Domestic Abuse in England and Wales: A Critique of Emerging Law and the Role of Criminal Justice

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A thesis submitted for the Degree of

Master of Jurisprudence

Durham Law School

Durham University

March 2022

Abstract

Although Domestic Abuse law has been increasingly prevalent as an issue on the social and political radar, the legal landscape that incrementally composes the law on domestic abuse requires urgent reformulation. The criminal law on domestic abuse remains piecemeal and inadequate, despite recent developments in the modern understanding of domestic abuse, and legal developments that appear to look more to the civil law to help protect victim-survivors. There is an absence of coherence in the criminal law's current approach. This issue, paired with the practical limitations placed on the law by a struggling criminal justice system, historically inept at recognising the experiences of women, compounds to create a wider picture of domestic abuse law that is failing victim-survivors.

This thesis offers an in-depth critical analysis of the role of the criminal law in cases of domestic abuse through a combination of doctrinal and socio-legal research. The approach is novel as there is a growing academic trend towards moving away from the criminal law as a response to domestic abuse, expressed by Michele Burman, who considers some limitations on the impact of creating new law. This thesis develops the argument that a new domestic abuse offence could be beneficial to collate current piecemeal criminal law and expand its applicability and reach.

This argument draws upon a broad range of literature, including Jonathan Herring's book 'Domestic Abuse and Human Rights', which explains that, thus far, the law in England and Wales has taken an incremental approach in addressing cases of domestic abuse. The importance of a new criminal law offence of domestic abuse is framed against the need to reconceptualise what is viewed as 'domestic abuse'. This argument builds upon the work of Evan Stark, who theorises domestic abuse as a liberty crime, to suggest that it should be categorised as both a liberty crime and an assault crime contemporaneously.

A feminist perspective, based largely upon the work of Carol Smart and Helena Kennedy, is employed to investigate the role, and failings, of the criminal justice system in dealing with cases of domestic abuse. Further, this thesis draws from Clare McGlynn and Kelly

Johnson's work on 'Cyberflashing', highlighting important linkages between the development of technology based harms and domestic abuse.

An analysis of the recent Domestic Abuse Act 2021 is then offered to assess the current direction the law is taking concerning domestic abuse and highlight some missed opportunities.

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Chapter 1. Introduction

1.1 Introduction

Domestic abuse is pervasive yet often hidden, illusive, or even invisible. It has been an issue tackled by law for many years, since the Criminal Procedure Act of 1853.[1] Its prevalence, of course, going back long before. Since 1853 domestic abuse has been given varied amounts of attention by law and policy, with trends since the 1970s being geared towards larger extents of intervention by the government in England and Wales. In the last few decades, legal scholars have engaged extensively with issues surrounding domestic abuse and the law, always being a couple of steps ahead of any statutory intervention. Over the past few years, domestic abuse has become an issue that has been pushed to the forefront of public discourse, by campaigning, academic work, television, and politics, among other things. This attention was warranted, and the government reacted by starting to develop the Domestic Abuse Act, which became law in April 2021.

The aim of this thesis is to review where the law on domestic abuse is now and what else might be done, particularly in relation to the criminal law and the criminal justice system. This will be done by undertaking a review of the current law, highlighting key issues, and the suggestion of potential developments.

In order to do this, Chapter 2 will review the current criminal law on domestic abuse, highlight inadequacies, and propose recommendations for improving the criminal law on domestic abuse. Most notably, this chapter will argue that current criminal law offences intended to deal with domestic abuse have numerous flaws and lacunas within them. The chapter explores the idea that a more all-encompassing domestic abuse offence could be an alternative to the incremental approach to domestic abuse law currently taken by England

[1] Lucy Williams and Sandra Walklate, 'Policy Responses to Domestic Violence, the Criminalisation Thesis and "Learning from History"' (2020) 59(3) The Howard Journal 305.

and Wales, and uses legislation in Scotland to inform what this could look like. Chapter 3 moves on to explore how the change in the substantive criminal law is limited by the deeply embedded flaws woven throughout the criminal justice system, particularly in relation to women's experiences of the criminal justice system. Chapter 4 then assesses the changes that have been made by the recent passing of the Domestic Abuse Act, highlighting some significant steps forward taken, whilst drawing attention to some significant missed opportunities ignored by the Act. Chapter 5 recognises that the criminal law does not operate alone as a solution to domestic abuse, and that other non-legal interventions are equally as important. It also briefly notes the other legal areas that could be argued to make up 'domestic abuse law', addressing civil law and human rights as further legal areas that could be improved to simultaneously improve domestic abuse law.

The thesis concludes that the current criminal law on domestic abuse is inadequate and explores alternatives models of legislating domestic abuse. The limitations of a potential all-encompassing offence are recognised in the context of a criminal justice system which is struggling severely. The gendered nature of some issues facing the criminal law on domestic abuse and the criminal justice system are addressed through a feminist perspective, to expose the nuanced severity of these problems. The Domestic Abuse Act is reviewed in order to assess the current landscape of domestic abuse law, yet it is found that the Act has missed a number of key opportunities that undermine how truly radical it may be touted as.

1.2 Background and Context

Domestic abuse is a pervasive form of violence in England and Wales. On average, two women a week are killed by their current or ex-partners, and one in four women will

experience domestic abuse in their lifetime.[2] 'Far from being a fringe issue',[3] it has been pushed to the forefront of public awareness in recent years, particularly as the view that domestic abuse is a 'private matter' has become increasingly outdated. Even more recently, the Covid-19 crisis has exposed the lack of protection and support available for women experiencing domestic abuse. During the first lockdown, domestic abuse prevalence increased, the project 'Counting Dead Women' recording at least 16 domestic abuse killings between the 23rd March (when lockdown began) and the 12th April 2020.[4] It must be stated clearly that domestic abuse was not caused by the lockdown and its increased presence must not detract from the seriousness of the crime being committed by perpetrators. Further, it should be noted that not all forms of domestic violence have increased, with a decline being seen in ex-partner abuse, contrasting with an exponential rise in current partner abuse to create an overall rise in statistics.[5]

Prior to the Domestic Abuse Act 2021 there was no statutory definition of 'domestic abuse' in England and Wales. The law protecting victim-survivors of domestic abuse was found across a wide array of legal instruments, across both civil and criminal law. Along with the creation of a statutory definition of domestic abuse, the scope and aims of the Act are ambitious. This once in a generation Act had the power to make some truly transformational differences to domestic abuse law. However, there were some

[2] Refuge, 'Domestic Abuse Bill Returning to Parliament' (*Refuge*, 31st December 2020) ' <https://www.refuge.org.uk/domestic-abuse-bill-returningto-parliament-second-reading-january2020/?utm_source=Twitter&utm_medium=Socialmedia&utm_campaign=PressNews> accessed 18th January 2021.

[3] Amanda Robinson and Sandra Walklate, 'Domestic Violence: still a women's issue?' (OUP Blog, 8th March 2015) <https://blog.oup.com/2015/03/domestic-violence-womens-issue/> accessed 2nd November 2021.

[4] Ria Ivandic, 'Domestic Abuse During Covid-19' (Rapid Response Research Projects, ESRC, Online, November 2020).

[5] ibid.

opportunities for change missed by the Act, and some aspects of the legislation that may not go as far as hoped when applied in practice.

1.3 Scope

This thesis focuses on the jurisdiction of England and Wales, as this is where the Domestic Abuse Act applies and where my study of law has been based. Where international comparisons are drawn, I focus on other common law systems that have recently developed their law on domestic abuse. Scotland is drawn upon as an example of an alternative model of legislation focusing on domestic abuse. This is used to contrast the approach taken by England and Wales and inform what further development of the law could look like.

My research is placed primarily in the bounds of criminal law. Argument is made for a more robust criminal law offence in England and Wales. This thesis also interrogates the ways in which the criminal law has failed victim-survivors of domestic abuse, and how the criminal law and justice system has historically excluded women's experiences. The Domestic Abuse Act is considered in relation to both its criminal and civil law provisions, but with heavier focus on its impact upon criminal law, to highlight what has (and has not) been done to improve the criminal law for victim-survivors of domestic abuse. Civil law is considered insofar as how it interacts with criminal law due to increasing hybridisation between criminal and civil law in cases of domestic abuse.

It must be noted that this thesis does not endeavour to argue that the criminal law is the only, or even the primary, solution to domestic abuse. Criminal law has been chosen as the subject of inquiry of one foundation of support of many. Nuance is of paramount importance in discussion of such complex and serious situations, as is the nature of cases of domestic abuse. While an in-depth study of all these solutions is outside the scope of this thesis, the multifaceted nature of a holistic response to domestic abuse is considered as fundamental in supporting or supplementing the criminal law.

1.4 Terminology

The terminology used in the study of domestic abuse is of great importance, especially as the use of certain language can indicate the stance of its author concerning controversial debates that are central to domestic abuse, and thus influence the stance of its reader.[6] While agreeing with the statement of Herring that 'the reality is that no single term can capture all the complexities' of domestic abuse, it is nevertheless important that terminology be addressed.[7]

1.4.1 Victim-survivor

Firstly, the word employed throughout this work for those who experience domestic abuse will be term 'victim-survivor'. This follows the approach of several contemporary feminist academics, who use this term to highlight the harm of the offence 'while simultaneously recognising the agency, strength and resistance' of those who experience abuse.[8]

1.4.2 Domestic Abuse

[6] Michele Burman and Oona Brooks-Hay, 'Understanding, Defining and Measuring Domestic Abuse' in O. Brooks-Hay, M. Burman and C. McFeely (eds), *Domestic Abuse: Contemporary Perspectives and Innovative Practices* (Dunedin Academic Press 2018).

[7] Jonathan Herring, *Domestic Abuse and Human Rights* (Intersentia 2020) 2.

[8] Although this sentiment was expressed in relation to Cyberflashing, it applies equally in the domestic abuse context and thus has been adopted throughout this thesis; Liz Kelly, Sheila Burton, Linda Regan, 'Beyond Victim or Survivor: Sexual Violence, Identity and Feminist Theory and Practice' in Lisa Adkins and Vicki Merchant (eds), *Sexualizing the Social* (St Martin's Press 1996) 77-101.

Perhaps most significantly for this research, the term ‘domestic abuse’ must be addressed. The understanding of domestic abuse varies from organisation to organisation and historically ‘has been defined inconsistently’.[9]

Prior to the passing of the Domestic Abuse Act in 2021, there was no statutory definition of domestic abuse. There was a working definition used by both the government and Crown Prosecution Service (CPS),[10] and this definition has very much been reflected by the definition found in the Domestic Abuse Act. The Domestic Abuse Act defines ‘domestic abuse’ in Part 1, section 1 of the Act:

> Definition of ‘domestic abuse’
>
> (1) This section defines ‘domestic abuse’ for the purposes of this Act.
>
> (2) Behaviour of a person (‘A’) towards another person (‘B’) is ‘domestic abuse’ if—
>
> (a) A and B are each aged 16 or over and are personally connected to each other, and
>
> (b) the behaviour is abusive.[11]

At this stage in the thesis, it should be noted that ‘abusive behaviour’ encompasses a wide range of behaviour in this context, ranging from economic, to emotional, to physical abuse. ‘Personally connected’ requires some form of relationship or previous relationship between the people. These legal terms will be interrogated in detail in Chapter 4 as part of the discussion on the Domestic Abuse Act.

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[9] Alpa Parmar and Alice Sampson, ‘Evaluating Domestic Violence Initiatives’ (2007) 42 British Journal of Criminology 671, 674.

[10] Kate Brown, ‘Domestic Abuse: Crown Prosecution Service Guidance’ (CPS) ,<https://www.cps.gov.uk/crime-info/domestic-abuse> accessed 2nd April 2021.

[11] Domestic Abuse Act 2021.

This definition of domestic abuse contained in the Domestic Abuse Act therefore forms the basis for the legal definition of domestic abuse in this thesis. However, a wider understanding of what domestic abuse is and means is necessary to approach this topic with required understanding of the realities of victim-survivors outside of academia and the legal system.

The broad conception of domestic abuse employed in this thesis recognises domestic abuse as an ongoing wrong, rather than a single incident.[12] It recognises a wide range of types and degree of harm, including psychological harm, physical harm, and harm to the identity of the victim-survivor, along with physical violence. The reverberating impacts of domestic abuse often go unrecognised and are minimised, but the impact on the lifestyle and identity of the victim-survivor are elements of this offence that should not go unspoken of, and this is what makes domestic abuse an ongoing offence rather than a single incident of physical abuse that occurs in the home.

To set more specific bounds of 'what counts' as domestic abuse, Madden Dempsey's work is helpful guidance.[13] She argues that there are three conceptual elements of domestic abuse: violence, domesticity, and patriarchy.[14] This model is to be construed widely, but it helps to raise salient questions relating to the nature of what domestic abuse is.

Firstly, 'violence'. This thesis has adopted the term 'domestic abuse' rather than 'domestic violence' for the same reason that the term 'violence' needs to be understood in its widest sense. 'Violence' can be argued to connote incidents of physical harm done to the victim-survivor when the term is used outside of a legal context and applied in public discourse, and domestic abuse needs to be understood to be far wider than this. The abuse that victim-survivors suffer goes beyond physical harm, into psychological harm, financial harm, and

[12] Vanessa Bettinson and Charlotte Bishop, 'Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?' (2016) 66(2) Northern Ireland Legal Quarterly 179.
[13] Michelle Madden Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (Oxford University Press 2009).

[14] Madden Dempsey (n 13) 105.

deconstruction of the self, among other things. 'Violence' must be understood as any of this harm that may be experienced by the victim-survivor. Similarly, this thesis argues that the term 'violence' is unhelpful in the sense of understanding domestic abuse as a pattern of behaviour, rather than a string of individual incidents, as the commonplace understanding of violence invokes the image of a single serious incident. Domestic abuse law is already struggling to shake off the limitations of the 'photograph approach' of criminal law, whereby it is single incidents that are primarily recognised as constituting the offence. Instead, domestic abuse needs to be recognised as an ongoing offence, in a similar way as to stalking. This thesis, therefore, opts to use the term 'abuse' and asks that Madden Dempsey's model be applied with the understanding of violence in its widest sense, as is the conception more commonly applied by legal scholars in recent years.[15]

Moving on to the second limb of Madden Dempsey's definition, she makes it clear that the element of 'domesticity' does not refer only to the concept of place.[16] Domestic abuse often occurs behind closed doors in the physical sphere of the home, and an insidious level of harm should be recognised as part of this, but it is not the location of the home that constitutes domesticity. Madden Dempsey's concept of domesticity encompasses the relationship between the victim and the perpetrator. It is the closeness of the personal relationship between the perpetrator and victim-survivor that satisfies this idea of 'domesticity'. This is a fairly commonplace understanding amongst legal academics in the sphere of domestic abuse but fails in terms of popular recognition in public discourse. The outdated notion of a husband beating a wife behind closed doors is becoming a thing of the past, but the more nuanced understanding of terms such as 'domesticity' in terms of public education remains lagging behind. More needs to be done to further public understanding of 'domestic' in domestic abuse as turning upon the relationship in question, rather than upon location or privacy.

[15] See the work of Burman, Herring, Bishop, amongst many others.

[16] Madden Dempsey (n 13) 105.

1.4.3 Gender and Domestic Abuse

Madden Dempsey's final part of what constitutes domestic abuse argues that for an offence to fall within the sphere of domestic abuse it must either 'sustain or perpetuate patriarchy'.[17] This gives rise to salient questions regarding gender and domestic abuse. If the abuse must 'sustain or perpetuate' patriarchy, some may try to argue that women cannot inflict domestic abuse upon men, or that the idea that domestic abuse is *only* committed by men against is being unhelpfully perpetuated. This is, of course, not the case. Further, Hunnicutt highlights women can, and do, promote and protect patriarchal values.[18] Being a woman does not preclude one from sustaining or perpetuating patriarchy, and it is unlikely many would advance such an argument resolutely. This thesis argues that this limb is not requisite to deciding whether an offence is domestic abuse or not. However, it does raise important questions regarding the gendered nature of domestic abuse.

This thesis focuses primarily on the experiences of women in the domestic abuse law context. This reflects the gendered dynamics of domestic abuse, and the statistical reality that the majority of victim-survivors are women (73% according to the Office of National Statistics for the year ending March 2021).[19] There is no claim made that this is always the pattern, and it is recognised that men can also be victim-survivors of domestic abuse, along with varying gender dynamics in the context of LQBTQ+ relationships.[20] Nevertheless, the

[17] Madden Dempsey (n 13) 105.

[18] Gwen Hunnicutt, 'Varieties of Patriarchy and Violence against Women: Resurrecting "Patriarchy" as a Theoretical Tool' (2009) 15(5) Violence against Women.

[19] Office for National Statistics, 'Domestic abuse victim characteristics, England and Wales: year ending March 2021' (ONS, 24th November 2021) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabusevictimcharacteristicsenglandandwales/yearendingmarch2021> accessed 16th December 2021.

[20] Catherine Donovan and Kate Butterby, '8 Days a Week: A Snapshot Report on the Precariousness of LGBT+ Domestic Abuse Services' (Centre for Research into Violence and Abuse, Durham University, Online, 8th December 2020).

gendered nature of domestic abuse is recognised, not only in terms of statistics, but the greater harm often suffered by victim-survivors who are women.

The intersection of the concepts of patriarchy and domestic abuse are therefore relevant when considering the gendered nature of domestic abuse. Patriarchy has a strong hand in sustaining the prevalence and seriousness of domestic abuse. As Arendt has observed 'Power is never the property on an individual; it belongs to a group. ... When we say of somebody that he is 'in power' we actually refer to his being empowered by a certain number of people ... *potestas in populo,* without a people or group there is no power.'[21] In this sense, male violence against women is protected by patriarchy as they are the ones who hold the control in the power dynamic of society. Stark explains this by arguing that domestic abuse requires men using 'social norms of masculinity and femininity [...] to impose their will'.[22] Once again, the gendered nature of domestic abuse is evident when one views the source of power as the patriarchy.

Domestic abuse therefore, at its very core, has a gendered impact. This is an important recognition when sculpting a response to domestic abuse that will allow practical benefit to victim-survivors. This thesis therefore draws upon a feminist perspective throughout,[23] in order to address the gender imbalance that is often inherent in the offence of domestic abuse.

This does not seek to invalidate experiences of others, namely those who are part of LQBTQ+ or children; it simply focuses this research on those who are part of the great majority of victims of domestic abuse. This research will be focus primarily on heterosexual relationships, as this is the focus of the largest body of both quantitative and qualitative research. I am unable to go beyond this given the scope of this research, but much more work needs to be done in the context of other relationships.

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[21] Hannah Arendt, *On Violence* (Harcourt 1970) 44.

[22] Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life (Interpersonal Violence): The Entrapment of Women in Personal Life* (Oxford University Press 2007) 6.

[23] Carol Smart , 'Reflection' (2012) Feminist Legal Studies 20(2) 161.

1.5 The Aims of Domestic Abuse Law – Guiding Principles

In order to assess what an effective response to domestic abuse might look like, some guiding principles must be drawn upon. While these principles are not intended as a framework, or core feature of this thesis, they will be returned to when the idea of a newly imagined offence is considered in Chapter 2. What may be considered effective is a deceptively complex question, as an 'effective' response is likely to look very different to different individuals and organisations. Some may seek financial remedies, others may look to reduce criminal cases, or increase criminal prosecutions, or it may look more towards the victim-survivors themselves in terms of what they need for support. There is no single formulaic answer to what can be seen as an 'effective response' to domestic abuse.

As Parmar and Sampson point out, the complexity of cases of domestic abuse and the need for individually tailored responses is of key importance in the response to domestic abuse.[24] It is for this reason that this thesis employs a victim-survivor based approach to domestic abuse as a legal solution. Parmar and Sampson cite the example of the use of bolts and padlocks, explaining that where this could protect one victim, another victim could be harassed into removing the padlock, only serving to aggravate the perpetrator. We cannot comprehensively conclude that something is an effective solution because it worked for one victim. Yet the contrary must be recognised, we cannot dismiss a solution because it does not work for a particular type of victim. Parmar and Sampson point out that research found that 'different approaches were required for women according to whether they were experiencing domestic violence but not necessarily seeking help and those women who were subject to repeat victimization and were actively seeking help'.[25] If a victim-based strategy to domestic abuse response should be pursued, as Parmar and Sampson suggest, this helps to inform us that responses to cases of domestic abuse must be flexible and nuanced.

[24] Parmar and Sampson (n 9) 675.

[25] ibid.

Exploring the aims of what domestic abuse law seeks to achieve is fundamental to the assessment of how the criminal law can help victim-survivors of domestic abuse. There is some inevitable overlap between the guiding principles explored below, but they provide helpful guidance, nonetheless. [26]

1.5.1 Protection

Protection is perhaps the most idealistic aim that informs responses to domestic abuse, as it includes prevention of domestic abuse itself. At its most idealistic, this category encompasses concepts such as the dismantling of the patriarchy and freedom from domestic abuse altogether. However, this is not a particularly straightforward, measurable, or imminently achievable goal. Protection may include prevention of the abuse occurring, or keeping the perpetrator away from the victim-survivor through incarceration, or rehabilitation as part of strategies to protect victim-survivors from domestic abuse. Looking at a lower level of protection through prevention, interventions surrounding education become vital. This education should be widely available, in much the same way as sex education in schools, focusing on recognising and preventing violence against women from early ages. This type of education would place the onus on stopping men from abusing women and to see them as equals, rather than on women to 'avoid' abuse.

Beyond this, protection through prevention also includes solutions such as the rehabilitation of offenders. Westmarland's research provides a strong statistical basis for believing that rehabilitation in cases of domestic abuse can be effective in reducing repeat abuse.[27]

The criminal justice argument that the criminal law can provide deterrence is also relevant here. Madden Dempsey cites the condemnation of domestic abuse alone as a sufficient

[26] These aims are informed by and then adapted from: Clare McGlynn and Kelly Johnson, *Cyberflashing: Recognising Harms, Reforming Laws* (Bristol University Press 2021).
[27] Nicole Westmarland and Liz Kelly, 'Why Extending Measurements of "Success" in Domestic Violence Perpetrator Programmes Matters for Social Work' (2013) 43 British Journal of Social Work 1099.

reason to implement pro-prosecution policies in domestic abuse cases.[28] By prosecuting and convicting perpetrators, the criminal justice system can be argued to play a role in the prevention of domestic abuse by condemning it in the eyes of society. This argument will be examined in further detail in Chapter 2, where the creation of a new criminal offence of domestic abuse is discussed.

When protection through prevention fails or is too late, the protection of the victim-survivor must become a primary aim when taking a victim-survivor based approach to domestic abuse responses. Ways in which victim-survivors are protected can fall outside of the sphere of criminal law, for example, material protections may help, such as providing shelter for a victim trying to escape or providing the victim with material tools such as new locks or a mobile phone to call the police. Civil law also may help to protect victims with remedies such as domestic abuse protection orders (DAPOs). Nevertheless, the criminal law can provide women with substantial help in terms of protection, not just prevention. Lewis argues that data shows that 'women's safety and quality of life can be significantly improved after legal intervention that includes protection and conviction'.[29] Protection can be found in the criminal justice system by the perpetrator being removed from the life of the victim through arrest and conviction. It must be stated that this may not be the wishes of the individual victim, but it is a significant form of protection nonetheless. This protection however can be rare, due to failings in the criminal law and criminal justice system resulting in low-reporting and conviction rates in cases of domestic abuse. Further, this type if protection is also limited by the period of incarceration in many cases, something the victim-survivor themselves has no control over.

There are undeniably a host of lacunas in the supposed protection the criminal justice system provides to victims. These will be further addressed in chapters considering the substantive law and the role of criminal justice. Nevertheless, it must be stated that for the

[28] Madden Dempsey (n 13).

[29] Ruth Lewis, 'Making Justice Work: Effective Legal Intervention for Domestic Violence' (2004) 44 British Journal of Criminology 204.

criminal justice system to provide a protective function, victims must have some faith in that system and perpetrators must be prosecuted, convicted, and sentenced appropriately. There are undoubtedly issues with each of these elements at present. To demonstrate one such issue, Bond and Jeffries state that in cases of violence, if that violence has occurred in cases of domestic abuse, the perpetrator is 0.672 as likely to receive an incarceration sentence as if it had not.[30] Further, as Bond and Jeffries state, it would be a mistake to measure the effectiveness of the responses to domestic abuse purely by statistical analysis of prosecutions and convictions, as would be the case with any criminal cases, due to the lack of further understanding this would provide and the currently deeply flawed system of reporting of crimes such as domestic abuse.[31] This type of information should inform our responses to domestic abuse, but alone are not sufficient to dictate them. Nevertheless, once the criminal justice system has identified a perpetrator, other methods of protection and prevention can be employed on a more meaningful level, for example, through perpetrator rehabilitation programmes.

