Academic Reflection – Gender, Subjectivity and Criminal Responsibility

Arlie Loughnan*

The topic of gender and criminal responsibility has long attracted critical scholarly attention. Several cohorts of feminist scholars in law, criminology and history have examined various dimensions of women's responsibility for crime. As a component of the wider body of scholarly work on the topic of female deviance or gender and crime, feminists have explored the 'sexed subject of law',[1] covering the gendered nature of norms about agency and rationality and their role in the construction of women defendants as less than full subjects of the law.[2] Some scholars have also examined what Carol Smart called the 'sickness model of female criminality' – the dense network of connections between women and 'madness' that inform parts of the law applying to criminal women, and according to which women are constructed as 'mad' or 'sad' rather than 'bad'.[3] Looking across these critiques, which are sophisticated and nuanced, it is clear that principles and practices governing women's responsibility for crime implicate wider concerns of feminist theory – with subjectivity, identity, equality, fairness and justice.

Nicola Lacey's work is at the forefront of this critical examination of gender and criminal responsibility. Lacey tackles this topic from both a feminist legal theory perspective and a criminal law theory perspective. Lacey's feminist legal scholarship is showcased in *Unspeakable Subjects: Feminist Essays in Legal and Social Theory*,[4] the impetus for this special issue of *feminists@law*. In *Unspeakable Subjects*, Lacey critiques the ways in which liberal legal ideology embeds individualism in legal systems, obscuring certain kinds of social arrangements, such as those around gender and sexuality. Lacey analyses several sub-disciplines within law to assess the gendered nature and operation of laws that exclude, discriminate and discount women and others.[5] As a feminist legal theorist, Lacey interrogates legal theoretical claims to neutrality, coherence and rationality, and incites feminist scholars to engage with jurisprudential questions about the nature of law.[6] Lacey makes a powerful case for the need for 'normative reconstruction' of the central legal and ethical concepts of rights

* Professor of Criminal Law and Criminal Legal Theory, School of Law, University of Sydney, Australia. Email arlie.loughnan@sydney.edu.au My research on criminal responsibility is supported by an ARC Award, *Responsibility in Criminal Law* (Grant No. DE130100418). I would like to thank Nicola Lacey for all the advice, encouragement and support she has provided me – both personally and professionally – since I was her very fortunate graduate student at NYU and LSE, and for all of her interventions into legal debates, which continue to stimulate my own thinking and writing.

[1] See eg Ngaire Naffine and Rosemary Owens (eds.) *Sexing the Subject of Law* (Allen and Unwin, 1997); Regina Graycar and Jenny Morgan *The Hidden Gender of Law* (Federation Press, 2002).

[2] See for discussion Nicola Lacey 'Violence, Ethics and Law: Feminist Reflections on a Familiar Dilemma' in Susan James and Susan Palmer (eds.) *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Hart Publishing, 2002); see also Ngaire Naffine 'Can Women be Legal Persons?' in James and Palmer, ibid.

[3] See Carol Smart *Women, Crime and Criminology: A Feminist Critique* (Routledge, 1976), ch 6; see also Hilary Allen *Justice Unbalanced: Gender, Psychiatry and Judicial Decisions* (Open University Press, 1987); Tony Ward 'The Sad Subject of Infanticide: Law, Medicine and Child Murder 1860-1938' (1999) 8(2) *Social and Legal Studies* 163.

[4] Nicola Lacey *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing, 1998).

[5] Ibid, chs 1-5.

[6] See ibid, ch s 7-9; see also Nicola Lacey 'Feminist Legal Theory Beyond Neutrality' (1995) 48(2) *Current Legal Problems* 1.

and equality, from a feminist perspective, in order to generate progressive legal scholarship and law and law reform.[7]

As a criminal law theorist, Lacey has pioneered a 'critical' approach to the study of criminal responsibility. In her most recent book, *In Search of Criminal Responsibility*, Lacey argues that the significance of criminal responsibility arises from its 'distinctive structural roles in legitimating and coordinating patterns and practices of criminalization understood as a form of social regulation'.[8] For Lacey, this means that criminal responsibility is a symbolic resource for the criminal legal system, enabling it to be regarded as a system of justice, rather than one of sheer force.[9] Lacey explicates her argument about the coordinating and legitimating functions of the criminal law under a tripartite frame – ideas, interests and institutions – which covers issues of power, including gender norms and social practices around sex and the family. According to Lacey, it is ideas, interests and institutions that have shaped the changing 'conceptual contours' and roles of criminal responsibility over time. As a result, there is no one basis on which individuals are held responsible for crime at any one moment in time. Rather, criminal responsibility is based on a mix of four principles of responsibility attribution (capacity, outcome, character and risk), which interact to give rise to the responsibility practices in systems of criminal law.[10]

