



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

## Motivating Questions and Partial Answers

**Citation for published version:**

Cowan, S 2012, 'Motivating Questions and Partial Answers: A Response to Prosecuting Domestic Violence by Michelle Madden Dempse', *Criminal Law and Philosophy*. <https://doi.org/10.1007/s11572-012-9197-2>

**Digital Object Identifier (DOI):**

[10.1007/s11572-012-9197-2](https://doi.org/10.1007/s11572-012-9197-2)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Peer reviewed version

**Published In:**

*Criminal Law and Philosophy*

**Publisher Rights Statement:**

Cowan, S. 2012 In : *Criminal Law and Philosophy*. The final publication is available at [link.springer.com](http://link.springer.com)

**General rights**

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

**Take down policy**

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact [openaccess@ed.ac.uk](mailto:openaccess@ed.ac.uk) providing details, and we will remove access to the work immediately and investigate your claim.



# **Motivating Questions and Partial Answers: A Response to Prosecuting Domestic Violence by Michelle Madden Dempsey**

**Sharon Cowan, University of Edinburgh**

## **Abstract**

Michelle Madden Dempsey's compelling book sets out a normative feminist argument as to why and when prosecutors should continue to pursue prosecutions in domestic violence cases where the victim refuses to participate in or has withdrawn their support for the prosecution. This paper will explore two of the key aspects of her argument - the centrality and definition of the concept of patriarchy, and the definition of domestic violence - before concluding with some final thoughts as to the appropriate parameters of feminist prosecutorial decision-making. The paper argues that Madden Dempsey could offer a more detailed and nuanced argument about the role that patriarchy plays, particularly its relevance in marking out appropriate cases for pursuit; and that her thesis requires a more convincing exposition of the precise reasons for offering such a narrow account of domestic violence.

## **Keywords:**

Domestic violence, patriarchy, prosecution, victim participation, domestic abuse

## **Introduction**

Michelle Madden Dempsey's excellent book does not provide a step-by-step 'prosecuting domestic violence handbook' for prosecutors, but what it does offer is a normative argument addressing some of the pressing issues that feminists and others have struggled to agree on with respect to prosecuting domestic violence cases. While Madden Dempsey occasionally draws on some of her (illuminating) experiences as a domestic violence prosecutor, she undertakes, as the subtitle of her book suggests, a more philosophical treatment of her subject. The early part of the book sets out the role of prosecutors as well as the actions and values that they should aim to realize, and their reasons for action. We journey with Madden Dempsey through a very careful and close analysis of the factors that should guide a prosecutor faced by her motivating question - 'what should public prosecutors do when victims withdraw their support for domestic violence prosecutions?'. Her answer to that question, in brief, is that in behaving as feminists, prosecutors should only consider continuing with domestic violence prosecutions without the support of the victim where there has been 'domestic violence in its strong sense' - that is, where the violence takes place in a domestic context, and perpetuates patriarchy (and is unjustified, e.g. does not occur as self-defence). At face value this seems right, and accords with, for example, the approach in England and Wales where the Crown Prosecution Service (CPS) Director's Legal Guidance on Prosecuting Domestic Violence (2009) states that prosecutions can and will go ahead without the consent or participation of the victim, particularly where the violence is serious<sup>1</sup> (see also

---

<sup>1</sup> See [http://www.cps.gov.uk/legal/d\\_to\\_g/domestic\\_violence\\_aide-memoire/#a24](http://www.cps.gov.uk/legal/d_to_g/domestic_violence_aide-memoire/#a24)

Ellison 2002). Paragraph 17 of the CPS Policy for Prosecuting Domestic Violence Cases (2009) states that: “Generally, the more serious the offence (for example, where children or young people were present, or where there was considerable violence, or where there is the real and continuing threat to the victim or others), the more likely we are to prosecute in the public interest, even if the victim says that they do not wish us to do so.”

Not only can prosecutions go ahead, but the CPS guidance also provides for legal measures to be taken to compel a victim to provide evidence as a witness. The guidance sets out the factors to be taken into account as to whether or not a victim can be compelled to participate, stating that “A witness summons should only be considered once it has been determined that (a) the safety of the victim and any children will not be jeopardised by the case continuing (b) the victim will not give evidence, even with the help of special measures and other support; and (c) the case cannot proceed without the participation of the victim.”<sup>2</sup> This differs from Madden Dempsey’s position, which is far more tentative on this point; although she admits that enforcement *may* in very narrow circumstance be warranted, she argues strongly, and I think correctly, that coercive measures against victims can be “self-defeating” – she states: “...the use of enforcement measures directed against domestic-violence victims itself has a strong tendency to sustain and perpetuate patriarchy” (p. 209), since the exercise of power inherent within such measures mirrors the problematic exercise of patriarchal power that occurs within an incident of domestic violence.

Questions remain though as to certain key aspects of Madden Dempsey’s central argument that when a victim withdraws support for prosecution of the domestic violence they have suffered, only certain kinds of domestic violence cases should be considered for continued prosecutorial action. This paper will focus on two of these key aspects that have left me troubled, before concluding with some final thoughts as to the proper parameters of feminist prosecutorial decision-making. The two key questions I will explore here are: what is meant by patriarchy - and whether or not patriarchy can explain the central wrong of domestic violence; and what gets to count as domestic violence.

