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Chapter Four: Criminalising Coercive Control

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Abstract

In this chapter the different ways in which the criminal law has been invoked as a space in which to respond to coercive control are considered. These strategies comprising looking for a role for expert testimony, adding coercive control to already existing offences, alongside considering coercive control as a specific offence and/or defence for criminal behaviour are examined through the lens of the criminalization thesis associated with the work of Goodmark (2018). The chapter both reconnects with concerns addressed in earlier chapters in reflection on understandings of coercion in the criminal law and also concludes by considering the implications of the absence of victim-survivor voices in these debates and the unintended consequences of their absence.

Key Words

Victim-survivor voices, criminalization thesis, expert testimony, criminal law.

Introduction

Since Stark (2007) defined coercive control as a 'liberty crime', much of the contemporary debate surrounding coercive control has been less concerned with whether it is a feature of domestic abuse or not (the previous chapters have indicated that it is), but more concerned with the extent to which there is a role for the (criminal) law in responding to this kind of abuse. Before proceeding to discuss the various ways in which different jurisdictions have endeavoured to criminalize coercive control, it is worth noting that the notion of a 'liberty crime' itself emanates from a very particular socio-legal context with its own traditions in respect of the relationship between citizenship, rights and the role of the local and federal state in both protecting and delivering these. Placing the notion of a liberty crime in its context immediately raises a question concerning the transferability of this vision of an appropriate response to coercive control from one criminal justice jurisdiction to another. Indeed, Sheley (2020) has pointed out that due process problems would be generated even in the United States in assuming the transferability of coercive control as a specific offence from one state to another. She concludes.

> legal reformers who seek to use our increased understanding of the sociological reality of gender-based harm may be better served not to create specialized offenses to address it, (ibid. 63).

Of course, it is the case that over the last fifty years or so views amongst academics, practitioners and campaigners on the efficacy of the law as a response to domestic abuse more generally do differ. Some see the progressive potential in the criminal law (for example, Lewis et al 2001), with others pointing to its unintended consequences (for example, Smart 1989; Wangman 2020). Such observations notwithstanding, efforts to criminalize coercive control have gained momentum and the purpose of this chapter is to consider these efforts and place

them within the wider context of what Goodmark (2018) has coined as 'the criminalization thesis'.

Before moving into a more detailed consideration of these issues, it is important to note that historically, as Williams and Walklate (2020: 314) evidence,

> .....the wider civil changes in women's rights over access to divorces, custody over children and property being used more frequently than criminalisation, in attempts to improve the position of those women living with violence, at least those who were in a position to avail themselves of the opportunities that these civil changes afforded. What is more, it was these changes that women living with domestic violence themselves asked for time and again, in court, in public writings, and as they reached out to campaigners and lawmakers.

Indeed, there are several important issues embedded within this observation. First, the civil law, and access to rights through civil and family law developments, have had some significant import for women and children living with violence, especially in England and Wales but in other jurisdictions too. This is the case from the telling intervention made by Frances Power Cobbe in 1878 in her essay on 'Wife Torture' (an intervention which proved to be hugely influential in the 1878 amendment to the 1853 Matrimonial Proceedings Act which for the first time allowed women to separate from their husband on the grounds of cruelty, and enabled magistrates to issue protection orders to women whose husbands had been convicted of aggravated assault, see also D'Cruze 1998) to the more recent 2020 judgement made in the Court of Appeal (Civil Division, England and Wales) in favour of a mother in relation to coercive control and the question of joint parental access to children. Second, historically, these civil changes impacted most on those who could make use of them. Third, it was these kinds of changes, relating to housing, custody and divorce, that women asked for.

So, in terms of twentieth and twenty-first century pre-occupations with criminal law responses, as distinct from civil/family law responses, there are important messages to consider when policy responses designed to improve the lives of women and children are being proposed. Risking repetition, family law matters. Listening to women matters. Placing those lives within a wider socio-economic context, matters. These three fundamental themes frame the discussion which follows. However, whilst it is recognised that in some jurisdictions civil/family law responses do embrace the import of coercive control (notably in the State of Victoria, Australia), the focus of this chapter is primarily on the recourse to the *criminal* law as a response to coercive control. Before proceeding further, it will be of some value to set the desire to criminalize coercive control within already existing legal understandings of coercion in the criminal law an issue which was also raised in Chapter Two.

What does coercion mean in criminal law?

