

# Beyond the Victim-offender Binary: Legal and Anti-violence Intervention Considerations With Women Who Have Used Force in the U.S. and Australia

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## Abstract

In the United States (U.S.) and Australian contexts, the fight to achieve legal and societal recognition of cisgender men's violence against cisgender women operated according to an incident-based victim-offender binary. Those held accountable for the violence were seen as offenders, those who survived the violence were seen as victims. This binary persists across police, court, corrections, intervention, and child protection settings. However, work with cisgender heterosexual women with offenses of abuse and violence demonstrates that the binary does not capture their complex experiences. Instead, they have "offended" in the context of often surviving long-term harm in their families of origin and from their intimate partners. Because their experiences do not align with the binary, they are caught in ineffective and retraumatizing responses. The authors use an intersectional theoretical framework to explore how heterosexual cisgender women's use of force complicates the victim-offender binary. By understanding women who have used force as having both survived and caused harm, rather than "victims" or "offenders," the authors call attention to the limitations of, and harm caused by, binary approaches. The authors also call for a reconceptualization beyond the binary—challenging established legal and intervention frameworks. To demonstrate the need for this reconceptualization, the authors report on U.S. and Australian legal cases, intervention approaches, and discuss socio-legal systems implications.

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**Introduction**

In the United States (U.S.) and Australia, the fight to achieve legal and societal recognition of men's violence against women operated according to an incident-based victim-offender binary. Those held legally accountable for the violence were seen only as offenders, while those who had survived the violence were seen only as victims.<sup>1</sup> The victim-offender binary pre-dates efforts to achieve legal and societal recognition of men's violence against women. But as a conceptual tool used as part of that struggle for recognition, the binary became inscribed in funding schemes, legal remedies, and intervention approaches.

Anti-domestic violence advocate and scholar Kim (2015) refers to this gradual alliance between feminist activists and those in the legal system as the "carceral creep," a "dance" that involved the subordination of battered women's movement activists to the Criminal Legal System (CLS)<sup>2</sup> focused on a "law and order regime." Kim's (2015) critique asserts that feminist activists initially believed that an alliance with the CLS would keep women safer and that activists would be able to maintain control over CLS responses. Instead, this reliance gave rise to carceral feminism (Bernstein, 2010), understood as feminists' over reliance on the CLS as a primary anti-violence intervention strategy. Eventually, activists became subordinate partners in the relationship, placing survivors — particularly Black women, Indigenous women, and women of color<sup>3</sup> — at risk of systems abuse. This subordination was predicted by feminists who warned against reliance on the legal system, as they were familiar with the abuse of power often wielded by law enforcement officers in communities of color (Miller, 1989; Richie, 2000).

Despite nearly two decades of contextual research in this area,<sup>4</sup> the binary persists in a range of legal and intervention settings. Anti-violence intervention with heterosexual women charged with abuse and violence demonstrates that the binary does not capture the complex relationship experiences of a large group of these women. Instead, these women have typically "offended" in the context of surviving long-term experiences of violence from their intimate partners. Feminist researchers have long established that when motivation, intent, and impact are taken into consideration; women are much more likely to be physically harmed by their intimate male partners; coercive control is typically held by men in heterosexual relationships; and behaviors such as sexual assault, strangulation, stalking, and homicide are "marked" as specific to men's violence against women (Anderson, 2009; Dasgupta, 2002; Dragiewicz & DeKeseredy, 2012; Dobash et al., 1992; Ferraro, 2006; Miller, 2005; Stark, 2007; Sweet, 2019).

While some women do use violence or coercive control, women's domestic and sexual violence survivorship histories are also often "a cause and consequence of inequality" (Armstrong et al., 2018, p. 100). Because their experiences do not align with the binary, these women are caught in ineffective and retraumatizing legal and intervention responses. In this conceptual article, the authors apply an intersectional theoretical framework to explore how cisgender, heterosexual women's use of force complicates the victim-offender binary. By understanding that women who have used force have often both survived and caused harm — rather than being "victims" or "offenders" — the authors are calling for a more complex reconceptualization beyond the binary that challenges established legal and intervention frameworks. Our hope is that this reconceptualization will lead to conversations that challenge the interplay of interpersonal and systemic violence in the lives of all violence-involved women, particularly those at most risk for systems involvement due to their marginalized race and class status. This work is authored by U.S. and Australian practitioner-scholars who have been critically engaged in this work for some time and are probing the common ground

and important differences in these two contexts. Therefore, exemplars from the U.S. and Australia, across the legal and domestic and family violence (DFV)<sup>5</sup> specialist responses, frame the article. Despite their different histories, the U.S. and Australia are similar in their struggles with the binary.

