The Criminalisation of Coercive Control: The Power of Law?

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Abstract

Making sense of intimate partner violence has long been seen through the lens of coercive control. However, despite the long-standing presence of this concept it is only in recent years that efforts have been made to recognise coercive control within the legal context. This article examines the extent to which the law per se has the power or indeed the capacity to respond to what is known about coercive control. To do so, it charts the varied ways in which coercive control has entered legal discourse in different jurisdictions and maps these efforts onto what is evidenced about the nature and extent of coercive control in everyday life. This article then places the legal and the everyday side by side and considers the unintended consequences of 'coercive control creep'. In conclusion it is suggested that the criminalisation of coercive control only serves to fail those it is intended to protect.

Key words
Coercive control, intimate partner violence, criminal law, legal discourse.

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Introduction

Making sense of intimate partner violence (IPV) has long been seen through the lens of coercive control (Schechter, 1982; Johnson, 1995; Stark, 2007). Indeed, in a recent overview of research on this topic Hamberger et. al. (2017) identify 22 different ways of defining and operationalising coercive control, all of which generate findings with different emphases. Nonetheless, their review of this work points to three features of coercive control on which there seems to be some agreement: intentionality on the part of the abuser; the negative perception of the controlling behaviour on the part of the victim; and the abuser's ability to obtain control by use of a credible threat. Taking these three features together, it is easy to see how Stark (2007: 13) understands coercive control as a 'liberty crime' and an endemic feature of wider gender inequalities experienced by women across the globe (see also Kelly and Westmarland, 2016; Manjoo, 2016; World Health Organisation (WHO), 2013). The concept itself certainly encourages a deeper appreciation of the hidden and intrusive consequences of "dimensions of partner abuse that have gone largely unnoticed and that are not normally associated with assault" (Stark 2007: 204), for example, psychological abuse, intimidation and isolation. Moreover, it is a concept designed to capture the long-term, ongoing nature of a wide range of forms of violence, not exclusively physical, that can pervade women's (and some men's) routine daily lives. However, despite the long-standing presence of this way of thinking about men's violence, it is only in recent years that efforts have been made to recognise coercive control within the legal context. The purpose of this article is to explore these efforts and to offer some reflections on the

extent to which the law per se has the power, or indeed the capacity, to respond to what is known about coercive control.

This exploration falls into four parts. The first offers a brief overview of the varied ways in which coercive control has entered legal discourse in different jurisdictions. The second part maps these efforts onto what is evidenced about the nature and extent of coercive control in everyday life. In placing the legal and the everyday side by side, the third part of the article goes on to consider the extent to which the recourse to the law, understood as a feature of 'coercive control creep', carries with it unintended consequences, particularly for those it is intended to help. The final and concluding part considers the extent to which, in the light of the preceding discussion, the law can be an efficacious route to responding to the everyday nature of intimate partner violence(s.

Coercive Control and the Criminal Law

When considered through Stark's frame of a "liberty crime", it is easy to see how coercive control has become harnessed more recently within the criminal justice domain. Nevertheless, as Williamson (2010) has pointed out, reframing domestic violence in this way poses challenges for all those working within this field for two reasons. Firstly, it focuses attention on the impact of a wider range of abusive behaviours (some criminalised, some not) on the victim. Secondly, it moves the focus of attention for criminal justice professionals away from responding to victims from an individual incident-led approach to a process-led approach concerned with addressing the cumulative effect of the minutiae of everyday behaviours. As Renzetti (1992) observed some time ago, finding the balance between autonomy and intimacy is a

challenge faced by all relationships; consequently, appreciating how and when that challenge becomes coercive and controlling is both important and difficult. Nevertheless, reframing IPV as a liberty crime has created the space for a range of different criminal law interventions. These potentialities range from its use as part of expert testimony in court proceedings to its use as a specific defence for action taken, particularly in cases of homicide, as a constituent element of specific offences, and as a specific criminal offence in its own right. It will be useful to say a little about each of these in turn, though it is the last of these interventions which has provoked the most reform activity and contemporary academic interest.

Coercive control in court: the use of expert testimony in criminal cases

Sheehy (2018) offers a detailed analysis of efforts in the case of Teresa Craig in Canada to invoke coercive control in support of making a case of self-defence in her trial for the murder of her partner. This is an interesting case in itself, since Evan Stark was brought to the court as an expert witness. Whilst his status as an expert witness was subjected to some considerable debate by the court, he was permitted to testify on Craig's behalf. The court was clearly rather more familiar with psychiatrists and/or psychologists providing reports in respect of post-traumatic stress disorder and/or battered women's syndrome as part of the defence in cases of this kind and evidence of coercive control was new ground. Sheehy (2018) documents the difficulties this strategy posed for the court and suggests that, without the broader criminalisation of coercive control, it is a strategy unlikely to prove successful in Canada.

