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### 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 longstanding 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.

#### Keywords

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 (Johnson 1995; Schechter 1982; Stark 2007). Indeed, in a recent overview of research on this topic, Hamberger, Larsen and Lehrner (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 Organization (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) such as, 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 longstanding 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 occurs in 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 evidence of 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 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 light of the preceding discussion, the law can be an efficacious route to responding to the everyday nature of IPV.

## Coercive control and criminal law

When considered through Stark's conceptualisation of a 'liberty crime', it is easy to see how coercive control has become harnessed more recently in the domain of criminal justice. 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, for criminal justice professionals, it moves the focus away from responding to victims in an individual incident-led approach to a process-led manner that is 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 the use of coercive control in 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 as 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. While 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 psychologists providing reports in respect of post-traumatic stress disorder and battered women's syndrome as part of the defence in cases of this kind; 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),<sup>1</sup> 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 that lack physical evidence (e.g., 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 (2019) as a 'bittersweet victory' for Challen, the court simultaneously ordered that Challen be retried for murder based on new evidence that she was suffering from a mental disorder at the time of the killing. In her original trial, Challen's defence team 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 standalone criminal offence in England and Wales in 2015 (discussed more fully below), four years after Challen's conviction. 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 for the court. However, the appeal judgement 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: 7)

As such, this case, as yet, does little to demonstrate how evidence of coercive control can be used at trial or on appeal to allow the courts to understand better 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 (who was released in June 2019 after the Crown accepted a guilty pleas to manslaughter) may further an appreciation of these kinds of circumstances.

### *Coercive control as an adjunct to already criminalised behaviours*

While the use of expert testimony to enable a jury to appreciate the particular circumstances that 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 or as an adjunct to behaviours already criminalised. For example, Ortiz (2018) notes that Tennessee has followed the example of the law now on the statute books in England and Wales and adapted 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, while 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: 707–708)

In a similar vein, Stansfield and Williams (2018) provide evidence for understanding non-fatal strangulation in coercive control. In their United States (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 and Williams 2018: 14)

In highlighting this link, their work contributes to a global debate concerning the introduction of specific offences of strangulation. Such offences exist in 47 jurisdictions in the US (Theakston 2019), have been introduced in NZ (s. 189A *Family Violence (Amendments) Act 2018*; 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 light 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 US (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 in terms of their inclusivity (e.g., 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 is necessary to capture a pattern of abusive behaviours the law is otherwise incapable of responding to. However, the operation of these new categories has arguably raised more questions than answers in terms of the merits of, and need for, more law to improve justice system responses to IPV.

Exemplifying an earlier reform of this kind, 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 several reasons for this, drawing attention to the flaws inherent in their formulation rather than a 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
- 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 commentaries in relation to the offence of coercive and controlling behaviour introduced in England and Wales on 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 who live together and/or who are in a current intimate relationship, 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 9,000 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 coercive control offences recorded for 2017, clearly indicative of this new legislation gaining a foothold among practitioners. However,

as the data reported by McClenaghan and Boutaud (2017) illustrate, the take-up has been patchy with varying levels of implementation by different police forces.

Early evaluations of the English legislation point to problems for frontline police officers in 'seeing' coercive control (Wiener 2017), in practitioner understandings of coercive control more generally (Brennan et al. 2018; Robinson, Myhill and Wire 2018) and problems associated with providing evidence of 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 Fitz-Gibbon, McCulloch and Walklate 2017; Goodmark 2018). 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, Fitz-Gibbon and McCulloch (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 longstanding dilemma within this field concerning the extent to which recourse to the law can make a difference (see also Goodmark 2018). This recourse to the 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 other strategies listed above, more often than not replicate the problem of defining coercive control, as identified by Hamberger, Larsen and Lehrner (2017), now reappearing in 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 that this article turns next.

### **Coercive control in everyday life**

It is without a doubt that coercive control operates in a myriad of ways in women's (and some men's) everyday lives. Variouslly 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 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 through the use of digital media as a means of control (see, e.g., Douglas, Harris and Dragiewicz 2019; Harris and Woodlock 2019), in directing practices of 'good' mothering (Heward-Belle 2017; Radford and Hester 2006), use as a tool in making sense of 'custody stalking' (Elizabeth 2017) and is well recognised as a non-violent mechanism of control (Crossman, Hardesty and Raffaelli 2016; Stark 2007).

The presence of coercive control in intimate partner relationships specifically in terms of physical coercion and control has been shown to impact children<sup>2</sup> (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 to 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 with 22 divorced women identified control as a feature of all these women's relationships. However, such control 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 the relationship, which might have also involved making sacrifices in the interests of their marriage or children. Many of these experiences could be seen to be associated with the kind of social norms and 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 and expectations to constrain them. Interestingly, the use of physical violence against them featured for women in both 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 work centres the importance of women's understandings of the nature and extent of the manipulation and exploitation they are experiencing.

