Review Essay

Criminal Conversations: Farmer, Lacey and the New Social Scholarship

Making the Modern Criminal Law: Criminalization and Civil Order by Lindsay Farmer (2016)
Oxford University Press, 352 pp, ISBN 9780199568642

In Search of Criminal Responsibility: Ideas, Interests, and Institutions by Nicola Lacey (2016)
Oxford University Press, 256 pp, ISBN 9780199248209

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Abstract

The prevailing Anglo-American theories of criminal law tend to be analytical, conceptual and at some remove from the practical institutions of criminal justice. In their new social histories of criminal law, Lindsay Farmer and Nicola Lacey respond directly to modern analytical criminal law scholarship, with its search for timeless principles that will limit and stabilise criminal law, and lend it legitimacy. Both Farmer and Lacey regard this search as misconceived. Criminal law, they say, is the outcome of historical and social processes. It takes its nature from social institutions that have supplied the conditions of its existence and brought it into being. To know why we have the criminal law that we have now, and why we think of it as we do, we must consider the changing nature of police, prosecutors, judges, jurisdictions, courts, and so on. In the course of historicising their subject, Farmer and Lacey advance strong and divergent theses about the development and trajectory of criminal law. This review essay explains and evaluates their arguments.

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I The Conversation

In any conversation of ideas, there is explicit and implicit dialogue. There are intended interlocutors, conversationalists you know you are talking to, perhaps they are pictured in the mind's eye. The two books reviewed here — *Making the Modern Criminal Law* and *In Search of Criminal Responsibility* — are deeply set within the prevailing conversations about the nature of criminal law.[1] They engage with its influential scholars, its explainers, its justifiers and also its critics. This is talk by and between people already immersed in the major theoretical debates in criminal law, about what it is, or should be, who have a certain vocabulary and language game. It is Anglo-American and philosophical in character. The implicit audience is also those who are familiar with the theories and concepts of criminal law theory.

Nicola Lacey and Lindsay Farmer are two of the most respected and influential scholars of criminal law in the Anglosphere. They are particularly known for their treatments of criminal law as a complex and changing social institution: one which takes its meaning from its society, not just from lawyers and their often abstruse doctrines and theories. They set out to write institutional social histories of criminal law and they decry the fact that modern criminal legal thought largely neglects its history, implicitly defining it as irrelevant.

Both authors are responding to modern analytical criminal law scholarship, and its search for enduring universal principles that will limit and stabilise criminal law, give it sharp and reliable contours, and that, most importantly, lend it legitimacy. The analytical scholars, with which they engage, tend to draw on a variety of philosophical correspondence theory. They believe that there are discrete definable wrongs or harms, which exist beyond law, and possibly also beyond societies; and that criminal law's task is to capture, classify, label and punish these wrongs or harms, in the right way and to the right degree: in other words, to ensure a correspondence between law and wrong. The 'harm principle' derives from John Stuart Mill[2] and was most fully developed in the 20th century by Joel Feinberg.[3] 'Legal moralism' is a variety of natural law theory and has been adopted, in different forms, by some of the most influential English and American theorists now writing about criminal law, including Antony Duff,[4] Victor Tadros[5] and Michael Moore.[6]

For Lacey and Farmer, criminal law is not a matching exercise designed to ensure a proper fit between law and its objects. Criminal laws are not better or worse labels for harms and wrongs, and the scholar's task is not to isolate these

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1 Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press, 2016); Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press, 2016).

2 John Stuart Mill, *On Liberty and Other Essays* (Oxford World Classics, first published 1859, 1991 ed).

3 Joel Feinberg, *The Moral Limits of Criminal Law: Volume 1 Harm to Others* (Oxford University Press, 1984).

4 R A Duff, 'Towards a Modest Legal Moralism' (2014) 8(1) *Criminal Law and Philosophy* 217.

5 Victor Tadros, *Criminal Responsibility* (Oxford University Press, 2005).

6 Michael Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford University Press, 1997).

wrongs in as clinical and exact a way as possible. Rather, criminal law is an organic social outgrowth: the outcome of historical and social processes. It takes its nature from social institutions that have supplied the conditions of its existence and brought it into being. To know why we have the criminal law that we have now, and why we think of it as we do, we must consider the changing nature of police, prosecutors, judges, jurisdictions, courts, law reporting, case law and legal codes, law treatises, law textbooks, even law schools and legal education.

