


Please cite the Published Version

Lalor, Kay  (2020) Book Review: Criminal Law and the Man Problem by Ngaire Naffine. *Legal Studies*, 40 (4). pp. 697-701. ISSN 0261-3875

DOI: <https://doi.org/10.1017/lst.2020.27>

Publisher: Cambridge University Press (CUP)

Version: Accepted Version

Downloaded from: <https://e-space.mmu.ac.uk/626933/>

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Additional Information: Book review of *Criminal Law and the Man Problem* by Ngaire Naffine. Oxford: Hart Publishing, 2019. ISBN: 978 1-50-991801-0

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Criminal Law and the Man Problem

by Ngaire Naffine. Oxford: Hart, 2019.

Naffine's *Criminal Law and the Man Problem* can be situated within a tradition of academic and legal texts that use gender 'as an analytical tool to push at the boundaries of orthodox thinking.'¹ The power and originality of Naffine's analysis however, is found in her examination of 'Men qua men, as the subjects and objects of criminal law...as a subset of the entire population...with a set of historical and modern sectional interests.'² This approach adds an important dimension to feminist legal work that has used gender in all its different iterations to interrogate law³, exposed the hidden histories of women in the law⁴, or applied a feminist lens to legal judgments.⁵ Naffine examines the construction of the male legal subject within criminal legal history.⁶ The subject that she traces is bounded and sovereign: he is a rational, civilized member of a civil polity⁷, exercising control over his use of force and respectful of other (male) subjects' boundaries and sovereignty.⁸

Naffine shows how this sovereign, bounded subject can only be fully iterated through his relation with a non-bounded subject – women. She explores how the female subject of criminal law did (and arguably does) not enjoy the same sovereignty as her male counterpart: 'the personal borders of men – the very bodies of men as understood by criminal law – were extended outwards annexing and colonising the body of the wife.'⁹ Iterated in legal history most clearly in *coverture* and repeated in multiple forms in the legal system, the female legal person is absorbed into that of the male.¹⁰ In exposing this interdependency and relationality, Naffine shows how different forms of subjectivity bring each other into view – women, and particularly wives, must assume complementary and dependent roles in order

¹ Dianne Otto and Anna Grear, 'International Law, Social Change and Resistance: A Conversation Between Professor Anna Grear (Cardiff) and Professorial Fellow Dianne Otto (Melbourne)' (2018) 26 FLS 351, p359

² Ngaire Naffine, *Criminal Law and the Man Problem* (Oxford: Hart, 2019) p183

³ Joanne Conaghan, *Law and Gender* (Oxford: Oxford University Press, 2013)

⁴ Erika Rackley and Rosemary Auchmurty, *Women's Legal Landmarks: Celebrating the history of women and law in the UK and Ireland* (Oxford: Hart, 2018)

⁵ See Rosemary Hunter, Clare McGlynn and Erika Rackley, *Feminist Judgments: From Theory to Practice* (Oxford: Hart, 2010) and the multiple *Feminist Judgments* texts that have followed this project.

⁶ Naffine above n2 p4

⁷ Ibid p35

⁸ Ibid p32

⁹ Ibid p81

¹⁰ Ibid p82, p89

to maintain the coherence of the stable male subject. This coexisting legal visibility and invisibility is apparent throughout the book as Naffine explores different legal horizons in order to show the fundamental instability of man's subjectivity in criminal law.¹¹

The 'acid test'¹² that brings all these elements into combination is rape law and specifically, the marital rape exception, which persisted until 1992 in England and Wales and Australia – key jurisdictions examined in the book. Naffine introduces the exemption in the first chapter through a detailed recounting of *DPP v Morgan*.¹³ Particularly clear in Naffine's analysis is how little attention was paid by the court to the marital rape exemption – 'an ancient common law doctrine'¹⁴ - despite its central role in ensuring that Morgan was only charged and convicted for abetting his wife's rape, not the rape itself, thus allowing Morgan 'to disappear from legal view, into the bedroom.'¹⁵ This apparent blindness to the injustice of Morgan's shielding from prosecution was further perpetuated by scholarly works discussing the case as it became a landmark not for the exemption – which was largely ignored¹⁶ – but for the principle that serious wrongs require a subjective mens rea.¹⁷

Having discussed *Morgan* and its legal and academic aftermath, Naffine then historicises the case's contradictions by exploring the work and writings of 'influential legal men'¹⁸ from Hale (1609) to the 20th century, most of whom - with notable exceptions - supported and justified the marital rape exemption and the unequal position of men and women in criminal law. In a close reading of the works of these men of law, Naffine points out the paradox of their position: crimes such as rape are endowed in these writings with a 'pre-legal wrongfulness'¹⁹, that is, a crime from which we should refrain because it is wrong, not because it is illegal. Yet one person – the husband – is exempt from this requirement. By letting the 'leading men of criminal law'²⁰ speak for themselves across the centuries on this topic,

¹¹ Ibid p76, p106

¹² Ibid p22, but note that Naffine is clear that a series of 'satellite laws', such as assault are also associated with the marital rape exemption.