The question of what coercion means in law and how it manifests itself in terms of co-offending behaviour, particularly coercion into crime, has been discussed in detail in Chapter Two. There is no intention to repeat those arguments here. Nevertheless, for the purposes of this discussion, and toward furthering our understanding of the potential space for the criminal law in relation to the concept of coercive control, it will be useful to reiterate some appreciation of how the law might construct coercion in the first instance.

As noted in earlier chapters, Brunk (1979) offers one analysis of coercion when used by legal practitioners in plea bargaining negotiations. This analysis draws attention to two interrelated questions: how the relationship between threat and coercion might be understood and what the conditions might be, under which an individual 'chooses' a course of action. Both questions

raise a more fundamental issue concerning what counts as voluntary or involuntary behaviour. Brunk's (1979) threat and coercion are separate and separable in law. Threats can be actionable in law though there is a requirement for corroborating evidence of a threat (a text message, a recorded telephone call or a third-party witness). However coercion is much more difficult to evidence in law. For coercion to be actionable in law, the context in which it takes place is key (Brunk, 1979). Herein lies an important link with Stark's (2007) conceptualisation of coercive control: understanding the context in which a pattern of behaviour and responses to that behaviour occur. Brunk (1979) argues that when individuals make a choice, whatever the conditions of that choice might be, the choice making process assumes that there are a set of normal conditions against which the choice being made can be compared. Thus he goes on to state: '[t]o identify an intervention as coercive is to judge that it breaks with some common practice and/or violates a norm of morality, custom, or law' (Brunk, 1979: 538). So to establish coercion in law, it is necessary to make assumptions as to what might count as 'normal' to demonstrate that coercion (considered non-normal) has taken place. Logically this is a requirement in every situation in which an attempt to define coercion occurs.

Whilst somewhat technical, Brunk's (1979) analysis serves as a useful reminder of the complexities that can occur when asserting coercion in law. It also serves as a reminder that such complexities also lie behind intimate relationships, in which what might constitute 'the normal' is also open to contestation (Renzetti, 1992). To be specific: the slippage between what might count as 'normal' in intimate relationships (in which wanting to know what each other is doing at any one point in time may be seen to be acceptable) to circumstances in which that 'wanting to know' becomes construed as surveillance and/or stalking, is one (obvious) complex and dynamic process. Moreover, as Hanna (2009: 1468) has pointed out,

> the law forces the question of illegal coercion into a yes or no answer. The line between free choice and coercion gets drawn somewhere – and you are either coerced or not.

This observation points up very well the difficult relationship between understanding choice as voluntary and/or involuntary. So as discussed in Chapter Two, in cases of intimate partner homicide where a woman claims coercive control when killing her partner, evidence needs to be forthcoming as to the nature of that coercion and her subsequent ability to make choices. (Though as Chapter Two also has illustrated this is neither a simple nor straightforward process; see also Sheehy, 2014; Sheehy et al., 2012). In such circumstances Midson (2016: 424) has suggested;

> [i]f the accused's choices are constrained or his or her will is overborne by the will of another, the moral fault of the accused is, or at least may be, absent.

In other words there is space for a potential defence case and/or plea of mitigation. Nevertheless dangers remain in translating this kind of appreciation of choice in a case of homicide. Arguably in these circumstance evidence for what Langer (1980) might say constitutes a 'choiceless choice' only becomes defensible when compared with the 'normality' of coercive control (qua Stark, 2007). Kuennan (2013: 6) expresses these dangers in the following way:

> This presumption of involuntariness, when coupled with the practical challenges of measuring the impact of coercion, poses an enormous risk to victim autonomy. If a court substitutes its judgment for that of the victim's because it believes her to be coerced, and presumes that when she is coerced she cannot make an autonomous decision, it usurps control over a decision the victim would like to make for herself, thereby replicating the very dynamic it seeks to prevent. Instead of the batterer compelling the victim to do something she does not want, the court does. This is particularly problematic in cases

involving domestic violence, in which an important element of responding to the problem is to restore a victim's fundamental rights of freedom, choice, and autonomy.