### *Historical Overview: Movement Messaging in the U.S. and Australia*

The contemporary anti-violence movement in the U.S. grew out of Rosa Park's work with the NAACP<sup>6</sup> in the 1940s, addressing white men's rape of Black women (McGuire, 2010), and the early 1970s white feminist anti-rape movement (Schechter, 1982). Because of these grassroots efforts, men's violence against women was recognized as a tool for the social control of women, with the racial dynamics often obscured (McGuire, 2010; Schechter, 1982). The anti-rape movement's framework—in terms of organizing, ideology, CLS responses, and messaging—provided battered women's movement activists with tools for mobilization (Schechter, 1982). In this effort, U.S. battered women's movement activists during the mid-1970s emphasized the common experiences of all women abused by their intimate male partners, in order to encourage movement cohesion and bring attention to the dire circumstances that many women faced (Kanuha, 1996; Richie, 2000; Schechter, 1982). Although well intended, this “everywoman” (Richie, 2000, p. 1135) messaging negatively impacted legal responses to, and intervention for, women with sexual and DFV survivorship histories who also used violence, as well as women already marginalized by their race, class and/or their sexual orientation (Kanuha, 1996). According to scholar and activist Beth Richie (2000), the movement's public discourse that violence against women “can happen to anyone” (p. 1134) was a white feminist analysis that rendered race and class invisible. Over time, “everywoman” evolved into a public perception that *real* DFV survivors were cisgender, straight, middle-class, white women who could afford therapy and expect to receive legal protection (Crenshaw, 1991). According to critical, Indigenous, feminist practitioner-scholar Val Kalei Kanuha, this tagline trivializes “both the dimensions that underlie the experiences of ... abuse victims and ... the ways we analyze the prevalence and impact of violence against them” (Kanuha, 1996, p. 41). Because of this perception, when a woman is perceived as responsible in any way for the violence against her, including when she uses violence herself, this exacerbates her struggle to find legal protection and supportive intervention (Richie, 2012). Richie (2012) also points out that Black women are at significant risk of systems involvement because they are often portrayed simultaneously as, “strong (and therefore not at risk of violence), castrating (incapable of heteronormative intimacy), hypersexual (therefore ill-suited for long-term relationships or parenting), or criminal (and therefore unworthy of protection or support)” (p. 130).

A similar everywoman discourse pervaded the violence against women movement in Australia (Nixon & Humphreys, 2010) and supported the second wave feminist concept of the sisterhood of all women oppressed through patriarchy and the dominance of men (Magarey, 2014). Much of the early Women's Liberation Movement debated intensively the different forms and process that social change could take through a powerful women's movement (Segal, 1987). However, the oppression of women was taken to be all-pervasive, and structural differences (for example between Indigenous and white women, or women in poverty and professional women) were overlooked in the interests of an overarching social movement.

There was also a pragmatism in the social movement, epitomized by the establishment of women's refuges to respond to women escaping domestic violence (Summers, 1999). In the Australian social milieu, Anne Summers identified the polarization in attitudes towards women in her seminal work, *Damned Whores and God's Police*: standards that remain today in the informal code of the innocent victim and the undeserving, transgressing woman. In the formal legal code, with some exceptions (Summers, 1975), this has translated into a legislative vacuum for women

who use force, whose self-defense and “fight back” has not found a place in the adversarial “innocent or guilty” legal system.

The everywoman perception is dangerous, explains Richie (2012), because it “detracts from the development of a broad social justice analysis of violence against women that might emerge from a contextualized understanding” (p. 91). Leigh Goodmark’s legal scholarship on the relationship between the battered women’s movement and the legal system, builds on the everywoman concept with her idea of the paradigmatic victim (Goodmark, 2012). In the Australian context, legal scholar Heather Douglas (2019), refers to the law’s recognition of this essentialized victim as a battered woman who is heterosexual, white, drug-free, and has no criminal record. Likewise, sociologist Paige Sweet’s work reveals how a “good survivor” of sexual and DFV is legible to service providers because she learns to tell her story in a manner accessible across settings (Sweet, 2018). However, women who use force rarely qualify as DFV’s “paradigmatic victims” (Goodmark, 2012) or “good survivors” (Sweet, 2018)—and women who use force who have low incomes or are in same-sex<sup>7</sup> relationships fall even further outside these bounds. Thus, they are often disqualified from the legal system’s protection of *real* victims and may be recipients of inappropriate intervention. Therefore, the messaging of both the early U.S. battered women’s movement and the Australian violence against women movement continues to have reverberating consequences for legal and intervention responses (Douglas, 2021; Muftić et al., 2007).

### *The Role of Intersectionality in Challenging Binary Thinking: U.S. and Australia*

Legal scholar Kimberle Crenshaw (1991) coined the term intersectionality. The term captures an analysis of how Black women, Indigenous women, and women of color in the U.S., who were also sexual and DFV survivors, found a mismatch between the institutional interventions they needed and the imperatives of those providing them. Crenshaw’s conceptual framing of intersectionality contributes to a history of work by Asian (Ling, 1989), Black (King, 1988; The Combahee River Collective, 1995), Chicana (Blackwell, 2011), and Native American (Thompson, 2002) activists. In doing so it recognizes how an “additive” (King, 1988) theoretical approach did little to acknowledge the complexity and inter-relationship of these overlapping and interlocking lived experiences. For example, constructs such as race, class, gender, and sexuality cannot simply be “added” to areas of investigation or critical thought. Instead, they are overlapping and intersecting phenomena that shape the way marginalized people experience power. An Australian Indigenous discussion of intersectionality made the following points:

There is a universality about feminist intersectionality, whereby the attention to the different axes of power, and how they are enacted and experienced in the lives of women (Silverstein, 2017), resonates across countries and the diverse experiences of marginalization. The challenge and the differentiation of intersectionality in the Australian context lies in the foregrounding of Aboriginal experiences of colonisation and the undermining of their First Nation status. In a forthright discussion of intersectionality, Aboriginal academic Crystal McKinnon points out that when Indigenous women talk about their primary oppression as their experience of being Indigenous, eclipsing their experience of class and gender, that this is ‘Indigenous intersectional theorising’ which configures their perceptions and the way they experience themselves and are experienced by others [McKinnon, cited in Silverstein (2017, p. 16)].

Intersectionality, according to sociologist Patricia Hill Collins (2015), is a theoretical and analytical tool which recognizes that “race, class, gender, sexuality, ethnicity, nation, ability, and age operate not as unitary, mutually exclusive entities, but as reciprocally constructing phenomena that in turn shape complex social inequalities” (p. 2). As a theoretical tool, intersectionality theory challenges tendencies to essentialize one identity category, for example, victim or offender, by

focusing on how individual identities and life experience overlap and interlock to produce privilege and oppression in a complicated matrix that exists beyond mutually exclusive categories (Samuels & Ross-Sheriff, 2008; Sokoloff & Dupont, 2005). Intersectionality is a critical theoretical tool as it destabilizes binary thinking by emphasizing that people must be seen and understood within the context of their lived experiences, a hallmark of the social work profession (Gringeri et al., 2010).