### **Patriarchy and the law**

Madden Dempsey carefully sets out – in diagrammatic as well as textual form – her explanatory model of what constitutes domestic violence. For Madden Dempsey, only unjustified physical violence that happens in the domestic sphere, and tends to sustain patriarchy, counts as domestic violence in its strong sense. Only domestic violence in its strong sense can be considered by prosecutors for criminal prosecution even where the victim withdraws her support for the prosecution. Domestic violence in its weak sense is defined as unjustified violence in the domestic context, which does not tend to sustain patriarchy. If victims withdraw their support for the prosecution of this kind of violence, prosecutors should not pursue the action. Therefore in answering Madden Dempsey’s motivating question (“What should domestic violence prosecutors do

---

<sup>2</sup> See [http://www.cps.gov.uk/legal/d\\_to\\_g/domestic\\_violence\\_aide-memoire/#a25](http://www.cps.gov.uk/legal/d_to_g/domestic_violence_aide-memoire/#a25)

if a victim withdraws support for prosecution?") we need to know whether or not we are talking about domestic violence in its strong or in its weak sense.

In order for domestic violence to be pursuable without victim support, it needs to involve (unjustified) violence, in a domestic context, and support patriarchy. The requirement that domestic violence (either of the strong or weak sort) entails physical violence will be discussed below and here I note only briefly the (by and large) uncontroversial explanation of domestic violence that takes place within the home environment and is inflicted within a family context (p. 109-112). What is more challenging is the requirement that for consideration for pursuit without support the violence has to support patriarchy. There are two issues that need to be addressed here: one, is it convincing that only acts that tend to sustain patriarchy can amount to domestic violence in its strong sense; and two, even if that is so, how can a prosecutor tell which acts perpetuate patriarchy and which do not?

*Is patriarchy an essential element of domestic violence?*

Patriarchy for Madden Dempsey is a 'wrongful structural inequality' (p. 112). In chapter seven she attempts to flesh out her concept of patriarchy, since it is a crucial element in understanding what counts as domestic violence. Therein she describes three different kinds, or levels, of patriarchy; sex discrimination, sexism and misogyny. This is an incredibly helpful elucidation of the various ways in which individuals can act either against or indifferently towards the interests of women or in furtherance of a misconceptualisation of their actual interests. However, Madden Dempsey also claims that "one's actions may possess a patriarchal or non-patriarchal (i.e. feminist) character" (p. 137). At first blush this seems overly dichotomous. Are there no actions that can be said to fall somewhere between these two poles? However her explanation (p. 143) of patriarchy as sexism - i.e., a "failure to provide women with what we need to live valuable lives" in spite of the recognition of what it means to be a woman and what interests and needs that being a woman entails, suggests that even those who are essentially indifferent to the lives and interests of women can be said to be patriarchal. In essence this means that only those acting in recognition and furtherance of women's interests can be said to be non-patriarchal - i.e., feminist. And yet there is some residual unease for this author with the notion that one is either "for us or against us". The notion that one is either patriarchal or feminist smacks of a kind of totalizing political and philosophical stance that does not account for complexity or nuance in motivation, action and outcome. This connects to a more fundamental question about the notion of patriarchy per se.

Madden Dempsey is attentive to feminist anti-essentialist critiques that point to a tendency of some feminists to use patriarchy as an analytical tool separate from but analogous to other theories of structural inequality based on, for example, race or class. Treating patriarchy in this way can universalize the needs of women, and "privilege the attributed, needs and interests of white, straight, able-bodied, upper class women" (p. 130). As such, theories of intersectionality (and indeed post-intersectionality) can prove useful in addressing the complex

realities of people's lived identities (p. 132-5).<sup>3</sup> But she rejects postmodern critiques, which she summarises (quoting MacKinnon) as "the view that there is no such thing as "women" because there are always other aspects to women's identities and bases other than sex for their oppressions" (p. 131). However relying on one quote from MacKinnon, whose theoretical framework is grounded in radical feminism, and who is evidently opposed to the methodological approach and conclusions of postmodernism, does not seem to be a particularly fair (or even accurate) account of feminist postmodernism(s), which are much more nuanced than MacKinnon's caricature suggests (for an overview see Gamble (ed) 2001). Madden Dempsey's argument here about the incompatibilities of postmodernism and her own approach would certainly have been strengthened through engagement with the arguments of postmodern feminists themselves, and certainly by taking into consideration potentially illuminating postmodern insights, particularly as they relate to allowing space for the voices of 'victims' of domestic violence: "A key point is that postmodernism suggests it is more liberating to empower 'victims' (an imposed category?) of 'violence' (an imposed category?) to reconstitute the meaning of violence they experience than to impose on them a critical interpretation (e.g. 'knowledge', 'truth', 'social policy') of this violence" (Schwartz and Friedrichs 1994, p. 231).