This is not a new problem. It is one generated as a result of investing energy in the criminal law as a response to domestic abuse (see for example, Mills 1999; Bumiller 2008) and hints at the ways in which the criminal law can, and does, act in the interests of the state rather than the interests of either individual women or women as a group. (This is developed more fully in Chapter Five). However, at this juncture it is important to note that the tensions commented on by Kuennan (2013) reflect one manifestation of the tensions confronting the law in endeavouring to reach a judgement in relation to interpersonal relationships. As she goes on to observe:

> In nonabusive relationships, it is a norm for women (and men) to make decisions about their intimate relationships based on love, particularly when deciding whether to end their intimate relationships. The question, then, is how do we as a society draw the line between abusive and nonabusive relationships so as to recognize staying for love as a legitimate reason to stay, rather than writing it off as maladaptive? (Kuennan (2014: 993–994)

One way of making this distinction is to consider the ways in which fear influences decision-making, which a specific offence of coercive control may aim to capture. Nevertheless, as we will go on to discuss, drawing a line between abusive and non-abusive relationships poses problems not just for the law in theory but also for the law in practice. Such distinctions matter. Previous chapters have highlighted the many and varied ways in which women experience coercive control in intimate relationships. Translating those many and varied experiences into legal practice can be fraught with difficulties. Lewis and Greene, (1978) have referred to this as the implementation gap. The question remains however, why criminalise coercive control at all?

Why criminalize coercive control?

As earlier chapters in this book have documented, experiences of coercive and controlling behaviours are real and carry with them severe consequences for those on the receiving end of such behaviours. Recognising the significance of these experiences is important for all those working within the field of domestic abuse. However, the extent to which the criminal law opens a 'space for action' (Sharp Jeffs et al 2018), particularly for victim-survivors, divides opinion. In one of the few studies asking women about their experiences and help-seeking behaviour in relation to coercive control, Boxall and Morgan (2021: 12) conclude:

> Importantly, women who had experienced coercive control were unlikely to seek help from formal or informal sources if they had not also experienced physical/sexual forms of abuse.

This comment alludes to some of the well-documented and problematic complexities for victim-survivors in relation to either what they might think is actionable and doable in law, the conditions under which they might choose the law as one way of seeking out a resolution to the violence in their lives, or indeed what they might want from criminal justice intervention. Tolmie (2018) reviews some arguments in favour of the criminalization of coercive control.

Tolmie (2018) suggests criminalising coercive control places any physical violence experienced by victim-survivors in the context of their relationships and sensitises police responses to non-violent and other forms of low-level offending. All of which may escalate to more overt physical abuse over time (see also Bettinson, 2016). Furthermore greater awareness of the context of a case, should it be prosecuted, can help validate women's experiences of violence, and enable the court to make better informed decisions, especially in relation to the disposition of the offender. This context could include psychological abuse, financial abuse, and abusive use of digital technologies. It would also include physical abuse but would not rely

on this alone. An offence labelled in such a way can capture what has happened, especially over time, more effectively and can inform sentencing (see also Youngs, 2014). Douglas (2015) has also suggested that criminalising coercive control has an educative function (as opposed to simply a symbolic function) and might help victims and the wider community recognise and make sense of their and other's experiences. Johnson et al (2019) have also proffered the view that the law has power as a preventive strategy and if coercive control was recognised as a common feature of lethal relationships, it might prevent such deaths from happening (Johnson et al 2019). However, in those jurisdictions in which specific offences of coercive control have been introduced, the jury is very much still out on whether such legislation can deliver on any of these presumed positive outcomes.

Not all jurisdictions have opted to respond to the increasing recognition and powerful presence of coercive control in abusive relationships with the introduction of specific offences. Following on from Walklate and Fitz-Gibbon (2019), it is possible to identify four different criminal justice strategies affording coercive control a presence in the justice process: as expert testimony, in constructing a specific defence for murder, as an adjunct to other offences, and as a standalone offence. Whilst there is some overlap in the first two of these strategies, each of these will be discussed in turn.

Finding a place for coercive control in the criminal law.

Expert testimony

The role of the expert in providing evidence as to the mental state and/or capacity for any offender of any crime is well-established, though is probably most contested in the context of murder/manslaughter. This is because decisions regarding the culpability of an offender are frequently related to the assignation of guilt and subsequent sentencing decisions. Expert

testimony can then be significant in the deliberations of the court. Sheehy (2018) analyses the efforts made in the Canadian of case of Teresa Craig to invoke coercive control in her defence for the murder of her partner. Evan Stark himself was the expert witness in this case and his presence as such was accepted by the court. Sheehy (2018) goes on to discuss the difficulties encountered and the questions posed for the court in this case in some detail. She concludes that the use of this kind of expert testimony (as opposed to that of a court recognised psychologist or psychiatrist) is likely to have limited success in Canada. Similarly, in the case of Sally Challen in England and Wales (discussed in more detail in Chapter Two), expert testimony relating to coercive control was also presented to the Court of Appeal by Evan Stark. A good deal of the media coverage surrounding Challen's appeal focused on this and the role the already existing standalone offence of coercive control introduced in England and Wales in 2015 might have had in this case. However, as in Canada, the appeal judgment suggests that the evidence of coercive control, as presented to the court, was not as significant as might have been anticipated. Indeed, Lady Justice Hallett stated:

> 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)

Thus, to date, expert testimony on its own, has had little success in securing positive outcomes from the court in cases of this kind. As Sheehy (2018) observes, to date the court seems to be far more comfortable with such experts presenting validated (in their view) evidence rooted in psychology and psychiatry as opposed to that rooted in understandings of interpersonal relationships.

