Book Reviews

CRIMINAL LAW AND THE MAN PROBLEM by NGAIRE NAFFINE
(Oxford: Hart Publishing, 2019, 224 pp., £55.00)

In this erudite and powerfully argued book, Ngaire Naffine adds to her already distinguished contributions to feminist legal scholarship with a trenchant critique of the persistent patriarchy of criminal law, illuminating the sexed ways in which it 'brings its characters into being' (p. 148). Focusing on key cases, legislative arrangements, texts, and commentaries stretching from Matthew Hale in the early eighteenth century right through to the present day, Naffine interrogates criminal law's construction of its subjects and deconstructs the supposedly neutral 'person' of modern criminal law. While '[t]he criminal law scholar['s] … people are persons and individuals; and even the bodies of the persons they invoke are strangely abstracted – typically lacking a sex and yet somehow imagined as enclosed forms but not thoroughly visualised' (p. 26), this, Naffine argues, is an illusion – a product of a structural erasure of, in effect, the sex of criminal law:

> [C]riminal law, as a discipline, does in fact engage mainly with men and their antisocial behaviour, and the formulation of its offences has necessarily been in response to male behaviour and male social norms. Men have made the criminal legal world. They have drawn it up, decided on its priorities and they are also its central characters. … The problems of men have been the problems of criminal law. (p. 23)

I will return below to Naffine's claim about criminal law being concerned primarily with male behaviour so as to concentrate in the first instance on the key contribution of the book in illuminating the evolving doctrinal and ideological mechanisms through which the sex of the legal subject has been at first explicitly asserted and then gradually obfuscated. At the heart of her analysis are criminal law's arrangements for the liability of husbands, and commentators' rationalizations of those arrangements. This focus on legal statements about men as husbands is necessary, she argues, because 'men, as men, only come clearly into view when they are defined in relation to women. Logically, it is the other sex, that which men are not, which sets the boundaries and the contours of men's nature' (p. 42). Of course, this focus puts the history of the marital rape exemption – alongside the doctrine of coverture, the defence of provocation, and the doctrine of the unity of husband and wife – at the core of the interpretive project.

I confess that my first reaction to this was that it might be difficult to ground a general critique of criminal law and criminal lawyers on such relatively specific grounds. However, I in fact found Naffine's analysis persuasive. In

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effect, she convicts both criminal law and criminal law commentators – right up to the present day – of rank hypocrisy. On the one hand, rape is universally held up to represent a paradigm offence at the most serious 'core' of criminal law; on the other, this allegedly horrific crime was, right up until the late twentieth century, magically erased by the mere fact of marriage. Many of the iconic figures of criminal law scholarship in the common law world are the objects of Naffine's critique: Matthew Hale, James Fitzjames Stephen, Glanville Williams, Tony Honoré, Norval Morris, and – of course – William Blackstone, who 'set the tone of male hubris and condescension for the other sex, with his wry note that "so great a favourite" were women to the laws of England that most of their rights were stripped away from them upon marriage' (p. 58). Only a few courageous thinkers – John Stuart Mill and Edward Christian key among them – have been willing to call out the law's hypocrisy and collusion in men's unjust domination of women. On the whole, 'Our men of legal influence were in the grip of incompatible ideas' (p. 107): that the wrongs and harms identified as criminal would be pursued by the law without prejudice; yet that the status of maleness accorded immunity in relation to some of those most serious wrongs when committed against women.

