



# Responding to 'image-based domestic abuse'<sup>☆</sup>

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## ABSTRACT

This paper questions whether the law is equipped to respond to the range of behaviours that characterise domestic abuse, especially those behaviours that are associated with coercion and control and, in particular, the disclosure of private sexual images to this end. A willingness to recognise notions of intimate terrorism and coercive control as an integral part of this gendered harm has now been embedded in our legislative regime through the enactment of s.76 Serious Crime Act. Alongside, s.33 Criminal Justice and Courts Act 2015 has criminalised so-called 'revenge porn' through prohibiting the disclosure of intimate sexual images. In this paper, I argue that neither of these offences truly reflect the experiences of women and both involve barriers to justice. In particular, I argue that, where coercion and the disclosure of private sexual images/threats to disclose the same, or other demeaning images coincide, the legal framework is particularly ill-equipped to respond.

## 1. Introduction

As the government and criminal justice system have begun to recognise and respond to domestic abuse, less as episodes of physicality and violence, but characterised instead as a systematic programme of gendered coercion that seeks to restrict victims' lives, futures and potentials, there have been significant legislative developments. The offence of 'controlling and coercive behaviour', contrary to s.76 Serious Crime Act 2015, has been the most overt legislative response, extending the narrative about the conducts which cause harm beyond the traditional adversarial focus on a single act or 'crime' towards the recognition that interventions should take into account the context, pattern and experience of abuse (Welsh, 2023). Alongside, recent years have seen piecemeal reform of the legislative regime around the taking, making and sharing of intimate images, with offences introduced to tackle voyeurism; up-skirting; cyber-flashing; and the disclosure of private sexual images, contrary to s. 33 Criminal Justice and Courts Act 2015.

The problems in the legislative regime around both coercive control and the disclosure of private sexual images are well-documented (Bettinson, 2020; Bishop and Bettinson, 2018; Bettinson and Bishop, 2015; Gillespie, 2015; Pegg, 2018), as,

<sup>☆</sup> At the outset, it should be noted that there will be some circumstances in which a woman who has experienced image-based domestic abuse will have recourse to the s.33 disclosure provision, assuming that other elements of this offence are made out. Equally, the proposed offences set out in the Online Safety Bill aim to strengthen the law on disclosure and increase its reach, meaning that more women, including those who have images released in the context of domestic abuse, will potentially have recourse to this new framework (see Welsh, forthcoming). Yet, when the disclosure is made in the context of ongoing control, is an intimate image disclosure route the best direction in which to proceed? Surely, the very purpose of the s.76 provision is to connect ostensibly disparate events within their context and an abuser's broader pattern of coercion? If we assume that the disclosure(s) of private images is an essential part of the conduct prohibited by s.76, surely it should be included as such without having to rely on a disclosure offence, such as s.33.

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increasingly, are those in relation to their implementation within the Criminal Justice System (Brennan and Myhill, 2022; Myhill et al., 2023; Barlow et al., 2020; Bettinson and Robson, 2020; Bond and Tyrell, 2021). Yet, only limited time has been given to the very particular problems that emerge in this regard when these gendered harms collide (see, for a recent account, Bishop, 2022). This is a significant gap in the literature, given that the disclosure of private sexual images is increasingly recognised as a matter of domestic abuse and, in particular, a manifestation of the control therein.

In this paper, I aim to address this gap by examining how the law and legal institutions respond where incidences of the disclosure of private sexual images or threats to do the same occur within the context of abusive domestic relationships. In doing so, I am seeking to provide a framework for change. This framework is of particular relevance in the context of the Law Commission's *'Taking, Making and Sharing of Intimate Images Without Consent'* report and the subsequent incorporation of the recommendations therein into the Online Safety Bill. In detailing the very specific concerns about the current legal position in relation to such abuse in a domestic context, the paper sets out an important perspective against which recommendations for change, including those proposed by the Law Commission and codified in the Online Safety Bill, can be judged.<sup>1</sup>

The paper is in four parts, beginning with an account of domestic violence and abuse, before moving to a brief examination of the legislative provisions relating to coercive control and intimate-image abuse. Both have been the subject of relatively recent statutory intervention, with s76 Serious Crimes Act 2015 seeking to address the former and s33 of the Criminal Justice and Courts Act 2015 seeking to do the same in relation to the latter. I move in the next part of the paper to explore the links between domestic abuse and the disclosure without consent of intimate, private images, ultimately introducing the concept of 'image-based domestic abuse'. Following this, I explore the difficulties when, in the context of an abusive relationship, intimate images are disclosed and examine whether and how the legal framework captures the experiences of women in these circumstances. Finally, I discuss how notions of image-based domestic abuse could be incorporated into the prevailing criminal law and justice system response in order to close the significant gaps therein.

## 2. Domestic abuse and the legislative framework

The single most dangerous thing for a woman<sup>2</sup> to do is enter into an intimate relationship with a man and women remain more likely to be threatened, raped, assaulted and murdered by men they know and, in particular, by men with whom they are having or have had a 'romantic' attachment (Welsh, 2023). Yet, for many women, it is the routine exercise of power in order to control and limit choices, operationalised through sustained and systematic harassment, intimidation and the use and threatened use of violence that is especially devastating. The corrosive (Westmarland et al., 2010) consequences on women's soul and sense of self of this exercise of gendered power have been long recognised within the women's movement and the literature thereof (Dobash and Dobash, 1979; Dobash et al., 1992; Schechter, 1982). They are now increasingly understood within Evan Stark's pioneering framework of 'coercive control', which mainstreamed the coercive control narrative and is now the preeminent reference point for any discussion on the matter (Stark, 2007).

