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**Citation for published version:**

Cowan, S 2017, 'In search of connections: Reading between the lines of Nicola Lacey's In search of criminal responsibility', *Critical Analysis of Law*, vol. 4, no. 2, pp. 211-221.

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Peer reviewed version

**Published In:**

*Critical Analysis of Law*

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# **In Search of Connections: Reading Between the Lines of Nicola Lacey's *In Search of Criminal Responsibility***

Sharon Cowan\*

## **Abstract**

Through the lens of feminist legal theory, this essay aims to draw out the connections between Lacey's *In Search of Criminal Responsibility*, and her other work and the work of interlocutors, on issues relating to law and gender. Lacey's work is placed into conversation with a broader community of ideas that challenge dominant discourses, not only in theory, but also in academic institutions and practices themselves. In doing so, the essay highlights the importance of taking critical approaches to law—and life—seriously.

## **Introduction**

Lacey's book *In Search of Criminal Responsibility* (henceforth ISCR) has been reviewed many times by various eminent scholars.<sup>1</sup> This review essay focuses on the way in which ISCR complements and advances other work in the field of criminal responsibility, and beyond. It goes without saying that the book is deliciously ambitious and intellectually provocative in its challenge to historical and jurisprudential accounts of responsibility, and to some degree accounts of criminal law more generally.

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\* Professor of Feminist and Queer Legal Studies, University of Edinburgh, Scotland. I would like to thank the Edinburgh Criminal Law Reading Group for helpful discussion of Nicola Lacey's book *In Search of Criminal Responsibility* in 2016-17, and Marcus Dubber and Simon Stern for inviting me to be part of this book forum. I would also like to sincerely thank Nicola Lacey herself, for her presentation to the Criminal Law Reading Group in March 2017, and more generally for all her contributions to a broad range of academic and political conversations that have inspired and encouraged me for many years.

<sup>1</sup> See for example: Kimberly Kessler Ferzan, *Of Weevils and Witches: What Can We Learn from the Ghost of Responsibility Past?*, 101 Va. L. Rev. 947 (2015) (reviewing an earlier article of Lacey's that formed part of ISCR); Ngaire Naffine, *Criminal Conversations: Farmer, Lacey and the New Social Scholarship*, 38 Syd. L. Rev. 505 (2016); Elies Van Sliedregt, *Book Review, Nicola Lacey, In Search of Criminal Responsibility: Ideas, Interests and Institutions*, 21 *Theor. Criminology* 400 (2017); Chloë Kennedy, *Nicola Lacey, In Search of Criminal Responsibility: Ideas, Interests, and Institutions*, 21 *Edinb. L. Rev.* 133 (2017); Caroline Henaghan, *Book Review, In Search of Criminal Responsibility: Ideas, Interests and Institutions*, by Nicola Lacey, *LSE Review of Books* (2017), <http://blogs.lse.ac.uk/lsereviewofbooks/2017/05/09/book-review-in-search-of-criminal-responsibility-ideas-interests-and-institutions-by-nicola-lacey/>; Daniel Bansal, *Book Review, Nicola Lacey: In Search of Criminal Responsibility: Ideas, Interests, and Institutions*, [AU: Please insert volume number] *Crim. L. & Phil.* 1 (2016). This book review has only been published online so far so has a DOI number rather than a volume number: <https://doi.org/10.1007/s11572-016-9406-5>

Some reviewers concentrate on the spaces within the text that could have been filled with their own interests and ideas that could contribute to contemporary debates on the concept of responsibility. I am neither a historian, nor someone who has contributed to these responsibility conversations. Through the lens of feminist legal theory, my aim in this essay is to read between the lines of Lacey's text, in order to illuminate the relationships between this volume and Lacey's other work, as well as those of her immediate interlocutors; but also to draw into the conversation those whose work we might not think of as being in the same conversation. This technique will draw out a slightly different community of ideas within which Lacey's work is grounded, but will also highlight the potential for broader conversations with other feminist scholars struggling with conceptual and practical questions about law and life, and about the nature of academic discourse *about* those questions.

Before undertaking this *passeggiata*, I will set out briefly the main tenets of Lacey's book.

