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Policing gender-based violence: The golden thread of discretion

Abstract

This paper offers a critical appreciation of pro-arrest-positive policing policies towards intimate partner violence (IPV). It examines the extent to which such policies, and the research associated with them, have operated within a partial understanding of discretion, which has paid detailed attention to the response of the front-line officer and how that response might be changed either by improved training and/or by rule tightening. Such approaches assume that policing IPV is separate and separable from policing other forms of violence(s) and fail to recognise the wider context of the policing task. This paper makes the case for a more holistic understanding of discretion (to include senior officers) as a way of promoting improved responses to IPV. This also means directing attention to policies and practices in relation to IPV to include police engagement with broader agency and societal responses to IPV. This is the point at which a holistic ‘golden thread’ of discretion can be found.

Introduction

It is now nearly thirty-five years since the publication of the findings of the Minneapolis Domestic Violence Experiment (Sherman and Berk 1984). This work indicated that when a perpetrator of intimate partner violence was arrested (as opposed to any other action that might be taken) a deterrent effect on their use of violence could be observed. The publications of these findings had a rapid and widespread effect on policing policy prompting mandatory and/or ‘pro-arrest’ stances for intimate partner violence being introduced in police

forces across the Anglo-speaking (Goodmark 2015). Such policies have persisted despite the absence of available evidence replicating these initial findings and in the face of partially contradictory evidence produced by a similarly constituted research team in 1991. That team's findings pointed to the short-term effectiveness of arrest and/or the unintended consequences of such practices (particularly in making the violence worse) for poor and ethnic minority women (Sherman et. al. 1991). Recent work by Sherman and Harris (2015) indicates that the stress experienced by those women whose partners are arrested for such violence renders them much more likely to suffer an early death. Indeed Sherman (2015) additionally commented that 'if the current policy is to be continued in the UK, the moral burden of proof now lies with those who wish to continue with this mass arrest policy'.

The brief summary above points to a number of controversies and confluences in policing responses to intimate partner violence (IPV). Space dictates that not all of these issues can be discussed in this paper. The focus here is the value of pro-arrest stances from the point of view of the victim. Pro-arrest, for the purposes of this paper, is taken to refer to the wide range of policy responses from mandatory arrest to positive action that focus attention on the response of the front-line officer and is placed in inverted commas to indicate this. Starting from this position, as Sherman (2015) quoted above implies, it is possible to frame pro-arrest-positive action as a 'boundary object' (Star and Griesmar 1989). For them,

Boundary objects are objects which are both plastic enough to adapt to local needs and the constraints of the several parties employing them, yet robust enough to maintain a common identity across sites (Star and Griesmar 1989: 393).

Using this concept as a way of making sense of the persistence of 'pro-arrest' policies across different sites (despite the contested evidence as to its efficacy), the concern here is not to

offer a systematic review of all the research on this topic, but to consider how that research has been framed (bounded) within particular understandings of discretion.

The paper falls into four parts. The first offers a brief overview of the problems and possibilities associated with the role of discretion for policework generally. The second illustrates the different ways in which police discretion can permeate responses to intimate partner violence (IPV). The third situates an appreciation of the evidenced ongoing problems in policing responses to IPV not solely related to discretion but also within the wider context of police accountability. This discussion affords a route into taking up the challenge posed by Sherman and Harris' (2015) recent work and explores how it might be possible to better recognise and respond to the ordinary violence(s) experienced by women on a routine daily basis (Genn 1988). The implications of this will be developed by exploring a holistic understanding of discretion (Gundhus 2017) and connecting this to an appreciation of the 'web of accountability' (Spencer 2016). This is discussed in the final and concluding section of the paper.

Understanding discretion

Discretion is central to all forms of policework and, as a wide range of research findings have indicated (see Jefferson and Grimshaw, 1984, Loftus, 2009), can have both positive and negative consequences. Indeed understanding the nature of discretion, in relation to understanding policing responses to IPV is of crucial importance (Johnson and Myhill 2016). Whilst discretion permeates all levels of policing organisations and all aspects of the criminal justice system (Gundhus 2017) understanding the role and influence of discretion is often focused only on the street level officer and as a result can be partial. As Stenning (2009: 84) suggests, much legislation 'states that police 'may', rather than 'shall', do this or that whey