In a comparative analysis of two cases and their associated judgements in New Zealand (NZ),[i] Midson (2016) also considers the possibilities of coercive control as a specific defence for murder. Using these two cases as illustrative, she explores the

question of culpability and responsibility and their relevance for such cases. She concludes by suggesting:

> When victims of coercive control kill their abusers there is no ‘‘malice aforethought’’ in the true sense of that phrase, despite the appearance of willed action. The act is not malicious or angry – it is a normative response to coercive conditions. On that basis, it is not just or fair to label these victims as ‘‘murderers’’ or ‘‘killers’’, even though the criminal justice system might rightly hold them responsible to some degree. (Midson, 2016:1272)

The tension between culpability and responsibility in cases which lack physical evidence (for example of injury or the use of tracking devices and so on) in support of a partial or complete defence to murder has recently been tested in England and Wales in the appeal case of Sally Challen. In February 2019, Challen successfully appealed her 2011 conviction for the murder of her husband, with the Court of Appeal quashing her original conviction for murder. In what has been described by Women’s Aid UK (2019) as a ‘bittersweet victory’ for Challen, the court simultaneously ordered that Challen be retried for murder on the basis of new evidence that she was suffering from a mental disorder at the time of the killing.. In her original trial, Challen’s defence unsuccessfully raised a partial defence of diminished responsibility. While coercive control has not been introduced as a specific (partial or complete) defence to murder, it was introduced as a stand-alone criminal offence in England and Wales in 2015 (discussed more fully below), four years after Challen’s conviction, and much of the media coverage in the lead up to Challen’s appeal focused on the new legislation and the possibility that it would be pivotal in contextualising Challen’s actions to the court. The appeal judgment

however, suggests that the evidence of coercive control was less pivotal than expected, with Lady Justice Hallett stating:

> There might be those out there who think this appeal is all about coercive control but it's not … Primarily, it's about diagnosis of disorders that were undiagnosed at the time of the trial. (cited in Curtis, 2019)

As such, this case, as yet, does little to demonstrate the ways in which evidence of coercive control can be used at trial and/or on appeal to allow the courts to better understand and respond to the circumstances within which women kill their prolonged domestic abusers. However understanding these circumstances has been valuable in challenging accepted interpretations of provocation as a partial defence for murder (as illustrated in the work of Fitz-Gibbon 2014) and the Challen case (still sub judice) may further an appreciation of these kinds of circumstances.

Coercive control as an adjunct to already criminalized behaviours

Whilst using expert testimony to enable a jury to appreciate the particular circumstances which may result in murder takes different forms across different jurisdictions, in some countries consideration is being given to the role of coercive control as a specific feature and/or as an adjunct to behaviours already criminalized. For example, Ortiz (2018) notes that Tennessee, following the example of the law now on the statute books in England and Wales, adapts its law on false imprisonment to include a specific category of behaviours she defines as domestic false imprisonment. This, she argues, maintains compliance with the American Constitution on the need for legal

clarity, whilst at the same time capturing the essence of coercive control. Thus, domestic false imprisonment could be defined as:

> A course of conduct intentional, knowing, reckless, or negligent repeated or continuing harassment, intimidation, exploitation, humiliation, isolation, and/or control, directed toward a person with whom the perpetrator has a personal connection, which interferes substantially with that person's liberty and autonomy. (Ortiz, 2018: 707-9)

In a similar vein, Stansfield and Williams (2018) provide evidence for understanding the presence of non-fatal strangulation in coercive control. In their US case data, they explore the relationship between the use of threats to kill and the delivery of such threats. They conclude that:

> The results consistently showed a robust empirical relation between perpetrators' death threats and subsequent escalation into nonfatal strangulation as a way of maintaining control through fear and intimidation. (Stansfield & Williams, 2018:14)

In highlighting this link, their work contributes to a debate making its presence felt globally concerning the introduction of specific offences for strangulation. Such offences exist in 47 jurisdictions in the United States (Theakston, 2019)), have been introduced in NZ (*Family Violence (Amendments) Act* 2018 s 189A, see further Law Commission, 2016), and have been introduced and/or debated in a number of Australian states and territories (Fitz-Gibbon et. al. 2018; Gotsis, 2018). The work of Stansfield

and Williams (2018) is clearly suggestive of a need to at least reframe understandings of such existing laws in terms of coercive control. This legal strategy focuses considerable attention on the role of practitioners in embracing such understandings (see also Brennan et. al. 2018). However, some jurisdictions have taken the concept of coercive control further and have introduced specific legislation designed to capture the wide range and ongoing nature of behaviours included within it.

A specific offence of coercive control

The introduction of new criminal law offences designed specifically to capture coercive and controlling behaviours is arguably where the translation of the clinical notion of coercive control into the legal realm has animated most debate. Over the last 10 years, new offences have been introduced to varying degrees across the United Kingdom, Europe, and Australia (Douglas, 2015), and debated in the United States (Tuerkheimer, 2007). While these offences have taken varied forms – in terms of the label applied to the abusive behaviour they are designed to address and their inclusivity (for example, some are gender-specific and/or apply only to those in intimate partner relationships) – at the core of each has been an argument that a new category of criminal offence was necessary to capture a pattern of abusive behaviours the law was otherwise incapable of responding to. The operation of these new categories have, however, arguably raised more questions than answers in terms of the merits of, and need for, more law to improve justice system responses to IPV.

Marking one of the earlier examples of this reform, in Australia, the Tasmanian *Family Violence Act* 2004 (Tas) introduced two new offences: one of economic abuse and one of emotional abuse and intimidation. Both fit within the rubric of coercive control and indeed both are couched in terms of an ongoing course of conduct. Yet, to

date neither has resulted in many prosecutions. In a detailed examination of the operation of these offences, McMahon and McGorrery (2016) suggest a number of reasons for this, drawing attention to the flaws inherent in their formulation, rather than failure of take-up on the part of legal practitioners. In sum, their analysis suggests that these laws are limited by the fact that:

- incidents need to be reported within 12 months of their occurrence;
- the legislative drafting suffers from lack of clarity concerning understandings of reasonableness in relation to each of these behaviours;
- there are difficulties in operationalising emotional abuse in the legal context;
- there are overlaps between the offences in terms of what is included/excluded; and
- there are overlaps between these offences and other offences on the statute books, arguably making both redundant.

