

# **Criminalizing Coercive Control in Canada: The Implications for Family Law**

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*"Remember all Men would be tyrants if they could..."*

- Abigail Smith Adams in a Letter to her husband John Adams, 1776<sup>1</sup>

*"Whether or not coercive control is new, its deployment today is designed to stifle and co-opt women's gains; foreclose negotiation over the organization, extent, and substance of women's activities in and around the home; obstruct their access to support; close the spaces in which they can reflect critically on their lives; and reimpose obsolete forms of dependence and personal service by micromanaging the enactment of stereotypic gender roles through 'sexism with a vengeance.'"*

- Evan Stark

*Coercive Control: The Entrapment of Women in Personal Life*, 2007<sup>2</sup>

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<sup>1</sup> As quoted in R Emerson Dobash and Russell Dobash, *Violence Against Wives: A Case Against the Patriarchy* (New York: The Free Press, 1979) at 20.

<sup>2</sup> See Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford: Oxford University Press, 2007) at 194 [Stark, "Coercive Control"].

## Table of Contents

Introduction.....	4
The Need for an Understanding of Coercive Control.....	5
Penalizing women's fear .....	6
Seeing the invisible cage .....	8
Coercive control and mind control .....	10
Stark's theory of coercive control .....	12
Nascent Reforms in North America .....	16
The UK Reforms.....	20
The <i>Serious Crime Act</i> , 2015.....	20
The "gold standard": Scotland's <i>Domestic Abuse Act</i> .....	24
The evidence on criminalization in the UK.....	28
The "Harm Report" and Contact Culture .....	35
The <i>Domestic Abuse Act</i> 2021 .....	38
UK Case Law on Coercive Control.....	42
<i>F v M</i> .....	46
<i>Re H-N and Others</i> .....	47
Post <i>Re H-N and Others</i> .....	51
Canadian Case Law on Coercive Control.....	52
<i>NDL v MSL</i> .....	53
A note about Situational Couples Violence .....	57
Other notable Canadian cases on coercive control.....	58
A Closer Look at Bill C-247 .....	60
The Shadow Pandemic's Review of Bill C-247.....	60
Framing and intertextuality .....	63
Recommendations.....	71
Conclusions.....	77
Bibliography .....	83

## Introduction

In Fall 2020, MP Randall Garrison (NDP) introduced a private member's Bill, C-247, to criminalize coercive control in Canada.<sup>3</sup> The introduction of this bill followed in the footsteps of the UK parliament's move in recent years to criminalize coercive control and domestic violence.<sup>4</sup> Indeed, there has been a movement worldwide in other jurisdictions to follow suit.<sup>5</sup> However, criminalization of coercive control may have serious unintended consequences for survivors of domestic violence. The chief fear is that abusers may find ways to use the new laws against their victims.<sup>6</sup> Given that many cases of domestic violence often involve both criminal and family law, the criminalization of coercive control will likely shape outcomes for survivors in family court.

Indeed, even prior to criminalization in Canada, the concept of coercive control has already entered the Canadian legal lexicon through the recent amendments to the Federal *Divorce Act* and the Ontario *Children's Law Reform Act*, which both refer to coercive control in the context of family violence.<sup>7</sup> To date, the bulk of the research on

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<sup>3</sup> See *Private Member's Bill: C-247 An Act to amend the Criminal Code (controlling or coercive conduct)*, LEGISInfo, online: <[www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=10868507](http://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=10868507)>.

<sup>4</sup> In 2015, England and Wales became the first jurisdiction to criminalize coercive control with Section 76 of the *Serious Crime Act 2015*. See UK Crown Prosecution Service, "Controlling or Coercive Behavior in an Intimate or Family Relationship—Legal Guidance, Domestic Abuse", online: <[www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship](http://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship)>. More recently, the UK Parliament introduced a new *Domestic Abuse Act* in 2021, see *Domestic Abuse Act 2021*, UK Parliament, online: <[bills.parliament.uk/bills/2709/publications](http://bills.parliament.uk/bills/2709/publications)>. The Scottish *Domestic Abuse Act* came into force in 2019, also introducing an offence of coercive and controlling behaviour. See Scottish Government, "Domestic Abuse Act in Force" (1 April 2019), online: <[www.gov.scot/news/domestic-abuse-act-in-force/](http://www.gov.scot/news/domestic-abuse-act-in-force/)>.

<sup>5</sup> Notably, most recently both Hawaii and California enacted legislation to this effect. France, Ireland, and Tasmania have also expanded their domestic violence legislation in recent years. Several other jurisdictions including New Zealand and Australia have been studying and attempting to introduce similar legislation to that in the UK, though in many cases this has been stalled and subject to intense debate. For a list of recent coercive control legislation, see the America's Conference to End Coercive Control, "Coercive Control Bill Tracker", online: <[www.theacecc.com/billtracker](http://www.theacecc.com/billtracker)> [ACECC].

<sup>6</sup> See Paul McGorry, Marilyn McMahon, "Prosecuting controlling or coercive behaviour in England and Wales: Media reports of a novel offence" (2019) 1-19 *Criminology & Crim J* 1 at 2-3.

<sup>7</sup> See *Divorce Act* (RSC, 1985, c3 (2nd Supp)); see also *Children's Law Reform Act*, RSO 1990, c C12.

coercive control has focused on criminal law and policing, while the impact of the criminalization of coercive control on family court cases remains understudied. In this paper, I will address this gap in the literature by evaluating the potential gains and pitfalls of criminalizing coercive control through the lens of family law.<sup>8</sup>

I will begin by examining the definition of coercive control, as well as its origins and its growing significance for family law. I will then examine the proposed legislation on coercive control in Canada and the wider movement of domestic abuse reforms taking place in the UK.

I will discuss research findings on the available evidence of the impact of the UK legislation so far and then will provide an analysis of both UK and Canadian family court case law before summarizing my recommendations for the future of coercive control in Canadian law. From my analysis, I conclude that while the legal recognition of coercive control may be a step forward in providing needed help to many women that the present system fails to protect, this development must, crucially, be set within the context of a broader survivor-led social movement and a campaign of education and multi-agency reform. Without wider systems reform and a critical intersectional lens of gender-based violence, any new enactments will fall flat and may harm more than help survivors. While Bill C-247 is an important step forward in the right direction, taken as a stand-alone effort it is grossly inadequate to meet the task it aims to perform.

## The Need for an Understanding of Coercive Control

Cassandra Weiner's 2017 paper on coercive control, "Seeing What is 'Invisible in Plain Sight': Policing Coercive Control" captures the insidious nature of domestic violence and

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<sup>8</sup> As Jane Wangmann emphasizes, "One of the clear lessons arising from experience in the area of feminist-informed law reform is the need to consider any risks or unintended consequences that might flow from an otherwise well-intentioned change to the law." See Jane Wangmann, *Coercive Control as the Context for Intimate Partner Violence: The Challenge for the Legal System* in Marilyn McMahon and Paul McGorrey eds, *Criminalizing Coercive Control: Family Violence and the Criminal Law* (Singapore: Springer Nature, 2020) 219 at 233.

the scale of the challenges it poses for policing something that is “invisible in plain sight.”<sup>9</sup> These challenges carry over into the family courts as well. Weiner describes an example of just how subtle signs of domestic violence can be by describing a seemingly innocuous detail noticed by an interviewer during a home visit to a rape victim. There was a dog bowl on the floor in the kitchen. The attentive but confused interviewer noted, however, that there was no evidence of a dog living in the home. After careful questioning, the woman revealed that her husband put the dog bowl on the floor for her to eat her meals. As Weiner says,

Perpetrators are manipulative and cunning – ‘some of the most nasty people you could come across’. No amount of ‘understanding’ can guarantee that an officer will think to question the presence of a dog bowl. But what is certain is that without that understanding, the significance of the dog bowl will remain invisible. Understanding, in theory, how the different dimensions of coercive control work together will help officers to ‘see’ it.<sup>10</sup>

Making domestic violence visible is one of the greatest challenges that feminist activists and survivors face. Despite decades of advocating about the harms of domestic violence and supporting women and children to find refuge in shelters, the law remains unable to “see” domestic violence in its full force.<sup>11</sup>

### Penalizing women’s fear

As a result, many women walk away from their interactions with the legal system feeling let down and worse off than they were before they sought help from the law. Lisa Fischel-Wolovick, a New York-based attorney who has represented abused women in for more than 30 years and has advocated for greater recognition of domestic violence and trauma, argues that family courts are even farther behind than criminal

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<sup>9</sup> See Cassandra Weiner, “Seeing What is ‘Invisible in Plain Sight’: Policing Coercive Control” (2017) 56:4 *Howard’s J Crime & Justice* 500.

<sup>10</sup> *Ibid* at 512.

<sup>11</sup> As Evan Stark says, despite decades of activism, domestic abuse and gender inequalities are endemic. Stark, “Coercive Control”, *supra*, note 2 at 12.

courts when it comes to protecting abused women and children.<sup>12</sup> She says that family courtrooms are “hostile” environments that easily retraumatize survivors, in part, because courtrooms have failed to base decisions on evidence-based research on domestic violence. Instead, family courts rely on outdated concepts or debunked gender-biased theories such as parental alienation.<sup>13</sup> Similarly, Elizabeth Sheehy and Susan Boyd describe how Canadian family courtrooms “penalize women’s fear” using parental alienation, discounting intimate partner violence, and enforcing shared parenting-time even when there is significant risk of harm to mother and child.<sup>14</sup> Gender discrimination and a lack of safety are sharply felt by mothers seeking help in family courtrooms across other common law jurisdictions as well.<sup>15</sup>

The consequences are deadly. Parenting disputes are often a triggering factor in intimate partner homicides.<sup>16</sup> Often, however, police are left shocked when women and children who have faced no previous physical violence are killed “out of the blue”.<sup>17</sup> Again, this is because of a failure to “see” the true nature of the domestic abuser. Often

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<sup>12</sup> See Lisa Fischel-Wolovick, “Battered Mothers and Children in the Courts: A Lawyer’s View” (2020) 17 *Intl J Applied Psychoanalytic Studies* 246 at 248.

<sup>13</sup> *Ibid.*

<sup>14</sup> See Elizabeth Sheehy and Susan B Boyd, “Penalizing Women’s Fear: Intimate Partner Violence and Parental Alienation in Canadian Child Custody Cases” (2020) 42:1 *J Soc Welfare & Fam L* 80 at 88.

<sup>15</sup> For a perspective on UK courts, see also Maya Oppenheim, “Domestic abuse victims ‘silenced’ by family courts and forced into letting dangerous exes see children, warn campaigners”, *The Independent* (22 June 2021), online: <[www.independent.co.uk/news/uk/home-news/domestic-abuse-family-courts-children-b1870605.html](http://www.independent.co.uk/news/uk/home-news/domestic-abuse-family-courts-children-b1870605.html)>.

A recent report by Women’s Aid UK on safe contact describes systemic failings in the UK family courts in terms of gender discrimination against women and failure to protect survivors. See also Jenny Birchall and Shazia Choudhry, “What about my right not to be abused? Domestic abuse, human rights and the family courts” (2018) at 3, online (pdf): *Bristol Women’s Aid* <[www.womensaid.org.uk](http://www.womensaid.org.uk)>. Similarly, Vivienne Elizabeth describes New Zealand’s family courts as a “no-win situation for mothers.” See also Vivienne Elizabeth, “From domestic violence to coercive control: Towards the recognition of oppressive intimacy in the Family Court” (2015) 30:2 *New Zealand Sociology* 26 at 39.

<sup>16</sup> Fischel-Wolovick, *supra*, note 12 at 250. See also R Emerson Dobash and Russel P Dobash, *When Men Murder Women* (Oxford: Oxford University Press, 2015) at 32 [Dobash, “Men Murder”]. Dobash and Dobash describe how men who murder their intimate partners are often in a process of separating or divorcing, they quite often have protection orders against them, and often the separating couple is engaged in custody battles.

<sup>17</sup> See Amanda L Robinson, Andy Myhill and Julia Wire, “Practitioner (Mis) understandings of Coercive Control in England and Wales” (2018) 18:1 *Criminology & Crim Justice* 29 at 44.

these men appear normal and socially well-adjusted – an average guy to the rest of the world (right up until the point they commit murder).<sup>18</sup> That is because the crux of domestic abuse is not in outbursts of uncontrollable physical violence (though that often accompanies the abuse), rather, the real harm is in the way the abuser is parasitic on the life of another person, deriving gratification from harming, controlling, and manipulating their life until they subordinate their victim's will and twist their reality into a psychological cage.<sup>19</sup> The common-law understanding of domestic violence however has predominantly been shaped through the lens of criminal law, which is incident-based and fixed on acts of physical violence.<sup>20</sup> In viewing domestic violence in this narrow this way, the court misses the forest for the trees.<sup>21</sup> Certain oppressive behaviours can only be understood when seen as a pattern of abuse over time. This narrow focus of criminal law translates into family law too, causing family courts to also miss the bigger picture of domestic violence. This narrow view creates an enormous gap in protection. Many survivors slip through the cracks and end up broken on the rocks.

### Seeing the invisible cage

Without "seeing" the invisible cage of control a woman is living in, justice system actors are unable to understand why women do not leave their abusers, or why abuse continues even after the relationship is over, or how abusers manipulate children,

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<sup>18</sup> Dobash and Dobash have reviewed studies from multiple jurisdictions worldwide and have concluded that, statistically speaking, men who murder their intimate partners often do not have anything that sets them apart from the rest of the population, i.e., they are not more prone to mental illness or substance abuse, they often do not have a criminal history, and they tend to have strong social bonds. One thing they do share, however, is "distorted thoughts about women." See Dobash, "Men Murder", *supra*, note 16 at 30.

<sup>19</sup> Stark, "Coercive Control", *supra*, note 2 at 198.

<sup>20</sup> See Paul McGorrery, Marilyn McMahon, "Prosecuting Controlling or Coercive Behaviour in England and Wales: Media Reports of a Novel Offence" (2019) 1-19 *Criminology & Crim J* 1 at 2.

<sup>21</sup> For example, Tanya Palmer describes how chronic sexual violation in the context of a coercive controlling relationship is under-recognized by the courts because of the incident-based model. An act that on its own might not amount to the level of an offence (such as forcing another adult to watch pornography), in the context of repeated behaviors in the context of a controlling relationship can communicate to a woman that she is nothing but an object of sexual desire or be used to coerce her into engaging in sexual acts that she does not wish to do. See Tanya Palmer, "Failing to See the Wood for the Trees: Chronic Sexual Violation and Criminal Law" (2020) 84:6 *J Crim L* 573.

family, and others in the community against women as a means of setting up a web of hurt and control over their lives.<sup>22</sup> Without seeing the “cage”, when a woman who has been facing years of domestic abuse but has never suffered physical violence is suddenly killed, or she breaks to the point that she kills her oppressor, the justice system just shakes its head, confused.<sup>23</sup> However, when the invisible network of control over a woman’s life comes into view, the missing puzzle pieces fall into place. Evan Stark, a renowned sociologist who has worked with abused women and their batterers for many decades, says that once you “[s]tart with the cage...everything changes.” As he says,

Suddenly, seemingly discrete, unrelated behaviors and effects fall into place. The iron rods—a barrage of assaults, a locked door, missing money or a distributor cap, rules for cleaning, a mysterious text message, a timer set at the telephone—are now recognized as “bars.”<sup>24</sup>

Over the past decade and a half, there has been a growing call by Stark and others to recognize these invisible bars. In many common law jurisdictions, feminist advocates have been pushing for a shift away from incident-based policing of domestic violence towards recognizing domestic violence as a series of ongoing acts of violence, often non-physical, that create a “continuum of oppression” in the lives of women and children.<sup>25</sup> Stark’s term for this is “coercive control”, which has been taken up by the UK Parliament in their attempts to combat domestic violence, and now is under consideration by the Canadian Parliament as well.

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<sup>22</sup> In this paper, I will use the term “justice system actors” in general to refer to the multi-agency workers who interact with abused women and their children at each stage of their interaction with the law: police, prosecutors, lawyers, judges, front-line support workers, Children’s Aid Society social workers, Office of the Children’s Lawyer, etc. “The system”. Julia Tolmie describes coercive control as a “web of behaviours over an extended period of time, the particular meaning of which may only be discernible to the perpetrator and victim.” See Julia R Tolmie, “Coercive Control: To Criminalize or Not to Criminalize?” (2018) 18:1 *Criminology & Criminal Justice* 50 at 55.

<sup>23</sup> McGorrey & McMahon, *supra*, note 20 at 2.

<sup>24</sup> Stark, “Coercive Control”, *supra*, note 2 at 198.

<sup>25</sup> *Ibid* at 216.

### Coercive control and mind control: Wife abuse as societally condoned torture

The application of the term “coercive control” to abused women dates to the 1970s. Two female psychologists, Margaret T. Singer and Camella Serum, both made the connection between “thought reform” torture experiments and the way abusive men break down and reshape the minds of the women they abuse and torture.<sup>26</sup> Margaret T. Singer built a career around studying thought reform, focusing first on interviewing US veterans who had been prisoners of war in Korea and subjected to thought experiments, and then shifting to studying religious cults and the power of cult leaders to exert control over the lives of their followers. Among her interviewees were Patricia Hearst and Charles Manson. After interviewing more than 4,000 cult members, she concluded that no single person is immune to mind control.<sup>27</sup> She gave a talk on a paper she presented at the Michigan Coalition Against Domestic Violence, on December 3, 1979, on “The nature of coercive control”.<sup>28</sup> Inspired by her talk, and by the work of Camella Serum, a researcher at the University of Michigan, Lewis Edward Okun, who was conducting psychology studies on 300 battered women living in shelters and 119 batterers, developed the theory further in his PhD thesis.

Okun says wife abuse is societally condoned torture. Okun describes the striking parallels between the tactics of domestic abusers and those used by the Chinese captors of prisoners of war in “thought reform” experiments.<sup>29</sup> These tactics include: confinement, verbal abuse, physical punishment, “restriction of free movement”, forcible confinement, (what Okun calls “internment in the home”), isolation, solitary confinement, sleep deprivation, lengthy interrogations, forced “false confessions”, assigning physically-tasking hard labour, humiliation, use of restraints, rape, having children act as informants and turning them against their mother, continual

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<sup>26</sup> See Lewis Edward Okun, “A Study of Woman Abuse: 300 Battered Women Taking Shelter, 119 Woman-Batterers in Counselling”, PhD Dissertation, University of Michigan (1983) at 55.

<sup>27</sup> “Obituary: Margaret Thaler Singer” (2004) 363 *The Lancet* 403.

<sup>28</sup> Okun, *supra*, note 26.

<sup>29</sup> Okun also compares the way abusers coercively control their intimate partners to how pimps control women who are sex-trafficked.

surveillance, lack of privacy, etc.<sup>30</sup> An ordinary household object – like a dog bowl – can become an object of torture when forced upon someone in degrading and humiliating ways. Okun points out that coercing false confessions out of prisoners destabilizes their grasp of reality and helps captors gauge how effectively they have shaped their beliefs into compliance with the captor's desires. Okun compares this to coercing "false confessions" out of abused women (e.g., demanding she confess that she was having an affair), which he calls a form of brainwashing used to "rationalize his assaulting her" and coercing her to agree that he was right to have beaten her.<sup>31</sup> Okun says these confessions are elicited by any combination of physical, emotional, and economic coercion to bring about obedience. Okun further notes that group dynamics are also manipulated by the abuser, who draws in others from the woman's network: religious leaders, family members, and other community members, to further reinforce her confessions and need for compliance.

Okun says that the main difference between prison guards and abusive husbands is that abused wives turn towards their "captor" for love and acceptance in a way a prisoner-of-war would never look to their captor. The simultaneity of love and harm gives abusive intimate partners enormous power over their victims; this power is greater than even a captor of a prisoner of war has.<sup>32</sup> A further difference between prisoners and abused women is that "society as a whole plays the crucial role in

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<sup>30</sup> As Okun says, "Some torture techniques used against battered women are chillingly creative and sophisticated in their morbid, sadistic fashion. Apart from beatings, common methods of torture in woman abuse include: cigarette burns; twisting limbs to, or past, the breaking point; submerging the victim to near drowning; bamboo or wood chips under the fingernails; introducing painful irritants to the eyes." *Ibid* at 426. Further, he says, "the batterer may play the children's interests against those of the battered woman in order to foment divisiveness. For example, the batterer may assault or sexually molest the children, in order to prove that their mother is an inadequate protector to be distrusted." *Ibid* at 429.