## I. Searching for Responsibility

Building on the work of historians, Lacey book excavates "decisive moments of change" that have shaped our understanding of responsibility over time. The abstract for the book suggests that ISCR builds on her wonderful 2008 book *Women, Crime, and Character* (WCC),<sup>2</sup> a characteristically interdisciplinary analysis of the fundamental shifts in notions of female criminality in the eighteenth and nineteenth centuries.

Responsibility is a key legal concept, because, says Lacey, it serves a distinctive role in legitimating the exercise of state power through criminal law. Importantly for Lacey, it is not so much that the concept of responsibility structures and organizes criminalization practices, but also that practices of criminalization inform and shape legal concepts such as responsibility. Therefore, the notion of responsibility cannot be understood without also examining the important social context of ideas, interests and institutions: understanding these three spheres of environment that shape ideas of responsibility allows for political and social influences and frameworks to come to the fore; and highlights the overlapping, contrasting and conflicting roles that different conceptions of responsibility can play at any one time.

For Lacey then, there is no one theory of responsibility, and, as she takes great pains to argue in chapter 6, there is no point in theorizing about responsibility to a level of generality that removes the analysis from any connection to its subject in the real world. She critiques those theorists who concentrate solely on the moral foundations of the criminal law, and search for universal concepts and definitions that are ahistorical or too abstract from the "real world." Responsibility is not, for Lacey, a "fixed star."<sup>3</sup>

Lacey recognizes the efforts of some criminal law theorists, such as HLA Hart, to engage with both the concepts and practices of criminal law. But while Lacey points out (177) the flaws in Hart's "middle order" theorizing (i.e., attending to both the practical

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<sup>2</sup> Nicola Lacey, *Women, Crime, and Character: From Moll Flanders to Tess of the D'Urbervilles* (2008).

<sup>3</sup> Ferzan, *supra* note 1, at 956.

realities of criminal law as well as striving for overarching grounding principles), she herself seems to call for some meso-level analytical approach. Lacey wants us to retain the idea that conceptual ideas about responsibility can be explored, but not at the expense of socio-legal, historical findings, i.e., that law's modality can never be truly separable from its functionality. As a "normative device" (203), responsibility can be seen, by way of "reflexive movement" (202), to have core themes across a range of social institutions, rather than as a singular concept that spans time and space. This chimes with the work of Brian Tamanaha, who has gone to some lengths to critique the analytical philosophers who espouse theories of law that aim to identify universal, necessary and essential truths about law.<sup>4</sup> Tamanaha underlines the importance of "social legal theories," suggesting that "theories that center on law within social and historical contexts . . . have been all but banished from jurisprudence."<sup>5</sup> In other words, jurisprudential analyses of the criminal law need to be *realistic*, in the sense that conceptual accounts must have some *empirical resonance* with the social, political and cultural nature of criminal law.

This is also a somewhat parallel claim to that made by Lindsay Farmer in his recent book *Making the Modern Criminal Law: Criminalization and Civil Order*.<sup>6</sup> Farmer argues that normative theories of criminalization have likewise been abstracted from the institutional features of criminal law, and neglect sociological analyses as well as the all-important practices of criminalization (such as the use of police powers, prosecution and enforcement of law). His aim is to bring together the normative and empirical dimensions of criminalization.<sup>7</sup> Linking the development of responsibility to the development of criminalization, Farmer suggests that contrary to contemporary criminal law theory that positions responsibility as an independent constraint on criminalization (via *mens rea*), the development of different ideas about responsibility have helped to define the scope of what can be criminalized, and hence the shape of the criminal law itself.<sup>8</sup> Like Lacey, he sees responsibility as central to the modality of law, and as a normative tool, or means to an end (which for Farmer, is the securing of civil order).<sup>9</sup> Again, it is the practices and legal institutionalization of responsibility, rather than responsibility as a moral concept, that mold the structure and scope of the criminal law.

Lacey's book therefore sits within this community of ideas that challenge any representation of law generally, or its key concepts such as responsibility, as universal or separable from a socio-historical analysis; and she looks more to the practices, meanings and functions of law within its socio-political context rather than an abstract evaluation of its moral contours.<sup>10</sup>

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<sup>4</sup> Brian Z. Tamanaha, *Necessary and Universal Truths About Law?*, 30 *Ratio Juris* 3 (2017); Brian Z. Tamanaha, *A Realistic Theory of Law* (2017) [hereinafter *A Realistic Theory*].