Madden Dempsey also states that all feminisms share a desire to end patriarchy. But would all feminisms even agree that patriarchy exists or is a useful concept? Here it may have been beneficial to engage with the work of, for example, Carol Smart, who has argued (1989) that patriarchy can never work in the totalizing way that many radical feminists such as MacKinnon theorise because it simply is not all-powerful; rather, exercises of power that attempt to support and sustain patriarchy are sometimes successful but sometimes are not – and likewise non-patriarchal actions can have unanticipated consequences that can support patriarchy. Although Madden Dempsey does not claim that patriarchy works against all women all of the time, the very notion of patriarchy invokes a broad, universalizing conception of gendered power relations that juxtaposes feminism as an expression of women's interests against patriarchy as an expression and valorization of men's interests. As such Madden Dempsey's account is in danger of being read as overly deterministic or universalizing, or worse – as reinscribing the behaviours and relationships she wishes us to challenge: "To talk about capitalist economic systems or patriarchal relations means that certain gender identities, roles, languages, ideologies, ways of knowing and types of knowledge are reinforced, welcomed and otherwise *more likely to occur* (Snider 1998, p. 4, emphasis in original). If as Carol Smart argues, it is possible to trace a "conflict and confluence of different mechanisms of power" (1989, p. 26) then it is difficult to understand Madden Dempsey's three manifestations of patriarchy as having descriptively captured the ways in which power typically plays out in uneven ways.

So do we need patriarchy (as defined by Madden Dempsey or otherwise) to understand domestic violence? If we take it out of the equation, do we lose an

---

<sup>3</sup> For a more critical engagement with intersectionality see Gunnarsson (2011); Conaghan (2009).

important distinction between men's and women's violence? Would we lose more than we gain – that is, would we lose an understanding of domestic violence as grounded in existing societal gender power imbalances? Do we need to see the violence in that way for it to be categorized as domestic violence? Dutton (1994) argues that patriarchy by itself cannot explain violence, and that the relationship between behaviour, psychology and patriarchy is complex; some men may tend towards patriarchal views in order to justify their own “pathological” violent behaviour. What Dutton, amongst others, highlights is a more complex understanding of patriarchy that avoids collapsing it into heterosexual masculinity. Although Madden Dempsey does not explicitly conflate the two, she unequivocally excludes same-sex couple violence from her account because, she says, it is not (straightforwardly) explained by patriarchy and patriarchy is central to her account of what constitutes domestic violence. So it is difficult to see how the concept of patriarchy in her account is not one that reverts to a now much critiqued, over deterministic, radical feminist model of heterosexual masculinity.

Avoiding the question of same-sex couple violence also does not help prosecutors in deciding which kinds of same-sex couple violence should be prosecuted despite lack of victim support. While the book focuses on the ‘paradigm’ case of domestic violence – heterosexual couple violence – this becomes a circular exclusion – she does not consider same sex domestic violence because it does not implicate patriarchy in the same way that male on female domestic violence does, and patriarchy only explains heterosexual domestic violence. In other words, the fact that she requires a tendency to perpetuate patriarchy for the violence to constitute domestic violence, means that some acts which constitute domestic violence do not figure in her account. This is somewhat unfortunate, both because a consideration of violence in a non-heterosexual setting may lead Madden Dempsey to a more fine-grained understanding of the concept of patriarchy - and one that might include same sex domestic violence (National Resource Centre on Domestic Violence 2007: 1; cf Ristock 2005; Whiting 2007) - but also because it would take seriously the problem of same-sex domestic violence in guiding prosecutorial decision making as to whether or not to pursue such cases where victim support for the prosecution has been withdrawn.<sup>4</sup> It may also have helped to tease out common reasons for prosecution across difference kinds of cases, in turn enabling us to perceive a broader range of ways in which prosecutors can act as feminists, even in cases that do not involve heterosexual male violence.

### *When is violence patriarchal?*

How can we tell whether or not a particular act of violence committed against a woman by her male partner is an act that tends to sustain patriarchy? Is this a matter of the severity of the violence? That cannot be so, as Madden Dempsey also acknowledges that non-violent acts can perpetuate patriarchy. Can we tell that an act of violence perpetuates patriarchy by examining the intention of the

---

<sup>4</sup> For a recent UK comparison of experiences of same sex domestic violence with heterosexual domestic violence see Donovan et al (2006).

perpetrator? That also cannot be the case, as I feel sure that Madden Dempsey does not believe that all actions that support patriarchy do so consciously – indeed, as discussed above, actions that are indifferent to the interests of women are included within her definition of patriarchy. It is not obvious, then, from Madden Dempsey’s account, how domestic violence prosecutors (even those who are the most feminist) are to correctly recognize and categorise those actions that tend to support patriarchy. It is not clear what the “paradigm” case is here, or even the range of cases that would fall in to this category. Madden Dempsey does give two examples of the kinds of violent acts that she perceives to be unjustified but non-patriarchal: “Examples include the actions of a woman who slaps her partner on the cheek to convey offence and the actions of a victim of domestic violence in its strong sense who engages in unjustified violent retaliation against his or her abuser.” (p. 115)

