

## NOTES

### READY TO BRIDGE THE DISCONNECT: IMPLEMENTING ENGLAND AND WALES' COERCIVE CONTROL MODEL FOR CRIMINALIZING DOMESTIC ABUSE IN THE UNITED STATES

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#### INTRODUCTION

Terry Traficonda was a hostage in her own home and had been for some time.<sup>1</sup> Terry was only permitted to eat one meager meal a day, such as a single slice of cold pizza. Her access to the restroom was restricted, and even when given access, she was deprived of toilet paper. Terry's money and car keys had been taken from her. She was forbidden from leaving the house to attend work, from speaking to family and friends, and even from touching her own baby. Terry experienced repeated threats to her life by the man holding her hostage—threats to kill Terry for violating any of these arbitrary rules, and sometimes even, to kill Terry for no reason at all.

On June 3, 1989, a warm evening in Waterford, Connecticut, Terry knew that she needed to escape. Running across the lawn as fast as her legs would take her, with her infant son clutched to her chest, Terry took refuge in the home of a neighbor. But it wasn't long before her captor burst through the door, snatched the baby from Terry's arms, and sped away with the boy in his pick-up truck. Terry frantically reported to a 911 emergency operator that the man had kidnapped her son. Law enforcement was familiar with the man and Terry's situation. Police responded to the home on multiple occasions, including once not even two weeks prior when a neighbor reported to 911 that the man was beating

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1. EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 18 (2009) [hereinafter STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE]. *See id.* at 17-20, for more on Terry Traficonda's abuse and subsequent litigation.

Terry. Finding Terry bloodied and bruised, the police arrested the man—though it wasn't long before the police released him from custody. Terry contacted law enforcement yet again, just days prior to her attempted escape on June 3rd, when she once more reported abuse by the same man to a police officer who observed additional bruises on Terry's neck, arms, and legs.<sup>2</sup>

While on the phone reporting her son's kidnapping to the 911 operator that June 3rd evening, the man returned with the boy. Fear for her son's safety overwhelmed Terry. She became hysterical, begging the 911 operator to recall dispatched law enforcement. "'If they come, he'll kill me,' she said."<sup>3</sup> No police officers came; at least, not until shortly after two a.m. that same evening, when police found Terry fatally shot in the head, naked from the waist down, and her body riddled with bruises. The man that held Terry hostage in her own home, her husband Phillip Traficonda, was arrested and charged with Terry's murder.

In a wrongful death action against the city, Terry's sister argued that had police appropriately responded to the home on June 3rd despite Terry's countermanding, Terry Traficonda's death would have been prevented.<sup>4</sup> Terry's sister hired one of the most prominent scholars on domestic violence against women, Professor Evan Stark, as an expert on appropriate police response in domestic violence situations.<sup>5</sup> On cross-examination, the city's attorney asked: Even if the police had responded to the home that evening, what could they have done that would have prevented Terry's death? Professor Stark knew what the attorney wanted him to concede: that under Connecticut's applicable domestic violence statute, typical of the American domestic violence law paradigm, there was little that law enforcement could have done.<sup>6</sup> True, police could have arrested her husband that night for minor offenses, "[b]ut because there was no evidence that Terry had been seriously injured on that night, he would be released the next day, almost certainly angrier than before. . . . Until he shot his wife, Phillip Traficonda had not committed a serious crime."<sup>7</sup>

Terry's story is not unique. It is not unlike the story of the approximately 300

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2. State v. Traficonda, 223 Conn. 273, 277 (1992).

3. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 1-2.

4. *Id.* at 18. It is "a basic tenet of police training" that law enforcement respond to domestic violence calls, "even when a victim countermands a previous request." *Id.* at 18-19.

5. Professor Evan Stark is a sociologist, forensic social worker, and award-winning research and author. He wrote the seminal book on coercive control in the context of domestic violence: *Coercive Control: How Men Entrap Women in Personal Life*. See generally STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1. Professor Stark is one of the world's leading authorities on coercive control and domestic violence, and he has "influenced the United Kingdom and other countries in Europe to expand their definitions of domestic violence to include coercive control." Author biography of Evan D. Stark, SAGE PUBLISHING, <https://us.sagepub.com/en-us/nam/author/evan-d-stark/> (last visited Feb. 19, 2019) [<https://perma.cc/U5R6-DSRZ>].

6. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 19-20. Like many other states, Connecticut law requires mandatory arrest in instances of domestic violence where there is probable cause that such a crime has occurred. *Id.* at 18.

7. *Id.* at 19-20.

million women per year between the ages of 15 and 64 who report an assault by an intimate partner: “[t]hat’s every [9th] woman in the world, every year.”<sup>8</sup> Globally, 38% of female homicide victims are killed by a spouse or partner, and 35% percent of women have been victims of rape or physical abuse—80% of those at the hands of their partner or spouse.<sup>9</sup> Experts have declared that violence against women is a prominent human rights issue and critical public health concern.<sup>10</sup> The most prevalent type of violence against women is intimate partner violence, commonly referred to as domestic violence or domestic abuse,<sup>11</sup> which encompasses experiences of “physical, sexual, psychological, or economic violence by a current or former intimate partner.”<sup>12</sup>

Academics and legal theorists argue that the traditional legal framework for criminalizing domestic abuse, which criminalizes discrete acts of physical

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8. Bjorn Lomborg & Michelle A. Williams, *The Cost of Domestic Violence Is Astonishing*, WASH. POST (Feb. 22, 2018), [https://www.washingtonpost.com/opinions/the-cost-of-domestic-violence-is-astonishing/2018/02/22/f8c9a88a-0cf5-11e8-8b0d-891602206fb7\\_story.html?noredirect=on&utm\\_term=.259fd83dad46](https://www.washingtonpost.com/opinions/the-cost-of-domestic-violence-is-astonishing/2018/02/22/f8c9a88a-0cf5-11e8-8b0d-891602206fb7_story.html?noredirect=on&utm_term=.259fd83dad46) [https://perma.cc/LH7S-AADK]. Though much of this Note’s discussion may also apply to other types of intimate or familial abuse, the focus of this Note will be on domestic violence committed *by men against women*, and how the United States and United Kingdom’s criminal justice systems respond to this type of domestic violence specifically. This is so for several reasons. Most importantly, “[i]n the vast majority of cases, women are the victims of domestic violence and men the perpetrators. Approximately eighty-five to ninety percent of heterosexual partner violence reported to law enforcement is perpetrated by men.” Deborah Tuerkheimer, *Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 960 n.5 (2004) [hereinafter Tuerkheimer, *Recognizing and Remediating the Harm of Battering*]. Further, in both the United States and the United Kingdom, the roots of each jurisdiction’s domestic violence laws are found in patriarchal English common law. See *infra* Parts I.A and II.A. Those roots offer some explanation as to why both the United States and the United Kingdom’s criminal laws against domestic violence have been “uniquely non-responsive to the concerns of women battered by men[.]” specifically. Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra*.

9. Michaelen Doucleff & Rhitu Chatterjee, *WHO Finds Violence against Women Is ‘Shockingly’ Common*, NAT’L PUB. RADIO, INC. (June 20, 2013, 9:01 AM ET), <https://www.npr.org/sections/health-shots/2013/06/20/193475321/who-finds-violence-against-women-is-shockingly-common> [https://perma.cc/A52H-3W2G].

10. Samia Alhabib, Ula Nur & Roger Jones, *Domestic Violence against Women: Systematic Review of Prevalence Studies*, 25 J. FAM. VIOLENCE 369, 369 (2009).

11. There is significant terminological debate regarding the meaning and use of various, interchangeable terms that describe “the broad range of behaviors considered to be violent and abusive within an intimate relationship.” Mary Ann Dutton, *Understanding Women’s Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1204 (1993). Terms such as intimate partner violence, domestic violence, and domestic abuse will likewise be used interchangeably throughout this Note.

12. Mary C. Ellsberg, *Violence against Women: A Global Public Health Crisis*, 34 SCANDINAVIAN J. PUB. HEALTH 1, 1 (2006).

violence, further aggravates the prevalence and seriousness of domestic abuse.<sup>13</sup> Commentators argue that this traditional violence framework produces a “vast and significant” disconnect between domestic abuse as it is actually experienced, and domestic abuse as it is punished by law.<sup>14</sup> Alarming statistics and conclusions such as these have led powerful non-government organizations (NGOs), the United Nations, and several countries to engage in domestic violence law reform in order to bridge this disconnect.<sup>15</sup> Recently, the United Kingdom joined in this reform campaign by enacting landmark legislation, Section 76 of the Serious Crime Act 2015, which creates a criminal “coercive control offense,” specific to domestic abuse.<sup>16</sup> Section 76 extends criminal liability for domestic abuse in England and Wales beyond discrete acts of physical violence, to include ongoing patterns of non-physical behavior that are engaged in for purposes of control, domination and fear-based subordination over an intimate partner, thereby adopting the “coercive control” model for criminalizing domestic abuse.<sup>17</sup>

The coercive control model of domestic abuse, championed by Professor Evan Stark, moves domestic abuse theory away from the misguided traditional “incident-specific definition of physical assault” that has historically dominated domestic violence law, response, and research.<sup>18</sup> Instead, coercive control characterizes domestic violence as an ongoing pattern in which abusive partners employ various combinations of coercive or controlling tactics in order to subordinate their partners, including, but not limited to, tactics of “intimidation, isolation, humiliation, . . . control,” and violence.<sup>19</sup> Further, while physical violence may be one tactic used within a larger campaign of abuse, it is not a

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13. See discussion of the traditional “violent incident model,” employed in the United States, and accompanying footnotes *infra* Part II.C.

14. See Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 959.

15. See Julia R. Tolmie, *Coercive Control: To Criminalize or Not to Criminalize?*, 18 CRIMINOLOGY & CRIM. JUST. 50, 50-51 (2018).

16. *Transforming the Response to Domestic Abuse – Government Consultation (full version)*, HM GOV'T 54 (Mar. 8, 2018), [https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation-sign-version/supporting\\_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf](https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation-sign-version/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf) [<https://perma.cc/JJP5-PZC3>] [hereinafter *Transforming the Response to Domestic Abuse – Consultation*]; see Serious Crime Act 2015, c. 9, § 76(1) (UK).

17. Evan Stark, *Coercive Control as a Framework for Responding to Male Partner Abuse in the UK*, in THE ROUTLEDGE HANDBOOK OF GENDER AND VIOLENCE 15, 16 (Nancy Lombard ed., 2018) [hereinafter Stark, *Coercive Control as a Framework for Responding to Male Partner Abuse in the UK*].

18. Evan Stark, *Coercive Control*, in ENCYCLOPEDIA OF DOMESTIC VIOLENCE 166, 166 (Nicky Ali Jackson ed., 2007) [hereinafter Stark, ENCYCLOPEDIA OF DOMESTIC VIOLENCE].

19. *Id.* Professor Stark's coercive control theory also emphasizes the role of sexual inequalities of women in domestic abuse. See *id.* However, due to limitations under the United States Constitution on gender-based government action, the role of gender will not be considered in this Note's proposed coercive control offense. See U.S. CONST. amend. XIV, § 1; *United States v. Virginia*, 518 U.S. 515 (1996).

necessary condition for coercive control, and may not even be present at all.<sup>20</sup> Coercive control is the most dangerous form of domestic abuse against women and is one of the most predictive factors for fatality in abusive relationships.<sup>21</sup> Additionally, though coercive control is also the most common type of domestic abuse,<sup>22</sup> it has curiously only recently begun to replace the traditional violent incident model of domestic violence, seen in countries recently engaging in domestic violence law reform, such as Scotland, Ireland, England and Wales.<sup>23</sup>

While these countries have been applauded by domestic violence experts for their progressive reformative efforts to bridge the domestic abuse disconnect by implementing a coercive control model for criminalizing domestic violence, the United States' framework, which continues to apply the traditional violent incident model, is widely considered to be inefficient and outdated, remaining relatively unchanged since the end of the twentieth century.<sup>24</sup> Though four decades of legislative reforms at local, state, and federal levels in the United States have made significant progress toward preventing domestic abuse and protecting victims, the American domestic violence law paradigm continues to "fall short of fully" reaching those goals.<sup>25</sup> Approximately three women are killed by a current or former intimate partner every day in the United States.<sup>26</sup> Moreover, in 2017, the United States identified intimate partner violence as a public health issue in light of a report published by the Center for Disease Control

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20. Stark, *Coercive Control as a Framework for Responding to Male Partner Abuse in the UK*, *supra* note 17, at 21. The tactic of violence is absent or has ceased in an estimated 25% of domestic abuse cases. *Id.*

21. Stark, *ENCYCLOPEDIA OF DOMESTIC VIOLENCE*, *supra* note 18, at 171. Other than the presence of a firearm, two factors predict fatality in abusive relationships better than all others: "whether the couple had separated after living together, and whether an abuser was 'highly controlling' in addition to being violent." Additionally, when both factors are present, "the chance that an abused woman would be killed by her partner was nine times higher than when these factors were not present." *Id.*; Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1090 (2003).

22. Stark, *ENCYCLOPEDIA OF DOMESTIC VIOLENCE*, *supra* note 18, at 167, 171.

23. See Domestic Abuse (Scotland) Act 2018, (ASP 5) § 1; Domestic Violence Act 2018 (Act No. 6/2018) (Ir.), <http://www.irishstatutebook.ie/eli/2018/act/6/enacted/en/pdf> [<https://perma.cc/4JC5-HWW7>]; Serious Crime Act 2015, c. 9, § 76(1) (UK).

24. See discussion of criticisms of "violent incident model" *infra* Part II.C.

25. Sally F. Goldfarb, *The Legal Response to Violence against Women in the United States of America: Recent Reforms and Continuing Challenges*, UNITED NATIONS 1 (July 30, 2008), [http://www.un.org/womenwatch/daw/egm/vaw\\_legislation\\_2008/expertpapers/EGMGPLVAW%20Paper%20\(Sally%20Goldfarb\).pdf](http://www.un.org/womenwatch/daw/egm/vaw_legislation_2008/expertpapers/EGMGPLVAW%20Paper%20(Sally%20Goldfarb).pdf) [<https://perma.cc/V9AG-VYHJ>].

26. *When Men Murder Women: An Analysis of 2015 Homicide Data*, VIOLENCE POL'Y CTR. 3 (Sept. 2017), <http://www.vpc.org/studies/wmmw2017.pdf> [<https://perma.cc/5BDE-S8JR>]. Of female homicide victims who were identified as having known their killer, 928 were current or former intimate partners of their killer. *Id.* Mathematically, that works out to an average of 2.54 women killed by an identified current or former intimate partner per day in the United States.

and Prevention, which found that in the United States, “[m]ore than half of female homicide victims [are] killed in connection to intimate partner violence[.]”<sup>27</sup>

The goal of this Note is to incentivize American legislators and policy-makers to join in the global domestic violence law reform campaign to bridge the domestic abuse disconnect by criminalizing ongoing patterns of coercive and controlling behavior, as the United Kingdom did by implementing Section 76. This Note proposes that the United States is ready to similarly bridge the domestic abuse disconnect and should follow the United Kingdom’s lead by implementing legislation similar to Section 76. Part I of this Note discusses the social and legal development of domestic violence criminalization in the United Kingdom, culminating in the enactment of a coercive control offense under Section 76 of the Serious Crime Act 2015. Part I goes on to explain the required elements of the offense, related legislative documents, and its enforcement since enacted in 2015. Likewise, Part II discusses the very similar socio-legal evolution of America’s criminalization of domestic violence since the seventeenth century. Part II then explains how, though the United States’ domestic violence reform initially followed the same path as the United Kingdom’s, it has since effectively stalled due to the current paradigm for criminalizing domestic violence in the United States—the “violent incident model.” Part III goes on to compare the respective approaches of the United States and the United Kingdom, discussing the similarities and differences between the two; dissecting each framework’s strengths and weaknesses in bridging, or perpetuating, the domestic abuse disconnect; and analyzing the implications of each jurisdiction’s approach on the experiences of domestic violence victims. Based on this comparative analysis, Part IV posits that the United Kingdom’s coercive control model, Section 76, more effectively bridges the disconnect, and thus is a better framework for criminalizing domestic abuse than that of the United States. Accordingly, Part IV advocates for the use of Section 76 as a model upon which the United States should build to create a new coercive control offense, and provides recommendations as to how Section 76 should be modified for a proposed coercive control offense in the United States in consideration of whether the advantages of the United Kingdom’s approach could be effectively captured within the United States’ unique criminal justice framework, and of obstacles the United States may face in adopting the United Kingdom’s model. Finally, learning from the United Kingdom’s implementation, Part IV emphasizes the need for comprehensive training and education for law enforcement and other criminal justice professionals to effectively implement legislation similar to Section 76 in the United States.

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27. Camila Domonoske, *CDC: Half of All Female Homicide Victims Are Killed by Intimate Partners*, NAT’L PUB. RADIO, INC. (June 21, 2017, 2:22 PM ET), <https://www.npr.org/sections/thetwo-way/2017/07/21/538518569/cdc-half-of-all-female-murder-victims-are-killed-by-intimate-partners> [<https://perma.cc/88AC-Q6N2>].

I. THE CRIMINALIZATION OF DOMESTIC VIOLENCE AND REFORM EFFORTS  
IN THE UNITED KINGDOM

This Part first reviews the historical roots of the United Kingdom's domestic violence jurisprudence, and how the common-law development of those rules effectively inhibited any meaningful domestic violence law reform in the United Kingdom until the 20th century. Next, this Part discusses three major impetuses for modern domestic violence law reforms in England and Wales that developed during the later 20<sup>th</sup> century: broadened international human rights doctrine regarding violence against women, increased scrutiny on passive government responses to domestic abuse by feminist and civil rights activists, and increased empirical understandings of domestic abuse. This Part then discusses the legislative gap under the substantive framework for prosecuting domestic abuse prior to 2015, as well as reform efforts made over the last decade, which culminated in the creation of a new coercive control offense under Section 76 of the Serious Crime Act 2015. Finally, this Part analyzes the implementation of Section 76 since its enactment, positing that the arguably underwhelming results are due to conceptual confusion regarding domestic abuse and the new offense, rather than resulting from the potential effectiveness of Section 76 itself.

*A. The Historical Roots of Domestic Violence Law in the United Kingdom*

Though the United Kingdom now recognizes the devastating effects of coercive or controlling behaviors on victims of domestic violence and criminalizes against these behaviors, that has not always been the case. Early English common law found precedent for sanctioned domestic violence in centuries-old religious customs of Europe.<sup>28</sup> Literal biblical interpretations of patriarchy and the familial hierarchy bred European traditions that subordinated women to their husbands.<sup>29</sup> Because the law of the land in medieval Europe was effectively the law of the church,<sup>30</sup> English feudal law reinforced these religious traditions.<sup>31</sup> The religious custom of subordinating women to their husbands was utilized in developing the English common law doctrine of chastisement,<sup>32</sup> which granted husband's the right to use physical violence to "command his wife's obedience, and subject her to corporal punishment or 'chastisement' if she defied his authority."<sup>33</sup>

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28. EVE S. BUZAWA, CARL G. BUZAWA, & EVAN STARK, *RESPONDING TO DOMESTIC VIOLENCE* 59-60 (5th ed. 2017).

29. *Id.* at 65-66. For example, the Bible states, "I will greatly multiply your (woman's) sorrow, and your conception; in pain you shall bring forth children; your desire shall be to thy husband, *and he shall rule over you.*" *Genesis* 3:16 (emphasis added).

30. DEL MARTIN, *BATTERED WIVES* 29 (1976).

31. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 60.

32. *Id.*

33. Reva B. Siegel, "*The Rule of Love*": *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2123 (1996). Sir William Blackstone explains, "The husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehavior [sic], [sic] the law

Although once largely unfettered, English common law began placing some limits on this chastisement right of English husbands in the sixteenth century.<sup>34</sup> In response to a number of beating deaths regarded as extreme, the courts slowly began placing formal “limits” on a husband’s legally sanctioned right to batter his wife, taking away his absolute power over her life and death.<sup>35</sup> However, short of a husband committing homicide, few meaningful restraints were placed on husbands exercising their chastisement right.<sup>36</sup> British jurisprudence continued to reinforce the doctrine for centuries, until England abolished the chastisement right of husbands in 1829.<sup>37</sup> Additionally, increasingly disturbing incidents of extreme violence by husbands against their wives led to some efforts during the late 1800s to develop England’s criminal laws to protect women and children, as well as expand family law remedies for battered wives.<sup>38</sup> However, even with legal remedies formally in place, in practice they were often inaccessible to many women and there was no intervention unless the violence was so grave that it endangered a wife’s “life and limb.”<sup>39</sup> Aside from these meager developments during the nineteenth century, England saw little to no meaningful reform to domestic violence law until the late twentieth century.

### *B. Moving toward Reform: Identifying the Disconnect*

Laying the groundwork for the United Kingdom’s current use of a coercive control model for criminalizing domestic violence began in the late twentieth century as human and women’s rights grew, and so too did global efforts among academics and activists alike to understand and address issues faced by women—namely, domestic violence.

#### *1. Expanded International Human Rights Doctrine*

One such issue taken on by activists was advocating for the expansion of international human rights doctrine to encompass domestic violence as a form of violence against women. A growing consensus among the international activist community developed throughout the end of the twentieth century, recognizing that domestic abuse “is part of a larger pattern of ‘violence against women and girls’; that this pattern is rooted in, exploits, and reproduces sexual inequality; that, therefore, it is a form of gender discrimination; and that, as such, violates

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thought it reasonable to intrust [sic] him with this power of restraining her, by domestic chastisement[.]” 1 William Blackstone, Commentaries \*444 (citations omitted).

34. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 60.

35. *Id.*

36. *Id.*

37. D. KELLY WEISBERG, DOMESTIC VIOLENCE: LEGAL AND SOCIAL REALITY 19 (2012).

38. Lorraine Mary Therese Radford, *The Law and Domestic Violence against Women* 31-33 (1988) (unpublished Ph.D. thesis, Univ. of Bradford) (on file with the University of Bradford).