Whilst it has long been acknowledged that much domestic abuse does not involve 'violence' in the strict sense,<sup>3</sup> the centrality of Stark's work on coercive control to the prevailing conceptualisation of the problem has ensured, not only that a broader range of behaviours are incorporated into our understandings – a '... constellation of abusive tactics ...' (Dragiewicz 2018: 611), but also that *control* is prioritised over violence. In reducing the focus on violent events, Stark's framework means that '... 'violence and other 'episodes' of abuse become understood as tools used to disempower the victim, rather than as articulations of the harm in and of themselves ...' (Bishop 2022: 134). Stark's work has elucidated how violence is used *in order* to control but also, importantly, that violence is often not needed to this end (see Dutton and Goodman, 2005).

As intimidation, threats and fear become central to women's everyday lives, some women seek to manage abuse by attempting to 'do everything right' (Robinson and Tregidga, 2005), constraining their own choices and lives to accommodate this 'abusive household gender regime' (Morris, 2009). The need to live within the limits and restrictions placed upon them; standards set by abusive partners; and micro-management of daily lives causes women to restrict and limit their 'life space' (Lundgren, 2004), ultimately resulting in women's 'entrapment' in personal lives and relationships (Stark, 2007). Stark's framework is one in which women's attempts to manage abuse through changing their own behaviour are not understood as weakness but rather as an active preservation of 'self' through their narrowing of their 'space for action' (Kelly, 2003; Lundgren, 1998). The focus throughout is on the constraints imposed on women to achieve their possibilities and life-projects and not on their *capacity* to do so (Stark, 2009).

For Stark, intimidation, coercion and continuous limitations on a woman's choices and space for action result in '... a condition of unfreedom ...' (2007: 205) that is highly gendered in its construction, conveyance and consequence. Since coercion is climatic and control is continuous, resulting in an '... ongoing loss of autonomy ...' (Hanna 2009: 1460), domestic abuse comes to be understood as a 'liberty crime', which rests on a systematic (Tadros, 2005) and ongoing strategy of intimidation, isolation and control (Kuennen, 2007). This '... continuing state of siege ...' (Dutton 1993: 1208) impacts on all areas of women's lives.

In seeking to position it as a gender-based strategy of isolation, intimidation and control, Stark's framework represents a move away from the narrative which has prioritised as domestic abuse single (albeit, often repeated) incidents of violence and, in doing so,

<sup>1</sup> Elsewhere (Welsh, forthcoming), I give greater consideration to the proposals themselves.

<sup>2</sup> In this paper, I focus on the domestic victimisation of women who were assigned female at birth and who identify as heterosexual by men who were assigned male at birth and who also identify as heterosexual. I refer to 'man', 'men', 'woman' and 'women' accordingly.

<sup>3</sup> The preference, in some circles, for the term domestic 'abuse' reflects this acknowledgement.

has reflected a very limited notion of men's abuses in the home; reducing men's conduct to an 'incident' that can be explained away and disconnected from the context (general and individual) in which it took place. Ultimately, Stark's framework has shifted our<sup>4</sup> notions of harm and safety away from violence, physicality and incidents thereof towards an understanding that, for women in abusive relationships, the real devastation is to their choices, options and possibilities around what they and their children do or are. It is in the repeated and sustained attack on their soul and sense of self – the '... dismember[ing of] the victim's self by systematically attacking her personality, style of communication, accomplishments, values and dreams ...' (Loring and Myers, 1994).

Whether an attempt to reflect the ontological shifts in this regard or an attempt to provide more opportunities for criminalisation (Bettinson, 2016),<sup>5</sup> the offence under s.76 Serious Crime Act 2015 signalled a significant development in the law's response to domestic abuse. Section 76 provides that.

- (1) A person (A) commits an offence if –
  - a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive
  - b) At the time of the behaviour, A and B are personally connected
  - c) The behaviour has a serious effect on B
  - d) A knows or ought reasonably to know that the behaviour will have a serious effect on B

Whilst the legislation gives no definition of the terms 'controlling or coercive', for Kelly and Westmarland, '... it is the "everyday" that sits within the revised definition and recognition of coercive control ...' (2016: 117). Yet, it remains highly questionable whether this legislative framework really reflects women's everyday experiences. Although the coercive control framework provides an opportunity for a woman to narrate the relationship in full, allowing '... the victim to tell her story – the whole story – and have it matter ...' (Hanna, 2009: 1462), the framework set out in s.76 is much more limited in scope. In fact, there are a number of legislative barriers to the narration of women's stories, whether generally or individually. These legislative barriers are, as we are beginning to understand, amplified by the translation of s.76 into the criminal justice system, with the legislation under-used; the offence under-recorded (Barlow and Whittle 2019; Barlow et al., 2020); '... the law of evidence ... not immediately accommodate[ing] the narratives which are required to prove this offence ...' (Bettinson and Robson, 2020: 1125) in court; and a '... dismal ...' (Bettinson and Quinlan, 2020: 5) conviction rate.

My purpose here is not to examine the obstacles, legislative or operational, that must be overcome towards the narration of women's stories. Nor is it to comment on the usefulness or otherwise of 'more law' to intervene in women's lives (Walklate et al., 2018; Walklate and Fitz-Gibbon, 2019; Tolmie 2018). Rather, I am interested to explore the very particular difficulties in this regard when, in the context of a coercively controlling relationship, intimate images are disclosed and to examine how the criminal law and justice system fail to capture the experiences of women in these circumstances. For many women, this experience will fall outside the remit of s.76 but will also fall outside the provisions of s.33 Criminal Justice and Courts Act 2015, the popularly (but inappropriately) called 'revenge porn' offence.

