

Feminist sociologists argue that IPA occurs continuously over a period of time (rather than involving isolated incidents), and can involve a variety of tactics (including threats, coercion, intimidation, isolation, and economic abuse, as well as physical force) aimed at trapping women in abusive relationships.[263] Feminist sociologists argue that abusers use these tactics repeatedly, and that their cumulative effects allow abusers to establish control over

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[259] See, eg, *Family Violence Protection Act 2008* (Vic) pt 5.
[260] See, eg, Straus, above n 251, 456.
[261] Schneider, above n 78, 24; Breines and Gordon, above n 99, 492.
[262] Breines and Gordon, above n 99, 492.
[263] Stark, above n 102, 5; Schneider, above n 128, 380.

victims.[264] These tactics are made more effective due to women's inferior position both in the relationship and society.[265]

Feminist sociologists do not deny the existence of abusive women, or that men can be victims of IPA.[266] However, they counter 'family violence' researchers' claims that women are as violent as men by elucidating the different contexts in which men and women use violence.[267] In an assertion that remains influential today,[268] Dobash and Dobash argued in 1984 that empirical studies that merely ask whether respondents have *ever* used physical violence against their partners fail to uncover that men's and women's use of violence is both quantitatively and qualitatively different. [269] Men, they argued, tend to use violence to control or intimidate others, and to secure benefits such as money, sex, or power.[270] Conversely, 'women almost always employ violence in defense of self and children in response to cues of imminent assault … and in retaliation for previous physical abuse'.[271] They argued that, when men kill their female partners, it is often the final act in a protracted campaign of physical violence, abuse and coercion, and may be triggered upon discovering their partners' infidelity or attempt to leave the relationship. Conversely, they suggested that

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[264] Stark, above n 102, 5.
[265] Ibid; Julie Stubbs, 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice' in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 42, 43.
[266] Schneider, above n 128, 380–1.
[267] Stark, above n 102, 98.
[268] See, eg, Shamita Das Dasgupta, 'A Framework for Understanding Women's Use of Nonlethal Violence in Intimate Heterosexual Relationships' (2002) 8(11) *Violence Against Women* 1364; Suzanne Swann and David Snow, 'The Development of a Theory of Women's Use of Violence in Intimate Relationships' (2006) 12(11) *Violence Against Women* 1026.
[269] R. Emerson Dobash and Russell P. Dobash, 'The Nature and Antecedents of Violent Events' (1984) 24(3) *British Journal of Criminology* 269, 269; Russell P. Dobash et al, 'The Myth of Sexual Symmetry in Marital Violence' (1992) 39(1) *Social Problems* 71, 72. Equally, 'family violence' sociologists have criticised the methods of 'violence against women' researchers. See, eg, Dutton, above n 246, 100.
[270] See also Claire Renzetti, 'The Challenge to Feminism Posed by Women's Use of Violence in Intimate Relationships' in Sharon Lamb (ed), *New Versions of Victims: Feminists Struggle with the Concept* (New York University Press, 1999) 42, 46.
[271] Dobash et al, above n 269, 80.

women who kill their male partners very rarely do so under the same circumstances. Rather, they do so in defence of themselves or their children.[272]

More recently, feminist sociologists have demonstrated that the method used to analyse crime statistics affects the apparent seriousness of IPA for women.[273] Walby, Towers and Francis note that it can be assumed, given the number of victims of crime in England and Wales, that the rate of violent crime is decreasing. However, they argue that IPA tends to involve repeated criminal conduct against individual victims. Therefore, measuring the incidence of crime by the number of victims fails to produce an accurate picture of the frequency with which violent crime is committed in intimate relationships.[274] Measuring crime rates both by the number of victims and the number of crimes, they are able to demonstrate that that there has been 'an increase … in violent crime and especially in the amount of violent crime against women and by domestic perpetrators'.[275]

Feminist sociologists are committed to examining IPA in the context of gender. As Renzetti argues, '[t]hat women are sometimes violent in intimate relationships does not diminish the importance of discerning the role that gender plays in the etiology and perpetration of intimate violence'.[276] IPA is represented by these researchers as 'systemic and structural, a mechanism of patriarchal control of women that is built on male superiority and female inferiority, sex-stereotyped roles and expectations, and economic, social, and political predominance of men and dependency of women'.[277] Feminist sociologists argue that it is

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[272] Ibid 81.
[273] Sylvia Walby, Jude Towers and Brian Francis, 'Is Violent Crime Increasing or Decreasing? A New Methodology to Measure Repeat Attacks Making Visible the Significance of Gender and Domestic Relations' (2016) 56 *British Journal of Criminology* 1203.
[274] Ibid 1209.
[275] Ibid 1220.
[276] Renzetti, above n 270, 45.
[277] Rhonda Copelon, 'Intimate Terror: Understanding Domestic Violence as Torture' in Rebecca J. Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994) 116, 120.

essential to remember the vast differences in men's and women's use of violence when analysing and responding to IPA.[278]

Intersectionality (third-wave feminist sociologists)

Women of colour and lesbians began entering the field of sociology in the 1990s, and have challenged an enduring assumption among various feminist scholars of the commonality of experience for all female IPA victims.[279] The second-wave feminist movement, which heavily influenced feminist sociology, had until this point largely consisted of white, middle-class women. This homogeneity perhaps allowed second-wave feminists to make the generalisation that IPA affects all women uniformly.[280] Richie observes that, by emphasising the shared experiences of victims, second-wave feminists avoided individualising and therefore trivialising the problem, and instead directed attention to the constant impact of male social privilege on the perpetration of IPA.[281] Nevertheless, these new members of the sociological community argued that, by generalising IPA to emphasise the role of gender, established feminist sociologists were making the problem race- and class-neutral, and denying the additional burdens faced by marginalised victims.[282]

The sociological study of female victims of violence who are marginalised in multiple ways was termed 'intersectionality theory'.[283] Intersectionality theorists 'challenged the primacy of gender as an explanatory model' of IPA, and 'emphasized the need to examine how other

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[278] Dobash et al, above n 269, 72.
[279] Natalie J. Sokoloff and Ida Dupont, 'Domestic Violence at the Intersections of Race, Class, and Gender' (2005) 11(1) *Violence Against Women* 38, 41–2.
[280] Valli Kanuha, 'Domestic Violence, Racism and the Battered Women's Movement in the United States' in Jeffrey L. Edleson and Zvi C. Eisikovits (eds), *Future Interventions with Battered Women and their Families* (Sage Publications, 1996) 34, 40.
[281] Beth E. Richie, 'A Black Feminist Reflection on the Antiviolence Movement' (2000) 25(4) *Signs* 1133, 1134-5.
[282] Ibid; Claire Renzetti, 'Studying Partner Abuse in Lesbian Relationships: A Case for the Feminist Participatory Research Model' in Carol T. Tully (ed), *Lesbian Social Services: Research Issues* (Harrington Park Press, 1995) 29.
[283] Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43(6) *Stanford Law Review* 1241.

forms of inequality and oppression, such as racism, ethnocentrism, class privilege, and heterosexism, intersect with gender oppression'.[284] These new feminist sociologists argued that, while 'being female does translate into some commonalities in oppression, marginalisation and exclusion', '[w]omen's experiences of violence and their ability to access justice are … not homogeneous'.[285]

Intersectionalities shape how each individual experiences IPA, how their experiences are understood by the criminal justice system, and how easily they are able to escape abuse.[286] Sokoloff and Dupont note that people 'exist in social contexts created by the intersections of systems of power (e.g. race, class, gender, and sexual orientation) and oppression (e.g. prejudice, class stratification, gender inequality, and heterosexist bias)'.[287] While one or more of these systems of power and oppression may be at play in an individual's experience of IPA, crucially, gender inequality is not the only (or even a necessary) determinant in every case.[288] For example, Filipino women who migrate to Australia to marry men met through marriage agencies have been found to have heightened vulnerability to IPA, and limited capacity for resistance or escape due to their relative lack of economic power, and the risk to their citizenship status if they leave their abusers.[289] Indigenous women face increased obstacles to escaping abuse because they are more likely to live in remote areas, lack access to social services, and are more likely to encounter racism directed against both them and their abusive partner if they seek police assistance.[290] Victims with disabilities can be

[284] Sokoloff and Dupont, above n 279, 39. See, eg, Richie, above n 281; Sherene Razack, 'What is to be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence' (1994) 19(4) *Signs* 894.
[285] Anna Carline and Patricia Easteal, *Shades of Grey – Domestic and Sexual Violence Against Women* (Routledge, 2014) 230.
[286] Michele Bograd, 'Strengthening domestic violence theories: Intersections of race, class, sexual orientation, and gender' (1999) 25(3) *Journal of Marital and Family Therapy* 275, 276.
[287] Sokoloff and Dupont, above n 279, 43.
[288] Ibid.
[289] Chris Cunneen and Julie Stubbs, 'Cultural Criminology and Engagement with Race, Gender and Post-Colonial Identities' in Jeff Ferrell et al (eds), *Cultural Criminology Unleashed* (Glasshouse Press, 2004) 97.
[290] Julie Stubbs and Julia Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23(3) *Melbourne University Law Review* 709, 746.

relatively powerless against their abuser, on whom they may be dependant economically and for personal care.[291] LGBTIQ victims may be prevented from leaving abusive relationships if they fear homophobia from police.[292]

Recognition of the role of intersectionality has led to greater protection for victims under UK law in recent years. As part of the UK Government's Violence Against Women and Girls (VAWG) strategy, it was recognised that 'women and girls from a black, minority-ethnic (BME) background may find it more difficult to leave an abusive situation'.[293] In BME communities, forced marriages, female genital mutilation and so-called 'honour'-based violence are more common, and can make it harder for victims of IPA to leave their abusers. As part of the strategy, offences of IPA, forced marriage, and failure to protect from female genital mutilation have been introduced.[294] Nevertheless, some intersectionality theorists argue that these new crimes identify abuse as a cultural phenomenon, thus obscuring abuse among non-minorities, and creating dangerous stereotypes of all BME men as violent.[295]

Broad issues in criminal law theory

Among criminal law theorists and law reform activists there has been discussion of a number of issues pertinent to the development of criminal law solutions to IPA. To appreciate how IPA is understood by these commentators, some of the major preoccupations within the field must be briefly addressed.

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[291] Carline and Easteal, above n 285, 234.
[292] Sokoloff and Dupont, above n 279, 43–4.
[293] HM Government, 'Call to End Violence Against Women and Girls: Equality Impact Assessment' (2011) 1.
[294] *Serious Crime Act 2015* (UK) c 9, ss 72, 76 ('*SCA*'); *Anti-social Behaviour, Crime and Policing Act 2014* (UK) c 12, pt 10. See also *Criminal Code Act 1995* (Cth) s 270.7B; *Crimes Act 1900* (NSW) s 45.
[295] Carline and Easteal, above n 285, 231–2; Leti Volpp, 'Blaming Culture for Bad Behaviour' (2000) 12(1) *Yale Journal of Law and the Humanities* 89.

Overcriminalisation

Criminalisation (the issue of determining the proper scope of the criminal law) has been the primary preoccupation of criminal law scholars since the 1990s.[296] The set of conditions that must be satisfied for conduct to be criminalised have been the subject of extensive debate.[297] Criminal theorists have tended to support one of two positions; either that the criminal law should prevent and punish morally wrong behaviour, or that it should punish the infliction of harm.[298]

Farmer suggests that neither position adequately explains why offences are created. He argues that the law is not developed based on core values of harm or morality, but that patterns of criminalisation demonstrate 'that the law develops in response to specific social needs'.[299] Those social needs develop and change over time, depending on the values deemed important, and the conduct deemed improper.[300] We can see this in the trend towards criminalising new forms of violence. Offences against the person were established and adapted to reflect society's changing understanding about legitimate forms of violence, rather than to reflect pre-legal wrongs. Farmer suggests that there is a chasm between the theory which 'focuses on abstract and decontextualized ideas', and the practice of criminalisation, which is determined by changing understandings of civil order and the aims of the criminal law.[301]

Nevertheless, Farmer maintains that it is important to debate the proper scope of the criminal law. He explains that the current focus in criminalisation literature stems from concern that the law is too invasive, thus 'limiting the autonomy of citizens, or punishing excessively

[296] Farmer, above n 62, 1-2.
[297] Douglas Husak, 'The Criminal Law as Last Resort' (2004) 24(2) *Oxford Journal of Legal Studies* 207, 209.
[298] This has been discussed extensively elsewhere. See, eg, A.P. Simester and Andreas von Hirsch, *Crimes, harms, and wrongs: On the principles of criminalisation* (Oxford University Press, 2011); Victor Tadros, *The ends of harm: The moral foundations of criminal law* (Oxford University Press, 2011).
[299] Farmer, above n 62, 8.
[300] Ibid 301.
[301] Ibid 302-3.

where the law is ineffective in changing conduct'.[302] Husak observes an increasing trend for governments to overcriminalise by creating offences that target highly specific behaviour already covered by existing provisions.[303] He expresses concern that there are too many criminal laws, and deplores the social obsession with criminalising ever more specific behaviour:

> A sensationalistic tragedy attracts media attention, and officials solemnly pledge to 'do something' to prevent similar events in the future. All too often, this 'something' consists in the enactment of a new offense: a crime *du jour*.[304]

For those theorists concerned with overcriminalisation, a specific offence of IPA may be objectionable as it could constitute re-criminalisation. Many existing offences in the UK and Australia are applicable in cases of IPA, including assault, stalking, harassment, false imprisonment, criminal damage, rape, murder, and manslaughter.[305] A specific offence that proscribes conduct covered by these offences could be seen as replicating these offences, with little practical benefit.

Some scholars, such as Tadros and Youngs, reject this line of reasoning, and advocate the creation of a specific IPA offence, on the basis that IPA is a morally distinct form of violence to that already criminalised.[306] They are able to conceive of IPA as morally distinct because they do not rely on a representation that focuses on individual criminal acts (e.g. assault, stalking, harassment, criminal damage, etc.). Instead, employing the feminist representation, these scholars argue that IPA constitutes a course of abuse undertaken in a relationship of

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[302] Ibid 299.
[303] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008).
[304] Ibid 36.
[305] Mandy Burton, *Legal Responses to Domestic Violence* (Routledge-Cavendish, 2008) 59.
[306] See, eg, Tadros, above n 108; Youngs, above n 99; Alafair S. Burke, 'Domestic Violence as a Crime of Pattern and Intent' (2007) 75(3) *George Washington Law Review* 552; Deborah Tuerkheimer, 'Recognising and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence' (2004) 94(4) *Journal of Criminal Law & Criminology* 959.

trust to restrict the victim's autonomy.[307] Given the ongoing nature of the conduct, and the variety of possible tactics involved, these scholars have suggested that IPA is sufficiently distinct to warrant a specific offence.[308]

State responsibility

Another point of contention among legal scholars is whether IPA ought to be dealt with exclusively by the state through the criminal law, or whether the victim ought to have a say in the action taken against the abuser. This debate stems from various understandings of the role of the criminal justice system, and various representations of IPA.

Some criminal theorists argue that the purpose of the criminal justice system is to protect the interests of citizens by controlling crime.[309] Ashworth argues that it is the state's responsibility 'to ensure that there is order and law-abidance in society, and to establish a system for the administration of criminal justice' through which crime can be punished and potential offenders can be deterred.[310] Thus, the prevention and prosecution of crime is in the public interest. Under this view, when conduct is found to be wrong, 'there is a public interest in ensuring that people who commit such wrongs are liable to punishment'.[311] This is not to deny the suffering of the victim, or to suggest that society as a whole is injured when one person is victimised. Rather, a wrong done to one member of the community is the proper concern of the whole community.[312]

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[307] Tadros, above n 108, 1001; Youngs, above n 99, 67–8.

[308] For the general proposition of having separate offences for morally distinct conduct, see Jeremy Horder, 'Rethinking Non-Fatal Offences Against the Person' (1994) 14(3) *Oxford Journal of Legal Studies* 335, 342.

[309] Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42(3) *British Journal of Criminology* 578, 579; R.A. Duff, *Punishment, Communication and Community* (Oxford University Press, 2001) 112; David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 109–10.

[310] Ashworth, above n 309, 579.

[311] Ibid.

[312] Andrew Ashworth, 'Some Doubts about Restorative Justice' (1993) 4(2) *Criminal Law Forum* 277, 284; R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart, 2007) 52.

Therefore, as IPA is considered worthy of criminal intervention, these theorists argue that it ought not to be open to victims to decide whether action will be taken against their abusers. The state, on behalf of the citizens it represents, is obliged to intervene and punish perpetrators. Duff argues that IPA 'should surely *not* be seen as a matter for negotiation or compromise. It should be condemned by the whole community as unqualifiedly wrong; and this is done by defining and prosecuting it as a crime'.[313] Thus, for these theorists, criminal justice is a matter between the community (the state) and the offender. The proper response to IPA is to prosecute for the sake of public interest.[314] The decision to prosecute abusers ought not to be left to victims, who may be so fearful of their abuser, or so deeply under their abuser's control, that they oppose prosecution.[315] Were victims given decision-making power, there would be inconsistency in prosecution, and the public interest in punishing offenders would not be satisfied.

