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## ***Making the Modern Criminal Law and the Paradox of Civil Order***

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*Making the Modern Criminal Law*<sup>1</sup> is Lindsay Farmer's latest comprehensive effort to expose and examine the social role of the criminal law, and how this role influences and conditions legal scholarship. This book represents, in many ways, the culmination of a project that can be traced back to Farmer's first monograph, *Criminal Law, Tradition and Legal Order*.<sup>2</sup> At the same time, *Making the Modern Criminal Law* is also part of the *Criminalization* series at Oxford University Press, a collection of works which arose from a research project undertaken by Farmer together with Antony Duff, Sandra Marshall, Massimo Renzo and Victor Tadros. The remarkable sophistication of Farmer's latest book can therefore be seen as the encounter of two paths, his long scholarship on the historical and contextual relationship between criminal law and social order on the one hand, and his participation in the wealth of recent debate on the grounds and limits of criminalization on the other.

In this short contribution, I intend to briefly discuss what I consider to be some of the most important elements of the core concept of the theoretical framework presented in the book: namely, Farmer's discussion and elaboration of civil order. I start by introducing how this discussion fits into the general argument in the book, and outline some general characteristics of Farmer's notion of civil order. I then examine in further detail how Farmer's conceptualisation grounds a critique of the limitations of contemporary criminal law scholarship, and discuss how it can inform a critical examination of the ideological dimension of civil order more broadly. In the final part of the paper, before some concluding thoughts, I raise a few reflections about how Farmer's theoretical framework and reflect on how it can be taken forward.

### **The Problem of Civil Order**

To a significant extent, thinking about the role that criminal law plays in society, the problems that surround this role and the ways in which legal scholarship relates to it inevitably involves looking at issues of criminalization; that is, it involves dealing with the question of "what and who should be treated as criminal under the law and the ways it can be justified."<sup>3</sup> For Farmer, the most adequate pathway towards addressing this question lies in understanding the criminal law as a social institution, concerned with performing a specific social function. Farmer has for a while now, persuasively argued that the primacy given by criminal law scholars to normative principles and values, such as individual autonomy and liberty, which results from the pervasive influence that moral and political philosophy

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<sup>1</sup> L. Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press, 2016).

<sup>2</sup> L. Farmer, *Criminal Law, Tradition and Legal Order* (Cambridge: Cambridge University Press, 1997).

<sup>3</sup> Farmer, *Making the Modern Criminal Law*, 1.

exert on legal scholarship, leads to an inadequate conceptualisation of the criminal law that neglects its concrete character as a modern institution.<sup>4</sup> Proper attention to this institutional dimension in turn reveals that the modern criminal law is largely shaped by “the broad aim of securing civil order,” so that it can only “be made ‘fully intelligible’ by looking at it from the perspective of the aim of securing the *civility* of civil society.”<sup>5</sup> Farmer’s notion of civil order is more specific than a broader idea of social order, of maintaining the minimal conditions of social life. Instead, it comprises “the co-ordination of complex modern societies composed of a range of entities or legal persons that are responsible, in a range of different ways, for their own conduct, for the wellbeing of others, and for the maintenance of social institutions.”<sup>6</sup> In this sense, the criminal law not only has a specific social function, but it is also a function that is tied to a specific notion of society, which is inextricably linked to the history of modernity and its conceptions of civility and civilization.

The idea that the criminal law is primarily concerned with the aim of securing civil order carries interesting implications. The first is that, contrary to what many criminal law scholars believe, criminal law and security are not fully distinct or distinguishable interests, and neither is the ‘securitisation’ of criminal law a recent phenomenon.<sup>7</sup> The second is that, again contrary to more traditional assumptions, the role of the criminal law is broader than, and ultimately distinct from, that of punishment; as will be discussed in more detail below, Farmer argues that the tendency to tie criminal law and punishment together tends to prevent us from appreciating the criminal law’s real institutional function. Thirdly, and this is where I want to focus now, the idea of civil order suggests that the institutional function of the criminal law has a specific quality which is intrinsically linked with the project of modernity and its civilizing process;<sup>8</sup> “our task”, according to Farmer, “is to understand the place of criminal law in this process.”<sup>9</sup>

Farmer pursues this task by dividing his book into three parts. The first part is dedicated to explaining the core of his argument, by discussing what it means to think of the criminal law as an institution, and what it means to think of the purpose of that institution as that of securing civil order. Here, criminalization itself is posited as the reflection of the link between criminal law and the project of civility; that is, the development the criminal law is the result of the need to promote and protect particular images of civil order, which involve normative ideas about what society is and how individuals in that society should behave. “Criminalization, or the question of the proper scope of the criminal law, is thus framed as a question of the rational government of individuals and their interests

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<sup>4</sup> Farmer, *Criminal Law, Tradition and Legal Order*, 182.

