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## Guest Editorial

### **Criminalisation and the Violence(s) of the State: Criminalising Men, Punishing Women**

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**Kate Fitz-Gibbon**

Monash University, Australia

**Sandra Walklate**

University of Liverpool, United Kingdom; Monash University, Australia

#### **Introduction**

This special issue of the *International Journal of Crime, Justice and Social Democracy* focuses on criminalisation and violence against women. Since the late 1970s, the pursuit of criminal law has provided a means of responding to the endemic problem of violence(s) against women. However, 'ironically, the very state interventions designed to eradicate the intimate abuse in battered women's lives all too often reproduce the emotional abuse of the battering relationship' (Mills 1999: 554). The tension between intervention and its (unintended) consequences has been a persistent feature of informed feminist debates and, recently, has been subjected to serious critical scrutiny by Goodmark (2018). She interrogated the recourse to criminal law in responding to violence(s) against women by asking three questions: Does the behaviour being targeted by the law result in harm? Does the law provide a deterrent from such harm? Who, if anyone, benefits from recourse to the law? In her view, the answers to all these questions could be used to make the case for decriminalisation equally as well as for criminalisation.

Underneath this brief overview lies a range of complex issues concerning whose interests are served by the law and under what conditions. The political and economic connections between the recourse to law and the perpetuation of responsibility (for crime) as lying in 'bad character' (Lacey 2013) have taken their toll on women. This special issue directly contributes to an understanding of these complex issues and, specifically, to building the evidence base on the impact of law in practice on women.

#### **The Move Towards Law in Improving Responses to Violence Against Women**

In the 1970s and 1980s, particularly throughout North America, there was a concerted push by feminists and social justice advocates to expand criminal law responses to violence against women. Criminalisation campaigns were underpinned by recognition of the need to improve responses to violence against women and establish a clear standard that this behaviour was unacceptable. The three decades that

followed saw a flurry of law reform activity, including new criminal law offences, civil law protection order schemes and mandated (also termed proactive) policing and prosecution policies. This has been most heavily documented in the context of the US and Canada (see, inter alia, Goodmark 2018; Gruber 2020) but is also evident elsewhere, including in the United Kingdom and Australia (see, inter alia, Nancarrow 2019).

Ongoing debates surrounding the criminalisation of different forms of violence(s) against women have been ever-present as we prepared this special issue. In England and Wales, as the long-awaited Domestic Abuse Bill makes its way through parliament, amendments to expand the remit of the offence of coercive and controlling behaviour and a late push for a new offence (non-fatal strangulation) have ensured that criminal law responses to intimate partner violence have remained central to that reform agenda. Similarly, in Ireland, Scotland and some European countries, new criminal offences for coercive control have been introduced in recent years to address a perceived gap in the criminal law's ability to respond to non-physical forms of intimate partner violence and to view such abuse as a course of conduct as opposed to a series of isolated events (Burman and Brooks-Hay 2018; Douglas 2015; Soliman 2019). Throughout the US and across Australian states and territories, calls have increased to introduce new crimes of coercive control, including the introduction of a Senate Bill in the state of New York (Senate Bill S5306, 2019–2020) and the establishment of a parliament Inquiry into Coercive Control Reform in New South Wales. Beyond coercive control, there are other recent examples of the expansion of the criminal law to respond to violence against women. These include new offences to address technology-facilitated abuse and revenge pornography (McGlynn et al. 2020), and non-fatal strangulation (Douglas and Fitzgerald 2020).

However, the impact of the push towards criminalisation has not been as linear as first envisaged. In some cases, those who fought for the criminal law to better recognise violence against women have recently driven the conversation towards rethinking the efficacy of justice system responses for women who experience men's violence (on recent dissenting voices within the criminalisation debate, see, inter alia, Goodmark, 2018; Walklate and Fitz-Gibbon 2019). It is to this debate and the rapidly evolving conversation that encourages a move away from the reliance on law that we now turn.