Opponents of this view suggest that 'criminal justice is not merely a contest between the defendant and the state', but that it ought to consider 'the rights and responsibilities of the victim'.[316] According to Lewis et al, the main reasons victims give for reporting violence are to ensure protection for themselves and their children, to deter their partner from future abuse, and to receive public recognition of their suffering.[317] Victims tend to be less concerned about punishment, and may oppose it if they wish to maintain the relationship with their abuser. If one understands the problem of IPA as an impairment of the victim's autonomy, then it is arguably preferable to give victims a choice about what remedies are

[313] Duff, above n 309, 62 (emphasis in original).
[314] Ashworth, above n 312, 297.
[315] Katherine van Wormer, 'Restorative Justice as Social Justice for Victims of Gendered Violence: A Standpoint Feminist Perspective' (2009) 54(2) *Social Work* 107, 111.
[316] Daniel W. Van Ness, 'New Wine and Old Wineskins: Four Challenges of Restorative Justice' (1993) 4(2) *Criminal Law Forum* 251, 260.
[317] Ruth Lewis et al, 'Protection, Prevention, Rehabilitation or Justice? Women's Use of Law to Challenge Domestic Violence' (2000) 7(1–3) *International Review of Victimology* 179, 188.

sought,[318] rather than to prosecute abusers without reference to victims' wishes.[319] Under this view, it is the victim's needs, rather than the public's, that ought to be the priority of the criminal justice system. Thus, to scholars who place the victim's interests at the fore, criminal sanctions can be viewed as 'too crude a remedy'.[320]

2.3. My Social Vision

In using the WPR approach to evaluate problem representations, the evaluator's social vision (that is, their values, assumptions and political motivations) will inform analysis.[321] Bacchi's social vision, for example, involves 'improving the lives of people, and in particular women'.[322] She therefore favours those social policies underpinned by problem representations that highlight women's circumstances. It is necessary to be explicit about my vision, as it will colour my evaluation of various problem representations throughout the thesis.

My social vision is for the criminal justice system to recognise and understand IPA as it is understood and experienced by individual victims. I suggest that victims are better served by context-specific approaches to intervention.[323] My understanding of the actual experiences of victims is informed by the work of intersectionality theorists, who reject the proposition that all victims have a uniform experience of IPA.[324] I understand IPA as *ongoing* conduct involving varied tactics (that may appear trivial when viewed independently), which have a cumulative effect on the victim's 'dignity, autonomy, and material security' and possibly 'physical integrity'.[325] Representing IPA as discrete incidents of physical violence may be simpler in criminal justice systems that tend to rely on incident-

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[318] This could include restorative justice measures such as mediation.
[319] van Wormer, above n 315, 111.
[320] Schneider, above n 128, 382.
[321] Bacchi, above n 26, 10.
[322] Ibid.
[323] Lewis et al, above n 317, 202.
[324] See especially Stark, above n 102; Sokoloff and Dupont, above n 279.
[325] Stark, above n 102, 398.

based analysis of most criminal conduct, but it misrepresents the experiences of victims, who deserve recognition of the fact that abuse tends to diminish the conditions under which they can flourish.[326]

My analysis of the effects of problem representations will be informed by this social vision. I favour those representations that emphasise the circumstances of individual victims, and the diminution of liberty associated with IPA. Laws underpinned by such problem representations are, in my opinion, likely to be better placed to recognise the wrongs done to victims. As Stark enunciates, it is 'the state's obligation to provide all adult citizens with equal access to the conditions under which personal capacities can flourish and they can feel worthy'.[327]

[326] Martha C. Nussbaum, *Sex and Social Justice* (Oxford University Press, 1999) 41.
[327] Stark, above n 102, 398.

Chapter 3: A Challenge to Fair Labelling Theory

3.1. Fair Labelling

A great deal has been said about the effect of labels in the field of IPA. As discussed in chapter 1, scholars frequently debate the capacity of terms such as 'wife batterer' and 'domestic abuser' to appropriately stigmatise abusers. When we create distinct offences of IPA, we inevitably encounter the debate once again under the guise of the principle of fair labelling. Fair labelling, attributable to Ashworth, who initially described it as 'representative labelling', is considered one of the normative principles of criminal liability.[328] Its purpose is to signal 'the nature and magnitude of … law-breaking' involved in distinct offences.[329] An inaccurate or vague label may encourage speculation or give a false impression about the offender's actions.[330] Thus, a fair label uses simple, descriptive language to conjure an image of what the offender did, and what is wrong with that conduct.

Although it has been claimed to be beyond reproach,[331] I challenge an aspect of fair labelling on the basis that it conflicts with WPR. The primary assumption of fair labelling – that there is *something* which can be fairly and accurately labelled – is flawed if we accept Bacchi's claim that social problems do not exist interpretation-free. Nevertheless, we must use labels, and the WPR approach can help us identify those that produce favourable effects. The language we use to label and define a problem inevitably places barriers around how the problem can be conceived and what solutions are possible. It is therefore vital to consider the effects of labels, even if I suggest abandoning the idea that there is one 'fair' or accurate label for IPA.

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[328] A J Ashworth, 'The Elasticity of *Mens Rea*' in C. F. H. Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths, 1981) 45, 53.
[329] Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th ed, 2009) 78.
[330] James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217, 227–8.
[331] Glanville Williams, 'Convictions and Fair Labelling' (1983) 42(1) *Cambridge Law Journal* 85, 85–6.

Fairness to whom?

Before challenging the assumption of fair labelling, it is important to consider to whom fairness is owed. In the following, I consider how fairness requirements differ for the offender and victim. Rather than consider offence labels for IPA, which are sparse and relatively new, I draw on sexual offence labels to demonstrate the importance of (and difficulty of attributing) fairness to offenders and victims.

The defendant

One of the foundational requirements of fair labelling is according fairness to the defendant. Persons convicted of crimes are stigmatised by society, and that stigma ought to be proportionate to the offender's wrongdoing.[332] Ashworth argues that the circumstances of an offender's conduct can fade from memory following conviction.[333] Before long, offence labels become the only way for potential employers, criminal justice officials, and the community to evaluate offenders. Therefore, of particular concern for Ashworth is finding a principle to ensure that the appropriate level of stigma attaches to offenders based on their moral deserts. He suggests that offence labels that 'express the wrongdoing of the accused and precisely identify his moral blameworthiness' can prevent the over-statement of an offender's fault.[334] A vague or misleading label could disproportionately damage an offender's reputation, lead sentencing judges for subsequent offending to pass more severe sentences based on previous convictions, and make potential employers reluctant about hiring the offender.[335] Thus, offence labels must accurately convey the offender's actions, so they are not excessively censured by the community into which they must eventually re-integrate.

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[332] Hilmi M. Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Criminal Tribunals* (Oxford University Press, 2014) 28.
[333] Ashworth, above n 328, 56.
[334] Zawati, above n 332, 28.
[335] Chalmers and Leverick, above n 330, 226–8.

The debate surrounding labels attached to sexual offences – 'rape' or 'sexual assault' – provides a useful example. The Law Reform Commission of Victoria (VLRC) recognised in 1986 that 'rape' is an emotive label, which evokes 'a particularly effective and appropriate form of stigma'.[336] The VLRC suggested that the term could conjure in the public's minds an accurate image of the offender's wrongdoing, as it aptly conveys the terror, humiliation and degradation associated with the conduct covered by the offence.[337] Various UK and Australian government bodies have concluded that 'rape' is a fair label as the public has a clear understanding of what the term means,[338] and therefore, upon hearing that a person is a 'rapist', could be expected to comprehend their exact behaviour and its immorality. Thus, these bodies consider that the label 'rape' is fair to offenders as the public is able to recognise those truly 'deserving of the stigma' entailed by the label.[339]

However, each UK and Australian jurisdiction that uses the 'rape' label defines the conduct differently. For example, UK offences of rape cover non-consensual penetration of the vagina, anus or mouth of a male or female victim with the offending male's penis.[340] In SA, rape covers non-consensual penetration of a male or female victim's vagina, labia majora or anus by a male or female offender, or an object controlled by the offender, as well as fellatio and cunnilingus.[341] In Victoria, a male or female offender can commit rape by sexually penetrating the male or female victim, or by compelling the victim to sexually penetrate themselves, the offender, another person, or an animal, or to be penetrated by another person or an animal.[342] Therefore, the suggestion that 'rape' is something accurately and

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[336] Law Reform Commission of Victoria, *Rape and Allied Offences: Substantive Aspects*, Discussion Paper No 2 (1986) 51.
[337] Ibid.
[338] *Report of the Advisory Group on the Law of Rape (the Heilbron Committee*), Cmnd 6352 (1975) 13–14 [80]; Criminal Law Revision Committee, above n 18, 16 [2.47]; Law Reform Commission of Victoria, *Rape and Allied Offences: Substantive Aspects*, Report No 7 (1987) 28 [66]; Home Office UK, *Setting the Boundaries: Reforming the law on sex offences* (2000) 15 [2.8.4]; Scottish Law Commission, *Discussion Paper on Rape and Other Sexual Offences*, Discussion Paper No 131 (2006) 49 [4.16]–[4.18].
[339] Ashworth, above n 328, 55.
[340] *Sexual Offences Act 2003* (UK) c 42, s 1; *Sexual Offences (Scotland) Act 2009* (Scot) asp 9, s 1.
[341] *Criminal Law Consolidation Act 1935* (SA) s 48 ('*CLCA*').
[342] *Crimes Act 1958* (Vic) s 38–9.

consistently understood by the public can be challenged by the fact that 'rape' does not, and has never had, a consistent meaning at law.[343] Thus, the argument that the label 'rape' can produce an accurate understanding of a person's wrongdoing is erroneous. Simester and Sullivan argue that for a label to be fair to an offender, it must be capable of conveying to the public '*exactly* what [the offender] has done wrong and why he is being punished'.[344] Given that 'rape' has an inconsistent meaning, the label is incapable of sending the public an exact message, and could lead to the unfair stigmatisation of some offenders.[345]

Unlike 'rape', the label 'sexual assault' implies that it captures a wide range of non-consensual sexual conduct. Its capacity to cover a broad range of conduct committed against victims of either sex is the main reason it has been preferred over 'rape' in NSW.[346] However, the label could be considered inappropriately vague. Unlike 'rape', 'sexual assault' is not a strongly emotive term. The public is less able to infer the offender's conduct from the label, as it may refer to a wide range of sexual conduct of varying degrees of seriousness. The label could therefore encourage 'speculation and false assumptions' about an offender's behaviour.[347] For example, the Committee responsible for developing the Australian Model Criminal Code (MCCOC) observed that the Australian public frequently refers to persons convicted of sexual assault as rapists, regardless of the offender's actual conduct.[348] Chalmers and Leverick argue that a label is fair to an offender when it 'does not create a false or misleading impression of the nature or magnitude of the offender's wrongdoing or encourage an inaccurate conclusion to be drawn'.[349] It is for this reason that

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[343] Consider that, until 1845, an Englishwoman was not raped if she failed to resist her attacker, even if she was unconscious. Farmer, above n 62, 274; *R v Camplin* (1845) 169 ER 163.
[344] A.P. Simester and G.R. Sullivan, *Criminal Law: Theory and Doctrine* (Hart Publishing, 3rd ed, 2007) 31 (emphasis added).
[345] Zawati, above n 332, 30.
[346] *Crimes Act 1900* (NSW) s 61I; New South Wales, *Parliamentary Debates*, Legislative Council, 8 April 1981, 5478.
[347] Chalmers and Leverick, above n 330, 227.
[348] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 5: Sexual Offences Against the Person Discussion Paper* (1996) 27 ('*MCCOC*').
[349] Chalmers and Leverick, above n 330, 228.

the MCCOC proposed the alternative label 'unlawful sexual penetration'.[350] It suggested that this label fairly represents the exact conduct involved in the offence – that is, non-consensual sexual penetration of any kind – and therefore does not give a false impression.

A further consideration in providing fairness to offenders is whether the label ensures accuracy and consistency in the application of the offence. The MCCOC, for example, avoided the label 'rape' on the basis that it conjures imagery of a furtive stranger attacking a defenceless woman in a darkened alley, which might lead juries to be 'reluctant to convict reasonable-looking, well-dressed and presentable men of an offence stereotypically associated with lower socio-economic males'.[351] It suggested that 'unlawful sexual penetration', a less emotionally-charged label, would help to remove the influence of stereotypes, thus ensuring that juries convict more fairly and consistently.[352]

Duff considers labels to be important for their capacity to speak to potential offenders prior to the commission of crime. He argues that the law must address potential offenders to give them 'fair notice of what would make them liable, and a fair opportunity to avoid liability'.[353] In theory, a potential offender ought to be able to discover from an offence label whether conduct they are considering is punishable. Offence labels that give little detail about the prohibited conduct hinder such discovery, and are therefore arguably unfair. Where a specific label (e.g. 'rape') is used to describe a wide range of conduct, or where a vague or broad label is used (e.g. 'sexual assault'), a potential offender is not given fair notice about how their planned actions will be judged.

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[350] *MCCOC*, above n 348, 29.
[351] Ibid 25.
[352] Ibid.
[353] Duff, above n 312, 43.

The victim

To Ashworth – who was deeply concerned about wrongly stigmatised offenders – fairness to victims did not appear a significant consideration. Since his original explanation of the principle, the interests of victims have been recognised as equally important.[354] As Horder puts it, if an offence label 'gives too anaemic a conception' of offending conduct and its moral gravity, 'it is fair neither to the defendant, nor to the victim. For the wrongdoing of the former, and the wrong suffered by the latter, will not have been properly *represented* to the public'.[355] The label applied to an offender inevitably also attaches to the victim.[356] Whether or not the victim is personally identified during trial, they will be referred to by the court and the media as the victim of crime – a victim of child marriage, a victim of female genital mutilation, etc. It is through illuminating the degradation suffered by the victim that courts can demonstrate the abhorrence of the defendant's conduct. Victim status is already troubling for many, as evidenced by the fact that some who have experienced IPA prefer to describe themselves as 'survivors' rather than 'victims'.[357] Distress at being described as a victim can be aggravated when the type of victimisation is misrepresented to the public through an inappropriately vague or inaccurate label.

Settling on a label for sexual offences that is fair to the victim is a particular challenge. As discussed above, many jurisdictions have 'rape' offences covering extensive conduct. Zawati observes that a broad definition of rape not only unfairly stigmatises the offender as a rapist, but also stigmatises the victim as a victim of rape.[358] A person may not see what they experienced as rape, but the label 'rape victim' nevertheless attaches to them, increasing

[354] Zawati, above n 332, 30.
[355] Horder, above n 308, 351 (emphasis in original).
[356] Zawati, above n 332, 30.
[357] Andrea J. Nichols, 'Meaning-Making and Domestic Violence Victim Advocacy: An Examination of Feminist Identities, Ideologies, and Practices' (2013) 8(3) *Feminist Criminology* 177.
[358] Zawati, above n 332, 30.

'the trauma and stigma' they experience.[359] Especially in conservative communities, victims may be dissuaded from reporting offending conduct to avoid the shame and humiliation of being improperly labelled and stigmatised as a rape victim.[360]

Conversely, where the 'rape' label is applied to a narrowly defined offence, those victims of equally humiliating and degrading sexual misconduct excluded from the definition do not receive appropriate recognition of their suffering.[361] It was for this reason that the Tasmanian rape offence was extended. The original offence defined rape as non-consensual penetration of the victim's vagina, anus or mouth by the offender's penis. However, following a 2017 Supreme Court ruling that a man could not be convicted of rape for performing non-consensual oral sex on an intellectually disabled man,[362] the Tasmanian government extended the offence to a wider range of conduct.[363] In NSW, the alternative label 'sexual assault' was adopted to address the same issue.[364] In parliamentary debates, it was argued that a broader offence would protect more people 'far better than the medieval law of rape'.[365] Nevertheless, it has been suggested elsewhere that the label 'sexual assault' does not provide fairness to victims because it 'does not convey the true character of the offence. The emphasis on "assault" detracts from the intrusive and violent nature of non-consensual penetrative sexual activity'.[366] The perception that 'sexual assault' does not adequately convey the victim's experience was rather crassly demonstrated by a cartoon in the *Sydney Morning Herald* during debates about the proposed law reform in NSW. The cartoon depicted a woman being pursued by a man who says 'But listen lady, since Mr Wran [then

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[359] *MCCOC*, above n 348, 25; Law Reform Commission of Victoria, above n 338, 28. See also Law Reform Commission of Canada, *Sexual Offences*, Report No 10 (1978) 12: '[T]he word 'rape' attaches a profound moral stigma to the victim and expresses an essentially irrational folklore about them'.
[360] Zawati, above n 332, 31; New South Wales, *Parliamentary Debates*, Legislative Council, 8 April 1981, 5457.
[361] Criminal Law Revision Committee, *Working Paper on Sexual Offences* (1980) 16 [44].
[362] *DPP (Tas) v TGW* [2017] TASCCA 1.
[363] *Criminal Code 1924* (Tas) s 185.
[364] *Crimes Act 1900* (NSW) s 61I.
[365] New South Wales, *Parliamentary Debates*, Legislative Council, 8 April 1981, 5478 [5.25] (Delcia Kite).
[366] *MCCOC*, above n 348, 27.