This analysis of these specific offences in a small Australian jurisdiction echoes some of the commentary to be found in relation to the offence of coercive and controlling behaviour introduced in England and Wales in December 2015, to which we now turn our attention.

Section 76 of the *Serious Crime Act* (England and Wales) 2015 states:

> A person (A) commits an offence [of coercive control] if—
>
> (a) A repeatedly or continuously engages in behaviour towards another person (B)
>
> that is controlling or coercive,
>
> (b) At the time of the behaviour, A and B are personally connected,
>
> (c) The behaviour has a serious effect on B, and

(d) A knows or ought to know that the behaviour will have a serious effect on B."

For the purposes of the English legislation, coercive control is defined as behaviour:

> ….which takes place "repeatedly or continuously". The victim and alleged perpetrator must be "personally connected" at the time the behaviour takes place. The behaviour must have had a "serious effect" on the victim, meaning that it has caused the victim to fear violence will be used against them on "at least two occasions", or it has had a "substantial adverse effect on the victims' day to day activities". The alleged perpetrator must have known that their behaviour would have a serious effect on the victim, or the behaviour must have been such that he or she "ought to have known" it would have that effect. (Home Office, 2015: 2)

While limited to persons in a current intimate relationship and/or who live together, this offence covers a wide range of behaviours (Home Office, 2015) and explicitly draws on the work of Stark (2007), with the key exception that the offence is defined in gender-neutral terms. This is a significant departure from Stark's (2007) conceptualisation of coercive control and stands in contrast to the Scottish legislation introduced in 2018, which recognises the gendered pattern of domestic abuse and also includes ex-partners within its remit (*Domestic Abuse (Scotland) Act 2018*; see further Burman and Brooks-Hay, 2018; Stark and Hester, 2019). In terms of take-up by the criminal justice system, there were just over 9000 offences of coercive control recorded by the police in England and Wales in the year ending March 2018, out of a total of just over 2 million incidents

of domestic abuse recorded for that year (Office of National Statistics, 2018). These figures represent a doubling of the coercive control offences recorded for 2017, clearly indicative of this new legislation gaining a foothold with practitioners. However, as the data reported by the Bureau of Investigative Journalism (BIJ, 2017) illustrate, the take up has been patchy, the data suggesting varied levels of implementation in different police forces.

Early evaluations of the English legislation point to problems for front-line police officers in 'seeing' coercive control (Wiener, 2017); in practitioner understandings of coercive control more generally (Robinson et al, 2018; Brennan et. al 2018); and problems associated with evidencing this offence (Bishop and Bettinson, 2018). However, despite mixed evaluations of its early operation, like offences have continued to emerge in nearby jurisdictions, including the aforementioned Scottish offence and, most recently, the introduction of a new offence of coercive control in Ireland, under section 39 of the *Domestic Violence Act*).

Many of the problems highlighted above are not new to the field of domestic abuse; in many ways, despite its symbolic power, the law itself is a blunt instrument in affording change to the wider social practices of violence rooted in gender inequality (see further Goodmark, 2018; Fitz-Gibbon et al 2017). Tolmie (2018) offers a substantial summary of the arguments both for and against using the law in this way, with Douglas (2018) adding the potential for criminal justice systems abuse to the list of abuses women already experience in their relationship with the law. Walklate et. al. (2018) offer a more detailed analysis of the specific problems associated with this particular offence, while Burman and Brooks-Hay (2018: 78) conclude their analysis of the prospective Scottish legislation by stating:

> Decades of policy and legislative reform of the criminal justice response to other forms of violence against women leave us somewhat pessimistic that the introduction of this new offence within Scotland's adversarial context, which sustains forms of legal practice known to effectively undermine the spirit of any well-intentioned legislation, will fully achieve its bold ambitions … 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.

Of course, here Burman and Brooks-Hay (2018) are articulating a long-standing dilemma within this field concerning the extent to which the recourse to law can make a difference on this issue (see also Goodmark, 2018). This recourse to law fails to recognise the law itself as coercive and controlling (Douglas, 2018), the problems of operationalising coercion as it already exists within legal discourse (Brunk, 1979) and the associated problems of (in)voluntariness (Kuennan, 2014). All of these issues are returned to below; however, at this juncture it is of value to note that the early evaluations of this specific legal intervention, alongside the other strategies listed above, more often than not replicate the commonalities found amongst definitions of coercive control identified by Hamberger et. al. (2017) now reappearing as problems of policy implementation. Thus, taken together, these issues unveil the potential of (mis)recognition of coercive control for perpetrators, victims and practitioners alike, perhaps leading to the fundamental question asked by Crossman and Hardesty (2018: 196): 'what makes control coercive?' It is to this question this article turns next.