### *Understanding Women Who Use Force: From Research to Practice*

Coercive control is a “pattern of intimidation, isolation, and control” (Stark, 2007, p. 102), in which the gendering of coercive control occurs at the interconnected levels of individual gender identity, interactions between people, and social structures (Anderson, 2009). The gendered differences in Anderson’s multi-level explanation of coercive control are evident in women’s descriptions of their use of force as attempts to gain individual autonomy within their coercively controlling partners’ regime of relationship authority that span domestic and public spheres (Douglas, 2018). Thus, coercive control is an integral aspect of the CLS that often replicates the intimate harms it is meant to remedy.

When women’s use of force is understood within the context of their relationships and experiences of coercive control, a more complicated picture emerges of how women have both been harmed and harmed others. Whereas women’s use of physical self-defense in the midst of their abusive partner’s imminent attack on their lives is often the default example, less often discussed is the broad spectrum of women’s forceful actions. One of the nine themes of women’s use of force identified by Larance and Miller (2017) is women’s attempts to “assert their dignity” by using non-self-defensive force in response to their abusive partners’ coercively controlling actions. This concept builds upon McMahon and Pence’s (2003) work:

[A] woman’s use of violence must also be understood in the context of the whole relationship, rather than in the context of the specific incident that occasions criminal justice intervention. A woman may or may not hit back at the moment when she is being beaten or abused — many women will not, as they realistically fear that any display of defiance will result in an even more brutal beating. Rather than simply ‘taking it’, however, some women will choose a safer and more strategic moment to ‘hit back’ — to symbolically assert their dignity (p. 51).

Thus, women who assert their dignity may resort to criminalized physical actions in an attempt to re-gain their self-respect. A more complex, contextual picture of the relationship’s context, her actions and motivations can inform legal and intervention responses. If only operating according to the victim-offender binary, she would likely be arrested and punished for her use of force without attention paid to her trauma history. Such a response is not only ill-informed, but also ineffective in addressing her experiences, and risks further stigmatizing her for her actions.

### **The Victim-offender Binary and the Law**

In both the U.S. and Australia women, and particularly marginalized women, are being criminalized in increasing numbers. Research in both countries shows that often their offending results from their own experience of DFV, and yet this survivor/victim experience is rarely recognized in criminal law responses.

#### *Legal Responses in the U.S.*

Women are the fastest growing segment of the prison population in the U.S. They make up about 10% of those incarcerated, making the U.S. “one of the top incarcerators of women in the world”

(Kajstura, 2019). Black, Latina, and Native women are incarcerated at disproportionate rates (The Sentencing Project, 2019). The vast majority of incarcerated women in the U.S. have been victims of violence with U.S. studies consistently showing that between 50% and 95% of incarcerated women have been raped or subjected to DFV (Dewey et al., 2019).

Many women enter the legal system as a result of DFV. Once they become criminal defendants, however, gendered victim-offender binaries prevent the legal system from understanding their actions in the context of the violence that they have experienced. The legal system reinforces gendered victim-offender binaries in a number of ways. Prosecutors, judges, and others in the legal system embrace stereotypes of blameless women victims and monstrous male offenders (Goodmark, 2008). As noted earlier, these stereotypes grew out of early social science research on DFV (Walker, 1984) that was later translated into law. Moreover, victimization in the U.S. is raced white. The historical failures of the legal system to recognize the claims of Black and Native women to bodily integrity and, indeed, the system's willingness to allow those women to be violated with impunity, continue to undercut the claims of victimization made by women of color (Richie, 2012; Ritchie, 2017). Criminal defendants who fail to present consistently with these stereotypes have difficulty convincing CLS actors<sup>8</sup> of their victimization (Goodmark, 2008). Not having access to victim status makes it difficult for victim offenders to access legal theories like "battered woman syndrome" meant to acknowledge their victimization and create a context for understanding their actions (Fischer, 2016). Problematically, the very act of using force creates a cognitive dissonance for CLS actors and prevents them from seeing women as anything but offenders; their histories of victimization are all but erased.

The victim-offender binary is further reinforced through various provisions of law. The law is structured around an understanding of people who use force as male. Nowhere is that more evident than in the law of self-defense. In the U.S., a defendant making a claim of self-defense must prove that the defendant had a reasonable belief that the victim posed an imminent threat of death or serious bodily harm and that the amount of force used by the defendant was not disproportionate to the threat (Dayan & Gross, 2015). The consideration of imminence is often divorced from the larger context of the parties' relationship, creating issues in cases where women use force during a lull in an abusive incident or while a partner is sleeping (Kinports, 2015). Similarly, the reasonableness of the defendant's belief in the imminence of harm may be questioned if extracted from the context of the relationship (Larance et al., 2019). Finally, self-defense law presumes a confrontation between two similarly situated men; the proportionality of the force used is understood relative to those two men. But because of the size and strength differentials between men and women, and the structured differences in power, women frequently use weapons, leading judges and juries to conclude that women used disproportionate force (Jacobsen et al., 2007).