As theorists of criminal law, Farmer and Lacey are deeply interested in the main conceptual debates and are adept at conceptual analysis. But both are also concerned about what they see as the failure of much modern conceptual theory to acknowledge the effects of legal institutions on the nature and shape of criminal law, and how it is organised and understood. They share an interest in historicising their subject and they advance strong theses about the trajectory of criminal law. Both have interestingly ambivalent relationships with the thinkers and theories that they see as the most influential. They are in direct dialogue; their intellectual lives interwoven.

II Lindsay Farmer

Right from the start of his rich and sustained institutional history of criminalisation — of what and who should be made criminal, and why — Farmer distinguishes his approach from the conventional one:

> Instead of beginning by asking what principle or principles should guide us in defining or limiting the scope of state action, I ask what I see as the prior question of how it is that the question of criminalization has come to be framed in these terms.[7]

In other words, why do the main writers on criminalisation believe that that there are principles external to criminal law that should constrain this process and that it is their job to find them?

One explanation, offered by Farmer, is that they have set up their criminal law problem in this way. They have cast it as something primarily for modern and political philosophy, and 'within a tradition of liberal theorizing about the role and limits of the [S]tate' and this is 'generally seen as an ahistorical question'.[8] They have cherrypicked ideas and persons from the liberal political tradition, in particular those of John Stuart Mill. They have then taken a great leap forward, of about a hundred years, to HLA Hart and his contemporaries in the 1960s. They have paid close attention to the renowned philosophical debate between Hart and Devlin about the scope of criminal law, triggered by the Wolfenden Committee in 1957, and its recommendations that the 'morals offense' of homosexual conduct should be partially decriminalised.[9]

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7 Farmer, above n 1, 1.

8 Ibid 2.

9 Committee on Homosexual Offences and Prostitution ('Wolfenden Committee'), *Report of the Committee on Homosexual Offences and Prostitution* (London, Her Majesty's Stationery Office, 1957).

This highly selective and abbreviated history, says Farmer, is presented in law schools today as the intellectual grounding of modern debates between harm theorists and legal moralists about the appropriate limits of state power. Farmer is, in effect, describing the modern liberal creation myth of criminal law: who are said to be the 'father figures', how an intellectual lineage is identified; and so a certain periodisation instated. It has been repeated, decade after decade, as the main story of criminal law in law schools.

Farmer offers a counter-thesis of criminal law: that it is a way of 'securing civil order … where self-governing individuals are guided by general rules and interact in civil society and the market'.[10] The securing of civil order is a general, overarching and continuing aim of the modern criminal law.[11] This thesis is developed throughout the book and so forms the focus of this commentary. In pursuit of his argument, Farmer draws on MacCormick's institutional theory of law and makes it his point of departure. For MacCormick, 'the aim of criminal law is to secure the conditions of civil society, understood in terms of facilitating relative peace and mutual trust between strangers'.[12] For this you need the institutions of law. As MacCormick tells it:

> The collective sense of security and solidarity in a relatively peaceful society is likely to depend on a fairly high degree of confidence among law-abiding persons that those who do not abide by the law, engaging in violent or dishonest behaviour, will be effectively restrained.[13]

And so public institutions come to replace the private pursuit of vengeance.[14]

For Farmer, the establishment of centralised legal institutions, 'an apparatus of rule', 'takes men out of the state of nature and guarantees the social order'.[15] It supplies the necessary conditions of a more civilised public world of men transacting with other men, as benignly self-interested individuals, 'pursuing multiple private interests ordered by manufacture, and commerce, and polite sociability',[16] protected and regulated in their transactions by civil government and its legal institutions. In the civil society envisaged, there emerge men with their 'claims to life and property'[17], who can transact peacefully, in impersonal relations, with veritable strangers, and who are expected, and also required, to be civil.