carrying out their duties. In exercising these powers, therefore, police are authorized to exercise discretion'. In some instances this can mean that in vague cases like Breach of the Peace, the condition exists because the police officer says that it does (McBarnett 1978). In other cases it is a matter of choosing the appropriate response rather than making a decision on the legality or otherwise of what has happened. In any event, as Stenning (2009: 86) comments, police use of discretion is always likely to be controversial. By implication the use of discretion applies to all areas of police work not just IPV and it applies to all levels of policing from those working on the streets to senior officers. Similarly it is important to note that whilst police officers are authorized to exercise discretion they remain, as individual police officers at every rank, required 'to explain, justify, and answer for their conduct' (Lewis, 2009: 1). This remains the case the increasing presence of budgetary, performance related, and inspectorate processes designed to call the police to account, notwithstanding. So any individual police officer needs to be clear in their own minds that they, and only they, can account for the (in)actions they have taken in relation to any particular incident. Thus discretion and accountability are interconnected. The space for discretion diminishes the more serious the offence being dealt with and the more that law, policies and policing priorities act as a constraint on its use. Therefore in exercising discretion a police officer will take into account a wide range of factors including whether or not they can justify their decision. Nonetheless the relationship between discretion and accountability, mediated as it is by law, policy, and actual practices creates a space in which two different areas for influencing the use of police discretion in relation to IPV have emerged; improving police training and/or tightening the rules.

As has been intimated, in the context of policing most attention has been directed to the use of discretion by the 'street level' police officer. Much of this work has been concerned to

examine the ways in which their responses to incidents are, or are not, informed by what Reiner (1984) termed 'cop culture'. Early studies exploring police discretion in relation to 'domestic' incidents informed by this concept highlighted various issues acting as barriers to positive policing interventions in such incidents. These barriers included sexist attitudes in highly gendered workforce responding to a highly gendered crime, lack of understanding of what constitutes 'domestic' violence, and underlying beliefs that 'domestic' violence does not constitute 'real police work' (Edwards, 1989; Stanko, 1995; Dobash and Dobash, 1979). Further work in the aftermath of the introduction of 'pro-arrest' policies highlighted additional issues from a lack of nuanced attention to the factors involved in re-victimization (Ariel and Sherman, 2012), to high rates of dual arrests of both victims and perpetrators (Braaf and Sneddon, 2007), and victim dissatisfaction with police interventions of this kind (Hoyle and Sanders, 2000; Stark, 2012). Thus over the last thirty years increased awareness of the role of 'cop culture' in informing police discretion has resulted in focused attention on this particular point of police-IPV interaction. Yet at the same time, as Myhill and Johnson (2016) note, interpreting current policy expectations (in their study in relation to coercive control) actually demands a considerable amount of discretion. Indeed the guidance offered by the College of Policing (2016) states: 'Officers must base their decision to arrest or not to arrest on their professional judgement, which itself must be based on the best information available'. Consequently there is a tension here between the demand for use of discretion and the evidence suggesting that it is not always used in the interests of the victim. Moreover, given that it is the individual officer who must be accountable for their actions it is perhaps not surprising that evidence of physical violence features prominently within their 'constellation of risk factors' (Robinson et. al. 2016) in making their judgements in cases of IPV, since this most likely gels with their response to all other forms of violent incidents they are likely to deal with. In this sense their use of discretion may actually be consistent and it

could be argued that it is the requirement for accountability that sets limits on what is considered reasonable, actionable, and doable rather than discretion per se. For the police officer, violence does not exist in the vacuum of IPV, it exists across the full spectrum of their working lives. It follows then that discretion needs to be understood holistically, that is as existing both horizontally and vertically within police organisations (Gundhus 2017). This means understanding the use of discretion by senior officers in setting local priorities alongside its use by street officers. . However before developing this point further it will be valuable to evidence in a little more detail the ways in which police discretion permeates responses to IPV.

‘Pro-arrest’ policies and intimate partner violence: a case of arrested development?

Despite being subjected to considerable critical scrutiny ‘pro-arrest’ policies have travelled the globe amounting to what Goodmark (2015) has called ‘exporting without a licence’. Here she is referring to the shaking empirical foundations on which such policies are based and whilst a number of scholars have asked important questions about the capacity of the criminal justice system to protect and support women and children (Hirschel et al, 2012) it remains the case that police officers are one important point of contact for many victims of IPV. The response that such victims receive can set the tone for future contact with the criminal justice process and the kind of protection they might receive. So understanding the features associated with this first point of contact has framed a wide range of research on ‘pro-arrest’ policy. In those research findings the role of discretion has been a reoccurring theme.