39. *Id.* at 9.



women's human rights."<sup>40</sup> Influenced by such activism, the United Nations and other NGOs formally recognized violence against women as linked to human rights and issues of female inequality incrementally by passing several treaties throughout the 1990s, including most notably, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1992.<sup>41</sup> CEDAW played a major role in broadening human rights doctrine to encompass domestic violence by formally "recognizing that rape and domestic violence are causes of women's subordination rather than simply its consequences and that, therefore, gender violence [is] a form of discrimination that 'seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.'"<sup>42</sup> Ultimately, this recognition and the United Kingdom's international obligations derived from CEDAW would go on to shape the United Kingdom's twenty-first century reform efforts and the substance of Section 76.<sup>43</sup>

## 2. Political Pressure Regarding Police Response to Domestic Violence

Another brick laid in the pathway to coercive control in the United Kingdom was women's advocacy during the late twentieth century criticizing the failing responses of police to women experiencing domestic violence. Prior to the mid-1970s, it was the formal policy of many police departments to "advise[] against arresting men who were violent to their partners," rationalizing that the reluctance to intervene specifically in cases of domestic violence was supported by the important goal of "maintain[ing] the unity of spouses."<sup>44</sup> However, as feminist activism flourished and women's rights grew during the late 1960s and early 1970s, political pressure regarding this and other "observed inadequacies of criminal justice response to issues of interest to women" began to mount, both in the United Kingdom and the United States.<sup>45</sup> As part of a global explosion of research to identify mechanisms for decreasing and preventing domestic violence, a body of research during the 1970s studied the effect of the criminal justice system and police response to domestic violence.<sup>46</sup>

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40. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 302.

41. *Id.* at 304-05.

42. *Id.* at 305; *see* Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13.

43. Vanessa Bettinson & Dr. Charlotte Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?*, 66 N. IR. LEGAL Q. 179, 182 (2015) [hereinafter Bettinson & Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary*]; BUZAWA, BUZAWA, & STARK, *supra* note 28, at 302; *see infra* Part I.C and Part I.D.

44. Carolyn Hoyle, *Responding to Domestic Violence: The Roles of Police, Prosecutors and Victims* 6 (1996) (unpublished Ph.D. thesis, Univ. of Oxford), [https://ora.ox.ac.uk/objects/uuid:cc7acb32-23c1-4286-911f-3b536d015bae/download\\_file?safe\\_filename=602330390.pdf&file\\_format=application%2Fpdf&type\\_of\\_work=Thesis](https://ora.ox.ac.uk/objects/uuid:cc7acb32-23c1-4286-911f-3b536d015bae/download_file?safe_filename=602330390.pdf&file_format=application%2Fpdf&type_of_work=Thesis) [https://perma.cc/B4B5-7FZ6].

45. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 145.

46. *Id.* at 148. Most research regarding police response during this era was coming from

Studies regarding law enforcement response to cases of domestic violence in the United Kingdom revealed that even when all necessary conditions for arrest were met in cases of domestic violence, arrest rarely occurred; only 2% of incidents of domestic violence resulted in arrest.<sup>47</sup> Building upon American research that produced comparable conclusions, experts studying police response in the United Kingdom posited that law enforcement discretion contributed to the demonstrated lower rates of arrest in domestic violence cases than in other non-domestic violence cases.<sup>48</sup> These studies found that decisions to arrest were influenced by cultural attitudes of police toward domestic violence, which often disregarded domestic violence as not being “real” police work, and that these attitudes effectively “create[d] a distinction between ‘deserving’ and ‘non-deserving’ victims. The implication was that victims of domestic violence invariably fell into the later category, provoking little sympathy and assistance from police officers.”<sup>49</sup> As research such as this developed and the data-driven inadequacies of police responses to domestic violence were uncovered, commentators argued that law enforcement’s passivity and policy of non-interference contributed to the steadily high rates of domestic violence during the late twentieth century.<sup>50</sup>

As criticisms regarding law enforcement’s lack of intervention in cases of domestic violence mounted, police departments rationally sought to remedy this problematic practice by increasing their response. Pressured by activists and the aforementioned emerging research supporting the conclusion that the impact and rates of domestic violence could be dramatically reduced by changing law enforcement’s response, the Government encouraged law enforcement to engage in more aggressive response practices.<sup>51</sup> The Home Office, the United Kingdom’s lead government department for crime and policing, committed to increasing effective police response to domestic abuse, recommending that “complaints of domestic violence should be recorded and investigated the same way as crimes committed by strangers,” and advising that “some sort of positive action” should be taken to investigate all domestic abuse reports.<sup>52</sup>

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America, but there were general trends and conclusions from the American research which could be drawn and considered in similar research of police response in the United Kingdom. Susan S. M. Edwards, *Police Attitudes and Dispositions in Domestic Disputes: The London Study*, 59 POLICE J. 230, 230 (1986).

47. Hoyle, *supra* note 44, at 11, 108 (citing Edwards, *supra* note 46).

48. See Hoyle, *supra* note 44, at 11-12; Edwards, *supra* note 46; Tony Faragher, *The Police Response to Violence against Women in the Home*, in PRIVATE VIOLENCE AND PUBLIC POLICY (Jan Pahl ed., Routledge 2016) (1985). “The literature showed that the police typically under-enforced the law by exercising their discretion not to arrest[.]” Hoyle, *supra* note 44, at 13.

49. See Hoyle, *supra* note 44, at 11-12; Edwards, *supra* note 46; Faragher, *supra* note 48.

50. See BUZAWA, BUZAWA, & STARK, *supra* note 28, at 148-49.

51. See Hoyle, *supra* note 44, at 15-18.

52. *Id.* at 16-17; Home Office Circular of 1990 [60/1990] (paras. 12 and 13). The Home Office is the United Kingdom’s lead government department for crime, policing, counter-terrorism, drug policy, and immigration. *About Us*, HOME OFFICE, <https://www.gov.uk/government/>

Following these recommendations, an increasing number of police departments in England and Wales adopted pro-arrest or mandatory arrest policies, strongly encouraging or requiring arrest in cases of domestic violence.<sup>53</sup> However, even as mandatory arrest policies gained traction across police departments, women's safety from domestic abuse did not substantially improve.<sup>54</sup> One study found that three years after recommendation and implementation of these increased response practices, rates of arrest in cases of domestic violence rose to 18%.<sup>55</sup> Though a fairly dramatic increase from the previous arrest rate of 2% in cases of domestic violence, the 18% arrest rate was nevertheless relatively low, especially when compared with arrest rates in non-domestic abuse cases, with less than 1 in 5 incidents of reported domestic violence resulting in arrest.<sup>56</sup> In light of the disappointing effect of arrest on the improvement of women's safety, commentators suggested that mandated arrest was not to blame; rather, increased arrest rates did not improve women's long-term safety because "the framework that guide[d] intervention" focused on discrete acts of physical violence.<sup>57</sup>

### 3. *Developed Empirical Understandings of the Realities of Domestic Abuse*

The third, and most significant, impetus that laid the groundwork for modern reform in the United Kingdom was increased empirical understandings of the realities of domestic violence developed by psychologists and sociologists throughout the second half of the twentieth century. Since the 1970s, victims of domestic abuse reported to domestic violence shelters time and again that the "violence wasn't the worst part[,]” leading academics and domestic violence experts to ask: If not the fear of physical violence, then what *does* keeps victims of domestic violence entrapped in their abusive relationship?<sup>58</sup> The disconnect was discovered in the late 1970s, when domestic violence researchers began recognizing for the first time that a wide variety of sexual and non-physical abusive behaviors often accompanied the well-understood physical abuse, and began positing that these other behaviors may account for victims' entrapment and lack of long term safety where consideration of violence alone thus far had not.<sup>59</sup>

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organisations/home-office/about (last visited Feb. 22, 2019) [<https://perma.cc/FW4F-5CAN>]. The Home Office is comprised of 30 agencies and public bodies. *Departments, Agencies and Public Bodies*, HOME OFFICE, <https://www.gov.uk/government/organisations#home-office> (last visited Feb. 22, 2019) [<https://perma.cc/9N2J-WRB3>].

53. See Hoyle, *supra* note 44, at 379-80.

54. See STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 127.

55. See Hoyle, *supra* note 44, at 109.

56. *Id.*

57. See STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 127.

58. See *id.* at 12.

59. Richard M. Tolman, *The Development of a Measure of Psychological Maltreatment of Women by Their Male Partners*, 4 VIOLENCE AND VICTIMS 159, 159 (1989).

In the 1970s, psychologists recognized parallels between tactics employed by domestic abusers and similar techniques used in the conditioning of hostages, prisoners of war, and other persons undergoing severe restraint in nonfamilial settings.<sup>60</sup> Psychologists recognized that the “coerced persuasion” techniques employed by the Chinese on American prisoners of war during the Korean War—where a prisoner’s self-concept and resistance was broken down, their reality was substituted by the controller’s altered reality, and a new version of the prisoner’s reality was installed “through ‘random, noncontingent reinforcement by unpredictable rewards and punishments[,]’”—were similar to tactics employed by domestic abusers to “plac[e] their partners in a [similar] coercive control situation of child-like dependency” on them, the controller.<sup>61</sup> Influenced by “torture-like experiences reported by” victims of domestic violence, researchers began focusing on the structural and systemic restraints employed in abusive relationships rather than on severe violence.<sup>62</sup> This research drew analogies between torture and brainwashing employed in nonfamilial settings of restraint, and the isolation and larger pattern of control employed by domestic abusers, by which they constrict or outright prohibit their partners independent decision-making.<sup>63</sup> Tactics employed in the context of both nonfamilial torture and domestic abuse included controlling the victim’s access to information, physical exhaustion, and limiting or completely confining their freedom of movement.<sup>64</sup> By drawing these parallels between psychological conditioning via tactics of control and coercion in nonfamilial settings of severe restraint, and learned helplessness and social isolation via similar control tactics in cases of domestic abuse, scholars began accounting for why focusing on violence alone had not explained the entrapment experienced by domestic abuse victims.

The presence of control tactics employed by domestic abusers became a significant factor in distinguishing between commonly understood “situational couple violence” in cases of domestic abuse, and an important separate class of abusive behavior, known as “intimate terrorism,” and later, as “coercive control.”<sup>65</sup> Prior to the 1990s, batterers had previously been understood as a “monolithic group,” characterized by their use of physical violence in response to situational conflicts.<sup>66</sup> Flowing from this understanding, a “major tenet on which the [traditional] domestic violence model” had relied upon is that the

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60. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 359.

61. *Id.*

62. *Id.* at 360.

63. *Id.* See generally LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS (1986).

64. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 361; OKUN, *supra* note 63.

65. See STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 37, 194; see generally MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENCE RESISTANCE AND SITUATIONAL COUPLE VIOLENCE (2008) [hereinafter JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE].

66. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 83; DONILEEN LOSEKE, RICHARD GELLES & MARY M. CAVANAUGH, CURRENT CONTROVERSIES ON FAMILY VIOLENCE 157 (2005).

amount of physical force used in battering is “the only significant variation in abuse that really matters[.]”<sup>67</sup> Research conducted in the 1990s dispelled the age-old prior understanding of batterers as one common group, instead finding that various types of domestic abuse exist, and “swept aside” the misconception that the severity of physical violence was the only important variation in abuse.<sup>68</sup> Influential research conducted by Michael P. Johnson in 1995 began identifying various typologies and classes of batterers, each with unique dynamics and outcomes resulting from their violence, thus, logically, requiring different responses.<sup>69</sup> Johnson distinguished between offenders who engage in “situational couple violence” and offenders who engage in “intimate terrorism,” distinguished largely “by the *control* context within which the violence is embedded.”<sup>70</sup> Under the “situational couple violence” typology, violence is spontaneous and impulsive, arising out of conflicts that escalate to physical violence; however, violence is not used as a tool to exert control over a partner.<sup>71</sup> In contrast, offenders who engage in “intimate terrorism” use violence as well as various coercive or controlling tactics in service of controlling their partner.<sup>72</sup> Between 60% to 80% of victims of domestic abuse experience such varying tactics with their abusers employing “multiple tactics to frighten, isolate, degrade, and subordinate them, as well [as] assault and threats[.]”<sup>73</sup> This second class of abusers engage in the most common, and most dangerous, type of domestic abuse: coercive control.

Under the coercive control model of domestic abuse, control tactics encompass various forms of isolation, regulation, and exploitation.<sup>74</sup> Abusers employ tactics of control “to compel obedience indirectly by isolating victims, depriving them of vital resources, exploiting them, and micromanaging their behavior through rules for everyday living that remain in play even when the

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67. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 194.

68. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 83; LOSEKE, GELLES & CAVANAUGH, *supra* note 66; STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 194.

69. See Michael P. Johnson, *Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence against Women*, 57 J. MARRIAGE & FAM. 283, 283 (1995); BUZAWA, BUZAWA, & STARK, *supra* note 28, at 84.

70. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE, *supra* note 65, at 13. Johnson actually distinguishes four types of intimate partner violence, but only “intimate terrorism” and “situational couple violence” are relevant for the purposes of this discussion. See *id.*, for a discussion of Johnson’s four typologies.

71. See Johnson, *Patriarchal Terrorism and Common Couple Violence*, *supra* note 69, at 285; JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE, *supra* note 65, at 13 (emphasis added); BUZAWA, BUZAWA, & STARK, *supra* note 28, at 83.

72. See JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE, *supra* note 65, at 13; Johnson, *Patriarchal Terrorism and Common Couple Violence*, *supra* note 69, at 285.

73. Evan Stark, *Looking beyond Domestic Violence: Policing Coercive Control*, 12 J. POLICE CRISIS NEGOTIATIONS 199, 206 (2012) [hereinafter Stark, *Looking beyond Domestic Violence*].

74. Stark, ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 18, at 168.

perpetrator is not present.”<sup>75</sup> These tactics deprive victims of support and options of escape, ensure dependence on the perpetrator, and replace a victim’s sense of reality with a self-serving version constructed by the perpetrator.<sup>76</sup> Control plays a key role in entrapment by restraining the ability of victims “to effectively resist abuse or to escape physical abuse, increasing their vulnerability to violence, including fatal violence.”<sup>77</sup> Coercive tactics include acts of physical or sexual assault, threats, or other acts of intimidation, such as surveillance or degradation.<sup>78</sup> These tactics of coercion are employed directly “to compel or dispel a particular response by inducing pain, injury, and/or fear,” and their effects may be immediate—pain, fear, injury, or even death—or may result in “long-term physical, behavior, or psychological consequences.”<sup>79</sup>

In contrast with the traditional misconception that abusive physical violence occurs as a result of conflict, “violence in coercive control is mainly used to punish disobedience, keep challenges from surfacing, [and] express power[.]”<sup>80</sup> While physical violence used in coercive control *may* be extreme and cause serious injury or even death, violence used in coercive control is typically minor, if used at all.<sup>81</sup> Additionally, violence used in coercive control is distinguished from other types of violent assault by: its duration and its frequency—often including hundreds of assaultive incidents—which contribute to its ongoing, rather than episodic, nature; its routine or even ritual nature; its cumulative, rather than incident-specific effects; and by the fact that its harms “are more readily explained by these factors than by its severity.”<sup>82</sup> Because “a victim’s level of fear derives as much from her perceptions of what *could* happen based on past experience as from the immediate threat by the perpetrator[.]” the cumulative effect of the minor, routine assaults employed over an extended period of time in cases of coercive control is just as fear-inducing as the imminent threat of severe physical violence would be.<sup>83</sup> Finally, and most importantly, research has shown that even where physical violence is entirely absent or has ceased, as in approximately 25% of cases, a similar profile of fear and entrapment can nonetheless be elicited.<sup>84</sup> Thus, the key to explaining why victims become

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75. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 111; Stark, ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 18, at 168.

76. Stark, ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 18, at 168; BUZAWA, BUZAWA, & STARK, *supra* note 28, at 111-12.

77. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 198.

78. *See, e.g.*, Stark, ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 18, at 168; BUZAWA, BUZAWA, & STARK, *supra* note 28, at 109-11.

79. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 109; Stark, ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 18, at 168.

80. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 109-10.

81. Stark, ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 18, at 168.

82. *Id.* at 168.

83. *See* STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 176-77.

84. *Id.* at 188; Stark, *Coercive Control as a Framework for Responding to Male Partner Abuse in the UK*, *supra* note 17, at 21.

entrapped in abusive relationships is the pattern of isolation, intimidation, and control tactics used by abusers, rather than physical violence.<sup>85</sup>

The ability of these coercive control tactics in domestic abuse to account for several questions that the traditional violence model had not yet answered provided strong support for the growing argument among reformists that a coercive control model for criminalizing domestic violence should be implemented.<sup>86</sup> First, the coercive control theory accounted for “critical facets of battering, including why it is ongoing[,]” while violence alone had not.<sup>87</sup> Second, coercive control accounted for why victims of domestic abuse “who experience infrequent, minor, or even no assaults may nonetheless become entrapped in relationships where abuse is ongoing[,]” and why they develop a host of complex “psychological, behavioral, medical, and psychosocial problems seen among no other population of assault victims.”<sup>88</sup> Finally, the alternative understanding of domestic abuse in the form of coercive control accounted for why arrest and other “interventions predicated on a violence-based [and incident-specific] definition of abuse have universally failed to reduce the problem, let alone prevent it.”<sup>89</sup> Thus, domestic violence experts argued that coercive control was the missing piece in remedying the domestic abuse disconnect, and ultimately used this coercive control theory as the foundation for modern reform in the United Kingdom.<sup>90</sup>

### *C. Twenty-First Century Reform Efforts in the United Kingdom*

Pressures stemming from the convergence of these three currents led the United Kingdom’s Home Office to commit to addressing domestic violence by engaging in serious, nation-wide policy development in the early 1990s, giving birth to the United Kingdom’s modern era of domestic violence law reform.<sup>91</sup> Aligning itself with emerging academic understandings of domestic abuse and modern international reform efforts, the Government continuously became more engaged in promulgating domestic violence reform throughout the 1990s and early 2000s, ultimately introducing “A Call to End Violence against Women and Girls: Action Plan” in 2010.<sup>92</sup> This policy paper publicly affirmed the

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85. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 188-89; 191-92.

86. *Id.* at 198-99; Stark, ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 18, at 170.

87. Stark, ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 18, at 170. Only 17%-25% of incidents of abuse are isolated incidents. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 201.

88. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 109; Stark, ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 18, at 170.

89. Stark, ENCYCLOPEDIA OF DOMESTIC VIOLENCE, *supra* note 18, at 170, 172.

90. See BUZAWA, BUZAWA, & STARK, *supra* note 28, at 302; *see infra* Part I.C and Part I.D.

91. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 302; ANNA MATCZAK ET AL., REVIEW OF DOMESTIC VIOLENCE POLICIES IN ENGLAND AND WALES 5 (Kingston Univ. and St. George’s, Univ. of London 2011).

92. *Call to End Violence against Women and Girls: Action Plan*, HM GOV’T (Mar. 8, 2011),

Government's commitment to ending violence against women, and set out a strategic, cross-government framework for combatting various forms of such violence, including domestic violence, sexual assault, and stalking.<sup>93</sup>

However, despite this official commitment to develop a more effective preventative framework, laws used to prosecute domestic violence under England and Wales' substantive framework continued to perpetuate the disconnect. Reform advocates criticized the framework, consisting of the Offences Against the Person Act 1861 and the Protection from Harassment Act 1997, because it created a legislative gap that did not protect domestic abuse victims who experienced non-physical harms caused by coercive or controlling behavior that occurred in an ongoing relationship.<sup>94</sup> As a result of this gap, reformists argued, the vast majority of abusive tactics, meaning all tactics other than physical or sexual assaults, went unrecognized, and repeated reports of domestic abuse were viewed as isolated incidents, no more likely to be punished than first-time offenses.<sup>95</sup>

This legislative gap arose by way of judicial interpretations of the two respective Acts. First, judicial interpretation of the requisite "actual bodily harm" under the Offences Against the Person Act 1861 had severely restricted the applicability of the 1861 Act to non-physical behavior.<sup>96</sup> Specifically, though "actual bodily harm" can encompass non-physical harm in the form of psychiatric injury, "mere emotions such as fear or distress [or] panic" are not included within the court's conceptualization of actual bodily harm; rather, a cognizable bodily harm to the mind requires a "recognised [sic] psychiatric injury," effectively meaning a formal diagnosis of battered woman's syndrome or post-traumatic stress disorder.<sup>97</sup>

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/118153/vawg-action-plan.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/118153/vawg-action-plan.pdf) [hereinafter *Action Plan*]. The Government published an updated Action Plan annually from 2011 through 2015, and published a four year Action Plan in 2016. *See generally* ANNA MATCZAK ET AL., *supra* note 91, at 5-7.

93. *Action Plan*, *supra* note 92, at 1. Also, the Government committed to combatting so-called 'honor-based violence,' female genital mutilation, and forced marriage. *Id.*

94. Bettinson & Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary*, *supra* note 43, at 185; *Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework*, HOME OFFICE 6 (Dec. 2015), [<https://perma.cc/XKE8-43WN>] [hereinafter *Statutory Guidance*].

95. *Domestic Violence Law Reform Campaign*, PALADIN (2014), <http://paladinservice.co.uk/wp-content/uploads/2014/03/Domestic-Violence-Campaign-March-2014.pdf> [<https://perma.cc/G8WD-JVUD>] [hereinafter *Domestic Violence Law Reform Campaign*].

96. Bettinson & Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary*, *supra* note 43, at 185. *See also* Offences Against the Person Act 1861, c. 100, § 20 (UK) (requiring "actual bodily harm" for legally cognizable harms under charges of assault).