Locating a space for expert testimony in relation to coercive control is pushed somewhat further by Tolmie et al (2021). In a detailed analysis they document the evidence needed to support a

case of self-defence for murder when through the lens of social entrapment. This draws on the concept of coercive control. They make an evidenced and convincing case for expert testimony in cases where social entrapment can be documented and indicate the criteria such testimony would need to meet. They conclude by suggesting that in Australian jurisdictions:

> While expert psychologists and psychiatrists have often been called in murder trials involving IPV, their evidence is focussed on the workings of the human mind. We suggest that expert testimony about understanding patterns of abusive behaviour in their social context would be appropriately provided by asocial scientist or a social worker with expertise in this area (Tolmie et al 2021: 354)

Clearly the debate surrounding the role of expert testimony in cases involving coercive control is ongoing and to date is unresolved. However this debate surrounding the potential for a role for expert testimony in relation to coercive control slips, almost imperceptibly, into the more legally focused space of framing specific defence strategies for murder per se.

Specific defences in cases of murder (and other crimes)

Midson (2016) made some early observations reflecting on the possibilities of coercive control as a specific defence particularly in cases of murder. She engaged in a comparative analysis of two cases and their associated judgements in New Zealand and explores the dual questions raised for the legal concepts of culpability and responsibility when viewed through the lens of coercive control. She reaches the conclusion that,

> 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)

In some respects it was this tension between culpability and responsibility which was exposed in the appeal case of Sally Challen (referred to above). The undisputed presence of a weapon used by Challen to kill her partner constituted part of this problematic equation in this case.

Nevertheless, understanding the circumstances and the wider context under which such acts occur (like that of Challen) has been a fruitful route to re-orienting accepted interpretations of provocation as a partial defence for murder (as illustrated in the work of Fitz-Gibbon 2014) and the Challen case, alongside the greater awareness of coercive control, may add to such re-orientations. More specifically the Prison Reform Trust of England and Wales has been involved in a campaign to encourage the recognition of coercive control as a route into all kinds of offending for women (see Chapter Two). They have also been vocal in seeking amendments to the 2021 Domestic Abuse Act (England and Wales), the success of which are, at the time of writing, remains unclear.

Coercive control as an adjunct to already existing offences

In some jurisdictions, notably the United States, the push to criminalise coercive control has taken the form of adding this feature of domestic abuse to other behaviours already criminalized in the criminal code. Ortiz (2018), for example, makes the case that Tennessee, could adapt its law on false imprisonment to include a specific category defined as domestic false imprisonment. This might be categorised 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)

Following this line of argument in adapting already existing laws, Stansfield and Williams (2018) provide evidence between the use of threats to kill and the delivery of such threats. Based on this evidence, 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)

Thus an offence of nonfatal strangulation constitutes another way of ensuring the recognition of coercive control on the statute books. Offences of nonfatal strangulation exist in 47 jurisdictions in the United States (Theakston, 2019), have been introduced in New Zealand (NZ *Family Violence (Amendments) Act* 2018 s 189A) and have been introduced and/or debated in several Australian states and territories (Gotsis, 2018). This offence was also introduced into the 2021 Domestic Abuse Act (England and Wales).

Taking this route to securing coercive control on the statute books requires practitioners to embrace an understanding of it and its impact (see also Brennan et. al. 2018). This is a process of change which has never been simple or straightforward. As was implied above, there is frequently a gap between the law in theory and the law in practice (Lewis and Greene 1978). Such difficulties notwithstanding, other jurisdictions have taken the concept of coercive control further and have introduced specific legislation designed to criminalize the behaviour included within it. This strategy has provoked much debate and is reviewed in what follows.