Coercive Control in Everyday Life

It is without doubt that coercive control operates in a myriad of ways in women's (and some men's) everyday lives. Variously envisaged as a cage (Stark, 2007) or as a web, tree, or trap (Pitman, 2017), its effects can be experienced cognitively, emotionally, and socially, frequently resulting in its victims being isolated, with little sense of self-worth and/or self-esteem. Most often conceptualised in terms of the everyday effects of wider patriarchal social relationships, the presence of coercive control and its value as a concept has been recently demonstrated in the use of digital media as a means of control (see for example, Douglas et. al. 2019; Harris and Woodlock, 2019), has been evidenced in directing practices of 'good' mothering (Radford and Hester, 2006; Heward-Belle, 2017); has been used as a tool in making sense of 'custody stalking' (Elizabeth, 2017); and is well-recognised as a non-violent mechanism of control (Stark, 2007; Crossman et al. 2016). The presence of coercive control in intimate partner relationships specifically has been shown to have an impact on children as physical forms of violence[ii] (Callaghan et al. 2018; McLeod, 2018), and is no respecter of age, ethnicity, ability or culture. However, despite its pervasive nature, the questions of intent on the part of the perpetrator and the negative perception and the credibility of the associated threats on the part of the victim remain central features of any potential impact this range of abusive behaviours might have. So, when does control become coercive or, as Kuennan (2014) might say, when is enough, enough?

In a recent empirical excavation of this question, Crossman and Hardesty (2018) draw the distinction between women's experiences of constraint through commitment and constraint through force. Their (retrospective) data from interviews undertaken with 22 divorced women identified control as a feature of all these women's relationships.

However, this manifested itself in two different ways. For some women in their sample, control/constraint was felt and experienced as part of the compromises made through their commitment to their relationship, which might have also involved making sacrifices in the interests of their marriage and/or children. Many of these experiences could be seen to be associated with the kind of social norms/expectations permeating their lives. In contrast, for those women who experienced constraint through force, the emphasis was different, even though the compromises and behaviours may have been the same. For these women, the men in their lives *used* social norms/expectations to constrain them. Interestingly, the use of physical violence against them featured for women in both of these groups, but the variations in control they experienced were not contingent upon the violence itself. These findings, Crossman and Hardesty (2015) suggest, support the notion of entrapment being used by some men to control their partners and lend support to the view that it is not the behaviours per se that are problematic, but the frequency with which they are used.

This study clearly lends support to the presence of coercive control in relationships, but adds a more nuanced understanding to its manifestation in recognising how control might be experienced as part of either a positive commitment to working in a relationship or as entrapment. Recognising the difference between these circumstances then becomes a critical issue for practitioner and legal responses. Importantly these findings, which resonate with the issue of the relationship between autonomy and intimacy raised by Renzetti (1992) some time ago, imply that control is not always coercive. Moreover, when applied in the context of criminal justice responses, they also pose the inherently tricky question: when does a 'normal' intimate partner relationship become criminal? (On the blurriness between coercive control, romance and intimate partner relationships, see for example Chung, 2005). So whilst coercive control has

been, and is, an enlightening descriptive tool for a range of behaviours, how – and under what conditions – an appreciation of relationship processes are appropriate for criminal justice intervention remains a moot point. The difficulty of identifying coercive and controlling behaviours as criminal is well captured by Bishop (2016: 2) who explains:

> it's difficult to objectively assess whether coercive control has taken place. The abuser will typically use signals and covert messages to exert and maintain control and often these have meaning only in the context of that particular relationship. For example, the perpetrator may use a specific look, phrase or movement to convey to the victim that they are close to breaking an unspoken "rule". But these signals may be hard to classify as abusive in and of themselves. Compliance with demands about dressing, shopping or cooking in a particular way to avoid repercussions may seem voluntary to an outsider with little or no understanding of the dynamics in the relationship.

In some ways, this alludes to the well-recognised tension between the 'isolated' incident-led focus of criminal justice responses and the process of responding to a series of inter-related experiences that the concept of coercive control endeavours to convey. This tension is not easy to address, since recognition of it belies further underlying difficulties with what might be called 'coercive control creep'.

Coercive Control Creep and its Unintended Consequences

Efforts to respond to violence against women have spiralled up criminal justice policy agendas across the globe since the mid-1980s. The dominance of North American voices in shaping those policy agendas has been well documented by Goodmark (2015). By the same token, those same policies have come under increasing scrutiny regarding

their efficacy, with researchers noting that the mere introduction and 'travelling' nature of such policies should not be misinterpreted as evidence of their effectiveness in practice (Goodmark, 2015; Walklate and Fitz-Gibbon, 2018). In some ways, coercive control creep emulates this policy process. Throughout this process, little thought has apparently been given to alternatives to criminalization and Goodmark (2017) outlines some of the possible reasons for this. At the same time, there has been sufficient evidence pointing to the unintended consequences of harnessing the law in this way, particularly for those who it is believed might be protected by the law (see, for example, Douglas 2018; Tolmie, 2018), with protection from the law being additionally problematic for Indigenous women (Blagg 2016); women with disabilities (Thiara et. al 2011); and those from ethnic minorities (Gill and Harrison 2017) This evidence is multi-faceted and multi-layered, ranging from the specific consequences associated with particular legal strategies to the more general question of what it is that women (in violent relationships) might want from a criminal justice response and what they might receive in reality. The criminalisation of coercive control has drawn comment along all of these dimensions.