97. *R v. Chan Fook* [1994] 1 WLR 689 (CA). Effectively creating a dichotomy of non-physical harm, consisting of only 'psychiatric injury' or 'merely emotional' harm, and providing criminal liability only for the infliction of the former, this judgement of *R v. Chan Fook* was reinforced in 2006 by *R v. Dhaliwal*. *R v. Dhaliwal* [2006] EWCA (Crim) 1139, [2006] 2 Cr App



Second, though the Protection from Harassment Act 1997 provides some protection for victims of non-physical controlling or coercive behavior via the offenses of harassment, causing fear of violence, and stalking,<sup>98</sup> judicial interpretation regarding the existence of a requisite “course of conduct” in circumstances where the accused and victim have an ongoing relationship has similarly limited the applicability of the 1997 Act to victims of coercive control.<sup>99</sup> In cases where the requisite two or more incidents amounting to harassment are interspersed “with considerable periods of affectionate life”<sup>100</sup> between the victim and the perpetrator, there is judicial reluctance to recognize a “course of conduct” within the meaning of the 1997 Act; rather, the incidents are considered to be isolated, sporadic, and unrelated.<sup>101</sup> This limitation of the 1997 Act to extend to post-separation coercive control is particularly devastating. Not only is it common for abusive relationships to experience intermittent trials of separation, but post-separation violence and victimization, such as through stalking and assault, of former intimate partners is alarmingly common—experienced by as much as 90% of women after separating from an abusive partner.<sup>102</sup> At the point of separation from an abusive partner, women are at a significantly dangerous

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R 24. The court in *R v. Dhaliwal* reaffirmed the requirement of psychiatric injury, more than ‘mere emotional harm,’ for a finding of bodily harm, and “effectively ruled out the impact abuse can have upon a victim when there has not been a formal diagnosis of battered woman’s syndrome or post-traumatic stress disorder.” Bettinson & Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary*, *supra* note 43, at 186-87.

98. Protection from Harassment Act 1997, c. 40, § 2 (UK); Protection from Harassment Act 1997, c. 40, § 4 (UK); Protection from Harassment Act 1997, c. 40, § 2A (UK) as amended by Protection of Freedoms Act 2012, § 111 (UK); Protection from Harassment Act 1997, c. 40, § 4A (UK).

99. Bettinson & Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary*, *supra* note 43, at 188. In order to establish an offense under the Protection from Harassment Act 1997, a course of conduct, consisting of at least two incidents that amount to harassment and have sufficient connection with each other, must be shown. *Id.* See also Protection from Harassment Act 1997, c. 40, § 7(3) (UK).

100. *R v Curtis* [2010] EWCA (Crim) 123; [2010] 3 All ER 849.

101. Bettinson & Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary*, *supra* note 43, at 188-89. See, e.g., *R v Hills* [2001] Crim LR 318; Official Transcript (2000) No 00/4898/W5 CA; (Crim); *R v Curtis* [2010] EWCA (Crim) 123; [2010] 3 All ER 849; *R v Widdows* [2011] EWCA (Crim) 1500; [2011] Crim LR 959.

102. Nicola Sharp-Jeffs, Liz Kelly & Renate Klein, *Long Journeys Toward Freedom: The Relationship Between Coercive Control and Space for Action – Measurement and Emerging Evidence*, 24 VIOLENCE AGAINST WOMEN 163, 182 (Feb. 2, 2017); Petra Ornstein & Johanna Rickne, *Why Does Intimate Partner Violence Continue After Separation?*, 19 VIOLENCE AGAINST WOMEN 617, 618-19 (2013).

risk;<sup>103</sup> too often, the ultimate act of control post-separation is homicide.<sup>104</sup> Of the 598 women killed by a current or former male partner in England and Wales between 2009–2015, 200 of those women were killed by an ex-partner or ex-spouse following a separation.<sup>105</sup> Additionally, coercive control is more likely than any other type of violence to persist post-separation.<sup>106</sup> Thus, the failure of the 1997 Act to recognize coercive control experienced during a period of separation from an abusive relationship has significant consequences.

The high-profile murder of Natalie Esack in 2012 shone a light on the very real consequences of the framework's gap, and further incentivized activists to argue for additional reform. On the morning of April 30, 2012, Natalie was stabbed eleven times with a kitchen knife by her estranged husband, Ivan Esack, with "such ferocity, the [eight inch] blade bent and the tip broke off."<sup>107</sup> Though Natalie attempted to leave the abusive relationship multiple times, she never managed to escape Ivan's control. Each time Natalie left Ivan, he would bombard her with incessant text messages and more than forty phone calls a day, which alternated between abusive degradation and remorseful begging.<sup>108</sup> These "would go on, one after the other, until she finally gave in and replied."<sup>109</sup> Ivan would show up at Natalie's home and at her work, bringing gifts and pleading for forgiveness one day, and threatening Natalie's life, the lives of her family, and her pets the next.<sup>110</sup> "You're a dead woman walking," he told her; "Tick-tock, tick-tock," he sent to her in text message.<sup>111</sup>

The media reported on Natalie's murder, treating it like they had in so many cases of women murdered by a current or former partner before: a freak accident, "something that could not have been predicted" or prevented.<sup>112</sup> However, a Domestic Homicide Review of Natalie's murder revealed that her murder was anything but unpredictable; rather, the report found "evidence of escalating abuse towards [Natalie] . . . and risk factors in [Ivan's] behaviour [sic]" that were "observable more than six months prior to her murder."<sup>113</sup> On five occasions over

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103. Dierdre Brennan, *Redefining an Isolated Incident*, FEMICIDE CENSUS 4 (2016), <http://www.niaendingviolence.org.uk/perch/resources/1498818396femicidecensusreport2016redefininganisolatedincident.pdf> [<https://perma.cc/5GDC-7DED>].

104. *Domestic Violence Law Reform Campaign*, *supra* note 95.

105. Brennan, *supra* note 103, at 4, 22.

106. Evan Stark & Marianne Hester, *Coercive Control: Update and Review*, 25 VIOLENCE AGAINST WOMEN 81, 89 (2019); Ornstein & Rickne, *supra* note 102, at 619.

107. Caroline Criado-Perez, "Isolated Incidents": How the Laws around Domestic Violence are Failing its Victims, NEW STATESMAN (July 23, 2014), <https://www.newstatesman.com/politics/2014/07/isolated-incidents-how-laws-around-domestic-violence-are-failing-its-victims> [<https://perma.cc/C2BR-H3ZP>].

108. *Id.*; *Domestic Violence Law Reform Campaign*, *supra* note 95.

109. Criado-Perez, *supra* note 107; *Domestic Violence Law Reform Campaign*, *supra* note 95.

110. Criado-Perez, *supra* note 107; *Domestic Violence Law Reform Campaign*, *supra* note 95.

111. Criado-Perez, *supra* note 107.

112. *Id.*

113. *Id.* Because numerous quotes using the British spelling of behavior, "behaviour," are used

the course of three years, Natalie contacted law enforcement to report abuse by Ivan or other related concerns.<sup>114</sup> However, under England's substantive framework, each of these reports was viewed by law enforcement as isolated, distinct incidents, rather than as a criminal course of conduct.<sup>115</sup> Further, Natalie's completely eroded self-confidence and sense of self-worth, her existence in a constant state of terror, her loss of weight and inability to sleep all went unrecognized and without redress under the law.<sup>116</sup> Despite the fact that Natalie's mental, emotional, and physical health had deteriorated as a result of Ivan's continuous campaign of abuse, no serious legal action against Ivan was taken—not until he brutally murdered her.

Criticisms of the then-existing substantive framework continued to mount as empirical understandings of domestic violence and concerns regarding police responses to cases of domestic abuse like Natalie Esack's grew, causing England's Home Office to recognize that more needed to be done.<sup>117</sup> Amongst other tools implemented in an effort to provide victims of domestic violence with more protection, the Home Office published a new non-statutory definition of "domestic violence and abuse" in March 2013.<sup>118</sup> The new definition recognized the modern empirical understandings of domestic abuse, and extended the Government's conception of domestic abuse beyond merely physical violence, instead defining "domestic violence and abuse" as:

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throughout this Note, for readability purposes, "[sic]" will not be added to any of the further quotes using the British "behaviour."

114. *Natalie Esack Murder: Domestic Abuse 'Not Investigated Fully,'* BBC (July 16, 2014), <https://www.bbc.com/news/uk-england-kent-28328423> [<https://perma.cc/C4PN-WT69>].

115. *Domestic Violence Law Reform Campaign*, *supra* note 95.

116. *Id.*

117. *Strengthening the Law on Domestic Abuse – A Consultation*, HOME OFFICE 8 (Aug. 2014), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/344674/Strengthening\\_the\\_law\\_on\\_Domestic\\_Abuse\\_-\\_A\\_Consultation\\_WEB.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/344674/Strengthening_the_law_on_Domestic_Abuse_-_A_Consultation_WEB.PDF) [<https://perma.cc/QQ3J-TCCJ>] [hereinafter *Consultation*].

118. *New Definition of Domestic Violence*, HOME OFFICE (Sept. 18, 2012), <https://www.gov.uk/government/news/new-definition-of-domestic-violence> [<https://perma.cc/U9EG-RQQE>]. Two other tools that significantly improved the ability of police to combat domestic abuse were introduced nationally in March of 2014: Domestic Violence Protection Orders and The Domestic Violence Disclosure Scheme, also known as "Clare's Law." Domestic Violence Protection Orders "require the perpetrator to leave the scene of their abuse, and can prevent them from returning to a residence and from having contact with the victim for up to 28 days." *Id.* The Domestic Violence Disclosure Scheme "entitles the police to disclose information about previous violent offending by a new or existing partner, empowering people to make informed decisions about entering potentially abusive relationships." *Id.* The Disclosure Scheme was named after Clare Wood, an English woman murdered by her ex-boyfriend, who had a criminal history of violence against women of which Clare was never informed about. *Salford Murder Victim Clare Wood 'Was Not Protected,'* BBC NEWS (May 23, 2011), <https://www.bbc.com/news/uk-england-manchester-13506721> [<https://perma.cc/47A3-TMWR>].

any incident or patterns 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 sexual orientation. This can encompass, but is not limited to, the following types of abuse: psychological; physical; sexual; financial; [or] emotional.<sup>119</sup>

The definition goes on to further define “controlling behavior” as “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[;]” and defines “coercive behavior” as “a continuing act or pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.”<sup>120</sup>

By publishing this new definition, “England became the first country to explicitly identify ‘coercive control’ as the framework for its response to partner abuse.”<sup>121</sup> However, though the new, broadened definition was certainly an applauded effort by the Government to bridge the legislative gap, the definition was non-statutory, and there was “no corresponding change in the law.”<sup>122</sup> Consequently, offenses of assault, stalking, and harassment under the 1861 Act and the 1997 Act continued to serve as the substantive framework for prosecuting domestic violence, and the disconnect persisted; as a result, because a recognized “actual bodily harm” was required and each incident was viewed in isolation “and therefore [as a] low level misdemeanor” under this framework, the law continued to fail in providing victims of domestic abuse with long-term protection: as few as 3 out of every 100 reports of abuse by men resulted in a conviction and punishment.<sup>123</sup>

As an additional measure taken in furtherance of improving England and Wales’ response to domestic abuse, the Government conducted an eight-week public consultation in England and Wales, asking advocates and domestic abuse experts if they believed that the law needed to be strengthened.<sup>124</sup> Published in March of 2013, the summary of consultation responses revealed that a significant majority of respondents supported strengthening domestic abuse laws in England and Wales, and respondents expressed concerns that the then-existing framework

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119. *New Definition of Domestic Violence*, *supra* note 118.

120. *Statutory Guidance*, *supra* note 94, at 3.

121. Stark, *Coercive Control as a Framework for Responding to Male Partner Abuse in the UK*, *supra* note 17.

122. Criado-Perez, *supra* note 107.

123. *Domestic Violence Law Reform Campaign*, *supra* note 95.

124. *Consultation*, *supra* note 117, at 9. The Consultation was conducted in light of a comprehensive review of police enforcement in domestic violence cases under the then-existing framework, conducted in September 2013. The results of that report exposed “significant failings” by law enforcement and concluded that “police practice in using the current law [was] inadequate.” *Id.* Arrest rates between police departments varied wildly, from 45% to 90%. *Id.*

did not capture the realities of abuse, though they were recognized by the Government's non-statutory definition.<sup>125</sup> Though some respondents proposed modifying the existing stalking and harassment legislation as a solution, the Government rejected the proposal, citing issues of judicial interpretation which had limited the applicability of the pre-existing framework to coercive control in ongoing, intimate relationships.<sup>126</sup> Rather, the Government announced that it would introduce a new, specific domestic abuse offense as an amendment to the Serious Crime Bill: Section 76 of the Serious Crime Act 2015.<sup>127</sup>

*D. England and Wales' Improved Framework: Section 76*

In its biggest effort to bridge the domestic abuse disconnect to date, the United Kingdom created a new "coercive control offense" in England and Wales that criminalizes patterns of controlling and coercive behavior occurring within ongoing intimate relationships, previously unrecognized by the prior framework.<sup>128</sup> The coercive control offense under Section 76, which came into effect on December 29, 2015, provides:

- (1) A person (A) commits an offense 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, and
  - (d) A knows or ought to know that the behaviour will have a serious effect on B.<sup>129</sup>

Parliament recognized that due to the nuanced, complex nature of domestic abuse and coercive control, a large hurdle in effectively introducing the offense would be confusion amongst law enforcement and prosecutors.<sup>130</sup> To address this challenge, the Government published two instruments alongside Section 76: the Statutory Guidance and the Prosecution Guidance.<sup>131</sup> The purpose of these two

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125. *Strengthening the Law on Domestic Abuse – Summary of Responses*, HOME OFFICE 5 (Dec. 2014), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/389002/StrengtheningLawDomesticAbuseResponses.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/389002/StrengtheningLawDomesticAbuseResponses.pdf) [<https://perma.cc/VB8T-GQ8S>] [hereinafter *Summary of Responses*]. "A significant majority of those who responded (85%) were in favour [sic] of strengthening the law on domestic abuse, and felt the current law does not capture the Government definition of domestic abuse (70%)." *Id.*

126. *Id.* at 11.

127. *Id.*

128. Serious Crime Act 2015, c. 9, § 76(1) (UK); Serious Crime Act 2015, c. 9, § 87(1)(e) (UK) (providing that Section 76 extends only to England and Wales).

129. Serious Crime Act 2015, c. 9, § 76(1) (UK).

130. See Marilyn McMahon & Paul McGorery, *Criminalising Controlling and Coercive Behaviour: The Next Step in the Prosecution of Family Violence?*, 41 ALTERNATIVE L.J. 98, 100 (2016). See, e.g., *supra* Part I.B.3.

131. *Statutory Guidance*, *supra* note 94; *Controlling or Coercive Behaviour in Intimate or*

instruments is to provide law enforcement, prosecutors, and other criminal justice agencies with guidance in investigating the new coercive control offense under Section 76.<sup>132</sup> The Guidance instruments explain the concept of coercive control and the new offense in detail; provide guidance for identifying domestic abuse and controlling or coercive behavior, and distinguish circumstances where the new offense would apply from circumstances better suited for other offenses, such as stalking and harassment; and provide additional information regarding best practices for building a case under Section 76, including types of evidence which would be helpful in proving the offense.<sup>133</sup> The guidance within these instruments is heavily relied on by police, prosecutors, and courts in prosecuting and defining various elements of the offense.

### *1. Repeated or Continuous Behavior That Is Controlling or Coercive*

The first element of the offense effectively contains two sub-elements: that the accused engage in the behavior “continuously or repeatedly” toward the victim, and that said behavior be “controlling or coercive.”<sup>134</sup> Though Section 76 itself does not further specify what amount of behavior amounts to “continuously or repeatedly,” the Guidance offers some parameters, explaining that there is no specific number of incidents of controlling or coercive behavior that must occur, nor is there a specific time frame that must exist between the incidents.<sup>135</sup> Rather, in determining if the alleged behavior meets the “continuously and repeatedly” requirement, courts are guided to, on a case by case basis, “look for evidence of a *pattern* of behaviour established over a period of time . . . to show that the behaviour is of a repetitive or continuous nature.”<sup>136</sup>

Though the legislation and Guidance instruments do not quantify the threshold number of incidents of controlling or coercive behavior which must occur in order to satisfy the “repeated or continuous” sub-element, what is clear

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*Family Relationship: Legal Guidance*, CPS (June 30, 2017), <https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship> [<https://perma.cc/X24C-LEMU>] [hereinafter *Prosecution Guidance*]. Under Section 77 of the Serious Crime Act 2015, the Secretary of State is authorized to “issue guidance about the investigation of offences under [S]ection 76[.]” Serious Crime Act 2015, c. 9, § 77(1) (UK), and any “person investigating offences in relation to controlling or coercive behaviour under [S]ection 76 must have regard to [the Statutory Guidance].” *Statutory Guidance*, *supra* note 94, at 2. Similarly, the Crown Prosecution Service publishes legal guidance to aid in the prosecution of various criminal offenses. Under The Code for Crown Prosecutors, prosecutors are required to “follow the policies and guidance of the [Crown Prosecution Service].” *The Code for Crown Prosecutors*, CPS 3 (7th ed., Jan. 2013), [https://www.cps.gov.uk/sites/default/files/documents/publications/code\\_2013\\_accessible\\_english.pdf](https://www.cps.gov.uk/sites/default/files/documents/publications/code_2013_accessible_english.pdf) [<https://perma.cc/4E93-2YF2>].

132. *Statutory Guidance*, *supra* note 94, at 2.

133. *Id.*; *Prosecution Guidance*, *supra* note 131.

134. Serious Crime Act 2015, c. 9, § 76(1)(a) (UK).

135. *Statutory Guidance*, *supra* note 94, at 5.

136. *Id.* (emphasis added).

is that liability under Section 76 arising from a single instance of behavior by the defendant is outright barred. This is not only implied by the “repeatedly or continuously” language within the legislation, but also the Guidance makes clear that “[b]ehaviour displayed on only *one* occasion would not amount to repeated or continuous behaviour[.]”<sup>137</sup> The coercive control offense as initially proposed did provide that a single act of coercive control could give rise to criminal liability under Section 76, but that single act allowance was removed upon amendment.<sup>138</sup> The removal of the single act allowance provided credibility to the legislation and ensured that the new offense specifically criminalized *patterns* of coercive or controlling behavior, rather than truly one-off, “ordinary . . . behaviour between partners.”<sup>139</sup>

The second sub-element, that the behavior be “controlling or coercive,” is also left undefined within Section 76, but extrapolated upon in the accompanying Guidance instruments. Both Guidance instruments advise that courts look to the new non-statutory “domestic violence and abuse” definition when determining

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137. ‘Repeatedly’ means “again and again[.]” *Repeatedly*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/repeatedly> (last visited Jan. 20, 2018) [<https://perma.cc/V6HC-SDUR>]; ‘Continuously’ means “in a continuous manner[;] without interruption[.]” *Continuously*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/continuously> (last visited Jan. 20, 2018) [<https://perma.cc/L6UB-ZTPW>]; *Statutory Guidance, supra* note 94, at 5 (emphasis added).

138. Serious Crime Bill 2014-2015, Notices of Amendments (Jan. 7, 2015), <https://publications.parliament.uk/pa/bills/cbill/2014-2015/0116/amend/psc1160701a.3-5.pdf> [<https://perma.cc/8BL3-9LX5>]; Serious Crime Bill 2014-2015, Notices of Amendments (Jan. 8, 2015), <https://publications.parliament.uk/pa/bills/cbill/2014-2015/0116/amend/psc1160801a.pdf> [<https://perma.cc/754J-5CXS>]. Additionally, the coercive control offense as initially proposed employed a “course of conduct” model, like that of the existing stalking and harassment offenses, rather than the “repeated or continuous” language. However, evidence was submitted to Parliament which highlighted the issues of judicial interpretation of “course of conduct” terminology in situations involving intimate partners. House of Commons Public Bill Committee Serious Crime Bill 2014-2015 Written Evidence submitted by Ms. Vanessa Bettinson (SC12) (Jan. 22, 2015), <https://publications.parliament.uk/pa/cm201415/cmpublic/seriouscrime/memo/sc12.htm> [<https://perma.cc/6TCT-JKZE>]. *See also* discussion of judicial interpretation issues regarding a “course of conduct” under the 1997 Act *supra* Part I.C. Because the resulting restrictive interpretations of a “course of conduct” led to the legislative gap that Section 76 was specifically created to remedy, terminology reflecting “patterns of behavior” was recommended as a replacement. Ultimately, the offense was amended to include the “repeatedly or continuously engage in behavior” language. This terminology “maintain[s] the focus of the offence on the offending behaviour” and “encourage[s] fresh judicial understanding of the nature of coercive and controlling behaviour[.]” House of Commons Public Bill Committee Serious Crime Bill 2014-2015 Written Evidence submitted by Ms. Vanessa Bettinson (SC12) (Jan. 22, 2015), <https://publications.parliament.uk/pa/cm201415/cmpublic/seriouscrime/memo/sc12.htm> [<https://perma.cc/6TCT-JKZE>].

139. Bettinson & Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary*, *supra* note 43, at 191.

whether a relevant behavior falls under Section 76.<sup>140</sup> Further, both Guidance instruments provide non-exhaustive lists of coercive or controlling behaviors that might be relevant behaviors under Section 76, including: isolating a victim from their friends or family; enforcing rules and activities within the relationship that are humiliating, degrading, or dehumanizing to the victim; depriving a victim of basic needs or access to support services; and monitoring or controlling aspects of a victim's daily life.<sup>141</sup> Additionally, relevant behaviors under Section 76 may also be crimes in their own right, such as rape, assault, or stalking, and may be charged as such.<sup>142</sup>

Despite this guidance, however, there is still some confusion as to whether Section 76 applies to physically or sexually violent behavior that is employed as a tactic of coercive control. On the one hand, both Guidance instruments include "assault" and "rape," which are clearly physically and sexually violent behaviors, as relevant coercive or controlling behaviors under Section 76.<sup>143</sup> Further, both instruments make explicit reference to the cross-government definition of domestic violence, which includes psychological, emotional, financial, *physical*, and *sexual* abuse; likewise, "act[s] or pattern[s] of *assault*" are included within the definition's sub-definition of coercive behavior.<sup>144</sup> On the other hand, though that definition was repeatedly referenced by the Solicitor General in implementing the new law, the Solicitor General has insisted elsewhere that Section 76 applies only to forms of *psychological* abuse and stalking, implying that physically and sexually violent behaviors fall outside the scope of Section 76.<sup>145</sup> As a result of these contradicting messages, the question remains as to whether Section 76 applies to "concurrent patterns of ongoing violence[] [and] sexual assault," or only to psychological abuse and stalking.<sup>146</sup>

## 2. Personal Connection at Time of the Behavior

The second element of the offense requires that the accused and the victim were "personally connected" at the time the relevant behaviors took place.<sup>147</sup> Section 76 defines a recognized personal connection when, at the time of the behavior, the accused and the victim either (1) "were in an intimate personal relationship (whether they lived together or not)[;]" or (2) they lived together, and either had previously been in an intimate personal relationship or they are members of the same family.<sup>148</sup>

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140. *Statutory Guidance*, *supra* note 94, at 3; *Prosecution Guidance*, *supra* note 131.

