IT'S NOT ENOUGH TO PLUG THE GAP: COERCIVE CONTROL AND THE CRIMINAL LAW

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Declaration

I hereby declare that this thesis has not been and will not be submitted in whole or in part to another University for the award of any other degree.

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UNIVERSITY OF SUSSEX

Cassandra Wiener **Doctor of Philosophy**

It's Not Enough to Plug the Gap: Coercive Control and the Criminal Law

Abstract

This study is a review of section 76 Serious Crime Act 2015 (section 76), a law that makes 'controlling or coercive behaviour' a criminal offence in England and Wales. It is the first comprehensive review of the new law, and as the UK is leading the way on coercive control legislation it will generate significant national and international interest. It is part doctrinal and part empirical in scope, and answers the research question: does the criminal law in England and Wales capture coercive control effectively?

The thesis begins with an exposition of coercive control before examining the criminal law. This allows for an initial assessment of coercive control outside of the domain of the criminal law in chapter three. I build on the existing literature, and on focus groups and semi structured qualitative interviews conducted with survivors and their closest advisors, to present a model of control that explains how perpetrator behaviour that is physically, sexually and emotionally abusive supports a strategy of domination.

Chapters four to seven then turn to the criminal law itself. In them, I set the implementation of section 76 into context by reviewing it, together with the other three pieces of legislation that are available to police and prosecutors to capture the different manifestations of coercive control. In each chapter the doctrinal review is given depth and context via the inclusion of data from interviews and focus groups conducted with the judiciary and the police. In the final chapter eight, I conclude that despite the introduction of section 76, the crime is not properly

labelled and the harms inflicted are not properly captured - while section 76 marks progress, it is clear that there is more work to be done.

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CHAPTER ONE: INTRODUCTION

This thesis is about coercive control. It is about what coercive control *is*, and about how it is captured by the criminal law. The over-arching research question is: does the criminal law capture coercive control effectively? Section 76 of the Serious Crime Act 2015 (section 76) came into force on 29 December 2015 making 'controlling or coercive behaviour in an intimate or family relationship' a criminal offence for the first time in England and Wales, carrying a penalty of up to five years in prison. Scholars place coercive control at the centre of domestic abuse,[1] and its criminalisation is an important criminal justice development. However, the analysis in this thesis of the physical and psychological aspects of coercive control reveals that the government fundamentally misunderstood the nature of the problem it was trying to address. My review of the criminal law that is currently used to prosecute coercive control shows that the criminal law, post section 76, still does not capture the totality of the harm experienced by survivors, or the unique nature of the wrong carried out by perpetrators. I conclude that further reform is necessary and I investigate ways in which this might be achieved.

This chapter is divided into two parts. I begin by explaining the criminal justice background to the relationship between domestic abuse and the criminal law. This background is sensitive and an understanding of its historically fraught nature is essential as its effects are still in evidence today. Having established the context for the thesis, I then turn to the content, and explain the thesis' approach. I set out the research questions and the definitions used in the thesis, before concluding with an explanation of the epistemological approach adopted throughout.

PART ONE: THE CRIMINAL JUSTICE BACKGROUND

The recognition that domestic abuse is criminal at all and not just a private matter is, from a criminal justice perspective, a relatively recent development. Previously, in the United Kingdom in the 1970s and 1980s, police regarded domestic abuse 'at best as a nuisance to be mediated and at worst as a dangerous situation to be

[1] Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007).

avoided'.[2] In other words, for a long time, domestic abuse was considered to be outside the remit of criminal justice altogether.

Domestic abuse is *s*hockingly ubiquitous. The Council of Europe, for example, estimated as early as 2002 that one in four women worldwide will experience abuse in her lifetime.[3] The harms caused by abuse are uniquely damaging. The most recent figures show that domestic homicides are at an all-time high, and that up to three women lose their life in this way in England and Wales each week.[4] Between four and ten victims of domestic abuse in England and Wales take their own lives every week.[5] Not all cases of domestic abuse end with the loss of life, but the physical and emotional fallout from the abuse is usually severe, as is explained in detail in chapter three. The "cost" of domestic abuse has been measured in terms of its impact on children,[6] on victims' mental health,[7] and in economic terms (estimated at £15.7 billion per year).[8]

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[2] Deborah Tuerkheimer, 'Recognising and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence' (2004) 94(4) Journal of Criminal Law and Criminology 959, 970.
[3] Council of Europe, *Recommendation 2002/5 of the Committee of Ministers to Member States on the Protection of Women Against Violence* (Council of Europe 2002).
[4] Thomas MacIntosh and Steve Swann, 'Domestic Violence Killings Reach Five Year High' BBC News (13 September 2019) available at <https://www.bbc.co.uk/news/uk-49459674> accessed 6 October 2019.
[5] Sylvia Walby and Jonathan Allen, 'Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey' (Home Office 2004); Jane Monckton Smith, Karolina Szymanska and Sue Haile, *Exploring the Relationship Between Stalking and Homicide* (Homicide Research Group University of Gloucestershire 2017) <http://eprints.glos.ac.uk/4553/1/NSAW%20Report%2004.17%20-%20finalsmall.pdf> accessed 7 September 2018; Jane Monkton-Smith, 'Intimate Partner Femicide: Using Foucauldian Analysis to Track an Eight Stage Progression to Homicide' (2020) 26(11) Violence Against Women 1267. For the most recent intimate partner homicide statistics see Office For National Statistics, *Domestic Abuse in England and Wales for the Year Ending March 2018*, available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2018#domestic-abuse-related-offences-specific-crime-types> accessed 1 September 2019. For a more recent analysis of the links between domestic abuse and suicide see Vanessa Munro and Ruth Aitken, 'Adding Insult to Injury? The Criminal Law's Response to Domestic Abuse Related Suicide In England and Wales' (2018) 9 Criminal Law Review 732; Vanessa Munro and Ruth Aitken, 'From Hoping to Help: Identifying and Responding to Suicidality Amongst Victims of Domestic Abuse' (2020) 26(1) International Review of Victimology 29.
[6] Jane Callaghan et al, 'Beyond "Witnessing": Children's Experiences of Coercive Control in Domestic Violence and Abuse' (2018) 33 Journal of Interpersonal Violence 1551. See also Susan Heward Belle, '"Exploiting the Good Mother" as a Tactic of Coercive Control: Domestically Violent Men's Assaults on Women as Mothers' (2017) 32 Journal of Women and Social Work 374. Office For National Statistics, *Domestic Abuse in England and Wales for the Year Ending March 2018*, available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2018#domestic-abuse-related-offences-specific-crime-types> accessed 1 September 2019.
[7] Cathy Humphries and Ravi Thiara, 'Mental Health and Domestic Abuse: "I Call It Symptoms of Abuse"' (2003) 33 British Journal of Social Work 209.
[8] Sylvia Walby, *The Cost of Domestic Violence* (Women and Equality Unit 2004) available at <www.devon.gov.uk/cost_of_dv_report_sept04.pdf> accessed 1 September 2019; HMIC, *Everyone's Business: Improving the Police Response to Domestic Abuse* (Home Office 2014); Rhys Oliver et al, *The Economic and Social Cost of Domestic Abuse* (Home Office 2019).

The criminal law infrastructure for the prosecution of some aspects of domestic abuse existed, in the 1970s and the 1980s, in the form of the legislative infrastructure that was commonly used for physical violence and sexual violence that did not have an intimate partner context. In other words, offences such as assault and battery, actual bodily harm and grievous bodily harm, murder, manslaughter, indecent assault and rape outside of marriage[9] were available to the police for the prosecution of domestic abuse.

However, the police were not always willing or able to respond to calls for help. A review carried out in 1991 in the United Kingdom recorded responses such as, 'it is only another bloody domestic'[10] and, 'domestic disputes are a common sort of call regarded as "rubbish" by many police officers'.[11] Some of the older police officers interviewed for this project remembered the 1980s, and even the early 1990s, as a time when police culture was such that they were encouraged not to take action even when the abuse was readily apparent. PC Fromer, for example, who began his career in the police in 1988, said 'it was literally like you turn up, somebody's got a bloody nose, I'm not interested thank you very much'.[12]

Feminists have been partly responsible for 'significant shifts towards seeing domestic violence as a social and public problem' around the world.[13] They have contributed to a rich body of research detailing 'powerful, vivid accounts of sexual violence and battering relationships'.[14] This research led to the repositioning of domestic abuse as an international human rights issue,[15] which in turn exposed

[9] The ruling in *R* ([1992] 1AC 599 HL) which overturned the marital rape exemption was confirmed by the Criminal Justice and Public Order Act 1994, s 142 – this step is reviewed in detail in chapter six.
[10] Sheila Edwards, *Policing "Domestic" Violence* (Sage 1991) 101.
[11] Ibid.
[12] Interview with PC Fromer (13 November 2017) 2. The names of all interview respondents have been changed to protect anonymity as is explained in chapter two.
[13] Marianne Hester, 'Who Is Doing What to Whom' (2013) 10(5) European Journal of Criminology 623, 623.
[14] Holly Johnson, 'Rethinking Survey Research on Violence Against Women' in Rebecca Dobash and Russell Dobash (eds) *Rethinking Violence Against Women* (Sage 1998) 23.
[15] See, for example, Charlotte Bunch, 'Transforming Human Rights from a Feminist Perspective' in Julie Peters and Andrea Wolper (eds), *Women's Rights Human Rights* (Routledge 1995); and Rhonda Copelon, 'Intimate Terror: Understanding Domestic Violence as Torture' in Rebecca Cook (ed.), *Human Rights of Women* (University of Pennsylvania Press 1994).

the way in which governments were absolving themselves from responsibility for human suffering.

While it is difficult to locate the shift to a specific date, since the early to mid 1990s in England and Wales, as elsewhere, the state has regarded domestic abuse as a serious criminal justice issue. In other words, 'the law no longer recognises a private realm in which a man is free to beat his wife'.[16] Furthermore, since 1992, the law does not recognise a private realm in which a man is free to rape his wife.[17] One aspect of this recognition of state responsibility has been a concerted focus by the Home Office, the Ministry of Justice, the Crown Prosecution Service (the CPS) and the police to make tackling domestic abuse a criminal justice priority.

The focus, and the shift toward seeing domestic abuse as a social and public problem, has had far reaching ramifications. There has been a plethora of policy initiatives aimed at improving the criminal justice response to domestic abuse.[18] These improvement initiatives - which have been directed at police and CPS working culture and criminal justice procedure as well as the criminal law - are too numerous to list comprehensively here, but some examples will suffice. In terms of police and CPS culture the Home Office Circular 60/1990 that advised police to treat "domestic violence" as they would any other violent crime, was significant.[19] Also important was the later Circular 19/2000 which asked the police to adopt a "pro-arrest" approach and made clear that marginalisation of domestic abuse as a policing issue was no longer to be tolerated.[20] Better victim care was introduced via a series of procedural initiatives such as the Multi Agency Risk Assessment Conferences (MARACs), the introduction of specialist advocacy services (Independent Domestic Violence Advisors (IDVAs)),[21] and specialist Domestic Violence Courts (SDVCs),[22] - to name but a few. Finally, there have been the

[16] Antonia Cretney and Gwynn Davis, 'Prosecuting "Domestic" Assault' [1996] Criminal Law Review 162, 162.
[17] R [1992] 1AC 599 HL.
[18] Hester, Who is Doing What to Whom n13 79.
[19] Nichola Groves and Terry Thomas, *Domestic Violence and Criminal Justice* (Routledge 2014).
[20] Home Office, *Domestic Violence: Revised Circular to the Police* (Circular no. 19/2000).
[21] Amanda Robinson, *Independent Domestic Violence Advisers: A Multisight Process Evaluation* (Home Office 2009).
[22] Marianne Hester et al, *Early Evaluation of the Domestic Violence Court, Croydon* (Ministry of Justice Research Series 14/08 2008).

significant legislative improvements that are the focus of this thesis. The Protection from Harassment Act 1997 (chapter five), the Sexual Offences Act 2003 (chapter six) and section 76 Serious Crime Act 2015 (chapter seven) all extend the remit of the criminal law.

Unfortunately, overshadowing all of these improvements has been recognition that the prevalence of domestic abuse is still unacceptably high. The Office For National Statistics figures show that recorded rates of domestic abuse in England and Wales remain stubbornly high, despite rates of other, related types of crime, (for example, violent crime that is not domestic), continuing to fall. The most recent published figures record an estimated two million victims of domestic abuse in the year ending March 2018, a figure which Home Office statisticians estimate has remained relatively stable over the last five years.[23] As stated above, recent domestic homicide figures are also, unfortunately, at their highest level for five years.[24]

A key empirical difficulty revealed by the statistics is a recognition of the so-called 'justice gap'.[25] Despite improvements in the criminal justice process, there is a shortfall between estimates of abuse and the number of cases in the legal system.[26] Furthermore, the proportion of cases in the system that result in conviction is very small.[27] While it is clear that problems remain, there is not an agreed consensus on how best to tackle them, or even from a more systemic perspective, why they persist. An important empirical study undertaken in 1996 suggested that the problem might be strategic when it concluded that 'there is a serious dislocation between the interests of domestic assault victims and the goals which are at present pursued by the prosecuting authorities'.[28] More recently, on 27 March 2014, Her Majesty's Inspectorate of the Constabulary (HMIC) published a report

[23] ONS, Domestic Abuse 2018 n5.
[24] MacIntosh and Swann, Domestic Violence Killings Reach Five Year High n4.
[25] Sonia Harris-Short and Joanna Miles, *Family Law Text, Cases and Materials* (Oxford University Press 2011) 210.
[26] ONS, Domestic Abuse 2018 n5.
[27] ONS, Domestic Abuse 2018 n5; Marianne Hester and Nicole Westmarland, *Tackling Domestic Violence: Effective Interventions and Practice* Home Office Research Study 290 (Home Office 2005).
[28] Cretney and Davis, Prosecuting "Domestic" Assault n16 162; see also Marianne Hester and Nicole Westmarland, *Tackling Domestic Violence: Effective Interventions and Practice* Home Office Research Study 290 (Home Office 2005).

analysing the results of a year-long investigation into the policing response to domestic abuse. This report concluded that the problem might still be one of police culture: 'the police response to domestic abuse is not good enough and must be improved'.[29]

Underpinning some of the reports and analysis was a recognition that the problem might be at least in part a legislative one, namely that the criminal law itself was contributing to the difficulties.[30] Lawyers pointed out that the incident-focused nature of the parts of the criminal law that were most often used to prosecute domestic abuse did not "fit" with abuse, which is a pattern of behaviour that develops over time.[31] The Protection from Harassment Act 1997 was, (before the implementation of section 76), the only piece of criminal legislation that was intended to apply to courses of conduct rather than one-off incidents in this context. However, there was resistance to its use in conjunction with the prosecution of domestic abuse: it was held by the courts that it does not apply in the case where the abuser and the survivor are sharing a living space.[32]

In 2012, at the request of the then coalition government, the policy development think-tank the Centre for Social Justice produced a policy report which claimed to provide a 'comprehensive review' of how what it referred to as 'the cycle of abuse' could be broken. One of its key conclusions was that the legislative position was inadequate. The report concluded:

> Fundamentally the law and legal system were not designed with domestic abuse in mind and they still both misapply understandings of other sorts of crime to it…. As the law emphasises incidents, rather than patterns of behaviour, it fails to give adequate recognition to the serious wrongdoing inherent in strategic patterns of control and subjugation.[33]

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[29] HMIC, *Everybody's Business: Improving the Police Response to Domestic Abuse* available at <http://www.justiceinspectorates.gov.uk/hmic/publications/improving-the-police-response-to-domestic-abuse/>accessed 7 September 2015, 6.
[30] Tuerkheimer, Recognising and Remedying the Harm of Battering n2; Alafair Burke, 'Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization' (2007) 75 George Washington Law Review 558.
[31] Ibid.
[32] *Curtis* [2010] EWCA Crim 123; *Widdows* [2011] EWCA Crim 1500. This is discussed in detail in chapter five.
[33] Samantha Callan and Ellie Farmer, *Beyond Violence, Breaking Cycles of Domestic Abuse* (Centre for Social Justice 2012) available from <www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20Exec%20summaries/DA%20Exec%20Sum.pdf >accessed 1 May 2013, 24.

The strategic pattern of control employed by perpetrators was brought onto the radar of mainstream public consciousness by the ground-breaking work of Evan Stark, whose analysis showed that domestic abuse could be better understood as an ongoing strategy of domination. He argues that the harm inflicted on victims is as much structural, (the deprivation of liberty), and psychological, (emotional), as it is physical, (injuries).[34] This strategy of domination is referred to in this thesis as coercive control, and the purpose of the thesis is to assess how coercive control is captured by the criminal law. The way in which coercive control is (and is not) recognised by the family courts is also of critical importance to survivors of abuse, but it is outside the remit of this thesis.[35] I use the rest of this chapter to explain how the assessment of the criminal law is done.

PART TWO: THE THESIS' APPROACH

The Research Questions

My assessment of the way that the criminal law captures coercive control takes place in the form of answers to five central research questions:

(1) How do survivors experience coercive control?
(2) How are the physical aspects of coercive control captured by the Offences Against the Person Act 1861 and related common-law offences of assault and battery?
(3) How are the non-physical aspects of coercive control captured by the Protection from Harassment Act and section 76?
(4) How are the sexual aspects of coercive control captured by the Sexual Offences Act 2003?, and
(5) Does the criminal law capture coercive control effectively, or is there need for further reform?

[34] Stark, Coercive Control n1.
[35] The recent Court of Appeal ruling in Re H-N and others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448 is a useful snapshot of the very difficult issues facing the family courts post the introduction of section 76 that are not the subject of this thesis.

I begin with an exposition of domestic abuse and coercive control (question one) before going on to examine the criminal law (questions two - five). This ordering is intentional: the normative and descriptive power of the criminal law is well recognised. It is important to establish what coercive control *is* as far as possible *outside* of the domain of the criminal law before assessing to what extent it is properly captured *by* the criminal law. In chapter three I examine coercive control as strategic domination from the perspective of survivors. I build on the existing literature, and on empirical work that I conducted with survivors and their closest advisers, to present a model of coercive control that explains how perpetrator behaviour that is physically, sexually and emotionally abusive supports this strategy of domination.

Chapters four to seven then turn to the criminal law itself. In them, I review each of the four pieces of legislation that are currently used by police and prosecutors to capture the different manifestations of coercive control. I conclude that the fragmentation of coercive control into its constituent parts in this way means that the crime is not properly labelled and the harms inflicted are not properly captured. Furthermore, the failure of the criminal law to describe or capture the realities of coercive control creates evidentiary, narrative and victim-validation limitations that are interfering with the Criminal Justice System response.

The final question five is the over-arching question which assesses whether the criminal law is effective in the context of coercive control. The assessment of the efficacy of the criminal law can be approached from different perspectives, and needs to be carefully articulated. My focus is on the viewpoint of the survivors of coercive control. I have chosen to focus on this viewpoint because of all the positions that I could have considered this is the most neglected. It is also the most important. My interest is in whether or not the law is working to protect those that need it. To address this, I recognise that I need to review how the law is experienced by those who are using it.[36]

[36] Rebecca Lewis et al, 'Protection, Prevention, Rehabilitation or Justice? Women's Use of the Law to Challenge Domestic Violence' (2000) 7 International Review of Victimology 179.

Definitions

As I explain in more detail in chapter three, definitions in this area are complicated. Domestic abuse, for the purpose of this thesis, is physical, sexual and/or psychological abuse between people who are in (or who have been in) an intimate relationship. Coercive control is a type of domestic abuse. Domestic abuse and coercive control are therefore not the same thing, and this distinction - between domestic abuse and coercive control - is the focus of examination in the first part of chapter three. While I recognise that, unfortunately, women also abuse men, empirical research suggests that the victims of coercive control are almost always women. For this reason I have chosen to focus on female victims of abuse for this thesis. Furthermore, while coercive control takes place within same sex couples research suggests that this is qualitatively and quantitatively different.[37] My focus is on heterosexual couples.

As far as the label domestic abuse is concerned, there are many different terms that I could have used, for example intimate partner abuse, domestic violence, intimate partner violence, family violence, gender violence and violence against women.[38] None of the terms are 'unstigmatized'.[39] Most consist of combinations of words - one indicating the nature of the behaviour under investigation (I use "abuse") and the other demarcating its context (I use "domestic").

My decision to use the label "abuse" is relatively straightforward. There are only two mainstream possibilities: "violence" or "abuse". "Violence" in its everyday use is the more specific of the two labels. It has a stronger connection in everyday usage with violence that is *physical*. It can be deliberately used in a broad, inclusive manner to include non-physical acts: indeed the Supreme Court has defined it in

[37] Catherine Donovan, Marianne Hester, Jonathan Holmes & Melanie McCarry, 'Comparing Domestic Abuse in Same Sex and Heterosexual Relationships' Initial Report (University of Bristol 2006).
[38] Michael Gordon, 'Definitional Issues in Violence Against Women: Surveillance and Research from a Violence Research Perspective' (2000) 6 Violence Against Women 747.
[39] Sylvia Walby and Andy Myhill, 'New Survey Methodologies in Researching Violence Against Women' (2001) 41 British Journal of Criminology 510, 512.

just such a way.[40] Nevertheless it has been pointed out that "violence" more immediately suggests acts of force occasioning *physical* harm. In 2014, HMIC published a report on the Metropolitan Police criticising their use of the label 'domestic violence' for this reason. The report highlighted that, 'the MPS uses the term "domestic violence" and this leads officers to concentrate on violence to the detriment of other forms of domestic abuse such as controlling behaviour.'[41]

In my view, using the label "abuse" resolves this particular issue. "Abuse" is less specific as a descriptive term. Abuse is suggestive of behaviour that is wrong in either a physical and/or a non-physical way.[42] Abuse as a label is therefore more naturally inclusive of behaviour such as coercive control, which manifests itself in physical and non-physical ways.[43] As coercive control is the primary area under investigation I decided that the broader term "abuse" is more appropriate as an umbrella term in the context of this project.

My decision to use the term "domestic" is more nuanced. "Family" abuse suggests the inclusion of family members other than intimate partners, and has a strong association with the "family violence" movement in the United States. This engenders a whole raft of unwanted associations that are explored in chapter three. "Gender abuse" has the difficulty that it might be confused with what is known as "gender-based violence"; that is, violence that is directed against a woman because she is female, which is at once too broad (no reference to an intimate relationship) and too specific (only acknowledging one root cause for the violence) for this project.[44] "Violence against women" again gives no indication of an intimate partner context. Furthermore it is used as a generic term to include

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[40] The Supreme Court defined "domestic violence" for the purposes of the Housing Act 1996, s 177(1) to include non-physical abuse in *Yemshaw v Hounslow* LBC [2011] UKSC 3.
[41] HMIC, *The Metropolitan Police Service's Approach to Tackling Domestic Abuse* available at <https://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/2014/03/metropolitan-approach-to-tackling-domestic-abuse.pdf> accessed 12 May 2017, 10.
[42] Michelle Madden Dempsey, 'What Counts as Domestic Violence' (2006) 12 William & Mary Journal of Women and Law 301.
[43] Stark, Coercive Control n1; the behaviours which constitute coercive control are explored in chapter three.
[44] See for example Sylvia Walby et al, 'Mainstreaming Domestic and Gender-Based Violence Into Sociology and the Criminology of Violence' (2014) 62 The Sociological Review 198.

other phenomena such as human trafficking, prostitution and pornography,[45] which are all important areas of scholarship in their own right but which are not under consideration here.

"Intimate partner" as a term has the advantage that it clearly demarcates the relationship as the site of importance. Its neutrality as a term, however, strips it of historical baggage which is important for this project. "Domestic", on the other hand, carries uncomfortable associations such as the belittling of abuse that used to accompany the use of "domestic' in police circles referred to above. It references a boundary between private and public space; as stated above it is the relegation of domestic abuse historically to the "domestic" sphere that made its trivialisation possible for so long.[46] I think that the historically fraught nature of the relationship between criminal justice and domestic abuse is still with us. Some of the associations generated by the use of the term "domestic" serve as a poignant and useful reminder of that fact.

Domestic abuse is therefore my term of choice for this thesis but I recognise that there are difficulties with this decision. Domestic abuse is used as a label by the government of the United Kingdom, but it is defined broadly to include many phenomena (female genital mutilation, honour-based violence, sibling violence)[47] that are not the subject of this thesis. My position is that it is unfortunate that the Government has chosen to define domestic abuse in this way, because while female genital mutilation, honour-based violence and sibling violence are all important areas of investigation, they are qualitatively different phenomena to domestic abuse. The second problem with my decision to use "domestic" is that "domestic" is a location-orientated term, which is misleading. This thesis makes it clear throughout that to regulate abuse is 'to regulate relationships, not

[45] These are all listed in the CPS annual report under the heading of 'Violence Against Women': see, for example, CPS, *Violence Against Women and Girls Crime Report 2017 – 2018* available at <www.cps.gov.uk/publications/docs/cps_vawg_report_2017.pdf> accessed 20 November 2019.
[46] For a discussion of the consequences of the relegation of abuse to the 'private space of the home' see Bunch, n15.
[47] See, for example, HM Government *Call to End Violence Against Women and Girls Action Plan* (2015) available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118153/vawg-action-plan.pdf> accessed 26 July 2016.

locations'.[48] Abuse between partners often occurs once the partners are no longer sharing a living space,[49] and can in any event take place in a supermarket as readily as in a sitting room.

Two further definitions are central to this research. "Victim" is the word most often used in the criminal justice literature to describe people who have suffered as a result of another's criminal behaviour, but it has some unhelpful connotations. To describe all people who have experienced abuse generically as "victims" is not appropriate. Debates over the language of "victim" versus "survivor" have been going on for some time.[50] I recognise that coercive control is a direct attack on agency. The term victim suggests passivity that my research shows does not adequately capture the experiences of people who have been abused. An alternative is the label "survivor". Although it could be said that "survivor" suggests resolution (of the abuse) as a threshold for qualification (as a survivor),[51] due to the special sensitivity around the idea of agency in relation to coercive control, I prefer "survivor" and use it wherever possible.

Finally, coercive control itself - the most important definition to this project - has already been introduced, above. I draw on Stark's work and on interviews and focus groups with survivors and their closest advisers to provide a detailed exposition of coercive control in the second part of chapter three, and I explain the extent to which it does (and does not) overlap with domestic abuse. The government uses the term 'controlling or coercive behaviour' in section 76, and the fact that the government's construct of controlling or coercive behaviour is not, in fact, the same phenomenon as coercive control is central to this thesis and is reviewed in chapter seven.

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[48] Victor Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom-Based Account' in Anthony Duff and Stuart Green (eds), *Defining Crimes Essays on the Special Part of the Criminal Law* (Oxford University Press 2005) 122.

[49] Cathy Humphreys and Ravi Thiara, 'Neither Justice Nor Protection: Women's Experiences of Post-Separation Violence' (2003) 25(3) Journal of Social Welfare and Family Law 195. See also Stark, Coercive Control n1 at p 104 where he points out that the use of the term 'domestic' can be misleading for this reason.

[50] Jenny Davis and Tony Love, 'Women Who Stay: A Morality Work Perspective' (2018) 65(2) Social Problems 251.

[51] See Liz Kelly and Jill Radford, 'Sexual Violence Against Women and Girls' in Russell Dobash and Rebecca Dobash (eds), *Rethinking Violence Against Women* (Sage 1998) for an example of this critique of the term 'survivor'.

Epistemology

Working from the perspective of survivors I use a mix of methods to approach the evaluation of the criminal law from under a feminist, socio-legal umbrella. Legal practice is located within the context of the survivor's lived experience and the court proceedings. It is subjected to an empirical inquiry that looks at the meaning and effect of rules as well as their legal articulation.[52] The research methodology is reviewed in detail in chapter two, below: but from a more general epistemological perspective, thinking about the effect of the criminal justice response to coercive control on the lives of survivors puts the thesis squarely within the socio-legal paradigm.

"Feminism" is not a homogenous discourse, and indeed as a field is as wide-ranging as that of socio-legal studies. Uniting feminisms, however, is an interrogation of the social structures that distribute social power unequally between men and women. These distributions of power are, of course, too endemic to be discrete or contextual or the result of individual choices. As Dempsey points out 'they are best understood as systemic in nature'.[53]

While I recognise that coercive control is fostered and facilitated by the gendered structural inequalities that result from a systemic societal power imbalance, this relationship, between structural and intimate power imbalance, is not the focus of this thesis. This is partly because a considerable body of scholarship has already explored this relationship, and that existing scholarship informs this thesis.[54] It is also because, in my view, a thesis (like this one), which is primarily concerned with law reform, benefits from a focus on the criminal justice response to abusive

[52] Nicola Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5(2) Social and Legal Studies 131, 132.
[53] Michelle Madden Dempsey, 'Towards a Feminist State: What Does 'Effective' Prosecution of Domestic Violence Mean?' (2007) 70 Modern Law Review 909.
[54] Some of the texts I have found particularly helpful on the relationship between the structural and the intimate aspects of imbalance include Drucilla Cornell, 'Beyond Accomodation: Ethical Feminism, Deconstruction, and the Law (Routledge 1991), Catherine MacKinnon, Toward a Feminist Theory of the State (Harvard University Press 1991); Carol Gilligan, In A Different Voice (Harvard University Press 1993); Lacey, Unpspeakable Subjects n53, Jennifer Nedelsky, Law's Relations A Relational Theory of Self, Autonomy and Law (Oxford University Press 2011).

individual relational dynamics. The criminal law itself is focused on individual rather than structural wrongdoing, and my practical focus is on improving the criminal law in the context of domestic abuse. This is absolutely not to say that the battle that rages against more general, structural, amorphous gender power dynamics is not critically important. My focus here, though, is deliberately on how domestic abuse is expressed specifically between two people, and on how that behaviour is (and is not) translated into the criminal law.

In particular, when focusing on the specifics of abuse, I found what has been referred to in the literature as "feminist standpoint theory" to be helpful for the purposes of this project. Feminist standpoint theories emphasise the importance of specificity: they 'reject the notion of an "unmediated truth". They argue instead that knowledge is always mediated by a host of factors related to an individual's particular position, in a determinate socio-political formation, at a specific point in history'.[55]

One of the best-known proponents of standpoint theory, Sandra Harding, explains how its roots are linked in the literature to Hegel's ideas on the insight into the master/slave relationship. This insight is given by occupying the position of the slave. Harding advocates a methodology that involves 'starting thought from the lives of margianalized peoples'.[56] Validating a discredited knowledge perspective has direct resonance for a project that aims to start from the lives of the survivors of coercive control.

Prominent standpoint feminists Nancy Hartsock and Dorothy Smith argue that 'those in domination can only ever have or produce partial knowledge'[57] and that, as a result, women necessarily produce more accurate knowledge than men. While I agree that "domination" generates a particular perspective, I do not agree that the

[55] Mary Hawkesworth, 'Knowers. Knowing. Known: Feminist Theory and Claims of Truth' (1989)14(3) Signs 533, 536.
[56] Ibid. 6.
[57] Nancy Hartsock, 'The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism' in Sandra Harding and Merrill Hintikka (eds), *Discovering Reality* (Springer 1983) as cited by Nicole Westmarland, 'The Quantitative/Qualitative Debate and Feminist Research: A Subjective View of Objectivity' (2001) 2(1) Forum: Qualitative Social Research Article 13, 3.

knowledge women produce is necessarily more accurate or more useful. Rather, I find it helpful to consider that knowledge is situated, and that 'neither men nor women can ever have total knowledge, as all knowledge is partial'.[58] Adopting the notion of situated objectivity allows for the assumption of some the tenets of postmodernism and post structuralism. But I deliberately do not adopt mainstream postmodern theory, which, it has been observed, has 'been remarkably blind and insensitive to questions of gender'.[59]

Locating feminism within a postmodern framework is difficult,[60] not least because of the ontological instability that follows from the relativism that underpins postmodern thought. Nicola Lacey talks about 'a kind of frightening irresponsible relativism'. She observes 'the radical relativism which seems to be embraced by some post-modern theories and which arguably threatens to cut the political ground from under feminism's feet'. [61] At one end of a spectrum, for example, radical relativism disrupts even feminism's insistence on the significance of gender: a disruption which is an example of the potential for contradiction within an outlook which is at once relativist and feminist.

Anxiety about postmodernism is not confined to feminist thought. In fact, relativism - to the extent that it regards truth as an 'illusion of Western dominated thought'[62] - can be a profoundly disruptive influence in any social research.[63] Donna Haraway encapsulates the destructive potential of radical deconstruction projects when she talks about them ending in a 'kind of epistemological

[58] Westmarland, the Quantitative/Qualitative Debate n58 3.
[59] Christine di Stefano (1987) 'Postmodernism/Postfeminism? The Case of the Incredible Shrinking Woman' (American Political Science Association Conference, Chicago, September 3 – 6 1987) as cited in Sandra Harding, 'Feminism, Science, and the Anti-Enlightenment Critiques' in Linda Nicholson (ed.), *Feminism/Postmodernism* (Routledge 1990).
[60] See for example Jane Flax, 'Postmodernism and Gender Relations in Feminist Theory'; and Christine Di Stefano, 'Dilemmas of Difference: Feminism, Modernity, and Postmodernism' both in Linda Nicholson (ed.), *Feminism/Postmodernism* (Routledge 1990). Also see Gregor McLennan, 'Feminism, Epistemology and Postmodernism: Reflections on Current Ambivalence' (1995) 29(3) Sociology 391; Lacey, Unspeakable Subjects n53 and Syliva Benhabib, 'Feminism and Postmodernism: An Uneasy Alliance' in Sylvia Benhabib et al, *Feminist Contentions A Philosophical Exchange* (Routledge 1995).
[61] Lacey, Unspeakable Subjects n53 183.
[62] Sally Wheeler and Patrick Thomas, 'Socio-legal Studies' in David Hayton, (ed.) *Law's Futures* (Hart 2000) 269.
[63] Alan Bryman, *Social Science Research Methods* (Oxford University Press 2012).

electroshock therapy'.[64] Thus my ontological position allows for the validity of a specific perspective. In other words, I accept the possibility of an external truth-evaluable reality. It is this acceptance that puts me in opposition to aspects of postmodern thought.

From an epistemological perspective, however, if the thesis is not postmodern in a mainstream sense, neither is it positivist. I agree that 'the positivist experiment has failed and we are now in a post positivist world'.[65] Instead, I acknowledge that knowledge is situated. This position allows for a degree of relativity. Haraway reviewed what she referred to as the 'problem' of 'how to have simultaneously an account of radical historical contingency for all knowledge claims … and a no-nonsense commitment to faithful accounts of a "real" world'.[66] Haraway's solution - what she refers to as 'situated knowledges'[67] - is adopted by this project. To allow that knowledge is possible, but situated, is to recognise an epistemological middle ground. This means acknowledging a 'real world with which we act and interact'.[68] It suggests that objectivity is not the opposite of subjectivity. Instead, objectivity is a 'socially constructed value that can nevertheless assist us in accessing social reality'.[69] This recognition or understanding of situated objectivity allows for conclusions about values, even while acknowledging that values are themselves situated, perspectival, and not necessarily universal.

Lacey suggests such an approach as an answer to what she refers to as the problem of the modernist/post-modernist dichotomy.[70] This fits with Haraway's understanding of 'positioned rationality': which she explains as 'the joining of partial views and halting voices into a collective subject position that promises a

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[64] Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14(3) Feminist Studies 575, 578.
[65] Mairead Dunne, John Pryor and Paul Yates, *Becoming a Researcher: A Research Companion for the Social Sciences* (Open University Press 2005) 16. Also see Yvonna Lincoln, Susan Lynham and Egon Guba, 'Paradigmatic Controversies, Contradictions, and Emerging Confluences, Revisited' in Norman Denzin and Yvonna Lincoln, *The SAGE Handbook of Qualitative Research* (Sage 2011).
[66] Haraway, Situated Knowledges n65 579.
[67] Haraway, Situated Knowledges n65.
[68] David Altheide and John Johnson, 'Reflections on Interpretive Adequacy in Qualitative Research' in Norman Denzin, Yvonna Lincoln, *The SAGE Handbook of Qualitative Research* (Sage 2011) 582.
[69] Malcolm Williams, 'Situated Objectivity, Values and Realism' (2015) 18(1) European Journal of Social Theory 76, 76.
[70] Lacey, Unspeakable Subjects n53 183.

vision of ... views from somewhere'.[71] Details of the empirical part of the project are set out in chapter two; empirical research widens normative insight because it includes different points of view. This is why I consulted survivors with experience of coercive control and the criminal law.

CONCLUSION

Coercive control is a significant criminal justice problem and the harm it causes is uniquely damaging. Awareness of prosecution difficulties has resulted in changes to the legislative position that are an important step. In this thesis, I evaluate the criminal law in the context of coercive control from the survivors' perspective. The evaluation takes place under a socio-legal umbrella that allows for an investigation of the criminal law which is social and empirical as well as doctrinal. The examination of the relationship between gender and the social structures that make coercive control possible draws on feminist scholarship, and the situated nature of the enquiry, namely its grounding in the perspective of survivors, is 'objectivity as positioned rationality'.[72] In other words, the project is guided by an epistemological position which recognises that knowledge is valid and important because of, and not in spite of, its situated or perspectival nature. This is because it is, in Haraway's words, a view 'from somewhere': [73] a place that is explored and explained in the next, methodology, chapter.

[71] Haraway, Situated Knowledges n65 590.
[72] Ibid.
[73] Ibid.

CHAPTER TWO: METHODOLOGY

INTRODUCTION

As explained in chapter one this thesis is a feminist, socio-legal evaluation of the intersection between the criminal law and coercive control which addresses five central research questions:

(1) How do survivors experience coercive control?
(2) How are the physical aspects of coercive control captured by the Offences Against the Person Act 1861 and the associated common-law offences of assault and battery?
(3) How are the non-physical aspects of coercive control captured by the Protection from Harassment Act 1997 and section 76 of the Serious Crime Act 2015?
(4) How are the sexual aspects of coercive control captured by the Sexual Offences Act 2003?, and

(5) Does the criminal law capture coercive control effectively, or is there need for further reform?

The answers to these research questions draw on theoretical, doctrinal and empirical sources. The answer to the first question, 'how do survivors experience coercive control?', uses empirical research with survivors and their closest advisors to build on a model of control drawn from the academic literature, in particular, the work of Evan Stark, Mary Ann Dutton and Lisa Goodman. The answers to questions two, three and four investigate the criminal law of England and Wales and draw on a doctrinal analysis of statute and cases together with empirical work with Crown Court Judges and police. Question five is the over-arching research question and the answer puts the case for further reform. Throughout, I position myself under a socio-legal umbrella that makes the combinations of methodological approaches possible.

DATA COLLECTION METHODS AND RESPONDENT CATEOGORIES

I used two different but complementary data collection methods, the focus group and the qualitative, semi structured interview, and concentrated on four different categories of respondents (survivors, Independent Domestic Violence Advisors, police officers and the judiciary). Three focus groups were conducted in the first phase of the project. One focus group was with Independent Domestic Violence Advisors (IDVAs), one was with survivors and one was with senior police officers. Interviews with senior police officers (3), junior police officers (12), survivors (6), IDVAs (6) and judges (5) took place throughout the duration of the project.

The four categories of respondents were chosen because of their ability to provide data of relevance to the research questions. The focus of my assessment of coercive control and the criminal law, as explained in chapter one, takes place from the perspective of the female survivors of abuse. The survivor category is therefore vital. The second category, IDVAs, was chosen because of their unique relationship to survivors. The Home Office introduced IDVAs originally as an extension of the government Witness Service programme to support survivors throughout their involvement with the criminal justice system both before court and during the court hearing.[1] As their professional commitment is to the survivor alone (unlike, say, lawyers who have an obligation first and foremost to the court, or police whose professional obligations are more complex) their perspective is survivor focused. As they have second hand experience of abuse they are also able to be objective in a way that was useful. The third and fourth categories, police officers and the judiciary, were selected because of their expertise in different aspects of the prosecution of coercive control.

While the survivor and IDVA categories were straight-forward in that for the purposes of the research questions they were homogenous as categories, the police were not. I planned initially to recruit respondents from four police forces in the South East. I quickly realised that this was too ambitious. My assumption that 'the police' were a consistent category of respondent was out of step with

[1] Nichola Groves and Terry Thomas, *Domestic Violence and Criminal Justice* (Routledge 2014).

empirical reality. For a start, there are 43 police forces in England and Wales, and each force is its own independent unit. The four forces that I had selected for this project were all organised in a different way. Even the location of domestic abuse as an issue area within the force varied. Divisions and roles within each force are also complex. I decided to group police officers into "senior" and "junior" categories, and to focus for the most part on one of the three forces. I explain this further when I discuss the chosen research methods, below.

As far as my research with the judiciary is concerned, I decided to focus on Crown Court judges rather than magistrates for the purposes of this project. This was because I assumed (wrongly) that as the focus of the project is coercive control, relevant trials would be those that took place in the higher courts. In fact, one of the conclusions of this research is that much domestic abuse is, erroneously, still being dealt with in the magistrates courts. It is therefore regrettable that the magistrates' perspective is not represented here, and it is my intention that this should form the basis of future research.

When I chose the two research methods, I was influenced by the need to answer the research questions and by feminist theory. The research questions seek contextual insight, and both methods chosen are therefore qualitative. A key feminist imperative 'is to produce knowledge that provides understanding of women's experience as they understand it'[2] - again, knowledge that is qualitative rather than quantitative in nature.

As a result, while I draw general conclusions, it was not my intention to produce results that are generalisable in the manner of quantitative research.[3]

Focus Groups

[2] Caroline Ramazanoglu,'Improving on Sociology: The Problems of Taking a Femininist Standpoint' (1989) 23 Sociology 427 as cited by Michelle Burman, Susan Batchelor and Jane Brown in 'Researching Girls and Violence Facing the Dilemmas of Fieldwork' (2001) 41 British Journal of Criminology 446, 448.
[3] Flyvbjerg, for example maintains that it is perfectly possible to draw general conclusions, even from a single case study: Brent Flyvbjerg, *Making Social Science Matter Why Social Inquiry Fails and How It Can Succeed Again* (Cambridge University Press 2011) chapter six.

I chose the focus group for two further reasons: its suitability in the context of vulnerable respondents, and the opportunity it offers to focus on language. Taking as my starting point the recognition that the power relations between the researcher and the researched always need to be considered,[4] I realised that the power dynamics within a focus group are less one-way.[5] In the event, the interaction between group participants in the focus groups that I ran did decrease the amount of interaction between me and individual members of the group.[6] This was both a strength and a weakness. It was a strength, because it meant that the participants took control of the discussion process and moved the conversation towards topics that they chose. It was a weakness, because the inevitably public nature of the forum (and my lack of control) made it more difficult for me to probe around sensitive issues. I come back to this when I explain my use of the semi structured interview, below.

The second advantage offered by the focus group as a research method is the opportunity it offers to focus on language. Language is central to an understanding of a phenomenon.[7] As explained in the introduction, language in this area is contested. How understandings of domestic abuse and coercive control are articulated outside of the academic literature and the criminal law is therefore critically important. I decided to run focus groups with three of my four respondent groups - survivors, IDVAs and police. I did not attempt to organise a focus group for the judiciary: I know from previous experience conducting empirical work with judges that the court timetable makes co-ordinating a focus group difficult. I say more about this below.

Recruiting respondents for the focus groups was straight-forward. I worked closely with one particular police force. The head of the safeguarding unit of that

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[4] Sandra Harding and Kathryn Norberg, 'New Feminist Approaches to Social Science Methodologies: An Introduction' (2005) 30(4) Signs 2009. Also see Sue Wilkinson, 'How Useful Are Focus Groups In Feminist Research?' in Rosaline Barbour and Jenny Kitinger (eds), *Developing Focus Group Research: Politics, Theory and Practice* (Sage 1999); Burman, Batchelor and Brown, Researching Girls and Violence n2.

[5] Daniel Kamberelis and George Dimitriadis, 'Focus Groups Contingent Articulations of Pedagogy, Politics, and Inquiry' in Norman Denzin and Yvonna Lincoln (eds), *Strategies of Qualitative Enquiry* (Sage 2011) 545. Also see Wilkinson n4 71.

[6] Esther Madriz, 'Focus Groups in Feminist Research' in Denzin N and Lincoln Y (eds), *The Sage Handbook of Qualitative Research* (Sage 2001).

[7] Michael Gibbons, 'Hermeneutics, Political Inquiry, and Practical Reason: An Evolving Challenge to Political Science' (2006) 100(4) American Political Science Review 545.

force was supportive of the research and offered to organise the focus group for me. This meant that it was possible to run a focus group with three senior officers at the start of the project. Getting senior officers to participate in a focus group would have been difficult without support at a senior level. I was concerned that the officers, having been cherry picked by their supervisor to attend, might feel constrained in what they could contribute, but in the event a full and frank discussion took place. Five survivors and twelve IDVAS were recruited for the survivor and IDVA focus groups via working relationships that I developed with voluntary sector organisations – I say more about that below.

Semi-Structured Interviews

As stated above, I used the focus group as a research method because it could contribute to the answers to the research questions in a specific way. I also explained, however, that the public nature of the discourses it generates can operate as a limitation as well as a strength. While the focus groups that I ran were supportive and exploratory, there was not time within the confines of the space allocated to the groups to ask follow-up questions. It did not always feel appropriate to probe individuals' responses to questions in the context of the group session. This is why I chose to complement the focus groups with semi-structured interviews. Importantly, the flexibility of the semi-structured interview means that it can be adapted so that it is particularly suitable in the context of respondents who may be vulnerable.

Semi structured interviews with survivors and IDVAs gave me an opportunity to test some of the theories I had been building from the work with focus groups. Deciding on how many respondents to interview was difficult. It was necessary to strike a balance between the need for diversity within each category and the time constraints of a PhD project. Much of the methodological literature on qualitative research stresses the importance of keeping the number of interviews to a manageable amount in order to allow for the maximum time possible for

preparation (before) and analysis (after).[8] In particular, it has been stressed that the emphasis within social science on a large quantity of interviews in order to make a study more "scientific" is based on quantitative presuppositions (such as a necessity for generalisability) that do not apply to qualitative work.[9]

I planned to interview five survivors and five IDVAs; in the event I spoke to six survivors, (although one had also taken part in the focus group), and six IDVAs. I felt confident that six was the right number because after the fourth or fifth interview I was getting significantly less new material in answer to the questions put to the respondents.

With the police category I found it necessary to interview more respondents. This is because of the different myriad roles that police officers play within the force, as I explained above. I began by interviewing three senior police officers from three different forces. These interviews focused on strategy and the data were useful as an overview perspective. I then chose one of the three forces to spend more time with, and interviewed fifteen junior police officers from this force with roles ranging from junior detectives, to emergency response officers, and officers staffing the emergency call centre. The junior officers were recruited centrally (via the police research unit) and were therefore self-selecting, in that they volunteered after seeing a call put out over the police intranet. Despite (perhaps because of) the range and breadth these data were the least useful. The interviews with the junior officers were mixed, and I often felt that they were sticking to a script, or telling me what they thought I wanted to hear.

If the interviews with police ended up being too many and too varied, the opposite was true of the interviews with the judiciary. Due to time restraints, (I did the judicial interviews last because approval from the Judicial Office took over six months to come through), I had to limit myself to five interviews, and these ended up being some of the most valuable interviews that I did. Judges were also answering a central call from the Judicial Office so were self-selecting, and all five

[8] Steiner Kvale and Svend Brinkmann, InterViews: An Introduction to Qualitative Research Interviewing (Sage 1996).
[9] Ibid.

judges that I interviewed had given thought to the questions I asked, and were prepared to be candid. In fact, the work with the judiciary raised as many questions as it answered, as I explain in more detail in chapters six and seven when I discuss the sexual offences and section 76 (controlling or coercive behaviour). Finally, as I mention above, the absence of the magistrates' point of view is regrettable. As a significant amount (the majority) of domestic abuse gets prosecuted in their courtrooms I would like to hear what they think about the reform proposals set out here. This would benefit from further research.

Safeguards

Survivors were potentially the most vulnerable category of respondents and I gave the most thought to their emotional wellbeing. The survivor group was co-facilitated by a domestic abuse specialist with experience of running groups of this type. She was able to recruit participants, and to offer ongoing support to any participants who felt that they needed it. The facilitator had experience of creating a safe space for vulnerable adults in which to discuss sensitive issues. Prior to the focus group session, I held meetings with the co-facilitator of the group to discuss safeguarding practices, all of which were followed. This helped ensure that established group safeguarding practices were used at the focus group session so that the focus group experience was as emotionally and physically safe as possible for participants.

I did the recruiting for the interviews myself. As explained in the introduction my focus is on female survivors of male abuse. Female survivors were approached initially in one of two ways. Firstly, I developed contacts within the domestic abuse sector. I used these contacts to identify survivors who work in the area of domestic abuse, or actively campaign around issues in connection with domestic abuse. Their professional involvement in the domestic abuse sector indicated that they were comfortable to talk in a general way about the issues of relevance to the research questions asked by this project. An example of a survivor who falls into this category would be someone who has experienced domestic abuse in her past, but who has since requalified with an organisation such as Victim Support and

works to offer support to other women currently experiencing abuse. I also used these contacts to recruit IDVAs and the senior police.

The second way that a survivor was recruited as an interviewee (and the method for recruiting IDVAs) was via local charities offering IDVA based services. I developed good contacts at a few different organisations, and recruited IDVAs for focus groups and interviews in this way. In the case of survivors, where the survivor indicated to the IDVA that she was willing to be interviewed, assurances were sought from the IDVA that the survivor was not currently at risk, and that the survivor was in a place that, from an emotional and a physical perspective, meant that the chances of her experiencing harm as a result of this research were minimised. The requirements for the recruitment of survivor interviewees were more stringent than the requirements for the recruitment of survivor focus group respondents in that the survivor interviewees had to be at a place in their lives where they did not feel themselves to be in crisis. This was in recognition of the fact that the attendees of the focus groups had the ongoing support of each other and of the professional group facilitator, whereas the survivor interviewees did not necessarily have access to ongoing support in the same way.

In addition to the special safeguards referred to above, I also implemented the usual safeguards that one would expect from a project of this type. Information Sheets setting out the scope, intention and purpose of the project together with an explanation of the confidentiality safeguarding steps taken were circulated before the focus group by the group facilitator. I kept contact with the respondents deliberately to a minimum to preserve the respondents' anonymity. Participants were told that they could leave the room at any time they wanted, either to take a break and return later on in the session, or to withdraw from the research completely.

Consent Forms were handed out at the start of the focus group session, which were collected and retained by the facilitator. Copies of the Information Sheet and the Consent Form used for the focus groups are attached as Appendices A and B respectively. The same care and attention was given to the issue of informed

consent in relation to the interviews as for the focus groups. The Information Sheets and Consent Forms that were used in respect of survivor interviewees followed a similar format to those used in the focus groups and are attached as Appendices C and D. Many of the same issues arose with respect to informed consent in the case of the professional respondents as with the survivors. A copy of the Professionals' Information Sheet and Consent Form is attached at Appendices E and F.

I said that one of the advantages of the interview, as opposed to the focus group, was the opportunity to ask directed questions. Two important sets of safeguards were incorporated into the design of the interviews with survivors. The first set of safeguards related to the issue of the power relations between the researcher and the researched. As this project had a clear focus from the outset I directed the interviews up to a point. I used an interview guide, but it consisted of relatively few key questions on broad topics. Thus the structure I provided was partial, and allowed for a degree of control to pass to the interviewees.

Equally important, from an ethical perspective, was the fact that survivors were not initially asked questions that directly related to their own experience. In recognition of the power imbalance inherent within the interview construct, and of the sensitivity of the subject matter, I kept questions initially deliberately general. This meant that, within the areas indicated by the topic guide, interviewees were allowed to explore what was important to them, but were never asked to discuss personal issues that were particularly sensitive for them. This gave them a degree of control that was helpful in light of the difficult subject matter of some of the topics. In the event, all six of the survivor respondents chose to discuss their personal experiences: but they were allowed to dictate the way in which this was done. The interviews with the IDVAs were not constrained by the same sensitivities and the questions were more directed. IDVAs were not talking about their personal experiences, but about their professional viewpoint, so no such safeguard was necessary. This gave me the freedom to ask probing questions about the nature of abuse.

