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DEFINING COERCIVE CONTROL IN LAW: PROBLEMS AND POSSIBILITIES

The Domestic Abuse Act 2021 introduced a legal definition of domestic abuse into law for the first time in England and Wales. Coercive control is itemised as one item in a list of offending behaviours, alongside other bullet points such as ‘physical or sexual abuse’ and ‘violent or threatening behaviour’. This chapter presents an exploration of how coercive control is used by men to entrap women, drawing on data from interviews and focus groups with survivors and their closest advisors, and on early reports of the controlling or coercive behaviour offending coming before the Court of Appeal. It concludes that the Domestic Abuse Act 2021 definition represents a fundamental misunderstanding of coercive control. All of the offending behaviours listed by the Domestic Abuse Act 2021 need to be understood as part of the domination strategy that is coercive control. In other words, it is not one of five bullet points, but rather a framework that brings meaning to all of the bullet points. Without this paradigm shift the ability of police and prosecutors to keep vulnerable women safe is severely compromised.

Introduction

On 14 August 2010, Sally Challen, a quietly spoken middle class Surrey housewife, prepared lunch for her husband Richard in their family kitchen in the wealthy suburb of Clayton. As Richard ate his lunch, Sally killed him in a frenzied attack with a claw hammer. Sally was convicted at Guildford Crown Court in June 2011 and sentenced to 22 years imprisonment, later reduced to 18 years on appeal.¹

In 2017, legal activists Centre for Women’s Justice took on her case. Their campaign emphasised that Sally’s ‘from nowhere’ crime could only be understood in the context of the abuse that had preceded it: Sally killed Richard only after years of being abused and humiliated by him. The abuse was continuous:

He bullied and belittled her, controlled their money and who she was friends with, not allowing her to socialise without him. But, whilst he forced strict restrictions on her behaviour, he himself, would flaunt his money, have numerous affairs and visit brothels. If she challenged him, he would turn it back on her and make her feel she was going mad.²

¹ Challen [2011] EWCA Crim 2919.

² Justice for Women, ‘Sally Challen’ available at <<https://www.justiceforwomen.org.uk/sally-challen-appeal>> accessed 06 November 2023.

Gaslighting³, economic abuse and isolation are all hall marks of coercive control. The extent to which these are, and are not, incorporated within the Domestic Abuse Act 2021 definition of domestic abuse are discussed in detail below. In any event, the Centre for Women's Justice submitted grounds of appeal highlighting new psychiatric evidence and an expert report showing how coercive control provides a better framework for understanding Sally's out of character attack. Professor Evan Stark and Dr Gwen Adeshead gave expert evidence on coercive control and Sally's mental health respectively at the appeal.⁴ Sally's conviction was quashed and a retrial was ordered. In June 2019, the Crown Prosecution Service decided against a retrial, accepted Sally's guilty plea to manslaughter on the grounds of diminished responsibility, and substituted her sentence for one of 14 years. She was released due to the time she had already served.⁵

In many ways the Sally Challen verdict was disappointing. The judgment is clear that coercive control was not and still is not a defence to murder.⁶ Nevertheless, the Court of Appeal *did take coercive control into account* when considering the partial defence of diminished responsibility, although declined to interpret loss of control manslaughter where it arose in the context of coercive control. The Court was prepared to accept that, 'The understanding of what has been labelled "coercive control" has improved over the years, so much so that Parliament enacted section 76 of the Serious Crime Act 2015 to make it a criminal offence'.⁷ It then considered that coercive control is relevant as a framework within which to understand Sally's deteriorating mental health for the purposes of manslaughter by diminished responsibility. In this way, the door as to its relevance to the partial defences to murder recognised by the criminal law could be said to have been left ajar.

Section 76 Serious Crime Act became law on 29 December 2015, making England and Wales the first jurisdiction in the world to specifically criminalise what is constructed as 'controlling or coercive behaviour' (CCB). Section 76 Serious Crime Act (the CCB offence) makes it an

³ A form of emotional abuse where a perpetrator causes a victim to doubt her own sanity by breaking down the victim's ability to trust her own perceptions of the world around her.

⁴ *Challen* [2019] EWCA Crim 916.

⁵ Editorial, 'Sally Challen on her Release from Prison' *The Guardian* (London, 10 December 2019).

⁶ Tony Storey, 'Coercive Control: An Offence But Not a Defence: R v Challen [2019] EWCA Crim 916, Court of Appeal' 2019 83(6) *The Journal of Criminal Law* 513.

⁷ *Challen* n3 [35].

offence for one person to engage in behaviour towards another which is controlling or coercive and which has a serious impact on the other. 'Controlling or coercive' is not defined further in the Act. As the CCB offence has now been in force for over seven years it has fallen to the courts to compensate for its lack of definitional clarity. Unfortunately (as is explained in more detail below) this has proved to be a difficult and confusing exercise, not helped by the government's own lack of understanding of key concepts in this sensitive area. The rest of this chapter begins by drawing on the work of Evan Stark,⁸ and on focus groups and interviews with survivors of abuse and their closest advisors to sketch the parameters of coercive control.⁹ Two focus groups took place, one with Independent Domestic Violence Advisors, and one with survivors of coercive control, and semi structured interviews were then used to address outstanding issues and develop a working model of coercive control.¹⁰ This empirical model is used as a reference point from which to reflect upon the courts' (and government's) attempts to define coercive control. The chapter concludes by reflecting on how the resultant muddle is adversely affecting the criminal justice system's ability to hold perpetrators to account or protect survivors of abuse.