NSW Premier] substituted "sexual assault" for "rape" there is no stigma attached to it'.[367] The NSW Court of Criminal Appeal also observed some years after the label was adopted that it 'tends to divert attention' from the true nature of the offender's 'vicious and brutal' behaviour.[368]

Thus, we can see what Ashworth described as 'the complex and contestable issues involved in implementing the principle of fair labelling'.[369] When creating an offence, we must be conscious of the effects of labels on victims and offenders, and aim to settle on one that meets the needs of both. With this understanding of the elusive nature of a 'fair' label in mind, we can now appreciate how the principle has been used to justify the creation of specific offences of IPA.

Fair labelling of IPA

When existing offences against the person are charged in cases of IPA, the nature of the abuser's wrongdoing is not expressed through the labels attached to them. The public cannot easily identify intimate partner abusers through labels such as assault, rape, false imprisonment, or stalking.[370] Thus, those who commit IPA are not appropriately stigmatised. The range of coercive and controlling tactics involved in IPA, when undertaken repeatedly, arguably form a morally distinct type of interpersonal violence, and therefore ought to be recognised through a specific offence label.[371] Thus, the use of general offence labels in cases of IPA is arguably unfair to victims, whose experiences go unrecognised, and to abusers, who are not appropriately stigmatised.

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[367] George Molnar, *Sydney Morning Herald* (Sydney), 21 March 1981, 12.
[368] *R v Draper* (Unreported, NSW Court of Criminal Appeal, Badgery-Parker J, 9 October 1990) 11–12.
[369] Ashworth, above n 329, 80.
[370] Zawati, above n 332, 28.
[371] Tadros, above n 108, 1001.

There are several options open to legislatures attempting to rectify this unfairness. One is to highlight specific conduct already covered by a general criminal offence by creating a distinct offence label. This was the approach taken in Queensland with the offence of 'Choking, suffocation or strangulation in a domestic setting'.[372] While such conduct can be charged as assault, a specific offence was introduced on the basis that strangulation is a frequent precursor to severe violence, particularly intimate partner homicide.[373] A specific offence label for such conduct therefore allows police, sentencing judges and social service providers to assess the risk of future violence, and facilitates better public understanding of the context and seriousness of the abuser's conduct.[374]

Another approach is to extend criminal liability to capture conduct not previously criminalised. A distinct offence of IPA, incorporating conduct not covered by existing offences against the person, with a descriptive label, could demonstrate to the public and criminal justice officials that IPA ought to be taken seriously in its own right.[375] The new UK offence of coercive and controlling behaviour,[376] for example, was touted by the Home Office as sending

> a clear message that this form of domestic abuse can constitute a serious offence. … It sets out the importance of recognising the harm caused by coercion or control, the cumulative impact on the victim and that a repeated pattern of abuse can be more injurious and harmful than a single incident of violence.[377]

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[372] *Criminal Code 1899* (Qld) s 315A.
[373] Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (2015) 302.
[374] Ibid.
[375] Chalmers and Leverick, above n 330, 229.
[376] *SCA* s 76.
[377] Home Office UK, 'Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework' (December 2015) 3.

Similarly, the Tasmanian offences of economic abuse, and emotional abuse or intimidation,[378] were justified as a demonstration to the public that IPA 'does not always take an overtly physical form and that it can involve a range of behaviours aimed at isolating the victim and undermining their capacity to take independent action'.[379] In fairness to victims, these governments deemed it important for the criminal law to specifically recognise these forms of behaviour as distinct from already proscribed conduct.[380]

Another option is to introduce statutory aggravations for existing offences when they are committed in the context of IPA. In SA and WA, certain offences against the person are aggravated when committed against current or former intimate partners.[381] Offences that can attract a higher penalty include assault, causing harm, stalking, and unlawful threats.[382] Crucially, however, aggravating elements are not included in offence labels, nor in the sentence passed. As such, it is arguable that offenders are not fairly labelled and stigmatised, and that victims do not receive fair recognition of their suffering.[383] Further, sentencing judges, who are required to take an offender's record of previous convictions into account in determining their sentence,[384] are not able to glean information about the circumstances of previous convictions from aggravated offences without distinct labels.[385] It is therefore important that labels on an offender's record are descriptive enough to provide sentencing judges with sufficient information to sentence intimate partner abusers appropriately. It was for this reason that the NSW Government introduced the *Crimes (Domestic and Personal Violence) Act*, which requires that if a person is found guilty of an offence of personal

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[378] *Family Violence Act 2004* (Tas) ss 8–9.
[379] Tasmania, *Parliamentary Debates*, House of Assembly, 18 November 2004, 31–118.
[380] The placement of these offences in the *Family Violence Act 2004* (Tas), rather than the *Criminal Code Act 1924* (Tas), could create the impression that they are less serious than other criminal offences. Heather Douglas, 'Do We Need a Specific Domestic Violence Offence?' (2015) 39(2) *Melbourne University Law Review* 434, 455.
[381] *CLCA* s 5AA(1)(g); *Criminal Code Act Compilation Act 1913* (WA) sch 1 s 221.
[382] *CLCA* ss 19–19AA, 20–4; *Criminal Code Act Compilation Act 1913* (WA) sch 1 ss 313, 317, 338E.
[383] Horder, above n 308, 351.
[384] See, eg, *Sentencing Act 2017* (SA) s 11(1)(d).
[385] Chalmers and Leverick, above n 330, 231.

violence, and the court is satisfied that the crime occurred in the context of a current or former domestic relationship, the offence will be recorded on the defendant's criminal record as a 'domestic violence offence'.[386] In parliamentary debates, it was argued that this label 'would leave a permanent stain on a person's record and would be readily identifiable by a sentencing court'.[387] The Act ensures that 'a clear statement is made about the aggravated nature of an offence of violence that is committed in the context of a domestic relationship'.[388]

3.2. A Challenge to Fair Labelling

The principle of fair labelling is one of the normative principles of criminal liability.[389] Williams goes so far as to suggest that it 'is immune from challenge as a principle of justice'.[390] However, is the principle so immune? The primary assumption of fair labelling is that there is *something* which can be fairly, and therefore accurately, labelled.[391] Chalmers and Leverick, who have made the most notable contribution to the study of fair labelling since Ashworth's original enunciation, use the adjectives 'fair' and 'accurate' interchangeably. One may argue that the two words are not synonymous and that 'fair' merely means suitable. It is Chalmers and Leverick's assumption that fair means accurate which I challenge.

It is a common assumption of some legal theorists that there exists in the world a variety of discrete moral wrongs that simply need to be matched with corresponding laws.[392] This assumption is in part attributable to the common practice Lacey identifies among these

[386] *2007* (NSW) s 12.
[387] New South Wales, *Parliamentary Debates*, Legislative Council, 29 November 2007, 4653 (Tony Kelly).
[388] Ibid 4652.
[389] Chalmers and Leverick, above n 330, 219.
[390] Williams, above n 331, 85–6.
[391] Chalmers and Leverick, above n 330, 218, 226.
[392] See, eg, Horder, above n 308, 335. Horder acknowledges that identifying a precise description of the moral essence of a wrong can be 'a matter of great controversy'. He suggests the apparently simple solution of adopting 'the best moral conception of the essence in society as it is today'. This is hardly conducive of an accurate label, especially when considering that the law frequently guides public understanding of wrongdoing.

theorists of discussing only those crimes that are undoubtedly morally wrong.[393] Duff, for example, insists that we ought to refrain from certain conduct, such as murder, rape and theft, 'not because the law prohibits them, but because they are wrongs'.[394] His influential view, according to Lacey, is that crime is a moral, rather than a legal category, and as such is 'outside the ambit of deliberate legislative change. Hence the role of criminal law is basically to reflect and articulate a pre-existing conception of wrongdoing'.[395] Thus, it is frequently supposed that the task of legislators is to write offences, and offence labels, that match these pre-existing wrongs. This assumes the existence of an accurate and concrete definition of the wrong outside of the law that can be reduced to a label. I challenge this assumption.

WPR denies the existence of unchanging social problems, and the idea that the law responds directly to those problems. There is, Bacchi argues, no such thing as a 'real' social problem.

> [W]hile … there are a multitude of disturbing social conditions, once they are given the shape of an interpretation, once they are characterized as a 'problem' or as a 'social problem', they are no longer 'real'. They are interpretations or constructs of the 'real'. We can have no access to the 'real'.[396]

Once a *social condition* has been constructed as a *social problem* (that is, once people start recognising certain conduct as problematic), it is assigned a particular shape or interpretation by those discussing it. It may, in fact, be assigned multiple competing interpretations by different people with varying expertise, experience and views. Regardless, once something is considered problematic, we cannot think about it without it being coloured by an interpretation. All we can know is our understanding of the problem. Thus, when it is claimed that an offence label accurately captures the essence of a crime, what it *really* captures is a

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[393] Nicola Lacey, 'Contingency and Criminalisation' in Ian Loveland (ed), *Frontiers of Criminality* (Sweet & Maxwell, 1995) 1, 4.
[394] Duff, above n 312, 86.
[395] Lacey, above n 393, 4.
[396] Bacchi, above n 26, 9.

representation of a social problem. A label cannot give an accurate picture of what is wrong with such conduct, because there is no accurate, interpretation-free picture.

The social condition of people abusing their intimate partners has occurred throughout history. However, as discussed in the chapter 2, the social condition only relatively recently regained problem status, following a period of silence in the early 20th century. When second-wave feminists argued that such abuse was a problem, and elucidated what the problem was, it lost its status as a 'real' condition, and became an interpretation of the 'real'. While myriad competing representations have emerged, none have captured the precise reality of the social condition. As Bacchi's approach tells us, there is no one, true, concrete definition of the causes and concerns of IPA that can be free from interpretation. There are representations of the 'real'[397] – coloured by the assumptions and biases of scholars. This is true of all social conditions – even those which legal moralists such as Duff have deemed to be pre-legally wrong. While Duff has argued that rape, for example, is indisputably and constantly wrong,[398] what constitutes rape, and what makes rape wrong, has changed dramatically over time as community attitudes have altered.[399] Thus, we cannot claim to have the capacity to identify the 'real' causes and concerns of IPA. This is not to suggest that the 'real' problem does not exist – only that, as Bacchi puts it, we 'can have no direct access to the "real"'.[400]

Our conventional understanding of new criminal offences is that they are lawmakers' best attempts to deal with 'fixed and identifiable' problems.[401] WPR denies this possibility. WPR demonstrates that lawmakers do not create labels that best describe a problem; rather, they

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[397] Ibid.
[398] Duff, above n 312, 86.
[399] Jennifer Temkin, 'Towards a Modern Law of Rape' (1982) 45(4) *Modern Law Review* 399, 400; John Gardner and Stephen Shute, 'The Wrongness of Rape' in John Gardner (ed), *Offences and Defences* (Oxford University Press, 2007) 1.
[400] Bacchi, above n 26, 9.
[401] Bacchi, above n 24, 1.

settle on a problem representation, and create a criminal offence reflecting that representation. The offence label will convey what the conduct is and what is wrong with it *according to their chosen representation*. Lawmakers are in a privileged position, because they are able to impose their problem representation on the public by enshrining it in law.[402] Their label, and its implicit representation, is widely broadcast to the public, and can shape how the community views the problem.[403] Chalmers and Leverick acknowledge and even encourage the use of labels to educate the public about wrongdoing.[404] While they argue that offence labels ought ideally to reflect public opinion, as the public is more likely to treat the law with respect if offence labels reflect their own understanding of the problem, Chalmers and Leverick suggest that there are circumstances where 'it may be legitimate for the law to seek to shape public opinion'.[405] They suggest that the state ought to be responsible for demonstrating to the public that certain conduct, especially that committed against a vulnerable minority, ought to be taken seriously. Tadros uses a similar line of reasoning to advocate the creation of a distinct IPA offence. He suggests that the duty of states to 'protect minorities and those without a strong public voice' may supersede their duty to 'reflect in their policies the views and values of the citizenry'.[406] The creation of a specific offence with a descriptive label may therefore be used as a tool to demonstrate to the public that certain conduct, such as IPA, is the 'proper subject of public condemnation'.[407]

Lawmakers are therefore not *reacting* to problems, but are *active* in their creation.[408] They create the problem in the sense that they tell the public what to think about it. When members

[402] Ibid 33.
[403] See chapter 5.
[404] Chalmers and Leverick, above n 330, 241.
[405] Ibid.
[406] Tadros, above n 108, 1004.
[407] Ibid 1005. While one could question whether the public needs to be told that IPA is wrong, Nedelsky observes that 'it is one of those things that most people know and yet don't know'. She suggests that public concern is roused by especially graphic media reports, but that awareness is not sustained. A new offence with a descriptive label could achieve more sustained awareness. Nedelsky, above n 84, 308.
[408] Bacchi, above n 24, 1, 33.

of the public first come to see that conduct as wrongful, they will likely see it through the lens of the lawmaker's representation. By creating an offence, lawmakers effectively silence alternative representations. The public's capacity to consider alternative representations is hindered because lawmakers present them with a definitive statement of the problem.

Consider the following offences applicable in cases of IPA: the UK offence of controlling or coercive behaviour,[409] the Tasmanian offences of economic abuse[410] and emotional abuse or intimidation,[411] and the Queensland offence of torture.[412] The labels of each of these offences are intended to explain to the public the kind of conduct involved, as well as the moral blameworthiness of perpetrators. Each label appears to achieve that which Chalmers and Leverick idealise, as they have 'simple, informative names that convey the essential nature of the wrongdoing and minimise the potential for misrepresentation or misunderstanding'.[413] They also differentiate the conduct they cover from other forms of interpersonal violence. Based on the labels of these offences, a member of the public could be expected to easily comprehend the seriousness of an offender's behaviour.

However, when viewed through the lens of WPR, these varying labels become problematic. The plethora of representations here, all purporting in various ways to address the same social problem – abuse between intimate partners – reveal that a 'fair' and 'accurate' label for IPA changes with how each legislature views the 'problem'. Each label presents a vastly different interpretation of what IPA is and why abusers ought to be condemned. Queenslanders are told that IPA is a human rights violation, UK citizens have it represented as an issue of autonomy, and Tasmanians are given the impression that it can be either an

[409] *SCA* s 76.
[410] *Family Violence Act 2004* (Tas) s 8.
[411] Ibid s 9.
[412] *Criminal Code Act 1899* (Qld) sch 1 s 320A. Although not a specific offence of IPA, it has been prosecuted in cases of extreme IPA, which have been covered extensively by the Queensland media. This coverage instructs the public to equate IPA with torture. See, eg, Chris Clarke, 'Abuse Link to Striker' *The Courier-Mail* (Brisbane), 14 July 2017, 13.
[413] Chalmers and Leverick, above n 330, 238.

issue of property rights or emotional abuse. The capacity for the law to mould public opinion means that in each jurisdiction people are led to accept the representation of IPA bound up in the relevant offence label. Media reports of trials involving these offences invariably use the offence labels interchangeably with 'domestic violence' or 'family violence', thus encouraging the public to equate them.[414] Clearly, each offence deals with behaviour of varying degrees of seriousness, and none claim to deal with all manifestations of IPA. Nevertheless, the public in different jurisdictions are being given different reasons for why they are supposed to abhor IPA and condemn abusers. Thus, what is 'fair' and 'accurate' is different in each jurisdiction. When lawmakers claim that an offence label matches the moral essence of a wrong, they are actually selecting one of multiple representations of the wrong, of which none are the fixed truth. There is in fact no true, accurate label, because different labels bring different understandings of the problem into being.

The principle of fair labelling is thus at odds with Bacchi's understanding of social problems. The former assumes that concrete social problems exist, and can be solved by corresponding offences, and the latter insists that the problem only comes into being once a law purporting to solve it is enacted. If we accept Bacchi's approach, then for any social problem there are myriad varying interpretations about its causes and concerns. Of these, lawmakers choose one and create an offence on the basis of that interpretation. How then can the resulting offence label be a fair and accurate summary of the prohibited conduct and its immorality? The label is in fact one of many possible descriptors, each of which is merely an interpretation of the 'real' problem.