<sup>31</sup> *Ibid* at 414.

<sup>32</sup> As Okun says, "the home can readily be converted into a torture chamber... no written enumeration of battering techniques can truly exhaust the twisted, sadistic ingenuity of men who torture their female conjugal partners." *Ibid* at 409 and 419.

permitting the deployment of coercive control by batterers (i.e., woman abuse).” Patriarchal values shape the acceptance of domestic abuse.

### Stark’s theory of coercive control

Stark, who literally wrote the book on *Coercive Control*, is the leading modern proponent of recognizing its harms. He agrees with Okun that male tactics of coercive control are the consequence of patriarchal society. Taking an anti-oppression, gender-based lens, Stark argues that it is precisely because of modern women’s attempts to throw off the shackles of patriarchy and gain advances in the workforce, economic independence, owning property, and independence from men and traditional domestic roles, that men resort to “microregulation of [women’s] everyday behaviors associated with stereotypic female roles, such as how women dress, cook, clean, socialize, care for their children, or perform sexually.”<sup>33</sup> As he says, men resort to “‘wife torture’ as a response to failed domesticity.”<sup>34</sup> Coercive control boils down to male domination and reducing women’s freedom in an era where women’s inequality is still institutionally and societally reinforced, but is no longer “outwardly” socially acceptable.<sup>35</sup>

Stark calls coercive control a “liberty crime”.<sup>36</sup> This form of violence is more fundamental than an incident of assault. It is a deprivation of the very grounds of one’s freedom, an “entrapment” that removes women from full participation in social and civic life and restricts their access to resources. Stark describes coercive control as

a course of calculated, malevolent conduct deployed almost exclusively by men to dominate individual women by interweaving repeated physical abuse with three equally important tactics: intimidation, isolation, and control...the primary harm abusive men inflict is political, not physical, and reflects the

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<sup>33</sup> Stark, “Coercive Control”, *supra*, note 2 at 5.

<sup>34</sup> *Ibid* at 176.

<sup>35</sup> As Stark says, “this new tyranny is only possible because the same societies that now promise women full sovereignty continue to disadvantage them as a sex.” *Ibid* at 197.

<sup>36</sup> *Ibid* at 13.

deprivation of rights and resources that are critical to personhood and citizenship.<sup>37</sup>

Coercive control is the subordination and domination of one human being to another. These conditions of tyranny can only be understood properly through a power lens. Coercive control must also be understood through a gendered lens, as this crime is disproportionately done by men to the women in their lives.<sup>38</sup> Indeed, Stark argues that the reason why coercive control has gone under the radar and been underacknowledged for so many years is that essentially these control behaviours by men were normalized by the patriarchal social structure of society, so much that many of them either go unnoticed or are not questioned – or if they are, they are reinforced by others in society, often unwittingly.<sup>39</sup>

This makes domestic abuse all the more insidious, because abusers often operate under the pretense of equality. In family courts, father's rights groups advocate for "friendly parent laws" and a "pro-contact culture" to enforce their equality rights. These trends have undermined the court's ability to recognize harms and to issue protective measures for women and children faced with violent men.<sup>40</sup>

Stark and Hester (2019), in their review of coercive control measures taken by governments thus far, call domestic violence a public health emergency. In terms of the needed public response, they compare coercive control to a chronic disease like cancer

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<sup>37</sup> *Ibid* at 5.

<sup>38</sup> *Ibid* at 5–7. Stark mentions that throughout his professional career he has worked with many abusers and their victims, but he has never seen a woman who has been a coercive controlling abuser. He insists that this is a specifically male form of violence resulting from the rise of women's equality in the face of intransigent patriarchal societal values. *Ibid* at 377. As Stark says, "What it means is that, like rape, everything about coercive control takes shape around conceptions of male dominance and the structures that situate men as dominant relative to women, irregardless of whether the person being degraded and subjugated is biologically male or the perpetrator is female." *Ibid* at 368.

<sup>39</sup> *Ibid* at 15.

<sup>40</sup> Birchall & Choudry, *supra*, note 15.

where there is no “clear beginning or end” in sight.<sup>41</sup> Coercive control falls into a class of other offences, like stalking and harassment, that are of a longer duration, not incident based as typical offences have always been; the impact is cumulative and, like cancer, it drastically curtails the freedom of those who are attacked. The tools that practitioners have traditionally used do not adequately diagnose this illness and therefore, the system is unable to provide the correct remedy needed to save lives.

Stark says the remedy is broad-based social justice reform recognizing the ills of coercive control. The solution is three-pronged: first, he argues that coercive control should be criminalized to remove the immediate threat of harm for women and children; second, social services should be reformed to take into account women’s deprivation of liberty alongside their overall safety needs (to understand the fuller picture of the threats they face); third, he calls for a revitalized social movement advancing equity for women to undergird these system-wide reforms.<sup>42</sup> Stark’s work on coercive control has been readily embraced and also cautiously rejected by feminist advocates who work with abused women. Of particular concern is his suggestion to criminalize coercive behaviours, which has recently been taken up by the UK Parliament.

Those who argue in favor of criminalization, argue that greater recognition of coercive control as a pattern of violence will help improve justice system actors’ ability to make assessments of domestic violence, including an improved understanding of post-separation violence. Heather Douglas (2018) argues that this in turn, can help combat legal systems abuse.<sup>43</sup> Vivienne Elizabeth (2015) also argues for greater recognition of coercive control in family courts. She says that family court systems’ failure to recognize

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<sup>41</sup> See Evan Stark and Marianne Hester, “Coercive Control: Update and Review” (2019) 25:1 *Violence Against Women* 81 at 96 [Stark, “Update and Review”].

<sup>42</sup> Stark, “Coercive Control”, *supra*, note 2 at 365 and 397–398.

<sup>43</sup> See Heather Douglas, “Legal Systems Abuse and Coercive Control” (2018) 18:1 *Criminology & Crim Justice* 84 at 94.

coercive control has led to a culture of “impunity” for abusive men.<sup>44</sup> Because family courts have relied on a flawed understanding of domestic violence as being limited to acts of physical violence, they miss the ways abusive men threaten women in non-physical ways, traumatizing them and their children: bullying and intimidating, isolating, economically controlling, grooming children for sexual violence – and then on top of that, using the court itself to bully and intimidate with “paper abuse”. The courts end up dismissing mothers’ valid safety concerns. In part, Elizabeth attributes the invisibility of coercive control to denial. Domestic violence is far more prevalent than anyone can comfortably admit. This is not helped by the fact that many abusive men present so well in family court.<sup>45</sup>

Arguments against criminalization include the hypocrisy of using the punitive coercion of the patriarchal state as a solution to male violence. More law, particularly criminal law, cannot be the answer.<sup>46</sup> As Sandra Walklate, Kate Fitz-Gibbon, and Jude McCulloch argue,

The difficulty lies in how to translate an understanding of coercive and controlling behaviour and its consequences for women (and children) into something actionable in law.<sup>47</sup>

This difficulty is what the UK Parliament has been grappling with for more than half a decade.

I will now turn to the recent UK reforms criminalizing coercive control and contrast them to the nascent attempts to introduce similar reforms in Canada.

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<sup>44</sup> See Vivienne Elizabeth, “From Domestic Violence to Coercive Control: Towards the Recognition of Oppressive Intimacy in the Family Court” (2015) 30:2 *New Zealand Sociology* 26 at 33.

<sup>45</sup> *Ibid* at 38–39.

<sup>46</sup> See 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) 18:1 *Criminology & Criminal Justice* 115 at 115.

<sup>47</sup> *Ibid* at 118.

## Nascent Reforms in North America

As early as 2006, the US Department of Justice commissioned a study into coercive control, emphasizing the critical need for an improved understanding of coercive control in the legal context,<sup>48</sup> instead of viewing acts of domestic violence through a “one-size-fits-all” lens, “without regard to the coercive context in which they occur.”<sup>49</sup> The authors noted that “[w]ithout attention to this critical element of IPV, legal actors hear only parts of the stories that victims bring them every day in court.”<sup>50</sup> They argued that a more nuanced understanding of domestic violence typology should be used by the courts, particularly with regard to criminal conduct. This would also lead to better safety planning. Despite these early studies, the US has ultimately trailed behind the UK when it comes to reforming the law to integrate an understanding of coercive control. In 2020, however, California and Hawaii signed coercive control bills into law. Other states have also introduced bills that are not yet in force, including New York (2019), Maryland (2020), and South Carolina (2020).<sup>51</sup>

Thus, the move to criminalize coercive control in Canada has roughly corresponded with similar legislative reform initiatives in the US. Bill C-247 is almost word-for-word modelled after the UK’s *Serious Crime Act 2015* section 76 on “Controlling or coercive behavior in an intimate or family relationship.”<sup>52</sup> The Bill aims to amend the Canadian *Criminal Code* by adding the following:

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<sup>48</sup> See Mary Ann Dutton, Lisa Goodman and R James Schmidt, “Development and Validation of a Coercive Control Measure for Intimate Partner Violence: Final Technical Report”, *US Department of Justice* (30 December 2005), online: <[www.ojp.gov/pdffiles1/nij/grants/214438.pdf](http://www.ojp.gov/pdffiles1/nij/grants/214438.pdf)> at 2.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid* at 3.

<sup>51</sup> AACECC, *supra*, note 5.

<sup>52</sup> See *Serious Crime Act 2015*, c. 9, Domestic Abuse, Section 76, *legislation.gov.uk*, online: <[www.legislation.gov.uk/ukpga/2015/9/section/76/enacted](http://www.legislation.gov.uk/ukpga/2015/9/section/76/enacted)>.

## Controlling or Coercive Conduct

### Offence

**264.01 (1)** Everyone commits an offence who repeatedly or continuously engages in controlling or coercive conduct towards a person with whom they are connected that they know or ought to know could, in all the circumstances, reasonably be expected to have a significant impact on that person and that has such an impact on that person.<sup>53</sup>

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<sup>53</sup> The draft provision also includes guidelines for interpretation:

**Interpretation — significant impact**

**(2)** For the purposes of subsection (1), the conduct has a significant impact on the person if

- (a)** it causes the person to fear, on reasonable grounds, on more than one occasion, that violence will be used against them;
- (b)** it causes the person's physical or mental health to decline; or
- (c)** it causes the person alarm or distress that has a substantial adverse effect on their day-to-day activities, including
  - (i)** limits on their ability to safeguard their well-being or that of their children,
  - (ii)** changes in or restrictions on their social activities or their communication with others,
  - (iii)** absences from work or from education or training programs or changes in their routines or status in relation to their employment or education, and
  - (iv)** changes of address.

**Interpretation — connected**

**(3)** For the purposes of subsection (1), two persons are connected if

- (a)** they are current spouses, common-law partners or dating partners, or have agreed to marry each other; or
- (b)** they are members of the same household, and
  - (i)** are former spouses, common-law partners or dating partners,
  - (ii)** have agreed to marry each other, whether or not the agreement has been terminated,
  - (iii)** are relatives, or
  - (iv)** carry out, or have carried out, parental responsibilities in respect of the same child, that child being under the age of 18 years.

**Exception — best interests of the person**

**(4)** If an accused is charged with an offence under subsection (1), it is a defence — in relation to conduct that is alleged to have caused a significant impact described in paragraph (2)(b) or (c) — that

- (a)** the accused was acting in the best interests of the person towards whom the conduct was directed; and
- (b)** the conduct was reasonable in all the circumstances.

**Proof of facts**

**(5)** Evidence that the accused was acting in the best interests of the person towards whom the conduct was directed and that the conduct was reasonable in all the circumstances is, in

In April 2021, the Canadian House of Commons Standing Committee on Justice and Human Rights released a report on domestic violence called, "The Shadow Pandemic: Stopping Coercive and Controlling Behaviour in Intimate Relationships."<sup>54</sup> The committee agreed to study domestic violence to evaluate the merits of the proposed Bill and to plan for the next steps forward. After listening to dozens of witnesses, including front-line agencies working with survivors, the committee made five chief recommendations, which included:

1. the need to recognize the harms of coercive control, and that these harms are under-recognized by the present legal and policing system;
2. the need for a "taskforce of experts" to review existing legislation with a gender-based analysis plus (GBA+) lens with particular attention to language;
3. the need to understand the challenges this legislation could pose for BIPOC women and women living in poverty, especially to avoid revictimization under the law;<sup>55</sup>
4. the need for increased funding for survivors including mental health support, housing, and culturally appropriate services;
5. the need for increased (trauma-informed) training of service providers about coercive control, public awareness, and creation of a policy framework.<sup>56</sup>

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the absence of evidence that proves the contrary beyond a reasonable doubt, proof of those facts.

Punishment

**(6)** Everyone who commits an offence under subsection (1)

**(a)** is guilty of an indictable offence and liable to imprisonment for a term of not more than five years; or

**(b)** is guilty of an offence punishable on summary conviction.

<sup>54</sup> See House of Commons, "The Shadow Pandemic: Stopping Coercive and Controlling Behavior in Intimate Relationships", (April 2021), online:

<[www.ourcommons.ca/Content/Committee/432/JUST/Reports/RP11257780/justrp09/justrp09-e.pdf](http://www.ourcommons.ca/Content/Committee/432/JUST/Reports/RP11257780/justrp09/justrp09-e.pdf)> ["Shadow Pandemic"].

<sup>55</sup> Given the trauma of Canada's colonization of Indigenous peoples, Indigenous women in Canada are classified as an "at-risk" population, three times more likely to report experiences of domestic violence than other non-Indigenous women. See Sarah Fotheringham, Lana Wells & Sharon Goulet "Strengthening the Circle: An International Review of Government Domestic Violence Prevention Plans and Inclusion of Indigenous Peoples" (2021) 27:3-4 *Violence Against Women* 425 at 427-428.

<sup>56</sup>"Shadow Pandemic", *supra*, note 54 at 1-2 and 35-36.

The report concluded that right now, the Canadian legal system is failing survivors of domestic violence. Survivors do not feel heard or helped when they go to the police.<sup>57</sup> It is agreed: this is unacceptable, something must change.<sup>58</sup> The hope that the panel articulated is that introducing this as a criminal offence will begin a process of change and facilitate protection for more survivors of domestic violence:

- by removing barriers for survivors to getting help;
- by giving increased recognition to emotional (non-physical) harms;
- by moving away from an incident-based policing approach to one that understands domestic violence as a pattern occurring over longer periods of time;<sup>59</sup>
- by increasing judicial and police education on domestic violence, preliminary evidence from the UK has shown that better evidence is being collected by police forces due to training;<sup>60</sup>
- by helping ease post-separation difficulties, providing help when survivors need it most, after the relationship ends, with additional help for housing and support;
- by providing criminal records that can be used in the family court for non-physical harms;
- by providing defences in criminal court for survivors of domestic violence who harm or kill their partners in self-defence.

The above efforts are already well-underway in the UK, which has had over half a decade now of attempts at reform and has generated significant public debate. In the following section I will examine the UK's leading domestic violence reform efforts in

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<sup>57</sup> *Ibid* at 24.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Ibid* at 26.

England and Wales, and in Scotland which has been referred to by many as the “gold standard”.<sup>61</sup>

## The UK Reforms

### *The Serious Crime Act, 2015*

The UK reforms on domestic violence have been over a decade in the making. In 2010, the UK first published a “Call to End Violence against Women and Girls.”<sup>62</sup> Among other key steps towards reform, following public consultation in 2012 the UK government announced that it would be widening its definition of domestic violence to include coercive and controlling behavior.<sup>63</sup> Over the next few years, further reforms would follow on domestic violence, backed by more than £80 million in funding. The reforms, which were largely driven by input from Women’s AID UK and other women’s organizations and refuges, had a focus on “changing attitudes” as a part of the government’s commitment to systemic change amongst police, health providers, and other practitioners who interact with abused women and girls.<sup>64</sup>

The *Serious Crime Act* came into force in 2015, and with it the world’s first criminal offence of coercive controlling behaviours in the context of intimate partner

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<sup>61</sup> See Marsha Scott, “The Making of the New ‘Gold Standard’: The *Domestic Abuse (Scotland) Act 2018*”, in Marilyn McMahon and Paul McGorry eds, *Criminalizing Coercive Control: Family Violence and the Criminal Law* (Singapore: Springer Nature, 2020) 177.

<sup>62</sup> See UK Government, “Ending violence against women and girls strategy: 2016 to 2020”, online: <[www.gov.uk/government/publications/strategy-to-end-violence-against-women-and-girls-2016-to-2020/ending-violence-against-women-and-girls-strategy-2016-to-2020-accessible-version](http://www.gov.uk/government/publications/strategy-to-end-violence-against-women-and-girls-2016-to-2020/ending-violence-against-women-and-girls-strategy-2016-to-2020-accessible-version)> [“Policy 2016 to 2020”].

<sup>63</sup> See UK Government, “Policy Paper: 2010 to 2015 Government Policy: Violence Against Women and Girls”, online: <[www.gov.uk/government/publications/2010-to-2015-government-policy-violence-against-women-and-girls/2010-to-2015-government-policy-violence-against-women-and-girls](http://www.gov.uk/government/publications/2010-to-2015-government-policy-violence-against-women-and-girls/2010-to-2015-government-policy-violence-against-women-and-girls)> [“Policy 2010 to 2015”].

<sup>64</sup> “Policy 2016 to 2020”, *supra*, note 64. Notably, Women’s Aid UK is the secretariat for the All-Parliamentary Group on Domestic Violence and Abuse. See “Reports from the All-Party Parliamentary Group on Domestic Violence and Abuse”, Women’s AID UK, online: <[www.womensaid.org.uk/appg-reports/](http://www.womensaid.org.uk/appg-reports/)>.

relationships.<sup>65</sup> Although the offence itself, like the Canadian draft provision that is modelled after it, does not provide a definition of “coercive control”, the UK Crown Prosecution Service has published a list of criminal coercive and controlling behaviours (that form a pattern of abusive behaviours over time). The non-exhaustive list includes:

- isolating a person from their friends and family;
- depriving them of their basic needs;
- monitoring their time;
- monitoring a person via online communication tools or using spyware;
- taking control over aspects of their everyday life, such as where they can go, who they can see, what to wear and when they can sleep;
- depriving them of access to support services, such as specialist support or medical services;
- repeatedly putting them down such as telling them they are worthless;
- enforcing rules and activity which humiliate, degrade or dehumanise the victim;
- forcing the victim to take part in criminal activity such as shoplifting,
- neglect or abuse of children to encourage self-blame and prevent disclosure to authorities;
- financial abuse including control of finances, such as only allowing a person a punitive allowance;
- threats to hurt or kill;
- threats to a child;
- threats to reveal or publish private information (e.g. threatening to ‘out’ someone).
- assault;

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<sup>65</sup> Notably, however, in 2004, Tasmania criminalized economic and emotional abuse, as well as intimidation in an intimate relationship. See *Family Violence Act, Tasmania 2004*, online: <[www.legislation.tas.gov.au/view/html/inforce/current/act-2004-067](http://www.legislation.tas.gov.au/view/html/inforce/current/act-2004-067)>.

- criminal damage (such as destruction of household goods);
- rape;
- preventing a person from having access to transport or from working.<sup>66</sup>

To make coercive control more widely understood by the population, a vibrant media campaign was undertaken by both state and non-governmental organizations following the introduction of the new offence.