Understanding Coercive Control – Perpetrator Behaviours

In the evidence which Stark gave to the Court of Appeal in the Sally Challen case, Stark explained that:

In coercive control, abusers deploy a broad range of non-consensual, non-reciprocal tactics, over an extended period of time to subjugate or dominate a partner, rather than merely to hurt them physically. Compliance is achieved by making victims afraid and denying basic rights, resources and liberties without which they are not able to effectively refuse, resist or escape demands that militate against their interests.¹¹

Stark conceptualises coercive control as a 'capture crime', analogous to other capture crimes such as hostage taking and kidnapping.¹² Using human rights discourse, Stark explains perpetrators' leverage of tools used to break the will of kidnap victims, prisoners, hostages and prisoners of war. In this way, the gaslighting tactics of a coercively controlling regime are brought into sharp focus, dimensions of domestic abuse that Stark points out,

⁸ Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007).

⁹ Cassandra Wiener, 'Seeing What is Invisible in Plain Sight: Policing Coercive Control' (2017) 56(4) *The Howard Journal of Crime and Justice* 500.

¹⁰ *Ibid.*

¹¹ *Challen* n3 [38].

¹² Stark, *Coercive Control* n7.

'have gone largely unnoticed and are not normally associated with assault'.¹³ Stark therefore frames perpetrator behaviour, (including physical/sexual violence), as compliance ensuring tactics - by making victims afraid and denying basic rights, perpetrators make coercive demands which they can ensure their victims obey. Critically the strategic intention that brings meaning to all of the perpetrator behaviours is his desire to control her. The perpetrator underpins his domination strategy by making his victim afraid of him and denying her the resources she needs to resist him.

Making the Victim Afraid

The first time a perpetrator demonstrates that he is prepared to physically attack, aggressively, is often when a victim realises how vulnerable they really are. As stated above part of my empirical work was with victims and third sector support workers, and data from this project demonstrate how one incident of violence is often enough. It is not necessary for the perpetrator to repeatedly use or threaten violence to achieve domination. Jessica (an Independent Domestic Violence Adviser (an 'IDVA')), for example, told me the disturbing story of a client who was 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 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".¹⁴

Sexual and physical violence are not always present as perpetrator behaviours, but violence - or the fear of it - usually underpins control. This can take the form of non-fatal strangulation,¹⁵ as in the above example, but generally speaking perpetrators use violence as an effective tool to make a victim afraid. With fear comes credibility: when a threat is credible, a demand is coercive. For many survivors, the onset of fear comes as a

¹³ Ibid. 205.

¹⁴ Wiener, Seeing What is Invisible in Plain Sight n8 509.

¹⁵ Vicki Lowik, Nicola Cheyne and Heather Lovvatt, "'He's Been Trying to Get me": the Lived Experience of Survivors of Intimate Partner Strangulation After Leaving the Abusive Relationship' November 2023 Journal of Family Violence available early access online at <<https://link.springer.com/article/10.1007/s10896-023-00664-x>> accessed 15 November 2023; Richard Stansfield and Kirk Williams, 'Coercive control between intimate partners: An application to non-fatal strangulation' (2021) 36(9-10) Journal of Interpersonal Violence 5105.

transformative moment as in the example above.

Once the stage has been 'set', ongoing physical and sexual violence often accompany the victim's life as a kind of backdrop. One survivor I spoke to described this as 'the usual'. She said, 'there was occasionally hitting and punching - the usual.'¹⁶ Describing this kind of physical abuse as 'the usual' is in some ways misleading even though it is typical of how survivors can articulate day-to-day physical abuse, in a general way, as a way of life that has to be accepted and navigated. Each 'usual' incident taken in isolation might seem 'low-level', but when seen as part of a chronically abusive strategy its insidious significance as a constant chipping of a survivor's autonomy comes into focus.

Sexual violence is used in the same way as physical violence. There can be a transformative moment; this can be a rape, or rough unwanted handling or touching, for example, and this gives credibility to later sexual demands and threats.

Sally Challen was sexually abused by her husband Richard. She said:

After we returned from America Richard started calling me slut, and other horrible things. He did anally rape me a few more times. I didn't resist, I just let him do it, but it would have been clear that I didn't want it. Occasionally I tried to get out of sex, by saying that I had a headache, but he would proceed anyway. He would tell me to "Go upstairs and get ready", which would mean being clean and washed, and sometimes he would leave me waiting for ages.¹⁷

Stark said of Sally's experiences of anal rape that 'for me those incidents are the context within which she experiences repeated sexual aggression on his part. The staging of sex, waiting for him - she experiences that as a repetitive assault. It's an example of what I call 'rape as routine'.¹⁸ Ongoing sexual violence of this type - 'rape as routine' is no less serious than a one-off attack. In many ways it is worse, because it is experienced as a constant. Even apparently 'low-level' forced touching and grabbing, when imbued with menace because of the credibility-threat nexus, is a visible manifestation of the worst kind of ever-present coercive demand. In this way, behaviour such as forced touching and grabbing of a victim functions as 'an assertion of ownership - a frequent reminder that her body is not her

¹⁶ Jessica n13 10.

¹⁷ BBC2, 'The Case of Sally Challen' available at <www.bing.com> accessed 20 July 2023.