One area that proved to be especially difficult and sensitive (and where the IDVA interviews were particularly helpful) concerned sexual offences. Survivors found this area of the abuse they had experienced the hardest to discuss, and in particular found the language of the Sexual Offences Act 2003 difficult to navigate. There were instances, for example, whereby the survivors would describe an experience whereby sex was imposed upon them by their partners without their consent. From my legal and, to an extent, emotionally detached perspective this set of circumstances constituted rape. However, rape was not a term that the survivors adopted easily. I was therefore careful to avoid using language that might impose my own construction or framework at the expense of the respondents'. There was not time in the focus group with survivors (which lasted for two hours) or even in the interviews to fully explore the issues that came up in relation to the sexual offences. One of the conclusions of this project is that the intersection between coercive control and sexual abuse is an area of research that would benefit from a further and more concentrated empirical focus.

I also gave some thought to my own safety in the context of this research project. As the focus groups did not involve lone working, physical safety was not an issue. The focus groups did, however, have the potential to raise emotional issues for me as well as for the respondents. I completed training in conducting research of this kind at the University of Sussex, and also at Paladin, the UK based stalking charity that runs support sessions for those working in the domestic abuse sector. In the event, I found that running the focus group with survivors was as inspirational as it was emotionally difficult. The bravery shown by individual survivors who were talking about aspects of their abuse for the first time was evident, as was the comfort that was drawn by individuals from the similarity of their stories. Thus the issue of researcher emotional safety was not as difficult as it might have been had the focus group been less of a supportive and positive space.

I also gave thought to my own safety, both emotional and physical, in the context of the interviews. The training that was referred to above in the context of the focus groups was equally relevant in relation to the interviews. Of particular significance to the interviews alone, however, was my physical safety in lone working

conditions. All interviews took place in public spaces, rather than at the respondents' homes, for example. Where it was necessary to seek a more private environment for the interview, because sensitive or confidential issues were being discussed, private spaces within public spaces were used, such as respondents' offices or meeting rooms within community centres and/or meeting rooms at Sussex University.

Finally, some explanation is needed for the way in which the empirical work is referred to in the thesis. As explained above, the anonymity of the interview respondents is respected at all times. To facilitate this, the names of the interviewees have been changed. Some survivors' stories were encountered via interviews with IDVAs, rather than directly. Where this is the case the names are still changed but it is made clear in the text that the survivor was not interviewed directly.

ANALYSIS OF THE DATA

I utilised aspects of grounded theory techniques to help with the analysis of the data. Grounded theory began with Barney Straus and Anselm Glaser in 1967,[10] ostensibly to provide qualitative researchers the kind of systematic method for analysing and processing data more often used by quantitative researchers.[11] More specifically, in its original form, (and as the name suggests), the approach was used to build theoretical frameworks that were "grounded" in the data that were collected: frameworks, in other words, that worked closely with the collected data to explain it. Most importantly for this research, grounded theory is iterative: it is a method of qualitative research in which data collection and analysis are ongoing simultaneously, such that they inform and shape each other.[12] The iterative nature of the techniques and the ensuing symbiotic relationship between theory and data promoted the close connection between the theoretical and empirical work that was central to the methodological approach adopted here.

[10] Barney Straus and Anselm Glaser, *The Discovery of Grounded Theory* (Transaction Publishers 1967).
[11] Jennifer Smith et al, *Interpretative Phenomenological Analysis Theory, Method and Research* (Sage 2009).
[12] Kathy Charmaz, 'Grounded Theory Methods in Social Justice Research' in Norman Denzin and Yvonna Lincoln, *The SAGE Handbook of Qualitative Research* (Sage 2011).

Some aspects of grounded theory as originally formulated made it less suitable for this project. In particular, Straus and Glaser envisaged the building of a theoretical level account of a studied phenomenon.[13] I do not build theory from data as such: as explained in chapter one the epistemological position adopted allows for a cross fertilisation of the theoretical and the empirical rather than the production of theoretical frameworks from empirical data. Furthermore, it could be argued that the recognition of the situated view of knowledge outlined in chapter one sits uncomfortably with Straus and Glaser's original vision, with its 'assumptions of an objective, external reality, a neutral observer who discovers data, reductionist enquiry of manageable research problems and objectivist rendering of research data'.[14]

Grounded theory, however, has itself splintered and fractured since its original formulation in 1967.[15] The original authors' disagreements as to the direction grounded theory should take have allowed for a loosening of the original concept, with debate in particular taking place around its epistemological underpinnings.[16] This project profits from that debate, and the type of grounded theory employed here is not grounded theory in its original form. Instead, I use a type of grounded theory that is widely used in psychology and has been referred to as "constructivist grounded theory".[17]

Constructivist grounded theory addresses the issue that grounded theory as originally formulated is too "objectivist" or positivist to be compatible with a hermeneutical approach. It recognises instead that there is much that can be usefully adapted from grounded theory techniques and applied in a more open-ended way. The methods can be used as 'flexible heuristic strategies rather than as formulaic procedures',[18] as the approach 'celebrates first-hand knowledge of

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[13] Straus and Glaser n10; Barney Straus and Juliet Corbin, *Basics of Qualitative Research: Basics and Techniques For Developing Grounded Theory* (Sage 1990) 24 as cited in Henry Yeung, 'Critical Realism and Realist Research in Human Geography: a Method or a Philosophy in Search of a Method?' (1997) 12(1) Progress in Human Geography 51.
[14] Kathy Charmaz, 'Grounded Theory: Objectivist and Constructivist Methods' in Norman Denzin and Yvonna Lincoln (eds,) *Strategies of Qualitative Enquiry* (Sage 2003) 249.
[15] Straus and Glaser have themselves moved in conflicting directions, see, for example, Charmaz, Grounded Theory Method n12.
[16] See Alan Bryman, *Social Research Methods* (Oxford University Press 2012) for a summary of this debate.
[17] Smith et al n11.
[18] Charmaz, Grounded Theory Method n14 250.

empirical worlds, and takes a middle ground between post-modernism and positivism'.[19] This is resonant of Donna Haraway's claiming of the middle ground with her vision of the partial perspective, which she asserts is 'as hostile to various forms of relativism as to the most explicitly totalizing versions of claims to scientific authority'.[20]

In other words: the tension between relativism and positivism acknowledged by the epistemological position adopted by this project is accommodated by constructivist grounded theory. Constructivist grounded theory says that it is possible to collect data about the empirical world, and to use analytic interpretations of data in conjunction with existing theoretical positions to revisit data and refine interpretations in an iterative and comprehensive way. Proponents of constructivist grounded theory such as Kathy Charmaz argue that this analysis can be used to make knowledge claims that are partial because they are situated and not necessarily universal in their scope.[21]

To facilitate the use of grounded theory techniques NVivo was used to analyse the data. NVivo was developed in part as a response to the growing numbers of qualitative researchers who were adopting grounded theory techniques to assist in the analysis of data, and it incorporates many of the insights of grounded theory in its design and operation.[22] I imported transcribed audio recordings of the interviews and focus groups into NVivo, and created categories via a labelling process. Parts of the data were labelled with codes. At the beginning of the process I kept an open mind and generated as many new ideas as possible and hence new codes as were necessary. The new codes were descriptive at the beginning: for example, they were concerned with relevant aspects of the criminal law framework or of domestic abuse behaviour patterns.

As the descriptive categories took shape, I began to look for and explore relationships between them, by a process that Victoria Braun and Virginia Clarke

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[19] Ibid.
[20] Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14(3) Feminist Studies 575, 584.
[21] Charmaz, Grounded Theory Method n14.
[22] Bryman n16 575.

have observed is similar to thematic analysis. [23] Braun and Clarke state that 'grounded theory seems increasingly to be used in a way that is essentially grounded theory 'lite' – as a set of procedures for coding data very much akin to thematic analysis'.[24] The methods used here are indeed similar to the methods set out by Braun and Clarke in their exposition of thematic analysis, but this is coincidental not intentional – my approach was adapted from the original grounded theory methods set out by Straus and Glaser and developed by Kathy Charmaz.

NVivo facilitated this process by encouraging the grouping of themes in intuitive ways, and by the way in which it displayed existing links and themes alongside the data. The groupings meant that I could "see" connections that existed between ideas that were prompted by the data. The iterative nature of the process meant that I could then revisit the data in light of emergent themes - both were displayed side by side. Themes were thus refined, and groups were developed of the most significant emergent themes or connections. The coding and analysis took place as an ongoing counterpart to the interview process. Insights gained from analysis thus fed into the interview process, allowing for a repetitive interplay between data and analysis.

As the process developed, it was possible to use concepts developed from emergent themes to answer the research questions, but I found that NVivo was more helpful in the early stages of the analysis process. While I used NVivo to begin with, to track emergent themes and to develop concepts in line with the theoretical models of coercive control extracted from the literature, once that initial coding and thematic work had been undertaken, NVivo was less useful. This was particularly true for the police and judicial data. At this stage in the analysis it was easier to revisit each interview individually, as it was more possible to be fully immersed in the data in a contextual way. In other words, while Nvivo facilitated the extraction of key themes and concepts, reading the interviews in context was

[23] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) Qualitative Research in Psychology 77.
[24] Ibid 84.

also a useful way to deepen understanding of a particular interviewee's perspective.

EVALUATION

The tension between postmodern and positivist epistemologies that has been explored in relation to all of the different aspects of this methodology is particularly relevant to the issue of validation criteria in relation to the research. As has been pointed out: 'the positivist and post-positivist traditions linger like long shadows over the qualitative research project, and no-where is this shadow more apparent than in the use of validation methods'.[25] Many qualitative researchers take the view that such validation criteria, and in particular the three "hard science" benchmarks of reliability, validity (internal and external) and replication, are irrelevant to their work. Such researchers contend, for example, that these criteria reproduce only a certain kind of science which silences too many voices.[26] Others from a more positivist epistemological position have tried to transfer evaluative criteria such as reliability, replication and validity across from "hard science" disciplines.

One's approach to validation methods is therefore directly related to one's epistemological position along the realism axis. Together with many other qualitative researchers,[27] I position myself somewhere in the middle of that axis. I therefore adopt the "middle way" approach to validation suggested by Sarah Tracey in 'Big Tent Criteria'.[28]

A number of authors have set out "middle way" approaches to validation.[29] All of these approaches have much in common, with similar themes running through but different emphases. I initially selected Tracey's approach because her criteria are among the most frequently cited by other qualitative researchers. Tracey

[25] Denzin and Lincoln, Strategies of Qualitative Enquiry n14 13.
[26] Ibid 14.
[27] Bryman n16 398.
[28] Sarah Tracey, 'Qualitative Quality: Eight "Big-Tent" Criteria for Excellent Qualitative Research' (2010) 16(10) Qualitative Inquiry 837.
[29] Kvale and Brinkmann n8; Yvonna Lincoln, Susan Lynham, and Egon Guba, 'Paradigmatic Controversies, Contradictions, and Emerging Confluences, Revisited' in Norman Denzin and Yvonna Lincoln, *The SAGE Handbook of Qualitative Research* (Sage 2011).

recognises that validation is important, but also that universalist criteria in the context of qualitative research have the potential to be inappropriate. Certainly the "hard science" criteria of reliability, validity and replication cannot be seamlessly transferred across to qualitative research: akin to 'Catholic questions directed to a Methodist audience'.[30] Nevertheless, research has to be capable of being subjected to evaluative scrutiny. A discussion of what might amount to useful quality markers in the context of this project is therefore helpful.

Criteria preferred by Tracey in the context of the evaluation of qualitative research are rigour, credibility and resonance. Rigour parallels the "reliability" criteria of quantitative research. It is labelled 'rich rigour' by Tracey, who suggests that 'high quality qualitative research is marked by a rich complexity of abundance - in contrast to quantitative research that is more likely appreciated for its precision'.[31] The methodology set out here deliberately aims for the combination of empirical and theoretical work to allow for rich description. The recognition of the situated nature of the knowledge claims made here meant that attention to contextual detail (as far as the empirical work was concerned) was rigorous throughout.

Credibility operates in a similar way to the internal validity criteria of quantitative methods. Internal validity relates to questions of causation (in the context of the relationship between two variables); credibility relates to how the researcher can show that the conclusions that she draws are trustworthy. Credibility is often aspired to by qualitative researchers by a process known as "triangulation". Triangulation allows researchers to assume that if two or more points of reference, for example sources of data, theoretical frameworks, or types of data collected, yield identical findings then those findings are more credible. The concept of triangulation however, as Tracey points out, emerged within a realist paradigm that aimed to 'rid research of subjective bias'.[32] As my perspective embraces the situated and thus to an extent subjective nature of 'truth' this was less relevant. Instead, the key was to use different data sources to allow for parallels to be drawn *across* different perspectives.

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[30] Tracey n28 838.
[31] Ibid. 841.
[32] Ibid. 844.

I found Tracey's description of a "crystallisation" metaphor more appropriate. As has been explained 'crystals are prisms that reflect externalities and refract within themselves'.[33] Crystallisation is a helpful metaphor for an intention to use multiple methods and frameworks not to provide a more 'valid singular truth' but rather to 'open up a more complex, in-depth, but still thoroughly partial, understanding of the issue.'[34]

Crystallisation is achieved here via the mix of methods employed by both the theoretical and the empirical parts of this project. The theoretical models draw on different sources, thus increasing the availability of different points of view. The empirical research used a mix of methods and also drew on the expertise of a range of strategically selected experts: experts that were selected on the basis of their ability to provide unique (and different) insight into one or more of the research questions. An example of this approach is where, on the issue of sexual abuse, survivors, police and judges all had valuable and differing insights into the difficulties posed by the legal construct of consent.

Resonance is Tracey's answer to external validity, often referred to in quantitative research as "generalisability". Resonance is a form of 'naturalistic generalisation'[35] that is performed by the reader of the research when she feels as though the findings overlap with her own frame(s) of reference. In other words, rather than enabling generalisation across cases, resonance comes from taking 'small instances' and 'placing them within a larger frame'.[36] The conclusions drawn here from the empirical work are not necessarily generalisable across cases. I deliberately selected smaller sample sizes to allow for an in-depth analysis. I did then place that analysis within larger theoretical frames. For example, in chapter three, insights from survivors on how they chose to express the experience of coercive control were allowed to disrupt the model of control developed by Stark, and Dutton and Goodman. That disruption was used to develop the model. Insights

[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid.

from the empirical work therefore "resonated" with (were placed within) the larger frame of the coercive control literature.

CONCLUSION

In many ways all of the issues discussed in this chapter were most relevant in the following chapter. This is because chapter three answers the first of the research questions: how do survivors experience coercive control? Chapter three therefore draws on interviews with the most vulnerable group of interviewees, so was the most rigorous test of all the safeguards built into the project and described above. In the event, I found that the interviews with survivors ended up being the most rewarding, and the most inspiring. Every survivor that I interviewed was prepared to share her personal experiences of abuse, and was motivated by the idea of "resonance" as described above, namely by the conviction that sharing her story with me might contribute to the "larger frame" of improving the situation for others. I realised early on that the most important methodological principle for me was the recognition that the survivors' faith in the project was a responsibility not to be taken lightly.

CHAPTER THREE: UNDERSTANDING COERCIVE CONTROL

In this chapter I address the research question: how do survivors experience coercive control? The chapter is divided into two parts. In part one, I draw on the literature to *locate* coercive control by explaining my position on 'who is doing what to whom?'[1] Feminists have long argued that domestic abuse can only be viewed through the lens of coercive control. I adopt a "feminist" position, but I acknowledge that this viewpoint is contested. Also, unlike many feminists, I do not *equate* domestic abuse with coercive control;[2] rather, I locate coercive control as a type of domestic abuse. Accepting coercive control as a type of domestic abuse means that domestic abuse can and does exist outside the coercive control paradigm. In other words, I recognise that abuse can occur between two people in an intimate relationship in the absence of coercive control.

Having located coercive control as a type of domestic abuse, in part two of this chapter I draw on the work of Evan Stark, Mary Ann Dutton and Lisa Goodman, and on empirical work with survivors and Independent Domestic Violence Advisors (IDVAs), to develop the working model of coercive control in the language of survivors that is used throughout the rest of the thesis. To be clear – this working model of coercive control has been developed completely outside of the criminal law. The extent to which it is, and is not, captured by the section 76 Serious Crime Act 2015 construct of 'controlling or coercive behaviour' is the subject of close examination in chapter seven.

PART ONE: LOCATING COERCIVE CONTROL

Introduction

In many ways it is surprising that locating coercive control is such a difficult exercise.[3] There is a 'rich store of knowledge', but a historical lack of consensus as

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[1] Marianne Hester, 'Who Does What to Whom? Gender and Domestic Violence Perpetrators in English Police Records' (2013) 10(5) European Journal of Criminology 1.
[2] See, for example, Sylvia Walby and Jude Towers, 'Untangling the Concept of Coercive Control: Theorizing Domestic Violent Crime' [2018] Criminology and Criminal Justice 1.
[3] Evan Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford 2007).

to what it means, or what to do with it, and this has hampered governmental and societal efforts to understand domestic abuse.[4] Instead, there are two, long established and competing schools of thought. On the one hand, researchers in the family violence tradition argue that abuse is highly prevalent and is symmetrical from a gender perspective. On the other hand, feminists in the advocacy movement insist upon the significance of coercive control, and continue to assert that abuse is less prevalent but highly gendered, with men the primary perpetrators and women the victims/survivors. The "acrimonious" nature of much of this debate has hampered progress as positions have become entrenched.[5] In this part of the chapter I conclude, with a review of the work of Michael Johnson and Stark, that there is an emerging consensus in the United Kingdom and in the United States as to the existence of different typologies of abuse and of the importance of coercive control, but that questions remain unanswered and more work needs to be done.

The Family Violence School of Research

Definitions of domestic abuse are controversial because of the two different theoretical approaches referred to above.[6] These approaches, and different associated assessment techniques, generate different findings from both a quantitative and a qualitative perspective. From the quantitative perspective the data generated record different rates of domestic abuse in the general population. Qualitatively, the data lend themselves to conflicting findings on the relationship between abusive behaviour and gender. In other words, the competing schools of thought disagree both on the meaning and the prevalence of domestic abuse. These two positions are linked: how domestic abuse is defined has a bearing on the data gathering exercises that determine its prevalence.

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[4] Holly Johnson, 'Rethinking Survey Research on Violence Against Women' in Rebecca Dobash and Russell Dobash, (eds) *Rethinking Violence Against Women* (Sage 1998) 23.

[5] Johnson reports that the debate was so "acrimonious" that in the late 1990s he was unable to persuade the protagonists to take part in a conference, as they refused to be in the same room as each other. Michael Johnson, *A Typology of Domestic Violence Intimate Terrorism, Violent Resistance, and Situational Couple Violence* (University Press 2008). Also see Murray Straus, 'Measuring Intrafamily Conflict and Violence: the Conflict Tactics (CT) Scales' (1979) 41(1) Journal of Marriage and Family 75. For more recent references to the "heated" nature of the debate see Mary Ann Dutton and Lisa Goodman, 'Coercion in Intimate Partner Violence: Toward a New Conceptualization' (2005) 52(11/12) Sex Roles 744; Andy Myhill, 'Measuring Coercive Control: What Can We Learn From National Population Surveys?' (2015) 21(3) Violence Against Women 355.

[6] Annah Bender, 'Ethics, Methods, and Measures in Intimate Partner Violence Research: The Current State of the Field' (2016) 23(11) Violence Against Women 1382.

The family violence position on the nature and the prevalence of what family violence researchers refer to as "conflict" dates back to the work of American sociologists Murray Straus and Richard Gelles. Straus and Gelles established the family violence school of research at the University of New Hampshire in the 1970s. They developed an empirical research tool called the Conflict Tactics Scale (CTS). The CTS is a questionnaire survey that measures the prevalence of the physical and non-physical aspects of conflict within the family unit.[7] Revised in 1996, (the Revised Conflict Tactics Scale CTS2),[8] it is still one of the most widely used quantitative tools for measuring the prevalence of domestic abuse.[9] In fact, with the exception of the National Crime Victimization Survey, which is a federal omnibus crime survey along the lines of the Crime Survey for England and Wales, all of the significant longitudinal and cross-sectional surveys conducted across the United States since the first of the Family Violence surveys in 1975 have used behavioural lists taken from the CTS to measure domestic abuse.[10]

One of the difficulties with the CTS is the way it has been adapted by other researchers who are then not always clear about what phenomenon they are measuring. This has led to a confusion over definitions. Straus and Gelles do not use the term "domestic abuse" or even "intimate partner abuse" or "domestic violence" in their work. Instead, they deliberately use the label "conflict" to include both physical and non-physical violence, and the term "family" to locate the conflict. Thus, the "family conflict" that they measure is not, for reasons that will become clear, synonymous with domestic abuse. It is much broader. These kinds of differences are important: it is a lack of definitional precision in this area that is responsible for much of the ensuing confusion. The differences in themselves do not invalidate Straus and Gelles' data, but the uses to which those data are put with no recognition of the data's limitations is a problem.

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[7] Straus, Measuring Intrafamily Conflict n5; Murray Straus and Richard Gelles, *Violence in American Families: Risk Factors and Adaptions to Violence in 8,145 Families* (Transaction Publishers 1990).
[8] Murray Straus et al, 'The Revised Conflict Tactics Scale (CTS2): Development and Preliminary Psychometric Data' (1996) 17 Journal of Family Issues 283.
[9] Marianne Dempsey, 'What Counts As Domestic Violence' (2006) 12 William & Mary Journal of Women and Law 301.
[10] Stark, Coercive Control n3.

The catalyst for the disagreement on gender has been the controversial 'sexual symmetry'[11] headline finding from CTS reliant population surveys, of which there have been more than 200 since the 1990s.[12] CTS dependent surveys tend to find that prevalence rates for men and women reporting "family conflict" are high, and very similar. The family violence tradition of researchers, led by Straus, Gelles and others use data from the surveys (which, to repeat, measure both physical and non-physical acts of "conflict") to indicate that women and men use "conflict tactics", including physical violence, at equal rates - and that in some cases, women use physical violence more often.[13] In support of their hypothesis that "conflict" is highly prevalent, as well as gender neutral, family violence researchers point to surveys such as the United States National Family Violence Surveys that also produce prevalence rates that are high. The National Violence Survey prevalence rate is approximately 13 times higher, for example, than the National Crime Victimization Survey (that does not rely on the CTS).[14]

Methodologically speaking the CTS is a questionnaire survey that measures the type and number of eighteen specific acts of physical, non-physical and psychological abuse, ('conflict'),[15] using a tick-the-box categorisation process. The approach is thus operational and incident-focused. The acts measured are grouped into three scales of 'tactics': the 'Reasoning' scale, the 'Verbal Aggression' scale and the 'Violence' scale.[16] Acts are then further essentialised within each scale along a continuum representing differing levels of seriousness. For example, the Verbal Aggression scale ranges from 'insults' and 'swearing' to 'throwing, smashing,

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[11] Sarah MacQueen, 'Domestic Abuse, Crime Surveys and the Fallacy of Risk Exploring Partner and Domestic Abuse Using the Scottish Crime and Justice Survey' [2016] Criminology and Criminal Justice 470, 470.
[12] Michael Johnson, 'Conflict and Control Gender Symmetry and Asymmetry in Domestic Violence' (2006) 12(11) Violence Against Women 1003; Michael Gordon, 'Definitional Issues in Violence Against Women: Surveillance and Research from a Violence Research Perspective' (2006) 6 Violence Against Women 747; Myhill, Measuring Coercive Control n5.
[13] Walter DeKeseredy and Martin Schwartz, 'Measuring the Extent of Woman Abuse in Intimate Heterosexual Relationships: A Critique of the Conflict Tactics Scales' (VAWnet Project of the National Resource Center on Domestic Violence 1998) available at <www.vawnet.org> accessed 10 January 2018; Also see Martin Schwartz, 'Methodological Issues in the Use of Survey Data for Measuring and Characterizing Violence Against Women' (2000) 6 Violence Against Women 815; Dutton and Goodman n5; Bender n6.
[14] Straus, Measuring Intrafamily Conflict n5 75; Murray Straus and Richard Gelles, 'Societal Change and Change in Family Violence From 1975 – 1986 As Revealed by Two National Surveys' (1986) 48 Journal of Marriage and the Family 465.
[15] Straus, Measuring Intrafamily Conflict n5 77.
[16] Ibid. These were updated in the Revised Conflict Tactic Scales (CTS2) to 'Physical Assault', 'Psychological Aggression' and 'Negotiation' see Straus et al, Revised Conflict Tactics Scale n8 289.

hitting or kicking something'.[17] Respondents are asked to indicate in the relevant boxes how often they have perpetrated each act and how often they have been the victim of each act.[18] Finally, points are allocated which are used to assess levels of 'conflict'.[19]

There are a number of obvious difficulties with this 'much maligned'[20] approach, not least the assumption that men and women provide unbiased, reliable accounts of their own behaviour.[21] In fact, much empirical evidence suggests that men in particular tend to minimise and deflect responsibility for their actions.[22] Another important issue is the way in which the CTS frames the acts that it measures. Many argue that this framing needs to be made explicit or there is a risk that the validity of the data it generates is compromised. Integral to the design of the CTS is its reliance on conflict theory, that is on the assumption by its authors that 'conflict is an inevitable part of all human association'.[23] Respondents are introduced to the items on the scales as ways of 'settling differences' and 'the family' is presented as the primary unit of analysis.[24] Spousal conflict is portrayed as a form of conflict within the family similar to others, such as child abuse or sibling violence.[25] All such conflict is framed as a way of attempting to resolve issues within the family unit.

These assumptions are illustrated by the introduction to the questionnaire:

> No matter how well a couple gets along, there are times when they disagree on major decisions, get annoyed about something the other person does, or just have spats or fights because they're in a bad mood or tired or for some other reason. They also use many different ways of trying to settle their differences. I'm going to read some things that you and your ([spouse]/partner) might have done when you had a dispute, and

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[17] Straus, Measuring Intrafamily Conflict n5 77.
[18] Straus, Measuring Intrafamily Conflict n5 78.
[19] Ibid.
[20] MacQueen n11 470, see also DeKeseredy and Schwartz n13.
[21] Rebecca and Russell Dobash, 'Women's Violence to Men in Intimate Relationships: Working on a Puzzle' (2004) 44 British Journal of Criminology 324.
[22] Johnson, Rethinking Survey Research n4; Dobash and Dobash, Women's Violence n21.; Hester, Who Does What to Whom? n1.
[23] Straus, Measuring Intrafamily Conflict n5 75, for a description (and critique) of this approach see Johnson, Rethinking Survey Research n4 and Dempsey, What Counts As Domestic Abuse n9.
[24] Dempsey refers to Straus' approach as the 'Domestic Account', see Dempsey, What Counts As Domestic Violence n9 324.
[25] Straus, Measuring Intrafamily Conflict n5 75, for a description (and critique) of this approach see Johnson, Rethinking Survey Research n5, and Dempsey, What Counts As Domestic Abuse n9.

would first like you to tell me for each one how often you did it in the past year.[26]

Gender symmetry is thus presented at the outset as a presumption, which establishes the focus for all of the questions that follow. The problem is that while some respondents think about experiences of physical and/or non-physical violence as a way of settling differences, empirical research suggests that a great many do not. Not all acts of aggression are precipitated by a disagreement. The assumption that they are, with no explicit recognition that this is an assumption, risks undermining the validity of the family violence paradigm.

The family violence paradigm also disregards the importance of context. For example, even in its revised form, the CTS2 does not consider the harms caused by the acts that it measures. This means that different acts can be, in theory, inappropriately classed as equivalent. For example: the scale treats a slap, a push or a shove by a man as equivalent to the same acts by a woman and fails to measure the different harms or consequences that may flow from those acts.[27] Not surprisingly in light of the physical differences between men and women, the relative probability that an act of aggression will result in harm is gendered. Empirical research has shown that the fear and helplessness experienced by women as a result of such acts are not apparent in the responses of men.[28] 'Meaning and context', in other words, 'render men and women's violence fundamentally different'.[29] As Straus himself points out, this does not in itself invalidate the CTS/CTS2.[30] But it does affect the validity of the claims made by some researchers using data from the CTS/CTS2.

Even if the physical differences between the sexes are put to one side, the lack of consideration given to the harms, or consequences, arising from the actions causes

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[26] Straus, Measuring Intrafamily Conflict n5 87.
[27] Johnson, Rethinking Survey Research n4; Gordon, Definitional Issues n12; Charlotte Bishop, 'Domestic Violence: the Limitations of a Legal Response' in Sarah Hilda and Vanessa Bettinson (eds), *Interdisciplinary Perspectives on Protection, Prevention and Intervention* (Palgrave Macmillan 2016).
[28] Dobash and Dobash, Women's Violence n21; Judy Postmus, Amanda Stylianou, and Sarah McMahon, 'The Abusive Behaviour Inventory – Revised' (2016) 31(17) Journal of Interpersonal Violence 2867.
[29] McQueen n11 470. This is also acknowledged in the Crime Survey for England and Wales as I explain later in this chapter, see Office For National Statistics, 'Domestic Abuse In England and Wales: Year Ending March 2018' available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2018#prevalence-of-domestic-abuse> paragraph 4, accessed 21 January 2019.
[30] Murray Straus and Richard Gelles, *Physical Violence in American Families* (Transaction Publishers 1990) 51.

an issue with regard to the ability of the researcher to make normative sense of the data generated. Only limited attention is paid to psychological conflict.[31] The sexual coercion subscale is underutilized and 'limited',[32] and different behaviours are conflated in a way that is unhelpful. Trying to hit your partner, for example, scores the same as beating up your partner, when the harms resulting from those two acts are likely to be very different.[33] The data generated by the CTS/CTS2 do not make it possible to distinguish between a play fight and an attack, or between an unprovoked assault and self-defence.[34] This inability to contextualise data means that critical distinctions between normatively legitimate and illegitimate acts are lost. It also means that claims made by Straus and Gelles as to, for example, gender symmetry are open to question.[35]

Straus' response to this critique has been disappointing. He comments: 'the criticism that the CTS does not take into account the context and meaning of the acts is analogous to criticizing a reading ability test for not identifying the reasons a child reads poorly'.[36] Michelle Madden Dempsey notes 'Straus' response to his critics demonstrates that he has fundamentally misapprehended the nature of the critique'.[37] The criticism of the CTS is not that it does not identify the reasons men abuse women. It is that more contextual information is needed to allow for a meaningful analysis of the acts the CTS/CTS2 are purporting to measure. To use Straus' analogy - the CTS is a reading test in English that does not distinguish between children who speak English and those who do not. Straus' more recent work does nothing to improve on his earlier position: he categorically refuses to address the significance of the criticisms that have been raised.[38]

Thus what Dempsey refers to as 'the methodological conflation of legitimate and

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[31] Postmus, Stylianou and McMahon n28 2868.
[32] Ibid. 2868.
[33] Dobash and Dobash, Women's Violence n21; MacQueen, n11.
[34] Dempsey, What Counts as Domestic Violence n9.
[35] Straus and Gelles, Physical Violence n30.
[36] Straus et al, Revised Conflict Tactics Scale n8 285.
[37] Dempsey, What Counts as Domestic Violence n9 327.
[38] See, for example, Murray Straus, 'Gender Symmetry and Mutuality in Perpetration of Clinical-Level Partner Violence: Empirical Evidence and Implications for Prevention and Treatment' (2011) 16(4) Aggression and Violent Behavior 279, where Straus refused to credit Michael Johnson's typologies (which are explained in detail later on) with any significance. Instead, he argues that Johnson's typographies measure the effects of victimisation rather than different phenomena. He does not address the issue of coercive control.

illegitimate acts' is, as she puts it, 'both linguistically confusing and conceptually problematic'.[39] It is linguistically confusing because the operationalisation of physical and non-physical violence within an intimate relationship in this way, with blurred normative legitimacy boundaries, conflicts with the way in which people generally talk about abusive acts within an intimate relationship. Stark quotes Straus and Gelles to illustrate this point in relation to physical violence. 'Our view', say Straus and Gelles, 'is that it is impossible to differentiate between force and violence. Rather, all violent acts from pushing and shoving to shooting and stabbing properly belong under a single definition of violence'.[40] Stark takes issue with this. He argues that 'force' and 'violence' have quite distinct meanings, and to conflate the two in an area that is linguistically sensitive is unhelpful. He observes that:

> As a practical matter, this approach puts research on a collision course with popular sentiment because it includes fights, which most people would consider personal business unless someone is seriously hurt or the force used is grossly disproportionate to the issues in dispute.[41]

Stark means by this that Straus and Gelles include what he refers to as 'fights' in their conflict paradigm. This is why what Straus and Gelles purport to measure (and what CTS reliant family violence surveys record) is inconsistent with popular usage of "domestic abuse" and "domestic violence".

Dempsey makes an additional criticism when she points out that, in addition to being linguistically confusing the CTS is *conceptually* problematic. She explains that it is conceptually problematic because it means that surveys that utilise the CTS measure a wider phenomenon than even adherents to the family violence account theorise is illegitimate. One example: from a theoretical perspective Straus and others are clear that self-defence is not illegitimate.[42] Self-defence is, of course, not domestic abuse. But CTS data does not allow for this distinction. This conceptual issue has had unfortunate repercussions – it has, for example, been 'detrimental to

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[39] Dempsey, What Counts as Domestic Violence n9 325.
[40] Richard Gelles and Murray Straus, 'Compassion or Control: Legal, Social and Medical Services' in Richard Gelles and Murray Straus, *Intimate Violence* 54 as cited in Stark, Coercive Control n3 54.
[41] Stark, Coercive Control n3 84.
[42] Richard Gelles and Murray Straus, *Intimate Violence* 90 as cited in Dempsey, What Counts as Domestic Violence n9 326.

the cause of addressing violence against women as it prompts some to doubt the validity of the statistics and the research that underlies them.'[43]

The Feminist Position

Feminist researchers have long doubted the validity of CTS dependent statistics and the research that underpins them. In particular, feminists take issue with the way in which the CTS frames violence as dispute resolution. Instead, dominant feminist expositions argue that structural inequalities leading to power imbalances between partners in abusive intimate relationships is the relevant backdrop. Once abuse is framed in this way it becomes apparent that it is highly gendered, with men the primary perpetrators.[44]

Rebecca and Russell Dobash published their ground-breaking study, *Violence Against Wives,* in 1979. The Dobashes trace the domination of women by men in intimate relationships from medieval times to the 1970s, and argue that the context of actions that comprise abuse is essential as a basis for understanding their significance. In particular, they point out that a purely operational approach misses the intention behind the abuse and the harms or consequences that result. Taken as a whole - the act within its context of intention, harm, and the broader question of the power relationship between the perpetrator and victim - reveals a 'constellation of abuse' that results in a complicated interplay of physical, emotional and other (for example economic) consequences.[45] In this thesis I adopt Stark's understanding of and label for the constellation of abuse: coercive control.

Michael Johnson and Typologies of Intimate Partner Abuse

In 1995 Michael Johnson 'like the child in "The Emperor's New Clothes"' pointed out 'a reality that was obvious as soon as he noticed it.'[46] The discrepant pictures

[43] Myhill, Measuring Coercive Control n5 370.
[44] Johnson, A Typology n5; Myhill, Measuring Coercive Control n5; Samantha Nielson, Jennifer Hardesty and Marcella Raffaeilli, 'Exploring Variations Within Situational Couple Violence and Comparisons with Coercive Controlling Violence and No Violence/No Control' (2016) 22(2) Violence Against Women 206.
[45] Rebecca Dobash and Russell Dobash, *Violence Against Wives* (The Free Press, 1979).
[46] Stark, Coercive Control n3 103.

of abuse that emerge from the two competing schools of research, which differ in their estimates from both a quantitative (how prevalent?) and qualitative (what is abuse?) perspective, are both "right" in that they are both measuring "real" phenomena. They are measuring different phenomena. For a start, the two approaches tap into different pools of respondents. While the national "family violence" type questionnaires survey the general population, the smaller scale empirical studies typically relied upon by feminists use point-of-service agency respondents. Respondents who, in other words, have already asked for help and therefore have self-identified as victims of domestic abuse. Family violence researchers claim that the feminists' sample sets are too biased to be generalisable. Johnson points out, however, that the so-called "random" population samples used by the family violence surveys are in fact equally biased, because of the group Johnson refers to as 'refusals',[47] that is the people who refuse to take part in the surveys. With refusal rates as high as 40%,[48] sampling techniques employed by the family violence surveys systematically exclude those respondents for whom power and control may be a significant issue.

Johnson proposes a typology to distinguish the contradictory findings from the two research perspectives. Common couple violence, which he has since renamed situational violence, describes a phenomenon where force is used to address situationally specific stressors, such as to express grievances or to resolve disputes. Neither party uses violence to exert long-term control. The violence, which can be extreme, is nonetheless rooted in the specifics of a particular situation.[49] Patriarchal terrorism, on the other hand, (which Johnson has since renamed intimate terrorism), consists of a range of tactics specifically designed to control, isolate and intimidate as well as to injure (physically and emotionally) victim survivors.[50]

Family violence researchers, framing their questions to the general population

[47] Johnson, A Typology n5 18.
[48] Ibid; See also: Michael Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women' (1995) 57 Journal of Marriage and the Family 283; Johnson, Conflict and Control n12.
[49] Johnson, A Typology n5 11.
[50] Ibid.

within a conflict resolution typology, are gathering data mainly on situational violence. Agency researchers, drawing on the experiences of victim-survivors in refuges or at police stations, are more likely to be describing intimate terrorism. With this distinction between typologies, much falls miraculously into place.

Johnson's key insight is that at the heart of the distinction between typologies is the presence or absence of coercive control. [51] While many researchers now accept this,[52] some important difficulties remain unresolved. The questions asked by the CTS do not measure coercive control. Therefore, it is still not possible to distinguish between different types of domestic abuse using surveys that are dependent on the CTS.[53]

The CTS is widely employed both in the US and in the UK. The most recent Office for National Statistics Domestic Abuse Bulletin explains, under the heading 'Prevalence of Domestic Abuse', that, while there were an estimated 1.3 million female victims in the year ending March 2018, 'the estimates do not take into account the context and impact of the behaviours experienced. Research suggests that when controlling or coercive behaviour is taken into account, the differences between the experiences of male and female victims become more apparent'.[54] It also observes that 'currently the Crime Survey of England and Wales estimates do not completely capture the new offence of controlling or coercive behaviour. New survey questions to better estimate experiences of this type of abuse are still under development'.[55] Despite researchers' best efforts it is proving difficult to agree a standard approach to measuring coercive control. [56] As Stark, Dempsey, and others have pointed out, the existing ambiguity has been a linguistic and a conceptual disaster.

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[51] Ibid.
[52] Myhill, Measuring Coercive Control n5. See also Nichola Graham Kevan and John Archer, 'Intimate Terrorism and Common Couple Violence: A Test of Johnson's Predictions in Four British Samples' (2003) 18(11) Journal of Interpersonal Violence 1247.
[53] Myhill, Measuring Coercive Control n5 357.
[54] Office For National Statistics, 'Domestic Abuse In England and Wales: Year Ending March 2018' available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2018#prevalence-of-domestic-abuse> paragraph 4, accessed 21 January 2019.
[55] Ibid.
[56] Myhill, Measuring Coercive Control n5; Kimberley Crossman et al, 'Toward a Standard Approach to Operationalizing Coercive Control and Classifying Violence Types' (2015) 77(3) Journal of Marriage and Family 833.

The Measurement of Domestic Abuse in the UK

While the influence of the CTS is felt in the UK, the family violence school has not been as influential here as in the US. The Crime Survey for England and Wales (CSEW) is the primary source for government estimations of the scope of domestic abuse in England and Wales. Formerly known as the British Crime Survey (BCS), many of the methodological flaws discussed in relation to the United States general population surveys above also apply.[57] It is an omnibus general population survey interviewing only those who do not refuse to be interviewed.

Even people who agreed to be interviewed were unlikely to disclose experiences of domestic abuse in the earlier days of the BCS. The BCS was designed in 1982 to collect data on mostly "stranger" type offences and issues. It was conducted by untrained interviewers in the respondent's home, (and therefore often in the presence of other family members), and did not encourage disclosure of sensitive experiences.[58] Up until the 1990s Johnson's observations on the unreliability of general population surveys as indicators of the nature or prevalence of abuse rang true, and 'the comparatively low rate of sexual and intimate partner violence generated by these surveys helped reinforce the popular (mis)conceptions that these crimes are rare and attributable to a few dangerous men'.[59] The main count of the BCS in the 1990s also found men as likely to be the victim of domestic abuse as women.[60]

Piecemeal advances have been made since 1982. Computer Assisted Self Interviewing (CASI) modules were introduced in 1996. The modules maximise anonymity and confidentiality by using a computer to "ask" the survey questions.

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[57] DeKeseredy and Schwartz n13.
[58] Mary Koss, 'The Underdetection of Rape: Methodological Choice Influence Incidence Estimates' (1992) 48(1) Journal of Social Issues 61; Sylvia Walby and Andy Myhill, 'New Survey Methodologies in Researching Violence Against Women' in Michael Freeman, (ed.) *Domestic Violence* (Ashgate 2001) 502.
[59] Holly Johnson, Bonnie Fisher and Veronique Jacquier, 'Measurement Innovations Overview of Methodological Progress and Challenges' in Holly Johnson, Bonnie Fisher and Veronique Jacquier, (eds), *From Critical Issues on Violence Against Women: International Perspectives and Promising Strategies* (Routledge 2015) 8.
[60] Walby and Myhill n58.

After the main part of the survey has been completed, the laptop is passed to the respondent for her to enter the answers to the questions herself. The answers, once entered into the computer, are electronically hidden even from the interviewer, and are not accessible until they are downloaded by a central research company. Further safety measures have been introduced: interviewers are encouraged, for example, to abort interviews if they suspect a perpetrator to be present, and to arrange another interview at a later date. Respondents are also encouraged to report incidents that they might not define as crimes by the use of questions that are framed in a sensitive way.[61]

While it undoubtedly marked progress, there were still a number of issues with the CASI as introduced in 1996. The prevalence of abuse it recorded was, not surprisingly, the highest to date.[62] The only abusive acts it measured were physical attacks, together with threats of such attacks. In other words, it focused on quantifying incidents that involved physical assault, thus meeting the legal definition of common assault or wounding (as it was then).[63] Modules on stalking and sexual victimisation were included with the 1998 and 2000 BCS, but the first comprehensive attempt to measure abuse that did not consist of physical assault came in 2001.

In 2001, a self-completion module was introduced that combined questions on what it referred to as 'intimate partner violence', 'sexual assault', and 'stalking' into a single interpersonal violence module for the first time.[64] Respondents were asked about emotional and economic abuse, in particular if they had been prevented from having their 'fair share of the household money' (economic abuse) and if they had been 'stopped' 'from seeing friends and relatives' (measuring isolation and control).[65] A single binary indicator was used to measure whether

[61] Catriona Mirrlees-Black, *Domestic Violence: Findings from a New British Crime Survey Self-Completion Questionnaire* (Home Office Research Study 191 1999).
[62] Ibid. 59; MacQueen n11.
[63] Mirrlees-Black, Domestic Violence n61 59.
[64] Sylvia Walby and Jonathan Allen, *Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey* (Home Office 2004) 15.
[65] Ibid. 15

respondents have suffered any emotional injury, described as 'mental or emotional problems, such as difficulty sleeping, nightmares, depression, or low self-esteem'.[66]

The interpersonal violence module uses a hierarchical scale that is still based on the CTS, but with some key modifications.[67] The typology of forms of abuse is more detailed and there is an attempt to measure the impact of actions, for example, whether or not an abusive act has caused the victim to be frightened. Measuring impact allows for an important degree of context, and is an improvement on the CTS, which as discussed above, does not allow for this. The impact measured, however, is only of one incident of abuse; the respondent is asked to consider the impact of the worst incident she has experienced. As I explain in the second part of this chapter, below, measuring the impact of an individual act does not really capture the generalized anxiety induced by coercive control.[68]

The third self-completion module in 2004/05 continued with the interpersonal violence module,[69] and since then a similar module has been included every year with the CSEW, but detailed questions on the nature of domestic abuse are only included every second year. Despite all of the improvements represented by this interpersonal violence model, 'progress has stalled'[70] and the key issue raised by Johnson - that at the heart of the distinction between typologies is the presence or absence of coercive control - has not moved on since the 2001 report referred to above. As the College of Policing said in 2015: 'despite the publication of more than 200 articles reporting the findings from innumerable surveys, it is difficult to escape the conclusion that there is yet to be, at a national level, a wholly satisfactory, let alone definitive, survey on IPV'.[71]

Furthermore, Johnson's comments about bias are still relevant. Women participating in the CSEW, for example, might still be living in the family home. Partners might be present, and it is not known what effect this may have on

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[66] Ibid. 15.
[67] Ibid. 15.
[68] Myhill, Measuring Coercive Control n5.
[69] Andrea Finney, *Domestic Violence, Sexual Assault and Stalking: Findings from the 2005/5 British Crime Survey* (Home Office 2006).
[70] Myhill, Measuring Coercive Control n5 372.
[71] Ibid. 369.

respondents, even with the added protection of the CASI methodology. Those experiencing severe abuse (which is likely to be those with experience of coercive control) and are living in refuges are excluded as a matter of course. This matters: 'this methodological issue can have major implications for theoretical understanding if both the most abused and the most recently abused group of women are significantly under-represented in the national surveys'.[72]

The fact that the most recent formulations of the self-completion modules do not allow for clear distinctions to be made between the different typologies of abuse explained in this chapter is also unfortunate. As a consequence, 'attempts to categorise victims in these data sets as having experienced either situational violence or coercive control can be regarded as speculative, at least to some extent'.[73] This results in the kind of linguistic and conceptual difficulties referred to by Dempsey and set out above. As Andy Myhill of the College of Policing puts it: 'when this 'one in four' statistic is presented alongside definitions of IPV emphasising domination and control, it can be misleading.'[74] The harm of coercive control is still not captured in anything like enough detail. It is for these reasons that Dutton and Goodman comment that 'the need for a tighter conceptualization and operationalization of this notion (coercive control) has gained new urgency in recent years'.[75]

Conceptual Uncertainties

In the absence of such a 'tighter' conceptualisation the data gathered by the CSEW still lags behind the theoretical work of Stark and Johnson. Even within the theoretical work there are conceptual uncertainties that need tightening. Mapping Stark's work onto Johnson's typologies is not straightforward. One key area of conceptual difficulty lies in the way Stark and Johnson approach situational couple violence. Stark and Johnson agree that situational couple violence does not involve

[72] Walby and Myhill, n58 510; MacQueen, n11.
[73] Walby and Myhill, n58 369.
[74] Ibid. 370.
[75] Dutton and Goodman, n5 744. See also Kimberley Crossman et al, 'Toward a Standard Approach to Operationalizing Coercive Control and Classifying Violence Types' (2015) 77(4) Journal of Family and Marriage 833.

coercive control. Stark draws a normative boundary between situational couple violence that is, for him, legitimate (Stark terms this behaviour 'fights') and that which is illegitimate (Stark terms this 'partner assault').[76]

Stark is clear that partner assault, while it does not involve coercive control, still constitutes abuse, while 'fights' do not. Stark accepts that 'the majority of incidents population surveys identify as domestic violence are properly understood as fights in which one or both partners use force to address situationally specific conflicts'.[77] In other words he agrees with Johnson that, at least some of the data picked up by population surveys is *not* what most people mean by 'domestic abuse'. The same cannot be said for 'assaults', which are clearly on the other side of the normative boundary: 'partner assaults are what most people recognize as domestic violence'.[78]

In this thesis, I adopt Stark's boundary, that is I recognise that there is domestic abuse that is coercive control - but also domestic abuse (Stark's 'partner assault') that is not. This is a contested position. For many feminists, including IDVAs interviewed for this project, coercive control and domestic abuse are the same thing.[79] This lack of clarity is further exacerbated by the CSEW, which does not even distinguish coercive control from situational couple violence, let alone allow for the drawing of normative boundaries within situational couple violence (separating Stark's 'fights' from 'partner assaults').

Johnson is at best ambivalent on the normative boundaries within common couple violence. He indicates that control is what distinguishes behaviour that is abusive from that which is not, thus suggesting that couple violence (with no control) is not abuse, as such. For example,

> The core idea of this book is that this "intimate terrorism" - violence deployed in the service of general control over one's partner - is quite a different phenomenon than violence that is not motivated by an interest in exerting general control over one's partner. I would argue, also, that intimate terrorism is what most of us mean by

[76] Stark, Coercive Control n3 234.
[77] Ibid.
[78] Ibid. 235.
[79] See, for example, interview with Jen (15 January 2016) 9; interview with Melanie (6 June 2015) 2, 6.

"domestic violence".[80]

'What most of us mean by domestic violence' admittedly lacks clarity as a construct, but Johnson seems to be suggesting by default that situational couple violence (which is the only one of his perpetrator typologies that does not involve an interest to exert control) is *not* what 'most of us mean' by 'domestic abuse'. On the other hand, Johnson admits that situational couple violence 'can be a chronic problem, with one or both partners frequently resorting to violence, minor or severe. I do not want to minimize the danger of such violence. Situationally provoked violence can be life threatening'.[81] I do not accept that violence between a couple who are (or have been) in a relationship that is 'chronic' or 'severe' or even 'life-threatening' could *not* be considered to be abusive. For this reason, I prefer Stark's clear normative boundaries. To sum up: there are different typologies of domestic abuse – firstly coercive control, which is always domestic abuse. Secondly there is situational violence, some of which is domestic abuse, and some of which is just 'fights' between partners that does not amount to abuse.

Finally, there is recent resistance to both Johnson and Stark. Sylvia Walby and Jude Towers have proposed a third approach (to that of Johnson and Stark) which they label 'domestic violent crime'.[82] Walby and Towers suggest that the only reliable way of measuring domestic abuse is to abandon theoretical accounts of coercive control altogether, and instead capture coercive control by counting specific incidents of physical violence between members of the same family. All such incidents, in Walby and Towers' account, by their very nature (physical violence in the family) involve coercion and control.

By ignoring the research that shows that partners can fight, and physically abuse each other, in the absence of any power imbalance,[83] it is likely that Walby and Towers over-estimate the prevalence of coercive control. A violent outburst can be a spontaneous emotional response that is situationally specific, not strategic or controlling. Myhill has re-analysed the CSEW interpersonal violence module and

[80] Johnson, A Typology n5 6.
[81] Johnson, A Typology n5 11.
[82] Walby and Towers, Untangling the Concept of Coercive Control n2 1.
[83] Johnson, A Typology n5; See also Graham Kevin and Archer, Intimate Terrorism n52.

estimates that a third of the women reporting domestic abuse were experiencing coercive control.[84] Earlier work by Johnson re-analysing past relationship data from NVWAS surveys resulted in a similar figure.[85] Counting physical incidents is unlikely to give a reliable measure of the prevalence of coercive control for this reason.

Walby and Towers' "domestic violent crime" model rests on four further assumptions that need challenging. The first is that coercive control always involves physical violence. The second assumption is that domestic abuse can be usefully reduced to a series of incidents, the third that coercive control can be effectively captured by the law on physical assault, and the final assumption is that coercive control follows a pattern of escalation that is matched by an equivalent escalation in physical violence. The first assumption, that coercive control always involves physical violence, is not borne out by the empirical research. In fact (as I explain in some detail in part two, below), research shows that coercive control can exist entirely outside of the violence paradigm.[86] Two of the six survivors I interviewed for this research project had experience of coercive control in the absence of physical violence.[87] A survey that only "counts" physical violence will miss any coercive control that does not involve physical violence.