141. *Statutory Guidance*, *supra* note 94, at 4; *Prosecution Guidance*, *supra* note 131.

142. *Statutory Guidance*, *supra* note 94, at 4.

143. *Id.*; *Prosecution Guidance*, *supra* note 131.

144. *Statutory Guidance*, *supra* note 94, at 3; *Prosecution Guidance*, *supra* note 131; *New Definition of Domestic Violence*, *supra* note 119 (emphasis added).

145. Stark & Hester, *supra* note 106, at 85 (emphasis added).

146. *Id.*

147. Serious Crime Act 2015, c. 9, § 76(1)(b) (UK).

148. *Statutory Guidance*, *supra* note 94, at 5; Serious Crime Act 2015, c. 9, § 76(1)(b) (UK);



This personal connection element and its limited scope regarding former intimate partners who are not cohabiting at the time of the coercive control aims to distinguish the coercive control offense from stalking and harassment offenses.<sup>149</sup> Section 76's Guidance explains that in cases where the coercive or controlling behavior occurs when both (1) the parties are no longer in a relationship, and (2) they are not cohabiting, offenses of stalking and harassment are more appropriate than the coercive control offense.<sup>150</sup> By limiting the recognized personal connections in the context of former intimate partners only to those who are still cohabiting at the time of the behavior this way, Section 76 places coercive or controlling behavior occurring post-separation, which occurs all too often, outside the scope of the coercive control offense.<sup>151</sup> Though harassment or stalking offenses under the Protection Against Harassment Act 1997 technically apply to victims experiencing post-separation domestic abuse, judicial interpretations of the requisite "course of conduct" under those offenses has severely limited the applicability of the 1997 Act to these particular victims, giving rise to the rationale for creating Section 76 in the first place.<sup>152</sup> Consequently, neither Section 76 nor the 1997 Act are effectively providing comprehensive protection to domestic violence victims who experience coercive or controlling behavior while separated from an ongoing, intimate relationship with the perpetrator.

### 3. Behavior has a Serious Effect

The third element of the offense requires that the controlling or coercive

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Serious Crime Act 2015, c. 9, § 76(2) (UK). For purposes of the offense, individuals are considered members of the same family if they are, or have been, married to each other or civil partners of each other; they are relatives; they have agreed to marry one another, or they have entered into a civil partnership agreement, whether or not the agreement has been terminated; they are both parents of the same child; or they have, or have had, parental responsibility for the same child. Serious Crime Act 2015, c. 9, § 76(6) (UK).

149. Stalking and harassment legislation would normally apply only in circumstances where the accused and victim were not ever "personally connected," or where the accused and victim were once "personally connected," but the behavior in question occurred *after* the relationship or cohabitation that gave rise to their personal connection. *Statutory Guidance, supra* note 94 (emphasis added).

150. *Id.*; *Prosecution Guidance, supra* note 131. The Guidance also notes that because of the nature of domestic violence, the relationship status between the perpetrator and the victim may change a number of times throughout the course of time. *Prosecution Guidance, supra* note 131. In situations such as these, "[t]he status of the relationship at the time the offending behaviour was alleged to have taken place" is relevant in determining which offense applies: coercive control, stalking, or harassment. *Statutory Guidance, supra* note 94.

151. Stark & Hester, *supra* note 106, at 89; Ornstein & Rickne, *supra* note 102, at 619. *See supra* Part I.C and accompanying footnotes (discussing prevalence and dangerous nature of post-separation abuse).

152. *See supra* Part I.C and accompanying footnotes (discussing legislative gap under pre-existing framework in the United Kingdom).

behavior by the accused results in a serious effect on the victim.<sup>153</sup> Section 76(4) specifies that a behavior has a cognizable “serious effect” on the victim when either: (a) it causes the victim to fear, on at least two occasions, that violence will be used against him or her; or (b) it causes the victim “serious alarm or distress which has a substantial adverse effect on [the victim’s] usual day-to-day activities.”<sup>154</sup> In determining whether the behavior had a serious effect on the victim, both the words of Section 76(4) and the Prosecution Guidance suggest that a subjective approach will apply.<sup>155</sup> This requirement of a serious effect on the victim provides a safeguard against criminalizing arguably trivial conduct, and serves to prevent the Government from going “too far” in regulating otherwise conventional, but nevertheless unhealthy, possessive behavior between consenting parties to an intimate relationship.<sup>156</sup>

It is within subsection (b) of Section 76(4) that the innovative aspect of Section 76 is found, as it untraditionally allows for criminal liability for domestic abuse to result even in the absence of physical injury or threat thereof.<sup>157</sup> By recognizing a serious effect on the victim not just when the behavior causes them fear of violence, but also when the behavior causes them serious alarm or distress which substantially and adversely impacts their daily life, Section 76 recognizes what has long been understood by those who study domestic violence: Domestic abuse is defined by both physical and non-physical manifestations of power, and by its patterned ongoing nature, which together cumulatively cause the victim’s entrapment in the abusive relationship.<sup>158</sup>

#### *4. Perpetrator Knew or Ought to Have Known That the Behavior Would Have a Serious Effect*

The fourth and final element provides the *mens rea* for the offense, requiring that the perpetrator knows or ought to know that their behavior will have a serious

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153. Serious Crime Act 2015, c. 9, § 76(1)(c) (UK).

154. Serious Crime Act 2015, c. 9, § 76(4) (UK). Due to the coercive control’s individualized nature and the subjectivity of its effects on different victims, the Prosecution Guidance explains that the substantial adverse effects on the victim’s usual day-to-day activities vary, and may include, but is not limited to, stopping or changing the way someone socializes, physical or mental health deterioration, a change in routine at home including routines associated with household chores or mealtimes, attendance record at school, or changes to work patterns or employment status. *Prosecution Guidance*, *supra* note 131.

155. Bettinson & Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary*, *supra* note 43, at 194; *Prosecution Guidance*, *supra* note 131 (explaining that it is important to consider the cumulative impact of the behavior on the victim and to consider the pattern of behavior within the wider context of the specific relationship). *See* Serious Crime Act 2015, c. 9, § 76(4) (UK).

156. McMahon & McGorrrery, *supra* note 130, at 99-100.

157. *Id.* at 99.

158. *See* Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 962-63. *See generally supra* Part I.B.3.

effect on the victim.<sup>159</sup> Section 76 employs this alternative, quasi-objective *mens rea*, providing that the accused “‘ought to know’ that which a reasonable person in possession of the same information would know.”<sup>160</sup> This is another facet of Section 76 that is doctrinally distinctive, as it “exceed[s] the subjective intent and recklessness standards usually employed for assault offences [sic].”<sup>161</sup>

#### *E. Implementation of Section 76 Since its Enactment*

In the approximate three years since its enactment, offenses of coercive control charged under Section 76 have resulted in 235 successful convictions.<sup>162</sup> However, some commentators have been skeptical of the effectiveness of the new offense in strengthening domestic violence criminalization, citing the relatively low number of coercive control offenses that have resulted in charges being brought.<sup>163</sup> For example, only 62 charges of coercive control were brought within the first six months after the enactment of Section 76.<sup>164</sup> Further, though 4,246 coercive control offenses were recorded in 2016 through March 2017,<sup>165</sup> only 309 offenses of coercive control were charged and reached a first hearing.<sup>166</sup> However, recorded offenses of coercive control were nearly doubled the following year, with 9,052 offenses recorded,<sup>167</sup> and charges nearly tripled, with 960 coercive control offenses charged which reached a first hearing.<sup>168</sup>

This remarkable growth in only one year’s time suggests that reasons other

159. Serious Crime Act 2015, c. 9, § 76(1)(d) (UK).

160. Serious Crime Act 2015, c. 9, § 76(5) (UK). Similar to the 1997 Act, Section 76 employs an objective *mens rea* requirement, rather than requiring proof of intent to coerce or control or “to cause fear of violence or a sense of harassment[.]” because victims of harassment, stalking, and coercive control suffer no less harm merely because the perpetrator’s behavior was unintentional under the law. Bettinson & Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary*, *supra* note 43, at 195.

161. McMahon & McGorrey, *supra* note 130, at 99.

162. Patrick Cowling, *Domestic Abuse: Majority of Controlling Cases Dropped*, BBC (Dec. 4, 2018), <https://www.bbc.com/news/uk-46429520> [<https://perma.cc/HY7W-6ABX>].

163. *See, e.g.*, Amelia Hill, *Police Failing to Use New Law against Coercive Domestic Abuse*, THE GUARDIAN (Aug. 31, 2016 11:34EDT), <https://www.theguardian.com/society/2016/aug/31/police-failing-to-use-new-law-against-coercive-domestic-abuse> [<https://perma.cc/D3DJ-CSZV>].

164. *Id.*

165. *Crime in England and Wales: Year Ending March 2018*, OFFICE FOR NAT’L STATISTICS (July 19, 2018), <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingmarch2018> [<https://perma.cc/59FD-LK8Y>].

166. *Violence Against Women and Girls Report: Tenth Edition 2016-17*, CPS 6 (Nov. 2017), [https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2017\\_0.pdf](https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2017_0.pdf) [<https://perma.cc/6BQ9-JPV5>] [hereinafter *VAWA and Girls Report 2016-2017*].

167. *Crime in England and Wales: Year Ending March 2018*, *supra* note 165.

168. *Violence Against Women and Girls Report: 2017-18*, CPS 6 (Sept. 2018), <https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2018.pdf> [<https://perma.cc/2XVT-4CHT>] [hereinafter *VAWA and Girls Report 2017-18*].

than the legislation's effectiveness in strengthening domestic violence law may be leading to relatively low numbers of coercive control offenses being charged. For example, the Guidance instruments explain that some coercive or controlling behaviors that would be recognized under Section 76 also fall under other criminal offenses in their own right and are able to be charged as such, such as rape or assault.<sup>169</sup> Section 76 was specifically enacted to cover the legislative gap for patterns of coercive or controlling behavior within intimate relationships that are not otherwise criminal in their own right.<sup>170</sup> Perhaps, then, the data suggests instead that coercive or controlling behaviors that also constitute a separate offense, such as stalking or rape, are being charged under the appropriate respective offense,<sup>171</sup> and the coercive control offense under Section 76 is being appropriately applied to those behaviors not covered by other criminal offenses.

Emerging evidence suggests another reason for relatively low charging rates and successful convictions under Section 76 may stem from confusion amongst law enforcement regarding the new offense and the concept of coercive control, generally.<sup>172</sup> In June of 2018, the first evidence-based research study<sup>173</sup> regarding implementation of Section 76 since the introduction was published.<sup>174</sup> The study found that of the 18,289 domestic-abuse related crimes reviewed, only 156 of those were recorded as a coercive control offense.<sup>175</sup> However, evidence of coercive control was in fact present in 83% of domestic abuse cases involving actual bodily harm, and such coercive control evidence was undetected by law enforcement officers.<sup>176</sup> This disparity suggests that law enforcement missed opportunities to identify coercive control, possibly caused by officers' lack understanding of the new offense and/or by officers not seeing this form of domestic abuse as a priority.<sup>177</sup>

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169. *Statutory Guidance*, *supra* note 94, at 4.

170. *See Summary of Responses*, *supra* note 125, at 10-11.

171. Of the 960 coercive control offenses charged in 2017-2018, 10.4% of those offenses were also flagged as rape offenses. *VAWA and Girls Report 2017-18*, *supra* note 168.

172. Unlike in the United States, in the United Kingdom, police forces make approximately 72% of charging decisions, and the Crown Prosecution Service "determines appropriate charges in more serious or complex cases." Alexandra Michelle Ortiz, *Invisible Bars: Adapting the Crime of False Imprisonment to Better Address Coercive Control and Domestic Violence in Tennessee*, 71 VAND. L. REV. 681, 695 n.91 (2018).

173. *New Tool to Help Police Identify Victims of Coercive Control*, UNIV. OF LIVERPOOL (June 28, 2018), <https://phys.org/news/2018-06-tool-police-victims-coercive.html> [<https://perma.cc/4FMV-5M4N>].

174. Charlotte Barlow et al., *Police Responses to Coercive Control*, N8 POLICING RESEARCH P'SHIP (June 29, 2018), <http://n8prp.org.uk/wp-content/uploads/2018/09/Police-responses-to-coercive-control.pdf> [<https://perma.cc/RR2G-R2L2>] [hereinafter Barlow et al., *Police Responses to Coercive Control*]. The study analyzed domestic abuse data of one English police department between January 2016 and June 2017.

175. *Id.*

176. *Id.*

177. *Id.*

Certainly, there are persuasive arguments and interesting data both supporting and criticizing Section 76's effectiveness heretofore in strengthening the law against domestic violence in England and Wales. However, because the legislation is still relatively new, only after more research and after more time has passed will commentators be able to more conclusively evaluate Section 76's effectiveness.

## II. THE CRIMINALIZATION OF DOMESTIC VIOLENCE AND REFORM EFFORTS IN THE UNITED STATES

This Part first reviews America's early domestic violence laws, which were rooted in same English common-law doctrines previously discussed under the United Kingdom's history. Next, this Part discusses the United States' lack of meaningful domestic violence law reform until the mid-twentieth century, similar to the lack of reform in the United Kingdom during this time. Similarly prompted by feminist activism and developments in empirical understandings of domestic abuse, this Part discusses America's domestic violence revolution, occurring in the late 1990's-early 2000s. This Part then discusses how, unlike the United Kingdom, which went on to engage in substantive reform after its wave of procedural reforms, the United States did not; instead, the American paradigm continues to employ an incident-specific, violence-focused model for criminalizing domestic abuse: "the violent incident paradigm." This Part discusses the violent incident framework, which experts argue is responsible for stalling America's domestic violence revolution, and discusses facets of the model which prevent the United States' from bridging the domestic abuse disconnect. Finally, this Part discusses the growing campaign for suggested reform to the United States' framework, aimed at replacing the violent incident model with one that accurately captures the realities of domestic abuse: its ongoing nature and the devastating impact of accompanying coercive control tactics.

### *A. The Historical Roots of Domestic Violence Law in the United States*

Like the United Kingdom, America's domestic violence culture finds its roots in centuries-old European philosophy toward women.<sup>178</sup> Upon gaining independence, the founding American colonies adopted the existing English common law.<sup>179</sup> Accordingly, the earliest domestic violence laws in the United States were based upon long-standing English common law chastisement doctrines that explicitly permitted, and even encouraged, the practice of wife-beating "for correctional purposes."<sup>180</sup> The Colonies began codifying the common law "chastisement right" doctrine, enacting laws that regulated, but did not

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178. MARTIN, *supra* note 30, at 31.

179. Paul H. Robinson, *United States*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 563, 564 (Kevin Jon Heller & Markus Dubber eds., 2010).

180. MARTIN, *supra* note 30, at 31.

prohibit, wife abuse during the mid-seventeenth century.<sup>181</sup> Though the New England colonies formally prohibited wife abuse for non-correctional purposes, enforcement of these laws was infrequent, and punishments were lenient and inconsistent.<sup>182</sup>

For the next two centuries—in the rare instance that criminal charges of domestic violence were brought at all—American courts continued to affirm the right of a husband to abuse his wife, so long as it fell within certain arbitrary limits.<sup>183</sup> For example, in 1824 in *Bradley v. State*, the Mississippi Supreme Court held that so long as no permanent injury occurred, a husband was within his right to use physical force “in cases of emergency” against his wife.<sup>184</sup> North Carolina’s Supreme Court, in affirming a husband’s chastisement right, explained that so long as a husband is not violent toward his wife out of “malice or cruelty,” the court believed that it would be better to leave the husband and wife to work their issues out privately.<sup>185</sup> As authority-based rationales for affirming the chastisement right slowly lost persuasive force, courts began using this marital privacy rhetoric as a replacement rationale for justifying the doctrine.<sup>186</sup> This reluctance by the courts to insert themselves into “private, marital affairs” is a key reason why there also was virtually no further initiative by the legislatures to control domestic violence through the mid-nineteenth century.<sup>187</sup>

Both the continued condonation by the American courts and the absence of action by the state legislatures during this time can be explained two-fold. First, the deep-rooted belief that women were subordinate to men, upon which the United Kingdom and the United States’ common law domestic violence jurisprudence was built, persisted.<sup>188</sup> Second, “as [American] society became more secularized, the [notion of state] enforcement of community moral standards in private conduct . . . [as] an overreaching use of governmental power” grew.<sup>189</sup>

Though the law remained relatively stagnant during the 1700s and most of the early 1800s, society’s concerns toward domestic violence grew, influenced by booming women’s rights activism, evolving gender mores, and increasing

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181. Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640-1980*, 11 CRIME & JUST. 19, 22 (1989). In 1641, the Massachusetts Bay Colony formally enacted the first of such laws, “the first law against wife abuse anywhere in the Western world.” *Id.* Plymouth Colony followed suit in 1672 by creating a statutory offense against spouse abuse, punishable by whipping or a five-pound fine, for wife beating, and by “a sentence to be determined by the court[.]” for husband beating. *Id.*

182. *Id.* at 25-26.

183. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 62; *see also* Lorie Rubenser, *Worldwide Sociolegal Precedents Supporting Domestic Violence from Ancient to Modern Times*, in ENCYCLOPEDIA OF DOMESTIC VIOLENCE 733, 736 (Nicky Ali Jackson ed., 2007).

184. *Bradley v. State*, 1 Miss. 156 Walker (1824).

185. *State v. Oliver*, 70 N.C. 60 (1874).

186. Siegel, *supra* note 33, at 2151.

187. Pleck, *supra* note 181, at 29-30.

188. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 63.

189. *Id.*

disapproval of corporal punishment.<sup>190</sup> Responding to society's mounting criticism of the American legal system's apathy toward domestic violence, state courts began overturning the longstanding common law chastisement right throughout the end of the nineteenth century.<sup>191</sup> State legislatures also began increasingly enacting statutes criminalizing acts of domestic violence; every state had made spousal abuse illegal by 1920.<sup>192</sup> However, though both the courts and the legislatures formally condemned domestic violence, lack of enforcement continued, and reservations regarding the propriety of state interference with a family's private matters, like the marital privacy rhetoric expressed in *State v. Oliver*, lingered.<sup>193</sup>

*B. America's Domestic Violence Revolution: Similar in Promise,  
Stalled in Action*

*1. The Revolution's Promise: Developments During the Second  
Half of the Twentieth Century*

Similar to the United Kingdom, what is known today as America's domestic violence revolution did not gain steam until the end of the twentieth century, in large thanks to pressures from international civil and human rights advocacy and the organized women's movement.<sup>194</sup> During the 1960s and 1970s, protests supporting civil and human rights swelled across the globe, and the women's movement in the United States blossomed.<sup>195</sup> While feminist advocacy in the United States during the nineteenth century had focused on protesting "institutional and structural sources of male dominance" in an effort to achieve their central goals of freedom and equality for women, radical feminists of the late twentieth century shifted the focus of their advocacy toward protesting various "acts of power and control [committed] by individual men[,]" highlighting concrete harms to women that resulted from "the unitary phenomenon of male violence[,]" such as rape, sexual harassment, and wife abuse.<sup>196</sup> Goals of protection and punishment consequently became central to this new feminist agenda.<sup>197</sup>

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190. Siegel, *supra* note 33, at 2130; *id.* at n.46.

191. *Id.* at 2129-30.

192. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 Harv. L. Rev. 1849, 1857 (1996) [hereinafter Hanna, *No Right to Choose*].

193. Ortiz, *supra* note 172, at 685-86. For example, while the North Carolina Supreme Court overturned the chastisement right in *State v. Oliver*, the court followed its holding with, "if no permanent injury is inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive." *State v. Oliver*, 70 N.C. 60, 61-62 (1874).

194. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 56.

195. *Id.*

196. *Id.* at 59.

197. *Id.*

American feminists and domestic violence advocates aimed to achieve their goals of protection and punishment by combating the systemic indifference to domestic violence that saturated the criminal response to domestic violence, their arguments for legal reform sparked largely by the same developing domestic violence research cited by reform advocates in the United Kingdom in the late twentieth century.<sup>198</sup> Activists and academics suggested that traditional attitudes supporting husbands' right to chastise their wives and traditional reluctance to intervene in private family matters contributed to law enforcement decisions to arrest practically "everyone *but* family violence offenders[.]"<sup>199</sup> While 88% of stranger felony assaults resulted in arrest, only 45% of assaults involving family members similarly ended in an arrest.<sup>200</sup> In response to these "observed inadequacies of criminal justice responses" to domestic violence against women, feminists and advocates "demanded that law enforcement provided battered women with the 'equal protection' they were guaranteed by the 14th Amendment to the U.S. Constitution."<sup>201</sup> Analogizing stranger assaults to partner abuse, this formal equality argument insisted that domestic violence between intimate partners to be treated equally under the law with other forms of general violence, such as assault.<sup>202</sup>

As in the United Kingdom, research and activism highlighting the disturbing effects of non-interference by police in cases of domestic violence achieved waves of procedural reform, aimed at increasing enforcement and restraining police discretion in cases of domestic violence. Unlike in the United Kingdom, however, the United States engaged in little-to-no substantive reform. The formal equality argument garnered support amongst law-and-order focused policy-makers during the 1970s and 1980s, and resulted in a rise of legislation and other reform efforts throughout the end of the twentieth century.<sup>203</sup> However, because the goal of the formal equality argument was for domestic violence to be treated *equally* with other forms of violence, the ensuing reform efforts and legislation were largely procedural, rather than substantive, and focused on increasing "enforcement of existing substantive criminal laws" by restricting discretion of law enforcement.<sup>204</sup> Such reforms included instituting more aggressive arrest

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198. See, e.g., Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 970; see discussion of "marital privacy" rhetoric *supra* Part II.A.

199. Sarah Fenstermaker Berk & Donileen R. Loseke, "Handling" Family Violence: Situational Determinants of Police Arrest in Domestic Disturbances, 15 LAW & SOC'Y REV. 317, 319-20 (1980-1981); BUZAWA, BUZAWA, & STARK, *supra* note 28, at 145.

200. Berk & Loseke, *supra* note 199, at 319 (citing Donald J. Black, *The Social Organization of Arrest*, 23 STAN. L. REV. (1971)).