¹⁸ *ibid.*

own'.¹⁹

Denying Basic Rights, Resources and Liberties

Perpetrators deny survivors' rights, resources and liberties that in 'normal' life are taken for granted. This makes them less able to resist or escape. The denials that take these rights, resources and liberties away are myriad and bespoke. To the outsider they can seem bizarre. A police officer I spoke to 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 the police officer 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.²⁰ Denying this victim the right that most of us take for granted - the ability to eat from a plate at a table - acted as a continuous reminder of the perpetrator's dominance, a visceral, humiliating and continual reminder of the impossibility of resistance.

Denying survivors access to family and friends is another tool - it has a profound and long-term effect on a survivor 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.²¹ This has emotional and cognitive repercussions that are discussed in relation to the survivor response, below. Perpetrators add further credibility to their threats via surveillance techniques. The survivor has reason to be fearful that her partner will know if she disobeys his demands because she knows that he is spying on her. Technology is the perpetrator's friend.²² Survivors are monitored everywhere, at the pub, at work; victims I have spoken to have told me their abusers monitor the time they spend on the toilet.²³

The dimensions of coercive control are therefore best seen as a strategy of domination. The

¹⁹ Palmer T, 'Failing to See the Wood For the Trees: Chronic Sexual Violation and the Criminal Law' 2020 84(6) *The Journal of Criminal Law* 573, 579.

²⁰ Wiener, *Seeing What is Invisible in Plain Sight* n8 510.

²¹ Stark, *Coercive Control* n7.

²² Tirion Elizabeth Harvard and Michelle Lefevre, 'Beyond the power and control wheel: How abusive men manipulate mobile phone technologies to facilitate coercive control' (2020) 4(2) *Journal of Gender-Based Violence* 223.

²³ Wiener, *Seeing What is Invisible in Plain Sight* n8.

strategy involves making the victim afraid - which usually, but not always, involves the fear of physical and/or sexual violence. The taking away of 'for granted' rights and freedoms makes it harder for the victim to resist. The survivor experiences this harm as a terrifying entrapment where the fight to survive is at the core of every lived day.

Understanding Coercive Control - The Harm

The survivor experience of coercive control is a 'condition of unfreedom that is experienced as *entrapment*'.²⁴ In the context of this 'state of siege',²⁵ survivors make it clear that they do not generally consider physical injury to themselves to be of much consequence. 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*'.²⁶ The important point to recognise is that there is no hierarchy here - living 'in fear'²⁷ is as destabilising as the fear of an immediate threat. In some ways it is more so because it is ongoing - and does not end with the relationship.

Fear continues not only as a response to continuing perpetrator behaviours, but even if/when the abuse does cease. Singer and songwriter FKA Twigs spoke to Louis Theroux of the post-traumatic stress she experienced long after she had successfully ended all contact with her abusive ex-partner Shia Labeouf:

You were asking what have you been doing over lockdown? For me I've just been like - I've been trying not to wake up between three and seven in a panic attack. That's what I have been trying to do. And I am there now. You know - just. But for a long time anything that woke me up in the night, whether it was my dog, or just a noise outside or needing to go to the bathroom it could trigger a really intense panic attack, because I was left with PTSD - from that which, again, is just something that I don't think we really talk about as a society. Just in terms of the healing, and how much work that has to be done to get back to the person that you

²⁴ Evan Stark and Marianne Hester, 'Coercive Control: Update and Review' (2019) 25(1) *Violence Against Women* 81, 89 (emphasis in original).

²⁵ Mary Ann Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' (1992) 21 *Hofstra Law Review* 1191, 1208.

²⁶ Susan Edwards, 'Recognising the Role of the Emotion of Fear in Offences and Defences' (2019) 83(6) *The Journal of Criminal Law* 450, 461 (my italics).

²⁷ *Ibid.*

were before.²⁸

Post-traumatic stress is a common long-term repercussion of coercive control that means the shadows of living 'in fear'²⁹ can stretch far into a survivor's future life.³⁰

Instability is also generated by changes in perpetrator mood. One survivor I spoke to 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'.³¹ Another 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.³²

For most survivors, accompanying the instability rollercoaster is an elusive sense of personal control: if only they could behave differently, the perpetrator's abusive behaviour would stop. FKA Twigs speaks, for example, of 'things that you could do wrong that could take away from the happiness of where things could be'.³³ 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 to keep him from exploding, keeping everyone safe, trying not to crush the eggshells underfoot. One survivor explained it to me 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'.³⁴ At another point in the interview she said, 'I would always try to make it OK'.³⁵

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:

²⁸ FKA Twigs, Interview with Louise Theroux, *Grounded* Podcast Audio.

²⁹ Edwards, *Recognising the Role of the Emotion of Fear* n24 461.

³⁰ Amanda Levine and Patti Timmons, 'Post Traumatic Stress Disorder, and Depression Among Homeless Women (2016) 7(1) *Partner Abuse* 26.

³¹ Wiener, *Seeing What is Invisible in Plain Sight* n8.

³² *Ibid.*

³³ FKA Twigs n26 5.

³⁴ Cassandra Wiener, *Coercive Control and the Criminal Law* (Routledge 2023) 28.