The second assumption is that domestic abuse can be captured as a series of incidents. In fact, the incident focus of the criminal law can obscure, or 'cloak',[88] the survivor experience as coercive control does not occur as a series of discrete events. This critique applies to the domestic violent crime approach, which attempts to reduce coercive control to a series of single incidents of physical violence. This is covered in some detail in the following chapter, but with this reduction the domestic violent crime approach obscures much of what makes coercive control uniquely devastating, the fact that it extends through time and

[84] Myhill, Measuring Coercive Control n5.
[85] Michael Johnson, Janell Leone and Yill Xu, 'Intimate Terrorism and Situational Couple Violence In General Surveys: Ex-Spouses Required' (2014) 20 Violence Against Women 186 as cited in Evan Stark and Marianne Hester, 'Coercive Control: Update and Review' (2019) 25(1) Violence Against Women 81.
[86] Stark, Coercive Control n3; Stark and Hester, Coercive Control Update and Review n85.
[87] Interview with Annie (4 December 2015); interview with Kim (6 October 2016).
[88] Deborah Tuerkheimer, 'Recognising and Remedying the Harm of Battering: a Call to Criminalize Domestic Violence' (2004) 94(4) Journal of Criminal Law and Criminology 959, 980.

space, for example, or the fact that the perpetrator uses his privileged access to information about his victim to make his abusive behaviours bespoke.

Their third assumption is that existing assault-related crime categories are sufficient for the capture of domestic abuse. With this, Walby and Towers argue that domestic abuse is no different from any other violent crime. The argument that domestic abuse is "just like any other crime" was relevant in the 1970s when domestic abuse was being swept under the carpet. This is no longer the case, and extensive scholarship since that time has established that domestic abuse is unfortunately qualitatively unique.[89] In any event, as is explained in some detail in the next chapter, the existing assault-related crime categories such as assault occasioning actual bodily harm, or inflicting grievous bodily harm, were drafted in the Victorian era to accommodate street fights and pub brawls between strangers. They take no account of strategic patterns of control that Walby and Towers argue are present in every case of what they term 'domestic violent crime'.

Finally, Walby and Towers do not put forward enough evidence in support of their thesis that CSEW data can be used to show that control and physical violence escalate in step with one another. As Myhill, who is a data analyst at the College of Policing, points out, 'CSEW data is simply not detailed or sophisticated enough to trace changes in patterns of abuse over time, nor can cross-sectional data show escalation in individual cases'.[90]

Survivors I interviewed, as I set out in more detail below, commented that often the physical violence tailed off as the control escalated. In other words, 'the element of control… can go on or escalate even if the physical violence stops; the effects are just as devastating in the absence of physical assault as when violence is present.'[91] The danger of Walby and Towers' escalation thesis is that it encourages a policing approach to risk that is out of step with empirical reality. The most recent and comprehensive study of domestic homicides in the UK showed plenty of

[89] Andy Myhill and Liz Kelly, 'Counting With Understanding? What Is At Stake In Debates On Researching Domestic Violence' [2019] Criminology & Criminal Justice 1, 5.
[90] Ibid 7.
[91] Gretchen Arnold, 'A Battered Women's Movement Perspective of Coercive Control' (2009) 15(12) Violence Against Women 1432,1436.

examples of cases (up to a third) where there is no history of physical assault but evidence of high levels of coercive control.[92]

As I explained in the last chapter, I put the survivor experience at the heart of the approach to coercive control and domestic abuse taken in this thesis. The irony of Walby and Towers' position from this perspective is that survivors make clear that they do not consider physical injury to be of much consequence at all in the context of control. Maya, who took part in the survivors' focus group, said:

> Physical pain was the least of my worries. When it comes to the rest of his abuse, I wouldn't even notice. It wouldn't even concern me. It is not something that really bothers you so much as all those other aspects of abuse which are preoccupying your mind.[93]

Myhill puts it thus: 'qualitative research has shown over time and across jurisdictions that victim-survivors experience the coercive nature of abuse as more harmful … than injuries sustained through discrete acts of physical violence'.[94] I therefore agree with Myhill and Liz Kelly, who conclude in their critique of the 'domestic violent crime' proposition that:

> While a focus on physical violence helps illuminate the gendered nature of domestic violence in some respects, it obscures it in others… [T]he criminal law, and the traditional crime categories that comprise it, are more open to interpretation than is acknowledged and do not reflect the continuous nature of the abuse experienced by many women, and that 'harm' needs to be interpreted more widely than (physical) injury resulting from discrete acts or incidents. We argue that engaging with qualitative research in which the voices of victim-survivors are at the core is a fundamental requirement for a theoretical conceptualisation of domestic violence, including how best to operationalise it in survey measurement.[95]

Counting physical acts of violence in the context of coercive control certainly simplifies things from an operational perspective, but if it does not reflect empirical reality it does not clarify them.

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[92] Jane Monkton-Smith et al, 'Exploring the Relationship Between Stalking and Homicide' (Suzy Lamplugh Trust 2017).
[93] Maya, Survivors Focus Group (8 September 2016) 3.
[94] Myhill and Kelly, Counting With Understanding n89 4. See also Liz Kelly *Surviving Sexual Violence* (Polity 1988); Dobash and Dobash, Women's Violence n21; Dutton and Goodman n5.
[95] Myhill and Kelly, Counting With Understanding n89 2.

Conclusion on the Location of Coercive Control

A fragile consensus is emerging in the literature that credits Stark's coercive control as 'offering a more accurate conceptualisation of what living with domestic violence means for women and children'.[96] Johnson's typologies are no longer controversial. The presence or absence of Stark's coercive control explains many of the disparities in research findings between different schools of academic thought.

My position, in terms of the location of coercive control, is the same as Stark's: coercive control is not the same thing as domestic abuse. Men and women in intimate relationships can abuse each other in the absence of an imbalance of power between them. It is not yet possible to be clear about what percentage of domestic abuse captured by the CSEW is coercive control, but early work suggests it is around a third.[97] Work continues on the development of more effective coercive control scales to address this.[98] What is clear, however, is that coercive control is abuse at its most insidious. The rest of this chapter provides a more detailed analysis of the infrastructure of coercive control, by explaining how the different facets of perpetrator behaviour fit together, and how this impacts on its victims.

PART TWO: MAPPING COERCIVE CONTROL

The idea of a working model of coercive control is not new, but it is an idea that is still in the process of development. Work began on modelling control in the 1980s with the well-known "power and control" wheel developed originally by Ellen Pence and Michael Paymar in Duluth in Minnesota.[99] The Duluth model is chiefly

[96] Walby and Towers, Untangling the Concept of Coercive Control n2 3.
[97] Myhill, Measuring Coercive Control n5. More recent work by Charlotte Barlow et al. suggests this figure might be much higher. In their study of police practice and coercive control in Northumberland they found evidence of coercive control in 87% of all cases involving assault by an intimate partner: Charlotte Barlow et al, 'Putting Coercive Control into Practice: Problems and Possibilities' (2020) 60(1)British Journal of Criminology 160.
[98] Myhill, Measuring Coercive Control n5; Nichola Sharp Jeffs, Liz Kelly and Renate Klein, 'Long Journeys Toward Freedom: the Relationship Between Coercive Control and Space for Action Measurement and Emerging Evidence' (2018) 24(2) Violence Against Women 163.
[99] Ellen Pence, Michael Paymar and Tineke Ritmeester, *Education Groups for Men Who Batter: The Duluth Model* (Springer 1993); This work has been continued by, among others, Dobash and Dobash, Women's Violence n21; Dutton and Goodman n5; Dempsey, What Counts as Domestic Violence n9; Betsy Stanko, 'Theorizing about Violence: Observations from the Economic and Social Research Council's Violence Research

descriptive, and consists of labelling the different constituent parts of coercive control. As explained above, the work of later authors, and in particular that of Dutton, Goodman and Stark is 'moving away from merely listing the abusive or controlling behaviour of batterers to a more theoretical approach focused on the concept of coercive control'.[100]

As I explained in the preceding chapter, I use data from interviews with survivors and Independent Domestic Violence Advisers (IDVAs) to develop the theoretical work of Stark, Dutton and Goodman. Dutton and Goodman organise coercive control into three distinct theoretical domains: 'setting the stage', 'coercive behaviour', and the 'victim's response'.[101] The survivors and IDVAs interviewed agreed on the existence of these structural dimensions, and they were comfortable with the label 'coercive behaviour'. 'Victim's response' tended to be expressed in terms of harm to the survivor, and I use the simple label 'harm' as a result.

Finally, survivors did not use 'setting the stage' as a label, perhaps because it is too neutral, and too located in time and space. Instead, they preferred the label 'grooming', which they felt better reflected its on-going nature. Later empirical work with the police supported this conclusion. DC James, a Safeguarding and Investigations Unit Officer who took part in the police focus group, said 'there are very clear parallels in the grooming process'[102] with the work that officers do in relation to child sexual exploitation. Grooming as a term, she concluded is 'very useful. It's very similar'.[103] I therefore used 'grooming', 'coercive behaviour' and 'harm' as reference points around which survivors were encouraged to frame their personal experiences.

Program' (2006) (12) Violence Against Women 543; Victor Tadros, 'Rape without Consent' (2006) 26(3) Oxford Journal of Legal Studies 515; Stark, Coercive Control n3 ; Johnson, A Typology n5; Kristin Anderson, 'Gendering Coercive Control' (2009) 15(12) Violence Against Women 1444; Cheryl Hanna, 'The Paradox of Progress: Translating Evan Stark's Coercive Control Into Legal Doctrine for Abused Women' (2009) 15(12) Violence Against Women 1458; Hester, Who Is Doing What to Whom n1; Stark and Hester, Coercive Control Update and Review n85.

[100] Johnson, A Typology n5 14. See also Michael Johnson and Janel Leone, 'The Differential Effects of Intimate Terrorism and Situational Couple Violence' (2005) 26(3) Journal Of Family Issues 322, and, more recently, Kevin Hamberger, Sadie Larsen and Amy Lehrner, 'Coercive Control in Intimate Partner Violence' (2017) 37(1) Aggressive and Violent Behaviour 1.

[101] Dutton and Goodman, Coercion in Intimate Partner Violence n5 746.

[102] DC James, Focus Group with Police (30 November 2016) 2.

[103] Ibid.

Grooming

Grooming is a critical component of coercive control. As I have argued elsewhere: 'victims of coercive control are vulnerable, but not because they are weak, character-deficient, or mentally unwell. They are vulnerable because they have been groomed'.[104] While the 'vulnerability' label must, it has been pointed out, be wielded with caution, especially in the criminal justice context, I am using it here with 'close and respectful engagement with the narratives of ''the vulnerables" themselves'.[105] Specifically, I am using it to highlight the 'implications of disempowerment'[106] and thereby to convey the instability that ensues once anyone experiencing domestic abuse finds themselves in a situation where their ability to protect themselves is compromised. The instability is enabled by the grooming.

Grooming is intense and strategic. IDVAs and survivors described "courtship" behaviours that are not as they first seem. Behaviour that is interpreted as romantic confuses and disorientates. Sarah commented that, 'the messages were so hard to follow. Because him wanting me seemed to be – I think I confused that with love. You know. He was really attentive in that kind of way.'[107] Survivors expressed their confusion; they felt flattered and disorientated. The attention was often welcomed as its significance was not apparent.

Survivors spoke about the grooming period as overwhelming. Sarah said: 'and I would say that the first three months were like being in a complete bubble. We were inseparable. And everything just got put on hold.'[108] During that intense period, Sarah was encouraged to share details about even the most intimate parts of her life. She explained: 'he would talk about his values of needing absolute loyalty, absolute transparency… having any sense of space or privacy or independence was kind of seen as not acceptable… I had to be available all the

[104] Cassandra Wiener, 'Seeing What is Invisible in Plain Sight: Policing Coercive Control' (2017) 56(4) The Howard Journal of Crime and Justice 500, 506.
[105] Vanessa Munro, Shifting Sands? Consent, Context and Vulnerability in Contemporary Sexual Offences Policy in England and Wales' (2017) 26(4) Social and Legal Studies 417, 429.
[106] Ibid 433.
[107] Interview with Sarah (29 June 2016) 1.
[108] Ibid. 2.

time.'[109] Karen described the beginning of her abusive relationship using similar language to Sarah: 'we were then seeing each other pretty much every day. It was really full on. Really intense, and really full on. I was just available when he wanted me to be, kind of thing.'[110] This is a common theme across survivors' stories. Dazzled by the intensity of the courtship, women gave perpetrators access to their lives: to their homes, their families and even their most intimate secrets. Access tends to increase not on surviviors' own terms but as a response to the demands of their new partners: 'I was just available when he wanted me to be', 'having any sense of space … was… seen as not acceptable', 'I had to be available - all the time'.

Overall, grooming is an essential component of coercive control. Initial "courtship" gains a perpetrator access and disclosure. This then gives way to enabling behaviour that terrifies, emotionally abuses and isolates survivors. In this way perpetrators create and then maintain the power differential between them and their victim.

Coercive Behaviour

For many survivors, recognition that they have been groomed, that is that their abuser's attention is more about grooming than courtship, comes as a result of the onset of fear. This is often a transformative moment. Jessica told me the disturbing story of a client who is badly frightened on her honeymoon:

> Her story was that everything was groovy, no issues, they got married they went on their honeymoon, and he strangled her with the bathroom towel. Really, really badly. There was a horrific, traumatic incident when he strangled her almost to death with the bathroom towel ... So then after that for that six years of their relationship -… he never ever again used physical violence on her but whenever there was a moment of tension he would go to the bathroom and he would bring out a towel, and he would put it on the table. And that was the sign; and then she would just be, like, "and then I would just give in - I would just do whatever it is he was trying to get me to do".[111]

The towel incident is a good example of the role of threats within coercive behaviour. The difficulty (for the outsider) is that the threat is, as in this case,

[109] Ibid.
[110] Interview with Karen (24 November 2016) 10.
[111] Interview with Sue (16 August 2016) 6.

contextual. The placing of the bathroom towel on the kitchen table throughout the six years of their relationship is an instrument of terror but without context would seem innocuous.

Coercive behaviour is the product of a relationship between demands, and threats that are given credibility via enablers such as physical and emotional abuse and surveillance. It is when a threat is *credible* that a demand becomes *coercive*. The different components of coercive behaviour were present in all of the survivors' stories with the exception of the physical abuse, which was present in all but two of the narratives.[112]

Demands

Survivors described demands that are small or big but pervasive:

> Controlling your entire life, how you eat how you sleep, what you wear. When you answer your phone, everything to how you look, your hair, how you cook you know, just literally your life is consumed by control.[113]

Survivors often spoke about demands linked to the construction of gender, both theirs and their abuser's. Survivors spoke, for example, of the perpetrator's desire to control the way in which they performed 'gendered' roles such as housewife and/or mother. This includes the way they cook, attend to their abuser's creature comforts, look after their children. Sarah said about her evening regime:

> I would have to cook three times in the evening. So I would have to make [my daughter's] food, then I would have to make food for my older children, and then he would come home at about eight o'clock and he would tell me *then* (not ever before) what it was he wanted to eat. And basically, … I would have to cook his dinner. Whatever it was he said he wanted at this point.[114]

Also important is the survivor's role as his sexual possession, the person who is presented to the world as sexually "his". Survivors spoke of a bewildering focus on their appearance in public - what clothes they wore, for example, becoming the focus of sexualised abuse. Karen talked about the trauma she experienced when

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[112] This fits with Stark's findings, he concludes that most cases of coercive control include physical and/or sexual assaults, but a significant proportion do not. See Stark and Hester, Coercive Control Update and Review n85.

[113] Sadia, Survivors Focus Group (8 September 2016) 1.

[114] Ibid.

deciding what to wear: 'whatever I did was never good enough, and he would then kind of move the goal posts, so criticize what I was wearing. If I wore make up, I was a tart. If I wore this, I was a tart; everything was very derogatory.'[115] Karen's abuser's use of language, 'if I wore make up, I was a *tart*', suggests that in these cases the appearance of the victim is important to the perpetrator because of the victim's role as "his" sexual partner. A perpetrator's concern is what the victim's appearance says about her sexual availability to others. The word 'tart', for example, is suggestive of someone who is sexually available. Calling Karen a 'tart' if she wears make up suggests that the perpetrator is anxious that others may see Karen as sexually attractive and/or available.

As well as controlling how survivors appear to others, survivors also talked about demands linked specifically to sexual abuse. Sarah, who was the only survivor to talk in depth about her partner's sexual demands, said 'he would not take no for an answer to sex'.[116] Kim said, 'I've only recognised this more recently because he would say around sex, as well - that if I didn't give it to him, he was going elsewhere. So there was a lot of pressure.'[117] Shirin went into a little more detail. She explained:

> Something controlling, this is something private … is my private life, in bed. I can be fast asleep. He will come and say "wake up". "Please go away", I say, "I want to sleep". And then the noise, and I give in. And it came to a point that it is now starting to get me down a bit. So I stay in the TV room until 3 or 4 o'clock in the morning, and then creep into my daughter's room and I'm tired and I'm sick now, but still it doesn't help him. It's "my duty".[118]

Demands are thus pervasive, and linked to the construction of gender related roles: her role as cook, as escort, as mother, as his sexual property. The next section explains how the threats that accompany the demands make them coercive.

Threats

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[115] Karen n110 3.
[116] Sarah n107 6.
[117] Interview with Kim (24 November 2016) 11.
[118] Shirin Survivors Focus Group n113 7.

In every case, the demands are coercive because the threats (both discrete and integrated) are credible. Survivors learn with good reason to be fearful. This is where the grooming and an appreciation of context are important. Survivors understand the threat posed by the perpetrator because they know that he has access and that he is dangerous. Threats can begin with physical violence, as in Jessica's story of the bathroom towel. Kim described how her partner, 'would threaten to kill me, and threaten to cut me up into little pieces'.[119] The threat of violence can also be entirely implicit, where a survivor is terrified because she knows what the perpetrator might be capable of, and because she knows he has access to her. When Sarah was asked, 'were his threats unspoken? In that did you know what would happen if you didn't behave?', she replied quietly 'yes, and I feared it'.[120]

Physical abuse

Threats are credible because of the victim's knowledge of the perpetrator's capability. Domination is therefore often made possible by the perpetrator's physical abuse. The physical abuse takes different forms. Most common is ongoing physical abuse that accompanies emotional abuse as a kind of backdrop. Jessica described this as 'the usual'. She said 'there was occasionally hitting and punching - the usual.'[121] Describing this kind of physical abuse as "the usual" is not to suggest that it is inconsequential or not serious, although the way that survivors talk about it suggests that they process it as both inconsequential and not serious.

Karen, for example, interjected her narrative with almost casual references to physical abuse. She said 'but then we would be walking on the road and he would just punch me in the face'[122] and 'he could just be violent for no apparent … he could just be violent'.[123] She described how her partner would decide on her supper, and if she refused to eat it immediately would shout at her and throw it at her.[124] All of these examples, the punching in the face, the violence for no reason,

[119] Kim n117 3.
[120] Sarah n107 6.
[121] Interview with Jessica (26 May 2016) 10.
[122] Karen n110 4.
[123] Ibid.
[124] Ibid. See also Sadia's description of physical abuse at the Survivors Focus Group n113 5.

the throwing of the dinner plate are typical of how survivors articulated day-to-day physical abuse, in a general way, as a backdrop that had to be accepted and navigated.

Not all physical abuse was viewed in this way, however. Karen, for example, remembers one or two incidents where the violence escalated into something more frightening for her. She said: 'but the big incident that stood out for me was when I was breast feeding my boys, and he head butted me.' Often it can be the one-off more frightening incidents that trigger the survivor to call for help. It was in Karen's case. For some survivors, the physical abuse is consistently extreme. Karen described a perpetrator who was 'incredibly violent, really incredibly violent, stabbings and, horrific…'.[125] One IDVA, Jen, talked about her client's experience of sadistic sexual violence. She was dragged along a railway bridge, and thrown onto the tracks as her abuser shouted 'I am going to fucking kill you'. On another occasion, Jen described how

> She comes to us after a weekend's worth of abuse where he locked her in the bedroom, turns all the lights off, strips her naked, ties her to the bed, rapes her repeatedly, and stabs her in the arm and the legs [with] a knife, and he wouldn't let her go to the toilet, she had to soil herself, really sadistic and the lights off and things like that…[126]

Horrifying physical abuse like that described by Jen was not typical of the survivors' stories that came out of this research project, but suggests that it is not possible to make definitive claims about the role of violence within the coercive control paradigm.

To sum up, the violence within an abusive relationship can take many forms. It can be constant and central, it can be peripheral; it can be normalised, it can be horrific. It can be one-off: as Stark has said 'control may continue unabated long after violence has ended'[127] (as exemplified by, for example, the story of the bathroom towel on the kitchen table). Physical violence can be entirely absent (although this is less usual). What all of the accounts have in common is the

[125] Karen n110 1.
[126] Interview with Jen (15 January 2016) 4.
[127] Stark and Hester, Coercive Control Update and Review n85 89.

structure of the coercive control, the campaign of domination in which the physical violence is a component piece.

Emotional abuse

The emotional abuse took similar forms for many of the survivors and IDVAs interviewed and is present in every story. The gendered "put-downs" contain criticisms of victims' roles as wives, mothers and homemakers - criticisms of the way they dressed, the way they cooked, the way they looked after their children. Emotional abuse is humiliating and degrading and depletes the victim's resources and thus her ability to resist his control. A police officer, DC Stephens, described an incident that had been attended by a colleague. The victim had reported a domestic rape, and the colleague had gone to the victim's house to interview her. The interview took place in the kitchen, and DC Stephen's colleague noticed a dog bowl on the floor by the fridge. She noticed that the victim did not appear to have a dog, so she asked about the bowl. The victim explained that that was where she ate her supper.[128]

Accompanying emotional abuse was evidence of the removal of emotional support. Survivors talk about the removal of support in terms of separation from family and friends and a crippling sense of isolation. Jessica described the process by which the perpetrator removes emotional support from the victim as follows:

> Although it does happen with friends, especially with male friends if you are a female victim, but they close down their friendship group. Initially it's people that aren't good for them because they think they are being used. "They use you, it's only because you are so nice…" kind of thing. And then it's "he fancies you" … so the woman disengages from the males in her company. So it can go that way as well.[129]

Isolation is another enabler - it has a profound and long-term effect on a victim in the way that it increases her vulnerability. Without support, it is difficult for her to resist the worldview that he has and wants her to share.[130] This has emotional and cognitive repercussions that are discussed in relation to the harm part of the model, below.

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[128] DC Stephens, Focus Group with Police on 30 November 2016 13.
[129] Jessica n121 8; see also Sue n111 1.
[130] Stark, Coercive Control n3.

Surveillance

The final piece of the jigsaw is surveillance - which adds credibility to the threat. The victim has reason to be fearful that her partner will know if she disobeys his demands because she knows that he is spying on her. This is another enabler, and technology is the perpetrator's friend. IDVAs such as Annie spoke about the technology available to perpetrators for surveillance purposes as one of the biggest challenges facing survivor support workers.[131] Survivors were monitored everywhere, at the pub, at work; one perpetrator even monitored the time his victim spent on the toilet.[132] Some form of surveillance was present in the lives of all of the survivors interviewed. As with everything else, it can seem innocuous if it is not contextualised. Kim explained how she herself did not realise that she was being stalked to start with. She said 'he would just appear where I was, so I wasn't actually aware, prior to that, that he was actually doing that?' She then went on to explain:

> If I had planned to meet anyone from work, which didn't happen very often, because I chose not to do that, he would - I mean a friend reminded me recently about it - he would just - then if we went to the pub, or wherever we were, he would then be there. He would then watch me.[133]

The sensation of being watched, as with so much of the coercive behaviours, does not end with the relationship. Kim spoke about the post-separation presence of her former partner:

> And there were incidents at the house that were happening to make me feel scared, I couldn't prove it was him. I'd come home and there was a big footprint at the front door, it was like someone had kicked the door because it was like rubber. And in the middle of the night I've got a little dog and he was barking and I came downstairs and the back door was open. And things like my washing line – I really like hanging washing out and he knew that and the washing line had been cut.[134]

Her relationship with her abusive partner had ended, but he still knew where she lives, and knew enough about her personally to continue to terrorise her. He knew, for example, that she likes to hang out her washing, so the cutting of the washing

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[131] Annie n87 3. See also Bridget Harris and Delani Woodlock, 'Digital Coercive Control: Insights from Two Landmark Domestic Violence Studies' (2018) 59(3) The British Journal of Criminology 530.
[132] Interview with Anita (6 June 2015) 10.
[133] Kim n117 3.
[134] Kim n117. See also Survivors Focus Group n113.

line had a personalised (frightening) significance. It is interesting that survivors are aware that the end of the relationship is not necessarily a solution for them. Sadia said, 'he always said… if I ever leave him, that he will continue for the rest of his life and he will make my life hell - that's his exact words.'[135] Separation is the subject of a more detailed analysis in chapter six, but the survivors I spoke to were aware that the controlling behaviours continue much as before.[136]

To summarise: the dimensions of coercive control are best seen as a strategy of domination. The strategy involves building an infrastructure (the "enabling" behaviours such as emotional abuse, isolation enforcement, physical violence and surveillance) which underpins threats and demands. The totality of the harm experienced by the survivor can only be understood with an appreciation of this infrastructure and context. The last part of the model explores the harm by reviewing the impact that the grooming and the coercive behaviour is likely to have on its victims.

The Harm

The survivor response to coercive control is the third dimension to the theoretical model. Stark describes a 'condition of unfreedom that is experienced as *entrapment*'.[137] Survivors make it clear that they do not generally consider physical injury to themselves to be of much consequence. Maya explained,

> Physical pain was the least of my worries. When it comes to the rest of his abuse. I wouldn't even notice. It wouldn't even concern me. It is not something that really bothers you so much as all those other aspects of abuse which are preoccupying your mind. You are more likely to ask for help when it comes to other parts of abuse than physically. Physically, I never thought 'oh, I need to go and do something about this bruise, or about him grabbing me here or kicking me, but about other aspects, his drinking threats, legal threats. Reflections on my child's life, those are things about which I wanted to ask for help, and eventually did.[138]

IDVAs also comment on the relative unimportance of physical violence to their

[135] Focus Group ibid. 5.
[136] See also Elizabeth Vivienne, 'Custody Stalking: A Mechanism of Coercively Controlling Mothers Following Separation' (2018) 25 Feminist Legal Studies 185.
[137] Stark and Hester, Coercive Control Update and Review n85 (emphasis in original).
[138] Maya Survivors Focus Group n113 16.

clients. Annie explained: 'some of the women that come in here say that they can deal with the physical part, because the body heals, but it's the emotional part that they can't deal with.'[139] Fear (and in particular fear for the safety of children), instability and personality change are all much more important to the survivor than physical injuries.

Fear is expressed as the generalised fear of an innominate event, a terror of something that might happen, rather than the fear of something specific. Susan Edwards distinguishes between 'immediate fear, fear of future harm or being *in fear*'.[140] This distinction becomes important in later chapters in the context of what the law is prepared to recognise as "fear". Every single survivor spoke of the instability generated by having a *generalised fear* at the core of every lived day.[141] To use Edwards' terminology, this is the 'fear of future harm' and/or being 'in fear' rather than 'immediate fear'.[142] Immediate fear was also experienced by survivors in relation to specific incidents such as the head-butting incident described by Karen above. The important point to recognise is that there is no hierarchy here - living "in fear" is as destabilising than the fear of an immediate threat. In some ways it is more so because it is ongoing, and because of the effect it has on a victim's ability to make choices (as I explain in more detail below).

Sarah reported that 'it was very much setting up this sense of "here are my rules", and immediately, although you can't see them, you are walking on eggshells'.[143] Sadia commented that:

> It's like living on a rollercoaster. It's like going on a train journey and never knowing which stop you are going to get off - if it's going to be a nice stop? Or a bad stop? And the day is like that every day. Basically. You don't know how the day is going to start. And you don't know how the day is going to end.[144]

For most survivors, accompanying the instability rollercoaster is an elusive sense of personal control: if only they could behave differently, the perpetrator's abusive

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[139] Annie n87 2.
[140] Susan Edwards, Recognising the Role of the Emotion of Fear in Offences and Defences (2019) 83(6) Journal of Criminal Law 450, 461.
[141] See, for example the conversation between Zara, Mahira and Sadia at the Survivors Focus Group n113 4.
[142] Edwards, Recognising the Role of the Emotion of Fear n140 461.
[143] Sarah n107 4.
[144] Sadia Survivors Focus Group n113 1.

behaviour would stop. This perception on the part of the victim of the link between what she does and how he might react goes to the core of the relationship between a victim's generalised fear and the impact it has on her daily life. The day is spent trying keep him from exploding, keeping everyone safe, trying not to crush the eggshells underfoot. Kim explained it thus: 'there were warning signs, and because I felt that I kind of got the measure of him, I felt that I could kind of adapt things, almost appease him, make sure the kids were safe, which obviously was the main thing'.[145] At another point in the interview she said 'I would always try to make it OK'.[146]

Linked to the desire to 'adapt things', 'appease him', 'make it OK' comes an assumption of responsibility for the consequences if she doesn't succeed. Sue, an IDVA, elaborated on this:

> One of the reasons that they blame themselves is that they feel then like they have a degree of control, like they can prevent it from happening again. So it's like I was raped because I did X. So if I don't do X again, then I won't get raped. Which means that I can now have control over my life so that I don't get raped. The reality is that's not why she got raped. She got raped because he's a perpetrator. Part of blaming yourself is about giving yourself back a degree of control.[147]

The most significant short-term part of the impact that the control has on the survivor is therefore the way that she moderates her behaviour: the "X" in 'so if I don't do X again', but the long-term context is more profound. Sarah explained how she blames herself for the abuse, 'and of course anything I did or didn't do, wasn't just wrong whether I did it or didn't do it, but it was also an example of my badness, my passive aggression, my withholding, my darkness…'. Sarah internalised the abuse even as she was describing it in an interview environment: 'my badness, … my darkness'.[148] This internalisation goes to the heart of the impact that coercive control has on its victims as it affects the way that they see themselves and the world around them. As Anita, an IDVA, put it: 'underneath something emotional about you has changed'.[149] In another IDVA's words:

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[145] Kim n117 8.
[146] Kim n117 9.
[147] Sue n111 3.
[148] Sarah n107, 7.
[149] Anita n132 10.

> They are at a point where they are pretty much believing what has been said over a period of time to the extent that they found it hard to see him as guilty of a crime because the blame was entirely on themselves and it informed who they were. (Jessica).[150]

Stark puts it thus: 'he changes who and what she *is*'.[151]

The impact of the control on the victim is devastating. She exists in a constant state of generalised anxiety that she has not moderated her behaviour sufficiently to avert catastrophe for herself and her children. Her fear is real and not imagined as it is based on a realistic appraisal of the perpetrator's capabilities. As Kim put it: 'and then obviously when the boys came along I just wanted everything to be OK so … treading on eggshells, and trying to make it OK. But it wasn't OK. And, so, it's like trying to paper the cracks, and there is only so many times that you can keep doing that before they start…'[152] (she trailed off).

For the survivor respondents, however, even the crippling anxiety is not the worst effect of the abuse. Dutton talks about the way in which the psychological impact of abuse goes beyond symptom focused conditions such as anxiety to include 'the ways in which battered women have come to think about the violence, themselves, and others as a result of their experiences'.[153] Survivors explain that worst of all was how they learn to blame themselves for the position in which they find themselves and lose confidence in their ability to make decisions about their own and their children's lives. Sue (IDVA) gave an example of this:

> I had one woman in particular who told me in the beginning like "I don't know what to eat, I don't know how to get dressed in the morning I don't know… because for so long he made every decision in my life, and now I don't know how to make any decisions anymore."[154]

IDVAs emphasise that the survivor will not always be aware of these changes in herself when she first reaches out for help: 'the time when they are first talking to us they are probably not the person who they really are but I don't know if they are

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[150] Jessica n121 6.
[151] Stark, Coercive Control n3 262 (emphasis mine).
[152] Kim n117 5.
[153] Mary Ann Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' (1992) 21 Hofstra Law Review 1191, 1217.
[154] Sue n111 2.

able to identify if that is the case'.[155]

Conclusion

A consensus has emerged in the literature on the importance of Stark's conceptualisation of coercive control and the usefulness of Johnson's typologies. Some difficulties remain. My position, in terms of the location of coercive control, is the same as Stark's: coercive control is not the same thing as domestic abuse. This means that I accept that men and women in intimate relationships can abuse each other in the absence of an imbalance of power between them. It is not yet possible to be clear about what percentage of domestic abuse captured by the CSEW is coercive control, but early work suggests it is around a third.[156] Work continues on the development of more effective coercive control scales to address this.[157]

Stark comments that coercive control is 'invisible in plain sight'.[158] This invisibility is a challenge to the way in which the criminal law articulates crime. Structurally, much of the criminal law focuses on a calculus of injuries arising from specific encounters to determine the seriousness of crimes. As discussed above, the extent of the physical violence at any one point in time within coercive control is not a reliable indicator of the seriousness of the offence. When physical abuse forms part of coercive control it is often relatively low level, but constant. When it is assessed in the context of, for example, the Offences Against the Person Act 1861, (reviewed in the following chapter), it appears not to be serious if no one individual incident causes significant physical injury.

Stark observes that this pattern of low-level physical abuse causes difficulties within a criminal justice system that assumes victims are lying, or exaggerating, if they articulate a level of danger that appears disproportionate in the context of the

[155] Sue n111 6.
[156] Myhill, Measuring Coercive Control n5. More recent work by Charlotte Barlow et al. suggests this figure might be much higher. In their study of police practice and coercive control in Northumberland they found evidence of coercive control in 87% of all cases involving assault by an intimate partner: Charlotte Barlow et al, 'Putting Coercive Control into Practice: Problems and Possibilities' (2020) 60(1) British Journal of Criminology 160.
[157] Myhill, Measuring Coercive Control n5; Sharp Jeffs, Kelly and Klein, Long Journeys Toward Freedom n98.
[158] Stark, Coercive Control n3.

immediately preceding incident alone.[159] As Stark explains, much of the physical and/or sexual violence that forms part of domestic abuse 'is on-going rather than episodic, its effects are cumulative rather than incident-specific, and the harms it causes are explained by these factors rather than by its severity'.[160]

It is not just the invisibility of coercive control that challenges the way in which the criminal law categorises criminal behaviour. The interplay between violent and non-violent, sexual and non-sexual tactics is also symbiotic, complex and thus problematic in the context of a lexicon which groups crimes in a binary manner as physical or non-physical, as sexual or not-sexual. Coercive control is often described in the popular press as "psychological abuse" or "emotional" as opposed to "physical" abuse but this is inaccurate, as the above survivors' stories make clear. Coercive control doesn't "fit" binary categories in this way as the behaviour undermines a victim's physical, sexual, psychological and emotional integrity and is not limited to one at the expense of others but blends the different domains in a way that defies such categorisations. This has repercussions for the criminal law which fragments aspects of control and attempts to criminalise them separately.

In following chapters I review the four main pieces of legislation and the relevant common law that is currently used to prosecute coercive control. In so doing, I tell the story of how the criminal law has been adjusted in a piecemeal way to keep pace with the associated development of understandings of perpetrator behaviour in the context of domestic abuse. I selected these four pieces of legislation and two common-law offences because they are most frequently utilised in the context of the survivor who lives. Tragically, many victims of domestic abuse lose their lives at the hands of their abuser.[161] Domestic homicide is critically important but is not the subject of this research. Throughout chapters four to seven I return to the model of coercive control set out in this chapter as I assess the extent to which the

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[159] Ibid. 94.
[160] Ibid. 94.
[161] Between two and three women lose their lives each week to domestic abuse. Office for National Statistics, 'Domestic Abuse in England and Wales for the Year Ending March 2018' <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2018> accessed 1 February 2019. The most recent statistics suggest the numbers have increased: Thomas MacIntosh and Steve Swann, 'Domestic Violence Killings Reach Five Year High' BBC News (13 September 2019) available at <https://www.bbc.co.uk/news/uk-49459674> accessed 6 October 2019.

wrongful behaviours and harms inflicted by the perpetrators of coercive control as articulated by the survivors of abuse are captured by the criminal law. Chapter eight, the conclusion, points the way to further research and touches on the possibilities for reform.

CHAPTER FOUR: 'BAR BRAWLS AND STREET FIGHTS'[1] - DOMESTIC ASSAULTS AND THE OFFENCES AGAINST THE PERSON ACT 1861.

The criminal law is the foundational component of the criminal justice system that defines what is, and is not, relevant from a criminal justice perspective.[2] One of the most important functions of the criminal law, therefore, is the correct labelling of a crime. Crimes must be defined in a way that 'reflects what makes the conduct of defendants who are convicted under them publicly wrongful'.[3] In this way correct labelling allows for proportionate, "fair" punishment, fulfils the criminal law's normative function and respects the lived experiences of victims.[4] In the next four chapters I focus on the criminal law with regard to the prosecution of coercive control. I conclude that coercive control is not labelled correctly in law, and that this means that the law's normative function is diminished, and that the unique harm experienced by the survivor of coercive control is not captured properly.

While the introduction of the Serious Crime Act 2015, s 76 (section 76) marks progress, it has inadvertently accelerated "fragmentation": a scattering of relevant statutes in a multitude of places.[5] The constituent parts of coercive control, as set out in chapter three, have to be prosecuted separately. This is counter-productive, because it is the interplay between the manifestations of abuse that makes the harm of coercive control uniquely damaging.[6] Forcing police and prosecutors to deal with each aspect of control in isolation makes it difficult for criminal justice agents to understand the totality of the survivor experience. It also makes it more difficult for the survivor herself.

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[1] Charlotte Bishop 'Domestic Violence: The Limitations of a Legal Response' in Sarah Hilda and Vanessa Bettinson (eds), *Interdisciplinary Perspectives on Protection, Prevention and Intervention* (Palgrave Macmillan 2016) 66.
[2] Deborah Tuerkheimer, 'Recognising and Remedying the Harm of Battering: a Call to Criminalize Domestic Violence' (2004) 94(4) Journal of Criminal Law and Criminology 959, 974.
[3] Victor Tadros, 'Rape without Consent' (2006) 26(3) Oxford Journal of Legal Studies 515, 524.
[4] James Chalmers and Fiona Leverick , 'Fair Labelling in Criminal Law' (2008) 71(2) Modern Law Review 217.
[5] Emily Finch, *The Criminalisation of Stalking: Constructing the Problem and Evaluating the Solution* (Cavendish 2001).
[6] Vanessa Bettinson and Charlotte Bishop, 'Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?' (2015) 66(2) Northern Ireland Legal Quarterly 179, 184.

In this chapter I address the second research question: how are the physical aspects of coercive control captured by the Offences Against the Person Act 1861 and the associated common-law offences of assault and battery, (together, the offences against the person regime)? The chapter is divided into two parts. In the first part, I review how the offences against the person regime has been used to prosecute domestic assault. In the second part I explain how this regime was developed by the judiciary in the 1990s, in part because of the recognition that certain behaviour patterns (which came to be known as "stalking") were not being adequately captured by the offences against the person regime. The pressure that stalking cases seemed to place on the criminal justice system received considerable media attention. The ensuing Protection from Harassment Act 1997 (the PHA) is the subject of analysis in the following chapter.

PART ONE: THE NON-FATAL OFFENCES AGAINST THE PERSON

Physical abuse that is not sexual is the fragment of domestic abuse that is most often investigated by the police. In the year ending March 2019, for example, 78% of the 746, 219 domestic abuse-related offences recorded by the police were for violence against the person offences.[7] These offences include all physically abusive acts that do not result in a death and are not sexual in nature, whether or not they are also part of a psychologically abusive strategy. This means that:

> The primary legislation used to prosecute domestic violence perpetrators was introduced more than 150 years ago to deal with problems of stranger violence and public order and is based on physical violence that is typically committed in public by one man against another.[8]

It is not surprising that legal provisions introduced in the nineteenth century 'to address bar brawls and street fights'[9] are ill-suited for the prosecution of domestic abuse well over a hundred years later.

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[7] Office for National Statistics 'Domestic Abuse in England and Wales: year ending March 2019' <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseprevalenceandtrendsenglandandwales/yearendingmarch2019> accessed 23 October 2020.
[8] Bishop, Domestic Violence n1 65.
[9] Ibid. 66.

Criticism of the OAPA, even without consideration of its unsuitability in the context of coercive control, is not new.[10] The Law Commission argued in its scoping report of 2011 that the OAPA is obsolete and in need of modernisation,[11] and in 2015 put forward comprehensive proposals for reform.[12] It has therefore been recognised for some time that the OAPA is not fit for purpose.[13] Even on its enactment in 1861 it was a consolidating statute, bringing together prohibitions that were already quite old.[14] Definitional problems arise because language such as 'malicious' and 'grievous' is antiquated and misleading for the public, and has to be translated for the jury. The excessive use of constructive liability,[15] and the incoherence of the offence classification resulting in the lack of a clear "ladder" of offences and corresponding penalties,[16] have also been singled out for criticism.

If the perspective of the survivor of domestic abuse is adopted then the criticism becomes more fundamental. The non-fatal offences against the person reflect a certain understanding of what constitutes a crime. This understanding rests on assumptions that are not always appropriate in the context of coercive control. In particular, the assumption that a crime is "transactional" in nature is a problem.[17] A transactional focus places an emphasis on the boundary preservation of property or a person. The crime is conceived of as a violation of that boundary that takes place at a particular instant in time.[18] Another inappropriate assumption is that the boundaries in need of policing are physical in nature. In other words, violations are conceived of as physical harm to person or to property. This emphasis on transactional specificity and physical harm means that much of the

[10] See John Gardiner, 'Rationality and the Rule of Law in Offences Against the Person 1994 53(3) Cambridge Law Journal 503 for a summary of the critique as early as 1994.
[11] Law Commission, *Eleventh Programme of Law Reform* (Law Com 330, 2011) para. 2.63.
[12] Law Commission, *Reform of Offences Against the Person* (Law Com 360, 2015).
[13] Matthew Gibson, 'Getting Their 'Act' Together? Implementing Statutory Reform of Offences Against the Person' (2016) 80(3) Journal of Criminal Law 1.
[14] Ibid. 2.
[15] See, for example, Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press 2009) 314.
[16] Michael Jefferson, 'Offences Against the Person: Into the 21st Century' (2012) 76 Journal of Criminal Law 472.
[17] Tuerkheimer, Recognizing and Remedying the Harm of Battering n2.
[18] Alafair Burke, 'Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization' (2007) 75 George Washington Law Review 558; see also Vanessa Bettinson and Charlotte Bishop, 'Evidencing Domestic Violence, Including Behaviour That Falls Under the New Offence of "Controlling or Coercive Behaviour"' (2017) 22(1) The International Journal of Evidence and Proof 3, for an English perspective.

harm experienced by survivors of coercive control is excluded altogether. Deborah Tuerkheimer refers to this exclusion as 'cloaking'.[19]

Cloaking is an example of what Tuerkheimer refers to as the 'disconnect between life and law'[20] that is particularly acute for survivors of coercive control engaging with criminal justice systems such as those in the United States and in England and Wales. She argues that the transactional crime paradigm is not a good framework from within which to prosecute coercive control.[21] There is a "disconnect" because, as has been explained, 'abusive behaviour does not occur as a series of discrete events.'[22] The wrong of abuse is enacted on the terrain of the relationship and it is the abuser's strategic intent that provides the thread that connects and organises the acts. Each specific act of physical violence is, to many women, unimportant in the context of the 'state of siege'[23] imposed by their abuser.

This unimportance of each individual act of physical violence to the survivor causes difficulties for prosecutors, who have to frame assaults in an incident-specific way. Survivors understandably find it difficult to pinpoint ongoing abuse to specific dates on which particular assaults took place. While the date of a one-off incident, such as a mugging by a stranger, is memorable; dates of attacks that occur regularly are not. Instead, the nature of living with attacks that are continuous is a tendency on the part of victims to 'blend, generalise and summarise'.[24]

In the last chapter I described how Jessica, for example, referred to this kind of physical abuse as 'the usual'. She said 'there was occasionally hitting and punching - the usual.'[25] Another example is Karen, who interjected her narrative with almost casual references to physical abuse. She said, 'but then we would be walking on the road and he would just punch me in the face'[26] and 'he could just be violent for no

[19] Tuerkheimer, Recognizing and Remedying the Harm of Battering n2 980.
[20] Ibid.
[21] Ibid.
[22] Mary Ann Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' (1992) 21 Hofstra Law Review 1191, 1208.
[23] Ibid.
[24] Tuerkheimer, Recognizing and Remedying the Harm of Battering n2 979.
[25] Interview with Jessica (26 May 2016) 10.
[26] Interview with Karen (24 November 2016) 4.

apparent… he could just be violent'.[27] While the 'usual' abuse such as punching in the face is remembered, it cannot easily be located to times or places.

This inability to locate specific attacks makes it difficult to prove domestic abuse offences in court.[28] Defence barristers can attack victims' credibility in a way that is reasonable in light of the evidential requirements of the OAPA, but that is unreasonable in the context of what survivors could be expected to remember. In *Hills*, for example, a case which is the subject of a detailed review below, the judge discounts much of the victim's evidence of assaults because, despite her saying that 'over a period of time and on a fairly regular basis, she had been ill-treated by the appellant',[29] none of the complainant's witness statements referred to the dates of the allegations. Furthermore, 'the complainant could not recall specific dates when she had been assaulted'.[30] Juries, too, find it difficult to understand the abuse when presented with isolated acts divorced from the narrative necessary to give those acts meaning.[31]

Individual incidents of physical violence are not always memorable, but the same cannot be said for the fear (and loss of autonomy) engendered as a result. Indeed, 'the battered woman's fear, vigilance, or perception that she has few options may persist, even when long periods of time elapse between physically or sexually violent episodes'.[32] In chapter three, I gave the example of the survivor who spent the ten years following an attack experiencing trauma and loss of autonomy every time her abusive partner put a bathroom towel on the kitchen table. Ten years elapsed, but she described how 'he was never physically violent to me ever again. He would just always bring out the towel'.[33]

Historically, there has been limited analysis in the legal literature of fear and

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[27] Ibid.
[28] Burke, Domestic Violence n18 577; Heather Douglas, 'Do We Need a Specific Domestic Violence Offence?' (2016) 39 Melbourne University Law Review 435.
[29] Hills [2001] 1FLR 580, [10].
[30] Ibid. [13].
[31] Burke, Domestic Violence n18 573; Steve Mulligan, 'Redefining Domestic Violence: Using the Violence and Control Paradigm for Domestic Violence Legislation' (2009) 29 Children's Legal Rights Journal 33; Jennifer Youngs, 'Domestic Violence and the Criminal Law: Reconceptualising Reform' (2015) 79(1) Journal of Criminal Law 55.
[32] Dutton, Understanding Women's Responses n22 1209.
[33] Interview with Sue (16 August 2016) 6.

trauma, and none of loss of autonomy.[34] This is linked to the fact that 'there is no consistent legal framework or doctrinal coherence within the law regarding this emotion (fear)'.[35] As I review in more detail below, recent developments mean that a clinical mental health condition can amount to bodily harm for the purposes of the OAPA.[36] Otherwise, traditionally, and prior to the legislative developments described in the following chapters, what Hobhouse LJ referred to as '*mere* emotions such as fear or distress or panic'[37] are irrelevant: "cloaked".[38]

Downgrading 'extreme fear or panic'[39] to 'something which is not more than a strong emotion'[40] trivialises the responses of women in domestic abuse cases. Severe and sustained "living in fear" usually has significant consequences, whether or not there is a clinical diagnosis.[41] The need for a clinical diagnosis is particularly unfortunate in the context of domestic abuse. Victims with dependent children understandably fear the ramifications of a diagnosis of a psychiatric illness.[42]

In summary, the crimes prosecuted under the non-fatal offences against the person regime account for over 75% of the domestic abuse offences recorded by the police, and yet are uniquely ill suited to prosecutions of this type. The crimes are incident specific and transactional in nature, and their prosecution puts unreasonable pressure on victim-survivors, and "cloaks" both aspects of perpetrator behaviour and the harm experienced by the victim. Harm that is not physical is often overlooked, and much of the "everyday" violence goes uncharged. Tuerkheimer describes the way that reality comes to 'bear on legal structures' via a series of 'pressure points'.[43] She says:

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[34] Jeremy Horder, 'Reconsidering Psychic Assault' [1998] Criminal Law Review 392, 400.
[35] Susan Edwards, Recognising the Role of the Emotion of Fear in Offences and Defences (2019) 83(6) Journal of Criminal Law 450, 450, brackets inserted. As Edwards acknowledges in this paper, fear has been afforded a degree of recognition in the context of the law on defences to a crime.
[36] The rulings in *Burstow*; *Ireland* 1997 UKHL 34 are considered in detail below.
[37] *Chan-Fook* [1994] 1 WLR 695 (CA) [696], my emphasis.
[38] See, for example *Dhaliwal* [2006] 2 Cr App R 24, where the Court of Appeal dismissed the impact of domestic abuse on a victim despite evidence of depression because there was no clinical diagnosis. For commentary on this case see Bishop, Domestic Violence (n1) 70, and more generally see Mandy Burton, 'Commentary on *R v Dhaliwal*' in Rosemary Hunter et al (eds), *Feminist Judgments: From Theory to Practice* (Oxford 2010).
[39] *Chan-Fook* n37 [696].
[40] Ibid.
[41] Vanessa Munro and Sangeeta Shah, 'R v *Dhaliwal* Judgment' in Rosemary Hunter et al (eds), *Feminist Judgments: From Theory to Practice* (Oxford 2010) 264.
[42] Marianne Hester, 'Making it Through the Criminal Justice System: Attrition and Domestic Violence' (2006) 5(1) Social Policy and Society 79.
[43] Tuerkheimer, Recognizing and Remedying the Harm of Battering n2 990.

> There is both movement and resistance on the part of legal structures subjected to the force of lived experience. Each (movement/resistance) reveals the defects of structures left intact, the remaining doctrinal patchwork a testament to the power of incompatible truths.[44]

In England, there was significant 'movement' towards the end of the 1990s in the shape of a new law that changed the way that domestic abuse was prosecuted for the better. Ironically, initially, the 'lived experience' that prompted this 'movement' was not associated with domestic abuse at all. In the second part of this chapter I review the movement that took place in England and Wales as the offences against the person regime was tested by the recognition of criminal behaviours that came to be known as "stalking".

PART TWO: THE "STRETCHING" OF THE CONCEPT OF ASSAULT

Stalking

In this thesis, I use the term "domestic stalking" to refer to stalking that takes place where there has been an intimate relationship between perpetrator and victim, whether or not that relationship is ongoing. I use the term "non-relational stalking" to refer to all other stalking, i.e. where the victim and perpetrator are known to one another but have never been intimately involved, or where the victim and perpetrator have never met. These definitional issues are important as they have not always been clear to Parliament and developments in the criminal law have suffered as a result.

The stalking that first became recognised as a serious social problem in the United States was non-relational.[45] Research tracking the development of the concept of stalking in the United Kingdom via content analysis of newspaper articles in the 1990s concludes that the media portrayal of stalking in the United Kingdom followed a similar trajectory.[46] A Home Office review conducted in 2000 supports these conclusions: 'public perceptions of stalking have been coloured by the media

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[44] Ibid.
[45] Michael Sazl, 'The Struggle to Make Stalking a Crime: a Legislative Road Map Of How to Develop Effective Stalking Legislation in Maine' (1998) 23 Seton Hall Legislative Journal 57.
[46] Finch, Criminalisation of Stalking n5.

attention given to high profile cases involving public figures or personalities'.[47]

Non-relational stalking can involve the obsessive pursuit of victims by people who are mentally ill. The media focused on stalkers as 'dangerous and mentally ill with a tendency towards the commission of violent crime',[48] and this fed a public preoccupation with celebrity victims who were in need of protection from delusional strangers.[49] In fact, it is now recognised that the most common form of stalking is domestic; it takes place where the victim and perpetrator know one another and are, or have been, in an intimate relationship.[50] The situation with regards to the mental health of perpetrators of domestic stalking is discussed below, and while it is possible that a percentage of such perpetrators are mentally ill, this has not been established. The inaccurate colouring of the public perception of stalking by the media attention given to non-relational celebrity cases had an impact on the PHA which I explore in the following chapter.