Section 33 preceded the introduction of s.76 and was introduced as a response to specific concerns about the malicious sharing of intimate images online, primarily by aggrieved partners during a relationship or at the end of that relationship in order to humiliate or degrade their partner. The resultant offence at s.33 of the Criminal Justice and Courts Act 2015 is titled 'disclosing private sexual photographs and films with intent to cause distress' and requires that a person 'disclose a private sexual photograph or film' without the consent of the individual featured and with the intention of causing them distress. The focus of this offence is the breach of privacy but the disclosed image must also be objectively sexual. From this definition flow many of the difficulties with the offence and there are a number of hurdles that victims of intimate/private image disclosure must overcome to have an intrusion into their sexual privacy via the sharing of images recognised (see Pegg, 2018).

The photograph or film (the 'image') which is disclosed must be 'real' and any written or recorded content that cannot be called a sexual 'image' is excluded. Disclosure is defined as giving, showing or making the photograph or film available and can take place on or offline, though prosecutions have typically concerned images posted online. Importantly, the disclosure of the image to the person featured in it does not fall under the offence. Section 33, as originally enacted, focused on disclosure, so a threat or threats to disclose would not suffice. Such threats are, however, now the subject of criminalisation through an amendment to s.33 by s.69 Domestic Abuse Act 2021.

Alongside, the s.33 offence is only committed when the image disclosed 'shows something that is not of a kind ordinarily seen in public' and is either inherently sexual or features something a reasonable person would consider to be sexual. The approach fails to give any weight to the experience of the individual pictured who *themselves* feel that the image is sexual; those who have been humiliated by the addition of sexual commentary to their images; or those who have had a non-intimate image of themselves masturbated over and then pictured as a, so-called, 'cum-shot' (a phenomena known as 'tributing'). Images which have been digitally altered to appear sexual are also excluded.

The image must be disclosed without the consent of the individual who appears in it, though very little guidance is given as to how we are to assess the reality of consent here. This is an obvious potential problem in situations in which intimate images are disclosed in the context of domestic abuse but it is by no means the only potential problem in this regard. Indeed, as we will see below, the difficulties with s.33 are amplified when the disclosure takes place in the context of a coercive relationship and it is to the growing

<sup>4</sup> For a challenge to this apparent consensus and a call to the continued relevance of physical violence, see Walby and Towers (2018).

<sup>5</sup> For a recent account of the 'arguments for and against' the enactment of s.76, see Myhill et al. (2023).

understanding about the role that intimate image disclosure plays in abusive relationships to which I now turn.

### 3. 'Image-based domestic abuse'

The jealous surveillance (Regan et al., 2007) associated with abusive domestic relationships is, it seems, not limited to women's 'real' lives and there is also huge potential for control and coercion to be exercised 'virtually', through modern technology. There is a growing body of research pointing to the harassment of women in general, and partners in particular, along a 'continuum of image-based sexual abuse' (McGlynn et al., 2017) and through what Henry and Powell (2015, 2016) term, 'technology-facilitated sexual violence.' As regards the harassment of partners in particular, it is clear that technology is an increasing feature of domestic victimisation (Womens 'Aid, 2013; Woodlock, 2017), with this conduct being termed, variously, 'technology facilitated coercive control' (Dragiewicz et al., 2018); 'technology-facilitated domestic violence' (Douglas et al., 2019); 'digital coercive control' (Harris and Woodlock, 2019); and 'techniques of agile technological surveillance' (Havard and Lefevre, 2020).

The issues raised as technology is used to operationalise the systematic control that is so important to coercion in domestically abusive relationships are graphically illustrated by a domestic abuse support worker in Henry and Powell's research:

'... back in the day, you could only be found at a place if somebody knew your location, so safe houses were safe because you could only be accessed emotionally if you were accessed physically ...' (2015: 114).

Indeed, not only has technology broadened and blurred the boundaries of acceptable 'romantic' behaviours and surveillance within intimate relationships; simultaneously providing opportunities for both routine contact and partner monitoring, it has also added to men's suite of abusive options. Technology, in its accessibility and immediacy (Bishop, 2022), has served to expand the repertoire of behaviours (Douglas, 2018) available to abusers (Drouin et al., 2015).

Within this repertoire is, it seems, the use of sexual imagery as a tool to threaten, harass and control both current and former partners, with 83% of the 376 s.33 prosecutions commenced in the year ending March 2019 flagged as domestic abuse related ([www.cps.gov.uk](http://www.cps.gov.uk)). Research is beginning to reveal the conduct in this context, which can range from images being shared or taken consensually when the relationship is going well (Cuomo and Dolci, 2021) to abusers recording intimate partner sexual violence (Henry et al., 2022). It can also include women 'agreeing' to intimate images being taken within a relationship in which not agreeing would be an unsafe option. Sometimes images are obtained under coercion or pressure (Cuomo and Dolci, 2020b, 2021) and other times they are obtained without the victim/survivor being aware an image has been captured, such as when they are asleep, intoxicated or showering/undressing (Henry et al., 2022).