The creation of any new offence in this field places women squarely within the domain of criminal justice. Yet the difficulties faced by women in dealing with criminal justice systems are both well-known and profound. As Hanna (2009) has commented, the more the criminal law tries to intervene on behalf of women, the more challenges it poses for them. From the point of contact with a front-line police officer, to presenting evidence at court, to dispositions by the court, whether that is criminal or civil, all present a range of hurdles for women to negotiate. The nature of these experiences can be contingent on a wide range of variables, including class, ethnicity and cultural background. However, a major contributing factor is fear: fear of their partner, fear of

the system and fear of what they might lose by exposing themselves to the criminal justice process (for example, their role as mothers to their children). These concerns have been consistently present, decades of policy activity notwithstanding. Responding to these concerns is not solely about training (criminal justice) professionals to respond more appropriately to women living with violence, though it is without doubt that more could be done in this respect. In particular, the creation of a new offence does not deal with any of the well-documented concerns women have for not engaging with the criminal justice process and, as Douglas (2018), has observed may also create new opportunities for what she has termed 'legal systems abuse': perpetrators using the legal system as a further way of asserting control over their partners (see, for example, research on protection orders and the criminalisation of women victims: Douglas and Fitzgerald, 2018; Douglas and Nancarrow, 2014). Additionally, such abuse can also contribute to the criminalisation of women, adding to their concerns about engagement with legal processes at all (see further Tolmie, 2018).

The concerns consistently expressed by women also touch upon questions of what it is that they want from any intervention, legal or otherwise (as opposed to what activists might want or what policy-makers and practitioners might be charged with delivering). Classic understandings of women living with violence point to evidence that, if it is the woman herself who has asked for help or support, more often than not she just wants the behaviour of her partner, both violent and non-violent in all of its intimidating and fear-inducing manifestations, to stop (see inter alia Kirkwood 1993). Sometimes, for some women, love still matters (Kuennen, 2014). So, wanting undesirable behaviour to stop does not necessarily equate with wanting a partner's behaviour to be subjected to criminal sanction. Clearly for some behaviours, particularly those of physical violence, a woman's wishes in this respect can quite legitimately, in

terms of the law, be ignored. Even in cases where women do seek legal intervention and a punitive criminal justice system outcome, the criminalisation of coercive control in and of itself does little to address the long-held barriers women victims of IPV have faced in accessing justice (on this, see further Walklate et. al., 2018). To this end, introducing coercive control as a stand-alone offence presumes that women will have access to police, that police will have access to the required evidence, and the legal frameworks of the inherently masculine criminal court system will be open to their experiences of a pattern of abuse. When considered from that vantage, it is a lot to expect from a single piece of legislative law reform.

Consequently, when women's everyday experiences of control in their relationships (not all of which will be seen by them as coercive) are put alongside what they might want from any intervention, there is no necessary neatness of fit. Indeed, neither is there a neatness of fit with the policy responses claiming to meet their interests. Two issues arise as a consequence of this. The first is concerned with the relationship between individual autonomy and/or agency and the ongoing concern to criminalise coercive control. The second is concerned with the ways in which coercive control in and of itself has the capacity to downplay violence in relationships which arguably is the very issue a legal response is better equipped to deal with. Each of these will be discussed in turn.

Kuennen (2014) discusses coercive control and the efforts to embrace this concept in criminal justice as the legal erasure of agency. This observation is similar to that made by Brunk (1979) some time ago in his discussion of the legal dilemma posed by the concept of coercion per se and what this implies for individual choice, or as Kuennen (2014) might say, agency. Perhaps put more squarely in terms of the evidence referred to in the discussion here, the question arises as to what this legal erasure

implies for women who choose to live with constraint, whether that be through commitment (Crossman and Hardesty, 2018) or as a result of any other motivation. This raises a further question concerning what a normal relationship might look like and who decides on such normality. The criminal law proves a blunt instrument for drawing such distinctions; as Hanna (2009: 1468) has argued, it 'forces the question of coercion into a yes or no answer. The line between free choice and coercion gets drawn somewhere – and you are either coercive or not' (see also Walklate et al. 2018: 119). Problematically, when these distinctions are drawn in the realm of law, it is not the individual experiencing the behaviour who decides whether the actions constitute coercive control and/or which actions should be considered criminal, but rather the legal actors involved. The erasure of agency in this way carries implications, of course, not just for women in cases of coercive control, but for all women, particularly as legal discourses can be, and are, used for purposes other than they were intended (Smart, 1989). The potential slippage from individual women to all women highlights the slipperiness of coercive control as a concept (Hamberger et. al. 2017) and, as a result of its lack of specificity, particularly in law, carries with it significant unintended consequences for its use in law. Ultimately, of course, the law itself must also be recognised as a site of coercion, alongside a range of other sources of sanction that coerce individuals to do things because they are afraid or intimidated to do otherwise. Brauer et. al. (2017) make the distinction between erratic and oppressive coercion in endeavouring to understand coercion as a feature of all aspects of offending behaviour and its consequences. For the purposes of this discussion, however, it is sufficient to note that the proponents of coercive control view its presence in women's lives as though this were separate and separable from their experiences of coercion in other aspects of their lives and/or as a constituent feature of the human condition for everyone.