However this does not appear to help us much, as it does nothing to illuminate the essential core of the category of patriarchal violence. In the first example, it is unclear whether the act is non-patriarchal because it involves a very minor level of violence (though presumably not, since, as discussed above, patriarchy can be sustained through non-violent acts); or because the slap is motivated by offence rather than by for example, hate, anger or jealousy; or the fact that it is carried out by a woman against a man. The second example is no clearer. It refers to retaliation against “his or her” abuser, implicitly acknowledging (since we are not discussing same sex couple violence) that women can subject men to domestic violence. But women’s violence against men is not the subject of this book. Therefore, we can assume that the focus here is on the cases of women’s unjustified retaliatory actions against male abusers. But if these women’s actions are non-patriarchal, does this in turn imply that no violence carried out by women against men can ever constitute domestic violence in its strong sense? Can women perpetrate domestic violence, as Madden Dempsey defines it? She does not explicitly answer this question. The proposition that women cannot perpetrate domestic violence is intuitively correct only if we are willing to accept that women’s violence can never perpetuate patriarchy – an argument that is far from incontrovertible and certainly requires support. Could it be that, as Tadros (2005) contends, it is its systematic nature that characterizes domestic violence and therefore isolated incidents (such as a slap indicating offence, or a victim of domestic violence striking back in vengeance rather than self defence) do not constitute what Madden Dempsey would call domestic violence in its strong sense? But it is not self-evident that that individual acts or several isolated acts over a long period of time can never support patriarchy. In any case, even if we accept that patriarchal violence is systematic rather than sporadic, since Madden Dempsey excludes same-sex violence under her definition of patriarchy, it is an untenable suggestion that all systematic violence is patriarchal (cf National Resource Centre on Domestic Violence 2007, p. 1). So we still are left with questions about what is it that makes violence patriarchal.

The connected question arising here is whether or not cases of unjustified violence inflicted by men upon women can ever count as domestic violence in its weak sense. In other words, is unjustified violence by a man against a woman always patriarchal and therefore always domestic violence in its strong sense?

Madden Dempsey's thesis does not offer a clear answer to this question. If the answer were yes, my sense is that this would indicate an analysis of domestic violence that is overly structuralist and totalizing, and does not sufficiently account for individual levels of responsibility and motivation. If the answer were no, how do we distinguish between men's actions that are patriarchal and those that are not, particularly since, as noted previously, some acts can support patriarchy even if the actor is not consciously attempting to do so. In short, it is extremely difficult to differentiate between those unjustified acts of violence in a domestic context that perpetuate patriarchy and those that do not, which in turn makes it an arduous task in practice, for us or for prosecutors, to answer Madden Dempsey's motivating question.

I move now to explore a second central feature of Madden Dempsey's account that raises potential concerns: the question of what constitutes domestic violence.

### **What counts as domestic violence? Physical harm versus domestic abuse**

Madden Dempsey argues for a 'non-legitimized, narrow account of violence'. In doing so she steers us away from existing accounts of domestic violence as structuralist (i.e., caused by states of affairs such as poverty, unemployment etc), and towards the physical act of violence itself (p. 108-9). Physical violence does not encompass threats of violence, only "direct physical use of force" (p. 108).

In this section of the book Madden Dempsey robustly refutes some of the claims made by Conflict Tactic Scale (CTS) researchers who suggest that interpersonal violence is more likely to be symmetrical than asymmetrical – i.e., that women beat men just as often as men beat women. This conceptualization of violence as family based, gender-neutral and mutually reinforcing excises the key factor that for Madden Dempsey characterizes domestic violence: patriarchy. Where this CTS understanding of domestic violence is operationalized by police officers, this results in dual arrests and women being prosecuted alongside their partners. Building upon sociologist Michael Johnson's empirical work, Madden Dempsey's account of domestic violence precludes the prosecution of women who assault their partners in self-defence, and therefore, in contrast to CTS researchers, relies upon a normative distinction between justified and unjustified violence.

While she is at pains to stress that physical violence need not result in bruises or other injury for it to constitute domestic violence, Madden Dempsey does not include threats of violence, or other kinds of verbal abuse, or other forms of controlling behaviour that can often characterize an abusive domestic relationship. Indeed there is a key distinction for Madden Dempsey between violence and abuse. Her account of the kinds of acts that constitute domestic violence is narrow, such that actions that tend to sustain patriarchy but do not involve physical violence are described as 'domestic abuse', and, according to her argument, abuse cases of this sort should not be pursued by domestic violence prosecutors if victim support for the prosecution is withdrawn.

What is lost and gained by excluding abuse cases from her list of cases where prosecutorial action must continue without victim support? What is gained by the narrow account of domestic violence is a clear delineation of a discrete type of case – arguably the most serious kind of domestic violence case – that prosecutors should (for reasons that are both consequentially and intrinsically important) consider pursuing without victim support. These cases will presumably also be easier to prove than abuse cases, since in contrast to physical violence, there is often no tangible evidence of controlling behaviour, or where there is, it might be explained as a chosen “traditional” approach to relationships rather than problematic behaviour and abuse.<sup>5</sup> But what is lost is the possibility of pursuing cases where women are too fearful to continue - not because of actual physical violence but because of oppressive behaviours that “punish” the women in other ways, behaviours such as threats of violence or restriction of economic support, constraints on movement or contact with friends and family and so forth. Should these cases not also be pursued?