1.5.2 Empowerment

Empowerment is also a fundamental aim which helps to inform responses to domestic abuse and the development of domestic abuse law. Empowerment seeks to show support to victim-survivors, recognising the harms that stem from domestic abuse, and showing that society aims to do something about these harms, realising the way that cultural change may be enacted through the expressive power of the law. Walklate places great importance on an approach that focuses on what enables the woman to leave, as she recognises that a

[30] Christine E. W. Bond and Samantha Jeffries, 'Similar Punishment? Comparing Sentencing Outcomes in Domestic and Non-Domestic Violence Cases' (2014) 54 British Journal of Criminology 849, 867.

[31] ibid.

'complex set of fears "lock" a woman into a violent relationship'.[32] This category places heavy emphasis on responses that focus on 'increasing the economic and social independence of a woman', particularly as a 'solution to the problem of a woman often blaming herself for her situation'.[33] These solutions, again, may be independent of the criminal justice system, for example, financial solutions around the woman independently receiving universal credit. However, these types of solutions may increase in effectiveness when they are a supplement to the criminal justice system, rather than being viewed as an entirely separate recourse.

The symbolic power of the criminal law is key in the consideration of the aim of empowerment. Scholars such as Mackinnon argue that the law 'can be a way to fight for change'.[34] McGlynn and Rackley argue that it is the potential deterrent and educative aspect of the law which can encourage such social change.[35] It is also be argued that the recognition of an offence through the criminal law can provide a sense of justice to the victim-survivor.[36] These are just a few examples of the way in which the criminal law can provide empowerment to victim-survivors. The law can express to women that they will be supported by society, that they are recognised as victims, and that they are deserving of legal recourse.

[32] Sandra Walklate, 'What is to be done about violence against women? Gender, Violence, Cosmopolitanism and the Law' (2008) 48 British Journal of Criminology 39, 685.

[33] ibid 684.

[34] Catherine MacKinnon, *Butterfly Politics* (Belknap Press 2017) 330.

[35] Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse' (2017) 37 Oxford Journal of Legal Studies 534.

[36] Clare McGlynn and Nicole Westmarland, 'Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perception of Justice' (2019) 28(2) Social and Legal Studies 179.

1.5.3 Redress

Redress refers to remedy of the wrong that has been committed. Redress is achieved through the criminal law in a way that is both punitive and provides victim-survivors with a sense of justice. This is not to suggest that the criminal law will be able to provide a way to put the abuse 'right', but it does recognise that the criminal law has a role to play in providing victims with access to legal recourse and a sense of justice, along with the need for punitive action to be taken against the perpetrator in the same way that the criminal law responds to other offences of equal seriousness.

Ventura's notion of redress is informative when considering domestic abuse. She asserts that the 'primary goal of law is to restore the normative balance deteriorated by the criminal action.'[37] She states that large part of criminal law is the process between the offender and the state. This introduces the idea that the principle of redress includes both a sense of redress for the victim-survivor, but that the duty of the state comes into this idea too.

It must be noted that the aim of redress need not be carceral punishment, and other alternatives are not precluded.[38] However, victim-survivors should be able to see justice done, and pursue a sense of closure, through recourse found in the criminal justice system, as is the case with other criminal offences.

The importance of redress should be emphasised when viewing law through a feminist lens. As McGlynn and Johnson note, complex debates surrounding criminalisation can serve to detract from the importance of assessing the merits and flaws of more substantive laws which effect women.[39] In a similar sense, redress can often be pushed to the side when considering the aims of criminal law which primarily effect women, due to the complexity of the debate on forms of punishment. In this thesis, redress refers to the answering of a wrong, which has an impact on the perpetrator.

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[37] Isabel Ventura, '"They Never Talk about a Victim's Feelings: According to Criminal Law, Feelings Are Not Facts"—Portuguese Judicial Narratives about Sex Crimes' (2016) 2 Palgrave Communications 1, 3.
[38] Anna Terwiel, 'What is carceral feminism?' (2020) 48(4) Political Theory 421.

[39] McGlynn and Johnson (n 26) 73.

The principles of open justice, and seeing justice to be done, are just as important for victim-survivors of domestic abuse, as they are with other criminal law offences. Redress allows victim-survivors the space to recognise that they have experienced a wrong, and that society stands with them in punishing this wrong.

1.6 Criminal Justice and the Aims of Domestic Abuse Law

This thesis argues that the criminal law can go some way in achieving each of these aims. This is not to say that anti-criminal law arguments are dismissed, on the contrary, they hold great weight in the context of domestic abuse. These arguments tend to centre around the limitations of criminal law, the over-use of the criminal law as a quick fix, and issues surrounding intersectionality. Each of these will be addressed in Chapter 2.

Despite these important considerations, this thesis follows the arguments of McGlynn and Johnson, that recognition of harms against women and expressive justice, along with the historic under-criminalisation of harms that primarily concern women, justify more positive intervention through the criminal law.[40]

What may be an 'effective response' is likely to fall under one of or a combination of these aims, but it does not follow that if it does a response will be effective; we can merely use these aims to help us assess what may be effective in the case of each victim. The appropriateness of each response will vary depending on the type of abuse that is being suffered, as domestic abuse encompasses a large range of offences. To create a truly effective response to domestic abuse, a toolbox of varying solutions must be accessible for victim-survivors. This toolbox must include tools from multiple sources, for example, local authorities, charities, civil law, and criminal law, to name but a few. These other solutions that should supplement an improved criminal law approach will be discussed in Chapter 5.

[40] McGlynn and Johnson (n 26) 67-8.

1.7 Conclusion

The first section of this chapter examined the background of domestic abuse law and the societal and political context which culminated in the passing of the Domestic Abuse Act. It then went on the set out the scope of this thesis. This thesis endeavours to review the current landscape of domestic abuse law, whilst highlighting key issues within this area and suggesting potential developments. Ultimately, this thesis will argue that there is a need for an improved criminal law approach to domestic abuse, both in the substantive criminal law itself and through the workings of the criminal justice system. This is not to suggest that an approach of 'more criminal law' should be myopically pursued without addressing the wider impacts of this part of the solution. However, the criminal law is one valuable tool in a wider toolbox for victim-survivors to use, and its improvement should not be abandoned entirely on the basis of its flaws.

The following chapter will move on to consider some of the current criminal law that formulates what could be described as 'domestic abuse law'. It will highlight the inadequacies contained in this current law to build an argument for considering an alternative legal approach, which would allow the correct lenses to be applied the domestic abuse and fill some glaringly important gaps in the law.

Chapter 2. Reframing the Criminal Law on Domestic Abuse

2.1 Introduction

In this chapter, some of the current criminal law that is used to help victim-survivors of domestic abuse is reviewed. Some of these piecemeal laws help to demonstrate the existing problems within the law of domestic abuse, including offences introduced recently aimed at remedying historic failings, such as coercive control. This chapter aims to expose some of the failings embedded in the current criminal law, and considers whether a single, more all-encompassing offence would be better at filling the gaps and fixing the problems left in the current law.

Through adopting a similarly nuanced recognition of the impact of the criminal law taken by Johnson and McGlynn in their recent work on 'Cyberflashing', this chapter argues that the criminal law is an imperfect vehicle, but nevertheless a necessary foundation for change, with a part to play in a more holistic response to domestic abuse.[41] The under-criminalisation of women's experiences leaves the criminal law as a site for struggle not to be abandoned.[42]

This chapter concludes that a single, more encompassing domestic abuse offence could be beneficial in its potential to reframe domestic abuse as a crime, and have it viewed through a lens that encourages greater access to redress for victim-survivors. However, issues as complex as domestic abuse seldom has simple solutions. It is recognised that where a more encompassing 'new law' could have benefits, it is likely to also bring unique new issues in such a contentious legal landscape. Nevertheless, Scottish legislation on domestic abuse is cited as a potential model for a wider reaching law on domestic abuse.

[41] McGlynn and Johnson (n 26) 70.

[42] ibid; Smart (n 23) 162.

In his book 'Domestic Abuse and Human Rights' Herring advocates for an incremental approach to the formulation of domestic abuse law in England and Wales, arguing that this approach is more pragmatic, and 'provides prosecutors with the most flexibility'.[43] Although this is a significant benefit to the current approach, this flexibility can come at the cost of flimsy protection from a legal landscape full of lacunas, sometimes leaving victim-survivors without adequate access to justice. Wiener and Stark summarise this debate when speaking about coercive control, explaining that 'an outstanding dilemma in shaping policy around coercive control was whether to craft a 'bespoke definition' (a definition or a law specifically designed to capture the particular patterns of behaviours) or an 'incremental' definition that only incorporates elements of the crime existing law failed to cover.'[44] Both approaches have different benefits and limitations.

This thesis will argue that the current incremental approach is proving inadequate in practice, and that a single new, wider ranging domestic abuse offence, could have significant benefits in reframing the law on domestic abuse, how people view domestic abuse, and improve the extent to which victim-survivors feel supported by the law. This aims to address the potential expressive/ transformative power of the law. A new domestic abuse offence, in line with the concept of fair labelling, holds value in its expression to society that the conduct of domestic abuse is an unqualified wrong, showing victim-survivors that their experiences are recognised and could grant them access to justice where it has previously eluded for the crime of domestic abuse.

A new, encompassing offence could also have benefits in overhauling the current failures, which are embedded across several different offences, and address gaps in the law. It would allow the true coalescence of harms suffered by victim-survivors to be recognised and make prosecution of domestic abuse easier by removing arbitrary harm thresholds, which

[43] Herring (n 7) 129.

[44] Cassandra Wiener and Evan Stark, 'Coercive Control, the Offense, and Men: A Response to Bates and Taylor' (2020) 25(2) Domestic Violence Report 31.

vary from offence to offence when domestic abuse is prosecuted through the jigsaw of criminal laws that currently exists, for example with assault. Scottish legislation will be analysed to help to construct what a new, more encompassing model of domestic abuse might look like.

However, the limitations of this legislative approach will also be noted, as a wider ranging model would also likely have its risks and flaws. The complexity of domestic abuse can be argued to suit several offences, as it is a concept that encompasses such a wide range of harms. Anti-carceral arguments will also be recognised in this chapter. It is maintained that, although there are tensions within and limitations to a criminal law approach to domestic abuse, and debate about how it can best help victim-survivors, there is value in it which must be pursued by academics and legislators alike.

2.2 The Inadequacies of Current Criminal Law

Domestic abuse involves several significant harms which can be varied in nature, and the current criminal law which addresses domestic abuse, such as the Offences Against the Person Act 1861 (OAPA), fails to respond to the coalescence of harms and continuous nature of the offence. Here, some of the laws that make up the criminal legal landscape of current offences that exist to protect victim-survivors of domestic abuse will be used to highlight some of the inadequacies of the current criminal law on domestic abuse.

The key offences that will be addressed here are assault and coercive control. [45] The way in which the law is failing to keep pace with the way abuse is evolving in relation to technology as a tool of abuse will then be investigated. Finally, criminal law defences for

[45] It should be noted here that other offences are equally relevant, for example legislation on stalking and financial abuse, however they have not been considered in detail in this thesis as it would not be possible to provide an in-depth analysis of all relevant offences relating to domestic abuse, and the examples chosen are sufficient to construct the argument this thesis makes.

women who kill the perpetrators of domestic abuse will be considered, to demonstrate the exclusion of women's experiences in the criminal law and domestic abuse context.

2.2.1 Assault and other Offences Against the Person

Common assault is a good example of how patchwork criminal law can act as a barrier to providing justice to victim-survivors of domestic abuse. Due to domestic abuse not being a specific criminal offence, alleged perpetrators are charged under other relevant criminal offences, as has been previously discussed in this thesis. If the reported abuse is categorised by police as 'common assault', a time limit of 6 month means that victim-survivors who have a slow burn reaction to their abuse, or who were not aware of their abuse at the time, can be denied an investigation. Alternative charges can be made, for example, that of coercive control. However, this is an unnecessary barrier for victim-survivors of domestic abuse who wish to come forward in providing evidence later, and a procedural issue that typifies the lack of accommodation to victim-survivors of domestic abuse in the criminal justice system. This statutory time limit is a glaring failure which demonstrates the way in which the piecemeal incremental criminal law approach is not effective. It is hoped that this failure is remedied quickly, but such significant failings within the law should not be left to incremental change, as victim-survivors wait for individual issues to slowly be remedied when they are drawn to the attention of the government.[46]

This thesis also argues that a new, more all-encompassing offence will help to reframe domestic abuse, and have the harms perpetrated as part of it put under a more appropriate lens. Assault and other physical harms, many of which come under offences from the Offences Against the Person Act 1861, are excellent examples of this, as a perpetrator may be charged under these offences, without true recognition of the wider course of domestic abuse behind this. This idea is expanded upon under the sub-chapter 2.3.

[46] It should be noted that this point is now academic, as the law has been changed since the submission of this thesis. This law remains correct up to December 2021.

2.2.2 Coercive Control

The law on coercive control is a useful example of where the current criminal law is falling short as the law itself contains several arbitrary barriers to successful prosecution of the offence.

The law on coercive control attempts to recognise that patterns of behaviour can amount to just as serious harm as physical abuse for the individual, as it is the aim of coercive control to dominate the victim, diminish their self-worth, through tactics deigned to isolate, degrade and exploit.[47] The term 'coercive control' was coined by Stark, who broadly defines coercive control as a course of oppressive behaviour grounded in gender-based oppression.[48] He defines coercion as 'the use of force or threats to compel or dispel a particular response'.[49] He separately defines control as 'structural forms of deprivation, exploitation, and command that compel obedience indirectly'.[50] His work was taken heavily into account by the UK government when the offence of coercive control was set out in section 76 of the Serious Crime Act 2015, although his gendering of the definition was not adopted. Barlow et al more simply define coercive control as 'a pattern of abuse that is used to harm, punish, or frighten the victim'.[51]

Despite Barlow et al's deceptively simple definition, coercive control criminalises a large scope of behaviours that relate to domestic abuse cases. It includes economic control,

[47] Evan Stark, 'Looking Beyond Domestic Violence: Policing Coercive Control' (2012) 12 Journal of Police Negotiations 199.

[48] Stark 2007 (n 22) 228.

[49] ibid.

[50] Stark 2007 (n 22) 229.

[51] Charlotte Barlow, Sandra Walklate and Kelly Johnson, 'What is Coercive Control and Why is it so Difficult to recognize?' (OUP Blog, 25th November 2019) <https://blog.oup.com/2019/11/what-is-coercive-control-why-difficult-recognize/> accessed January 21st 2021.

ostracisation, degradation, monitoring, controlling sleeping patterns, clothing choices, and friendships, among many other examples.[52] This expansive law aims to protect victims of domestic abuse, recognising a huge range of wrongs, as well as recognising that it is the pattern of behaviour that can harm the victim, not just isolated incidents.

R v P demonstrates when the offence of coercive control may be used in a domestic abuse case.[53] In this case, a young woman met her partner at university and months into the relationship became pregnant. She began losing contact with friends and family, dropped out of university and got engaged to her partner. Her and her partner used different shared accommodation for around 3 years, during which time her parents did not know her whereabouts. In the Court of Appeal LJ Jackson listed the behaviours that were considered in this case to amount to coercive control. These included: misrepresentation, making her abandon her studies, alienating her, controlling her day-to-day activities, and moving accommodation with the aim to isolate her.[54] This case could be particularly significant for the law on coercive control, as the accused begun a new relationship and exhibited similar controlling behaviours, consequently it was held that this new relationship could be used as evidence to establish a pattern of behaviour - it is this approach this thesis argues should be adopted by a new offence of domestic abuse. Rather than relying on cases such as this to filter through both the criminal and family courts to create good precedent, a new offence would ensure that victim-survivors are not dependent on piecemeal caselaw when looking to the law for redress. A new domestic abuse offence could endeavour to emulate this 'big picture' approach taken by the judges in *R v P,* set in primary criminal law legislation.

[52] Home Office, 'Statutory Guidance Framework: controlling or coercive behaviour in an intimate or family relationship' (Home Office, 5th December 2015) <https://www.gov.uk/government/publications/statutory-guidance-framework-controlling-or-coercive-behaviour-in-an-intimate-or-family-relationship> accessed 1st February 2021, 5.

[53] *R v P* [2020] EWCA Civ 1088 4 WLR 132.

[54] ibid, para 5.

A new, more all-encompassing offence of domestic abuse (as opposed to the current approach of a patchwork of offences) *could* lead to an increase in both understanding and (hopefully) an increase in numbers of prosecutions and convictions in relation to the offence. It also facilitates the improvement of the law that recognises patterns of conduct that are termed coercive control/ domestic abuse. For example, in England and Wales the offence requires the perpetrator and the victim-survivor of coercive control to be 'personally connected'. Prior to the Domestic Abuse Act 2021, this was held to mean: if they are in an intimate relationship, live together, are family, or have previously been in an intimate relationship or lived together. The offence did not extend to those whose relationship is not ongoing and the couple were not living together. This 'residency requirement' was significantly unhelpful, as arbitrary barriers were created, placing victim-survivors outside of the reach of redress found through the criminal justice system.[55] The Domestic Abuse act has since remedied this issue, but it remains an example of the ways in which domestic abuse law has numerous substantive failings which are slow to be remedied, that drastically impact the access of victim-survivors to redress.

The next element is that the coercive or controlling behaviour must have a 'serious effect' on the victim survivor. This element is satisfied where the victim has feared violence on at least two occasions, or if it causes the victim such substantial distress that it has an adverse effect on her day-to-day activities.[56] This is a high standard of proof. In contrast, Scottish legislation adopts an objective test of whether the victim was likely to suffer harm from the behaviour, which prevents the revictimization of victim-survivors in court.[57] Scotland is used here to highlight that the current coercive control legislation in England and Wales is already behind, and the law needs to revisit much of the haphazard legislation that victim-survivors of domestic abuse currently rely on. Victim-survivors should not be required to

[55] Cassandra Wiener, 'Coercive Control Doesn't End With a Breakup and the Law has to Reflect That' (The Independent, 17th March 2020).

[56] Serious Crime Act 2015, s.76(4)(a-b) .

[57] Michelle Burman and Oona Brooks-Hay, 'Aligning policy and the law? The creation of a domestic abuse offence incorporating coercive control' (2018) 74.

establish in evidence the impact their abuser has had on them, often in front of the perpetrator of their abuse. This is made even more of a significant issue when one considers that victim-survivors frequently suffer from a trauma response after suffering serious abuse, impacting how their evidence comes across to a jury.[58]

The introduction of a new offence that encompassed all of the criminal law that made up 'domestic abuse law' could collate all the incremental positive developments that domestic abuse law has seen in recent years. Beyond reconceptualising the harms associated with domestic abuse, a new offence could also ensure that the reach and applicability of the law is not limited by inappropriate and arbitrary thresholds, leaving victim-survivors without a path to redress through the criminal justice system. Areas such as stalking, financial abuse, and physical violence, among other offences, can be recognised as part of the wider conduct that is the offence of domestic abuse. Given formal word limit restrictions, the details of these cannot be explored here but it is important to recognise that the opportunity for an inclusive offence is not limited to coercive control. A new, more encompassing offence could allow these behaviours to be prosecuted through their presence as a pattern of behaviour, rather than as individual incidents with complex legal requirements.

2.2.3 Technology and Domestic Abuse

A new, more encompassing offence of domestic abuse could ensure that the criminal law will keep up with society and harms that continue to develop, which, if left unchecked, could create gaps in the law leaving victim-survivors unprotected, which is a significant inadequacy of the current criminal law on domestic abuse. A suitable example of this is the increased availability and use of technology, which has allowed perpetrators of domestic abuse to develop the ways they can hurt victim-survivors, particularly in relation to stalking, monitoring online activity, and sharing (or threatening to share) intimate images of

[58] Helena Kennedy, *Misjustice: How British Law is Failing Women* (Vintage 2018) 98.

victim-survivors without their consent.[59] Technology is a new tool for perpetrators and it is a mode of abuse that develops quickly due to the nature of the rate of evolution of technology, thus it is difficult to predict precisely how its use will develop in relation to domestic abuse in future.

A new, wider ranging of domestic abuse could be made a malleable and valuable instrument in combatting harms of domestic abuse that do not yet exist but that will grow to be gaps in the criminal law. This can be achieved by moving away from developing an exhaustive list when considering typologies of harm in relation to domestic abuse.

For instance, it could adopt a similar textual approach that is taken in the equality clause of the South African Constitution 1996. Section 9(3) states that:

> The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, *including* race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[60]

This allows the court to recognise new grounds that are analogous to a recognised ground. This could help the law to strike a practical balance between ensuring that no exhaustive lists of harms are created, without leaving the list of harms so open ended that it would be unjustified to use such a clause in the criminal law.

A similar approach could be taken in the context of a domestic abuse offence. It could outline the key harms we currently understand to be associated with domestic abuse, such as physical harm, stalking, coercive control, financial abuse, but use a language that reflects that these are harms that are included, along with other unforeseen harms that may arise but which are analogous in character or consequence for the victim-survivor. This would ensure flexible protection for victim-survivors in the criminal law.

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[59] Elizabeth Yardley, 'Technology-Facilitated Domestic Abuse in Political Economy: A New Theoretical Framework' (2021) 27(1) Violence Against Women 1479, 1479.
[60] (emphasis added)

An alternative, rather than complementary, approach for a new offence of domestic abuse to take could be for the criminal law to move away from harm thresholds entirely, to focus primarily on the conduct of the perpetrator. This would remove the requirement of reaching legal thresholds, and instead the focus of the offence would be on condemning the pattern of conduct, rather than the harms themselves. Victim-survivors should not be required to prove the ways that they have subjectively suffered in evidence in front of the perpetrator of their abuse. An offence addressing the domestic abuse as a course of conduct that recognises patterns of harmful behaviour would allow domestic abuse as a continuous act to be condemned as criminal, rather than relying on high criminal law thresholds of proof of particular harms, as with the offences of stalking or coercive control. The pattern of behaviour that amounts to domestic abuse could be put at the focal point of the legislation, rather than how women deal with their abuse (if a subjective test were employed), or how women are expected to deal with their abuse (if an objective test were employed). It is evident that the criminal law has, so far, failed to tackle domestic abuse with this level of nuance and understanding.

2.2.4 Conclusion

It is evident that there are a host of inadequacies scattered and embedded throughout the current criminal law. This provides one basis to argue that a new criminal law offence of domestic abuse could be a beneficial development within domestic abuse law. McGlynn and Johnson have recently recognised this issue in relation to cyberflashing, explaining: 'The current fragmented, ad hoc and reactive approach is inadequate.'[61] The same can be said for domestic abuse law, and the introduction of a new, more encompassing criminal offence could be the diligent catchall way to remedy years of misunderstanding and mis-legislating such a chronic and pervasive gendered crime. Ultimately, the current law does not do what society needs it to do, therefore this thesis argued that a different legal

[61] McGlynn and Johnson (n 26) 87.

approach may be needed because of these current inadequacies and the wrong lenses being applied when looking at what domestic abuse actually is. This latter concept is explored in more detail below at 2.3 and in the discussion of what a new legal model of domestic abuse could look like.

2.3 Reframing Domestic Abuse: Time for a New Lens?

This thesis has begun to address some of the inadequacies of the current criminal law that constitutes 'domestic abuse law'. It will now move on to consider whether a new, wider-ranging piece of legislation would a positive step forward in the law for victim-survivors, or an ineffective vehicle of change.

On the one hand, a new piece of criminal law could allow allows current gaps to be filled, new thresholds to be set (or removed) in line with society's updated understanding of domestic abuse, and the reach and application of the criminal law in relation to domestic abuse to be expanded. Further, the law is not traditionally constructed around women's experiences, and this must be updated in an attempt to 'catch up' with more a modern understanding of domestic abuse.[62] Whether new law could help to change social norms surrounding domestic abuse is also considered.

However, the limitations of a 'more law' approach are also recognised. It is argued that a change in norms requires reciprocity between the law and society, and Hakan's 'gentle nudges vs hard shoves' thesis is used to note the limits of 'new' law.[63] Arguments surrounding carceral punishment are also addressed in this chapter, before Chapter 3 explores the limitations of the criminal law in relation to the failings of the wider criminal justice system.

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[62] Liz Kelly, *Surviving Sexual Violence* (Polity Press 2013) 62; McGlynn and Johnson (n 26) 70.

[63] Daniel Hakan, *Gentle Nudges vs Hard Shoves: Solving the Sticky Norms Problem* (University of Chicago Law Review, 2000) 67.

2.3.1 Legislating the Coalescent Harms of Domestic Abuse

A wide array of criminal law already exists to protect victim-survivors from specific incidents of abuse, but this law is piecemeal and haphazard. Victim-survivors of domestic abuse experience a coalescence of significant harms, which are not experienced in the same combination or degree from case to case. Using existing legislation, for example, the OAPA 1861, to prosecute single incidents that occur as part of a wider pattern of domestic abuse, is not sufficient. This approach fails to recognise the pattern of behaviour that amounts to the conduct of domestic abuse, and with it, it fails to recognise the coalescence of harms that victim-survivors experience.

