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Book review: making the modern criminal law: criminalization and civil order

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Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* Oxford: Oxford University Press 2016, 352 pp., hb £65.00

In this remarkable book, Lindsay Farmer presents a wide-reaching account of the emergence of modern criminal law: an account which frames both the law and its doctrines, as well as the institutions through which criminalization is realized, within the context of its developing relationship with the modern state and that state's projects of governance. On Farmer's view, criminal law and the distinctive modalities of criminalization are oriented to the production of a certain form of civil order: and that conception of order represents something quite fundamental about the nature of modern societies and of how state power is coordinated and legitimated. Farmer will already be well known to criminal lawyers and legal historians for his first, fine monograph, *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law*¹, and also to legal theorists for his role in *The Trial on Trial*² and the more recent *Criminalization*³ projects, which have made a powerful contribution to criminal law theory over the last decade. The systematic, even definitive nature of his latest monograph makes this symposium in a leading legal theory journal most appropriate.

I should preface my contribution by acknowledging that I know Farmer and his work well, and have long been an admirer of the distinctive blend of historical scholarship and theoretical acuity

¹ Cambridge University Press 1996.

² Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, *The Trial on Trial I: Truth and Due Process* 2004; *II: Judgment and Calling to Account* 2005; *III: Towards a Normative Theory of the Criminal Trial* 2007: Oxford: Hart Publishing.

³ Antony Duff, Lindsay Farmer, Sandra Marshall, Massimo Renzo and Victor Tadros, *The Boundaries of the Criminal Law* 2010; *The Structures of the Criminal Law* 2011; *The Constitution of the Criminal Law* 2013; *Criminalization: the Political Morality of the Criminal Law* 2015, Oxford University Press.

which characterizes his writing. After a brief period when we were colleagues at Birkbeck in the mid 1990s, we have kept in close touch and regularly exchange drafts of each other's work. We have both been fortunate to have been working in the broad criminal law field at a particularly auspicious time: a period in which some innovative ideas were being explored, and one in which some of the most influential established scholars in the field have been open-minded and encouraging to younger scholars working in different traditions. A notable example is Andrew Ashworth, whose own work has embraced not only criminal law but also sentencing, evidence and the criminal process – a far broader terrain than the one over which leading doctrinal scholars would have worked 40 years ago.⁴ Another is George Fletcher, whose *Rethinking Criminal Law*⁵ gave a new impetus to historical scholarship when it appeared in the late 1970s, reviving other scholars' appreciation of how much was to be learnt from looking at the dynamic developments of criminal law over time. And Fletcher's serious treatment – critical though it was – of the interdisciplinary thesis of Jerome Hall's *Theft, Law and Society*⁶ was a timely reminder of what could be gained by – as well as of the pitfalls of – setting criminal law in a broader historical and socio-economic context. From the 1980s on, in many English-speaking countries, notably Australia, Britain, Canada, and the United States, the critical, historical and feminist work of scholars like John Braithwaite, Markus Dubber, Jeremy Horder, Mark Kelman, Ngaire Naffine, Alan Norrie, Mariana Valverde, Celia Wells and Lucia Zedner was creating a vibrant intellectual context for the broader approaches to criminal law to which Farmer and I were also drawn. Farmer's book contributes materially to this rich tradition.

⁴ Ashworth's *Principles of Criminal Law* was first published in 1991 and is now in its 8th edition, in the hands of Jeremy Horder (Oxford University Press 2016); *The Criminal Process: An Evaluative Study* went to four editions, the first in 1994, and the last, co-written with Mike Redmayne, in 2010 (Oxford University Press); and *Sentencing and Criminal Justice*, first published in 1983 as *Sentencing and Penal Policy* (London: Weidenfeld and Nicolson), is now in its 6th edition (Cambridge University Press 2015).

⁵ (Boston and Toronto: Little, Brown; 1978)

⁶ Second edition (Indianapolis: Bobbs-Merrill 1952).