As already intimated above, research work on police-IPV interaction has highlighted ‘cop culture’ as problematic in framing how discretion is operationalised. Indeed there is some support for assuming this. Historically research on the police has shown that police officers often prioritise and emphasise danger in their day to day work (Skolnick, 1966; Holdaway, 1983) and domestic incidents are frequently only viewed as dangerous if there is evidence of physical violence (see also Robinson et. al. 2016). The emphasis on physical violence is at least in part influenced by the incident driven approach to policing dominant in the UK and elsewhere (Waddington, 2012; Stark, 2012). This emphasis results in many behaviours which constitute IPV (even according to the official definition of the Home Office 2016) often being ignored or minimised by police officers since they fail to fit with their understanding of the role of risk factors associated to the risk of current and/ or future harm (Robinson et al 2016; Medina et. al. 2016). Issues such as these are overlaid with views on the likelihood of victims retracting statements which can add to officers feeling frustrated, cynical or suspicious, about the outcome of being pro-active in such incidents. Diemer et. al. (2017) suggest these issues may impact on police officers use of discretion insofar as they may be less proactive in recording or counting domestic incidents as criminal offences in the first place. This is endorsed by the findings of Myhill and Johnson (2016) who point to the ways in which domestic incidents are classified as having a direct impact on the level of intervention a victim can hope to receive. Taken together this work implicitly lends some power to the ‘cop culture’ lens and supports the argument that inappropriate use of discretion affects the safety of victims and the criminal justice support they receive (Myhill and Johnson, 2016).

The cumulative effect of this kind of research has been threefold. First it has perpetuated a belief in the ‘pro-arrest’ stance to IPV despite the contested nature of available evidence questioning the efficacy of this approach (see in particular Sherman and Harris 2015,

Goodmark 2015). This is one feature of its ‘boundary object’ status (Star and Griesemer 1989). Boundary objects provide a framework ‘within which individuals in different communities can represent their knowledge; provide a means for these individuals to communicate across boundaries their concerns or questions about a practice or idea’ (quoted by Miers 2016: 96). In the context of ‘pro-arrest’ policies this shared knowledge has stood in the way of responding flexibly to the changing context of policing (like performance management and/or in the context of the U.K. the impact of austerity measures) and ongoing research findings (like some of those cited at the beginning of this paper). At the same time this shared knowledge about the ‘pro-arrest’ stance has served to sediment ongoing concerns with two further issues on how to tackle the impact of discretion on responses to IPV. These constitute the second and third effects of this kind of work which has resulted in attention being paid to whether or not improved training/education might result in a more ‘appropriate’ use of discretion and whether or not tightening the rules might also produce the same effect. Each of these concerns will be discussed in turn.

Responding to the ‘arrested’ development of ‘pro-arrest’ policy

The central role discretion plays in policing generally and IPV in particular is acknowledged in the research findings cited above. However, whilst much of this work views discretion in a negative light not all those wishing to see changes in the policing response to IPV share this view. For example, the role of discretion is strongly supported in the Duluth approach to IPV (Pence and McDonnell, 1999) and Stark (2012) advocates that it is not discretion itself that is the issue, but rather police understanding of IPV itself which is problematic. Indeed, the College of Policing (2016; cited above) endorses the use of professional judgement (read discretion) in such cases. Nevertheless not all commentators agree with this. Recognition of

the central role of discretion on this issue has led some to argue that removing discretion from front-line responses to IPV would result in a more consistent approach (Hanmer et. al. 1999). Others suggest that the route to the ‘proper’ exercise of discretion (Goldsmith 1990) is by professionalization through training and/or education. For example Cockcroft (2015) suggests professionalization will control discretion (arguably a counter-intuitive understanding of professionalization), Diemer et al (2017) argue that discretion in the policing of IPV is more likely to be used appropriately if officers receive appropriate levels of training and supervision, and Gundhus (2017) suggests a twofold approach focusing on education (rather than training) directed by a more holistic understanding of discretion.

The extent to which training and supervision alone can solve the underlying attitudinal problems associated with inappropriate use of discretion is questionable, particularly given the persistent minimisation of IPV in police work (Loftus, 2009) alongside the ever-changing legal framework in which such training and/or education is required to respond. As just one example, this is particularly notable in the U.K. in respect of the requirements to embrace ‘coercive control’ subsequent to the introduction of Section 76 of the Serious Crime Act 2015. Wiener (2017) reports only 59 convictions under this legislation by December 2016 perhaps indicative of the gap between the changing legislative environment and the operationalisation of it. At this juncture it is apparent that improved training is intimately connected with the second response to the problem of discretion discernible in the literature: rule tightening.

