

IN DEPTH

## Feminist strategies against penal paternalism

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**A global debate about the place of penal policy** in constructing citizenship in the twenty-first century is currently underway. The sociologist Loïc Wacquant is one of the main references in the area of critical assessment of the present advance of systems of punishment in liberal democracies. His thesis is that the expansion of the penal system is an essential characteristic of the present phase of neoliberalism. Given the shrinking of the welfare state and social protection systems as well as growing uncertainty and lack of security, states promise peace and order through hardening their punishment systems, which then target the poorest and most vulnerable populations. When inequality is not identified as a structural problem and there is no attempt to tackle its causes, the political discourses that appear separate crime from poverty and single out individuals and groups of individuals as guilty, while promising harsh punishments for criminals. In the United States, for years now, several theorists from the domain of critical legal studies and antiracism circles have been discussing the need to reflect on the advance of the prison system. They point not only to conservative agendas but also to policies that *progressive neoliberalism* has implemented in recent years, often in the name of feminism and LGBT projects. Neither Europe nor Spain is an exception to this. As Ignacio González Sánchez<sup>[1]</sup> notes, “nowadays, we have more police and more prisoners than there were fifty years ago, and a Criminal Code that is harsher than the one in force when Franco died”.

In this context of a generalised expansion of penal policies in capitalist democracies, it also is necessary to consider the emergence of reactionary projects that characterise

the early years of the twenty-first century. The advent of far-right forces in the democracies of Europe and the Americas further aggravates the problem and reveals how urgent it is for democratic initiatives to move away from the punitive option. Hence, the type of politics put forth by various feminist tendencies are becoming radically decisive because violence against women is frequently played as the perfect trump card in arguments in favour of harsher penal policies. Sexual violence, in particular, is an issue that feminism has placed in the public arena of present-day democracies, thus leading to a call from society for harsher punishments for the crimes it encompasses.

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The American criminal lawyer Aya Gruber<sup>[2]</sup> argues that a significant part of US feminism has inevitably become an ally of carceral policy that is extending the powers of police and prosecutors, promoting punishment as a way of solving social problems, and taking resources from marginalised communities to fund the penal system. It is evident that such political formulae are a weapon of the enemy and that they contribute to the consolidation of the notion that reactionary responses are a form of common sense. One only has to see how the discourse of the National Front leaders in France or of Vox in Spain is used to criminalise migrant populations or to defend the death penalty.

Feminist policy implemented by the Spanish state has always been notable for its unwavering reliance on the criminal justice system, with laws against gender violence which mean that lodging a criminal complaint is almost the only way women have of asking for help. The crisis of 2008 and the consequent budgetary cuts in the domain of equality policies reinforced the punitive focus. After a series of amendments that

reinforced the Criminal Code to the point of making it one of the harshest in Europe, some sentences for rape have come to be comparable with sentences for homicide. Yet, today's debates about sexual violence show that a large part of the public is always ready to call for tougher penalties and not even the left seems willing to engage in anti-punitive education. The public debate that has given rise to Organic Law 10/2022 on the comprehensive guarantee of sexual freedom—known as the law of *only yes means yes*—is clear proof that, once punitivism takes over from common sense, nothing triggers a sense of insecurity more than the idea of criminals getting out of prison. This fear is something that the far right can then fan for its own purposes. Institutional feminism, which has also embarked on the punitive path, has contributed to the creation of a debate on penalties and this means that feminists have sold out to the far right. Today's feminisms face an extremely important challenge: how to confront violence and what kinds of discourse should be constructed about it. The matter of what public policies should be implemented is one of the most sensitive and delicate political questions we must deal with. At stake here is the possibility of escaping from far-right frameworks or, conversely, totally falling for them and thus collaborating in the advance of punitive, reactionary guises of common sense.

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I would like to dwell on two strategic questions that non-punitive feminism must take on if the aim is to tackle violence against women. These issues continue to be completely absent from the predominant public policy approaches and hegemonic discourse.

First, punitivism means surrender. As the feminist Laura Macaya has pointed out on numerous occasions, it requires a certain construction of masculinity and femininity.

The former is presented as a natural masculinity, which is irremediably dangerous for and violent towards women. Naturalising this predatory masculinity and acceptance of the inevitability of this danger become the basis of social discourse that instructs women to be careful, for example, through inhibiting their own sexuality. The other side of the coin of this irrepressibly violent masculinity is a withdrawn and vulnerable femininity, helplessly trapped in the role of victim and totally in need of protection. This essentialist, determinist perspective on men and on women has been, and is, part and parcel of equality policies, especially those against gender violence, while also dictating the kind of response to violence coming from organisations and institutions.