Madden Dempsey does recount the arguments of other feminists who understand domestic violence to be the product of patriarchy (p. 123), acknowledging their claim that domestic “abuse” that does not involve direct physical violence can often be more of a problem than violent behaviour (though the patriarchy accounts she refers to also distinguish between domestic violence and domestic abuse). Perhaps then prosecutorial pursuit is foreclosed because these abuse and control cases are exactly the kinds of cases where pursuit could expose the victim to further danger of retribution – either by way of further control and domination, or the escalation of threats, etc., into actual physical violence. But Madden Dempsey recognizes that risk of retribution also within cases where physical violence has already occurred, and indeed values the choice of prosecutorial non-pursuit in such cases, for the sake of the victim’s future safety. In short then it is not clear to me why abuse cases are automatically ruled out for prosecution without victim support.

In contrast, Victor Tadros (2005) grounds his argument for a nominate offence of “domestic abuse” on the claim that domestic abuse is morally distinctive from other assaults for two reasons: because it is systematic, and because it therefore restricts the freedom of the victim in particularly troubling ways. Although he does not explicitly address the question of whether actual physical violence is necessary before the act can be labelled domestic violence, and notwithstanding the fact that he contrasts domestic abuse with “other violence”, I take him to include both violent and non-violent sorts of domestic violence. I assume this is so because he clearly chooses to use the term abuse rather than violence; and because physical violence is not one of his two features of domestic abuse that marks out domestic abuse as distinct from other acts. I therefore assume that in his account he includes both violent and non-violent acts within domestic abuse.

In comparing it with other violent offences, Tadros focuses on the repetitive nature of domestic abuse; while he acknowledges that one-off assaults can be very serious, a nominate offence should capture the essence of the wrong, which

---

<sup>5</sup> See for example the controversial website Taken in Hand: <http://www.takeninhand.com/>

is that the abuse takes place in a context of intimacy, proximity, and repeat instances of intimidation, control and/or physical harm. Domestic abuse is wrong because “[it] can result in the victim not only having a limited range of options, but also having her options subject to the unwarranted and arbitrary control of another person... the abuser has the kind of power over the victim’s options that he ought not to have and deprives the victim of the kind of perpetual and evaluative control over her options that is required for true freedom” (2005, p. 998; see also Stark 2007). Leaving aside the question of which of us, if any, has true freedom, the point is that Tadros’s convincing account (which does not rely on patriarchy to explain the moral wrongness of domestic abuse), does not ground the moral wrong of domestic abuse in a distinction between behaviour that does entail physical violence and behaviour that does not. He also emphasises that controlling behaviour (whether or not it involves violence) is especially insidious as victims tend to overestimate the amount of control their partner in fact has over their lives, leading the victims themselves to police their own behaviour, and to self-blame for their partner’s actions.<sup>6</sup> It is this systematic loss of capacity of victims to properly evaluate the extent of their own freedom and autonomy (alongside the “demolition” (2005, p. 1001) of the kind of trust and intimacy that usually characterizes relationships between partners, siblings, etc.) that for Tadros marks out domestic abuse as distinctive.

It seems right to suggest, as Tadros does, that whether or not there is violence involved, a distinctive aspect of domestic abuse is the expression of power (real or perceived) over the victim’s life. Madden Dempsey herself links power and patriarchy in her explanation of why a tendency to perpetuate patriarchy is a crucial aspect of domestic violence (p. 113). This power can be exercised whether or not physical harm is inflicted. So on what basis does Madden Dempsey exclude non-violent offences?

Presumably Madden Dempsey could not object to the inclusion of non-violent abuse cases for consideration for pursuit in absence of victim support on the basis that, absent violence, abuse cases do not tend to perpetuate patriarchy; she explicitly accepts that abuse cases can and do perpetuate patriarchy. Perhaps the problem then is how to tell the difference between abuse cases that perpetuate patriarchy and those that do not; however, it is just as difficult for a prosecutor to distinguish a violent act that perpetuates patriarchy from one that does not (unless the claim is being made, and it is not clear whether or not this is the case, that all violence always perpetuates patriarchy). Thus, while she emphasises the importance of disaggregating domestic violence in its strong sense from domestic violence in its weak sense (p. 178 et seq), she does not offer a clear and convincing explanation for the exclusion of abuse from domestic violence in its strong sense.

---

<sup>6</sup> That is not to ignore the very real and serious threats that are posed by aggressors, and women often know exactly the extent of the harm threatened to them even when agencies such as the police underestimate or downplay such harm. Women are at disproportionate risk of death from a current or ex partner. Povey (2009) reports figures from 2007/8 indicating that only 6% of male victims of homicide were killed by a current or ex partner/lover, compared to 35% of female victims.