201. Stark, *Looking beyond Domestic Violence*, *supra* note 73, at 200.

202. *Id.*

203. Deborah M. Weissman, *The Personal is Political – and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387, 396 (2007); Stark, *Looking beyond Domestic Violence*, *supra* note 73, at 200.

204. Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 559 (2007) (emphasis added); Tuerkheimer,



procedures, such as mandatory arrest statutes enacted by many jurisdictions, which generally require an arrest whenever there is probable cause in cases of domestic violence.<sup>205</sup> Similarly, prosecutors' offices throughout the country instituted policies which limited charging discretion in cases of domestic violence, often referred to as "no-drop" prosecution policies.<sup>206</sup>

The federal government even committed to aiding in increasing the criminal justice response to domestic violence, passing the Violence Against Women Act (VAWA) in 1994.<sup>207</sup> Amongst other things, VAWA provided extensive funding to community-based services, and provided millions of dollars in grants to state and local governments who improved their response to domestic violence.<sup>208</sup> Though VAWA created some new substantive federal offenses related to domestic violence, such as offenses prohibiting the crossing of state lines to commit domestic violence or in violation of a protection order, these offenses do not broaden the scope of criminalized domestic abuse to capture its ongoing nature or its coercive control tactics and thus, no more bridged the domestic abuse disconnect than general offenses such as assault employed by the various states.<sup>209</sup>

Though these procedural reforms are certainly admirable in comparison to the prior American framework, which once explicitly permitted domestic violence, they resulted in no significant improvement to the United States' framework for properly responding to and redressing domestic abuse. No meaningful reform to the substantive laws criminalizing domestic abuse accompanied this wave of procedural reform; rather, incidents of domestic violence continued to be typically charged under general offenses used to prosecute violence against the person, such as assault or battery.<sup>210</sup>

## *2. A Revolution Stalled: The Current Substantive Framework for Criminalizing Domestic Abuse*

Notions of formal equality that achieved procedural, but not substantive, reform during the late twentieth century linger even today, and domestic violence

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*Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 970-71.

205. Burke, *supra* note 204.

206. *Id.* at 559-60.

207. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 294-96. *See also* Nancy Meyer-Emerick, *Violence Against Women Act*, in *ENCYCLOPEDIA OF DOMESTIC VIOLENCE* 718, 718-19 (Nicky Ali Jackson ed., 2007); Violence Against Women Act of 1994, Pub L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 34 U.S.C.). Since its enactment, VAWA has been reauthorized three times. With each reauthorization, VAWA has been expanded to address various issues of violence against women, such as sex-trafficking, backlogged rape-kits, and dating violence and stalking on college campuses. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 296-97.

208. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 294-96. *See also* Meyer-Emerick, *supra* note 207.

209. *See* BUZAWA, BUZAWA, & STARK, *supra* note 28, at 294-96; *see also* Meyer-Emerick, *supra* note 207.

210. Hanna, *No Right to Choose*, *supra* note 192, at 1859 and accompanying footnotes.

continues to be substantively treated no different than other forms of violence.<sup>211</sup> Today, approximately half of the states continue to prosecute acts of domestic violence under their respective general statutes for offenses against the person, such as assault and battery, harassment, stalking, or menacing.<sup>212</sup> Though the remaining half of the states have enacted a separate, criminal offense for the crime of domestic violence, careful attention to the statutes reveals that there is little within them that makes them substantively different than the general existing crimes for various offenses against the person.<sup>213</sup>

Rather, these states' separate domestic violence statutes merely incorporate existing crimes, such as assault or menacing, either explicitly<sup>214</sup> or implicitly<sup>215</sup> by including the same elements with the additional requirement simply that there is an intimate or familial relationship between the victim and the perpetrator.<sup>216</sup> These recognized relationships "typically include . . . current and former spouses, cohabitants, and shared participants in procreation," as well as other family

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211. Burke, *supra* note 204, at 558. Different states have enacted widely varying statutory frameworks regarding the criminalization of domestic violence. Some key variations include the extent to which state criminal codes provide for domestic violence related crimes, severity of punishment for domestic violence, and the breadth and scope of authority of law enforcement to conduct a warrantless arrest of perpetrators of domestic violence. Neal Miller, *Domestic Violence: A Review of State Legislation Defining Police and Prosecution Duties and Powers*, INST. FOR L. & JUST. 5-6 (June 2004), [http://www.ilj.org/publications/docs/Domestic\\_Violence\\_Legislation.pdf](http://www.ilj.org/publications/docs/Domestic_Violence_Legislation.pdf) [<https://perma.cc/LZ73-2YSQ>]. However, though the depth of protection provided by the law varies from state to state, substantively most states do not treat domestic violence differently than other forms of violence. Burke, *supra* note 204, at 558.

212. 50 State Statutory Surveys: Criminal Law: Domestic Violence, 0030 Surveys (Thomson Reuters) 7 (Oct. 2017) [hereinafter Domestic Violence Statutory Survey]. See also Miller, *supra* note 211, at 7.

213. Domestic Violence Statutory Survey, *supra* note 212; Burke, *supra* note 204, at 561.

214. See, e.g., MISS. CODE ANN. § 97-3-7(3) (providing that when an individual commits the offense of simple assault "against a current or former spouse of the defendant or a child of that person, a person living as a spouse or who formerly lived as a spouse with the defendant or a child of that person, a parent, grandparent, child, grandchild or someone similarly situated to the defendant, a person who has a current or former dating relationship with the defendant, or a person with whom the defendant has had a biological or legally adopted child[.]" the individual commits the offense of 'simple domestic violence.')

215. See, e.g., OHIO REV. CODE ANN. § 2919.25 (providing a separate domestic violence offense for any person who knowingly or recklessly causes, or attempts to cause, physical harm to a family or household member, or by threat of force, knowingly causes a family or household member to believe that the individual will cause imminent physical harm to the family or household member); cf. OHIO REV. CODE ANN. § 2903.13 (providing for the general crime of assault, which already criminalizes knowingly causing or attempting to cause physical harm to another, and recklessly causing serious physical harm to another), and OHIO REV. CODE ANN. § 2903.21 (providing for the general crime of menacing, which criminalizes knowingly causing another to believe that the individual will cause serious harm to the victim.)

216. Burke, *supra* note 204, at 561-62.

members.<sup>217</sup> Thus, even in states with a so-called separate domestic violence offense, in practice the varying states criminalize domestic violence by resorting to their existing substantive frameworks for criminalizing violence generally.

Though different states have enacted widely varying statutory frameworks regarding the criminalization of domestic violence since the domestic violence revolution began in the late twentieth century, these various reforms continue to institute largely procedural elements aimed at enhancing enforcement under the general, substantive framework. For example, some key variations enacted by states since the early 2000s include the severity of punishment for domestic violence, and the breadth and scope of authority of law enforcement to conduct a warrantless arrest of perpetrators of domestic violence.<sup>218</sup> However, though these various reforms implemented throughout the 1990s and early 2000s may procedurally increase the depth of protection provided by the law, they continue to fail to provide victims of domestic violence with long-term protection because “[a]t the root of these reforms is a model that equates partner abuse with discrete assaults or threats [thereof], . . . call[ed] the ‘violent incident model.’”<sup>219</sup>

### C. The Violent Incident Model

The United States’ framework for criminalizing violence, consequently including domestic violence, is based upon what has been coined as the “violent incident model.”<sup>220</sup> Under this model, “violence” is defined as “an act carried out with the intention or perceived intention of causing physical pain or injury to another person.”<sup>221</sup> The effect of incorporating this broad definition of violence, which more accurately reflects violence between strangers than between intimates, into American domestic violence laws has been that the phenomenon of domestic abuse, generally, is conflated with *discrete acts of physical violence*.<sup>222</sup> Flowing from this is the assumption that “abuse consists of discrete acts that can be sharply delineated and so managed within a tight temporal frame, like stranger assaults.”<sup>223</sup> Accordingly, intervention methods and risk assessment are “predicated on the belief that perpetrators and victims possess decisional autonomy *between* episodes. Thus the former can be persuaded not to repeat their violence and the latter to leave.”<sup>224</sup> Further, because the United States’ violent incident paradigm continues to prosecute domestic abuse under general offenses of violence, such as assault or menacing, the American framework extends only to physically violent acts, or sometimes imminent threats thereof.<sup>225</sup> Additionally,

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217. *Id.* at 561 n.49; *see, e.g.*, MISS. CODE ANN. § 97-3-7(3).

218. Miller, *supra* note 211.

219. *Id.* at 5; Stark, *Looking beyond Domestic Violence*, *supra* note 73, at 200.

220. *Id.* at 201.

221. RICHARD J. GELLES, INTIMATE VIOLENCE IN FAMILIES 14 (1997).

222. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 106 (emphasis added).

223. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 173.

224. *Id.*

225. *See* Stark, *Looking beyond Domestic Violence*, *supra* note 73, at 201.

the United States follows the tradition of employing subjective intent and recklessness standards for assault crimes, and consequently, domestic violence crimes.<sup>226</sup> Under these statutes, the requisite *mens rea* generally exists for anyone who purposely, knowingly, or recklessly causes, or attempts to cause, physical harm to another.<sup>227</sup> In sum, because the domestic abuse has been conflated with discrete acts of physical violence in this way, the United States' legal paradigm for addressing domestic abuse is characterized by a narrow temporal lens, focusing on isolated incidents or discrete acts, and by a limited conception of harm, focusing on physical injuries on imminent threats thereof.<sup>228</sup>

The adaptation of the violent incident model to the framework for criminalizing domestic violence in the United States and complementary reforms instituted throughout the late twentieth-century has resulted in substantial improvements to the American response to domestic violence over the traditional approach, "when few instances of domestic violence led to any intervention, let alone an arrest."<sup>229</sup> However, the aforementioned legislation and law enforcement practices have done little to improve victims' overall safety or long-term protection from domestic abuse.<sup>230</sup> Accordingly, some scholars have argued that the American domestic violence revolution has stalled, taking the United States' criminalization of domestic abuse as far as it can.<sup>231</sup> A continuously growing network of prominent domestic violence experts argue that the reason for this lack of improvement is that statutes used to criminalize domestic abuse under United States' violent incident paradigm fail to accurately define the nature of domestic violence and the reality of harm it inflicts, effectively placing domestic abuse "outside the reach of criminal" law.<sup>232</sup> Specifically, theorists have noted three major issues with violent incident model which, in practice, prevent it from effectively addressing the reality of domestic violence and bridging the disconnect.<sup>233</sup>

One principal problem of the violent incident paradigm is its limited concept of harm, which criminalizes only the infliction of physical injuries, or in some instances, the imminent threat thereof.<sup>234</sup> Empirical evidence demonstrates that

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226. McMahon & McGorriery, *supra* note 130, at 99. *See, e.g.*, Model Penal Code 211.1(a) (2007) ("A person is guilty of assault if he attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another.").

227. *See, e.g.*, Model Penal Code 211.1(a) (2007) ("A person is guilty of assault if he attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another.").

228. Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 971-73.

229. Stark, *Looking beyond Domestic Violence*, *supra* note 73, at 200. *See, e.g., supra* Part II.B.1.

230. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 29-30, 127.

231. *Id.* at 30.

232. Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 959-60.

233. *See generally* Stark, *Looking beyond Domestic Violence*, *supra* note 73, at 204-06.

234. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 106; Stark, *Coercive Control as a*

physical violence is entirely absent in an estimated 25% of domestic abuse, and even when present, often the physical violence is only one of several coercive or controlling tactics used as a *means* of ultimately gaining power and control.<sup>235</sup> Between 60% to 80% of victims of domestic abuse experience “multiple tactics to frighten, isolate, degrade, and subordinate them, as well [as] assault and threats[.]”<sup>236</sup> Because the United States’ paradigm so narrowly limits its concept of harm to physical violence, domestic violence charges and assessments almost never include these other subordinating tactics, experienced by the vast majority of domestic abuse victims.<sup>237</sup> Further, it is these tactics of isolation, intimidation, and control that are key to the cumulative entrapment experienced by victims of coercive control; the entrapment being critical to making coercive control the most devastating form of domestic abuse.<sup>238</sup>

A related second problem associated with the violent incident model of domestic abuse is the exaggerated weight it assigns to injury.<sup>239</sup> Empirical evidence suggests that when physical violence is experienced as a tactic of domestic abuse, it is better characterized by frequent low-level assaults that cumulatively achieve the desired result of power and control than by the severity of injury caused during a particular incident.<sup>240</sup> Between 95% and 99% of domestic abuse cases involve what are considered non-injurious assaults.<sup>241</sup> However, under the violent incident paradigm, the seriousness of physical injuries resulting from domestic violence, and consequently the likelihood of police response to the abuse, is “measured by the degree of harm inflicted or intended.”<sup>242</sup> Accordingly, non-injurious low-level acts of violence are viewed as minor assaults, each considered separately, and consequently do not “appear[] to

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*Framework for Responding to Male Partner Abuse in the UK*, *supra* note 17, at 21; *see also* Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 971-72.

235. Stark, *Coercive Control as a Framework for Responding to Male Partner Abuse in the UK*, *supra* note 17, at 21; BUZAWA, BUZAWA, & STARK, *supra* note 28, at 109-10 (emphasis added). “Contrary to the popular belief that abusive violence occurs during conflicts, violence in coercive control is mainly used to punish disobedience, keep challenges from surfacing, [and] express power[.]” BUZAWA, BUZAWA, & STARK, *supra* note 28, at 109-10.

236. Stark, *Looking beyond Domestic Violence*, *supra* note 73, at 206.

237. *Id.* In fact, the subordination of the victim caused by these tactics is instead often misinterpreted as a resulting from the victim’s “dependent personality.” *Id.*

238. *Id.*; STARK, *HOW MEN ENTRAP WOMEN IN PERSONAL LIFE*, *supra* note 1, at 23-24, 498-99.

239. Stark, *Looking beyond Domestic Violence*, *supra* note 73, at 204.

240. *Id.* at 202, 213.

241. *Id.* at 204.

242. *Id.* (“Domestic violence laws target discrete assaults/threats and carry the implication, only occasionally spelled out in criminal statutes or service protocols, that the severity of abuse can be gauged by applying a calculus of physical harms to these incidents. Research shows that the level of harm they observe is among the most important factors that determine how police respond to domestic violence[.]”).

merit serious intervention.”<sup>243</sup> Further, when viewed separately and as trivial or minor, even multiple offenses often will not “prompt a more serious response than a single incident.”<sup>244</sup> Consequently, the most persistent domestic abusers are effectively not held any more accountable than first-time offenders,<sup>245</sup> and because “response is gauged to *severe* violent acts, most [domestic] abuse goes either unrecognized or unpunished.”<sup>246</sup>

The third major problem of the violent incident paradigm criticized by reformists is its narrow temporal lens, which views each offense of domestic violence as a discrete act, and consequently treats each offense as an isolated incident, abstracted from its historical context.<sup>247</sup> In reality, however, empirical evidence shows that experiences of domestic abuse “are almost never isolated incidents.”<sup>248</sup> Only 17%–25% of incidents of abuse are isolated incidents.<sup>249</sup> In fact, approximately 50% of domestic abuse reported in population surveys involve “serial abuse,” with violence occurring at least once a week, and approximately one third of victims who make police calls report being assaulted daily.<sup>250</sup> For these victims, abuse is not merely repeated; rather, it is ongoing.<sup>251</sup>

Further, not only is the ongoing nature of domestic abuse missed when characterized as isolated incidents under the narrow temporal lens of violent incident model; also, by abstracting incidents of domestic abuse from the course of conduct in which they occur, the most devastating outcome of coercive control is masked: the cumulative entrapment.<sup>252</sup> Under the American violent incident framework, even if a pickpocket commits “dozens of similar offenses, because each harm is inflicted on a different person, the law is compelled to treat each act as discrete.”<sup>253</sup> Applying that same logic to domestic violence, however, does not accurately reflect the reality of domestic abuse. This is so because “the single most important characteristic of woman battering is that the weight of multiple harms is borne by the same person, giving abuse a cumulative effect that is far greater than the mere sum of its parts.”<sup>254</sup> Thus, because of this ongoing and cumulative context of domestic abuse, distinct from other forms of violence, experts argue that domestic abuse “has more in common with course of conduct crimes[,] such as harassment[,] . . . than the sort of acute, time-limited assaults

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243. *Id.*

244. *Id.* at 205.

245. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 106.

246. Stark, *Looking beyond Domestic Violence*, *supra* note 73, at 201 (emphasis added).

247. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 106; *see also* Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 971.

248. Stark, *Looking beyond Domestic Violence*, *supra* note 73, at 204.

249. STARK, *HOW MEN ENTRAP WOMEN IN PERSONAL LIFE*, *supra* note 1, at 201.

250. Stark, *Looking beyond Domestic Violence*, *supra* note 73, at 204.

251. *Id.*

252. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 106; STARK, *HOW MEN ENTRAP WOMEN IN PERSONAL LIFE*, *supra* note 1, at 95.

253. STARK, *HOW MEN ENTRAP WOMEN IN PERSONAL LIFE*, *supra* note 1, at 94.

254. *Id.*

that involve strangers and that are anticipated by our current laws[.]”<sup>255</sup> By treating each “incident” of domestic violence de novo, as it would for a recidivist pickpocket, the violent incident model “fragments, trivializes, and confounds what is actually happening” in abusive relationships, and the criminal justice system “become[s] a revolving door[] through which the same perpetrators pass an average of five times or more.”<sup>256</sup> Accordingly, “[t]he most serious consequence of the incident-specific approach is the reduction of woman battering to a second-class misdemeanor for which no one is punished.”<sup>257</sup>

*D. Calling for Reform: From Domestic Violence to Coercive Control*

In light of these issues with the violent incident model, reformists argue that in order to reignite the domestic violence revolution and meaningfully further American domestic violence reform, the next step is to focus on the substantive criminal laws themselves, rather than the procedures, rules, and customs surrounding them.<sup>258</sup> There is a growing body of domestic violence scholars within the national and international community who believe that the current traditional “transactional model of crime that isolates and decontextualizes violence[,]” needs to be replaced with a framework that criminalizes ongoing patterns of behavior that are characterized by power and control, rather than criminalizing isolated incidents characterized merely by physical violence.<sup>259</sup>

Many have proposed such models of reform, focused on ongoing patterns of coercive or controlling abuse, which resemble the United Kingdom’s modern reform efforts and Section 76. Two such notable proposals are those of Professor Deborah Tuerkheimer and Professor Alafair S. Burke. Professor Tuerkheimer, a distinguished scholar in the American domestic violence law reform campaign, proposes redefining the crime of battery as a course of conduct crime, which gives rise to liability when: a perpetrator “intentionally engages in a course of conduct directed at a family or household member;” and the perpetrator “knows or reasonably should know that such conduct is likely to result in substantial power or control over the” person; and “[a]t least two acts comprising the course of conduct constitute a crime in [that] jurisdiction.”<sup>260</sup> Building off criticisms of Professor Tuerkheimer’s proposal, Professor Burke proposes the creation of a separate domestic violence statute.<sup>261</sup> Under Professor Burke’s proposed “coercive domestic violence” statute, liability arises when the perpetrator

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255. Stark, *Looking beyond Domestic Violence*, *supra* note 73, at 204.

256. STARK, *HOW MEN ENTRAP WOMEN IN PERSONAL LIFE*, *supra* note 1, at 99.

257. *Id.*

258. Deborah Tuerkheimer, *The Real Crime of Domestic Violence*, in 3 *VIOLENCE AGAINST WOMEN IN FAMILIES AND RELATIONSHIPS: CRIMINAL JUSTICE AND THE LAW* 1, 1 (Evan Stark & Eve S. Buzawa eds., 2009) [hereinafter Tuerkheimer, *The Real Crime of Domestic Violence*].

259. *Id.* at 4.

260. Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 1019-20.

261. Burke, *supra* note 204, at 602-03.

“attempts to gain power or control over an intimate partner through a pattern of domestic violence[,]” defining “to gain power or control” as “restrict[ing] another’s freedom of action[,]” and defining “pattern of domestic violence” as “the commission of two or more incidents of assault, harassment, menacing, kidnapping, or any sexual offense, or any attempts to commit such offenses, committed against the same intimate partner.”<sup>262</sup>

Though the specifics of their proposed statutes differ, they both embody the general consensus of many modern American domestic violence law reformists: that any statute aimed at effectively criminalizing domestic abuse and bridging the traditional disconnect “must reflect two fundamental characteristics of domestic violence: the patterned nature of abuse, and the centrality of power and control to the abuse dynamic.”<sup>263</sup>

### III. STATUTORY COMPARISON OF SECTION 76 AND THE VIOLENT INCIDENT MODEL: BRIDGING OR PERPETUATING THE DISCONNECT?

A principle goal in the modern reform of domestic violence law is to bridge the “vast and significant” disconnect between domestic abuse as it is practiced and as it is criminalized.<sup>264</sup> This Part examines the ability of the United Kingdom’s coercive control offense and the United States’ violent incident paradigm to accomplish that goal. This Part will identify the similarities and differences between the two frameworks and will analyze the respective strengths and weaknesses of four aspects of the frameworks which have great potential to remedy, or perpetuate, this disconnect: their concept of harm, their temporal lens, their scope of recognized relationships between the batterer and the victim, and their standards for the requisite *mens rea*. Additionally, this Part addresses the strengths and weaknesses of the clarity, or lack thereof, within the two approaches.

#### *A. Concept of Harm: Physical Injuries Versus Serious Effects*

Most notably, the United States’ violent incident paradigm and Section 76 differ in their conception of harm, and consequently, the scope of criminalized behavior. The violent incident paradigm employed in the United States adheres to the traditional requirement that the victim must experience injurious physical harm, or in some cases, imminent fear of such physical injury.<sup>265</sup> Section 76, on the other hand, does not require an infliction of bodily harm resulting from the perpetrator’s behavior. Rather, Section 76 requires that the perpetrator’s behavior have a “serious effect” on the victim.<sup>266</sup> Similar to the violent incident model, Section 76’s serious effect element may be satisfied when a perpetrator’s

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262. *Id.* at 601-02.

263. Tuerkheimer, *The Real Crime of Domestic Violence*, *supra* note 258, at 15.

264. Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 959-60.