¹³ [1975] UKHL 3

¹⁴ Halisham LJ, 14 in Naffine above n 2 p10

¹⁵ Naffine above n 2 p11

¹⁶ Ibid p7

¹⁷ Ibid p18

¹⁸ Ibid p3

¹⁹ Duff in Ibid p21

²⁰ Ibid p3

Naffine exposes their hypocrisy. She shows how the exemption is justified by reference to (usually stereotypical or under researched) appeals to women's and men's 'natures' (which are taken to be complementary and diametrically opposed). In many of these works, a woman 'needs' to be dominated and cared for: the 'gentle violence' required to ensure her sexual submission is viewed by thinkers and legislators as a marital good rather than a criminal offence.²¹

Neither the legal limits of permissible violence, nor the legal and academic justifications for the marital rape exemption have remained static over time, but have shifted with prevailing social norms, while continuously preserving the central doctrine of a husband's unrestricted access to his wife's body. Within these shifting and contradictory arguments a clear view of the gendered relations of legal power emerges - one that, as Naffine notes, was apparent to thinkers such as JS Mill and Edward Christian, who wrote critically on the rape exemption and other unequal aspects of marriage in 18th and 19th centuries. In making men specifically visible within these gendered relations, Naffine shows how specific masculine subjectivities and figurations are constructed within authoritative legal writings. These subjects, like the arguments that sustain them, also shift over time *while appearing to remain constant* - and as Naffine notes, these shifts and contradictions are the cause of considerable cognitive dissonance.²²

In the final section of the book, Naffine shows how historical contradictions have been carried through into the present. The marital rape exemption may have been removed, the subject of criminal law may be ostensibly gender free, but the history of men and women's differential construction and treatment in criminal law has not been fully faced. The gender-free criminal legal subject is more often than not read as male - and once again, the woman disappears, or is unserved by criminal legal norms and practices.²³ It is from this basis that Naffine issues an important challenge: to face this criminal legal

²¹ As explored in depth in relation to *G v G* [1924] AC 349 Ibid p91. However, when these naturalist justifications fail: particularly when law's brutality is revealed, as in the case of *R v Clarence* (1888) 22 QBD 23 in which Clarence's conviction for inflicting grievous bodily harm on his wife by transmission of gonorrhoea was overturned. Naffine shows how jurists and judges were willing to adopt a strict positivist stance rather than facing the contradictions inherent in the supposedly 'natural' legal position of men and women. This allowed the justification for immunity to remain a moving target dependent upon the legal horizon in view.

²² Ibid p87, p136

²³ Eg Harriet Samuels, 'International Women's Day 2019: In Conversation with Harriet Wistrich' (2019) 27 FLS 311, p315; Emma Milne, 'Concealment of Birth: Time to Repeal a 200-Year-Old "Convenient Stop-Gap"?' (2019) 27 FLS 139; H. Douglas, 'Battered Women's Experiences of the Criminal Justice System: Decentering the Law' (2012) 20 FLS 121; Silvana

history and make visible both the historic injustices faced by women and the sectional interests that have created the male criminal legal subject in their own interests. This must be done not by fudging or denying the past²⁴, or in a piecemeal fashion, but through a recognition of the extent of a systemic and sustained system of violence and violation. This story, she notes ‘continues to unfold’.²⁵

Naffine’s challenge is far reaching, but it is sustained by the book’s tightly focused argument. This focus is both a source of strength and a potential weakness, or at least a point of departure for further consideration of the ramifications of Naffine’s analysis of ‘the man problem’. In particular, the tight focus on the marital rape exemption, as theorised by influential legal thinkers, leaves open the question of how the law constructed and regulated men outside of criminal law. It would be useful, for example, to consider how these gendered subjectivities existed or were activated in other legal fields – such as property or family law.²⁶

Equally, it would be useful to consider how criminal law regulated those men who did not align with the bounded, civilised subject that emerged as these legal thinkers’ own image. For example, the male, subject that Naffine identifies might be usefully contrasted with criminal legal approaches to and figurations of men who upset law’s gendered relations and by men who were, at various points in criminal legal history configured as ‘uncivilized’.²⁷ Gay, bisexual and queer men as well as gender non-conforming men and women have experienced a very different relationship with criminal law - and indeed, Naffine briefly mentions the way in which criminal law has undermined the personal sovereignty of millions of homosexual men, in a similar fashion to its undermining the personal sovereignty of women.²⁸ This brief comment exposes the multiple ways in which law’s gendered subjects and ‘criminal legal principles imbued with misogyny and homophobia’²⁹ expands far beyond

Tapia Tapia, 'Feminism and Penal Expansion: The Role of Rights-Based Criminal Law in Post-Neoliberal Ecuador' (2018) 26 FLS 285; Mimi E. Kim, 'Anti-Carceral Feminism: The Contradictions of Progress and the Possibilities of Counter-Hegemonic Struggle' (2019) *Affilia* 1 Beth E. Richie and Kayla M. Martensen, 'Resisting Carcerality, Embracing Abolition: Implications for Feminist Social Work Practice' (2020) 35 *Affilia* 12

²⁴ Naffine above n 5, p121, p136

²⁵ *Ibid* p187

²⁶ Eg Kate Galloway, 'The Role of Pateman’s Sexual Contract in Beneficial Interests in Property' (2019) 27 FLS 263

²⁷ There is also space here to consider women who challenged regimes of gender or civilization, although this is less central to the focus on the male criminal legal subject.