³⁵ *Ibid.*

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.³⁶

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. FKA Twigs speaks about how she was berated for hours, and made to feel like she was 'the worst person ever, so cold and so awful and such a terrible girlfriend' if/when she didn't manage to meet Laboeuf's demands for frequent displays of affection throughout the day.³⁷ Another survivor explained to me 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...'. She internalised the abuse even as she was describing it in an interview environment: 'my badness, ... my darkness'.³⁸ 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'.³⁹ In another IDVA's words:

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.⁴⁰

FKA Twigs said simply, 'everything that I was, was somehow tied to him'.⁴¹ Stark puts it thus: 'he changes who and what she *is*'.⁴²

Defining Control In Law

Definitions of domestic abuse have been through various iterations in the last 25 years. 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

³⁶ Wiener, Coercive Control n32 27.

³⁷ FKA Twigs n26.

³⁸ Wiener, Coercive Control n32 27.

³⁹ Ibid.

⁴⁰ Ibid..

⁴¹ FKA Twigs n26.

⁴² Stark, Coercive Control n7 262 (emphasis mine).

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.⁴³

By 2011, this policy definition seemed inadequate. In particular the reference to ‘incidents’ of abuse and the lack of specific reference to coercive control were thought to be a problem. The government launched its first consultation on whether or not to change the cross-governmental working definition of ‘domestic violence’ (as it was then).⁴⁴ 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.⁴⁵

Feedback from consultees confirmed 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’.⁴⁶ Furthermore, ‘The current (2004) definition fails to identify coercive control, the most common class of abuse cases in which victims seek outside assistance’.⁴⁷ As a result of the consultation, a new definition, which also had 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

⁴³ Home Office ‘Cross-government Definition of Domestic Violence A Consultation’ (December 2011) available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157798/dv-definition-consultation.pdf> accessed 2 February 2023 6.

⁴⁴ Ibid.

⁴⁵ Ibid. 5.

⁴⁶ AVA Against Violence and Abuse, ‘AVA’s Response to Cross-government Definition of Domestic Violence: A Consultation’ (document on file with me) 2.

⁴⁷ Ibid.

- 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.⁴⁸

This is in many ways a helpful definition that accurately defines and portrays both the ‘wrong’ and the ‘harm’ of domestic abuse and coercive control.⁴⁹ In part, this definition is helpful because it begins from the behaviour being defined, (what domestic abuse really looks like), rather than the existing criminal law legislative infrastructure, (how fragments of domestic abuse are currently prosecuted). It uses coercive control as a wrapper within which to locate its constituent parts, by stating that any pattern of incidents of coercive control *encompasses* various examples of abusive behaviour.

The reference to ‘family members’ is in my view unfortunate;⁵⁰ family members can and do abuse each other outside of an intimate relationship but this abuse is quantitatively and qualitatively different to abuse perpetrated by someone who is, or has been, in a relationship with the victim. Attempting to deal with, for example, the abuse of a parent by a teenager in a statute that is designed to address abuse between intimate partners is unhelpful because the dynamics of the abuse are so different. Apart from that, this definition reflects the interconnected nature of the different physical and non-physical behaviour patterns that constitute coercive control, as set out in the first part of this chapter. 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 was in fact taken from the response to the consultation drafted by Davina James-Hanman and Evan Stark.⁵¹ In particular, the

⁴⁸ Home Office, ‘New Definition of Domestic Violence’ (19 September 2012) available at <<https://www.gov.uk/government/news/new-definition-of-domestic-violence>> accessed 12 September 2017.

⁴⁹ Wiener, Coercive Control n32.

⁵⁰ I deal with this in more detail in the section on the Government Consultation of 2014-15 below. See also Liz Kelly and Nicole Westmorland, Time for a rethink—why the current government definition of domestic violence is a problem. *Trouble & Strife*, 14 April. Available at <http://www.troubleandstrife.org/2014/04/time-for-a-rethink-why-the-current-government-definition-of-domestic-violence-is-a-problem/> (last accessed 10 November 2023).

⁵¹ Home Office, ‘Strengthening the Law on Domestic Abuse Consultation Summary of Responses’ (December 2014) 5 available at

definitions of ‘controlling behaviour’ and ‘coercive behaviour’ were drafted by Stark.⁵²

The CCB offence, as stated above, was introduced in December 2015. As stated above there is no 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.

The Domestic Abuse Act 2021 (the DAA) received Royal Assent on 29 April 2021. Hailed as a once in a lifetime opportunity to improve the lot of men and women experiencing domestic abuse, its torturous journey through Parliament began in 2017 when it was introduced by Theresa May as one of her government’s flagship reform initiatives.⁵³ While the DAA is not as radical or reformist as many in academia and the women’s sector had hoped, it does include some helpful procedural and doctrinal improvements for survivors of abuse. The important development for this chapter is the new *statutory* definition of domestic abuse for all agencies with safeguarding obligations, which is introduced by section 1.⁵⁴

The DAA s 1 itemises domestic abuse as a list, separating out five categories of “abusive” behaviour:

- Behaviour of a person (“A”) towards another person (“B”) is “domestic abuse” if—
- (a) A and B are each aged 16 or over and are personally connected to each other, and
 - (b) the behaviour is abusive.
- (3) Behaviour is “abusive” if it consists of any of the following—
- (a) physical or sexual abuse;
 - (b) violent or threatening behaviour;
 - (c) controlling or coercive behaviour;
 - (d) economic abuse (see subsection (4));
 - (e) psychological, emotional or other abuse;

<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).

⁵² Ibid.

⁵³ Susan Edwards, David Malone and Gillian Jones KC 2023, *Blackstone's Guide to the Domestic Abuse Act 2021* (Oxford University Press, 2023).