Madden Dempsey's narrow understanding of how domestic violence is constituted also faces another challenge when we consider what else her definition neglects – what Nicola Lacey in the context of rape has called “the affective dimension” (1998, p. 115). In dominating the will and undermining the confidence of a victim, and rendering her fearful, the aggressor inflicts what is often in criminal law parlance named “psychiatric injury”. Indeed, English law has accepted that psychological harm can be serious enough to amount to actual or grievous bodily harm. Madden Dempsey might thus be interpreted as privileging harm to the body over harm to the mind, a mistake that has often been made by legislators and others in relation to rape, both in terms of its separation of body/mind, and in its underestimation of the seriousness of psychological harm (Cowan 2007). The kinds of psychological harm of domestic violence that Tadros outlines, which undermine agency and freedom, are serious, systematic and often involve long term effects. When we also remember Tadros's claim that such women may misjudge the totality of their partner's domination over them, the victims of domestic abuse who suffer these harms may in fact be those very women whose cases ought to be pursued even where they withdraw their support for participation; at the very least their cases ought not be ruled out at the first instance for prosecutorial pursuit without support.

Madden Dempsey measures the desirability of pursuit by means of the values – both consequential and intrinsic – that prosecutorial action can realize (Chapter 4). These values can be appropriately realised in non-violent domestic abuse cases, as well as those that involve violence. In consequential terms, the pursuit of domestic abuse claims might give women a more realistic sense of the extent of their partner's control over them, and enable them to exercise more control over their own lives; it might also give them confidence in the criminal justice system and empower them to seek help in case of future difficulties. Moreover, there also seems to be intrinsic value in aiming at the protection of these women, through the prosecution of their partners, for the following reasons: as an attempt to secure justice for them; for the expressive value of signalling how seriously their cases will be taken; and for its constitutive value, in that prosecutors represent collective responsibility for this wrongful, systematic attempt to dominate the victim and diminish their freedom.<sup>7</sup>

It is not clear then, what work, if any, Madden Dempsey's distinction between domestic violence and domestic abuse should do, except perhaps simply labelling behaviour as either directly violent or not. To my mind it is wrong-footed to argue that only those cases involving physical violence be considered for pursuit against the victim's wishes, but those involving mere abuse are not open to the same consideration. Assuming that threats of violence count as domestic abuse, these could form the basis of a successful prosecution, at least in the UK; the agreed cross government definition of domestic violence in England and Wales currently is:

“any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have

---

<sup>7</sup> I have omitted the fourth of Madden Dempsey's intrinsic values – retributive value – because she later dismisses it as a value that can justify prosecutorial pursuit action.

been intimate partners or family members, regardless of gender or sexuality", and according to CPS guidelines, this is the definition used by the police to refer domestic violence cases to the CPS for charging and prosecution." (2004)<sup>8</sup>

Cases that involve threats and abuse less than physical violence deserve consideration for pursuit, even where the victim has withdrawn her support for the prosecution.

### **Final thoughts – the relational value of prosecutor’s decision making**

One final worry is that in her focus on the actions and values of prosecutors, Madden Dempsey over-individualizes one aspect of a range of criminal justice responses to domestic violence. As an ex-prosecutor Madden Dempsey brings knowledge, practical experience and expertise to her project of answering her motivating question and focuses on the actions and decisions of individual prosecutors faced by a victim who wants to withdraw participation, addressing in particular why non-pursuit might be the best way of protecting a victim’s physical safety. But this focus on individual decision making does not speak to the fact that prosecutors’ decision-making is embedded within: a complex network of criminal justice agencies who have different aims, methods and indicators of success; a system of often fraught and resource obsessed political jockeying; and a local and national system of prosecution which may be lacking in institutional will or resources for training in issues such as domestic violence.

Much feminist attention has been paid to the interconnectivity and contradictions of different criminal justice agencies and other agencies who are not necessarily singing from same hymn-sheet, as well as the panoply of interventions and efforts, outwith the criminal justice system, to change cultures and practices around domestic violence, including preventing domestic violence and rehabilitating perpetrators, and increasing public confidence in the criminal justice agencies (see for example: Snider 1998; Epstein 1999; Coker 2001; Lewis 2004; Hester and Westmarland 2005). Thus, while “decisions by prosecutors and the approach of particular courts may be important aspects in reducing attrition through the courts” Hester and Westmarland found in their review of the available UK data that as well as the pursuit of civil remedies alongside or in place of criminal justice remedies,

“other studies have also indicated that withdrawal may be lower where victims are supported in their engagement with the criminal justice system; that attrition may be lower where specialist domestic violence courts are in operation; and where prosecutors and judges or magistrates have domestic violence training” (2005, p. 56).<sup>9</sup>

---

<sup>8</sup> The Westminster government is currently conducting a consultation, due to report in March 2013, on whether or not the definition of domestic violence should be widened to include, amongst other things, ‘coercive control’. See <http://www.homeoffice.gov.uk/publications/about-us/consultations/definition-domestic-violence/>

<sup>9</sup> References omitted.