There is a further body of scholarship in which Lacey addresses the topic of gender and criminal responsibility. In interdisciplinary work that may be seen as a bridge between her feminist theoretical work and her criminal law theory, Lacey examines the ways in which gender and criminal responsibility have come together and apart in different historical periods. Through close and careful analysis of changing literary representations of women and crime, Lacey explores the dramatic reduction in numbers of women defendants that occurred in England between the eighteenth and twentieth centuries. Lacey argues that this decline is in part accounted for by the move from criminal responsibility based on character to a more capacity-based mode of responsibility-attribution (a mode of responsibility attribution resting on ideas of autonomy and rationality) that unfolded gradually (and incompletely) over this same period.[11]

In this short paper, I offer some further comments on gender and criminal responsibility, with an examination of what I call the atypical criminal legal forms that govern women's responsibility for crime in the current era. I briefly summarize an argument presented in full elsewhere, and then offer some reflections on the significance of this account for extant scholarship on criminal responsibility.[12] In so doing, I consider in a circumscribed way how some of the different dimensions of Lacey's impressive oeuvre come together, a truly pleasurable task also undertaken by others.[13]

[7] Lacey, *Unspeakable Subjects*, 239 and ch 8 more generally.
[8] Nicola Lacey *In Search of Criminal Responsibility: Ideas, Interests and Institutions* (Oxford University Press, 2016), 13.
[9] Ibid, 19-20.
[10] See ibid, chs 2-4.
[11] Nicola Lacey, *Women, Crime and Character: From Moll Flanders to Tess of the D'Urbervilles* (Oxford University Press, 2008); see also Nicola Lacey 'Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility' (2010) 4(2) *Criminal Law and Philosophy* 109.
[12] See Arlie Loughnan 'Women's Responsibility for Crime: Dynamics of Change in Australia Since the Turn of the Twentieth Century' (2018) 5(2) *Law & History* 137.
[13] See Sharon Cowan 'In Search of Connections: Reading Between the Lines of Nicola Lacey's *In Search of Criminal Responsibility*' (2017) 4(2) *Critical Analysis of Law* 211.

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Criminal responsibility – 'all the rules which shape how the legal system attributes a particular act or omission to a particular individual or group'[14] – is the normative heart of the modern criminal law. Responsibility for crime is typically regarded as recognition in law of the status of individuals as autonomous, reasoning actors, encoding the respect due to such individuals as subjects of law and citizens of liberal political social systems.[15] The organization of the modern criminal law around individual responsibility for crime has constituted a systematization, as well as a rationalization, of the law, providing a basis on which it can be made to accord with liberal moral and political philosophical precepts, which demand a minimalist criminal law and respect for individuals accused of crime as autonomous agents.[16] That is, the traditional notion of individual responsibility for crime is that the ordinary principles of liability and punishment apply, and the application of these ordinary principles to an individual is an acknowledgment or affirmation of their subjectivity.

In broad terms, the development of criminal responsibility principles and practices since the turn of the twentieth century is told as a story of the triumph of generality and universalism. Criminal responsibility is thought to be general in that it underpins the corpus of the law as a whole, and universal in that it applies to all individuals charged with criminal offences.[17] Evidence in support of this story of the triumph of generality and universalism is found in various aspects of the modern criminal law. These include the place of the responsible subject (as a rational and autonomous agent) at the normative centre of the criminal law, the distinction between offence and defence and conduct and fault on the structure of criminal offences, and widespread acceptance of the idea that, as a matter of principle, crime is any act that can be committed by any actor.

But women's responsibility for crime does not fit this general story. Women's criminal responsibility is characterized by particularity and specificity, rather than generality and universalism. Women are not equally positioned as legal subjects and are not held to account for their criminal conduct – via principles and practices of criminal responsibility – in the same way as men. Rather, women's responsibility for crime is governed by what I call 'atypical' responsibility forms. I use the term 'atypical' to denote those responsibility forms – formal legal constructions of accountability for crime – that do not fit the standard story of the development of criminal responsibility. As I discuss below, atypical responsibility forms are those which are restricted to particular individuals committing particular offences in particular contexts – and in which elements, such as offence and defence, conduct and fault, that are usually separate, are brought together.