An example of this is clearly visible when considering physical abuse and the criminal law. Well established offences such as assault, battery, and offences listed in the OAPA 1861 are used to prosecute a number of harms, which would exist in the wider conduct of domestic abuse. The issue with this, is that it is the physical harm that is being punished, rather than the wider, less singular, event of domestic abuse.

The issue here is not the substantive law surrounding battery, or actual bodily harm, or grievous bodily harm, or the related physical harm offences (this is not to suggest that no such issues exist). Therefore, this thesis will not provide an in-depth analysis of these offences, or the issues that exist relating to them. However, these offences are raised to demonstrate that there is something missing in the current approach of domestic abuse law. The common law offence of battery, for example, is defined as any intentional or reckless touching of another person, without the consent of that person or lawful excuse.[64] This clearly encompasses some of the harm that will often occur in the wider course of domestic abuse. Aside from issues regarding prosecution rates, and maximum sentences; the problem this thesis seeks to focus on is the failure of these types of criminal offences in capturing the true wrong of domestic abuse. These crimes are not being viewed through the appropriate lens, even when the current law *does* make it as far as prosecution. Ultimately,

[64] *R v Ireland* [1997] 3 WLR 534

the problem with the current law is that it does not allow domestic abuse to be recognised for what it is.

A new offence of domestic abuse, which encompassed a greater range of harms inflicted on victim-survivors, could be argued to have a positive effect in reconceptualising how domestic abuse is prosecuted. The current law fails to identify domestic abuse as harm that 'dismembers the victim's self by systematically attacking her personality, style of communication, accomplishments, values and dreams'.[65] Domestic abuse is not just physical, or even physical and psychological, it is an attack on the identity of the victim, to an extent that the 'victim almost becomes used as a tool against herself'.[66] Tolmie summaries this explaining: 'Domestic abuse is a course of conduct that subordinate's women to an alien will by violating their physical integrity (domestic violence), denying them respect and autonomy (intimidation), depriving them of social connectedness (isolation) and appropriating or denying them access to the resources required for personhood and citizenship (control)'.[67] The range and severity of harms in cases of domestic abuse can vary to a great extent, but most cases of domestic abuse have an ongoing affect that impacts the lifestyle of the victim-survivor. It is this aspect of domestic abuse that the current criminal law fails to adequately account for.

While it is evident that harm can be done to the victim in numerous ways, Stark has theorised that domestic abuse should be viewed as a liberty crime rather than an assault crime.[68] Herring corroborates this view to some extent, citing 'loss of freedom' as one of the ways he views domestic abuse as a 'special wrong'.[69] However, this thesis argues that

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[65] Marti Loring and David Myers, 'Differentiating Emotionally Abused Women' in M. Loring (eds) *Emotional Abuse: The Trauma and the Treatment* (JB 1998) 22.

[66] Lynne Arnault, 'Cruelty, Horror, and the Will to Redemption' (2003) 18 Hypatia, 155.

[67] Julia Tolmie, 'Coercive Control: To Criminalize or Not to Criminalize?' (2018) 18 Criminology & Criminal Justice 50, 51.

[68] Stark 2007 (n 22) 15.

[69] Herring (n 7) 55.

domestic abuse is an offence that should be able to be categorised as both an assault crime *and* a liberty crime, as that reflects the nuances of the way in which harm is inflicted upon victim-survivors.

It is in striving to understand and reconceptualise the complex harm of domestic abuse that the consideration of a new, wider offence becomes arguable, even in a societal and academic context that is recoiling from a 'more law' approach. A new offence, one that could encompass more of the harms that occur over the course of domestic abuse, provides the opportunity for an overhaul of law that has insidiously built up in a way that places single incidents of physical harm at the forefront of the law, ignoring the true nature of the experiences of victim-survivors.

Historically, cases of abuse in the home were viewed as private, and thus not a matter for criminal law.[70] Gradually, academics have identified that violence that occurs in the home should be treated as seriously as public violence.[71] However, few have gone beyond this. Research establishes that cases of domestic abuse involve patterns of behaviour, where the perpetrator engineers abuse based on manipulating the victim-survivor, or their relationship with the victim-survivor, to exercise control.[72] Domestic abuse perpetrators are close or were previously close to the victim-survivor, meaning that the abuse that they endure can be systematically perpetrated in a way personally designed to hurt them. The familiarity of the relationship between the perpetrator and the victim-survivor embodies a considered use

[70] Antonia Cretney and Gwynn Davis, 'The Significance of Compellability in the Prosecution of Domestic Assault' (1997) 37(1) British Journal of Criminology; Jennifer Hartman and Joanne Belknap, 'Beyond the Gatekeepers: Court Professionals' Self-Reported Attitudes about and Experiences with Misdemeanour Domestic Violence Cases' (2003) 30(3) Criminal Justice and Behaviour 349-373.

[71] Carolyn Hoyle and Andrew Sanders, 'Police response to domestic violence: From victim choice to victim empowerment?' (2000) British Journal of Criminology 40(1) 14.

[72] Charlotte Bishop, 'Domestic Violence: The Limitations of a Legal Response' in Sarah Hilder and Vanessa Bettinson (eds), *Domestic Violence: Interdisciplinary Perspectives on Protection, Prevention and Intervention* (Palgrave Macmillan 2016).

of power or abuse that attacks that specific victim-survivor's characteristics or weaknesses, through the perpetrator weaponising a personal knowledge of them.[73]

Domestic abuse law needs to endeavour to highlight the power dynamics that are exercised in abusive relationships, along with the personalised abuse that often entraps victim-survivors. Consequently, it should be recognised that a case can be made for domestic abuse being treated *more* seriously than random acts of violence, due to the betrayal of an intimate relationship and the capitalisation upon unequal power dynamics by perpetrators; 'love should not hurt'.[74] There is a failure in the current law to recognise the misuse of power dynamics in relationships to cause harm.

Similarly, the entrapment that is inherent in cases of domestic abuse should be recognised when considering its harms. As Parmar and Sampson point out: 'A complex set of fears "lock" a woman into a violent relationship.'[75] The femicide census data reveals that the period immediately following a breakup is the most dangerous for women; 3/4 of women who are killed by someone they have had a close relationship with are killed within a year of their separation.[76] This is disconcerting when contrasted with the fact that other research indicates that a woman can be blamed by a jury for failing to leave a relationship: Dawson states that women who try to leave the relationship are somehow 'perceived to be less responsible for their own demise'.[77] This creates a paradox where the victim is more likely to be seen to have done the 'right thing' in the eyes of the jury if they attempt to leave a

[73] Deborah Tuerkheimer, 'Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence' (2004) Journal of Criminal Law and Criminology 94(4).

[74] Women's Aid, 'Challenging the Myths' (Women's Aid) <https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/myths/> accessed 21st January 2021.

[75] Parmar and Sampson (n 9) 685.

[76] Femicide Census, 'UK Femicides 2009-2018' (2020) <https://www.femicidecensus.org/wp-content/uploads/2020/11/Femicide-Census-10-year-report.pdf> accessed 24th March 2021.

[77] Myrna Dawson, 'The Cost of 'Lost' Intimacy' (2003) 43 British Journal of Criminology 689, 703.

relationship, but by fitting this mould, may be putting themselves at a higher risk of danger that requires intervention from the criminal law.

Cases of domestic abuse involve an interconnected web of significant harms that are currently being overlooked in favour of physical injury - incidents of domestic abuse that result in actual bodily harm being 20% more likely to result in an arrest and a charge.[78] Bishop argues that a 'hierarchy of harm' has been created in our criminal justice system 'whereby physical violence still dominates in the assessment of both the existence and severity of domestic violence, even in light of broader recognitions that many abusive behaviours do not include physical contact'.[79]

A recent example of a positive shift in the law, which attempts to adopt this type of legislative approach and wider understanding, is the offence of non-fatal strangulation. Section 70(1) of the Domestic Abuse Act 2021 inserted section 75A into Part 5 of the Serious Crime Act 2015. This is significant as in cases of non-fatal strangulation, we should not just see the bruised neck, we should see the desire of the perpetrator to assert control and dominance over the victim-survivor, as part of a wider pattern of abusive behaviour. Domestic abuse must be recognised as a 'continuum of violence', a harm that affects the victim-survivor far beyond the individual incident.[80] It is the wider pattern of conduct that should be the focus of a new domestic abuse offence, not individual incidents.[81] It is important that behaviours that may not always be criminal in isolation are recognised as part of a pattern of abuse and placed within the protective reach of the criminal law, especially given the continuous nature of the harm that is experienced by the victim-survivor.

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[78] Barlow et al (n 51).

[79] Charlotte Bishop, 'Domestic Violence: The Limitations of a Legal Response' in Sarah Hilder and Vanessa Bettinson (eds), Domestic Violence: Interdisciplinary Perspectives on Protection, Prevention and Intervention (Palgrave Macmillan 2016) 61.

[80] Kelly (n 62) 74.

[81] Alafair Burke, 'Domestic Violence as a Crime of Pattern and Intent' (2007) 75 George Washington Law Review 552.

However, this recent development can also be used to demonstrate that there are ways for the law to improve incrementally. The insertion of non-fatal strangulation into the SCA 2015 provides a strong foundation in criminal law for an offence highly relevant in cases of domestic abuse, providing victim-survivors with a better opportunity to access justice. It also contributes to the way domestic abuse is viewed, and goes some way in demonstrating that incidents involved in the course of domestic abuse are not acceptable. Arguments regarding the expressive power of the law are provided below.

2.3.2 The Expressive Power of the Law

A new domestic abuse offence could be argued to bring most significant benefits through the expressive power of the law. New offences can mean that that 'its expressive function will be to the fore'.[82] This argument suggests that a new offence could express complete condemnation of the conduct that makes up domestic abuse by society, with the message that it is unacceptable made explicit. The criminal law would be helping to state that domestic abuse is an unqualified wrong, bringing it out of the shadow of being a historically private issue. In challenging the behaviour, the law endeavours to shape it, along with hearing the voices of women and recognising their experiences. This lays a foundation for education that may serve the aim of protection through prevention, as well as empowering women, who are more likely to feel supported in their experience by both society and the criminal justice system.[83] Criminal law should go beyond merely reflecting social changes that have already occurred.[84]

However, debate surrounds this argument, as academics have differing views as to how much the law can truly shape society in its potential to change common norms. Hakan's

[82] McGlynn and Johnson (n 26) 106.

[83] McGlynn and Westmarland (n36) 179.

[84] Michael Buchhandler-Raphael, 'The failure of consent: re-conceptualising rape as sexual abuse of power' (2011) Michigan Journal of Gender & Law Vol 18, issue 1, 181.

'sticky norms problem' and his gentle nudges vs hard shoves thesis are helpful in recognising the potential limitations of the expressive power of the law.[85]

This thesis will interrogate the extent to which law can shape behaviour and norms. It will also argue that some laws should be supported because it is intrinsically valuable for society to make statements through the law, condemning the conduct involved in cases of domestic abuse.[86] Madden Dempsey places significant weight on the ability of the law to denounce patriarchal actions.[87] She argues that condemnation alone is a sufficient reason for a strong criminal law response to domestic abuse,[88] and that criminal law condemning domestic abuse holds a 'constitutive value', that being, that the state is exhibiting a good character trait – being a feminist.[89]

It should be noted that the expressive power of the law is inextricable from the transformative power of the law. Sunstein developed the idea of the expressivist view of law to argue that making a statement with the law can become most valuable when it is proven that it can change how society acts; he argues that 'a good expressivist is also a consequentialist'.[90] Bilz and Nadler acknowledge that legal regulation can increase or decrease activities directly, for example as a deterrent through fear of sanctions, or

[85] Hakan (n 63) 607.

[86] Cass R. Sunstein, 'On the Expressive Function of the Law' (1996) 144 *University of Pennsylvania Law Review* 2021, 2026.

[87] Michelle Madden Dempsey, 'Towards a Feminist State: What Does "Effective" Prosecution of Domestic Violence Mean?' (2007) *Modern Law Review* 908.

[88] Madden Dempsey 2009 (n 13) 214.

[89] Madden Dempsey, 'Towards a Feminist State: What Does "Effective" Prosecution of Domestic Violence Mean?' (2007) *Modern Law Review* 908 Quoted in J. Herring, *Domestic Abuse and Human Rights* (2020), 148.

[90] Sunstein (n 86) 2047.

indirectly through changing attitudes about regulated behaviours.[91] Citron argues that this *is* the value of the expressive power of the law, stating that law 'shapes attitudes, beliefs, and behaviour through its messages and lessons'.[92] This power goes even further than society internalising what is right and wrong, it also legitimises the harm to victim-survivors, allowing her to see herself as harmed.[93] This support is especially important when one considers how victims of domestic abuse are 'kept in a constant state of disempowerment', by identifying the harm of domestic abuse and creating a criminal offence aimed at addressing the wider course of domestic abuse, we move forward in allowing victim-survivors to recognise that they have been wronged, which may serve to empower women.[94]

Criminal law can offence 'show society what is not acceptable and demands that the experiences of women are taken seriously'.[95] Going further than this, Stark states that for victim-survivors 'When being in the law, calling the police or appearing before a judge […] becomes for them a moment of autonomy, in which their voice is not only heard but magnified and when their personal power […] is recognized as a political asset.'[96] The

[91] Kenworthey Bilz and Janice Nadler, 'Law, moral attitudes, and behavioural change' in E. Zamir and D. Teichman (eds*) The Oxford Handbook of Behavioural Economics and the Law* (Oxford University Press 2014).

[92] Danielle K. Citron, 'Sexual Privacy' (2019) Yale Law Journal, 128: 1874-1960, 1945.

[93] Danielle. K Citron, 'Law's Expressive Value in Combatting Cyber Gender Harassment' 108(3) (2009) Michigan Law Review, 407.

[94] Bishop (n 79) 60.

[95] Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch, 'Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence Through the Reform of Legal Categories' (2018) 18(2) Criminology and Criminal Justice 115, 124.

[96] Stark 2007 (n 22) 403.

legal system alone cannot end domestic abuse, but its 'role in providing remedies to victims and deterring abusers is central to the greater social struggle'.[97] As Finley explains:

> Law is a language of power, a particularly authoritative discourse. Law can pronounce definitively what something is or is not and how a situation or event is to be understood. The concepts, categories, and terms that law uses... has a particularly potent ability to shape popular and authoritative understandings of situations. Legal language does more than express thoughts. It reinforces certain world views and understandings of events.[98]

These powers need to be adequately harnessed for victim-survivors of domestic abuse, and a new, wider-ranging criminal offence of domestic abuse could be one way of doing this.

Despite the argument that the law can hold expressive power, the limitations of this should also be noted. It can also be argued that such limitations mean that domestic abuse is an issue best legislated by small changes, rather than an overhaul of the law. Hakan's ideas on sticky norms are helpful in highlighting the difficulties that a large change in the law can face, particularly in relation to offences like domestic abuse.[99] Hakan suggests that as the state tries to make new laws to eliminate problems, such as domestic abuse, those bodies enforcing the laws, such as authorities, judges and jurors act in such a way that they will fail to be fully enforced, and as a result, such reforms do nothing to reduce the incidence of these offences.[100] Therefore, Hakan advocates for the law in these areas to develop through 'gentle nudges' rather than 'hard shoves', as these nudges are more likely to embody the necessary reciprocity between society and changing law, in a way that makes law more

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[97] Cheryl Hanna, 'The Paradox of Progress: Translating Evan Stark's Coercive Control into Legal Doctrine for Abused Women' (2009) 15(12) Violence Against Women 1458, 1460.

[98] Lucinda Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 Notre Dame Law Review 886, 888.

[99] Hakan (n 63) 607.
[100] Ibid 608.

effective in changing norms.[101] This is a valuable idea that injects realism into how truly effective the expressive/ transformative power of the law can be, if it overreaches.

This thesis concludes that there is a balance to be struck when considering the merits and drawbacks of a 'more law' approach. It argues that the attempt to changes norms is based upon some reciprocity between societal norms and the law. It also argues, as is considered in detail in Chapter 3, that change in the law is limited by the system that law is situated in. Notwithstanding the limitations, it is maintained that there could be some value in adopting a new criminal domestic abuse offence.

The following sub-chapter will consider what a new domestic abuse offence could look like, and whether such legislative changes would bring more benefits than problems.

2.4 A New Domestic Abuse Offence

2.4.1 Introduction

This thesis has suggested that there are some strong arguments in favour of the creation of a new criminal law offence of domestic abuse, due to the failings of current piecemeal law, and the inability for single offences to encompass the true wrongs of domestic abuse, with it being recognised as a harmful course of conduct. This proposal quite closely mirrors the reasoning of the Scottish executive, when they introduced the proposal of the Domestic Abuse (Scotland) Bill in March 2017.

2.4.2 The Domestic Abuse (Scotland) Act: A Legislative Example to Follow?

The Bill proposed a specific offence of domestic abuse and was primarily aimed at recognising domestic abuse as course of conduct which encompassed an array of harms, and that the new criminal law would call this domestic abuse, rather than 'coercive control', as it was considered that the complexities of defining 'coercion' and 'control' were likely to

[101] Hakan (n 63) 609.

have a negative impact on being able to identify and distinguish behaviours from their impacts.[102]

The impetus for the Scotland Bill came in August 2013, when the legal case of Bill Walker MSP ignited public appetite for a new criminal offence of domestic abuse.[103] When Walker was tried in one of Scotland's specialist domestic abuse courts, his 28-year history of abuse against his three former partner's was revealed, and he was convicted of 24 separate charges, for which he was sentenced to 12 months in prison.[104] This case is an example of the failure of the law to capture the course of conduct and patterns of behaviour involved in the perpetration of domestic abuse. It should be noted that, at the time, a large proportion of this debate rested upon the perceived inability of Scottish law to recognise his coercive and controlling behaviour.[105]

In early 2015 the Scottish government began the process of issuing consultation papers on domestic abuse, and the 93% majority response was that a specific offence should be created to identify the particular distinctive 'wrong' of domestic abuse.[106]

The Domestic Abuse (Scotland) Act has since been described as the 'gold standard' in domestic abuse law internationally.[107] This thesis proposes that a new criminal law offence in England and Wales might look towards Scotland's construction of a criminal domestic abuse offence. New legislation in England and Wales would also benefit from hindsight, in that the flaws of the Scotland Act should begin to become visible in the coming years, allowing an even further developed offence to be adopted in England and Wales if necessary.

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[102] Burman et al, 'Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control' (2018) 73.

[103] BBC News, Bill Walker jailed for 12 months for domestic abuse, 20 September 2013 <Bill Walker jailed for 12 months for domestic abuse - BBC News>

[104] Burman et al (n 102) 72.

[105] Ibid.

[106] Scottish Government (2015a) *Equally Safe: Reforming the criminal law to address domestic abuse and sexual offences.* A Scottish Government Consultation Paper, March 2015 <http://www.gov.scot/Publications/2015/03/4845/0> (accessed December 2020).

[107] Marsha Scott, 'The Making of the New 'Gold Standard': The Domestic Abuse (Scotland) Act 2018' in Marilyn McMahon and Paul McGorrey (eds) *Crimianlising Coercive Control* (Springer 2020).

As this thesis has proposed until now, there are arguments that lend themselves to the introduction of a new criminal law offence to capture the course of conduct of domestic abuse, allowing it to be viewed through a more appropriate lens than through the prosecution of single piecemeal criminal offences. It has been argued that coercive control as an offence in England and Wales has issues, a fact recognised by Scotland in the passing of the Domestic Abuse (Scotland) Act.[108] It is accepted that the introduction of new law must be justifiable. But, as Buchhandler-Raphael argues, its creation should be pursued where the law fails to capture harm and injury, fails to capture criminal wrongdoing, fails to account for victim-survivors' narratives, and fails to account for conflicting considerations.[109]

In summary, the Domestic Abuse (Scotland) Act 2018 requires a 'course of behaviour' (section 1(1)(a). This focuses the offence on the course of conduct, rather than individual incidents. Examples of abusive behaviour include violent, threatening, or intimidating behaviour, but also behaviour that has *a purpose* of:

"(a) making B dependent on, or subordinate to, A,

(b) isolating B from friends, relatives or other sources of support,

(c) controlling, regulating or monitoring B's day-to-day activities,

(d) depriving B of, or restricting B's, freedom of action,

(e) frightening, humiliating, degrading or punishing B"[110]

Additionally, for an offence of domestic abuse to have been committed, two other conditions must be met: the behaviour needs to be such that a reasonable person would consider it likely to cause the victim physical or psychological harm; and that the accused either intended to cause the victim physical or psychological harm, or else has been reckless as to the causing of such harm. Hence, the focus is on the behaviour of the alleged perpetrator rather than the victim's reaction or the

[108] Scottish Government (n 106).
[109] Buchhandler-Raphael (n 84) 184-191.

[110] Domestic Abuse (Scotland) Act 2018, section 2(3).

evidencing of actual harm to them.[111] Section 4 of the Act explicitly states this, reading that the commission of an offence does not depend on the course of behaviour actually causing a victim-survivor to suffer the harms mentioned.[112] The offence also addressed aggravation in relation to a child.[113]

Section 6 of the Scotland Act provides an ostensibly straightforward defence to domestic abuse, which is defence on the grounds of reasonableness. The burden falls on the accused raising the defence to show that the course of behaviour was reasonable in the particular circumstances. This is arguably a positive development regarding defences and domestic abuse, as it does not carry forward the gendered failing carried through defences that exist in England and Wales (in relation to homicide).[114] It also provides a way in which the law may not fall into the trap of bouncing back on victim-survivors and seeing them dragged into the criminal justice system.[115] However, it is noted that the flexibility of the reasonableness test comes with dangers as well as benefits, as any application of this defence could be impeded by Hakan's 'sticky norms' thesis, discussed above, in that jurors may not enforce the law to the extent this well-intention legislation hopes.[116]

It is proposed that if a new offence of domestic abuse were the best way for England and Wales to develop their criminal law in this area, they might consider looking to the construction of the Domestic Abuse (Scotland) Act, when assessing what a better criminal law offence might look like.

2.4.3 Concerns Surrounding a New Offence

It has been argued that England and Wales could benefit from a new, improved criminal offence of domestic abuse. However, such significant benefits do not often come without limitations or unforeseen consequences when considering radical changes to the law. As this thesis has noted, complex social issues seldom have simple solutions.

[111] Burman et al (n 102).
[112] The risk of setting the bar of criminalisation too low is discussed below.
[113] Domestic Abuse (Scotland) Act 2018, section 5.
[114] Loss of Control, Diminished Responsibility (Coroners and Justice Act 2009).
[115] This will be further discussed in Chapter 3.
[116] Hakan (n 63).

One difficulty of a new, more encompassing domestic abuse offence is that domestic abuse is such a varied and context specific wrong. New, flexible legislation may be able to capture these wider circumstances, but often result in the use of vague language in legislation, which can cause issues with enforcement, as considered above in relation to Hakan's sticky norms. Domestic abuse is a wrong that could benefit from clarity in its wording in order to best utilise the expressive power of the law, but practically, an offence may require wording that allows it to be flexible enough to thrive in a contextually sensitive area.

In considering the Scotland Act, Burman et all also point out that, whilst the new offence has scope to make a positive contribution, it must be accompanied by public awareness campaigns and other changes, such as judicial training.[117] Burman et al also suggest that a new offence could risk setting the bar of criminalisation too low, which risks increasing pressure on police and court resources, and cost.[118] This thesis respectfully argues that these things alone should not dissuade legislation, but that they are a valid concern when paired with the assessment of how effective a new law can truly be.

Further, Burman and Brooks have argued that the criminal law should be able to distinguish between different forms of domestic abuse.[119] This is an understandable argument, as a new, all-encompassing offence of domestic abuse would stand to incorporate a wide range of behaviours, that, when taken individually, may differ in seriousness. However, this misses the opportunity to reconceptualise domestic abuse in a truly transformative way, as it perpetuates the idea that they are different single incidents, rather than recognising the abuse as an enduring course of conduct that encompasses several different harms. If we hope to undo the 'hierarchy of harm' currently present in the understanding of domestic abuse, whereby physical violence 'still dominates in the assessment of both the existence and severity of domestic violence',[120] then differentiating types of domestic abuse through

[117] Burman et al (n 102) 76
[118] Ibid 77.
[119] Burman and Brooks-Hay (n 57) 71.

[120] Bishop (n 79) 60.

labels becomes unhelpful. Instead, the varying degrees of harm suffered may be accounted for in sentencing.

The criminal law approach to domestic abuse is not infallible. Even if the substantive criminal law relating to domestic abuse were improved, it must be recognised that the criminal law approach to domestic abuse contains tensions and limitations, particularly in its practical application. The key arguments that advocate an anti-carceral approach to domestic abuse will be noted here, as it must be recognised that many of these arguments hold significant weight, and thus the criminal law approach alone cannot be myopically pursued. Nevertheless, this thesis argues that the criminal law is an important part of a wider approach to domestic abuse.