⁵⁴ Vanessa Bettinson, Adding to the Domestic Abuse Criminal Law Framework: the ‘Domestic Abuse Act’ 2021 2022 (2) *Criminal Law Review* 88.

and it does not matter whether the behaviour consists of a single incident or a course of conduct.

To be clear: the DAA, s 1 does not create a crime. But it is unfortunate that rather than creating clarity it muddies the waters in an already contested definitional space, where the stakes (from a commissioning as well as a criminal justice perspective) are high. As a bullet point approach, it attempts to itemise the behaviours that comprise domestic abuse as a non mutually exclusive list. There are problems with most of the individual items on the list, but the most confusing part of the list as itemised is the way that it incorrectly locates coercive control.⁵⁵

In the previous (2012) policy definition the five behaviour types listed (psychological, physical, sexual, financial and emotional abuse) are given correctly as constituent *parts* of coercive control. Rather than using the coercive control paradigm as the wrapper for what constitutes domestic abuse, the DAA, s 1 definition follows the fragmentation approach of the existing criminal law legislative infrastructure. ‘Controlling or coercive behaviour’ is positioned (incorrectly) as a bullet point, to be understood alongside the other (bullet point) behaviour types such as physical or sexual abuse, or psychological abuse. This makes no sense - as was explained in the first part of this chapter coercive control is a strategy that brings particular meaning to all of the other behaviour types listed.

Unfortunately the confusion generated by the inaccurate positioning of coercive control in this way plays out at all stages of criminal justice process. The remainder of this chapter reviews the criminal justice process at three critical junctions: how the police assess risk, how and what the CPS decide to charge, and how the judge approaches sentencing.

Police assessment of risk

Perhaps the most significant consequence of the bullet point approach imposed by the DAA, s1 definition in England and Wales is the effect that this has on the ability of the police to assess risk. As stated above, the bullet point approach uses domestic abuse as an umbrella

⁵⁵ The extent to which this incorrect framing of coercive control is, and is not, mitigated against by the statutory guidance is discussed in detail at pp. 14 – 15 below.

term, which lists controlling or coercive behaviour as a bullet point alongside sexual and physical violence. Critically no consideration is given to whether any sexual and physical violence that is present is part of a controlling strategy or not. A failure to prioritise the identification of coercive control at the earliest opportunity often has tragic consequences.⁵⁶ Senior police explained to me that cases that end in a domestic homicide are often assessed incorrectly initially as low risk because the coercive control lens is missing.⁵⁷ The bullet point approach means that police still use situationally specific law (the old regime) to investigate many of the constituent parts of coercive control. This forces them down situation specific rabbit holes. Using law that requires evidence of location in time and place, means that they still focus on 'individual' 'acute' 'incidents' of violation. In coercive control, the cumulative nature of the harm/risk is much greater than the sum of its 'low-risk' parts. Conceptualising coercive control as a fragment of offending behaviour rather than a paradigm shift is responsible for this muddle.

The way that the criminal law is structured in England and Wales, therefore, has a significant, direct impact on risk assessment. Feeding into this impact on the risk assessment process is also a harder to quantify indirect impact on the ability of police to empathise with victims of coercive control. Focusing on incidents leads to 'the assumption [by police] that victims ... exercise decisional autonomy "between" episodes'.⁵⁸ This means that victims who fail to capitalise on that (assumed) autonomy can be perceived as responsible, at least in part, for the ongoing abuse that they experience. Being *trapped*, in other words, is misconstrued as a *decision* to stay. An understanding of the coercive control paradigm shift would allow police to understand that each acute, violent incident is, to many women, relatively unimportant in the context of the chronic 'state of siege'⁵⁹ imposed by their

⁵⁶ Jennifer Chopra, Laura Sambrook, Shane McLoughlin, Rebecca Randles, Marek Palance, Victoria Blinkhorn, Risk factors for intimate partner homicide in England and Wales (2022) 30(5) Health and Social Care in the Community 2022 30(5) 3086, Monkton Smith, J In Control Dangerous Relationships and How They End in Murder (Bloomsbury 2021), Jane Monckton-Smith, Intimate Partner Femicide: using Foucauldian analysis to track an eight stage relationship progression to homicide. Violence Against Women, (2020) 26 (11) 1267.

⁵⁷ Ibid.

⁵⁸ Ibid. 200.

⁵⁹ Mary Ann Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' (1992) 21 Hofstra Law Review 1191, 1208.

abuser - and that escape is neither possible, nor, necessarily, a route to safety.

CPS charging decisions

The second reason that the DAA, section 1 definition is a mistake relates to the confusion over what controlling or coercive behaviour *is*. For example, does it incorporate physical abuse? Listing it as a separate bullet point to physical abuse suggests that it is something separate to physical abuse. As is clear from the stories in the first part of this chapter women tell us about abuse that is at the same time physical *and* controlling. Evan Stark⁶⁰ and Michael Johnson,⁶¹ two of the most prominent academic commentators on coercive control, are also clear that coercive control usually includes physical and non-physical behaviours.

The Home Office Statutory Guidance is more accurate but confuses things further. It 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 lists 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.