All of these factors, particularly the whiteness of victimization and the question of the legitimacy of the use of force, were at play in the case of Marissa Alexander. A Black woman living in Florida, Alexander was charged with three counts of aggravated assault in 2012. The "victim" in Alexander's case was her then-husband, Rico Gray. Gray had a long history of abusing multiple women, including Alexander, and Alexander had a protective order against Gray. Gray came to Alexander's home and refused to leave. After Gray chased her around her home, Alexander retrieved her legally-issued firearm from her garage and fired a shot into the ceiling of her home. No one was injured during the incident. Nonetheless, after Alexander rejected a plea deal, prosecutors tried Alexander for aggravated assault. Prosecutor Angela Corey rejected Alexander's claim of victimization, saying, "She was angry ... She was not in fear" when she fired (Lee, 2012). Corey's statement invoked the stereotype of the "angry Black woman," which is often used to undercut Black women's credibility (Jones & Norwood, 2017). Alexander claimed self-defense; the jury was told that they could take into account the "relative physical abilities and capabilities" of Alexander and Gray as well as the relationship context. Nonetheless, Alexander was convicted and sentenced to twenty-years

incarceration, a verdict later overturned on appeal. The prosecutor's initial decision to charge Alexander, as well as the jury's verdict, raise questions about their willingness to see Alexander as a victim despite the history of abuse and the existence of a protective order. Race may have also played a significant role in the decision to pursue criminal charges against Alexander. Black women who use force against their partners are more likely to be arrested, become court involved, and receive harsh penalties than white women (Kajstura, 2019; Miller & Becker, 2021). In their 2021 study, Miller and Becker found that 27% of women arrested and charged with intimate partner violence were Black; Black women make up approximately 14% of the general population.

### *Legal Responses in Australia*

In Australia, Aboriginal women are overrepresented significantly compared to other women in charges of injury, receiving jail time, and in time served (Australian Law Reform Commission, 2017).<sup>9</sup> Over the past ten years, women have also been the fastest growing group in the prison population (Day et al., 2018). Aboriginal and Torres Strait Islander women are significantly overrepresented, making up around 3% of the total Australian population and 34% of the population of women in prison (Australian Bureau of Statistics, 2019; Watego et al., 2020). Recent Australian research has shown that many women who come before the criminal courts as DFV offenders have themselves been the subject of violence and abuse by a current or previous partner (Bartels et al., 2019). A victimization history is particularly common among Aboriginal and Torres Strait Islander women and DFV is increasingly recognized as a key driver for their imprisonment (Australian Law Reform Commission, 2017).

Across Australia, state and territory based statutory regimes provide for the making of domestic violence protection orders (DVOs) (Australasian Institute of Judicial Administration, 2020, [7.1]). DVOs aim to protect victims from further DFV, and to promote the accountability of DFV offenders. They are the most common legal response to DFV in Australia (Douglas & Fitzgerald, 2013) and usually include a range of conditions, such as not contacting the victim or coming within a certain distance of the victim. If one of the conditions of the order is breached, this can result in the charge of a criminal offence of breach of the order. In some cases, victims are misidentified as offenders within the DVO scheme (Boxall et al., 2020; Nancarrow et al., 2020; Nancarrow, 2019; Reeves, 2020). Where this occurs, women are at risk of criminalization through breach offences.

Further, some victim-survivors may be misidentified as offenders in cross-orders (Douglas & Fitzgerald, 2013; Durfee & Goodmark, 2021; Jillard & Mansour, 2014; Wangmann, 2010). A cross-order refers to a scenario where both parties have a DVO against each other. Legislation allows victims to apply on their own behalf for a DVO. However, in most cases in Australia, front line police and police prosecutors apply for DVOs, and DVOs are more likely to be granted by magistrates when police apply (Douglas & Fitzgerald, 2013). Police, therefore, play a key role in determining who should be protected by a DVO. In the wake of several inquiries in Australia, police have "strengthened" their approach to DFV (Neave et al., 2016). The result of this strengthened approach is that police call outs are increasingly likely to result in a DVO or a criminal charge, or both. One of the unintended consequences of higher levels of police intervention is that women are more likely to be criminalized (Reeves, 2020). In some cases, police apply for cross-orders (Douglas & Fitzgerald, 2013). The underlying message of cross-orders is that both parties are equally violent and dangerous, an approach which risks misidentifying a victim and fails to understand the context of the violence (Reeves, 2020). In particular, self-defense may be misinterpreted as DFV offending and the woman's victimization history missed or minimized when determining the reasons for violence and the appropriate sentence (Boxall et al., 2020; Tarrant et al., 2019).

Studies of Australian legal responses to DFV suggest that both police and magistrates continue to be guided by perceptions of "true" or "ideal" victims (Douglas, 2019; Stubbs & Wangmann, 2015),

which, as we have noted earlier, may stand in opposition to the lived experiences of many women. The “battered woman syndrome” that suggests that women who experience domestic violence may develop a disorder that makes them unable to leave the violence, still has a hold in some Australian courts (Tarrant et al., 2019). Women as DFV offenders continue to be a relatively unusual occurrence in the Australian CLS process and, unless they appeal, the lower courts’ findings on cases such as breaches of protection orders and assaults are rarely published. We discuss an example involving a woman charged with a domestic assault. This case was appealed and so the judgment was published.

Charlene Douglas had been drinking when she stabbed David Hoppner in his leg with scissors, making a small cut. She was charged with aggravated assault. Charlene was 19 years old and had been in a relationship with David since she was 13. They had a four-year-old child in state care. At sentencing, Charlene’s lawyer explained that Charlene lashed out in anger because of David’s abuse and her personal circumstances were exceptional so she should avoid imprisonment. She was imprisoned for 4 months for the assault and appealed the sentence.

The appeal court reiterated the submissions made about Charlene’s history of DFV:

two or three months after their relationship started David ... started hitting her. ... David ... will engage in sex with her when she says no. [She] has not complained to the police about this ... [H]e bashed her about once a week ... The appellant has been to the police and made general complaints. The police have advised her she can take out a domestic violence order. ... The appellant has had a problem with alcohol misuse. She started drinking alcohol from the age of 15 or 16 years. (*Douglas v Dole*, 2019, [23]-[25]).