As I argue in full elsewhere, an assessment of homicide law reform in Australia since the turn of the twentieth century exposes the distinctive dynamics that have produced this particularity

[14] Lacey *In Search of Criminal Responsibility*, 1.
[15] See generally Anthony Duff *Answering for Crime* (Oxford University Press, 2006); see also Victor Tadros *Criminal Responsibility* (Oxford University Press, 2005); John Gardner 'The Mark of Responsibility' (2003) 23 (2) *Oxford Journal of Legal Studies* 157.
[16] See Lindsay Farmer, *Making the Modern Criminal Law: Criminalisation and Civil Order* (Oxford University Press, 2016), 163, and for critique, ch. 6 more generally.
[17] See further Arlie Loughnan *Self, Others and the State: Relations of Criminal Responsibility* (Cambridge University Press, forthcoming).

and specificity.[18] I argue that, in relation to women, particularity and specificity in criminal responsibility is the product of two dynamics, relating to violence by women, and violence against women. In the first dynamic, which was dominant up to the mid-twentieth century, violence by women promoted the creation of atypical responsibility forms that depicted women's violence as pathological, and that constructed women's responsibility for crime as diminished or circumscribed. In the second dynamic, which has been dominant since the last decades of the twentieth century, the rising prominence of violence against women has recast women's violence as responsive and led to the development of a novel set of atypical responsibility forms that reconstruct women's responsibility as an amalgam of agency and victimhood/survivorhood.

To illustrate this argument here, two examples will suffice. The most prominent illustration of an atypical form resulting from the depiction of women's violence as pathological is infanticide. Infanticide – women's killing of their biological children under the age of 12 months – made its appearance on the face of the criminal law as both an offence and a defence in the first decades of the twentieth century in England and Wales, and in subsequent decades in Australian jurisdictions. Infanticide rests on the disorder of the woman alleged to have committed the offence/defence as it requires that the 'balance' of mind be disturbed at the time of the killing.[19] Infanticide is an atypical legal form. The special provision of the offence/defence of infanticide rests on a de facto collapse of conduct and fault into each other. Infanticide law has the effect of over-determining the legal significance of the infanticidal woman's act of killing her child, as *caused* or determined, by disorder.[20] In addition, reflecting the broad continuities in the meanings given to women's 'madness' at the point of intersection with crime, infanticide slides between the categories of offence and defence, meaning that the doctrine itself is most accurately understood as both/either partially exculpatory and/or partially inculpatory.[21]

A prominent illustration of an atypical responsibility form resulting from the depiction of women's violence as responsive and women's responsibility as an amalgam of agency and victimhood/survivorhood is the defence of excessive self-defence – a partial defence available to reduce murder to manslaughter. In Australia, excessive self-defence had existed at common law, but was abolished by the High Court in 1987.[22] In recent decades, excessive self-defence has been reintroduced in several Australian jurisdictions.[23] The partial defence now accommodates women's violence, understood as responsive, in particular, in the context of violence following domestic abuse. As the Victorian Law Reform Commission stated in recommending the introduction of a partial defence of excessive self-defence in that state, 'excessive self-defence would seem to better fit the circumstances of women who kill in this context [family violence] …[because] women's actions are not treated as if they arise from a mental condition'.[24] As this suggests, women who use excessive force in defending themselves

[18] See Loughnan 'Women's Responsibility for Crime'.
[19] See *Infanticide Act* 1922 (England and Wales); *Infanticide Act* 1938 (England and Wales); *Crimes Act 1900* (NSW) s 22A, created by *Crimes (Amendment) Act* 1951 (NSW).
[20] See Arlie Loughnan *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford University Press, 2012), ch 8.
[21] Ibid.
[22] *R v Zecevic* (1987) 162 CLR 645.
[23] See e.g. *Crimes Act 1900* (NSW) s 421; *Criminal Law Consolidation Act 1935* (SA) s 15 (introduced in 1991 and amended in 1997); *Criminal Code Act Compilation Act 1913* WA) sch. 1, s 248.
[24] Victorian Law Reform Commission *Defences to Homicide* (VLRC, 2004), [3.117], Recommendation 9, and ch 3 more generally.

against abusive partners are seen as a particular class of 'deserving accused',[25] and it is appropriate to accommodate them within homicide law. Excessive self-defence is an atypical legal form in that it combines elements that are usually separate – justification and excuse – which are brought together by the circumstances in which women use violence in response to domestic abuse.

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While homicide law reforms have varied from jurisdiction to jurisdiction, in Australia and elsewhere, the place of atypical responsibility forms in these reforms is an important if hitherto underappreciated formal feature of the criminal law. These legal forms are characterized by particularity and specificity, giving distinctive contours to women's responsibility for crime, and undermining the story of triumph of generality and universalism in criminal responsibility. The story of women's responsibility for crime summarized above raises a question about how it is that the general story of the development of criminal responsibility has remained largely impervious to the gendered nature of criminal responsibility.