Hence, given these traditional approaches, one of the strategies that must be introduced to combat violence from non-punitive standpoints, is working with men and producing policies aimed at countering the powerful imperatives of hegemonic masculinity. Precisely to the extent that feminism addresses a real problem, which is to say, a structure of domination and inequality rooted in the depths of our social and cultural system, punishing certain individuals cannot be the only response. If anything has been absent, and is still disappearing from institutional policies against violence, it is the matter of masculinity which, far from being a natural and inevitable phenomenon, is a social construction in which everyone is involved. If the patriarchy is a structure, if it precedes all individual subjects, and continues to exist after them, if it keeps affecting our place in the world, generating commands and prohibitions concerning our behaviour and our roles, the problem will not be solved by means of prison and punishment. As bell hooks says, “The perpetuation of male violence through the teaching of a dominator model of relationships comes to boy children from both women and men”.<sup>[3]</sup>

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In fact, feminist attention to the question of masculinity must lead us to a broader, more complex understanding of what we can understand as gender violence. Rita Segato, for example, points out that a large number of the expressions of male violence aiming to perpetuate masculinity also targets men. This culture of violence that men are taught from childhood situates them not only as aggressors but also as victims and therefore as objects of a malaise that must also be named by feminism. The impossibility of men themselves managing male violence, the lack of tools for dealing with it, the absence of social attention and a collective response to it is inseparable from the fact that much of male frustration, rage, and wrath is taken out on women. Feminism must, then, draw attention to the hierarchical nature of the patriarchy, which also affects men, as well as pointing out how it relates to mistreatment, its culture of humiliation, and its forms of violence, and must show men that they can escape from this violence, not only to stop inflicting it on women, but also and from the very start, that they need to be able to stop accepting it and suffering it as men. This leads to the urgent task that involves us at many levels as a society, from feminist discourse and educational initiatives through to the institutional resources that laws must introduce. The fact that men can change and, moreover, that they have good reasons for wanting to change, is the premise that underpins every kind of feminism that aims at transformation rather than at punishment.

The second strategic matter is that punitivism means renunciation. Seeing men as irredeemably innate aggressors entails, as a necessary counterpart, a conception of women as victims who are stuck in the position of those who receive the action and damage done by others without any leeway whatsoever for their own action. Punitivism traps women in passivity and gives rise to paternalistic discourse, practices, and laws which, in the name of protection, end up denying any agency to victims. Hence, institutions frequently undertake the task of guardianship of all victims, as if they were minors, and thereby conveying to society and to the victims themselves the idea that they are incapable of having any kind of responsibility for their own recovery.

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Framed in such views, the Spanish laws against violence have totally disabled some of the main strategies of restorative justice. Law 1/2004, of 28 December on Integrated Protection Measures against Gender Violence includes an explicit prohibition of mediation as an alternative to criminal proceedings, or as a complementary strategy. Almost two decades later, Organic Law 10/2022, on the Comprehensive Guarantee of Sexual Freedom, has once again put paid to this approach as an option. This instrument of justice, recognised as valid in cases of wars and terrorism, and whereby victims can sit down to speak with aggressors, is directly prohibited for women. In their case, the state knows what is best for victims and takes charge of their protection and guardianship, even when this denies the possibility that the women concerned are able to say what they need for their recovery. It is this situation that ends up pushing many women to take legal action, a measure that, in some cases, they would prefer not to resort to and with effects that can revictimise them. The legal option must exist, but victims should not be pushed into this as a matter of obligation and as the only way open to them, and neither should making a police report be the condition or main requisite if they are to be heard by the institutions (in order to gain access to help, social work services, and even shelter resources). In order to leave behind the punitive resort or, in other words, to start thinking about justice in terms of recovery and not punishment, it is also necessary to implement complementary feminist strategies whereby women themselves can know what they need and be heard. Ensuring that support does not become infantilising tutelage must be one of these feminist commitments.

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The austerity of the second decade of the present century has meant that policies that go beyond criminal procedure have been left untapped, and these are also the most dependent on investment by governments and institutions. Educational and cultural policies are needed in order to change shared understandings. Also necessary are redistributive policies that make more resources and tools available to women, allowing them to be more autonomous, more able to decide for themselves, better equipped, and less exposed to precariousness and violence. Policies that go beyond the punitive option are not the most beneficial in electoral terms, and neither are they the cheapest. But they are the most effective.

The main problem that the various branches of critical feminism have with punitive solutions is this deep disagreement over analysis of the problem from which these prescriptions are deduced. The patriarchy will never be tried in a court of law and, therefore, any policy based on the criminalising solution will leave the underlying problem untouched. In order to tackle this, it is necessary to escape from some of the main traps in which we have been caught thanks to policies of the last few decades. The standpoint must change. It means moving from a politics of defeat—one which, moreover, will aid consolidation of far-right discourse—to a politics based on the conviction that men and women want to change. And, on this basis, we could believe that, together, we can organise a society that is more just than the one we have now.

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[1] *Neoliberalismo y castigo*, Bellaterra, 2021.

[2] Gruber, Aya, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration*, University of California Press, 2020.

[3] hooks, bell *El deseo de cambiar*, Bellaterra, 2021 (In English, *The Will to Change: Men, Masculinity and Love*, Atria Books, 2004, p.61).

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## About the author

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## Photography

Spanish national police officers at the International Women's Day demonstration in Granada, Spain, on March 8, 2023. Author: Victor Martin Dorronsoro (Shutterstock).