The appeal judge highlighted that Charlene had made no complaints to police about sexual abuse and said that her lawyer did not argue that Charlene was a “battered wife syndrome survivor who took the opportunity to stab [the victim] as he slept” (*Douglas v Dole*, 2019, [23]-[25]). The appeal judge observed that if Charlene had stabbed David as he slept, that would have been “more consistent” with the DFV history. He found that it was impossible to draw a “firm conclusion” that Charlene’s experience of domestic violence “was operative” on her when she stabbed David (*Douglas v Dole*, 2019, [23]-[25]) and found there was no evidence that violence was normalized for Charlene because she had no prior convictions for violence, rather alcohol and jealousy led to the attack. Thus, the appeal judge effectively removed the DFV experienced by Charlene from the contextual background of the assault. Instead, he sentenced on the basis that her assault was a one-off incident arising from Charlene’s use of alcohol and her jealousy. She was simply an offender. Charlene’s sentence was reduced to six weeks, not because of the history of DFV, but because Charlene’s parents separated when she was young, she had a child with David at 16, and her alcohol misuse — not her history of DFV — was significant. Our case examples illustrate the ways in which the legal system reinforces the victim-offender binary.

## **The Development of Binary Responses to Violence**

It is not only in the enactment of the law that the binary conceptualizations of victims and offenders is problematic. The service system responses run in parallel and demonstrate similar gaps and short-comings.

### *The Development of Intervention Responses in the U.S.*

In the U.S., mandatory arrest laws originated in the 1970s and were increasingly implemented during the 1980s and 1990s. As a result of these laws, the number of women arrested on domestic violence charges increased (Durfee, 2012). These laws compel a police officer to make an arrest in domestic



violence cases and were introduced to take discretion away from police officers, who historically had failed to use that discretion to make appropriate arrests (Goodmark, 2018). The goal of mandatory arrest laws was to keep victims safe and hold offenders accountable through arrest. In lieu of adopting mandatory arrest, some jurisdictions adopted preferred arrest policies, which suggest, but do not require, police to make arrests in domestic violence cases. An unintended consequence of these policies for women with survivorship histories who used force was that their arrest rates rose significantly (Durfee, 2012), a consequence of the policies themselves, rather than an actual increase in women's use of force (Durfee, 2012). As criminologist Susan Miller (2005) observes, "people in violent situations are dichotomized into 'victim' and 'perpetrator' categories, with the context of the situation left unexamined ... a single act of a woman's violence eclipses her entire history of victimization" (pp. 9–10). Emphasizing this point, Goodmark (2008) details how the legal system dismisses battered women's survivorship histories when they fight back.

In the U.S., the established coordinated community response protocol (Pence & Shepard, 1999) in domestic assault cases has been that police encourage victims (typically, women) to voluntarily seek confidential, trauma-informed (Elliott et al., 2005) counselling at a domestic violence agency. In contrast, the referral pathway for domestic violence offenders (typically, men) who were arrested, charged, and convicted was court-ordered, probation-monitored completion of Battering Intervention Programming (BIP) [referred to as a Men's Behavior Change (MBC) programs in Australia]. These programs were designed to address the sociocultural underpinnings of the power and control that abusive men leverage against their female partners (Tolman & Edelson, 1995). BIPs require participants to pay a per-session group fee. They typically do not focus on the participants' experiences of trauma due to the belief that men's violence against women is only due to patriarchy rather than to traumatic histories. In short, it was their offences that were to remain in focus during the intervention process, not their own histories.

Responding to the rising arrest rates of women, some communities across the U.S. began ordering arrested women to BIPs, designed to address men's behavior, following a "one-size-fits-all" (Miller et al., 2005) approach to intervention. However, many advocates and practitioners understood that the motivation, intent, and impact of women's actions were often very different from those of men and, therefore, believed that such an approach to anti-violence intervention was not only inadequate, but ineffective and potentially retraumatizing. Furthermore, some services refused to work with women charged with domestic violence because they were now systems-identified "perpetrators" (Osthoff, 2002). Advocates and practitioners heard women's pleas for letters of advocacy and support, and opted to respond by creating gender-responsive, trauma-informed interventions designed to meet the complex needs of women who had both survived and caused harm (Larance et al., 2019). However, risks remain as the session fees, intensive time commitments, and State surveillance for women on probation falls most heavily on low-income, marginalized women — enduring systems punishment that replicates their abusive intimate relationships (Larance, 2021). For example, Larance (2021), found that of 33 women who had contact with an anti-violence intervention program, their ages ranged from 20 to 57, 84% lived on less than \$45,000USD annually, and 61% identified as Asian, African American/Black, Latina, or Native American.

### *Gender Equivalence and Misidentification in Australia*

In Australia, as elsewhere, legal interventions by police and courts are critical. Victim-survivors have been primarily supported through specialist family violence services, which have grown from a network of community-based women's refuges in the 1970s and now constitute a wide range of support services for women and children. The most common referral pathway for DFV offenders has been to Men's Behavior Change (MBC) programs. Following the recommendations of the Victorian Royal Commission into Family Violence (Neave et al., 2016), increased funding was

provided in Victoria for offender programs, leading to the funding of several programs aimed at women. Several other states have programs, however, funding is short-term and limited. Services to address DFV are fully or partially funded by government rather than by participants, and the funding streams are divided into offender programs and services for victim-survivors—reinforcing this binary view. Similarly, the risk assessment frameworks perpetuate the victim-offender binary through questions addressed to either victims or offenders (Victorian Government, 2020).

As elsewhere, the context in Australia for addressing women who use force has been a profoundly contested space. The gender-equivalence debates have been long standing, and particularly evident in the Family Law Court where men's rights groups have advocated strongly that women are equally complicit with men in DFV and that the impact of men's violence is over-stated, particularly where children are concerned (Humphreys et al., 2019). Police have also been active in arresting, charging or naming women as respondents in civil protection orders, focusing on an incident rather than a pattern of abuse. In Victoria, an examination of a one-month sample of women identified by police as offenders and referred to a multi-agency DFV triage project, found that two-thirds of the women with children had previously been DFV victims, often many times previously (Humphreys & Nicholson, 2017). This study was further amplified by the findings from a five-month audit of the files of the Victorian Women's Legal Service (N = 346) that found that female respondents (offenders) were misidentified in 57% of cases (Women's Legal Services, 2018).