I had the advantage of receiving the final draft of *Making the Modern Criminal Law* just as I finalized my last book,⁷ and on the basis of our many conversations over the years, I settled down to read it with a sense of excitement, and with very high expectations. These were not disappointed. Indeed I felt as if I were reading the coming to fruition of many of Farmer's ideas over the last twenty years – all brought into clear and illuminating relation with one another, in – particularly for such a substantial book – a remarkably digestible form. The book opens with a methodological chapter which explores the main traditions in theoretical criminal law scholarship, and makes the case for an institutional approach which is capable of integrating the insights of each of these traditions while transcending the limitations of each. In particular, Farmer demonstrates the pitfalls of the tendency to reduce criminal law theory to a question of normative moral theory, hence sidelining its distinctive functions and institutional structure – an argument which however is he is careful to point out does not imply that criminal law is immune from moral evaluation and criticism.⁸ Farmer's institutional conception of criminal law is situated within both political and social theory, with the presence of many of the great figures in each tradition of thought about criminalization, the state and social order – Locke, Hobbes, Smith, Mill; Durkheim, Marx, Weber, Elias – being felt in his elegant account of criminal law's distinctive modern role in underwriting a certain vision of civility and citizenship guaranteed by the state. This vision in turn implies that questions of jurisdiction are central; in addition, the impulse to systematize and professionalize which is reflected in projects – imagined or realized – of codification, in treatises and textbooks and in legal education – is very much part of the distinctive quality of modern criminal law. Responsibility, which is central to most criminal law theory, also plays a key part in Farmer's story, though as a broad understanding of attribution which

⁷ Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests and Institutions* (Oxford University Press 2016).

⁸ Farmer, *Making the Modern Criminal Law* op. cit note 1, p. 33.

cannot be understood independent of the quality and rationale of criminalization, and which may facilitate the broadening of imposed responsibilities as well as constraining them.

The questions which I raise in the remainder of this contribution are offered very much in the mode of dialogue about shared interests and concerns. I focus in particular on some of the questions of method which have arisen as critical, historical and contextual criminal law scholars have expanded the boundaries of conventional legal analysis.⁹

A first such concern has to do with periodization. For any scholar seeking to trace the development of a complex social institution over a couple of centuries, periodization is an almost indispensable tool, for both analytic and expositional reasons. Without a sense of relatively distinctive stages, it is hard to identify the principal explanatory arguments which underpin the overall account. And without periodization to give a structure to the exposition, the reader may get lost in a welter of detail. Of course, periodization is not the only tool available here; and Farmer also deploys a range of thematic classifications. Hence he develops his analysis of how things worked in each of his broad periods – the 18th Century emergence of a new sense of criminal law as concerned with public wrong; the era of the 19th century legislative state; that of early 20th Century penal welfarism; and that of the neoclassical revival of the late 20th Century - in relation to key issues such as codification, jurisdiction and responsibility, before turning to three key areas of substantive law – that relating to persons, to property and to sex.

At root, Farmer makes a strong case for the modernity of criminal law as a form of public law, through its emerging relationship with a certain conception of the state and of governance in the late 18th

⁹ For thoughtful discussion of these methodological issues, and in particular of the place of ethics in relation to the historical and critical tradition, see Alan Norrie, 'Criminal Law and Ethics: Beyond Normative Assertion and its Critique', (2017) *Modern Law Review* 955-73.