<sup>5</sup> Farmer, *Making the Modern Criminal Law*, 299 (emphasis in original).

<sup>6</sup> Ibid.

<sup>7</sup> For other nuanced discussions of the relation between criminal law and security, see P. Ramsay, *The Insecurity State* (Oxford: Oxford University Press, 2012); A. Ashworth and L. Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014); H. Carvalho, *The Preventive Turn in Criminal Law* (Oxford: Oxford University Press, 2017).

<sup>8</sup> See N. Elias, *The Civilizing Process* (Oxford: Blackwell Publishing, 1994).

<sup>9</sup> Farmer, *Making the Modern Criminal Law*, 55.

in a commercial society with the end of securing civil order.”<sup>10</sup> The second and third parts of the book explore this institutional character of the criminal law through the historical development of what came to be considered aspects of the general and the special part of the criminal law respectively.

This historical and theoretical exploration is focused on English criminal law, and starts at the late part of the eighteenth century, at a period that Farmer identifies as constituting the dawn of criminal law as a modern institution. Farmer’s deployment of notions such as modernity and order follows certain theoretical assumptions, which have as one of their points of reference the work of Charles Taylor in *Modern Social Imaginaries*.<sup>11</sup> Taylor’s notion of social imaginary is a way of thinking about society which conceptualises its underlying normative framework as fluid and dynamic, whose social images and expectations are inherently malleable. According to Taylor, in thinking about a social imaginary, “I am thinking, rather, of the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations.”<sup>12</sup> What characterises a modern social imaginary, furthermore, is that it is underpinned by a specific moral order, constituted by that Taylor described as “an ethic of freedom and mutual benefit.”<sup>13</sup> To guarantee and promote these normative ideas, the modern state is entrusted with the provision of “certain common benefits [to its citizens], of which security is the most important.”<sup>14</sup> From this perspective, therefore, the very way in which we imagine modern societies is intrinsically tied to a concern with security. It is arguably for this reason that the primary manifestation of the ethics of freedom and mutual benefit enunciated by Taylor is a specific notion of *order*, a social configuration in which these values can not only be expressed, but also—and primarily—organised and secured.

Farmer further develops this understanding by characterising the modern social order as one inherently linked to the civilizing process. In order to properly examine this relation, it is important to note that the notion of civilization can be understood as possessing both a normative and a sociological dimension. In the normative sense, civilization is often contrasted to the status of non-civilized or ‘barbaric’ societies, as an ideal standard of progress and of living that societies should attain or sustain. In the sociological sense, in turn, the idea of ‘being civilized’ has a very specific context and development, linked to the history of Europe and to the values that evolved around the notion of modernity.<sup>15</sup> Farmer alludes primarily to this second dimension of the term, stating that ‘civilization’ should be understood as “a particular configuration of selfhood, violence, and law” produced by “the modernizing process.”<sup>16</sup> Just like the social order which for Taylor results from a modern social

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<sup>10</sup> Ibid, 59.

<sup>11</sup> See Taylor, *Modern Social Imaginaries*.

<sup>12</sup> Ibid, 23.

<sup>13</sup> Ibid, 21.

<sup>14</sup> Ibid, 4.

<sup>15</sup> See J. Pratt, ‘Norbert Elias, the Civilizing Process, and Punishment’ (2016) *Oxford Handbooks Online*, 1-28.

<sup>16</sup> Farmer, *Making the Modern Criminal Law*, 55.

imaginary, the idea of civil order is also fluid. As Farmer indicates, “there is no single or simple concept of civil order which it is the aim of the criminal law to secure or produce.”<sup>17</sup> It is this fluidity that characterises the socio-historical character of civil order, presenting it as the result of the interaction between ideas of selfhood and social and political organisation on the one hand, and the cultural, historical and political context in which these ideas have to be actualised on the other.