The conduct here can also include abusers threatening to show sexual imagery (whether taken initially with consent or not) to women's children, family or others should, for example, the woman report or seek assistance regarding the relationship abuse (Powell and Henry, 2018). The threats here can be explicit or implicit (Henry et al., 2022) and can also be used to make sure that more general demands are met and limits/restrictions are observed (Eaton et al., 2021). Research by Refuge revealed that threats to share intimate images coerced women into continuing or resuming the relationship, allowing contact with children and even restricting or revealing their movements and social contacts. As one woman put it, '... the photos were a part of his plan to intimidate and pressure me into submission and compliance ...' (Refuge, 2020: 9).

Of course, all studies show that the disclosure or threatened disclosure of private sexual images is a means to operationalise the control that characterises abusive relationships and, more, that the controlling potential and possibilities in this regard must be understood in the context of wider patterns of gendered control. On control, '... victim/survivor experiences of image-based sexual abuse demonstrate the diverse ways in which abusive partners use non-consensual intimate images as a means of exerting coercion and control, alongside other behaviours ...' (Henry et al., 2022: 11). At the same time, gendered expectations about 'appropriate' female conduct can provide the context for the pressure to disclose, resting on an assumption that it is 'normal' for women and girls to share intimate images of themselves – '... I knew full well, so many other girls done it ...' (Huber 2022: 6).

Reflecting the double standard when women do, indeed, express themselves sexually, in domestic abuse these gendered expectations can also amplify the abuser's ability to control. When intimate images are disclosed, women are, themselves, deemed responsible, with the 'revenge porn' moniker itself signifying this supposed responsibility (see also Flynn et al., 2022). As Cuomo and Dolci note in relation to domestic abuse, '... distributing or threatening to distribute intimate images is such an effective tactic for disciplining survivors ... because survivors know that ongoing systemic sexism will position them as responsible for their abusers' abuse ...' (2021: 230). Dragiewicz and colleagues add a further level to the analysis here in drawing on Marwick and boyd's (2011) notion of 'context collapse', where social media networks connect previously separate social worlds; bringing together audiences from different contexts into one virtual space, meaning that material aimed at one audience (family/friends) can be seen by other audiences (work colleagues). As Dragiewicz et al. (2018) note, when domestic abusers circulate or threaten to circulate intimate images they collapse these contexts in potentially devastating ways, utilising gendered tropes to override women's attempts to manage and contain abuse in one context.

Ultimately, these processes serve to limit women, leaving them unable to leave the house (Huber, 2020) and keeping them trapped in abusive relationships (Cuomi and Dolci, 2021). Thus, as with the use of technology more generally, scholars are now beginning to theorise the disclosure or threatened disclosure of private sexual images with reference to understandings about control, coercion and

reduced life-space. Eaton and colleagues, for example, use the power and control wheel<sup>6</sup> to show that abusers use the same or similar ‘tactics’ in domestic abuse and ‘non-consensual pornography’ (‘NCP’) and that, as such, both occur within an ‘... interlocking pattern of abuse ...’ (Eaton et al., 2021: 1150). Eaton et al. conclude that it is important to treat ‘NCP’ as a ‘... potential form of partner violence ...’ (2021: 1140).

Charlotte Bishop, in contrast, encourages us to avoid ‘... reinforc[ing] understandings of DVA as consisting of different ‘types’ of abuse ...’ (2022: 136). Drawing on the work of Dragiewicz et al. (2018), who see (ab)use of intimate images as part of the ‘constellation’ of behaviours that partner abusers use to ‘expand’ their ‘sphere of control’ over women, Bishop seeks to conceptualise the various ways intimate image abuse manifests in abusive relationships as tactics of coercive control ...’ (2022: 137). In turn, Henry and colleagues draw on Stark’s concepts of intimidation, entrapment and degradation in order to theorise ‘intimate image sexual abuse’ as a means to coercively control (Henry et al., 2021). Similarly, for Cuomo and Dolci (2021), the distribution of intimate images without consent is ‘a consistent form’ of ‘Technology-Enabled Coercive Control’.

It does, indeed, seem increasingly clear that the use of sexual imagery is as a tool to threaten, harass and control both current and former partners as part of a broader repertoire of coercive behaviours in domestic abuse. Whilst I hereafter use the term ‘image-based domestic abuse’, this is not to reduce domestic abuse into ‘types’. Rather, in a policy context which, in its focus on ‘high-risk’ victimisation, still seems deeply attached to a narrative of incident physicality (Welsh, 2023), it is to broaden our language in relation to domestic abuse. It is to give voice to *all* abusive behaviours which are used in order systematically to erode a woman’s selfhood and curtail their space for action. In this sense, the ‘routine demeaning’ (Coy and Kelly, 2011) as women are ridiculed and humiliated in their roles as women, mothers, sexual partners and so on (Stark, 2007) and the degradation, humiliation and shame as their private images are released or threatened to be released are one and the same. Intimate-image disclosure is, of course, ultimately about women’s dehumanisation – it is a denial of autonomy and an attack on a woman’s personhood. In this regard, the disclosure of a private image is a very particular manifestation of the reduction to ‘no-thingness’ (Lungren, 2004) that accompanies men’s curtailment of women’s life space in domestic abuse. In terming this conduct ‘image-based domestic abuse’, then, we give voice to those who experience a very literal exposure as part of a much broader effort to expose and erode a woman’s self.