Crossman and Hardesty's study clearly lends support to the presence of coercive control in relationships but adds a more nuanced understanding of its manifestation in recognising how control might be experienced as either a positive commitment to working in a relationship or as entrapment. Recognising the difference between these circumstances then becomes a critical issue for practitioners and legal responses.

Importantly, these findings, which resonate with the tension 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 e.g., Chung 2005). So while 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 can inform criminal justice intervention remains a moot point. The difficulty with 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, these observations allude to the well-recognised tension between the 'isolated' incident-led focus of criminal justice responses to date, and the process of responding to a series of interrelated experiences that the concept of coercive control endeavours to convey. This tension is not easy to address since the recognition of process 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 fuelled criminal justice policy agendas across the globe since the mid-1980s. The dominance of North American voices in shaping these policy agendas has been well documented by Goodmark (2015). Similarly, the efficacy of these same policies has come under increasing scrutiny, 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, the increasingly present use of this concept as a point of uncontested reference, emulates this policy process. Throughout this process, little thought has apparently been given to alternatives to criminalisation; Goodmark (2017) outlines some of the possible reasons for this. At the same time, there is sufficient evidence pointing to the unintended consequences of harnessing the law in this way—particularly for those whom it is believed might be protected by the law (see, e.g., Douglas 2018; Tolmie 2018)—with protection from the law being additionally problematic for Indigenous women (Blagg 2016), women with disabilities (Thiara, Hague and Mullender 2011) and those from ethnic minorities (Gill and Harrison 2017). This evidence is multifaceted and multilayered, ranging from the specific consequences associated with particular legal strategies to the more general question of what response women (in violent relationships) might want from a criminal justice system and what they might receive in reality. The criminalisation of coercive control has drawn comment along all 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 frontline police officer, to presenting evidence at court, to dispositions by the court—whether 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 (e.g., their role as mothers to their children). These concerns have persisted, 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 without a doubt, 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 to further assert control over their partners (see, e.g., 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 they would want from any intervention, legal or otherwise (as opposed to what activists might want or what policymakers 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, Fitz-Gibbon and McCulloch 2018). To this end, introducing coercive control as a standalone 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 agency and the ongoing concern to criminalise coercive control. The second is concerned with how coercive control in and of itself can downplay violence in relationships, which arguably, is the very issue that is better dealt with through a legal response. 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, to put it more squarely 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. There is here 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, Fitz-Gibbon and McCulloch 2018). 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 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, Larsen and Lehrner 2017), and as a result, its lack of specificity—particularly in the law—carries with it significant unintended consequences for its use.

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, Tittle and Antonaccio (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. However, for the purposes of this discussion, it is sufficient to note that the proponents of coercive control view its presence in women's lives as though it was separate and separable from their experiences of coercion in other aspects of their lives and/or separate from the human condition experienced by 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 in intimate partner relationships is as much methodological as it is conceptual, although these two concerns are connected. The absence of conceptual clarity impedes measurement efforts, 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 domain.

However, police 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, e.g., Robinson, Pinchevsky and Guthrie, 2018). Physical violence can more often than not be evidenced and can result in the kind of criminalisation that is 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 adequately by the incident-led response of the law, while it simultaneously places demands on criminal justice systems that, as yet, have been shown to be less well equipped to respond to when compared with response to physical violence.

In this respect, a concern emerges that 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. Such hiding has far-reaching implications in terms of assessments of perpetrator risk, management of victim safety and seriousness of criminal justice system intervention.

### **Conclusion: Coercive control, meaning and consequences**

A number of themes run 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 more significant question. In particular, the criminalisation of coercive control may fail women in two respects. Firstly, it arguably fails at the conceptual level, in misunderstanding the coercive nature of the law and the inability to appreciate how this concept contributes to the process of erasing women's agency. Secondly, it fails at the experiential level, in failing to see women's lives as a whole, 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 (Easteal, Bartels and Mittal 2019; Hudson 2006). In her later essay, Naffine (2003) sees little to be optimistic about the hold this subject of law has on law’s formulation and practice. However, following Smart (1989) and more recently, Howe and Alaattinoğlu (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 advent of second-wave feminism (see, e.g., 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 power structure 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.

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<sup>1</sup> The two NZ cases analysed by Midson (2016: 425–426) are *R v Wickham* HC Auckland CRI-2009-090-010723 (20 December 2010) and *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775.

<sup>2</sup> However, the importance of the presence of children is specifically mentioned in the Scottish legislation cited above (see further, Stark and Hester 2019).

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