It can be argued that the criminal justice system itself is inherently incompatible with the sensitivity of cases of domestic abuse. The criminal justice system can demand that victim-survivors become involved in lengthy legal proceedings, difficult cross-examinations, and many other stresses that come with involvement in the inherently adversarial criminal justice system.[121] The difficult realities involved with the use of the criminal law when applied in the context of cases of domestic abuse exposes some significant issues to the criminal law approach to domestic abuse, giving rise to anti-carceral arguments in this context.

A similar issue arises when one considers the potential incompatibility of the criminal law approach with the complex relationship dynamics involved in cases of domestic abuse, resulting in high attrition rates in cases of domestic abuse, whereby support for prosecution is often withdrawn by victim-survivors.[122] The criminal justice approach is also shown to be particularly ineffective when it goes against the woman's own wishes.[123] Although these are valid concerns, the criminal law approach, in line with the use of pro-prosecution policies, serves to abate these issues, as, in theory, the State is responsible for the

[121] The flaws within the criminal justice system are specifically addressed in Chapter 3 of this thesis.
[122] Bettinson and Bishop (n 12) 179-80.

[123] Hoyle and Sanders (n 71) 19.

prosecution of the public wrong of domestic abuse. It is accepted that the practical realities of these circumstances are far more complex. However, it is submitted that these concerns alone do not serve to completely undermine the value of the criminal law approach to domestic abuse, rather, highlight issues that are of importance when making assessments relating to responses to cases of domestic abuse.

Further, the creation of a new domestic abuse offence could be argued to be a mere duplication of the law for achieving the political aim of being seen by the public to be doing something about domestic abuse. However, even if the creation of the law's initial impetus is political, it provides a genuine opportunity to improve the legal landscape. Where appropriate, 'more law' goes further than advancing a political agenda: it addresses concerning gaps in the law, as discussed at length above.

Another key anti-carceral argument is that the criminal justice system chronically fails women, particularly minoritised women. These concerns are dealt with in detail in Chapter 3. Nevertheless, this argument is an important one in addressing concerns overuse of the criminal law, most significantly in relation to minoritised women. Richie explains that a 'crime-centred approach can be harmful to those already harmed by state intervention'.[124] Other academics take this approach further, expressing that the law will always continue to exclude and oppress marginalised groups, meaning that it can never be part of an ideal solution.[125] These concerns are recognised, and it is accepted that it is imperative that intersectionality be placed at the forefront of debates surrounding criminal law responses to domestic abuse.

[124] Beth Richie, 'Who Benefits and Who Loses in the Criminalization of IPV: Considering the Logic of Punishment and Impact of Legal Intervention as a Tertiary Prevention Strategy' (Paper presented at National Science Foundation/National Institute of Justice Workshop: A Workshop on Developing Effective Primary, Secondary and Tertiary Interventions, Arlington, Virginia, 14–16th May 2014) 42.

[125] Ejeris Dixon and Leah Piepzna-Samarasinha, *Beyond Survival: Strategies and Stories from the Transformative Justice Movement* (AK Press 2020).

Finally, it is a concern that the criminal law approach to domestic abuse can redirect attention from other equally valuable forms of support. Goodmark argues that the disproportionate focus being placed on criminal justice in the US has 'displaced serious policy attention to and funding from these other dimensions of the problem',[126] such as housing, culture, education, and economic considerations. It is suggested that the use of quick-fix criminal law absolves the state of further responsibilities relating to the issue.[127] This concern holds significance, and it should be noted that it is imperative that policy attention must continue to be directed towards helping to tackle domestic abuse through other methods than through only the criminal law, hence why this thesis places emphasis on the importance of the criminal law as a part of a holistic solution.

Perhaps the most dangerous threat that emerges through the introduction of a new offence of domestic abuse is the fixation upon the criminal law as a panacea for such a complex social issue. Some argue that the introduction of new criminal laws can encourage a myopic pursuit of the criminal justice system as a solution, having the impact of the state feeling absolved of further urgent responsibility regarding the issue, leading to the neglect of other forms of assistance for victim-survivors.[128] Miller and Meloy comment that an over-reliance on the criminal justice system to protect women fails in part because it endorses:

> […] movement away from a critique of underlying social, legal, and political structures that underpin male privilege and use of violence and toward a more individual focus on the pathologies of offenders and victims, and the intricacies related to practitioners' styles, practices, and specific procedures.[129]

The criminal law cannot be seen as a relatively cheap and quick fix at the expense of other support. Goodmark argues that in the USA this concern has been realised, stating that the

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[126] Leigh Goodmark, *Decriminalizing Domestic Violence* (University of California Press 2018) 4.

[127] ibid.

[128] Goodmark (n 126) 69.

[129] Susan Miller and Michelle Meloy, 'Women's Use of Force: Voices of Women Arrested for Domestic Violence' (2006) 12(1) Violence Against Women 89, 108.

focus on the criminal justice system has 'displaced serious policy attention to and funding from these other dimensions of the problem'.[130]

Additionally, heavy reliance on the criminal justice system is most harmful to marginalised communities as they are the least likely to want to engage with the criminal justice system.[131] Intersectionality is an incredibly important issue in relation to domestic abuse. While Kennedy points out that all women can suffer from domestic abuse, regardless of ethnicity, social background, disability and sexuality,[132] domestic abuse impacts these groups in varying ways, and to varying degrees, with more marginalised communities often feeling the harshest effects of domestic abuse.[133] In the same way that this thesis argued that nuance was required to recognise the impact upon women specifically, it is salient that this recognition is intersectional in terms of race. There is danger in the assumption that all women face a similar risk of gendered violence, and therefore require the same responses in practice and policy terms.[134]

If fixation on the criminal law as the catchall solution to domestic abuse emerges, other elements of the solution such as housing, economic support, restorative justice, community work, human rights, education, and change of culture all risk suffering from reduced resources and attention. This argument does not suggest that developing criminal law through a new offence has no part in helping the lives of victim-survivors, but it does argue that it must be seen as one aspect of a more multifaceted solution.

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[130] Goodmark (n 126) 5.

[131] ibid 21.

[132] Kennedy (n 58) 100.

[133] Goodmark (n 126) 21.

[134] Aviah Sarah Day and Aisha Gill, 'Applying Intersectionality to Partnerships Between Women's Organizations and the Criminal Justice System in Relation to Domestic Violence' (2018) 60(4) British Journal of Criminology 830, 846.

Recognising all of these anti-carceral arguments is important in the development of good policy and practice in relation to domestic abuse. Nevertheless, this thesis maintains that there is value in taking a criminal law approach to domestic abuse, when it is situated as part of a multi-faceted holistic solution.

There has been a historic failure of the law to act promptly in relation to both women's experiences and the 'domestic' sphere.[135] The criminal law seems slow to act when it is needed to promote the interests of women and marginalised communities, while it is often much quicker to respond to protect the interests of state institutions and white men. The criminal law has chronically failed to account properly for the experiences of women.[136] Therefore, there is a need to reshape law and policy to reflect these experiences, addressing some of the wrongs these things themselves helped to create.

In this development of law and policy to reflect the everyday experiences of women, recognition of the harms suffered by victim-survivors follows. Recognition in this context means that understanding is conveyed of the harm the victim-suffer experienced and 'entails an expectation or entitlement to consideration, to redress'.[137]

Despite these anti-carceral critiques, and the inadequacies in the law, it is for these reasons, along with many others that will be addressed throughout this thesis, that the law, and the criminal law in particular, should be viewed as a valuable tool in combatting domestic abuse, and improved so that it can be used as such.

2.5 Conclusion

The limitations of introducing a new law to solve such an issue should not be ignored. But is has been argued that limitations or flaws in new law can be mitigated to an extent that it is still worth considering newer forms of legislation, if these best suits the offence itself.

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[135] *R v R* [1991] UKHL 12; *R v Brown* [1993] UKHL 19.

[136] McGlynn and Johnson (n 26) 69.

[137] McGlynn and Johnson (n 26) 68.

Ultimately, in agreement with Burman et al, 'Whatever laws we have will be only as effective as those who enforce, prosecute and apply them. Improving these practices through education, training and embedding best practice and domestic abuse expertise is likely to be more effective than the creation of new offences alone'.[138] This concept is further developed in Chapters 3 and 5.

[138] Burman et al (n 102) 78.

Chapter 3. Domestic Abuse and the Criminal Justice System

3.1 Introduction

This thesis has argued that there is a place for updated criminal law through a new offence of domestic abuse to provide an overhaul of outdated laws and understanding, harmonising these elements with a more modern academic understanding of domestic abuse. However, this change would be situated against the backdrop of the criminal justice system, which, ultimately, is failing victim-survivors of domestic abuse.

This thesis will argue that the procedural and structural inadequacies of the criminal justice system in cases of domestic abuse precludes any practical improvement through the law for victim-survivors. A blended approach (of both substantive law and systemic/ procedural change) to reform must be taken for victim-survivors to be supported by the criminal law in cases of domestic abuse, rather than falling into the lacuna that exists between abstract legal criticism and the lived experience of the criminal justice system.

This chapter will highlight some of the ways that the criminal justice system is failing victim-survivors. While Chapter 2 considered this from a more general perspective, a feminist lens is applied in this chapter with the aim of highlighting more precisely how gender impacts the application of domestic abuse law in the criminal justice system. The justice system, and the way in which the courts treat victim-survivors, is impeding the law's ability to make change.[169] Firstly, this chapter will address poor prosecution rates for crimes that primarily impact women, also considering retraction of support for prosecution by victim-survivors and underreporting. Following this, fundamental failures relating to evidence will be addressed, with it being argued that opportunities are frequently missed in gathering evidence for cases of domestic abuse and that giving evidence in an adversarial court system is distressful for victim-survivors, often leading to a response impacted by

[169] Ventura (n 37).

trauma. The thesis will then consider other potential procedural issues. Next, it will consider how disproportionately impacted vulnerable or marginalized communities who suffer from domestic abuse are most harmed by failures in the criminal justice system, paying particular attention to children, those with learning difficulties, racialised people,[170] and the LGBT+ community.

Attitudes to women in court will also be explored, highlighting the damage that gender myths and assumptions cause in cases of domestic abuse. The requirement of being viewed as the 'ideal' victim throughout each of the stages of the criminal justice system is then interrogated, concluding that there can seldom be someone described as 'ideal'. Finally, the chronic under-funding of the criminal justice system will be explored as a further reason why victim-survivors are being failed.

Too often the criminal justice system is seen as a panacea for social issues, when the opposite may be closer to the truth, especially when the problem is most centrally concerning the experiences of women. Goodmark is highly critical of the criminal justice system's power in relation to cases of domestic abuse, describing it as 'ineffective, (and) focuses disproportionately on people of color and low-income people, ignores the larger structural issues that drive intimate partner violence, robs people subjected to abuse of autonomy, and fails to meet the pressing economic and social needs of people subjected to abuse'.[171] Similarly, Bows in her research on elder abuse writes 'it is not a lack of relevant substantive law (which in fact already exists) which is causing the low prosecutions and conviction rates for violence and abuse against older people, but rather, broader criminal justice procedures and policies and evidential difficulties.'[172] A similar approach can be

[170] Alex Mistlin, 'So the term BAME has had its day. But what should replace it?' (The Guardian, 8th April 2021); https://www.theguardian.com/commentisfree/2021/apr/08/bame-britain-ethnic-minorities-acronym; https://www.gov.uk/government/publications/the-report-of-the-commission-on-race-and-ethnic-disparities/summary-of-recommendations; https://www.britishfuture.org/beyond-bame-what-does-the-public-think/.

[171] Goodmark (n 126) 5.

[172] Hannah Bows, 'Violence and Abuse of Older People' (2020) 10 Criminal Law Review 882, 886.

taken in reviewing how the criminal justice system deals with cases of domestic abuse. By focusing on criminal justice as a solution, we fail to recognise the fundamental flaws deeply engrained in that system, and how they can undermine any potential progress that could be achieved by positive steps taken by the criminal law. Legislative reform alone cannot lead to improvements, as whatever laws we have will only be as effective as those who enforce, prosecute, and apply them.[173]

'Put simply, the law does not exist in a vacuum. Laws require interpretation and implementation.'[174] Positive change in criminal law can only go so far in compelling change and improvement in the lives of victim-survivors. The law must be understood and implemented, yet the current state of our criminal justice system does not seem at all capable of building the foundation from which we can help victim-survivors of domestic abuse. At its most basic level, 'the needs of women and girls are not given enough consideration in the criminal justice system'.[175] Gender-neutral policies have been seen to be by default policies that fit the needs of men, and the needs of women have become invisible. Just 5% of the prison population are female, yet 60% of the women in prison are victims of domestic abuse.[176] It is evident that, at the very least, there are some key components of the criminal justice system that are failing women, and particularly failing victim-survivors of domestic abuse.

3.2 Prosecuting Domestic Abuse

[173] Burman and Brooks-Hay (n 57) 14.

[174] Charlotte Barlow, Kelly Johnson, Sandra Walklate and Les Humphreys, 'Putting Coercive Control into Practice: Problems and Possibilities' (2020) 60(1) British Journal of Criminology 160, 161.

[175] Clare Wade, 'International Women's Day: Ending Injustice for Girls and Young Women in the Criminal Justice System' (Garden Court, Online, 10th March 2021).

[176] ibid.

Prosecution rates for crimes that primarily affect women are notoriously underwhelming.[177] More than 1/20 women have experienced rape or attempted rape since the age of 16, 44% were victimised by their partner or ex-partner, fewer than 1/6 reported the assault, and the number of convictions there is for rape is abysmal.[178] Alternative studies project that these already concerning statistics largely underestimate the prevalence of violence against women.[179] Reasons for this are complex, deep-rooted and expansive, but some include fear from the victim-survivor they will not be believed, fear of the perpetrator, and lack of belief that anything would be done about the crime - the same issues that are known to affect cases of domestic abuse. Recently statistics emerged that around 50% of women and around 40% of men had little or no faith in the CPS.[180] This may be due to cases like that of Shana Grice, who asked the police 5 times to do something about her stalker and was fined in response before she was killed by her ex-boyfriend.[181]

The first reason for poor statistics relating to cases of domestic abuse may be that domestic abuse is a difficult crime to prosecute. The CPS cites reasons why prosecution is difficult, 'love, shame, guilt, isolation, fear of the process and languages barriers to name just a

[177] Office for National Statistics, 'Nature of sexual assault by rape or penetration, England and Wales: year ending March 2020' (ONS, 18th March 2021) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/natureofsexualassaultbyrapeorpenetrationenglandandwales/yearendingmarch2020> accessed 24th March 2021; Office for National Statistics (n 19).

[178] Office for National Statistics (n 177).

[179] Jessica Taylor and Jaimi Shrive, '"I thought it was just a part of life": Understanding the scale of violence committed against women in the UK since birth' (Victim Focus, 2021) 8 <https://irp.cdn-website.com/f9ec73a4/files/uploaded/Key-Facts-Document-VAWG-VictimFocus-2021a.pdf> accessed September 5th 2021, 5.

[180] Kate Devlin, 'Half of women have little or no faith in CPS to prosecute crimes against them, poll finds' (The Independent, 21st March 2021).

[181] Lorraine King, 'Teenager was fined for reporting her stalker to police five times before he murdered her' (The Mirror, 23rd March 2021).

few.'[182] Whilst these are relevant feelings and tensions existing within victim-survivors, these factors point to just that – victim-survivors. The CPS in writing this list appear to take an uncomfortable approach whereby the victim-survivors are what make 'prosecution difficult'.[183] Low rates of prosecution in cases of domestic abuse have been attributed by some to the failure of the two limbs of the CPS charging tests where victims withdraw support, due to lack of evidence without them or lack of perceived seriousness when this occurs.[184]

Victim-survivors withdrawing their support for prosecution is an issue that must be addressed, as evidence that can be provided by victim-survivors can heavily strengthen the case of the CPS in prosecuting alleged perpetrators. However, victim-survivor testimony cannot be the benchmark of what makes a case of domestic abuse strong enough to prosecute. This has been acknowledged by the development of a pro-prosecution policy in England and Wales, where prosecution should continue 'but for' the removal of support for prosecution from the victim-survivor.[185] This is a necessary protection, as Madden Dempsey highlights that in her role as prosecuting attorney of domestic abuse cases in the US at any given time, up to 85% of the named victims in her caseload requested dismissal of charges against their alleged perpetrators.[186]

3.2.1 Victim Attrition

Bishop and Bettinson make the statement that 'Historically, prosecutions for crimes occurring within the context of domestic violence and/or abuse have been hampered by

[182] Brown (n 10).

[183] ibid.

[184] Herring (n 7) 145.

[185] ibid.

[186] Madden Dempsey 2009 (n 13) 4.

several factors including police responses to these offences and the high level of retraction by victim-survivors themselves.'[187] Victim-survivors often have several reasons for not wanting to testify against their perpetrators: fear of harm to themselves or others by the perpetrator, not wanting to be revictimised in court, emotional connection to the perpetrator, and fear of societal/ cultural repercussions, amongst other factors.[188] These are, unfortunately, not irrational fears for victim-survivors to harbour, and they should be respected when allowing victim-survivors to withdraw support for a case (this is not to say that prosecution should not continue without their in-person provision of evidence).

3.2.2 Retaliation

Some victim-survivors fear retaliation by alleged perpetrators for playing a part in their prosecution, which could result in harm to themselves or others. Research suggests that long-term, violence may worsen when victim-survivors are forced (against their will) to testify against their alleged perpetrators, despite short-term gains.[189] This unspoken threat of harm will have often already been internalised by victim-survivors of domestic abuse, meaning that this fear cannot be alleviated by lack of contact with the alleged perpetrator on arrest (although this should, of course, continue to be standard practice).

3.2.3 Revictimisation

Fear of revictimisation may be another reason that victim-survivors may not want to engage with the criminal justice system, as the adversarial nature of our criminal justice system often requires them to give evidence in front of their abuser or in open court. Here, the

[187] Bettinson and Bishop (n 12) 184.

[188] Barlow, Johnson, Walklate and Humphreys (n 174) 164; Walklate, Fitz-Gibbon and McCulloch (n 95) 121.

[189] Walklate (n 32) 41.

victim-survivor is required to 'go through the trauma of engaging with police, giving evidence against the perpetrator and to navigate complex litigation, often taking significant time and requiring legal advice and support which is regularly unavailable and unaffordable'.[190] For some victim-survivors, this heavy emotional, social, temporal, and financial cost does not feel worth the hope that their perpetrator may be convicted, which is by no means a certain prospect even if the victim-survivor engages with all these necessary stages. Further, in giving evidence, victim-survivors may be painted to have invited the abuse, or accused of being a bad parent or partner, instilling the fear in victim-survivors that they may lose their children.[191]

3.2.4 Connection to the Perpetrator

For some women, 'Love still matters.'[192] Some victim-survivors may not want to engage with the criminal justice system due to them not wanting the perpetrator of the abuse to get into any serious trouble with the criminal justice system. This may often be the case where victim-survivors have internalised some of their abuse and feel as though they have a part of the blame, or where the relationship between the victim-survivor and the perpetrator is ongoing.[193] In the case of women whose perpetrators are migrant men, they may also fear that reporting their perpetrator could lead to deportation if they entered the country illegally

[190] Heather Douglas, 'Legal systems abuse and coercive control' (2018) Criminology and Criminal Justice 18(1) 85.

[191] Silke Meyer, 'Seeking Help for Intimate Partner Violence: Victims' Experiences When Approaching the Criminal Justice System for IPV-related Support and Protection in an Australian jurisdiction' (2011) 6(4) Feminist Criminology 268, 269.

[192] Tamara Kuennen, 'Love matters' (2014) 56(4) Arizona Law Review 977, 1001.

[193] Herring (n 7).

or are living on expired visas.[194] Along with personal emotional connections, the perpetrator can be intertwined with the life of the victim-survivor in several ways, for example as a parental figure for children, or as financial support. Victim-survivors may be unwilling to aid the incarceration of the alleged perpetrator due to personal losses that themselves and their families could undergo.

3.2.5 Cultural and Societal Repercussions

Some victim-survivors may also suffer the fear of being shunned by their family or by society.[195] This is a particularly prevalent fear for migrant women, some of whom have expressed that it is against some cultural norms to engage the criminal justice system in issues regarding the family.[196] In supporting prosecution, the potential wider repercussions for victim-survivors may sway them away from giving personal evidence.

These reasons begin to explain the multitude of barriers that victim-survivors must overcome if they wish to play an active role in the prosecution of their perpetrators. Victim-survivor attrition is a serious issue which must be tackled through changes in procedure and culture of the criminal justice system, particularly relating to the collection and presentation of evidence. A discussion of evidence and other procedural issues that could be tackled to reduce victim-survivor attrition in cases of domestic abuse follows.

3.3 Evidence and Other Procedural Issues

[194] D. Wilson, 'Colonisation, Race and Coercive Control' (Criminalizing Coercive Control Webinar, de Montford University, 30–31 July 2020)

[195] ibid.

[196] ibid.

The criminal justice system, at present, holds a plethora of problems and tensions for victim-survivors, particularly relating to crimes primarily impacting women. Issues highlighted here are the collection of evidence, lack of appropriate support for victim-survivors going through the criminal justice system, the adversarial nature of the criminal justice system, and judicial training in cases of domestic abuse.

3.3.1 Collecting Evidence

In cases of domestic abuse, especially where victim attrition is so common, the collection and presentation of evidence is highly important, as without positive practice and procedure here cases can often rely on the victim-survivor giving evidence in court. Even where attrition does not occur, victim-survivors can sometimes struggle to identify that they have been victims of domestic abuse until there is positive space between themselves and the incident. In cases relating to non-physical abuse, cases risk becoming perceived as 'one word against the other',[197] with the word of the victim-survivors being heavily impacted by the nature of the abuse.

Better police practice in relation to gathering evidence is also crucial when one considers that even when victim-survivors do wish to give evidence in their cases, they can experience what psychologists have labelled 'lack of effect'.[198] This is where the victim-survivor can come across as uncaring and unemotional, causing the jury not to believe their account, when this is proven to be a trauma response to giving evidence in cases of severe abuse. Tolmie has suggested that victim-survivors are misunderstood throughout their cases.[199] Not only does adequate support need to be provided to victim-survivors in dealing with this trauma, juries, magistrates and judges must all be educated about this potential

[197] Barlow et al 2020 (n 174) 170.

[198] Kennedy (n 58) 100.

[199] Tolmie (n 67) 50.

trauma response, so that this does not create a false impression of the victim-survivor as appearing uninvolved in the proceedings. If evidential opportunities were not missed prior to giving evidence in court, and the distressing adversarial nature of the criminal justice system abated, and unreasonably high standard of proof abandoned – this education about trauma response would not be the key pillar that could be relied upon in evidence. But the criminal justice system has found itself creating a perfect storm of failings that act as incrementally harmful to victim-survivors of domestic abuse. If there is no change with these stages, although the change in the criminal law may create an increase in prosecutions of domestic abuse, it may not see the same rise in convictions.

Sufficient police or CPS training in relation to evidence collection in cases of domestic abuse is therefore crucial. Barlow et al note that at present 'Officers miss evidential opportunities by, for example, not fully investigating coercive control disclosed witness statements, failing to seek third party witness statements, or not making use of the body camera footage they may have recorded.'[200] The police must employ a more consistent and reliable use of body cameras in all cases that have red flags regarding abusive relationships, as it is these incidents that are being misconstrued as 'small' which will add up to create the course of conduct that becomes criminal. As domestic abuse is currently seen as a crime that occurs behind closed doors, evidence is often coming down to one word against another, and any opportunities being missed by police to gather other tangible evidence is a huge failure of the criminal justice system. Similarly, in cases of alleged abuse statements need to be taken from not only the victim-survivor, but also any neighbours, friends, or family that may be able to give evidence in the case.[201]

By failing to prosecute domestic abuse cases more than other crimes, the message to victim-survivors, and society, that domestic abuse is a 'lesser' crime and a public cost that we must pay, is not acceptable.

[200] Barlow, Walklate, Johnson (n 51).

[201] Barlow et al 2020 (n 174) 170.

Another issue relating to evidence in the criminal justice system is the rather uncomfortable evidence disclosure checklist in cases of domestic abuse: social media, internet, fake profiles, emails, phone records, police recordings, medical records, bank statements.[202] A difficult tension arises when looking to gather evidence without the support of the victim-survivor giving their own evidence in court, however, the deeply personal and intrusive nature of this list does provide reason as to why victim-survivors may try to stay away from the criminal justice system entirely.