<sup>5</sup> Tamanaha, *A Realistic Theory*, supra note 4.

<sup>6</sup> Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016).

<sup>7</sup> *Id.* at 21.

<sup>8</sup> *Id.* at 164.

<sup>9</sup> *Id.* at 165.

<sup>10</sup> Ferzan, supra note 1, at 947.

But what can we say about some of this context that Lacey highlights as crucial to the project of understanding responsibility? One natural focus of her critique would be the vectors of power that have constructed our social world in the UK (and elsewhere), such as class, race and gender, especially perhaps in chapter 3 of ISCR, where she discusses how criminal law is shaped by powerful interests, often those of the elite. And indeed, as discussed below, Lacey does, in various places in this text, suggest that these factors have played a part in the development of responsibility, but there is remarkably little space given to these important drivers and markers of social life, partly because, as she points out, interest-based analyses tend towards reductionism and monolithic notions of power (80). However, she also highlights the importance of not dismissing interests as a significant part of the structure of criminal responsibility (81).

There is a vast contemporary literature on the ways in which sex/gender, class, sexuality, physical ability and race work independently and together such that those of the “wrong” race and so forth become socially marginalized, and disproportionately appear within the criminal justice system. It is not clear from ISCR how the marginalization of “others” has shaped law generally or responsibility in particular. It is important then to explore the ways that markers of identity and often of repression, such as gender, class and race, have impacted upon the development of criminal law—and responsibility—both conceptually and in practice. However, in what follows, I will focus specifically on gender, since much of Lacey’s other work has analyzed the ways in which sex and gender operate to shape the conceptual and practical meaning of law.<sup>11</sup>

## II. Searching for Gender

It is surely curious that gender, while figuring so centrally in the construction and organization of social life across virtually all societies and civilizations is nevertheless barely visible in the conceptual armoury of law.<sup>12</sup>

Gender does not figure centrally in this book, even though Lacey points out that “one of the most radical changes in the conception of legal personhood, viewed in modern perspective [is] the relatively recent acknowledgement of women as legal persons” (183). Lacey explores how from the nineteenth century onwards, doctrines of *mens rea* and notions of responsibility as grounded in capacity gained ascendance, situated within the context of more general discourses of the individual, freely choosing subject, “premised on a very particular, modern construction of criminal law’s subjects as responsible agents” (139). The fact that the criminal law’s responsible subject has historically been male, is not the topic of this book, but

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<sup>11</sup> In doing so I do not mean to neglect the intersectional way in which people and communities are marginalised through race, class, sex/gender, physical ability and a myriad of other social characteristics. [Markus and Simon, have inserted this new footnote which has messed up the numbering of the ‘supra’ footnote references – I can fix this, but I didn’t want to do it without asking you first as you may prefer to do it through copy editing processes. Sorry!]

<sup>12</sup> Joanne Conaghan, *Law and Gender* 5 (2013).

that fact is certainly worth mentioning. Of course, this (male) liberal choosing subject who has opportunity and capacity is only one legal persona in the story of responsibility, as Lacey so skillfully demonstrates—notions of bad character, risk, and harmful outcomes, also drive the criminal responsibility practices of contemporary criminal law. However, none of these responsibility levers are understood in the text as specifically gendered either—though as suggested above, Lacey’s has, in previous analyses, revealed “the continued vitality of a cultural sense of women’s agency” within the process of criminalization throughout the nineteenth century.<sup>13</sup> Clearly, as Naffine suggests in her review of Lindsay Farmer’s book, it is crucial that “[a] historical account of criminal law’s persons, as social beings, would need to acknowledge the very different social, economic and legal lives of men and women—as legal institutional facts; and then reflect on the implications for past and present criminal law: its interests and priorities and its very civility.”<sup>14</sup>

Near the beginning of ISCR Lacey lists the authors and texts that dominate the field of criminal law scholarship on responsibility (10), and the vast majority of those texts are written by men. It is not surprising then that her bibliography and footnotes refer mostly to male authors. Lacey does reference some female authors, as well as her own work, but largely that which deals with responsibility and criminalization, and only very minimally that which addresses gender.