Perhaps most telling for the contemporary reader is Naffine's coruscating critique of the terms in which the marital rape exemption was finally abolished in many common law jurisdictions in the late twentieth century. The various stepping stones on the way to abolition – notably the quite extraordinary period in South Australia during which the exemption was abolished in cases involving humiliation or violence, as if any rape could avoid such features – were themselves shameful, and the evasive way in which full abolition was finally secured simply failed to notice that a fundamental change in the status of men was being effected. Rather, this revolutionary moment was presented as one small step in a gradual process of modernization by which women have been drawn out of the 'primeval female slime' of reduced status (p. 126), in a (moderately) embarrassingly belated instance of the law catching up with social mores: 'With its single-minded focus on the incapacities of women, *R v R* implicitly treated men as liberal subjects all along, their status as men essentially unchanged by these amendments to the law of rape' (p. 210). In this context, Naffine draws a striking contrast between the acknowledgement that, in effect, the law had colluded in the victimization of married women by legitimizing marital rape for centuries, and parallels such as former Prime Minister Gordon Brown's posthumous apology to Alan Turing, let alone phenomena such as the Nuremberg Trials or Truth and Reconciliation Commissions following instances of genocide or other forms of racially based oppression.

However, while women have been treated with serious and persistent contempt and injustice, men, too, have been damaged, not least by the early doctrines through which criminal law in effect established and legitimated the male social role as encompassing wives' and daughters' identities; as the

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‘domestic monarch’; as the ‘sexual master’. The nineteenth-century doctrine of the unity of man and wife was simply one amid

> [a] range of laws [which] physically bloated and morally withered men’s legal personality … [removing] from men legal duties or responsibilities regarded as defining of Kantian moral and liberal legal personhood: the duty to respect the autonomy of others and not to breach their personal security. This moral diminution of the personality of the husband, as a consequence of his reduced responsibility to ‘female’ others, has received little scholarly attention. And yet it represents a serious significant adjustment to the liberal idea of the individual. We are accustomed to thinking of this adjustment as one which pertains to women. But equally, and perhaps more damagingly, it pertains to men. (p. 90)

Law’s arrangements, in other words, were inconsistent with men attaining standing as a liberal individual – a further form of institutional hypocrisy, or perhaps self-deception.

At the heart of Naffine’s account, of course, is the role of power – both in shaping legal arrangements, and in distorting commentators’ view of them:

> Immense power, a tight social demography and self-interest are poor ingredients for fair and impartial judgment. They have led to what might be called the self-ignorance of the influential. … The imputed features of women and of men (and the person), and the regulation of their relations within criminal law, need to be seen as a function of power. The moral and legal character of the person, and of men and women, has depended on who has been permitted to define them. … [T]he result has been law in the interests of the powerful, which has not been defined as such. (pp. 141–142)

Ironically, these effects of power have become yet more difficult to expose amid the emergence of the ‘neutral’ (even if, on occasion, accorded a female pronoun…) subject of criminal law and the ‘Olympian’ stance of modern philosophical criminal law theory. Yet attributes of the modern legal person/abstracted individual – rationality, autonomy, self-government – are of course strongly socially associated with men. Hence it is ‘very difficult to pluck gender out of the abstraction of the person’ (p. 171):

> Rather, he has a male lineage … This patrimonial lineage of the abstraction of the person is highly destabilising for the discipline of criminal law because of [its]… defining commitments to the preservation of the bodily integrity of *every* individual, not just men. (p. 173)

In this context, Naffine also notes the irony that the emergence of impartiality and neutrality in legal theory has gone hand in hand with the insight, across the social sciences, humanities, and even the ‘hard’ sciences, that the analyst’s gaze and social position shape the construction of knowledge (p. 131). Until the ‘man problem’ is much more widely recognized across in criminal law practice and scholarship, and the insights of Jennifer Nedelsky’s and other feminist theorists’ work on the relational nature of subjectivity and

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human being[1] taken fully on board, Naffine concludes that criminal legal discourse will be fundamentally distorted by its internal contradictions and moral incoherence, achieving a mere 'deeming' of the inclusion of women (or indeed of any realistically embodied human beings). The upshot is that the vaunted idea of criminal law's contribution to peaceable and respectful civil society remains radically incomplete.