Farmer's reversal of, and reply to, modern criminal law theory is that these 'individuals' do not stand outside law and its institutions, their characters fully formed, waiting to be addressed by law, and brought to account if they choose to do wrong or to harm others. In Farmer's reckoning, individuals are socially-formed beings 'produced by government, rather than government resting on the natural or

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10 Farmer, above n 1, 6.
11 Ibid 27.
12 Farmer, above n 1, 25.
13 Ibid quoting Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press, 2007) 5.
14 Farmer, above n 1, 30.
15 Ibid 41.
16 Ibid 57.
17 Ibid.

pre-social characteristics of individuals'.[18] They are the products of modern civil institutions and modern thinking. Farmer thus advances a variety of classic social contract theory. His person is the individual who is mainly located in civil society and the market, rather than the home, and the problem for criminal law is one of securing the civility of the public sphere — 'the management of conduct in public space',[19] making it safe and 'building and reinforcing trust between individuals'.[20]

With his thesis stated, Farmer proceeds to give it a rich historical setting in what he describes as the 'general' part of his book. There are long and thoughtful chapters on the emergence of criminal law, its changing jurisdictions, and the incomplete move towards codification. A particularly engaging chapter establishes a conversation with four influential and 'representative' writers, each standing for a period and a set of concerns about the nature of criminal responsibility. They are William Blackstone, James Fitzjames Stephen, Glanville Williams and Andrew Ashworth. This is an immensely useful survey of the changing orthodoxy of criminal legal thought, intended to explain how we arrived at the current preoccupations of criminal law theory, especially the concern with getting the law right in its identification, labelling and condemnation of true or 'core' wrongs or harms.

In his chapters on the 'special part' of criminal law (what criminal lawyers' call the 'substantive' offences), Farmer continues his account of the civilising process of criminal law and shows how it has played out in the offences against property and persons, as well as the sexual offences. He begins with the crimes against property because of the historical link between property and civil order. He reminds us that 'the law of property provided an elaborate system for the protection of hereditary rights'.[21] It also secured primogeniture, though this patriarchal law, and its social implications, are not pursued here. He tells us that 'property owners were dealing with strangers, in commercial transactions and in growing cities, [and so] trust was no longer based on personal knowledge but was increasingly guaranteed by law'.[22] Again, we have invoked the community of commercial individuals, transacting as strangers, and in need of security.

In his treatment of the offences against the person, 'one of the pillars of the modern criminal law', Farmer rightly observes that 'its supposed object — the person — is not only undefined … but is seemingly not regarded as a topic worth analysing'.[23] He sets out to rectify this: 'to reconstruct the missing person at the heart of the law'[24] and he proceeds to describe that person's character and social transformation. At the beginning of the story, 'the person' of criminal law is a pugnacious and physically-controlling character. We learn that 'there was a high tolerance of violent behaviour in eighteenth century society… It could be seen in popular culture in forms of recreation and sports, such as prize fighting'.[25] There

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18 Ibid 58.
19 Ibid 60.
20 Ibid 299.
21 Ibid 226.
22 Ibid 227.
23 Ibid 234.
24 Ibid 235.
25 Ibid 237.

was 'the domestic "correction" of wives, children, and servants'.[26] And '[i]t was widely accepted that disagreements might be resolved by physical means'.[27] There was also '[t]he use of flogging … in the army and navy'.[28] From 'about 1750 to 1900', however, there was a 'civilizing offensive', a 'shift in social attitudes towards interpersonal violence'.[29] The upshot was 'the control and policing of violence, particularly in public places'.[30] There was a heightened legal and social expectation 'that individuals control the urge to resort to violence … Violence … was to be a last resort for both individuals and the [S]tate'.[31] And so there emerged 'civilized modern man': the subject of modern criminal law.[32]

Farmer's account of 'the changing boundaries between legitimate and illegitimate violence' in the Victorian period entails '[c]ampaigns against public fighting and "wife beating" and other forms of brutal and "uncivilized" conduct'.[33] There were three areas of life, in particular, where 'these boundaries were contested'.[34] These were the use of 'consensual fights to settle disputes', which once served to express 'the values of manliness and English national character'.[35] There was drunken violence, with its 'unchecked brutality' and new demands for the exercise of self control.[36] Third, 'ideals of masculinity and femininity' began to change, so that women came to be seen as weak and in need of protection (from men) and the civilised man offered women that protection, not their fist.[37] Thus 'wife beating' became increasingly unacceptable.[38] Nevertheless 'it was clearly recognized that the man had authority, or dominion, over women … within the domestic sphere and that this extended to the use of physical violence'.[39] So the question was how much force could a good man use. The 'new civic virtues of self-discipline [and] control of the passions' did not demand the complete suppression of violence.[40]