We are, then, beginning to understand notions of ‘image-based domestic abuse’ and the possibilities for the coercion and control associated with abusive relationships to be operationalised through the release or threatened release of private intimate images are clear. What is also clear, however, are the distinct obstacles to conviction when this happens. Of course, even a quick look to the legislative frameworks of s.76 and s.33, reveals the more general problems with each offence and, whilst I have not covered them here, I would echo others’ significant concerns in this regard. In this paper, I am interested in the very particular obstacles that must be overcome when intimate images are disclosed or are threatened to be disclosed in the context of a coercively controlling relationship and it is to these obstacles that I now turn.

#### 4. A gap in the law (in action)?

My starting point in this regard is to think about women in abusive relationships who have experienced just one disclosure of an intimate image or one threat to do the same. Given the controlling currency that intimate-images appear to have in abusive relationships, it is highly conceivable that women do, indeed, experience single disclosures/threats, with this one tactic alone achieving the relevant compliance. As Bishop puts it, “... one threat to share an image if the victim leaves could well be enough to keep the victim entrapped in the relationship and subservient to the demands of the perpetrator ...” (2022: 142). For conviction under s.76, the prosecution must prove, *inter alia*, that the abuser repeatedly or continuously engaged in the relevant conduct. Despite prosecutions proceeding where the behaviour spans a relatively short timeframe (sometimes, just a week) (Bettinson, 2020), it would surely be impossible to prove repeated or continuous conduct in cases when there was just one disclosure/threat, meaning, in these cases, a woman will fall outside the s.76 framework.

What of women who are not being threatened with violence but who are having private sexual images (repeatedly) released or threatened to be released? For the purposes of s.76, it must be proved that the defendant’s conduct had a ‘serious effect’ on the victim. Section 76(4) explains that ‘serious effect’ means causing B to fear, on at least two occasions, that violence will be used against them or causing B serious alarm or distress which has a substantial adverse effect on B’s usual day-to-day activities. The ‘fear test’ is clearly an attempt to recognise the connections between control and violence but does not take into account that there are other threats which women in coercive relationships face and that violence is only one of the risks women are juggling. Certainly, a woman who has had her intimate images distributed or has been threatened in this regard will not fear violence but is being coerced in relation to her fundamental right to control of and over her body and how it is represented.

These women will clearly not fall under s.76’s ‘fear test’ but must rely, instead, on the additional elucidation of ‘serious effect’ set out in s.76(4) – that of causing B serious alarm or distress which has a substantial adverse effect on B’s usual day-to-day activities. Of course, the focus in the ‘substantial effect’ test is on the impact on the victim and this focus will limit application to those who are able to appreciate and articulate how abuse has impacted on them (Bishop and Bettinson, 2018). Yet, coercively abusive relationships revolve around the connection of the extreme with the everyday. For many women, everyday life continues, albeit severely curtailed by the limitations placed on them by abusers. For these women, it will take years to recognise and rehearse fully the true impact of the restriction of the life space and space for action associated with a controlling and abusive relationship and it will be hard to identify the

<sup>6</sup> <https://www.theduluthmodel.org/> (last accessed 24/07/23).



'substantial adverse effect on their day-to-day activities'. A woman who has had her intimate images distributed, or has been subject to threats to do the same, must, therefore, be able to see, name and evidence that she has been caused sufficiently serious alarm or distress in order to fulfil the 'serious effect' requirement of s.76. Whilst, as a particular act, the taking/sharing of intimate images might be easier to see than other more insidious coercive conduct, as Bettinson and Robson point out, the '... exploitation of existing gender norms makes it difficult to determine when "normal" ends and abuse begins ...' (2020: 1113). For a woman who is routinely photographed in (gender) compromising or otherwise denigrating circumstances, it could, indeed, be difficult to draw the line here.

That said, and given that we are increasingly acknowledging the significant impact on women and limitation of their life-space from image-based domestic abuse, there is a chance that s.76 could serve as an intervention through the 'serious effect' provision. More straightforwardly, when image-based abuse is used alongside other tools of coercion and within the context of a systematic programme of control in abusive domestic relationships (assuming this wider pattern of coercion and its impact can be evidenced), then s.76 would surely provide an opportunity for these harms to be narrated as part of a woman's 'full story'. Thus, as a matter of substantive definition, at least, s.76 could provide recourse for women who have intimate images disclosed in the context of an abusive relationship. Yet, this substantive law must be operationalised (within a criminal justice system that remains fundamentally premised on single incidents of stranger assault) and it is here that the real difficulties in the s.76 framework appear.

An emerging body of research suggests that the difficulties in this regard are, in large part, because of the continued prioritisation of physical violence in police attitudes and their belief that there is a very high threshold for evidencing the s.76 offence. Barlow and Whittle, for example, found that '... [o]fficers tended to have a 'tunnel vision' focus on physical violence when responding to domestic abuse ...' (2019: 11). Brennan et al. (2019) suggest that a focus on physicality resulted in an under-use of s.76 and Barlow et al. (2020) found that there were missed opportunities for using s.76 in almost nine out of ten domestic abuse cases. On their research, McGorrey and McMahon conclude that:

'... The extremity of the behaviours that constituted the controlling or coercive behaviour in the [successful] cases analysed, with offenders keeping their partners under surveillance, forbidding them from being employed, taking their mobile phones, prohibiting or monitoring their use of social media and killing pet animals, suggests that police and/or the Crown Prosecution Service have adopted a high hurdle for determining what constitutes offending behaviour ...' (2021: 579).