A specific offence of coercive control

Over the last decade, introducing a specific offence of coercive control has either been implemented or considered across in a number of jurisdictions. For example, specific offences foregrounding coercive control have been differently introduced in England and Wales, Scotland, the Republic of Ireland (Soliman 2019) and have been considered in Canada,

different states in Australia (Douglas 2015) and debated in the United States (Tuerkheimer 2007). Some of these interventions are gender-specific and some are not, some only apply to intimate partners and others include other family members. However they all share the view that a new kind of criminal offence is needed to capture the pattern of abusive behaviours embedded in coercive control, that this constitutes a gap in the legal framework and that such an intervention would fill this gap in an innovative way (Weiner 2020). As will be developed, in some ways such interventions raise more questions than answers in respect of the efficacy of the criminal law as a response, for either violence against women generally or coercive control specifically.

One early legal intervention drawing on coercive control was the Tasmanian *Family Violence Act* 2004 (Tas). This legislation introduced two new offences: one of economic abuse and one of emotional abuse and intimidation. Both offences were defined in relation to an ongoing course of conduct, though to date neither have secured many prosecutions. McMahon and McGorrery (2016) have suggested several reasons for this but point primarily to limitations inherent in the formulation of the law itself. Their observations echo some of the early commentary associated with the specific offence of coercive control introduced in England and Wales in December 2015, amended in the 2021 legislation and discussed in detail in Chapter One. The definition in this legislation explicitly draws on the work of Stark (2007) except regarding the question of gender. The legislation, both in 2015 and 2021, is framed in gender-neutral terms. In contrast, the Scottish legislation introduced in 2018, 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). (The 2021 legislation in England Wales now also include ex-partners). However, Scottish legislation has come to be referred to as the 'gold standard' (Scott 2020) in terms of its appropriateness

and efficacy as a legal response. Yet the extent to which either pieces of legislation has been taken up and acted upon within the criminal justice process since their introduction is still under scrutiny.

Statistics for the year ending March 2019 indicate a fourfold increase in cases of coercive control receiving a first hearing in a magistrate's court (from 309 year ending March 2017 to 1177 year ending March 2019) with 308 convictions in which coercive control was the principal offence being tried in the year ending December 2018 (Office of National Statistics 2019). Given that the police recorded 1.3 million domestic abuse related crimes in the year ending March 2019 and in that same year the Crime Survey for England and Wales estimated that 2.4 million people experienced domestic abuse, these figures highlight the ongoing relatively low usage of the offence. In a detailed statistical and evidenced review of the coercive control legislation (Home Office 2021), one conclusion there points out:

> There is currently a lack of robust data on CCB prevalence, making it difficult to measure how effective the offence has been at capturing CCB offending. There is no common statistical definition of CCB used across survey data, administrative data collected by third-sector organisations and research data, making it difficult to compare prevalence and characteristics of CCB across different sources.

In a recent empirical study on the implementation of the 2015 legislation based on Freedom of Information requests from police forces in England and Wales, Brennan and Myhill (2021: 14) found that:

> the rate of charge or summons for perpetrators of controlling or coercive behaviour offences was half that for other domestic abuse offences, and the likelihood that a case would be discontinued because of evidential difficulties was over 50% more likely than for other domestic abuse offences.

Of course some of the issues found in this study are pertinent to criminal justice responses in all cases of domestic abuse and lack of comparable data does make efficacy claims on behalf of specific legislation more difficult. However, as is developed below, some work has focused on such claims and the associated problems of implementation. (At this juncture it is worth noting that at the time of writing there are no official comparable figures from Scotland where the legislation did not come into effect until April 2019).

In terms of evaluation of the efficacy of the 2015 legislation, whilst McMahon and McGorrery (2019) make some positive claims in this regard, it is important to note that their analysis is based on press coverage of cases. This is limited as a source of data. Nevertheless, what has been evidenced is the difficulties associated with translating this law into practice. For example, data reported by the Bureau of Investigative Journalism (BIJ, 2017) illustrated that the initial take up of this legislation was patchy and suggested varied levels of implementation in different police forces, evidencing issues with 'justice by geography'. Early evaluations also pointed 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). In a study analysing police responses to coercive control in partnership with a police force based in the North of England, Barlow et al (2020) identified that less than 1% of all domestic abuse offences were recorded as coercive control (in the year 2016-17). This work engaged in both quantitative and qualitative analyses, paying particular attention to those cases in which it was possible to identify patterns of abuse. Based on this work, this research suggests police officers may be missing key opportunities for identifying such abuse with the tendency to focus on isolated incidents of abuse proving to be persistent. Evidential opportunities were often missed, including not fully investigating evidence of coercive control

disclosed in victim witness statements (such as behaviours being disclosed and not followed up by police officers), failure to seek third party witness statements, and failing to capture effectively the victim's initial account or using body-worn cameras as a source of evidence.