The second issue to be addressed here, the erasure of physical violence, has been discussed at length by Walby and Towers (2018). Their concern with downplaying physical violence and its importance for intimate partner relationships is as much methodological as it is conceptual, although these two concerns are connected. The absence of conceptual clarity impedes efforts to measure and for Walby and Towers (2018), any agenda focused on violence against women demands accurate measures, since it is these measurements and the counting of violence that ultimately persuade governments to take action across a wide range of domains, including but not limited to the legal context. However, the policing preoccupation with the presence of physical violence, for example, as a means of informing their decision-making in relation to violence against women is well-documented (see for example Robinson et al. 2016). Physical violence can more often than not be evidenced and can result in the kind of criminalisation pursued by those wanting to criminalise coercive control. Thus, there is a conundrum here in the way in which coercive control as a concept downplays the physically violent aspect of women's lives that can be responded to more or less effectively by the incident-led response of the law, whilst simultaneously placing demands on criminal justice systems that, as yet, they are ill equipped to deal with. In this respect, a concern emerges which begs the question of whether, in seeking to criminalise a wider range of abusive behaviours, the day-to-day operation of an offence of coercive control may also serve to hide acts of physical violence. This kind of hiding has far reaching implications in terms of assessments of perpetrator risk, victim safety management and seriousness of criminal justice system intervention.

Conclusion: coercive control, meaning and consequences

There are a number of themes running through this paper, some of which contribute to a bigger question and debate recently posed by Goodmark (2018) on decriminalising domestic violence. The coercive control creep documented here stands as testimony to some aspects of that bigger question. In particular, the criminalisation of coercive control may fail women in two respects. Firstly, it arguably fails at the level of the conceptual, in misunderstanding the coercive nature of the law and the inability to appreciate how this concept contributes to that process in erasing women's agency. Secondly, it fails at the level of the experiential, in failing to see women's lives in the round, particularly their reluctances to engage with criminal justice. Put simply, coercive control fails to 'see' responses to violence against women holistically and, in so doing, leaves the subject of law untouched (Naffine, 2003).

Some time ago, Naffine (1990) observed that the subject of law was the rational, middle-class entrepreneurial male. Law was made and practised with this subject in mind. This subject renders all those who fall outside of its parameters 'other', in both their experiences of the law and the likelihood that the law can 'see' or 'hear' them (Hudson, 2006; Easteal et. al 2018). In her later essay, Naffine (2003) sees little to be optimistic about in relation to the hold this subject of law has on law's formulation and practice. However, following Smart (1989) and, more recently, Howe et al. (2019), this does not necessarily mean that law is not a site for action. It is. However, the law itself will never be enough and this truism has abounded in this field since the presence of second-wave feminism was felt (see, for example, Wilson, 1983). Coercive control is a constituent element in framing our understandings of the pervasive impact of a wide range of behaviours on women's lives, but the law and its inherent structure of power is a very blunt instrument to address the concerns it brings to the fore. In this respect,

more law is definitely not the answer and only furthers the exclusion of those already excluded from criminal justice.

References

Legislation

Domestic Abuse (Scotland) Act 2018 (UK)

Domestic Violence Act (Ireland) 2018 (UK)

Family Violence Act 2004 (Tas)

Family Violence (Amendments) Act 2018 (NZ)

Serious Crime Act (England and Wales) 2015 (UK)

References

Blagg, H. (2016) Crime, Aboriginality and the Decolonisation of Justice. 2nd edn. Sydney: Federation Press

Bureau of Investigative Journalism. (BIJ) (2017) Questions raised over patchy take-up of domestic violence law November 24th www.thebureauinvestigates.com/stories/2017-11-24/coercive-control-concerns

Bishop, C. (2016) Why it's so hard to prosecute cases of coercive or controlling behaviour. *The Conversation*, 31 October.

Bishop, C. and Bettinson, V. (2018) Evidencing domestic violence, including behaviour that falls under the new offence of 'controlling or coercive behaviour'. *The International Journal of Evidence & Proof* IJEP, 22 1 (3)

Burman, M. and Brooks-Hay, O. (2018) Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control. *Criminology & Criminal Justice,* 18(1): 67–83/doi/10.1177/1748895817752223

Brauer, J.R., Tittle, C. & Antonaccio, O. (2017): The Costs of Coercive Control: Assessing Behavioral and Mental Health Correlates of Erratic and Oppressive Coercion, *Justice Quarterly*, DOI: 10.1080/07418825.2017.1403643

Brennan, I., Burton, V., Gormally, S., and O'Leary, N. (2018) Service Provider Difficulties in Operationalizing Coercive Control *Violence Against Women* 1-19 /doi/10.1177/1077801218797478

Brunk, G.G. (1979) The problem of voluntariness and coercion in the negotiated plea. *Law and Society Review,* 13(2): 527-553.

Callaghan, J.E., Alexander, J.H., Sixsmith, J. and Lisa Chiara Fellin, L. (2018) Beyond "Witnessing": Children's Experiences of Coercive Control in Domestic Violence and Abuse *Journal of Interpersonal Violence* 33(10) 1551–1581doi.org/10.1177/0886260515618946

Chung, D. (2005) Violence, control, romance and gender equality: Young women and heterosexual relationships. *Women's Studies International Forum*, 28(6):445-455.

Crossman, K.A., Hardesty, J.L. and Raffaelli, M. (2016) "He Could Scare Me Without Laying a Hand on Me": Mothers' Experiences of Nonviolent Coercive Control During Marriage and After Separation *Violence Against Women* 22(4): 454–473 DOI: 10.1177/1077801215604744

Crossman, K. & Hardesty, J. (2018) Placing Coercive Control at the Center: What Are the Processes of Coercive Control and What Makes Control Coercive? *Psychology of Violence*, 8(2):196–206 .doi.org/10.1037/vio0000094

Curtis, J. (2019) Woman, 65, who killed her husband with a hammer after decades of abuse weeps in court as she has her 2011 murder conviction overturned in watershed moment for 'coercive control' law. *Daily Mail,* 1 March.