Naffine's book is an eloquent testimony to the illuminating power and critical potential of a historical analysis of legal arrangements and the terms in which they have been justified. In a precedential, common law system, each decision and development proceeds in some sense by reference to the past, and Naffine's comprehensive survey of the treatment of the marital rape exemption and other features of criminal law's empowerment of men at the expense of women shows how the field has been polluted by the uncritical reception of the legacies of its luminary-patriarchs. She is able to show that the assumptions underlying the purportedly archaic arrangements have yet to be thoroughly exposed and revised. This is painstaking work, against the grain of both contemporary academic discourse and prevailing legal ideology; but it is work on which Naffine makes decisive progress. Certainly, as some critics may complain, many of the influential scholars whose slowness in acknowledging the outrage of the marital rape exemptions had impeccable liberal credentials in many areas. However, this simply serves to underline the shocking contrast between their sensibilities about other forms of oppression and those bearing centrally not just on women's physical and emotional safety but also on the status of men.

A trickier issue from my point of view has to do with Naffine's argument about the centrality of criminal law's concern with men's 'antisocial behaviour': the claim that criminal law has a 'man problem' not merely in terms of its implicit assumptions about 'full' or 'normal' personhood, but in terms of the fundamental problems that it addresses. In this context, she cites artist and cultural commentator Grayson Perry's (perhaps tongue-in-cheek) argument that women should be claiming a tax credit to compensate for the fact that by far the largest part of the cost of criminal justice is occasioned by men.[2] Certainly, both certain forms of female victimization and the striking, and strikingly persistent and pervasive, male-gendered pattern of criminalization call for our critical attention. As I began to draft this review, the Femicide survey for 2018 revealed that 149 women were killed by men in the United Kingdom, 61 per cent of them by a former partner – a statistic that reflects the continuing shadow of the marital rape exemption. Of the 58 women not killed by a current or former partner, 17 were killed by their sons, sons-in-law, former sons-in-law, or stepsons. Notwithstanding a significant

1 See, for example: J. Nedelsky, *Law's Relations: A Relationship Theory of Self, Autonomy and Law* (2011); S. Benhabib, *Situating the Self* (1992); D. Tietjen Meyers (ed.), *Feminists Rethink the Self* (1996).

2 G. Perry, *The Descent of Man* (2016).

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political and policy focus on domestic abuse in the United Kingdom in recent years, these figures represented an increase on the previous year.

Such figures undoubtedly invite the diagnosis of a 'man problem' in criminal law. However, of course, they represent a small fraction of the behaviour formally labelled as crime, and a yet smaller fraction of that which might be so labelled. Furthermore, as the sociological and critical criminologies of the latter part of the twentieth century have shown so clearly, a range of vectors of power are implicated not merely in shaping how the criminal law defines offending behaviour, but – equally if not more important – how those definitions are interpreted and implied in enforcement practice. This does not detract from criminal law's 'man problem' as Naffine mainly defines it. However, it reminds us that criminalization raises a range of problematic questions of justice. It implies, for example, a race/ethnicity problem, a class problem, and a heteronormative problem, each of which calls for a similarly thorough critical analysis. Such an analysis will also need to deal with the interaction between different strands of prejudice, power, and structurally mandated ignorance.

At first sight, the recent emergence in countries like the United Kingdom of an array of mentalities and social practices resistant to the sex/gender binary might be thought to subvert any effort to pinpoint a 'man problem' in criminal law. However, once we understand – as Naffine helps us to do – that criminal law's constitution of male and female subject positions is at once real (an operation of power) and yet a fantasy (a set of ideas projected into human bodies under the gaze of the law), we can see that some of these new forms of gender-binary resistance are even now calling forth reactions that re-enact that binary and oppressive coding. Key examples are cases in which a young woman's presentation of herself to a sexual partner as male has been taken as an obvious case of a fundamental deception destroying consent: as self-evidently a more important deception than, say, presenting oneself as a genuinely engaged partner as opposed to an undercover police officer. Naffine's analysis prompts us to ask whether this is a matter of protecting vulnerable victims or rather an impulse to punish women who appropriate the appendages of male power. The marital rape exemption may have been laid to rest; but, as Naffine shows, the challenge of constituting criminal law's subjects in ways conducive to gender inclusivity and social civility remains to be adequately confronted.

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