The, almost universal, police perception in Myhill et al.'s research that there was a 'high-threshold' for evidencing the offence was summarised by one officer, who noted that: '... we've had training on it, there needs to be a F\*\*\* TONNE of stuff ...' (Myhill et al., 2023: 409). Yet, this research also revealed that a squeeze on police time and resources caused many to avoid this (perceived) need in s.76 cases to gather this 'tonne of stuff', with these researchers concluding that there is a '... disincentive to building a case for coercive control if there [i]s a more straightforward alternative ...' (Myhill et al., 2023: 408).

Thus, whatever, possibilities are presented by the substantive definition of the offence at s.76 as a route to justice for women experiencing image-based domestic abuse, these possibilities are compromised by its translation into criminal justice. In the face of the police's focus on violent physicality and the high-threshold, there seems little chance that a woman who has had intimate images disclosed or threatened to be disclosed will fall within the legislative framework set out in s.76.

Yet, there are further, significant problems in how the prevailing legislative provisions operate when intimate images are disclosed in domestic abuse. The decision, which rightly attracted widespread criticism, to omit threats to disclose from s.33 was particularly problematic in this regard, given the relevance of threats within abusive intimate relationships. As noted above, the disclosure of an image may be threatened in order to assert control or to pressure a partner, or ex-partner, into – or out of – particular behaviour(s) and a woman in such circumstances is clearly being coerced. In responding to the threat of exposure, it is almost certain that her choices and space for action are being curtailed and she is being hugely compromised in relation to her fundamental right to have control of and over her body and how it is represented. The amendment to s.33 is, then, to be welcomed. Yet, there remain problems with the revised definition, many of which will continue to be of particular relevance to domestic abuse.

The revised s.33 criminalises threats to *share* private images – it does not criminalise threats to *make* or *take* such images. Equally, it does not criminalise threats to disclose to the person pictured in the image – nor, of course, does it criminalise actual disclosure to that person. Yet, what of the situation where an abuser sends an intimate image to his partner and threatens that her children will 'see mummy like this' unless she live within whatever limits and restrictions he has placed upon her? What of the situation where a former abusive partner sends an intimate image to his partner with the caption 'you will always be mine' (Law Commission, 2022)? At a general level, it is '... odd ...' that this conduct is excluded (Gillespie, 2015), with evidence to the Law Commission that, in many cases, images are sent to the person who appears in them as a form of threat. Yet, at the particular level of domestic abuse, the significance of this exclusion cannot be overstated. Against a background of intimidation, harassment and threats, which are often central to women's everyday lives and ultimately result in women's 'entrapment' in personal lives and relationships, the coercive possibilities of such conduct are clear. Yet, there will be no recourse to s.33 in this situation.

There are further, significant problems in how the legislative provisions as s.33 operates when intimate images are disclosed in domestic abuse. For example, as noted, the offence is only committed when the image disclosed 'shows something that is not of a kind ordinarily seen in public' and is either inherently sexual, defined as showing 'all or part of an individual's exposed genitals or pubic area', or features something a reasonable person would consider to be sexual because of its nature or the content as a whole is such that a reasonable person would consider it to be sexual.

The definition of sexual in s.33 means, *inter alia*, that images of women in their underwear are likely to be excluded and this exclusion could have particular relevance in relation to intimate coercion. A picture taken of a woman in her underwear who has been coerced into posing for a 'sexy' image or who has just been raped might not be objectively sexual but, when used as a souvenir or reminder of a particular occasion of sexual violation, would surely feel both sexual and deeply distressing. Equally, a picture taken of a

woman in her underwear by an abuser who is, for example, monitoring her weight, restricting her intake of food or otherwise denigrating her in relation to her size; weight; physical appearance; sexual performance; and so on will be potentially devastating. A woman who is subject to control through such denigration will, again, fall outside the provisions of s.33.

Ultimately, what we see here in the context of abusive relationships is a failure truly to understand women's lived experiences and, importantly, to understand the context for, and implications of, the disclosure of images. Yet, this is not the only point at which men's conduct is obfuscated by the legal categories created at s.33 and, indeed, at s.76. Indeed, reflecting on discussions thus far, it is clear that, throughout the legislative framework set out in both sections, is a failure fully to acknowledge both men's motivations and the context in which these motivations play out, with this failure amplified when intimate images are disclosed by domestic abusers.

Very noticeable in the framework established by s.76, for example, is the focus on the effect on the victim and not on the motivations of the abuser (Bettinson and Bishop, 2015). The focus on the victim in this regard is clearly a familiar narrative in sexual violence. Alongside, and most problematically, there is shifting of focus (also familiar) in the legislative framework away from the abuser's motivations and, in particular, away from his pattern of coercion and control and routine attempt to establish, exercise and maintain power. Yet, coercive control is a means to *do gender*, both generally and individually. Whilst the ontological framing of coercive control has signalled a move to '... emphasise the batterers' pattern of coercion and control ...' (Edwards, 2016: 882) and routine attempt to establish, exercise and maintain power, the legislative framework returns us to the victim. Whilst the effects of coercive and controlling relationships on women are, of course, potentially devastating, the problem which is overlooked in the legislation is the man's programme of behaviours and the social context of the relationships within which they are exercised and historically legitimised (Dutton and Goodman, 2005). As we have seen, the available research suggests that, in their focus on violent physicality and incidents thereof, the police also overlook these programmes, '... lacking appreciation of the power dynamics inherent in controlling relationships ...' (Brennan et al., 2019: 635). This research also suggests that the police often use this social context to overlook abuse as falling under s.76. As Myhill et al., note, '... [w]e also observed officers drawing upon their own gendered assumptions and values about intimate relationships to determine whether cases involved, or should be recorded as, coercive control ...' (2023: 406).