265. McMahon & McGorrey, *supra* note 130, at 99; *see supra* Part II.C.1 and Part II.C.

266. Serious Crime Act 2015, c. 9, § 76(1)(c) (UK).



behavior causes a victim to fear that violence will be used against them.<sup>267</sup> However, Section 76 goes one step further: a defendant's behavior may also have the requisite serious effect if it causes the victim "serious alarm or distress" which has a substantial adverse impact on their usual day-to-day activities.<sup>268</sup>

This alternative conceptualization of harm under Section 76 moves away from the traditionalistic emphasis on physical trauma, recognizing instead what has been long understood by domestic violence experts: In reality, physically violent assaults are only one of many tactics inflicted upon victims to frighten, isolate, degrade, and subordinate them, and it is the entrapment effect of these non-violent tactics that make coercive control the most devastating form of domestic abuse.<sup>269</sup> By recognizing the serious alarm or distress that adversely affects a victim's day-to-day life as a cognizable harm of domestic abuse, Section 76's serious effect elements acknowledges that rather than merely the rare occurrence of serious physical injury, structural constraints on victims' autonomy, liberty, dignity, and psychological and physical integrity are major harms inflicted by domestic abuse.<sup>270</sup> This recognition supports what many domestic violence victims have been reporting about their experiences for decades: The physical violence is not the worst part.<sup>271</sup> This "serious alarm or distress" conception of harm also recognizes that it is the cumulative entrapment effect of these harms that make coercive control the most devastating form of domestic abuse and seeks to redress that devastating harm.<sup>272</sup> Additionally, by allowing for the requisite serious effect element to be satisfied when a perpetrator's behavior causes the victim to experience either fear of violence *or* "serious alarm or distress" as provided by the legislation, Section 76 more comprehensively protects domestic abuse victims, especially those who may not otherwise be protected under laws criminalizing actual bodily harm or fear thereof.<sup>273</sup> For these reasons, reformists and domestic violence experts applaud the United Kingdom and Section 76's serious effect conception of harm as a shift in the right direction toward more accurately criminalizing and redressing the realities of domestic violence.<sup>274</sup>

In contrast, the United States has yet to follow suit in shifting toward more effectively bridging the domestic abuse disconnect, as the United States' violent incident paradigm continues to extend only to injurious, physical harms.<sup>275</sup>

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267. Serious Crime Act 2015, c. 9, § 76(4)(a) (UK). Section 76, however, requires that a fear that violence will be used against them must be experienced on at least two occasions in order to have the required serious effect. *Id.*

268. Serious Crime Act 2015, c. 9, § 76(4)(b) (UK).

269. Stark, *Looking beyond Domestic Violence*, *supra* note 73; STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 23-24, 498-99.

270. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 105.

271. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 37.

272. *See* STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 28.

273. *See supra* Part I.C.

274. *See supra* Part I.B.3.

275. *See supra* Part II.C.

Because the United States' violent incident paradigm so narrowly conceptualizes harm in this way, it offers redress only to a tiny fraction of harms suffered by victims of domestic abuse; consequently, the 95% to 99% of women who experience domestic abuse but suffer only "noninjurious [sic] assaults[.]" go unprotected under the United States' framework.<sup>276</sup> By inadequately extending criminal punishment only to physically injurious assaults in this way, the United States' framework dismisses and tacitly belittles victims whose experiences are not recognized under the violent incident model, and at worst, these limitations of the current American framework downright endanger victims of domestic violence.<sup>277</sup>

Though Section 76's serious effect conception of harm is more applaudable than the narrow physical conception under the United States' violent incident framework, the United Kingdom's subjective approach in determining whether the victim experienced the requisite serious effect opens the offense to some practical and policy-based criticisms. First, a subjective approach limits the applicability of Section 76 to victims "who are able to appreciate or verbalise [sic] the impact of the harm they are experiencing."<sup>278</sup> In this way, by employing a subjective approach focused on whether a perpetrator's behavior *did* in fact have a serious effect on the victim, the subjective inquiry creates a hierarchy of harm suffered by domestic abuse victims, providing redress under Section 76 only to those who can sufficiently demonstrate the serious effect that they experienced.<sup>279</sup> Consequently, in practice, employing a subjective approach to determine whether a victim experienced the requisite serious effect as a result of a defendant's coercive control frustrates Parliament's purpose of enacting Section 76: to provide more comprehensive protection to victims of coercive control and domestic abuse.<sup>280</sup>

Additionally, Section 76's serious effect element is subject to various discursive criticisms regarding subjective inquiries into the psychology of domestic violence victims, which are avoided under the United States' framework. Many feminist scholars criticize the focus of domestic violence statutes on the subjective, psychological evaluation of the victim on discursive grounds, arguing that they are "in tension with the agency of battered women[;]" effectively put the victim on trial, thereby perpetuating the problematic "why did she stay" rhetoric, rather than focusing on "why did he batter;" and they require a narrative that effectively empowers the abuser and revictimizes the victim.<sup>281</sup>

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276. Stark, *Looking beyond Domestic Violence*, *supra* note 73, at 204.

277. Hanna, *The Paradox of Progress: Translating Evan Stark's Coercive Control Into Legal Doctrine for Abuse Women*, 15 *VIOLENCE AGAINST WOMEN* 1458, 1463 (2009).

278. Bettinson & Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary*, *supra* note 43, at 194.

279. See Serious Crime Bill [HL] 2014-15, Mother's Union (SC 10) Written Evidence, <https://publications.parliament.uk/pa/cm201415/cmpublic/seriouscrime/memo/sc10.htm> [<https://perma.cc/3FR8-WM4X>].

280. See *Statutory Guidance*, *supra* note 94, at 3.

281. Burke, *supra* note 204, at 600-03. Statutes that require a result element such as gaining

The serious effect requirement in Section 76 is similarly subject to these criticisms due to its subjective determination.<sup>282</sup> In contrast, assault and battery statutes used to prosecute domestic violence under the United States' paradigm avoid some of these particular discursive criticisms regarding victims' agency. By limiting the concept of cognizable harm to physical injuries, assault statutes remove the examination of a victim's psychology altogether, instead measuring the relevant harm objectively, by evaluating the severity of the injuries.<sup>283</sup> Further, even under assault statutes that extend to causing imminent fear of bodily harm, victims are not subjected to the same extensive psychological examination into their powerlessness and domination as they would be under an offense that criminalizes a perpetrator gaining power or control over a victim through abusive behavior.<sup>284</sup>

Despite these practical and discursive criticisms, Section 76's subjective approach to determining if a victim experienced the requisite serious effect does offer some benefits, as it captures the intimate, particularized wrong committed in coercive control and also avoids certain evidentiary difficulties that would arise under an objective approach. A principal strength of the subjective approach is that it recognizes that when engaging in coercive or controlling behaviors toward their partner, abusers individualize the tactics of abuse "based on . . . privileged access to personal information about [their] partner[.]"<sup>285</sup> It is precisely the unique harms of this intimate betrayal that Parliament aimed to recognize and redress in creating the new coercive control offense.<sup>286</sup> Additionally, employing a subjective approach to a victim's serious effect avoids difficulties that would arise under an objective approach. Due to the individualized nature of coercive control, there would be difficulty in conveying the serious impact of otherwise seemingly innocent, or even loving, behavior under an objective approach, particularly where the serious effect is "the result of gestures, phrases and looks that have meaning only to those within the relationship[.]"<sup>287</sup> For example, Professor Stark

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control or having a serious effect "would force testifying victims to concede that their batterers had 'succeeded' in dominating them, and would force prosecutors to depict domestic violence victims as subordinated." *Id.* at 603. Additionally, "[d]efense attorneys would cross-examine victims about every trivial act that might demonstrate autonomy – driving to the store, going to work, or choosing what to eat for dinner." *Id.* Thus, under these statutes, "[t]he narrative necessary for a conviction would in effect revictimize women and empower their abusers." *Id.*

282. See Bettinson & Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary*, *supra* note 43, at 194.

283. Charlotte Bishop & Vanessa Bettinson, *Evidencing Domestic Violence, Including Behaviour that Falls under The New Offence of 'Controlling or Coercive Behaviour'*, 22 THE INTERNATIONAL JOURNAL OF EVIDENCE & PROOF 3, 8 (2018) [hereinafter Bishop & Bettinson, *Evidencing Domestic Violence*].

284. See Burke, *supra* note 204, at 603.

285. Stark & Hester, *supra* note 106, at 87.

286. Bettinson & Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary*, *supra* note 43, at 194.

287. *Id.*

discusses a case where a man would give his girlfriend a sweatshirt as a tacitly understood warning between the two that she would later need the sweatshirt to cover bruises he planned on inflicting upon her.<sup>288</sup> In one instance, after the woman had pitched well for several innings of her recreational softball game, the man brought her the sweatshirt, saying, “Darling, you’re cold. Why don’t you put this on?”<sup>289</sup> To the woman, the frightening message was clear; to onlookers, the gesture was loving.<sup>290</sup> In cases such as this, prosecutors would have an extremely difficult time objectively proving the requisite serious effect of these seemingly innocent behaviors.

*B. Temporal Lens: Discrete Acts Versus Repeated or Continuous Behaviors*

A second aspect in which the United States’ paradigm and Section 76 most clearly diverge is in their temporal lens of criminalization. A fundamental principle of traditional American criminal law and laws of evidence is that crime is “transaction-bound.”<sup>291</sup> Under this traditional approach, “crime was conceived as occurring at a discrete moment,”<sup>292</sup> with the crime’s “act . . . taking place in an instant of time so precise that it can be associated with a particular mental state of intention[.]”<sup>293</sup> Thus, the perpetration of “continuing acts” is generally not accounted for by American criminal offenses of violence, such as assault or battery.<sup>294</sup> Rather, these offenses criminalize discrete acts of physical violence, considered as isolated incidents.<sup>295</sup> In contrast, rather than defining the conduct element of the offense as a discrete act, Section 76 prohibits repeated or continuous behavior, evidencing a pattern of behavior.<sup>296</sup>

Because the narrow temporal lens of the United States’ violent incident model de-contextualizes domestic abuse from the ongoing course of conduct in which it occurs, this narrow lens plays a key role in perpetuating the domestic abuse disconnect and in preventing the increased long-term safety of domestic abuse victims. Though statistics show domestic abuse is almost never an isolated incident, the United States continues to employ a framework that conflates domestic abuse with discrete acts of physical violence.<sup>297</sup> Accordingly, the United States’ paradigm generally treats each “incident” of domestic abuse within a relationship de novo, reframed as recidivism rather than a pattern of ongoing

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288. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 229.

289. *Id.*

290. *Id.*

291. George E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 932 (1987).

292. Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 972.

293. Lynch, *supra* note 291, at 933.

294. Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 972.

295. *See supra* Part II.C.

296. Serious Crime Act 2015, c. 9, § 76(1)(a) (UK); *Statutory Guidance*, *supra* note 94, at 5.

297. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 201; BUZAWA, & STARK, *supra* note 28, at 106.

abuse.<sup>298</sup> Reframed as isolated incidents of domestic violence this way, generally evidence of context, of the ongoing nature of the abuse, and of the range of subordinating tactics employed alongside the physical abuse is legally irrelevant.<sup>299</sup> Incidents of domestic abuse, thus, are effectively abstracted from the course of conduct in which they occur.

This abstraction becomes especially troubling in light of the fact that most acts of physical violence committed in coercive control relationships are non-injurious or relatively minor. Because “[t]he importance of ‘minor’ acts of violence only becomes clear when we set them in their historical context as part of a pattern of physical intimidation that has a cumulative effect on a particular victim that can be devastating[.]”<sup>300</sup> This outcome is masked by the abstraction of abuse from its context under the violent incident paradigm.<sup>301</sup> Instead, “the pattern of routine, low-level assault” experienced by the vast majority of domestic abuse victims “is replaced by a view of minor assault or a series of trivial assaults, none of which appears to merit serious intervention.”<sup>302</sup> The result is that the American criminal justice system “become[s] a revolving door[] through which the same perpetrators pass an average of five times or more[.]” domestic abuse is effectively reduced “to a second-class misdemeanor for which no one is punished.”<sup>303</sup>

Section 76, on the other hand, contextualizes the coercive or controlling behavior by placing it within the larger pattern of abuse in which it occurs, thereby allowing the criminal justice system to respond appropriately. Unlike the United States’ paradigm, Section 76’s “repeated or continuous” element “enable[s] the context in which the behavior occurred to be used in building a case.”<sup>304</sup> Under Section 76’s model focusing on patterns of behavior, evidence of the context of the abusive relationship, of the accompanying devastating coercive or controlling tactics, and of the “serious psychological effect of ongoing and programmatic abusive behavior” is now relevant.<sup>305</sup> In turn, by re-contextualizing the abusive incident and placing it within its historical context, police responding to domestic abuse complaints can view the same incident in a completely different light, understanding that serious intervention may be required even in cases of non-injurious or minor assault.<sup>306</sup> Further, under Section 76, each subsequent “incident” of domestic abuse can be considered as an escalation of abuse and punished appropriately, rather than meriting no more serious intervention than a first-time offense, as under the United States’ framework.<sup>307</sup>

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298. See STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 18.

299. See Bishop & Bettinson, *Evidencing Domestic Violence*, *supra* note 283, at 4.

300. Stark, *Looking beyond Domestic Violence*, *supra* note 73, at 204

301. BUZAWA, BUZAWA, & STARK, *supra* note 28, at 106.

302. Stark, *Looking beyond Domestic Violence*, *supra* note 194, at 204.

303. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 186.

304. Bishop & Bettinson, *Evidencing Domestic Violence*, *supra* note 283, at 14.

305. *Id.* at 4.

306. Stark, *Looking beyond Domestic Violence*, *supra* note 73, at 213.

307. *Id.* at 205, 214.

Additionally, when abuse is defined as a pattern of ongoing behavior, as under Section 76, courts can appropriately punish these abusers, both more severely in terms of culpability and in a way that is “designed to curtail the course of conduct[.]”<sup>308</sup> Rather than being treated as second-class misdemeanors, the coercive control is taken more seriously; “the vast majority of convicted offenders [under Section 76] have received significant time in prison, up to a maximum of 6.6 years.”<sup>309</sup> Thus, through its broadened temporal lens, Section 76 appears to more accurately capture the ongoing, patterned nature of domestic abuse, and more effectively increase domestic abuse victims’ long-term protection.

*C. Requirement of a Relationship Between the Parties and the Scope of Recognized Relationships*

While both Section 76 and specific domestic violence offenses under the United States’ paradigm require some kind of domestic relationship between the victim and the perpetrator, the two differ in regard to the scope of recognized relationships. Both American states that define domestic violence separately within their criminal code and Section 76, via its personal connection element, require some kind of statutorily recognized relationship between the parties.<sup>310</sup> However, as to the scope of recognized relationships, Section 76 and the United States’ paradigm critically differ in that the United States’ scope is broader, providing more protection to victims of post-separation abuse. In the context of former intimate relationships, because the requisite personal connection exists only if, at the time of the behavior, the parties live together, Section 76 does not apply to post-separation abuse experienced by *former* intimate partners who are *no longer* living together at the time of the coercive or controlling behavior.<sup>311</sup> Under the United States’ paradigm, however, generally the requirements of the statutorily recognized domestic relationships are not so strictly limited.<sup>312</sup> Typically, so long as the victim and perpetrator either are or were in a recognized domestic relationship, the relationship element of the offense is satisfied and the statute will provide protection to the victim, even if the abuse is occurring post-separation.<sup>313</sup>

It is within this scope of recognized personal connections, and thereby the ability to comprehensively protect victims against post-separation abuse, that Section 76 finds its greatest flaw, and conversely, it is where the United States’ paradigm shines. Not only is post-separation abuse alarmingly common,

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308. *Id.* at 214.

309. Stark & Hester, *supra* note 106, at 87.

310. Burke, *supra* note 204, at 561 n.49; Serious Crime Act 2015, c. 9, § 76(1)(b) (UK); Serious Crime Act 2015, c. 9, § 76(2) (UK); *See, e.g.*, MISS. CODE ANN. § 97-3-7(3).

311. *See* Serious Crime Act 2015, c. 9, § 76(2) (UK) (emphasis added); Serious Crime Act 2015, c. 9, § 76(1)(b) (UK).

312. *See* Burke, *supra* note 204, at 561-63.

313. *See supra* Part II.B.2 (discussing commonly recognized relationships under the United States’ paradigm.)

experienced by as much as 90% of women after separating from an abusive partner, but it is also a time when women are most significantly at risk of danger, or even death.<sup>314</sup> Further, coercive control is more likely than other type of violence to persist post-separation.<sup>315</sup> Thus, Section 76's coercive control offense greatly fails to protect a significant number of victims—those who experience coercive or controlling behavior by their former intimate partner during a period of separation from the relationship—by narrowly limiting the recognized “personal connections” of former intimate partners only to those who are still cohabiting at the time of the behavior. Recognized relationships under American domestic violence statutes, however, are not so strictly limited as they are under Section 76.<sup>316</sup> Because former intimate partners are generally not required to be cohabiting at the time of the domestic violence incident in order to have a recognized relationship under the violent incident model, the United States' paradigm provides greater protection to victims experiencing post-separation abuse.

*D. Mens Rea: Traditional Versus Alternative, Quasi-Objective Standards*

The United States' violent incident paradigm and Section 76 largely employ similar *mens rea* standards. Both the United States' framework and Section 76 employ the subjective intent standard of knowledge.<sup>317</sup> Accordingly, the requisite *mens rea* exists for anyone who: under the United States' violent incident model, intentionally or knowingly causes physical harm to another; or under Section 76, knows that their coercive or controlling behavior will have a serious effect on the victim.<sup>318</sup>

However, the United States' paradigm and Section 76 diverge in that Section 76 allows for a purely objective *mens rea*, whereas the United States' paradigm

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314. Sharp-Jeffs, Kelly & Klein, *supra* note 102, at 182. An abuser's history of controlling behavior has been identified as a key predictor of post-separation assault and stalking, with such controlling behaviors accounting for as large as a 20% variance in the likelihood of post-separation stalking and an 11.1% variance of the likelihood of assault occurring post-separation. Ornstein & Rickne, *supra* note 102, at 619.

315. Stark & Hester, *supra* note 106; Ornstein & Rickne, *supra* note 102, at 619.

316. *See supra* Part II.B.2 (discussing commonly recognized relationships under the United States' paradigm.)

317. *See supra* Part II.C.1 (discussing typical *mens rea* standards under the United States' framework); Serious Crime Act 2015, c. 9, § 76(1)(d) (UK).

318. *See supra* Part II.C. (discussing typical *mens rea* standards under the United States' framework); *See, e.g.*, MODEL PENAL CODE 211.1(A) (AM. LAW INST. 2007) (“A person is guilty of assault if he attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another.”); Serious Crime Act 2015, c. 9, § 76(1)(d) (UK). Though no *mens rea* is provided within the legislation itself as to the conduct element, that the defendant repeatedly or continuously engage in controlling or coercive behavior toward the victim, the Prosecution Guidance establishes that “the prosecution should be able to show that there was intent to control or coerce someone.” *Prosecution Guidance*, *supra* note 131.

does not. While the violent incident model does generally allow for a *mens rea* of recklessness, Section 76 breaks from convention by alternatively allowing for an objective *mens rea* to satisfy the fourth element regarding the defendant's awareness as to the risk that their behavior would have a serious effect on the victim.<sup>319</sup> Akin to American criminal law's *mens rea* of negligence,<sup>320</sup> this objective *mens rea* broadens the applicability of Section 76 by extending criminal liability to defendants who did not subjectively know that their behavior would cause a serious effect on the victim, but who instead objectively "ought to have known" what a 'reasonable person' with the same information would have known.<sup>321</sup>

Section 76's use of an alternative, quasi-objective lesser *mens rea* ensures more accountability for defendants attempting to escape liability and avoids certain evidentiary difficulties that would arise, or be magnified, if only a subjective, intentional *mens rea* were employed. First, Section 76's objective *mens rea* standard prevents perpetrators from escaping liability by defending their behavior on the grounds that they did not know that their behavior would have a serious effect on the victim, or on the grounds that the perpetrator believed their behavior was reasonable.<sup>322</sup> Additionally, because the serious effect of the ongoing coercive control victims experience is no less harmful when it is subjectively unintentional, the objective *mens rea* requirement ensures more comprehensive protection for victims – regardless of the perpetrator's conscious intention.<sup>323</sup> Importantly, employing an objective *mens rea* also minimizes some of the unavoidable difficulties faced by prosecutors in evidencing coercive control - difficulties which would be amplified by requiring proof of an intentional *mens rea*.<sup>324</sup> Meeting the requisite burden of proof under an intentional *mens rea* standard would often be very difficult, requiring proof that a perpetrator consciously intended to cause a victim such fear, alarm, or distress as to have a serious effect.<sup>325</sup> Further, a *mens rea* of intent or knowledge would prevent

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319. See *supra* Part II.C. (discussing typical *mens rea* standards under the United States' framework); See, e.g., MODEL PENAL CODE § 211.1(a) (Am. Law Inst. 2007) ("A person is guilty of assault if he attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another."); Serious Crime Act 2015, c. 9, § 76(1)(d) (UK). Compare Serious Crime Act 2015, c. 9, § 76(5) (UK) ("For the purposes of subsection (1)(d) A "ought to know" that which a reasonable person in possession of the same information would know."), with e.g., MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1985).

320. See MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1985), for the general 'negligence' standard and its relation to the reasonable person.

321. Serious Crime Act 2015, c. 9, § 76(5) (UK) (providing that a defendant "'ought to know" that which a reasonable person in possession of the same information would know.")