Century. This is very persuasive. On the other hand, it must be acknowledged – as indeed Farmer does¹⁰ - that many of the features of criminal law which Farmer highlights as symptomatic of this emerging modernity in fact have a longer history. For example, the very conception of ‘pleas of the crown’, and of the judges as enforcing the King’s or Queen’s peace, in some sense already discloses a public law and centralising impulse. So I found myself wondering at various points whether this might lend itself to an interpretation of this quality of criminal law in terms of a spectrum rather than a distinctive moment of reshaping. Similarly, one might argue that the emergence of hybrid offences like the preventive orders of recent years¹¹ is a throwback to a less centralised understanding of how the proscription of criminal wrongs relates to the project of securing civil order, with the conceptualisation of wrongs in the neoclassical period harking back in some sense to the premodern revenge/private retribution model. This further suggests a possible link with the argument, developed in my last book, that the end of the 20th Century has seen a resurgence of character responsibility.¹² We could think of this, in the terms of Farmer’s method, of a remaking of attributions of responsibility founded on character in a new, hybrid form which incorporates elements of risk or danger – this emerging practice of attribution itself reflecting a shifting conception of the civil order which is to be guaranteed by the state.¹³ This would be another way of interpreting the ‘neoclassical’ turn to censure, help to establish the link with neoliberalism to which Farmer is pointing, in the specific sense of an intensified use of criminal law to govern the marginal. Like any complex social institution, criminal law presents a history of uneven development, and any systematic presentation inevitably flattens out that unevenness. But the systematic presentation itself raises

¹⁰ Farmer op cit note 1, p. 42.

¹¹ See for example Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2014); Peter Ramsay, *The Insecurity State* (Oxford University Press 2012).

¹² Lacey op cit note 7, Chapter 5.

¹³ In Ramsay’s terms (op cit note 11) this emergent notion of civility consists in the state’s providing a guarantee of security in the face of subjects’ ‘vulnerable autonomy’.

new issues and provides an invitation to further theorization. To take another example, Farmer's approach challenges us to reflect on how to account for the doubtless significant fact that English criminal law only formed itself within a framework of completely unified criminal jurisdiction in 1971.¹⁴

A second issue is the theoretical question of the extent to which we should see the modality of law as itself unitary or distinctive. On Farmer's view, while law's modality is most certainly shaped historically, and should be understood in terms of the institutional arrangements through which it is realized,¹⁵ it is nonetheless sufficiently distinctive at any particular time to be treated as discrete. Putting one's finger on the perfectly nuanced characterization here is a tricky matter; one with which most sociologically, historically or critically minded legal theorists, myself included, have grappled.¹⁶ This tension is felt in Farmer's effort to acknowledge special aims in particular areas of criminal law while insisting on maintaining a conception of criminal law as a whole or 'in general'.¹⁷ But it is a tension which is inescapable, and best handled through precisely the sort of reflexive theorization which Farmer's book provides.

This question of law's distinctive modality abuts, of course, upon the lively debate about legal pluralism;¹⁸ and its converse is the question

¹⁴ Farmer op cit note 1, Chapter 4.

¹⁵ Farmer draws here on Neil MacCormick's influential institutional conception of law: *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007).

¹⁶ See Lacey op cit Chapter 6; William Twining, *General Jurisprudence* (Cambridge University Press 2009); Brian Z. Tamanaha, *A Realistic Theory of Law* (Cambridge University Press 2017); Roger Cotterell, *Sociological Jurisprudence: Juristic thought and social inquiry* (Routledge, forthcoming 2017).

¹⁷ Farmer op cit note 1, p. 30.

¹⁸ See for example Emmanuel Melissaris, *Ubiquitous Law: legal theory and the space for legal pluralism* (Aldershot: Ashgate 2009); William Twining, *Globalisation and Legal Theory* (Cambridge University Press 2000); Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (Cambridge University Press 2002).

of the relationship between formal, criminal-legal and informal modes of governance and social ordering. Farmer's thesis about the emergence of a modern state project of criminalization in pursuit of civil order might be taken to imply that that private vengeance and other non-legal forms of dispute resolution diminish in significance in the modern period. And, in some sense, that is true. Yet such forms of plural social ordering do persist, and it is interesting to speculate as to whether the perception of the need to keep them in their place is one of the things which has shaped the boundaries of criminalisation at various points in modern history. Brian Simpson's unforgettable *Cannibalism and the Common Law*¹⁹ explores one such case study. On Simpson's reading, the prosecution of (two of) the shipwrecked sailors in *R v Dudley and Stephens*²⁰ represented a concerted attempt by the senior judiciary to assert the authority of the criminal law over and above the maritime conventions which had governed social reactions to cannibalism following shipwreck over the centuries, and which were regularly reported in the national press in the decades immediately preceding the case. That this assertion was still needing to be made in the late 19th Century seems highly significant.