Public awareness in the UK received a boost when a BBC Radio soap called “The Archers” began to explore gaslighting and coercive control one year after the *Serious Crime Bill* was enacted.<sup>67</sup> The captivating plotline had one of the leading actresses coercively controlled by her abusive husband. The story was revealed over the course of more than two years to an anxious audience of more than five million listeners and prompted a nation-wide discussion on domestic abuse. On the show, the lead actress (who had been playing her character Helen for over a decade) turned on her abuser and killed him, after which she was arrested. The British tabloids were all over it. Prominent actors all stepped in to play jurists and government officials on the show. A fundraising campaign went live on social media and raised close to 200,000 British pounds to #FreeHelen, which went to support the women’s charity Refuge.<sup>68</sup> Also in 2016, Women’s AID UK published a shocking report called “Nineteen Child Homicides” describing the avoidable deaths of children for whom the courts had

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<sup>66</sup> See UK Home Office, “Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework” (December 2015), online: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/482528/Controlling\\_or\\_coercive\\_behaviour\\_-\\_statutory\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf)> [“Statutory Guidance”] at 4.

<sup>67</sup> The UK has previously worked with MTV and other major media producers to raise awareness about domestic violence with their “This is Abuse” campaign. See “Policy 2010 to 2015”, *supra*, note 64.

<sup>68</sup> See “The Archers: Verdict Revealed in Helen Titchener Trial”, BBC (12 September 2016), online: <[www.bbc.com/news/entertainment-arts-37333372](http://www.bbc.com/news/entertainment-arts-37333372)>. See also, “The Archers: The Trial of Helen Titchener”, BBC Radio 4, online: <[www.bbc.co.uk/programmes/articles/550Y8rftt7Kcrz7Z8RJ7cX7/the-trial-of-helen-titchener](http://www.bbc.co.uk/programmes/articles/550Y8rftt7Kcrz7Z8RJ7cX7/the-trial-of-helen-titchener)>.

ordered contact with abusive fathers. Women's AID followed this up with a campaign called "Child First" to raise awareness about the devastating results of what happens when courts order contact despite valid safety concerns. This spotlight on the failings of the family courts prompted the House of Commons to discuss the issue and develop recommendations for reform.<sup>69</sup> They revised the "Practice Direction for Child Arrangements and Contact Orders: Domestic Abuse and Harm" (PD12J), and set out guidelines for judges to follow when considering cases of domestic abuse in the family courts.<sup>70</sup> The new guidelines, which came into force in 2017, emphasized the new definition of coercive control in criminal law and imported it into the family courts by defining "domestic abuse" as:

any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment.<sup>71</sup>

Then, in 2019, the crown prosecution service assigned a lead for domestic abuse and adopted a "Domestic Abuse Best Practice Framework" and "Domestic Abuse Guidelines for Prosecutors" to flag all domestic abuse cases as "vulnerable/intimidated victim".<sup>72</sup> The new statutory guidance acknowledged that while the legislation on coercive control was drafted in a gender-neutral fashion, the evidence consistently showed that women

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<sup>69</sup> See Rosemary Hunter, Adrienne Barnett and Felicity Kaganas, "Introduction: Contact and Domestic Abuse" (2018) 40:4 J Soc Welfare & Fam L 401 at 407.

<sup>70</sup> See Courts and Tribunals Judiciary, "Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Violence and Harm", online: <<https://www.judiciary.uk/wp-content/uploads/2017/09/presidents-circular-domestic-abuse-pd12j-substituted-pd-20170914.pdf>>.

<sup>71</sup> *Ibid.*

<sup>72</sup> See Crown Prosecution Service UK, "Domestic Abuse: Foreword from Kate Brown, CPS lead for domestic abuse", online: <[www.cps.gov.uk/crime-info/domestic-abuse](http://www.cps.gov.uk/crime-info/domestic-abuse)>. See also Crown Prosecution Service UK, "Domestic Abuse Guidelines for Prosecutors", online: <[www.cps.gov.uk/legal-guidance/domestic-abuse-guidelines-prosecutors](http://www.cps.gov.uk/legal-guidance/domestic-abuse-guidelines-prosecutors)>.

and girls are disproportionately impacted by this offence, and that coercive control is a form of violence that is “underpinned by wider societal gender inequality” and therefore has to be viewed from the lens of power.<sup>73</sup>

### The “gold standard”: Scotland’s Domestic Abuse Act

Scotland’s catalyzing moment for reform came in 2012, when a member of the Scottish Parliament, Bill Walker, was charged with 23 counts of assault against his three ex-wives (including also a stepdaughter).<sup>74</sup> Walker punched his first wife in the face on their wedding day, such that she had to cover the bruises with make-up. Despite more than three decades of extreme violence against four different women in his life, he had risen to prominence as an MP. The scandal hit the papers, and he eventually stepped down from office, was convicted and then sentenced to prison for 12 months. The sheriff who sentenced him wrote an excellent decision that was indignant about his denial over the harm he had caused and over the ways he casually dismissed his violent behaviours.<sup>75</sup> The decision invigorated feminists and women’s organizations, particularly Women’s AID Scotland, to begin campaigning for wider systems reforms. In 2013, the National Domestic Abuse Taskforce was established as a unit within the police.<sup>76</sup> Then, in 2014, the government set out its overall strategy for combatting violence against women: “Equally Safe: Scotland’s Strategy for Preventing and Eradicating Violence

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<sup>73</sup> “Statutory Guidance”, *supra*, note 67 at 7. Notably, the Crown Prosecution Service dedicate large section of their guidance on domestic violence to “Male Victims”, emphasizing that there is significant “under-reporting of domestic abuse against male-victims,” and that “female perpetrated abuse against male partners is a sensitive and complex area. Some women may use children within the relationship to manipulate a male victim, by for example threatening to **take away contact rights.**” (emphasis mine) The advice for victims page also makes note of a dedicated helpline (MALE) for male victims of domestic abuse, see “Respect Men’s Advice Line”, *Mens Advice Line online*: <[mensadviceline.org.uk/contact-us](http://mensadviceline.org.uk/contact-us)> which talks about safety planning for male victims of domestic abuse. Another men’s abuse helpline can be found at *ManKind Initiative*, online: <[www.mankind.org.uk](http://www.mankind.org.uk)>.

<sup>74</sup> See Press Association Scotland, “Former MSP Bill Walker Jailed Over Violent Domestic Abuse”, *The Guardian* (20 September 2013), online: <[www.theguardian.com/politics/2013/sep/20/msp-bill-walker-jailed-domestic-abuse](http://www.theguardian.com/politics/2013/sep/20/msp-bill-walker-jailed-domestic-abuse)>.

<sup>75</sup> *Ibid.*

<sup>76</sup> Scott, *supra*, note 62 at 181.

Against Women and Girls”, taking a “whole systems” approach to justice putting safety for women and girls first.<sup>77</sup>

Scotland’s *Domestic Abuse Act* came into force in 2018.<sup>78</sup> The reforms it brought forward used an anti-oppressive, gendered, and trauma-informed lens.<sup>79</sup> Although the *Act* itself is worded in a gender-neutral way, like the UK legislation, Scotland has taken a gendered approach to domestic abuse since 2000, when it adopted a definition of domestic violence that “explicitly positions it as both a cause and a consequence of gender inequality.”<sup>80</sup> Since then, Scotland has introduced a suite of responses since 2000, including a lead national prosecutor for domestic abuse, training for prosecutors, a victim information service, and over £20m in funding.

Michele Burman and Oona Brooks-Hay (2018), two criminologists at the University of Glasgow who work in the area of feminist legal reform, have described the new legislation in Scotland as “one of the most radical attempts yet to align the criminal justice response with contemporary (feminist) conceptual understandings of domestic abuse.”<sup>81</sup> Others, like Stark, have echoed their sentiment.<sup>82</sup> The Scottish Act recognizes abuse as a continuum.<sup>83</sup> It merges all domestic abuse charges under one offence. The

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<sup>77</sup> See Michele Burman and Oona Brooks-Hay, “Aligning Policy and Law? The Creation of a Domestic Abuse Offence Incorporating Coercive Control” (2018) 18:1 *Criminology & Crim Justice* 67 at 70. See also Scottish Government, “Violence Against Women and Girls (VAWG): Equally Safe Strategy”, online: <[www.gov.scot/policies/violence-against-women-and-girls/equally-safe-strategy/](http://www.gov.scot/policies/violence-against-women-and-girls/equally-safe-strategy/)>.

<sup>78</sup> See *Domestic Abuse (Scotland) Act 2018*, asp 5, Part 1, Evidence, aggravation and defence, s 4, *legislation.gov.uk*, online: <[www.legislation.gov.uk/asp/2018/5/section/4](http://www.legislation.gov.uk/asp/2018/5/section/4)> [Domestic Abuse (Scotland) Act].

<sup>79</sup> The Scottish Government dedicated £1.35 million to a National Trauma Training Programme for frontline staff, led by insights from survivors with lived experience. See Scottish Government, “Identifying and Responding to Trauma”, (12 July 2019), online: <[www.gov.scot/news/identifying-and-responding-to-trauma/](http://www.gov.scot/news/identifying-and-responding-to-trauma/)>. See also NHS Education for Scotland, “National Trauma Training Programme”, online: <[www.nes.scot.nhs.uk/our-work/trauma-national-trauma-training-programme](http://www.nes.scot.nhs.uk/our-work/trauma-national-trauma-training-programme)>.

<sup>80</sup> Burman & Brooks-Hay, *supra*, note 78 at 67. See also Emma E Forbes, “The Domestic Abuse (Scotland) Act 2018: The whole story?” *Edinburgh Law Review* 2018 at 406.

<sup>81</sup> Burman & Brooks-Hay, *supra*, note 78 at 78.

<sup>82</sup> Stark, “Update and Review”, *supra*, note 41 at 85.

<sup>83</sup> Forbes, *supra*, note 81 at 406–407.

Scottish law does not speak about patterns of behaviour, but it does say that domestic violence should happen on at least two occasions, and that there are other offences that will cover singular acts of violence.<sup>84</sup> Unlike the UK law and the proposed Canadian legislation, the Scottish law on domestic violence depends on an assessment of the objective *mens rea* only, which means that prosecution does not need to rely on evidence from the victim.<sup>85</sup> As Emma Forbes argues,

This acknowledges that some behaviours will not have a visible "harm", for sometimes complex reasons, including victim minimisation and resilience...The objective test is a significant safety consideration for victims reporting abuse and a welcome shift towards some autonomy, as it provides an opportunity to narrate their story without being compelled to share personal details of its impact.<sup>86</sup>

Section 4(1) of the Scottish *Domestic Abuse Act* says:

The commission of an offence under section 1(1) does not depend on the course of behaviour actually causing B to suffer harm of the sort mentioned in section 1(2).<sup>87</sup>

The act also recognizes that abusers will be violent towards other people their victims care about, as a means to hurt their victims. From the outset, the Act explicitly acknowledged that this includes children, and correctly defines child as anyone under the age of 18.<sup>88</sup> The act makes punishable for up to 14 years of imprisonment any one of the following abusive behaviours on the part of Abuser (A) towards victim (B):

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<sup>84</sup> Burman & Brooks-Hay, *supra*, note 78 at 74.

<sup>85</sup> Note: Stalking and harassment in England and Wales are also objective *mens rea* offences, it is not required to prove that the victim was subjectively afraid. *Ibid* at 74.

<sup>86</sup> Forbes, *supra*, note 81 at 407.

<sup>87</sup> *Domestic Abuse (Scotland) Act*, *supra*, note 79.

<sup>88</sup> Note, by contrast, the EW/C offence mentions age 16. The UN Conventions on the Rights of the Child at Article 1 defines "child" as "every human being below the age of 18 years." See UN Commission on Human Rights, *Convention on the Rights of the Child*, 7 March 1990, E/CN.4/RES/1990/74, online: <[https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch\\_IV\\_11p.pdf](https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf)>.

- (2) Behaviour which is abusive of B includes (in particular)—
- (a) behaviour directed at B that is **violent, threatening or intimidating**,
  - (b) behaviour directed at B, **at a child** of B **or at another person** that either—
    - (i) has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (3), or
    - (ii) would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in subsection (3).
- (3) The relevant effects are 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.
- (4) In subsection (2)—
- (a) in paragraph (a), the reference to violent behaviour includes sexual violence as well as physical violence,
  - (b) in paragraph (b), the reference to a child is to a person who is under 18 years of age. [emphasis mine]<sup>89</sup>

This is much more comprehensive legislation than either the England/Wales or the proposed Canadian offence (which, as already stated, is closely modelled after the England/Wales version). In the England/Wales and Canadian offence (for ease, I will refer to this as EW/C), “coercive control” is ill-defined. Further, the EW/C offence insists

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<sup>89</sup> *Domestic Abuse (Scotland) Act 2018*, asp 5, Part 1, Engaging in course of abusive behavior, s 2, *legislation.gov.uk*, online: <[www.legislation.gov.uk/asp/2018/5/section/2?view=extent](http://www.legislation.gov.uk/asp/2018/5/section/2?view=extent)>.

that the abuser “repeatedly or continuously engages in behaviour.” The Scottish offence does not insist on the behaviour meeting the level of “continuous” or “repeated” engagement, and it spells out far more concretely directly in the legislation what the difficult behaviors to which judges, police, and other officials should be alert.<sup>90</sup>

### The evidence on criminalization in the UK

I begin this section with a preface: The evidence being made publicly available by the UK Police on coercive control is lacking sufficient detail right now for a number of in-depth analyses.<sup>91</sup> As Iain Brennan and Andy Myhill, from the University of Hull and the UK College of Policing respectively, say in their latest 2021 paper in the *British Journal of Criminology*, those who create laws are unlikely to be eager to collect data that points to the ways the new laws fail.<sup>92</sup> However, it is precisely this lack of data on the failings of the law that prevents its improvement. To address the deficiency in information, researchers have had to resort to creative means to obtain information: Paul McGorrery and Marilyn McMahon (2019) investigated coercive control prosecutions in England/Wales using a search engine to find media reports (they identified a total of 452 reports concerning 145 individuals).<sup>93</sup> Iain Brennan and Andy Myhill’s latest study (2021) relied on Freedom of Information requests from each of the 43 police forces in

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<sup>90</sup> Defining domestic abuse as a pattern however may lead to a higher bar being set for domestic violence survivors, with violent “incidents” no longer counting as domestic abuse. Dee-Dee Kanhai points out that this is the case with recent California legislation, which, if enacted, will make it more difficult for survivors to get help. See Dee-Dee Kanhai, “Not All Bills are Created Equal: A Review of Coercive Control Legislation”, *ACECC*, (29 October 2020), online: <[www.theacecc.com/post/not-all-bills-are-created-equal-a-review-of-coercive-control-legislation](http://www.theacecc.com/post/not-all-bills-are-created-equal-a-review-of-coercive-control-legislation)>.

<sup>91</sup> For example, the latest statistics released by the UK Office of National Statistics (ONS) do not mention how many women versus men are criminalized each year for the new offence of coercive control. The only data about gender breakdown is for the aggregate of all domestic abuse offences taken together each year. See UK Office for National Statistics, “Domestic Abuse and the Criminal Justice System, England and Wales: November 2020”, online: <[www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2020](http://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2020)> [ONS, “2020”]. The latest gender breakdown for coercive control is from an ONS Bulletin from 2018, see note 98 below.

<sup>92</sup> As Brennan & Myhill say: “Few policy makers are sufficiently pessimistic to also establish a system to count how their new law might be failing”. See Iain Brennan and Andy Myhill, “Coercive Control: Patterns in Crimes, Arrests and Outcomes for a New Domestic Abuse Offence” (2021) *XX Brit J Criminology* 1 (advance access publication 31 July 2021) [Brennan & Myhill, “Patterns”] at 13.

<sup>93</sup> McGorrery & McMahon, *supra*, note 20 at 4.

the UK combined with information from the UK Home Office.<sup>94</sup> I will address their findings below. I do note, however, that the offence is still relatively new, and more information is coming out each year. It is hoped that data collection by the police will improve as they become more familiar with their new powers; currently the domestic violence assessment tools used by police are under review.<sup>95</sup>

What *is* made publicly available by the police, is that in the first-year coercive control was criminalized (in the year ending in March 2017), the UK police recorded 4,246 offences of coercive control; just three years later (in the year ending in March 2020), this number had risen to 24,856 offences of coercive control recorded by the UK police.<sup>96</sup> However, it is roundly acknowledged, even by the government itself, that the total numbers of actual coercive control crimes far outnumber those being prosecuted.<sup>97</sup>

Iain Brennan et al. (2019) point out that, paradoxically, it is this inability of the system to work as well as it should to identify cases of domestic violence that has inadvertently enabled the system to work better by preventing it from being overwhelmed with an influx of too many demands.<sup>98</sup> The steady increase in recording and arrests may indicate that, over time, survivors are realizing this is a tool they can use to get help.<sup>99</sup> However, Brennan and Myhill (2021) caution that a recent decrease in charging rates (from 10% down to 6%), may be a sign that coercive control victims “are being failed

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<sup>94</sup> Brennan & Myhill, “Patterns”, *supra*, note 93 at 6 and 14.

<sup>95</sup> See Charlotte Barlow et al, “Putting Coercive Control into Practice: Problems and Possibilities” (2020) 60 *Brit J Criminology* 160 [Barlow et al, “Problems and Possibilities”] at 172. See also See Charlotte Barlow and Sandra Walklate, “Gender, Risk Assessment and Coercive Control: Contradictions in Terms?” (2021) 61:4 *Brit J Criminology* 1 [Barlow & Walklate, “Risk Assessment”] at 895 and 899.

<sup>96</sup> ONS, “2020”, *supra*, note 92.

<sup>97</sup> See UK Government, “Guidance: Review of the controlling or coercive behaviour offence”, online: <[www.gov.uk/government/publications/review-of-the-controlling-or-coercive-behaviour-offence/review-of-the-controlling-or-coercive-behaviour-offence](http://www.gov.uk/government/publications/review-of-the-controlling-or-coercive-behaviour-offence/review-of-the-controlling-or-coercive-behaviour-offence)>.

<sup>98</sup> As Brennan et al. point out, if all domestic abusers in the country were entered into the system, the system simply could not cope. See Iain R Brennan et al, “Service Provider Difficulties in Operationalizing Coercive Control” (2019) 25:6 *Violence Against Women* 635 [Brennan et al, “Operationalizing CC”] at 646.

<sup>99</sup> Brennan & Myhill, “Patterns”, *supra*, note 93 at 11.

by the criminal justice system at similar rates to victims of other domestic abuse crimes."<sup>100</sup>

Until now, the total number of prosecutions for coercive control pale when compared to other domestic abuse prosecutions. Barlow et al. (2020) suggest this may be from the relative newness of the offence, although they do point out that despite the lower conviction rate, many more cases of coercive control have been declared "high risk" and nonetheless were dismissed.<sup>101</sup> Barlow et al.'s study (2020), conducted by a team of researchers from multiple universities across the UK, attributed the low conviction rate to difficulties in evidence gathering on the new offence.<sup>102</sup> The unique challenges posed by the offence of coercive control in terms of gathering evidence have been pointed out by other studies.<sup>103</sup> Barlow et al. suggest that in future better guidance for police and other justice system actors on what constitutes adequate evidence of coercive control would help with prosecutions and evidence gathering. In a later study, Barlow and Walklate (2021) also suggest that the low arrest rates relative to risk may be an indication that police dismiss the urgency of responding to the risk right away.<sup>104</sup> Barlow and Walklate attribute this dismissal to the way police forces continue to focus on the "here and now" and incidents reflecting what is "visible" (i.e., physical harm) rather than ongoing longer-term behaviours as in the case of coercive control.<sup>105</sup> As they and others have reported, despite the emphasis of non-physical harm in the offence, the corresponding presence of physical violence increases the likelihood of arrest for

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<sup>100</sup> *Ibid* at 12.

<sup>101</sup> Barlow et al, "Problems and Possibilities", *supra*, note 96 at 163 and 167.

<sup>102</sup> *Ibid* at 171.

<sup>103</sup> See Charlotte Bishop and Vanessa Bettinson, "Evidencing Domestic Violence, Including Behaviour that Falls Under the New Offence of 'Controlling or Coercive Behaviour'" (2018) 22:1 Intl J Evidence & Proof 3 at 9. With regard to the Canadian context, Susan Boyd and Ruben Lindy also describe the difficulties in gathering evidence on domestic violence for the family court in Canada. See Susan B Boyd and Ruben Lindy, "Violence Against Women and the B.C. Family Law Act: Early Jurisprudence" 35 Can Fam L Q 101 at 112.