322. Bettinson & Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary*, *supra* note 43, at 195.

323. *Id.*

324. *Id.*

325. Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 1022 n.331.



liability in the all too common case of batterers who themselves are not even consciously aware of their reasons for engaging in domestic abuse; those who do, in fact, “act[] out of a desire to control, but who do not *know* [their] own reasons for acting.”<sup>326</sup>

However, Section 76’s use of an objective standard also gives rise to criticisms that could potentially be avoided by employing only the subjective *mens rea* of knowledge. By allowing for liability to arise under a less serious standard of culpability, the objective *mens rea* necessarily results in a less serious punishment of the offense.<sup>327</sup> Consequently, the relatively lenient maximum penalty under Section 76 “does not reflect the severity of the harm of coercive control[.]”<sup>328</sup> Further, a central argument for domestic violence reform is that the core wrong of domestic abuse is not the law’s traditional conception of isolated incidents of physical violence; rather, it is “‘a course of calculated, malevolent conduct’ which exploits societal inequality to restrict the freedom of another[.] [I]t is intentional.”<sup>329</sup> Accordingly, if the aim of reform is to capture the unique behaviors and harms of coercive control within domestic abuse, only a subjective *mens rea* can capture that unique, intentional conduct.<sup>330</sup> Moreover, fair labelling principles and any prospective educative function of a coercive control offense likewise support the use of a subjective, intentional *mens rea*.<sup>331</sup>

#### *E. Vagueness: A Strength and a Weakness*

The strengths and weaknesses in the vagueness of Section 76 are somewhat reciprocal to those of the clarity of the United States’ violent incident paradigm. On the one hand, the lack of specificity in defining certain elements of the offense, such as what constitutes the prohibited “controlling or coercive behavior,” is a strength of Section 76 because it recognizes that experiences of domestic abuse are not universal.<sup>332</sup> Rather, tactics employed by abusers run the gamut from violence and intimidation to isolation and degradation, and the unique combination of tactics used are specifically tailored to the unique dynamics of the relationship and the parties involved.<sup>333</sup> Thus, the lack of clarity

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326. Burke, *supra* note 204, at 609. (“For example, a defendant might honestly believe that he hits his wife out of frustration, without knowing that his frustration is triggered by her autonomy.”).

327. Bettinson & Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary*, *supra* note 43, at 195. Under Section 76, the maximum term of imprisonment is five years. Serious Crime Act 2015, c. 9, § 76(11)(a) (UK).

328. Bettinson & Bishop, *Is the Creation of a Discrete Offence of Coercive Control Necessary*, *supra* note 43, at 195.

329. Jennifer Youngs, *Domestic Violence and the Criminal Law: Reconceptualising Reform*, 79 J. OF CRIM. L. 55, 68 (2014).

330. *Id.*

331. *Id.*

332. *See supra* Part I.B.3.

333. Stark, *Looking beyond Domestic Violence*, *supra* note 73; STARK, HOW MEN ENTRAP

as to what specific coercive or controlling behaviors are prohibited by Section 76 allows for consideration of the particularity of the victimization and the range of tactics experienced by victims. On the other hand, this lack of clarity is simultaneously a weakness of Section 76. The lack of clarity further compounds conceptual confusion of coercive control amongst both the public and law enforcement, ultimately hindering the potential effectiveness of the legislation.<sup>334</sup> Further, without clearly defining what behaviors are prohibited under Section 76, citizens are arguably not provided with fair notice of what conduct is criminalized, and therefore cannot conform their behavior to the law.<sup>335</sup>

Conversely, while the United States' paradigm provides clear and fair notice of what is criminalized, the clarity of the American framework perpetuates the domestic abuse disconnect by so narrowly recognizing only a fraction of domestic abuse victims' experiences. Due to Constitutional requirements, statutes employed under the violent incident model in the United States much more narrowly define what exactly is criminalized by the statute: conduct which causes physical injury.<sup>336</sup> This clarity provides knowledge to law enforcement in regulating the prohibited conduct, and provides adequate notice to citizens regarding how to conform their behavior to fit within the law.<sup>337</sup> However, the clear prohibition against conduct which causes physical injury greatly limits the applicability of United States' statutes to the reality of harms suffered by domestic abuse victims, perpetuating the domestic abuse disconnect.<sup>338</sup> As a result, aside from violence and threats, the vast range of subordinating and regulatory tactics experienced by most domestic violence victims go unpunished, and their cumulative effects go without remedy under the American paradigm.<sup>339</sup>

#### IV. EFFECTIVELY BRIDGING THE DISCONNECT BY CRIMINALIZING COERCIVE CONTROL: RECOMMENDATIONS FOR A PROPOSED COERCIVE CONTROL OFFENSE IN THE UNITED STATES

As demonstrated above, the coercive control model embodied in Section 76 in almost every aspect more effectively bridges the domestic abuse disconnect than the United States' violent incident model. Principally, the broader

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WOMEN IN PERSONAL LIFE, *supra* note 1, at 370; BUZAWA, BUZAWA, & STARK, *supra* note 28, at 109.

334. *See supra* Part I.E (discussing conceptual confusion amongst law enforcement, which hindered the implementation of Section 76 in England and Wales).

335. *See Skilling v. United States*, 561 U.S. 358, 402-03 (2010).

336. *See infra* Part IV.A and accompanying footnotes (discussing Constitutional requirements regarding challenges for vagueness).

337. *See Skilling*, 561 U.S. at 402-03.

338. *See supra* Part II.C and Part III.A.

339. Stark, *Looking beyond Domestic Violence*, *supra* note 73. Not only do domestic violence charges and assessments almost never include these other tactics, even worse, the resulting subordination they cause the victim "is often misinterpreted as a byproduct of the same 'dependent personality' that kept [the victim] from leaving." *Id.*

conceptualization of harm in Section 76's serious effect element and Section 76's broadened temporal lens, among other aspects of the offense, recognize the fundamental characteristics of domestic abuse—its patterned, ongoing nature and its centrality of control and subordination.<sup>340</sup> By recognizing these realities, Section 76 more effectively punishes and redresses domestic abuse as actually practiced and experienced. Accordingly, Section 76 has an ability to provide victims of domestic abuse with the long-term protection that the United States' violent incident model has thus far failed to provide. For that reason, and due to similarities between the United Kingdom's and the United States' relative legal histories, their developments of domestic violence law, and similar social and cultural influences on reform, American legislators should use Section 76 as a model upon which they can build a similar coercive control offense in the United States.

However, in light of various challenges in adapting the English statute to the American criminal law and certain remediable flaws in Section 76 and the United Kingdom's implementation thereof, certain modifications will need to be made to a proposed coercive control in the United States. Accordingly, this Part will provide recommendations related to: clarifying Section 76's vagueness, adjusting the serious effect element, removing the cohabitation requirement from the personal connection element, adapting the *mens rea* standards to fit within American criminal law jurisprudence, and engaging in comprehensive training for law enforcement to ensure effective implementation of a coercive control offense in the United States. Finally, this Part will conclude by providing a proposed model of such legislation, embodying the various recommendations discussed.

#### *A. Challenges for Vagueness: Identification of Prohibited Behavior and Definitions*

One major obstacle in implementing legislation similar to Section 76 in the United States would be potential challenges to the statute for being unconstitutionally vague. To satisfy the requirements of Due Process embraced by the void-for-vagueness doctrine, “a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.”<sup>341</sup> Because the American legal system does not provide Statutory Guidance or Prosecution Guidance like the United Kingdom, any similar coercive control offense implemented in the United States must include more clear language as to the various elements and the specific behaviors prohibited by the new offense within the statute itself in order to avoid challenges

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340. See Tuerkheimer, *The Real Crime of Domestic Violence*, *supra* note 258, at 15.

341. *Skilling*, 561 U.S. at 402-03 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1973)). “[T]he void-for-vagueness doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions.” *Skilling*, 561 U.S. at 412.

for vagueness.<sup>342</sup>

In doing so, those drafting a similar coercive control offense in the United States could look to other countries who have used Section 76 as a learning tool in drafting their respective offenses that criminalize ongoing patterns of coercive and controlling behaviors in intimate relationships.<sup>343</sup> For example, Scotland's new offense under the Domestic Abuse Act 2018 similarly employs the coercive control model, and was identified by the Scottish government as a "rough equivalent" to the coercive control offense under Section 76 in England and Wales.<sup>344</sup> The Scottish offense uses terminology from Professor Stark's seminal definition of coercive control to explicitly identify what constitutes "abusive behavior" criminalized under the offense.<sup>345</sup> Accordingly, the Scottish offense provides that "behavior which is abusive" includes: (1) behavior that is physically or sexually violent, threatening, or intimidating; and (2) behavior that has as its purpose (or among its purposes) one or more of listed relevant effects, or would be considered by a reasonable person to be likely to have one or more of the relevant effects.<sup>346</sup> Relevant effects listed within the legislation include various controlling or coercive regulatory tactics, such as isolation, degradation, humiliation, subordination, regulation, and restriction of the victim's freedom of action.<sup>347</sup>

When drafting a coercive control offense in the United States, a similar provision identifying types of proscribed behaviors within the statute would reduce the likelihood of successful challenges for unconstitutional vagueness. First, by providing a similar list within the statute of specific prohibited behaviors, the offense will provide "sufficient definiteness" of what conduct is prohibited.<sup>348</sup> In fact, providing such a list goes further than other American course of conduct statutes, such as stalking, that have been upheld.<sup>349</sup> Secondly,

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342. Ortiz, *supra* note 172, at 698.

343. See, e.g., Domestic Abuse (Scotland) Act 2018, (ASP 5) § (1).

344. Domestic Abuse (Scotland) Act 2018, (ASP 5) § (1).

345. "Coercive control may be defined as a strategic course of gender-based abuse in which some combination of physical and sexual violence, intimidation, degradation, isolation, control, and arbitrary violations of liberty are used to subjugate a partner and deprive her of basic rights and resources." BUZAWA, BUZAWA, & STARK, *supra* note 28, at 105; Domestic Abuse (Scotland) Act 2018, (ASP 5) § (2).

346. Domestic Abuse (Scotland) Act 2018, (ASP 5) § 2(2); Domestic Abuse (Scotland) Act 2018, (ASP 5) § (2)(4)(a).

347. Domestic Abuse (Scotland) Act 2018, (ASP 5) § (2)(3).

348. *Skilling v. United States*, 561 U.S. 358, 402-03 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1973)). Prohibited behaviors would include those that are violent, threatening, frightening, or that have as their purpose one of the identified effects – engaged in knowingly or intentionally. See *infra* Part IV.F (proposed coercive control offense, sub-section (2)).

349. See, e.g., IND. CODE ANN. § 35-45-10-1 (LexisNexis 2019) (defining the term "stalk" as "a knowing or an intentional course of conduct involving repeated or continued harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or

and similarly reminiscent of stalking statutes, by embedding reasonableness standards within the statute's definition of prohibited coercive or controlling behaviors, the offense will be defined in such a way as to constrain "arbitrary and discriminatory" enforcement.<sup>350</sup>

Drafters can further avoid vagueness challenges by providing within the statute further clarifications or definitions as to certain language in the offense. Terms such as "repeatedly or continuously" and "behavior" could be left to development through case law and judicial interpretation. However, by providing clarification within the statute, not only will successful challenges as to vagueness be further avoided, but it will also provide law enforcement with necessary additional guidance in implementing a new offense, which is admittedly conceptually confusing upon first encounter.<sup>351</sup> This guidance function would likewise be served by the previously discussed provision identifying prohibited behaviors and specific, relevant effects.

### *B. Required Result of a Serious Effect: A Compromise*

America's long-standing reservations regarding expansive state regulation, especially in the context of intimate relationships and the enforcement of moral standards, will undoubtedly present a unique challenge in the proposal of a coercive control offense for the United States.<sup>352</sup> Further, like in the United Kingdom, there will surely be concerns among state legislatures regarding the potential of a coercive control offense to criminalize "trivial" conduct—conduct that is certainly unhealthy or dysfunctional within an intimate relationship, but otherwise considered conventional.<sup>353</sup> To alleviate those concerns, and thereby increase the willingness of states to adopt a coercive control offense, Section 76's serious effect result element should be retained by a proposed coercive control offense.

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threatened").

350. See *infra* Part IV.F (proposed coercive control offense, sub-section (2)(b)); see, e.g., IND. CODE ANN. § 35-45-10-1 (LexisNexis 2019) (defining the term "stalk" as "a knowing or an intentional course of conduct involving repeated or continued harassment of another person that would cause a *reasonable person* to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened.") (emphasis added); *Skilling*, 561 U.S. at 402-03 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1973)). See also, *Johnson v. State*, 648 N.E. 2d 666 (Ind. Ct. App. 1995) (providing that stalking statutes are not void for vagueness because the offense of stalking involves an intentional or knowing course of conduct, and the statutes employ reasonableness standards which "provide a constraining and intelligible enforcement standard for those charged with enforcing the statute").

351. See *supra* Part I.E (discussing problems in the United Kingdom with law enforcement confusion regarding coercive control generally, and the new coercive control offense); see *infra* Part IV.F (proposed coercive control offense, sub-section (5)).

352. See *supra* Part II.A (discussing United States' history of animosity toward governmental over-regulation and intrusion into private, personal matters).

353. See McMahon & McGorrery, *supra* note 130, at 99-100.

True, retention of a result element that focuses on the psychological impact of a defendant's behavior on the victim, as the serious effect element does, will not accomplish the desired discursive shift to instead focusing solely on the motivations of batterers.<sup>354</sup> However, compromises will surely need to be made to increase willingness of hesitant state legislatures to adopt a coercive control offense. The retention of an element requiring resulting harm on the victim is one compromise that reformists may have to make if there is to be any realistic chance of a coercive control offense being adopted. However, even when retaining the serious effect element, there are other ways in which drafters of a model coercive control offense could draft this element to at least begin shifting the conversation toward the underlying motivations of the batterer.

To accomplish this initial shift, the methods of causing a serious effect under a proposed model coercive control offense in the United States can be modified in a way which indirectly shifts some focus toward the motivations of the batterer, furthering feminist reformists' goal of a discursive shift. Specifically, the ambiguous secondary serious effect method under Section 76(4)(b)—finding a serious effect on the victim if the batterer's behavior causes the victim serious alarm or distress which has a substantial adverse effect on their usual day-to-day activities - should be replaced with a method that specifically refers to the coercive or controlling motivations underlying a batterer's abusive behavior.<sup>355</sup> Additionally, the replacement method should aim to capture the unique, cumulative harm suffered by victims of coercive control, as the current "serious alarm or distress" method under Section 76 aims to capture.

Accordingly, a perfect method of causing a serious effect on the victim that drafters could substitute in a proposed coercive control offense is a method that explicitly refers to a list of identified coercive or controlling behaviors, such as those identified under the previously recommended "relevant effects" section of a proposed offense.<sup>356</sup> Specifically, the proposed statute could provide that a defendant's "behavior has a 'serious effect' on the victim if it causes the victim, on at least two occasions, one or more of the 'relevant effects' listed under" the appropriate section.<sup>357</sup> By reframing what constitutes a serious effect on the victim in this manner, drafters accomplish two important tasks. First, it provides a middle ground for compromise, as it begins the desired shift of at least some discursive focus toward the motivations of the batterer in causing the serious effect on the victim. Second, Section 76's vague language in respect to finding a serious effect when the behavior causes a victim "serious alarm or distress" that

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354. See Burke, *supra* note 204, at 600.

355. Serious Crime Act 2015, c. 9, § 76(4)(b) (UK).

356. See *supra* Part IV.A (discussing recommendation of list of coercive or controlling behaviors and relevant effects); see *infra* Part IV.F (proposed coercive control offense, sub-section (2)(b)).

357. See *infra* Part IV.F (proposed coercive control offense, sub-section (3)(b)). Including the requirement that the victim experience one or more of the relevant effects *on at least two occasions* helps to ensure that the offense is capturing patterns of behavior that it specifically intends to target, rather than capturing truly one-off incidents and trivial behavior.

would likely be challenged for vagueness in the United States, is removed from a proposed coercive control offense.<sup>358</sup>

Additionally, drafters of a proposed American coercive control offense should retain the first method of finding a serious effect under Section 76(4)(a)—finding a serious effect on the victim if the batterer’s behavior causes the victim to fear, on at least two occasions, that violence will be used against them.<sup>359</sup> Not only should this method be kept due to its recognition of the coercive or controlling effect that a batterer’s violence or intimidation has on a victim<sup>360</sup>—also, because of this serious effect method’s comparableness to existing offenses under the United States paradigm, law enforcement and prosecutors will be more familiar with this concept of harm. By employing a familiar conception of harm, evidentiary difficulties caused by conceptual confusions will more likely be avoided, and this familiarity may serve as an opportunity for law enforcement and prosecutors to ease into enforcing the new offense.<sup>361</sup>

*C. Protection for Domestic Abuse Victims Against Post-Separation Abuse:  
Removal of the Cohabitation Requirement for Former Intimate Partners*

In order to effectuate the purpose of creating this new offense—to close the gap between domestic violence as experienced by victims and domestic violence as punished by the law—any offense criminalizing coercive control adopted in the United States should recognize that abusive relationships do not fit neatly into narrowly defined temporal boundaries.<sup>362</sup> Coercive or controlling behavior often continues after separation, and in order to effectively criminalize this ongoing abuse, a coercive control offense must provide comprehensive protection to victims against this behavior.<sup>363</sup> To do so, the offense needs to remove from its definition of “personal connection” the requirement that the parties live together at the time of the behavior in the context of former intimate relationships. Rather, a coercive control offense implemented in the United States should simply provide that the requisite personal connection exists if the victim and the perpetrator are current or former intimate partners, or they have any of the already commonly recognized relationships under existing American domestic violence statutes.<sup>364</sup> By drafting a proposed coercive control offense this way, it will provide more comprehensive protection to victims of coercive control and will

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358. Serious Crime Act 2015, c. 9, § 76(4)(b) (UK). *See supra* Part IV.A (discussing due process requirements for unconstitutional vagueness).

359. Serious Crime Act 2015, c. 9, § 76(4)(a) (UK). *See infra* Part IV.F (proposed coercive control offense, sub-section (3)(a)).

360. *See supra* Part I.B.3.

361. *See supra* Part I.E (discussing problems in the United Kingdom with law enforcement confusion regarding coercive control generally, and the new coercive control offense).

362. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 373.

363. *See* Sharp-Jeffs, Kelly & Klein, *supra* note 102. *See supra* Part III.C.

364. *See infra* Part IV.F (proposed coercive control offense, sub-section (4)).

further bring the law's disconnect with the experiences of domestic abuse victims.

*D. Adapting Section 76 to Fit within American Law: Clarifying and Modifying the Mens Rea Requirements*

The following two recommendations regarding the *mens rea* standards of a proposed coercive control offense in the United States result from a compromise between difficulties stemming from *mens rea* jurisprudence under American criminal law and efforts to more effectively protect victims of coercive control.

*1. Clarifying the Mens Rea of the Conduct Element*

The first recommendation is that, to ensure that the offense only criminalizes the deliberate behavior employed in coercive control and to avoid challenges for vagueness, drafters should add language explicitly identifying a *mens rea* of knowledge to Section 76's conduct element. Thus, the first element of the proposed coercive control offense would require that the defendant "knowingly engages in repeated or continuous behavior towards another person that is controlling or coercive."<sup>365</sup> Adding "knowingly" to the conduct element of the offense provides timid legislators with reservations about adopting a coercive control offense with additional assurance that the proposed statute only criminalizes the devastating, purposeful campaigns of abuse it was specifically drafted to target.<sup>366</sup> This adjustment is also in accordance with the Guidance under Section 76, instructing that the prosecution be able to show an intent by the perpetrator to coerce or control someone.<sup>367</sup> Further, by explicitly identifying the *mens rea* of knowledge to the defendant's repeated or continuous engagement in coercive or controlling behavior, drafters would provide an additional safeguard against challenges for vagueness.<sup>368</sup>

To ensure the greatest likelihood of conviction within the boundaries of American *mens rea* jurisprudence, and thereby ensure more comprehensive long-term protection to victims, a *mens rea* of knowledge is advised over one of intent or purpose. Principally, an intent standard of knowledge is preferred for the practical purpose of avoiding evidentiary difficulties associated with proving beyond a reasonable doubt an abuser's conscious intent to subordinate his partner via repeated or continuous tactics of coercion or control that would arise under an intentional *mens rea*, thereby increasing the likelihood of conviction and the

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365. See *infra* Part IV.F (proposed coercive control offense, sub-section (1)(a)).

366. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 680.

367. *Prosecution Guidance*, *supra* note 131. As discussed above, because the United States does not use official Guidance instruments like the United Kingdom does, this *mens rea* requirement will need to be added into the proposed offense itself. Ortiz, *supra* note 172, at 698.

368. See *Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 499 (1982) (explaining that "the [Supreme] Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed").



possibility of greater protection to victims.<sup>369</sup> Additionally, though employing a lesser *mens rea* of knowledge rather than one of intent, the offense will nevertheless capture the purposeful nature of coercive control.<sup>370</sup> Further, allowing for a lesser *mens rea* of knowledge to satisfy the intent requirement, rather than allowing only for intent or purpose to so satisfy, is entirely common in American criminal law, even for the most serious of crimes; indeed, very few crimes employ a sole *mens rea* of intent or purpose.<sup>371</sup> In sum, employing a lesser *mens rea* of knowledge, rather than purpose or intent, in a proposed coercive control offense is both permissible and advised because it nevertheless captures the intentional wrong committed in coercive control while avoiding evidentiary difficulties associated with proving an intentional *mens rea*.

2. *Retaining, but Modifying, the Alternative, Quasi-Objective Mens Rea Standard Regarding the Defendant's Awareness as to the Resulting Serious Effect*

To both provide more protection to victims and bring Section 76's quasi-objective alternative standard into conformity with established American *mens rea* jurisprudence, a second recommendation is that drafters of a proposed coercive control offense for the United States should retain, but modify, the alternative, quasi-objective *mens rea* standard with the fourth element of Section 76. Rather than employing a sole *mens rea* of knowledge as to the defendant's awareness that their behavior would have a serious effect on the victim, the availability of a lesser alternative, quasi-objective *mens rea* as to the result element should be retained to prevent defendants from avoiding liability due to difficulties in proving a higher burden *mens rea* of knowledge, thereby increasing protection to victims. However, because American law generally disfavors the use of negligence to support criminal liability,<sup>372</sup> drafters of a proposed offense

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369. See Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 1022.

370. MODEL PENAL CODE § 2.02(5) (AM. LAW INST. 1985) ("When acting knowingly suffices to establish an element, such element also is established if a person acts purposely [or intentionally]."). Under model American *mens rea* standards, the requirement that the defendant knowingly engages in repeated or continuous coercive or controlling behavior toward the victim would be satisfied if the defendant: so intended, is aware that his conduct is of that nature, or has knowledge of a high probability that his behavior is coercive or controlling. See MODEL PENAL CODE § 2.02(5) (AM. LAW INST. 1985) ("When acting knowingly suffices to establish an element, such element also is established if a person acts purposely [or intentionally]."); MODEL PENAL CODE § 2.02(2)(b) (AM. LAW INST. 1985); MODEL PENAL CODE § 2.02(7) (AM. LAW INST. 1985).