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[414] See, eg, Edith Bevin, 'Tasmanian man accused of preventing wife from making decisions, accessing joint accounts', *ABC News* (online), 1 August 2016 <http://www.abc.net.au/news/2016-08-01/tasmanian-man-prosecuted-for-alleged-economic-abuse/7679922>; Stuart Abel, 'Violent Plymouth bully approached ex-wife a week after he was told to stay away', *The Plymouth Herald* (online), 21 December 2017 <http://www.plymouthherald.co.uk/news/plymouth-news/violent-plymouth-bully-approached-ex-955791>.

3.3. Evaluating Offence Labels

Nevertheless, we must have *a* label with which to describe criminalised conduct. Chalmers and Leverick note the absurdity of outlining an offender's conduct in narrative form on their criminal record.[415] While I suggest that no label can give an accurate and uncoloured picture of the offending conduct and what is wrong with it, I do not suggest being flippant about the choice of label. Different labels produce different effects, so we ought to carefully consider which produces the most favourable effects. Settling on a label is not about uncovering 'whose reality is right',[416] but about choosing the best possible representation, based on our particular aims.

The WPR method can help us to evaluate offence labels. Question 5 of WPR prompts us to consider the effects of competing representations – that is, who benefits and who suffers under various interpretations of the problem. We can use this information to determine which representation, and therefore which label, produces better outcomes. As noted in chapter 2, Bacchi insists that such evaluations are coloured by the values, beliefs, and assumptions of the evaluator.[417] For example, my own social vision, as enunciated in chapter 2, would lead me to favour a criminal offence label informed by a representation of IPA that recognises and reflects the experiences of victims. Offences and labels underpinned by a representation that reflects the experiences of victims are, in my opinion, more likely to provide appropriate recognition of the harms they suffer. Provided we are explicit about our convictions, and whose interests we seek to promote in new offences, we are able to evaluate problem representations, and therefore offence labels, in an open and conscious manner.

[415] Chalmers and Leverick, above n 330, 221. We could not hope for like cases to be treated alike under such a system. Additionally, the sheer volume of material for police and courts would be untenable.
[416] Leslie Pal, 'Missed Opportunities or Comparative Advantage? Canadian Contributions to the Study of Public Policy' in Laurent Dobuzinskis, Michael Howlett and David Laycock (eds), *Policy Studies in Canada: The State of the Art* (University of Toronto Press, 1996) 359, 362–3.
[417] Bacchi, above n 26, 10.

3.4. 'REPRESENTATIVE' LABELLING

I do not mean to completely disparage the principle of fair labelling. Its aims remain relevant in determining the best offence label. However, the phrase 'fair labelling' is perhaps no longer appropriate, as it suggests the existence of an accurate and unequivocal description of social problems. I suggest that we return to Ashworth's original terminology of 'representative labelling', though admittedly not for Ashworth's reasons.[418] When Ashworth first used this phrase, he intended for it to signify an accurate representation of the offender's wrongdoing. Williams rejected the use of the word 'representative' in his response to Ashworth, on the grounds that 'representative' is frequently used to denote the few acting for the many (e.g. representative government).[419] Williams instead favoured the word 'fair'. I do not see the danger of misunderstanding that concerned Williams. I fail to see the context in which the word 'representative', meaning the few acting on behalf of the many, could be paired with the word 'labelling' to create a meaningful principle. Further, the phrase 'fair labelling' appears to me to be no more self-explanatory than 'representative labelling'. A return to the former title seems to me no great hindrance.

I suggest that 'representative labelling' far better serves our purposes, as it allows for recognition that the label reflects merely a *representation* of the problem. The OED defines 'representation' as an 'action of putting forward an account of something discursively', or a statement 'which conveys or intends to create a particular view or impression'.[420] This is similar to Bacchi's definition of problem representations: the way 'problems are described, implied causations and the implications which follow'.[421] Using the phrase 'representative labelling' reminds us that lawmakers choose one of many possible representations of the

[418] Ashworth, above n 328.
[419] Williams, above n 331, 85.
[420] Edmund S. Weiner and John Simpson (eds), *Oxford English Dictionary* (online ed, June 2018) 'representation 8a'.
[421] Bacchi, above n 26, 36.

problem, none of which are completely accurate. The label is therefore ‘representative’ of the wrong, rather than a fair and accurate description of the wrong. The phrase is an important reminder that, to judge the suitability of an offence label, we must consider who benefits and who suffers from its implicit problem representation.

> I actually did change my language when it … was brought to my attention that there [were] some serious issues surrounding some men in our community needing help as well.[422]

When Queensland Premier Annastacia Palaszczuk spoke with a male IPA survivor during a community event in 2015, she admitted her previous lack of recognition of male victims. She confirmed her new commitment to using gender-neutral language when discussing IPA, and to make future IPA campaigns more inclusive of male victims.[423] Palaszczuk's seemingly mild decision to use gender-neutral language when talking about IPA was met with indignation, with a responding headline blaring 'Annastacia Palaszczuk warned: don't put domestic violence against men above women'.[424] Karyn Walsh, a representative of the Brisbane Domestic Violence Service, responded to Palaszczuk's comments by saying '[i]t's important to acknowledge any human being that experiences violence but we need to make sure our response to domestic violence maintains a gendered focus'.[425] For Walsh, the core of IPA is men's belief in their right to possess women. Her concern was that, by not explicitly referring to women as victims and men as abusers, Palaszczuk could overlook the role of gender in IPA perpetration, which could result in improper allocation of funding for victim resources.[426] This example succinctly demonstrates an unrelenting debate about the language we use to talk about IPA: should we refer to perpetrators and victims using gender-neutral pronouns (such as 'the person') to ensure that all cases are treated as equally serious, or

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[422] Amy Remeikis, 'Premier Annastacia Palaszczuk "changes language" about violence against men', *Brisbane Times* (online), 19 October 2015 <http://www.brisbanetimes.com.au/queensland/premier-annastacia-palaszczuk-changes-language-about-violence-against-men-20151018-gkc3e9.html>, quoting Annastacia Palaszczuk.
[423] Ibid.
[424] Bridie Jabour, 'Annastacia Palaszczuk warned: don't put domestic violence against men above women', *The Guardian* (online), 19 October 2015 <https://www.theguardian.com/society/2015/oct/19/annastacia-palaszczuk-warned-dont-put-domestic-violence-against-men-above-women>.
[425] Ibid, quoting Karyn Walsh, CEO of Micah Projects.
[426] Ibid.

should we use language that highlights what is often represented as the paradigmatic case of IPA (that is, a man abusing his female partner)?

Of particular interest to Bacchi is the language used to refer to the subjects of problems – the people who engage in, and are affected by, problematic conduct. She argues that an important aspect of WPR is considering to whom 'the roles of bully and underdog' are allocated in problem representations, 'and how a different definition would change power relations'.[427] In this chapter, I analyse the language used in IPA offences to uncover how these roles have been assigned, and the effect of language that brings the gender of perpetrators and victims to the fore, compared with language which obscures gender. By considering the language we use to talk about victims and offenders, we can identify the most useful way to convey the experiences and circumstances of victims of IPA.[428]

4.1. How IPA Became Gender-Neutral

While most UK and Australian government policy is underpinned by an assumption that IPA is a gendered phenomenon (i.e. that IPA is more commonly committed by men against women, and made possible or more serious by physical and social inequalities between men and women),[429] it is striking that offences charged in cases of IPA in both countries are almost invariably written in gender-neutral language.[430] Before we can uncover the effects of statutory language on victims of IPA, it is useful to examine why this dominant assumption in policy is not transferred into law.

[427] Bacchi, above n 26, 36, quoting Deborah A. Stone, *Policy Paradox and Political Reason* (HarperCollins, 1988) 183.
[428] Alec McHoul and Wendy Grace, *A Foucault Primer: Discourse, Power and the Subject* (Melbourne University Press, 1993) 35.
[429] Heather Douglas and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36(1) *UNSW Law Journal* 56, 62.
[430] See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 12–13; *Family Violence Act 2004* (Tas) ss 8–9; *SCA* s 76.

At this stage, the question of whether IPA is *actually* a gendered phenomenon is not important for our purposes.[431] We are not concerned with identifying the truth (if indeed it can be identified), but with what has been assumed to be true by those representing the problem.[432] There are two major arguments about how the gendered dynamics of IPA ought to be conceptualised. The first is that IPA should not be understood as a gendered phenomenon because women can be abusers, and IPA can occur in same-sex relationships. The second is that IPA is generally committed by men against their female intimate partners. As part of this assumption, male aggression against current and former female intimate partners tends to be contextualised as part of men's social and physical domination over women. Male violence against women is thus presented as a consequence of men's greater physical strength, economic standing, and historic superiority over women.[433]

As discussed in chapter 2, these competing assumptions stem from the extensive debate on the causes and dynamics of IPA among researchers from various fields. As Stark observes, '[n]o question … excites more passionate disagreement' than whether perpetrators are predominantly men and victims are predominantly women.[434] The word 'passionate' is perhaps an understatement. Critics of the gender-neutral explanation have written to government agencies to demand the rescission of grants awarded to 'family violence' researchers.[435] Proponents of the gender-neutral explanation have received death threats, and bomb threats have been made against conferences at which some have been scheduled to appear.[436] On the other side, opponents have called the gender paradigm a 'cult' that ignores 'inconvenient' data in pursuit of their 'dogma'.[437] The two sides are irreconcilable, and are

[431] It will become important in chapter 5.
[432] Bacchi, above n 24, 5.
[433] See, eg, Dobash et al, above n 269; Douglas and Fitzgerald, above n 429, 62.
[434] Stark, above n 102, 97.
[435] Richard J. Gelles, 'The Missing Persons of Domestic Violence: Battered Men' [1999] (Autumn) *Women's Quarterly* 18, 20.
[436] Ibid.
[437] Dutton, above n 246, 100.

likely to remain so given that qualitative and quantitative data drawn on by each tends to measure entirely different conduct.[438] Nevertheless, the assumption that IPA is gendered underpins most Australian and UK government research and policy on IPA,[439] and has been the basis of several government-funded awareness campaigns.[440] It could therefore be considered strange that the assumed roles of men and women in the perpetration of IPA appear to have slipped from the consciousness of lawmakers. New UK and Australian IPA offences invariably refer to offenders and victims as 'persons',[441] or 'A' and 'B',[442] as opposed to 'the man' and 'the woman' respectively. Consider, for example, the following UK offence:

> **76 Controlling or coercive behaviour in an intimate or family relationship**
>
> (1) A person (A) commits an offence if—
>
> (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
>
> (b) at the time of the behaviour, A and B are personally connected,
>
> (c) the behaviour has a serious effect on B, and
>
> (d) A knows or ought to know that the behaviour will have a serious effect on B.
>
> (2) A and B are "personally connected" if—
>
> (a) A is in an intimate personal relationship with B, or
>
> (b) A and B live together and—
>
> (i) they are members of the same family, or
>
> (ii) they have previously been in an intimate personal relationship with each other.[443]

The offence represents IPA as controlling or coercive behaviour committed by one genderless person, A, against another genderless person, B. Yet tracing back through

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[438] Dobash and Dobash, above n 251.
[439] Douglas and Fitzgerald, above n 429, 62. See, eg, HM Government, *Call to End Violence against Women and Girls: Strategic Vision* (2010) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97905/vawg-paper.pdf>; Victoria, Royal Commission into Family Violence, above n 90.
[440] See, eg, the 2004 'Violence Against Women. Australia Says No' and the 2016 'Violence Against Women. Let's Stop it at the Start' campaigns in Australia, and the 1992 'Zero Tolerance' campaign in Edinburgh.
[441] See, eg, *Family Violence Act 2004* (Tas) ss 8–9.
[442] See, eg, *SCA* s 76.
[443] Ibid.

research and government policy that influenced the content of the offence reveals that the representation has not always been gender-neutral.

The concept of coercive control has informed programs to reduce male violence against women since the late 1970s.[444] The most authoritative scholarly statement of coercive control comes from the highly influential American feminist sociologist Evan Stark. Although Stark's sociological research draws heavily on his clinical work with abusers and victims in America, his is the dominant representation of coercive control in the UK and Australia.[445] Stark represents coercive control as 'a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation and control'.[446] For Stark, while physical violence is an important (though not vital) aspect of IPA, the primary harm inflicted by coercive control 'is political, not physical, and reflects the deprivation of rights and resources that are critical to personhood and citizenship'.[447] Gender is fundamental to Stark's formulation of coercive control. While Stark recognises that both women and men physically and verbally assault intimate partners, he argues that women's subordinate position in society makes them especially vulnerable to coercive control by men.[448] He points to specific examples of women's inequality that increase the risk of, and difficulty of escaping abuse: economic inequality between men and women, gender norms that attribute greater household and childcare responsibilities to women, and gendered expectations that women will defer to the needs of their husbands and family.[449] Stark observes that abusive men adopt tactics that take advantage of this imbalance of power

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444 Stark, above n 102, 12–13. Perhaps the most notable is the Duluth Model, which teaches male perpetrators to identify their behaviour as geared towards establishing power and control over their female intimate partners.

445 Elizabeth Sheehy, 'Expert evidence on coercive control in support of self-defence: The trial of Teresa Craig' (2018) 18(1) *Criminology & Criminal Justice* 100, 106.

446 Stark, above n 102, 5.

447 Ibid.

448 Ibid 5, 377. See also Gretchen Arnold, 'A Battered Women's Movement Perspective of *Coercive Control*' (2009) 15(12) *Violence Against Women* 1432, 1433.

449 Stark, above n 102, 188–190.

to establish control. One tactic men may use is micromanaging their female partners' performance of stereotypically female behaviour and roles: 'how women dress, cook, clean, socialise, care for their children, or perform sexually'.[450] Another tactic a man can use to establish control is to diminish his partner's independence (e.g. by confiscating pay cheques, constantly checking up on her at work, or not permitting her to socialise).[451] In addition, a man may be physically violent.[452] A man may employ some or all of these tactics, slowly increasing his demands of his partner over time, in order to diminish her autonomy.[453] These tactics 'limit [women's] freedoms, curtail their liberties, exploit their resources and subjugate them'.[454] They are effective because they are seemingly ordinary – control can be established imperceptibly, and the effect of the various tactics accumulates, slowly eroding the victim's 'space for action'.[455]

Stark's gendered representation of IPA as coercive control was adopted by the UK Government in the process of implementing its VAWG strategy. The strategy was deeply influenced by a gendered construction of violence against women – that is, it was based on an assumption that women and girls frequently experience violence *because* they are female.[456] To implement aims of the strategy, the UK Government introduced the offence of controlling or coercive behaviour into the Serious Crime Bill.[457] However, the offence was framed in gender-neutral terms.

Despite the influence of Stark's representation, it seems his views about the primacy of gender in coercive control did not prevail. It might be said that Stark did not hold the

[450] Ibid 5.
[451] Ibid 166, 214, 270.
[452] Ibid 5.
[453] Liz Kelly and Nicole Westmarland, 'Naming and defining "Domestic Violence": Lessons from research with violent men' (2016) 112(1) *Feminist Review* 113, 121.
[454] Sheehy, above n 445, 107.
[455] Kelly and Westmarland, above n 453, 125.
[456] HM Government, above n 439.
[457] [HL] 2014–15 (UK).

enunciative position in the creation of the new offence. Had he retained his enunciative power, the resulting offence may well have been gender-specific, or may have included a definition of controlling or coercive behaviour which would have revealed the gendered nature of the representation. Rather, the enunciative power was held by lawmakers, who altered Stark's representation. Bacchi reminds us that problem representations are strategic endeavours, designed 'to win the most people to one's side and the most leverage over one's opponents'.[458] Whatever the UK Government's attitude towards the role of gender in IPA, it is important to satisfy the majority of the voting public when creating a new offence and, as we shall see, the public has a strong opinion about the use of gendered language, both in general and in relation to IPA.