That Lacey’s immediate points of reference are men, and that citations to the relevant texts in the field are to those by men, is not an accident. Lacey’s bibliography maps out the contours of the field as it is commonly understood to exist. In stark contrast to Lacey’s bibliography, which is dominated by white men, in *Living a Feminist Life* (LaFL),<sup>15</sup> Sara Ahmed adopts a policy of citing *no* white men. What she means by this is that she does not cite those she sees as part of the academic institution of white men, that is, “the persistent structure or mechanism of social order governing the behaviour of a set of individuals within a given community.”<sup>16</sup> Her aim is to challenge institutional habits—“tendencies are acquired through repetition”<sup>17</sup>—and the practice of only referring to those with whom we are already familiar, such that citational patterns repeat and reproduce themselves, and becomes inevitable.<sup>18</sup> Ahmed is not a lawyer or a criminologist, but a feminist social theorist and activist, writing in LaFL about, amongst other things, the brick walls that feminist scholars come up against when trying to talk about or do equality-based work in the academy; her work here is helpful for the insights it brings to critical questions about the place or absence of gender in our academic conversations.

Replying to the question of why a reading list or bibliography is all white or all male with the answer, “of course, that’s just how it is” is what Ahmed calls “disciplinary fatalism.”<sup>19</sup> The point is not to shame people or make them feel bad, she says, but to question

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<sup>13</sup> Lacey, *supra* note 2, at 105.

<sup>14</sup> Naffine, *supra* note 1.

<sup>15</sup> Sara Ahmed, *Living a Feminist Life* (2017).

<sup>16</sup> *Id.* at 153.

<sup>17</sup> *Id.* at 149.

<sup>18</sup> *Id.* at 150-51.

<sup>19</sup> *Id.* at 150.

the re-production of knowledge as (ir)relevant, and highlight the impact that reproduction has. As such, Ahmed's citations do not simply reflect the field as it is (as if there was such a solid and immovable *fact* as the field as it is); they are chosen to represent work that is relevant to her arguments, but not always cited, and to deliberately demonstrate the impact upon a text, and upon a reader, of the citations we choose (and those we do not). As long ago as 1987, Anne Bottomley raised the question of "whether the very construction, not only of legal discourse, but *representations* of the discourse in the academy is the product of patriarchal relations at the root of our society."<sup>20</sup> One way of addressing this is to use tools of feminist critique, which is itself a powerful resource of resistance "even where we do not have the means to radically change law schools and law itself."<sup>21</sup>

In such a short book, which ambitiously aims to historicize responsibility, it is not possible for Lacey to "connect the dots" with other kinds of scholarship or the work of those outside the mainstream of this field. But for the remainder of this essay, I would like to undertake this task. It is important not only to connect the ideas in ISCR with Lacey's own formidable gender analyses that appear elsewhere, most particularly in her 1998 book *Unspeakable Subjects*,<sup>22</sup> but also to highlight the work of those theorists of gender and law for whom Lacey's ideas can provide important points of resonance and contrast.

### III. Searching for Connections

Ngairé Naffine's book *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person*<sup>23</sup> (LMoL) makes some important arguments that clearly connect with Lacey's in ISCR. Lacey does briefly reference Naffine's work but it lies outside the mainstream criminal law theory scholarship on responsibility that Lacey directly engages in ISCR. But like Lacey, Naffine endeavors to excavate the competing influences on how we have come to understand a core legal concept—here personhood, or "the nature (and legitimacy) of law's conception of its subject."<sup>24</sup> Chapter 5 of LMoL, "Moral agents and responsibility," examines the work of theorists who believe that it is the capacity for reason that makes one a legal person that can be held responsible. Unlike many legal theorists who start with the "What is Law?" question, chapter one of her book begins with the question "Who is Law for?." This is strongly echoed in Lacey's own critical inquiry at the beginning of ISCR—that we should ask not what responsibility *is* so much as what it is *for* (2). It is the importance of what it means to be a person that is crucial for Naffine—because to be a person is "to have political and moral as well as legal standing"<sup>25</sup> and that a legal person is "an act of legal creativity with immense social and political import."<sup>26</sup> It is not a merely a metaphysical question, but

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<sup>20</sup> Anne Bottomley, *Feminism in Law Schools* 12 (1987) (cited in Carol Smart, *Feminism and the Power of Law* 20 (1989) (emphasis added)).