This ambiguity at a Home Office level as to what, exactly, constitutes coercive control gives the CPS a practical problem when it is deciding what behaviours should be charged further to the CCB offence, and what should be charged separately.⁶² Not surprisingly, the approach taken to date by the CPS, on the limited evidence that is available, is inconsistent. Some CPS areas charge violence separately.⁶³ Statistics published by the Ministry of Justice show that in 2018, half the defendants who were prosecuted for controlling or coercive behaviour

⁶⁰ Evan Stark, Introduction to the Second Edition, *Coercive Control How Men Entrap Women in Personal Life* (Oxford University Press 2007) .

⁶¹ 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 Ibid.

were also prosecuted for common assault and battery.⁶⁴ Some put it forward as evidence of the controlling or coercive behaviour.⁶⁵ In some cases there is no mention of physical or sexual violence,⁶⁶ which could mean that there was not any, or could mean that the relevant CPS area has decided to leave it out altogether. At this time, we have an incomplete picture of CPS decision-making on CCB, due to the relative dearth of empirical evidence.

A review of early sentencing decisions shows the judiciary to be just as inconsistent. In *Barratt*,⁶⁷ 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 that controlling or coercive behaviour incorporates violent behaviour. The 'conduct' which comprises the CCB 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.'⁶⁸ 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*⁶⁹ is also interesting on this point. *Challen*, as mentioned in the first part of this chapter, is a review of a murder conviction. When asked to consider what the criminalisation of coercive control meant, 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.

⁶⁴ Home Office, *Review of the Controlling or Coercive Behaviour Offence* (Home Office Research Report 122, Home Office 2021) 26.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ [2017] EWCA Crim 1631.

⁶⁸ [2017] EWCA Crim 2450 [26].

⁶⁹ [2019] EWCA Crim 916.

As violence is 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.

Ambiguity as to what, exactly, to include as part of controlling or coercive behaviour charge and what to charge separately means that a significant amount of the violence – described as 'the usual' in the first part of this chapter - is still going uncharged. In *Conlon*, for example, there is evidence of 'everyday' violence which is constructed as separate to controlling or coercive behaviour, some of which is charged but most of which is not. 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.⁷⁰

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.'⁷¹ 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.'⁷²

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 violence in the stories in the

⁷⁰ Ibid 4.

⁷¹ Ibid 8.

⁷² Ibid 18.

first part of this chapter, and, indeed of behaviours evident in other CCB reported cases.⁷³ In other words, if an offence of ‘psychological abuse’ is something separate to ‘physical violence’ then this has the potential to mean that a significant amount of violence gets missed.

This point was made by the Court of Appeal in *Berenger*.⁷⁴ Joshua Berenger was charged with one count of controlling or coercive behaviour and one count of assault occasioning actual bodily harm contrary to the Offences Against the Person Act 1861, s47. 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.⁷⁵

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.⁷⁶

The ‘solution’ proposed by the Court of Appeal in this case is that violence should be properly charged separately.⁷⁷ This is not necessarily a solution. As is clear from the stories in the first part of this chapter, if framed as the kind of one-off incident that forms the basis of assault charges much of the significance of the harm – its role in the perpetrator’s domination strategy – is missed.

⁷³ See, for example, *Ramskill* [2021] EWCA Crim 61; *Dalgarno* [2020] EWCA Crim 290; *Holden* [2019] EWCA Crim 1885 and *Berenger* [2019] EWCA Crim 1842.

⁷⁴ [2019] EWCA Crim 1842.

⁷⁵ *Ibid* [3].

⁷⁶ *Ibid* [12].

⁷⁷ *Ibid* [22].

Take the Offences Against the Person Act 1861. It is not surprising that legal provisions introduced in the nineteenth century ‘to address bar brawls and street fights’⁷⁸ are ill-suited for the prosecution of coercive control well over a hundred and fifty years later. The non-fatal offences against the person regime reflects a Victorian preoccupation with ‘men’s security of property and persons’,⁷⁹ and rests on assumptions that are not appropriate in the context of coercive control. A transactional focus places an emphasis on the boundary preservation of property or a person. The crime is conceived of as an acute violation of that boundary that is located in time and space.⁸⁰ Harm is conceived of as physical harm to person or to property. This emphasis on transactional specificity and physical harm means that much of the violence and the harm experienced by survivors of coercive control is excluded altogether. Trying to capture that strategic intent and harm as fragments, and prosecuting them together, but as somehow separate to the physical violence, means that what Deborah Tuerkheimer refers to as the ‘disconnect between life and law’⁸¹ persists for survivors of domestic abuse.

The same difficulties apply in the context of the sexual offending. Sexual offending that takes place within an intimate relationship is rarely one-off - it usually forms part of a perpetrator’s controlling strategy.⁸² The Sexual Offences Act 2003 is also transactional and incident specific and targets acute, one-off incidents of sexual violation, using the ‘moral magic’⁸³ of ‘consent’ to separate behaviour that is abusive from that which is not. The structuring of the sexual offences around the consent construct was not drafted with

⁷⁸ 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.

⁷⁹ Nagire Naffine, *Criminal Law and the Man Problem* (Hart 2019) 23.

⁸⁰ See also Charlotte Bishop and Vanessa Bettinson, ‘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.

⁸¹ Deborah Tuerkheimer, ‘Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence’ (2004) 94(4) *Journal of Criminal Law and Criminology* 959, 980.