It may also be noted that intersecting systems could help in relation to evidence. GP's can flag up cases of domestic abuse, and these medical records may be used as evidence in cases where victim-survivors do not wish to give evidence. However, we must make sure that medical practice develops with a feminist understanding the same way we are looking towards the criminal justice to, we cannot rely on medical practice, criticized for using the male norm in a much similar way to the criminal justice system, to pick up slack from the criminal justice system. A study of medical schools displayed that 75% of respondents felt that the teaching provided at their institutions was inadequate.[203] In medical practice, healthcare providers felt that a lack of resources, lack of consultation time, misconceptions and misunderstandings around domestic abuse, and lack of effective referral pathways or support were barriers to the provision of quality care in relation to what could be done in cases of domestic abuse.[204] Nevertheless, improved training and greater communication between the two systems could prove invaluable.

[202] Hannah Couchman, 'Towards Ending Domestic Abuse' (RebLaw, Online, 16th November 2020).

[203] Lucy Potter and Gene Feder, 'Domestic Violence Teaching in UK Medical Schools: a cross-section study' (2018) 15 The Clinical Teacher 382, 384.

[204] Mary McCauley et al, '"Keeping family matters behind closed doors": healthcare providers' perceptions and experiences of identifying and managing domestic violence during and after pregnancy' (2017) 17 BMC Pregnancy Childbirth, 318.

3.3.2 Presenting Evidence

Victim-survivors may be unwilling to engage in the criminal justice system due to the need to give evidence in the context of an intrusive adversarial court system. This system is 'inherently unsuitable' for victim-survivors of domestic abuse and 'creates a number of dilemmas for those experiencing domestic abuse as well as those whose job it is to deal with this high-volume crime.'[205]

The adversarial nature of the court also stands to perpetuate some harmful gender stereotypes and the revictimisation of the victim-survivor. One barrister stated that 'the "go to" defence is fabrication and exaggeration', and another that 'I make my best efforts not to repeat gender stereotypes in the courtroom, but it is the arguments that my clients often ask me to put forward as their main defence'. [206] This steers the court towards an attitude of victim-blaming from the outset, making the presentation of evidence for victim-survivors an even more highly emotional and difficult task to accomplish.

Reliance being placed on victim-survivor testimony in such a context can often result in a trauma response being elicited from the victim-survivor, making them appear either 'over emotional' or 'entirely closed'.[207]Adequate support and therapy must be provided to victim-survivors throughout their journey through the criminal justice system to allow them the best opportunity at redress through the criminal justice system. In terms of the criminal justice system itself, some recent improvements in practice have been implemented by the Domestic Abuse Act, which makes changes in relation to special measures in relation to victim-survivors of domestic abuse. These are discussed in more detail in Chapter 4, but it must be noted that these measures are both welcome, and overdue.

[205] Robinson and Walklate (n 3).

[206] Couchman (n 202).

[207] M. Tagg, 'Psychological impact on those who experience domestic abuse' in H. Hughes (ed) *Domestic Abuse and Scots Law* (W Green 2011) 158–180.

3.4 Lack of Trust in the Criminal Justice System

It has been argued that significant changes regarding procedure and evidence is needed to support victim-survivors of domestic abuse through the criminal justice system. Another significant issue when prosecuting cases of domestic abuse is lack of reporting.[208] This means that the criminal justice system falls at the first hurdle; it is simply not trusted enough by victim-survivors to be used. Lack of reporting can be for a wide number of reasons, but the fear of nothing being done and revictimisation through the adversarial nature of the court system, are fundamental flaws pertaining to the criminal justice system itself, which must be addressed.

A significant body of research indicates the reticence of victim-survivors in engaging with the criminal justice system. The distrust of the criminal justice system and doubt that anything will be done and the fear of revictimisation in the context of the adversarial court system is causing under-reporting of domestic abuse.[209] Richie has suggested that often in cases of domestic abuse a circuitous pattern of disempowerment results from the first time victim-survivors are hurt by the criminal justice system, stating:

> First, 1) women are hurt by IPV, [intimate partner violence] 2) they aren't helped when they attempt to get relief from the criminal legal system, 3) so they are hurt more, 4) then they avoid turning to the system that has not helped them, and 5) since they don't engage with what has become the expected trajectory to safety they are understood to be non-victims.[210]

[208] Taylor and Shrive (n 179) 5.

[209] Walklate, Fitz-Gibbon and McCulloch (n 95) 121.

[210] Richie (n 124).

As Goodmark points out, if those subjected to abuse are harmed rather than helped when turning to the criminal legal system, that system is not working.[211] As victim-survivors experience this failing of the criminal justice system first-hand, it does not seem surprising that they do not trust the criminal justice system to help them, and do not report their perpetrators.

Tolmie argues that the nature of domestic abuse and controlling behaviour means that victim-survivors are misunderstood and disbelieved at every stage of the criminal justice process, stating that:

> The totality and meaning of the perpetrator's behaviour, the continuing risk he poses and the weight of harm experienced by the victim are all potentially misunderstood and minimized at every stage of the criminal justice process – investigation, charging, trial and sentencing.[212]

This can only be described as an abject failure of the criminal justice system in supporting victim-survivors of domestic abuse, and a significant barrier to redress through the criminal justice system.

There is work for the criminal justice to do here in instilling a sense of confidence in the public, particularly women, in trusting that something will be done about their abuse and their voice will be heard and listened to throughout criminal justice proceedings. The perception of the justice system needs to develop reciprocally with the practical procedural issues that are pervasive throughout the criminal justice system. Much of this relates to attitudes towards women and harmful gender myths.

3.5 Women and the Criminal Justice System

[211] Goodmark (n 126) 5.

[212] Tolmie (n 67) 50.

It has been established that domestic abuse is a crime that disproportionately impacts women, and thus a feminist perspective is not only helpful to apply to cases of domestic abuse, but necessary. Ultimately, we live within a legal culture 'authored by men'.[213] This does not only apply substantively, but in the culture that runs through the criminal justice system, pooling in the courtroom.

Kennedy argues that all women in court must strive to be believed in a way their male counterparts do not: 'Wherever they stand in the courtroom, women have to fight harder to gain the same authority and credibility as their male counterparts.'[214] For victim-survivors of domestic abuse patriarchal attitudes and gender myths that seep insidiously through society can impact how they are perceived, and whether they are believed, in a courtroom. For example, myths such as that they are exaggerating, or that they somehow invited their abuse.[215]

The legal system is not immune to misogyny, prejudice and bias, instead, it can serve to foster the inequalities and gendered societal expectations that enable the commission of domestic abuse in the first instance.[216] Kennedy speaks about the significance that myths about gender can have in the legal system, stating 'Myths are tent pegs which secure the status quo. In the law, mythology operates almost as powerfully as legal precedent in inhibiting change.'[217] The cultural flaws that are rooted deep in the foundations of our society are failing women in the legal system. Myths about victim-survivors 'inviting beatings because of nagging, because they pushed their man to the edge or because they were masochists' are prevalent.[218] This shifts the responsibility away from the perpetrator

[213] Matthew Ritter, 'The Penile Code: The Gendered Nature of the Language of Law' (1998) 2(1) City University of New York Law Review 1, 15.

[214] Kennedy (n 58) 39.

[215] Couchman (n 210).

[216] Bishop (n 79) 60.

[217] Kennedy (n 58) 22.

[218] ibid 91.

and immediately puts the victim-survivor under the microscope, to find ways in which their behaviour somehow warranted their abuse. Our culture fosters an environment where men are not held fully accountable for their actions and their motives for their actions become synonymous with their excuse; the same is not done for women. Instead, misogynistic culture gives rise to a culture of victim-blaming both inside and outside of the courtroom.

Where women are vilified and society scrambles to find a way to place some blame on them, if through what they were saying, what they were wearing, what they were posting, instead, men benefit from attitudes that seek to reduce their culpability. The myth that domestic abuse is 'a crime of passion' serves to embolden this attitude that men are somehow less culpable, as they acted through their honour-based rage or their fatal love for the woman.[219] The idea that the perpetrator is not a danger to society, only to their partner, somehow is seen to reduce the seriousness of the offence committed. Domestic abuse cannot be seen as something that 'just happens in relationships'.[220] These attitudes corrode the practical usefulness of good criminal law in improving the lives of victim-survivors of domestic abuse, as judges and juries fail to untangle themselves from the very ideas that lay at the root of the abuse. It is easier for people to view domestic abuse as an isolated incident that affects random individuals than it is to recognise it as a pattern of abuse against women that stems from the gendered attitudes ingrained in their society, and their own minds.

Even more disconcerting is the idea that domestic abuse is not only being treated not seriously enough but even more leniently than 'regular' forms of violence. Some research indicates that violence that occurs within the home 'are 0.672 as likely to receive custodial

[219] Jane Monckton Smith, *In Control: Dangerous Relationships and How They End in Murder* (Bloomsbury 2021) 8*; R v Clinton* [2012] EWCA Crim 2.

[220] Myrna Dawson, 'Representing intimacy, gender and homicide; The validity and utility of common stereotypes in law' in Fitz-Gibbon K and Walklate S (eds) *Gender, Homicide and Responsibility: An International Perspective* (Routledge 2016) 60.

sentences' than if it occurs in public, and of those who do face custodial sentences, they are on average '0.712 months shorter'.[221] Hanna writes that:

> In the vast majority of cases before the courts currently, the problem is not that the defendant's conduct did not violate the law. The problem is that the criminal justice system is overwhelmed and underfunded and, depending on the jurisdiction, under enlightened about the concept that men do not have a legal prerogative to beat their intimate partners.[222]

The criminal law has a role to play in changing these attitudes, as it can serve to re-educate the public on the harm of domestic abuse and its roots. The criminal law must also require sufficient resources and training to be given to all services within the criminal justice system, from the police to judges directing juries to challenge these beliefs. The criminal justice system itself must be properly funded, not only domestic abuse services. In 2021 papers are publishing headlines such as 'Victims of domestic abuse told to take civil action as courts clog up.'[223] The criminal law cannot be a pillar for helping to improve the lives of victim-survivors if the criminal justice system is broken.

If significant improvements to the criminal justice system are left unrealised, victim-survivors are left with little more than well-intentioned legislation, set within a criminal justice system failing to recognise prejudices, allowing the reliability of women finding justice to be invisibly corroded. However, this does leave a type of culture Catch 22, whereby reciprocated change is required by both society and the criminal justice system, creating a difficulty in first tipping the balance back towards the support of women.

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[221] Bond and Jeffries (n 30) 862.

[222] Hanna (n 97) 1468.

[223] Fiona Hamilton, 'Victims of Domestic Abuse Told to Take Civil Action as Courts Clog Up' (The Times, 24th November 2020).

3.6 The Myth of the 'Ideal' Victim

Academics and practitioners have been conscious for a long time that women not presenting as the 'ideal' or 'perfect' victim has left them unfairly exposed in the criminal justice system.[224] More recently, victim-survivor Cyntoia Brown said that 'We seem to struggle with a victim fitting a certain mould before we validate their victimisation.'[225] There is an idea perpetuated that for a victim-survivor to be worthy of societal support, and thus redress through the criminal justice system, that they must somehow be 'worthy' of this support.

Christie stated that 'to obtain a successful conviction, women have to accommodate themselves to the category of "ideal victim"'.[226] Kennedy laments that when having a woman as a client, their defence or their case is most likely to succeed if you can paint them as this same female ideal.[227] An 'ideal' victim at its most basic level is someone who has not retaliated to their abuse, not committed infidelity, has no issues with addiction, has no previous convictions, and is without links to previously abusive relationships.[228] But Kennedy suggests it is more than this, as a woman, you cannot be seen to have been a 'nagging wife' without some blame for the abuse being attributed to you by a jury.[229] Women who do not fit this 'ideal' are being exposed, and as Becker points out, victim-survivors are rarely going to fit this impossible model, writing that victim-survivors are not perfect, and are more likely than not to have also used violence, vulgar language, to drink,

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[224] Nils Christie, 'The Ideal Victim' in E. A Fattah (ed) *From Crime Policy to Victim Policy* (1984) 24.

[225] Garden Court, 'International Women's Day: Ending Injustice for Girls and Young Women in the Criminal Justice System' (Garden Court, Online, 10th March 2021).

[226] Christie (n 224) 18.

[227] Kennedy (n 58) 87.

[228] Barbara Hudson, 'Restorative Justice and Gendered Violence: Diversion or Effective Justice' (2002) British Journal of Criminology 42(3) 620.

[229] Kennedy (n 58) 89.

to use drugs and to have past experiences with abuse, as 'it is not good for the soul to live in terror'.[230]

The irony of such a harmful and misogynistic model, is that it is also an impossible apparition. The 'ideal' victim can be theoretically constructed, but she can seldom exist. If she were to exist, and to fit a model of the above characteristics, along with being a straight, white, middle-class and educated woman, it is still unlikely for this to be 'enough' anymore. Christie's model of the ideal victim highlights some very important issues when exploring female victim-survivors in the criminal justice system, but the double-edged sword of the development of the ideal 'modern' woman, may undermine even the most idealistic victim-survivor. Arguably, the 'ideal modern woman' would inhabit an even smaller, even more impossible grey area, where she should be soft but strong, able to voice an opinion without being loud, a mother and a professional. Further, if, a woman can mould herself into this 'ideal' in the eyes of a jury, a situation may arise where she becomes more culpable for not leaving the relationship sooner as she 'should have known better'. These harmful myths and stereotypes create impossible paradoxes, which women should, firstly, not have to fit into, but secondly, will find it increasingly difficult to fit into.

Research indicates that juries prefer victim-survivors who tried to leave the abusive relationship, otherwise for the jury doubt is cast over how abusive the relationship could have really been.[231] This is, of course, ridiculous. As Parmar and Sampson point out 'a complex set of fears "lock" a woman into a violent relationship', this could be from difficulty in getting past the paralysing fear, or the emotional attachment that still exists in the relationship.[232] We need to reject the notion of asking why a victim-survivor did not leave the relationship, as this implies a level of ease and autonomy that does not reflect the reality of most victim-survivors of domestic abuse.

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[230] Mary Becker, 'The Passions of Battered Women: Cognitive Links between Passion, Empathy and Power' (2001) 8 William & Mary Journal of Women & Law 1, 5.

[231] Dawson (n 77) 703.

[232] Parmar and Sampson (n 9) 685.

This is a highly important distinction to make if juries are showing prejudice to women who could not escape relationships. The femicide census data shows that the time immediately following a breakup can be extremely dangerous for women; 3/4 of women who are killed by an ex-partner are killed within a year of their separation.[233] Contrast this with the idea that juries prefer women who are separated from the perpetrator, a paradoxical trap arises whereby the victim-survivor is left with nowhere to turn: if she stays, she may be penalised by a jury, if she leaves, she may put herself, her loved ones, her position in society, her finances, in danger.

It is the failing of society that the model of the ideal victim exists, not the failing of the victim-survivor. It is the failing of the criminal justice system not to take conscious steps to try and ensure that it does not impact proceedings. The onus should never be on the woman to fit this ideal; it should firstly be on society to recognise that you do not have to be a flawless damsel in distress to be a victim-survivor of any form of abuse. Misogynistic culture and insidious gendered narratives must be tackled in the courtroom for this issue to be resolved meaningfully.[234] Until society changes, the onus falls to the criminal justice system to displace the notion of the ideal victim. Judges and magistrates need to be trained to understand their bias against female victim-survivors, judges need to direct juries in the same way.

3.7 Judicial Training on Domestic Abuse

Another issue contained within the criminal justice system is the lack of adequate judicial training on domestic abuse. The recent case of *Re H-N* in the family courts highlighted the need for better judicial understanding of cases of domestic abuse, particularly relating to

[233] Femicide Census (n 76).

[234] Clare McGlynn, 'Challenging the Law on Sexual History Evidence: A Response to Dent and Paul' (2018) 3 Crim LR 216, 222; Hannah Bows and Jonathan Herring, 'Getting Away With Murder? A Review of the 'Rough Sex Defence' (2020) 84(6) Journal of Criminal Law 525, 538; Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge 2013).

non-physical abuse, as the judges in this case noted that domestic abuse should be commonly recognised as going beyond physical violence.[235] Better understanding here, achieved through increased length and depth of judicial training, could also help to look past what Herring describes as the 'photograph approach' of the criminal law, whereby the criminal law is seen to deal best with single specific incidents with harm that is visible and more easily measurable.[236] Research also indicates that there could be issues in the sentencing of cases of domestic abuse, as Bond and Jeffries state that 'Of those cases that received a prison sentence, a domestic violence offence significantly decreases sentence length.'[237]

More resources and training must be committed for the courts to deal with cases of domestic abuse in a way that aligns with modern understanding of the crime. The creation of clearer guidance and policy documents, such as a threshold document for the criminal court, could be fundamental in facilitating positive change.

3.8 Disproportionately Impacted Victim-Survivors

The assumption that all women face the same risk of domestic abuse is misguided.[239] Intersectional scholars have recognised that an understanding of intersectionality is key when exploring domestic abuse in the criminal justice system and the differing experiences of victim-survivors. This acceptance of difference means that acceptance of differing practice and policy responses must also follow.[240] Here, this thesis acknowledges the

[235] *Re H-N and Others (children) (domestic abuse: finding of fact hearings)* [2021] EWCA Civ 448 .
[236] Herring (n 7) 130.
[237] Bond and Jeffries (n 30) 867.
[239] Day and Gill (n 134) 846.

[240] ibid.

experiences of racialised people, LGBTQ+ people, children, and people with learning difficulties in relation to the criminal justice system and the prosecution of domestic abuse.

Those in mixed ethnic groups were found to be more likely to suffer from domestic abuse than their white counterparts.[241] This must then be coupled with the fact that these victim-survivors are less likely to be believed and supported by the criminal justice system than their white counterpart.[242] Migrant women have reported feeling unable to turn to the criminal justice system, as they have expressed that they felt their immigration status will be put under the limelight more than the offence itself.[243] It is these people who lose the most when we rely too heavily on the criminal legal system without adequate policy recognising these statistics.[244] Both racialised women and migrant women have also suggested that culturally they fear being shunned if they involve the criminal justice system in cases of abuse.[245] Despite these statistics, the Domestic Abuse Act 2021 does not apply to migrant women. Law and the criminal justice system need to align their protection to victim-survivors most impacted, rather than seek to exclude them from protection, this will be discussed in the following chapter on the Domestic Abuse Act.

LGBTQ+ people are also understood to suffer different experiences of domestic abuse. Similar patterns of abuse occur in that incident recur and escalate over time,[246] however, the perception of the abuse and victim-survivors by society and the criminal justice system is problematic for LQBTQ+ people. A study suggests that this is not due to sexualities themselves, but due to the differing gender dynamics within LQBTQ+ relationships. For example, where participants in a study dislike gay male perpetrators as much as heterosexual perpetrators, they felt less sympathy for the male victim-survivor who was gay

[241] Office for National Statistics (n 19).

[242] Kennedy (n 58) 85; Goodmark (n 126) 7.

[243] Jasmine Mohammad, 'Cyberflashing: What Should We Do About It?' (Online, 24th March 2021).

[244] Richie (n 124) 11.

[245] Wilson (n 194).

[246] Patrick Letellier and David Island, *Men Who Beat the Men Who Love Them* (Routledge 1991) 30.

than women, but the study did not show that responses were primarily determined by the sexual orientation of the couple, as lesbian couples elicited similar responses to heterosexual couples.[247] Participants did indicate that the women seemed more to blame for the abuse that counterpart male victim-survivors.[248] Despite these complexities, a recent study of domestic abuse services found that LGBTQ+ services have been disproportionately impacted by funding cuts.[249] Ongoing research on domestic abuse and LGBTQ+ relationships is essential, as perceptions of LGBTQ+ relationships, and in particular at the moment, transsexual relationships, are rapidly evolving and proving a tumultuous and controversial issue.

Children have traditionally been seen as 'collateral' victims of domestic abuse, although academic trends are moving to shift away from this conception.[250] Nevertheless, the legal definition of domestic abuse stands to exclude children from being 'primary' victims, despite a plethora of extremely harmful effects of children both suffering and witnessing domestic abuse.[251] This thesis is restricted by word count in providing an in-depth analysis of children's experiences of domestic abuse, as it has elected to write along the framework of an adult victim-survivor due to the current applicability of legal definitions of domestic abuse. Nevertheless, it must be noted that significant change is needed in developing the law relating to children and domestic abuse, with far greater sensitivity to the impact that it has upon children, and what could be done in the criminal justice system to provide redress,

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[247] Eric Seelau, Sheila Seelau and Paula Poorman, 'Gender and role-based perceptions of domestic abuse: Does sexual orientation matter?' (2003) 21(2) Behavioural Sciences & the Law 199, 202.

[248] ibid 211.

[249] Catherine Donovan and Kate Butterby, '8 Days a Week: A Snapshot Report on the Precariousness of LGBT+ Domestic Abuse Services' (Centre for Research into Violence and Abuse, Durham University, Online, 8th December 2020).

[250] Debbie Noble-Carr, Tim Moore , Morag McArthur, 'Children's Experiences and Needs in Relation to Domestic and Family Violence: Findings from a Meta-Synthesis' (2019) 25(1) Child & Family Social Work 182.

[251] Herring (n 7) 159.

whilst ameliorating further harmful impact that comes from the child's involvement in the criminal justice system itself. Improved specialised services and far better guidance in terms of policy and practice is required, along with a more accessible and approachable version of law and legal proceedings.

People with disabilities are more likely to suffer from domestic abuse than those without.[252] Around half of disabled women report experiencing domestic abuse.[253] This prevalence of abuse must then be viewed in conjunction with huge flaws in the accessibility and functionality of the criminal justice system for people with disabilities. For example, data suggests that those with learning difficulties are less likely to see their cases pass the 'evidential test and they are less likely to see a conviction', even when current special measures are applied.[254]

It must be recognised that everyone is at risk of domestic abuse, but that that risk varies, and domestic abuse is experienced differently by certain sections of society. The criminal justice system has a long way to go in both recognising and accommodating these differences. Procedural change regarding policy is one step, but it is necessary to fit this in the context of more radical and comprehensive change.

3.9 Fixing the Problems – Where to Begin?

Along with the procedural changes that need to be made to counter some of the more specific flaws in the criminal justice system relating to domestic abuse, wider systemic

[252] Office for National Statistics (n 19).

[253] Kennedy (n 58) 85.

[254] Alison Jobe and Helen Williams, 'Evaluation of the experiences of people with learning disabilities who report rape or sexual assault' (September 2020) <https://rctn.org.uk/wp-content/uploads/2020/09/Full-Report-Evaluation-of-the-experiences-of-people-with-learning-disabilities-who-report-rape-or-sexual-assault.pdf> accessed 8th October 2020, 5.

changes are also required. This includes changes within society to counter misogynistic culture and influences, which are then reflected by the criminal justice system. But meaningful change also depends upon sufficient attention and resources being dedicated to our criminal justice system.

Some failings within the criminal justice system have roots deep in our patriarchal society and the way the criminal justice system has been constructed. The most effective way to create change that could be labelled as a solution is to dismantle the patriarchy, and the current criminal justice system, and start again.[255] Of course, theorising such a change is well beyond the scope of this thesis and, in practical and realistic terms, largely unachievable imminently. This is not to say there is no role for the work of dismantling patriarchy, however, a multi-pronged process must be taken. At the same time, we must work to make immediate changes. In this context, this would to be to try and fix the parts of the criminal justice system that are most directly failing victim-survivors.

These types of changes rely on education, the provision of resources and training, addressing rehabilitation, and challenging gender myths and stereotypes within the cases of domestic abuse that come before the criminal justice system. If we are complacent about the inadequacy of our criminal justice system, our belief that victim-survivors will be helped by the criminal law is misguided and leaves them exposed to false protection. Through improving practices, through education, training and embedding best practice and domestic abuse expertise – we are likely to be more effective at improving the lives of victim-survivors than through the creation of new offences alone.[256]

Effective justice is not free. Chronic underfunding of our criminal justice system has led to failings being accepted at multiple stages of the criminal justice system, from disclosure, to prosecution, to proper case preparation, to the ability for the case to be argued by skilled

[255] Dixon and Piepzna-Samarasinha (n 125).

[256] Burman and Brooks-Hay (n 57) 78.

lawyers and heard by experienced and well-trained judges.[257] It also requires the case to come before the criminal courts, a crucial stage that has seen itself pushed back due to court backlogs that can now date over two years from when the offence took place.[258] Funding is a key component in allowing positive change to be brought through effective prosecution of domestic abuse in the criminal justice system; without it, shiny new criminal laws can do little in practical terms for victim-survivors.