<sup>21</sup> *Id.* at 25.

<sup>22</sup> Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1998).

<sup>23</sup> Ngairé Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (2009).

<sup>24</sup> *Id.* at 13.

<sup>25</sup> *Id.* at 11.

<sup>26</sup> *Id.* at 12.

one that is deeply legal, as well as having religious and biological consequences. It has, she says, massive implications for social justice.<sup>27</sup> Indeed, in her view, evaluating the appropriateness of a concept such as legal personhood—or, indeed, we might say responsibility—is not about whether it closely resembles reality, or accords with philosophical theory, but “how well it serves a *just* legal purpose,”<sup>28</sup> i.e., how the concept is applied, and the outcome of that application.

In her book, Naffine examines competing views of *human nature* and what it means to be a person. In a way, this is a similar kind of question to “what is responsibility?,” but it appears almost as an a priori question—the question of capacity or character for example cannot be asked unless we ask whether or not the subject even counts as a human person. Lacey alludes to this in ISCR when she says:

[I]n . . . the nineteenth century . . . an idea of responsibility as founded in freedom and capacities, coinciding as it did with an increasingly medicalized view of female deviance and an understanding of women as less rational, more feeble-minded, less autonomous, less fully citizens—indeed less persons—than men, may have had the ironic consequence that women became less often subject to criminal justice controls (57).

Taking this brief thought one step further, we might ask, not simply what impact have ideas of responsibility had on women, but what impact has the idea of *women*, the idea of gender itself, had on the idea of responsibility? The answer of course might be, none at all—and if so, this is an important point in its own right, one that Lacey—in ISCR at least—does not address. As Conaghan has put it: “identifying the various ways in which gender acts upon and influences law is not the end of the matter. What is most interesting is that it consistently appears *not* to do so.”<sup>29</sup> It is vital, therefore, at least to acknowledge the pressing question of the *absence* of gender, and the ways in which the concept of responsibility has been impervious to gender, how, as Conaghan says, “in the jurisprudential imagination, law occupies a self-consciously artificial and gender-devoid world.”<sup>30</sup> Analytical jurists may argue that responsibility is a gender-blind concept, but clearly being responsible is historically seen, as Lacey points out, as that which women are *not*. It is important to highlight then, that in this volume, Lacey’s brief treatment of the relationship between responsibility and gender demonstrates how femaleness acts as the negative against which we define responsibility - which by implication and default then, is always a male concept.

The notion of responsibility as founded in “freedom and capacities,” as Lacey mentions in the quote above, still has significance today—we need only look at the Sexual Offences Act 2003 in England and Wales, section 74: “a person consents if he (sic) agrees by choice, and has the freedom and capacity to make that choice.” The vast majority of those who make use of this provision are women. The consent provisions and the Act more

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<sup>27</sup> Id. at 11.

<sup>28</sup> Id. at 183 (emphasis in original).

<sup>29</sup> Conaghan, *supra* note 11, at 25.

<sup>30</sup> Id. at 5.

generally have been widely critiqued, but the question of why responsibility is, even now in 2017, modelled on a liberal, rationalist—masculinist—model, needs to be addressed head-on: “After all, the concept of law (to invoke the title of Hart’s famous work) has been endlessly interrogated in terms which do not admit the relevance of gender.”<sup>31</sup> Lacey herself points to this in *Unspeakable Subjects*<sup>32</sup> when she says that the “structure and method” of law is gendered.<sup>33</sup> There is nothing in ISCR that explicitly acknowledges the gendered history of responsibility itself—or indeed, ongoing questions about the way that it continues to be theorized in a male-dominated discipline. However, there are clear links between the ways in which Lacey understands responsibility to be constructed in and through ideas, interests and institutions, and her other published work on gender (and that of others). Placing ISCR into conversation with this other work allows us to engage in a more nuanced analysis of how some of those ideas, interests and institutions are, amongst other things, gendered, raced and classed.