These issues of misidentification are deeply entwined in the discussion of women who use force in Australia. They have raised questions about the legitimacy of providing services for this group of women, where it may be the courts and justice system in lockstep with men who use violence inappropriately naming women as offenders when they are victim-survivors. While this is an important question, it has also become clear from different parts of the service system (e.g., women's services, family services, child protection, and substance misuse services) that some women do use force, whether in self-defense or proactively in their family relationships. It has also emerged that most of this use of force does not occur in the same context, or with the same motivation or intent, as men's violence and coercive control of women in their domestic relationships (Kertesz et al., 2019). Both evidence and practice experience suggest that this group of women need a service which addresses both victimization and use of force, and differs significantly from MBC programs.

## **Moving Beyond the Binary**

The victim-offender binary is an outcome of the carceral creep (Kim, 2015), proof that advocates have become subordinate partners in the alliance between feminist activists and those in the legal system. Applying critical context (Larance, 2021) across legal and intervention settings is a necessary departure from conceptualizing and then treating women as "victims" or "offenders," and moving intervention conversations toward a more complicated reconceptualization beyond the binary. Critical context makes room for critical analysis of the forms and mechanisms of oppression within legal and intervention approaches and their divergent impacts on women of differing social identities, locations, and experiences. Engaging critical context involves a four-part, overlapping process that includes: (1) incorporating Black Feminist Epistemology's (Collins, 2009) central tenet of focusing on women's lived experience; (2) applying an intersectional (Crenshaw, 1991) analysis by learning from women about how their multiple identities shape their daily lives and interactions with CLS actors; (3) employing a feminist research perspective (Miller, 2005) that considers a woman's motivation and intent when using harmful actions and understanding the impact of those actions; and (4) gathering a longitudinal relationship history that illuminates how a woman, who has caused or allegedly caused harm, may have also been harmed (Larance, 2006). A decontextualized approach to intervening in the lives of women who have used force erases the harm they have experienced, making them more vulnerable to punishment-focused legal and anti-violence services,

rather than visible to trauma-informed approaches and critical efforts to dismantle structural inequalities. In summary, the critical context of a woman's situation exists in a much more complicated space beyond the victim-offender binary.

### *Legal Developments that Challenge the Binary: US and Australia*

The anti-violence community in the U.S has attempted to mitigate the unintended consequences of criminalization and complicate the victim-offender binary by advocating for laws that enable survivors to introduce evidence about their own victimization and the relationship of that victimization to their crimes. Laws allowing defendants to offer evidence of battered woman syndrome were the result of the earliest attempts (Goodmark, 2012). In 2019, New York passed the Domestic Violence Survivor's Justice Act to provide a vehicle for judges to decrease the sentences of people whose crimes are directly related to abuse that they experienced (Law, 2019). But as with any tool that allows for the use of discretion, the results of these laws have been mixed. While some women have benefitted from the ability to offer evidence of domestic violence at trial or sentencing, others have been denied that opportunity by skeptical judges (Kamis & Rose, 2021). A New York judge, for example, found that Nicole Addimando, who killed her partner, should not be sentenced under the Domestic Violence Survivors Justice Act, despite evidence that her former partner had physically and sexually abused her for years. The judge ruled that Addimando's account of the abuse was not credible, that Addimando may have consented to her partner's abuse of her, and that Addimando could have left her partner rather than killing him (van der Leun, 2020). While ten people have been resentenced or released under the Domestic Violence Survivors Justice Act, advocates and defense attorneys report "significant obstacles" to obtaining relief under the law. For those who have received relief, the process has been traumatic, particularly in those cases where prosecutors oppose release (Kamis & Rose, 2021).

There have been some attempts to reform Australian law so that it goes beyond the binary understanding of women as either victims or offenders. One example is the "self-preservation defense", introduced in Queensland law in 2010. It aims to provide a new defense for a woman who has killed her violent abuser in circumstances where her response does not justify a not-guilty finding, nor does it justify a finding of guilty of murder. Rather it allows for a manslaughter finding, usually resulting in a much lower sentence (*Criminal Code Act 1899* (Qld) s 304B).

If successful, the resulting verdict is manslaughter rather than murder. Some jurisdictions have attempted to expand self-defense provisions to accommodate the circumstances in which women kill their abusers (eg. *Crimes Act 1958* (Vic) s 322M). Recent acquittals and discontinuances of charges involving women who have killed, or attempted to kill, abusive partners and claimed self-defense in Victoria, suggest that these amendments may be working (e.g., Cooper, 2017). Evidence provisions have also been introduced in some States to facilitate the consideration and understanding of the woman's history of domestic violence victimization in relation to her use of violence (e.g., *Crimes Act 1958* (Vic) s 322J; *Evidence Act 1906* (WA) ss 37–8).

There have been developments in the civil law context as well. For example, in an attempt to respond to the problem of cross-orders, where both parties are allegedly committing acts of domestic violence "including for their own protection", Queensland protection order legislation requires judicial officers to consider the "person most in need of protection" when making orders (*Domestic and Family Violence Protection Order Act 2012* (Qld)). Further provisions provide guidance to judicial officers managing cross-application hearings to ensure that cross orders are not made against victims of domestic violence who may be acting in self-defense. In a recent case, Smith DCJA observed that "violence used in self-defense and to protect children can be misconstrued as domestic violence if a broader view of the circumstances is not taken" (*WJ v AT* [2016] QDC 211, [166]). In this case the male partner appealed unsuccessfully against the dismissal of his cross-application while an order

was made to protect his ex-wife and children from his abuse. Legal developments that allow evidence to be heard in courts about the broader context and circumstances in which women's actions take place help to recognize the diversity of women's experiences.