Interestingly, the current trend of using gender-neutral language in legislative drafting in the UK and Australia may be associated with the second-wave feminist movement.[459] Prior to that, a common drafting practice was the 'masculine rule' – a term Petersson uses to describe the use of male pronouns to represent both men and women.[460] The masculine rule was adopted in the UK in 1850,[461] as a way of reducing the volume of law.[462] As a result, statutes such as the *Offences Against the Person Act 1861* used 'he' as the predominant pronoun for offences applying to 'all persons'.[463] By the 1980s, dissatisfaction with the masculine rule (both in legislative drafting and as a general grammatical practice) was widely expressed in the UK and Australia.[464] The masculine rule was regarded by feminists as perpetuating discrimination against women. To some, the assumption that 'he' subsumed 'she' implied

[458] Bacchi, above n 26, 36, quoting Stone, above n 427, 106–7.
[459] Christopher Williams, 'The End of the "Masculine Rule"? Gender-Neutral Legislative Drafting in the United Kingdom and Ireland' (2008) 29(3) *Statute Law Review* 139, 139.
[460] Sandra Petersson, 'Gender Neutral Drafting: Historical Perspective' (1998) 19(2) *Statute Law Review* 93.
[461] *Acts of Parliament Interpretation Act 1850* (UK) 13 & 14 Vict, c 21; *Interpretation Act 1889* (UK) 52 & 53 Vict, c 63. There are earlier recorded uses of the masculine pronoun to refer to both sexes. See, eg, *Criminal Law Act 1827* (UK) 7 & 8 Geo 4, c 28, s 14.
[462] United Kingdom, *Parliamentary Debates*, House of Lords, 12 February 1850, vol 108, col 708–9 (Lord Brougham).
[463] (UK) 24 & 25 Vict, c 100.
[464] Jocelynne A. Scutt, 'Sexism in Legal Language' (1985) 59(3) *Australian Law Journal* 163, 164.

that 'personality is really a male attribute, and that women are a human subspecies'.[465] By 1988 in Australia and 2007 in the UK, drafting practice was altered, and statutes are now primarily drafted in gender-neutral terms.[466] The pervasive attitude of disdain for the masculine rule makes it clear why legislators tend to frame new IPA laws in gender-neutral terms, even if they assume that gender plays a role in its perpetration. Ironically, the demand for gender-neutral language in legislative drafting originated with the same feminist movement that identified IPA as a gender-specific problem.

Further, it seems that the public increasingly doubts the role of gender in IPA. Australian community attitude surveys suggest that, in spite of official statistics indicating that women are most commonly victims of male-perpetrated IPA,[467] the public increasingly views IPA as a gender-neutral problem.[468] While 86 per cent of Australians surveyed in 1995 believed that men are the primary perpetrators of 'domestic violence', the proportion dropped to 71 per cent in 2013.[469] Schneider and Wangmann suggest that public scepticism about the gendered nature of IPA stems from reports and opinion pieces in the news media which are frequently based on the work of 'family violence' sociologists and men's rights activists.[470] The media are able to shape public attitudes by drawing on research from one side of the gender debate to characterise the 'essential nature' of IPA as gender-symmetrical.[471] Articles

[465] Casey Miller and Kate Swift, *Words and Women* (Anchor Press/Doubleday, 1976) x.
[466] Williams, above n 459, 141, 145.
[467] Australian Bureau of Statistics, *Personal Safety Australia 2016*, (8 November 2017) <www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0>.
[468] Kim Webster et al, 'Australians' attitudes to violence against women: Full technical report – Findings from the 2013 National Community Attitudes towards Violence Against Women Survey' (Victorian Health Promotion Foundation, 2014). Comparable statistics are not collected in the UK. However, submissions to UK government inquiries indicate that people are increasingly concerned that male victims do not receive appropriate recognition. See, eg, Justice Committee, Scottish Parliament, *Stage 1 Report on the Domestic Abuse (Scotland) Bill* (2017) 33 [105].
[469] Webster et al, above n 468, 86.
[470] Schneider, above n 78, 26; Jane Wangmann, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33(3) *UNSW Law Journal* 945, 946.
[471] Claire Renzetti, 'On Dancing with a Bear: Reflections on Some of the Current Debates among Domestic Violence Theorists' (1994) 9(2) *Violence and Victims* 195, 197.

reporting on IPA against men tend to portray these cases as 'typical'.[472] Thus, the public is increasingly presented with articles such as the following from *The Guardian*:

> More than 40% of domestic violence victims are male, report reveals: About two in five of all victims of domestic violence are men, contradicting the widespread impression that it is almost always women who are left battered and bruised …[473]

Faced with a community that demands equality in the language of the law, and which increasingly doubts the gendered nature of IPA, even those lawmakers who accept a gendered representation of IPA could be expected to use gender-neutral language. Therefore, the comments about not forgetting male victims dotted throughout the debates on the new UK offence of controlling or coercive behaviour are to be expected. For example, the Parliamentary Under-Secretary of State noted that 'it is absolutely right that we also consider male victims of domestic abuse. All our policy initiatives are gender-neutral in recognising what domestic abuse means'.[474] Moreover, it was an understandable goal of the UK government to protect, and to appear to be protecting, all victims of IPA regardless of gender and sexuality. Therefore, rather than mete out the roles of 'bully' and 'underdog', [475] UK lawmakers opted instead to create a generally-applicable offence based on two genderless and context-free characters – persons 'A' and 'B'. Having uncovered their reasons for doing so, we can continue to consider the offence of controlling or coercive behaviour to identify the effects of such a representation.

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[472] Ibid.

[473] Denis Campbell, 'More than 40% of domestic violence victims are male, report reveals', *The Guardian* (online), 5 September 2010 <https://www.theguardian.com/society/2010/sep/05/men-victims-domestic-violence>.

[474] United Kingdom, *Parliamentary Debates*, House of Lords, 13 May 2014, vol 753, col GC490 (Lord Taylor of Holbeach).

[475] Stone, above n 427, 183.

4.2. THE EFFECTS OF GENDER-NEUTRAL REPRESENTATIONS

The intended effect of using gender-neutral language in law is to ensure that men and women are treated equally – the assumption being that equality is achieved by linguistically treating women the same as men.[476] While feminist demands for linguistically equal treatment were met through the abolition of the masculine rule, some scholars argue that the law is resolutely male.[477] They argue that gender-neutral laws have a bias towards men – having in large part been written by men who imbue them with masculine 'characteristics and mannerisms'.[478] Thus, the intended effect of achieving equality at law by removing references to gender is thwarted as the law is invested with dominant male attitudes about criminal conduct.[479] Women's experiences and attitudes are silenced – their behaviour becomes atypical, rather than the norm.[480] As Mooney argues, 'to change the linguistic evidence would not re-make the gendered world in which we live'.[481]

This is evident if we return to the offence of controlling or coercive behaviour. Of the 155 defendants proceeded against between March 2015 (when the offence was enacted) and December 2016, 150 were men and 5 women.[482] Perhaps this indicates that men are indeed more likely to engage in IPA than women, or that reporting abuse is easier for female victims, or that the assumption of the gendered nature of IPA leads police to pay greater attention to male abusers. Nevertheless, the language of the offence does not prompt consideration of the role of gender in IPA. The offence is not designed for victims *as* women. It is designed

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[476] Anne Pauwels, *Women Changing Language* (Longman, 1998) 3.
[477] See, eg, Anna Carline, 'Women Who Kill Their Abusive Partners: From Sameness to Gender Construction' (2005) 26(1) *Liverpool Law Review* 13, 19; Katherine O'Donovan, 'Law's Knowledge: The Judge, The Expert, The Battered Woman, and Her Syndrome' (1993) 20(4) *Journal of Law and Society* 427, 435.
[478] Carline, above n 477, 24.
[479] Annabelle Mooney, 'When a woman needs to be seen, heard and written as a woman: Rape, law and an argument against gender neutral language' (2006) 19(1) *International Journal for the Semiotics of Law* 39, 66.
[480] Stella Tarrant, 'Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws' (1990) 20(3) *University of Western Australia Law Review* 573, 574.
[481] Mooney, above n 479, 67.
[482] Office for National Statistics, *Statistical bulletin: Domestic abuse in England and Wales: year ending March 2017* (23 November 2017), appendix table 30 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2017#coercive-and-controlling-behaviour>.

to protect the abstract, dehumanised and desexualised 'B'.[483] Stark insists that coercive control is characterised by a man engaging in 'an ongoing and gender-specific pattern' of behaviour that reduces his female partner's autonomy.[484] The abusive man is able to draw on social expectations of the roles of men and women in intimate relationships to entrap his partner.[485] However, the offence of controlling or coercive behaviour is gender-neutral, and applies not only to intimate partners but also to members of the same family. This suggests that the dynamics that contribute to all forms of family violence are the same, thus obscuring the imbalance in power which, according to Stark's representation, characterises male abuse of female partners. The gender-neutral offence does not prompt recognition of the context in which controlling or coercive behaviour is said to occur – a society in which women are frequently physically, economically, and sexually subordinate to their male partners. The language of the offence has 'disguised, diluted and distorted' the behaviour originally targeted by Stark.[486] Thus, the gender-neutral offence of controlling or coercive behaviour 'seems no longer to be about the very behaviour that the crime … was supposed to proscribe'.[487]

By removing gender, as well as broadening the category of people who come under the offence to include family members, the UK government has attempted a one-size-fits-all solution that distorts Stark's representation of the essence of coercive control. The underlying assumption that equality can be achieved through sameness of treatment fails to acknowledge that IPA can, according to Stark, be made more serious for female victims because of the disadvantages they face. Treating female victims the same as male victims

[483] See also Naffine, above n 11, 23. Naffine makes this observation about gender-neutral rape laws.
[484] Stark, above n 102, 99-100.
[485] Ibid.
[486] Kelly and Westmarland, above n 453, 114.
[487] Naffine, above n 11, 25. Naffine makes this observation about gender-neutral rape laws. See also Vanessa Bettinson and Charlotte Bishop, 'Is the creation of a discrete offence of coercive control necessary to combat domestic violence?' (2015) 66(2) *Northern Ireland Legal Quarterly* 179, 193.

may only serve to reinforce their disadvantage. What then would happen if the law acknowledged gender differences?

4.3. When the Criminal Law Acknowledges Gender

The intended effect of recognising gender differences in law is to achieve equality between men and women by recognising them as having the same status, while explicitly acknowledging their differences in experience and circumstances.[488] Lawmakers with this understanding of equality (and who accept a gendered representation of IPA) would be likely to create an offence of IPA that labels the victim as female and the perpetrator as male.[489] These labels would be intended to make clear to criminal justice officials and the public that the abuser's behaviour was carried out in the context of an imbalance of power between him and his victim. They would make salient the gendered context in which IPA is sometimes said to occur. It would remind those administering the offence of the gendered dynamics of male dominance and female subjugation that certain representations of IPA count as typical.

Exposing the effects of gender-specific representations of IPA in the criminal law is hindered by the fact that there are few gender-specific offences related to IPA in the UK and Australia.[490] The idea of having a gender-specific offence or aggravating factor has been mooted, for example in Queensland and Scotland, but is disfavoured because it is predicted

[488] Mooney, above n 479, 67.
[489] As there is a gender-neutral offence of sexual assault as a counterpart of the gender-specific offence of rape in the UK, a gender-specific IPA offence would likely have a gender-neutral counterpart covering cases in which IPA is committed by a woman, or in LGBTIQ relationships.
[490] One of the few examples is in the Northern Territory, where assault is aggravated when it is committed by a man against a woman. *Criminal Code Act 1983* (NT) sch 1 s 188(2)(b). Other countries have adopted gender specific offences, such as Brazil's offence of femicide, which was intended to allow courts to consider homicide through a 'gender lens'. Thiago Pierobom de Ávila, 'The criminalisation of femicide' in Kate Fitz-Gibbon et al (eds), *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (Routledge, 2018) 181, 181.

that such language would trivialise women's experiences, stereotype women, and exclude certain victims of IPA.[491] I will examine each of these negative effects.

Trivialising women's experiences

The 2000 Queensland Taskforce on Women and the Criminal Code considered the possibility of introducing a gender-specific crime of IPA based on the New Zealand offence of 'assault by a male on a female', which sets a higher maximum sentence for assault when it is committed by a man against a woman.[492] The Queensland Taskforce received multiple submissions rejecting such a model on the grounds that it could separate 'crimes against women from the mainstream'.[493] The New Zealand offence of assault by a male on a female is the equivalent of common assault, although it has a higher maximum penalty. It is intended to indicate the heightened culpability of men who abuse women, especially those with whom they are in an intimate relationship, and to indicate propensity to engage in IPA.[494] However, separating physical assault against women from common assault could give the impression that assault against women is different from, and by implication less serious than, assault against men.[495] By separating assault against women from ordinary assault, women's experiences of violence are arguably trivialised and 'othered'.[496] As one respondent to the Queensland Taskforce noted, 'assault is assault is assault … no matter who is the subject, since the implications … may well be as great for [women and men] depending more on the

[491] Taskforce on Women and the Criminal Code, 'Report of the Taskforce on Women and the Criminal Code' (Queensland Government, 2000) 112, 117 ('*Qld Taskforce*'); Justice Committee, above n 468, 33 [105], 36 [115].
[492] *Crimes Act 1961* (NZ) s 194(b).
[493] *Qld Taskforce*, above n 491, 112.
[494] New Zealand Law Commission, *Review of Part 8 of the Crimes Act 1961: Crimes Against the Person*, Report No 111 (2009) 6 [22].
[495] *Qld Taskforce*, above n 491, 116.
[496] See also Law Commission, *Reform of Offences against the Person: A Scoping Consultation Paper*, Consultation Paper No 217 (2014) 126–7 [5.149]. The Law Commission made a similar point about the effects of introducing a separate domestic violence offence.

"nature" of the individual rather than any features generalised as those being of one sex or another'.[497]

Stereotyping female victims

Another reason the Queensland Taskforce did not recommend a gender-specific offence of IPA is that such an offence has the potential to reinforce a stereotype of women as perpetual victims.[498] A gender-specific offence of IPA, that labels women as victims and men as abusers, may encourage the public and criminal justice officials to equate victimhood with womanhood. It may suggest that women are unable to fend for themselves, and denies women's capacity for independence and autonomy. A woman who retaliates against an abusive partner, or resists her partner's attempts to establish control, may therefore struggle to be recognised as a 'real' victim and obtain assistance.[499] Further, representing all victims as women suggests that all victims are the same, thus denying the circumstances of individual cases, and the additional barriers faced by some victims due to other forms of societal discrimination.[500] Intersectional feminist commentators have rejected the essentialist view that all women share inherent characteristics of weakness and passivity, and therefore experience IPA in the same way. Rather, they insist that the law recognise the particular circumstances of individual victims. As Goodmark argues, '[d]omestic violence does not transform every woman who experiences it into a stereotypical victim, nor should this victim stereotype shape domestic violence law and policy'.[501]

Haigh and Hepburn argue that there are some circumstances in which relying on stereotypes about women can be useful for courts 'in clarifying the complex realities of social

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[497] *Qld Taskforce*, above n 491, 114.
[498] Ibid 112.
[499] Heather Douglas, 'A consideration of the merits of specialised homicide offences and defences for battered women' (2012) 45(3) *Australian & New Zealand Journal of Criminology* 367, 377.
[500] Sokoloff and Dupont, above n 279, 39.
[501] Goodmark, above n 234, 41. See also Angela P. Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581.

existence'.[502] They consider *Garcia*,[503] in which the High Court of Australia confirmed the existence of the wives' special equity. This principle allows for guarantees to be set aside where they have been made by a woman who was under undue influence from her husband or who failed to understand the guarantee. In his dissenting judgment, Kirby J argued that this principle reinforces 'outdated assumptions' about wives, and accords 'legitimacy to a discriminatory rule expressed in terms which are unduly narrow, historically and socially out of date'.[504] However, the majority ruled that, in spite of social change, '[t]here is still a significant number of women in Australia in relationships which are, for many and varied reasons, marked by disparities of economic and other power between parties'.[505] This, Haigh and Hepburn posit, was an appropriate use of stereotyping. While it 'undoubtedly perpetuates the stereotype of wives as vulnerable, weak or disempowered',[506] the majority's decision addresses the social reality that some people conform to this stereotype, and 'would be at risk if the protection were removed'.[507] To ignore this stereotype would be to ignore a very real inequality. As with all stereotypes however, there are many women who do not conform, though are nevertheless deserving of recognition.[508] Thus, we should avoid ways of constructing offences which allow harmful stereotypes to inform judicial decision-making, and which preclude consideration of individual experiences.[509]

Silencing other victims

A gender-specific construction of IPA would obscure the harm suffered by male and LGBTIQ victims. As one respondent to the Queensland Taskforce noted, a gender-specific

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[502] Richard Haigh and Samantha Hepburn, 'The Bank Manager Always Rings Twice: Stereotyping in Equity After Garcia' (2000) 26(2) *Monash University Law Review* 275, 299–300.
[503] *Garcia v National Australia Bank Limited* (1998) 155 ALR 614 ('*Garcia*').
[504] Ibid 636 [66].
[505] Ibid 619 [20].
[506] Haigh and Hepburn, above n 502, 305.
[507] Ibid.
[508] See *Osland v R* [1998] HCA 75, 158-161. Commenting on BWS, Kirby J notes that this sex-specific legal category tends 'to reinforce stereotypes' about IPA victims, based on the experiences of Caucasian, middle-class women. This prevents recognition of the circumstances of individual victims.
[509] Douglas, above n 499, 377.

approach 'assumes that power imbalances will only exist between men and women, and does not recognise that power imbalances may occur in many other contexts eg abuse in same sex relationships'.[510] Hassouneh and Glass have shown that women in same-sex relationships struggle to recognise that they are victims of IPA, or seek help, due to an assumption that IPA occurs only in heterosexual relationships.[511] Thus, a gender-specific offence of IPA, which proscribes male abuse of female intimate partners, could perpetuate the assumption that violence committed by men in heterosexual relationships is more serious and worthy of intervention than violence committed against men or violence in same-sex relationships.