For example, in chapter 6 of *Unspeakable Subjects*, entitled “Closure and Critique in Feminist Jurisprudence: Transcending the Dichotomy or a Foot in Both Camps?” Lacey raises methodological challenges similar to those suggested in ISCR—i.e., that legal theory must look beyond “pure” conceptual analyses of law if it is to have any purchase in the real world—but from a distinctly gender-sensitive perspective: “[I]t could be argued that feminist legal theory inevitably begs questions about the definition of law and the legal sphere which have been the stuff of analytical jurisprudence.”<sup>34</sup> However, she points to the reluctance of most feminists to engage directly with traditional jurisprudence, and the failure of some feminists to recognize that traditional jurisprudence comes in various different shapes and sizes (natural law, positivism etc.), each of which raises distinct kinds of questions for feminist theory;<sup>35</sup> the result is that core questions like “what is law” are often left to the analytical philosophers to “appropriate.” She ends the chapter with a strong call to arms: “We should not abandon the concept of jurisprudence to the orthodoxy, but claim it as our own as part of a transformative feminist practice.”<sup>36</sup>

Joanne Conaghan is an important interlocutor here for Lacey, particularly her most recent book, *Law and Gender*, which “considers understandings and conceptualizations of law in the jurisprudential imagination with a view to highlighting both the role of jurisprudence in the construction of a realm of the strictly legal and the gendered implications of so doing.”<sup>37</sup> Lacey mentions the book in a footnote in the final chapter of ISCR, referencing Conaghan’s critique of general theories of law that neglect socio-political and cultural context. And Conaghan echoes some of Lacey’s concerns laid out above when she says, “[F]or the most part, legal scholarship continues to hold on to the view that gender

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<sup>31</sup> Id. at 6 (footnote omitted).

<sup>32</sup> Lacey, *supra* note 21.

<sup>33</sup> Id. at 2.

<sup>34</sup> Id. at 169.

<sup>35</sup> Id. at 170.

<sup>36</sup> Id. at 187.

<sup>37</sup> Conaghan, *supra* note 11, at 28.

plays little or no role in the conceptual makeup, normative grounding, or categorical ordering of law.”<sup>38</sup>

Most feminist theories, influenced by postmodern critiques, would now accept that feminism alone is not sufficient to critique law.<sup>39</sup> And it seems strange that meta-level Marxist and Feminist theories did not survive the challenge of postmodernism intact—critical theories must now at least acknowledge the intersecting nature of inequality if not reject explanatory theories all together—while much analytical jurisprudence asking the “What is law?” question seems to have emerged relatively unscathed, continuing to engage in vacuum-based philosophical analyses of legal concepts. Similarly, Conaghan agrees that it is odd that mainstream jurisprudential scholarship remains “immune to the contamination” of contemporary feminist and critical legal theory: “Notwithstanding the wholesale assault of critical legal scholarship, the spirit of law as an intelligible and self-legitimizing field of vision is remarkably resilient, still directing and informing much of the work produced by new generations of legal scholars. More importantly, it continues to have cultural and political purchase.”<sup>40</sup>

On the other hand, Carol Smart argues that the quest for a distinctly feminist jurisprudence is misguided if—even while it challenges the form and substance of law—it “leaves untouched the idea that law should occupy a special place in ordering everyday life.”<sup>41</sup> Something similar could be said specifically of criminal law too, of course. We may interrogate the foundational concepts and the substantive rules of criminal law, but this leaves untouched the central place of criminal law rules and concepts in our daily lives. Undermining the centrality of law—and indeed of criminalization<sup>42</sup>—in contemporary life is clearly not Lacey’s goal in ISCR, but Lacey does imply an over-expansive resort to criminal law when she discusses the increasing popularity of “risk” as a motivation for deeming someone criminally responsible and imposing criminal punishment (46-48); and the connections between “risk”- and “character”-based responsibility practices (148).

Smart’s rousing call to “resist the siren call of law” has been much debated in feminist literature (see for example the 2012 special issue of *Feminist Legal Studies*<sup>43</sup>), leaving some feminists conflicted about whether and to what extent engaging with law can really achieve feminist aims.<sup>44</sup> As Lacey reminds us, it is crucial to remember that law also interacts with and is implicated in other powerful social, political, economic and cultural institutions<sup>45</sup> and

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<sup>38</sup> Id. at 8.

<sup>39</sup> Lacey, supra note 21, at 13-14.

<sup>40</sup> Conaghan, supra note 11, at 16.

<sup>41</sup> Smart, supra note 19, at 5.