III All about Men

Though this is presented as an account of the changing nature of 'persons' and 'individuals', and is intended to reveal the 'missing person' of criminal law, the public space envisaged is peopled by men intent on securing a non-violent and regulated and knowable public life, where it is safe to transact business with other men, while the private is conceived as a place where husbands exercise domestic authority, without excessive force. In this account of the persons undergoing the

26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid 235.
30 Ibid.
31 Ibid.
32 Ibid.
33 Ibid 244.
34 Ibid 246.
35 Ibid.
36 Ibid 248.
37 Ibid 249.
38 Ibid.
39 Ibid 250.
40 Ibid 253.

civilising process, we move from private blood feuds, implicitly between territorial men, to a more seemly set of relations between men bent on economic advantage, which ultimately redounds to the common good, rather than primitive revenge. Such economic men are themselves made possible, are brought into being, by certain fair and effective institutions that can respond to their perceived needs: for order and safe conditions in which to negotiate between strangers.

The problem of civil order, thus disclosed, is not one of both men and women doing physical violence, and learning to control their violent urges. Rather this is a description of changing standards of *male* civility and the uses of criminal law to establish and enforce them. Men are the subjects of criminal law, we learn about here, the intended subjects of regulation, and it is men's behaviour which represents the changing index, the metric, of civility and national character. Men's treatment of women is one of the measures of that civility. The civility of women is not itself the issue (nor is it in issue). There are walk-on parts for women but then they are generally cast as victims or as 'the weak', not as civic characters who must learn to act with civility.

The civilising of men in these different areas of their lives is deeply interesting and Farmer gives us a fascinating account of this process. But to explain it systematically, men need to be explicitly identified *as men*, their male lives delineated and examined, and not strangely conflated with women — every time there is a substitute reference to 'persons' and 'individuals'. We need to recognise that women are not the 'persons' or 'individuals' of this story. These are quite clearly male lives and male cultures; and yet there is only the occasional reference to men, as men: about the older and newer forms of manliness and masculinity; why men once thought it was acceptable to engage in public displays of retributive or sporting violence and then go home and 'correct' the wife. And why this understanding of manliness changed.

Farmer describes well the changing androcentric nature of criminal law: it has been a vehicle for regulating and responding to men's changing financial and bodily concerns, their shifting interests and priorities, of allaying their fears for their own personal safety, and making it possible to transact with other men, without bloodshed. The next tantalising step would be to name this inquiry into criminal law as a male (not female) project, and then inspect the specificity of men, as men, and their concerns for themselves.

And then we need to know about the changing lives of this other half of the population (women), who are not really a part of this story of criminal law and civility. All this means that the 'missing persons' of criminal law, the men and women, remain at large. We have neither men treated as men, nor women treated as persons.

The discussion of the so-called 'sex crimes' would seem to invite such a gendered analysis of the men of criminal law and how they set civil standards for themselves. After all, it is still the case in England that only men can commit the offence of rape (in the language of the law, 'persons' require a 'penis' to achieve the act) though now both men and women can be victims. However, the central character of rape law never really acquires a sex. Farmer expresses reservations

about a view of rape law reform, as 'the gradual working out of an underlying [liberal] principle', and yet he identifies the current aim of this law as the securing of 'sexual autonomy' — for everyone, regardless of sex.[41]

Farmer captures well the modern liberal zeitgeist of the new sex laws. Sex is between choosing individuals now interested in a range of sexual options, who seek a free choice without fear of force: these are persons whose liberal freedoms are now extended to include their sexuality. This 'places sexual *freedom and citizenship* at the heart of the law'.[42] He observes, perceptively, that this has its own expansionary logic, as ever more infringements to liberal sexual freedom are identified: 'there is a tendency towards universalism: thinking of every possible instance of sexual wrong'.[43] Still missing from this account of the sex offences are men *and* women, with their very different social and institutional histories as persons, individuals, citizens and subjects.

Perhaps because men, *as men*, are not identified as the central characters of this story of the civilising process, the 'person' of modern criminal law, who emerges from this story of brutal men learning to rein in their violent impulses, is not a newly civilised and reformed man, now sensitive to the historical ways in which masculinity has set the course of the criminal law. Rather 'he' is strangely abstracted and without a gender. Modern criminal law is said now to be concerned with the personal sovereignty of every individual and how that can be threatened; it takes a broad view of these threats, extending to 'hate crimes' and other forms of 'abuse'. For Farmer, the real concern now is one of an escalating criminal law, evermore willing to identify new ways of making a victim of persons.