4.4. CONCLUSION

A gender-neutral representation of IPA cannot appropriately convey the context in which abuse takes place. Equally, a gender-specific offence gives the impression that gender is the only explanation for why IPA occurs and how it harms its victims.[512] An alternative representation, explored in the following chapter, is that factors such as sexuality, race, religion, and disability, along with gender, can intersect to make certain victims more vulnerable to abuse. Being a woman *may* contribute to the harm suffered by a victim, but without acknowledging the relevance of other factors that make a victim vulnerable to abuse, the full context of their situation cannot be comprehended by the law. I will seek to create a specific offence of IPA that not only makes the victim's gender salient, but which draws attention to all of the factors contributing to the victim's vulnerability.

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[510] *Qld Taskforce*, above n 491, 114.

[511] Dena Hassouneh and Nancy Glass, 'The Influence of Gender Role Stereotyping on Women's Experiences of Female Same-Sex Intimate Partner Violence' (2008) 14(3) *Violence Against Women* 310, 316, 320.

[512] Kristin L. Anderson, 'Why Do We Fail to Ask "Why" About Gender and Intimate Partner Violence?' (2013) 75(2) *Journal of Marriage and Family* 314, 314.

CHAPTER 5: VULNERABILITY – AN ALTERNATIVE REPRESENTATION

5.1. UNIVERSAL VULNERABILITY

The concept of vulnerability has been the subject of considerable feminist scholarship,[513] and is increasingly deployed to frame political problems.[514] American feminist law scholar Martha Fineman is perhaps the most notable proponent of the concept, and hers is generally accepted as the dominant model.[515] She advocates vulnerability as a way to reframe the problem of women's inequality. Rather than suggesting that women have unequal social standing, Fineman views vulnerability as a universal human condition. She argues that all people are vulnerable to 'the ever-present possibility of harm, injury, and misfortune'.[516] Vulnerability prevents us from being completely autonomous and independent – instead, we are 'enmeshed in a web of relationships' on which we are interdependent.[517]

Fineman qualifies her account by explaining that vulnerability ranges in magnitude for each person. While everyone is vulnerable, each person is made more or less so by various factors outside their control.[518] Those whose identities are 'marked by precariousness' are more likely to experience heightened vulnerability.[519] Fineman asserts that women tend to experience heightened vulnerability because, among other reasons, they are typically responsible for unpaid caretaking.[520] Vulnerability may be exacerbated among the elderly,

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[513] See, eg, Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) *Yale Journal of Law and Feminism* 1; Susan Ayres, 'When Women Kill Newborns: The Rhetoric of Vulnerability' in Kirsti Cole (ed), *Feminist Challenges or Feminist Rhetorics? Locations, Scholarship, Discourse* (Cambridge Scholars Publishing, 2014) 83.
[514] Vanessa E. Munro and Jane Scoular, 'Abusing Vulnerability? Contemporary Law and Policy Responses to Sex Work in the UK' (2012) 20(3) *Feminist Legal Studies* 189, 189. These political problems include prostitution, neonaticide, and globalisation.
[515] Fineman, above n 513; Munro and Scoular, above n 514, 190.
[516] Fineman, above n 513, 9.
[517] Ibid 11. See also Jonathan Herring, *Vulnerable Adults and The Law* (Oxford University Press, 2016) 10–11.
[518] Fineman, above n 513, 10.
[519] Vanessa E. Munro, 'Shifting Sands? Consent, Context and Vulnerability in Contemporary Sexual Offences Policy in England and Wales' (2017) 26(4) *Social & Legal Studies* 417, 421.
[520] Martha Albertson Fineman, 'Equality: Still Illusive After All These Years' in Linda C. McClain and Joanna L. Grossman (eds), *Gender Equality: Dimensions of Women's Equal Citizenship* (Cambridge University Press, 2009) 251, 254.

those with disabilities, racial minorities, and the LGBTIQ community. However, heightened vulnerability is not inevitable for every member of a minority. A great deal depends on the resources upon which a person can draw.[521] A person who is, for example, financially secure, or part of a highly supportive community, will be substantially less vulnerable than someone who has no access to such resources, even if both are members of the same minority. Fineman does not use the term 'vulnerable' in a negative sense to suggest that certain people or groups are weak. Rather, she uses it in an inclusive sense that recognises that all humans are vulnerable (physically, economically, and institutionally), but that vulnerability ranges in magnitude for each individual.[522]

Vulnerability and equality

Fineman argues that equality can be rendered 'less illusive' by recognising humanity's shared vulnerability.[523] Looking at IPA through the lens of vulnerability offers a way of comprehending the uneven distribution of power between victims and offenders without the negative effects that accompany a purely gendered focus. Representing IPA as men taking advantage of male social privilege to abuse female partners ignores those victims who are made more susceptible to abuse because of factors such as disability, race, sexuality, or economic standing. Representing IPA as an abuser taking advantage of their partner's vulnerability to establish power and control over them avoids this oversight.

So too can the vulnerability approach address the negative effects of a gender-neutral representation. Unlike a gender-neutral representation, the vulnerability approach can comprehend the imbalance between male and female partners due to uneven gendered power relations. In addition, it has the capacity to comprehend other power imbalances, such as the dependence of one partner on the other for financial assistance, personal care, or the ongoing

[521] Fineman, above n 513, 9–10.
[522] Ibid.
[523] Fineman, above n 520, 251.

right to residence in the country. Fineman argues that trying to achieve equality by treating all people the same fails to provide equal opportunities to everyone because, in practice 'there is no level playing field'.[524] Trying to achieve equality through sameness of treatment only guarantees rights 'to an abstract individual shorn of limiting human characteristics and potentially debilitating social and historical inequities'.[525] Thus, unlike the approaches to equality discussed in chapter 4, the vulnerability approach offers a way of comprehending IPA that takes into account the range of potential factors that can cause a power imbalance between victims and offenders.

Vulnerability and intersectionality

The vulnerability approach can be used to reframe our understanding of IPA in a way that closely aligns with intersectionality theory. As noted in chapter 2, my representation of IPA draws heavily on intersectionality theory. Rather than subscribing to the assumption that IPA is a gendered phenomenon, intersectionality theorists insist that there is a variety of forms of discrimination that can heighten an individual's vulnerability to their partner's abuse, and which can make obtaining help more difficult.[526] Various forms of discrimination, 'such as racism, ethnocentrism, class privilege, and heterosexism [can] intersect with gender oppression' to shape the experiences of individual IPA victims in different ways.[527] For example, Indigenous Australian women may encounter racism, sexism, and other forms of discrimination both within their intimate relationship and in society generally, which can determine whether they seek assistance.[528] An expectation of institutional racism from criminal justice officials may prevent an Indigenous woman from reporting abuse for fear that she will not be believed, that she will experience hostile treatment, or, if her partner is

[524] Fineman, above n 520, 257.
[525] Ibid 260.
[526] See, eg, Sokoloff and Dupont, above n 279; Bograd, above n 286.
[527] Sokoloff and Dupont, above n 279, 39.
[528] Emma Buxton-Namisnyk, 'Does an Intersectional Understanding of International Human Rights Law Represent the Way Forward in the Prevention and Redress of Domestic Violence against Indigenous Women in Australia?' (2014) 18(1) *Australian Indigenous Law Review* 119, 122–3.

also Indigenous, that he will be subject to extreme treatment and harsh sentencing.[529] Her abuser can take advantage of these fears, using his influence over her to make her feel guilty about reporting abuse, or to taunt her about her lack of resources and power. Thus, the intersection of various forms of oppression may leave a victim more vulnerable to her partner's control and abuse, and less able to access help.

Fundamental to intersectionality theory is recognition that the experience of IPA is not common to all victims – it varies depending on the vulnerability of the victim relative to their abuser and in society generally.[530] Similarly, Fineman emphasises the need to assess vulnerability on an individual basis.[531] To comprehend the magnitude of a person's vulnerability, we must consider the context in which they exist; their relationships with other individuals, the community to which they belong, the quality and quantity of economic and social resources upon which they can draw, and how they are treated by the criminal justice system. This approach is therefore useful as it recognises the potential for intersecting forms of discrimination to heighten a victim's vulnerability.

Vulnerability in the criminal law

Acknowledgement of vulnerability in the criminal law is not without precedent. According to Farmer, the 'person' protected by the criminal law has evolved from a physical body to an individual located in the context of their relationships and individual characteristics.[532] Whereas conduct has traditionally been criminalised for causing physical harm, the law increasingly protects the individual from conduct which diminishes their autonomy. The person's autonomy is vulnerable. It may be eroded not just by physical harm, but also by fear caused by 'threatening, intimidating, controlling or abusive conduct'.[533] Farmer draws

[529] Matthew Willis, 'Non-disclosure of violence in Australian Indigenous communities' (Trends & issues in crime and criminal justice No 405, Australian Institute of Criminology, January 2011).
[530] Richie, above n 281, 1134.
[531] Fineman, above n 513, 4, 10.
[532] Farmer, above n 62, 260–1.
[533] Ibid 260.

on the example of the *Crime and Disorder Act 1998*, under which a range of offences become aggravated if they are motivated by hostility towards the victim's race or religion.[534] He suggests that this demonstrates the increasing concern of the criminal law with protecting those with 'prior vulnerability' from conduct which could induce fear and anxiety, thereby diminishing autonomy.[535] This evolved conception of personhood 'facilitates a pressure for increased criminalization' of conduct which threatens vulnerable autonomy.[536]

An alternative representation of IPA

IPA can be reframed by assuming universal vulnerability. Both parties in an intimate relationship are vulnerable. Neither exists independently. Rather, they are involved in a network of institutional and personal relationships upon which they are reliant for their sense of self.[537] The intimate relationship is part of that network, and the trust and intimacy which tend to characterise intimate partnerships can create an environment in which both develop personal integrity, self-esteem, and self-trust.[538] However, if one partner abuses the other, trust and intimacy are destroyed, and the victim's self-esteem and autonomy are eroded. The victim becomes even more vulnerable because a close relationship, upon which they had become dependent for an aspect of their sense of self, has been exploited.

In individual cases, it may be that the victim has heightened vulnerability relative to their abuser, depending on the nature of their network of relationships. A victim with supportive external relationships is likely to be far less vulnerable than a victim who has no one in whom to confide the abuse.[539] If, for example, a victim is rejected from his previously supportive church group because of his same-sex relationship with his abuser, he may find

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[534] (UK) c 37, ss 28–32.
[535] Farmer, above n 62, 260.
[536] Ibid 261.
[537] Fineman, above n 513, 15.
[538] Tadros, above n 108, 1000.
[539] Unless the abuser restricts the victim's access to those networks.

himself less able to escape abuse. A victim's family may pressure her to remain in an abusive relationship due to cultural beliefs that she will bring shame on the family by leaving.[540] A victim with a criminal history, or from a racial minority, may find either that his calls for police assistance go ignored, or that he is blamed for abuse. A victim can be vulnerable relative to their abuser even where both have identities 'marked by precariousness'.[541] For example, both partners in a same-sex relationship may be subject to homophobia and heterosexism from their family, work colleagues, and society generally. However, the abusive partner can take advantage of the other's increased vulnerability by, for example, threatening to expose the victim's sexuality to her family, workplace or religious institution.

Thus, my representation of IPA relies on a contextual understanding of the abuser's power over the victim. While both the abuser and victim are vulnerable, my representation focuses on the abuser's exploitation of the victim's heightened vulnerability. I represent IPA as the conduct of a person who takes advantage of their partner's vulnerability to restrict their freedom of action. They abuse their position of trust to engage in repeated behaviour levelled at establishing power over the victim, potentially entrapping them in the relationship.

There are several ways in which this representation can be translated into a criminal law response. The abuser's exploitation of the victim's vulnerability could be added as an aggravating circumstance in sentencing.[542] Alternatively, new offences or defences could be introduced to capture those situations where a vulnerable IPA victim commits a crime. Consider, for example, a defence similar to marital coercion,[543] which operates in Victoria on the grounds that women may be under their husbands' control, and coerced into

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[540] Marianne Winters and Isabel Morgan, 'Cross-Cultural Perspectives on Intimate Partner Violence' in Louise McOrmond-Plummer, Patricia Easteal and Jennifer Y. Levy-Peck (eds), *Intimate Partner Sexual Violence: A Multidisciplinary Guide to Improving Services and Support for Survivors of Rape and Abuse* (Jessica Kingsley Publishers, 2014) 234, 241.
[541] Munro, above n 519, 421.
[542] See, eg, *Criminal Code Act 1983* (NT) sch 1 s 188(2)(b).
[543] *Crimes Act 1958* (Vic) s 336.

committing crime.[544] Another approach is to introduce a new offence of IPA that constructs the proscribed conduct around the exploitation of the victim's vulnerability. While each of these options has its merits, I focus here on the latter option, by redrafting the UK offence of controlling or coercive behaviour to focus on the victim's vulnerability.[545]

5.2. The Communicative Function of the Law

Before considering how such an offence should be worded, it is imperative to consider to whom the offence will speak, and the message that audience needs to receive. Dan-Cohen suggests that criminal offences simultaneously guide public behaviour, and instruct criminal justice officials on what behaviours to punish and how to punish them.[546] I therefore consider the messages that need to be sent to these audiences.

Guiding the public

The criminal law must communicate with the public generally, and specifically with victims and offenders. Duff makes the critical point that, to uphold the principle of fair notice of potential liability, the law must be addressed to those whom 'it claims to bind'.[547] It must be explicit about the conduct it proscribes, what is wrong about that conduct, and the penalties for engaging in it.[548] An offence that fails to send a potent message about the immorality of an offender's conduct cannot give the public an adequate understanding of the 'significance of conviction' and the victim's experience.[549]

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[544] Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 122 [3.168]. Such a defence represents an archaic construction of marriage where a woman is expected to be 'feebleminded' and completely under her husband's control. See Carolyn B. Ramsey, 'Provoking Change: Comparative Insights on Feminist Homicide Law Reform' (2010) 100(1) *Journal of Criminal Law & Criminology* 33, 81.
[545] *SCA* s 76.
[546] Meir Dan-Cohen, 'Decision rules and conduct rules: On acoustic separation in criminal law' (1984) 97(3) *Harvard Law Review* 625, 650.
[547] Duff, above n 312, 43.
[548] Ibid.
[549] Horder, above n 308, 351.

An important point at which the law communicates with individual members of the public is when they are brought to answer for their conduct in court. Throughout their trial and sentencing, offenders hear about the moral gravity of their conduct. However, Duff argues that the communicative function of the law is unfulfilled if offenders are punished without having the opportunity to understand the reason for their punishment.[550] That being said, if an offender does not recognise and repent their wrongdoing, the law does not fail in its aim. Provided that the language of the law is sufficiently expressive to give offenders the opportunity to understand why they are being condemned, the communicative function is achieved. Duff argues that 'we owe it to his victim, to the values he has flouted, and even to him, to censure his wrongdoing even if we are sure that he will be unmoved and unpersuaded by the censure'.[551]

An offence of IPA that explains the conduct and its wrongfulness to the public can serve an additional educative function. A descriptive offence, reformulated on the basis of vulnerability, could give the public the impetus to re-evaluate how they understand IPA. Dominant representations of IPA tend to highlight discrete incidents of physical abuse. An offence underpinned by a broader representation could send a message that the public ought to condemn not only incidents of physical abuse, but also ongoing belittlement, isolation and control of victims. Such an offence could also educate the public about the kinds of behaviour to be aware of among family or friends who may be either abusers or victims.[552]

A reformulated offence could send an especially important message to those victims who have been unable to recognise the nature of the wrong directed at them.[553] Stark has observed that IPA victims who have not experienced physical abuse can be apologetic for not being

[550] Duff, above n 309, 81.
[551] Ibid 82.
[552] Herring, above n 517, 195.
[553] Tadros, above n 108, 1005.