Stalking is important to this thesis because it often forms part of the behaviour patterns that make up coercive control, as I explained in chapter three. It is usually one of the tactics utilised by perpetrators of coercive control. Certainly most, if not all, of the survivors that took part in this project described stalking as a key constituent of the abuse that they experienced. In chapter three, I gave examples of how perpetrators tracked survivors' movements and spied upon them. Karen spoke about how:

> If I had planned to meet anyone from work, which didn't happen very often, because I chose not to do that, he would - I mean a friend reminded me recently about it - he would just then if we went to the pub, or wherever we were, he would then be there. He would then watch me.[51]

By watching Karen in the pub, the perpetrator made his presence felt when they are not ostensibly together. This demonstrates how stalking is the mechanism

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[47] Jessica Harris, *An Evaluation of the Use and Effectiveness of the Protection from Harassment Act 1997* Home Office Research Study 203 (Home Office 2000) 1.
[48] Finch, Criminalisation of Stalking n5 109.
[49] Kenneth Campbell, 'Stalking Around the Main Issue' (1997/8) 8 Kings College Law Journal 128, 128.
[50] Laurie Salame, 'A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others' (1993) 27 Suffolk University Law Review 67.
[51] Karen n26 3.

within control that a perpetrator uses to extend his control through time and space to make that control "complete". Kim described similar behaviour: 'he used to come to my work - he knew where the kids were at nursery - so he used to go to their schools. Everywhere I went, he was there'.[52] Sarah used the term 'complete control' when describing the stalking behaviours she experienced. She said:

> He was in complete control. He was a very Mac man - iMac all that kind of stuff, really early adopter of all that technology. And so basically he - I actually had to have a police cyber detective set up new emails for me. He was the administrator of all the accounts. So even though I sought help, of course, anything that was on the computers he could see it all. And he knew where I was, because of the "find my phone" tracker, which he delighted in proving.[53]

There is no doubt that stalking and coercive control are highly correlated in that they are often simultaneously present and the one "completes" the other.[54] Two points are important here, however. Firstly, stalking forms *part* of the controlling or coercive behavioural repertoire of a perpetrator within an abusive intimate relationship; *it is not the same thing as coercive control*. Secondly, as reflected by the early media reports of stalking referred to above, non-relational stalking exists as a typology completely outside of coercive control.

From 1994 to 1997 there was extensive media coverage of the perceived inadequacies of the non-fatal offences against the person regime in the context of non-relational stalking.[55] From a legal perspective, the difficulties faced by the courts coalesced around both the nature of stalking (the act), and its effect (the harm). In both cases the difficulty for the criminal law was the "cloaking" caused in part by the lack of an incident-specific physical dimension to perpetrator behaviour and victim response. In 1997 three important stalking cases came before the courts: *Constanza*,[56] *Burstow* and *Ireland*.[57] In all three cases the courts grappled with the inadequacies of the OAPA in the context of the nature of stalking

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[52] Interview with Kim (6 October 2016) 2.
[53] Interview with Sarah (29 June 2016) 7.
[54] In a study in Maine, stalking was found to occur within 80% of domestic abuse cases: Michael Sazl, 'The Struggle to Make Stalking a Crime: a Legislative Road Map Of How to Develop Effective Stalking Legislation in Maine' (1998) 23 Seton Hall Legislative Journal 57. This finding was mirrored by Jane Monkton-Smith in the UK: see Jane Monkton-Smith et al, 'Exploring the Relationship Between Stalking and Homicide' (Suzy Lamplugh Trust 2017) and also by Charlotte Barlow et al. 'Putting Coercive Control into Practice: Problems and Possibilities' (2020) 60(1) British Journal of Criminology 160.
[55] Finch, Criminalisation of Stalking n5.
[56] *Constanza* [1997] Crim LR 576 (CA).
[57] *Ireland, Burstow* n36.

and the way that the experience of being stalked devastates the lives of its victims.

Constanza[58]

The judgment in *Constanza* was handed down first, in March 1997. The stalking was non-relational: the perpetrator (Mr Constanza) and his victim (Miss Wilson) were acquaintances, but were not, nor had they ever been, in a relationship. They both worked for the same company. Constanza wished to form a relationship with Wilson, and resorted to increasingly intrusive behaviour in pursuit of her. Schiemann LJ summarised his behaviour:

> Between October 1993 and June 1995 the Appellant (Constanza) indulged in the following unusual behaviour: - following her home from work, making numerous silent telephone calls to her at work and at home as well as some telephone calls in which he spoke, sending and delivering over 800 letters to her home over a period of 4 months, sitting in his car outside her home in the early hours of the day, driving past her home and circling on occasion, visiting her home in April 1995 and talking to her and her mother for long periods on the doorstep when asked not to do so, and daubing the words "no guts, coward" on her door in marker pen on three occasions.[59]

Schiemann LJ explained that by June 1995, Wilson 'felt that all the actions of Constanza were such that he posed a threat to her personal safety. She had told him that his behaviour was making her ill and he had told her that if he could not have her nobody else could.'[60]

Constanza was originally convicted at first instance of assault occasioning actual bodily harm under section 47 of the OAPA. This offence is satisfied where the defendant commits a common assault or a battery and the victim has suffered actual bodily harm as a result. As there had been no physical contact between Constanza and Wilson there could be no question of a battery. Both parties at first instance agreed on the legal definition of common assault,[61] and on the actual bodily harm that Constanza accepted he had caused Wilson to suffer. Wilson was

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[58] *Constanza* n56.
[59] Ibid. 493.
[60] Ibid.
[61] Glanville Williams states 'it has been settled law since the middle ages that the actus reus of assault has a technical meaning, different from battery, and focuses on the apprehension that unlawful force is about to be applied to the victim' Glanville Williams, *Textbook of Criminal Law* (Sweet and Maxwell 1983) 172 as cited by Horder, Reconsidering Psychic Assault n34 393.

diagnosed with clinical depression and chronic anxiety by a psychiatrist in July 1995; Constanza accepted the psychiatrist's conclusion that it was Constanza's relentless pursuit of her that had caused her to be seriously, clinically ill. Nevertheless, Constanza appealed his conviction on the basis that his actions could not, in law, amount to an assault. The essential issue for the Court of Appeal was a question of fact: whether or not he had committed the common assault that forms the basis of the s. 47 OAPA offence. Had he caused the victim to apprehend *immediate* violence?

The action of Constanza that was singled out for the OAPA, s 47 charge was his hand-delivery of a letter on 12 June which contained the following wording: 'after that no more excuses, no more being the child. Or we play games my way'.[62] It is an illustration of Tuerkheimer's 'disconnect between life and law'[63] that, having outlined the shocking extent of the perpetrator's campaign of intimidation and the ensuing destruction of Wilson's life, the essential question before the Court of Appeal was whether or not he had caused the victim to apprehend immediate violence. Was the victim in fear of *immediate* violence on the 12 June at the moment when she opened and read the letter from Constanza? If not, there was be no common assault, and thus no assault occasioning actual bodily harm.

The court ruled that Constanza's actions could amount to an assault because Wilson *had* been in fear of immediate violence. Schiemann LJ explained that it was enough if the victim was in fear of violence 'at some time not excluding the immediate future'.[64] Schiemann LJ had to be creative if he was to assist a victim of stalking within the OAPA framework. The section 47 OAPA requirement that "fear" must be "fear-of-imminent-violence" makes it ill-suited for the prosecution of stalking. Susan Edwards' distinction between 'immediate fear, fear of future harm or being in fear' is relevant here.[65] Critics argued that Schiemann LJ's creativity in this regard distorted the meaning of section 47 of the OAPA. Wilson was certainly living in fear, and she feared future harm, but was she really in fear of immediate

[62] n56 493.
[63] Tuerkheimer, Recognizing and Remedying the Harm of Battering n2 980.
[64] n56 [492].
[65] Edwards, Recognising the Role of the Emotion of Fear n35, 461.

violence from Constanza when she opened his letter? Or, is it more that 'this case … seems to provide another example of the courts distorting the law of assault in an attempt to counter the problem of stalking'.[66] Another commentator went further: 'the approach of the Court verges on the cavalier'.[67]

As I stated above, fear is under theorised from a legal perspective.[68] Instead, a hierarchy is assumed which privileges immediate fear of a specific violent event at the expense of a more generalised fear of future harm. In fact, research shows that high levels of fear - *living in fear* - lead to states of 'hyper-vigilance' in victims that can have a serious and detrimental effect on their health.[69] Survivors that I interviewed described a generalized anxiety that they said was far more devastating, in terms of the impact on their day-to-day life, than fear that is limited in time and space to a single physically violent event.[70] At the time of *Constanza*, resistant commentators were correct to suggest that 'the victim's fear may not have been "of" any specific future event, but rather a generalised state of acute anxiety. And that… has not sufficed.'[71] The fact that fear must be "of" a specific imminent future event in order to "count" for the purposes of the OAPA is one of the many reasons the OAPA is ill-suited to the prosecution of stalking.

At the time Wilson received the 12 June letter, she, just like Karen, was experiencing high levels of fear arousal for much of the time. Whether or not that fear arousal was linked to an expectation of violence at a particular moment on 12 June might have seemed irrelevant to her in the context of how it felt to live in its grip. Despite the best efforts of the Court of Appeal, in other words, the totality of the psychiatric distress experienced by Wilson was "fragmented" in a way that led to the "cloaking" of much of the harm she experienced. This had repercussions for

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[66] David Cowley, 'Assault by Letter *R v Constanza*' (1998) 62(2) Journal of Criminal Law 155, 156. See also Campbell, Stalking n49. This point was also made in relation to the later House of Lords judgment in *Ireland, Burstow*: see Faye Boland, 'Psychiatric Injury and Assault the Immediate Effect of *R v Ireland*, *R v Burstow*' (1997) 19(2) The Liverpool Law Review 231.
[67] Campbell, Stalking n49 131.
[68] Horder, Reconsidering Psychic Assault n34; Bishop, Domestic Violence n1.
[69] Paul Mullen et al, *Stalkers and their Victims* (Cambridge University Press 2000); Monkton Smith et al, Exploring the Relationship Between Stalking and Homicide n54.
[70] Sadia, Zara and Maia in particular described their experiences of fear, Focus Group with Survivors, London 8 September 2016.
[71] Simon Gardner, 'Case Comment Stalking' [1998] Law Quarterly Review 33, 36.

the validity of the criminal sanction (OAPA, s 47) in the stalking context that had already become the subject of a high-profile media debate.[72]

Ireland, Burstow[73]

Ireland and *Burstow* were heard together in the House of Lords and fed into the debate. *Ireland* concerned non-relational stalking. The case against Robert Ireland was that during a period of three months in 1994 he made repeated silent telephone calls to three different women. Sometimes he breathed heavily down the phone. The calls were mostly made at night. One of his victims was diagnosed with a psychiatric illness (anxiety and depression) that her psychiatrist determined was caused by Robert Ireland's behaviour. *Burstow* concerned domestic stalking. Anthony Burstow had an intimate relationship with his victim. She ended the relationship, and he proceeded to harass her over a lengthy period of time. During the eight-month period covered by the indictment under consideration he made silent telephone calls to her, made abusive telephone calls to her, distributed offensive cards (about her) in the street where she lived and was frequently at her home and place of work. He took photographs of her without her permission and sent threatening letters. She suffered a severe depressive illness.

Robert Ireland was convicted at first instance of assault occasioning actual bodily harm (OAPA s 47); Anthony Burstow was convicted of inflicting grievous bodily harm (OAPA s 20). Both men appealed their convictions and both appeals were dismissed. Leave was granted to appeal to the House of Lords in both cases and the appeals were heard together. The question of public importance to be decided in *Ireland* was 'whether the making of silent telephone calls can amount in law to an assault'.[74] The point of general public importance in *Burstow* related to a different offence but amounted to essentially the same question: 'whether the offence of inflicting grievous bodily harm … can be committed where no physical violence is

[72] Finch, The Criminalisation of Stalking n5 104 who cites: 'Police Lack Powers Over Dangerous Obsession' *The Daily Telegraph* (London 30 January 1996); 'Can Laws Stop the Obsessed?' *The Times* (London 22 February 1993); 'Men Who Must Pursue Women' *The Guardian* (London 26 June 1993); 'the Law and the Stalker' *The Independent* (30 January 1996).
[73] *Ireland, Burstow* n36.
[74] Ibid. 149.

applied directly or indirectly to the body of the victim'.[75] Both questions are, in fact, dealing with the same point that was looked at in *Constanza*:[76] could the nefarious behaviour of stalkers be captured by the law on offences against the person? Also at issue in *Burstow* and *Ireland* was a question as to whether psychiatric illness could constitute bodily harm.

The House of Lords ruled in the affirmative on both points. It held that the making of silent telephone calls could constitute assault occasioning actual bodily harm further to s 47 OAPA. Furthermore, 'in light of contemporary knowledge covering recognisable psychiatric injuries, and bearing in mind the best, current scientific appreciation of the link between the body and psychiatric injury', a recognisable psychiatric condition could amount to bodily harm.[77] This ruling is progressive from the survivor perspective, but it highlights the limitations of the criminal law as it then stood, in the context of a growing awareness of an insidious wrong. While the ruling in *Ireland* and *Burstow* represented a creative attempt to accommodate the act and harm of stalking, it was somewhat akin to fitting a 'square peg' (stalking) into a 'round hole' (the criminal law).[78]

CONCLUSION: STALKING IS NOT ASSAULT

The artificial nature of the "fit" between "life" and "law" exemplified by *Constanza, Ireland* and *Burstow* was observed by commentators at the time, both in the legal and psychological literature, and in the media.[79] One commentator concluded that:

> The cases of *Ireland* and *Constanza* involved a deliberate restatement of the immediacy requirement in cases of psychiatric harm, a situation which led to the accusation that the courts were distorting the law of assault in an attempt to counter the problem of stalking.[80]

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[75] Ibid.
[76] *Constanza* n56.
[77] *Ireland, Burstow* n36 147.
[78] Tuerkheimer, Recognizing and Remedying the Harm of Battering n2 566.
[79] 'Call For Tighter Law As Victim Tells Of Stalking Campaign' *The Times* (London 3 September 1996); 'Law Change After Stalking Case Acquittal' *The Guardian* (London 18 September 1996); 'Law In Urgent Need Of Reform' *The Independent* (London 19 September 1996); 'Stopping Stalkers: How Would The Law Change?' *Daily Telegraph* (London 16 October 1996). For further examples and analysis see Finch, Criminalisation of Stalking n5 111.
[80] Finch, Criminalisation of Stalking n5 203.

Heather Keating et al state: 'this whole approach adopted by the House of Lords is misguided and involves stretching the existing concept of assault too far.'[81] Of particular concern is the tension between behaviour that is ongoing, and the incident-specific focus of the OAPA. The mismatch between the ongoing nature of the fear generated by stalking and the requirement for fear that is linked to the anticipation of an imminent violent event has already been referred to above. Lawyers also argue that adapting the incident-specific section 47 assault occasioning actual bodily harm in this way gives rise to difficulties with the correspondence principle: when did the assault in *Constanza* begin? For how long did it continue? 'Does the actus reus have intermissions when the perpetrator is asleep?'[82] Psychologists point out that it is difficult to pin generalised disorders such as depression or anxiety that are ongoing to single abusive incidents.[83]

Data from my interviews with police support Keating's view that this approach is misguided. DC Shell, for example, spoke about a case he had investigated involving a woman who had had a nervous breakdown as a result of her abusive partner's behaviour. DC Shell explained 'I tried to run with mental ABH, but in the end I couldn't get enough medical evidence to show that she was… we couldn't document that he was causing this. Rather than that she was suffering for a different reason'.[84] In other words, DC Shell tried to persuade the CPS to charge the perpetrator in question with causing the victim to suffer actual bodily harm. The harm in this case constituted the victim's recognised psychiatric disorder. This attempt failed because it was difficult for DC Shell as the officer in charge of the investigation to get expert evidence that established a conclusive link between the psychiatric illness of the victim and specific acts of the perpetrator.

In conclusion, the crimes that constitute the offences against the person regime are the fragments of domestic abuse that are most often prosecuted by police. The regime has been under review for some time, but is uniquely unsuitable for the

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[81] Heather Keating et al*, Clarkson and Keating: Criminal Law* (Sweet and Maxwell 2014) 565. See also Paul Andrew, 'Assault Occasioning Actual Bodily Harm – Stalking Over Period of Nine Months' [1998] Criminal Law Review 810.
[82] 'Case Comment Assault: Whether Committed By Words Alone' [1997] Criminal Law Review 576, 577.
[83] Dutton, Understanding Women's Responses n32.
[84] Interview with DC Shell (4 December 2017) 12.

prosecution of coercive control. This is because the focus on transactional specificity and physical harm "cloaks" much of the harm experienced by survivors. Survivors find it hard to pinpoint abuse that is ongoing and a constant in their lives to specific dates. This means that some abuse does not get prosecuted. Even with the attacks that are more memorable, the severe and sustained emotional suffering experienced by survivors is not recognised as legally significant, unless and until it is diagnosed as a clinical medical condition. Even where there is such a diagnosis, establishing legal causation – pinpointing a psychiatric condition to a single event – is difficult.

Andrew Simester and others sum it up thus: 'psychiatric injury may have devastating consequences but it is *different* from physical injury. Policing the causing of psychiatric injury by way of nineteenth century laws focused on matters physical is not the way forward'.[85] Against this backdrop of media attention, controversial judicial expansion and accompanying critique, the PHA was making its way through the House of Commons. This is the subject of the following chapter.

[85] Andrew Simester et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Oxford 2010) 440 cited by Judith Garland, 'Comment: Protection From Harassment Act 1997: the 'New' Stalking Offences' (2013) 77 Journal of Criminal Law 387, 388 (emphasis in original).

CHAPTER FIVE: 'STALKING AROUND "*THE MAIN ISSUE*"'[1] - DOMESTIC STALKING AND THE PROTECTION FROM HARASSMENT ACT 1997

In chapter three, I explained that this thesis tells the story of how the criminal law has been adapted to keep pace with the associated development of understandings of perpetrator behaviour in the context of domestic abuse. I used Deborah Tuerkheimer's framework to show how 'reality' comes to 'bear on legal structures' via a series of 'pressure points'[2] resulting in legal reform. The difficulties experienced by judges in the face of the perpetrator behaviour exhibited in cases such as *Ireland* and *Burstow* is an example of just such a reality, and the pressure that these cases put upon the criminal law did not go unnoticed. In fact, articles in all of the leading newspapers called specifically for a change in the law.[3] Pressure mounted on the Government to make stalking a bespoke criminal offence. Home Secretary Michael Howard responded: introducing a draft Bill in December 1996 and explaining as he did so that 'in the past year, a number of highly publicised stalking cases have come to public attention. They have highlighted the need to give the courts more effective powers to deal with stalkers'.[4]

Framing the legislation turned out to be a difficult exercise: the issues were novel and the Protection from Harassment Bill was a ground-breaking and innovative piece of law. This chapter is divided into two parts. In the first part I look at what Parliament was trying to achieve with the Protection from Harassment Act 1997 (PHA), firstly by looking at the relevant parliamentary debates, and secondly with a doctrinal review of the PHA itself. In the second part of the chapter I assess how the PHA came to be used in practice. This is where the domestic abuse context becomes important. Parliament had not specifically considered the use of the PHA

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[1] Kenneth Campbell, 'Stalking Around the Main Issue' [1997/8] 8 Kings College Law Journal 128, 132 (emphasis mine).
[2] Deborah Tuerkheimer, 'Recognising and Remedying the Harm of Battering: a Call to Criminalize Domestic Violence' (2004) 94(4) Journal of Criminal Law and Criminology 959, 990.
[3] 'Call For Tighter Law As Victim Tells Of Stalking Campaign' *The Times* (London 3 September 1996); 'Law Change After Stalking Case Acquittal' *The Guardian* (London 18 September 1996); 'Law In Urgent Need Of Reform' *The Independent* (London 19 September 1996); 'Stopping Stalkers: How Would The Law Change?' *Daily Telegraph* (London 16 October 1996). For further examples and analysis see Emily Finch, *The Criminalisation of Stalking: Constructing the Problem and Evaluating the Solution* (Cavendish 2001) 111.
[4] HC Deb 17 December 1996, Vol 287, Col 778.

in the context of domestic abuse, but once again "reality" intruded even in the very early days of the new law. The PHA quickly came to be what DC James told me was 'bread and butter'[5] for police investigating domestic abuse.

As I explained in chapter four, the media portrayal of stalking in the 1990s was sensationalist, misleading and overly preoccupied with non-relational stalking.[6] As a result, parliamentary debates examined in part one of this chapter were concerned only with non-relational stalking. As soon as the PHA was in force, in the 2000s, it was used by police and prosecutors mostly to prosecute domestic stalking. Once again, police and prosecutors had to be creative in order to tackle behaviour that, importantly for this thesis, is often a manifestation of coercive control. This quickly became a 'pressure point'[7] for the courts, as it fell to them to decide how far the PHA could be "stretched" to cover domestic stalking. In the second part of this chapter I review the three key cases that demonstrate how the Court of Appeal drew boundaries in relation to the application of the PHA - boundaries that eventually led to the passage of Serious Crime Act 2015, s 76 (section 76), and which therefore have had serious repercussions for the prosecution of coercive control.

PART ONE: THE PROTECTION FROM HARASSMENT BILL

The Parliamentary Debates

In March 1996, six months prior to Michael Howard's introduction of the draft bill referred to above, what was originally the 'Stalking Bill' was introduced by backbench Labour MP, Janet Anderson, under the ten-minute rule.[8] The Stalking Bill is interesting both because of the way in which it was structured and for the reasons it was rejected. The Stalking Bill defined stalking using what has been referred to since as the "list" approach; it lists the prohibited behaviour types such as "following", "interfering with property", etc that often manifest as stalking. The official Home Office news release contained a number of criticisms, including the

[5] DC James, Police Focus Group (30 November 2016) 7.
[6] Finch, The Criminalisation of Stalking n3.
[7] Tuerkheimer, Recognising and Remedying the Harm of Battering, n2 990.
[8] HC Deb 6 March 1996, Vol 273, Col 370.

fact that the definition of stalking was too wide and that legitimate activities would be curtailed as a result.[9]

The first controversial decision made by the parliamentary committee responsible for the drafting of the PHA was to abandon any attempts to define stalking. In fact, the word "stalking" is not mentioned anywhere in the bill. The rationale for its absence, (and the abandonment of the list approach adopted by the Stalking Bill), was that 'the behaviour engaged in by stalkers was so diverse that it was impossible to formulate a definition which encompassed all such activities'.[10] Instead, criminal liability is based upon the wider notion of harassment.

Harassment is similarly not defined by the act. Howard explained that there was no need for such a definition because 'harassment as a concept has been interpreted regularly by the courts since 1986'.[11] The lack of a definition of stalking was opposed by the shadow Home Secretary, Jack Straw, at the time[12] and later considered to be a mistake. It was reversed by the 2012 amendments to the PHA, which are reviewed below.[13] Curiously, a similar "mistake" was made with section 76; there is no attempt to define 'controlling or coercive' behaviour', whether by list or otherwise.

The Government criticised the list approach for being 'too wide in one respect, and too narrow in another'.[14] It was felt to be too narrow because of the nefarious nature of stalking. Anthony Burstow, for example, spoke publicly of his knowledge of the criminal law and the way that he used that knowledge, strategically, to adapt his behaviour.[15] For example, in later interviews he reveals his outrage at the decision by the House of Lords in his case, thus showing that he was well aware that the Offences Against the Person Act 1861, s 20 did not cover psychological harm until the courts decided to extend it in order to convict *him*.[16] If the list

[9] Home Office News Release, May 1996, as cited in Finch, The Criminalisation of Stalking n3 12.
[10] HC Deb 17 December 1996, Vol 287, Cols 823 – 27 as cited in Finch, The Criminalisation of Stalking n3 10.
[11] HC Deb 17 December 1996, Vol 287, Col 784.
[12] HC Deb 17 December 1996, Vol 287, Col 789; Judith Garland, 'Comment: Protection From Harassment Act 1997: the 'New' Stalking Offences' (2013) 77 Journal of Criminal Law 387.
[13] As inserted by the Protection of Freedoms Act 2012.
[14] HC Deb 17 December 1996, Vol 287, Col 819.
[15] Finch, The Criminalisation of Stalking n3 14.
[16] Ibid. See also Garland, The 'New' Stalking Offences n12 387.

approach was felt to be narrow in that it left gaps for stalkers to exploit, it also managed to be "wide" by leaving open the possibility that innocuous behaviour would be criminalised. Stalking often involves behaviour that is, in and of itself, seemingly innocent: it is the context that renders it criminal. The Government felt that it would be inappropriate to try to capture context in a definition.[17]

One question that became critical subsequently is the extent to which Parliament intended the PHA to apply to domestic stalking. The fact that stalking can be relational or non-relational is not explicitly discussed in the parliamentary debate that took place on 17 December 1996. Instead, there seems to be an assumption throughout the debate that references to stalking are to non-relational stalking. As he introduced the bill, for example, Howard explained: 'The Bill covers not only stalkers, but disruptive neighbours and those who target people because of the colour of their skin'.[18] It is likely that his use of "stalkers" in the same sentence as harassment that is clearly non-relational (disruptive neighbours, racist strangers) means that he is referring to stalking in its non-relational sense. The discussion in Parliament centres on stranger stalking, neighbourhood disputes, and nuisance neighbours.[19] The popular portrayal of stalkers in the 1990s as dangerous and mentally ill strangers supports this theory, and makes it likely that the PHA was designed for harassment outside of an intimate relationship. Certainly this was the conclusion drawn later by the Court of Appeal.[20]

The PHA introduced two new criminal offences (section 2 and section 4). The lesser of the two offences, the section 2 summary offence, is actually set out in section 1 *and* section 2. This is because the PHA creates (in section 1) a prohibited course of conduct which is made both a crime (section 2) and a tort (section 3). I am only concerned with the crime. Section 1 states that 'a person must not pursue a course of conduct (a) which amounts to harassment of another and (b) which he knows or ought to know amounts to harassment of the other'. Section 2 states that 'a person who pursues a course of conduct in breach of section 1 is guilty of an

[17] HC Deb 17 December 1996, Vol 287, Col 782-784.
[18] HC Deb 17 December 1996, Vol 287, Col 857.
[19] HC Deb 17 December 1996, Vol 287, Cols 781 – 851.
[20] *Hills* [2001] 1FLR 580; *Curtis* [2010] EWCA Crim 123; *Widdows* [2011] EWCA Crim 1500. This is discussed in some detail below.

offence'. The maximum sentence is six months' imprisonment. The more serious section 4 offence is triable either way, and appears under the heading 'putting people in fear of violence'. Section 4, which had a maximum prison sentence of five years at the time,[21] states that 'a person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions'.

Actus Reus of the PHA: Course of Conduct

As I said at the beginning of this chapter, Tuerkheimer's conceptualisation of the way in which reality comes to bear on legal structures via a series of pressure points, and thus promotes 'movement and resistance'[22] is a useful framework within which to understand the novel terminology of the PHA, and in particular the idea of the "course of conduct" which is central to both the section 2 and the section 4 offences. Crimes that constitute the non-fatal offences against the person are conceived as transactional, as forming a single incident. Specificity is an important part of the ideology of the criminal law.

This focus means that 'the function of the criminal law is not to judge a person's general character or behaviour over a period of time; its concern is only with the distinct criminal conduct charged'.[23] This links in with the emphasis on choice, control and the "rule of law" summed up by the correspondence principle. The correspondence principle states that the *actus reus* of the crime must take place at the same moment in time (i.e. the time of the single incident) as the *mens rea* in order to amount to a criminal offence. Only if the defendant's mental state could be said to relate to the proscribed harm should he be held to have "chosen" and thus be liable for his criminal act.[24]

[21] The Police and Crime Act 2017 raises the maximum sentence for stalking and harassment from five years to ten, and from seven to fourteen in the case of racially or religiously aggravated stalking and harassment.
[22] Tuerkheimer, Recognizing and Remedying the Harm of Battering n2 990.
[23] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press 2009) 314.
[24] The principle that there must be a coincidence in time of actus reus and mens rea has a degree of elasticity as demonstrated by cases such as *Thabo Meli* [1984] 1 All Eng 373 and *Church* [1966] 1 QB 59.

The difficulty with stalking is that, just as with coercive control, it does not occur as a discrete event. This empirical reality is Tuerkheimer's 'pressure point'.[25] 'Course of conduct' is defined in s. 7(3): 'a 'course of conduct' must involve (a) in the case of conduct in relation to a single person, conduct on at least two occasions in relation to that person'. The idea of a 'course of conduct' crime is thus a concession to the *ongoing* nature of the behaviour patterns that constitute stalking, but an insistence on specificity is the 'resistance'.

In fact, defining a crime by reference to two related but separate incidents instead of just one incident did not 'move' the transactional nature of the legal structure very far - in some ways it had the unintended effect of increasing the incident-specific focus yet delaying a police response. PC South gave an example of this when he explained to me in interview that 'often things will come in as harassment, but actually when you look at them you think this doesn't qualify…it's a first-time harassment and that's your first one for the next time, which is almost inevitably going to happen'.[26] Forcing police and a victim to watch and wait for the next "inevitable" harmful episode is far from ideal.

Other ways in which the 'course of conduct' requirement has unintended effects include both the way in which 'judicial decisions interpreting the Act … lapse back into an examination of individual incidents of assault and battery', and also confusion over the 'nexus' that is required sufficient to give rise to the course of conduct..[27] *Hills*[28] is an example of the 'lapsing' into an incident focus. There was evidence before Otton LJ of the abusive nature of the relationship in that case, with multiple incidents of abuse that the victim found it difficult (in court) to pin to specific times and dates. Otton LJ held, for example, that: 'the learned judge ruled that the complainant had said that, over a period of time and on a fairly regular

[25] Tuerkheimer, Recognizing and Remedying the Harm of Battering n2 990.
[26] Interview with PC South (22 January 2018) 3.
[27] Charlotte Bishop, 'Domestic Violence: The Limitations of a Legal Response' in Sarah Hilda and Vanessa Bettinson (eds), *Interdisciplinary Perspectives on Protection, Prevention and Intervention* (Palgrave Macmillan 2016) 68. For examples of judicial treatment of the 'course of conduct' element of the offence see *Hills* n20, *Lau v DPP* [2000] Crim LR 580; *Qosja* [2016] EWCA Crim 1543; Tom Rees and David Ormerod, 'Case Comment Harassment: Separate Incidents Not Linked' [2001] Criminal Law Review 318, 319. See also Neil Addison and Timothy Lawson-Cruttenden, *Harassment Law and Practice* (Blackstone 1998) 30 – 32; Paul Infield and Graham Platford, *The Law of Harassment and Stalking* (Butterworths 2000) 10. On the 'nexus' point see *Patel* [2004] EWCA Crim 3284.
[28] *Hills* n20.

basis, she had been ill-treated by the appellant'.[29] The particulars on the indictment included the fact that 'the appellant assaulted the complainant on a number of occasions by throwing a stool at her, hitting her, restricting her breathing by putting his hands over her mouth or around her throat and attempting to smother her with a pillow'.[30] Otton LJ nevertheless found that the two incidents of assault that formed the basis of the s. 4 case could not constitute a course of conduct. Otton LJ was influenced by the fact that the two incidents were isolated and separated by six months, and 'the prosecution might have been wiser to have abandoned the harassment count and to have concentrated on the two substantive counts of violence, and with more prospects of success'.[31]

The alleged behaviour between the two incidents was not legally relevant.[32] Otton LJ, correctly, focuses on an examination of the two individual incidents of assault. This examination is abstracted from the abusive backdrop that the prosecution tried to argue demonstrated the necessary course of conduct for the section 4 harassment offence.

Some legal academics have similarly resisted any move from an incident-specific focus. For example, in relation to *Curtis*,[33] a case similar on the facts to *Hills* that is reviewed in more detail below, David Ormerod (who has described the 'course of conduct' element of the PHA as 'deficient drafting')[34] suggests that the prosecution would have been better off to charge the abuse as separate assaults. He states 'the principal lesson of this case seems to be about the correct selection of charges. There are numerous types of offence where prosecutors might be tempted to try to elevate what look like plain assaults into something more'.[35] With section 76, as is shown in chapter six, Parliament sensibly abandoned the 'course of conduct' construct altogether.

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[29] Ibid. [10].
[30] Ibid. [9].
[31] Ibid. [32].
[32] Vanessa Bettinson and Charlotte Bishop, 'Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence' (2015) 66(2) Northern Ireland Legal Quarterly 179,188.
[33] n20 1.
[34] Rees and Ormerod, Harassment: Separate Incidents Not Linked n27 320.
[35] David Ormerod, 'Case Comment R v Curtis: Harassment – Protection from Harassment Act 1997 s 4(1)' [2010] Criminal Law Review 638, 640.

Actus Reus of the PHA: the Result

The second unusual or innovative aspect of the *actus reus* of both section 2 and section 4 is the conceptualisation of the harm that is a constituent part of the offence. Emotional distress that does not constitute a clinical disorder forms the result component of the crime. Section 7(2) is the closest the PHA comes to a definition of harassment, and it states 'references to harassing a person include alarming the person or causing the person *distress*'.[36] Section 4 criminalises causing a *fear* of violence in another person. Thus there is no requirement with either of the two offences that the course of conduct is unlawful in itself: it is the emotional reaction of the victim that determines its criminality. This links with the decision described above not to define stalking with a list of stalking behaviours - Howard explained: 'the Bill overcomes the difficulty of defining stalking by focusing on the harmful effect that this activity has on its victims'.[37]

The PHA is structured in this way to address the limitations that the Offences Against the Person Act 1861 previously presented to police and prosecutors. Legal intervention was only possible if the stalker committed a substantive criminal offence, which often he deliberately did not, and harm only "counted" if it amounted to a diagnosed clinical condition. The approach taken in the PHA has been criticised; there is a concern that the nature of the offences is left open.[38]

The reason this is a concern, some argue, is because it means that almost anything could constitute harassment. As different individuals will react differently to similar events, and conduct that might alarm one person might not alarm another, the imposition of criminality becomes contingent upon an unknown variable: the emotional response of the recipient.[39] While this is technically correct, it is not of concern because the majority of defendants prosecuted under the PHA are well acquainted with the emotional responses of their victims. The behaviour manifested by perpetrators is a cynical exploitation of their prior knowledge of

[36] Emphasis added.
[37] HC Deb 17 December 1996, Vol 287, Col 782.
[38] Garland, The 'New' Stalking Offences n12.
[39] Ibid.

these emotional responses. For this reason, it is difficult to imagine a case of domestic harassment or stalking where the emotional response of the recipient is unknown.

The Mens Rea

The principle of *mens rea* honours the importance of autonomy in that it states that defendants should be held criminally responsible only for consequences that they 'intended or knowingly risked'.[40] This is often referred to as subjective rather than objective *mens rea*, meaning that the criminal law should only hold individuals liable on the basis of their informed choices. In other words, to be liable, a defendant must be aware of what he is doing and the consequences likely to follow from what he is doing so that he could be said to have chosen the behaviour and its consequences. This correspondence – between the defendant's state of mind and the actions he took – forms the basis of the correspondence principle referred to above and means that there has been traditionally in the criminal law an emphasis on *mens rea* requirements necessitating subjective awareness by the defendant.[41] Andrew Ashworth says firmly: 'there should be recognition of the principle that no person should be liable to imprisonment without proof of sufficient fault'.[42]

Sections 2 and 4 of the PHA make it an offence to pursue a course of conduct that the offender knows *'or ought to know'* amounts to harassment. The inclusion of 'ought to know' introduces a negligence-based *mens rea* that is unusual; all other main offences against the person are based on intention or subjective recklessness.[43] Negligence as a term describes a behaviour pattern on the part of the defendant that falls below the standard that would be expected from a reasonable person in the defendant's position. A negligence-based *mens rea* allows a person to be found guilty of wrongdoing in circumstances where there is no

[40] Ashworth and Horder, Principles of Criminal Law n23 74.
[41] Ibid. 16. Arguably this traditional focus on subjective mens rea is being challenged by a number of recent legislative developments - strict liability offences, for example - and also a number of offences that are reviewed in later chapters of this thesis, such as the Sexual Offences Act 2003 and section 76 of the Serious Crime Act 2015.
[42] Ibid. 168.
[43] Campbell, Stalking Around the Main Issue n1 132.

proof that he "chose" to do wrong. In fact, there is no need to prove that the defendant was even aware of the consequences of his actions as long as a reasonable person in his situation would have been. Ashworth and Jeremy Horder state dryly with regard to the PHA that 'the combination of a negligence standard with a maximum penalty of five years is unfortunate'.[44] In fact, Parliament has recently increased the maximum sentence to ten years.[45]

Including a wholly objective *mens rea* as an option for the prosecution was a deliberate attempt by Parliament to circumvent some of the difficulties that were anticipated in the context of the prosecution of stalkers.[46] Howard explained to the House of Commons that 'the greatest difficulty that the police find in using existing legislation against stalkers is the need to prove the intention of the stalker'.[47] In any event, determining *mens rea* in the context of perpetrators who struggle with mental or personality disorders was felt to be too difficult. Parliament was persuaded that these are perpetrators who 'are so preoccupied with their obsession with the victims that they are unable to comprehend that their attentions may be unwelcome.'[48]

This view, that the PHA was passed with mentally ill defendants in mind, was certainly reflected in the early decisions of the courts. The Court of Appeal, for example, held in 2001 that:

> As is well known the Act was passed with the phenomenon of "stalking" particularly, although not exclusively, in mind. The conduct at which the Act is aimed, and from which it seeks to provide protection, is particularly likely to be conduct pursued by those of obsessive or otherwise unusual psychological make-up and very frequently by those suffering from an identifiable mental illness.[49]

More research is urgently needed into the issue of the extent to which perpetrators convicted under the PHA suffer from mental health or personality disorder related issues which precludes them from understanding the significance of their conduct.

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[44] Ibid. 328.
[45] The Police and Crime Act 2017 raises the maximum sentence for stalking and harassment from five years to ten, and from seven to fourteen in the case of racially or religiously aggravated stalking and harassment.
[46] Finch, The Criminalisation of Stalking n3 22.
[47] HC Deb 17 December 1996, Vol 287, Col 783.
[48] Finch, The Criminalisation of Stalking n3 238.
[49] *Colohan* [2001] EWCA Crim 1251 [18].

Home Office early research on this subject concluded that 'the media portrayal of stalking is of repetitive, unwanted attention, communications or approaches from obsessive, psychotic strangers or fanatics'.[50] In fact, the Home Office report found that the kind of behaviour dealt with under the PHA was linked less with strangers or people with mental illnesses than with the unwanted attentions of ex-partners and harassment by neighbours.[51]

The Home Office's findings are supported by research in the United States and the United Kingdom which concludes that while a minority of stalking cases involve the stalking of strangers by perpetrators with mental health issues, the majority of stalking has a domestic context - and 'perpetrators of this type of stalking generally are *not* suffering from any type of psychological disorder'.[52] Certainly the early constructions of stalking in the media referred to above relied heavily on the idea that there is an overlap between stalking and serious mental health issues. A proper examination of this issue is outside the scope of this thesis, but the question of the link between perpetrators of stalking and mental illness is likely to have a bearing not only on the appropriate *mens rea* for the PHA offences, but also on section 76.

It is not disputed that some perpetrators of harassment *do* have mental health conditions. In these cases, one unfortunate repercussion of the objective *mens rea* threshold is the inability to provide any resolution other than punishment for perpetrators who are in genuine need of help. In other words, there is no capacity-based exception. Ashworth and Horder, in their concluding remarks on the viability of negligence-based *mens rea* offences, make capacity-based exceptions a pre-condition.[53]

Some critics anticipated in 1997 that the lack of such an exception might be a problem: 'what of the mentally disturbed individual who simply does not see the

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[50] Jessica Harris, *An Evaluation of the Use and Effectiveness of the Protection from Harassment Act 1997* Home Office Research Study 203 (Home Office 2000) 9.
[51] Ibid.
[52] Laurie Salame, 'A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others' (1993) 27 Suffolk University Law Review, 67 80. See also Jane Monkton-Smith et al, 'Exploring the Relationship Between Stalking and Homicide' (Suzy Lamplugh Trust 2017).
[53] Ashworth and Horder, Principles of Criminal Law n23 185.

distress their conduct is causing? Is this to be taken account of in the "reasonable person" test, and, if not, can this be just?'[54] These concerns are vindicated by cases such as *Colohan*, where the Court of Appeal upheld the conviction of a diagnosed schizophrenic who wrote threatening letters to his MP while in the grip of a delusional episode.[55] This was 'despite a finding that the defendant was compelled to act as he did due to suffering from schizophrenia and that he had no appreciation that his behaviour might engender a negative response'.[56] The Court of Appeal found that to do otherwise would weaken the protection available to stalking victims. This is a cause for concern.[57]

On the other hand, and while it is possible that Parliament was over-influenced by inaccurate media portrayals of stalking, it should be remembered that negligence liability is not strict liability. The English doctrinal tradition of restricting criminal liability to intention and recklessness alone fails to take into account that risk of serious harm or injury can manifest greater culpability than some cases of so-called subjective recklessness, as even Ashworth and Horder acknowledge.[58] In other words, the negligence construct does not derail what Keating et al refer to as 'the central quest of identifying blameworthiness',[59] particularly because establishing the serious harm experienced by the victim is a constituent part of the offence. Any violation of the principle of contemporaneity is less of an issue in the context of stalking, where the timeframe of the criminal law has already been widened as a result of the nature of the criminal behaviour.

Furthermore, the principle of individual autonomy, while important, is not the only founding principle of the criminal law. The principle of welfare is described by Nicola Lacey as 'the fulfilment of certain basic interests such as maintaining one's personal safety, health and capacity to pursue one's chosen life plan'.[60] The principle of welfare recognises that citizens are entitled to protection, by the criminal law if necessary, to allow them to benefit from basic interests without

[54] Campbell, Stalking Around the Main Issue n1 132.
[55] *Colohan* [2001] EWCA Crim 1251.
[56] Emily Finch, 'Stalking the Perfect Stalking Law' [2002] (Sep) Criminal Law Review 703, 710.
[57] Garland, The 'New' Stalking Offences n12 392.
[58] Ashworth and Horder, Principles of Criminal Law n23 183.
[59] Heather Keating et al, *Clarkson and Keating: Criminal Law* (Sweet and Maxwell 2014) 146.
[60] Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge 1988) 104.

being constrained by fellow citizens. The violations represented by the stalking offences targeted by the PHA affect the ability of the victim to pursue her basic interests. Ashworth concludes that 'negligence may be an appropriate standard where there are well-known risks of serious harm'.[61] While the absence of a capacity-based exception is regrettable, my conclusion is that in principle the introduction of the objective *mens rea* in the context of the PHA can be justified.

Section 4 and the Fear of Violence

The wording of the section 4 offence unfortunately continues a preoccupation with violence that is physical. Section 4 does not encompass a textured understanding of the generalised anxiety dynamic generated by stalking. Instead, a course of conduct that causes harassment and also leads to a fear that violence will be used against the victim on at least two occasions, is targeted. Lord Steyn considered the PHA in his judgment in the *Ireland* and *Burstow* appeals referred to above. He said:

> For the future there will be for consideration the provisions of section 1 and 2 of the Protection From Harassment Act 1997, not yet in force, which creates the offence of pursuing a course of conduct which amounts to harassment of another and which he knows or ought to know amounts to harassment of the other. The maximum custodial penalty is six months' imprisonment. This penalty may also be inadequate to deal with persistent offenders who cause serious psychiatric injury to victims. Section 4(1) of the Act of 1997 which creates the offence of putting people in fear of violence seems more appropriate. It provides a maximum custodial penalty upon conviction on indictment of five years' imprisonment. On the other hand section 4 only applies when as a result of a course of conduct the victim has cause to fear, on at least two occasions, that violence *will* be used against her. It may be difficult to secure a conviction in respect of a silent caller: the victim in such cases may have cause to fear that violence *may* be used against her but not more. In my view, therefore, the provisions of these two statutes are not ideally suited to deal with the significant problem which I have described.[62]

Lord Steyn's early criticism of the PHA - that the section 2 penalty is inadequate and that section 4 has an unhelpful focus on the *certain* expectation of physical violence - proved prescient.

In the previous chapter I suggested that, historically, the criminal law was based

[61] Ashworth and Horder, Principles of Criminal Law n23 184.
[62] *Ireland, Burstow* 1997 UKHL 34 [153].

upon the assumption that victims are in need of protection from physical violence - and that there is in existence a laddering of harms that places physical violence, or the fear thereof, in some way at the top. Section 4 of the PHA imports the old common-assault emphasis on fear of physical violence into a piece of legislation that was introduced to help the criminal law take a new direction. It is an improvement on common assault in that the immediacy requirement is gone (section 4 necessitates a fear of violence but not a fear of *immediate* violence). Despite the broadening of the fear of violence component, however, section 4 retains a focus on physical violence that is curious in the context of what is understood about the behaviours that constitute stalking.

The section 4 physical violence requirement has been described as too "high" a threshold. It has been argued, for example, that 'in many stalking cases, the behaviour is too serious to merit section 2, but it falls short of meeting the very high threshold of section 4 which requires a fear that violence will be used on two occasions.'[63] Rather than being too "high", the section 4 threshold is simply inappropriate in the context of the offence of stalking. Emily Finch explains this:

> The wording of section 4 prioritises fear of physical harm over any other reaction to stalking, regardless of its severity or the impact on the life of the victim. This prioritisation of physical harm is indicative of the ongoing subordination of psychological harm that is evident elsewhere in the criminal law. It also represents a fundamental misunderstanding of the nature of stalking and the way in which victims react to being stalked. Research into the impact of stalking has indicated that there are a considerable range of responses to stalking victimisation. In particular, it is more common for victims to experience a heightened sense of generalised fearfulness – a fear of some innominate harm – rather than a specific fear that violence will be used against them. It is the fear of intrusion rather than the fear of a specific violation of one's physical person, that is anxiety provoking.[64]

The assumption that the threshold is too "high" rather than simply the wrong threshold invokes the "typical" victim of crime, who needs help safeguarding the physical boundaries of his person and his property from illegal transactional interference. It is still the case that generalised anxiety 'is viewed implicitly as being less serious than a fear of direct physical violence'.[65] Privileging the fear of

[63] Garland, The 'New' Stalking Offences n12 393.
[64] Finch, Stalking the Perfect Stalking Law n56 6.
[65] Bishop, Domestic Violence n27 68.

physical violence in this way does not make sense in the context of stalking: which is ongoing, not transactional, and where it is the constant fear of intrusion (rather than violence) that it induces that is of a different, some would say more serious nature.

In fact, Lord Steyn's early observations on the likely limitations of both section 2 PHA (too low a maximum sentence) and section 4 PHA (unhelpful insistence that the victim must fear that violence *will* be used) proved to be correct. Attempts in the following decade to move section 4 away from an insistence on fear of the certainty of physical violence were not successful. This is not surprising in light of the clear wording of the section.

In 2000, for example, the victim in *Henley*[66] described a traumatic 'state of siege'[67] not dissimilar to that of the victim in *Burstow*. She ended her relationship with Henley, and he embarked on a campaign of terror. This campaign included continuous, abusive and frightening calls and breaking into her flat and causing damage. Henley was charged with the section 4 offence. The trial judge at first instance in her summing up directed the jury that 'to put (the victim) in fear of violence meant "to seriously frighten her as to what might happen"'. Being afraid 'of what might happen' is the 'fear of some innominate harm' articulated by Finch,[68] or Edwards' 'fear of future harm or being in fear',[69] and encapsulates the fear of intrusion that is the hallmark of stalking. At his appeal against conviction Pill LJ found that:

> When purporting to turn section 4(1) into English, the judge left out the word "violence" and said instead "to seriously frighten her as to what might happen"; that was confusing and did not necessarily bear the same meaning… the direction so distorted the meaning of the section that the conviction could not be regarded as safe.[70]

Pill LJ was right in that the judge at first instance did 'distort' the meaning of

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[66] *Henley* [2000] All ER 171 (CA).
[67] Mary Ann Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' (1992) 21 Hofstra Law Review 1191, 1208.
[68] Finch, Stalking the Perfect Stalking Law n56 6.
[69] Susan Edwards, Recognising the Role of the Emotion of Fear in Offences and Defences (2019) 83(6) Journal of Criminal Law 450, 461.
[70] Henley n66 [582].

section 4 PHA, but perhaps wrong as to her motivation. Rather than trying to turn section 4(2) into English, she was possibly - like Lord Steyn before her in *Burstow* - struggling with the square peg of stalking and the round hole of section 4(2).

In any event, despite its limitations, the PHA came to be extremely useful to police, but not in ways that were anticipated by Parliament. The Home Office early evaluation of the PHA said that when the PHA was implemented, the government anticipated that it would be used relatively infrequently, perhaps around 200 cases a year.[71] In fact, in 1998 there were 4,300 section 2 charges and 1,500 section 4 charges.[72] By 2018 this number had dramatically increased; there were 11,922 charges brought in 2018 for harassment and stalking.[73] From 200 cases a year to 11,922 is a big jump: police interviewed for this project explained that the PHA has become increasingly central to their work. At the focus group I ran with senior police there was unanimous agreement that the PHA was used 'all the time. Daily. Bread and butter.'[74] The next part of this chapter looks at how the PHA came to be used in this way, and why - and at the steps the judiciary took to curtail its use and the repercussions of this step.

PART TWO THE '*MAIN ISSUE*'[75]: STALKING AND DOMESTIC ABUSE

Use of the PHA

As explained above, and putting the difficulties with both section 2 and section 4 to one side, the most significant impact of the PHA lay in the use to which it was put. The Home Office's early report on the PHA took place three years after implementation, in 2000. It stated that 'the PHA is being used to deal with a variety of behaviour other than stalking, including domestic and inter-neighbour disputes, and rarely for stalking itself: the suspect and victim were known to each other in

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[71] Harris, An Evaluation of the Protection from Harassment Act n50 vi.
[72] David Povey and Julian Prime, *Recorded Crime Statistics England and Wales, April 1998 – March 1999* Home Office Research, Development and Statistics Directorate (Home Office 1999).
[73] CPS, *Violence Against Women and Girls Crime Report 2017 – 18* <https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2018.pdf> accessed 31 April 2019.
[74] DC James, Focus Group with Senior Police (30 November 2016).
[75] Campbell, Stalking Around the Main Issue n1.

almost all cases'.[76] This reference to "stalking" is adopting the same non-relational connotations as was used by Parliament as it debated the Protection from Harassment Bill. In other words, the Home Office report makes the assumption that, where the 'suspect and victim were known to each other', this reflected behaviour other than stalking. The report goes on to observe that 'the most common reason for harassment was that the complainant had ended an intimate relationship with the suspect'.[77] What this early report was suggesting, in fact, is that the PHA was indeed being used to prosecute stalking: it was being used to prosecute *domestic* stalking.

The situation now is clear: the PHA is used most frequently in the context of domestic abuse,[78] but this gave the judiciary a problem. Finch noted in 2003 that, in the absence of a statutory definition, the parameters of the application of the PHA would have to be drawn by the courts. She observed that a 'line' was needed separating 'unpleasant conduct from actionable harassment' and that line, she said, 'will determine the parameters of acceptable conduct within society.'[79] She concluded: 'where this line is to be is a question that is likely to occupy the courts in the future, as more harassment cases are heard.'[80] Finch was right, it did indeed fall to the courts to determine the boundaries of 'actionable harassment'. The extent to which the PHA could apply to domestic stalking was considered in three key Court of Appeal decisions *Hills*,[81] *Curtis*[82] and *Widdows*.[83]

Hills

Hills was decided first, in 2000. Gavin Hills was convicted at first instance of s. 4 harassment. He was later charged with rape. The harassment consisted of two

[76] Harris, An Evaluation of the Protection from Harassment Act n50, vi.
[77] Ibid. 17.
[78] Of the 11,922 charges for harassment and stalking brought in 2018, nearly 75% had a domestic abuse context. See CPS, *Violence Against Women and Girls Report 2017-18,* 6, available at <https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2018.pdf> accessed 31 April 2019.
[79] Finch, The Criminalisation of Stalking n3 229.
[80] Ibid. 230.
[81] n20.
[82] n20.
[83] n20.

assaults that took place six months apart while he was still living with his victim. Otton LJ found that the assaults could not amount to a course of conduct for the purposes of the PHA. In the penultimate paragraph of the judgment, Otton LJ explains that he was influenced by his understanding of Parliament's intention for the PHA:

> It is to be borne in mind that the state of affairs which was relied upon by the prosecution was miles away from the "stalking" type of offence for which the Act was intended. That is not to say that it is never appropriate so to charge a person who is making a nuisance of himself to his partner or wife when they have become estranged. However, in a situation such as this, when they were frequently coming back together and intercourse was taking place (apparently a video was taken of them having intercourse) it is unrealistic to think that this fell within the stalking category which either postulates a stranger or an estranged spouse.[84]

Otton LJ thus explains that there was a '"stalking" type of offence for which the Act was intended'. It is likely that here he is referring to the kind of non-relational stalking that was certainly the only kind of stalking referred to in the parliamentary debates. Otton LJ is prepared to extend the application of the PHA to include 'a person who is making a nuisance of himself to his partner or wife when they have become estranged'. He is prepared, in other words, to extend the PHA to cover domestic stalking, whether or not this was intended by Parliament, but only in cases of domestic stalking where the perpetrator is no longer in a relationship with his victim: a 'stranger or an estranged spouse'. He is not prepared to extend the application of the PHA to include domestic stalking where the partners are still in a relationship.