371. See, e.g., MODEL PENAL CODE § 210.2(1)(a) (AM. LAW INST. 1980). Defining the elements of murder, including that it is committed "purposely or knowingly[.]" (emphasis added); *cf.* MODEL PENAL CODE § 5.01(1) (AM. LAW INST. 1985) (requiring the most stringent *mens rea* standard of intent or purpose for crimes of attempt.)

372. In the United States, criminally punishing negligence is relatively rare, "typically only in exceptional situations, such as where a death is caused." Robinson, *supra* note 179, at 575.

for the United States should remove Section 76's purely objective, negligence-equivalent *mens rea* standard, which allows for liability when the defendant "ought to know" that which a reasonable person would know in respect to the effect of their behavior on the victim.<sup>373</sup> Drafters should replace this alternative *mens rea* with an American standard of recklessness, which would generally allow for liability when the defendant has awareness of the risk that their behavior will have a serious effect on the victim, but consciously disregards that unjustifiable risk.<sup>374</sup> Accordingly, the fourth element of a proposed offense should require that a defendant knows, or is reckless as to the risk, that their behavior will have a serious effect on the victim.<sup>375</sup>

Not only will a replacement alternative standard of recklessness bring the proposed offense into conformity with American criminal law, but it will also accomplish discursive goals due to the consciousness of the wrongdoing underlying recklessness. By requiring explicit focus on a defendant's awareness as to the resulting serious effect that their behavior has on a victim, the alternative standards of knowledge or recklessness both "emphasize[] the natural consequences of the abuser's pattern of activity[,] the intentional campaign of coercion or control."<sup>376</sup> Further, such an inquiry into the defendant's awareness

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Instead, the norm in America is a *mens rea* of recklessness. This is so because of "[t]he narrow distinction between recklessness and negligence[, which] lies in the defendant's awareness of risk." *Id.* A person who acts recklessly "is aware of the circumstances that make his or her conduct criminal or is aware that harmful consequences may result[,] but consciously disregards that risk, "and is therefore both blameworthy and deterrable." *Id.* In contrast, a person who acts negligently fails to recognize the risk because he or she "is unaware of the circumstances or consequences[,] and therefore, some writers argue, is neither blameworthy nor deterrable." *Id.* "The difference between negligence and the three higher levels of culpability is one of the most critical distinctions in U.S. criminal law." *Id.*

373. Serious Crime Act 2015, c. 9, § 76(1)(d) (UK); Serious Crime Act 2015, c. 9, § 76(5) (UK) ("For the purposes of subsection (1)(d)[,] A "ought to know" that which a reasonable person in possession of the same information would know.").

374. Under model American *mens rea* standards, the requirement that the defendant knows, or is reckless as to the risk, that their behavior will have a serious effect on the victim would be satisfied when a defendant, either: is aware that it is practically certain that their behavior will cause a serious effect on the victim, is aware of a high probability of such a result, or when the defendant "consciously disregards a substantial and unjustifiable risk that" the serious effect on the victim will result from the behavior. MODEL PENAL CODE § 2.02(2)(b)(i) (AM. LAW INST. 1985); MODEL PENAL CODE § 2.02(7) (AM. LAW INST. 1985); MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1985). Under the quasi-objective *mens rea* of recklessness, "[t]he risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1985).

375. See *infra* Part IV.F (proposed coercive control offense, sub-section (1)(d)).

376. Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 1022-23.

avoids “a singular inquiry into the victim’s powerlessness[.]” necessary in proving the third result element, by shifting at least some focus to the defendant’s awareness and motivations for engaging in coercive control.<sup>377</sup>

Admittedly, legislators considering the adoption of a proposed coercive control offense such as this may take pause at the varying *mens rea* standards of the first element, requiring knowledge, and the fourth element, allowing for a *mens rea* of knowledge or recklessness. While it is true that employing varying *mens rea* standards as to different elements within the same offense is not the norm in American criminal law, such a practice is permitted by the Model Penal Code.<sup>378</sup> Further, the use of varying standards of *mens rea* for different elements of an offense has been employed by prominent domestic violence law reformists in the drafting of their proposed offenses.<sup>379</sup> Professor Tuerkheimer similarly proposes a subjective *mens rea* of intent as to her conduct element, while simultaneously proposing a quasi-objective *mens rea* alternative of “knows or reasonably should know” as to the result element of the offense, comparable to Section 76 and the recommended American coercive control offense.<sup>380</sup> Supporting this choice to use varying, alternative *mens rea* standards of knowledge or criminal negligence as to this element, Professor Tuerkheimer similarly acknowledges the “practically insurmountable” difficulty of sufficiently proving an intentional *mens rea* as the batterer’s conscious intent to dominate a victim.<sup>381</sup>

However, though allowing for an alternative quasi-objective standard of recklessness is advised in order to increase victims’ protection, the proposed offense would still be advisable even if the alternative reckless *mens rea* were struck. If legislators are concerned with the varying *mens rea* between the elements of the proposed offense, or with the lesser recklessness standard giving rise to criminal liability, it is still recommended that the proposed coercive control offense be adopted even if the alternative standard of recklessness is removed and the offense allowed only for liability when the defendant knew that their behavior would have a serious effect on the victim. Such a modification would still accomplish the discussed goals of avoiding difficulties associated with proving an intentional *mens rea* and shifting emphasis toward the consequences of the perpetrator’s coercive control rather than solely on the powerlessness of the

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377. *Id.*; see *supra* Part III.A (discussing discursive criticisms of inquiries into victim’s psychology).

378. MODEL PENAL CODE § 2.02(1) (AM. LAW INST. 1985); see also Robinson, *supra* note 179, at 573.

379. See, e.g., Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 1019-20.

380. *Id.* “He or she *intentionally* engages in a course of conduct directed at a family or household member; and [h]e or she *knows or reasonably should know* that such conduct is likely to result in substantial power or control over the family or household member[.]” *Id.* (emphasis added).

381. *Id.* at 1022.

victim.<sup>382</sup>

*E. Ensuring the Effectiveness of a Coercive Control Offense:  
Comprehensive Education and Training*

In any jurisdiction introducing a new coercive control offense, perhaps the most difficult obstacle to meaningful reform is ensuring effective implementation and enforcement of the new offense. As seen in the United Kingdom, there have been an underwhelming number of charges and successful coercive control prosecutions under Section 76 in the three years since its enactment.<sup>383</sup> However, research suggests that Section 76 itself is not to blame for the lack of enforcement; rather, the cause appears to stem from confusion regarding the concept of coercive control, the new offense, and the domestic violence legal framework as a whole, particularly amongst law enforcement.<sup>384</sup>

In fact, a draft Domestic Abuse Bill aimed at addressing confusion amongst law enforcement regarding coercive control and the domestic abuse criminal framework was introduced to Parliament on January 21, 2019.<sup>385</sup> Many domestic violence law experts suggest that “the lack of a unified policy and legal framework for defining, identifying and responding to domestic violence” is largely to blame for the misunderstanding amongst law enforcement regarding the domestic violence criminal framework, and consequently, the hindered progress of the United Kingdom’s reform efforts.<sup>386</sup> Accordingly, in order to improve and

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382. *Id.* at 1022-23.

383. *See supra* Part I.E.

384. *See* Barlow et al., *Police Responses to Coercive Control*, *supra* note 174; *see supra* Part I.E.

385. *Transforming the Response to Domestic Abuse – Consultation Response and Draft Bill*, HM GOV'T (Jan. 21, 2019), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/772202/CCS1218158068-Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CCS1218158068-Web_Accessible.pdf) [<https://perma.cc/U86J-XPUQ>]. As of the writing of this Note, the Bill is simply a draft. However, even if the Bill is given Royal Assent and becomes law, the new domestic abuse definition expressly “applies [only] for the purposes of the Bill[.]” *Id.* at 161. Though it is expected that the definition will “be adopted more generally, for example by public authorities and frontline practitioners[.]” *id.*, the definition does not amend Section 76 of the Serious Crime Act 2015, *Id.* at 54. Rather than proposing any amendments to Section 76, the Government explains that they believe improvement to Section 76’s implementation and enforcement “can [instead] be made by raising awareness and improving understanding of the offence in statutory agencies[.]” *Id.* Accordingly, the Government plans to update the Statutory Guidance and the Prosecution Guidance for Section 76. *Id.* at 53-4. However, the Government makes clear that there are no plans to amend the coercive control offense under Section 76, not even to include former intimate partners who are not cohabiting, as included under the proposed draft Bill. *Id.*

386. *See, e.g.*, Hannah Bows, *The New Domestic Violence Laws Sound Good but They Could Be Utterly Useless – Here’s Why*, THE INDEPENDENT (Jan. 21, 2019 18:45), <https://www.independent.co.uk/voices/domestic-violence-abuse-laws-bill-violence-funding-theresa-may-a8739491.html> [<https://perma.cc/2K5H-9QAV>].

transform how domestic abuse is understood and addressed in the United Kingdom, a draft Domestic Abuse Bill was introduced.<sup>387</sup>

The draft Bill is comprised of various measures aimed at achieving four main objectives in addressing domestic abuse: promoting public and professional awareness, protecting and supporting victims, transforming the justice process, and improving performance across all government agencies and sectors.<sup>388</sup> A key measure implemented to promote awareness is the introduction of a statutory definition of domestic abuse.<sup>389</sup> Recognizing that “[d]omestic abuse is complex” and “involves many different acts and behaviors[,]” the proposed definition clarifies what types of behavior are considered “abusive,” and extends the scope of recognized relationships to cover former intimate partners who are not cohabiting.<sup>390</sup> A behavior is “abusive” under the proposed definition “if it consists of any of the following[:]” physical or sexual abuse; violent or threatening behavior; controlling or coercive behavior; economic abuse; or psychological, emotional, or other abuse.<sup>391</sup> Other relevant measures implemented by the Bill revolve around training and education, both for the public and professionals, regarding domestic abuse and the United Kingdom’s legislative framework for prosecuting domestic violence, as well as improving professional performance under said framework.<sup>392</sup>

Like in the United Kingdom, to ensure effective implementation of a coercive control offense in the United States, states should similarly invest resources in educating and providing extensive training to law enforcement and other professionals regarding the complexity of domestic abuse, coercive control, and the American legal framework for prosecuting domestic violence. By providing comprehensive training to law enforcement regarding the many tactics of domestic abuse and the complex nuances of coercive control, police will be able to more effectively respond to and investigate cases under a new coercive control offense.<sup>393</sup> In turn, by delivering a more effective investigation and response, prosecutors will be better equipped with evidence to support charges under the coercive control offense, reducing the risk of evidentiary difficulties affecting the outcome of these cases, as seen in the United Kingdom.<sup>394</sup> Consequently, strengthened cases will result in securing more convictions, ultimately improving

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387. *Transforming the Response to Domestic Abuse – Consultation Response and Draft Bill*, *supra* note 385, at 3.

388. *Id.* at 1, 4.

389. *Id.* at 5.

390. *Id.* at 5, 100-01.

391. *Id.* at 100.

392. *See Transforming the Response to Domestic Abuse - Consultation Response and Draft Bill*, *supra* note 388, at 5, 49, 77.

393. *See* Charlotte Barlow, Kelly Johnson, & Sandra Walklate, *Coercive Control Cases Have Doubled – But Police Still Miss Patterns of This Domestic Abuse*, *THE CONVERSATION* (July 23, 2018 12:08PM EDT), <https://theconversation.com/coercive-control-cases-have-doubled-but-police-still-miss-patterns-of-this-domestic-abuse-100347> [<https://perma.cc/4NS3-238B>].

394. *See id.*; *Crime in England and Wales: Year Ending March 2018*, *supra* note 165.

the long-term protection of victims.

Additionally, by improving professional understanding of domestic abuse and enforcement of a coercive control offense, there will be a second normative benefit of shaping the public's understanding and perception of domestic abuse. Victims often lack understanding of domestic abuse, and sometimes are even entirely unaware of the full extent of an abuser's coercion or control over their lives; in cases such as these, victims are inevitably less likely to report their abuse.<sup>395</sup> Further, without an understanding and awareness of the coercive control they are suffering, victims lack the ability to effectively aid in the prosecution of their abusers, one factor which may ultimately hinder the success of prosecutions, and in turn, their own safety. "The criminal justice system possesses 'a unique power to mark a public recognition of the wrongful nature of a particular kind of conduct' and to stigmatise [sic] those who perpetrate it."<sup>396</sup> By implementing a new coercive control offense effectively through comprehensive education and training, the government can shape society's moral perception of domestic abuse, and encourage a zero-tolerance attitude. Such an attitude has the potential to increase reporting of domestic abuse and support for victims by the public. Further, an increased understanding and condemnation of domestic abuse by the public may reduce risks of juror misunderstanding and apathy in cases of domestic violence, in turn reducing acquittal rates of defendants who are factually guilty of domestic abuse.<sup>397</sup>

In sum, by providing comprehensive training and education regarding coercive control, domestic violence, and the legal framework for criminalizing these behaviors, there will be increased public and professional awareness from the top down. With increased understanding and improved perceptions of domestic abuse being achieved at each level, the likelihood of effective implementation of a new coercive control offense in the United States increases.

*F. Proposed Offense for the United States: 'Controlling or Coercive Behavior in Intimate and Familial Relationships'*

Based on these recommendations, a proposed offense criminalizing coercive control in the United States could read:

- (1) A person, (A), commits an offense of "coercive or controlling behavior in an intimate relationship" if:
  - (a) (A) knowingly engages in repeated or continuous behavior towards another person, (B), that is controlling or coercive;
  - (b) at the time of the behavior, (A) and (B) are personally connected;

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395. See, e.g., *VAWA and Girls Report 2016-17*, *supra* note 166, at A8 (2017). In this 2017 data report published by the Crown Prosecution Service, when analyzing the implementation of Section 76, "[i]t was noted . . . that the majority of victims of controlling or coercive behaviour were waiting until a violent act had occurred before they made a report to the police." *Id.*

396. Youngs, *supra* note 329, at 65.

397. See Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 987-88.

- (c) the behavior has a serious effect on (B); and
- (d) (A) knows, or is reckless as to the risk, that the behavior will have a serious effect on (B).

Further, the proposed statute should include other sections which provide definitions or modify various elements of the offense, such as:

(2) For purposes of section (1)(a), behavior that is controlling or coercive includes:

- (a) behavior that is intimidating, threatening, or physically or sexually violent;
- (b) behavior that has as its purpose (or as one of its purposes) one or more of the following relevant effects, or that a reasonable person would consider likely to have one or more of the following relevant effects:
  - (i) making (B) dependent on, or subordinate to, (A)
  - (ii) isolating (B) from friends, family, relatives, or other sources of support
  - (iii) controlling, regulating, or monitoring the day to day activities of (B)
  - (iv) depriving (B) of, or restricting (B)'s, freedom of action;
  - (v) frightening, degrading, humiliating, or punishing (B).<sup>398</sup>

(3) For purposes of (1)(c), (A)'s behavior has a "serious effect" on (B) if:

- (a) it causes (B) to fear, on at least two occasions, that violence will be used against (B); or
- (b) it causes (B), on at least two occasions, one or more of the relevant effects listed under section (2)(b).

(4) (A) and (B) are "personally connected" if:

- (a) they are current or former intimate partners;
- (b) they are current or former spouses;
- (c) they share an adopted or biological child in common; or
- (d) they are "related by consanguinity or affinity[.]"<sup>399</sup>

(5) Definitions: For purposes of this offense:

- (a) "Behavior" includes conduct, communications, or an intentional lack of conduct or communication, that is directed at a person and that is carried out in either a personal or direct manner, by way of conduct towards property, or through making use of a third party.
- (b) "Repeated or continuous" means on at least two separate occasions "over a period of time, however short, evidencing a

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398. See Domestic Abuse (Scotland) Act 2018, (ASP 5) § (2)(3).

399. Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 1020.

continuity of purpose” or pattern of behavior.<sup>400</sup>

(c) “Sources of support” includes financial, emotional, psychological, or physical support.

#### CONCLUSION

Traditionally, an “incident-specific definition of physical assault” has dominated state intervention and responses to domestic violence.<sup>401</sup> However, outside of the criminal law, there is a clear consensus among domestic violence professionals that domestic abuse is instead characterized by ongoing patterns, and by both physical violence and other non-physical tactics designed to isolate, intimate, subordinate and control one’s partner.<sup>402</sup> Accordingly, the law’s misconception of domestic abuse produces a “vast and significant” disconnect between domestic abuse as experienced by victims and domestic abuse as recognized and redressed by the law.<sup>403</sup> As a result of this disconnect, victim’s overall safety and long-term prospects to be free of domestic abuse remain so grave that domestic violence continues to be recognized as a critical public health issue.<sup>404</sup>

The United Kingdom and the United States’ criminalization of domestic violence have followed a largely similar path, diverging only in the last two decades. Both countries’ domestic violence laws are rooted in patriarchal English common law, which similarly inhibited meaningful reform in both countries throughout the mid-twentieth century.<sup>405</sup> These common roots also explain why both countries have been “uniquely non-responsive to the concerns of women[,]” specifically in the context of domestic violence.<sup>406</sup> In addition to their historic legal similarities, modern reform efforts in the late twentieth century in both the United Kingdom and the United States were similarly prompted by activism and emerging research highlighting lack of police response and other issues associated with domestic violence – issues that were related to both countries’ use of a substantive legal framework focused on discrete acts of physical violence.<sup>407</sup> Additionally, both countries responded to these issues by engaging in more aggressive arrest in domestic abuse cases and by implementing other largely procedural reforms during the late twentieth century.<sup>408</sup> However, while the United Kingdom has since continued to engaged in more substantive law reform over the last two decades, ultimately implementing the new coercive control offense under Section 76, the United States’ domestic violence revolution has

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400. *Id.*

401. Stark, *ENCYCLOPEDIA OF DOMESTIC VIOLENCE*, *supra* note 18, at 166.

402. Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 8, at 961.

403. *Id.* at 959.

404. See STARK, *HOW MEN ENTRAP WOMEN IN PERSONAL LIFE*, *supra* note 1, at 65.

405. See *supra* Part I.A and Part II.A.

406. Tuerkheimer, *Recognizing and Remediating the Harm of Battering*, *supra* note 9.

407. See *supra* Part I.B and Part II.B.1.

408. See *supra* Part I.B and Part II.B.1.



fizzled, and there has still been no meaningful substantive reform to American domestic violence law.<sup>409</sup> Rather, the United States continues to substantively treat domestic violence effectively the same as all other forms of violence, criminalizing domestic abuse under the outdated, traditional violent incident model.

The consequence of the United States' continued use of the violent incident model for criminalizing domestic violence is that the United States has been unable to increase victims' overall safety and long-term prospects of protection from domestic abuse. Because violence is not even present in approximately 25% of domestic abuse cases, and because even when present, the hallmarks of violence in cases of coercive control are its duration and its frequency, not its severity, under a framework requiring injurious physical harm for criminal liability like the United States' paradigm, "offenders are arrested in only a small proportion of [domestic abuse] cases, few of these cases are prosecuted, and almost no offenders go to jail[.]" even in jurisdictions where mandatory arrest reforms are strictly enforced.<sup>410</sup> In fact, the odds that an instance of domestic abuse experienced by a victim will result in conviction of the abuser are infinitesimal, hardly better than the odds of winning the lottery; domestic violence experts suggest that a "realistic estimate is that about 1 incident in 100,000 ends with imprisonment."<sup>411</sup>

In contrast, by moving away from a violence-focused framework and enacting the coercive control offense under Section 76, which more effectively criminalizes and redresses the realities of domestic abuse, the United Kingdom has been able to increase victims' overall safety and long-term prospects of protection from domestic abuse where the United States has not. Since engaging in more substantive reform and introducing the coercive control offense, the United Kingdom has experienced "a long term fall in prevalence of domestic abuse[,] []from 8.9% of the population of England and Wales in year ending March 2005 to 5.9% in the year ending March 2017[.]"<sup>412</sup> Further, the United Kingdom saw a 20% increase in the reporting of domestic abuse-related offenses in 2017, and domestic abusers are more likely to be convicted than ever before.<sup>413</sup> Accordingly, if the United States is similarly committed to more successfully protecting victims of domestic abuse and bridging the disconnect between domestic abuse as it is experienced and as it is criminalized, the next logical step

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409. See *supra* Part I.B, Part I.C, and Part II.B.

410. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 61-62. "What arrest does not do is substantially improve women's overall safety or long-term prospects to be free of abuse." *Id.* at 65.

411. STARK, HOW MEN ENTRAP WOMEN IN PERSONAL LIFE, *supra* note 1, at 63.

412. *Transforming the Response to Domestic Abuse – Consultation*, *supra* note 16, at 7.

413. *Id.*; *Crime in England and Wales: Year Ending September 2017*, OFFICE FOR NATIONAL STATISTICS 43 (Jan. 25, 2018), <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingseptember2017> [<https://perma.cc/F9T3-WXCN>]; *VAWA and Girls Report 2016-17*, *supra* note 166 (finding the conviction rate in 2016-2017, 75.7%, to be the highest rate ever recorded).

in America's domestic violence law reform is replacing the traditional violent incident framework with a coercive control model of reform that captures the realities of domestic abuse, like the United Kingdom reformed its prior framework with Section 76.

Though the enactment of a coercive control offense would more effectively bridge the domestic abuse disconnect, and thus more successfully protect victims of domestic violence, it would be foolish to think that the enactment of a coercive control offense alone will end domestic violence. However, government investment of legal, professional, and financial resources in combating domestic abuse is a great place to start. Law is perhaps one of the most "powerful source[s] for shaping and sustaining moral norms," particularly in a diverse, modern society such as ours.<sup>414</sup> Until American law conforms to modern understandings of the realities of domestic abuse and engages in developing reformatory legislation which captures these realities, the law will continue to perpetuate the domestic abuse disconnect and implicitly condone the underlying values that drive America's current domestic violence crisis.

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414. Kenworthy Bilz & Janice Nadler, *Law, Psychology & Morality*, in 50 THE PSYCHOLOGY OF LEARNING AND MOTIVATION: MORAL COGNITION AND DECISION MAKING 101, 108 (Daniel Bartels et al. eds., 2009).