<sup>42</sup> There is a vast literature arguing against overcriminalization generally, and in relation to specific offenses. For discussion, see Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (2008); Sharon Cowan, *The Heart of the Matter: Criminalising Fraudulent Consent to Sex* (unpublished, on file with author).

<sup>43</sup> Special Issue, Carol Smart’s Feminism and the Power of Law, 20 *Fem. Leg. Stud.* 65 (2012).

<sup>44</sup> Sharon Cowan, Taking a Break from the Legal to Transform the Social, in *Exploring the “Legal” in Socio-Legal Studies* [AU: Please insert first page number] (2015). Page 121

<sup>45</sup> Lacey, supra note 21, at 175.

for that reason if no other, we cannot ignore law. But Smart’s main argument remains convincing here—that it is always dangerous to attempt to dismantle the master’s house using only the master’s tools. In other words, in trying to understand the key concepts of law, if we do not name the underlying norms, in this case gender norms, we risk masking “the operation of legal norms that produce problematic gendered consequences with a troubling degree of regularity.”<sup>46</sup>

For Smart, this means that feminists should *not* seek to transform jurisprudence by supplanting it with another “grand theory” of feminist jurisprudence—“replacing one hierarchy of truth with another,”<sup>47</sup> since this does nothing to challenge the notion that there are universal and essential truths about law,<sup>48</sup> and risks ignoring the fact that law is socially and historically contingent.<sup>49</sup> A feminist jurisprudence project also potentially disregards the possibility of praxis, whereby theory and practice are dialogically situated, rather than theory being formulated simply by identifying the “truth” of experience.<sup>50</sup> In other words, in theorizing about law, analytical jurists may give too much weight to the abstract; feminists may give too much weight to the experiential. Smart seeks some sort of intellectual compromise in calling for feminist discourses and critiques.<sup>51</sup> This neatly connects us back to Lacey’s methodology in *ISCR* of “reflexive movement” (202), between modality and functionality, that is, identifying core themes but avoiding universalism, and being cognizant of social contexts and institutions.

A more reflexive approach is also akin to what Sara Ahmed has recently suggested—that feminism needs to embrace doubt and the necessity of “waver[ing] with our convictions” since “[a] feminist movement that proceeds with too much confidence has cost us too much already.”<sup>52</sup> This is very much an anti-universal truth approach. While Ahmed’s writing is grounded in her own experience, it has the element of praxis that Smart refers to. Feminist theory is not just something we generate in the academy, or in the office, Ahmed says, but something we do also “at home”;<sup>53</sup> it is not something that is abstracted from empirical reality, but rather, “feminist theory is what we do when we live our lives in a feminist way.”<sup>54</sup> The particularities of our lives can be used to challenge the universal, to “bring theory back to life”<sup>55</sup> so that feminist theory is both reflexive *and* accessible. Lacey’s book is not feminist theory, but it is reflexive and accessible, and is part of a conversation, with her own work and the work of others, about the importance of taking critical approaches to law—and life—seriously.

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<sup>46</sup> Conaghan, *supra* note 11, at 28.

<sup>47</sup> Smart, *supra* note 19, at 89.

<sup>48</sup> *Id.* at 68.

<sup>49</sup> Tamanaha, *A Realistic Theory*, *supra* note 4, at 2.

<sup>50</sup> Smart, *supra* note 19, at 70 & 72. Lacey herself engages this debate on praxis in chapter 6 of *Unspeakable Subjects*. See Lacey, *supra* note 21.

<sup>51</sup> Smart, *supra* note 19, at 69.

<sup>52</sup> Ahmed, *supra* note 14, at 7.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 11.

<sup>55</sup> *Id.* at 10.

#### **IV. Conclusion**

Lacey's impressive theory of criminal responsibility connects with a wider community of ideas; not simply ideas about responsibility (such as those of Lindsay Farmer) or law more generally (such as those of Tamanaha) or indeed legal theory from a feminist perspective (to which Smart, Naffine and Conaghan, to name a few, have developed). The question about the nature of law and the operation of its concepts in the real world draws in a broader range of interlocutors such as Sara Ahmed, because it is rooted in conversations about power, and about challenging dominant discourses, not only in theory, but also in academic institutions and practices themselves. As such, this book should be read as part of an important social dialogue about the need to contextualize concepts and to conceptualize contexts.