

Review

Making the Modern Criminal Law: Criminalization and Civil Order
by Lindsay Farmer, Oxford University Press, 2016, 340pp (ISBN
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Introduction

Making the Modern Criminal Law is part of a broader project on criminalisation undertaken by Lindsay Farmer, Antony Duff, Sandra Marshall, Massimo Renzo and Victor Tadros. Lindsay Farmer is a respected and influential scholar of criminal law theory, who has long argued that criminal law should not be seen as timeless but should be situated within historical and social processes. The monograph is an in-depth, persuasive engagement with, and challenge of, contemporary accounts of criminalisation.

To provide some specificity, Farmer restricts his focus to English criminal law and primarily English criminal law theorists. He justifies this by noting English common law is the foundation of many Anglophone systems of criminal law, and thus continues to offer insights into the foundations of many systems of criminal jurisprudence worldwide. For Australian audiences the book is relevant, as the histories of 18th- and 19th-century treatise writers and law reform reflect our common history, while contemporary English law and academic debates continue to resonate in Australia. The monograph provides a masterful overview of historical and contemporary criminal law theory debates and analysis, which will offer academics, students and practitioners a guide for further reading.

Book structure

The monograph consists of three parts. The first part critiques contemporary discussions of criminalisation and lays the foundations for the central thesis of the monograph that criminal law should be understood as a particular type of social and legal institution directed at the general aim of securing civil order. Farmer relies on MacCormick's theory that law must be understood as a form of institutional normative order (MacCormick 2007). Thus Farmer asserts that, in thinking about the conditions for a justifiable system of criminal law, we should not begin from the requirement of a wrong, such that securing civil peace is seen as a side-effect of the imposition of justified punishment on individuals. 'Instead, this relation must be reversed: peace and civility should be seen as preconditions for justice, and the just imposition of punishment can only take place once institutions have been established' (p. 24).

Part Two develops the idea of securing civil order and links it to the modern understanding of criminal law. It provides theoretical and historical accounts of what Farmer terms themes of the institutionalisation of modern criminal law of jurisdiction, codification

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and responsibility. Despite the breadth of his analysis, Farmer manages to provide a nuanced account of concepts. For example, Farmer traces the emergence of different conceptions of responsibility and considers the function that these play in coordinating and legitimating the criminal law, drawing upon historical and contemporary theorists.

Part Three analyses the law relating to distinct areas: property, person and sex. Farmer emphasises a key argument that has to some extent been neglected from George Fletcher's influential book *Rethinking Criminal Law* that criminal law was polycentric (Fletcher 1978). That is, Farmer explores the extent to which patterns of criminalisation pull against or raise questions about the unifying tendencies of the criminal law. Thus Farmer argues:

the aim is ... to demonstrate that each of these areas has its own pattern and logic of development and also, crucially, that they are not based on a single understanding of a 'core' interest or wrong but that the understanding of wrongdoing has been shaped by the changing aims of the law in each area (p. 9).

Criminal law as a body of rules protecting civil order

The key argument of the book is that modern criminal law can and should be conceived as a body of rules aimed at securing civil order. In making this argument, Farmer challenges a dominant theme in contemporary criminal law theory and criminalisation that rationalises criminal law in terms of justifications of punishment. Thus if the aim of punishment is deterrence, the aim of criminal law is similarly deterrence. Farmer argues successfully and thought provokingly that we can and should have a richer account of criminal law, whereby punishment is not the major aim of criminal law. He asserts that the argument that modern criminal law is aimed at securing civil order has implications for the scope of criminal law. On this account, criminal law cannot be understood solely in terms of the interests that are to be protected, but also 'requires reflection on the purposes of aims of that protection, the kind of order that is being secured through law' (p. 5).

Farmer also engages with a second dominant theme of academic criminal law theory — over-criminalisation (Husak 2008). A key concern in contemporary criminal law theory is to determine the proper scope of the criminal law, and much of this is situated with moral and political philosophy within a tradition of liberal theorising about the role and limits of the state. Farmer identifies a contemporary concern to limit the reach of the criminal law by articulating key themes of criminal law structured in terms of punishment. For example, the contemporary emphasis by many theorists and jurists upon subjectivism as a key principle of criminalisation (based on the idea that an accused is only sufficiently blameworthy to justify punishment if he or she was subjectively culpable) is regarded as a principled way of limiting 'real' criminal offences only to those which have some element of subjective culpability. This emphasis upon subjectivism excludes or precludes analysis of the burgeoning number of regulatory offences. Farmer's monograph gestures towards a possible link between conceptions of the civil order and regulatory offences, but this is an idea that needs much more development. He undermines the quest for principles of criminalisation by asserting the polycentric nature of criminal law and also by noting that at times such principles may lead to an extension of criminal law, rather than a reduction.

Farmer offers clever and insightful re-readings of classic legal and philosophical texts in order to justify and develop his idea of the criminal law as an institution aimed at protecting the civil order (Elias 1939/1978/2000). I particularly enjoyed the analysis of JS Mill's harm principle, with Farmer arguing that an often overlooked feature of Mill was his reference to the civilised community: '[T]he only purpose for which power can be rightfully exercised

against any member of a civilised community against his will, is to prevent harm to others' (Mill 1859/1982; Farmer 2016). Farmer then goes on to analyse what Mill meant by civilisation, asserting that, for Mill, 'in a civilized society, security, which he understood as the protection of individual interests, would depend on the collective arrangement of society, rather than on individual strength or courage' (p. 49).

The title of the book and a central claim by Farmer is that his monograph is about the 'making of the modern criminal law'. The idea of identifying a point of origin for modern criminal law is awkward (Foucault 1966/2002) and also undermined by the choices that Farmer makes. Farmer argues that he is looking for how the criminal law came to be thought of as a whole (p. 64) and starts his analysis in the late 18th century with Sir William Blackstone, noting that he 'occupies an important position in the modern criminal law for most common law traditions' (p. 66). Blackstone was and is important, but identifying Blackstone as the point of origin of modern law is strange; his treatise drew heavily upon prior treatise writers in terms of structures and analyses while retaining old offences (such as witchcraft). Rather than emphasising the discontinuity of modern and old conceptions of criminal law, it may have been more fruitful to explore the ideas of 'order' informing criminal law across time from the 15th century onwards. Rather than foreclosing this kind of analysis, it would have been interesting to analyse links and discontinuities between assumptions of order that the criminal law was seeking to protect, whether religious, sovereign and/or civil. I do not, however, regard this criticism as undermining the quality of the book. The idea of framing criminal law as protecting order is excellent and offers the opportunity for a great deal more analysis and development.

A second, related quibble is that the idea of 'civil order' is nebulous. Farmer could have broadened his argument to consider different conceptions of order that have informed the institution of criminal law across time. Criminal law has long drawn upon equally nebulous conceptions such as the public/private dichotomy, morality and harm in justifying criminalisation. The openness and contingency of these conceptions are a cause for ongoing analysis and reform — and thus I see no reason why 'civil order' cannot be a welcome addition to principles of criminalisation.

I very much enjoyed reading *Making the Modern Criminal Law*. It provided a thorough engagement with key academic debates about criminalisation. The idea of framing criminal law as aimed at protecting order is excellent.

References

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