The difficulty for all those involved with the prosecution of domestic abuse is that while the non-relational "stranger" and even the domestic "estranged spouse" categories might seem relatively clear, the third, unnamed category in Otton LJ's analysis, the category into which he puts Gavin Hills and in respect of which he decided that the PHA does not apply, is not clear at all. Even as Otton LJ marks his boundary he recognises the instability of this category. He does not refer to Gavin Hills as "married" or as "in a relationship", for example, instead he refers to 'a situation like this … when they were frequently coming back together and

[84] Ibid. [31].

intercourse was taking place'.[85] The instability of the relationship between Gavin Hills and his partner is very typical of abusive relationships where a "transactional" moment of separation rarely exists.

It is understandable that Otton LJ felt the need to establish a boundary somewhere. The remit of the PHA *had* already been extended from that originally intended by Parliament. Parliament's intentions, however, were founded on a misunderstanding of what constitutes stalking, a misunderstanding that has become apparent only with the passage of time and by scrutinising the uses to which the PHA has been put. This decision has had significant consequences for the way in which domestic abuse is criminalised in England and Wales. This is because attempting to establish any boundary dividing relationships that have ended from those that have not is fraught with difficulty. Giving the boundary legal significance was, in hindsight, a mistake.

Curtis

The facts of *Curtis*[86] and *Widdows*[87] are similar, and Pill LJ presided over both. *Curtis* was heard first, in January 2010. Daniel Curtis was convicted at first instance of section 4 harassment on the basis of six violent incidents that occurred while he was living with Donna Brand, his then partner and victim. Pill LJ considers what might amount to harassment. He reflects on both the definition of harassment and the type of victim that, in his view, should benefit from the protection of the PHA. In so doing, he draws on three separate sources: the House of Lords' judgment in *Majrowski,*[88] the Concise Oxford dictionary and Otton LJ's judgment in *Hills*.[89]

In *Majrowski*, the House of Lords considered the purpose of the PHA. Pill LJ draws on two paragraphs of Lord Nicholls' judgment: the first delineating the framework within which the PHA should be allowed to operate, and the second identifying the

[85] Ibid. [31].
[86] n20.
[87] n20.
[88] *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1AC 22.
[89] n20.

behaviour that the PHA should regulate. On the appropriate framework Pill LJ describes how Lord Nicholls states: 'the Act seeks to provide protection against stalkers, racial abusers, disruptive neighbours, bullying at work, and so forth'.[90] On where to draw the boundary between harassment and behaviour that could instead be classed as part of the 'irritations, annoyances, even a measure of upset' that 'arise at times in everybody's day-to-day dealings with other people', Lord Nicholls concludes: 'courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable'.[91] Pill LJ goes on to use the Concise Oxford Dictionary definition to support Lord Nicholls' conclusions on the nature of harassment, before finishing with the comments of Otton LJ quoted at some length above on the type of victim to be protected: 'a stranger or an estranged spouse'.[92]

Pill LJ's concluding remarks are important. He states:

> In the present case, the jury would have been entitled, if they saw fit to conclude that, over the course of the relationship, the appellant's conduct was deplorable and worse than that of Donna. The incidents were far from trivial and significant force was on occasion used. However, we cannot conclude that, in this volatile relationship, the six incidents over a nine-month period amounted to a course of conduct amounting to harassment within the meaning for that statute. The spontaneous outbursts of ill-temper and bad behaviour, with aggression on both sides, which are the hallmarks of the present case, interspersed as those outbursts were with considerable periods of affectionate life, cannot be described as such a course of conduct. We do not exclude the possibility that harassment in section 1 may include harassment of a co-habitee but the appellant's conduct in this case could not properly be categorised as a course of conduct amounting to harassment within the meaning of the Act.[93]

These concluding remarks give an insight into the framework within which Pill LJ assesses Daniel Curtis' abusive behaviour. What is missing from the concluding remarks is a consideration of the power differential between Daniel Curtis and Donna Brand. To use the typologies of abuse that were explained in chapter three, Pill LJ is assuming (possibly) that the violence before him was the situationally specific "common couple violence" that can exist in the absence of control.[94] But

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[90] *Curtis* n20 [27].
[91] Ibid [28].
[92] Ibid [30].
[93] *Curtis* n20 [32].
[94] Michael Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women' (1995) 57 Journal of Marriage and the Family 283.

was it?

Of the six incidents described in evidence, Daniel Curtis pushed Donna Brand (on three separate occasions, once so that she fell over and hit her head, once so that he bruised her chest), manhandled her, and put his hands around her neck (on two separate occasions). Donna Brand's only physical action was a punch made in self-defence (Daniel Curtis had his hands around her neck). On another of the occasions, she threw some beer over him, but only after he had been angry and was shouting at her. Even had Donna Brand been guilty of an equal amount of physical violence (which she was not) it is unlikely that acts of aggression between the two parties would have been "equivalent" as men are generally stronger than women. It has long been established in the research literature that this strength differential matters, in other words that 'meaning and context … render men and women's violence fundamentally different'.[95]

At the beginning of his concluding paragraph, Pill LJ acknowledges that Daniel Curtis was more at fault than Donna Brand. He states that 'the jury would have been entitled to conclude that the appellant's conduct was deplorable and worse than that of Donna'.[96] He does not, however, explicitly consider whether the one-sided nature of the violence indicates the existence of a power imbalance between the parties in this case. Daniel Curtis was more at fault; he was the perpetrator. Donna Brand was less at fault, and her actions were mostly defensive.

The fact that a consideration of the balance of power is often missing in legal analysis is regrettable:

> Concepts of coercive controlling violence are far less apparent in any legal analysis, which prefers to adopt an approach based on this assumed symmetry between violence inflicted by male and female partners as individual, physically aggressive responses to a relationship dispute. In doing so, it lacks full comprehension of the harm caused by the systematic process of oppressive behaviours highlighted by Stark, the long-term psychological damage caused to

[95] Sarah MacQueen, 'Domestic Abuse, Crime Surveys and the Fallacy of Risk: Exploring Partner and Domestic Abuse Using the Scottish Crime and Justice Survey' [2016] Criminology and Criminal Justice 1, 2.
[96] *Curtis* n20 [32].

> victims and their children and, most importantly, key indicators that risks may be escalating and indeed may be exacerbated by the legal response adopted.[97]

Pill LJ seems to view the violence before him in *Curtis* 'as individual, physically aggressive responses to a relationship dispute'.[98] At the end of his concluding paragraph Pill LJ states that 'the spontaneous outbursts of ill-temper and bad behaviour, with aggression on both sides, … interspersed as those outbursts were with considerable periods of affectionate life, cannot be described as such a course of conduct.'[99] Pill LJ's use of the phrase 'on both sides', is suggestive of an *equal* balance of power between the parties, and that allowed him to find that what he framed as 'ill-temper' did not amount to a course of conduct.

It must be remembered that Pill LJ was reviewing an abusive intimate relationship with a view to deciding whether or not the defendant was guilty of harassment. He was right to consider, as did Otton LJ ten years previously, that the facts were not typical of the kinds of harassment anticipated by Parliament as they debated the Protection from Harassment Bill in 1997. By the time of *Curtis* in 2010, however, it was becoming apparent that that Parliament based its intentions for the PHA on a misunderstanding of the nature of stalking. Rather than the non-relational celebrity-type cases that were being reported in the press in the 1990s, 'the suspect and victim were known to each other in almost all cases'.[100]

It is well established that statutes are 'always speaking', which is to say they can be interpreted in the light of developments in scientific understanding.[101] In this regard 'the subjective intention of the draftsman is immaterial'.[102] An example of this would be the decision in *Ireland, Burstow*[103] where viewing the OAPA as a 'living instrument' enabled the House of Lords to find that psychiatric illness could amount to bodily harm, (it is unlikely that the Victorians had this in mind as in 1861 psychiatry was in its infancy). As has been pointed out: 'it is wholesome for

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[97] Bishop, Domestic Violence n27 62.
[98] Ibid. 62.
[99] *Curtis*, n20 [32].
[100] Harris, An Evaluation of the Protection from Harassment Act n50 9.
[101] Ruth Harrison, 'Telephone Calls Amounting to Assault or Grievous Bodily Harm' [1998] Journal of Criminal Law 62, 84.
[102] Ibid.
[103] n62 147.

offences to track the social taxonomy of misbehaviour'.[104] If the use to which the PHA had been put by police and the courts since 1997 was not that intended by Parliament, it was nevertheless necessary in light of what had become apparent about the nature of harassment and stalking.[105]

Widdows

The facts of *Widdows*[106] are similar to *Curtis*.[107] Pill LJ explains in his judgment that David Widdows and his partner and victim Sarah Bunn: 'were involved in a *volatile* relationship, and lived together'.[108] On a number of occasions during a time-period of approximately 24 months David Widdows became violent with Sarah Bunn, and on one occasion (according to Sarah Bunn's evidence) he raped her twice. The section 4 harassment charge on the indictment was joined with two counts of rape. The assaults were not charged separately, but were relied upon as creating the fear of further violence required by section 4.

David Widdows was acquitted of rape but convicted of section 4 harassment. On appeal, Pill LJ decided that the section 4 conviction was unsound because the judge, in summing up, did not

> Have in mind the concept of harassment which is at the core of the 1997 Act… The section is not normally appropriate for use as a means of criminalising conduct, not charged as violence, during incidents in a long and predominantly affectionate relationship in which both parties persisted and wanted to continue.[109]

Just as in *Curtis,* Pill LJ was influenced by the fact that the relationship was 'long', 'predominantly affectionate' and by his finding that it was 'wanted' by both parties. It was these facts that lead him to conclude that section 4 PHA was 'not… appropriate'.

There was certainly evidence of Sarah Bunn's affection for David Widdows before

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[104] Simon Gardner, 'Case Comment Stalking' [1998] Law Quarterly Review 33, 39.
[105] Harris, An Evaluation of the Protection from Harassment Act n50.
[106] n20.
[107] n20.
[108] *Widdows* n20 [4] (my emphasis).
[109] *Widdows* n20 [29].

Pill LJ. Referring to a holiday she had taken with David Widdows, for example, Sarah Bunn said 'we had a really lovely time'.[110] There was also evidence before Pill LJ that, on occasions, having separated, Sarah Bunn 'invited him back'.[111] Pill LJ does not consider whether or not there was a power imbalance between David Widdows and Sarah Bunn that may have given a different context to the 'affectionate' nature of the relationship or its duration, or, even, to occasions when it looked like Sarah Bunn had 'invited him back'.[112] This is important: 'a period of affection may not necessarily signal a break in a course of conduct'.[113]

Responses to *Hills, Curtis* and *Widdows*

Much of the legal commentary on *Curtis* reflects a similar lack of consideration of the question of a power imbalance. For example:

> Spouses or cohabitees may put up with and even 'enjoy' a volatile relationship. Often, there are constant arguments, rows, abusive language, threats, pushing, even striking; though basically the relationship is apparently close and affectionate. They make up with each other; peace is restored; and they are reconciled. Then trouble breaks out again: they make up again - ups and downs all the time. Eventually the female party goes to the police. Is this a case of harassment? The course of conduct and the alarm or distress will call for careful direction of the jury.[114]

Survivors spoken to as part of the empirical work conducted for this research project would agree that their abusive relationships were 'volatile'. None of them would refer to their abusive relationships as 'close' or 'affectionate'. That is not to say that they would deny ever feeling 'close' or 'affectionate' with their abusive partners. It is rather that once the moments of affection are seen as part of a controlling and manipulative strategy (on the part of the perpetrator) they take on a different significance.

Peace that is negotiated in this way is not 'restored', for example, it is carefully

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[110] Ibid. [9].
[111] Ibid.
[112] *Widdows* n20 [10].
[113] Heather Douglas, 'Do We Need a Specific Domestic Violence Offence?' (2016) 39 Melbourne University Law Review 435, 440.
[114] Alec Samuels, 'Harassment: Protection from Harassment Act 1997 (as amended)' [2013] (2-4) The Criminal Lawyer 216. See also Garland, The 'New' Stalking Offences n12 391.

engineered by the survivor who 'treads on eggshells' as the price for the survival of herself and her children. Karen, for example explained:

> Then obviously when the boys came along I just wanted everything to be OK so absolutely as you described it, treading on eggshells, and trying to make it OK. But it wasn't OK. And so it's like trying to paper the cracks, and there is only so many times that you can keep doing that before they start…[115]

In the same article, *Hills*[116] is cited as the authority for the principle that 'the odd nasty row between spouses or co-habitees does not suffice' as the course of conduct element for a PHA harassment charge.[117] The abuse in *Hills* included (according to the particulars on the indictment) the fact that 'the appellant assaulted the complainant on a number of occasions by throwing a stool at her, hitting her, restricting her breathing by putting her hands over her mouth or around her throat and attempting to smother her with a pillow',[118] which is not how most of us would describe 'the odd nasty row'.[119]

More unfortunate wording can be found in legal commentary on *Curtis*:[120] 'difficulties can, however, occur in on/off relationships where what would otherwise constitute a course of conduct, is often considered a routine aspect of a difficult relationship'.[121] Here, the suggestion is that what might, in other circumstances constitute harassment, is, in the context of a 'difficult' relationship considered 'routine'. Again, the consideration of the imbalance of power is missing. It is not just that such relationships are 'difficult'. Survivors do, tragically, learn to view the abuse they experience as 'routine'. Chapter three explained how Jessica described everyday physical violence as 'the usual'. She said 'there was occasionally hitting and punching - the usual.'[122] Processing physical violence in this way as both inconsequential and not serious might be a protection mechanism for victims in a 'state of siege'[123] but from a normative perspective this should not be endorsed by the outside world.

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[115] Interview with Karen (24 November 2016) 5.
[116] n20.
[117] Samuels, Harassment n114 3.
[118] *Hills* n20 [9].
[119] Samuels, Harassment n114 3.
[120] n20.
[121] See Samuels, Harassment n114 3.
[122] Interview with Jessica (26 May 2016) 10.
[123] Dutton, Understanding Women's Responses n67, 1208.

Separation Issues

Without a consideration of coercive control it is easy to make assumptions about what might be mistaken for the "decision" of the victims in "difficult" cases to "consent" to relationships with perpetrators. Underneath the assumption that the victim "chooses" to stay lie many others: for example that she had options,[124] or that employing those options would have kept her safe.[125] In other words: 'law assumes - pretends - the autonomy of women, every legal case that discusses the question "why didn't she leave?" implies that the woman *could* have left'.[126] Or, put in another way: 'that individuals have choices is a basic legal assumption: that circumstances constrain choices is not'.[127] Unfortunately the victims of coercive control do not have free choices, the choices that they do have 'are subject to the arbitrary control of another'.[128] Not understanding this can lead to an unhelpful focus on a victim's responsibility for her own predicament.[129]

Separation is a particularly fraught issue. Distinguishing relationships that have been "left" by a victim from those that have not is not that simple for a number of reasons. Firstly, as has been noted: 'there is nothing simple about leaving'.[130] Sarah described the complexity as follows:

> Oh, God I tried so many times to get away from him, but I could never say "I'm leaving you". So it was a case that he would constantly threaten that this wasn't he wanted - and I would say - 'I don't want to live with someone who doesn't want to live with me - let's separate'. I even bought my own house and moved back to (the countryside) with the two children. But he was coming down at weekends, for sex, you know - I could not get rid of him - and still my children have a father.[131]

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[124] Victor Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom Based Account' in Anthony Duff and Stuart Green (eds), *Defining Crimes Essays on the Special Part of the Criminal Law* (Oxford University Press 2005) 128.
[125] Dutton, Understanding Women's Responses n67, 1226.
[126] Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90(1) Michigan Law Review 1, 164.
[127] Barbara Hudson, 'Punishing the Poor: A Critique of the Dominance of Legal Reasoning in Penal Policy and Practice' in Duff et al (eds), *Penal Theory and Practice* (Manchester University Press 1994) 302.
[128] Bishop, Domestic Violence n27 69.
[129] Julia Tolmie, 'Coercive Control: To Criminalize or Not to Criminalize' (2018) 18(1) Criminology and Criminal Justice 8.
[130] Tanya Palmer, 'Distinguishing Sex from Sexual Violation: Consent, Negotiation and Freedom to Negotiate' in Alan Reed et al (eds) *Consent: Domestic and Comparative Perspectives* (Routledge 2017) 8.
[131] Interview with Sarah (29 June 2016) 8, brackets inserted to protect Sarah's anonymity.

Secondly, the control does not end with the relationship. As Sarah explained, 'I have never been more controlled by him than I am now'.[132]

Karen spoke in some detail about the process of separating from her abusive partner. In particular she described the way the control that continued after separation as threatening and destabilising. She opened her interview with me by explaining that although she had - finally - separated from her abusive partner, the control continued: 'I am obviously still "in it", but obviously most people are anyway as it doesn't actually generally go away; that's the sad thing.'[133]

For Karen, the most difficult aspect of the post-separation control was the way in which it impacted on her son: 'But I'm living with my son, and with an order that is really unworkable - trying to co-parent with a perpetrator and a narcissist actually is really tricky.'[134] She also found the control and the fact that he could use their past intimacy against her intimidating and frightening. She was left with a nagging sensation that he might intrude at any time:

> And there were incidents at the house that were happening to make me feel scared, I couldn't prove it was him. I'd come home and there was a big footprint at the front door, it was like someone had kicked the door because it was like rubber. And in the middle of the night I've got a little dog and he was barking and I came downstairs and the back door was open. And things like my washing line - I really like hanging washing out and he knew that and the washing line had been cut.[135]

Her fear that he might intrude at any time was based on her knowledge of his capability (he had done so in the past) and his access (he knows where she lives, and also how to upset her, for example, he knows she likes to hang her washing).

Thirdly, leaving *is* extremely dangerous. Karen was right to fear what her abusive ex-partner might do: cutting her washing line (he had a knife) and the big footprint on the door (he has big feet, he is not afraid to use his physical advantage to inflict damage) are chilling reminders of how the violence might escalate. Another survivor, Kim explained how her abusive ex-partner 'wasn't violent until the end?

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[132] Ibid.
[133] Karen n115 1.
[134] Ibid.
[135] Ibid. 15.

And I think that's quite common in domestic violence? Until the end, when the relationship breaks down, I think that's the point where it can be incredibly dangerous and that was the case.'[136]

In *Hills*, Donna Brand was trying to leave Daniel Curtis. He was 'jealous' and 'possessive'.[137] She had 'wanted to separate' and was 'frightened of what the appellant would try to do'.[138] Her fear may have been well placed. The social science research on the dangers (to the victim) of separating from an abusive partner is extensive.[139] Exiting from an abusive relationship is extremely dangerous. Victims are at their most vulnerable once they *initiate* separation discussions with a controlling partner. It is then that they and their children are most at risk of serious violence or, tragically, homicide.[140]

In their recent study of risk factors for domestic homicides in the UK, Jane Monckton Smith et al. concluded that control was present in 92% of the domestic homicides reviewed, and that 'the key trigger appeared to be separation or its threat'.[141] As demonstrated by Kim, above, victims know and fear this. In fact, empirical research shows that even the *decision* to attempt to separate, if communicated, increases the risk of violence.[142] In these cases, where it is the communication of the intention to leave that has provoked abuse, rather than an actual separation, the fact of the communication is known only to the victim and her abuser. The communication might remain invisible even to friends and family, and certainly to police, prosecutors and the judiciary. Instead, women describe

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[136] Interview with Kim (6 October 2016) 1.
[137] *Curtis* n20 [10].
[138] Ibid. [13].
[139] Clare Connelly, 'Institutional Failure, Social Entrapment and Post-Separation Abuse' [2010] Juridical Review 43, 43.
[140] Dutton, Understanding Women's Responses n67; Salame, A National Survey n52; Cathy Humphreys and Ravi Thiara, 'Neither Justice nor Protection: Women's Experiences of Post-Separation Violence' (2003) 25(3) Journal of Social Welfare and Family Law 196; Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007); Holly Johnson et al 'Intimate Femicide: The Role of Coercive Control' [2017] Feminist Criminology 1; Megan Bumb, 'Domestic Violence Law, Abusers' Intent, and Social Media: How Transaction-Bound Statutes Are the True Threats to Prosecuting Perpetrators of Gender-Based Violence' (2017) 82(2) Brooklyn Law Review 917.
[141] Monkton-Smith et al, Exploring the Relationship Between Stalking and Homicide n52 1; Jane Monkton-Smith, 'Intimate Partner Femicide: Using Foucauldian Analysis to Track and Eight Stage Progression to Homicide' (2020) 26(11) Violence Against Women 1267. See also Alafair Burke, 'Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization' (2007) 75 George Washington Law Review 558, 579.
[142] Desmond Ellis, 'Post Separation Woman Abuse: the Contribution of Lawyers as "Barracudas", "Advocates," and "Counsellors"' (1978) 10 International Journal of Law and Psychiatry 403, 408.

fear that can seem disproportionate to those on the outside. Interestingly, in *Widdows* Pill LJ says of the victim that: 'she was shaking with fear though he did not behave in a violent, aggressive or threatening way'.[143]

Unfortunately, 'women who stay occupy a morally ambiguous identity'.[144] The 'morally ambiguous identity' allocated to women who report yet remain - who are prepared to support a police investigation and court proceedings yet seem unable to leave their abusers - is apparent in the judgments of *Hills*,[145] *Widdows*[146] and *Curtis.*[147] It is perhaps not surprising that 'where the case reveals an ongoing relationship between the alleged victim and perpetrator, there is judicial reluctance to acknowledge the existence of a course of conduct with the required qualities'.[148]

This 'judicial reluctance' can be seen, for example, in *Hills:* where despite evidence of disturbing ongoing domestic abuse Otton LJ was able to agree with the defence counsel's submissions that two proven incidents of abuse were unconnected:

> The complainant's most recent witness statement disclosed no evidence that the April incident was linked to the October incident. Harassment was a continuing offence. There was nothing to show that the April matter was more than an unconnected incident. *This was particularly so since the parties continued to live with each other during the relevant period*…[149]

The problem is that this takes no account of significance of coercive control. Instead, 'the perception of victims as autonomous individuals who remain in or return to the relationship because they freely choose to do so means that judges find it difficult to understand a victim who reports the behaviour of her partner but remains in the relationship'.[150] Otton LJ, in other words, does not appear to consider that there may have been a power imbalance between Hills and his victim, and that the instability of the relationship, (which he specifically comments

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[143] n20 [13].
[144] Jenny Davis and Tony Love, 'Women Who Stay: A Morality Work Perspective' (2018) 65(2) Social Problems 251, 251.
[145] n20.
[146] n20.
[147] n20.
[148] Bettinson and Bishop, Discrete Offence n32 188.
[149] n20 [13], author's emphasis.
[150] Bettinson and Bishop, Discrete Offence n32 188.

on as is discussed earlier), might therefore be a reflection of the victim's desire to escape from it.

The desire to distinguish and downplay domestic stalking that takes place while the relationship continues is an indication of the tendency that still exists to minimise the significance of abuse in the context of ongoing abusive relationships. Tuerkheimer explains:

> Violence within intimate relationships is justified as the product of choice on the part of its victims…. What would not be tolerated absent a relationship is quite acceptable for precisely this reason: the existence of an ongoing relationship becomes a proxy for a woman's consent to all that takes place within it (at least, to the point of physical assault).[151]

This is where a consideration of the question of power is essential. Once an imbalance of power has been identified, it is much harder to make 'the existence of an ongoing relationship' a '*proxy* for a woman's consent to all that takes place within it'.[152]

Whatever the reasoning behind *Hills*,[153] *Widdows*[154] and *Curtis,*[155] the effect of the judgments is that police and prosecutors have to draw a line between relationships that are over and those that are not. If the relationship is over, the perpetrator behaviour might constitute harassment (PHA), if the relationship is on-going, he might be guilty of controlling or coercive behaviour (section 76). Section 76 only applies if the parties are together; the PHA only applies if they are not. Drawing that line is difficult: identifying separation as a moment in time is often impossible.[156] As Tuerkheimer explains:

> The paradigm of the transactional breakup - one that occurs at a distinct moment in time, upon mutual agreement by two parties hopelessly fails to capture the complexities that attend ending abusive relationships. In these relationships, separation is a process. Breaking up is often difficult, but the realities confronting battered women make separating from a partner distinctly dangerous, complicated, and protracted. For these women, there is typically no moment of

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[151] Deborah Tuerkheimer, 'Breakups' (2013) 25 Yale Journal of Law and Feminism 51, 87.
[152] Ibid, emphasis mine.
[153] n20.
[154] n20.
[155] n20.
[156] June Keeling et al, 'A Qualitative Study Exploring Midlife Women's Stages of Change from Domestic Violence Towards Freedom' [2016] Women's Health 1.

> breakup; rather, domestic violence victims "leave" relationships multiple times, in different ways, to varying degrees of success.[157]

Tuerkheimer's analysis of the false nature of the transactional breakup paradigm was supported by the experiences of the survivors interviewed for this project. As discussed in chapter four all of the survivors I interviewed had a difficult and complicated time leaving abusive partners.[158] There was usually a degree of tracking back and forth between 'leaving' and 'staying' (as described by Sarah, above) before any of the victims could be said to have escaped the relationship.[159]

This pattern is also visible in the caselaw. In *Widdows*, for example, Pill LJ reported that: 'They separated on many occasions during that period but reunited "after a few hours or days"'.[160] Police reports, for example, might record that the perpetrator has said that they are still together. A victim might point to her efforts to escape and say they are not. A suspect might say he is still living with a reporting victim. The victim might say to the police that he is not welcome. Kim described this: 'And every time I made a 999 call they would then come, and it seemed like it was fruitless because he would just deny it. His defence would always be we were in a relationship, she wants me - she likes it. This kind of thing.'[161] This is a particular issue for the police, who do not, in those cases, know which crime has taken place; 'legal preoccupation with a moment of departure does not comport with reality.'[162]

If identifying the moment of separation is difficult, it is also, from the survivor perspective, not necessarily that significant. Analysis of the experiences of the survivors interviewed for this research clarifies that the perpetrator's controlling intent does not change with the end of the relationship.[163] As Sarah put it, 'I have never been more controlled by him than I am now'.[164] As Tuerkheimer said: 'control is ratcheted up when women attempt to separate'.[165]

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[157] Tuerkheimer, Breakups n151 15.
[158] See, for example Karen n115; Kim n136 3.
[159] Ibid, see interview with Sarah (29 June 2016) 1.
[160] n20 [2].
[161] Kim n136 2.
[162] Tuerkheimer, Breakups n151 15.
[163] Sarah n159; Survivors Focus Group (8 September 2016).
[164] Sarah n159 9.
[165] Tuerkheimer, Breakups n151 84.

Post separation, the behaviour patterns manifested by the perpetrator might take a different form, but the malevolent strategic intent (that gives meaning to the patterns) continues in much the same way as they did before. What distinguishes him from all of the other people in her life is his desire to continue controlling her. In other words, the boundary between the period of her life when she is in an intimate relationship and the period when she could be finally said to have left it is not always a particularly conceptually significant one - *to the victim* - in the context of the coercive control exerted by him over her. Survivors such as Sarah explain that 'I would say that the coercive control is worse now, than it was before'.[166]

CONCLUSION

In the case of coercive control there *is* no clear boundary between partners who are 'estranged' and those that are not. Indeed, it is the lack of the boundary that is part of the problem. Restricting the use of the PHA to Otton LJ's 'strangers' and 'estranged' partners does not make conceptual or empirical sense,[167] and it meant that further legislation was deemed necessary. In their later consultation document the government described the judgments in *Widdows* and *Curtis* as an 'unhelpful barrier'.[168] As Charlotte Bishop argues:

> Whether or not the 1997 Act was intended for use within the context of relationships involving violence and/or abuse, it could have been applied in this way… that the legislation has not been interpreted in this way displays a lack of judicial comprehension of the dynamics of domestic violence and/or abuse and has given rise to a legislative gap in this context.[169]

It was parliamentary recognition of a 'legislative gap' that paved the way for the introduction of section 76. This new offence, together with the Sexual Offences Act 2003 that came just over a decade before it, are two of the most important legislative developments in the 21st century for the survivors of coercive control. The Sexual Offences Act 2003 and section 76 are reviewed in the following two chapters.

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[166] Sarah n159 8.
[167] Hills n20 [31].
[168] Home Office, 'Strengthening the Law on Domestic Abuse Consultation – Summary of Responses' (December 2014) 11 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/389002/StrengtheningLawDomesticAbuseResponses.pdf> accessed 30 April 2019.
[169] Bishop, Discrete Offence n32 189.

CHAPTER SIX: FROM RELUCTANT SEX TO RAPE – DOMESTIC SEXUAL ABUSE AND THE SEXUAL OFFENCES ACT 2003

INTRODUCTION

Sexual abuse is a key component of coercive control. It remains, however, the area of domestic abuse that is the hardest to bring within the ambit of the criminal law. Research has suggested for some time that there are especially high attrition rates when it comes to the prosecution of domestic sexual offending.[1] The interviews that I conducted with judges and police identified domestic rape as a particular problem for the justice system. Judge Little commented that:

> Stranger rapes are dead easy, and have the highest conviction rate therefore unsurprisingly. The people who meet at a party are very complex because often drink is involved and all the rest of it. But when you come to the context of in a relationship, so a domestic setting … it's the kind of thing that makes it very difficult.[2]

Judge Harwood said of the prosecution of sexual offences that, 'at the moment the conviction rate within intimate relationships from my experience is at such an all-time low', and that juries find it 'really hard to convict, [they] really struggle'.[3] Judge Wallace, when she was asked whether she thought that the criminal law around rape in the context of an intimate relationship was problematic, was blunt in her response: 'I don't think it's the criminal law that's the problem, I think it's society's perception.'[4]

Interviews with police generated consistent findings. PC Hardie, for example, said that she felt that domestic rapes were particularly difficult at the moment, 'the overlap between rape and domestic abuse is really tough'.[5] PC Hardie went on to explain that she felt that convictions were prohibitively difficult to achieve. In her

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[1] The Home Office Study 'A Question of Evidence' (discussed in more detail later in this chapter) found in 1999 that cases of sexual offending involving intimate partners were most likely to be discontinued by police and/or the Crown Prosecution Service. Jessica Harris and Sharon Grace, *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* Home Office Research Study (Home Office, 1999). See also Jeanne Gregory and Sue Lees, 'Attrition in Rape and Sexual Assault Cases' (1996) 36(1) The British Journal of Criminology 1 and Liz Kelly, Jo Lovett and Linda Regan, *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office 2005).
[2] Interview with Judge Little (20 March 2018) 3.
[3] Interview with Judge Harwood (21 May 2018) 6.
[4] Interview with Judge Wallace (13 March 2018) 6.
[5] Interview with PC Hardie (15 January 2018) 1.

view, this is because juries are unable to convict due to their prejudicial views of what constitutes rape. She concluded: 'It's because rape conjures up images of people being dragged by their hair into the bushes, doesn't it, with a knife at their throat, it's just not - that's not how rapes usually happen, and the public don't realise that. The public perception is not as it should be.'[6] The idea that there is a "paradigmatic stranger-rape" that makes it difficult for juries to perceive acquaintance or domestic rape as rape was evident in many of my interviews with the judiciary and the police.

Jurors are, of course, bound by strict confidentiality requirements which means that they cannot discuss their deliberations outside the courtroom. The Contempt of Court Act 1981 prohibits research with real juries in England and Wales. While we therefore do not know for certain in any given case what jurors were thinking, contemporary research supports the idea that, generally speaking, the responses of jurors to rape cases involving acquaintances or intimates are complex. It is possible that people hold 'rape supportive beliefs' that influence how they assess sexual abuse that takes place between men and women who know each other.

In particular, work by Louise Ellison and Vanessa Munro using "mock" jury trials and reconstructions of acquaintance and also domestic rape suggests that jurors are not wedded to the "paradigmatic stranger-rape" scenario. Responses to surveys show mock jurors being receptive, in principle, to the idea that a woman could be raped by a man with whom she had had a relationship, for example.[7] Ellison and Munro found that juries do respond *differently* to rapes where the defendant and complainant are known to each other, however. While not being necessarily 'blinded by the 'real rape' stereotype',[8] it is nevertheless fair to say that there are '*complexities at play* in framing jurors' responses' to these different scenarios.[9]

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[6] Ibid. 2.
[7] Lousie Ellison and Vanessa Munro, 'Better the Devil You Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations (2013) 17 The International Journal of Evidence & Proof 299, 299.
[8] Ibid. 321.
[9] Ibid. 303 (my italics).

In this chapter I investigate three areas of complexity that affect the prosecution of domestic rape. Firstly I discuss the existence of resistance to the idea that forced sex between intimate partners is rape. Secondly, I review the tendency to prioritise the importance of physical violence in the context of domestic rape, (and, furthermore, an insistence on the close proximity of the physical violence with the incident of domestic rape). Finally, I examine the confusion over the boundary in the domestic context between what is referred to as 'submission' and the all-important construct of consent. All three of these issues are exacerbated by the failure of the current legislative regime to give enough, if any, guidance. In this chapter I look at each of the three identified issues in turn in the context of the current regime, before concluding with a discussion of what research is needed to facilitate reform.

THE DISAVOWEL OF DOMESTIC RAPE

The Survivor's Perspective

Resistance to the idea that forced sex between intimate partners is rape was evident in data from interviews with survivors themselves. Women found it hard to articulate their experiences of sexual abuse in the language of the criminal law. Sarah, for example, when I asked her about the frequency of physical violence in her relationship, replies: 'it was frequent but I didn't see it as violence because it was sexual violence … he would not take no for an answer for sex'.[10] At another point in the interview, she describes being raped on her return from hospital (where she had just given birth via caesarean section):

> I discharged myself [from hospital] after six days. I was meant to be there for ten, because he kept saying - it was like a separation anxiety - so I went back because he was like a crying baby, you couldn't - you know - and sitting there having nursed Holly, massive lactating breasts and still had this metal suture, but he again forced sex - I hadn't even - but basically his view was that because I'd had a caesarean that area wasn't affected.[11]

[10] Interview with Sarah (29 June 2016) 6 (brackets inserted).
[11] Ibid.

When I asked her, 'were his threats unspoken? In that did you know what would happen if you didn't comply?' she replied softly 'yes, and I feared it'.[12] The Sexual Offences Act 2003 (SOA) is discussed in detail below, but many of Sarah's experiences of marital sexual abuse come within the section 1 SOA definition of rape. Nevertheless, Sarah preferred to talk about 'forced sex' rather than 'rape'. She explained:

> Rape is not something you can associate with... But I can remember the judge in the children's proceedings saying 'did he hit you?' 'Did he rape you?' just like that. And I said no to both. But… [she trailed off].[13]

Jen, an IDVA, commented on her client Frankie that 'even when she reported the rape, on the tapes she says 'I'm not saying it is rape, I just didn't want to'.[14]

The Historical Position

Resistance to the idea that forced sex between men and women who are married is rape has deep legal roots. *Kowalski*[15] was one of the last cases to be heard by the Court of Appeal in the era when rape by a spouse was not legally rape. The victim and the defendant were married in January 1985. By September 1986 the marriage had failed, and they were living together in the same house but leading separate lives. The defendant raped the victim orally and vaginally at knifepoint. The details of the victim's ordeal are set out in the judgment as follows:

> On Sunday, 14 September 1986 the relevant events took place. The complainant returned to the house at about 6.15 p.m. She had occasion to go to the lavatory. While she was there, the appellant burst in, carrying a knife; he placed the point against her throat. He told her not to do anything foolish and then ordered her to take off all her clothing. This she did, including the tampon that she was wearing. He then forced her, still at knifepoint, to walk to the bedroom and there he made her undress him, again at knifepoint. In the middle of this process he remembered that she had an appointment elsewhere later that evening, so he took her to the telephone and made her telephone to say that she would be late. They returned to the bedroom; he had provided drinks for them both – a bottle of rum and a plastic bottle of Pepsi Cola, which, because it could not be undone, he cut open with the knife. He compelled her to pour them each a drink. He said to her that she should

[12] Sarah n10 6.
[13] Sarah n10 10.
[14] Interview with Jen (15 January 2016) 2.
[15] [1988] 1FLR 447.

> take a drink in advance of what was going to happen. She took a few sips while she was kneeling in front of him.
>
> He then began an act of oral intercourse with her. She objected, and took her hands away from his buttocks where she had had to place them. She took her hands away to wipe her mouth, and then she tried to put her hand between his body and hers. He said to her, angrily, that she must put her hands back on his buttocks. She did so, and he put his penis back in her mouth. While it was there he kept thrusting; because of the force of his thrusting she choked and began to, as she described it, 'urge' – or, as one would suppose she meant, 'retch'. He asked her why she was doing that. She replied that he had 'pushed it too far back'. He continued with what he was doing, albeit not pushing as far back as he had been before. Throughout the whole of this episode the knife was at the nape of her neck.
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> He then stopped, withdrew his penis from her mouth and said, 'Get on the bed'. She lay on the bed. He told her to get on her front and instructed her to kneel, to put her head down and her hands behind her back. She obeyed. With her kneeling in that position he put his penis into her vagina. She could feel the knife in the region of her neck the whole while. He continued the act of sexual intercourse. She did not co-operate and he said to her, 'You can do better than that. If you help me you will live, if you don't you will die; I am going to die tonight anyway.' So she did something to appease him.
>
> Although he was to continue the intercourse for some little time, that is a sufficient description of the events for the purposes of this case.

After setting out the facts of this ordeal, (which went on for two hours), Ian Kennedy J states:

> It is clear, well-settled and ancient law that a man cannot, as actor, be guilty of rape upon his wife. That exception, which traces its history back to *Hale's Pleas of the Crown*, is dependent upon the implied consent to sexual intercourse which arises from the married state, and which continues until that consent is put aside by decree nisi, by a separation order or, in certain circumstances, by a separation agreement. Self-evidently, none of those limitations in time arise in this case.[16]

Lord Justice Hale wrote his Pleas of the Crown in the 1650s. His stricture on marital rape is:

> The husband cannot be guilty of a rape committed by himself upon his lawful wife for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.[17]

There is nothing to indicate that this was anything more than Hale's personal view: unusually for him, he cited no other authority for the proposition.[18] The construct,

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[16] Ibid. 449.
[17] 1 Hale 269 as cited in Peter Rook and Robert Ward *Rook and Ward on Sexual Offences* (Sweet and Maxwell 2016) 70.
[18] Richard Brooks, 'Marital Consent in Rape' [1989] Criminal Law Review 877, 878.

which is of a kind of consent-for-all-time-which-cannot-be-retracted, is in complete opposition to the traditionally transactional focus of the criminal law (as discussed in previous chapters) and does not bear much legal scrutiny, either as a principle in contract[19] or in family law.[20] Nevertheless consent-for-all-time to sex within marriage was accepted as doctrine by the courts of England and Wales for over three hundred years.

Thus by a 'strange process of intellectual compartmentalisation',[21] domestic rape was not historically recognised as such at all. The ordeal suffered by the victim in *Kowalski* in many aspects bore the hallmarks of the paradigmatic stranger attack referred to by DC Hardie in the introduction to this chapter. She was attempting to separate from her husband, was raped at knifepoint, and was nevertheless correctly informed by the Court of Appeal that her abuser could not be found guilty of rape.

Ian Kennedy J did his best within the confines of the criminal law as it was then: he found the defendant guilty of indecent assault as a result of the forced act of oral sex, which he was able to find was outside the marital exemption construct. Except in the limited circumstances referred to by Ian Kennedy J,[22] rape within marriage was not a criminal offence until *R v R* in 1992, as reinforced by s. 142 Criminal Justice and Public Order Act in 1994.[23] It is no surprise that the relatively recent entrenchment of the old regime casts a shadow over contemporary responses to domestic rape.[24]

<u>The Sex Offences Review</u>

[19] For an example of a contractual analysis see Lalenya Siegal, 'The Marital Rape Exemption: Evolution to Extinction' (1995) 43 Cleveland State Law Review 351.
[20] Michael Freeman, 'But If You Can't Rape Your Wife, Who Can You Rape: the Marital Rape Exemption Re-examined' (1981) 15 Family Law Quarterly 1, 14.
[21] Jennifer Temkin, *Rape and the Legal Process* (Oxford University Press 2002) 72.
[22] If a separation order existed or, in certain limited circumstances, a separation agreement.
[23] *R v R* [1992] 1AC 599 HL. For an account of the resistance to the repeal of the marital exemption see Adrian Williamson, 'The Law and Politics of Marital Rape in England, 1945 – 1994' (2016) 26(3) Women's History Review 1.
[24] Candice Monson and Jennifer Langhinrichsen-Rohling, 'Does "No" Really Mean "No" After You Say "Yes"? Attributions About Date and Marital Rape' (2000) 15(11) Journal of Interpersonal Violence 1156.

Five years after Parliament had legislated to do away with the marital rape exemption, the Home Secretary set up the Sex Offences Review to re-examine the sexual offences regime. The Sex Offences Review published its findings in a green paper, *Setting the Boundaries*. That work culminated in the 2002 white paper, *Protecting the Public* and finally in the Sexual Offences Act 2003 (SOA). Unfortunately, while the Sex Offences Review did consider some of the issues in relation to domestic sexual offending (as discussed in more detail below) *Protecting the Public* and the SOA do not.

The Overview to *Protecting the Public* is instructive. Under the heading 'The Need to Reform the Law on Sexual Offences' there is a reference to changes in the way that sexual offences are understood:

> The conviction rate for rape is very low and has been falling in recent years. The number of persons found guilty of rape in comparison to the total number of offences reported has fallen from 25% in 1985 to 7% in 2000. Much of this is due to the change in the nature of the cases coming to trial, with many more instances of date or acquaintance rape being reported than before. These cases, which often rely on one person's word against that of another, make the decision of juries much harder than in cases of stranger rape.[25]

Thus the Home Office in its report acknowledges "date rape" and "acquaintance rape" *but not "intimate" or "domestic" rape*. The Home Office had commissioned a report from its own directorate into the difficulties with prosecuting rape in the 1990s. *A Question of Evidence?* (referred to earlier in this chapter) was also published in 1999. The 'the most striking finding' of *A Question of Evidence?* was that:

> Rape committed by a person unknown to the victim ("stranger" rapes) formed only 12 per cent of the sample, those committed by acquaintances or intimates accounted for 45 per cent and 43 per cent of cases respectively.[26]

The Home Office report includes family members in its definition of 'intimates'.[27] Adjusting this figure to subtract the family members that were included in the 43 per cent leaves 36 per cent of rapes that were committed by an abuser who had

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[25] Home Office, *Protecting the Public Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* (CM 5668, 2002) para 10.
[26] Harris and Grace, *A Question of Evidence* n1 iv.
[27] Ibid. 6.

had a relationship with the victim. Over a third, therefore, of rapes that are committed were identified as intimate partner rapes, and as an issue in this Home Office report.

Furthermore, a Home Office research study published in 2002 concluded that 'current partners' were responsible for 45% of the rapes reported to the survey.[28] What is unclear, is why was this not explicitly considered anywhere in *Protecting the Public* or, indeed, in the SOA? There have been considerable changes in the reporting of rape since 1999. It is now evident from the reported statistics that the *majority* of perpetrators of rape are not an acquaintance or a stranger: they are partners or ex-partners.[29] It is exactly this kind of "silence" in relation to the specific issues that relate to domestic sexual offending that are examined in this chapter that feeds into the rape supportive belief that rape within an intimate relationship is not really rape.

PHYSICAL VIOLENCE AND RAPE

The Survivor Perspective

The second area of difficulty is the relationship between physical violence and domestic rape. As was explained in chapter three, physical violence can, and often does, play a part in coercive controlling strategies but it need not. Evan Stark articulates domestic rape as 'rape as routine', which he says is 'perhaps the most common form of sexual exploitation, where women comply with their partner's sexual demands because of the "or else" proviso.'[30]

As I explained in chapter three the 'or else' can be explicit or implied. When Sarah, for example, spoke about her experiences of sexual abuse, some involved physical violence and some did not. When Sarah described the rape that took place after her return from hospital, for example, she confirmed that her abuser's threats were

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[28] Andy Myhill and Jonathan Allen, *Rape and Sexual Assault of Women: the Extent and Nature of the Problem* (Home Office Research Study 237, 2002).
[29] John Flatley, *Sexual Offences in England and Wales Year Ending 20 March 2017* (ONS Bulletin 2018).
[30] Evan Stark, 'Forward' in Louise McOrmond-Plummer et al (eds), *Perpetrators of Intimate Partner Sexual Violence: A Multidisciplinary Approach to Prevention, Recognition, and Intervention* (Routledge 2016) xxvii.

mostly unspoken.[31] Although Sarah was afraid, her abuser did not in that instant physically attack her. He did not need to – she knew he could if he so chose. Physical resistance in that context might have been extremely dangerous for Sarah, as she would have known. Yet for reasons that are explored below, it is likely that the absence of physical injuries in the context of domestic rape is a hurdle for the prosecution of domestic rape.

Physical Violence, Rape and the Criminal Law

Just as with the marital rape exemption, above, rape supportive beliefs around violence and rape have their roots in legal history. The premise that physical violence is a component of rape was also historically legally accurate although with less clarity (than the marital rape exemption) and less recently. Historically, the common law on rape required that sexual intercourse occur against the victim's will. In order for intercourse to have occurred against the victim's will, there had to be evidence of the use of 'force, fear or fraud'.[32] Force, fear or fraud included force or violence by the defendant, or the threat of immediate force or violence, and resistance by the victim.[33] It is thought that the abolition of the death penalty for rape in the early nineteenth century prompted judges to widen the scope of what might constitute rape.[34]

The leading case is *Camplin* in 1845,[35] where it was held that the use of threat or force is not an essential ingredient of the offence. However the case-law post *Camplin* is confused - notwithstanding the finding in *Camplin* that force is not an essential ingredient, some judges continued to direct juries that force by the defendant and resistance by the complainant are essential ingredients of the offence of rape.[36] By the time of *Morgan,*[37] in 1975, the trial judge's restating of this

[31] Sarah, n10 6.
[32] Peter Rook and Robert Ward, *Rook and Ward on Sexual Offences* (Sweet and Maxwell 2016) 6.
[33] Ibid.
[34] Ibid.
[35] (1845) 1 Cox CC 220.
[36] *Camplin* n 35; *Morgan* [1976] AC182, HL.
[37] Ibid.

(confused) common law position in his summing up to the jury attracted considerable criticism.[38]

Morgan was a controversial ruling chiefly for the impact it had on the development of the requisite mens rea of rape, but it also had an influence on the role of physical violence as part of the actus reus. The trial judge said:

> First of all, let me deal with the crime of rape. What are its ingredients? What have the prosecution to prove to your satisfaction before you can find a defendant guilty of rape? The crime of rape consists in having unlawful sexual intercourse with a woman without her consent and by force. By force. Those words mean exactly what they say. It does not mean there has to be a fight or blows have to be inflicted. It means that there has to be some violence used against the woman to overbear her will or that there has to be a threat of violence as a result of which her will is overborne.[39]

In the aftermath of *Morgan* the Government set up a committee chaired by a judge (Mrs Justice Heilbron) to conduct a review. The Heilbron committee expressed its disapproval of the judge's summing up as follows:

> It is wrong to assume that the woman must show signs of injury or that she must always physically resist before there can be a conviction for rape. We have found this erroneous assumption held by some and therefore hope that our recommendations will go some way to dispel it.[40]

It recommended that:

> As rape is a crime which is still without statutory definition the lack of which has caused certain difficulties, we think that this legislation[41] should contain a comprehensive definition of the offence which would emphasise that lack of consent (and not violence) is the crux of the matter.[42]

The Sexual Offences Amendment Act 1976 (SOAA) was passed as a response. It does indeed emphasise that lack of consent and not violence is the 'crux of the matter' by section 1(1), which defines rape as sexual intercourse with a woman without her consent. The SOA confirms this position. Section 1 of the SOA sets out the offence of rape and states that a person commits rape if he intentionally

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[38] Temkin, Rape n21.
[39] Morgan n36 356.
[40] Home Office, *Report of the Advisory Group on the Law of Rape* (Cm 6352, 1975) 21.
[41] This is a reference to what became the Sexual Offences Act 1978, which was being considered by Mrs Justice Heilbron as part of her review.
[42] Home Office, Report of the Advisory Group 1975 n40 84.

penetrates the vagina, anus or mouth of another person with his penis, the victim does not consent to the penetration and the defendant does not reasonably believe that the victim consents. There is no reference in section 1 to physical violence; there is no need, in other words, to give evidence of physical violence on the part of the defendant, or resistance on the part of the victim, in order to show that the victim was not consenting.

The SOA is not entirely consistent in its approach to the relationship between physical violence and consent, however. The definition of consent is in section 74; sections 75 - 76 then contain presumptions about consent. The three sections give the prosecution options, as it can use any of them to prove the absence of consent in relation to any given case. Section 76 of the SOA sets out 'conclusive presumptions' about consent that, if proved, establish that no consent was given. As might be expected in light of a presumption that is 'conclusive' the presumptions are limited and are based on the old common law provisions on deception and impersonation; they are not relevant here. Section 75 contains 'evidential presumptions' about consent that, if proved, must be rebutted by the defence. It is in this section that the old preoccupation with physical violence is most apparent. Finally section 74 gives the general definition of consent and is used in all cases where sections 76 and 75 of the SOA do not apply.

Section 75 was originally intended by the Sex Offences Review as an opportunity to give guidance: to dispel some of the unhelpful assumptions that still surrounded the prosecution of the sexual offences. In *Setting the Boundaries*, the Sex Offences Review explained that they wanted to adopt the approach used in a number of Australian States of setting out a list of examples of circumstances where consent was not present. The list would be a set of examples only, but it would 'help both practitioners and juries in coming to decisions in particular cases, and give broad guidelines for considering the issue'.[43] One of the recommended examples in the Sex Offences Review's list was where a person submits 'because of threats of fear of serious harm or serious detriment of any type to themselves or another

[43] Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (2000) para 2.10.6.

person'.[44]

This wording had the potential to encompass a wide range of threats including the sorts of threats experienced by Sarah and other survivors of coercive control. Indeed, this was the Sex Offences Review's intention:

> These would cover the broad set of cases where there was force or coercion or threat to a person, their child etc. It could also cover situations where other threats were made - for example losing a job or killing the family pet. It would be for the court to consider in each case what the nature of the threat was and whether the victim would think that she or he would suffer serious harm. These could vary from case to case: the threat of loss of employment might be far more serious in a small community with few other opportunities, for example. The pressures in this section are all negative - there was a distinction between a threat and an inducement, and the distinction that consent was obtained by coercion.[45]

The references to the 'family pet' in this paragraph is an explicit, albeit indirect, reference to rape in the context of an abusive relationship. It is helpful - a threat to kill the family dog, for example, is an example of the kinds of coercive threats made by the perpetrators of coercive control. However, somewhere between the publication of the *Setting the Boundaries* in 2000 and the later *Protecting the Public* (2002) all references to domestic sexual abuse were forgotten.