A third question relates to the place of punishment – both penal institutions and conceptions of what motivates and justifies penal measures – within a systematic conception of criminal law. Farmer argues persuasively at the very outset of his book that, both conceptually and practically, the aims, functions and social meaning of criminal law should not be assumed to be driven by, and cannot be reduced to, the imperatives of penalty: criminal law has a symbolic function as well as setting social and collective standards and, at least indirectly, constituting a certain conception of citizenship²¹ – all roles distinct from the functions of penalty.²²

¹⁹ A.W. Brian Simpson, *Cannibalism and the Common Law* (Chicago University Press 1984)

²⁰ (1884) 14 QBD 273.

²¹ Farmer op. cit. 116-7.

²² Farmer op cit pp. 14-22.

Farmer argues persuasively that much – particularly liberal – criminal law theory has had the penal tail wagging the criminalization dog, and has accordingly misrepresented or downplayed important aspects of criminal law and its distinctive aims and functions. Yet punishment turns out to be very hard to keep in its place. So while Farmer’s characterization of the 18th and 19th Centuries are framed in terms of, first, a distinctive conception of what the criminal law represents and stands for and against; and then an emerging conception of state governance through the distinctive modality of legislation; his 20th Century classifications – penal welfarism and the neo-classical revival with its conception of criminal responsibility in terms of ‘the ‘punishable subject’ – suggests that punishment and its various aims, functions and modalities has nonetheless played a substantial role in shaping the overall history that he recounts.

This leads us to a further point about the centrality which Farmer gives to the aims, functions or purposes of criminalisation - as distinct from those of punishment - in his account of criminal law. Clearly, they need to be a key part of any complete picture of the nature of criminal law as a social institution. The law’s treatment of the ignorance or mistake of fact/ ignorance or mistake of law distinction is one really useful example of how law’s criminalisation functions and role directly shape its understandings of responsibility. These and other linkages come out nicely in Farmer’s account. But there are two complications which need to be acknowledged. The first is the obvious fact that, within its umbrella role of underwriting civil order, criminalisation may have more than one purpose; indeed its purposes may be somewhat different from its actual roles or functions, which may moreover come into tension with one another. The second is that ‘aim’ or ‘purpose’ assumes an agent – again, there may be more than one relevant agent or group or institution, and in addition we may be ‘reading purpose off’ institutional structures or vectors of power which reflect the accumulated impact of the actions of a range of agents over time.

This is broadly what I was trying to capture with the structure of *In Search of Criminal Responsibility*.²³ This distinguished between the interests and structures of power which shape the development of criminal law; the institutions through which those developments are realized, and which also shape and constrain them; and the ideas which propel, rationalize and indeed limit criminal law, while emphasizing their co-evolution and inter-relationship. But it must be admitted that it can be tricky not to give way to the temptation to write/think as if the criminal law were the outcome of one coherent project. Farmer's welcome emphasis on the insight that law is 'made' – and indeed is constantly being remade – provides a nuanced way of presenting the multiple nature of criminal law's roles amid its process of uneven development over time.

In short, this book is a huge contribution. Full of insight; bold; erudite, it is a book which really moves the field on. The central idea of civil order/security which Farmer has developed, and the way in which he draws, explains and illustrates its connection with the development of modern states, significantly advances our understanding of criminal law's place in the political and social development of modern societies. The focus on jurisdiction; the contextualization of the development of criminal law in political history, and in particular within the history of colonialism and its long term ramifications; the interpretation of criminal law as public law; the elaboration of a conception of civil as distinct from public order; the elucidation of the relevance of the imperial project to criminal law; and the historical treatment of areas of substantive law, notably the sexual offences, all strike me as particularly valuable and distinctive contributions. But, above all, Farmer has shown us that it is possible to combine a meticulous historical scholarship with a big analytic picture of what criminal law and its institutional structures are all about, and of what shapes their development over time. His

²³ Op cit note 7.

book sets the standard to which we should all aspire.

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