The 2009 CPS guidance in England and Wales explicitly recognizes the value of multi-level intervention rather than a sole focus on the criminal justice system: “We can and should guide the court in relation to ancillary orders available (such as anti-social behaviour orders, exclusion orders or restraining orders) and draw attention to relevant cases. Applications for compensation should be made, where appropriate, bearing in mind that where the parties remain together such orders will probably be met from family money.”<sup>10</sup> Likewise, their 2009 policy for prosecuting domestic violence highlights the importance of prosecutors working alongside others inside and outside of the criminal justice system: “Prosecutors should also be fully aware of the importance of working with the police, WCU and any specialist support organisations to prioritise the safety of domestic violence victims. The impact and dynamics of domestic violence make this a critical consideration” (paragraph 11.1).<sup>11</sup>

Madden Dempsey makes the extremely valuable point that non-pursuit of domestic violence claims can be as appropriate and justified as pursuit, particularly where participation in criminal justice action can further endanger the victim’s safety by way of retribution from the offender (see generally chapter 8; p. 203-4).<sup>12</sup> Likewise, the 2009 CPS guidance for prosecutions in England and Wales requires prosecutors to take into account the impact on the victim’s life and that of any children if the case is continued (paragraph 1.11; see also section 12). What is not further explored in the book – primarily because Madden Dempsey’s focus is the prosecution of domestic violence – is the issue of what the consequences might be of non-pursuit. In other words, what duties or obligations do prosecutors have with respect to cases that are not pursued? This might seem like a strange question – once the case is dropped, surely a prosecutor has no further role to play. But I wonder whether such a response is too quick, since a central point of the book is to urge those prosecuting domestic violence to be feminist in their approach. No feminist would suggest that “dropped” domestic violence cases ought to be ignored. But what should a feminist *prosecutor* do about cases that have been dropped, when even the pursuit of domestic violence cases may in itself be insufficient to address domestic violence? Without wishing to expand the role of prosecutor “unnaturally”, it might be worth considering not only the question of whether or not to prosecute the case, but also what the evidence tells us about non-criminal justice based effective interventions into domestic violence. For example, research in both the US and the UK seems to suggest that a more integrated response to domestic violence, within which arrest and prosecution are used alongside advocacy for victims and anti-violence programmes for abusers, has had more long term positive impacts (Coker 2001, p. 816; Lewis 2004). Lewis found, in her Scottish study, that prosecution and conviction were effective tools for change when followed by targeted rehabilitation programmes (largely grounded within a cognitive-behavioural framework) rather than a prison sentence, although, as she acknowledged, a more nuanced approach is required to identify which aspects of programmes and processes are effective.

---

<sup>10</sup> Available at: [http://www.cps.gov.uk/legal/d to g/domestic violence aide-memoire/](http://www.cps.gov.uk/legal/d%20to%20g/domestic%20violence%20aide-memoire/)

<sup>11</sup> Available at: <http://www.cps.gov.uk/publications/prosecution/domestic/index.html>

<sup>12</sup> According to Lees (2000), women are at greatest risk of homicide at the point of or after separation.

This body of research suggests that prosecution of domestic violence by itself does not necessarily stop violent men from being violent, and in fact as Madden Dempsey acknowledges, can often increase violence. Therefore, solely relying on prosecution and criminal punishment does not adequately address the question of how to address or prevent violence, or how best to support a woman's choice to leave a violent relationship, particularly if, as Snider (1998, p. 3) claims, criminalization strategies tend to disproportionately benefit "privileged white women at the expense of women of colour, aboriginal and immigrant women". Madden Dempsey recognizes, in her conclusion, that non-criminal responses to domestic violence can undermine patriarchy, although she seems cautious in her endorsement, since she believes that only when a community rather than the victim themselves calls the offender to account can patriarchy truly be condemned (p. 212). A more relational account of how the decisions of feminist prosecutors, as to whether or not to pursue domestic violence cases, are bound up with other factors such as the availability of and consequences of alternative interventions, both within and outwith the criminal justice system, and the role that feminist prosecutors might play in this more holistic approach, would give Madden Dempsey the opportunity to demonstrate the depth of her experience and understanding of the complexity of the question "what should we do about domestic violence?" – but since this is a much broader inquiry than her motivating question, it is beyond the scope of Madden Dempsey's thesis.

## **Conclusion**

Madden Dempsey's compelling book boldly ventures into the relatively uncharted water of normative analysis of prosecutorial practice, engaging along the way with many of the on-going feminist (and other) debates around how best to address the problem of domestic violence, and offering both practical expertise and thoughtful theoretical arguments to ground her recommendations for improving the ways in which prosecutors deal with domestic violence cases that lack victim support. She nimbly counters some of the more problematic conclusions reached by CTS researchers, and sets out a nuanced account of what constitutes domestic violence for the purposes of prosecutorial pursuit without victim support. However, that the book encompasses both practical experience and theoretical principles is, in a sense, both its strength and weakness. Madden Dempsey's passion for the subject and her attention to the thorny detail of practice is clearly borne of the daily challenges posed by her decision-making duties during her time as a prosecutor. However some readers may be left frustrated by several theoretical commitments that lack flesh; for example her argument that prosecutors should habituate a "disaggregated response" (p. 178-183) to victim withdrawal (i.e., differentiating between domestic violence in its strong sense, and domestic violence in its weak sense), needs a more convincing exposition of the precise reasons for distinguishing between the two. Likewise, notwithstanding the promise of practical experience to guide us, we are left wanting answers to the questions raised here, such as how exactly prosecutors are to tell the difference between those actions that perpetuate patriarchy and those that do not. However, Madden Dempsey's book is both innovative and absorbing and will

prompt many to take more seriously the question of how to prosecute domestic violence, in order to promote a more just outcome for victims and a more feminist state.

## References

Coker, D. (2001). Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review. *Buffalo Criminal Law Review*, 4, 810-860.