### **The Criminalisation Debate: Rethinking the Role of State Intervention**

The debate concerning the efficacy of legal responses to violence(s) against women has ebbed and flowed since the late 1970s. Smart (1989), for example, observed how the legal domain could be (and was being) utilised in the interests of those (men) for whom the interventions with which she was concerned (changes in abortion laws, ways of thinking about rape and sexual assault) were not intended. In this vein, Goodmark's (2018) thorough assessment of how criminalisation has added to the burgeoning prison population (of men) is timely, significant and ripe for further scrutiny. Her examination brought into view the subtle, and not so subtle, ways in which the unintended consequences of legal intervention can not only worsen the harms of violence(s) for women (sometimes resulting in their misrecognition as offenders rather than victims) but also are seeping increasingly into civil law interventions and the regulation of migration. Building the evidence further, Gruber (2020) has set out the ways in which criminal law interventions introduced with women's protection in mind—such as zero-tolerance policing policies—have served to erode women's safety and increase their vulnerability to criminalisation. Gruber (2020) contended that the 1970s feminist call for action regarding criminalising violence against women has worked to counter its ambitions. Consequently, she argued that we must now reorient not to a full decriminalisation approach but one in which criminalisation is utilised as a last resort measure. Writing in the Australian context, Nancarrow's (2019) work documented how the turn to criminalisation has negatively affected Aboriginal and Torres Strait Islander communities in Australia. Like Gruber, Nancarrow (2019) highlighted the need for a paradigm shift, noting that, while there have been some benefits of women's advocacy to criminalise men's violence, the current approach relies too heavily upon a punitive intervention system.

In the context of this debate, this special issue embraces the opportunity to look afresh at the punishment consequences of criminalisation in relation to violence against women. By bringing together a collection of articles on this topic, we aim to stretch the concept of punishment to extend beyond the boundaries of formal court sanctions towards recognising the central importance of informal criminal and civil responses—alongside the role of the state—in punishing women. The contributions contained within do not attempt to offer an exhaustive interrogation of these issues. Rather, we have sought to bring together academics working in different contexts, on different core issues and at different stages of their career to interrogate further the concept of criminalisation.

### **This Special Issue**

This special issue subjects the criminalisation thesis to further interrogation in a range of key contexts where the criminalisation of men's behaviour (and, on occasion, the criminalisation of women's behaviour) has resulted in increased state intervention in women's lives including their punishment. Crucially, the harms inflicted by the state as it is invoked and displayed in the deployment of the criminal law are often 'the elephant in the room' when such interventions are subjected to critical scrutiny and seen through the eyes of women affected by them. This collection subjects the law to further scrutiny and questions the degree to which the everyday safety and security of women—the very subjects that the criminalisation of violence against women often has in mind—may be disadvantaged by law's intervention.

To do this, the issue begins with an article by Goodmark in which she builds upon her previous contributions to this debate (see Goodmark 2018, 2020) by focusing on what she describes as 'perhaps the most serious unintended consequence' of efforts to criminalise violence against women – the criminalisation of victim-survivors'. Focusing her analysis on the impacts of the criminal law in the US, Goodmark sets out the challenges of justice system responses that, on the one hand, recognise an individual's victim status but, on the other, respond punitively to their protective actions and inability to conform to ideal victim stereotypes. Building on her 2018 intervention, which advocates for a process of decriminalising violence against women, Goodmark's article calls for abolition feminism as a strategy to ensure the protection of victim-survivors.

Demonstrating that the unintended failings of the criminal law highlighted by Goodmark are neither specific to the US nor state criminal laws, Segrave's article extends current debates surrounding the harms of criminalisation through her analysis of the ways the migration system can be (mis)used by perpetrators of domestic and family violence to limit access to protections and safety for victim-survivors. Segrave's analysis provides a welcome focus on the actions of perpetrators in a debate that has, to date, been predominantly focused—perhaps rightly so—on the needs and experiences of victim-survivors in the criminal justice system. Drawing on an Australian dataset, her analysis promotes an approach to legal intervention that prioritises inclusion rather than exclusion and better recognises (and responds to) the ways in which the system can be weaponised by perpetrators.