⁸² Tami Sullivan, Tara McPartland, S Armeli, Veronique Jackquer, and H Tennen, ‘Is it the exception or the rule? Daily Cooccurrence of Physical, Sexual and Psychological Partner Violence in a 90 day Study of Substance Using Community Women’ (2012) 2(2) *Psychology of Violence* 154; Laura Tarzia, (2021) *Toward an Ecological Understanding of Intimate Partner Sexual Violence* (2021) 36 (23 – 24) 11704; Laura Tarzia and Kelsey Hegarty ‘He’d Tell Me I was Frigid and Ugly and Force me to Have Sex with him Anyway’: Women’s Experiences of Co-Occurring Sexual Violence and Psychological Abuse in Heterosexual Relationships (2022) 38 (1-2) *Journal of Interpersonal Violence*; Katherine Tellis, *Rape as a part of domestic violence: A qualitative analysis of case narratives and official reports* (LFB Scholarly Pub 2010).

⁸³ Heidi Hurd, ‘The Moral Magic of Consent’ (1996) 2(2) *Legal Theory* 121.

coercive control in mind. Even survivors struggle to articulate their experiences of controlling sexual abuse in the language of the Sexual Offences Act 2003, preferring to talk about 'unwanted sex' or 'forced sex' rather than 'rape'.

To conclude, if the physical and psychological aspects of coercive control are charged separately this makes it more difficult to prosecute both fragments of coercive control. If the physical abuse is charged separately further to the Offences Against the Person Act 1861 and associated common law offences, survivors have to pinpoint ongoing abuse to specific dates on which particular assaults took place. This is difficult in the context of physical abuse that is ongoing. Day to day assaults appear 'low-level' if their significance as part of a domination strategy is missed. And the offences against the person regime is wholly inadequate when it comes to recognising the 'harm' of coercive control.

The Home Office, in its early review of the CCB offence, concludes that there is 'insufficient evidence to confidently assess what is driving the current practice'.⁸⁴ It surmises that it could be that it is easier to prosecute 'controlling or coercive behaviour' when it is charged alongside other offences that are perceived as less difficult to prosecute. Another explanation for the charging practices put forward by the Home Office review is the low maximum sentence tariff of the CCB offence.⁸⁵ Finally, it could be 'a lack of understanding among the CJS that these other crimes could be charged and prosecuted as part of coercive or controlling behaviour'.⁸⁶ There is a lack of understanding, a lack which is unfortunately exacerbated by ambiguities created by the DAA, section 1 definition of domestic abuse.

Earlier, in the same review, the Home Office captures the ambiguities perfectly. It states:

While CCB (coercive and controlling behaviour) (sic) often includes both physical and non-physical forms of abuse, a key aim of the creation of the offence was to provide a clearer legal framework to capture patterns of non-physical domestic abuse, where were not prosecutable under alternative offences in the same way that forms of physical abuse might be.⁸⁷

The Home Office is contrasting in one sentence the reality of the behaviour (physical and

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid. 11.

non-physical) with the fragmentation effect of the CCB offence, as it only captures, or only tries to capture 'patterns of non-physical domestic abuse'. In my view, it is not surprising that the CPS are struggling on how and what to charge.

Judicial Sentencing Decisions

The last part of this chapter looks at the final (critical) part of the criminal justice journey – the judicial sentencing of the CCB offence. Here I draw on five qualitative interviews that I undertook with Crown Court judges in the South East of England and Wales. I worked with the judicial office to put out a call for judges who had experience of sentencing the new (as it was then) CCB offence, and so the judges I interviewed were self-selecting. All agreed that the sentencing process was fraught - as is evidenced by reports of appeals of sentencing decisions in this context. In a sense the confusion around sentencing is the practical repercussion of what this chapter has found to be the fundamental (and unhelpful) uncertainties generated by the DAA, s1 definition of domestic abuse. Whether or not so called 'low level' physical violence is charged alongside the CCB offence and the low maximum sentence of imprisonment, (five years), makes sentencing an especially delicate exercise.

The most common accompanying counts on a CCB 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. One judge I interviewed 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 the judge 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 additional violence detailed in the Court of Appeal judgment that is not charged

separately.⁸⁸ The judge decided to use the CCB 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 the judge to use that charge (for example rape, or inflicting grievous bodily harm) as the principal offence and to make the sentencing of the CCB offence concurrent.⁸⁹

Difficulties remain, however. I did not ask this particular judge 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 controlling violence continues to go unrecognised and 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*⁹⁰ 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 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.

⁸⁸ It is not possible to cite the Court of Appeal judgment in question as this identifies the judge in question who asked to remain anonymous.

⁸⁹ 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).

⁹⁰ *Parkin* [2018] EWCA Crim 2764.

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.⁹¹

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 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.

Unfortunately, the low maximum sentence of imprisonment for controlling or coercive behaviour, (five years), also adds to the perception of a hierarchy of harms.⁹² Judges I have interviewed agreed that this is too low.⁹³ 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.

Conclusion

The DAA, s1 definition lists controlling or coercive behaviour as one of six bullet point behaviour types. It does not define ‘controlling or coercive behaviour’ any further. This supports the view that the intention is/was for the CCB offence to be charged alongside existing criminal law offences to prosecute coercive control. The six bullet points in the definition are therefore prosecuted mostly separately, as fragments. Physical assaults are charged as offences against the person,⁹⁴ sexual assaults as sexual offences,⁹⁵ threatening behaviour as stalking and harassment.⁹⁶ This means that much of coercive control in England and Wales, despite the introduction of the CCB offence, is still prosecuted under the old set of non-bespoke criminal law statutes. ‘Controlling or coercive behaviour’ is

⁹¹ Ibid. [39].