Conaghan, J. (2009). Intersectionality and the feminist project in law. In E. Grabham, D. Cooper, J. Krishnadas, and D. Herman (Eds.), *Intersectionality and Beyond: law, power and the politics of location* (pp. 21-48). Oxford: Glasshouse Press.

Cowan, S. (2007). Choosing Freely: theoretically reframing the concept of consent. In R. Hunter and S. Cowan (Eds.), *Choice and Consent: feminist engagements with law and subjectivity* (pp. 91-105). London: Routledge Cavendish.

Crown Prosecution Service (2009). *Legal Guidance on Prosecuting Domestic Violence*. London: CPS. Retrieved November 27, 2012, from Crown Prosecution Web site:

[http://www.cps.gov.uk/legal/d\\_to\\_g/domestic\\_violence\\_aide-memoire/](http://www.cps.gov.uk/legal/d_to_g/domestic_violence_aide-memoire/)

Crown Prosecution Service (2009). *Policy for Prosecuting Domestic Violence Cases*. London, CPS. Retrieved November 27, 2012, from Crown Prosecution Web site: <http://www.cps.gov.uk/publications/prosecution/domestic/domv.html>

Donovan, C., Hester, M., Holmes, J., and McCarry, M. (2007). Comparing Domestic Abuse in Same Sex and Heterosexual Relationships. Initial report from a study funded by the Economic & Social Research Council, Award No. RES-000-23-0650. Retrieved November 27, 2012, from Bristol University Web site: <http://www.bristol.ac.uk/sps/research/projects/completed/2006/rc1307/>

Dutton, D. (1994). Patriarchy and wife assault: the ecological fallacy. *Violence and Victims*, 9(2), 167-82.

Ellison, L. (2002). Prosecuting domestic violence without victim participation. *Modern Law Review*, 65, 834-858

Epstein, D. (1999). Effective Intervention in Domestic Violence Cases: rethinking the roles of prosecutors, judges, and the court system. *Yale Journal of Law & Feminism*, 11, 3-50.

Gamble, S. (2001). *The Routledge Companion to Feminism and Postfeminism*. London: Routledge.

Gunnerson, L. (2011). A defence of the category "women". *Feminist Theory*, 12(1), 23-27.

Hester, M. and Westmarland, N. (2005). *Tackling domestic violence: effective interventions and approaches*. Home Office Research Study 290. London: Home Office.

Lacey, N. (1998). *Unspeakable Subjects: Feminist Essays in Legal And Social Theory*. Oxford: Hart Publishing.

Lees, S. (2000). Marital rape and marital murder'. In J. Hanmer and N. Itzin (Eds.), *Home Truths about Domestic Violence: Feminist Influences on Policy and Practice: a reader* (pp. 57-74). London, Routledge.

Lewis, R. (2004). Making Justice Work: effective legal interventions for domestic violence. *British Journal of Criminology*, 44(2), 204-224.

National Resource Centre on Domestic Violence. (2007). *Lesbian, Gay, Bisexual and Trans (LGBT) Communities and Domestic Violence: information and resources: the intersection of sexism and homophobia*. Pennsylvania: NRC DV. Retrieved November 27, 2012, from National Resource Centre on Domestic Violence Web site: [new.vawnet.org/Assoc\\_files\\_VAWnet/NRC\\_LGBTDV-Full.pdf](http://new.vawnet.org/Assoc_files_VAWnet/NRC_LGBTDV-Full.pdf)

Povey, D., Coleman, K., Kaiza, P. and Roe, S. (2007/8). *Home Office Statistical Bulletin: homicides, firearm offences and intimate violence 2007/08*. Supplementary Volume 2 to Crime in England and Wales 2007/08. London, Home Office 2009.

Ristock, J., (2005). Relationship Violence in LGBTQ Communities: moving beyond a gender-based framework. Violence Against Women Online Resources. Retrieved November 27, 2012, from the Minnesota Centre Against Violence and Abuse Web site: [www.mincava.umn.edu/documents/lgbtqviolence/lgbtqviolence.pdf](http://www.mincava.umn.edu/documents/lgbtqviolence/lgbtqviolence.pdf)

Schwartz, M. and Friedrichs, D. (1994). Postmodern thought and Criminological Discontent: new metaphors for understanding violence. *Criminology* 32(2), 221-246.

Smart, C. (1989). *Feminism and the Power of Law*. London: Routledge.

Snider, L. (1998). Towards Safer Societies: punishment, masculinities and violence against women. *British Journal of Criminology*, 38(1), 1-39.

Stark, E. (2007). *Coercive Control: how men entrap women in personal life*. New York: Oxford University Press.

Tadros, V. (2005). The Distinctiveness of Domestic Abuse: A Freedom Based Account. *Louisiana Law Review*, 65, 989-1014.

Whiting, N. (2007). A Contradiction in Terms?: a gendered analysis and same-sex domestic abuse. Edinburgh: Scottish Women's Aid. Retrieved November 27,

2012, from Scottish Women's Aid Web site:  
<http://www.scottishwomensaid.org.uk/publications/practitioners-briefings/gender-theory-and-violence-in-same-sex-relationships>