<sup>104</sup> Barlow & Walklate, "Risk Assessment", *supra*, note 96 at 895.

<sup>105</sup> *Ibid* at 898.

coercive control.<sup>106</sup> Out of a focus group of 10 survivors, all of the women interviewed by Barlow and Walklate indicated that they felt the police did not understand the risk they faced.<sup>107</sup>

This dismissal of risk is also confirmed by Iain Brennan et al.'s 2019 study, which was commissioned by the Criminal Justice Board in England for a team of researchers to conduct interviews with a wide range of service providers in the UK from June to August 2015.<sup>108</sup> The study pointed out that many cases in the early days of the offence were being dismissed when they should not have been. They concluded that:

The interviews suggest that the ambiguity in definitions of coercive control across services, when coupled with limited resources, can result in an abuse of discretion that leads to the discounting or failure to fully investigate potential cases of coercive control.<sup>109</sup>

Brennan et al. argued that until domestic abuse is reconceptualized, survivors will continue to be at risk, especially those deemed "low-risk", which time and again prove to be at the highest level of risk and, too often unexpectedly, turn fatal.<sup>110</sup> Another early study conducted by Myhill and Johnson (2016) suggested that the failure of police officers to take domestic violence seriously was more nuanced than simply because it is "a crime committed primarily by men against women and investigated primarily by men."<sup>111</sup> Based on their observations, a number of officers displayed "risk-averse attitudes to dealing with domestic violence" because it was viewed as an area where no one wanted to "drop the ball"; they identified that the challenge for policy-makers is to make police officers feel they are "trusted to make professional decisions based on

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<sup>106</sup> *Ibid* at 896. See also Robinson, Myhill & Wire, *supra*, note 17 at 44.

<sup>107</sup> Barlow & Walklate, "Risk Assessment", *supra*, note 96 at 895 at 897.

<sup>108</sup> Brennan et al, "Operationalizing CC", *supra*, note 99 at 636.

<sup>109</sup> *Ibid*.

<sup>110</sup> *Ibid* at 648.

<sup>111</sup> See Andy Myhill & Kelly Johnson, "Police Use of Discretion in Response to Domestic Violence" (2016) 16:1 *Criminology & Crim Justice* 3 at 15.

robust evidence and practice.”<sup>112</sup> Such standards-setting would likely have a spillover effect into family courts as well.

This finding is consistent with Robinson, Myhill and Wire’s 2018 study, which looked at empirical data from two British national research projects on the use of standardized tools for identifying domestic violence: the Priority Perpetrator Identification Tool (PPIT) and the Domestic Abuse, Stalking and Harassment and Honour-based violence risk identification, assessment and management model (DASH).<sup>113</sup> The study found that the PPIT helped justice system actors recognize patterns of coercive control.<sup>114</sup> It also found that the DASH study showed that coercive control is easier for police to recognize when there are other corresponding risk factors they can identify (such as past acts of physical violence). The study suggested that having clear training on known “non-physical” risk factors to “prime” police on what to look for may help them more readily identify the subtle signs of coercive control. The study also suggested that designing tools to have “explicit reference to coercive control” and non-physical harm can improve the police’s ability to recognize abuse.<sup>115</sup> While the authors point out that it is important to recognize that police officers will never have the same level of understanding of domestic abuse as experts in the field, they nonetheless contend that providing a baseline of knowledge about coercive control will go a long way to “measurably improve” police response to domestic violence over time.<sup>116</sup> Indeed, the findings of Iain Brennan et al, in a more recent 2020 study, support this last point by confirming demonstrable improvement in rates of arrest for coercive control following officer training, with a 41% increase in arrests following force-wide training.<sup>117</sup>

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<sup>112</sup> *Ibid* at 17–18.

<sup>113</sup> Robinson, Myhill & Wire, *supra*, note 17 at 44.

<sup>114</sup> *Ibid* at 44.

<sup>115</sup> *Ibid* at 45.

<sup>116</sup> *Ibid*.

<sup>117</sup> The training consisted of “a one-day training event, enhanced training for a small number of selected ‘champions’ and follow-up support provided through an online forum and continuous professional development training events.” See Iain Brennan et al, “Policing a New Domestic Abuse Crime: Effects of Force-wide Training on Arrests for Coercive Control” (2020) SocArXiv 1 at 8 and 32.

Despite these notable efforts at re-training police to recognize the signs and risks of domestic abuse, a number of authors suggest that these efforts will fall flat unless a gendered lens is imported into risk assessment and training. Charlotte Bishop and Vanessa Bettinson (2018) argue that when investigating coercive control, “the role of gender...cannot be ignored.”<sup>118</sup> As they explain, “gendered expectations can disguise the controlling and coercive nature of certain behaviours.”<sup>119</sup> Barlow et al. also agree that mainstreaming gender into the offence “would be a sensible way forward to maximize the full potential of the offence.”<sup>120</sup> The focus of Charlotte Barlow and Sandra Walklate’s most recent 2021 study is on the problem of the “failure to ‘see’ gender” in risk assessment.<sup>121</sup> Risk assessment tools that are “gender-blind” fail to see risk through survivor’s eyes and lived experiences. This means that a great deal of risk goes unassessed or improperly assessed.<sup>122</sup> However, in terms of concerns that the offence would be turned against victims by their abusers, a gender breakdown of successful prosecutions of the offence does roughly confirm Stark’s conclusions of “coercive controlling behaviors” as being a male problem; of those successfully prosecuted for coercive and controlling behavior 97% are male to only 3% female.<sup>123</sup>

Despite the ongoing challenges, Barlow et al. have found that the criminal offence of coercive control was an important move forward for the policing of domestic violence.<sup>124</sup> Overall, the offence has allowed for help where it did not exist before. As their study results show, around 37% of the coercive control crimes they studied

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<sup>118</sup> Bishop & Bettinson, *supra*, note 104 at 9.

<sup>119</sup> *Ibid* at 3.

<sup>120</sup> Barlow et al, “Problems and Possibilities”, *supra*, note 96 at 173.

<sup>121</sup> See Charlotte Barlow and Sandra Walklate, “Gender, risk assessment and coercive control: Contradictions in terms?” (2021) 61:4 *Brit J Criminology* 1 at 3.

<sup>122</sup> *Ibid* at 890–891.

<sup>123</sup> See UK Office for National Statistics, “Domestic Abuse in England and Wales: Year Ending March 2018”, online:

<[www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2018](http://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2018)> [ONS, “2018”].

<sup>124</sup> *Ibid*.

involved no physical violence.<sup>125</sup> McGorrery and McMahon's 2019 study also supports this finding.<sup>126</sup> As Barlow et al. say:

These findings do point to the potential of the coercive control offence in providing means through which police officers may robustly respond to sustained domestic abuse in instances where they might not have been prompted or able to previously.<sup>127</sup>

They emphasize that their research only highlights the need to "go further" and continue to improve "understandings of the nature and impact of coercive control at all points of contact within the criminal justice process."<sup>128</sup> In the Scottish context, Emma Forbes, of the Scottish Centre for Crime and Justice Research, also concludes "that the challenges should not detract from its influence to drive a societal appreciation of domestic abuse as a significant public and private wrong."<sup>129</sup> Brennan and Myhill (2021) take a more cynical stance; however, caution about the need for better data and a clear-sighted recognition of the myriad ways the justice system fails domestic abuse survivors. As they recommend,

Any legislature that chooses to criminalize coercive control cannot plead ignorance to the possible abuses of and failings of such a law. The myriad ways in which legal systems abuse is perpetrated have been clearly demonstrated. Therefore, the future criminalization of coercive control should be accompanied by mechanisms to measure the failings and potential abuses of this legislation as well as its use and successes.<sup>130</sup>

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<sup>125</sup> Barlow et al, "Problems and Possibilities", *supra*, note 96 at 173.

<sup>126</sup> McGorrery & McMahon, *supra*, note 20 at 1.

<sup>127</sup> Barlow et al, "Problems and Possibilities", *supra*, note 96 at 173.

<sup>128</sup> *Ibid* at 175.

<sup>129</sup> Forbes, *supra*, note 81 at 406.

<sup>130</sup> Brennan & Myhill, "Patterns", *supra*, note 93 at 13.

In sum, in terms of criminal law enforcement reforms, there is a need for better collection of evidence not only on behalf of survivors but also referentially by the police themselves about their own practices and areas for further future improvement. Next, I will turn to how the above reforms on the criminalizing of coercive control have begun to be translated specifically into the family courts.

### The "Harm Report" and Contact Culture

In the past two years, the emphasis on coercive control has begun to shift from the criminal to the family courts in the UK. In April 2021, the UK's *Domestic Abuse Act* received royal assent. The new legislation builds on the successes and failures of the 2015 introduction of coercive control as an offence in the *Serious Crime Act*. The *Domestic Abuse Act* was informed by a 2020 review into how family courts deal with domestic violence.<sup>131</sup> The expert-led report "Assessing Risk of Harm to Children and Parents in Private Law Children Cases" (known as "the Harm Report") incorporated the views of more than 1,200 individuals and organizations.<sup>132</sup> Those interviewed expressed strong concerns for the ways that family courts continue to be a tool of violent abusers, leveraged to revictimize survivors, both women and children.

The Harm Report pointed out how pro-contact culture continues to trivialize domestic abuse in UK family courts, despite the recent attention paid to domestic abuse and the criminal reform efforts with respect to coercive controlling behaviours.<sup>133</sup> Previous studies confirmed the same. Research led by Rosemary Hunter, Adrienne Barnett and Felicity Kaganas (2018), argued that the chief barrier to effective implementation of the

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<sup>131</sup> See UK Ministry of Justice, "Press Release: Major Overhaul of Family Courts to Protect Domestic Abuse Victims", UK Government (25 June 2020), online: <[www.gov.uk/government/news/major-overhaul-of-family-courts-to-protect-domestic-abuse-victims](http://www.gov.uk/government/news/major-overhaul-of-family-courts-to-protect-domestic-abuse-victims)> [MoJ, "Major Overhaul"].

<sup>132</sup> See UK Ministry of Justice, "Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report", (June 2020), online: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/895173/assessing-risk-harm-children-parents-pl-childrens-cases-report\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895173/assessing-risk-harm-children-parents-pl-childrens-cases-report_.pdf)> [MoJ, "Harm Report"]

<sup>133</sup> *Ibid.*

court's practice guidelines for contact ("PD12J") was the persistence of the strong assumption in favor of contact.<sup>134</sup> Adrienne Barnett, a family law and domestic abuse expert, recalls how after the 2016 Women's AID campaign on safe contact "Nineteen Child Homicides" (see page 18 above), there was a surge of media attention as well as discussions in Parliament on the issue of Parental Alienation (PA). At the time, it was even debated whether PA should be turned into a criminal offence.<sup>135</sup> Barnett's 2020 study, which examines family case law from 2010 to 2019, confirms that since 2017 the courts have had "increasing enthusiasm for transferring residence of children from 'alienating' mothers to fathers."<sup>136</sup> Barnett says that one notable exception is a harsh critique of PA "experts" delivered in 2018 by Justice Russell in *P v C and Others (Child Arrangements Order)* [2018] 2 FLR 1139, where she spoke about the "punitive" nature of PA expert recommendations to remove children from the care of their mothers. Echoing these sentiments, Barnett (2020) describes how PA silences the voices of domestic abuse survivors:

PA is a concept that is proving more powerful than any other in silencing the voices of women and children resisting contact with abusive men. PA is not an 'equal' counterpart to domestic abuse, it is a means of obscuring domestic abuse, and should be recognised as such. We need to find 'other' ways of talking about children's welfare that recognise children's interlinked vulnerability, agency and relationships before any further harm is done to them.<sup>137</sup>

The Harm Report confirmed the above findings. The 2020 report found that "selective listening" to children about their desires not to have contact has led to many children being let down by the system and being put in a place of unnecessary harm; children who do not wish to have contact with an abusive parent are often "pressured to change

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<sup>134</sup> Hunter, Barnett & Kaganas, *supra*, note 70 at 408–409.

<sup>135</sup> See Adrienne Barnett, "A genealogy of hostility: parental alienation in England and Wales" (2020) 42:1 J Soc Welfare & Fam L 18 at 23–24.

<sup>136</sup> *Ibid* at 25.

<sup>137</sup> *Ibid* at 27.

their views".<sup>138</sup> In most cases where domestic abuse was reported, contact was nevertheless ordered.<sup>139</sup> As one childhood survivor of domestic abuse said in the report:

We do not expose children to adults who are abusive and coercive in any other social context other than family law. If a child is deliberately and repeatedly exposed to the abusive and coercive behaviour of an adult in any social context other than family law, it becomes a matter for social services. The harm of exposing a child to the behaviour of an abusive and coercive adult is so obvious that this question should not even need asking. Abuse and coercion are not okay just because a man is biologically related to the child.<sup>140</sup>

These feelings of failure were echoed by adult survivors of domestic abuse too. Indeed, many of the survivors interviewed said that the family violence escalated after their involvement in the family court.<sup>141</sup> Thus, despite the massive funding funnelled into advancing women's equality and combatting violence against women over the past decade, when it comes to family courts, the report found that women in UK still feel as though the "odds are stacked against them."<sup>142</sup>

The Harm Report found that when contact is ordered, the focus of the court on protection for the non-abusive parent still remained limited to physical abuse and failed to sufficiently consider coercive control and other emotional harms in ordering

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<sup>138</sup> MoJ, "Harm Report", *supra*, note 133 at 5.

<sup>139</sup> *Ibid* at 7. Gillian Baker also confirms how a pro-contact culture continues to shape Scottish family court decisions as well, despite the progressive attempts in Scotland at legislative reform. One key barrier is the mistaken belief that violence is over once the relationship has ended. Baker cites a recent case, *LRK v AG* [2021] SAC (Civ) 1, where it was confirmed that the father had forced the mother to eat dog faeces, and also put petrol into the home threatening to light the house on fire while she and the child were inside, yet despite the judge making a finding of the child being a victim of domestic abuse, the court ruled that this was now in the past and that "historical abuse is not...sufficient to prevent an award of contact being made". See Gillian Baker, "Child contact and protection from domestic abuse", *Law Society of Scotland* (8 March 2021), online: <[www.lawscot.org.uk/members/journal/issues/vol-66-issue-03/child-contact-and-protection-from-domestic-abuse](http://www.lawscot.org.uk/members/journal/issues/vol-66-issue-03/child-contact-and-protection-from-domestic-abuse)>.

<sup>140</sup> MoJ, "Harm Report", *supra*, note 133 at 167.

<sup>141</sup> *Ibid* at 8.

<sup>142</sup> *Ibid* at 115.

protection measures.<sup>143</sup> The report also highlighted how the adversarial nature of the family court was not conducive to resolving family court cases involving domestic violence.<sup>144</sup> Finally, the report also found that social workers who conducted assessments had “significant weaknesses” in knowledge and skills and that their training needed improvement.<sup>145</sup> The report called for sweeping reform.

### The Domestic Abuse Act 2021

On 14 December 2020, a Family Justice Council forum was held to address concerns about evidence of mounting violence in contact cases. Further, on 19 January 2021, the Court of Appeal heard four domestic abuse appeals in a ground-breaking decision on how the court should handle domestic abuse and coercive control, *Re H-N and Others (children)* (which I will cover in further detail in the coming section).<sup>146</sup> The *Domestic Abuse Act* came into force a few months later. The Act expanded the scope of the prior coercive control legislation to take account of post-separation and economic abuse. It also made non-fatal strangulation an offence and introduced priority housing for survivors. Further, the new legislation acknowledged that children are victims of domestic abuse even when they do not experience it directly. In addition, the *Domestic Abuse Act*:

- appointed a Domestic Abuse Commissioner who “speaks on behalf of victims and survivors.”<sup>147</sup> The Commission released a report in June 2021 entitled, “Understanding Court Support for Victims of Domestic Abuse”;<sup>148</sup>

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<sup>143</sup> *Ibid* at 141.

<sup>144</sup> *Ibid* at 4.

<sup>145</sup> *Ibid* at 185.

<sup>146</sup> *Re H-N and Others (children) (domestic abuse: finding of fact hearings)* [2021] EWCA Civ 448 [*H-N and Others*].

<sup>147</sup> See Domestic Abuse Commissioner, “Understanding Court Support for Victims of Domestic Abuse”, *Safe Lives UK*, (June 2021), online:

<[safelives.org.uk/sites/default/files/resources/Court%20Support%20Mapping%20Report%20%20DAC%20Office%20and%20SafeLives.pdf](https://safelives.org.uk/sites/default/files/resources/Court%20Support%20Mapping%20Report%20%20DAC%20Office%20and%20SafeLives.pdf)>.

<sup>148</sup> *Ibid*.

- introduced new protection orders (“DAPO – Domestic Abuse Protection Order) to address the shortcomings of former orders, including the previous short duration and lack of criminalization;<sup>149</sup>
- made screens available for survivors providing evidence in family courts;
- gave judges the power to intervene to prevent survivors of domestic abuse from aggressive lines of questioning; and<sup>150</sup>
- made ANI codes (“Action Needed Immediately”) available at pharmacies, where those involved pharmacies provide women with a private space and a phone to make a call, as well as dedicated “safe spaces” in major pharmacy chains that also provide domestic abuse support information.<sup>151</sup>

Further, an additional £35 million in funding was allocated to support survivors.<sup>152</sup> The newly appointed Domestic Abuse Commissioner, Nicole Jacobs, has already indicated that family law will be a priority focus area, noting that the family court is the most common issue raised by domestic abuse survivors.<sup>153</sup>

However, despite these important gains, many survivors’ and women’s organizations continue to be disappointed with the results of the reforms. As Olive Craig, senior legal officer at Rights of Women said in an interview with *The Independent* in June 2021,

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<sup>149</sup> See 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 J Soc Welfare & Fam L 133 at 135.

<sup>150</sup> See Owen Bowcott, “Family Court Judges Given Power to Intervene in Domestic Abuse Cases”, *The Guardian* (25 June 2020), online: <[www.theguardian.com/society/2020/jun/25/family-court-judges-given-power-to-intervene-in-domestic-abuse-cases](http://www.theguardian.com/society/2020/jun/25/family-court-judges-given-power-to-intervene-in-domestic-abuse-cases)>.

<sup>151</sup> See UK Government, “Domestic Abuse: How to Get Help”, online: <[www.gov.uk/guidance/domestic-abuse-how-to-get-help#domestic-violence-and-abuse-new-definition](http://www.gov.uk/guidance/domestic-abuse-how-to-get-help#domestic-violence-and-abuse-new-definition)>. Recently, another important development is that Vodaphone UK partnered with a company called Hestia to provide a mobile app for domestic abuse survivors to get help. See “Bright Sky App”, Hestia, online: <<https://www.hestia.org/brightsky>>.

<sup>152</sup> See UK Ministry of Justice, “Press Release: Major Overhaul of Family Courts to Protect Domestic Abuse Victims”, UK Government (25 June 2020), online: <[www.gov.uk/government/news/major-overhaul-of-family-courts-to-protect-domestic-abuse-victims](http://www.gov.uk/government/news/major-overhaul-of-family-courts-to-protect-domestic-abuse-victims)>.