Additionally, we must recognise that the criminal justice system is not the only solution to improving the lives of victim-survivors of domestic abuse and that improvement of the criminal law cannot become a myopic pursuit of a single fix. Full reliance upon the criminal justice system is like sending a firefighter after a fire and concluding that this was the best way to achieve fire safety. Other services such as community services, financial aids, housing, group rehabilitation programmes, human rights, and civil law remedies, amongst other things, must also be utilised.[259]

It seems easy to label the expression of no hope for the criminal justice system as nihilistic, but equally a wholly criminal law approach to domestic abuse can be seen as unrealistic and naive. The adage that 'perfect is the enemy of the good' may hold some truth in this context. A blended approach of better substantive criminal law, an improved criminal justice system, and cultural change within that justice system, are all needed. It may not be possible to construct a perfect system through these tools, but we can be optimistic about positive legal change if we are realists about the limited impact that it will be able to have on the lives of victim-survivors if things in the criminal justice system remain the way they are now.

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[257] The Law Society, 'Justice on trial 2019: Fixing our criminal justice system report' (The Law Society, 14th June 2019) <https://www.lawsociety.org.uk/en/topics/research/justice-on-trial-2019> accessed June 10th 2021; The Secret Barrister, Stories of the Law and How It's Broken (Basingstoke: Pan Macmillan 2018).

[258] Phil Shepka and Ben Schofield, 'Court backlog: 'I don't believe my abuse case will get to court' (BBC News, 16th December 2021).

[259] This will be discussed in more detail in Chapter 5.

3.10 Conclusion

This chapter has considered some of the ways in which the criminal justice system is failing victim-survivors of domestic abuse. They range from issues in the collection and presentation of evidence, to lack of trust in the criminal justice system, to stereotypes and myths that are pervasive at all stages of it. These problems are significant in themselves, but they also augment to build a criminal justice system that is unsuited to deal with cases of domestic abuse. It has been argued that these problems must be addressed if an effective criminal justice solution to domestic abuse can exist. Improved substantive law will not be enough alone, as the law can only be as effective as the way in which it is implemented. It has been argued that, along with broader cultural and systemic changes, immediate changes must also be made, particularly relating to the chronic underfunding of the criminal justice system.

In the following chapter, we move on from sole focus on the criminal justice system to the Domestic Abuse Act. The Act is reviewed to help to formulate a wider understanding of where domestic abuse law stands now. This also allows us to develop our understanding on the direction in which domestic abuse law may be heading, whilst assessing where further developments may be needed, and how this fits in with an improved criminal justice approach.

Chapter 4. Domestic Abuse Act 2021: Once in a Generation Transformation or a Missed Opportunity?

4.1 Introduction

This chapter will examine the Domestic Abuse Act in the light of the discussion in previous chapters which emphasised that domestic abuse law, particularly in the criminal law context, had fallen behind its modern understanding. This chapter will highlight key changes the Act will make for victim-survivors, along with exposing some problems, gaps and missed opportunities with these changes. This thesis argues that the Act is most significantly a missed opportunity in relation to migrant women, and the failure to adopt criminal law proposals that have been argued throughout this thesis.

Although the focus of this thesis has been centred around the criminal law, it is important to assess what other legal developments must supplement better criminal law as part of a holistic response to domestic abuse; as Holder states, 'The criminal justice system is a resource not a solution.'[260] The Domestic Abuse Act makes some of its most significant changes in updating broader legal structures, such as within the sphere of civil law, that will act to supplement the criminal justice system.

This chapter provides a broad review of the Domestic Abuse Act. This allows us to develop a broader understanding of where domestic abuse law is now, and where it is heading. Links can then be made to the other arguments made in this thesis, as an understanding of recent developments can put in the context of what an improved criminal law approach might look like. The first section of this chapter examines the background to the Domestic Abuse Act, and an overview of the key definitions contained within it. It then goes on to examine some of the most significant changes made by the Act, and how these changes

[260] Robyn Holder, 'Domestic and Family Violence: Criminal Justice Interventions' (2001) 3 Domestic and Family Violence Clearinghouse Issues, 2.

might interact with an improved criminal justice response. This chapter concludes that the Domestic Abuse Act has made some significant substantive changes but fails to bring the criminal law up to date. It also remains exclusionary as migrant women are left outside of the scope of the Act. Therefore, it can be argued that the Act has failed to reach a truly transformative threshold, despite some welcome developments being made.

4.2 Background to the Domestic Abuse Act

The Domestic Abuse Act was created due to the rise in societal and political will to deal with the issue. There has been increasing political impetus to deal with domestic abuse in recent years due to multiple successful campaigns driven by charities and NGOs, bringing the issue to the forefront of public discourse.[261] This work has been amplified by the discussion of domestic abuse more frequently within television and mainstream media, which, in turn, has led to increased parliamentary discussion of domestic abuse, culminating in the Domestic Abuse Act.

The prevalence of domestic abuse is also a factor that demands attention when one considers the impetus behind the Domestic Abuse Act. The explanatory notes of the Domestic Abuse Act explain that the background of the Act stems from the reality that 'domestic abuse remains one of the most prevalent crimes in England and Wales', with an estimated 2.3 million adults aged 16-74 experiencing domestic abuse in the year ending March 2020.[262] Further, it is unlikely that this figure can reflect the true reality of the scale of the offence, as it is difficult to obtain reliable prevalence data on domestic abuse.[263]

[261] See the work of Refuge, Women's Aid, The Angelou Centre.

[262] Home Office, Explanatory Notes to the Domestic Abuse Act 2021, 6.

[263] Shazia Choudhry, 'When Women's Rights are Not Human Rights – the Non- Performativity of the Human Rights of Victims of Domestic Abuse within English Family Law' (2019) 82(6) Modern Law Review 1072, 1080.

The legal background of the Domestic Abuse Act relates to what has been discussed throughout this thesis, particularly regarding a new offence of domestic abuse. The explanatory notes of the Domestic Abuse Act detail that 'the legislation relating to domestic abuse in England and Wales is set out in a number of statutes. Generally, such legislation is not bespoke to domestic abuse; instead the general criminal, civil, and family law is applied to domestic abuse cases.'[264] This thesis has argued that there are weaknesses to this legal approach, particularly in relation to the criminal law. Nevertheless, the Domestic Abuse Act received royal assent in April 2021, becoming part of the law in England and Wales, and making some wide-ranging and significant changes to domestic abuse law.

4.3 Overview

The Domestic Abuse Act has provided a statutory definition of domestic abuse for the first time in England and Wales. The breadth of the definition that has been adopted is welcomed, as the Act encompasses a broad range of behaviours as what constitutes 'domestic abuse', encouraging domestic abuse to be seen as a course of conduct that goes beyond only physical violence. It also served to broaden the scope of victim-survivors of coercive control, including ex-cohabiting partners as potential victim-survivors to the offence. The Act also provides a significant overhaul of civil orders relating to domestic abuse, seeing a hybridisation of civil and criminal law relating to Domestic Abuse Protection Orders (DAPOs). The Act also makes some welcome steps forward regarding victim-survivors and special measures both in the criminal and family courts, amongst other changes relating to local authority duties and housing.

Despite the welcoming of its broad scope and ambitiously wide-ranging provisions, the Domestic Abuse Act failed to address the substantive criminal law proposals addressed in

[264] Home Office, Explanatory notes to the Domestic Abuse Act 2021, 16.

this thesis. It also failed to take the opportunity to adequately protect migrant women who are victim-survivors of domestic abuse, which is a significant flaw in such an otherwise positively transformative piece of legislation.

Nevertheless, the aims of this legislation are broad, and, for the most part, constitute a welcome shift in the way domestic abuse is understood. It shall remain to be seen what practical impact these wide-ranging provisions may have in future.

4.4 Scope - Listed Behaviours

Section 1 of the Domestic Abuse Act contains the statutory definition of domestic abuse, which forms the guiding definition for the changes made by the rest of the legislation. The behaviours that are listed as forms of domestic abuse are set out in section 1(3) of the Act and are listed below.

"(3) Behaviour is "abusive" if it consists of any of the following—

(a) physical or sexual abuse;

(b) violent or threatening behaviour;

(c) controlling or coercive behaviour;

(d) economic abuse (see subsection (4));

(e) psychological, emotional or other abuse;

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

Firstly, it should be noted that the breadth of these listed behaviours is a welcome advancement in the understanding of domestic abuse, as well as its impact of widening the practical scope of the law. This range of behaviours begins to take forward recommendations in this thesis relating to a new offence, and a reconceptualized vision of what constitutes domestic abuse.

Nevertheless, there are some issues regarding clarity of this definition, which may impact upon how effectively this definition of domestic abuse will be implemented by various organisations and services, for example relating to the tautologist phrasing of 'physical *or* sexual abuse'. It should be noted the use of the conjunction 'or' between subclauses that appear to be grouped arbitrarily, could be unhelpful. For example, in most cases, sexual abuse *is* physical abuse. The explanatory notes of the Domestic Abuse Act denote that 'physical or sexual abuse' is 'self-explanatory', and thus no further comment is made on this conflation of physical and sexual abuse.[265]

Additionally, the lack of guidance as to the meaning of 'psychological, emotional, or other abuse' could see issues arise regarding the implementation of section 1(3). There are also issues woven throughout Part 1 of the Domestic Abuse Act, whereby the Act purports to make a change, but fails to take practical steps to combat it, for example with economic abuse and the failure to act on universal credit payments.

4.4.1 Economic Abuse

The Domestic Abuse Act defines economic abuse in section 1:

> Economic abuse means any behaviour that has a substantial adverse effect on B's ability to—

[265] Home Office, Explanatory notes to the Domestic Abuse Act 2021.

(a) acquire, use or maintain money or other property, or

(b) obtain goods or services.[266]

Through successful campaigning from organisation such as Surviving Economic Abuse, for the first time, economic abuse has a statutory footing as a category of domestic abuse. This is a significant change and welcome recognition, as controlling and restricting a person's financial freedom heavily impacts that person's autonomy and ability to prosper independently from the perpetrator.[267]

This is also a welcome change as research from Refuge highlights that less than a third (32%) of adults said they had heard of the term economic abuse before.[268] This aligns with further findings in the report, whereby 16% of adults surveyed reported that they had experienced economic abuse, whilst 39% of respondents recorded incidents that would be characterised as economic abuse.[269] The recognition of economic abuse in Domestic Abuse Act may help to bring economic abuse to the fore of the discussion in relation to cases of domestic abuse where previously it was absent, allowing victim-survivors of economic abuse to more effectively self-identify.

Clarification is provided in the explanatory notes to the Act, which provides that behaviour shall constitute economic abuse where there is a substantial and adverse effect on a victim's ability to acquire, use or maintain money or other property, or to obtain goods or

[266] Domestic Abuse Act 2021, s. 1.

[267] Surviving Economic Abuse, 'Roundtable Report' (Surviving Economic Abuse 2018) <https://survivingeconomicabuse.org/wp-content/uploads/2020/11/SEA-RoundtableReport-2018-1.pdf> accessed 20th September 2021, 6.

[268] Refuge, 'Know Economic Abuse' (Refuge, 2020) <https://www.refuge.org.uk/wpcontent/uploads/2020/10/Know-Economic-Abuse-Report-2020.pdf> accessed 29th July 2021.

[269] Ibid.

services.[270] It is submitted that the inclusion of the threshold of 'substantial' may create some unnecessary barriers for victim-survivors claiming they have been economically abused, and that this threshold also creates a situation whereby certain degrees of abuse are acceptable. It is hoped that this provision is interpreted widely in forthcoming cases to recognise that differing levels of abuse may impact individual victim-survivors in differing ways.

Despite the Act taking some meaningful steps forward in relation to placing economic abuse on a statutory footing, it does fail to act on some policy reform that could have served to aid economic abuse of victim-survivors. For example, the Domestic Abuse Act failed to act on the recommendation of Refuge in implementing automatic separate payments of Universal Credit, which leaves the full amount of Universal Credit for a household being paid fully into one account.[271] This leaves the victim-survivor without any access to this finance without the involvement of the perpetrator, enabling such economic control to continue. Nevertheless, the inclusion of economic abuse is a welcome advancement in terms of broadening both the understanding of abuse and the practical legal scope.

4.4.2 Psychological, Emotional or Other Abuse

Also found in the list of abusive behaviours is an interestingly open-ended provision found in section 1(3)(e) which notes 'psychological, emotional, or other abuse'. The inclusion of this form abuse is welcome, as once again it attempts to push beyond immediate physical injury.

The open-ended wording of this provision suggests that something other than psychological or emotional abuse, yet that which is somewhat analogous, may also be seen as abusive

[270] Home Office, Explanatory notes to the Domestic Abuse Act 2021, 18.

[271] Refuge (n 268) 14.

behaviour. It is not immediately clear what this means, or what the aim of the phrasing of this provision is. It could be the case that the wording of the Act has been made flexible in order to be applicable to new forms of abuse that are not currently recognised, which would be a rather forward-looking element to the definition of abuse. Alternatively, the Act may merely be leaving itself open to synonymous forms of abuse, for example, mental or verbal abuse, which of course, in practice, are psychological or emotional abuse.

However, with regards to new primary legislation, lack of clarity is rarely welcome. It is even more unhelpful that this provision found in section 1(3)(e) is excluded from any further explanation in the explanatory notes or guidance found in the Domestic Abuse Act. This could create issues in how these provisions are interpreted and used in practice; as if they are misunderstood by organisations, it is likely they will be less actively utilised.

These provisions appear as though they are to be interpreted objectively, so perhaps they will be able to bring a broad stroke approach to psychological and emotional abuse to domestic abuse law. Nevertheless, the lack of clarity of this particular provision may prove unhelpful in its application. Examples of this type of abuse and how they should be recognised by legal professionals and other services would be useful.

4.4.3 Technology-based Abuse – A Missed Opportunity?

It is submitted that an additional category pertaining to 'technology-based abuse' could have also been included to improve the Section 1(3) definition, especially considering the attention that is given to technology facilitated 'image-based abuse' in Section 69 of the Domestic Abuse Act (this is discussed in more detail later in this chapter).

Domestic abuse perpetrators are increasingly drawing upon technology as a way of committing abuse.[272] The increasing availability of technology, including smartphones, social media, and GPS monitoring are being used by perpetrators to monitor, control,

[272] Yardley (n 59) 1479.

threaten, and abuse victim-survivors.[273] This is being done in a plethora of ways, all of which relate to domestic abuse. These ways include monitoring, stalking, the sending of explicit images, harassment, threatening to share explicit images, and sharing explicit images.[274] The harms involved with technology-based abuse are expansive, with studies providing evidence that the use of technology to perpetrate abuse creates a sense of the perpetrator being omnipresent.[275]

Of course, due to the nature of the harms involved in technology-based abuse, most of the harms could be argued to fall under some of the existing categories of abuse found in the definition of abuse in Section 1, for example, within 'psychological, emotional or other abuse'. However, the increase in the use of technology in cases of domestic abuse is a cause for great concern, as has been outlined by recent academic research.[276] These methods of abuse and causes of harm are not specifically foreseeable, yet completely predictable, and the inevitable evolution of forms domestic abuse must be responded to both progressively and flexibly by legislation. The government has clearly recognised that technology is playing an increasing role in cases of domestic abuse, and it could have been helpful to explicitly outline this in the categories of abusive behaviours listed above. This could have served to both raise awareness of this, and make sure that the statutory definition of domestic abuse is being appropriately applied in cases involving technology.

[273] Yardley (n 59) 1479.

[274] Delanie Woodlock, 'The Abuse of Technology in Domestic Violence and Stalking' (2017) 23 Violence Against Women 584, 584.

[275] Heather Douglas, Bridget Harris and Molly Dragiewicz, 'Technology-facilitated domestic and family violence: Women's experiences' (2019) 59 British Journal of Criminology 551, 565.

[276] ibid.

4.4.4 Incident or Course of Conduct

Section 1 of the Domestic Abuse Act explicitly recognises that domestic abuse can occur 'as a single incident or as a course of conduct'. It is positive that abuse that occurs as part of a 'course of conduct' is recognised in the legislation, as many academics have been advocating for this reconceptualization of domestic abuse over recent years.

Bishop highlights that 'the harm of domestic violence needs to be reconceptualised in a way that comprehends the impact of the behaviours on the victim-survivor's autonomy and liberty and not from the infliction of physical injury per se'.[277] The recognition of harms such as emotional abuse is section 1(3) in conjunction with this statement that abuse can be an incident or course of conduct, allows differing harms to be recognised and domestic abuse to be understood as an ongoing course of conduct rather than only single incidents of harm.

Walby and Towers also point out that there is value in recognising both single incidents and the course of conduct, as it is far more difficult to establish a course of conduct without being able to look at single incidents that indicate patterns.[278]

There is little doubt that courses of conduct can be recognised as offences, as Douglas points out, England and Wales have had criminalised courses of conduct previously, such as with the offence of stalking.[279] Nevertheless, it should be noted that offences that centre around a course of conduct do often rely more on evidence collected overtime, which will make victim-survivors potentially more reliant on the resources available in the criminal justice system. This means that the course of conduct is still a collection of incidents that occur overtime, which must be noted and identified.

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[277] Bishop (n 79) 69.

[278] Sylvia Walby and Jude Towers, 'Untangling the Concept of Coercive Control: Theorizing Domestic Violent Crime' (2018) 18 Criminology & Criminal Justice 7, 14.

[279] Douglas (n 190) 439.

In summary, the scope of abusive behaviours included in the Domestic Abuse Act, overall, should be considered as broad, which creates a positive advancement in domestic abuse law, both in terms of advancing public understanding of domestic abuse and broadening the scope of legal protection. Nevertheless, there are number potential issues that may arise in relation to the specificity of definitions, along with some potential missed opportunities.

4.5 Scope – Who Qualifies as a Victim Under the New Definition

As mentioned briefly above, the Domestic Abuse Act has taken an opportunity to expand the scope of who can qualify as a victim-survivor of coercive control, by removing the 'residency requirement' that stood as a previous barrier to victim-survivors.[280] This is a welcome advancement, created through the expansion of the definition of those who are 'personally connected'. The Act also moves forward in recognising children who witness domestic abuse as victim-survivors. However, this broadening of scope did not translate across the whole of the Domestic Abuse Act, which leaves migrant women without adequate protection from domestic abuse, limiting how truly radical the Act can be touted as.

4.5.1 'Personally Connected'

The definition of 'personally connected' in the Domestic Abuse Act reads:

> (1) For the purposes of this Act, two people are "personally connected" to each other if any of the following applies—

[280] Wiener (n 55).

(a) they are, or have been, married to each other;

(b) they are, or have been, civil partners of each other;

(c) they have agreed to marry one another (whether or not the agreement has been terminated);

(d) they have entered into a civil partnership agreement (whether or not the agreement has been terminated);

(e) they are, or have been, in an intimate personal relationship with each other;

(f) they each have, or there has been a time when they each have had, a parental relationship in relation to the same child (see subsection (2));

(g) they are relatives.[281]

This section of the Domestic Abuse Act has extended the scope of the law on coercive control, set out in the Serious Crime Act 2015. Previously, 'personally connected' included only those in an intimate relationship, couples who lived together, or family, creating a 'residency requirement' whereby the offence did not extend to those whose relationship was not ongoing and did not still live together.[282] This was a significant oversight, especially considering that the period after the woman leaves an abusive relationship can often be the most dangerous.[283] The Domestic Abuse Act has removed this requirement, helpfully extending the scope of the offence of coercive control.

The Domestic Abuse Act also recognises that children who witness domestic abuse can be included as victim-survivors. Whilst this has few practical legal implications, as the Domestic Abuse Commissioner has expressed that any children in cases involving abuse

[281] Domestic Abuse Act 2021.
[282] ibid.

[283] Dawson (n 77) 703.

would instead be dealt with under child abuse laws, it does make a symbolic advancement relating to cases of domestic abuse involving children.[284]

Section 3 of the Act holds a child can be a victim of domestic abuse where a child 'sees or hears, or experiences the effects of, the abuse and is related to A or B'. Research has repeatedly shown that the long-term impacts on children witnessing abuse are expansive and troubling.[285]

Although this creates a somewhat strange situation whereby the child can be recognised as a victim-survivor of 'domestic abuse' when they see abuse, but not when they experience it themselves, this change is welcomed in relation to advancing understanding of the impact of domestic abuse upon children, who have previously been described as 'silent victims'.[286]

Arguably the most significant failing of the Domestic Abuse Act in terms of scope regarding who qualifies for protection is the exclusion of migrant victim-survivors. This has attracted widespread and vociferous criticism, particularly from domestic abuse organisations and NGOs who campaign for intersectional improvements in law and services. Southall Black Sisters describe the rejection of the opportunity by the government to protect migrant women as 'deeply disappointing', releasing that they would 'not be celebrating' the Domestic Abuse Act receiving royal assent due to it being 'discriminatory',

[284] Nicole Jacobs, 'What new domestic abuse legislation means for social workers' (Community Care, 13th May 2021) <https://www.communitycare.co.uk/2021/05/13/new-domestic-abuse-legislation-means-social-workers/> accessed 21st September 2021.

[285] Anne Bogat et al, 'Trauma symptoms among infants exposed to domestic violence' (2006) 30 Child Abuse & Neglect 109; M. Cyr, A. Fortin and L. Lachance, 'Children exposed to domestic violence: effects of gender and child physical abuse on psychosocial problems' (2006) 3 Journal of Child & Family Welfare 16; Rachel Fusco and John Fantuzzo, 'Domestic violence crimes and children: a population-based investigation of direct sensory exposure and the nature of involvement' (2009) 31(2) Children and Youth Services Review 249.

[286] Nancy Ver Steegh N, 'The Silent Victims: Children and Domestic Violence' (2000) 26 Wm Mitchell Law Review 775.

accusing the government of putting control over immigration above the protection of victim-survivors of domestic abuse.[287]

Although victim-survivors can come from all backgrounds and subsects of society, it has been established in this thesis that black and minoritised women and migrant women are found to be more likely to experience domestic abuse than their white counterparts. [288] The seriousness of this issue augments when one considers how prevalence conjoins with severity of the effects of the abuse.

Insecure immigration status is often a tool of control used be perpetrators, who utilise it to threaten victim-survivors by suggesting that they will be reported or removed from the country without the support of the perpetrator for them to remain there, which puts the victim-survivor in fear of both the abuser and asking for help.[289] Statistics reveal a concerning prevalence to this tool of control, with Imkaan's vital statistics report suggesting that 92% of migrant women have reported threats of deportation from the perpetrator in cases of domestic abuse.[290] The current lack of safe-reporting mechanisms available to migrant victim-survivors leave them exposed to domestic abuse without realistic recourse to support. Charity Refuge writes that the message that is sent to women who have 'no recourse to public funds' or insecure immigration status is that they are

[287] Southall Black Sisters Admin, 'The struggle continues: SBS responds to the Government's rejections of our amendments to protect migrant women' (Southall Black Sisters, 16th April 2021) <https://southallblacksisters.org.uk/news/the-struggle-continues-sbs-responds-to-gov-rejection-of-amendments-to-protect-migrant-women/> accessed 23rd September 2021.

[288] Office for National Statistics (n 19).

[289] Step Up Migrant Women, 'Consultation Response to the Domestic Abuse Act statutory guidance' (14th September 2021) <https://stepupmigrantwomen.org/> accessed October 13th 2021.

[290] Imkaan, 'Vital Statistics Report' (Imkaan, 2021) <https://drive.google.com/file/d/0B_MKSoEcCvQwWHA0eG81cFZxc0U/view> accessed September 21st 2021.

somehow less valuable and experiences less valid, writing that 'the government has effectively said not all women are worthy of protection'.[291]

This is a glaring hole which severely limits the scope of the Domestic Abuse Act, excluding some of the most vulnerable victim-survivors of domestic abuse, as has been previously established in this thesis. Imkaan describes this as a reinforcement of a hostile political environment and a state of impunity through non-action.[292] It is proposed that the 'no recourse to public funds' condition is removed from the Act, serving to protect *all* victim-survivors of domestic abuse, by allowing migrant victim-survivors to apply for indefinite leave independently of their perpetrator.

4.5.2 Gender Neutrality

The language employed by the Domestic Abuse Act with regards to gender was a topic of debate whilst the Bill passed through parliament.[293] This debate arose as the Domestic Abuse Act adopted gender-neutral language, despite all mainstream statistics revealing that all forms of domestic abuse are perpetrated overwhelmingly by men against women.[294] This gender-neutral language is accompanied by statutory guidance that addresses the gendered nature of domestic abuse, but some academics may feel this does not go far

[291] Ruth Davidson, 'Domestic Abuse Bill Receives Royal Assent' (Refuge, 29th April 2021) < https://www.refuge.org.uk/refuge-domestic-abuse-bill-royal-assent/> accessed 30th July 2021.

[292] Imkaan, 'From the Margin to the Centre' (Imkaan, October 2018) < https://829ef90d-0745-49b2-b404-cbea85f15fda.filesusr.com/ugd/2f475d_91a5eb3394374f24892ca1e1ebfeea2e.pdf> accessed 21st September 2021, 8.

[293] Domestic Abuse Bill, Session 2019-2021, Written evidence submitted by Equi-law Uk (DAB13) <https://publications.parliament.uk/pa/cm5801/cmpublic/DomesticAbuse/memo/DAB13.htm> accessed September 22nd 2021.