Equally, at s.33, treating the disclosure of a sexual image as an interference with privacy allows the motivations of the abuser to be overlooked and obfuscated. As noted at the outset, s.33 is not a sexual offence, with this aspect of the s.33 provisions attracting sustained comment and criticism (see McGlynn, 2017). Undoubtedly, the prioritisation of privacy over the inherently sexual aspects of the violation denies the role that sexual coercion plays in the harassment and intimidation of women and this prioritisation in turn denies how men disclose sexual images *in order* to operationalise these connections. The prioritisation in this regard also denies a growing weight of research evidence which indicates that the experience of intimate image disclosure mirrors that of serious sexual assault, including rape (see Bates, 2017).

In its definition of 'sexual', the legislation also colludes in the eroticisation of intimate image disclosure and reflects a deeply gendered view of sexuality. This view clearly rests on notions of desirability and old assumptions about which women experience male sexual violence and why, rather than on the connections between sex and power and is, of course, concerning generally. Yet, it is also relevant to the present discussion because the assumption that the disclosure of an intimate image is about 'porn' – a moment that captures female, sexual objectification and commoditisation – further separates situations in which disclosure occurs within a coercively controlling relationship from the paradigm case narrative promoted in s.33. The disclosure of a private, intimate image is neither about 'revenge' nor 'porn' yet for a woman who has had such images disclosed in the context of a coercively controlling relationship, her experience is still further removed from this dominant narrative and often sits too far away from the legislative framework to be recognised.

In fact, in many situations where the abuser's primary motivation is control, it is likely that s.33 will not apply and this is also because of the very specific *mens rea* element of the offence, which focuses on the motivation in disclosing the image; requiring disclosure with the intention of causing distress to the individual featured, recklessness to do the same not being sufficient. Unlike s.76, there is no requirement that the disclosure of the image has any impact upon the victim. However, the focus on an intention to cause distress has been strongly criticised at a number of levels, with the legislation undoubtedly failing to capture the diverse motivations for the creation or distribution of intimate images beyond that of revenge (Henry et al., 2021).

Further criticism emerges as consideration is given to how the 'intent to cause distress' requirement sits with understandings about men's motivations in sexual violence in general – long understood to be very different from common assumptions in this regard – or in image-based sexual abuse in particular. It seems that, as in sexual violence more generally, in disclosing intimate sexual images, men are often more motivated by asserting power over their victim and by misogyny, founded on male entitlement – '*because I can*', than by causing distress (Henry et al., 2021). Of course, this will be particularly true when intimate images are disclosed in the context of domestic abuse since men abuse their intimate female partners to control and denigrate rather than to cause distress. Whilst a man's control over and denigration of his female partner is, in itself, deeply abusive and *distressing*, men's behaviours in this context are not about distress *per se*.

## 5. Discussion

If we accept, then, that the disclosure of private sexual images is a matter of domestic abuse – '*image-based domestic abuse*' – and we further accept the problems in the prevailing criminal law response in this regard, how could this analysis be incorporated into the law and its operation?

The offence at s.76 carries a heavier sentence and is much more obviously connected to the policy response to domestic abuse, coercive control being very much the language of policy and being specifically included in the statutory definition set out in the

Domestic Abuse Act 2021. More generally, led by Stark's work and influenced by high-profile cases, alongside the ubiquitous use of the term 'gaslighting',<sup>7</sup> our collective consciousness around domestic abuse has now been turned to the concept of coercive control. There is clearly both policy and popular conversation about the characteristics and consequences of a much broader range of intimate abusive behaviours. Whilst there was not the same recognition of the relevance of intimate image disclosure when s.76 was being enacted and the problems in s.76 are by no means confined to a failure to include intimate image disclosure within its parameters, surely the narrative of the offence should be that, given the significance of this disclosure as a form of coercion, image-based domestic abuse *does* fall within its reach and this narrative should be strengthened – and continue to be so.

Any such push in this direction would, inevitably, have to begin with a wider shift in the policy narrative to recognise the significance of this disclosure as a form of coercion in domestic abuse. Elsewhere (\*\*\*\*, Welsh, forthcoming; see also Welsh, 2023) I examine this narrative and explore the dominant drivers on what 'counts' as domestic abuse, noting that risk assessment, in particular, pushes the prevailing response into a focus on high-risk domestic victimisation. There are, then, clearly challenges in any call for a shifting of the policy (and practice) narrative. Yet, as Stark and Hester put it, '... simply giving public voice to the experience-based "wrong" of coercive control has already transformed the narrative representation of male partner abuse in the various media to emphasize insults to dignity and personhood rather than only physical injury ....' (2019: 88). Of course, the transformative potential of giving a voice, including a celebrity voice,<sup>8</sup> to the experience has also been seen in relation to developments on intimate image disclosure more generally and it seems inevitable that the challenges to calls for the policy narrative to shift will reduce as the story of image-based domestic abuse is more widely told.

At the very least, it is important that coercion and control are not seen as static concepts and that, within the legal definitions of both, there is room to develop our understandings in a way which reflects women's lived experiences. It is, then, encouraging to see this room to accommodate the behaviours that have come to be termed 'digital coercive control' within s.76 and, more recently, space for image-based coercion. Certainly, initial CPS guidance, building on the statutory guidance to s.76 (Home Office, 2015), included as 'relevant behaviour' for prosecutors in decisions under this section, '... monitoring a person via online communication tools or using spyware ...' and '... threats to reveal or publish private information ...' (CPS, 2017). More recent guidance includes a broader set of behaviours as 'technology-facilitated abuse', including '... image-based abuse – for example the non-consensual distribution of private sexual photographs and films with the intent to cause the person depicted distress, as well as threats to distribute such material ...' (CPS, 2017). Clearly, this guidance does not fully represent developing understandings about image-based domestic abuse but it does give something for police and prosecutors to work with in this respect.