‘real’ victims, because the ‘dominant victimization narrative’ does not incorporate ongoing, ostensibly low-level tactics.[554] Because the criminal law expresses ‘public condemnation’ of proscribed behaviour,[555] a specific IPA offence that captures a wider range of tactics could give more victims permission to see themselves as such, and could validate their desire to seek help or leave the relationship.[556]

Instructing criminal justice officials

Every offence guides criminal justice officials on what conduct is prohibited and how it should be punished.[557] Tadros notes that a specific offence therefore has the potential to deliver an important message to criminal justice officials about the seriousness of IPA. He argues that the UK criminal justice system has historically failed to respond adequately and consistently to IPA.[558] This he attributes to an attitude among criminal justice officials that IPA is ‘less serious’ than other forms of abuse, and a failure among prosecutors and courts to recognise the ‘systematic nature of domestic abuse’.[559] As IPA tends to be charged as individual incidents of physical violence, the ongoing nature of abuse is not uncovered during trial. The abusive conduct that is prosecuted can therefore appear not especially egregious because it is viewed out of context. Therefore, a specific offence based on an assumption of vulnerability, which delineates precisely the conduct involved, could educate criminal justice officials and encourage improved practice.[560]

Communicating with both audiences

Dan-Cohen explains that criminal offences must be capable of sending all of these messages.[561] This could lead to contradictory conclusions about the best wording for the

[554] Stark, above n 102, 111.
[555] Tadros, above n 108, 1005.
[556] Youngs, above n 99, 66.
[557] Dan-Cohen, above n 546, 650.
[558] Tadros, above n 108, 1005-6.
[559] Ibid 995, 1006.
[560] Ibid 1005; Youngs above n 99, 65.
[561] Dan-Cohen, above n 546, 649.

offence. On the one hand, Dan-Cohen suggests that for a law to communicate with the public, and to send a message that corresponds with the public's existing moral sensibility (so they are more willing to treat that law with respect), the offence definition must be 'broadly drawn and open-ended'.[562] On the other hand, the offence must be sufficiently 'narrow and precise' to constrain criminal justice officials in their decisions about whether to charge and convict, and how severely to punish offenders.[563] These requirements are not necessarily inconsistent, because the messages sent to each audience are transmitted in different ways.

It is unlikely that many members of the public read new offences. Rather, the message of an offence tends to be conveyed to the public through the news media and advertising campaigns. Noteworthy cases of IPA are frequently reported by news outlets as trials unfold. Such reports often draw on the language of the offence label and definition to explain the abuser's conduct.[564] Increasingly, criminal justice organisations use social media to communicate directly with the public. The UK Crown Prosecution Service, for example, has more than 220,000 Twitter followers, and uses that platform to explain the significance of new offences.

It is therefore important that the label and definition of my proposed offence use 'ordinary language',[565] so the public can comprehend what the prohibited conduct is, and what is wrong with it. The language of the label and definition must be sufficiently familiar to give people a sense of the significance of vulnerability, the ongoing nature of the behaviour, and the tactics involved.[566] In other words, it must reveal the problem representation.

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[562] Ibid 651.
[563] Ibid.
[564] See, eg, Rosa Silverman, 'When she threatened to leave, he threatened to kill himself: the story behind a landmark coercive control case' (online), 16 May 2018 <https://www.telegraph.co.uk/women/family/threatened-leave-threatened-kill-story-behind-landmark-coercive/>.
[565] Dan-Cohen, above n 546, 652.
[566] A campaign intended to explain to the public exactly what IPA is, and what is wrong with it, may potentially lead some people to deny that such behaviour is problematic and ignore the campaign's message; the so-called

Criminal justice officials, on the other hand, receive their particular message primarily from the wording of the offence itself. The language of the entire offence must precisely articulate the criminalised conduct, so that criminal justice officials understand what decisions are expected of them. Dan-Cohen explains that the offence can include 'technical and esoteric professional language' because this does not present a barrier to criminal justice officials' comprehension.[567]

5.3. The Vulnerability Approach in Practice

In the following section, I lay out the proposed offence, and analyse its elements. To demonstrate how it has been adapted, the elements of the UK offence of controlling or coercive behaviour which I have retained are underlined. An extract of the relevant sections of the UK offence can also be found on page 80.

Intimate partner abuse

(1) A person (the abuser) commits an offence if –

  a. the abuser **repeatedly or continuously** takes advantage of another person's (the victim) vulnerability by engaging in **coercive or controlling** behaviour towards the victim;
  b. at the time of the behaviour, the abuser and the victim are in an intimate partnership, or have previously been in an intimate partnership with each other; and
  c. the abuser **knows or ought to know** that the behaviour would tend to restrict the victim's freedom of action.

(2) Indicators of the victim's vulnerability may include one or more of the following –

  a. gender;
  b. sexual orientation;
  c. race;
  d. physical or mental illness or disability;
  e. age;
  f. religion;
  g. citizenship or immigration status;
  h. socio-economic status;
  i. marital status;

'boomerang effect'. Sarah N. Keller, Timothy Wilkinson and A. J. Otjen, 'Unintended Effects of a Domestic Violence Campaign' (2010) 39(4) *Journal of Advertising* 53.

[567] Dan-Cohen, above n 546, 652.

j. pregnancy;
k. child-rearing responsibilities;
l. homelessness;
m. previous intimate partner abuse victimisation; or
n. any other relevant factor.

(3) For the purposes of subsection (1) –

a. "coercive behaviour" means one or more acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish or frighten the victim;
b. "controlling behaviour" means one or more acts designed to make the victim subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour;
c. "intimate partnership" means persons who are or have been married or in de facto, dating or ongoing sexual relationships regardless of whether they live together or have previously lived together;
d. **The abuser "ought to know" that which a reasonable person in possession of the same information would know.**

(4) A person guilty of an offence under this section is liable to **imprisonment for a term not exceeding five years**.

Offence label

While I have retained the language of coercive control which informed the UK offence, I have altered the offence label. I am convinced of the utility of Stark's representation of IPA as coercive control, though I use the label 'Intimate partner abuse' to assist in realising a communicative aim of the offence. As discussed in chapter 3, an offence sends an appropriate message to the public when it is 'known by a name that not only describes factually what the defendant has done, but also purports to capture the moral essence of the wrong involved'.[568] The term 'coercive control', while descriptive, is incapable of conveying the exact conduct involved without reference to a definition.

'Intimate partner abuse', as explained in chapter 1, has the capacity to create 'a clear moral as well as factual picture of the wrongdoer and the wrongdoing'.[569] It uses 'ordinary

[568] Horder, above n 308, 335.
[569] Ibid.

language',[570] which signifies the offender's conduct, and therefore 'minimise[s] the potential for misrepresentation or misunderstanding'.[571] Perhaps neither label can convey the ongoing nature of IPA, and the potential erosion of the victim's autonomy. However, I suggest that 'Intimate partner abuse' would nevertheless be more capable of giving the public reason to condemn the behaviour and those who engage in it.

Repeated or continuous behaviour

I have retained the requirement from the original offence that the abuser's behaviour be repeated or continuous.[572] This prevents criminal justice officials from focusing only on discrete incidents of abuse. Stark argues that IPA is not characterised by isolated incidents of physical or psychological abuse, but by a range of ongoing tactics aimed towards establishing power over the victim.[573] Some of these tactics are already crimes (e.g. stalking and sexual assault), although many are not (e.g. repeated put-downs, monitoring phone calls, or restricting access to finances). Stark observes that it is only when viewed as part of a pattern of conduct that the cumulative effect of these apparently trivial tactics can be recognised.[574] Therefore, an offence formulated around repeated or continuous behaviour will allow police and prosecutors to identify apparently trivial conduct as part of a pattern of behaviour directed towards eroding the victim's freedom of action.[575]

Some scholars favour a requirement of a 'course of conduct', rather than 'repeated or continuous behaviour'.[576] Both Burke's and Tuerkheimer's proposed offences require a course of conduct, defined as at least two acts directed against the victim, each of which

[570] Dan-Cohen, above n 546, 652.
[571] Chalmers and Leverick, above n 330, 238.
[572] *SCA* s 76(1)(a).
[573] Stark, above n 102, 5.
[574] Evan Stark, 'Re-presenting Battered Women: Coercive Control and the Defense of Liberty' in Maryse Rinfret-Raynor et al (eds), *Violence Against Women: Complex Realities and New Issues in a Changing World* (Presses de l'Université du Québec, 2014) 33, 38–9.
[575] Ibid 47; Bettinson and Bishop, above n 487, 180.
[576] See, eg, Burke, above n 306; Tuerkheimer, above n 306; Youngs, above n 99, 69.

constitute criminal conduct.[577] This formulation has been described as 'unnecessarily restrictive', and indicates Burke's and Tuerkheimer's unwillingness to depart from the traditional representation of IPA as involving individual instances of serious (physical) abuse.[578] Bettinson and Bishop argue that a 'course of conduct' offence would maintain judicial focus on discrete incidents of physical violence.[579] They suggest that a formulation based on repeated or continuous behaviour would permit new 'judicial understandings' of IPA to emerge.[580] Moreover, while Burke's and Tuerkheimer's offences require the abuser to have committed multiple crimes, and this may be easier to prove than repeated or continuous behaviour, it could reinforce the perception in the public and among criminal justice officials that only those acts of an especially violent or oppressive nature constitute IPA. Such formulations obscure those acts which may appear ordinary when removed from the context of an ongoing effort by the abuser to establish control over the victim.

Vulnerability

The proposed offence requires that the abuser takes advantage of the victim's vulnerability by engaging in coercive or controlling behaviour. Subsection (2) lists various factors that may cause the victim to be vulnerable, both in society and to the abuser. These factors are well-known indicators of vulnerability.[581] Evidence of the victim's membership in any of these groups need not be presented unless they are part of the reason for the victim's vulnerability.

This list of factors contributing to vulnerability has the potential to assist in the educative function of the offence. The public dissemination of information about the characteristics

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[577] Burke, above n 306, 602; Tuerkheimer, above n 306, 1020.
[578] Youngs, above n 99, 67.
[579] Bettinson and Bishop, above n 487, 191. As evidence, they draw on judicial interpretations of other UK course of conduct offences, such as stalking and harassment. See, eg, *R v Henley* [2000] Crim LR 582; *Lau v DPP (UK)* [2000] 1 FLR 799 [15].
[580] Bettinson and Bishop, above n 487, 191.
[581] See, eg, *Equal Opportunity Act 1984* (SA); Carline and Easteal, above n 285, 230–50.

that may contribute to vulnerability could assist in educating the public about the additional barriers faced by vulnerable people. The list of vulnerability factors also has the capacity to constitute the problem of IPA as a political problem as well as a personal one. It represents IPA not merely as a problem of interpersonal abuse, but also of the social institutions and divisions that allow one person to take advantage of another.

Subsection (2)(n) of the proposed offence, which allows prosecutors to introduce any other factor relevant to the victim's vulnerability, is included to ensure that no victim is excluded from protection.[582] This provision avoids the 'patchwork protection' provided by other offences aimed at protecting vulnerable groups.[583] For example, the UK offence of causing or allowing a vulnerable adult to die or suffer serious physical harm only applies to those who are vulnerable due to physical or mental disability or old age.[584]

I use the terms 'abuser' and 'victim' to refer to the offender and victim respectively. This allows for recognition of male and LGBTIQ victims, which would not be possible if the law labelled the abuser a man and the victim a woman. Although these labels obscure the gender of both parties, subsection (2)(a) permits consideration (where relevant) of how the victim's gender made her (or him) vulnerable to the offender. Although the terms used in the UK offence – 'A' and 'B' – also prevent exclusion of male and LGBTIQ victims, they are dehumanising.

Coercive or controlling behaviour

The proposed offence uses the UK cross-government definition of the terms 'coerce' and 'control'.[585] These were definitions settled on by the UK Home Office in 2012 to be used

[582] Herring, above n 517, 223.
[583] Ibid.
[584] *Domestic Violence, Crime and Victims Act 2004* (UK) c 28, s 5(6).
[585] Home Office UK, 'Cross-Government Definition of Domestic Violence – A Consultation: Summary of Responses' (September 2012) 19.

across government agencies to ensure consistent policy development and service provision. The original offence did not define these terms, which could hamper implementation due to ambiguity about the conduct they include.

I include the UK government definitions of the terms, which draw on Stark's own definitions,[586] to convey a message to the public and criminal justice officials about the conduct targeted by the offence. The definitions give criminal justice officials 'precision and determinacy' about the range of conduct covered under the offence, which is lacking in the original offence.[587] At the same time, the definitions could educate the public about the kinds of behaviour involved in IPA, and the tendency of IPA to limit the freedom of its victims. The definitions are therefore sufficiently broad and 'open-ended' for the public to develop a wider conception of the conduct involved in IPA.[588]

Intimate partnership

The proposed offence defines 'intimate relationship' to include current or former partners, regardless of whether they are living together.[589] This counters the seemingly arbitrary exclusion in the original UK offence of former intimate partners who do not live together.[590] Given the increased risk of serious abuse immediately following separation,[591] the exclusion of former intimates who do not cohabitate in the UK offence is troubling.

[586] Stark, above n 102, 228–9.
[587] Dan-Cohen, above n 546, 650.
[588] Ibid 651.
[589] See 1.2.
[590] *SCA* s 76(2)(b)(ii). See Home Office UK, above n 377, 6. The offence does not apply to former intimate partners because harassment and stalking offences only apply in cases where the relationship has ended. The offence of controlling or coercive behaviour was therefore filling a gap. Nevertheless, I find it important for the communicative function of the proposed offence to reinforce that IPA can be committed both during and after the termination of an intimate relationship.
[591] Jenny Morgan, *Who Kills Whom and Why: Looking Beyond Legal Categories* (Victorian Law Reform Commission, 2002) 43.

The original UK offence applies to both intimate partners and members of the same family,[592] therefore encompassing distinct forms of violence such as child and elder abuse. However, the proposed offence restricts application to current and former intimate partners, and thus cannot be applied in other cases of family violence. There is something distinctive about IPA that warrants a separate offence from other forms of family violence. Relationships between parents and children tend to be characterised by the dependence of one party on the other. Children rely on their parents for food, shelter, education and other amenities. An elderly parent may rely on their child for personal care and maintenance. Thus, when abuse occurs between parents and children, one of the primary wrongs is neglect of care. The dependence of one party on another is not paradigmatic of intimate partnerships. Of course, in certain intimate relationships, one party may, for example, have a physical disability and rely on the other. However, intimate partnerships tend to be characterised by relationships of trust and intimacy, which are betrayed when one partner abuses the other.[593] IPA is therefore morally distinct from child and elder abuse because of the different dynamics present in the relationship between abuser and victim. Thus, if we accept Horder's general proposition that morally distinct forms of interpersonal violence ought to be differentiated in the criminal law,[594] then IPA ought to have a separate offence that draws attention to its fundamental dynamics. Failure to distinguish different forms of family violence through distinct offences could perpetuate public confusion over the distinction between IPA, child and elder abuse.[595]

[592] *SCA* s 76(2).
[593] But see Tadros, above n 108, 1000–1.
[594] Horder, above n 308, 351.
[595] Bettinson and Bishop, above n 487, 193.

Restriction of the victim's freedom of action

The existing offence of controlling or coercive behaviour requires that the abuser's actions have a 'serious effect' on the victim.[596] 'Serious effect' is defined as either causing the victim 'to fear, on at least two occasions, that violence will be used against' them, or causing the victim 'serious alarm or distress which has a substantial adverse effect on [their] usual day-to-day activities'.[597] This phrasing suggests that the victim's fear, alarm or distress will be assessed subjectively, which limits application of the offence to those cases in which the victim is able to recognise and articulate the harm they suffered.[598] Moreover, it places focus on the victim's reaction to abuse, highlighting their mental state and making their response to abuse as important an element as the abuse itself.[599]

The proposed offence instead describes the harm as a restriction of the victim's freedom of action, and does not require that the victim *actually* experience it – only that the abuser knew or ought to have known that such a restriction would tend to be the result of their behaviour. Removing the requirement that the victim actually experience fear, alarm or distress prevents focus of the trial being on a pathologised victim. The focus will instead be on the actions of the abuser.[600]

Further, like Youngs,[601] Burke,[602] and Tadros,[603] I argue that a person who tries to restrict their partner's freedom should not escape condemnation simply because they are unsuccessful. As Tadros observes:

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[596] *SCA* s 76(1)(c).
[597] Ibid s 76(4).
[598] Bettinson and Bishop, above n 487, 194.
[599] Ibid.
[600] Ibid 195.
[601] Youngs, above n 99, 69.
[602] Burke, above n 306, 605.
[603] Tadros, above n 108, 1010.

> [t]he fact that there are instances of domestic abuse that do not lead to the diminution of freedom … does not entitle the perpetrators of such abuse to an acquittal. The diminution of freedom is central to the wrong, and yet the natural tendency of such conduct to lead to that diminution is sufficient to justify conviction. The defendant has perpetrated conduct which often leads to such a diminution of freedom. Indeed, such an effect is arguably paradigmatic of domestic abuse. That such a diminution does not in fact come about cannot save him from being liable for the same offense as those whose conduct has the relevant harmful consequence.[604]

Failure to establish control should not be a barrier to conviction. Abusers ought not to be absolved simply because their victims respond to attempts to establish control by resisting or seeking assistance.