⁹² Serious Crime Act 2015, s 11.

⁹³ Wiener, Coercive Control n32.

⁹⁴ Offences Against the Person Act 1861.

⁹⁵ Sexual Offences Act 2003.

⁹⁶ Protection From Harassment Act 1997.

framed as a type of non-physical, non-sexual psychological abuse which often accompanies but which is somehow separate from (exists alongside) the other fragments of abuse.

In fact, listing coercive control as one of six behaviour types is misleading. It suggests an equivalence between 'controlling or coercive behaviour', 'sexual abuse', 'physical abuse' 'economic abuse' and 'emotional/psychological abuse' which is inaccurate. Coercive control is not one of five behaviour types that make up domestic abuse. It is the wrapper that gives meaning to other the four behaviour types in the list. Coercive control, where it exists, is a domination strategy *consisting of* the sexual, physical, emotional and economic abuse which function as instruments in its toolbox.

The repercussions of this mis-framing are still playing out in England and Wales to the detriment of the prosecution of domestic abuse. In this chapter, I have sketched out three of the most significant problem areas: at the police station, with the CPS and in the courtroom. Ultimately, if ongoing controlling physical abuse is prosecuted, say, alongside rather than as part of coercive control, much of what makes it wrong is missed. The non-bespoke offences, the Offences Against the Person Act 1861, the Sexual Offences Act 2003 and even the Protection from Harassment Act 1997, that end up getting used alongside the coercive control law, were not, as I explain above, drafted with coercive control in mind.

In light of the difficulties introduced by the DAA, s1 bullet point approach, it is perhaps not surprising that the uptake of the CCB offence in England and Wales has been disappointing. Firstly, the data suggest that only a fraction of cases involving coercive control are being investigated as such by the police in England and Wales. Data obtained by the BBC, for example, 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 charges.⁹⁷ This finding is supported by a Freedom of

⁹⁷ 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.

Information request issued by the Bureau of Investigative Journalism which showed some forces in England and Wales recording as few as five charges over a twelve-month period.⁹⁸

The conclusion thus reported in the press - that coercive control is, in England and Wales, still going under the radar - is supported by academic research findings. One recent study showed that of the nearly 19,000 domestic abuse offences recorded by one police force during a recent 18-month period less than 1 per cent were recorded as coercive control.⁹⁹ The authors of the study conclude that, 'This number is considerably low, particularly when compared with other offences'.¹⁰⁰ Another study found that the rate of charge for controlling or coercive behaviour was half that for other domestic abuse offences.¹⁰¹ And finally, this position is supported by national statistics: in the year ending March 2022, 1,925 defendants were prosecuted for CCB - this is 0.001% of an estimated 1.7 million women experiencing domestic abuse during that time period.¹⁰²

Secondly, the data show difficulties in England and Wales with evidencing CCB charges. A Home Office early review of the CCB offence reports that in England and Wales, 85% of CCB offences in 2018/19 were 'finalised' (which means discontinued) due to 'evidential difficulties'.¹⁰³ An independent academic study found that the likelihood that a case would be discontinued for evidential reasons was over 50% higher than for other domestic abuse related offences.¹⁰⁴ Criticism that police and prosecutors in England and Wales are not pursuing enough CCB offences is therefore 'regular and ongoing'; also apparent is that

⁹⁸ 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.

⁹⁹ Ibid.

¹⁰⁰ Charlotte Barlow, Kelly Johnson K, Sandra Walklate and Les Humphries, 'Putting Coercive Control into Practice: Problems and Possibilities' (2020) 60(1) *British Journal of Criminology* 160 166.

¹⁰¹ Ian Brennan and Andy Myhill, 'Coercive Control: Patterns in Crimes, Arrests and Outcomes for a New Domestic Abuse Offence' 2022 22(2) *The British Journal of Criminology* 468.

¹⁰² ONS, Domestic Abuse Prevalence and Trends, England and Wales, Year Ending March 2022 available at <www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseprevalenceandtrendsenglandandwales/yearendingmarch2022> .

¹⁰³ Home Office, *Review of the Controlling or Coercive Behaviour Offence* (Home Office Research Report 122, Home Office 2021).

¹⁰⁴ Brennan and Myhill, *Coercive Control* n102.

police understanding of coercive control in England and Wales is poor, and that this is hampering their ability to investigate.¹⁰⁵

To conclude: understandings of coercive control from a criminal justice perspective in England and Wales are flawed. The DAA, s1 bullet point definition cements, rather than resolves, the fragmentation of coercive control into its constituent parts. This makes it harder to investigate, prosecute and sentence coercive control than it would be if it was properly defined in law. There is no 'perfect' way to define domestic abuse and every jurisdiction will work within the socio-legal confines of what is politically possible. It is, also, early days for the criminalisation project: as has been said 'the incorporation and use of coercive control in an adversarial context is relatively uncharted territory'.¹⁰⁶ To the extent that there is room for manoeuvre, there are useful lessons to be learnt from the confusion generated by the DAA s1 definition. Legal reform is always a work in progress. While the criminal justice recognition of coercive control marks progress, it is clear that in England and Wales there is more work to be done.

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¹⁰⁵ Wiener, Seeing What is Invisible in Plain Sight n8; Paul McGorrey 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 n101.

¹⁰⁶ 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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