<sup>153</sup> *Ibid.*

The women we support on our family law advice line tell us nothing is changing – the minimisation of abuse and pro-contact culture that is causing so much harm is still alive and well.<sup>154</sup>

Craig told *The Independent* that the Harm Report should have been a “wake-up call for the system,” for practitioners to begin to have a hard look at how the present system “re-traumatizes and further abuses women and children.”<sup>155</sup> The new Domestic Abuse Commissioner is well aware of the steep challenges that lie ahead, from ongoing misrecognition of domestic violence to “children being forcibly removed from their beds by police in the middle of the night taken from one loving parent to one they are frightened of.”<sup>156</sup>

All of this could have gone differently, Hunter, Barnett, and Kaganas argue.<sup>157</sup> In 2000, the Court of Appeal heard *Re L, V, M, H* (2000). Two expert witnesses, Dr. Claire Sturge and Dr. Danya Glaser, discredited the theory of Parental Alienation by Richard Gardner, which had been picked up and promoted by the fathers’ rights movement in the UK during the 1990s.<sup>158</sup> Sturge and Glaser recommended that a finding of domestic abuse should raise a presumption against direct contact.<sup>159</sup> The court rejected this finding. Until now, even after the reforms brought forward by the *Domestic Abuse Act*, the critical “presumption of parental contact” is still under review in the UK. This is a chief and central failing of the new attempts at reform and, as demonstrated by the Harm

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<sup>154</sup> See Maya Oppenheim, “Domestic Abuse Victims ‘Silenced’ by Family Courts and Forced into Letting Dangerous Exes See Children, Warn Campaigners”, *The Independent* (22 June 2021), online: <[www.independent.co.uk/news/uk/home-news/domestic-abuse-family-courts-children-b1870605.html](http://www.independent.co.uk/news/uk/home-news/domestic-abuse-family-courts-children-b1870605.html)>.

<sup>155</sup> *Ibid.*

<sup>156</sup> See Domestic Abuse Commissioner UK, “The Hour of Change is Now for the Family Courts”, (20 July 2021), online: <[domesticabusecommissioner.uk/blogs/the-hour-of-change-is-now-for-the-family-courts/](http://domesticabusecommissioner.uk/blogs/the-hour-of-change-is-now-for-the-family-courts/)>.

<sup>157</sup> Hunter, Barnett & Kaganas, *supra*, note 70 at 413.

<sup>158</sup> See Adrienne Barnett, “Parental Alienation and the Family Courts” (28 April 2020), *Women’s Aid*, online: <[www.womensaid.org.uk/parental-alienation-and-the-family-courts/](http://www.womensaid.org.uk/parental-alienation-and-the-family-courts/)>. See also *L & Ors (children)*, *Re* [2000] EWCA Civ 194 (19 June 2000).

<sup>159</sup> Hunter, Barnett & Kaganas, *supra*, note 70 at 413.

Report, it clearly fails to listen to the concerns and lived experiences of survivors. Laura Monk and Erica Bowen, experts in criminal psychotherapy, strongly suggest a shift in focus from PA to raising awareness on how mother-child separation tactics are also forms of coercive control, which they suggest will go a long way to helping women “challenge this behavior using the law”, make the gendered-nature of domestic abuse more salient, and increase support for mothers and children “jointly”.<sup>160</sup> Barlow et al. support this and argue for the risks of contact with abusive fathers to be made explicit in policy and to the family courts.<sup>161</sup>

Further concerns with the new reforms are pointed out by Lucy Williams and Sandra Walklate (2020), who describe the *Domestic Violence Act* (which was still a draft Bill at the time of their writing) as ambitious, but they caution that the legislation is still gender-neutral, “contradicting the widely-available evidence about such abuse.”<sup>162</sup> They also note the problematic heavy focus on criminalization. Williams and Walklate look to history for answers on how to advance women’s rights, by examining the Victorian era. As they discovered from their studies,

What is most remarkable about this period of progress is that, despite the Victorian’s love of criminalisation and incarceration, the greatest legal protections against domestic violence received by women were not through criminal law interventions, but through advances in family and property law.<sup>163</sup>

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<sup>160</sup> There are eight behaviors they identify: “1) Lying to and manipulating children; 2) Sabotaging children’s contact with their mothers; 3) Weaponising children; 4) Conditioning children through reward and punishment; 5) Exploiting women’s vulnerability, particularly as mothers; 6) Threatening mothers with taking their children from them; 7) Actively employing mother-blaming by exploiting mother-blaming institutions and practices; and 8) Denigrating mothers and elevating themselves in order to supplant mothers as children’s primary caregivers and attachment figures.” See Laura Monk and Erica Bowen, “Coercive Control of Women as Mothers via Strategic Mother-Child Separation” (2020) *J Gender Based Violence* 1 at 21.

<sup>161</sup> Barlow et al, “Problems and Possibilities”, *supra*, note 96 at 163.

<sup>162</sup> See Lucy Williams and Sandra Walklate, “Policy Responses to Domestic Violence, the Criminalisation Thesis and ‘Learning from History’” (2020) 59:3 *How J Crim & Justice* 305 at 308.

<sup>163</sup> *Ibid* at 309.

Both then and now, women have been hesitant to pursue justice through criminal prosecution of their violent (ex)partners. The reasons they remain in violent relationships remain the same today as they were over a century ago: “loss of income, status, shame...accommodation, access to children,” etc.<sup>164</sup> Williams and Walklate point out that neither the criminalization of coercive control in 2015, nor the new *Domestic Abuse Act* 2021, adequately address these reasons.

In part, some of these challenges faced in the UK courts may be explained by the dominant focus on criminalization of coercive control, and not on family court where separation and “alienation” issues are more determinative of court outcomes. Indeed, the UK’s reform efforts appear to have taken family law into consideration only as an afterthought. This is one distinct advantage of Canadian law, that “coercive control” has entered the law through family law first; a focus that should be maintained, as I will argue later in this paper.

In the next section, I will look more closely at recent family law cases from both the UK and Canada which mention “coercive control” to analyze how the concept has been employed thus far in family law decisions.

### UK Case Law on Coercive Control

To examine UK case law, I conducted a search on the British and Irish Legal Information Institute’s website (<https://www.bailii.org>) for “coercive control”. I limited the decisions I analysed to those which were released in the past year and focused on family law decisions, principally those which involved violence between the parents. This resulted in 28 cases that addressed coercive control in the UK over the past year, which I then coded and analyzed for how the court discussed domestic abuse.<sup>165</sup>

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<sup>164</sup> *Ibid* at 313.

<sup>165</sup> This included the four cases that were looked at in the Court of Appeal decision *H-N and Others*, one of the total 28 was appealed in this decision (*Re H-N*). Only one of the cases was from the court system of Scotland, this is likely be due to the wider lens taken by the Scottish *Domestic Abuse Act*, which does

The results are mixed. The UK courts are grappling with the new directives on family law and coercive control. This is clear from the recent Court of Appeal decision *H-N and Others*, where the Court of Appeal considered four cases and found that in three of them the trial judge had not properly understood the evidence before them on domestic violence and coercive control.<sup>166</sup> Echoing the insights learned from the Harm Report, the Court of Appeal remarked on the need for creative solutions to come up with alternate models for the family court, as the present system was failing to meet the needs of victims. Domestic violence is the work of the family court, they said. It is incumbent on the court to update its understanding of domestic violence and rid itself of outdated notions given that research and evidence has now confirmed many of the old stereotypes about family violence to be flawed. In issuing their decision, they noted their hope that, in the future, cases like the ones they were overturning would become exceptions.

Of the 28 decisions that mentioned coercive control, 26 of them referred to children. Of these 26: four referred to parental alienation by the mother, while another three referred to alienation of the mother by the father (with respect to coercively controlling her and alienating her from friends and family). Some of the topics discussed are listed below:

- Transnational issues (i.e., abduction/abandonment): 15 cases
- Physical violence against mother: 14 cases
- PD12J (practice directions for custody, revised for domestic abuse): 12 cases
- Emotional abuse: 12 cases
- Isolation: 11 cases
- Threats: 8 cases

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not specifically name "coercive control" but has a wider offence of domestic abuse that explicitly names many violent behaviors such as "controlling", "isolation", "depriving...of freedom of action", etc. *H-N and Others, supra*, note 147.

<sup>166</sup> *Ibid.*

- Mother reported father to police: 8 cases
- Sexual harm towards mother: 6 cases
- Non-molestation orders: 6 cases
- Physical violence against father: 5 cases
- Patterns of abuse: 5 cases
- Strangulation: 4 cases
- Bullying: 4 cases
- Harassment: 4 cases
- Monitoring of mother: 3 cases
- Sexual abuse of children: 3 cases
- Stalking: 2 cases
- Electronic abuse / hacking: 1 case
- Harming animals: 1 case
- Safety plans: 1 case

In only two cases was the mother/wife accused of coercive controlling behaviours, and in both cases the husband/father made counter-allegations. In the first of these, *KSH Farm*, both parties cross-alleged coercive control.<sup>167</sup> The court found that the behaviours did not amount to coercive and controlling behaviours but were the result of unfortunate conflict between spouses in a marriage that had turned sour. In the other case where a mother was accused of coercive control, *J, K, and L (Children)*, Justice Poole found that the father's allegations were not only wrong, but the evidence he provided itself was a confirmation of his own coercive controlling behaviours, as he had secretly filmed the wife for an entire year without her knowing.<sup>168</sup>

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<sup>167</sup> *KSH Farm Ltd & Anor v KSH Plant Ltd & Anor* [2021] EWHC 1986 (Ch) [*KSH Farm*].

<sup>168</sup> Burman and Brooks-Hay (2018) argue that shifting from incident-based offences to a new offence based on patterns of behavior may minimize the ability of abusers to counter-claim violence. This case would appear to confirm this suggestion. Burman & Brooks-Hay, *supra*, note 78; *J, K, and L (Children) (Transnational Abandonment)* [2021] EWHC 280 (Fam) [J, K, and L].

For the four cases where “parental alienation” was raised, the results are mixed.<sup>169</sup> It is clear that it is a concept that is still being used by the courts and accepted as valid. In *F v G*, there was a finding of domestic abuse towards the mother and the Cafcass (Children and Family Court Advisory and Support Service) officer said that the child had justified reasons to not want to see the father; nonetheless, the judge said that the court needed to balance between

the harm that could be caused to the children by the immediate loss of their relationship with the father, which had to be set against the risks to the children and the mother of contact continuing...<sup>170</sup>

The father seeking contact won the appeal. In *F v M & Ors*, parental alienation was claimed after the mother reported the father had sexually abused the child while in their country of origin, the judge dismissed the abuse claims as inconclusive and blamed the mother for causing the father emotional harm.<sup>171</sup> In *AA v BB*, the mother won an appeal to have additional evidence of domestic abuse admitted; however, the judge noted that admitting the mother’s evidence could also help the father regarding his claims that the mother was violent and alienating.<sup>172</sup> In *CLB v SLB*, the father launched an appeal because the trial judge did not accept evidence of parental alienation.<sup>173</sup> Justice Williams denied the father’s appeal for the most part, saying the trial judge found that if there was any evidence of domestic abuse, it was by the father not the mother, and therefore it was right to dismiss his evidence on parental alienation, particularly in the context of COVID-19 and the need to expedite proceedings. The judge did however dismiss the mother’s accusations of legal abuse, noting this amounted to coercive and controlling behaviours.

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<sup>169</sup> *F v M & Ors* [2021] EWHC 553 (Fam) (11 March 2021) [F v M & Ors]; *F v G* [2020] EWHC 2396 (Fam) [F v G]; *CLB v SLB* [2021] EWHC 891 (Fam) [CLB v SLB]; *AA v BB* [2021] EWHC 1822 (Fam) [AA v BB].

<sup>170</sup> *F v G*, *supra*, note 170 at para 31.

<sup>171</sup> *F v M & Ors*, *supra*, note 170.

<sup>172</sup> *AA v BB*, *supra*, note 170.

<sup>173</sup> *CLB v SLB*, *supra*, note 170.

## F v M

One of the key recent judgements from the UK is *F v M*.<sup>174</sup> In this decision, Justice Hayden went to great length to describe coercive control. Justice Hayden explicitly said that there has been little uptake of the term “coercive control” by the family courts, and that in his view more training is needed in the profession.<sup>175</sup>

'Controlling behaviour' really involves a range of acts designed to render an individual subordinate and to corrode their sense of personal autonomy. Key to both behaviours is an appreciation of a 'pattern' or 'a series of acts', the impact of which must be assessed cumulatively and rarely in isolation.<sup>176</sup>

In his decision, he noted that the mother herself had little awareness of the extent of the abuse she had been facing in her relationship, as he said,

She relates her experiences in a way which reveal a complete ignorance of the paradigmatic pattern of controlling and coercive abuse she is describing.<sup>177</sup>

He quoted extensively from a police transcript of the mother in the decision, to highlight how “innocuous” coercive control can be, pointing out, for example, how her boyfriend made her call her mother to tell her she was pregnant, even when she was not ready to tell her, with the intent to hurt her.<sup>178</sup> Referring to the Statutory Guidance by the Home Office on coercive and controlling behaviours, Justice Hayden emphasized that this was non-exhaustive.<sup>179</sup>

Among the signs of coercive and controlling behaviour he noted were behavioural changes in the mother, forcibly confining her, financially controlling her, controlling

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<sup>174</sup> *F v M* [2021] EWFC 4.

<sup>175</sup> *Ibid* at para 4.

<sup>176</sup> *Ibid*.

<sup>177</sup> *Ibid* at para 46.

<sup>178</sup> *Ibid* at para 49.

<sup>179</sup> *Ibid* at para 61, quoting from *A County Council v LW & Anor* [2020] EWCOP 50.

what food she ate, whether she could take a shower, sexually assaulting her, harassing her with incessant messages and threats that he would commit suicide, isolating her from friends and family, causing her to withdraw from school. He would login to her social media accounts and then pretend to be her to solicit information about her from her friends. Justice Hayden concluded that this manipulative behavior frightened not just the mother but her parents too.<sup>180</sup> All of this was “dehumanizing” and “corrosive of her autonomy”.<sup>181</sup> Justice Hayden found evidence that the father had the same pattern of behaviour with another woman, too. Emphasizing how essential it is to see the big picture in cases of coercive control, Justice Hayden found it relevant to link the evidence of the father’s behaviour towards the two women. As he said:

two women who have never met, with entirely different experiences of life are describing how their daughters were coerced into a distorted relationship which gradually and relentlessly chipped away at their own sense of self and personal autonomy. It need hardly be said that these two accounts, strikingly similar as they are, each reinforce the other. It is also the case that when the two relationships are compared, it brings the force of the abuse, in each separate relationship, into greater focus and serves better to illustrate its corrosive and debilitating impact.<sup>182</sup>

This is a recent decision, but it has already begun to be cited by a number of the other cases on coercive control which have followed it, including the other major recent case, *Re H-N and Others*.<sup>183</sup>

### Re H-N and Others

This recent case has made waves in UK family law. The appeal combined four decisions about domestic abuse; it allowed three of the appeals, overturning the original decisions on the basis that judges had not sufficiently recognized the domestic abuse

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<sup>180</sup> *Ibid* at para 30.

<sup>181</sup> *Ibid* at para 64.

<sup>182</sup> *Ibid* at 72.

<sup>183</sup> *Re H-N And Others, supra*, note 147.

before the court. The appeal set out to provide general guidance for future cases to follow. Women's Aid, Rights for Women, Rape Crisis England and Wales and Welsh Women's Aid were interveners.

In two of the three cases which were overturned, the trial judges had either failed to recognize signs of abuse or had trivialized the confirmed findings. In *Re T*, despite making findings that the father had put a plastic bag over the mother's head, held her by the neck and likely had threatened to kill her, the trial judge dismissed this as a "mutually abusive relationship".<sup>184</sup> In *Re H-N*, the father had made admissions of physical violence, yet the judge diminished the importance of this, made berating comments about the "mess" her house was in, and found her testimony to be disjointed, all of which he used to discredit her. The court held that the judge failed to see that many of the symptoms he had used to dismiss her were signs of trauma typical of a domestic abuse survivor.<sup>185</sup> In the third appeal that was allowed, *Re B-B*, a judge had said offhandedly to a young single mother that her child could be taken away from her and given up for adoption. She could be heard crying throughout the court session after that comment, and the Court of Appeal ruled the judge had been out of line and granted the appeal.<sup>186</sup>

In the decision, the Court of Appeal emphasized that nearly half of all cases in family court touch on the topic of family violence, and that this matter is therefore of great concern for the courts.<sup>187</sup> As they said,

the task of engaging with and determining allegations of domestic abuse is at the very core of the everyday work of the Family court; it is what Family judges do.<sup>188</sup>

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<sup>184</sup> *Ibid* at para 171.

<sup>185</sup> *Ibid* at para 221.

<sup>186</sup> *Ibid* at para 110.

<sup>187</sup> The court noted that 40% of "private law children cases" involve domestic abuse. *Ibid* at para 3.

<sup>188</sup> *Ibid* at para 11.

Despite the many cases of domestic abuse that the family courts face, the Court of Appeal admitted that “[v]ictim and parent support groups and other bodies rightly seek to hold the Family Justice system to account for its failures.”<sup>189</sup> They emphasized that previous models of domestic violence which focused on physical violence were “wholly outdated”, as was the view that domestic violence is between adults only and does not have an impact on children.<sup>190</sup> The court also found that post-separation abuse was relevant when examining coercive control:

In like manner, the approach of regarding coercive or controlling incidents that occurred between the adults when they were together in a close relationship as being 'in the past', and therefore of little or no relevance in terms of establishing a risk of future harm, should, we believe, also be considered to be 'old fashioned' and no longer acceptable.<sup>191</sup>

Some of the other points the court emphasized included:

- Prioritizing the examination of coercive control in domestic abuse cases;
- Prioritizing the welfare of children in contact cases;
- Considering past abuse when evaluating contact;<sup>192</sup>
- Learning to recognize patterns of abusive behaviour;
- Not limiting evidence to isolated incidents;
- Trying to see the wider lens of abuse.

The women’s organizations that were interveners had pointed out to the court that coercively controlling behaviour was a form of violence predominantly engaged in by

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<sup>189</sup> *Ibid* at para 13.

<sup>190</sup> *Ibid* at paras 23–24.

<sup>191</sup> *Ibid* at para 52.

<sup>192</sup> The Court said, “Where past domestic abuse is found to have taken place, the court must consider the impact that abuse has had on both the child and parent and thereafter determine what orders are to be made for the future protection and welfare of parent and child in the light of those findings. Depending upon the circumstances, such orders may substantially restrict, or even close down, the continuing relationship between the abusive parent and their child”.

*Ibid* at para 4.

men, and therefore it should be prioritized in evaluating domestic abuse cases. The court agreed.<sup>193</sup>

The court also set out guidelines for examining the impact of domestic abuse on children, by bringing the lens of coercive control (and searching for patterns of abuse) into assessment for risk of harm to children:

A pattern of abusive behaviour is as relevant to the child as to the adult victim. The child can be harmed in any one or a combination of ways for example where the abusive behaviour:

- i) Is directed against, or witnessed by, the child;
- ii) Causes the victim of the abuse to be so frightened of provoking an outburst or reaction from the perpetrator that she/he is unable to give priority to the needs of her/his child;
- iii) Creates an atmosphere of fear and anxiety in the home which is inimical to the welfare of the child;
- iv) Risks inculcating, particularly in boys, a set of values which involve treating women as being inferior to men.<sup>194</sup>

The Court also reiterated that the standard in family court is on a balance of probabilities, and while the criminal law has developed a sophisticated analysis of coercive control, the family judge does not need to prove to a criminal standard.<sup>195</sup> However, the court did mention, in a comment that may raise the threshold of proving abuse, that not all behaviour rises to the level of domestic abuse, quoting Jackson LJ in *Re L (Relocation: Second Appeal)*:

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<sup>193</sup> *Ibid* at para 51.

<sup>194</sup> *Ibid* at para 31.

<sup>195</sup> *Ibid* at paras 60–74.

Yet not all such behaviour will amount to 'domestic abuse', where 'coercive behaviour' is defined as behaviour that is 'used to harm, punish, or frighten the victim...' and 'controlling behaviour' as behaviour 'designed to make a person subordinate...' In cases where the alleged behaviour does not have this character...it will not be in the interests of the child or of justice for the court to allow itself to become another battleground for adult conflict.<sup>196</sup>

The Court of Appeal spoke about ongoing efforts and mandatory training for judges in the areas of sexual assault and domestic violence, but also recognized that the adversarial court is not the most appropriate forum for responding to domestic abuse and indicated that efforts were underway to re-envision what an alternative set up could be. The four cases under consideration, they said, should become exceptions, not the rule.

### *Post Re H-N and Others*

Despite the emphasis of the Court of Appeal in *Re H-N and Others* on debunking the notion that domestic abuse is only physical, some recent decisions that have followed since *Re H-N and Others* seem to problematically dismiss signs of coercive control when there is no corresponding physical violence.