By the time of the parliamentary debate in 2003 the Government took the view that the reference to 'serious detriment' was too wide and that it would not be advisable to cover such a wide range of threats. It was also decided to make the list exhaustive rather than open. Lord Falconer, then Lord Chancellor, in resisting the suggestion that the exhaustive list should be more comprehensive, said 'the rebuttable presumptions should be limited sensibly. Something that might frighten someone in a particular condition might not frighten someone else'.[46] There was no reference to sexual abuse in a domestic setting.[47]

Six scenarios, (a) - (f), form the basis of section 75 of the SOA. The 'because of threats of fear of serious harm or serious detriment of any type to themselves or

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[44] Ibid. para 2:10:9.
[45] Ibid. para 2.10.8.
[46] Hansard HL Deb 2 June 2003, vol 648, col 1082.
[47] Ibid.

another person' from the Sexual Offences Review's list became scenarios (a) and (b). Section 75(a) reads as follows:

> Any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him.

Scenario (b) mirrors scenario (a) except that it covers causing the victim to fear that immediate violence would be used against another. Thus, the reference to the Sex Offences Review's 'broad set of cases where there was force or coercion or threat to a person' has been narrowed down to become 'violence' and/or 'fear that immediate violence would be used'. This does not, of course, mean that it is necessary to provide evidence of violence in order to prove that consent was absent. But it does suggest that physical violence, or the fear of it, is considered to be more significant than other threats.

As I explain in chapter three, the threats used by the perpetrators of coercive control are myriad and bespoke, they can include threats to exploit vulnerabilities, for example, or threats to expose secrets.[48] They do not necessarily involve threats of physical violence but this does not mean that the victims of coercive control are less frightened, or more able to consent to sex. Also difficult is the fact that the fear needs to be of immediate violence, the so-called immediacy requirement that was the subject of a detailed analysis in chapter four. Including an immediacy requirement forces the prosecution on each occasion to prove a proximity that is out of step with the experiences of survivors like Sarah. It does not allow for any consideration of the interpersonal dynamic between the parties.

Criticism of the section 75(a) immediacy requirement was not confined to the feminist literature.[49] It also received criticism from criminal law textbooks. Rook and Ward, for example, observed that 'neither paragraph s75(2)(a) nor (b) deals with the situation where a complainant fears future violence, although in such circumstances the fear may well mean that the complainant does not consent. The

[48] Sarah n10.
[49] See Temkin, Rape n21 for an example of the feminist critique.

justification for this omission is less than clear.'[50] The pre-2003 common law did not necessarily require the threat of force to be immediate, and section 75(a) is therefore unfortunately a step backwards in this context.[51]

As explained previously, the threats that Sarah reported in the context of sexual abuse were often implicit and unspoken. Sarah would therefore not benefit from the presumption in section 75(a) because, although she was afraid, her abuser did not in that instant make an explicit threat of immediate physical violence. He did not need to - he had access to her all of the time, so the threat could be *implicit*. Implicit threats are not necessarily transactional, they are not limited to a particular time and place, for example, but tend to be ongoing. An immediacy requirement makes more sense in the context of threats that are explicit and transactional, threats that might be used by a stranger encountering his victim for the first time. The insistence on temporal proximity does not exclude an implicit threat but makes it more difficult for a survivor such as Sarah (who lived in fear) to prove a link between her fear and the incident of rape. It is an import from 'stranger' type offences that misunderstands the nature of abusive relationships.

The Jurors Perspective

Ellison and Munro's work with mock jury trials supports the view that there may be especially unhelpful rape supportive beliefs in the context of domestic rape. They certainly found that mock jurors have more rigid expectations about how a woman would react to an assault by someone with whom she is familiar. In a stranger rape context mock jurors were supportive of the idea that a woman might be so 'overcome by shock and fear of escalating violence that she would be unable to engage in physical, or even verbal resistance'.[52] In the context of 'acquaintance rape', however, 'jurors were typically committed to the idea that a woman would do her utmost to avoid an assault by issuing strong verbal protests and fight

[50] Rook and Ward n32 130.
[51] Temkin, Rape n21 130; Also see Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] Criminal Law Review 328, 339.
[52] Louise Ellison and Vaness Munro, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections Upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13 New Criminal Law Review 781, 790.

back'.[53] There seemed to be an assumption, in other words, that 'rape by a known assailant would provoke less fear'.[54]

In a later study, Munro and Ellison looked specifically at a domestic rape: a rape, in other words, where the trial parties had previously been involved in an intimate relationship. They found that:

> The onus was typically placed upon the complainant to correct any potential misreading of her behaviour by communicating her lack of consent unequivocally to the defendant… for many jurors, this stretched to an expectation, and indeed a de facto requirement, that the complainant physically resist and/or use force where it was clear that her verbal protestations were not being taken on board by a defendant.[55]

In other words, while the mock jurors were prepared to accept that a woman could 'freeze' during sexual abuse due to fear they only considered this response plausible in the context of the stranger rape scenario.[56] It should be noted that in the scenario in this later Ellison and Munro study, while the parties had previously been in a relationship they had separated and were no longer living together at the time of the alleged rape. There was also no suggestion of a history of abuse. Ellison and Munro report that some jurors suggested that a frightened 'freezing' response might be more credible if there was such a history.[57]

As set out in chapter three my research suggests that the survivor response in this context is complicated. That a woman experiencing coercive control can 'choose' to resist her abusive partner's demands ignores the myriad ways in which control curtails agency. This needs further investigation and research. In the absence of such research, however, it can be concluded that the existence of rape supportive beliefs around physical resistance in the context of domestic rape is likely to be a problem for jurors who are not familiar with the dynamic of coercive control.

THE PROBLEM WITH CONSENT

[53] Ibid.
[54] Ibid.
[55] Ellison and Munro, Better the Devil You Know n7 314.
[56] Ibid.
[57] Ibid. 315.

Olugboja

As with the two previous problem areas reviewed in this chapter, the history of the reform of the law in the context of consent is instructive. *Olugboja*[58] was the leading authority on consent before the SOA, and was decided in 1981. Dunn LJ acknowledges that the issue of consent is difficult where the defendant threatens something other than violence.[59] He introduces the idea of a spectrum of responses, some of which collectively amount to consent and some of which do not. With regard to consent, he says that it 'covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other'.[60] However, there comes a point at which real consent ceases to be consent at all, and, the victim's state of mind is such that it could more appropriately be associated with mere submission. The identification of that point, that is the point at which reluctant acquiescence (no rape) becomes mere submission (rape), is up to the jury, to decide in any given case.[61]

This is a thoughtful and in many ways progressive decision whose exposition (of consent) is not necessarily out of step with the way in which survivors of domestic rape describe their experiences of sexual abuse. Sarah, when describing her experiences of domestic rape, did not use the words "consent" or "submission", but she was clear nevertheless that she was submitting to her husband's demand for sex and not consenting to it. What is missing from the later debate (it was not an issue in *Olugboja*) is an analysis of when the intersection between coercive control and domestic rape results in "submission" and not "consent". This is the discussion that is unfortunately mostly absent from the work of the Sexual Offences Review, and entirely absent from the later debates in Parliament on the Sexual Offences Bill. Commentators responding to the *Olugboja* judgment at the time,[62] and since,[63]

[58] [1982] QB [321].
[59] Ibid. 448 – 9.
[60] Ibid. [331].
[61] Ibid.
[62] Glanville Williams, *Textbook Of Criminal Law*, (Stevens and Sons 1983) 551.
[63] David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law*, (Oxford University Press 2015) 822.

have pointed out that the boundary between consent and submission is at once critical and unclear. The SOA does nothing to clarify this.

The Sexual Offences Act 2003 Definition of Consent s 74

As stated above, sections 74, 75 and 76 of the SOA deal with consent. The shortcomings with regard to the section 75/76 presumptions have been reviewed above. The SOA, s 74 gives the general definition of consent, to be used when sections 75 and 76 of the SOA do not apply. Even without a consideration of survivors of domestic rape, it has been observed that 'section 74 is not a model of tight drafting'.[64] The SOA s 74 states that: 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice'.[65] This is in many ways a progressive statement in that a specific reference to 'freedom' and 'capacity' points, it has been observed, to the need for a 'fuller exploration of the surrounding power dynamics and conditions within which (sexual) choices can meaningfully made'.[66]

While the definition of consent in section 74 of the SOA therefore has the *potential* to bring about a more progressive understanding of what constitutes sexual abuse, as it stands this terminology is challenging, and in need of explanation that is absent. It does not shed enough light on the distinction between submission and consent. Andrew Ashworth and Jennifer Temkin, for example, note that:

> It might be thought that "freedom" and "choice" are ideas which raise philosophical issues of such complexity as to be ill-suited to the needs of criminal justice - clearly those words do not refer to total freedom or choice, so all the questions about how much liberty of action satisfies the "definition" remain at large.[67]

In other words 'freedom remains to be too loose a word to be useful in defining such a crucial element of such serious offences'.[68] Furthermore, it has been

[64] Rook n32 79.
[65] Sexual Offences Act 2003, s 74.
[66] Vanessa Munro, 'Shifting Sands? Consent, Context and Vulnerability in Contemporary Sexual Offences Policy in England and Wales' (2017) 26(4) Social and Legal Studies 417, 418.
[67] Temkin and Ashworth, Rape, Sexual Assaults and the Problems of Consent n51 336.
[68] Bethany Simpson, 'Why Has the Concept of Consent Proven So Difficult To Clarify?' (2016) 80(2) Journal of Criminal Law 97, 100. See also Vanessa Munro, 'An Unholy Trinity? Non-consent, Coercion and Exploitation in Contemporary Responses to Sexual Violence in England and Wales' (2010) 63 (1) Current Legal Problems 45.

observed that the fact that 'freedom', 'choice' and 'capacity' are terms which everybody understands, does not mean that everybody understands them to mean the same thing, either generally, or in relation to specific incidents of rape.[69] Early work with mock juries suggested that the looseness of the terms caused juries considerable difficulties, and resulted in 'considerable leniency' towards the defendant.[70]

In the context of domestic sexual offending the boundary between consent and submission, even if clear to survivors, (and more research is needed on this point) appears to be especially difficult to communicate to jurors. Unexplained references to 'freedom' and 'choice' in this context are unhelpful. Criminal law textbooks suggest that "choice" highlights that the victim had options from which to choose, and focus on whether or not sufficient information was conveyed so as to make that choice "informed".[71] "Capacity" supposedly covers cases where consent is negated by, for example, a mental disorder, youth, or intoxication.[72] "Freedom" is said to rule out cases where it is negated by the immediate threat of physical force, or by fraud.[73]

None of these explanations would be of much help to Sarah. Sarah did not feel that she had options from which to choose, but for none of the reasons identified above. Sarah explained that she lived in constant fear of her partner. He could be extremely violent. On several occasions she feared for her life. The violence was not always immediate. The threats were usually unspoken. She was clear that, in this context of fear and life-threatening danger, she often submitted to sex. This is not consent. IDVAs supported this view. One said to me, 'When you do it with someone who has been violent towards you or who is, for want of a better word, a bully - and you are frightened of them - how easy is it for you to say no? So if you don't say no - where are we on the spectrum of consent there?'[74]

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[69] Emily Finch and Vanessa Munro, 'Breaking Boundaries? Sexual Consent in the Jury Room(2006) 26(3) Legal Studies 303.
[70] Ibid. 317.
[71] See, for example Heather Keating et al, *Clarkson and Keating: Criminal Law* (Sweet and Maxwell 2014) 647 – 658; Simpson, Concept of Consent n68.
[72] Ibid.
[73] Ibid.
[74] Interview with Jen (15 January 2016) 6. See also interview with Anita (6 June 2015) 9; and the comments of Shirin and Maya at the Survivors Focus Group (8 September 2016) 7.

The SOA, s 74, as it stands, does not assist with this important point, and neither do the s 75 presumptions as parameters on this question. To some extent these scenarios "anchor" the debate, they give an indication of the kinds of situations that Parliament was considering as it constructed the SOA, s 74. Scenarios (d) - (f) are a good example of where the 'anchor' provided by the presumptions is unhelpful. (d) - (f) deal respectively with victims who are asleep or unconscious, physically disabled, or have been caused to take a substance capable of stupefaction without their consent. The fact that these are *rebuttable* presumptions implies that consent *can* be present - this 'does imply that consent can be present in highly coercive circumstances and thus undermines the definition of consent as "agreement by choice, [with] the freedom to make that choice"'.[75]

Furthermore, in this area the law has taken a step backwards. At common law, if a complainant was asleep or unconscious she was incapable of consenting.[76] Thus, section 75 of the SOA can still be said to be disappointing in the way that it operates to *undermine* the utility of section 74. It begs the question: 'can freedom and capacity to make a choice really exist in any meaningful sense in this situation?'[77]

Commentators at the time of the passage of the SOA expressed concern with regard to the then new framework on consent stating, 'the fact that responsibility for this interpretation is left, first, in the hands of the Judicial Studies Board and the judiciary, and then in the hands of jurors who will apply judicial guidance to the circumstances of each case, is also disconcerting'.[78] The use of judicial directions to guide juries in this area is the subject for further discussion below, but unfortunately this concern has proved prescient. The central question for juries remains unclear: 'what degree of impairment should be taken to mean that any

[75] Tanya Palmer, *Contested Concepts: Sex and Sexual Violation in the Criminal Law* (PhD Thesis, University of Bristol 2011) 73 – 74.
[76] Rook and Ward n32 131.
[77] Temkin and Ashworth, Rape, Sexual Assaults and the Problems of Consent n51 337.
[78] Finch and Munro, Breaking Boundaries n69 307.

apparent consent was not free?'.[79] Or, 'what degree of coercion and/or abuse of position, power or authority has to be exercised upon a person's mind before he or she is not agreeing by choice with the freedom to make that choice?'[80]

The Mens Rea of Rape

Even if a survivor manages to explain to a jury that she was not consenting to sex, the prosecution case can still run into difficulties. This is because as well as proving that the victim did not consent, the prosecution has to prove the mens rea of rape further to section 1 of the SOA. The SOA was reformist in its approach to mens rea.[81] *Morgan*[82] - to widespread disapproval[83] - established the defence of honest but mistaken belief in consent. The SOA removes this by establishing a partly objective mens rea standard. The relevant question is whether or not the defendant reasonably believed that the complainant consented. An honest but unreasonable belief is no longer a defence. But section 1(2) qualifies the objective test by introducing the somewhat ambiguous requirement that: 'whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents'.[84]

Commentators have observed that the section 1(2) qualification muddies the objective standard in an unhelpful manner, invites jurors to use the complainant's behaviour to determine whether it could have induced a reasonable belief in consent, and 'is confusing for jurors who find themselves left to interpret the level of objectivity or subjectivity required by the test'.[85] In particular, early work with mock juries suggested that the invitation to consider all the circumstances encouraged jurors to focus on the victim and allowed jurors to deduce the defendant's reasonable belief in consent from other, unrelated events.[86]

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[79] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press 2009) 352.
[80] Rook and Ward n32 81.
[81] Rook and Ward n32 4.
[82] 1976 AC 182.
[83] See, for example, Temkin, Rape n21 119.
[84] Sexual Offences Act 2003, s 1(2).
[85] Finch and Munro, Breaking Boundaries n69 317; Temkin and Ashworth, Rape, Sexual Assaults and the Problems of Consent n51.
[86] Finch and Munro, Breaking Boundaries n69.

This is especially problematic in the context of an ongoing abusive relationship. The invitation to consider all the circumstances introduces unhelpful assumptions about sexual access, and communication of that access. Jurors rely on inferences extrapolated from views on ”appropriate” socio-sexual interaction that they impute to the defendant and use these assumptions to attribute to the defendant a reasonable belief in consent.[87] As explained earlier in this chapter, the scenario under review by these particular mock jurors involved a complainant and a defendant who had been in a relationship that had ended two months prior to the incident in question. It is possible that the ways in which conduct on the part of the complainant may be held to signal sexual interest is even more complex in a scenario where the relationship is continuing.

Data from my interviews with the judiciary suggest that determining whether or not the complainant had signalled sexual interest is particularly an issue in prosecutions of domestic rape where the relationship is ongoing. In cases where there is a continuing intimate relationship between the parties, judges observed that the defence often used evidence of previous (and post) consensual sex to cast doubt in the juries' minds as to whether the complainant had done enough to communicate a lack of consent. Judge Little said:

> Because rape is two parts, it's not simply that she wasn't consenting, but that the defendant knew she wasn't consenting. And clearly if he is hurting her at the time then it's much easier to say well of course he would have known she wasn't consenting. But when it's an assault that happened two months ago, or even just two weeks ago, And, of course, very often in the context of those relationships, as well, the witness will be saying, 'I have had sex with him in the interim and it was fine, but it's just this occasion, and I said no, and he got very angry, and so I didn't like to kind of ...' It's that kind of thing that makes it very difficult … If the witness is saying 'I was not consenting and he would have known I was not consenting because …' from a jury's point of view it's that - it's my belief that it is that that causes them the concern.[88]

Judge Little observes that the prosecution face a number of hurdles as they attempt to persuade the jury that the defendant has the appropriate mens rea for rape in an ongoing intimate relationship. The absence of physical violence, the passage of time, and the presence of interim consensual sex, in her opinion, all lead

[87] Finch and Munro, Breaking Boundaries n69.
[88] Judge Little n2 3.

the jury to doubt whether or not the defendant would have known that the complainant was not consenting to sex.

From the survivors' perspective it is the backdrop to the relationship, the strategy of domination that constitutes coercive control, that explains why 'he would have known that I was not consenting'. For jurors, rape supportive beliefs that legitimise assumptions on the part of the defendant about sexual access in the context of an ongoing relationship get in the way. IDVAs agreed with this. Jen, for example, said,

> But when you are trying to prove consent, particularly in a domestic abuse relationship, it's very difficult because you will have moments where it all looks to the CJS or the public that she is - you know - how could she have been raped when she is, you know, texting him that she loves him the next day.[89]

In other words, even if the difference between submission and consent is clear to a victim, and even if she manages to explain this to a jury, the 'spectre of sexual miscommunication loom(s) large' in the context of the mens rea of section 1 of the SOA.[90] Juries still need to be sure that there was clarity (from the defendant's perspective) in the complainant's communication to the defendant. In the context of a previous and even post, consensual sexual relationship this can be an extremely difficult hurdle to overcome.

Judicial Directions

In *Doody*[91] in 2008 the Court of Appeal said that balanced directions could, in certain circumstances in rape cases, be given to the jury. Balanced directions can be given where they are necessary to ensure fairness to the complainant, where there is a danger, in other words, of the jury jumping to conclusions in the absence of an appropriate warning. Any such comment must be uncontroversial – that is to say it must be general in nature. Since 2008, judicial comment has become a routine feature in cases on rape and sexual assault, although it is not compulsory.

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[89] Jen n14 7.
[90] Ellison and Munro, Better the Devil You Know n7 314.
[91] [2008] EWCA Crim 2557.

There is a question mark over its value. This is because there is a risk a direction will entrench rather than overcome any rape supportive beliefs held by jurors.[92]

It was not possible within the confines of this research project to put detailed questions to the judiciary on the question of judicial comment in the context of domestic sexual offending. Readings of the Crown Court Compendium in 2016, and then again in December 2019, suggest that while there have been improvements in the way that the judges are advised to direct juries, some concerns remain. There is still a risk, in other words, that the recommended directions will have the opposite effect to that intended.

The suggested wording for a specific direction on consent for judges in the context of domestic sexual offending is set out at section 20-21 under the heading of 'non-consensual activity within or immediately after a long-term relationship'. It reads:

> It is agreed that D and W have had a long-term sexual relationship. This is relevant to the question of whether or not W consented to D (specify act) on this occasion. That is because the situation between two people who have/have had such a long-term sexual relationship is quite different from a situation in which two people are strangers or have met one another only a few times. When two people have/have had such a relationship, there is likely to be some give and take between them in relation to any number of things, including their sexual relationship, and sometimes a partner who is not feeling enthusiastic may nevertheless reluctantly give consent to sex.[93]

This part of the direction, (which has not changed substantially since 2016), puts the idea that the victim's evidence may be construed as reluctant acquiescence, in light of the long-term sexual relationship that she and her partner have had, at the forefront of the jury's mind. Reluctant acquiescence ('sometimes a partner who is not feeling enthusiastic may nevertheless reluctantly give consent') is not offset by an example of where, when two people have an abusive relationship, consent might become submission. In other words there is no consideration given to the

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[92] Jennifer Temkin '"And Always Keep A-Hold Of Nurse For Fear Of Finding Something Worse": Challenging Rape Myths in the Courtroom' (2010) 13(4) New Criminal Review 710, 725.
[93] Courts and Tribunals Judiciary, *Crown Court Compendium Part One (2019) section 20-21* available at <https://www.judiciary.uk/publications/crown-court-bench-book-directing-the-jury-2/> accessed 15 May 2020.

possibility of a power imbalance, just like the old pre section 76 Serious Crime Act case law on harassment.[94]

The next section of the advice has been improved. In 2016, it continued 'this is not to say however that when two people are/have been in such a relationship it must follow that both of them will consent to any sexual activity that takes place'.[95] This suggested that, while it *does not have to* follow that both parties to a relationship will consent to any sexual activity that takes place, it *can* follow. This therefore contained strong echoes of the *rape within a relationship isn't really rape* belief which was unfortunate as the intention of the direction was to dispel such unhelpful rape supportive beliefs.

The direction now reads: 'when two people are/have been in a long-term sexual relationship it is not the case that both of them will consent to any sexual activity that takes place'. This wording is more neutral and is to be preferred. The direction finishes in much the same way as it did in 2016:

> One party is fully entitled to say "no" to the other regardless of their relationship. What you must decide in this case is whether W consented freely and by choice, even if reluctantly, to what took place or whether W did not consent but submitted to it. You must also decide whether D may have reasonably believed that W was consenting, taking into account all the evidence including the nature of the [previous] relationship between W and D.[96]

Both parts of this section could have the opposite effect to that intended. The first part deals with the actus reus: was she consenting? It contains a reference to a type of choice that may look like submission but is nevertheless a choice ('consented freely and by choice, even if reluctantly'), but contains no reference to a submission that may look like a choice, but is nevertheless submission (submission in the context of control).

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[94] This direction is drawn from the judgment of Pill L (as he was then) in *Mohammed Zafar* (No. 92/2762/W2) unreported 18 June 1993 CA. Pill LJ is the judge who decided both of the leading pre section 76 cases on harassment that are discussed in chapter four: *Widdows* and *Curtis.*

[95] Courts and Tribunals Judiciary, Crown Court Compendium (2016) 20-*21* available at <https://www.judiciary.uk/publications/crown-court-bench-book-directing-the-jury-2/> accessed 15 November 2018 .

[96] The Crown Court Compendium 2019 n93, brackets in original text.

The second part of this section deals with the mens rea: did he reasonably believe she was consenting? It asks the jury to consider whether, in light of the previous relationship, D may have reasonably believed her to be consenting but does not ask the jury to consider whether, in light of the previous relationship, D must have known that she was not consenting (as in Sarah's situation, for example). In other words, as has been noted with regard to other well-meaning judicial directions, 'quite unintentionally, the direction would appear to be ideally formulated to ensure that the false claim it highlights becomes more rather than less influential'.[97]

I accept that judges giving directions are in an awkward position. They have to safeguard the defendant's position even as they try to counter any unhelpful stereotypical beliefs. This balance is a delicate and difficult one to strike.[98] It is possible however that the recommended judicial direction 'what you must decide in this case is (a) whether V consented freely and by choice, albeit reluctantly, to what took place or whether she did not consent but submitted to it' gives little assistance. It merely brings the idea of reluctant acquiescence to the forefront of juries' minds without giving any guidance on the critical point of the distinction between reluctant sex and submission.

Juries need to consider the context – is there an imbalance of power between the defendant and the victim? Juries could be asked, for example, to consider the state of mind of the victim. Was she very afraid, terrified even, of the defendant? Did she have any reason to be afraid? Would the defendant have known that she was afraid? In the absence of physical evidence, and the presence of prior and/or subsequent consensual sex between the parties, some understanding of what an abusive power differential looks like is essential. In the absence of that understanding, it is not surprising that juries find it difficult to be sure that the defendant knew that the victim was not consenting.

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[97] Temkin, Always Keep A-Hold of Nurse n92 727.
[98] Louise Ellison and Vanessa Munro, 'Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials (2009) 49 British Journal of Criminology 363.

SUGGESTIONS FOR FURTHER WORK AND REFORM

It has been suggested that the pervasiveness of rape supportive beliefs is part of a more general prejudicial belief system centred around discriminatory views on gender/sex roles.[99] Temkin identifies factors that have been found to be associated with what she frames as 'rape myth acceptance' as: 'sex role stereotyping, adversarial sexual beliefs and the acceptance of interpersonal violence, [and] hostile attitudes towards women'.[100]

Many of the abusers discussed in chapter three displayed behavioural traits that could be attributed to these factors. Sarah, for example, described the sex role she was ascribed; Karen explained that she was a 'tart' for dressing the way that she did. The acceptance of interpersonal violence was present in all but one of the women's stories. Hostile attitudes to the survivors was certainly present in all of the stories, hostile attitudes to women in general was not a focus of the interviews but it would be interesting to see if this kind of generalised hostility was also present. Analysis of the data from this research project suggests a high correlation between the factors that Temkin identifies as associated with 'rape myth acceptance' and the perpetrators of coercive control.

Stark suggests that domestic rape would be better framed as part of coercive control.[101] He argues that 'stranger rape and IPSV [intimate partner sexual violence] have little in common.'[102] He states:

> The perpetrators and victims have different psychological and behavioural profiles and demographic characteristics. Stranger rape and IPSV occur in different settings; derive from different notices; incur different experiences of violation; and involve different risks of repeat, injurious, and/or fatal physical/sexual violence.[103]

[99] Jennifer Temkin, Jaqueline Gray and Jastine Barrett, 'Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study' (2018) 13(2) Feminist Criminology 205, 17; Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007).
[100] Temkin et al, Different Functions n99 17.
[101] Stark and Hester, Coercive Control: Update and Review n85.
[102] Stark, Forward n30 3.
[103] Ibid.

The logical conclusion of Stark's line of reasoning would be the inclusion of domestic rape within a domestic abuse offence. Judge Little was resistant to this idea. She said:

> I do think that controlling and coercive behaviour and rape are different things. I think one of the ways that people control and coerce people can be by the use of rape, but I do think it's important to keep the distinction between them, because rape is a very serious offence, and should never – to my mind it would be downgrading it to say, 'well it was part of the controlling and coercive behaviour so it just all gets dealt with as one' – I think controlling and coercive behaviour and rapes should be dealt with separately… the minute we start to downgrade rape we are taking a backward step. And I think even in the context of a domestic relationship rape should always be seen for the offence that it is, not as part and parcel of the way somebody was being treated in their relationship. That should be one offence, the rape should be another. I think that it is very important that it is still seen – because it is the ultimate act of power over a woman and it should in my view never be watered down or lessened, and therefore there should never be a sense of, 'well, it's just a domestic rape'.[104]

For Judge Little, the seriousness of rape means that it needs to be kept separate. Any attempt to incorporate the crime of rape into a more general domestic abuse offence would inevitably downgrade it.

Judge Harwood took a more pragmatic view. She said (on the question of incorporating rape into a domestic abuse offence):

> It does have the potential of almost dumbing it down. But at the moment the conviction rate within intimate relationships from my experience is at such an all-time low, that isn't it better that you create the right framework for juries to be able to understand what is going on in that relationship? Rather than worry about the title. I think that as long as the sentencing guidelines reflected that it wasn't seen as a lesser offence …[105]

This is an extremely difficult question and one that goes to the heart of the issues that are being discussed in this thesis. Is a separate domestic abuse offence, one that puts the power imbalance at the centre, and includes all of the different manifestations of that power imbalance - sexual abuse, physical abuse, psychological abuse – to be recommended? As Stark argues, 'the "rape is rape" approach throws the normative nature of IPSV and its typical context into the shadows'.[106] By this, Stark means that if you extract rape from the intimate partner

[104] Judge Little n2 9.
[105] Judge Harwood, n3 6.
[106] Stark, Forward n30 xxvii.

sexual violence ('IPSV') context, you lose much of what makes IPSV a wrong like no other.

It is possible to argue, however, that some manifestations of control have the potential to be so discrete as wrongs that they become a separate offence. It is clear that domestic homicide, for example, is the most serious manifestation of control. Nevertheless, the taking of someone's life is so serious, so qualitatively different as a wrong both in terms of the culpability of the defendant and the harm done to the victim that it *has* to be dealt with as a separate offence. Arguably the same could be said for the crime of rape. It is such an extreme manifestation of control that it needs to be identified and labelled as such.

Furthermore cases such as *Kowalski*, and the history of resistance to the recognition of domestic rape outlined in detail earlier in this chapter shows that this area of law is historically sensitive. In the past, domestic rape was treated differently to rape that was not domestic in a way that was extremely prejudicial. Long and insistent campaigning by women's groups eventually brought change. Bringing domestic rape within a domestic abuse statute would not be downgrading it. Sentencing guidelines could make clear that this was the case. Nevertheless, it would be reform that insisted on the *different* treatment of domestic rape and to the women's sector and survivors' groups this might appear insensitive.

An alternative to the inclusion of domestic rape within a domestic abuse statute might be to adopt the kind of compromise position taken by the Domestic Abuse (Scotland) Act 2018 (DASA), which I refer to in more detail in the following chapter. Section 1 of the DASA makes it an offence for a person to engage in a course of behaviour that is abusive towards a partner or an ex-partner. Section 2 defines abusive behaviour and includes behaviour that is 'violent'. Subsection 2(4) makes it clear that the reference to physical violence includes 'sexual violence'. 'Sexual violence' is not defined further in the Act, but the Guidance Notes are clear

that non-violent sexually abusive behaviour comes within section 2(4).[107] Technically, rape is a legitimate constituent part of a section one offence.[108] The Crown Office and Procurator Fiscal Service has made it clear that while domestic rape will always be charged separately, domestic sexual abuse that does not amount to rape can be charged as part of the section 1 DASA offence.[109]

This approach would fit with Temkin's idea of reform to create offences that are graduated. Temkin writes:

> Juries may not be willing to convict of rape men who obtain agreement to sex by the use of trivial threats, even though these threats were serious to the complainant…[a lesser offence] could be retained to give the prosecutor choices.[110]

'Trivial' does not seem the correct adjective in the context of experiences such as Sarah's, but it would be interesting to know what Sarah might think about the proposition. She might, for example, feel comfortable charging some of the incidents that she recounted as rape. The incident that she referred to as 'rape' when she was 'manhandled' down onto the bed, and the incident post-caesarean that she referred to as 'forced sex' might be two examples of incidents that could be charged as rape. In addition to the rape charges, a charge under section 1 DASA would allow the sexual abuse that occurred outside of these incidents to be particularised as part of the pattern of coercive control. Sarah was the only survivor interviewed for this project who spoke in any depth about her experiences of domestic sexual abuse. More research is needed firstly into how survivors experience sexual abuse in the context of coercive control, and secondly how they would view reform of the criminal law in this difficult area.

CONCLUSION

In 2006, Emily Finch and Munro concluded their then early assessment of the SOA with the observation that 'it is abundantly clear that the 2003 Act does not and

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[107] Domestic Abuse (Scotland) Act 2018 Explanatory Notes <http://www.legislation.gov.uk/asp/2018/5/notes> accessed 30 April 2019.
[108] Emma Forbes, 'The Domestic Abuse (Scotland) Act 2018: the Whole Story?' (2018) 22 Edinburgh Law Review 406, 409.
[109] Interview with Alistair MacCleod, Crown Office and Procurator Fiscal Service (Edinburgh 23 October 2019).
[110] Temkin, Rape n21 102.

cannot represent the end of the line for rape reform.'[111] This is still the case today. It is not possible to come to a conclusion on the future of sexual offences reform in this chapter, but the chief hurdles - the ambiguity of the wording of the SOA, the lack of guidance needed to balance the existence of rape supportive beliefs in the context of intimate sexual abuse, and the resulting difficulties with the communication of the boundaries between consent and submission - need to be addressed.

Framing sexual domestic abuse as part of a pattern of coercive control might help with some of the issues identified, but because of the extreme nature of the offence and the historical sensitivities explored in this chapter, it is my view that domestic rape will always need to be prosecuted separately as rape. This is an area where further research is urgently needed: in the first instance, the way in which survivors experience and articulate domestic sexual assault in the context of coercive control needs to be better understood. Secondly, existing work with mock jury trials could be built on to have a specific coercive control focus. How the 'pre-existing evaluative schema' that jurors bring to a courtroom affects the way that they respond to domestic rape in the presence of coercive control, and how to improve the guidance that is given to them, for example, needs consideration.

Recent studies confirm that defendants' barristers still use the rape supportive beliefs that exist about rape to undermine victims' assertions about consent.[112] Judicial direction as recommended in the Crown Court Bench Book in the context of domestic rape is unlikely to do enough to combat this. While it is important to remember that 'feminists have been urged not to write off legislation dealing with sexual assault where its failures are evident, but to recognise that success and failure exist side by side when it comes to inevitably controversial reforms of this kind,'[113] recent tabloid newspaper headlines suggest public unease at the fall in

[111] Finch and Munro, Breaking Boundaries n69 320.
[112] Oliva Smith and Tina Skinner 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials.' (2017) 26(4) Social and Legal Studies 441; Temkin et al Different Functions n99; Jennifer Gray and Miranda Horvath, 'Rape Myths In the Criminal Justice System' in Milne E, Brennan K, South N and Turton J *Women and the Criminal Justice System* (Palgrave 2018).
[113] Temkin and Ashworth, Rape, Sexual Assaults and the Problems of Consent n51 346.

number of successful prosecutions of rape cases.[114] Further research along the lines proposed in this chapter would help progress understandings of why this is the case.

[114] Owen Bowcott and Caelainn Barr, 'Just 1.5% Of All Rape Cases Lead To Charge Or Summons, Data Reveals' *The Guardian* (London 26 July 2019) available at <https://www.theguardian.com/law/2019/jul/26/rape-cases-charge-summons-prosecutions-victims-england-wales> accessed 16 May 2020; Lizzie Dearden, 'Only 1.7% of Reported Rapes Prosecuted in England and Wales, New Figures Show' *The Independent* (London 25 April 2019) available at <https://www.independent.co.uk/news/uk/crime/rape-prosecution-england-wales-victims-court-cps-police-a8885961.html> accessed 16 May 2020.

CHAPTER SEVEN: SECTION 76 SERIOUS CRIME ACT 2015

INTRODUCTION

In the last chapter I focused on the first legislative development to take place this century that is particularly relevant to the survivors of domestic abuse and coercive control: the Sexual Offences Act 2003. This chapter continues with a review of later legislative developments that lie at the heart of this thesis. It is divided into three parts. In part one I take up the story of the development of the criminal law where chapter five left off. I explain the review of the Protection from Harassment Act 1997 (PHA) that resulted in considerable amendments to the PHA. I also review other developments in 2012 - 2015 that led to the introduction of section 76 of the Serious Crime Act 2015 (section 76). In part two I review Parliament's intentions for section 76 via an analysis of the relevant parliamentary debates and I go on to assess section 76 itself. I conclude the chapter (part three) with a discussion of suggestions for further work and reform.

In essence, my assessment of the developments in this chapter consolidates the position already expressed in this thesis, that further reform is needed. Before the introduction of section 76, domestic abuse was prosecuted as set out in the previous three chapters, as an offence against the person, as harassment, as a sexual offence. None of these crimes account properly for the strategic patterns of control outlined in chapter three of the thesis, either in terms of the behaviour of the perpetrator or the harm experienced by the victim.

Section 76 was an opportunity to put this right. Recognising coercive control as a crime does represent significant progress. Unfortunately, Parliament focused on the shortcomings of the existing law (the legislative "gap") and did not give enough consideration to the behaviour (coercive control) that it was trying to regulate. As a result, while section 76 is innovative up to a point, it reflects mistaken assumptions as to the nature of coercive control. As a result, the 'controlling or coercive behaviour' construct set out in section 76 does not properly capture the

phenomenon of coercive control as set out in this thesis. For the avoidance of doubt, and as explained in chapter two, I use the label 'coercive control' in this thesis to describe the empirical phenomenon articulated originally by Evan Stark and developed by my work with survivors and Independent Domestic Violence Advisers as set out as a working model in chapter three. When I use the label 'controlling or coercive behaviour' I am referring to the construct set out in section 76 Serious Crime Act, which is the subject of this chapter. The fact that these two constructs, 'coercive control' and 'controlling or coercive behaviour' are not the same thing goes to the root of what this thesis concludes are the problems that persist with the criminalisation of domestic abuse in England and Wales.

There are three mistaken assumptions that I focus on in this chapter. The first is that coercive control is psychological, or emotional, abuse. The second is that there is a transactional moment of separation for a victim that is a useful legal boundary. The third is that focusing on the victim's response to coercive control is an appropriate way to define the offence. As a result of these mistakes, Deborah Tuerkheimer's mismatch between 'life' and 'law'[1] referred to in chapter five remains, as do many of the issues identified in the context of the old regime.

Developments since 2015 show how this could be improved upon: the Domestic Abuse (Scotland) Act 2018 (DASA) deals with all three of the issues raised above and is an example of what Evan Stark has referred to as a 'gold standard' for domestic abuse and coercive control legislation.[2] It could point the way for further reform in England and Wales. In the absence of that reform, I conclude that, while section 76 represents progress, the criminal law still does not allow for the proper recognition of the wrong of coercive control, nor is coercive control labelled effectively.

PART ONE: THE ROAD TO SECTION 76

[1] Deborah Tuerkheimer, 'Recognizing and Remedying the Harm of Battering: a Call to Criminalize Domestic Violence' (2004) 94(4) Journal of Criminal Law and Criminology 959, 980.
[2] Libby Brooks, 'Scotland Set to Pass "Gold Standard" Domestic Abuse Law' *The Guardian* (London, 1 February 2018) <https://www.theguardian.com/society/2018/feb/01/scotland-set-to-pass-gold-standard-domestic-abuse-law> accessed 28 March 2018.

I reviewed the PHA in detail in chapter five. The first significant development in the time period 2012 - 2015 took the form of substantial amendments to the PHA, one of which provided the template for the later section 76. Secondly, a new working definition of domestic abuse was introduced in 2012 which fed into the third development - Theresa May's governmental consultation of 2014-15 on the criminalisation of 'controlling or coercive behaviour'. These developments will be looked at in turn.

The Protection of Freedoms Act 2012

In February 2012 the Justice Unions' Parliamentary Group conducted an extensive review into the PHA. Their concluding report referred to Home Office research that suggested that the police chose to press charges under the lesser PHA, s 2 'harassment' offence over the more serious PHA, s 4 offence 'causing fear of violence'. This was true even where the nature of the offending in question meant that the PHA, s 4 was available.[3] This is because the section 2 offence was perceived to be 'easier to run with'.[4]

My empirical work with police supports this finding. DC Shell, for example, confirmed that he did not tend to use the PHA, s 4 charge 'technically, just because it is a definition of section 4, it does not mean that we will charge it'.[5] By this he meant that he just become he comes across behaviour that fits the definition of a section 4 offence, it does not mean that the defendant will end up being charged with a section 4 offence. He went on to explain, 'if you charge a lesser offence, they might plead guilty, or you might get an early magistrates'.[6] An earlier trial, a guilty plea, a trial in a lower court, all of these points made by DC Shell in favour of the lesser charge are examples of the section 2 charge being 'easier to run with'. This meant that the PHA, s 4 was 'rarely used'[7] and that the maximum sentence

[3] Justice Unions' Parliamentary Group, 'Independent Parliamentary Inquiry into Stalking Law Reform: Main Findings and Recommendations' [2012] <http://www.dashriskchecklist.co.uk/wp-content/uploads/2016/09/Stalking-Law-Reform-Findings-Report-2012.pdf> accessed 9 May 2017.
[4] Jessica Harris, *An Evaluation of the Use and Effectiveness of the Protection from Harassment Act 1997* Home Office Research Study 203 (Home Office 2000) 24.
[5] Interview with DC Shell (4 December 2017) 9.
[6] Ibid. More empirical work urgently needs to be done with magistrates on this issue: as stated in chapter two (methodology) it is regrettable that magistrates were not included as a class of respondent for this project.
[7] Justice Unions' Parliamentary Group, Independent Parliamentary Inquiry n3 12.

available under the PHA, s 2 (six months' imprisonment) was out of step with the more serious offences which were being prosecuted. As a result of the difficulties with the PHA s 4 and the limitations of the PHA s 2, the PHA was declared no longer fit for purpose in the context of stalking.

The enactment of the PHA followed an extensive parliamentary debate around the decision of whether or not to define stalking. This was reviewed in chapter five. The so-called "list" approach recommended by the then opposition party was abandoned because it was not thought necessary or helpful to attempt to define stalking in law. The Justice Unions' Report concluded that this had been a mistake: 'many believed that the chief shortcoming of the 1997 iteration of the PHA was its failure to name "stalking" in law'.[8] The report argued that 'behaviours' were 'being hidden and missed as they are recorded under different crime categories such as malicious communications, common assault, harassment and so on'.[9] The report concluded that 'the victim's perspective was missing' and that 'many incidents were not recorded as crimes and that stalking behaviour was therefore hidden'.[10]

Chapter four explained how Tuerkheimer describes that a failure to record aspects of behaviour as crimes leads to what she describes as "cloaking".[11] Cloaking is an exclusion of the crime, or part of the crime, from the criminal law meaning that harm experienced by the victim goes unrecognised and unacknowledged. Emily Finch uses the term "fragmentation" to describe the process by which the sum of parts of behaviours recorded under different crime categories amounts to less than a recognition of the behaviour as a whole.[12] It is interesting that the Justice Unions' Report appears to support Tuerkheimer and Finch as it finds that the failure to properly define the stalking behaviour being criminalised because they are 'hidden' (cloaked) and 'recorded under different crime categories' (fragmented) leading to behaviours being 'missed'.

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[8] Justice Unions' Independent Parliamentary Group, Independent Parliamentary Inquiry n3 2.
[9] Ibid. 11.
[10] Ibid.
[11] Tuerkheimer, Recognizing and Remedying the Harm of Battering n1.
[12] Emily Finch, *The Criminalisation of Stalking: Constructing the Problem and Evaluating the Solution* (Cavendish 2001).

Parliament addressed these concerns with the Protection of Freedoms Act 2012, which inserts two offences, sections 2A and 4A, into the PHA.[13] Section 2A introduces an offence of stalking by replicating the old section 2 but with a reference to 'stalking'. Section 2A of the PHA states that a person is guilty of an offence where he commits an offence under the existing section 2 offence *and* his course of conduct includes actions or omissions 'associated with stalking'.

Examples of actions or omissions 'associated with stalking' are given in exactly the list approach that was rejected by the government fifteen years previously. Examples include following, contacting, publishing any statement, monitoring the use by a person of the internet, email, loitering, interfering with any property, watching or spying. There is no new mens rea requirement. The possibility that the offence can be committed with an objective mens rea is included with the wording 'knows *or ought to know*':[14] the same as for the existing PHA s 2.

The new section 4A offence is entitled 'stalking involving fear of violence or serious alarm or distress' and has two limbs. The first limb, section 4A(1)(b)(i), states that a person whose course of conduct amounts to stalking and who causes another to fear, on at least two occasions, that violence will be used against them, is guilty of an offence. This is the old section 4 base offence (harassment involving fear of violence) but amended to include a specific reference to stalking. The second limb, section 4A(1)(b)(ii), states that conduct that amounts to stalking and causes the victim serious alarm or distress that has a substantial adverse effect on their day to day activities is an offence.

This second limb of section 4A is thus the only significant insertion made by the Protection of Freedoms Act 2012 to the PHA in that it constitutes a brand-new offence.[15] The "new" section 2A, and section 4A(1)(b)(i) (the so-called "first limb" of s 4A), simply add emphasis to the old section 2 and section 4 of the PHA. The potential to prosecute stalking always existed under the old section 2 and section 4

[13] Protection of Freedoms Act 2012, s 111.
[14] Emphasis mine.
[15] Neil Addison and Jennifer Perry, 'Will the New Stalking Legislation Deliver for Victims?' (2013) 177 Criminal Law and Justice Weekly 53.

offences. The Protection of Freedoms Act simply clarifies that this is so.

The second limb of section 4A creates a significant new offence which was hailed at the time as having the potential to 'fill an important gap in the protection offered to victims of stalking'.[16] It is this new offence that was used as a template for the construction of the later section 76. The new offence is especially innovative in that it does, finally, move away from the old 'fear of violence' paradigm. It also has less of an incident-specific focus. It moves further away from the necessity of temporal specificity with the wording 'substantial adverse effect'. It does not require the identification of any particular incident as 'especially alarming or serious'.[17] Instead, it looks at the overall effect on the victim's life. This is important because 'looking at the cumulative effect of stalking and indeed all harassment is what is important, rather than getting bogged down in the effect and nature of individual incidents'.[18] By defining the crime in terms of an ongoing 'substantial adverse effect' rather than an incident-based fear of something specific, the statute is moving towards a more contextual, less transactional approach that is helpful in the context of stalking.

As is to be expected, it is apparent from the guidance notes that were issued by the Home Office to accompany the amendments that the 'substantial adverse effect' was conceived by the government in terms of the harms that result from stalking. This is relevant because the same wording is used in the later section 76 (which is attempting to capture the harms that result from coercive control, not from stalking). The guidance notes state that:

> The second arm of the offence prohibits a course of conduct which causes "serious alarm or distress" which has a "substantial adverse effect on the day-to-day activities of the victim". It is designed to recognise the serious impact that stalking may have on victims, even where an explicit fear of violence is not created by each incident of stalking behaviour.[19]

The guidance goes on to give examples of what might constitute 'substantial

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[16] Ibid. 54.
[17] Ibid. 54.
[18] Ibid. 54.
[19] Home Office Circular 018/2012 available at <https://www.gov.uk/government/publications/a-change-to-the-protection-from-harassment-act-1997-introduction-of-two-new-specific-offences-of-stalking> accessed 26 July 2017.

adverse effect on day-to-day activities' as follows:

> The Home Office considers that evidence of a substantial adverse effect when caused by the stalker may include: the victim changing their routes to work, work patterns, or employment, the victim arranging for friends or family to pick up children from school (to avoid contact with the stalker), the victim putting in place additional security measures in their home, the victim moving home, physical or mental ill-health, the victim's deterioration in performance at work due to stress, the victim stopping /or changing the way they socialise.[20]

Changing work patterns, moving house etc are all indications of behaviour designed to minimise contact with a stalker, who is therefore conceived of as a stranger, or an ex-partner, but not as someone who is still in a relationship with the victim. As explained above this becomes important in the context of the later section 76 which I review later on in this chapter.

The 'Working Definition' of Domestic Abuse

As stated above, the Protection of Freedoms Act 2012 was not the only development in 2012. Previously, on 14 December 2011, the government launched a consultation on whether or not to change the cross-governmental working definition of 'domestic violence' (as it was then).[21]

The government first introduced a single working definition of domestic violence in 2004, for use across government and the public sector. The definition was not given statutory footing, but was used by government departments to inform policy development and by agencies such as the police, the Crown Prosecution Service and health services to help with the identification of domestic abuse. The 2004 definition was as follows:

> Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.[22]

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[20] Ibid.
[21] Home Office 'Cross-government Definition of Domestic Violence A Consultation' [December 2011] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157798/dv-definition-consultation.pdf> accessed 2 February 2018.
[22] Ibid. 6.

As part of the consultation, participants were asked whether they thought that coercive control should form part of the definition of domestic abuse. The vast majority of respondents (85%) indicated that it should.[23]

Feedback from consultees indicated that the incident-specific nature of the 2004 definition was unsatisfactory, as it 'equates domestic violence with discrete incidents of threats or assaults', which 'seriously distorts the nature of abuse experienced by the vast majority of abuse victims'.[24] Furthermore, 'the current (2004) definition fails to identify coercive control, the most common class of abuse cases in which victims seek outside assistance'.[25] As a result of the consultation, the new working definition, which also has no legislative status (and therefore received little or no attention in the legal literature), was published in September 2012:

> Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass but is not limited to the following types of abuse:
> - psychological
> - physical
> - sexual
> - financial
> - emotional
>
> Controlling behaviour is: a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.
>
> Coercive behaviour is: an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.[26]

This is in many ways a helpful definition that accurately defines and portrays both the "wrong" and the "harm" of domestic abuse.

In part this definition is helpful because it begins from the behaviour being defined

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[23] Ibid. 5.
[24] AVA Against Violence and Abuse, 'AVA's Response to Cross-government Definition of Domestic Violence: A Consultation' (document on file with me) 2.
[25] Ibid.
[26] Home Office, 'New Definition of Domestic Violence' (19 September 2012) <https://www.gov.uk/government/news/new-definition-of-domestic-violence> accessed 12 September 2017.

(what domestic abuse really looks like) rather than the existing criminal law legislative infrastructure (how fragments of domestic abuse are currently prosecuted). The reference to 'family members' is an issue,[27] but apart from that, this definition reflects the interconnected nature of the different physical and non-physical behaviour patterns that constitute abuse. It also recognises the perpetrator's strategic intent. Most importantly the definition correctly puts 'controlling, coercive or threatening behaviour' at the heart of the definition. Much of the wording for the definition is in fact taken from the response to the consultation drafted by Davina James-Hamman and Stark.[28] In particular, the definitions of 'controlling behaviour' and 'coercive behaviour' were drafted by Stark.[29]

Differing definitions of domestic abuse have hampered governmental and societal efforts to combat it, as was explained in chapter three. A clear working definition is an improvement, but it served to highlight that the existing criminal infrastructure was inadequate. The central component of the working definition – the controlling/coercive behaviour – was not captured by the criminal law. Furthermore the "working definition" had no legal status and did nothing to resolve the main issue created by *Hills*, *Curtis* and *Widdows*. Thanks to those judgments, which the Government later referred to as an 'unhelpful barrier',[30] the ability of police to take action in a situation where a victim was still in an intimate relationship with her partner was limited. In August 2014 the government launched a consultation to investigate exactly this issue.[31] It is this consultation that led directly to the passage of section 76.

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[27] I deal with this in more detail in the section on the Government Consultation of 2014-15 below.
[28] Home Office, 'Strengthening the Law on Domestic Abuse Consultation Summary of Responses' (December 2014) 5 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389002/StrengtheningLawDomesticAbuseResponses.pdf> accessed 31 July 2017; email from Evan Stark to me (2 February 2018).
[29] Ibid.
[30] 'Even where stalking and harassment legislation may be the appropriate tool to tackle domestic abuse, Court of Appeal case law is an unhelpful barrier.' (R v Curtis 1 Cr. App. R.31, and R v Widdows (2011) 175 J.P. 345).' Home Office, Summary of Responses n28 11.
[31] Home Office, 'Strengthening the Law on Domestic Abuse: A Consultation' [2014] 9 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/344674/Strengthening_the_law_on_Domestic_Abuse_-_A_Consultation_WEB.PDF> accessed 28 March 2018.

The Government Consultation Of 2014-15

The Home Office was clear from the start about the remit of the consultation: its scope was extremely narrow. This was a mistake. Parliament's intentions for section 76 can be understood partly as a response to this consultation, and the eight weeks that it was given (the consultation ran from 20 August - 15 October 2014), puts it in the camp of 'single-stage, executive controlled' legislation, which, it has been pointed out, 'tends to be fast and driven by Cabinet with limited or no opportunity for consultation or independent input'.[32] The equivalent consultation in Scotland (prior to the DASA) was much more extensive.[33] The English/Welsh consultation description states:

> This consultation is specifically focused on whether we should create a specific offence that captures patterns of coercive and controlling behaviour in intimate relationships, in line with the Government's non-statutory definition of domestic abuse.[34]

Many important issues were overlooked. There is no attempt to unpick or define 'patterns of coercive and controlling behaviour in intimate relationships'. Theresa May was clear: in her mind coercive control is non-violent behaviour. She explains: 'the consultation asks whether reinforcing the law to capture patterns of *non-violent behaviour* within intimate relationships will offer better protection'.[35] This assumption - that coercive control is non-violent behaviour - is not interrogated.