[294] Office for National Statistics (n 19).

enough. Stark, Bishop, and Burman and Brooks-Hay, all argue that the adoption of gender-neutral language fails to recognise a more nuanced approach to domestic abuse law, whereby the gendered nature of the offence goes unchallenged, in a male-dominated and patriarchal legal system.[295] Stark has argued that the failure of England and Wales to adopt gendered language for the offence of coercive control in the Serious Crime Act 2015 was one of its biggest failings.[296] In a recent review of coercive control Stark and Hester highlight the contrasting approach taken by Scotland in adopting gendered language as a standard England and Wales should also be looking towards.[297] This approach was based on CEDAWs (Convention on the Elimination of All Forms of Discrimination Against Women) definition of gender violence as a violation of human rights, which linked gender inequality and the elimination of violence against women by citing rape and domestic abuse as causes of the subordination of women, rather than only a consequence.[298]

Ultimately, the Domestic Abuse Act could go further in recognising the gendered nature of abuse, but it does attempt to take the first steps forward in relation to this. The law being gender-neutral serves to tackle the toxic consequences of patriarchy by not limiting itself to any one group of victim-survivors that suffer under it. Law should strive to be inclusive of the experiences of women, without becoming exclusionary. This is a particularly pertinent point when one considers how statistics relating to domestic abuse may develop in coming years as societies increasingly recognise more than heterosexual relationships. The language reflecting the scope of the Domestic Abuse Act is therefore welcome.

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[295] Stark (n 22); Bishop (n 79); Burman and Brooks-Hay (n 57).

[296] Garden Court, 'International Women's Day: Ending Injustice for Girls and Young Women in the Criminal Justice System' (Garden Court, Online, 10th March 2021).

[297] Evan Stark and Marianne Hester, 'Coercive Control: Update and Review' (2019) 25(1) Violence Against Women 81, 85.

[298] General Recommendation No. 19 adapted by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1992.

4.6 Other Significant Legal Changes

Some of the most significant legal changes made by the Domestic Abuse Act will be addressed here. While this thesis has focused upon the criminal law, this sub-chapter endeavours to briefly outline some further key changes that will supplement the criminal law in the pursuit of a holistic solution of domestic abuse.

4.6.1 Domestic Abuse and Housing Duties

Women's Aid have noted, 'Domestic abuse is by its very nature a housing issue.'[299] Whilst one may in fact argue that the nature of domestic abuse does not centre around the physicality of the home, but the relationships that exist within them, it is clear that 'housing is often a critical factor in being able to escape an abuser or abusers.'[300] In 2015, '35% of female rough sleepers left their homes due to domestic violence',[301] and it is likely that this only begins to uncover the true extent of similar statistics linking domestic abuse and homelessness, which has been long understood to be strongly correlated.[302]

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[299] Lizzie Magnusson and Sarah Davidge, 'Domestic Abuse Report 2020: The Hidden Housing Crisis' (Women's Aid, 2020) <https://www.womensaid.org.uk/wp-content/uploads/2020/06/The-Domestic-Abuse-Report-2020-The-Hidden-Housing-Crisis.pdf> accessed 22nd September 2021.

[300] ibid.

[301] Rachel Greaves, 'All-Party Parliamentary Group for Ending Homelessness' (Crisis, July 2017) <https://www.crisis.org.uk/media/237534/appg_for_ending_homelessness_report_2017_pdf.pdf> accessed 22nd September 2021, 3.

[302] Kelda Henderson, 'The Role of Housing in a Coordinated Community Response to Domestic Abuse' (2019) Durham Theses, Durham University, 64; Annabel Tomas and Helga Dittmar 'The Experience of Homeless Women: An Exploration of Housing Histories and the Meaning of Home' (1995) 10(4) Housing Studies 493; Charlene Baker, Sarah Cook and Fran Norris, 'Domestic Violence and Housing Problems - A

Therefore, one of the most practically significant legal changes for victim-survivors of domestic abuse can be argued to stem from the Domestic Abuse Act automatically giving victim-survivors priority need status for settled housing, without the requirement of the vulnerability test, through the Act amending Part 7 of the Housing Act 1996. The definition of 'domestic abuse' used is that of the Domestic Abuse Act 2021, bringing the understanding of domestic abuse and homelessness more up to date than had previously been accommodated by other statutory instruments. There are, of course, severe and enduring issues relating to victim-survivors of domestic abuse and stable housing.[303] However, the Domestic Abuse Act does take significant steps in trying to aid the experiences of victim-survivors who have struggles with housing when fleeing abuse.

In the case of *Yemshaw v Hounslow*, the perpetrator subjected the victim-survivor to verbal abuse, and the victim-survivor feared that physical abuse would follow.[304] Despite the threat of physical violence (along with the verbal abuse, which should be recognised as domestic abuse without more), she was told to return to the local authority for help with housing once she had experienced physical violence. In this case the judgment of Lady Hale established that domestic violence should not be limited to the view of only physical harm, but also includes psychological harm which might give rise to the risk of harm. Section 78 of the Domestic Abuse Act therefore appears to not only clarify that this judgment was correct in affirming that violence need not be limited to physical violence in respect of domestic abuse, but also expand the protection of victim-survivors of domestic abuse further. This is so, as section 78(5) includes victim-survivors of domestic abuse as being in priority need for accommodation, with 'domestic abuse' given the meaning that is set out in section 1 of the Domestic Abuse Act. Therefore, it seemingly removes the

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Contextual Analysis of Women's Help-Seeking, Received Informal Support, and Formal System Response' (2003) 9(7) Violence Against Women 754.

[303] For detailed research on this, please see Kelda Henderson K, 'The Role of Housing in a Coordinated Community Response to Domestic Abuse' (2019) Durham Theses, Durham University http://etheses.dur.ac.uk/13087/1/Kelda_Henderson_Thesis_2018_December_Formatted_2019.pdf?DDD34+.

[304] *Yemshaw v London Borough of Hounslow* [2011] UKSC 3.

requirement of proving that the victim-survivor has experienced either physical or psychological harm, as a person will be a victim-survivor of domestic abuse if they are 'personally connected' and has experienced any form of abusive behaviour listed in the Act.

These hopeful steps forward for homeless victim-survivors of domestic abuse must not be hindered by women needing to provide high levels of evidence of abuse, which Kelly et al exposed to be a significant issue in their research on women and children fleeing domestic abuse.[305] The culture surrounding disbelief of victim-survivors must be challenged within local authorities and housing providers for this statutory opportunity to make practical difference in the lives of victim-survivors. Nevertheless, it is a welcome development that the Domestic Abuse Act has moved forward in recognising victim-survivors as being in a category of priority need for housing.

4.6.2 Domestic Abuse Protection Orders

Domestic Abuse Protection Orders (DAPOs) are set out in Part 3 of the Domestic Abuse Act. These orders replace the array of existing protection orders relating to domestic abuse, from Non-Molestation Orders (NMOs) to Domestic Violence Protection Orders (DVPOs). The legal changes made by the Domestic Abuse Act are discussed here in some detail, as the use of these orders will impact heavily on the criminal law approach relating to domestic abuse, which is the primary focus of this thesis.

DAPOs are part of a hybridisation of civil and criminal law measures as a response to domestic abuse. They can be issued by police and/or in criminal proceedings, or through an application to the family courts. They can impose requirements, such as attendance on

[305] Liz Kelly, Nicola Sharpe and Renate Klein , 'Finding the Costs of Freedom How Women and Children Rebuild their Lives after Domestic Abuse' (Solace Women's Aid, 2014) <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/Costs_of_Freedom_Report_-_SWA.pdf> accessed 23rd September 2021.

rehabilitation programmes, vacating the home of the victim-survivor, and other such measures. They act in a hybrid way, in that a civil order, can lead to criminal sanctions if a breach of the order occurs. A breach of a DAPO means that the police can become immediately involved without returning to court and the breach can lead to up to 5 years imprisonment.

DAPOs are an attempt to simplify the large number of varying orders that existed to protect victim-survivors of domestic abuse, attempting to keep the strongest elements of existing orders.[306] In some ways this has been achieved. DAPOs have removed the 28-day limited duration of some previous orders, allowing more long-term and robust protection for victim-survivors without the need to frequently return to family courts, often at great personal cost both temporally and financially. They also give police more options when managing perpetrators of abuse, without the need to be reliant on the victim-survivor providing evidence in an intimidating and adversarial criminal trial. The standard of proof for DAPOs is also at a civil standard, on balance of probability, meaning that they could be far more reliably accessible for victim-survivors without huge amounts of evidence collection through police involvement. The imposition of civil orders also offers a level of flexibility to victim-survivors, who can rely on legal support without engaging heavily with the more 'serious' criminal justice system, if they wish to avoid this.

Despite these positive changes to orders that function to support victim-survivors of domestic abuse, there are issues that threaten to limit the usefulness of the new DAPOs. Bates and Hester highlight that a 'hierarchy of orders' may be arising in relation to DAPOs that are issued as part of criminal proceedings and/or by police, and those that are made by parties through the family courts, with the former being more stringently enforced and supported by police resources.[307] This threatens to limit the usefulness of the orders that are made by the civil courts at the request of victim-survivors and may also deter victim-

[306] Jacobs (n 284).

[307] Lis Bates and Marianne Hester, 'No Longer a Civil Matter? The Design and Use of Protection Orders for Domestic Violence in England and Wales' (2020) 42(2) Social Welfare and Family Law 133, 135.

survivors who do not want to engage with the criminal justice system from seeking orders, as once a civil order is issued, a breach can quickly make the matters criminal.[308]

DAPOs may also be criticised for being seen as back door method to lower the standard of proof in domestic abuse criminal proceedings. Although this is a positive practical change for victim-survivors in expanding the availability of legal tools to help to protect them, it does risk police being deterred from pursuing substantive criminal charges in favour of these easier to achieve civil orders.[309] This also means that in the case of a breach of the order, the maximum sentence available for perpetrators is up to 5 years imprisonment, which could be significantly lower than sentences available if criminal charges were pursued. However, this concern is ameliorated when one considers the practical realities of sentencing and the functionality of the criminal justice system. This thesis has argued that failings in the criminal justice system limit the extent to which victim-survivors can access redress through the criminal justice system, which sees low prosecution and conviction rates of domestic abuse.[310] Therefore, if the enforcement of these civil remedies is likely to result in any custodial sentence at all, it could be the reality that these 'lower sentences' imposed, are, in reality, significantly higher.

The lack of enforcement of these civil breaches is also an issue that could impede the access of support to victim-survivors. The enforcement of these breaches centre around resources and the funding available to all parts of the criminal justice system. If resources are insufficient, it will be difficult to enforce breaches adequately to protect victim-survivors due to the hybrid nature of the orders relying on the chronically underfunded criminal justice system, as has previously been argued in this thesis. This could lead to a

[308] Bates and Hester (n 307) 135.

[309] ibid 136.

[310] Jackie Davis, 'Domestic Abuse' (Cabot Police Department, School of Law Enforcement Supervision Session XVII, 2019) < https://www.cji.edu/wp-content/uploads/2019/04/domestic_abuse_report.pdf> accessed 23rd September 2021.

loss in confidence among victim-survivors that anything can be done by either legal systems to help protect them from domestic abuse.

Bates and Hester argue that the government should consider maintaining a fully civil order, such as a non-molestation order (NMO), alongside the new hybrid DAPOs.[311] This would allow for victim-survivor discretion in involvement with the criminal justice system and would not rely on the limited resources available to the criminal justice system. However, it is submitted that this would serve to undermine the aim of untangling a number of complicated civil orders in relation to domestic abuse, only complicating things further. Instead, as DAPOs are used over the next few years they must be monitored and more research needs to be done on their use, particularly when they fail to be granted. It is also imperative that the CPS continue to seriously prosecute domestic abuse offences as substantive criminal offences, rather than showing an overreliance on DAPOs.

4.6.3 Protecting Victim-Survivors in Legal Proceedings

Part 5 of the Domestic Abuse Act sets out provisions regarding protection for victim-survivors and witnesses in legal proceedings, often known as special measures. This is relevant in the context of this thesis as this provision begins to make some welcome changes relating to what can be achieved through the use of the criminal justice system. The availability of improved special measures for victim-survivors in the criminal justice system could go some way in protecting victim-survivors and making them feel more comfortable with using the justice system, leading to reduced numbers of withdrawal of victim-survivor support in cases, therefore reducing attrition rates of domestic abuse cases.

This provision makes all domestic abuse victim-survivors eligible for assistance on the grounds of fear and distress about testifying in all types of proceedings. Special measures can include screens, live links, evidence given in private, visual recorded interviews, and

[311] Bates and Hester (n 307) 142.

examination of the witness through an intermediary.[312] This provision amends the Youth Justice and Criminal Evidence Act 1999, placing domestic abuse victim-survivors in the same category as victim-survivors of sexual offences and modern slavery offences. These create a necessary change, as this thesis highlighted the need for victim-survivors of domestic abuse to be treated more sensitively by criminal justice proceedings, akin to sexual offences victim-survivors; it is welcomed that the Domestic Abuse Act took this opportunity.

This well-intentioned recategorisation of victim-survivors of domestic abuse shows victim-survivors the harm they suffered is recognised in the same way as other similarly serious offences. However, it must be noted that being automatically *eligible* for these measures does not mean that the court will automatically grant them. The court must consider all the circumstances of the cases as a part of this measure. Therefore, this measure will be as effective as its implementation, and judicial training on this is heavily encouraged.

Part 5 of the Domestic Abuse Act also recognises that victim-survivors and parties connected to them (such as family members or witnesses) may have the quality of their evidence, and ability to participate in hearings, diminished by their vulnerability. This allows for the trauma of victim-survivors to be recognised, supported, and taken into account during legal proceedings. This is helpful in the context of it being commonplace that a trauma response is elicited from the victim-survivor or connected person during the giving of evidence, which often makes them appear either 'over emotional' or 'entirely closed'.[313]

Finally, Part 5 of the Domestic Abuse Act prohibits the cross-examination in person of victim-survivors by alleged perpetrators. This has been an issue in proceedings that has long endured and reminded many of the stark inadequacy of the courts in dealing with victim-survivors, as it failed to recognise the way the courts could be used to revictimise

[312] Crown Prosecution Service, 'Special Measures, Legal Guidance' (CPS, 19th April 2021) <https://www.cps.gov.uk/legal-guidance/special-measures> accessed 20th September 2021.

[313] Tagg (n 207) 162.

victim-survivors. This is an undoubtedly a welcome and necessary step forward taken by the Domestic Abuse Act, it is merely regrettable that the cross-examination of victim-survivors endured for as long as it did.

4.6.4 Domestic Abuse Law and Sexual Offences

The Domestic Abuse Act also raises some significant issues regarding violence against women and sex offences. The changes that will be discussed here are the offence of non-fatal strangulation, the criminalisation of threatening to share explicit images, and the 'removal' of the 'rough sex defence'. Non-fatal strangulation and threats to share explicit images are offences that are closely linked to the course of conduct that is regularly involved in cases of domestic abuse, which should be dealt with by the criminal law. This thesis has argued that a new criminal offence could encompass these offences more effectively than adding to piecemeal criminal law, but the creation of these offences is welcome nonetheless. Discussion of the 'rough sex defence' will be limited to highlighting the way in which the Domestic Abuse Act makes some performative legal changes, without any significant legal benefit. These changes all fall under Part 6 of the Domestic Abuse Act, which addresses offences involving violent or abusive behaviour.

4.6.4.1 Non-fatal Strangulation

Section 70 of the Domestic Abuse Act makes non-fatal strangulation a specific offence. Due to the patchwork nature of the criminal law on domestic abuse in England and Wales, this adds to the body of offences that victim-survivors can look to for protection and

redress. Research has shown that non-fatal strangulation is a highly gendered form of domestic abuse,[314] often used as a method of control of abusive relationships.[315]

The study of non-fatal strangulation in the context of domestic abuse has grown substantially over the past two decades, and as studies mounted the clarity of the connection between non-fatal strangulation and domestic abuse has become increasingly clear.[316] Non-fatal strangulation overlaps with domestic abuse in a number of ways, as it can be part of the course of domestic abuse itself, but also represents harm that can be both physical and emotional simultaneously. Non-fatal strangulation allows the perpetrator to state to the victim-survivor that they have total power and control over them.[317] The significant overlap between domestic abuse and non-fatal strangulation has been found in the research of Strack et al, who state that in their study, 89% of strangulation victims had suffered from a history of domestic violence.[318]

Prior to the Domestic Abuse Act, this represented a significant gap in the law, as non-fatal strangulation does not always leave marks, in fact, in up to 40% of cases, there are no visible injuries related to the non-fatal strangulation.[319] Therefore, this offence could

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[314] Kristie Thomas, Manisha Joshi and Susan Sorenson S, '"Do you know what it feels like to drown?": Strangulation as coercive control in intimate relationships' (2014) 38 Psychology of Women Quarterly 124, 125.

[315] Julianna Nemeth, Amy Bonomi, Meghan Lee and Jennifer Ludwin, 'Sexual Infidelity as Trigger for Intimate Partner Violence' (20120) 21 Journal of Women's Health 942, 945-6.

[316] Martyna Bendlin and Lorraine Sheridan, 'Nonfatal Strangulation in a Sample of Domestically Violent Stalkers: The Importance of Recognizing Coercively Controlling Behaviours' (2019) 46(11) Criminal Justice and Behaviour 1528, 1529.

[317] Adam Pritchard, Amy Reckenwald and Chelsea Nordham, 'Nonfatal Strangulation as Part of Domestic Violence: A Review of Research' (2017) 18(4) Journal of Trauma, Violence and Abuse 407, 407.

[318] Dean Hawley, George McClane and Gael Strack, 'A review of 300 attempted strangulation cases Part III: Injuries in fatal cases' (2001) 21 The Journal of Emergency Medicine 317, 320.

[319] Julia De Boos, 'Non-Fatal Strangulation: Hidden Injuries, Hidden Risks' (2019) 31 Emergency Medicine Review Australia 302, 302.

previously only be prosecuted as battery, a crime that does not adequately capture the seriousness of the offence and could only result in up to 6 months imprisonment.[320] Alternatively, the offence of non-fatal strangulation contained in the Domestic Abuse Act will carry up to 5 years imprisonment. The creation of the offence of non-fatal strangulation is a positive step forward taken by the Domestic Abuse Act, which will hopefully be utilised in a criminal law context to provide victim-survivors of this offence with greater access to justice.

The offence of strangulation in the Domestic Abuse Act is subject to a defence of consent, but this defence also reflects some positive changes in attitude towards domestic abuse and consent. The defence will apply where A can show that B consented to the strangulation. This is a necessary defence to ensure that the line of criminalisation of private matters amongst consenting adults is not crossed. However, it should be noted that this defence has also taken a positive step forward in switching the burden of proof on consent in cases of non-fatal strangulation, as it requires that the alleged perpetrator proves that the victim-survivor *did* consent, rather than the victim-survivor having to prove that she did not. The defence is also revoked as soon as the victim-survivor suffers serious harm from the offence, or the perpetrator intended or was reckless to the victim-survivor suffering serious harm.

The Domestic Abuse Act has therefore taken some significant steps in improving the substantive criminal law relating to domestic abuse, particularly in the case of this specific offence of non-fatal strangulation. At the very least, this change demonstrates to victim-survivors that the offence is taken seriously and will be dealt with through access to legal recourse. However, it shall remain to be seen if this offence is utilised, as the issues relating to criminal justice discussed in this thesis continue to limit how transformative more

[320] Sentencing Council, 'Common assault/ Racially or religiously aggravated common assault/ Common assault on emergency worker' (Sentencing Council, 1st July 2021) <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/common-assault-racially-or-religiously-aggravated-common-assault-common-assault-on-emergency-worker/> accessed September 22nd 2021.

criminal law can truly be for victim-survivors. It may, unfortunately, be the case, that low prosecution and convictions rates for crimes that exist in the sphere of domestic abuse may be an enduring issue here.

4.6.4.2 Threatening to Share Intimate Images

Legal developments in the area of 'image-based sexual abuse' have also been significant in the last few years.[321] Strong links can also be made between image-based abuse and domestic abuse, as perpetrators can use phones and cameras to control assert control over and threaten victim-survivors of domestic abuse.[322] This has increased both in ease, as technology has become more widely available, and in severity, as people are able to access more and more people through growing platforms such as social media, in some cases increasing the severity of the threat of the abuse.

It has been established in already in this thesis how the growing use of technology could pose an unprecedented problem in the fight against domestic abuse, as it is incontestable that the significance and prevalence of technology in the context of domestic abuse is growing. This is also the case relating to image-based abuse and the threat to share intimate images. Empirical research on the prevalence of image-based abuse is rising, demonstrating that it is an issue far more widespread than many would expect.[323] Further, research on the experiences of victim-survivors reveal the severity of the harms involved in image-based sexual abuse, termed by McGlynn et al as social rupture, constancy, existential threat,

[321] McGlynn and Rackley (n 35); Jason Haynes, 'Judicial approaches to combating 'revenge porn': a multijurisdictional perspective' (2018) 39(3) Statute Law Review 319; Asher Flynn and Nicola Henry, 'Image -based sexual abuse: an Australian reflection' (2019) 31(4) Women and Criminal Justice 313.

[322] Douglas, Harris and Dragiewicz (n 275) 562-3.

[323] Yanet Ruvalcaba and Asia Eaton, 'Nonconsenusal pornography among U.S adults: a sexual scripts framework on Victimization, perpetration, and health correlates for women and men' (2020) 10(1) Psychology of Violence 68.

isolation, and constrained liberty, along with specifically identifying the life-threatening nature of threats to share intimate images.[324] While laws have been introduced to criminalise the sharing of intimate images, academics such as McGlynn have described the legislative response as 'piecemeal and focusing mainly on the practices of vengeful ex-partners'.[325]

Section 69 of the Domestic Abuse Act attempts to take steps forward within the law on sharing intimate images, amending section 33 of the Criminal Justice and Courts Act 2015 to include 'threatening to disclose' in the offence, rather than only 'disclosing'. This amendment does expand the range of conduct that is criminalised, allowing victim-survivors improved access to justice, as it recognises the powerful harms involved in the threats to share such images, rather than requiring that the photos were, as a matter of fact, sent.

Despite this positive step forward, the law on sharing and threatening to share images still requires significant improvement. The requirement for the intention of the perpetrator to cause distress remains, allowing the intention of the perpetrator to cause distress to remain central to the offence, rather than the law focusing on the harmful conduct itself. Unfortunately, detailed analysis of the issues surrounding image-based abuse is beyond the scope of this thesis. The Domestic Abuse Act has attempted to take a step forward, but it has tackled only one element of legal problems in relation to image-based abuse, which is certainly a missed opportunity for now. Although, it may be argued that the Domestic Abuse Act is not the most appropriate instrument in which to enforce such changes, and that an in-depth review and more updated law is required in this area. Once again, some quite specific criminal law that should be tackling what is primarily, an issue concerning women, has been added on to an incredibly wide-ranging piece of legislation, demonstrating that women's experiences are treated as an afterthought. These steps forward

[324] Clare McGlynn et al, '"It's Torture for the Soul": The Harms of Image-Based Sexual Abuse' (2020) 30(4) Social & Legal Studies 541, 557.

[325] Clare McGlynn, Erika Rackley and Ruth Houghton, 'Beyond "revenge porn": The continuum of image-based sexual abuse' (2017) 25(1) Feminist Legal Studies 25, 26.

taken by the Domestic Abuse Act in relation to non-fatal strangulation and image-based sexual abuse are certainly welcome, but it is disappointing that they have not warranted more in-depth and specific attention before campaigning that surrounding the Domestic Abuse Act was successfully opportunistic.

4.6.4.3 The 'Rough Sex Defence'

Following a campaign by Harriet Harman MP,[326] section 71 of the Domestic Abuse Act purports to remove the 'rough sex defence' to murder by stating that 'It is not a defence that the victim consented to the infliction of the serious harm for the purposes of obtaining sexual gratification.' This follows cases where the defendant raises that the death of the victim occurred due to 'rough sex gone wrong' which the victim consented to.

The issue with this well-intentioned law is that it has not changed the law in any meaningful way, and it is unclear why it has been dealt with in the Domestic Abuse Act. It has restated on a statutory footing an already well-established legal principle, that a person cannot consent to serious harm, and thus by extension, their own death.[327] Therefore, the central issue this not about the consent of the victim, but the intent of the perpetrator. This is ultimately an over-simplified political statement which lacks nuanced understanding of the current criminal law contained in the Act, rather than a real solution to what is a deep-rooted issue. A more practical solution comes from one argument of Bows and Herring, who suggest that 'sentencing guidelines could be introduced which make sexual activity, immediately before or during the commission of the offence, an aggravating feature', along with changes in evidence law to prohibit the use of evidence that relies upon consent, where

[326] Katherine Johnston, ''Rough Sex Defence' will be outlawed after MPs back Harriet Harman's campaign' (Southwark News, 7th July 2020) <https://www.southwarknews.co.uk/news/rough-sex-defence-will-be-outlawed-after-mps-back-harriet-harmans-campaign/> accessed 19th September 2021.