Rules may be tightened by a range of measures in police work, such as changes to legislation, administrative rules or policy guidelines (Chan, 1997). This approach adopts a mechanistic

view of police organisations presuming that changes in practice can be brought about by changes in rules imposed from the top or an external body. The consistent findings by Her Majesty's Inspectorate of Constabulary Reports (HMIC 2014, HMIC 2015) pointing to the continuing failures in policing responses to IPV are perhaps illustrative of the folly of such a presumption. As van Maanen (1983) pointed out some time ago, the limited supervision of lower ranking officers by senior officers compounds the problems inherent in such a view of police organisations. A rule tightening approach is also based on the assumption that legal rules act as an explicit instruction to the police. Whilst legal rules are undoubtedly important in setting out the broad parameters under which police can legally act, there are, as Smith (1986) has argued, many sources of influence guiding the actions of the police, from individual, to group to organisational imperatives. This reflects the kind of holistic understanding of discretion centred by Gundhus (2017). Indeed Henry and Smith (2007) argue that rule tightening reforms have, by themselves, a limited capacity to create actual change in the nature and pattern of policing. However, both Applegate (2006) and Myhill and Johnson (2016) report policy can nonetheless impede discretion.

Within the context of IPV the rule tightening approach has led to the creation of various new laws and legislation (such as coercive and controlling behaviour, Clare's Law and female genital mutilation). However the number of women murdered every year by their intimate (current or former) partners has remained constant (Brennan, 2016) suggesting that such laws are limited in their capacity to generate wider social change. Furthermore, such legislation provides limited guidance in terms of everyday police work. Coercive control in particular is highly complicated and the extent to which frontline police officers are able to understand and evidence such abuse is questionable. As Walklate, Fitz-Gibbon and McCulloch (2017: 5) point out,

The implementation of the new offence is reliant on a police officer's ability to identify the potential presence of coercive and controlling behaviour, elicit information on a series of abusive events from the victim and correctly assess that behaviour, in terms of laying charges. This requires a reframing of an officer's typical approach from responding and taking stock of crime 'incidents' as isolated events towards looking to a series of interrelated events and the harm that flows from these.

Training may provide 'guidance' to police officers on legal changes and will assist officers understanding of procedure (Waddington, 2012), but it is unlikely to impact on either their understanding of the broader social context and/or the attitudinal changes required in recognising the seriousness of intimate partner violence. Grant and Rowe (2011: 64) comment:

Police discretion endures, then, in ways that raises questions about the relative merits of compliance-based or professional-ethical models of policing for reforming frontline performance.

By implication, and perhaps more importantly, the issue of rule tightening in relation to police discretion and IPV assumes it is (legally) possible for police officers to respond to IPV in a vacuum i.e. as incidents separate and separable from all other 'like' offences.

To summarize; the understandable desire to challenge the nature and extent of IPV has focused attention on policing responses, one of the most likely first responders when such incidents are reported. However over thirty years of research and policy refinement indicates that this focus has met with some intransigence and limited improvement in front line policing responses. This same body of work also points to areas in which further

improvement in policy and practices might pertain whether that be in tightening the rules or improving knowledge about the nature of IPV. None of this is to be denied. It is also the case that greater clarity concerning the purpose of this first ‘pro-arrest’ response (for example, it is offender focused or victim focused) might result in some improvements. Here there may well be some mileage in reflecting on the value of ‘focused deterrence’ (Tillyer and Kennedy 2008). Nevertheless some issues remain. Firstly, this body of work has proceeded as though responding to IPV exists in a vacuum from the rest of police work. Secondly it has proceeded as though policing responses in general exist in a vacuum from the wide range of other agencies who might also constitute a significant point of intervention for IPV. Thirdly in focusing on discretion little of this work (perhaps with the exception of the recent contribution of Gundhus, 2017) has explicated a holistic understanding of discretion. Taken together these less visible features of the ‘pro-arrest’ stance have also contributed to its status as a ‘boundary object’. These less visible features are the ‘elephants in the room’: those issues that are taken for granted and as such remain under-examined. In essence much of the work discussed here has presumed that discretion is an impediment to effective police intervention in relation to IPV and thus endorse this moment of response as particularly problematic. Thus the status of ‘pro-arrest’ responses as a boundary object is sustained.