Domestic Violence Victoria. (2018) Focus should be on improving police practice and not a stand-alone offence. *Media Release*, Domestic Violence Victoria, 28 August.

Douglas, H. (2015) Do we need a specific domestic violence offence? *Melbourne University Law Review* 39(2): 434-471.

Douglas, H. (2018) Legal systems abuse and coercive control. *Criminology & Criminal Justice,* 18(1): 84–99 doi/10.1177/1748895817728380

Douglas, H, Harris, B A & Dragiewicz, M (2019) Technology-Facilitated Domestic and Family Violence: Women's Experiences. *British Journal of Criminology*, published online first, doi: 10.1093/bjc/azy068.

Douglas, H. & Fitzgerald, R. (2018) The domestic violence protection order system as entry to the criminal justice system for Aboriginal and Torres Straight Islander people. *International Journal for Crime, Justice and Social Democracy*, 7(3): 41-57.

Douglas, H. & Nancarrow, H. (2014) Perils of Using Law: A Critique of Protection Orders to Respond to Intimate Partner Violence. In H, Johnson, B S, Fisher and V, Jaquier (eds), *Critical Issues on Violence against Women: International Perspectives and Promising Strategies*, London: Routledge, 77-90.

Easteal, P., Bartels, L., & Mittal, R. (2019). The importance of understanding the victims' 'reality' of domestic violence. Alternative Law Journal, 44(1), 11–16. https://doi.org/10.1177/1037969X18790040

Elizabeth, V. (2017) Custody Stalking: A Mechanism of Coercively Controlling Mothers Following Separation *Feminist Legal Studies* 25:185–201 DOI 10.1007/s10691-017-9349-9

Fitz-Gibbon, K. (2014) Homicide Law Reform: Gender and the Provocation Defence: A Comparative Perspective. London: Palgrave-MacMillan.

Fitz-Gibbon, K., McCulloch, J. & Walklate, S. (2017) 'Australia should be cautious about introducing laws on coercive control to stem domestic violence', The Conversation, 27 November https://theconversation.com/australia-should-be-cautious-about-introducing-laws-on-coercive-control-to-stem-domestic-violence-87579

Fitz-Gibbon, K, Maher, JMM, McCulloch, J, & Walklate, S (2018) Victorian government should be wary of introducing a stand-alone offence of non-fatal strangulation. *The Conversation*, 3 August.

Gill AK and Harrison K (2016) Police responses to intimate partner sexual violence in South Asian communities. Policing 10(4): 446-455

Goodmark L (2015) Exporting without license: The American attempt to end intimate partner abuse worldwide. In Goel R and Goodmark L (eds) *Comparative Perspectives on Gender Violence: Lessons from Efforts Worldwide*: 3–14. Oxford: Oxford University Press.

Goodmark, L. (2017) Should domestic violence be decriminalized? *Harvard Journal of Law and Gender,* 40:54-113. ciprod01\productn\H\HLG\40-1\HLG105.txt

Goodmark, L. (2018) *Decriminalizing domestic violence: A balanced policy approach to intimate partner violence*. California, University of California Press.

Hamberger, K, Larsenb, & Lehrnerd A (2017) Coercive control in intimate partner violence. *Aggression and Violent Behavior,* 37: 1–11doi.org/10.1016/j.avb.2017.08.003

Hanna, C. (2009) The paradox of progress: translating Evan Stark's coercive control into legal doctrine for abused women. *Violence against Women*, 15(12): 1458-1476 DOI: 10.1177/1077801209347091

Harris, B. & Woodlock, D. (2019) Digital coercive control: Insights from two landmark domestic violence studies. The British Journal of Criminology 59 (3); 530–550, https://doi.org/10.1093/bjc/azy05

Heward-Belle, S (2017) Exploiting the 'good mother' as a tactic of coercive control: Domestically violent men's assaults on women as mothers *Journal of Women and Social Work* 32(3) 374-389/doi.org/10.1177/0886109917706935

Home Office. (2015) Controlling or coercive behaviour in an intimate or family relationship: Statutory guidance framework. London: Home Office.

Howe, A, and Alaattinoğlu, D. (eds) (2019) *Contesting Femicide Feminism and the Power of Law Revisited.* London: Routledge.

Hudson, B. (2006) Beyond white man's justice: race, gender and justice in late modernity. *Theoretical Criminology* 10(1): 29-47.

Johnson, M. (1995) Patriarchal terrorism and common couple violence: two forms of violence against women' *Journal of Marriage and the Family*, 57(2), 283-294.

Kelly, L. & Westmarland, N. (2016) Naming and defining "domestic violence" lessons from research with violent men. *Feminist Review*, 112(1): 113-127.

Kirkwood, C. (1993) *Leaving Abusive Partners*. London: Sage

Kuennan, T. (2014) Love Matters. *Arizona Law Review,* 56(4): 977-1015.

Law Commission. (2016) Strangulation: The case for a new offence. Report 138. Wellington, New Zealand, Law Commission.

Manjoo, R. (2016) Special guest contribution: violence against women as a barrier to the realisation of human rights and the effective exercise of citizenship. *Feminist Review* 112: 11-26.