Moving on to the legal position, there is no suggestion that it might be appropriate to consider how, or to what extent, the existing legal infrastructure was capturing the behaviour patterns that constitute domestic abuse in general and coercive control in particular. The fact that a core part of the government's own definition of domestic abuse (the strategic intent) was not captured by the existing infrastructure might have suggested that a review of the regime was in order, not

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[32] Julia Quilter, 'Evaluating Criminalisation as a Strategy in Relation to Non-Physical Family Violence' in Marilyn McMahon and Paul McGorrery *Criminalising Coercive Control* (Springer 2020) 112.
[33] This included a consultation, public evidence from senior police, prosecutors, academics and survivors groups taken at six different meetings over a two month period, written evidence and private testimony from survivors of domestic abuse. See the Justice Committee, *Stage One Report on the Domestic Abuse (Scotland) Bill* (SP Paper 198, 16th Report, 2017) 47. See also my interview with Marsha Scott, Chief Executive of Women's Aid (1 December 2017).
[34] Home Office, Strengthening the Law on Domestic Abuse: A Consultation n31 5.
[35] Ibid. 8 (emphasis mine).

unlike the review of the sexual offences regime that took place before the introduction of the Sexual Offences Act 2003 that was the subject of chapter four.

Around 85% of respondents to the consultation felt that the law as it stood did not adequately protect the victims of coercive control.[36] The government's conclusions at the end of the consultation period are summarised as follows:

> On balance, we are persuaded that there is a gap in the current legal framework around patterns of coercive and controlling behaviour, particularly where that behaviour takes place in an ongoing intimate partner or inter-familial relationship. Non-violent coercive behaviour, which is a long-term campaign of abuse, falls outside common assault, which requires the victim to fear the immediate application of unlawful violence. [37]

The Home Office makes a number of problematic assertions in this extract I will review in turn. First: the conclusion begins with the reference to a 'gap in the current legal framework'. It has been pointed out that 'one of the most powerful tropes in criminalisation debates is the identification of the alleged "gap" that needs to be "filled".[38] One of the pitfalls of identifying a "gap" in this way is that it cements the surrounding legislative infrastructure.

The second part of the first sentence locates 'coercive and controlling behaviour' in two contexts: 'an ongoing intimate partner' context, and an 'inter-familial relationship' context. 'Inter-familial relationship' is not defined, but presumably the Home Office is referring to relationships within a family but not between intimate partners. The empirical research to date has focused on coercive control between intimate partners. More research is needed before it can be decided whether other relationships (between siblings, for example, or between parents and children) are affected by coercive control.[39]

The second sentence refers to 'non-violent coercive behaviour', and comments that this kind of behaviour falls outside the law on common assault. This is the "gap" referred to in the preceding sentence. This is a good example of where assuming 'a

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[36] Home Office, Summary of Responses n28 5.
[37] ibid.
[38] Quilter, Evaluation Criminalisation as a Strategy n32 124.
[39] Liz Kelly and Louise Westmarland, 'Time For a Rethink. Why the Current Government Definition of Domestic Violence is a Problem.' [2014] <http://www.troubleandstrife.org/2014/04/time-for-a-rethink-why-the-current-government-definition-of-domestic-violence-is-a-problem/> accessed 25 October 2017.

simple lacuna into which a new offence can be inserted to "fill" …. has the capacity to obfuscate the well documented problematic operation of current criminal laws'.[40] It is correct to state that non-violent coercive behaviour falls outside common assault. But what about violent coercive behaviour? The implication seems to be that it is already covered by common assault. This is not entirely correct. Violent behaviour per se falls within the law on assault. The Offences Against the Person Act 1861, however, as I explained in chapter four, is transactional, incident-specific, and does not take either a controlling perpetrator's strategic intent or the full extent of the harm he inflicts into account. Violent *coercive* behaviour is only partially captured by the law on common assault.

The other false implication is the one already touched upon above, that 'controlling or coercive behaviour' can be described as 'non-violent coercive behaviour'. The government working definition states that 'incidents of coercive, controlling or threatening behaviour' can encompass psychological *and* physical types of abuse.[41] Vanessa Bettinson and Charlotte Bishop, commenting on the Serious Crime Bill as it was in the summer of 2015, highlight this confusion as an obstacle. They argue that 'such a concept of coercive control is difficult to criminalise while… this separation of physical and non-physical forms of domestic violence and/or abuse does not reflect … the complex way that both physical and non-physical forms of behaviour often co-exist'.[42] My empirical work supports this. In chapter three, I explained how survivors describe a combination of violent and non-violent tactics. It is possible for coercive behaviour to exist in the absence of physical violence, but it is unusual.

The government continues:

> The law on stalking and harassment does not explicitly apply to coercive and controlling behaviour in intimate relationships. Indeed, as some respondents to our consultation pointed out, the law on stalking and harassment is not designed to capture the dynamic of sinister exploitation of an intimate relationship to control another, particularly where a relationship is ongoing. The element of control is not such a feature of stalking or harassment, which is generally intended

[40] Quilter, Evaluating Criminalisation as a Strategy n32 125.
[41] Gov.uk, 'Guidance Domestic Violence and Abuse' (2018) <https://www.gov.uk/guidance/domestic-violence-and-abuse> accessed 28 March 2018.
[42] Vanessa Bettinson and Charlotte Bishop, 'Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence' (2015) 66(2) Northern Ireland Legal Quarterly 179, 184.

> to intimidate or cause fear. Domestic abuse adds an extra layer to such intimidation, with perpetrators operating under the guise of a close relation or partner to conceal their abuse, and safe in the presumption that the victim is likely to want to continue a relationship despite the abuse. For these reasons, domestic abuse may be said to be more subversive than stalking.[43]

These observations are the most interesting of all, in light of the legislation that followed (section 76). The government correctly identifies that coercive control is not the same thing as stalking. As stated in chapter four, while there is no doubt that stalking and coercive control are highly correlated in that they are often simultaneously present,[44] stalking forms *part* of the controlling or coercive behavioural repertoire of a perpetrator. The government therefore recognises that, as different phenomena, coercive control and stalking require a different legislative approach. Despite this, the law that was designed to capture coercive control used the PHA as a template, as is discussed in more detail below.

PART TWO: SECTION 76 SERIOUS CRIME ACT 2015

Parliamentary Debate

Then Attorney General Robert Buckland introduced a new clause on 'controlling or coercive behaviour' into the Serious Crime Bill in January 2015, which was the government's major crime bill of 2014 – 2015. This clause is quietly tucked away in Part V of the Act under the heading 'Protection of Children and Others'. This seems unfortunate, in light of the Attorney General's rousing introduction to the committee: 'abuse is hidden behind the closed doors of far too many families. We must bring domestic abuse out into the open if we are to end it. The first step is to call it what it is: a crime of the worst kind'.[45] 'Protection of Children and Others' seems a far cry from 'call it what it is'.

With regard to coercive control and stalking, Buckland comments:

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[43] Home Office, Summary of Responses n28 11.
[44] In a study in Maine, stalking was found to occur within 80% of domestic abuse cases: Michael Sazl, 'The Struggle to Make Stalking a Crime: a Legislative Road Map Of How to Develop Effective Stalking Legislation in Maine' (1998) 23 Seton Hall Legislative Journal 57. This finding was mirrored by Jane Monkton-Smith in the UK: see Jane Monkton-Smith et al, 'Exploring the Relationship Between Stalking and Homicide' (Suzy Lamplugh Trust 2017) and also by Charlotte Barlow et al., 'Putting Coercive Control into Practice: Problems and Possibilities' (2020) 60(1) British Journal of Criminology 160.
[45] HC Deb, 20 January 2015, Vol 591, Col 171.

> I am sure that the Committee would agree that a person who causes someone to live in constant fear through a campaign of intimidations should face justice for their actions. If such a person is unknown to their victim or is known but unrelated they would be called a stalker… We must create a new offence that makes it crystal clear that a pattern of coercion is as serious within a relationship as it is outside one.[46]

Buckland would appear to be making the assumption that coercive control and stalking are much the same thing. Controlling or coercive behaviour is constructed as a kind of stalking within a relationship. The purpose of the new law on controlling or coercive behaviour is simply to overcome the barrier put into place by the Court of Appeal and the House of Lords - in other words, to criminalise 'stalking within a relationship' in the same way that the PHA criminalises 'stalking outside a relationship'. This shows a misunderstanding of both coercive control and stalking as empirical phenomena; it also assumes that this boundary is a useful marker around which to delineate behaviour that is coercive or controlling from that which is not.

Secondly, on the question of coercive control and physical violence Buckland says:

> In the consultation we identified a gap in the law - behaviour that we would regard as abuse that did not amount to violence. Violent behaviour already captured by the criminal law is outside the scope of the offence. Within the range of existing criminal offences a number of tools are at the disposal of the police and prosecution, which are used day in and day out. We do not want duplication or confusion; we want an extra element that closes a loophole.[47]

He thus adopts the assumption made previously by the Home Office that coercive control, like stalking, is behaviour that by definition does not involve physical violence. This is, as has been stated, empirically incorrect. Perhaps the thread that connects all of the above is his last sentence: 'we want an extra element that closes a loophole'.[48] It is possible that in his desire for an 'extra element' he is over influenced by the 'loophole'.

In other words, the Attorney General appears to construct his understanding of controlling or coercive behaviour around a legal lacuna that he has previously

[46] HC Deb, 20 January 2015, Vol 591, Col 172.
[47] Ibid.
[48] Ibid.

identified, and not the other way around. It would have made more sense to reverse that process, to begin with an understanding of coercive control, and then conduct a review of legislation. By approaching the project in terms of a legislative gap rather than as a (relatively) newly recognised form of behaviour in need of a fresh approach, the Buckland reified much of what was unhelpful about the old regime. The reporting of the new offence in the legal press at the time confirmed this impression, for example:

> Section 76 of the Serious Crime Act 2015 … creates an offence of controlling or coercive behaviour in an intimate or family relationship. The new offence is designed to close a gap in the law surrounding patterns of controlling or coercive behaviour in ongoing intimate or family relationships.[49]

In any event, the clause on controlling or coercive behaviour generated significant cross-party agreement and was adopted as the Serious Crime Act 2015, s 76:

> Controlling or coercive behaviour in an intimate or family relationship
> (1) A person (A) commits an offence if
> (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
> (b) at the time of the behaviour, A and B are personally connected,
> (c) the behaviour has a serious effect on B

I use the rest of this chapter to reflect on the constituent parts of section 76. Throughout, I report on how section 76 has been interpreted by the courts so far, drawing on my interviews with some of the judges and police who have been involved with these early cases and the sentencing decisions that have been reported to date. The last part of the chapter concludes with some suggestions for further reform.

Section 76(1)(a) the conduct element of the offence

Repeatedly or continuously

Section 76(1)(a) deals with the criminal conduct itself. The first innovative step is the abandonment of any reference to a "course of conduct". The original intention was to use the PHA course of conduct model, or to define the conduct element

[49] Joanne Clough, 'Criminal Law Legislation Update' [2016] Journal of Criminal Law 3, 3.

around a single "incident" of controlling or coercive behaviour.[50] The inadequacy of the course of conduct model, and the tendency of some judges and legal academics to 'lapse back'[51] into incident specific analysis, was highlighted in chapter five. Instead, section 76(1)(a) states that A commits an offence if A 'repeatedly or continuously' engages in controlling or coercive behaviour. This aroused suspicion in the legal literature, with the meaning of repeatedly or continuously causing concerned questions such as: 'how consistent does D's controlling or coercive behaviour have to be in order for it to be repeated or continuous?'.[52]

In fact, repeatedly and continuously appear to be given their ordinary meanings and this marks significant progress. It allows the victim to move away from dates/times of "incidents" of control, and instead take a more contextual approach, which is more in line with the way in which victims "story" their experiences. This conclusion (that the move away from an incident specific focus is workable and working) is supported by a review of the first 107 section 76 cases which concluded: 'none of the reported cases in our research suggests that there have been any noticeable issues in relation to the prosecution needing to establish particulars such as dates, times and locations for alleged behaviours'.[53]

Judge Little, who has presided over three section 76 trials, agreed that juries understand and like the wording 'repeatedly or continuously'. She felt that it was appropriate to move away from the course of conduct approach taken by the PHA: 'harassment is a different thing – there has to be that – minimum number before it can be considered to be harassment, but coercive and controlling behaviour is a different thing.'[54] It is possible that the new wording successfully allows for a move

[50] Serious Crime Bill 2014-2015, Notices of Amendment 7 January 2015, House of Commons Public Bill Committee Serious Crime Bill 2014-2015 Written Evidence (22 January 2015) SC12 as cited in Bettinson and Bishop, Discrete Offence n42 191.
[51] Charlotte Bishop, 'Domestic Violence: The Limitations of a Legal Response' in Sarah Hilda and Vanessa Bettinson (eds), *Interdisciplinary Perspectives on Protection, Prevention and Intervention* (Palgrave Macmillan 2016) 68.
[52] Karl Laird, 'Parts 5 and 6 of the Serious Crime Act 2015 – More Than Mere Miscellany' (2015) Criminal Law Review 789, 800.
[53] Paul McGorrery and McMahon, 'Criminalising "the Worst" Part: Operationalising the Offence of Coercive Control in England and Wales' (2019) 11 Criminal Law Review 957, 963.
[54] Interview with Judge Little (20 March 2018) 3.

away from the tendency for judges to 'lapse back'[55] into an incident-specific focus.

Lack of a definition of controlling or coercive behaviour

An 'interesting anomaly'[56] with the conduct element, however, is the lack of a definition of controlling or coercive behaviour . The phrase 'controlling or coercive' in 1(a) is given no further explanation. Even the construct of 'controlling or coercive' is awkward, with the use of the conjunction 'or' potentially suggestive of a further fragmentation of meaning. In fact, 'or' as a conjunction can be used to connect *possibilities* as well as alternatives, and there has been no suggestion in either the academic or the policy based literature that the government's intention is to fragment coercive control into 'controlling' and 'coercive' behaviour as alternatives from a legislative/crime category perspective.

The statutory guidance issued by the Home Office further to section 77 (the Statutory Guidance) does define 'controlling' behaviour and 'coercive' behaviour separately, but there is no indication that there is an expectation that the one will exist *without* the other, rather that they work together to encompass a behaviour that is criminal via its manifestation of both. Stark himself, while he *describes* the different aspects of coercive control separately in his book does not intend the reader to assume that the 'coercion' and the 'control' that make up coercive control can exist in isolation.[57] Certainly the possibility of 'controlling' behaviour existing as a separate phenomenon to 'coercive behaviour' was not raised by any of the survivors, IDVAs, police or judiciary that I spoke to for this project. It is also not raised by the Court of Appeal in any of the first thirty or so reported cases on section 76.

A clumsy construction notwithstanding, early research into implementation of the new offence suggest that the lack of definitional clarity is a problem, because it means that services do not understand controlling or coercive behaviour and are

[55] Bishop, Domestic Violence n51 68.
[56] Bettinson and Bishop, Discrete Offence n42 192.
[57] Evan Stark, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press 2007) 228.

not prepared to report, prevent or prosecute it as a result.[58] The low prosecution rates to date would support this: the most recent ONS report records only 455 successful prosecutions in the last year.[59] The Attorney General explained the decision not to include a definition of controlling or coercive behaviour as follows:

> The Government's new clause has no reference to domestic violence or domestic abuse. That is deliberate. We are dealing with specific behaviour that can be characterised as coercive or controlling, but that should not be the subject of over-prescriptive statutory definition, which would do a disservice to victims… we did not fall into that trap when it came to the law on stalking and harassment. We should not fall into it now with the law on coercive and controlling behaviour within the context of domestic abuse.[60]

In fact, the issue of how to define harassment and/or stalking caused Parliament considerable difficulty in the context of the PHA, as was explained in chapter four. The decision not to define stalking was eventually reversed (as explained above) by the Protection of Freedoms Act 2012. A definition of stalking was inserted into the PHA precisely because it was recognised that stalking consists of interlinking and complicated behaviour patterns and therefore is especially in need of clear labelling. There was a realisation that the PHA as it stood, without a definition, missed an opportunity to fulfil the educative function of the criminal law. It is thus odd that the Attorney General states 'we did not fall into that trap when it came to the law on stalking and harassment'. If indeed there was a trap, it was not to define stalking and harassment, a misstep that was corrected with the "list" approach introduced by the Protection of Freedoms Act 2012.

The final reason that a lack of a definition was a mistake relates to the confusion over what controlling or coercive behaviour is. Does it incorporate physical abuse? Stark and Michael Johnson, two of the most prominent academic commentators on coercive control (whose work is reviewed in detail in chapter three) are both clear

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[58] Cassandra Wiener, 'Seeing What Is Invisible in Plain Sight: Policing Coercive Control' (2017) 56(4) Howard Journal of Crime and Justice 500. See also Iain Brennan et al, 'Service Provider Difficulties in Operationalizing Coercive Control' (2019) 25(6) Violence Against Women 635.

[59] ONS, Domestic Abuse in England and Wales: year ending November 2019, para 8 available at <www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2019#prosecution-and-conviction-outcomes> accessed May 24 2021.

[60] HC Deb, 20 January 2015, Vol 591, Col 172.

that coercive control usually includes physical and non-physical behaviours.[61] My empirical work with survivors and IDVAs supports Stark and Johnson on this.

The Statutory Guidance suggests that there is ambiguity even in the Home Office as to what behaviours should, and should not be charged further to section 76 and what should be charged separately.[62] The definition contained within the Statutory Guidance is clear: controlling or coercive behaviour includes behaviours that are physically violent as well as behaviours that are psychologically and/or emotionally abusive. Furthermore, on the following page, under the heading 'Types of Behaviour' the Statutory Guidance helpfully includes a list of behaviours that may be associated with controlling or coercive behaviour. It explains that the types of behaviours listed 'may or may not constitute a criminal offence in their own right'. Both physical and sexual violence are included in the list.

The Statutory Guidance seems to be suggesting that the CPS has a degree of flexibility as to how it uses the various criminal charge options open to it in the context of domestic abuse. Certainly the approach taken to date by the CPS and the courts is inconsistent. There is ambiguity as to whether controlling or coercive behaviour incorporates violent offending, or whether violence is something that needs to be construed as separate to (rather than part of) the section 76 offence.

A review of early sentencing decisions confirms this inconsistency. In *Barratt*,[63] for example, the Court of Appeal observes that

> In our judgment, a sentence of 30 months imprisonment before a reduction for the guilty plea for the offence in this case of controlling and coercive behaviour is appropriate and is not manifestly excessive, given the conduct involved. The offence involves a sustained period of abuse and violent and controlling conduct by the appellant towards his former partner. There was prolonged and serious aggression and violence.

The Court of Appeal in *Barratt*, in other words, seems to be making the assumption

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[61] Stark, Coercive Control n58; Michael Johnson, *A Typology of Domestic Violence Intimate Terrorism, Violent Resistance, and Situational Couple Violence* (University Press 2008).
[62] Home Office, Controlling or Coercive Behaviour in an Intimate Relationship Statutory Guidance Framework (Home Office December 2015) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf accessed 7 May 2021.
[63] [2017] EWCA Crim 1631.

that controlling or coercive behaviour incorporates violent behaviour. The 'conduct' which comprises the section 76 offence includes violent conduct. In *Conlon*, however, the Court of Appeal took a different approach. It said: 'The new offence targets psychological abuse in which one partner to a relationship coerces or controls the life of the other without necessarily or frequently using threats or violence.'[64] Thus in *Conlon* although the Court of Appeal leaves open the possibility that violence can be used (whether this is alongside, or as part of, the controlling or coercive behaviour is not entirely clear), the main purpose of the offence is to target psychological (non-violent) abuse.

Challen[65] is also interesting on this point. *Challen* is not a sentencing decision, but a review of a murder conviction. Sally Challen killed her husband Richard in 2010, and the Court of Appeal were asked to consider whether the criminalisation of coercive control constituted new evidence in that it encouraged a legitimisation, from a criminal law perspective, of Sally's experiences of coercive control and her resulting mental state at the time of the homicide. The Court of Appeal, therefore, was being asked to consider the impact of the introduction of the section 76 offence, and the high profile nature of the judgment makes it potentially influential and therefore important. At paragraph [35] Hallet LJ explains that:

> Parliament enacted s. 76 of the Serious Crime Act 2015 to make it a criminal offence to exercise coercive control over one's partner. S. 76 criminalises a pattern of abusive behaviour, the individual elements of which are not necessarily unlawful in themselves.

As violence in unlawful in itself, this suggests that Hallet LJ leaning towards constructing controlling or coercive behaviour as non-violent abuse. The use of the word 'necessarily' implies a degree of ambiguity, so it could be said that Hallet LJ is not ruling out the inclusion of violent offending.

Sentencing is the subject of a full discussion later in this chapter, but present in many of the sentencing decisions is evidence of the difficulty caused by the lack of clarity with regards to what, exactly, constitutes controlling or coercive behaviour.

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[64] [2017] EWCA Crim 2450 [26].
[65] [2019] EWCA Crim 916.

In *Conlon,* for example, there is evidence of violence which is constructed as separate to controlling or coercive behaviour and which goes uncharged as a result. Robert Conlon was charged separately with one assault occasioning actual bodily harm, but there are numerous references throughout the judgment to his *frequently* violent behaviour to the victim. For example, paragraph 4 of the judgment states:

> While on police bail, on 8th November 2015 the appellant jumped on top of the complainant when she was in bed, she screamed and to stop her screaming the appellant put his fingers in the complainant's mouth. The neighbours again contacted the police and the appellant was arrested. On that occasion the complainant told the police the appellant controlled every aspect of her life.[66]

Paragraph 8 refers to the fact that 'on occasions the complainant reported that the defendant had been violent to her, pinning her to the wall and shouting at her.'[67] In paragraph 13 there is a reference to the defendant punching the victim in the right breast. Paragraph 18 of the judgment reports: 'In anger he repeatedly punched the complainant to the head and face, kicked her to the back and pulled her by the hair to prevent her from leaving.'[68]

None of the references to violence in paragraphs 8, 13 or 18 are charged separately (the assault occasioning actual bodily harm charge relates to yet another violent episode). The violence exhibited by Conlon in this case is very typical of the controlling or coercive behaviours that I have described in previous chapters, and, indeed of behaviours evident in other section 76 reported cases.[69] This is a good example of a continuing mismatch between life and law in the area of coercive control. In other words, if an offence of "psychological abuse" as something separate to "physical violence" is constructed then this has the potential to mean that a significant amount of violence goes uncharged.

This point was made by the Court of Appeal in *Berenger*.[70] Joshua Berenger was charged with one count of controlling or coercive behaviour and one count of

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[66] Ibid 4.
[67] Ibid 8.
[68] Ibid 18.
[69] See, for example, *Ramskill* [2021] EWCA Crim 61, *Dalgarno* [2020] EWCA Crim 290, *Holden* [2019] EWCA Crim 1885 and *Berenger* [2019] EWCA Crim 1842.
[70] [2019] EWCA Crim 1842.

assault occasioning actual bodily harm contrary to section 47 Offences Against the Person Act 1861 (ABH). The Court of Appeal observed that

> That controlling behaviour took a number of forms of an essentially non-violent, but nevertheless, coercive kind. However, in addition he had also been violent towards her on a number of occasions … he had on occasions pulled her hair, ripped her clothing, punched her to the face, threatened her with a knife, spat in her face, stamped on her, thrown a drink on her, elbowed her to the face and head butted her.[71]

This use of 'in addition' in the second sentence suggests that the controlling or coercive behaviour is being constructed as separate to physical violence. The Court of Appeal recognises that this is problematic:

> For reasons which we have not had to investigate, these serious offences of violence were charged as coercive or controlling behaviour which is a new offence designed to capture conduct of that description specifically when it does not involve some other more serious substantive offence.[72]

The 'solution' proposed by the Court of Appeal in this case is that violence should be properly charged separately.[73] Especially in relation to the 'low-level' violence that is so typical of coercive control, this is a step backwards – the incident-specific nature of the OAPA is inconsistent with victims' experiences of physical abuse that are consistent and ongoing.

If it is not always possible to charge low level violence separately, the same cannot be said, perhaps, about one off serious incidents of violence that amount to inflicting grievous bodily harm. For the same reasons that were put forward in the preceding chapter in the context of rape, there is an argument to suggest that serious violence that amounts to grievous bodily harm could - or even should - be charged separately. Survivors that were interviewed for this research tended to remember specific incidents of serious violence in a way that is more compatible with an incident specific focus. Is the infliction of grievous bodily harm so discrete as a wrong that it becomes a separate offence? I argued in the previous chapter that the taking of someone's life is an example of a wrong that is so serious, so qualitatively different as a wrong both in terms of the culpability of the defendant

[71] Ibid [3].
[72] Ibid [12].
[73] Ibid [22].

and the harm done to the victim that it *has* to be dealt with as a separate offence. I said that arguably the same could be said for the crime of rape. Could the same be said for the infliction of grievous bodily harm? I come back to this point with the discussion of the Domestic Abuse (Scotland) Act 2018 (DASA) below.

To conclude, if the physical and psychological aspects of coercive control are separated this makes it more difficult to prosecute both fragments. Survivors will still have to pinpoint ongoing abuse to specific dates on which particular assaults took place, which is often difficult in the context of low level physical abuse that is ongoing. Coercive control is harder to understand in the absence of the physical abuse that often underpins it. In other words, 'the binary juxtaposition of physical and psychological/emotional abuse fails to capture the embodied physicality and brutality of coercive control'.[74] As explained in chapter three, the victim obeys the perpetrator because she has reason to be frightened of him. The physical assaults are often (not always) the reason.

Early research into media reports of the first cases suggest that police and CPS are struggling to be consistent on the question of how to charge section 76. Should "incidents" of violence be charged separately? Should "on-going" violence be simply 'part of the factual matrix constituting the course of controlling or coercive conduct'?[75] Or can low-level day to day violence be ignored altogether?

The authors of this early research conclude that 'given this apparent conflict between the sociological and legislative conceptualisations of coercive control, it is perhaps unsurprising that the various police forces in England and Wales have taken what seem to be quite disparate approaches to charging alleged offences.'[76] Some forces charge violence separately.[77] Some put it forward as evidence of the controlling or coercive behaviour.[78] In some cases there is no mention of physical or sexual violence,[79] which could mean that there was not any, or could mean that

[74] Adrienne Barnett, '"Greater Than The Mere Sum of its Parts": Coercive Control and the Question of Proof' [2017] Child and Family Law Quarterly 379, 380.
[75] McGorrery and McMahon, Criminalising "the Worst" Part n54 964.
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Ibid.

the relevant force has decided to leave it out altogether. A legal definition of 'controlling or coercive behaviour' that would work alongside (rather than in opposition to) the government's own working definition of domestic abuse would help clarify this muddle.

The Scottish Approach

In this respect there may be lessons to learn from Scotland, who have taken a different approach. The Domestic Abuse Scotland Act (DASA) received Royal Assent on 9 March 2018. Referred to as 'one of the most radical attempts yet to align the criminal justice response with contemporary (feminist) conceptual understandings of domestic abuse as a form of coercive control'[80] newspapers reported on its novel approach - ie that a central feature of this new Scottish law is that 'the legislation will cover not only physical abuse but psychological abuse and controlling behaviour'.[81] Extensive research was conducted by the Scottish Parliament Justice Committee over a ten year period prior to the drafting of the Bill.[82]

One of the key questions considered by the Scottish Government was the issue of whether to follow the English approach, and 'create an offence which is specifically limited in scope to dealing with psychological abuse and coercive and controlling behaviour in a relationship which is of a kind that could not necessarily be prosecuted under the existing criminal law', or

> To provide for a general offence of 'domestic abuse' that covers the whole range of conduct that can make up a pattern of abusive behaviour within a relationship: both physical violence and threats which can be prosecuted using the existing criminal law and other behaviour mounting to coercive control or psychological abuse, which it may not be possible to prosecute using the existing law.[83]

The reason given for taking the second approach is as follows:

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[80] Michele Burman and Oona Brooks-Hay, 'Aligning Policy and Law? The Creation of a Domestic Abuse Offence Incorporating Coercive Control' (2018) 18(1) Criminology & Criminal Justice 67, 78.
[81] Ibid.
[82] See n33. See also Justice Committee, Stage One Report n33 para 47, and interview with Marsha Scott, Chief Executive of Women's Aid (Edinburgh, 22 October 2019).
[83] The Scottish Government, 'A Criminal Offence Of Domestic Abuse Scottish Consultation Paper' (Scottish Government, March 2015 para 3.1) available at <https://www2.gov.scot/Resource/0049/00491481.pdf> accessed 28 June 2019.

> Where the criminal conduct in question consists of an on-going campaign of abuse which may comprise physical and or sexual assaults, threats, the placing of unreasonable restrictions of the victim's day-to-day life and acts intended to humiliate or degrade the victim, we consider there is a strong case for allowing the prosecution the flexibility to treat it as all "of a piece" and enabling the ambit of an offender's abusive behaviour to be labelled within a single offence, where considered appropriate to do so. The alternative would require that certain aspects of a course of conduct amounting to domestic abuse must be labelled as separate offences because they fall outwith the scope of the "domestic abuse" offence.[84]

That this was to be the preferred approach is then confirmed by the Justice Committee report on what became the DASA:

> The new offence provides for a definition of abuse expressly encompassing both physical and psychological abuse ... The Scottish Government took the decision to include both physical and psychological abuse within the new offence in order to enable prosecutors to include all acts of abuse in a single charge as evidence of a course of conduct, rather than having to bring a separate charge for the physical aspect of the abuse.[85]

The Scottish Government, having listened to the experiences of survivors of domestic abuse, decided to give the prosecution the flexibility to include the 'ambit of an offender's abusive behaviour to be labelled within a single offence'[86] specifically to address the fragmentation issue caused by the separation of physical and psychological aspects of domestic abuse. A single offence is better able to reflect harm that is experienced as a continuum: 'the rationale for merging all abusive behaviours into one criminal charge is a recognition that abuse is often experienced as a continuum'.[87] The infliction of grievous bodily harm is included within the DASA offence and it is not intended that it should be charged separately, but the possibility is left open, ie it *could* be charged separately.[88]

To sum up, the Scottish Government deliberately did not seek to plug a gap, and the benefit of this approach is that it narrows Tuerkheimer's gap between life and law. The legislation more correctly mirrors the behaviour it regulates. Instead, in England and Wales, 'the separation of the physical and psychological aspects of

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[84] Ibid.
[85] Justice Committee, Stage One Report n33, para 4. For academic commentary see Emma Forbes, The Domestic Abuse (Scotland) Act 2018: The Whole Story?' (2018) 22 Edinburgh Law Review 406.
[86] Scottish Government, A Criminal Offense of Domestic Abuse Scottish Consultation Paper n87 para 3.1.
[87] Forbes, The Domestic Abuse Scotland Act n89 406.
[88] There is a potential, however, for serious physical violence (as well as rape) to be charged separately if otherwise there would be an issue with corroboration – a uniquely Scottish evidential problem.

coercive control cause problems for the prosecution of both'.[89] It is too early to fully assess the practical implications of the Scottish approach, in particular with regard to the possibility of the inclusion of the infliction of serious physical violence within one domestic abuse offence. My preliminary view is that this flexibility, that violence can be charged as part of a course of conduct or as individual stand alone offences, will give the prosecution helpful flexibility. This is an area where further research will be needed, as it has important implications for the points made earlier in this chapter around whether or not serious violence needs to be charged separately. There are also implications for sentencing decisions which are reviewed in detail at the end of this chapter.

Section 76(1)(b) The Circumstances Element of the Offence

Section 76(1)(b) deals with the necessary circumstances of the offence. At the time of the behaviour, defendant and victim must be 'personally connected'. Subsection 76(4) states that two people are personally connected if they are in an intimate personal relationship (but not necessarily living together); or, if they live together and are members of the same family; or, if they live together and have previously been in an intimate personal relationship. This is at once too narrow and too wide. It is too narrow because it means that section 76 is not always available to protect a victim who is trying to separate from her abusive partner. The partner who has ended her relationship and who is no longer living with the perpetrator does not come within section 76(4).

The difficulties with using the moment of separation as a legal boundary were explored in some detail in chapter five. Firstly, separation rarely exists as a transactional moment.[90] Secondly, if identifying the moment of separation is difficult, it is also, from the survivor perspective, not necessarily that significant. This is because the perpetrator's controlling intent does not change with the end of

[89] Cassandra Wiener, 'From Social Construct to Legal Innovation: the Offence of Controlling or Coercive Behaviour in England and Wales' in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control* (Springer 2020) 168.
[90] Deborah Tuerkheimer, 'Breakups' (2013) 25 Yale Journal of Law and Feminism 51; Interview with Karen (6 October 2016); Interview with Kim (24 November 2016); Interview with Sarah (29 June 2016) 1.

the relationship.[91] Karen comments: 'I am obviously still "in it", but obviously most people are anyway as it doesn't actually generally go away, that's the sad thing.'[92] Finally leaving a relationship is dangerous, because the controlling behaviours often intensify once a perpetrator fears that his relationship with his victim is over.[93]

Judge Harwood became aware of this section 76 limitation - that it does not apply where a couple have separated and are no longer living together - for the first time in her interview with me. She commented:

> Well that is definitely a change that needs to happen. As you will know from your research, and I know from my limited experience, very often the controlling and coercive behaviour is ongoing … If you have had the strength to leave - we are suddenly not supporting those people? They have got the legislation wrong, haven't they as they are probably missing about 50 or 60% of the people who need to be protected? Those that manage that to escape but are still being controlled? That has got to be wrong. We have to change the law.[94]

Early research into the first media reports of cases concludes that limiting the application of section 76 to current partners in this way has caused police and CPS considerable confusion. In some cases behaviour which post-dated the relationship appeared to be included in the evidence put forward in court of the section 76 charge.[95] This has potentially serious implications for the validity of the criminal sanction.

Subsection 76(6) defines 'members of the same family' for the purposes of section 76(4). This part of the definition is unnecessarily wide. The defendant and victim are members of the same family, and therefore personally connected, if they are 'relatives' (section 76(6)(c)). There is, as yet, not enough research on the important question of the extent to which coercive control might apply to family relationships. It is likely that coercive control is perpetrated almost always by men who are, or who have been, in an intimate relationship with their victims. From the clear labelling perspective it is therefore detrimental to draft the offence so widely that it could include, for example, an overbearing parent or a controlling sibling.

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[91] Sarah n94; Survivors Focus Group (8 September 2016).
[92] Karen n94 1.
[93] Tuerkheimer, Breakups n94.
[94] Interview with Judge Harwood (21 May 2018) 9.
[95] McGorrery and McMahon, Criminalising "the Worst" Part n54.

Some police expressed confusion on this point at interview.[96]

The Scottish Government were of the opinion that it was important to limit the DASA to abusive intimate partners for precisely this reason.

The Justice Committee reported that:

> At the start of oral evidence-taking, Scottish Government officials informed the Committee that, in prior Government consultations the question of what types of relationship to include in legislation had been put and that "there was strong support for an offence that relates to partners and ex-partners, because there is such a particular dynamic to that type of abuse."[97]

Section 1 of the DASA restricts the offence to a 'partner or ex-partner'.[98] There have been prosecutions of cases involving non partners in England and Wales, some of which have been reported in the media. Often in these cases the perpetrator was convicted of extracting money from his parents/adopted parents. Many of the indicators of coercive control as set out in chapter three (the coercive intent, for example, or the desire to control victim behaviour) appear to be absent.[99] One of the concerns expressed by the Scottish Government during the consultation process was that 'extending the legislation to cover other familial relationships could lead to a dilution and diminution of the understanding of and response to domestic abuse'.[100] It is not possible to draw firm conclusions from the limited coverage of cases in the newspaper reports, but the early signs appear to support this concern.

One last point is relevant in relation to section 1 of the DASA - and that is the use of

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[96] See DC James' comments on the difficulties of trying to use s. 76 to prosecute in the context of a difficult mother-daughter relationship: Police Focus Group (30 November 2016) 3.
[97] Justice Committee, Stage One Report n33 para 74.
[98] Domestic Abuse Scotland Act (2018), s 1.
[99] CPS, 'Man Sentenced For Controlling and Coercive Behaviour Against His Mother' (26 March 2019) available at <https://www.cps.gov.uk/london-north/news/man-sentenced-controlling-and-coercive-behaviour-against-mother> accessed 26 June 2019; Andrew Bardsley, 'This Bully Terrorized His Adoptive Mother and Demanded Booze Money' *Greater Manchester News* (Manchester, 26 February 2019) available at <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/daniel-beech-openshaw-manchester-court-15885131> accessed 26 June 2019; Emily Walker, 'Crawley Man Banned From Seeing Mother After Months of Bullying' *The Argus* (Brighton, 19 March 2018) available at <https://www.theargus.co.uk/news/16097510.crawley-man-banned-from-seeing-mother-after-months-of-bullying/> accessed 26 June 2018; Stuart Able, 'The Evil Grandson Who Controlled His Own Family and How They Got Him Back' *The Plymouth News* (Plymouth, 6 June 2018 available at <https://www.plymouthherald.co.uk/news/plymouth-news/evil-grandson-who-controlled-family-1647659> accessed 26 June 2019.
[100] The Scottish Government, A Criminal Offence of Domestic Abuse Scottish Consultation Paper n87 6.

'partner or ex-partner' as the relational remit for the application of the offence. This effectively deals with all of the problems generated by the more limiting 'personally connected' construct of section 76. There is no evidence, interestingly, that the Scottish Government specifically discussed this point, but it is perfectly possible that they never saw the need. In other words, an assumption was made at some point by all concerned that it made sense for the new offence to apply to partners and ex-partners and this assumption was (correctly in my view) never challenged.

Section 76 (1)(c) The Result Element of the Offence

Section 76(1)(c) is the result element of the crime and is defined in terms of the effect that the perpetrator's behaviour has on his victim. Section 76(1)(c) states that the controlling or coercive behaviour is an offence only where it has a 'serious effect' on the victim. 'Serious effect' is defined in subsection (4): if it causes the victim to fear, on at least two occasions, that violence will be used against the victim or if it causes the victim serious alarm and distress which has a substantial adverse effect on her usual day-to-day activities. This mirrors the wording of the new section 4A PHA (as inserted by the Protection of Freedoms Act 2012) that was discussed above. Using this construct thus has the advantage that it is familiar, which has the potential to be helpful for police and prosecutors.

Familiarity is only helpful, however, if the harm experienced by the victims of coercive control is properly captured by section 76(1)(c). The case law on the offences against the person regime that I referred to in chapter four limited the recognition of emotional distress to diagnosed clinical disorders. It was suggested that the PHA was in part a political response to Parliament's perception (guided by the media) of the inadequacy of the old offences against the person regime to deal with such emotional distress. Social science analysis of the victim response to

coercive control indicates that it is complicated: such responses incorporate cognitive, emotional, behavioural and physiological reactions.[101]

While the definition of 'adverse effect' does not incorporate all of this complexity, it should be remembered that criminal justice recognition of purely psychological harm is still recent. It would be unrealistic to expect section 76 to incorporate all of the nuances of the extensive harms suffered by victims. Emotional harm is, as has been pointed out, difficult to operationalise.[102] As I explained in chapter four, the only consideration of psychological harm further to the Offences Against the Person Act 1861 was harm that constituted a clinical mental illness. To the extent that section 76(1)(c) does go some way towards addressing the "cloaking" of any emotional response that is not a clinical condition, it is progress.

However, the wording of the two limbs of the result element of section 76 seem a better description of the harm experienced by victims of the stalking type offences for which they were originally intended than for the harm experienced by victims of coercive control. The first limb, if it causes the victim to fear that violence will be used against her on two occasions, brings with it the incident specific focus reviewed in chapter five with all of its attendant problems.[103] The generalised fear induced by coercive control cannot always be located to a singular threat or violent event. The fear experienced by the victim is not always (although often can be) of violence. She might fear disgrace. Or shame. Her fear is most likely to be generalised, in response to the 'state of siege'[104] described by survivors in chapter three.

The second limb, 'if it causes the victim serious alarm or distress that has a substantial adverse effect on her day-to-day activities' has more potential. Even this wording, however, focuses on the state of mind of the victim, her 'alarm or

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[101] Sara Simmons et al, 'Long-Term Consequences of Intimate Partner Abuse on Physical Health, Emotional Well-Being and Problem Behaviors' (2018) 33(4) Journal of Interpersonal Violence 540; see also Wiener, Seeing What is Invisible in Plain Sight n59.
[102] Marilyn McMahon and Paul McGorrery, 'Criminalising Emotional Abuse, Intimidation and Economic Abuse in the Context of Family Violence: the Tasmanian Experience' (2016) 35(2) University of Tasmania Law Review 1; Sandra Walklate and Kate Fitz-Gibbon, 'The Criminalisation of Coercive Control: The Power of Law?' (2019) 8(4) International Journal for Crime, Justice and Social Democracy 94.
[103] McGorrery and McMahon, Criminalising the "Worst" Part n54.
[104] Mary Ann Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' (1992) 21 Hofstra Law Review 1191, 1208.

distress'. This runs the risk of necessitating medical and psychological evidence as to depression or anxiety, for example.[105] It is also too imprecise.

Specialist police interviewed for this project found the second limb too broad. DC Canford, for example, a specialist domestic abuse officer, explained that 'the wording is too broad. I think that it is far too broad… debatable and poorly defined'. When questioned on this DC Canford explained that 'the issue is less about the serious adverse effect, and more about the evidence of control and the nature of the control'.[106] In other words, DC Canford felt from an investigative perspective that the behaviour of the perpetrator is more relevant than the mindset of the victim.

Stark conceptualises the harm experienced by victims of coercive control as political: 'a deprivation of rights and resources that are critical to personhood and citizenship'.[107] Alafair Burke, who has written extensively about domestic abuse legislation in the US, argues for a doctrinal conceptualisation of the harm experienced as 'restricting the victim's "freedom of action".[108] Jennifer Youngs and Charlotte Bishop both advocate this approach, Bishop arguing that the 'freedom of action' construct 'is a useful and preferred approach that focuses less on the mental capacity of the victim and her reactions to the offending behaviour. It more adequately reflects the nature of coercive control as a liberty crime'.[109]

I agree with Bishop and Youngs. Survivors who took part in the focus group expressed the harms they experience in terms of what they felt they had lost, (their freedom), rather than in terms of an impact on day-to-day activities. A statute could capture this by, for example, listing examples of ways in which a victim's freedom might be constrained, such as the dependence she might have on her abuser, the isolation she might be experiencing, the economic abuse she might be experiencing. Section 2 of the DASA defines abusive behaviour in exactly this way.

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[105] Susan Edwards, 'Coercion and Compulsion – Re-imagining Crimes and Defences' [2016] Criminal Law Review 876.
[106] Interview with DC Canford 20 November 2017, 4.
[107] Stark, Coercive Control n58 5.
[108] Alafair Burke, 'Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization' (2007) (75) George Washington Law Review 558, 602.
[109] Bettinson and Bishop, Discrete Offence n42 194. Jennifer Youngs, Domestic Violence and the Criminal Law: Reconceptualising Reform (2015) 79(1) Journal of Criminal Law 55.

Subsection 3 lists the 'relevant effects' on the victim's behaviour both in terms of restrictions on her liberty (isolation, dependence, being punished) *and* emotional distress (being afraid).

Finally, the resilient survivor is the survivor who, against the odds, manages to continue with her roles at work and/or in the home without displaying visible signs of distress. This has, in fact, proved to be a thorny issue. Judge Harwood, when asked about the result element, commented:

> I think that this is unnecessary for this offence. Yes, yes so if you are someone who is able to cope with it, and it hasn't affected your daily life. You are still able to go to work, and see friends. The fact that you're living in coercive or controlling relationship, the court will say this hasn't had enough of an effect on you yet, terribly sorry, we are not going to be supporting a prosecution. That can't be right.[110]

Recent media reports seem to support Judge Harwood's concern. Paul Measor subjected his partner Lauren Smith to horrific abuse, teaching their toddler son to tell her to 'fuck off' and spitting in her face. Nevertheless District Judge Helen Cousins acquitted him (in my view, from the limited amount of information I have gleaned from the media, correctly) of a section 76 offence. District Judge Cousins ruled that while Paul Measor's actions were 'disgraceful', they did not have a 'serious effect' on Lauren's life. District Judge Cousins said,

> I have to be satisfied the behaviour was controlling, coercive and had a serious effect on the victim. There's no doubt the victim is a strong and capable woman. It is to her credit that I cannot find his behaviour had a serious effect on her in the context of the guidelines.[111]

The women's sector responded angrily with Women's Aid calling for judges to be 'sent for training on the Serious Crime Act 2015'.[112] Suzanne Jacob, Chief Executive of SafeLives, argued immediately after the ruling that 'yes, you can be strong and still be a victim of coercive control'.[113] All of the points Jacob makes in her article - that there is a link between assault and coercive control, that leaving your abusive partner shouldn't be a justification for not holding that partner liable for his

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[110] Judge Harwood n98 4.
[111] Jeremy Armstrong, 'Violent Boyfriend is Cleared After Judge Says Partner Is 'Too Strong' To Be Victim' *The Mirror,* (London, 23 November 2018).
[112] Ibid.
[113] Suzanne Jacob, 'Yes, You Can Be "Strong" and Still Be a Victim of Coercive Control' *The New Statesman*, (London, 27 November 2018).

crimes, and that 'this analysis of Lauren's strength is entirely subjective and plays into the narrative of what a "perfect victim" should look like'[114] - are entirely accurate. But the problem lies with the wording of the offence, and not in District Judge Cousins' application of the law.

Irrespective of how the harm is defined, therefore, there is a second question that is more fundamental. Is the prominent role that harm plays in the construction of s.76 appropriate? Or is a focus on the response of the victim rather than the actions of the perpetrator in the context of coercive control unhelpful? One of the concerns expressed by commentators researching the likely legal implications of the criminalisation of coercive control is that:

> People who do not understand how entrapment operates - because they have not personally lived the manner in which coercive control can inhibit resistance and who have life experiences that have led them to expect personal safety at all times and for whom calling the police will always be an effective means of achieving this - can be vehement and entrenched in their judgments of victims.[115]

Many of the judges interviewed for this research project showed, in fact, an impressive understanding of how entrapment operates. No judge was 'vehement' in his or her judgment of victims. Nevertheless, it is fair to say that their appreciation of how difficult it might be for the victim to portray her experience of harm in the courtroom was, as is to be expected, more limited than that of other criminal justice agents such as IDVAs or police.

Police spend time with survivor-witnesses on an almost daily basis in the run up to a trial. Judges do not speak to witnesses outside the courtroom, and the judicial perspective is necessarily detached. While judges interviewed for this project tried to be sympathetic, they admitted frustration at what they perceived to be the victim's inadequacies as a witness. In other words they expressed frustration that the victim-witness is frequently unable to deliver what is needed in order to persuade a jury of the defendant's guilt. Judge Little, for example emphasised that, 'I am not unsympathetic as I know the reasons that very often women are unwilling [to give evidence], because they have been rather ground down by the

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[114] Ibid.
[115] Julia Tolmie, 'Coercive Control: To Criminalize or Not to Criminalize?' (2018) 18(1) Criminology and Criminal Justice 50, 9.

situation in which they've been'.[116] At the same time Judge Little expressed frustration with what she called 'woolly witnesses'.[117] She explained:

> From a judge's point of view the difficulties are often in getting women to come to court and to speak fully and openly and honestly about their experiences - probably the most frustrating thing… They come to court, and they are a bit wishy washy and they are trying to water it down because they still love him and so trials can be very frustrating.[118]

Judge Little's perception that victim/witnesses are 'woolly' or 'a bit wishy washy', and that they 'water it down because they still love him' might be entirely fair, but it must be remembered that section 76 only applies where a victim and her partner are still together. That a victim-witness finds it difficult to testify against an abusive and controlling partner who still has access to her might be because she is afraid.[119] It could also be that it is particularly complicated to portray the effect of the perpetrator's behaviour in an adversarial court of law. Adversarial justice, it has been pointed out, is not sensitive generally to the needs of victims experiencing trauma.[120] Complications arising from the interplay between trauma, the giving of testimony and the requirements of adversarial justice process are particularly acute in the case of the victim of coercive control.

The process of cross-examination is a good example of the "catch-22" situation experienced by the coercive control victim in court. There is much empirical evidence that suggests that the way in which a witness gives evidence affects jurors' perception of their credibility.[121] Furthermore, giving cross-examination is highly stressful. In fact, it has been pointed out that the experience is challenging 'even for professional witnesses (eg police officers and experts)'.[122]

The first hurdle, therefore, is for the coercive control victim to 'maintain her perspective under cross-examination'.[123] If she cannot hold her ground she , like all

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[116] Judge Little n55 1.
[117] Ibid. 2.
[118] Ibid. 1.
[119] Antonia Cretney and Gwynn Davis, 'Prosecuting "Domestic" Assault' [1996] Criminal Law Review 162.
[120] Louise Ellison and Vanessa Munro, 'Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process' (2017) 21(3) 183.
[121] For a full discussion of the impact of the way in which a victim, post trauma, gives evidence on a jury see Louise Ellison and Vanessa Munro, 'Reacting to Rape Exploring Mock Jurors' Assessments of Complainant Credibility (2009) 49 British Journal of Criminology 202.
[122] Ellison and Munro, Taking Trauma Seriously n124, 192.
[123] Tolmie, Coercive Control n119 7.

victims of crime whose trauma interferes with their ability to produce evidence under pressure, will have failed in her role as prosecution witness.[124] But the victim of coercive control has an additional evidential hurdle to surmount. This is because, if she *can* hold her own, it may 'undercut her claim to have been the victim of coercive control'.[125] In fact, the court will inevitably ask 'why the victim didn't leave if the effect of the behaviour was so bad'?[126] Jen, a criminal justice IDVA who supports survivors through the trial process, put it this way: 'fundamentally, the bottom line is judges think that she is somewhat complicit or it is her fault'.[127]

My empirical work shed some light on the issues facing victims. In the focus group that I ran with survivors I asked expressly for survivors' thoughts on their experiences of the criminal justice process. No two survivors had an identical experience, but the difficulties that they encountered included a lack of support, a lack of legal aid, and a feeling of being "bullied" all over again by police and prosecutors.[128] Underpinning all of their experiences was fear for their safety, and that of their children in the face of what they knew about perpetrator capability and the inadequacy (to their minds) of the safeguarding capabilities of the police.[129]

Judge Fern agreed that domestic abuse trials are incredibly frustrating from the judicial perspective. He said:

> Oh yes, they are a nightmare. They are a total nightmare to prosecute. Because as we know the problem with the controlling coercive relationship is that the victims of that behaviour inevitably are persuadable by the individual. I mean that is the old problem. So what ends up happening is that we have a compete nightmare - or the prosecution which is more to the point have a complete nightmare - trying to get the witness, the complainant at that stage - to court. It's very - you end up with: do you issue witness summonses? To somebody who has clearly suffered a great deal whereas is that the best way to deal with it? Often they just won't co-operate. Withdraw statements, and so it goes on, and we lose a lot of cases that cannot be prosecuted because witnesses are, for whatever reason - you don't always get to

[124] For a discussion of the effect of trauma on evidence giving generally see Ellison and Munro, Taking Trauma Seriously n124.
[125] Ibid.
[126] Bettinson and Bishop, Discrete Offence n42 194.
[127] Interview with Jen (15 January 2016) 14.
[128] Survivors Focus Group (8 September 2016).
[129] Ibid.

> the bottom of it - persuaded not to give evidence. Whether they persuade themselves or they are persuaded.[130]

Judge Fern thus exhibits a similar mix of sympathy and frustration as that expressed by Judge Little. He recognises that victims have 'clearly suffered a great deal', but is frustrated by the 'nightmare' of trying to get victims to testify in court. Intermixed with the sympathy and frustration is, perhaps, a lack of understanding of the complexity of the survivor's situation.

Judge Fern says, for example, that the victims of coercive control are 'persuadable'. Survivors encountered for this research project were bullied and terrorised, rather than persuaded. In fact Judge Fern recognises that he does not understand the victim's behaviour, 'you don't always get to the bottom of it', and this only adds to his frustration.