In *AA v BB*, decided in June 2021, Justice Harrison found that the husband expressed his disapproval of the wife by "ignoring her and refusing sexual intercourse" and there appeared to be signs that she was constraining her life to fit the mould he created for her to the point that she was "no longer the person she had once been."<sup>197</sup> The father was also found to be moody and unempathetic, however the judge said he could not believe that he was a "so domineering that [the mother] became wholly subservient to him" and emphasized that the father had never threatened her with physical

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<sup>196</sup> *Ibid* at para 32 quoting from Jackson LJ in *Re L (Relocation: Second Appeal)* [2017] EWCA Civ 2121 at para 61.

<sup>197</sup> *AA v BB* [2021] EWFC 55 at para 64.

violence.<sup>198</sup> He dismissed her allegations of abuse. The mother had framed the abuse as “passive coercive control”.<sup>199</sup> Justice Harrison problematically relied on lack of physical abuse (or threat thereof) as a sign that there had been no harm.

In another recent case, from May 2021 (*C v B*), that also appears to disregard coercively controlling behaviour, a mother and child were returned to Spain; the judge found that the mother’s admission that it had been “almost impossible for me to substantiate his coercive behaviour as it does not manifest itself in bruises or scars” to be, in the judge’s words, “telling”.<sup>200</sup> And, while the “mother’s claims of domestic abuse at the hands of the father are powerfully made,” they could “be adequately met in the short term” through the father’s undertakings and with the support of Spanish social services.”<sup>201</sup>

It remains to be seen, how far *Re H-N and Others* will take the family court in the UK. One thing is for certain, there is still a long way to go.

## Canadian Case Law on Coercive Control

I conducted a similar online search on the use of the term “coercive control” for Canadian family law, using the open access database CanLii.org (Canadian Legal Information Institute). Searching for the term “coercive control” resulted in a total of 56 cases which, unlike the UK cases, covered a span of almost a decade. I removed cases that were on criminal law and focused on cases centered around a family law dispute between parents. I arrived at 26 cases that mentioned the term “coercive control”. It is clear that the use of the term “coercive control” is still very new in Canadian law.<sup>202</sup> In a

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<sup>198</sup> *Ibid* at para 63.

<sup>199</sup> *Ibid* at para 24.

<sup>200</sup> *C v B* [2021] EWHC 1369 (Fam) at para 27.

<sup>201</sup> *Ibid* at para 50.

<sup>202</sup> As Elizabeth Sheehy points out, when coercive control was explained in Teresa Craig’s criminal trial, the judge remarked, “this is cutting edge stuff!” See Elizabeth Sheehy, “Expert evidence on coercive control in support of self- defence: The trial of Teresa Craig” (2018) 18:1 Criminology & Crim Justice 100 at 111 [Sheehy, “Expert Evidence”].

few of the more recent cases, it only appears in the case because the judge is quoting from the amendments to the *Divorce Act*, but the concept on its own is not actually explored by the case.

Some of the earliest cases citing coercive control in Canadian law are to be found in the Nova Scotia courts, particularly in the judgments of former Justice Beryl MacDonald, which I consider together below.

### NDL v MSL

Justice Beryl MacDonald is the Canadian judge who has written the most about coercive control. She wrote a progressive judgement on coercive control in 2010, in *NDL v MSL*, and another in 2014, *AV v EV*.<sup>203</sup> However, in three other decisions she wrote on coercive control, she used the definition of coercive control as a means of downgrading signs of domestic abuse, even when she found there had been physical violence, because it had not risen to the level of “coercive control”.

In *NDL v MSL*, Justice MacDonald took judicial notice of “coercive control”. She made a number of important points about domestic abuse, among them that domestic abuse had bearing on the safety and best interests of the child. As she said,

Children are harmed emotionally and psychologically when living in a home where there is domestic violence whether they directly witness the violence or not. Exposure to domestic violence is not in the best interests of children and those who are the perpetrators of domestic violence, who remain untreated and who remain in denial are not good role models for their children.<sup>204</sup>

Capturing the subtlety of coercive control as depicted by authors like Stark and in other decisions like the UK's *F v M* (over a decade later), she recognized that the father was

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<sup>203</sup> *NDL v MSL*, 2010 NSSC [NDL v MSL]; *AV v EV*, 2014 NSSC 204 [AV v EV].

<sup>204</sup> *NDL v MSL*, *supra*, note 203 at para 35.

undermining the mother's parenting and coercively controlling her when he interfered with her parenting, put her down in front of the child and called her a "terrible mother", physically blocked her and forcibly restrained her, and caused her to fear for her own safety. She described the domestic violence the mother was facing as coercive control and allowed her to return home with the child to the US.

In the same year, however, Justice MacDonald decided *C(JR) v C(SJ)*. In a sharp reversal of her earlier decision in *NDL v MSL*, she said that the abuse of one parent by another had no bearing on the children:<sup>205</sup>

...whatever occurred between the parties has not caused the wife concern about the husband's ability to appropriately parent these children. Therefore his allegedly abusive behaviour toward her should have no relevance to the appropriate parenting plan for these children.<sup>206</sup>

Almost accusing the mother of exploiting domestic violence in the courts, she said that this was a serious matter that should not be "used as a tactic to engage judicial sympathy."<sup>207</sup> She further dismissed the mother's claims that, "the husband did not support her return to high school, would not permit her to explore her native heritage, and isolated her from her friends and family."<sup>208</sup> She found the mother's claims unfounded and the mother to be an unreliable witness, and while acknowledging that the fighting was from both sides found that the evidence pointed towards the mother being the instigator. She defined domestic violence as behaviours limited to those which are "coercive control" over another partner and dismissed physical acts of violence "a push", "a shove" as not rising to the level of needing "judicial intervention" if they "have no pattern of repetition and leave little if any lasting impact upon the recipient."<sup>209</sup>

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<sup>205</sup> *C(JR) v C(SJ)*, 2010 NSSC 85.

<sup>206</sup> *Ibid* at para 15.

<sup>207</sup> *Ibid* at para 15.

<sup>208</sup> *Ibid* at para 18.

<sup>209</sup> *Ibid* at para 16.

Similarly, in *LeBlanc v Khallaf*, Justice MacDonald dismissed allegations of abuse of a mother because it did not rise to the level of a pattern of coercive control.<sup>210</sup> She found that the mother had “nothing positive to say about the Father” which made her call “into question [the mother’s] objectivity in recalling past events.”<sup>211</sup> She found that the father was more “kindly” towards the mother in court, even though she did also find that the father had made “hurtful and unkind remarks to the mother”. She also found that both the mother and father were “pushing and shoving each other”.<sup>212</sup> On top of this, the father was awaiting trial for assaulting the mother.<sup>213</sup> Nonetheless, Justice MacDonald found that this did not rise to the level of domestic abuse, which she defined as coercive control over another person. She ordered supervised parenting time for the father.

Four years later, however, in *AV v EV*, Justice MacDonald issued another decision on coercive control, where she expounded on the nature of domestic violence at length, describing many of its signs:

Domestic violence most commonly refers to a situation where an adult intimate or former intimate partner attempts by psychological, physical, financial or sexual means to coerce, dominate or control the other. This violence reveals a pattern of conduct that may be verbal, physical or sexual. The conduct targets another person’s self-esteem and emotional well-being. It can include humiliating, belittling, denigrating, intimidating, controlling or isolating behaviour. It can include physical assaults, sexual assaults, sexual humiliation, sleep deprivation, extortion, economic coercion, threats to harm or kill, destruction of property, threatened or attempted suicide, litigation harassment and litigation tactics, manipulation of children, of relatives, of investigation agencies and helping personnel, surveillance, monitoring, and

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<sup>210</sup> *LeBlanc v Khallaf*, 2010 NSSC 219.

<sup>211</sup> *Ibid* at para 9.

<sup>212</sup> *Ibid* at para 24.

<sup>213</sup> *Ibid*.

stalking. The abuse and violence in intimate partnerships has a complex reciprocal dynamic not found in violence that occurs between strangers.<sup>214</sup>

She emphasized that domestic abuse survivors can react to the abuse in different ways; some will submit to the domination and accept it as normal, others will try to break free. Children are impacted by these behaviours; she said it could not be supposed that an abusive parent would behave any better when left alone with the child. She noted that abusive parents enjoy using the legal system and parenting arrangements to continue to threaten the other non-abusive parent, but these concerns must be weighed against supporting a relationship with the abusive parent because “[c]hildren generally love and want to spend time with both of their parents.”<sup>215</sup> She reiterated in this decision that the domestic violence which the court should take notice of was strictly “coercive control”.

The last decision she wrote on coercive control was *RWB v DCB*, where she referred, for the first time, to “situational” violence which she used to distinguish those behaviours between couples that did not rise to the level of coercive control.<sup>216</sup> Not only did she dismiss the domestic abuse, she also took note of claims of parental alienation by the father and quoted extensively from an article co-authored by Nicholas Bala that described the way the “alienated child” expresses disfavour and rejection of the parent, which the article says is usually the father.<sup>217</sup> Although the father did have “parenting deficiencies that have contributed to his daughter’s estrangement from him”, Justice MacDonald ordered “therapeutic intervention to assist her in accepting contact with her Father” and set out a parenting plan for joint custody.<sup>218</sup>

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<sup>214</sup> *AV v EV, supra*, note 203 at para 15.

<sup>215</sup> *Ibid* at 17, 18, and 20.

<sup>216</sup> *RWB v DCB*, 2015 NSSC 254.

<sup>217</sup> *Ibid* at 51.

<sup>218</sup> *Ibid* at 57 and 66.

### A note about Situational Couples Violence

In 2000, Johnson introduced a theory of domestic abuse largely in response to what he claimed were feminist writings on the one hand that described family violence as being disproportionately male, and other contradictory research which showed family violence could also be female-led. Johnson said they were both right. The distinguishing factor, he found, was in the type of abuse happening, which he classified into four groups: intimate terrorism, mutual violent control, situational couple violence, and violent resistance. On the one extreme, “intimate terrorism” is about exerting power and control over another human being – often in the form of non-violent behaviours, while “situational couple violence” was about instances of family conflict that went out of control. The distinction, Johnson argued, was based in the amount of control. “Violent resistance”, Johnson says, “is almost entirely a woman’s type of violence” while “intimate terrorism is perpetrated by men.” However, Johnson also said that most violence was “situational couples’ violence”, whereas shelters disproportionately see cases of “intimate terrorism” which he said skewed their perception of family violence being disproportionately male.

“Situational couples’ violence” has been used repeatedly to dismiss signs of abuse in family courts. Joan Meier however argues that Johnson’s theory is not empirically supported.<sup>219</sup> First, because the data he relied upon was not specifically about control and was not his own original research but drawn from old datasets, and second because his own empirical evidence contradicts his findings, causing Johnson to modify his theory repeatedly over the years, and to admit that situational couples violence can escalate into more severe violence.<sup>220</sup> Further, Meier points out that subsequent studies

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<sup>219</sup> See Joan S Meier, “Johnson’s Differentiation Theory: Is It Really Empirically Supported?” (2015) 12:1 J Child Custody 4.

<sup>220</sup> *Ibid* at 12.

have shown that situational couples violence may be the least frequent form of violence between couples. Nonetheless, his theory has left an indelible mark on family law.<sup>221</sup>

### Other notable Canadian cases on coercive control

Other noteworthy decisions where a positive finding of coercive control was made include *TSV v BV* in 2019, where a mother was allowed to relocate across provinces with children on a finding of coercive control among other forms of family violence.<sup>222</sup>

*Malik v Malik*, 2019, cited the Association of Family and Conciliation Courts (AFCC) Guidelines for Child Custody Evaluators on evidence of domestic violence, point 5 of which is:

coercively controlling behaviors involving harmful conduct that subordinates the will of another through violence, intimidation, intrusiveness, isolation and/or control.<sup>223</sup>

The court found that the mother had been subjected to oppressive behaviour and multiple forms of abuse, including legal abuse through the courts. In *AP v JK*, 2018, the court found that the mother had been a victim of coercive controlling behaviour and allowed her to relocate to her home country Sweden with the children.<sup>224</sup> In *Naylor v Malcolm*, 2011 ONCJ 629, the court cited an article by Dr. Peter Jaffe addressing coercive control and agreed with the mother's concerns for her safety, limiting the father's parenting time until he had completed parenting programming.<sup>225</sup> In *DX v MJZ*, 2011, the court found an extreme situation of coercive controlling behaviours on the

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<sup>221</sup> *Ibid* at 20. Wangmann also reports that cases in Australia are similarly using Johnson's "situational couples' violence" to dismiss cases of coercive control as non-domestic violence in family courts, citing the case of *Ackerman & Ackerman* [2013] FMCAfam 109 which was about parenting arrangements. See Wangmann, *supra*, note 8 at 232–233. A counter view however is suggested by Scott, who argues that Johnson's typologies helped push forward acceptance of domestic violence as being gender asymmetrical in Scotland. See Scott, *supra*, note 62.

<sup>222</sup> However, the judge dismissed some highly questionable behaviors that were admitted to by the father with respect to sexual abuse claims towards his daughters. *TSV v BV*, 2019 BCSC 1970.

<sup>223</sup> *Malik v Malik*, 2019 ONSC 5959 at para 25.

<sup>224</sup> *AP v JK*, 2018 NSFC 14.

<sup>225</sup> Peter Jaffe, founding Chairperson of the London Coordinating Committee to End Woman Abuse, an expert consultant on children and the justice system. *Naylor v Malcolm*, 2011 ONCJ 629.

part of the husband. Both parties were immigrants, but the wife could barely speak English and the husband used her vulnerability to enhance control over all aspects of her life.<sup>226</sup>

Other decisions where coercive control claims were dismissed include *Arbitman v Lee*, 2021, which the court described as “high conflict” and dismissed the mother’s claim of being coercively controlled, based on advice from the Children’s Aid Society, which had found no indication of harm. The court ordered “generous access to both...parents” on a going forward basis.<sup>227</sup> In *TEA v RLHC*, 2019, the father counter-alleged parental alienation. The court brought in an expert witness who dismissed the mother’s allegations on the basis that the abuse fit the pattern of “situational couple violence” and did not rise to the level of coercive controlling family violence.<sup>228</sup> The expert testified that if there was coercive control, then “one would see increased instances of physical violence”, which was used to dismiss the mother’s reports of violence as the physical violence had occurred in the past and had not been repeated.<sup>229</sup> Another case from Ontario, *Abdelhamid Tayebi v Salima Oukachbi*, 2013, after quoting from Justice MacDonald’s decision in *NDL v MSL*, found that there was no abuse because the level of violence did not rise to “coercive control”.<sup>230</sup> While the court found that the mother had taken on the traditional role of an Algerian housewife, the fact that she was a successful physician was a sign she was not an abused woman. Further evidence of this was that she had recanted after calling 911 on the father. The house, its contents, and full custody were all awarded to the father.

It is clear that coercive control is not a term that is being frequently used yet by Canadian courts; however, there are some concerning precedents that have been

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<sup>226</sup> *DX v MJZ*, 2011 NBQB 66.

<sup>227</sup> *Arbitman v Lee*, 2021 ONSC 315.

<sup>228</sup> *TEA v RLHC*, 2019 BCSC 1042 at 173.

<sup>229</sup> *Ibid.*

<sup>230</sup> *Abdelhamid Tayebi v Salima Oukachbi*, 2013 ONSC 6960.

established that should give pause, especially as coercive control has now been entered into family law through amendments to the federal *Divorce Act* and Ontario's *Children's Law Reform Act*. The great risk is that, as has been seen in some of these past cases, legitimate instances of family violence may be overlooked or dismissed for not rising to the level of "coercive control". The lack of definitional clarity on what constitutes coercive control is only certain to complicate this further.

### A Closer Look at Bill C-247

Having examined the legislative changes that have been made abroad in the UK on criminalizing coercive control and importing it thereafter into family law, as well as an examination of case law on coercive control from both the UK and Canadian courts, I will now revisit Bill C-247 and the House of Commons Standing Committee on Justice and Human Rights' report, "The Shadow Pandemic", and situate this intertextually with other government online publications about domestic abuse.

### The Shadow Pandemic's Review of Bill C-247

"The Shadow Pandemic" takes a cautious but positive approach to the draft legislation on criminalizing coercive control. The report says that witnesses testified that they expect the new bill will: "empower women"; educate the public and the judiciary; increase confidence in the justice system; be "symbolically powerful" with abusers by showing them their actions are "morally reprehensible" and will hold abusers "accountable".<sup>231</sup> This is a tall order for a piece of legislation that essentially consists of a paragraph of 54 words. While over-pessimism could derail the legislation, wishful thinking could too.

To that end, the report did note several concerns with the bill, citing concerns from women's organizations. To start, only 5% of sexual assaults in Canada are reported to police. Survivors do not trust the system and when they do, they often walk away with

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<sup>231</sup> "Shadow Pandemic", *supra*, note 54 at 27.

a bad experience of it. As has already been seen from the UK context, unless police undergo serious training and a corresponding culture shift, this is not expected to improve.<sup>232</sup> Substantial work is needed to improve faith in the system.<sup>233</sup> This begins by listening to survivors.<sup>234</sup> It also means recognizing harmful misogynist stereotypes about survivors that harm women and children escaping abuse and fail to take their fears seriously.<sup>235</sup> Witnesses expressed scepticism that criminalization could make things better, when the police and courts already have existing tools to help prosecute domestic violence but fail to use them. They expressed concerns about re-victimization by the courts.<sup>236</sup> They also expressed concern for the over-incarceration of BIPOC populations and people living in poverty and noted that this new offence, if liberally applied, might be misused to disproportionately impact already vulnerable populations.<sup>237</sup> Other concerns by advocates included:

- the definition of coercive control is so vague and potentially wide that it could either be used too loosely or be unhelpful;<sup>238</sup>
- women will underreport because of fear of losing their children or fear of their ex-partner (either in the form of aggravated violence against her in the face of her complaint, or conversely, fear he will be criminalized by her reporting);<sup>239</sup>
- the language of the bill is modelled on UK law, it should be reformulated to match the language of the *Criminal Code* of Canada;<sup>240</sup>

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<sup>232</sup> As has been seen in the UK, even with substantial funding and training, the policing efforts have obstinately fallen short. *Ibid* at 5.

<sup>233</sup> *Ibid* at 19 and 29.

<sup>234</sup> *Ibid* at 20–21.

<sup>235</sup> *Ibid* at 21.

<sup>236</sup> *Ibid* at 29.

<sup>237</sup> As Chief Nishan Duraiappah is quoted in the report, "What I think goes through everybody's mind is: Is this phone call to the police actually going to compound my situation and make it worse?" *Ibid* at 19.

The Australian government's parliamentary report on criminalizing coercive control also echoed similar fears, "We have concerns that there may not be the specialist training for police to deal with the offence, which is likely to be quite complex, and this could result in the offence being applied very broadly and unfairly." See The Law Society of New South Wales, "Coercive Control in Domestic Relationships", *Parliament of Australia* (27 January 2021), online: <[www.parliament.nsw.gov.au/ladocs/submissions/70374/Submission%20-%2018.pdf](http://www.parliament.nsw.gov.au/ladocs/submissions/70374/Submission%20-%2018.pdf)> at 26 and 29.

<sup>238</sup> "Shadow Pandemic", *supra*, note 54 at 6.

<sup>239</sup> *Ibid* at 19. See also Bates & Hester, *supra*, note 150 at 136.

<sup>240</sup> "Shadow Pandemic", *supra*, note 54 at 19 quoting Genevieve Isshak and Gaëlle Fedida.