McLeod, D. (2018) Coercive control: Impacts on children and young people in the family environment. Devon, England: Research in Practice.

McMahon, M & McGorrery, P. (2016) Criminalising emotional abuse, intimidation and economic abuse in the context of family violence: the Tasmanian experience. *University of Tasmania Law Review*, 35: 1-22.

Midson, B. (2016) Coercive control and criminal responsibility: victims who kill their abusers. *Criminal Law Forum*, 27: 417–442 DOI 10.1007/s10609-016-9292-5

Moore, A. (2018) 'I miss him so much': why did a devoted wife kill the man she loved? The Guardian 29th September www.theguardian.co.uk

Naffine, N. (1990) *Law and the Sexes*. London: Allen and Unwin.

Naffine, N. (2003) Who are Law's Persons? From Cheshire Cats to Responsible Subjects. *Modern Law Review*, May, 346-67.

Gotsis, T. (2018) NSW's strangulation offence: Time for further reform? NSW Parliamentary Research Service Issues Backgrounder, Number 3. Sydney, Parliamentary Library.

Office of National Statistics. (ONS) (2018) Domestic abuse in England and Wales: year ending March 2017 ons.gov.uk

Ortiz, A.M. (2018) Invisible bars: Adapting the crime of false imprisonment to better address coercive control and domestic violence in Tennessee. *Vanderbilt Law Review*, 71, 682-715.

Pitman, T. (2017) Living with Coercive Control: Trapped within a Complex Web of Double Standards, Double Binds and Boundary Violations. *British Journal of Social Work,* 47: 143–161doi: 10.1093/bjsw/bcw002

Radford, L. and Hester, M. (2006) *Mothering through Domestic Violence*. London: Jessica Kingsley.

Renzetti, C. (1992) *Violent betrayal: Partner abuse in lesbian relationships*. Newbury Park, California: Sage.

Robinson, A, L, Myhill, A, & Wire, J. (2018) Practitioner (mis)understandings of coercive control in England and Wales. *Criminology and Criminal Justice*, 18(1): 29-49. doi/10.1177/1748895817728381

Schechter (1982) *Women and male violence: the visions and struggles of the battered women's movement.* Cambridge, MA: South End Press.

Sheehy, E. (2018) Expert evidence on coercive control in support of self-defence: The trial of Teresa Craig. *Criminology & Criminal Justice* 18(1): 100-14

Smart, C. (1989*) Feminism and the Power of Law*. London: Routledge.

Stansfield, R & Williams, K R (2018) Coercive control between intimate partners: An application to nonfatal strangulation. *Journal of Interpersonal Violence*. Published online first, doi: 10.1177/0886260518795175.

Stark, E. (2007) *Coercive control: how men entrap women in personal life*. Oxford: Oxford University Press.

Stark, E. & Hester, M. (2019) Coercive control: update and review. *Violence against Women*, 25(1): 81-104.

Tolmie, J. (2018) Coercive control: to criminalize or not to criminalize? *Criminology & Criminal Justice*, 18(1): 50-66. doi.org/10.1177/1748895817746712

Thiara RK, Hague G and Mullender A (2011) Losing out on both counts: disabled women and domestic violence. Disability & Society26 (6): 757-771. DOI:10.1080/09687599.2011.602867

Theakston, S. (2019) 'Horrific act.' Why Kentucky needs to make nonfatal strangulation a felony. Lexington Herald Leader, February 11th https://www.kentucky.com/opinion/op-ed/article226087915.htm

Tuerkheimer, D. (2007) Renewing the call to criminalize domestic violence: An assessment three years later. *George Washington Law Review* 75, 613.

Walby, S. & Towers, J. (2018) Untangling the concept of coercive control: Theorizing domestic violent crime. *Criminology & Criminal Justice*, 18(1): 7–28. doi.org/10.1177/1748895817743541

Walklate, S. & Fitz-Gibbon, K. (2018) 'Criminology and the violence(s) of Northern Theorizing: A critical examination of policy transfer in relation to violence against women from the global north to the global south' in Carrington, K., Hogg, R., Scott, J. and Sozzo, M. (eds.) *The Palgrave Handbook of Criminology and the Global South*, Palgrave, pp. 847-865.

Walklate, S, Fitz-Gibbon, K & McCulloch, J. (2018) Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories. *Criminology & Criminal Justice*, 18(1): 115-121. doi.org/10.1177/1748895817728561

Wiener, C. (2017) Seeing What is 'Invisible in Plain Sight': Policing Coercive Control. *The Howard Journal* DOI: 10.1111/hojo.12227

Williamson, E (2010) Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control *Violence Against Women* 16(12) :1412– 1423 DOI: 10.1177/1077801210389162

Women's Aid. (2019) Women's Aid comments on Sally Challen's appeal verdict. *Women's Aid,* 28 February. Access online at https://www.womensaid.org.uk/womens-aid-comments-on-sally-challens-appeal-verdict/

World Health Organisation. (2013) Global and regional estimates of violence against women: Prevalence and health effects of intimate partner violence and non-partner sexual violence. Geneva: WHO.

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[i] The two NZ cases analysed by Midson (2016, p. 425-6) are *R v Wickham* HC Auckland CRI-2009-090-010723 (20 December 2010) and *R v Wihongi* [2011] NZCA 592 [2012] 1 NZLR 775.

[ii] The importance of the presence of children is, however, specifically mentioned in the Scottish legislation cited above (see further Stark & Hester, 2019).