The focus on physical violence when responding to domestic abuse also influenced police officers' assessment of risk and likelihood of arrest in such cases. Tolmie (2018) suggested that the coercive control offence may only lead to successful charges in cases where physical violence is present, consequently minimizing the nature of intimate partner violence in non-physical contexts. The empirical work by Barlow et al (2020) supports this view with many of the (few) successful prosecutions in this research featuring evidence of physical violence. This echoes the earlier findings of Robinson et al (2016) which pointed to the 'small constellation of risk factors' embraced by police officers in their decision-making in relation to domestic abuse and is also supportive of the observations made by Tolmie (2018) and the Home Office (2021) review of this offence.

The emphasis on physical violence as a risk factor is hardly surprising, since risk assessment tools are designed to assess what is measurable and actionable neither of which readily translate to assessing the risks present a pattern or web of abusive behaviour (Barlow and Walklate, 2021). Nevertheless there is some evidence to support the view that training interventions for police officers can both improve their understanding of coercive control, procedures for evidencing it in conjunction with the adoption of a positive stance towards domestic abuse more generally (Brennan et al 2021). However what might be seen to be as a positive intervention on the part of the police also needs to be viewed in the same light by other criminal justice professionals and partner agencies, as well as being seen to be positive by victim-survivors themselves. This is an issue returned to below.

To summarize; the problems so far identified with a recourse to the criminal law generally and the development of specific offences of coercive control particularly, especially in relation to their implementation, are not new to the field of domestic abuse. There are, and have been historically, difficulties in shifting the criminal justice gaze away from incidents to processes. This is required for the recognition of coercive control (Kelly and Westmarland 2016). This re-orientation in approach also applies to the problems of evidencing coercion (Bishop and Bettinson 2018; Brennan and Myhill 2021). Moreover, it has been well-documented that the law is a blunt instrument in affording change to the wider social practices of violence rooted in gender inequality (see inter alia Smart, 1989; Goodmark 2018). Tolmie (2018) provides a substantial summary of the arguments both for and against using the law in this way, with Douglas (2018) suggesting that the law itself can act as a site of abuse, adding to and exacerbating the list of abuses women already experience in their relationship. 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 what was then 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.

As already indicated, Burman and Brooks-Hay (2018) are articulating a long-standing dilemma within this field. However, it is important to add that the recourse to the law in the context of this specific offence, also fails to recognise three issues: 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). In addition, it is possible to add to this list the emergent issue of misrecognizing the victim as the principal offender (see inter Women's Legal Services Victoria, 2018; Nancarrow, 2019; Reeves, 2021). All these failures add to the fundamental question asked by Crossman and Hardesty (2018: 196): 'what makes control coercive?'. Perhaps expressing this question in a slightly different way, there are clearly difficulties in evidencing the extent to which the recourse to the criminal law achieves either improved safety outcomes for women (especially women who are particularly marginalised from the criminal justice process) and/or enhances perpetrator accountability. In the light of these questions it will be useful to push the question of victim-survivor voices in relation to criminal justice in general and the criminalisation of coercive control particularly, a little further.

Finding a space for victim-survivor experiences.

In some ways the speed with which coercive control as a specific offence has grasped policy imaginations reflects that which Goodmark (2015) has called 'exporting without a licence' and that which Walklate and Fitz-Gibbon (2019) have called 'coercive control creep'. This offence creep, however, contains within it a number of problematic assumptions when seen through the eyes of what is known about victim-survivors' embrace of criminal justice processes.

The offence of coercive control relies on the willingness of victims to engage in the legal and criminal justice process to secure a successful prosecution. It is important to acknowledge that frequently there is less physical evidence in coercive control cases when compared with other

domestic abuse related offences, such as actual bodily harm or criminal damage. This means that victim testimony can be vital in securing a charge, the option of evidence-led prosecutions notwithstanding. Stark's (2007) emphasis on coercive control as a 'liberty crime' is rooted in an assumption that women would want, or feel able, to provide a detailed narrative of their experience in court or would trust another to do so on their behalf. Victim-survivor reluctance to engage with criminal justice is well-documented and is particularly pertinent when viewed through the lens of structural inequalities such as race, ethnicity, class, disability, and indigenous status (Nancarrow 2019). Reflecting on the work discussed in Chapter Two, it is important to note that women as offenders coerced into crime are also unlikely to engage in the criminal justice process concerning their experiences of victimization consequent to their own experiences of criminalisation and the coercive nature of the system itself (Barlow, 2019). It is also the case that victims of coercive control can experience further abuse and the exertion of power and control by their abusers when they attempt to prosecute (Douglas, 2015).