There is no doubt that s.76 is a significant step on the road to allowing a much more varied domestic abuse story to be told, not least because it gives women, police and prosecutors a framework which is less obviously dominated by narrow, legal categories. Yet, it is important that s.76 is viewed as the beginning and not the end of this road and, to this extent, there remain concerns. Currently, it is implemented by criminal justice practitioners whose deep attachment to violent incidentalism (Robinson and Tregidga, 2005) has been amplified by resourcing constraints (Myhill et al., 2023). These structural challenges speak to the problems in responding to s.76 more generally but also to those in bringing the disclosure of private intimate images within the conduct prohibited by the section. For s.76 to meaningfully address the range of behaviours that is associated with the overwhelming attempt to undermine self and soul that habituates (Edwards, 2016) the domestic abuse experience and which acknowledges the profoundly devastating effects of reduced life-space on women, their choices, their lives and their mothering, the police must be robustly encouraged away from this narrow focus. They must also be empowered in this direction by and within the criminal justice system. This is true in relation to coercion in abusive relationships more generally but, for the purposes of this paper, resonate particularly with the controlling conduct covered here.

Of course, the weight of this argument inevitably derives from the obvious drawbacks of the offence at s.33 as a route to justice for women who have had private images disclosed in the context of a coercive and controlling relationship. Even a quick look to the legislative provisions reveals that s.33 was introduced to address the paradigm and easily packaged case involving the scorned ex-partner who discloses a classically sexualised ('pornographic') image in a one-off act of revenge. Section 33 does little to offer redress to women whose situation differs to any great extent from this classic 'revenge porn' situation. Coupled with this, there is a lack of clarity about the existing s.33 offence within the police, with 78.2% reporting having an average or patchy understanding of the offence and 5.9% reporting having no knowledge at all (Bond and Tyrell, 2021).

That is not to say, however, that a disclosure offence could not provide an avenue for redress for image-based domestic abuse, were it to be reconceptualised to include disclosure as a matter of domestic abuse. Elsewhere, I examine whether and how the legislative landscape will change in relation to intimate image abuse, especially that in coercive relationships, if and when the Online Safety Bill eventually becomes law (Welsh, forthcoming). What is clear for now is that we will still be left with a legislative framework in which both s.76 and a disclosure offence would be available to police and prosecutors in situations of image-based domestic abuse. Such a position could clearly mean further gaps in the law (in action), with women continuing to fall between the respective provisions. More likely and, given the difficulties in achieving a positive criminal justice outcome in the *individual* offences, there are surely very real possible implications of continuing to present two potential offences to the police in terms of the practical response women experiencing image-based domestic abuse receive from these and other criminal justice services. Whilst I would suggest that, ultimately, the

<sup>7</sup> Shortlisted for the Oxford English Dictionary's 2018 word of the year (<https://languages.oup.com/word-of-the-year/2018-shortlist> (last accessed 09/05/22)), "gaslighting" is 'the action of manipulating someone by psychological means into accepting a false depiction of reality or doubting their own sanity'.

<sup>8</sup> See especially the contribution of Zara McDermott, <https://www.bbc.co.uk/programmes/p096h12v> (last accessed 09/05/22).



better direction in image-based domestic abuse is a strengthening of the s.76 framework and a clear focus on this as the appropriate arena for tackling the constellation and repertoire of coercive behaviours in domestic abuse, including non-consensual sharing, whilst ever there remain two possible offences for tackling image-based domestic abuse, there must, at the very least, be strong guidance as to how prosecutors should proceed in this context. This will be especially true if and when a new disclosure offence ever appears since any purported expansion or strengthening of the s.33 provisions could serve further to complicate the legislative landscape and distract police and prosecutors from the s.76 offence.

## 6. Conclusion

Whether or not the s.76 framework is bolstered to support police and prosecutors to include within it image-based domestic abuse or whether the Online Safety Bill leads to a disclosure offence which, unlike s.33, is equipped better to respond to this conduct, what is clear is that, if our understanding of image-based domestic abuse has changed, then so too should how we choose to regulate it. Of course, how we conceptualise this conduct plays an important role in shaping responses and this is important from the moment a woman chooses to report her victimisation. A clear legislative regime; strong guidance thereof; and clearer communication about our changing understanding, including in relation to domestic abuse, is needed in order to ensure much more appropriate and consistent responses from services, especially those providers who offer a gate-way to the criminal justice system.

This paper has shown that, in relation to the disclosure of private images within the context of a controlling relationship – ‘image-based domestic abuse’ – the current criminal law framework suffers from a significant gap for those who are subject to conduct that does not fit the parameters of the offence at s.76, particularly as its provisions are translated into the criminal justice system, and the narrowly drawn offence s.33. At worst, this gap means that abusive conduct in this regard is supported and sustained by the law and its institutions. As we await possible legislative reform to the disclosure offence at s.33, the paper has set out a framework for change. In light of the mounting evidence which points to the links between intimate image disclosure and domestic abuse and of the catastrophic impact when these gendered harms collide, we must surely be willing to embrace this change.

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