[327] *R v Brown* [1994] UKHL 19; *R v Wacker* [2003] 1 Cr App R 22; *R v Emmett* [1999] EWCA Crim 1710.

the victim is voiceless and cannot challenge it.[328] These types of solutions reflect a more nuanced understanding of how criminal law cases involving sexual activity and deaths can continue to be prosecuted under the offence of manslaughter, while allowing for the law to impose more serious sanctions. Such solutions are less likely to grab headlines, but more likely to result in practically significant outcomes in cases.

This speaks to the way in which the Domestic Abuse Act does, in parts, appear to make opportunistic political statements regarding violence against women. This is reflective of an unconsidered approach taken towards the criminal law and women's experiences. Ultimately, the area of law that tackles sexual activity, violence, and death is complex. It holds on to some conflicting caselaw, exacerbated by deep-rooted issues that span across law, the CPS, and culture. The Domestic Abuse Act has failed to make any significant substantive changes, aside from slight clarification and symbolic support. A review of this area of law is long overdue and this remains the case.

4.7 Conclusion

This chapter addressed a broad range of changes made by the Domestic Abuse Act. The creation of a statutory definition of domestic abuse was welcomed, as was the scope of behaviours included in the Act, which expanded what is viewed as 'domestic abuse' well past purely physical abuse, which was argued to be an important point in relation to the creation of a new criminal offence of domestic abuse. It also makes some other significant changes, for example in relation to increasing availability of special measures in legal proceedings, and to how victim-survivors will be prioritised in relation to housing aid. Such changes have made notable improvements when looking to the aim of protection of victim-survivors. However, this chapter also highlighted areas where the Act does not go far enough or misses opportunities altogether. The most significant of these arguments is made

[328] Hannah Bows and Jonathan Herring, 'Getting Away With Murder? A Review of the 'Rough Sex Defence' (2020) 84(6) Journal of Criminal Law 537.

in relation to migrant women, who fall entirely outside of the scope of the Act. The Act fails to hit the mark of being a truly radical, intersectional, feminist instrument. The Act also falls short in its improvement of the criminal law and criminal justice system. Instead, it hybridises civil orders, arguably creating a weaker form of protection/redress that falls between the two stools of criminal and civil law.

The next chapter will move on to discuss how the criminal law response to domestic abuse should be viewed as part of a holistic solution. The other legal areas that make up domestic abuse law are noted with brief overviews provided, as they are recognised to be a valuable supplement to the criminal law approach that has been argued for throughout this thesis.

Chapter 5. Supporting a Holistic Response to Domestic Abuse

5.1 Introduction

This thesis has focused primarily upon domestic abuse law in a criminal law context, arguing for more robust and expansive criminal laws to protect and empower victim-survivors, and provide them with adequate redress. However, this thesis recognises that the criminal law is a foundation which does not, and should not, exist in isolation to combat domestic abuse. More law alone will rarely be the answer, even if it is an antecedent to creating a solution to protect and empower victim-survivors, along with providing them with redress. Instead, different elements are needed to make up an adequate state response to domestic abuse.[329] The criminal law is a key part of a wider solution; it is one important tool in a fuller toolbox of solutions.

In this chapter I briefly outline some other legal contexts that deal with domestic abuse law. This is for the purpose of raising these relevant issues, rather than going into depth or providing a detailed analysis, as has been done with the criminal justice approach. The focus of this thesis has been the Domestic Abuse Act and the criminal law, however, human rights law and civil law will be dealt with in this chapter, as they are the other primary legal areas that formulate what could be described as domestic abuse law. It is argued that these other areas of law serve to supplement the criminal law on domestic abuse to create a more robust legal response.

This chapter does not endeavour to provide an in-depth analysis of everything that can help victim-survivors of domestic abuse due to them falling outside the scope of this legal thesis, which focuses on domestic abuse law. These things can range from financial aids, housing support, counselling, work done by local authorities, important aid provided by charities,

[329] Herring (n 7) 157.

campaigns, education, amongst many other things. It is also important that resources such as financial aid and counselling are available to women *after* their cases have progressed through the criminal justice system. Cultural changes are also of fundamental importance if we are to see any significant reduction in the prevalence of domestic abuse. These other solutions are noted as some examples of invaluable support provided outside of the law, that should be recognised to be of equal importance to an improved legal response to domestic abuse.

5.2 Civil Law

Civil law is a further tool that can be used by victim-survivors to combat domestic abuse. It must be noted that this thesis does not propose that the criminal law is any more or less important than civil law in relation to combatting domestic abuse, as the two legal areas have become increasingly commingled. There has been an element of hybridisation of civil and criminal law through the imposition of criminal sanctions on civil law orders relating to domestic abuse (DAPOs), addressed in the previous chapter. It is because of this hybridisation of the criminal and civil law that makes it important that the civil law be addressed in this thesis, as the effectiveness of the criminal and civil law will inevitably be affected by one another due to this increasing interdependence.

Civil law and the Family Courts allow victim-survivors of domestic abuse access to some forms of legal support, for example through injunctions, divorce, and proceedings relating to the contact of children. It should be noted that these are legal elements to the lives of victim-survivors, rather than a way of necessarily combatting domestic abuse. Nevertheless, it should be noted that these elements of the law do add to the periphery of domestic abuse law, as they provide important legal channels that may make escape of domestic abuse achievable for victim-survivors.

Civil law provision relating to the aims discussed throughout this thesis in relation to combatting domestic abuse most notably include the civil law orders introduced by the

Domestic Abuse Act: Domestic Abuse Protection Notices (DAPNs) and Domestic Abuse Protection Orders (DAPOs).

5.2.1 Civil Law Provisions in the Domestic Abuse Act

The introduction of DAPOs and the benefits and limitations to this were discussed in Chapter 4. The Domestic Abuse Act aims to simplify the civil orders that previously related to domestic abuse, replacing them with DAPNs and DAPOs, a brief summary of these civil orders are provided here.

The aim of a DAPN is to secure the immediate protection of the victim and will be issued when a police officer has reasonable grounds for believing domestic abuse (as defined in Section 1 of the Act) has occurred.[330] This protection can be achieved through a number of methods, for example the removal of the alleged perpetrator from a home in which him and the victim-survivor cohabit, prohibiting the perpetrator for coming within a specified distance of the victim-survivor, or requiring the perpetrator to make no form of contact with the victim-survivor.[331] The issue of a DAPN will trigger a police-led application for a DAPO in a magistrates' court.[332] Section 24 outlines matters to be considered in the issuing of DAPNs, which include, but are not limited to, the welfare of any child whose interests the officer considers relevant and the opinion of the victim-survivor.

A DAPO is also a civil order which aims to protect victim-survivors, and overlaps considerably with DAPNs, although DAPOs are the more serious of the two, as they can carry more onerous requirements and the breaking of a DAPO has more serious consequences. Where the breaking of a DAPN can lead to arrest without warrant,[333] the

[330] Domestic Abuse Act 2021, s. 22.

[331] Domestic Abuse Act 2021, s. 23.

[332] ibid.

[333] Domestic Abuse Act 2021, s. 26.

breach of a DAPO without reasonable excuse will be an imprisonable offence, carrying the maximum sentence of 5 years in custody.[334] DAPOs can be obtained through a variety of routes, including on application by certain categories of person (including the alleged victim-survivor), a member of the police force, or by family, criminal or county courts.[335]

It should be noted that the issuing of a DAPN or DAPO does not constitute a finding of guilt. These are merely protective orders. Therefore, while civil orders may be more suited to providing immediate protection where the victim-survivor fears involvement with the criminal justice system, these civil orders do not have the same effect of empowerment through recognition, or the provision of redress, as is available through the criminal law.

It could therefore be argued that, in one sense, civil orders are not serious enough in dealing with cases of domestic abuse, as there lacks recognition of the harms experienced by the victim-survivors and the provision of redress, as there would be no conclusive finding of guilt. This follows the chronic approach of under-criminalisation of women's experiences. On the other hand, these civil orders have the potential to be quite severe, as perpetrators face up to 5 years in prison for the breaking of the order (rather than for the conduct itself). It is submitted that the introduction of less complicated civil orders is a welcome change made by the Domestic Abuse Act. However, making the breach of civil orders the criminal behaviour that warrants criminal sanctions, rather than recognising the harm that results due to the conduct of domestic abuse through the criminal law, sends the wrong message to victim-survivors. Further, partially placing the onus on victim-survivors to seek remedy through the civil law is a similarly concerning message to send, along with it being a negative rerouting of who should be prosecuting domestic abuse. It must remain a primary responsibility of the state, rather than the victim-survivor.

[334] Domestic Abuse Act 2021, s. 39.

[335] Domestic Abuse Act 2021, s. 28.

Further, this thesis has already discussed the concerning impact that the reduction of legal aid has had on the criminal justice system. The same impacts can be seen throughout civil legal aid too, which was decimated by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The recently published 'Future of Legal Aid' report published in July 2021 highlights several significant issues in relation to the availability of and access to civil legal aid.[336] The report welcomes a review of a number of areas in relation to both criminal and civil legal aid and recognises that the rise of litigants in person is an unacceptable outcome of the decline in legal aid.[337]

Similarly, the toxic cultural attitudes that persist through the criminal justice system, discussed in Chapter 3 of this thesis, apply equally to courts that apply the civil law. The prevalence of false-allegation myths, and the pro-contact culture of the courts, mean that legal recourse can be just as evasive in civil courts as criminal courts for victim-survivors.[338]

A detailed analysis of these issues is beyond the scope of this thesis, but it is important that the way in which the decline of legal aid impacts victim-survivors transcends the criminal justice system and exposes fundamental issues in the civil courts. Cultural issues that perpetuate myths and misogynistic attitudes are also as common in the civil courts as the criminal courts. It must therefore be considered that the civil law will not be a strong enough supplement to the criminal law, if it is suffering from the very same problems in terms of underfunding and cultural issues.

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[336] Justice Committee, 'Future of Legal Aid' (Justice Committee, 27th July 2021) <https://committees.parliament.uk/work/531/the-future-of-legal-aid/publications/> accessed 2nd October 2021.

[337] ibid.

[338] Michael Flood, 'The Myth of Women's False Accusations of Domestic Violence and Rape and the Misuse of Protection Orders' (May 2010) <https://xyonline.net/sites/xyonline.net/files/False%20Accusations%20DV%20Rape%202010_0.pdf> accessed October 13th 2021.

In conclusion, the civil law is another existing legal route for victim-survivors of domestic abuse, and it is imperative that it remains both flexible and accessible. However, there are some deep-rooted and complex issues that are insidiously woven through the fabric of the civil courts, which make the civil courts as unreliable in dealing with cases of domestic abuse as the criminal courts. Further, it can be questioned whether the creation of protective orders, which can lead to the imposition of criminal sanctions without conclusive finding of guilt, is the most effective way to bring about criminal legal sanctions in cases of domestic abuse. It is submitted that a new criminal law offence may have been more appropriate if custodial sentences were the aim of the government in the creation of these orders.

5.3 Human Rights

The final area of law this thesis will address is human rights law. Few would immediately associate domestic abuse law with human rights, but as Herring emphasises, domestic abuse is at its very core, a human rights issue.[339] Herring explains that most theories of human rights contain four fundamental elements: fundamentality, universality, group vulnerability, and state accountability.[340] Domestic abuse law therefore axiomatically holds foundations in human rights based on these grounds. Nevertheless, human rights law has been slow to take up domestic abuse as an issue, due to the nature of human rights law being associated historically with absence of state interference, particularly in relation to issues primarily impacting women.[341] But human rights in the modern legal world should go beyond this, they 'are not simply tools to prevent states from acting in a way which infringes human rights, but they require the state to put in an effective legal response'.[342] In

[339] Herring (n 7) 10.

[340] ibid.

[341] Celina Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 Harvard Human Rights Journal 87, 105.

[342] Herring (n 7) 59.

the same way that this thesis has argued a foundational principle of better criminal law in relation to domestic abuse is the recognition and condemnation of crimes that primarily affect women, the uptake of domestic abuse as a human rights issue allows us to appropriately recognise the significance of domestic abuse as a matter of international human rights law.

Whilst a detailed assessment of human rights in relation to domestic abuse will not be possible in this thesis, the growing relevance of human rights in domestic abuse law, and its usefulness to victim-survivors, must be noted. The three instruments that are of particular interest are the European Convention on Human Rights (ECHR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Istanbul Convention.

5.3.1 The ECHR

The European Convention on Human Rights is the first human rights tool that will be addressed in relation to domestic abuse. The Articles that may be applied in the context of domestic abuse are:

- Article 2: the right to life
- Article 3: the right to protection from torture and inhuman and degrading treatment
- Article 8: the right to respect for private and family life

Article 2 relates to domestic abuse, as domestic abuse is a noted precursor to domestic homicides.[343] It was found in *Kongrová v Slovakia* that the authorities were under a duty to prevent a death in a domestic homicide where the victim had withdrawn a complaint of domestic abuse and it had not been investigated.[344] This case clearly establishes the

[343] Monckton Smith (n 219) 8.

[344] *Kongrova v Slovakia* App no 7510/04 (8 August 2000)

applicability of Article 2 in relation to cases of domestic abuse and imposes positive duties on the state regarding their investigation of alleged abuse.

Article 3, the right to protection from torture and inhuman and degrading treatment, also has applicability in the domestic abuse context. Both physical and psychological injury can be considered here as elements of degrading treatment, and as this thesis has already established, these are two significant harms experiences by victim-survivors of domestic abuse. The question also arises whether domestic abuse falls under the limb of 'torture', as has been argued by academics such as Copelon.[345] McQuigg argues that this would be a welcome development as it would make a strong statement regarding the seriousness of domestic abuse.[346] Regardless, Article 3 has been recently interpreted by the European Court of Human Rights (ECtHR) in the case of *Volodina v Russia*, where it was held that the Russian authorities has failed in their Article 3 duties by failing to protect the victim-survivor from repeated acts of domestic abuse or hold the perpetrator accountable.[347] The welcome development in this caselaw follows the fact that the ECtHR emphasises that psychological abuse to meet the threshold of engaging Article 3, not just physical abuse, which is 'reflective of the evolution which the Court's jurisprudence on this issue has undergone'.[348]

Article 8 has been one of the most frequently engaged articles in domestic abuse cases.[349] This is understandable, as the occurrence of domestic abuse almost automatically infringes upon one's right to respect for private and family life.

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[345] Rhonda Copelon, 'Intimate Terror: Understanding Domestic Violence as Torture' in R Cook (ed), *Human Rights of Women – National and International Perspectives* (University of Pennsylvania Press 1994) 121.

[346] Ronagh McQuigg, 'The European Court of Human Rights and Domestic Violence: Volodina v. Russia' (2021) 10 International Human Rights Law Review 155, 166.

[347] *Volodina v Russia* [2019] ECHR 539.
[348] McQuigg (n 346) 166.

[349] Herring (n 7) 75.

Herring argues that the Convention as interpreted by the ECtHR can be a powerful tool from which to develop an effective legal response to domestic abuse.[350] He points out that the state has an obligation to protect the human rights of its citizens, regardless of the source of the intervention to these rights.[351] Nevertheless, positive duties on the state, generally, require knowledge of the abuse, which is incredibly difficult to both establish and rely upon. Herring succinctly summarises that 'The text of the ECHR, read strictly, is not a promising source of rights for victims of domestic abuse. However, through the interpretation of the ECtHR, much progress has been made.'[352]

It is through this interpretation that domestic abuse law in relation to human rights is most likely to develop a stronger and practically implementable basis, rather than attempting to impose an illusory protection from the plain text of the ECHR itself.

5.3.2 The Istanbul Convention

The Istanbul Convention was one of the first treaties to explicitly deal with violence against women, outlining State's obligations regarding the prevention of violence against women, protection of women, and the prosecution of violence against women.[353]

The Istanbul Convention takes a victim-centred approach to combatting violence against women and is particularly progressive in its pre-amble which states that 'Violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women.'

[350] Herring (n 7) 61.

[351] *Valiuliene v Lithuania* App no 33234/07 (26 March 2003) para 72.

[352] Herring (n 7) 99.

[353] Olga Jurasz, 'The Istanbul Convention: a new chapter in preventing and combatting violence against women' (2015) 89(9) Australian Law Journal 619, 619.

In addition to the recognition of historic power imbalance, the preamble also explicitly recognises the structural nature of violence against women, and that domestic violence affects women disproportionately. This recognition and centrality of women, along with positive obligations to protect women, makes the Convention a relatively progressive tool in the potential protection of victim-survivors of domestic abuse.

The Convention uses the term 'domestic violence' to mean:

> All acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.[354]

This means that this part of the definition of the Convention is quite closely aligned with academic conceptions of domestic abuse, and the legal definitions adopted by the UK recently with the passing of the Domestic Abuse Act. It is therefore, arguably, one of the more ambitious human rights treaties directed at the protection of women.

The Istanbul Convention also recognises that law alone is not the answer, and that responses to domestic abuse must encompass a range of other types of support, from economic support to healthcare to housing.

Despite some welcome elements of the Istanbul Convention, as with CEDAW, its usefulness is capped by the intentions and actions of States. The United Kingdom has signed the Istanbul Convention, but has not ratified it in over 8 years, and therefore it has not entered into force in the UK. It would be welcomed to see the UK take this positive step in protection victim-survivors of domestic abuse in human rights law on the international stage, in terms of symbolic support for women everywhere. However, the extent to which this would afford any more practical legal protection in the UK is contestable. The changes made by the Domestic Abuse Act arguably align UK law and policy more with the Istanbul Convention, but its failings in relation to migrant women arguably leaves the UK still in

[354] European Convention on Human Rights, Article 3.

non-compliance with Article 4(3) of the Istanbul Convention, which requires non-discrimination in relation to migrant or refugee status relating to state duties to protect women.

5.3.3 The Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW)

Fundamentally, this Convention acknowledges that discrimination against women is ongoing, wide-ranging, and pervasive throughout the world. Article 1 of CEDAW defines the term 'discrimination against women' as:

> Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[355]

It is the view of the Committee on the Elimination of All Forms of Discrimination Against Women that domestic violence constitutes a form of discrimination against women, due to the gendered nature of violence occurring against women in the domestic abuse context.

Subsequent interpretation of this definition by the ECtHR has explicitly stated that gender-based violence constitutes a form of discrimination against women. In *Volodina v Russia* it was confirmed that the 'State's failure to protect women against domestic violence breaches their right to equal protection of the law.'[356] This is a welcome development from a time when international law was criticised for 'reinforcing, and to some extent

[355] Convention on the Elimination of All Forms of Discrimination Against Women 1979, Article 1.
[356] *Volodina v Russia* [2019] ECHR 539, para 110.

replicating, the exclusion of women's rights abuses from the public sphere and therefore the state's international obligations.'[357]

Article 2 then goes on to require that States Parties should adopt legislative and other appropriate measures to prohibit discrimination against women and protect women's rights. However, the extent to which this has been realised appears limited, with the responses of States in relation to this definition and these duties lacking foundational strength. McQuigg examined the responses of Western States to the comments of the Committee in relation to domestic violence, finding that the majority of States were failing to implement appropriate measures, and so failing to make real practical difference to the lives of victim-survivors.[358] In his conclusion, McQuigg also points out that it is impossible to say whether positive changes that were made, for example in the cases of Luxembourg, Sweden and the Netherlands, were made *because* of the human rights standards imposed.[359] He argues that human rights instruments are relied upon more by countries outside of these Western States examined, whereas in these states, domestic law and politics appeared to be relied upon more in the context of a legal response to domestic abuse.

5.3.4 The Limitations of a Human Rights Approach

The level of protection and legal support provided by human rights in the domestic abuse context is limited by the general effectiveness and applicability of human rights law in

[357] Dorothy Thomas and Michele Beasley, 'Domestic Violence as A Human Rights Issue' (1995) 58(4) Albany Law Review 1119, 1123.

[358] Ronagh McQuigg, 'The Responses of States to the Comments of the CEDAW Committee on Domestic Violence' (2007) 11(4) The International Journal of Human Rights 461, 464.

[359] ibid, 475.

general. For this reason, a human rights approach at present seems, at best, a supplement to domestic law in England and Wales.

Douzinas argues that human rights are articulations of how things ought to be, rather than how they truly are.[360] He argues that freedom and equality are not achieved through human rights, but through political struggles. Although human rights can be 'a powerful weapon',[361] it can be argued that, due to the paradoxical nature of rights, they are primarily a tool of the establishment and status quo. Therefore, political struggles can then be legitimised and consolidated by human rights law, but it is the political struggle that almost always precedes the law. This links clearly with the modern realist perspective of human rights, that states will always act in their own political interests, so human rights become irrelevant in the pursuit of social change that has not yet been accepted. This speaks to the function and effectiveness of human rights law; rights-claims for the excluded are foreclosed by political means. This perspective helps us to realistically consider both the flaws and strengths of human rights law, allowing global action to react in a way that achieves the most consequentially.

In a domestic abuse law context, as victim-survivors are recognised in human rights instruments as primarily women, a historically marginalised group, they are unlikely to see their rights and protection practically advanced by reliance upon human rights.[362] It is more likely that human rights will develop in line with political understanding of domestic abuse, and eventually, human rights may act as one source of protection of these legal rights. It is for this reason, human rights in relation to domestic abuse must be seen as only one part of the puzzle, in the same way this thesis has argued that the criminal and civil law should be too.

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[360] Costas Douzinas, *The Meaning of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge University Press 2014).

[361] ibid.

[362] It should be noted that this argument is advanced in relation to human rights being utilised in the context of England and Wales. Human rights can be a comparatively more significant tool in other countries, where domestic law is less readily available for support on human rights issues.

5.4 Conclusion

This chapter has outlined that the criminal law approach to domestic abuse does not stand alone as the only solution to domestic abuse, it is merely one part of a wider solution. Further, it recognises that the criminal law approach is not the only area of law that makes up the landscape of domestic abuse law. This chapter has briefly outlined how the civil law and human rights can help victim-survivors. This chapter has also made brief comment on the limitations of these two approaches, and how they might develop in the coming years. It is unfortunate a more in-depth analysis of these approaches falls outside the immediate scope of this thesis due to limitations concerning word-count. It has been argued that a multifaceted approach to domestic abuse has value, and that a holistic solution to domestic abuse should be pursued to meet the aims of domestic abuse law.

Chapter 6. Conclusion

6.1 Conclusion

Domestic abuse is a severe and unqualified wrong that has been chronically misunderstood both by society and by the law. As the understanding of domestic abuse has developed among academics and professionals, the criminal law has failed to keep pace. This thesis has argued that the criminal law has an important role to play as part of a holistic solution in order to improve the legal landscape of domestic abuse.

In order to establish this argument, this thesis has provided a review of the current landscape of domestic abuse law, highlighting significant substantive inadequacies within the criminal law, and systemic and procedural issues throughout the criminal justice system. On the basis of these arguments, this thesis has submitted that a new offence of domestic abuse could be a useful development in order to overhaul an insidiously outdated approach that has built up through the incremental development of domestic abuse in relation to the criminal law. Further, it has been argued that for new substantive criminal law to be successful in achieving the aims of domestic abuse law, the criminal justice system must also improve simultaneously, in order to allow any updated law to be enforced in any meaningful way for victim-survivors. A review of the Domestic Abuse Act and other significant areas of domestic abuse law was also undertaken, to create a broader understanding of the direction of domestic abuse law, and how these areas may be developed to provide a stronger foundation which can serve to supplement the criminal law approach to domestic abuse.

Whilst domestic abuse law has seen some welcome and significant changes in the past year, particularly in relation to the wider understanding of what domestic abuse ‘looks’ like, it should be stated that there are still notable flaws and outstanding developments that must be made for the aims of domestic abuse law to be achieved, particularly in relation to the availability of redress to victim-survivors. The criminal law on domestic abuse desperately

needs reviewing, both in relation to historic inadequacies and developing crimes such as technology-based abuse.

Nevertheless, the recent policy attention directed towards domestic abuse is welcome, as gendered issues have seen an increase in visibility both throughout society and within the Houses of Parliament. This attention has arisen due to the bravery, resilience, and tireless campaigning of both victim-survivors and a number of fearless organisations.[363] It is hoped that this placement of attention continues, paired with a development of nuanced understanding of gendered issues. Further, it is hoped that the criminal law surrounding gendered issues is also afforded adequate attention and not abandoned as a 'site for struggle.'[364] As victim-survivors grow evermore empowered by social developments, it is increasingly important that we ensure that they have robust tools available to them, as they reach for their toolbox to help them access justice.

[363] Refuge, The Angelou Centre, Women's Aid.
[364] Smart (n 23) 162.

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