Coercive control is highly complex with perpetrators often able to create a false reality of 'what is actually going on here'; a reality which in turn can become internalised by victim-survivors. This renders engagement within the criminal justice process challenging for them, and the response of criminal justice professionals, including prosecutors and judges, central to the success or otherwise of any prosecution. As Tolmie (2018) points out, assuming victim-survivors can address bad relationships by 'choosing' to leave, or they can keep themselves and their children safe by contacting the police or getting a protection order, is hugely problematic. These assumptions also put the burden of responsibility for addressing the perpetrator's behaviour onto the victim. Responsibilising the victim-survivor in this way constitutes a danger especially when they have children (see inter alia Meyer 2011). Frequently women believe what their partners have told them about their ability as mothers and the

likelihood of them losing access to their children should they report their partner for abusive behaviour. Such fears become more acute the more marginalised the woman is. For example, for women living with disability the 'fear of retribution or a loss of support' can be heightened if the perpetrator they report is also their carer (RCFV 2016: 31, 183; McCulloch et al 2020). Similarly issues in relation to reporting behaviour and engagement in the criminal justice system can be acute for Indigenous women. For example, Wilson (2017: 288) reports that:

> The under-reporting of family violence for indigenous peoples is a concern made worse by structural discrimination, fear of being excluded from their community, fears about consequences for the offender, lack of access to services due to rurality and remoteness, and encountering culturally inappropriate responses.

These silencing processes add to women 'Feeling unsafe within one's family and within a system designed to provide helping services can place indigenous women and children at greater risk of serious injury and death' (Wilson 2017: 289).

Some of these same issues also apply to those men who have experienced coercive control and whilst it is widely accepted that coercive control is a gendered phenomenon, this does not mean it is only done by men to women. As Chapter three has documented, men can be subjected to coercive control too and whilst their experiences may take on a different shape and form and are most frequently expressed in terms of access to children, they too can feel unheard in the criminal justice process. These 'contextual complexities' (Wilson, 2017) not only raise fundamental questions about the appropriateness of criminal justice responses in general, but also about understandings of coercive control in particular. In the case of the latter, the coercive and controlling behaviour of a partner may be seen as more tolerable than the coercive and controlling responses of the state and its authorities (Wilson 2020; see also Nancarrow 2019).

Such contextual and structural complexities are also evident for migrant women, women whose visa status may be temporary (Maher and Segrave 2018) and women for whom offending family honour may be a more traumatic prospect than living with the violence in their lives (Gill and Harrison 2017).

These observations provide some insight into the complexity of criminalisation and in using the law as an avenue for innovation and/or as a mechanism for changing such complexities. In sum, for those women for whom the state and/or their family are feared more than their partner, to engage 'successfully' with criminal justice they must demonstrate that they are blameless victims. The reality is the state finds it much easier to construct these and other women as dual offenders than it does to readily accept their status as a victim-survivor (see for example, Reeves and Meyer 2021, Stubbs and Wangmann 2015). With all of this in mind, the criminalisation of coercive control may work for some women, but it will not work for all and indeed it may further marginalise others. In practice criminalisation is not a quick fix policy option.

The debate generated around the introduction of coercive control as a specific offence discussed above is in many ways a manifestation of a deeper problem which has plagued those committed to changing policy responses to violence against women since the 1970s. This problem is: how and under what conditions might a criminal justice response to such violence(s) be an effective one? Goodmark (2018) refers to this problem as the 'criminalisation thesis'.