Mental elements

There are two mental elements of the proposed offence. The first is that the abuser *intentionally* takes advantage of the victim's vulnerability by engaging in coercive or controlling behaviour. The requirement that the abuser 'takes advantage' implies that intention must be proved. Further, all of the conduct covered under the definitions of coercive and controlling behaviour is widely recognised as requiring intention (e.g. assault, intimidation, stalking, false imprisonment, etc.).[605]

The second requirement is that the abuser *knew or ought to have known* that their behaviour would tend to restrict the victim's freedom of action. This places the abuser's conduct in the context of the relationship – a person who possesses information about the vulnerability of the victim ought to know the likely effect of taking advantage of that vulnerability. Finch,

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[604] Ibid.

[605] Requiring intention, rather than recklessness, makes the offence more difficult to prove. However, the proposed offence is designed to capture those who deliberately exploit the vulnerability of others. Other offences, such as the UK offence of assault occasioning actual bodily harm, can be committed recklessly, and could be charged in cases in which intention cannot be proved.

commenting on the objective standard adopted in UK stalking and harassment offences, observes that the objective standard is vital in such offences, because victims have a right to protection regardless of whether the offender intended their behaviour to cause fear.[606] In the same way, an abuser should not be able to claim that they did not realise their behaviour might restrict their partner's freedom.[607]

In contrast, some scholars suggest that an offence of IPA ought to require that the abuser *intended* to reduce the victim's freedom of movement.[608] Youngs, for example, suggests that an abuser ought only to be liable for pursuing 'a course of conduct with the intent to establish, or maintain, power and control' over the victim.[609] Drawing on Stark's representation of IPA, Youngs argues that the 'core of the wrong' is the intention to establish control over an intimate partner, and therefore, an educative criminal offence of IPA must reflect that intention.[610] While this is an apt observation, I am nevertheless concerned that an offence framed around intention to restrict the victim's freedom of action suggests that a person who is ignorant of the likely effect of abusive conduct is less culpable. Abusive, threatening, coercive or isolating conduct is no less wrong because an abuser did not understand its likely effects.[611] Further, as Tuerkheimer has observed, it is likely to prove difficult to convince judges beyond reasonable doubt that a person intended to restrict their victim's freedom of action.[612]

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[606] Emily Finch, 'Stalking the Perfect Stalking Law: An Evaluation of the Efficacy of the Protection from Harassment Act 1997' [2002] *Criminal Law Review* 703, 710.
[607] Bettinson and Bishop, above n 487, 195.
[608] See, eg, Burke, above n 306, 605; Youngs, above n 99, 69.
[609] Youngs, above n 99, 69.
[610] Ibid 68.
[611] Finch, above n 606, 710.
[612] Tuerkheimer, above n 306, 1022.

'[A]nother string to the bow of the criminal justice system'[613]

The proposed offence should supplement, rather than replace, existing offences against the person in cases of IPA. Intimate partner homicide, for example, ought not to have a distinct charge from other forms of homicide, and non-consensual sex within an intimate relationship should not be viewed differently from rape. As Tadros argues, a specific offence of IPA is best thought of, not as a replacement charge, but as 'another string to the bow of the criminal justice system'.[614] This offence offers a way to recognise a range of behaviours, some already criminal and others not, which, when undertaken repeatedly over a period of time, in a relationship of trust, can produce harm.[615] Having a separate offence based on repeated or continuous behaviour ensures that there are multiple options for prosecutors.

As with the offence of controlling or coercive behaviour,[616] the proposed offence has a relatively low maximum penalty. Bettinson and Bishop have suggested that the maximum sentence of five years imprisonment 'does not reflect the severity of the harm of coercive control and leads to the creation of a hierarchy of harm when compared with the maximum sentences for physical harm'.[617] Nevertheless, I suggest that it is useful to have a lower-level offence which can stand as an alternative to general offences such as rape and assault, and which captures a range of behaviours, some of which would otherwise go unnoticed by the criminal justice system, but are still detrimental to the victim's full and free citizenship.[618]

5.4. EFFECTS OF THE VULNERABILITY APPROACH

Some effects of the proposed offence have already been revealed. Here, I delve further to answer question 5 of WPR; that is, to identify the effects of the underlying problem

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[613] Tadros, above n 108, 1011.
[614] Ibid.
[615] Douglas, above n 380, 468.
[616] *SCA* s 76(11).
[617] Bettinson and Bishop, above n 487, 195.
[618] Stark, above n 102, 398.

representation. I consider three further consequences of the representation that could produce mixed effects on trial procedure and outcomes, but nevertheless do not undermine the utility of the offence.

Protection or paternalism?

A major criticism levelled at the concept of universal vulnerability – the idea that we are all vulnerable – is that it tends to license paternalistic state intervention at the cost of depriving vulnerable people of their autonomy and free will.[619] According to Fineman, once we accept universal vulnerability, the state has a responsibility to intervene in exploitative conduct and to protect its vulnerable citizens.[620] However, if we accept that IPA has a limiting effect on a victim's freedom of action, then it could be argued that an appropriate response would involve giving the victim freedom to decide whether and how the offender is punished.[621] In criminalising IPA, it could be argued that the state paternalistically takes the decision about how to proceed out of the victims' hands.[622] As Dunn, Clare and Holland have observed, this could be counter-productive – first the abuser disempowers the victim and then the state intervenes, giving the victim no say in whether it intervenes and how it treats the abuser.[623]

Nevertheless, state intervention is important for a crime that tends to erode the victim's liberty. If an abuser has successfully established power and control over their victim, then the victim may be unwilling to pursue prosecution and give evidence at trial because of pressure from the abuser, or because they fail to realise that they are in an abusive

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[619] Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence* (Duke University Press, 2008) 63; Munro and Scoular, above n 514, 196; Herring, above n 517, 24–5.
[620] Fineman, above n 513, 10.
[621] van Wormer, above n 315, 111.
[622] Herring, above n 517, 195.
[623] 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, 247.

situation.[624] In such circumstances, one could argue that the victim needs the state's protection because they are vulnerable and unable to act in their own best interests.

Further, it might be in society's best interests to ensure that abusers are prosecuted for IPA even when victims are reluctant to pursue prosecution. Some scholars argue that, while the wrong of conduct such as IPA is directed at, and felt primarily by, the victim, the wrong still 'properly concern[s] us all as citizens'.[625] As Duff argues:

> [w]e must take such wrongdoing seriously, if we take seriously the values against which it offends, the victim's standing as one who has suffered such a wrong, and the wrongdoer's standing as a responsible agent who has done wrong: but to take it seriously is to be prepared to declare it to be wrong … and to call to account and to condemn those who engage in it.[626]

According to this logic, regardless of the victim's position on intervention, abusers 'must answer to [their] fellow citizens' for their criminal behaviour.[627] Stark argues that the primary harm of IPA is that it deprives victims of 'their rights to privacy, self-respect, and autonomy',[628] making it not just a wrong against individuals, but a broader political wrong in which the state ought to intervene.[629] Nevertheless, it cannot be denied that, '[r]ather than the abuser dominating the victim and making decisions about her life, now the state is taking on the same role'.[630] Ultimately, however, the paternalistic nature of the proposed offence is a necessary cost to protect victims and ensure abusers are held accountable.

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[624] Herring, above n 517, 201; Stubbs, above n 265, 45.
[625] Duff, above n 312, 52. See also Cheryl Hanna, 'The Paradox of Progress: Translating Evan Stark's Coercive Control Into Legal Doctrine for Abused Women' (2009) 15(12) *Violence Against Women* 1458, 1462.
[626] Antony Duff, *Theories of Criminal Law* (2013) The Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/archives/sum2013/entries/criminal-law/>.
[627] Duff, above n 312, 52.
[628] Stark, above n 102, 13.
[629] Ibid 380–2.
[630] Herring, above n 517, 201.

Evidence of vulnerability and its exploitation

As part of the proposed offence, prosecutors must prove beyond reasonable doubt that the victim was vulnerable, and that the abusive tactics used against the victim exploited that vulnerability. Given the difficulty in successfully prosecuting specific offences of IPA,[631] the additional burden of proving the victim's vulnerability and its exploitation could lead to low conviction rates for the proposed offence. Establishing exploitation of vulnerability is likely to be more onerous than those offences that can be proved using tangible evidence such as medical records. In the following, I consider how these elements of the proposed offence can be proved, and whether there is still utility in the offence given the potential for a low conviction rate.

The ideal person to present evidence of the victim's vulnerability and its exploitation is the victim, as other people in the victim's life are unlikely to be able to understand and articulate the impact of various forms of social oppression on the victim's experience of IPA. Hanna argues that an offence framed around coercive control has the unique benefit of making a 'complete narrative' of the victim's experience important evidence.[632] Focusing on the ongoing exploitation of the victim's vulnerability 'allows the victim to tell her story – the whole story – and have it matter'.[633]

However, the victim is likely the *only* person who can present such evidence. Hanna and Stark both observe that the ongoing tactics of IPA target aspects of everyday life, and may therefore not be identifiable as IPA without the victim's narrative to link them together.[634] The defendant taking the victim's pay cheques, or not allowing the victim to participate in

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[631] For example, in the nine years following the enactment of the Tasmanian offence of economic abuse, it was never prosecuted. Marilyn McMahon and Paul McGorrery, 'Criminalising Controlling and Coercive Behaviour: The Next Step in the Prosecution of Family Violence?' (2016) 41(2) *Alternative Law Journal* 98, 100.

[632] Hanna, above n 625, 1462.

[633] Ibid.

[634] Ibid; Stark, above n 102, 229.

important household decisions may be viewed as a normal division of decision-making typical in some relationships.[635] The defendant constantly checking up on the victim, or monitoring their whereabouts could be viewed by external observers as deeply affectionate.[636] A facial expression that may appear innocuous to others may induce extreme fear in a victim who recognises it as a threat of violence.[637] Individual incidents of aggression, such as the offender slamming doors, could be viewed as inappropriate, though not especially noteworthy in isolation.[638]

If, as Hanna suggests, the only way to prove that trivial behaviour constitutes IPA is through the victim's narrative,[639] then prosecution could be doomed if a victim refuses to testify. Hanna rejects Tadros' claim that an offence of this nature could be successfully prosecuted without the victim's testimony.[640] Tadros' assumption that the victim's evidence is not always necessary stems from the example he uses – he envisages a case in which the victim is physically assaulted by their partner several times, each time being admitted to hospital with minor injuries, and refusing to explain how the injuries came about. Tadros argues that the victim's testimony may not be necessary, as medical reports and evidence from neighbours about fighting between the couple could be sufficient to establish ongoing abuse. However, such evidence would likely be insufficient where the abuser's tactics are subtler or seemingly ordinary.[641] In fact, friends, family, or colleagues may even attest to the abuser being affectionate. Hanna fears that an offence based on continuous, ostensibly low-level, behaviours would produce fewer successful prosecutions than existing offences against the person, because it relies almost entirely on the testimony of a potentially unwilling or

[635] Stark, above n 102, 230.
[636] Ibid 229.
[637] Ibid.
[638] Hanna, above n 625, 1462.
[639] Ibid 1465.
[640] Tadros, above n 108, 1012.
[641] Julia R. Tolmie, 'Coercive control: To criminalize or not to criminalize?' (2018) 18(1) *Criminology & Criminal Justice* 55.

inarticulate witness.[642] Nevertheless, the proposed offence captures behaviours which are not already covered under existing offences, and so is still ultimately beneficial.

Further, expert evidence could be introduced where victims refuse to testify, or where they are unable to articulate how the abuser exploited their vulnerability. As it is unlikely that this form of abuse will be understood by the court,[643] expert evidence could 'help to ensure that the contexts of the lives of abused [people] … are better understood and heard throughout the criminal justice process'.[644] In addition, expert witnesses could explain that a common result of IPA is the erosion of the victim's autonomy, thus explaining a victim's reluctance to give evidence.[645]

Sheehy notes that finding qualified experts on coercive control could prove difficult, as the expertise of psychologists is mostly in BWS and PTSD.[646] However, she notes that in US and Canadian battered women's murder trials, evidence has been admitted from frontline victim advocates regarding the consequences of coercive control.[647] For the proposed offence, frontline workers (e.g. victim advocates, refuge staff etc.) are ideally placed to articulate how the victim's vulnerability left them open to their abuser's exploitation, as well as the likely effect of that exploitation. This evidence could allow judges to understand the vulnerability of victims who are unable to articulate it themselves, or are unwilling to give evidence. Thus, while there are potential difficulties in gathering evidence, there are nevertheless valid reasons for enacting this offence, and ways of mitigating these difficulties.

[642] Hanna, above n 625, 1465.
[643] Douglas, above n 499, 376.
[644] Ibid 378.
[645] Ibid 376.
[646] Sheehy, above n 445, 112.
[647] Ibid.

Highlighting vulnerability

Drawing attention to the various ways in which victims are vulnerable is perhaps a double-edged sword. On the one hand, the offence could be seen as packaging together disparate groups and labelling them as weak and therefore inferior.[648] In the same way as female IPA victims tend to be viewed as weak and defenceless when gender is rendered salient, the proposed framing could suggest that all minority victims are incapable of autonomous action. On the other hand, in drawing attention to the victim's vulnerability, not only to their abuser but also in society, the offence ensures that attention is given both to the abuse, and context in which it occurs. Mahoney suggests that drawing attention to the context of the struggle for power and control within which IPA occurs prevents stigmatisation of the victim.[649] For example, when the social context of the abuse is emphasised (e.g. the homophobia, racism, or sexism the victim faces in society), criminal justice officials are less likely to question why the victim did not leave the relationship or report the abuse.

Without highlighting the way that the victim's gender, culture and other identity markers intersect to shape their experience of abuse, it may be that judges would be tempted to fall back on preconceived notions of what to expect from minority victims. As Armor notes, if we 'consciously confront' prejudices by drawing attention to the victim's particular circumstances, we are more likely to afford the victim justice 'than if we take a colorblind, ostrich-head-in-the-sand approach' that allows the court to rely on assumptions.[650] Given that the victim's vulnerability is an element that must be proved, we can expect that the proposed offence would allow an examination of how various forms of discrimination 'work to sustain the power differences' between the abuser and victim, as well as between the

[648] Razack, above n 284, 896.
[649] Mahoney, above n 240, 79.
[650] Jody Armour, 'Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit' (1995) 83(3) *California Law Review* 733, 772.

victim and society.[651] Victims would be less likely to be seen as weak because the context of their oppression in the relationship and in society would be revealed.

5.5. Conclusion

The vulnerability approach provides an alternative way to examine IPA that articulates the wide range of possible determinants in each case, and makes them central to understanding the harm suffered by each victim. In adopting this representation, I have aimed to better capture the experiences of victims – not only their treatment at the hands of their abusers, but also how their experience of abuse is shaped by interactions with other people and institutions. The proposed offence is, of course, based on one of many possible problem representations. Nevertheless, I suggest that the effects of the representation on the operation of the offence would be beneficial for victims, at least when the offence is understood in the context of the various legal and social services available. Making the victim's narrative central to the offence may indeed create a barrier to prosecution in certain cases. Nevertheless, this reframing has the potential to change the perceptions of everyone to whom the criminal law speaks, thus making criminal law intervention more effective.

[651] Stubbs, above n 265, 49.

Chapter 6: Conclusion

> It is hard to imagine liberties more basic to personal development or citizenship than those suppressed [by IPA].[652]

My social vision is for the criminal justice system to recognise IPA victims as individuals whose experiences are shaped by their relationships with their abuser and society. In using the WPR approach, I have examined the ways in which academics, activists, law reformers, and criminal justice officials have shaped responses to the social problem of abuse in intimate partnerships. I have traced how IPA came to be a problem for the criminal law and how legislatures have been influenced by competing problem representations. WPR has allowed me to comment on the effects on victims of varying representations of IPA bound up in criminal offences. It has also given me the tools to proffer my own representation of IPA, and propose a criminal offence that might better articulate the experiences of victims. As I have shown, it is vital to examine and challenge problem representations which lodge in criminal law solutions to IPA, because the way the problem is represented has serious consequences.

One area in which this thesis has been relatively silent, and thus where further research is necessary, is in examining how the judiciary considers new criminal law responses to IPA. As judges are important social commentators, with strong enunciative power, the way they talk about these offences is equally important to consider. For instance, it would be useful to examine the language employed by judges interpreting the UK offence of controlling or coercive behaviour.

Criminal law responses to IPA are constantly evolving as governments attempt to find better solutions to a changing problem. Since the beginning of 2018, both Scotland and Ireland

[652] Stark, above n 102, 398.

have introduced new, specific offences of IPA.[653] It is vital that we constantly examine and challenge new offences of IPA as they arise, and the representations underpinning them. In so doing, we can determine whether new offences appropriately convey the experiences of victims. Wrongs perpetrated against the vulnerable in our society must be the concern of all citizens,[654] and we must seek solutions which allow victims of IPA to 'live the fullest, most flourishing life'.[655]

[653] *Domestic Abuse (Scotland) Act 2018* (Scot) asp 5, s 1; *Domestic Violence Act 2018* (Ireland) s 39.
[654] Duff, above n 312, 52.
[655] Nussbaum, above n 326, 41.

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