- Canadian services and legal systems operate in siloes, there is a need for more inter-agency coordination, particularly between criminal and family courts;<sup>241</sup>
- proving the subjective element of the offence may revictimize the survivor;<sup>242</sup>
- the new law will criminalize women instead of their male abusers.<sup>243</sup>

Some lessons learned and recommendations mentioned in the report:

- the new offence should not be limited to present partners<sup>244</sup>
- children living in a home with coercive and controlling violence should also be victims; in these cases punishment should be higher<sup>245</sup>
- the new offence should explicitly mention that "violence" includes electronic means<sup>246</sup>
- the new offence could model the Scottish and UK domestic violence acts by pulling together other domestic violence offences into a single offence or under a single heading of domestic violence in the Criminal Code<sup>247</sup>
- the government should consult with a wide range of experts and survivors, especially including the perspectives of BIPOC populations (Black people,

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<sup>241</sup> *Ibid* at 30, quoting Megan Stephens. The UK uses a tool called "Multi Agency Risk Assessment Conferences (MARACs), which allows information sharing on high-risk domestic abuse cases to be shared between agencies. As of 2019 there were 270 MARACs in operation. Brennan et al, "Operationalizing CC", *supra*, note 99. See also Sarah L Stewart, who cautions that not all inter-agency collaboration benefits victims equally, and that the fragility of interagency networks should be recognized, in Sarah L Stewart, "Enacting Entangled Practice: Interagency Collaboration in Domestic and Family Violence Work" (2020) 26:2 Violence Against Women 191

<sup>242</sup> "Shadow Pandemic", *supra*, note 54 at 30, quoting Megan Stephens.

<sup>243</sup> *Ibid* at 19, quoting Professor Jennifer Khoshan and The Redwood.

<sup>244</sup> *Ibid* at 26, quoting witness Professor Carmen Gill.

<sup>245</sup> *Ibid* at 30, quoting witness Professor Simon Lapierre.

<sup>246</sup> *Ibid* at 30, quoting witness The Canadian Centre for Child Protection. See also Elizabeth Yardley, "Technology-Facilitated Domestic Abuse in Political Economy: A New Theoretical Framework" (2020) 27:10 Violence Against Women 1.

<sup>247</sup> As Megan Walker explained, "[D]omestic violence-related crimes are spread out among at least 35 different sections in the Criminal Code, making it difficult to connect them to a pattern of behaviour by the male abuser to gain and maintain power and control over his partner... Domestic violence cases are different from other criminal cases." "Shadow Pandemic", *supra*, note 54 at 31, quoting witness Megan Walker. For a list of the various family violence laws already enacted that could be gathered into a single domestic violence offence, see also Justice Canada "Family Violence Laws", Government of Canada, online<[www.justice.gc.ca/eng/cj-jp/fv-vf/laws-lois.html](http://www.justice.gc.ca/eng/cj-jp/fv-vf/laws-lois.html)>.

Indigenous people, and other people of colour) and members of the 2SLGBTQQIA community.<sup>248</sup>

- there should be more interagency support, interactions between police and community-based agencies<sup>249</sup>
- there should be regular review of the bill, extensive training, plus monitoring and evaluation<sup>250</sup>

### Framing and intertextuality

The above conclusions by the “Shadow Pandemic” seem sound. However, I will now take a closer look at the text of the standing committee’s report and study the way it frames the language, by examining

- whether it hides gender and/or hides perpetrator agency (e.g., by using the passive construction)
- whether it reinforces or disrupts patriarchal norms, systems, and social power (e.g. male leadership)
- whether it discounts women’s lived experiences/viewpoints or blames them for the violence they face.<sup>251</sup>

To begin, I will evaluate the five recommendations, including my own recommendations for revisions in italics:<sup>252</sup>

- **First recommendation:** says that the House of Commons “acknowledges the significant harms coercive and controlling behavior causes”, is written in a

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<sup>248</sup> “Shadow Pandemic”, *supra*, note 54 at 32.

<sup>249</sup> *Ibid* at 19–20.

<sup>250</sup> *Ibid* at 33.

<sup>251</sup> As Kuskoff and Parsell (2021) argue, “It is not sufficient for domestic violence policy to take into account gender inequities, rather it is important to examine how gender is understood and situated in the policy, and identify how a gendered understanding contributes to the formation and implementation of policy that reduces domestic violence at the systems and structure levels.” See Ella Kuskoff and Cameron Parsell, “Striving for Gender Equality: Representations of Gender in “Progressive” Domestic Violence Policy” (2021) 27:3-4 *Violence Against Women* 470 at 475.

<sup>252</sup> “Shadow Pandemic”, *supra*, note 54 at 35–36.

gender-neutral way.

*This recognition should be modified to include a recognition that this violence is disproportionately male.*

- **Second recommendation:** is to analyse current legislation with a gender-based analysis plus lens, paying particular attention to the language. *This passes muster.*

- **Third recommendation:** acknowledges that the justice system “presents challenges”.

*It would be good to strengthen the language here to make more explicit the ways that structural inequalities reinforce patriarchal norms that create barriers for women and other equity-seeking populations to get the support and justice they deserve.*

- **Fourth recommendation:** that funding be given to “assist organizations working to support victims of coercive and controlling behaviour”

*Again, this is written in a gender-neutral way. The committee should apply its own instructions and apply a GBA+ lens to its own language. When speaking about “organizations working to support victims of coercive and controlling behaviour”, name it instead: women’s shelters and Violence Against Women (VAW) agencies.*

- **Fifth recommendation:** the government should educate service providers (police, lawyers, and judges) about the “dynamics of such behavior”.

*First, they should emphasize the need for a multi-agency approach that brings together not only the police and the judiciary but also gets them speaking together with the Children’s Aid Society (which also needs updated training in this area), women’s organizations, hospitals, psychologists, and other service providers. A domestic violence ombudsperson could help facilitate inter-agency coordination so that survivors do not have to be revictimized by telling their stories over and over again.*

To its credit, from the outset, the report identifies that this form of violence “harms mostly women and children” – though it does immediately wed this (in the same sentence) with how many “billions of dollars” this costs Canada every year, as if ending domestic violence in Canada in and of itself were not enough of a reason, unless it somehow contributes to Canada’s bottom line.<sup>253</sup>

The report takes the definition of family violence that is found on the government of Canada websites, “any form of abuse, mistreatment or neglect that a child or adult experiences from a family member, or from someone with whom they have an intimate relationship.”<sup>254</sup> The report goes one (important) step farther by immediately preceding this with a focus on gender inequalities. As the report states:

**Domestic violence is a serious violation of human rights that contributes to gender inequality.** It can be defined as “any form of abuse, mistreatment or neglect that a child or adult experiences from a family member, or from someone with whom they have an intimate relationship.”<sup>255</sup> (emphasis mine).

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<sup>253</sup> *Ibid* at 3.

<sup>254</sup> The Public Health Agency of Canada’s page “How to recognize if you or your children are being abused” defines family violence as: “*Family violence is any form of abuse or neglect that a child or adult experiences from a family member or intimate partner (boyfriend, girlfriend, spouse, fiancé(e)).[sic] It is an abuse of power by one person to hurt and control someone who trusts and depends on them.*” This definition is limited in several ways. First, it focuses on active relationships, whereas statistically, post-separation violence is worse than while couples are still together. Second, “someone who trusts and depends on them” is slightly deceptive wording. Indeed, family violence severs all bonds of trust. It does create and reinforce dependency, however by grouping the two together, the word “depends” as it is used in this definition, is extracted from the power-relations that frame the relationships of control that lead to family violence. By listing “boyfriend, girlfriend, spouse, fiancé(e)” it also gives the impression that the violence is evenly distributed by male and female perpetrators.

The Public Health Agency’s page on domestic violence begins with, “*Family violence affects us all.*” While this may be true, at a macro-community level, violence does not affect us all equally. The website removes the perpetrator from the equation. See Public Health Agency of Canada, “How to recognize if you or your children are being abused”, Government of Canada, online: <[www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/recognize-you-your-children-being-abused.html](http://www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/recognize-you-your-children-being-abused.html)>. The government of Canada’s “Fact Sheet - Divorce and Family Violence” uses a similar definition. See Department of Justice, “Fact Sheet - Divorce and Family Violence”, *Government of Canada*, online: <[www.justice.gc.ca/eng/fl-df/fsdfv-fidvf.html](http://www.justice.gc.ca/eng/fl-df/fsdfv-fidvf.html)>.

<sup>255</sup> “Shadow Pandemic”, *supra*, note 54 at 4.

This changes the definition that follows entirely. The rest of Canada's documentation on the definition of domestic violence should be updated to match this language. The report goes on to describe the gendered nature of domestic violence, mentioning that the majority of abusers are men.<sup>256</sup> When speaking of numbers, the report notes how underreporting of domestic violence skews the statistics; which are more likely that one in every three women in Canada are survivors of domestic violence.<sup>257</sup>

When it comes to defining coercive control, however, the report slips back into gender neutral language and the passive voice which removes the subject from the equation. The first sentence in the section on defining coercive control states:

Manifestations of coercive and controlling behaviour may include physical, sexual, and emotional abuse, financial control, implicit or explicit threats to the partner or ex-partner, and against their children, belongings, or pets. Coercive and controlling behaviour does not relate to a single incident, but a pattern of behaviour that takes place repeatedly and continuously. Indeed, taken on their own, certain behaviours may seem normal, but when considered all together, they amount to coercive and controlling behaviour.<sup>258</sup>

Indeed, the language is taking the behaviours "on their own", emphasized by the word "manifestations" which is highly abstract. The paragraph removes the abuser altogether and is gender-neutral. It also removes the word "violence". Echoing the proposed legislation, it does, however, mention that ex-partners need to be taken into account. Notably, the paragraph does not mention "fear" or "threat".

There are subtle ways that the report still places the emphasis on describing the survivor but making the male perpetrator invisible. Throughout the report there are 79 mentions of victim(s) as compared to only 18 mentions of abuser(s). For example:

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<sup>256</sup> *Ibid* at 4.

<sup>257</sup> As opposed to the statistics which say one in every four. *Ibid* at 5.

<sup>258</sup> *Ibid* at 6.

(my suggested rewording is in italics)

- "Victims of coercive and controlling behaviour are deprived of their liberty and autonomy."<sup>259</sup>

**Rewording:** *Abusers use coercive and controlling violence to violate women's liberty and autonomy.*

- "Victims of coercive and controlling behaviour can be under constant surveillance, a state that can be facilitated by the use of digital technologies and social media platforms."<sup>260</sup>

**Rewording:** *Abusers use any means at their disposal to monitor and track the activities of women escaping their violence, including abusing digital and social media platforms to stalk, harass, and monitor their movements and activities.*

- "a pattern of coercive and controlling behaviour can be more damaging than a single violent incident"

**Rewording:** *Because male violence is societally condoned and institutionally embedded (and therefore often invisible), abusers become habitually violent over long periods of time. Acts of violence committed by abusers often form a part of a larger pattern of male dominance through violent control and coercion.*

- "It is widely documented that the risk of lethal reactions in the context of domestic violence is significant, particularly when women attempt to leave the abusive relationship."<sup>261</sup>

**Rewording:** *Abusive men will often kill women who try to leave them.*

(note: the wording "lethal reactions" in the original sterilizes murder)

- "the [COVID-19] restrictions resulted in more frequent and severe violence, and created greater obstacles for victims to access services and protections."

**Rewording:** *Abusive men took advantage of the conditions of lockdown to further isolate women from their support units. Abusers used the lockdown to*

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<sup>259</sup> *Ibid* at 7.

<sup>260</sup> *Ibid* at 8.

<sup>261</sup> *Ibid* at 10–11.

*assert their dominance and intensify their control over women's lives. Abusive men became more violent, both in terms of the frequency and the severity of their attacks on women and children.*

(note: the original text removes the abuser, it is written in such a way that the violence flows from the COVID restrictions themselves, not the abusive man).

- "Real work is needed to restore the trust of survivors in police and the justice system more generally"<sup>262</sup> or "Survivors need to have confidence that they will be respectfully heard and trust in the justice system needs to be fostered."<sup>263</sup>

**Rewording:** *The police and the justice system need to work hard to recognize signs of violence and restore their credibility with survivors after years of treating survivors badly and dismissing real abuse as "unfounded".*

- "While it is possible that the violence endured by the victim will never be physical..."<sup>264</sup>

**Rewording:** *Male violence is both physical and non-physical. Non-physical violence is still violence.*

(Note: the word "endured" in the original sounds like what a runner does when they get to the end of a marathon. Survivors of torture should not be described as "enduring" but as *suffering* from a violent act. Indeed, *The Canadian Oxford Dictionary* has several definitions of the verb "endure", among them include: "tolerate (a person)", and also "submit to, experience without resisting."<sup>265</sup> Endured is the wrong word to use here.)

The report also quotes the Office of the Federal Ombudsman for Victims of Crime who says:

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<sup>262</sup> *Ibid* at 19.

<sup>263</sup> *Ibid* at 34.

<sup>264</sup> *Ibid* at 9.

<sup>265</sup> See *The Canadian Oxford Dictionary*, Katherine Barber ed, 2nd ed (Oxford: Oxford University Press, 2004).

The abuser as the main provider for the family is another nuance: sending the abuser to jail means sending the provider away.<sup>266</sup>

As well-intentioned as this comment may have been, it is important to recognize the implicit assumptions of male as “main provider” and equating “abuser” with “provider” in the same breath, as if sending the abusive male away is detrimental, rather than the real harm from economic disenfranchisement, which is linked to wider systemic economic inequalities and a lack of housing and adequate social supports for women and children escaping violence. In some places, the report also places emphasis on the victim to get support, as opposed to what society needs to do to prevent male violence:

coercive and controlling behaviour affects a victim’s sense of self-worth and creates “barriers to accessing the resources they need to get away from an abuser.”<sup>267</sup>

However, the report did mention an example from a report by Redwood, of a program in Alberta that works at “rehabilitating these individuals who are responsible for the abuse in order to break the cycle of violence.”<sup>268</sup> (**reword:** *rehabilitating abusers to break their cycle of violence*). This correctly places emphasis on the need to correct male violent behaviours, and not the surviving behaviors of women.

The report does, however, implicitly recognize the ways that the patriarchal norms that structure our society create barriers to women getting help because male violence is largely invisible. As the report says:

Without broader societal awareness of coercive and controlling behaviour, it can take time for victims to recognize the serious nature of the abuse they

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<sup>266</sup> “Shadow Pandemic”, *supra*, note 54 at 19.

<sup>267</sup> *Ibid* at 9.

<sup>268</sup> *Ibid* at 15.

are experiencing. Friends and neighbours may fail to intervene due to a belief that the conduct is not violent, or not a serious form of abuse.<sup>269</sup>

It would be good to make a more explicit acknowledgement of this in the future. Government publications and websites should be written in a way that does not hide the abuser or minimize violence or frame the issue of domestic abuse in such a gender-neutral light that male violence against women is invisible.<sup>270</sup>

To the extent the report gets things right, largely, this can be attributed to the fact that it is informed by evidence presented by witnesses who work on the frontlines of male violence against women in the family. The report is replete with quotes from them, which allows advocates and survivors with first-hand perspectives to have their voice heard. This should be continued going forward. If the government of Canada wants to be truly successful in making a difference in ending domestic abuse, government responses should be survivor-led, and act on the expertise of front-line workers, agencies, and survivor's networks.

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<sup>269</sup> *Ibid* at 18.

<sup>270</sup> I have indicated issues with the Public Health Agency of Canada's website materials above at footnote 255. Similarly, the RCMP's page on "Intimate partner violence and abuse", in addition to being gender-neutral, also uses the passive voice when describing the actions of abusers, thereby distancing the act of violence from the perpetrator yet again (e.g., the website describes as an example of physical abuse "a threat or attack made with a fist or object" – as if there is a disembodied fist flying around attacking innocent victims) . The page places focus on the victim, and describes warning signs solely based on victim behaviors, not on signs of abuse that can be recognized in the actions of the abusers themselves. The page ends by describing how victims can create safety plans. While it is important for victims to create safety plans, again the page places the onus on the victim for getting herself and her children safe and makes no mention of what is needed to end male violence. To their credit, the RCMP does acknowledge that the harm is "often a result of a person looking to gain or assert power or control over their partner." Unlike some of the other government web pages, the RCMP page draws attention to "Who is at risk" by emphasizing the women and girls are at higher risk, and that Indigenous women and non-heterosexual women are at even higher risk than most other women. See Royal Canadian Mounted Police, "Intimate Partner Violence and Abuse", online: <[www.rcmp-grc.gc.ca/en/relationship-violence/intimate-partner-violence-and-abuse](http://www.rcmp-grc.gc.ca/en/relationship-violence/intimate-partner-violence-and-abuse)>.

## Recommendations

Having reviewed the proposed legislation, evaluated it for intertextuality with other government of Canada publications and case law, and situated it within the wider context of a growing international movement led by progressive social reforms in the UK, I will now propose several recommendations for moving forward in combatting domestic violence in Canadian law.

### 1. **Make the legislation survivor-led.**<sup>271</sup>

The government should continue the consultations with women's organizations that it began with the "Shadow Pandemic". This should include focus groups with survivors and listening to community input carefully, focusing on qualitative narratives.<sup>272</sup> True change can only come if it is driven by a social movement. The government should *support* the movement and be careful not to usurp it. Given the well-documented barriers that survivors face in accessing support through legal systems, survivor perspectives are critical in shaping legal and other responses.<sup>273</sup>

### 2. **Provide a clear definition of "coercive control".**

Thus far, Canadian law has only vaguely defined this term. A clear definition would help. Definitions should lean into Stark's concept of coercive control rather than Johnson's.<sup>274</sup> Even better, domestic abuse should be defined in a

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<sup>271</sup> Smyth et al say that "given the well-documented apprehension and structural barriers that some women face in accessing support through the criminal justice system, survivor perspectives are critical in shaping legal and other responses". See Ciara Smyth et al, "COVID-19 lockdowns, intimate partner violence and coercive control" (2021) *Austl J Soc Issues* 1 at 9–10. See also Andy Myhill & Liz Kelly, "Counting with Understanding? What is at Stake in Debates on Researching Domestic Violence" (2021) 21:3 *Criminology & Crim Justice* 280 at 293. See also Mala Htun and S Laurel Weldon, "The Civic Origins of Progressive Policy Change: Combating Violence against Women in Global Perspective, 1975–2005" (2012) 106:3 *Am Pol Sci Rev* 548.

<sup>272</sup> Myhill & Kelly, *supra*, note 272 at 280.

<sup>273</sup> Smyth, *supra*, note 272 at 8.

<sup>274</sup> See pages 44–45 of this paper for a note on the problems with Johnson's theory of "situational couple's violence"

clear but broad way like the Scottish legislation.

3. **Remove the need for the survivor to prove subjective fear.**<sup>275</sup>

If a victim is particularly resilient and they do not present as afraid judges may use this to dismiss the violence. Needing to prove subjective fear punishes survivors for their resiliency.<sup>276</sup> It also risks revictimizing survivors through placing a harrowing evidential burden on them.

4. **Make sure the law does not swing too far in the other direction from incidents.**

While it is true that many coercive controlling behaviours form a pattern over time, incidents of physical violence should not be diminished by the courts either.

5. **Make it easier for survivors to give evidence.**

Mandate screens for survivors in family courts, and the ability of survivors not to have to come face to face with their abusers in the courthouse.

6. **Take strong steps to mitigate survivors being blamed.**<sup>277</sup>

Survivors continue to be blamed for their own abuse in Canadian legal systems. Protect women by taking a gender-based lens and naming male violence.

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<sup>275</sup> Wangmann, *supra*, note 8 at 234.

<sup>276</sup> *Ibid* at 234.

<sup>277</sup> In both Australia and the US, like Canada, mandatory charging regimes have led to many women survivors being caught in the system and charged themselves. As Ellen Reeves says, abusers will even self-injure themselves just to find ways to charge their victims. The fact that abusers are often calm when police arrive also plays in their hands. See Ellen Reeves, "Family Violence, Protection Orders and Systems Abuse: Views of Legal Practitioners" (2020) 32:1 Current Issues in Crim Justice 91 at 92 and 99-100. See also McGorry & McMahon, *supra*, note 20 at 2-3.