### **Civil Order and the Civil(ised) Subject**

If the fluidity and dynamism of the idea of civil order means that manifestations of this idea change and transform over time, the notion that all these manifestations represent a form of *civil* order also evidences the ideological character of the civilizing process. It is ideological in that it provides disparate social frameworks and institutions with a broad sense of legitimacy, by linking them to the normative dimension of civilization and thus suggesting that these forms of order are not only appropriate to their context, but also the ideal or best kind of order that could be achieved. In so doing, forms of civil order repress levels of insecurity and disorder in society, by presenting themselves as a product of the civilizing process. A critical analysis of civil order must be wary of the extent to which the idea of modernity is not only a product of a specific socio-political trajectory, but also an idea of society that is actively *produced*, and deployed to reinforce specific social values and expectations. It is thus important to be aware of the “deep structural embeddedness” of the civilizing process in modern society as both expressing and repressing the existence of “civilizing and decivilizing forces both competing with and simultaneously shaping and reshaping each other”<sup>18</sup> within its remit. Similarly, what we call “civilization” must be understood as involving “ambivalent power dynamics, which work to repress the negative forces it embodies in [favour] of a purely progressive perspective on social development.”<sup>19</sup>

Farmer’s analysis of the institutional role of the criminal law provides important insights that are helpful to such an examination. One such insight comes from Farmer’s discussion of the relationship between civil order and individual subjectivity. On the one hand, the idea of a civil order presupposes the attainment of a specific level of sociability, where individuals in society are deemed to display a high degree of trust, interdependence and self-control. This notion of individual autonomy and responsibility is at the core of the project of modernity, where “the ‘individual in society’ is seen as the source of order.”<sup>20</sup> At the same time, however, this notion of individual autonomy is itself conceptualised as dependent on the conditions provided by civil order. In other words, the idea of autonomy that is presumed by the notion of civil order is also conceptualised as depending on civil

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<sup>17</sup> Ibid, 63.

<sup>18</sup> Pratt, ‘Norbert Elias, the Civilizing Process, and Punishment’, 6.

<sup>19</sup> H. Carvalho, A. Chamberlen, ‘Punishment, Justice, and Emotions’ (2016) *Oxford Handbooks Online*, 1-31.

<sup>20</sup> Farmer, *Making the Modern Criminal Law*, 58.

order to exist. Thus “although the individual is seen as the primary unit of analysis, it is recognized that the social individual is [actually] produced by government.”<sup>21</sup> From this perspective, the aim of the criminal law in securing civil order is intrinsically linked to a process of subjectification,<sup>22</sup> in which the kind of individuality which is embedded in the idea of the legal subject is being actively produced through the violence of criminalization.

This aspect of Farmer’s theoretical framework is particularly important to an understanding of the problems and limitations found in contemporary criminal law theory. Chapter Three of *Making the Modern Criminal Law* traces the development of criminal law scholarship in modernity through the historical emergence of four periods or moments, each characterised by a specific ‘ideal type’: public wrong, the legislative state, penal welfarism, and neo-classical criminal law. Each period is mainly analysed through the work of an ‘exceptional’ scholar who is deemed to have expressed the zeitgeist of criminal law thinking at that particular moment: William Blackstone, James Fitzjames Stephen, Glanville Williams, and Andrew Ashworth respectively. Farmer’s conceptualisation of the current state of criminal law as ‘neo-classical’ is meant to suggest that it is characterised by a reaction or resistance against “the disorder and fragmentation of the actual criminal law by positing a kind of ideal order in the criminal law.”<sup>23</sup> This image of an ideal order is largely dependent on an abstract conception of individual autonomy and agency,<sup>24</sup> since it essentially privileges normative conceptions of individual responsibility and social order that are essentially independent from socio-historical contingencies—what Elias has called the “we-less I.”<sup>25</sup> Farmer’s discussion stresses how this idealised conception of criminal law, which is inherently tied to notions of retributive punishment, fails to capture the reality of criminalization, thus producing a skewed idea of what the criminal law really is. This critique, which is in many ways the main argument pursued in the book, is detailed in the subsequent chapters of the book, which expose how the contours of the criminal law cannot be defined in the abstract, following normative principles, but rather depend on its institutional purpose.

### **Securing the Paradox of Criminal Law**

An important implication of Farmer’s critique of contemporary criminal law scholarship, which deserves particular attention, is that the institutional role of the criminal law in securing civil order, as well as contemporary scholarship’s neglect of this role, are not only related, but are also inherently contradictory. The final chapter of the second part of *Making the Modern Criminal Law* arguably provides the best illustration of Farmer’s exploration of this contradictory character of contemporary criminal law, through a discussion of criminal responsibility. While most recent normative accounts of

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<sup>21</sup> Ibid.

<sup>22</sup> See M. Foucault, ‘The Subject and Power’ (1982) 8(4) *Critical Inquiry*, 777-795.

<sup>23</sup> Farmer, *Making the Modern Criminal Law*, 109.

<sup>24</sup> See A. Norrie, *Crime, Reason and History* (Cambridge: Cambridge University Press, 2014).