A social and historical account of criminal law, which this book professes to be, cries out for a gendered history of its human subject. Men of law are invoked in this account, but so much more could have been made of the fact that they are men. What did this male monopoly of legal and social power mean for the ensuing vision of civil society and for the role of criminal law in its realisation and regulation? These are large and difficult questions. As the social historian John Tosh has observed,

> [t]he history of masculinity does not deal with a neglected group, nor can it be placed under the banner of 'history from the margins'. Rather it is a new perspective which potentially modifies our view of every field of history in which men are the principal subject-matter — which is to say the overwhelming majority of written history. The implications of treating men as gendered persons are so all-embracing that it makes little sense to concentrate on exclusively male contexts.[44]

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.

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41 Ibid 293.
42 Ibid 289 (emphasis added).
43 Ibid 294.
44 John Tosh, *Manliness and Masculinities in Nineteenth-Century Britain: Essays on Family, Gender and Empire* (Pearson Longman, 2005) 2.

IV Nicola Lacey

Nicola Lacey's *In Search of Criminal Responsibility* forms an interesting counterpoint to Farmer's treatise. It, too, is social and historical in intent. Both authors are critical of modern analytical philosophy of criminal law, and its search for enduring principles. Both insist on the need to connect criminal law to its history, its institutions, to show it as an outgrowth of society, which necessarily changes as society changes.

Lacey agrees that modern analyses of criminal responsibility are, in the main, grounded in Enlightenment notions of human agency. They presuppose a 'self-determining moral agent, equipped with distinctive cognitive and volitional capacities of understanding and self-control, and of a universal human personhood'.[45] It is an 'essentially modern understanding of human being' thought to 'transcend place and time'.[46] Though this is the received modern view of responsibility, it is one she disputes. For Lacey, the choosing agent is no longer the dominant character of modern criminal law, though criminal law scholars tend to treat him as such and also to see him as an enduring model of responsibility. Rather, the choosing agent now has multiple identities.

Lacey's book is more sharply focused on the nature of this responsible legal subject, and how this individual has changed since the 18th century. She identifies four 'ideational frameworks' for making sense of criminal responsibility that have influenced English criminal law over this period.[47] Each contains assumptions about human agency and how the human agent who strays from the righteous path should be treated by the State: how they should be held responsible and made accountable. There is 'capacity responsibility',[48] which assumes that we are thinking agents endowed with free will, with cognition and volition, and self-control. Because we have rational agency, we can be held responsible for our chosen actions and because we have agency, criminal law is morally obliged to address us as choice-makers, capable of obeying the law.[49] It is this approach to responsibility that presupposes a certain type of 'modern self',[50] a being with a stable unified interior life,[51] whose rational inner thought processes are known to the individual subject and are also capable of inspection by a court of law. There is a '*choice* version' of the capacity approach, which makes 'the knowledge, intentions, and beliefs of the defendant … central'.[52] There is also an '*opportunity* version', which means that there should be evidence that the defendant had a real opportunity to do otherwise.[53]

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45 Lacey, above n 1, 5.
46 Ibid 6.
47 Ibid 24.
48 Ibid 27.
49 Ibid.
50 Ibid 50.
51 Ibid 51.
52 Ibid 31 (emphasis added).
53 Ibid.

Lacey's second 'ideational framework' is character responsibility. Here the attribution of criminal responsibility is a judgement on that person's character and there is an implicit assumption that we are responsible for our character. Lacey observes that criminal law texts today mostly assume that capacity responsibility has dominated criminal law.[54] But she finds this misleading. In Blackstone's time, the defendant's conduct was judged according to evidence of '*character and reputation*', by the standards of the local community.[55] Character, rather than capacity, responsibility suited the local lay systems of justice that looked to the reputation of the defendant.

Lacey's third framework of responsibility is based on conduct and its 'harmful outcomes'.[56] It is associated with the emergence of strict liability (liability without the need for proof of subjective fault).[57] This type of liability, she tells us, has been marginalised in the accounts of criminal lawyers and philosophers, despite the actual expansion of such offences in the summary jurisdiction.[58] Finally, there is responsibility founded on 'the apprehension of risk',[59] which is 'forward-looking' rather than 'past-oriented'.[60] This poses the greatest worry for the criminal scholar. Lacey observes that there have been shifting commitments to these different frameworks for finding someone criminal and proceeds to trace the changing alignment and influence of these ideas.