Also writing in the Australian context, Reeves focuses on one of the emerging acknowledged risks of increased criminalisation—the 'misidentification' of victim-survivors as predominant aggressors (see also Nancarrow et al. 2020; Wangmann 2009). Drawing upon her research with Victorian legal practitioners and victim-survivors, Reeves provides a detailed examination of the impacts of misidentification and the court process. The article lends further weight to the criminalisation debate, documenting that, while Victoria has undertaken significant family violence reform in recent years, the law's (unintended) impact on women victim-survivors remains a persistent issue that demands attention.

Mirroring Reeves' call—in addition to Goodmark and others—for increased recognition of how criminal justice system intervention can punish women, our article scrutinises current campaigns to criminalise

coercive control to argue that the extension of the criminal law in this space runs the very real risk of extending the patriarchal powers of a system which, for too long, has failed to provide meaningful responses to female victims of men's violence. Utilising the work of Goodmark (2018) and Lacey (2013), we argue that the responsible subject of the criminal law (*men*) represents a stubborn gendered subject that fails to meet the safety needs of women who come before the law as victims of violence.

Moving the focus from coercive control to prostitution, the article by Scoular and FitzGerald seeks to move the criminalisation debate from focusing on justice and punishment to considering what a response to sex work that is grounded in the principles of rights, recognition and representation would entail. Their analysis outlines the merits and limitations of the criminalisation of prostitution and recent reforms. In adopting a social justice focus, Scoular and FitzGerald outline the need to move away from the assumption that the law and justice are one and the same and, instead, to adopt an approach that seeks justice but not necessarily legal intervention.

Continuing the theme on prostitution, Balfour's article, located in the Canadian context, provides a critical analysis of the impacts of a recent Supreme Court of Canada decision. Focusing on the impact of carceral feminism on Indigenous women, Balfour teases out the challenges of moving away from criminal law alongside the persistence of colonial violence. Returning to recent debates surrounding the decriminalisation of domestic violence, Balfour's analysis provides a Canadian caution regarding the need to consider the wider implications of any shifts away from criminalisation.

The final article in this special issue offers a critical victimological analysis of understandings of sexual violence victimisation, perpetration and responses in the aftermath of the Spanish Civil War. Demonstrating the value of learning from history, Varona's article continues the thread of Balfour's focus on colonisation by considering how violence(s) committed in the context of war are acknowledged and where silence is located at the individual victim level. When considered in the context of earlier contributions to this special issue, this final article encourages reconceptualising how different social and cultural contexts across time can foster the conditions that reinforce men's power and women's assumed victim status. When read against the backdrop of the earlier contributions to this issue, it leaves a lingering question regarding how a criminal justice system—inherently masculine and colonial in design and operation—could ever respond adequately to the violence(s) experienced by women.

## Conclusion

By bringing this range of articles together, we hope that this special issue stimulates further discussion and a reconceptualisation of the merits of *more* law. Further, it adds new scholarly insights to the criminalisation debate. We also hope the articles contained within serve as a caution for those who see the further criminalisation of men's violence(s) as a convenient reform option for improving whole-of-system responses to violence against women. The articles outline the ways in which legal interventions have negatively affected the very subject advocating feminists have sought to protect: women victim-survivors. Each of the authors, writing with their own focus and context in mind, have recommended a move away from reliance on the punitive and patriarchal system of the criminal law. We are extremely grateful to each of the authors for their contributions—it has been a privilege to work with them and to read each of their contributions. We are extremely pleased with the thought-provoking collection we have brought together and hope our readers enjoy the challenges presented by this work.

*Correspondence:*

Associate Professor Kate Fitz-Gibbon, Director, Monash Gender and Family Violence Prevention Centre and Associate Professor of Criminology, Faculty of Arts, Monash University, Victoria, Australia.

[kate.fitzgibbon@monash.edu](mailto:kate.fitzgibbon@monash.edu)

Professor Sandra Walklate, Eleanor Rathbone Chair of Sociology, Liverpool (UK) conjoint Professor of Criminology, Monash (Australia), Lead Researcher, Monash Gender and Family Violence Prevention Centre. [S.L.Walklate@liverpool.ac.uk](mailto:S.L.Walklate@liverpool.ac.uk)

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