<sup>25</sup> N. Elias, *The Society of Individuals* (New York: Continuum, 1991), 201.

the criminal law celebrate the idea of subjective responsibility as the main guarantor of individual rights and the main corollary for a minimalist criminal law, Farmer exposes how the rise of individual responsibility in the framework of criminal liability did not hinder, but rather actually assisted in a continuous expansion of the scope of criminalization. The neo-classical focus on responsible subjectivity, grounded on the premise that the criminal law is required to establish responsibility before it can assign blame, cannot explain why, throughout modernity, impulse of treating individuals as responsible has controversially made them increasingly responsible for more.<sup>26</sup>

The third and last part of the book, besides further developing the argument concerning the expansion of criminal liability, also illustrates how the idea of responsibility is not only contingent in historical terms, but also shaped and conditioned by the specific area in which it operates, and the kind of behaviour which it aims to regulate. By looking at criminalization in the areas of property, person and sex, Farmer discusses in rich detail how the notion of responsibility changes to reflect specific normative expectations and regulatory needs. The book concludes by stressing once more how the ‘criminalization question’ is tied to the idea of civil order, and by highlighting how an understanding of this connection is fundamental to a proper examination of what he deems the “paradox of the modern criminal law,” namely, “that despite being shaped by a liberal sensibility that state power should be limited and the desire to respect individual rights and liberties, it has expanded in scope, more or less continually, since the late eighteenth century.”<sup>27</sup> At the heart of this paradox, then, lies the notion that the criminal law’s efforts to maintain and produce specific kinds of order and subjectivity lead it to continually produce new or expanded forms of criminalization. Thus, although the criminal law claims to promote and secure the conditions for individual freedom, the way in which it actively does so is by continually restricting that same freedom.

Farmer’s diagnosis of this paradox is acute and sophisticated, but it leaves space for further elaboration in some areas. For instance, there is a lot to be said about how the paradox of modern criminal law to a significant extent mirrors and reflects a paradox that is inherent to the civilizing process contained within the very idea of civil order. The ambivalent power dynamics mentioned above indicate that the civilizing process is constantly concerned with repressing its negative aspects, producing and maintaining the same violent tendencies which it is supposed to eliminate.<sup>28</sup> From this perspective, the neo-classical period in criminal law is less a reaction against the current fragmented condition of criminal law, and more the latest manifestation of a constant tension in the modern pursuit for civil order. Perhaps the criminal law is always violent and disordered, and perhaps its function of securing civil order requires it to always be rationalised in a way that attempts to repress and deny its contradictory character—to deny its own contingency.

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<sup>26</sup> See Farmer, *Making the Modern Criminal Law*, 192.

<sup>27</sup> Farmer, *ibid*, 298.

<sup>28</sup> For a more detailed discussion on this, see Carvalho and Chamberlen, ‘Punishment, Justice, and Emotions’, and Carvalho, *The Preventive Turn in Criminal Law*.

Moreover, although Farmer has explicitly left a detailed examination of the civil order as a broader social phenomenon outside the scope of his book, understandably deciding to focus on the specific part that criminal law plays on the modernising process, and while such theoretical and conceptual restrictions are inevitable, it is also important to explicitly acknowledge that such conceptual distinctions themselves have obvious limits. For instance, as mentioned above, Farmer repeatedly rejects the traditional link between criminal law and punishment maintained by the normative framework of neo-classical criminal law theorists, stressing that the criminal law must be de-coupled from punishment if its institutional role is to be properly examined. While it is definitely important to maintain that the criminal law goes beyond the retributive ideals embedded in its normative justifications, it must also be recognised that the legitimacy framework of criminal law cannot be made fully intelligible if completely divorced from the idea of punishment. In many respects, practices of criminalization and punishment are intimately connected; this arguably includes the extent to which punishment, as a social phenomenon and institution, itself is in service of the project of civil order.

## **Conclusion**

In suggesting that the paradox that he identified is somehow unique to modern criminal law, Farmer may have missed an opportunity to deepen and further explore what will undoubtedly be considered one of the main intellectual contributions of his latest book, the notion of civil order as a thicker, more sophisticated conception of legal and social ideas of order which underpin the institutional contours of the criminal law. However, this should not be taken as a shortcoming in his conceptual and theoretical project; quite the contrary. This is most likely the reflection of Farmer's rigorous historical method, and of his effort to subsume complex ideas under clear expositions and detailed factual examples. Within the scope of his enquiry, Farmer provides us with a rich and purposeful exploration of the history and current framework of English criminal law, which imposes a strong demand upon criminal law scholarship, and legal scholarship more broadly, to actively engage with the social, political and historical context of criminalization.