### *Critical Context in Anti-violence Intervention: U.S. and Australia*

In the U.S., efforts that engage critical context in meeting the intervention needs of women who have both survived and caused harm exist in a range of formats across communities. Examples of these community-based efforts are Domestic Violence Project/SAFEHouse advocacy guide (House, 2001); *At a Crossroads*, Duluth, Minnesota's Prosecution Response to Battered Women Who Fight Back (Asmus, 2007)<sup>10</sup>; anti-violence intervention program development and frameworks (Larance, 2006; Larance & Rousson, 2016); Beyond Anger and Violence (Covington, 2013), Turning Points (Pence et al., 2011), and Vista (Larance et al., 2009) curricula. A range of common promising practices across programs include: safety and support planning; raising awareness of viable alternatives to non-self-defensive force; encouraging community-wide resource allocation to the women and their family members; promoting network formation among group participants across a range of social identities; cofacilitating intervention groups by those who understand coercive control and the gender dynamics of domestic violence; engaging systems' partners, such as police and child protection, and concrete efforts to move the conversation as well as interventions beyond the binary.

In Australia, interventions that engage with critical context have emerged in many jurisdictions, although the numbers are still small and there is very little published literature in this area. Programs have been developed by agencies in response to locally identified need, most based on the American curricula listed above. These Australian programs target a range of situations that women find themselves in, including incarcerated women, women mandated through the legal system, or child protective services, and women referred by community sector services. A recent scoping review (Warren et al., 2020) identified only one program developed in the Australian context. The We Al-Li for Kungas Family Violence Program has provided trauma-informed pre- and post-release support to Aboriginal women in the Alice Springs Correctional Centre since 2014. The program works with both individuals and groups, using the "educaring" approach that offers "a trauma-specific blend of Aboriginal traditional healing activities and western therapeutic processes" (Atkinson et al., 2014, p. 8), thus simultaneously attending to intersectional identities and trauma-informed practice.

The +SHIFT (Positive Support and Healing creates Innovative Forward Thinking) program was introduced in 2018 in Victoria, adapted for the Australian context from the U.S. Vista program (Larance et al., 2009). +SHIFT acts a disruptor within the binary-focussed service system. Funded as an offender program and working with women primarily referred from the police or child protective services, the program philosophy nevertheless emphasizes healing, family safety and viable alternatives to force, in recognition of the complex contexts in which women act. This program brings a new agenda to the binary-oriented Victorian service system and faces challenges in educating relevant services, whose staff are firmly rooted in either victim support or perpetrator response approaches. Program managers are working alongside researchers evaluating the program to communicate the program's nuanced approach to policy-makers, funders, and referring professionals.

From October 2018 until June 2020, +SHIFT provided services to 88 women—a diverse group in terms of age, educational level, relationship status and cultural background, though most had low incomes.<sup>11</sup> Of the group, 14% were of Aboriginal origin, and a similar proportion were born overseas. Most women reported that they experienced mental health problems and almost all had experienced partner abuse at some time in their lives. The following discussion of women's experiences,

differing social identities, and systems responses to those differences, is drawn from the published program evaluation (Kertesz et al., 2020).

The various incidents described by women as leading to their involvement in the program, and the reasons they gave for using force in their relationships, build a picture of a group of women who have survived abuse in their relationships and often also in their families of origin. While a small proportion of women believed that they had been falsely identified as a perpetrator of violence, most described using force to defend themselves or their children, to prevent an assault or in an effort to assert their dignity because they had had enough of the abuse (Larance & Miller, 2017). Comments such as the following illustrate the situations women found themselves in: “He had me pinned to a wall. Being verbally abusive. I pushed my way out. He told me to hit him, so I did”.

Despite these experiences, a notable characteristic of the women attending the program was the degree to which they took responsibility for their own actions and situations in which they found themselves. They admitted to their actions, without the context of these actions always being clear either to themselves, police or child protection services. For example, Michelle<sup>12</sup> explains:

I think the reason I was here was because of my toxic relationship with the father of the kids. I'd always considered myself I guess the perpetrator and because I was the one who was here [in group], I was the one who was at court ... But having discussions with [the facilitators] ...it wasn't just me, where I'd always thought it was my fault.

A primary aim of the +SHIFT program is to provide the opportunity for women to apply an ecological and intersectional understanding to the circumstances of their lives so that their sense of responsibility is more realistically limited to areas under their control. This contextual, person-in-situation approach is a cornerstone of social work practice, and helps women understand their experiences in light of their intersectional identities. Program practitioners also advocate for women to ensure that statutory services such as courts, corrective services and child protection understand the context of the woman's actions and to mitigate against the disadvantages faced by women up against systems who disregard the impacts of marginalization.

The women in the program describe responding to the situations in which they find themselves, using the skills they have developed to cope with the environments and relationships they have experienced. For women who grew up with violence, verbal and physical aggression was a known way of managing conflict or “being heard”. Others defined themselves as strong, independent women, and some suggested that using force was their way of refusing to be passive victims.

Sometimes ... I think maybe that's why I don't feel threatened when he became violent with me or whatever because I think I am a strong person. They always say if you're put in a situation, 'Do you flight or fight?' and I think I'm a fighter. (Tania)

A number of women who were clearly being victimized in their relationships with men were resistant to identifying themselves as victims. The complexities in their relationships, along with their experiences of abuse, made it difficult for them to define themselves as an offender only, or simply a victim-survivor.