The 18th century, Lacey says, was dominated by character responsibility.[61] Then 'the trial was focused not on *internal* questions about the defendant's state of mind but rather on *external* facts of conduct' and a finding of criminal responsibility entailed a judgement of bad character.[62] At this stage, 'the institutional mechanisms needed to render subjective responsibility an object of proof in a criminal trial were not yet in place'.[63]

Character responsibility waned from around 'the middle of the nineteenth century through to the latter part of the twentieth century'[64] and there were 'increasingly elaborate doctrines of mens rea'.[65] Lacey explicitly concurs with Farmer (whose manuscript she had at the time of writing) that 'the project of securing civil order was itself premised on a very particular, modern construction of criminal law's subjects as responsible agents'.[66] This was 'an increasingly individualist world'[67] in which 'a freely choosing, responsible citizen stood centre stage'.[68] Medicine and psychology made it feasible to have a trial in which the

54 Ibid 37.
55 Ibid 38 (emphasis in original).
56 Ibid 41.
57 Ibid 42.
58 Ibid 45.
59 Ibid 46.
60 Ibid 47.
61 Ibid 136.
62 Ibid 137 (emphasis in original).
63 Ibid 138.
64 Ibid.
65 Ibid 139.
66 Ibid.
67 Ibid 140.
68 Ibid 141.

thought processes of the defendant were 'an object of proof'.[69] She then documents a third stage in which capacity is combined with outcome responsibility.[70]

By the late 20th century, with its increasing focus on state security, there was yet another alignment. Capacity responsibility, and its requirement of proof of subjective fault, still applied to the 'core' criminal offences — murder, assault and theft — but there emerged a new discourse of risk and 'a new sense of bad character' meaning someone who was thought to be dangerous.[71] And so, Lacey contends, character responsibility is undergoing a revival.[72] Concerns about terrorism have licensed the expansion of state powers, and the creation of classes of 'irregular' persons, whose criminality lies in their suspect status. 'Non-citizens in general, and recent immigrants and asylum seekers more specifically, are obvious potential targets'.[73]

Criminal law scholars remain fixated on the capacity model, but to Lacey this is based on selective attention and a failure to observe those social and historical developments which have accorded priority to the other principles. For example, pre-trial practices such as plea-bargaining 'invite character-based responsibility'.[74] So, too, at sentencing, character evidence assumes importance.[75]

In Lacey's rendition of the making of modern criminal law and justice, and its changing ideas of responsibility, we learn about the role of an emerging legal profession, the development of a modern police force, the centralisation and professionalisation of the courts and the growth of criminal legislation. There was, thus, a shifting balance of power from the layperson to the lawyer.[76] Up to the early 20th century, the criminal trial was dominated by laypersons, not lawyers and was decentralised.[77] It took almost 200 years for the general doctrines to be systematically applied.[78] This depended on the development of 'legal representation, rules of evidence, systematic reporting of criminal cases, legal education and … a system of appeals'.[79]

Over the course of the 19th century, there was 'a flourishing of treatises' that gradually rationalised and unified the criminal law. Then, late in the 19th century, these came to be superseded by the student textbook, which was itself 'a product of the development of university education'.[80]

Although English criminal law resisted full codification, there was an expansion of statutory criminal law. The important effect of this, according to Lacey, was to subject criminal definitions to democratic processes. By the 1970s,

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69 Ibid 144.
70 Ibid 145.
71 Ibid 147.
72 Ibid 148.
73 Ibid 170.
74 Ibid 62.
75 Ibid 64.
76 Ibid 128.
77 Ibid 110.
78 Ibid 112.
79 Ibid.
80 Ibid 127.

the political system had become highly responsive to popular opinion about crime. Laypersons were, therefore, helping to define crime (once again). 'In the absence of effective processes for a more deliberative form of popular participation, this makes for highly volatile criminal policy, and increasing incoherence in the concept of crime.'[81] There has been 'a law and order "arms race" and … rampant criminalization'.[82]

From this it follows that 'this move towards the investigation of individual capacity responsibility was never complete'.[83] It was too expensive to establish the intentions and knowledge of the accused; there needed to be 'shortcuts' to proof, as with the regulatory offences.[84] 'In the end, the capacity principle gained a serious foothold in the law governing the more serious criminal offences'.[85] But there is also 'a new generation' of criminal status offences.[86] We are seeing 'the resurgence of short cuts to proof reminiscent of the extreme form of character responsibility, which we might have hoped to have been laid to rest along with the *ancien régime* in English criminal justice'.[87] This is prescient, in light of Brexit — the United Kingdom's ('UK') vote in favour of withdrawing from the European Union in a referendum held on 23 June 2016.