This imperviousness seems to be the result of a two-fold exclusion that quarantines the general story of criminal responsibility from the situation of women. First, the atypical responsibility forms considered above – infanticide and excessive self-defence – tend to be dismissed as mere components of the positive law – the products of historical accidents or contingencies, but not matters going to the core of criminal responsibility in the current era. Even where they are considered, these responsibility forms are often regarded as practically useful but theoretically incoherent, impermissibly mixing conceptually separate notions such as inculpation and exculpation, and justification and excuse. As a result, the significance of the particularity and specificity that I have outlined has been largely overlooked in studies of criminal responsibility. Second, the impact of the enhanced social and legal profile of violence against women, and the law reform it has generated, has not been fully appreciated. Greater public recognition of the harm of domestic violence has been understood to reconstruct the field of suffering and victimization – which is reflected in the creation of new offences such as stalking and attempted strangulation[26] – but has not been thought to influence responsibility for crime. But, while marginalized in responsibility scholarship, these atypical legal forms are a crucial component of responsibility in the modern era: they indicate that responsibility for crime is more complex than might be assumed and that, once again, the gendered dimensions of law are ignored to the detriment of legal theory and jurisprudence.[27]

Over and above the lack of attention from criminal responsibility scholars, the persistence of specificity and particularity in responsibility for crime that emerges through my study of women's responsibility for crime is all the more remarkable when viewed in light of the development of the criminal law more generally. The creation and maintenance of gender-specific doctrines (such as infanticide), and facially neutral defences with a gendered operation (such as excessive self-defence), over the course of the twentieth century, stands in contrast with the wider trajectory of change in criminal legal principles and practices, according to which principles constructing women's specialness have been removed from the formal

[25] Ibid, [3.83].
[26] See e.g. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13 (offence of stalking or intimidation with intent to cause fear) and *Criminal Code 1899* (QLD) s 351A (offence of strangulation, suffocation and choking in a domestic setting) respectively.
[27] See, for insightful analysis on this point, Joanne Conaghan *Law and Gender* (Oxford University Press, 2013).

criminal law.[28] Over the second half of the twentieth century, for example, changes have included the reform of the gendered definition of rape, and the abolition of a substantive doctrine of spousal privilege.[29] Change has also occurred in criminal legal processes, including in relation to prosecutions of rape in marriage.[30] While the picture of gender and criminal law and process remains complex – and the operation of law 'on the ground' is marked by additional complexity, in which gender interacts with other aspects of identity such as race and class – it is clear that women's specificity in criminal responsibility principles and practices is increasingly out of place on the face of the contemporary criminal law.

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By way of conclusion, I return to the stimulus *Unspeakable Subjects* provides for the special issue of which this piece forms a part. As mentioned above, in this book and other work, Lacey interrogates legal theoretical claims to neutrality, coherence and rationality. Her sophisticated and multilayered analysis remains a timely reminder to ask questions about what we can identify as the stories the criminal law tells itself. The story of criminal responsibility – as the triumph of generality and universalism – is one such story that demands close interrogation. As discussed in this piece, the story of women's criminal responsibility radically undermines the general (and rather self-congratulatory) story of the development of criminal responsibility over the twentieth century. As Lacey writes, exposing the 'departures of legal doctrine from its own standard method' usefully exposes 'the politics of the criminal law'.[31]

[28] This is not to deny that the general categories employed in the criminal law may embed specificity through forms of subjectivity drawn from male experiences.

[29] On the change in the definition of rape, see Simon Bronitt and Bernadette McSherry *Principles of Criminal Law* 3rd ed. (Thomson, 2010). On spousal privilege (comprising the marital coercion doctrine, the intra-spousal conspiracy exemption and uxorial post-offence accessorial immunity), which was abolished in Australian jurisdictions only in the last 20 years, see G McCoy, *Uxorial Privileges in Substantive Criminal Law: A Comparative Enquiry* (unpublished thesis, University of Canterbury, 2007). Privilege persists in evidence law: spouses and close family members are not compellable witnesses: see s18 *Uniform Evidence Acts* s 18; and see Jill Hunter et al. *Litigation* 7th Ed. (Lexis, 2005), 334 for discussion.

[30] On the abolition of rape in marriage laws, see Wendy Larcombe and Mary Heath 'Developing the Common Law and Rewriting the History of Rape in Marriage in Australia: *PGA v The Queen*' (2013) 34 *Sydney Law Review* 785.

[31] Lacey *Unspeakable Subjects*, 199.