The Criminalisation Thesis

The criminalisation thesis grew in prominence during the 1980s, particularly in the United States and spread soon after to other parts of the Anglo-speaking world. During the late 1970s and 1980s the voices demanding tougher responses to crime more generally became aligned with feminist voices campaigning for all violence(s) against women to be taken more seriously, particularly within the criminal justice system. As recognition of, and concern about, violence against women became more prominent, the policy responses developed in response to these concerns became marked by a recourse to the law. (See inter alia Walklate 2008, Smart 1989). It is important to note that not all feminist voices spoke as one in relation to this. Some pointed to the fact than changing the law and its practice was only one piece of the puzzle (see for example Wilson 1983) and Goodmark's (2018) analysis does point to the myriad ways in which focusing attention on criminal justice has been beneficial for some women. However, as Goodmark (2018) goes on to outline, and has been intimated above, these same practices do not impact on all women (and some men) in the same way. Importantly, as Stubbs and Wangmann (2015) evidence, the different legal domains women are exposed to when their experiences of violence come to the attention of the authorities, requires them to perform themselves differently (to fit with the expectations of these different authorities as legitimate and/or blameless victims) to secure legal redress and safety for themselves and their children (see also McCulloch et al 2020; Meyer, 2011). At the same time Goodmark (2018) has argued that many of the policies marked by criminalisation have added to the hyper-incarceration of men of colour (especially in the United States) and have committed police and criminal justice resources in ways in which it is difficult to see what good effect they might have had (see also Goodmark 2020).

Goodmark (2018) is clearly commenting on the impact that this move towards criminalisation has had in the United States ultimately asking the question: does criminalisation deter? Despite the US orientation of her analysis, the issues raised in her work are pertinent to the recurring recourse to law found in other jurisdictions across the global north and south. Whilst this work proffers some interesting questions around global convergence in relation to criminalisation, significant institutional/local differences remain (see Carrington et al 2018). Echoing observations made earlier in this chapter; Lacey (2016) observes that the law in action is not the same as the law in books (as the problems of implementing coercive control laws referred to above illustrate). Thus a deeper analysis of the problems and possibilities of criminalisation is called for. Put simply, in searching for that deeper analysis criminalisation is rendered more complex. This serves to remind us that the criminal law, in the creation of the legal subjects of law (complainants and defendants), is intimately connected with understandings of responsibility (in law) and the construction of the responsible subject (of law). This subject as Lacey (2013) reminds us, is gendered. Thus in law, who did what to whom and why, is interconnected and gendered. These are not new observations, but an understanding of their import is often absent from the desire to expand the remit of the criminal law to capture coercive and controlling behaviours. The failure to recognise the silent but pervasive influence of these issues in the recourse to law is telling and important for (at least) two reasons. It brings more clearly into view the questions of who the subject of criminalisation is and whose interests are served in the construction of this subject. This requires further explication and is discussed in the chapter that follows.

Concluding Thoughts

This chapter has explored the increasing policy interest in, and focus on, what is known about the impact of coercive control on those subjected to it and the role of the criminal law. The chapter has noted the different ways in which different criminal justice agendas have embraced

the need for this kind of response and reviewed the problems and possibilities associated with it. Importantly this discussion has considered this desire for criminalisation in the context of not only the increasing awareness of coercive control itself, but also in the context of thinking about what coercion might mean in law and the historical embrace of criminal law (discussed here in reference to Goodmark's delineation of the criminalization thesis) and its unintended consequences. Reflecting on those unintended consequences has led to a further consideration of the under-explored question of the extent to which the criminalization of coercive control meets the requirement of meeting women's (and children's) desire for safety. This point is perhaps worth developing further.

The wider reluctance of women to engage in the criminal justice process more generally is not only well-documented but also needs to be a central concern for the debates discussed here. To date, the voices of advocates notwithstanding, there is little evidence available to be able to make decision on the relationship between rendering coercive control illegal and resultant improved safety for women (and children). Recognising this as a central issue provokes the need to unpack a range of further questions in relation to this agenda, some of which have been alluded to in the discussion above. Put simply for the purposes of this conclusion, if improving women's (and children's) safety is of central concern then consideration needs to be given to several issues. The extent to which rendering coercive control illegal achieves women's safety and if it does not what needs to be in place to ensure that it does. This might lead to a more holistic approach to understanding the criminal justice system as a system and the need then, for example, for common understandings of risk and risk assessment which put women's voices at the centre (Barlow and Walklate, 2021), and for robust and commonly grounded information sharing systems that do not put women's and children's interests at odd with one other (Hester's 2011 'three planets' model is of relevance here). In the absence of asking these

questions the elephant in the room might be the question: whose interests are being served in the criminalization of coercive control? At this juncture it is possible to offer some insight and a partial answer to this question.

Criminalising coercive control certainly serves the interests of the state in appearing to be 'doing something' about violence against women. However more concerningly, it also potentially ensures the ongoing marginalization of Indigenous women, ethnic minority women, women living with disability and so on as some of the work referenced in the discussion above articulates. It does this primarily by leaving the man of the law invisible (Naffine 2019) in whose presence women are required ever to be blameless victims (Fitz-Gibbon and Walklate 2021). These are the questions to be developed further in the chapter that follows.

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