²⁸ Naffine above n 2 p145-6

²⁹ *Ibid* p146

just the question of historical marital rape immunity. Indeed, as Naffine notes, strict public/private divisions did much to hide the violence of husbands from criminal legal scrutiny, but those men who strayed from the gendered figurations of masculinity contained within criminal law could not expect the same protections – and had to litigate over an extended period in various jurisdictions to acquire them.³⁰ Part of meeting Naffine’s challenge to recognise the violence of the criminal legal past should be to bring these stories into view.³¹

Implicit in Naffine’s analysis throughout the book is the relationship between male personal sovereignty and concepts of statehood, civilisation and national identity. A kind of ‘statecraft as mancraft’³² underpins the writings of the men of law – whether it be through a consideration of the concept of civilisation by Norbert Elias³³ or through the Australian High Court’s reworking of legal history to portray South Australia as a ‘progressive state in a progressive nation’, despite evidence to the contrary in a case of historical marital rape.³⁴ For all the emphasis placed by men of law on bounded sovereign subjectivity, as Naffine notes, no subjects are isolated, and all are integrated into wider systems of gendered, state, and institutional power. In this respect, it is notable that many of the texts Naffine considers were written during the colonial era or its immediate aftermath.³⁵ An interesting consideration here would therefore be the influence of Britain’s imperial rage for order³⁶ on the development of criminal legal thinking. Not only were British colonies zones of experimentation for the development of penal codes³⁷, but more generally and significantly for the arguments developed in the book, the colonial era was marked by an civilized/uncivilized binary in which the supposedly civilized or brutal behaviour of colonized men became the motivation for the ‘civilizing mission’ of imperial control.³⁸

³⁰ *Dudgeon v UK* (1981) 3 EHRR 40, *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994

³¹ See for example the work of Queer Beyond London <http://queerbeyondlondon.com/about/>

³² Cynthia Weber, *Queer International Relations: Sovereignty, Sexuality and the Will to Knowledge* (Oxford: Oxford University Press, 2016) p6

³³ Naffine above n 2 p35

³⁴ *Ibid* p123

³⁵ *Ibid* p59

³⁶ Lauren Benton and Lisa Ford, *Rage for Order The British Empire and the Origins of International Law, 1800–1850* (Harvard University Press 2016)

³⁷ Michael Kirby, 'The sodomy offence: England’s least lovely criminal law export?' in Corinne Lennox and Matthew Waites (eds), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (London: Institute of Commonwealth Studies, 2013), p65

³⁸ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2007)

From a perspective of the ‘civilized’ subject therefore, women were not the only ‘other’ against which the male subject of law was constructed.

Moreover, the ideas of civilization that underpinned male bounded subjectivity and sovereignty have not remained static.³⁹ Naffine highlights this contradiction throughout: the male subject of law is assumed to be timeless and fixed, even when shifting norms and conceptions of acceptable violence are in flux, creating concurrent shifts in legal subjectivities and criminal legal figurations. An important part of responding to Naffine’s call to face criminal legal history’s violence might thus be facing the ongoing impact of empire, and the way in which imperially created subjectivities continue to animate binaries of self and other, in a way that still disproportionately criminalises and polices those who do not resemble the white, elite, educated men of law.⁴⁰

Naffine’s focus on the ‘demographically restricted community’⁴¹ of male thinkers and jurists historically and into the 20th century offers powerful support for arguments in favour of widening participation in the judiciary the academy and the criminal legal system. It also raises a question: Naffine is right to note that these men were extremely influential, but – as the book shows – no subject or thinker operates in isolation. There is space here to further consider how patriarchal thought was maintained by an entire architecture – that extended from social norms, to policing and forms of regulation, to the judiciary and the legal system in its entirety. Part of meeting Naffine’s challenge to fully face the violence of legal history faced by women, might be to face its expansion beyond the elites and their legal texts, and to explore how law’s failure to acknowledge its own violence contributes to the persistence of gendered stereotypes and subjectivities more generally.

Criminal Law and the Man Problem is a powerful and provocative addition to literatures of criminal legal history, gender and the law and critical approaches to criminal law. It can function as a valuable teaching tool, with accessibly written chapters that might be used to encourage students to think critically about the histories and practices of ostensibly neutral criminal legal systems. Equally

³⁹ Naffine above n 2 p30

⁴⁰ In an immigration law context see Nadine El-Enany, *Bordering Britain: Law, Race and Empire* (Manchester: Manchester University Press 2020) see also Patrick Williams and Becky Clarke, 'The Black Criminal Other as an Object of Social Control' (2018) 7 *Social Sciences* 1

⁴¹ Naffine above n 2 p139

important however, is the book's call to action: it reminds us that 'the man problem' is unresolved and that our task must be to continue the unfolding story by which the deficiencies of the 'default man'⁴² that animates the criminal legal subject are exposed, challenged and remedied.

⁴² Ibid 187