**7. Make power dynamics and gendered violence explicit.**<sup>278</sup>

Justice system actors need to not only understand what coercive controlling behaviours are, but the context for them.<sup>279</sup> Mainstream a gender perspective ensuring that the laws aim at substantive equality and do not “reinforce sexist ideas of men’s superiority and power over women,” however subtle and long held those beliefs may be.<sup>280</sup> Making the legislation GBA+ means making clear how domestic violence is a form of patriarchal control that is culturally and structurally reinforced by our society.<sup>281</sup>

**8. Create a roster of experts for the courts.**<sup>282</sup>

Have a ready list of vetted experts for the courts to call upon who are trained in “the minutia of men’s patterns of coercive control”<sup>283</sup>

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<sup>278</sup> As Stark says, “[w]ith coercive control, the rationale for gender-specific intervention lies in its construction and typical victims as well as its substantive focus on stereotypic female roles that have no counterpart in the experiences of men, children, or other groups. This does not mean women are incapable of coercive control or that men are never its victims. What it means is that, like rape, everything about coercive control takes shape around conceptions of male dominance and the structures that situate men as dominant relative to women, irregardless of whether the person being degraded and subjugated is biologically male or the perpetrator is female.” Stark, “Update and Review”, *supra*, note 41 at 96. Julia Tolmie also throws the issue of the gender asymmetry of coercive control into sharp relief: “The danger in enacting a gender-neutral offence of coercive control which is untethered from the need to prove physical violence is that it will be applied to primary victims. This danger is exacerbated when decision makers lack a sophisticated understanding of the manner in which gender roles, expectations of male entitlement, disparate physical strength and disparate resources can create power imbalances in heterosexual relationships.” Tolmie, *supra*, note 22 at 62.

<sup>279</sup> Understanding controlling behaviors is not enough; justice system actors need to understand how the controlling behaviors affect the survivor’s actions. Police or other assessors should be prompted to be explicit about describing “the harmful consequences of psychological and/or physical abuse.” Such prompts help justice system actors have a more holistic understanding of violence that goes beyond assault. Robinson, Myhill & Wire, *supra*, note 17 at 43.

<sup>280</sup> Kuskoff and Parsell describe Australia’s domestic violence reforms as hypocritical in exactly these terms. Kuskoff & Parsell, *supra*, note 252 at 471 See also Julia R Tolmie, who emphasizes that understanding coercive control “requires a sensitive gender analysis” in Tolmie, *supra*, note 22 at 55.

<sup>281</sup> *Ibid* at 471. See also Iain Brennan et al (2019), who recommend drawing attention to the way systems themselves produce and structure both knowledge and power, and further, how they “facilitate awareness of the microdynamics of control in everyday life.” They suggest that understanding power as the “capacity to act” can help shape how service providers engage with survivors and their abusers and understand them. Brennan et al, “Operationalizing CC”, *supra*, note 99 at 640–1.

<sup>282</sup> Birchall & Choudhry, *supra*, note 15 at 3.

<sup>283</sup> Elizabeth Sheehy points out that often the specialists who are brought into the courtroom to testify on domestic abuse have training in battered women’s syndrome or PTSD but do not adequately know how

**9. Legislate against the debunked “parental alienation”.**<sup>284</sup>

The contact presumption is now gone from Canadian family law, but many judges still take a pro-contact for both parties stand. The legislation should go one step farther and follow the advice given in *Re L, M, V, H* in the UK courts in 2000 by Dr. Claire Sturge and Dr. Danya Glaser, that if there is a finding of domestic violence there should be a presumption against direct contact. This may go farther towards ending violence against women and children than criminalizing coercive control.

**10. Set the age of the child to 18 not 16**<sup>285</sup>

Make it clear in any legislation that children are also victims of domestic abuse, both from direct encounters and/or through witnessing a parent or sibling being hurt.

**11. Clarify for the law several thorny issues about the nature of domestic violence.**

Evidence should support policy. Many misconceptions about domestic abuse are still rampant in our legal systems. Research and data on the nature of abuse should inform decision making.

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to look for signs of male violence. Front-line workers, when they are called in to testify, often provide better assessments. See Sheehy, “Expert Evidence”, *supra*, note 203 at 112.

<sup>284</sup> Canadian cases of parental alienation study by Elizabeth Sheehy and Susan Boyd between 2014 and 2018, show that domestic violence is made invisible in PA cases, despite the PA theory being debunked by science. “Alienating behaviors” are used to justify losing custody/access. The majority of parents who are “alienators” are mothers. In nearly half of cases where PA was found, custody changed. In 10% of the cases child sexual abuse was reported but none of these cases were successful. Judges take PA as more determinative in awarding parenting-time than domestic violence which is often dismissed. “Most disturbingly, women’s reactions to violence seem to overshadow men’s violence such that women become alienators for not suppressing their own fear.” Sheehy & Boyd, *supra*, note 14 at 88.

<sup>285</sup> See Emma Katz, Anna Nikupeteri and Merja Laitinen, “When Coercive Control Continues to Harm Children: Post-Separation Fathering, Stalking and Domestic Violence” (2020) 29 *Child Abuse Rev* 310 at 322.

- Make clear the dangers of post-separation abuse, legal systems abuse, and that non-physical forms of violence can be as bad and even worse than physical forms of violence.<sup>286</sup>
- Ensure legal system actors understand that survivors of coercive control normalize the abuse as a coping mechanism.<sup>287</sup>
- Ensure legal system actors understand that children are often “weaponized” by abusers to control their mothers.<sup>288</sup> The justice system must recognize mother-child separation as a gendered form of abuse and understand that mother and child can be jointly abused.<sup>289</sup>

## **12. Fund trainings on trauma and on child psychology for legal system actors.**

This includes creating an updated framework for Children’s Aid Society (CAS) assessors and better channels for healthcare professionals to communicate with social workers at CAS as well as the Office of the Children’s Lawyer. Creating a Commissioner for Children would help in this regard. There is a need for trauma informed practice, for the courts to recognize that victims not only are traumatized, but that often their trauma is still ongoing.<sup>290</sup> Courts and other legal system actors need to understand that coercive control puts survivors in a state of hyper-vigilance. Many survivors develop

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<sup>286</sup> As Vivienne Elizabeth points out in her 2017 study on “custody stalking”, it is critical that judges learn about the “unique dynamics of domestic violence”, such as how survivors (adults and children) recant, how children behave when they are exposed to violence, how to recognize evidence of past violence, admissibility of past evidence, and how to assess lethality in the context of coercive control. See Vivienne Elizabeth, “Custody Stalking: A Mechanism of Coercively Controlling Mothers Following Separation” (2017) 25 Fem Leg Studies 185 at 189.

<sup>287</sup> Bishop & Bettinson, *supra*, note 104 at 12.

<sup>288</sup> Stark, “Update and Review”, *supra*, note 41 at 96.

<sup>289</sup> Monk & Bowen, *supra*, note 161.

<sup>290</sup> Bishop & Bettinson, *supra*, note 104 at 3.

complex-PTSD.<sup>291</sup>

**13. Create a position of Commissioner of Domestic Violence.**

Modelled after the Office created in the UK, to similarly give survivors a voice.

**14. Commit to Reconciliation.**

Recognize the historic role that colonization has had in the disproportionate violence against Indigenous women and girls in this country. Consult with Indigenous women's organizations first and foremost at every stage. Explore alternative ideas such as community healing from domestic violence rather than individual responses. Ensure "culturally responsive healing practices". Provide options for housing and other forms of economic stability to provide safety for those the system has already historically and systemically disenfranchised.<sup>292</sup>

**15. Create a national framework to combat violence against women in the family.**<sup>293</sup>

For systems change to happen there needs to be national coordination. This means inter-agency sharing (led by front-line workers) and communication, media and public education campaigns, and, most critically, funding.<sup>294</sup> The new legislation should not be limited in focus to one area of law but should

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<sup>291</sup> *Ibid* at 11–12.

<sup>292</sup> See Sarah Fotheringham, Lana Wells & Sharon Goulet "Strengthening the Circle: An International Review of Government Domestic Violence Prevention Plans and Inclusion of Indigenous Peoples" (2021) 27:3-4 *Violence Against Women* 425 at 435–436.

<sup>293</sup> See Evan Stark, "The 'Coercive Control Framework': Making Law Work for Women", in Marilyn McMahon and Paul McGorrery eds, *Criminalizing Coercive Control: Family Violence and the Criminal Law* (Singapore: Springer Nature, 2020) 33 at 34 [Stark, "CC Framework"].

<sup>294</sup> Walklate, Fitz-Gibbon & McCulloch, *supra*, note 46 at 147. Iain Brennan et al suggest to focus education efforts on youth because they are most susceptible. Stop domestic violence before it begins. Brennan et al, "Operationalizing CC", *supra*, note 99 at 642.

cross multiple legal domains.<sup>295</sup> Get behind culture change.

#### **16. Review and Repeat.**

There should be monitoring and evaluation, regular statutory review commitments. Focus should be on evaluating failures, not only successes.<sup>296</sup> The learning process will likely be an iterative one. The bigger picture and the end goal of safety should always stay in view.

#### **17. Explore alternative models.**

Canada's most intelligent minds should be engaged in a think-a-thon to remodel the family courts. It is widely acknowledged the present adversarial court system does not suit family law. Dispute resolution, on the other hand, also is often highly unsuitable for survivors. There should be incentives for collective brainstorming to arrive at novel solutions. Canada should not be trailing behind the rest of the world in pushing forward reforms, we should aim to leap ahead. Efforts should be made to get creative about re-imagining family courts in a way that makes them safe for survivors.<sup>297</sup>

## Conclusions

Canada has a golden opportunity to start off on the right path. The UK began with criminalization and has taken more than half a decade to come around to updating family law on coercive control. The work that has been done in criminal law in the UK is commendable for its efforts at education and training police and other legal system actors to see domestic abuse through a more nuanced lens. Their efforts at public education and consultations with front-line workers and survivors have also been

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<sup>295</sup> Wangmann, *supra*, note 8 at 238.

<sup>296</sup> Brennan and Myhill say that better data in the UK is needed to really track how the police have been doing, this includes measuring the ways they are failing to live up to the policy standards that have been set. The eagerness to justify the policy should not get in the way of clear-sightedness on its effectiveness once put into practice. Brennan & Myhill, "Patterns", *supra*, note 93 at 13.

<sup>297</sup> Bishop & Bettinson, *supra*, note 104 at 3.

commendable. There has been some success from their efforts, albeit limited. Some of the worst fears of feminists and women's organizations have not come to pass (yet): almost all of the offender's charged under the new offence of coercive control have been men, reflecting the gendered nature of domestic violence.<sup>298</sup>

There has been some evidence that supports the recent reforms in UK police training to help officers become better at recognizing signs of domestic abuse. The UK has also developed best practices for conducting risk assessments: it has been found that giving prompting questions and a list of suggested coercive controlling behaviours helps officers to better understand coercive control and to look for non-physical signs of abuse. Officers should also be prompted to explain the consequences of the abuse that they are identifying, which helps them to see the wider picture of abuse and to understand the reactions of survivors.<sup>299</sup>

However, while the numbers of successful prosecutions are growing each year, they remain small compared to other offences of domestic violence. There remain substantive issues with policing, such as the continuing emphasis on incidents and physical offences over non-physical. If the police found both coercive control and physical violence, they were more likely to prosecute than if there was coercive control and no accompanying physical violence.<sup>300</sup> In part, however, the failure to recognize domestic abuse has ultimately allowed the UK system to succeed and function while incrementally changing over time. The weight of arresting all domestic abusers in the country would simply make the system crash.<sup>301</sup>

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<sup>298</sup> With the caveat, this is still a new offence and abusers may not yet be alive to the possibilities of manipulating the offence against their victims. However, as was pointed out by Burman & Brooks-Hay, shifting from incident-based offences to a new offence based on patterns of behavior may minimize the ability of abusers to counter-claim violence. The recent 2021 UK case *J, K, and L*, where the father tried to gather evidence by secretly monitoring the mother for a year backfired on him. Many abusers can be drawn out or pulled into the light when the larger picture comes into view. *J, K, and L, supra*, note 169; Burman & Brooks-Hay, *supra*, note 78. For more details, refer to page 35.

<sup>299</sup> Robinson, Myhill & Wire, *supra*, note 17 at 43.

<sup>300</sup> Barlow & Walklate, "Risk Assessment", *supra*, note 96 at 895.

<sup>301</sup> Brennan et al, "Operationalizing CC", *supra*, note 99 at 646.

It is unclear how well the UK's attempts at reform can translate into the Canadian system. The transformation in Canada must be local and both community and survivor-led. Further, one of the key points emphasized by Stark and others is the need for reform to be led by social movements and not be top-down.<sup>302</sup> As Stark says,

Broadening the discussion of how men oppress women is a first step. The sort of commitment needed to counter the entrapment of women in personal life can only emerge from a far-reaching public dialogue that brings those who have survived coercive control together with the multiple constituencies determined to end it.<sup>303</sup>

Any work to combat violence against women and girls in Canada must also take into account the disproportionate violence against Indigenous women and girls that has resulted from Canada's colonizing policies and take care that this new legislation is not a tool to further this systemic oppression, but that it instead sets out to meaningfully improve the lives of women and girls. This means taking into account the appalling over-incarceration of Indigenous women as well as Black women and other people of colour.

This brings me to my main conclusion: focusing on criminalization is misguided. It is a bandage for a wound that cannot heal unless real systems change take place. This means understanding how oppression moves through our society and seeking to disrupt those patterns of control. Policing, which reinforces patriarchal and racial oppression, is not the correct tool to disrupt the patriarchy that supports gendered violence and inequalities. Ella Kuskoff and Cameron Parsell express it well:

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<sup>302</sup> Stark says that the most important thing is that the change is driven by a vibrant social movement. In Northern Ireland and the Irish Republic, though the criminal offence itself is narrower and more vaguely worded meaningful reform has taken place because of the rising local social movements that drove the change. See Stark, "CC Framework", *supra*, note 294 at 33–34.

<sup>303</sup> Stark, "Coercive Control", *supra*, note 2 at 367.

law-and-order approaches, in particular, play into patriarchal power systems rather than challenge them. This is because such approaches aim to protect victims from individual perpetrators, thereby using the patriarchal power of the state to protect women from the patriarchal power of men.<sup>304</sup>

Sandra Walklate and Kate Fitz-Gibbon have studied the way coercive control has entered the legal discourse in the UK and Australia conclude that criminalization “only serves to fail those it is intended to protect.”<sup>305</sup> Julia Tolmie writes that, while criminalizing coercive control may be part of the solution, on its own it is not a “complete solution to the problem of fragmentation in the criminal justice response to IPV.”<sup>306</sup> This is echoed by Burman and Brooks-Hay who say:

Legislative change cannot on its own lead to improvements. 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.<sup>307</sup>

Further, in the Canadian context, there may be constitutional challenges to criminalizing coercive control with such a broad definition as has been done in the UK. Erin Sheley points out that the way the UK law on coercive control was drafted might face constitutional challenges in US courts, for vagueness or overbreadth, in addition to concerns about administration.<sup>308</sup> Canadian legislators may face similar challenges in

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<sup>304</sup> Kuskoff & Parsell, *supra*, note 252 at 475.

<sup>305</sup> Sylvia Walby and Jude Towers, “Untangling the Concept of Coercive Control: Theorizing Domestic Violent Crime” (2018) 18:1 *Criminology & Criminal Justice* 7 at 7.

<sup>306</sup> Tolmie, *supra*, note 22 at 63.

<sup>307</sup> Burman & Brooks-Hay, *supra*, note 78 at 78.

<sup>308</sup> Sheley instead suggests that the offence could be drafted in the US based on the offences of fraud and conspiracy, given the “fraud-like nature of coercively controlling behavior” that is comparable to the “know-it-when-I-see-it” way fraud is determined by courts. For both, it is the pattern that creates the danger. See Erin Sheley, “Criminalizing Coercive Control within the Limits of Due Process”, (2021) 70 *Duke LJ* 1221 at 1227, 1288.

criminalizing coercive control, which is just one more reason why criminal law may not be the best area for Canadians to focus their efforts.

Still, something needs to change. Without reform, many women will continue to be underserved by our legal systems and placed in positions of harm because legal system actors are unable to see the abuse right in front of their eyes. The “invisible” harm of coercive control and domestic violence must be made clear across the multiple intersecting sectors of our justice system. The knowledge of front-line workers who are working in the trenches needs to be transferred to other actors across the justice system.

I have listed many options for consideration, including appointing a Domestic Violence Commissioner, bringing accurate evidence and data about domestic abuse into policy and practice, and pursuing public education and media campaigns. Further, providing support to women and children through housing and a guaranteed livable income would go a long way towards keeping women and children safe, much farther than criminalizing coercive control. As Williams and Walklate point out, looking to history, the greatest advancements of women’s rights have come from property rights and advances in family law.<sup>309</sup>

Change must start somewhere. While an updated understanding of domestic abuse should be revised across all areas of our legal systems, I propose that family law rather than criminal law would be a more fruitful area for Canada to begin. Indeed, this has already occurred with the recent amendments to the *Divorce Act* and the *Ontario Children’s Law Reform Act*. This is a positive step. However, the legal system still lacks definitional clarity on coercive control. I suggest that this reform and clarity not come

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<sup>309</sup> Williams & Walklate, *supra*, note 163 at 308. For more on this, see page 32 of this paper.

from criminal law but from family law.<sup>310</sup> Further, Deanne Sowter suggests that coercive control should be introduced into the Model Code of Professional Conduct for lawyers, pointing out that,

it is vital that a systemic response includes the law governing lawyers. By including coercive control in the Model Code, it tells all lawyers that coercive control is serious enough to warrant exceptional treatment and a collective response.<sup>311</sup>

Our discourse on domestic violence should not skirt around the violence, hide it, or make the source of violence invisible.<sup>312</sup> As Stark says, “[n]aming challenges us to story coercive control.”<sup>313</sup> Our narratives need to be grounded in the bigger picture: which is safety, not punishment. Getting the narrative right is essential before real transformative change can take place. In the meantime, lives are on the line.

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<sup>310</sup> Note: Another consideration may be to introduce a “tort of coercive control”. Tort law has the potential for restorative justice for survivors, without the high bar of proof that criminal law needs to meet. Tort law also sets the values for society and establishes clearly what we consider to be wrongs. As former Justice Allen Linden says, “The mission of tort law in the next millennium should be empowering the injured, that is, those who are hurt in the multifarious activities of modern society...There are several types of empowerment that may be supplied by tort law – (1) financial, (2) compliance, (3) didactic, (4) psychological, (5) economic, and (6) political.” See Allen M Linden, “Empowering the Injured” in Allen M Linden, Lewis N Klar and Bruce Feldthusen eds, *Canadian Tort Law: Cases, Notes & Materials* (LexisNexis: Toronto, 2018) 41 at 42.

<sup>311</sup> See Deanne Sowter, “The Future Harm Exception: Coercive Control as Serious Psychological Harm and the Challenge for Lawyers’ Ethics” (2021) 44:2 Dal LJ (forthcoming) See also Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2019) at R 3.3-3 [Model Code].

<sup>312</sup> As Stark has said of the deaths on the avoidable deaths of Daniel and Magdalena Lucek: “failure to recognize the danger posed to ML and her children early on arose primarily from the lack of understanding about and an **unwillingness to confront the role of male dominance in conjoining woman abuse and child abuse**, not the lack of commitment to address domestic violence as an issue relevant to child protection or of skill on how to do so.”

See Evan Stark, “The Coercive Control of Daniel and Magdalena Lucek: A Case of Child Abuse as Tangential Spouse Abuse” (2020) 17:3 Applied Psychoanalytic Studies 262 at 274. (emphasis mine) The way we prioritize some lives over others should also be made explicit: Magdalena Lucek was a young immigrant woman, sex-worker, with a substance use disorder and a history of being vulnerable to violent men. The system should have stepped in earlier to have helped her, but it did not. As for so many other women, the consequences were deadly for Magdalena and her child.

<sup>313</sup> As Stark says, “[a]sking clients, patients, or friends, ‘Is there someone in your life making you afraid?’ or ‘controlling what you do or say?’ or ‘making you do something of which you are ashamed?’ promises an even more profound awakening than asking women about violence” Stark, “Coercive Control”, *supra*, note 2 at 371.

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