V A Modern Conception of Civil Society?

There is a continuing preoccupation among criminal law scholars with the expansion of criminal law, its encroachment into much of modern life, its anticipation of wrongful conduct broadly conceived, and its consequent departure from principle. This has perhaps meant less time for contemplation of what positively constitutes civil conduct, in modern society, and what role criminal law *should* play in its preservation. In order to rein in the law, there is still a harking back to a narrow core of wrongs and harms — the 'true' common law crimes of violence, of murder and rape, whose wrongness is thought not to be in doubt — and how to make such conduct criminal in a principled manner. But really this is golden age thinking, as both Farmer and Lacey show. These never were stable enduring universal wrongs. They have always been crimes of their time and place, and the criminal regulation of public and private violence has changed considerably.

But what is to supply a metric of good criminal law for modern times, one which does not rely on these cultural dinosaurs? Lacey describes well the incivility of modern criminal law: 'which treats its objects as dangers to be managed, as distinct from citizen criminal law, which responds to subjects invested with rights'.[88] The articulation of the positive standards of modern civil conduct seems no longer to be the province of the modern criminal law scholar who, for understandable reasons, is now bent on constraining criminal law.

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81 Ibid 130.
82 Ibid.
83 Ibid 164.
84 Ibid.
85 Ibid 166.
86 Ibid 170.
87 Ibid 204.
88 Ibid 158–9.

Reflection on the positive content of civil conduct has possibly been taken over by public lawyers.

Farmer's account of the civilising process, away from bloody feuds and fist-fighting, and towards modern contractual society, is informative and very interesting. But it delivers up an oddly abstracted and neutered modern liberal individual, endowed with an ever-expanding repertoire of rights demanding criminal protection. It does not seem to take us into the modern polis, now populated by public women as well as public men: though their numbers remain small, women have assumed political and legal leadership in a manner hardly contemplated by influential legal men of the Victorian period, many of whom were vehemently against it. Lord Chancellor Halsbury spoke out against the right of women to sit on public bodies.[89] The current Lord Chancellor of the UK is a woman, the first ever, appointed in July 2016: the Lords Chancellor date back to the 11th century. This represents a long unbroken line of men. It is only by recognising the male monopoly of civil life and of criminal regulation for much of the history of criminal law that we can ponder the significance of the possible feminisation of critical leadership roles.

Because we still do not have a criminal legal story of men, *as men*, and their changing standards of public behaviour, we do not have an understanding of modern men, as men. As Tosh explains, '[i]n the historical record it is as though masculinity is everywhere but nowhere'.[90] And, certainly, the modern civil woman of authority has yet to be seriously contemplated as a central figure. As Lacey observes, very little of the scholarship of criminal lawyers has considered 'what is one of the most radical changes in the conception of legal personhood, viewed in modern perspective — the relatively recent acknowledgement of women as legal persons'.[91] This is not to suggest, as some feminists once did, that powerful public women necessarily bring with them more civil conceptions of civility, though it is an interesting possibility.[92] For example, hate speech may indeed be something that female world leaders are more willing to see criminalised, given their greater exposure to it.

Were women to be afforded the sort of close scholarly attention to their public and private lives that has so far only been afforded to men (though not as men), we might acquire a fundamentally different view of criminal law and its supposedly civilising processes. Such new intellectual work would be deeply subversive; it would demand a rewriting of criminal law as a principled institution.

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89 See Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson, 1985) 75.

90 John Tosh, 'Essays: What Should Historians do with Masculinity? Reflections on Nineteenth-century Britain (1994) 38 *History Workshop* 179, 180.

91 Ibid 183.

92 It is one pursued in Gabrielle Appleby and Ngaire Naffine, 'Civility, Gender and the Law: Critical Reflections on the Judgments in *Monis v The Queen*' (2015) 24(4) *Griffith Law Review* 616.