The +SHIFT program is consistent with a practice framework which combines both trauma-informed therapeutic work, and an intersectional approach focusing on how social messages pressure women to define themselves and their relationships in particular ways, and respecting women's own understandings of their lives experience (Kertesz et al., 2021). An important aspect of the program is that it provides a safe space for women to share common experiences of individual and systems abuse, with others from a range of backgrounds and social identities. The program thus

engages with critical context and seeks to support women with complex histories in legal and intervention environments focused on the victim-offender binary.

## Recommendations

In concluding this article, we draw together some recommendations that arise from an analysis of the shortcomings in the current legal and service system binary response, which renders critical context invisible. Future trauma-informed criminal legal responses should include police officer awareness of the significant overlap between women's use of force and women's own victimization, and in using that knowledge to ascertain at the scene who the predominant offender is in the relationship, what the context for the use of violence is, and whether referrals to DFV and other services might be a more appropriate intervention than arrest (Nancarrow et al., 2020). Prosecutors with similar knowledge and orientation could make more informed choices about whether and when to prosecute cases involving women's use of force in the context of DFV, and judges could make better use of the tools available to them—such as the Domestic Violence Survivors' Justice Act in the U.S. or the self-preservation defense in Queensland for considering violence in the context of both verdicts and sentencing.

The development of responses that go beyond the binary of victim or offender services are now becoming obvious. The +SHIFT Program is an example of an intervention which engages with critical context and seeks to support women with complex histories in a legal and service environment focused on the victim-offender binary. In anti-violence intervention spaces that serve people who have both survived and caused harm, engaging critical context at assessment, during intervention and in advocacy with the Criminal Legal System are crucial to moving beyond the binary. In the process, intentional, trustful relationships would be built with community-partners to streamline communications and respect the differing roles, but common goals in ending DFV. This approach provides a strong alliance with Aboriginal organizations in Australia who are challenging the carceral state and its destructive impact on Aboriginal women.

This work intentionally challenges the victim-offender binary in legal and intervention practices, using examples from the U.S. and Australia. It is grounded in an understanding of two anti-violence movements' complex histories and the authors' identification with intersectional feminism (Crenshaw, 1991) that emphasizes the importance of foregrounding multiple interlocking, overlapping categorical identities and exploring how those identities shape the way marginalized women experience power. Over time, as trauma-informed remedies were embraced for *real* "victims", punitive measures were solidified for "offenders". Lost in the process, however, was formal systems-wide acknowledgement of the necessity for a reconceptualization beyond the binary that would make it possible to understand and contextually address the lives of those who have both survived and caused harm. Continuing to operate according to these dichotomous legal and intervention frameworks reproduces systems-perpetrated harm, particularly for women of marginalized identities and communities, and impedes innovative approaches that promote individual healing as well as the promise of eradicating DFV. Thus, continued reliance on the legal system, such as criminalizing coercive control, holds unintended consequences that will surely be borne by the most marginalized (Watego et al., 2020).

Through advocacy and public debate it is anticipated that a greater understanding of the binary and its unintended consequences will inject a similar recognition across political-legal systems. It is a fundamental practice principle to hold women accountable for the harm they have caused, while also attending to their individual trauma histories in the context of the impact of political-legal systems on marginalized groups. This approach is fundamental to innovations in this service provision area and to reigniting a social movement that (re)centers the voices of those it is meant to serve.

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## Notes

1. Although the language of victim and perpetrator are commonly used in intervention settings in both countries, the authors have used the language of victim and offender in this context. That choice is meant to emphasize our argument that the singularity of the incident and case focus is grounded in the state's definition of people who are involved in crimes of assault.
2. The CLS includes the entire legal system including emergency call operators, law enforcement officers, prosecutor victim-witness programs, criminal defense, judges, the process of incarceration, probation, and parole.
3. Although "women of color" terminology is used in the U.S., it is not used in the Australian context. Instead, marginalized women are understood to be Indigenous and refugee women as well as women from Culturally and Linguistically Diverse (CALD) backgrounds, a term often used to describe people living in Australia who were born overseas, or who have parent(s) or grandparent(s) born overseas, and are predominately from non-English speaking or non-Western countries.
4. Although once a scarcely researched area, the contextual experiences of women who have used force and have survivorship histories have increasingly been researched. For example, *Violence Against Women* dedicated four special issues to the subject (See: Bible et al., 2002; Dasgupta et al., 2003; Larance & Dasgupta, 2012; Osthoff et al., 2002).
5. DFV is common language in Australia to recognize both the preferred feminist terminology of domestic violence, and the Indigenous preference for language that references "family violence", as it goes beyond intimate partner violence.
6. The NAACP (National Association for the Advancement of Colored People) is a civil rights organization formed in 1909 for the purpose of advancing justice for African Americans in the United States.
7. Although heterosexual cisgender women's experiences are the focus of this work, the authors acknowledge the harms caused in women's same-sex relationships and trans women's relationships; however, we believe the responses to those relationship dynamics deserve separate conversations (Lindhorst et al., 2010).
8. CLS actors are those tasked with enforcing social control of the population.
9. Among Aboriginal and Torres Strait Islander (ATSI) women, custodial orders comprised 22%, a much higher proportion than the proportion of custodial orders for non-Indigenous women (6.5%). Among all women who received a custodial order, ATSI women accounted for a large majority (69%). See Douglas & Fitzgerald (2018).
10. Mary Asmus (the Former Chief Prosecutor for the City of Duluth, Minnesota) and her colleagues were among the first prosecution teams in the U.S. to suggest use of the descriptor, "women who use violence" to distinguish women's experience from men who use violence, and to refrain from considering women with survivorship histories as "batterers" or "offenders."

11. Women's ages ranged from 18 to 65, with a mean of 35.5 years. While there was a broad range of educational attainment, from post-school education (42%) to "some school" (38%), more than a third were unemployed. Over 60% reported an annual income of less than AUD\$30,000 and nearly 80% reported an income of less than AUD\$50,000.
12. The women's names used in this section are pseudonyms.

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