However, as implied above, boundary objects not only involve a community of interested parties who frame ways of thinking and doing about particular subjects, they involve excluding other ways of thinking and knowing. Arguably it is within what has been excluded by this ongoing body of knowledge, particularly in understanding discretion holistically and its relationship to accountability, that much more could be done in devising policy responses, including policing responses, to IPV. Such holistic thinking, by definition, moves the focus of

attention to a much wider range of interested including and beyond those within the policing family.

Concluding thoughts: policing, discretion and the ‘web of accountability’.

Much of the discussion above has been concerned to offer a critical assessment of discretion as constituting the ‘golden thread’ for making sense of policing responses to IPV. In so doing, it has served to endorse the findings of already existing research to the role of discretion as having a potentially negative effect on the efficacy of policies designed to-do otherwise. It is without doubt that discretion, mediated as it is by what is referred to as ‘cop culture’, can be an impediment in relation to IPV and that education/training and rule tightening can have some impact on its worst aspects. However, this paper has also been concerned to put in the foreground the bounded nature of the body of knowledge that has perpetuated the attention given to the response of the front line officer. That attention has failed to appreciate the importance of discretion to the work of policing as a whole and in doing so, it not only fails to take account of the nature of accountability for each individual officer in fulfilling their duties, it also assumes that IPV can be treated as separate and separable from other kinds of violence(s) as far as the police officer is concerned. Given the nature of police work, this is a moot point. Perhaps to express these failures another way: one wonders if there would be similar calls to impede the discretion of the medical profession when they deal with patients (women) who clearly come to them with non-accidental injuries? Questions such as these are tricky indeed but they do put to the foreground the relevance of thinking about discretion holistically (Gundhus 2017) and not just something to be found problematic for IPV within policing. Such thinking might lead to an appreciation of

what has been called the ‘web of accountability’ (Spencer 2016) and thereby direct the policy gaze to devising more holistic policy responses:

Spencer (2016: 227) states,

A web of accountability comprises various strands including the actions of legal systems (criminal, civil, child protection and family law), service systems and informal networks of victims, families and communities that together hold the perpetrator to account by intervening and monitoring ongoing behaviour.

In many ways this notion is as obvious as it might be challenging to implement. However after over thirty years of efforts at positive policing in relation to IPV and research that points the finger at police discretion, it may be time to recognise that this is no longer a fruitful endeavour. Whilst there might be more to be done within this vein, there is even more to be done by taking a holistic view of agency responses to IPV that render such policy responses accountable and have clarity of focus and purpose. This requires much more than the multi-agency conferencing which is also a prominent features of work within the IPV field. It requires centring and understanding IPV and its costs in all its forms across and between a wide range of agencies. This includes the criminal justice agencies (though not exclusively) and demands shared understandings of the problems faced, shared definitions of those problems, and data sharing, as just an initial agenda (see for example, Walby et. al. 2017). All of which make demands of senior police officers not front line ones. However even here it might be time to turn policy attention in different directions. For example, recent research from Australia has suggested that there is a ‘punishment cost’ when it comes to being an older, Indigenous male being sentenced for domestic violence when compared with non-domestic violence (Bond and Jeffries 2014), and that this is particularly the case in a context in which the ‘cultural scripts’ of family violence courts ‘undercut [the] cultural acceptance of

men's violence in the home' (Kramer 2016: 203). In other words, there is a complex web of likely intervention points to be considered. Thus reminding us, as Mooney (2007) commented some time ago, that whilst violence against women might be a public anathema it is a private commonplace. It is ordinary (Genn 1988). Observations such as these, alongside acknowledgement that discretion permeates the whole of the criminal justice process, both vertically and horizontally (including senior officers), lend considerable weight to developing a holistic vision on the relationship between discretion and the successful implementation of policies directed towards IPV.

Such an holistic vision was proffered by Elizabeth Wilson in 1983 in her book, 'What is to be done about violence against women'. In many ways, whilst we know more about what can and cannot be done in relation to policing and IPV, Wilson's vision remains as relevant now as it did in 1983. So rather than calling for more legislation on violence against women (as indicated the Queen's Speech to parliament in 2017), perhaps it is time to follow the lead of the State of Victoria in Australia and demand a Royal Commission on what is to be done about violence against women. That commission, reported in 2016 and took a holistic view on IPV (there understood as family violence) with the State of Victoria committing to implementing all 227 of its recommendations covering all the agencies who might have a role to play in tackling such violence. This kind of web of accountability might be one way of thinking and doing differently in relation to IPV. Operating with a wider structural and holistic vision proffers a view that it is within a 'golden thread of discretion' understood both vertically and horizontally, where, for the purposes of positive policy intervention on IPV, the real issues lie.

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