Specific research into the behavioural response of abused women has shown that victims are resourceful and strategic in what amounts to impossibly complex life situations.[131] Stark and others have vividly described how a victim will try to at once conform to the perpetrator's demands while remaining in a permanent state of hyper vigilance to keep herself and her children safe.[132] Testifying in court against her abuser is a difficult and potentially dangerous experience. What is often pointed out, however, is that even where a victim is able to give evidence 'it is difficult… to present a complex account of women as both oppressed and struggling'.[133] Or, put in another way: 'it is difficult to portray the frustrations women meet as they energetically pursue safety'.[134] The impact of trauma, and the

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[130] Interview with Judge Fern (6 March 2018) 1.
[131] Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90(1) Michigan Law Review 1; Dutton, Understanding Women's Responses n107; Cathy Humphreys and Ravi Thiara, 'Neither Justice Nor Protection: Women's Experiences of Post-Separation Violence' (2003) 25(3) Journal of Social Welfare and Family Law 195; Stark, Coercive Control n58; Vanessa Bettinson and Charlotte Bishop, 'Evidencing Domestic Violence, Including Behaviour That Falls Under the New Offence of 'Controlling or Coercive Behaviour' (2018) 22(1) The International Journal of Evidence and Proof 3.
[132] Stark, Coercive Control n58; Bettinson and Bishop, Evidencing Domestic Violence n135.
[133] Mahoney, Legal Images of Battered Women n135 61.
[134] Rosemary Hunter, 'Consent In Violent Relationships' in Sharon Cowan and Rosemary Hunter, (eds) *Choice and Consent: Feminist Engagements With the Law and Subjectivity* (Routledge 2007) 158.

way that it can cause disorientation and confusion can undermine perceptions of credibility still further.[135]

Thus a focus on the victim's response is unhelpful in the context of coercive control legislation because of the pressure that it puts on the victim to disclose intimate details about her emotional state when under cross examination, and possibly while living with her abusive and controlling partner. As has been pointed out, offences that are 'heavily reliant on the victim's testimony' are unhelpful when 'frequently victims are in dangerous and/or compromised positions when it comes to giving that testimony'.[136] Certainly the data from my interviews with judges and the police show that the requirement for the survivor to play the dual role of victim and chief witness for the prosecution creates pressure points right the way through the criminal justice system.

The Scottish Government specifically considered the issue of whether or not to include harm as a constituent part of its new offence. It decided not to, in part because it was concerned that 'where a victim is stoical and does not exhibit obvious distress (even where it would be quite reasonable for them to do so) a court may not feel able to convict'.[137] In its report on the then draft Scottish bill the Scottish Justice Committee elaborated further on this decision not to include the harm experienced by the victim as a constituent part of the Domestic Abuse (Scotland) Bill:

> It is the Scottish Government's view that proving a crime was committed should not depend on demonstrating in court that the complainer suffered harm. The Scottish Government considers that this reduces the likelihood of the trial process being traumatic for the victim (by forcing them to "re-live" the experience of the abuse in order to establish that the crime was committed)… Instead the focus is on what the individual actually did (or failed to do), on whether they had the requisite mental element of recklessness or intent, and on an objective assessment of what the outcome for the victim would likely have been.[138]

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[135] Charlotte Bishop, 'Why It Is So Hard to Prosecute Cases of Controlling or Coercive Behaviour' (2016) The Conversation available at <http://theconversation.com/why-its-so-hard-to-prosecute-cases-of-coercive-or-controlling-behaviour-66108>accessed 1 August 2019.
[136] Tolmie, Coercive Control n119 55.
[137] The Scottish Government, A Criminal Offence of Domestic Abuse Scottish Consultation Paper n87 para 3.14.
[138] Justice Committee Stage One Report n33 para 17.

Section 4 of the DASA makes it clear that the commission of an offence 'does not depend on the course of behaviour actually causing B to suffer harm'.[139] I think that the Scottish consideration of the victim's court-room experience and determination to focus on the perpetrator's actions and state of mind is progressive and to be preferred. It means that victims might not face cross examination in relation to the most personal aspects of their story, their response to the abuse they have experienced.[140] And it means that resilient victims (like Lauren Smith in the Paul Measor case) do not get unfairly penalised.

Mens Rea

The last aspect of section 76 to be considered in this chapter is the mens rea. The mens rea is set out in s. 76 (1) (d) as follows:

(1) A person (A) commits an offence if— …
(d) A knows or ought to know that the behaviour will have a serious effect on B.

Section 76(1)(d) thus states that the mens rea can be satisfied both subjectively, in terms of what the perpetrator actually knew, or objectively, in terms of what the reasonable person would have known. As with the PHA, section 76(5) states that the reasonable person for these purposes is in possession of the same information as the perpetrator. Including the possibility of a wholly objective mens rea as a route to conviction, while an affront to the correspondence principle, was justified in the context of the PHA in that it was thought necessary to make sure that stalkers whose mental illness precluded them from appreciating the impact of their behaviour were not excluded from the scope of the legislation.[141]

Chapter five argued, in addition, that the negligence construct did not derail 'the central quest of identifying blameworthiness'[142] in the context of the PHA in part because establishing the serious harm experienced by the victim is a constituent part of the offence. As far as section 76 is concerned, however, it could be argued that including the possibility of an objective mens rea is harder to justify. More

[139] Domestic Abuse (Scotland) Act 2018 s. 4(1).
[140] Forbes, The Domestic Abuse Scotland Act 2018 n89 407.
[141] Finch, Criminalisation of Stalking n12.
[142] Heather Keating et al*, Clarkson and Keating: Criminal Law* (Sweet and Maxwell 2014) 146.

research is needed to investigate the issue of whether or not perpetrators of coercive control are mentally ill. If a correlation was found between perpetrators and mental ill-health this would introduce a new factor into the debate: perpetrators should not be subject to a mens rea standard that they cannot meet. The reasonable person, it could be argued, is not an appropriate culpability standard in these circumstances.

Another potential negative consequence relates to what an objective mens rea says about the crime of controlling or coercive behaviour. In chapter five, I highlighted that the correct labelling of a crime is one of the most important functions of the criminal law. Research shows that 'an abuser's intent is now a crucial and engrained portion of our modern understanding of intimate partner violence'.[143] From the perspective of the survivor of coercive control, the malevolence of the strategic campaign of domination is *the* central (and most harmful) feature of the abuse. If crimes must be defined in a way that 'reflects what makes the conduct of defendants who are convicted under them publicly wrongful',[144] then is ostracising the motive of the defendant counter-productive? In other words, the perpetrator's strategic intent is a key part of what makes him culpable. Does the criminal law need to reflect this if it is to fulfil its educative and normative function?

Arguments as to the inclusion of an intention requirement in a domestic abuse statute are more developed in the US literature. Tuerkheimer and Burke disagree on the relative merits of subjective/objective mens rea in the context of coercive control.[145] Burke supports the arguments set out above in relation to the result element of the crime, and argues that a 'discursive shift' away from the victim focus is necessary. She sees a mens rea of intent as a necessary part of this 'shift'. She argues that:

> By grounding a specialized domestic violence statute in the requirement of intent, this Article's proposal would bring an important discursive shift in the criminal law's treatment of domestic violence by turning the focus away from the claimed

[143] Meghan Bumb, 'Domestic Violence Law, Abusers' Intent, and Social Media: How Transaction-Bound Statutes Are the True Threats to Prosecuting Perpetrators of Gender-Based Violence' (2017) 82(2) Brooklyn Law 917, 925.
[144] Victor Tadros, 'Rape without Consent' (2006) 26(3) Oxford Journal of Legal Studies 515, 524.
[145] Tuerkheimer, Recognising and Remedying the Harm of Battering n1 959; Burke, Domestic Violence n112 558.

> effects of domestic violence on a victim's autonomy and instead toward the coercive motivations of the batterer.[146]

I agree with Burke that the discursive shift away from the victim focus is necessary and desirable, but I do not agree that a requirement of intent is necessary to achieve this. The DASA achieves a shift away from the victim without a mens rea of intent. Section 1(2) of the DASA has a mens rea of intention or recklessness. Recklessness in Scottish law includes an objective standard – the mens rea of the DASA is therefore similar to that of section 76. Yet, section 2 of the DASA is headed 'what constitutes abusive behaviour', and lists the controlling behaviours that constitute coercive control. Section 3 specifically states 'the commission of an offence under section 1(1) does not depend on the course of behaviour actually causing B to suffer harm'. The DASA, in other words, combines the possibility of a wholly objective mens rea with a shift away from the victim focus by excluding the harm element from the offence altogether.

Finally, it is possible for reasons that have been put forward in the literature and that are supported by my empirical work with judges, that a mens rea of intent would create as many problems as it would solve. Tuerkheimer, herself a former prosecutor, argues that a mens rea of intent would place too great a burden on the prosecution. She says:

> Prosecutors would understandably balk at a requirement that intentional mens rea be proven with respect to the exercise of power and control. The difficulty of convincing jurors beyond a reasonable doubt that a batterer *consciously* intended to dominate his victim may be practically insurmountable.[147]

Bishop and Bettinson also point out that, just as with the PHA, the behaviour could appear innocuous.[148] They argue that:

> The defendant could simply claim that they just wanted their partner to be at home for a particular reason or did not realise that preventing their partner from leaving the house on occasions would have that effect upon her, whereas, the harm to the victim is the same regardless of the intention of the perpetrator.[149]

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[146] Burke, Domestic Violence n112 556.
[147] Tuerkheimer, Recognizing and Remedying the Harm of Battering n1 1022, her emphasis.
[148] Bettinson and Bishop, A Discrete Offence n42 195; Youngs, Domestic Violence and the Criminal Law n112.
[149] Bettinson and Bishop, A Discrete Offence n42 195.

Bishop and Bettinson conclude by agreeing with Tuerkheimer that 'the objective standard is to be welcomed as providing the best possible means of securing a conviction given the present limitations to legal and societal understandings of coercive control'.[150] I agree with Tuerkheimer, Bettinson and Bishop that, despite the fact that this is an affront to the correspondence principle, the objective standard is necessary in the context of what is currently understood about the mindset of perpetrators of coercive control.

Data from my interviews with judges support this conclusion. Judge Little emphasised that, for her, a mens rea of intent 'would change it completely'. She said 'I think actually it would make it far more difficult to get convictions, I feel that very strongly'.[151] She gave as an example a defendant in one of the cases she had presided over, Robert Clint.[152] In Judge Little's view, Robert Clint was 'your typical kind of offender'. 'But', she went on to explain, while 'he intended to control her', 'he had no concept that what he was doing was wrong'.[153]

Judge Little thought that this would be difficult for a jury because 'for a jury an intent is a very specific mens rea, so it has to be something somebody has thought about, the consequence of their action'. Judge Little used assault occasioning grievous bodily harm as an example to illustrate her point. She said:

> If you intend to do GBH, you intend to do somebody really grievous bodily harm, if you intend to control somebody, it seems to me you can only intend to effectively diminish the quality of their life - Robert Clint actually I don't believe intended to diminish the quality of her life. There may well have come a point when he did.'[154]

Judge Little thus identified a difference between the intention to dominate and the intention to cause harm. This difference, for Judge Little, allows for a disconnect in the minds of defendants between the two constructs. Despite the presence of the intention to dominate, there is a simultaneous absence of the intention to cause harm that makes a mens rea of intent inappropriate. While Judge Little conceded that Robert Clint had a specific intention to dominate, she felt that if there was a

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[150] Bettinson and Bishop, A Discrete Offence n42 195.
[151] Judge Little n55 5.
[152] The name of the defendant has been changed to protect the anonymity of Judge Little.
[153] Judge Little n55 5.
[154] Judge Little n55 6.

mens rea of intent, then the fact that he *did not intend to cause harm* would cause problems for a jury. It would remain open to Clint to escape liability by claiming that he did not know that his behaviour would have a harmful effect on the victim, despite his intention to dominate.

Judge Little thus raises an important issue. I agree that, while a defendant's strategic intent to control his partner might be clear, his conviction that that intent (his desire to control her) is benign, and not intended to cause her harm, might indeed cause problems for a jury. There is no doubt that the perpetrator's strategic intent is a key part of what makes him culpable, but it is possible that the perpetrator might confuse a jury by convincing them of his lack of intention to cause harm. My empirical work did not include interviews with perpetrators, and more research is urgently needed on this point. In the meantime it would appear that including the possibility of an objective mens rea is appropriate in the context of the section 76 offence.

Sentencing

The sentencing difficulties experienced by judges in the context of a section 76 conviction are the practical repercussion of what this chapter has found is the fundamental (and unhelpful) ambiguity surrounding the meaning of the controlling or coercive behaviour construct. Even low level physical violence still has to be charged alongside section 76 and this, together with the low maximum sentence of imprisonment for section 76 (five years) makes sentencing an especially delicate exercise.

The most common accompanying counts on a section 76 indictment are, as is to be expected, offences against the person and sexual offences. The difficulty for the sentencing judge is how to separate out the different strands of the offending behaviour while avoiding the possibility of double counting. Judge Little referred specifically to this dilemma. She said:

> Because where we have to be a bit careful, and the reason I gave (the defendant) four years with the plea, was the two offences of violence I said effectively were aggravating features of the overall behaviour and this is one of the difficulties,

> because the CPS do put the violence where they have got specific incidents they can point to…

In the sentencing decision Judge Little is referring to (which has been upheld by the Court of Appeal) the other counts on the indictment are assault occasioning actual bodily harm (one count) and perverting the course of justice (two counts). There is a significant amount of addition violence detailed in the Court of Appeal judgment that is not charged separately.[155] Judge Little decided to use the section 76 offence as the principal offence to reflect the totality of the offending for the sentence on that count, and to make the sentencing for the aggravated assault charge concurrent. The Court of Appeal confirmed that it is happy with this approach. If there had been an even more serious charge on the indictment then it would have been open to Judge Little to use that charge (for example rape, or inflicting grievous bodily harm) as the principal offence and to make the sentencing of the section 76 offence concurrent.[156]

Difficulties remain, however. I did not ask Judge Little the extent to which she felt able to take into account (for sentencing purposes) the additional violence that was not charged separately, and this is an important question. The risk is that if controlling or coercive behaviour is constructed as 'psychological' or 'non-violent' abuse (as suggested by the judgments in *Challen*, *Conlon* and *Beringer* referred to above) then a significant amount of low-level violence continues to go unpunished.

Furthermore, even where serious violence is charged separately, the approach that has been taken by the courts (to make the serious violence the principal offence and to punish the controlling or coercive behaviour with a concurrent sentence) means that the distinct harm of coercive control potentially does not get enough recognition. *Parkin*[157] is a good example of the pitfalls of this approach. Parkin was convicted of three counts of rape (counts one to three) for which he received a total of seven years imprisonment. He was also convicted of controlling or coercive

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[155] It is not possible to cite the Court of Appeal judgment in question as this identifies Judge Little.
[156] This approach was approved by the Court of Appeal in cases such as *Chanaa* [2019] EWCA Crim 2335 (where the defendant was convicted of rape and controlling or coercive behaviour), *Cunningham* [2019] EWCA Crim 2101 (four counts of rape and controlling or coercive behaviour) and *Holden* [2019] EWCA Crim 1885 (rape and controlling or coercive behaviour).
[157] *Parkin* [2018] EWCA Crim 2764.

behaviour (count four), for which he received two years imprisonment concurrent. Application for leave was made by the Attorney General to refer the sentence on the basis that it was too lenient. The application was granted, with the Court of Appeal explaining:

> There was effectively no sentence passed in respect of count 4, which was quite separate coercive behaviour. We do not agree that that offence could properly be simply absorbed into the overall low sentence that he was already going to pass for the three other offences. The controlling behaviour was a quite separate offence requiring to be reflected either in a separate consecutive sentence or by an uplift of the principal sentence.[158]

The Court of Appeal is therefore suggesting that the judge could properly have sentenced the controlling behaviour separately, or by using the totality principal to 'uplift' the principal sentence. Neither approach is ideal. Sentencing separately raises the issues of double counting highlighted by Judge Little above. And using the violence as the 'principal sentence' means we are still left with the hierarchy of harms that places physical violence at the top, which is not the way that survivors articulate their experiences of abuse. The 'mismatch' between life and law, in other words, continues.

Unfortunately, the low maximum sentence of imprisonment for controlling or coercive behaviour (five years) adds to the perception of a hierarchy of harms.[159] Judges interviewed for this project agreed that this is too low.[160] The low sentencing threshold contributes to a perception of a hierarchy of harm that places physical violence at the top, which is not how survivors articulate the harms they have experienced. Furthermore, it does not reflect the severity of coercive control. The DASA deals with this issue by incorporating the violent and non-violent behaviours into a single offence with a maximum penalty on conviction on indictment of fourteen years imprisonment.[161]

CONCLUSION

[158] Ibid. [39].
[159] Serious Crime Act 2015, s 11.
[160] Judge Little n55; Judge Harwood n114.
[161] Domestic Abuse (Scotland) Act 2018, s 8.

Section 76 brings challenges even as it creates opportunities. The first challenge is the further fragmentation of domestic abuse, as police and prosecutors are expected to use section 76 to capture psychological aspects of abuse alongside the existing offences against the person regime, a consequence of the Attorney General's construction of 'controlling or coercive behaviour' via a focus on the 'gap' in the law. A second challenge is the adoption of an unrealistic 'transactional' approach to separation, which makes no sense to the survivor and makes life more complicated for the police.

Finally, the emphasis on the response of the victim makes section 76 uniquely challenging to investigate and prosecute, and creates a more traumatic courtroom experience for survivors. In the following and final chapter I draw together my conclusions on the role of coercive control within domestic abuse, and on the current doctrinal position with regard to the prosecution of domestic abuse and coercive control. I finish by setting out where further work is needed. I also put forward suggestions for reform.

CHAPTER EIGHT: CONCLUSION

In this thesis I answer the question: does the criminal law capture coercive control effectively? I began with an exposition of coercive control grounded in the literature and in the language and experiences of survivors of coercive control and their closest advisors. I carried out this work first intentionally, so as to identify what coercive control *is* before reviewing how it is dealt with by the criminal law. The empirical work I conducted did nothing to contradict what a review of the literature on domestic abuse and coercive control suggested: that coercive control is not the same thing as domestic abuse, in that not all abuse between intimate partners involves an abuse of power. Where coercive control exists, however, it is domestic abuse at its most insidious.

I used the data from my empirical work with survivors and independent domestic violence advisors (IDVAs) to refine models of coercive control developed by Evan Stark, and Mary Ann Dutton and Lisa Goodman. This model explains coercive control as three overlapping domains - one (grooming) that is preparatory, and two (the controlling behaviour and the harm to the survivor) that are ongoing. Coercive control contains perpetrator behaviours that can be physical, sexual and/or psychological. What makes it uniquely devastating as a wrong is the way in which those behaviours extend through time and space to produce an individualised campaign of domination, personalised to have maximum impact on its victims.

Survivors that I interviewed spoke of the devastation caused by coercive control. They described the 'the instability rollercoaster', the unbearable and impossible responsibility they felt to appease their abuser in order to keep themselves and their children safe. The victim's fear is real and not imagined, as it is based on a realistic appraisal of perpetrator capability. The behaviour moderation 'if I don't do 'x' again, I won't get raped' was the most significant short-term effect of the control, but more fundamental were the changes in the way that victims understood their capabilities and the world around them. In other words, the

psychological impact of the abuse goes beyond symptom-focused conditions, such as anxiety, to include personality change: changes in survivors' ability to make decisions about their own and their children's lives. Stark says 'he changes who and what she *is*'.[1] Research suggests that levels of control are a better indicator of risk to life than physical violence thus underscoring its importance to front-line services.[2]

HOW WAS COERCIVE CONTROL CAPTURED BY THE CRIMINAL LAW PRIOR TO SECTION 76 OF THE SERIOUS CRIME ACT 2015?

Having established what coercive control is, I then reviewed how the criminal law captures it. Firstly, in chapter four I identified that the Offences Against the Person Act 1861, which remains the piece of legislation most used by police and the CPS to prosecute domestic abuse, was not drafted with domestic abuse and coercive control in mind. Designed to combat street brawls and pub fights in the Victorian era, incident-specific offences such as inflicting grievous bodily harm[3] and assault occasioning actual bodily harm,[4] and associated common law offences such as battery and assault take no account of the strategic pattern of domination identified in chapter three as central to coercive control. The emphasis on transactional specificity and harms that are physical is hard for survivors who often find it difficult to isolate the physical attacks from ongoing abuse and locate them to specific times and places. Harms that include acute emotional suffering go mostly unacknowledged[5] - this exclusion has been referred to as 'cloaking'.[6]

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[1] Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) 262 (emphasis mine).
[2] Jane Monkton-Smith, 'Intimate Partner Femicide: Using Foucauldian Analysis to Track an Eight Stage Progression to Homicide' (2020) 26(11) Violence Against Women 1267; see also Evan Stark, *Coercive Control: How Men Entrap Women In Personal Life* (Oxford University Press 2007); Jane Monkton-et al, 'Exploring the Relationship Between Stalking and Homicide' (Suzy Lamplugh Trust 2017); Iain Brennan et al, 'Service Provider Difficulties in Operationalizing Coercive Control' (2019) 25(6) Violence Against Women 635; Danielle Tyson, 'Coercive Control and Intimate Partner Homicide' in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control* (Springer 2020).
[3] Offences Against the Person Act 1861, s 20.
[4] Offences Against the Person Act 1861, s 47.
[5] Psychiatric harm that has been diagnosed as a clinical illness can constitute harm for the purposes of the Offences Against the Person Act 1861 but causation is difficult to establish due to the ongoing nature of psychiatric illness. This is discussed in detail in chapter four.
[6] Deborah Tuerkheimer, 'Recognising and Remedying the Harm of Battering: a Call to Criminalize Domestic Violence' (2004) 94(4) Journal of Criminal Law and Criminology 959, 980.

The Protection from Harassment Act 1997 (PHA) was a radical piece of law that was introduced on the back of a sustained media campaign that highlighted the inadequacies of the offences against the person regime in the context of (mainly) non-relational stalking. Cases such as *Ireland*[7] and *Burstow*[8] illustrated how judges were trying to 'stretch' the law on offences against the person in order to accommodate stalking-type behaviours that were otherwise beyond the scope of the criminal law. The PHA marked progress, and it became a useful tool for police and prosecutors, who used it primarily in the context of *domestic abuse* offences, rather than for the non-relational stalking for which it was intended.

As a result of this use of the PHA, it fell to the Court of Appeal to demarcate the boundaries of actionable harassment. The reluctance of the Court of Appeal to allow its application in circumstances where abuse occurred while a relationship was ongoing revealed a 'gap' in the criminal law. Having come to rely upon the PHA as their 'bread and butter'[9] police found they were unable to use it where stalking and/or harassment offences took place in a domestic context while a couple were still together.

Awareness of "gaps" in the criminal law prompted a campaign for change: but when reform came it was piecemeal. Reform to sexual offences that took place in 2003[10] seemed to take little specific account of coercive control or of the domestic context that the Home Office's own research found is so often the background to sexual offending.[11] Reform to the PHA,[12] and the introduction of a new domestic abuse "working definition" that put coercive control at its centre,[13] paved the way for a government consultation in 2014,[14] and the introduction of section 76 at the end of 2015. The government consultation was limited, and assumptions were

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[7] 1997 UKHL 34.
[8] Ibid.
[9] DC James, Police Focus Group (30 November 2016) 7.
[10] The Sexual Offences Act 2003.
[11] Jessica Harris and Sharon Grace, *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* Home Office Research Study (Home Office 1999) iv.
[12] Protection of Freedoms Act 2012, s 111.
[13] Home Office, 'New Definition of Domestic Violence' <https://www.gov.uk/government/news/new-definition-of-domestic-violence> accessed 12 September 2017.
[14] Home Office, 'Strengthening the Law on Domestic Abuse: A Consultation' [2014] 9. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/344674/Strengthening_the_law_on_Domestic_Abuse_-_A_Consultation_WEB.PDF> accessed 28 March 2018.

made about the nature of coercive control that are out of step with the way in which the survivors and IDVAs that I interviewed articulate their experiences of abuse.

HOW HAS SECTION 76 MADE A DIFFERENCE?

In light of the limited nature of the consultation, and the government's expressed intention to plug the gap, it is perhaps not fair to expect too much of section 76. Plugging the gap, in other words, created a number of problems. Limiting the new offence to 'an extra element to close a loophole'[15] contributed to the fragmentation of the criminal law in this area and thus curtailed its ability to create positive impact.

Furthermore, the government was distracted by the existing legal infrastructure and its 'gap'. An opportunity to investigate the empirical problem (the offending behaviour) was missed, and the government managed to misunderstand the very problem it was trying to address as a result. In particular, there were three mistaken assumptions that fed directly into the construction of section 76. Firstly, as stated above, there was an assumption that coercive control was psychological abuse. Secondly, there was an assumption that the end of the relationship is a useful boundary for a coercive control offence. And thirdly, there was an assumption that the victim's response is a useful way to define the offence. All three of these assumptions have exacerbated the difficulties that have already existed pre-section 76.

Constructing coercive control as "non-physical", "emotional" or "psychological" abuse[16] divorces it from the violence that often, if not always, makes it possible. This has a number of repercussions. It means that much low-level violence goes uncharged,[17] and the sentences (section 76 carries a five-year maximum sentence)[18] do not reflect the severity of the harm inflicted. It also means that any

[15] HC Deb, 20 January 2015, Vol 591, Col 172.
[16] As the Attorney General made clear in the Parliamentary Debate: 'Violent behaviour already captured by the criminal law is outside the scope of the offence.' HC Deb, 20 January 2015, Vol 591, Col 172.
[17] *Conlon* [2017] EWCA Crim 2450 is an example of this.
[18] Serious Crime Act 2015, s 11.

acts of violence that take place as part of a strategy of domination still have to be charged separately under the OAPA with all of its attendant difficulties in this context: namely that no account is taken of the coercive intent and that it is difficult for victims to be incident-specific about abuse that for them is systemic and ongoing.

Section 76 only applies where an abuser and his victim are in a relationship.[19] The PHA only applies when they are not.[20] Assuming that the end of the relationship is a useful boundary for coercive control in turn assumes that there *is* an "ending" that exists as a transactional moment. In fact, as is well-documented, leaving an abusive relationship is complicated and dangerous, and almost never happens as a one-off event.[21] This leaves a key element of two offences - stalking/harassment and controlling or coercive behaviour - dependent on an unstable variable. Finally, it makes no sense to the survivor, for whom the end of the relationship is often not a particularly significant event in the context of the control that the perpetrator will continue to attempt to exercise over her, whether they are still living together or not.[22]

Making the offence a "result" crime[23] puts unnecessary pressure on judges, juries, police and survivors. This is because it makes the testimony of the victim as to her emotional state a necessary and central plank of the offence, in circumstances where giving evidence can put a victim in life threatening danger. Police waste valuable resources on what they term "victim engagement": coaxing the victim to go through the gruelling ordeal of explaining the most sensitive aspects of their ordeal while under cross examination. Judges find the experience of what one judge termed 'woolly witness' testimony frustrating.[24] Furthermore, the construction of harm expressed by section 76[25] replicates the PHA stalking

[19] Serious Crime Act 2015, s 76(2).
[20] *Curtis* [2010] EWCA Crim 123 [2011]; *Widdows* EWCA Crim 1500.
[21] Deborah Tuerkheimer, 'Breakups' (2013) 25 Yale Journal of Law and Feminism 51. See also Interview with Sarah (29 June 2016); Interview with Kim (6 October 2016).
[22] Sarah ibid.; Kim ibid.
[23] Serious Crime Act 2015, s 76(1)(c).
[24] Interview with Judge Little, (20 March 2018) 2.
[25] Serious Crime Act 2015, s 76(1)(c)/Serious Crime Act 2015, s 76(4).

offence[26] and does not reflect the way in which survivors articulate the effects of the abuse.

Improvements are nonetheless possible and necessary. The Domestic Abuse (Scotland) Act 2018 (DASA) represents the most radical attempt yet to align the criminal law with Stark's conceptualisation of domestic abuse as a form of coercive control. The DASA creates a new crime of domestic abuse that has controlling intent at its centre,[27] and includes all of the behaviour patterns identified in this thesis as those that form coercive control.[28] It puts an end to fragmentation by incorporating everything in one place. It signals a new and possibly more effective way of prosecuting sexual abuse that is also domestic abuse. The DASA came into force in April 2019. More research is urgently needed into how the DASA is implemented. It could very well be that this approach signals the future of domestic abuse reform in England and Wales.

In light of the above, it is perhaps not surprising that the uptake of section 76 has been disappointing. The most recent Office for National Statistics report records that only approximately half of the 915 defendants who were prosecuted further to section 76 in the year ending November 2019 were convicted. This is in the context of an estimated 1.3 million women experiencing domestic abuse during that time period.[29] Of the nearly 19,000 domestic abuse offences recorded by one police force during a study of a recent 18 month period less than 1 per cent were recorded as coercive control.[30] The authors of the study conclude that 'this number is considerably low, particularly when compared with other offences'.[31] Furthermore, data obtained by the BBC from 33 police forces in England and Wales show that while there were 7,034 arrests in the time period January 2016 - July 2018, there were only 1, 157 cases that ended up with a perpetrator facing

[26] The Protection From Harassment Act 1997, s 4A.
[27] The Domestic Abuse (Scotland) Act 2018, s 2.
[28] Ibid.
[29] Only 455 defendants were convicted: ONS, Domestic Abuse in England and Wales: year ending November 2019, para 11 available at <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2019#prosecution-and-conviction-outcomes> accessed May 24 2021.
[30] Ibid.
[31] Charlotte Barlow et al, 'Putting Coercive Control into Practice: Problems and Possibilities' (2020) 60(1) British Journal of Criminology 160, 166.

charges, suggesting that police are struggling to gather sufficient evidence.[32] This finding is supported by a Freedom of Information request issued by the Bureau of Investigative Journalism which showed some forces recording as few as five charges over a twelve month period.[33] Criticism that police and prosecutors are not pursing enough section 76 cases is 'regular and ongoing'; also apparent is that police understanding of coercive control is poor, and that this is hampering their ability to investigate.[34]

It is important, however, not to be too critical of a step that is progressive and helpful. Evan Stark said of section 76:

> The wrong identified by coercive control is the wrong of subordination. The fact that a major state has, for the first time in history, identified this as a wrong when committed in personal life, is revolutionary in implication, however imperfect the execution. This changes the result of decades of struggle by NGOs, Advocacy Groups and ordinary women to shift the ways in which violence against women is understood.[35]

The 'shift' is real, and fundamentally important. It means that whatever the doctrinal imperfections of section 76 (and there are many), it is a significant step in the right direction, in the context of the relationship between criminal justice and domestic abuse. The shift, in other words, is the shift in perception and the reframing it allows. Jen, an Independent Domestic Violence Advisor explained it like this:

> For our sector, it's absolutely a gift because we are now able to turn around our survivors and say: this is a criminal offence. So it values and puts an evidence-base underneath what they are experiencing. "It is a criminal offence that he was behaving like that." It is just so valuable to us.[36]

To conclude: section 76 *is* imperfect in execution. It contributes to, rather than resolves, the fragmentation of coercive control into its constituent parts. This

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[32] Patrick Cowling, 'Domestic Abuse: Majority of Controlling Cases Dropped' BBC News Services (4 December 2018) available at <https://www.bbc.co.uk/news/uk-46429520> accessed 28 June 2019.
[33] Maeve McClenaghan and Charles Boutard, 'Questions Raised Over Patchy Take-up of Domestic Violence Law' (*Bureau of Investigative Journalism*, 24 November 2017) available at <https://www.thebureauinvestigates.com/stories/2017-11-24/coercive-control-concerns> accessed 15 November 2019.
[34] Cassandra Wiener, 'Seeing What is Invisible in Plain Sight: Policing Coercive Control' (2017) 56(4) 500; Paul McGorrery and Marilyn McMahon, 'Criminalising "the Worst" Part: Operationalising the Offence of Coercive Control in England and Wales' (2019) 11 The Criminal Law Review 957, 963; Barlow et al, Putting Coercive Control into Practice n31.
[35] Email from Evan Stark to the author 7 September 2017.
[36] Interview with Jen (15 January 2016) 8.

makes it harder to investigate, prosecute and sentence coercive control than it would be if there was one domestic abuse offence. It quite possibly makes the experience of criminal justice a more difficult and traumatic one for the survivors of domestic abuse than it needs to be. Yet this does not detract from its enormous significance: it validates victims' experiences by articulating that coercive control is a crime. In the context of a wrong that makes victims doubt their own sanity this is indeed a 'gift'.

Domestic abuse that is coercive control is a wrong like no other crime. This is why it requires a bespoke criminal offence dealing with all of its various manifestations - the sexual abuse, the physical abuse, the stalking, the emotional abuse - in one place. In the absence of such a bespoke offence, section 76 is significantly better than no legislation at all. Finally, it must be remembered, that this is still a recent development: 'the incorporation and use of coercive control in an adversarial context is relatively uncharted territory'.[37] Legal reform is always a work in progress. While section 76 marks progress, it is clear that there is more work to be done.

[37] Michele Burman and Oona Brooks-Hay, 'Aligning Policy and Law? The Creation of a Domestic Abuse Offence Incorporating Coercive Control' (2018) 18(1) Criminology & Criminal Justice 67, 74.

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APPENDICES

A. Information Sheet for Focus Groups
B. Consent Form for Focus Groups
C. Information Sheet (Survivors) Interviews
D. Consent Form (Survivors) Interviews
E. Information Sheet (Professionals) Interviews
F. Consent Form (Professionals) Interviews

Appendix A: Information Sheet for Focus Groups

University of Sussex

FOCUS GROUP INFORMATION SHEET

Study title
CHANGING JUSTICE: ASSESSING SS76 – 77 OF THE SERIOUS CRIME ACT 2015 IN THE CONTEXT OF CONTEMPORARY UNDERSTANDINGS OF DOMESTIC ABUSE

This Information Sheet is an invitation to take part in a doctoral research project that I am undertaking at the University of Sussex. In this Information Sheet, I hope to give you the information you need in order to decide whether or not you want to take part. I will explain why I am doing the research, what I hope to achieve, and what your involvement would look like, should you decide to take part.

What is the purpose of the study?
The purpose of my study is to investigate how the law criminalises domestic abuse. I am a lawyer, and I have received funding from the Economic and Social Research Council to do this research as part of my Ph.D. at the University of Sussex. In particular, I will be looking at new legislation that criminalises 'coercive and controlling behaviour' in an intimate relationship. This legislation is a completely new way of criminalising domestic abuse, and I want to look at it in this study. As well as reviewing it from a legal perspective, I want to look at how it is being used on the ground, in practice. For me, the most important opinions are those of survivors. As well as talking to police, lawyers and other specialists, I therefore want to talk to survivors of domestic abuse to find out what they think of the criminal justice system in general and the new law in particular.

Why have I been invited to participate?
You have been invited to participate because you are part of the Community Action Network Support Group (insert details of the support group here if not the CAN support group) that meets at (insert location here).

Do I have to take part?
Taking part in this research is entirely voluntary. If you decide to take part you are still free to withdraw at any time and without giving a reason – you can also leave the focus group temporarily at any time if you feel you want to take a break from it. If you decide to take part you do not have to answer any questions you do not wish to answer.

What will taking part in the research involve?
If you would like to take part in this research you will be asked to participate in up to two focus group sessions. These sessions will take the form of a group meeting, either immediately after the time when the [Community Action Network Group] that you attend usually meets, or at a time most convenient to you and the other members of the [Community Action Network Group] taking part. The only other people invited to the meeting will be other members of the [Community Action Network Group] and the group facilitator. At the meeting, I will invite the group to discuss their understanding of what constitutes domestic abuse, and I will explore the groups' thoughts on the criminal justice system in this context. In particular, I will ask for the groups' opinions on the new legislation criminalising coercive control. There is no obligation to answer any questions that you do not wish to answer. The meeting will take about an hour and it will be audio recorded. You would of course be free to leave the meeting at any time, and if, after the first meeting, you decide you don't want to attend the second meeting, that is also fine.

What are the possible disadvantages and risks of taking part?
The focus group discussions will centre on domestic abuse and criminal justice. This is a subject that might understandably be distressing for you, and you might therefore decide that you do not want to take part in this research. In addition, the focus group discussions would take approximately one hour, which might not be possible for you. Taking part in this research is entirely voluntary, and if you decide you do want to take part, you are free to change your mind at any time.

What are the possible benefits of taking part?
The new regulations have been controversial and divisive, with various public figureheads disagreeing about whether or not they will improve the ability of the criminal justice system to prosecute perpetrators of domestic abuse. I hope that this research study will make a valuable contribution to our understanding of whether or not the regulations are having a positive impact: and if not, why not? Domestic abuse has been ignored as an issue for far too long, but it is finally generating a degree of media and criminal justice attention. The timing is therefore right for research studies like this one, which offer an opportunity to improve understanding and thus effect change in an area in which many people argue there is still a real need for improvement. I think it is vital that survivors' opinions are taken into account: your views are therefore really important to me.

Will my information in this study be kept confidential?
All information that might identify you that is stored by me will be kept confidential throughout the research (subject to legal limitations – for example I will not have control over the other members of the focus group). After the meeting, the recording will be transcribed, and any references that could identify you or other members of the group will be removed. If I need to use professional transcribers, I will ensure strict confidentiality provisions apply and that your personal information is secure and safe. The recording and the transcript once completed will be securely stored and I am the only person who will have access to them. At the end of the study all data relating to your interview (with the possible exception of the Consent Form as I explain below) will be archived in the University of Sussex secure data storage facility or the UK Data Archive.

What should I do if I want to take part?
If you want to take part in the research, you should let your facilitator XXXX know. She will pass your email address on to me, if you are happy for her to do so. I will then contact you by email to find out when would be most convenient for you to meet. I will also email you a Consent Form which you will need to sign and bring to the meeting. If you would like to take part, but you would prefer not to liaise directly with me, this is absolutely fine - you just need to let your facilitator XXXX know. She can then liaise with me to co-ordinate the most convenient time for us to meet, and she will email you a Consent Form. You can sign the Consent Form and return it to the facilitator, who will store it securely on my behalf.

What will happen to the results of the research study?
The results of the research study will be incorporated into my Ph.D, which will be publicly available. The results might also help me to write reports and articles, which may be published. I will provide a copy of any published research to any participant who wants to be kept updated in this way.

Who is organising and funding the research?
I am conducting the research as a doctoral student at the University of Sussex in the School of Law, Politics and Sociology. The research is being funded by the Economic and Social Research Council.

Who has approved this study?
The research has been approved by the Social Sciences & Arts Cross-Schools Research Ethics Committee.

Contact for Further Information
In the event that you would like further information about this project, you can email me at c.wiener@sussex.ac.uk. You could also, if you would prefer, email your facilitator who will be able to pass on any questions to me. If you have any concerns about the way in which this research has been conducted, you should contact my supervisor Professor Heather Keating, at h.m.keating@sussex.ac.uk, or, again, you can let your facilitator know your concerns and she will liaise with Professor Heather Keating on your behalf. The University of Sussex has insurance in place to cover its legal liabilities in respect of this study.

Thank you
Thank you for taking the time to read this Information Sheet.

Date
XXXX

Appendix B: Consent Form for Focus Groups

University of Sussex

CONSENT FORM FOR PROJECT PARTICIPANTS

PROJECT TITLE:

CHANGING JUSTICE: ASSESSING SS76 – 77 OF THE SERIOUS CRIME ACT 2015 IN THE CONTEXT OF CONTEMPORARY UNDERSTANDINGS OF DOMESTIC ABUSE

Project Approval Reference: _____

I agree to take part in the above University of Sussex research project. I have had the project explained to me and I have read and understood the Information Sheet, which I may keep for my records. I understand that agreeing to take part means that I am willing to:

- Take part in a focus group facilitated by the researcher
- Allow the focus group to be audio taped

I understand that any information I provide is confidential, and that no information that I disclose will lead to the identification of any individual in the reports on the project, either by the researcher or by any other party.

I understand that my participation is voluntary, that I can choose not to participate in part or all of the project, and that I can withdraw at any stage of the project without giving a reason for my decision.
I consent to the processing of my personal information for the purposes of this research study. I understand that such information will be treated as strictly confidential and handled in accordance with the Data Protection Act 1998.

Signed:
Date:

Appendix C: Information Sheet for Survivors' Interviews

University of Sussex

INFORMATION SHEET

CHANGING JUSTICE: ASSESSING SS76 – 77 OF THE SERIOUS CRIME ACT 2015 IN THE CONTEXT OF CONTEMPORARY UNDERSTANDINGS OF DOMESTIC ABUSE

This Information Sheet is an invitation to take part in a doctoral research project that I am undertaking at the University of Sussex. In this Information Sheet, I hope to give you the information you need in order to decide whether or not you want to take part. I will explain why I am doing the research, what I hope to achieve, and what your involvement would look like, should you decide to take part.

What is the purpose of the study?
The purpose of my study is to investigate how the law criminalises domestic abuse. I am a lawyer, and I have received funding from the Economic and Social Research Council to do this research as part of my Ph.D. at the University of Sussex. In particular, I will be looking at new legislation that criminalises 'coercive and controlling behaviour' in an intimate relationship. This legislation is a completely new way of criminalising domestic abuse, and I want to look at it in this study. As well as reviewing it from a legal perspective, I want to look at how it is being used on the ground, in practice. For me, the most important opinions are those of survivors. As well as talking to police, lawyers and other specialists, I therefore want to talk to survivors of domestic abuse to find out what they think of the criminal justice system in general and the new law in particular.

Why have I been invited to participate?
You have been invited to participate because you are an active campaigner in the area of domestic abuse and your views are important to this study.

Do I have to take part?
Taking part in this research is entirely voluntary. If you decide to take part you are still free to withdraw at any time and without giving a reason – you can also leave the interview temporarily at any time if you feel you want to take a break from it. If you decide to take part you do not have to answer any questions you do not wish to answer.

What will taking part in the research involve?
If you would like to take part in this research I would be grateful if you could email me at c.wiener@sussex.ac.uk so that I can send a Consent Form for you to sign and

return. We can then agree a time and a place to meet that is convenient to you. At the meeting, I will ask you some general questions about your views on the criminal justice system in the context of domestic abuse. In particular, I will ask you about what behaviour you think constitutes abusive behaviour, and about whether you think the criminal law reflects this. I will also be interested in your thoughts on the new regulations criminalising coercive and controlling behaviour. I will ask you if you think that the criminal justice system is working as it is, or if it could be improved. There is no obligation to answer any questions that you do not wish to answer. The meeting will take about an hour and it will be audio recorded.

What are the possible disadvantages and risks of taking part?
My questions will centre on domestic abuse and criminal justice. Although I will not ask you directly about your own experience, this is a subject that might understandably be distressing for you, and you might therefore decide that you do not want to take part in this research. In addition, the meeting would take up to an hour of your time, which might not be possible for you. Taking part in this research is entirely voluntary, and if you decide you do want to take part, you are free to change your mind at any time.

What are the possible benefits of taking part?
The new regulations have been controversial and divisive, with various public figureheads disagreeing about whether or not they will improve the ability of the criminal justice system to prosecute perpetrators of domestic abuse. I hope that this research study will make a valuable contribution to our understanding of whether or not the regulations are having a positive impact: and if not, why not? Domestic abuse has been ignored as an issue for far too long, but it is finally generating a degree of media and criminal justice attention. The timing is therefore right for research studies like this one, which offer an opportunity to improve understanding and thus effect change in an area in which many people argue there is still a real need for improvement. I think it is vital that survivors' opinions are taken into account: your views are therefore really important to me.

Will my information in this study be kept confidential?
All information that might identify you will be kept confidential throughout the research (subject to legal limitations). After the meeting, the recording will be transcribed, and any references that could identify you will be removed. If I need to use professional transcribers, I will ensure strict confidentiality provisions apply and that your personal information is secure and safe. The recording and the transcript once completed will be securely stored and I am the only person who will have access to them. At the end of the study all data relating to your interview will be archived in the University of Sussex secure data storage facility or in the UK Data Archive.

What should I do if I want to take part?
If you want to take part in the research, I would be grateful if you could email me at c.wiener@sussex.co.uk so that we can arrange a time and a place to meet. I will also email you a Consent Form, for you to sign.

What will happen to the results of the research study?

The results of the research study will be incorporated into my Ph.D., which will be publicly available. The results might also help me to write reports and articles, which may be published. I will provide a copy of any published research to you if you let me know that you want to be kept updated in this way.

Who is organising and funding the research?
I am conducting the research as a doctoral student at the University of Sussex in the School of Law, Politics and Sociology. The research is being funded by the Economic and Social Research Council.

Who has approved this study?
The research has been approved by the Social Sciences & Arts Cross-Schools Research Ethics Committee.

Contact for Further Information
In the event that you would like further information about this project, you can email me at c.wiener@sussex.ac.uk. If you have any concerns about the way in which this research has been conducted, you should contact my supervisor Professor Heather Keating, at h.m.keating@sussex.ac.uk. The University of Sussex has insurance in place to cover its legal liabilities in respect of this study.

Thank you
Thank you for taking the time to read this Information Sheet.

Date

Appendix D: Consent Form for Survivors' Interviews

University of Sussex

CONSENT FORM FOR PROJECT PARTICIPANTS

PROJECT TITLE:

CHANGING JUSTICE: ASSESSING SS76 – 77 OF THE SERIOUS CRIME ACT 2015 IN THE CONTEXT OF CONTEMPORARY UNDERSTANDINGS OF DOMESTIC ABUSE

Project Approval Reference: _____

I agree to take part in the above University of Sussex research project. I have had the project explained to me and I have read and understood the Information Sheet, which I may keep for my records. I understand that agreeing to take part means that I am willing to:

* Be interviewed by the researcher
* Allow the interview to be audio taped

I understand that any information I provide is confidential, and that no information that I disclose will lead to the identification of any individual in the reports on the project, either by the researcher or by any other party.

I understand that my participation is voluntary, that I can choose not to participate in part or all of the project, and that I can withdraw at any stage of the project without giving a reason for my decision.
I consent to the processing of my personal information for the purposes of this research study. I understand that such information will be treated as strictly confidential and handled in accordance with the Data Protection Act 1998.

Signed:
Dated:

Appendix E: Information Sheet for Professionals' Interviews

University of Sussex

PROFESSIONALS INTERVIEW INFORMATION SHEET

Study title
CHANGING JUSTICE: ASSESSING SS76 – 77 OF THE SERIOUS CRIME ACT 2015 IN THE CONTEXT OF CONTEMPORARY UNDERSTANDINGS OF DOMESTIC ABUSE

This Information Sheet is an invitation to take part in a doctoral research project that I am undertaking at the University of Sussex. In this Information Sheet, I hope to give you the information you need in order to decide whether or not you want to take part. I will explain why I am doing the research, what I hope to achieve, and what your involvement would look like, should you decide to take part.

What is the purpose of the study?
The purpose of my study is to investigate ss S76 & 77 of the Serious Crime Act 2015 (SCA), which criminalises coercive and controlling behaviour in an intimate or family relationship for the first time in England and Wales. I am a lawyer, and I have received funding from the Economic and Social Research Council to do this research as part of my Ph.D. at the University of Sussex. The criminalisation of coercive control has been controversial, with commentators disagreeing about whether or not it will be effective. My goal is to look at the problem from a legal as well as a practical perspective. As well researching the law, I therefore need to talk to experts – in particular, police, lawyers, magistrates and specialists within the voluntary sector - to find out what they think of the interface between the Criminal Justice System and domestic abuse in general, and the SCA in particular.

Why have I been invited to participate?
You have been invited to participate because you are an expert in this area and your opinion is important to this research.

Right to withdraw
If you decide to take part you are still free to withdraw at any time and without giving a reason.

What will taking part in the research involve?

If you kindly agree to take part in this research, I would be grateful if you could email me at c.wiener@sussex.ac.uk so that I can send a Consent Form for you to sign and return. We can then arrange a time and a place for us to meet that is convenient for you. At the meeting, I will ask you some questions relating to your opinion of the criminal justice system in this context. In particular, I will ask for your thoughts on the SCA. There is no obligation to answer any of my questions. I anticipate that the meeting will take from thirty minutes to an hour (depending on how much time you have) and it will be audio recorded.

What are the possible disadvantages and risks of taking part?
It might not be possible for you to give up your time in this way. Of course, if you decide now that you do want to take part, but later commitments make this difficult, you are free to change your mind at any time.

What are the possible benefits of taking part?
The new regulations have been controversial and divisive, with various public figureheads disagreeing publicly about whether or not criminalising coercive control will improve the ability of the criminal justice system to prosecute perpetrators of domestic abuse. I hope that this research study will make a valuable contribution to our understanding of whether or not the regulations are having a positive impact: and if not, why not? Your opinion could be really critical for this study – I recognise that, in order to get as accurate a picture as possible I need to speak to professionals like you, who are in many ways in the best position to evaluate the impact of the SCA.

Will my information in this study be kept confidential?
All information that might identify you will be kept confidential throughout the research (subject to legal limitations). After the meeting, the recording will be transcribed, and any references that could identify you will be removed. If I need to use professional transcribers, I will ensure strict confidentiality provisions apply and that your personal information is secure and safe. The recording and the transcript once completed will be securely stored and I am the only person who will have access to them. The only exception to this will be if you decide you are happy for me to refer to you by name in my report. If you do decide you are happy to be referred to in this way, I will circulate drafts of any sections of the report that refer to you by name for your authorisation before publication. At the end of the study all data relating to your interview will be archived in the University of Sussex secure data storage facility or in the UK Data Archive.

What should I do if I want to take part?
If you want to take part in the research, I would be grateful if you could email me at c.wiener@sussex.ac.uk. We can then arrange a meeting at a time and a place that is convenient for you. I will also email you a Consent Form, for you to sign.

What will happen to the results of the research study?
The results of the research study will be incorporated into my Ph.D., which will be publicly available. The results might also help me to write reports and articles, which may be published. I will provide a copy of any published research to you if you want to be kept updated in this way.

Who is organising and funding the research?
I am conducting the research as a doctoral student at the University of Sussex in the School of Law, Politics and Sociology. The research is being funded by the Economic and Social Research Council.

Who has approved this study?
The research has been approved by the Social Sciences & Arts Cross-Schools Research Ethics Committee.

Contact for Further Information
In the event that you would like further information about this project, you can email me at c.wiener@sussex.ac.uk. If you have any concerns about the way in which this research has been conducted, you should contact my supervisor Professor Heather Keating, at h.m.keating@sussex.ac.uk. The University of Sussex has insurance in place to cover its legal liabilities in respect of this study.

Thank you
Thank you for taking the time to read this Information Sheet.

Date
XXXX

Appendix F: Consent Form for Professionals' Interviews

University of Sussex

CONSENT FORM FOR PROJECT PARTICIPANTS

PROJECT TITLE:

CHANGING JUSTICE: ASSESSING SS76 – 77 OF THE SERIOUS CRIME ACT 2015 IN THE CONTEXT OF CONTEMPORARY UNDERSTANDINGS OF DOMESTIC ABUSE

Project Approval Reference: _____

I agree to take part in the above University of Sussex research project. I have had the project explained to me and I have read and understood the Information Sheet, which I may keep for my records. I understand that agreeing to take part means that I am willing to:

* Be interviewed by the researcher
* Allow the interview to be audio taped

I understand that any information I provide is confidential, and that no information that I disclose will lead to the identification of any individual in the reports on the project, either by the researcher or by any other party.

OR (please delete as appropriate)

I understand that I will be given a transcript of any references concerning me for my approval before being included in the write up of the research, and on this basis (and on this basis alone) I have given my approval for my name and the name of my workplace to be used in the final report of the project, and in further publications.

I understand that my participation is voluntary, that I can choose not to participate in part or all of the project, and that I can withdraw at any stage of the project without giving a reason for my decision.

I consent to the processing of my personal information for the purposes of this research study. I understand that such information will be treated as strictly confidential and handled in accordance with the Data Protection Act 1998.

Signed:
Date: