

Vertical, Horizontal, Backwards, Forwards

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Abstract

This review essay on Lindsay Farmer's *Making the Modern Criminal Law: Criminalization and Civil Order* begins by discussing a few issues related to the identity of the "civilizer," as this figure comes (and—it is argued—partly doesn't come) to life in the book. It next considers the (at times) strongly forward-looking ambitions tied to construction and application of the rules for ascription of responsibility, as well as the recent ambitions, among writers on criminal law, to build a partly free-standing "system" of criminal law that includes a theory of criminalization.

I. Introduction

Lindsay Farmer's *Making the Modern Criminal Law: Criminalization and Civil Order* is a brilliant read. It is well-crafted, written in thoughtful language—almost as part of a good conversation—and transparently argued. The book is a rich, innovative contribution to discussions on what criminal law is and should be seen as being, what it does and should be seen as doing. Also, and not least, the book offers additional perspectives on an ongoing (scholarly) discussion regarding *criminalization*, a topic which has received considerable attention from Anglo-American writers in recent decades (but only then). The attention has mostly generated efforts to construct prescriptive theories on criminalization, often of a "negative" kind, regarding what "may" be criminalized rather than what "should" or "must" be criminalized. One further characteristic of many such theories is the starting point—as an undisputed truth—that there is a state of "overcriminalization," though it is not always entirely clear in relation to *what*, exactly.¹

Another characteristic of these prescriptive theories is that they are often explicitly or implicitly claimed to be universally valid, *or* valid at least for—as it has often been put in later decades—"liberal democracies."² Such a determination brings, for example, the USA as well as Scotland and Sweden under the same theoretical umbrella, which might seem unusual—or downright wrong—to some (myself included). I will return to such universalist claims later on, especially in relation to Farmer's discussion of contemporary

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¹ One might think of it, for instance, (1) in terms of some kind of absolute *amount* ("there's simply too much of it out there"), (2) in a Durkheimian way (in the present situation, the proportions are somehow wrong, meaning that efficient use of the inside-outside distinction is not possible), or (3) in relation to one's own prescriptive criteria for (permissible) criminalization.

² Accompanying this claim is often, at least implicitly, another: that all countries should be "liberal democracies," something which again gives one's theory universal application.

scholars and theorists of criminal law. At this early stage, it is sufficient to note that his book diverges from many other writings on criminalization in the ways mentioned above: Farmer refrains from presenting a prescriptive theory of what should (not) be criminalized, etc.,³ and he emphasizes the contingency (including the historical contingency) of certain issues regarding criminal law and criminalization.⁴

As with other good reads, there is a lot to say about the book. Having praised it, I will in what follows pick a few issues for discussion. Some of them might be issues because I, territorially and criminal law-wise, come from a different tradition than does Farmer (from Sweden, which traditionally was strongly influenced by German criminal law thinking). It is difficult to discuss themes in a book as rich as Farmer's in an equally rich way, especially when space is limited. My contribution has the character of more over-arching reflections. Those in Section II address more directly (and question partly) suggestions made or conclusions drawn by Farmer; those in Sections III and IV start from important observations made by Farmer, but discuss them more generally (and partly comparatively).

II. The Other Side of the Equation, and How the Sides Relate to Each Other

A. *The Civilizer and Its (Broader) Relations to the Civilized*

Using ideas introduced by Neil MacCormick as points of departure and structuring tools, Farmer suggests that if one wishes to make intelligible the idea of criminal law, one should think of its role as one of creating and maintaining *civil order*. The role of criminal law—and thus of criminalization, the formal act that ties criminal law to a certain kind of behavior—is then seen as one of creating an institutional order which is something different from and more than just social order.⁵ As part of this, society, or more precisely the *individuals* in society, also need to be “civilized” in ways deemed appropriate. Farmer ties this civilizing ambition to shifts in needs (as experienced by the side of the civilizer) in society over time in interesting ways. It is especially interesting in this sense, in my opinion, how he ties the efforts to civilize not only to particular criminalizations, or to

³ Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* 3 (2016) (“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.”).

⁴ *Id.* at 303 (“The substance of the law cannot be determined by a core of moral wrongs, as even in those areas which might be thought to be central (person, property, sex) to criminal regulation, wrongs are shaped by particular and emergent social problems and needs.”). Farmer's book remains at a more or less national (English) or Anglo-American level, but the idea of a core of moral wrongs also could face resistance, for instance, in the EU. See, e.g., Vagn Greve, *Criminal Law: A Technical Tool or a Cultural Manifestation*, 54 *Scandinavian Stud. L.* 51, 55-56 (2009).

⁵ See, e.g., Farmer, *supra* note 3, at 41:

Civil order can . . . be understood as a particular kind of social order; it is not merely order as such. It refers not only to the existence of norms and social relations guaranteeing stability of expectations, but also to a certain kind of institutional ordering in which the burdens of guaranteeing social and normative order is taken on by centralized institutions . . .

criminalization in particular areas of social life (in the “special part” part of Farmer’s book property crimes, crimes against person and sexual crimes are dealt with in separate chapters), but also to the rules for ascribing responsibility. The latter connection, which points at interesting potential differences between schools of thought in criminal law, will be returned to in Section III.

The first set of issues that I would like to discuss pertain to Farmer’s ambition to capture as *one* what seems like *more* than one voice. A number of questions are dealt with in parallel, developing—intertwined—over time. At times, this contributes to uncertainty as to the identity and role of some actors involved, and as to whose voice is actually heard at a given time. This also results in, I would say, a kind of unexplained double meaning given to concepts like “the criminal law” and “the criminal law system,” and sometimes vagueness in distinctions between “criminalization” and “criminalization theory.” These tensions will be discussed below. Farmer and the authorities he relies on are very clear that the *object* of civilizing ambitions is the individuals in society. We get to know less, though, about who or what is on the *other* side of the relationship—an entity that I will refer to as “the civilizer”—and what views this entity might have on the more general *relation* between civilizer and civilized. We learn (examples of) what the civilizer perceived as problems at various stages, but we learn less about the larger picture of social ideology and political philosophy in relation to which criminal law, at each stage, was given its particular place and role. What views on the proper (conceptual and other) relations between state, community, and individual served as background to—and were decisive for—the “civilizing” measures taken? We learn that criminal law was used in response to changes in the factual environment (or was used to *change* the same environment), but beside the factual environment there is an ideological one, and the latter could, in my opinion, have received more attention. That could have helped bridge what at times comes through like an unspoken, somewhat empty space or gap between those to be civilized, on the one hand, and the civilizer, on the other.

One way of trying to bridge such a gap—of relating the actors more to each other (thereby also making the civilizer more distinct)—would be to sketch, as a background, the larger ideological landscapes mentioned above.⁶ Another way—perhaps more interesting for a book on the making of (the modern) criminal law—might be to turn inwards and search within the criminal law for a few more objects and thus angles to add to the tale. I will briefly mention two such possibilities.

Firstly, Farmer’s message is that the civilizing process has been almost exclusively concerned with what individuals do to each other. The civilizing process is, of course in many senses, brought about “vertically,” from above, but to a very large extent it has as its

⁶ Not, then, in the way Farmer describes other criminalization literature—as “arguing that in order to understand criminalization it is necessary to go back to basics: the approach is not to ask about how to limit state power, but more fundamentally how the relationship between state and citizen should be conceived, and about the proper place of the criminal law in this relationship,” *id.* at 2—but instead how such things actually *were* looked at.

object the civilizing only of “horizontal” relations. With regard to the various aspects of more “vertical” relations we learn little, which gives the impression that the civilizing process was almost equated with, and was meant to be equated with, “horizontal” crimes. Also, Farmer’s choice of specific areas of criminalization to discuss further (chs. 7-9) emphasizes individual-to-individual offenses. It would have been interesting, in terms of bridging empty spaces, if more attention had been given to crimes against the state or the public. Such an additional focus could also be easily defended, when looking at the criminal law as produced by the legislator: at the time when something which we properly may label criminal law initially made its debut (long before we could talk of it as “modern” in the sense used in Farmer’s book), the center of the legislator’s attention was *not* the horizontal level, *not* things committed by individuals against other individuals (that came later), but instead things committed against those in power (in a first stage, the king) and against that which at least in some senses, at least indirectly (through the ruler), could be defined as shared. Ever since this start, crimes against what today would be called the state and community have, at least in terms of quantity and at least if one were to ask the legislator, occupied a strong position in factual criminal law. Yet these crimes have generally received little attention from criminal law scholars or theorists.⁷

Doubtless, ideas about “civilizing” largely targeted person-to-person behavior.⁸ But crimes against (and criminalizations targeting behavior directed at) other kinds of entities also played an important role in the making of the modern criminal law in a more profane sense. Perhaps there is a parallel story about the making of criminal law, yet to be told, that does not have much to do with “civilizing” ambitions in a narrow sense. Here, though, I intend to emphasize something else: that if one were to give crimes against other entities more attention as opposed to those against natural persons, doing so might facilitate seeing what kind of bridges, what kind of views (on the side of the civilizer) on such bridges, tied civilizer and civilized together. To return to Section I above and ideas of the “universality” of prescriptive criminalization theories: were we in Farmer’s tale, in the senses here touched upon, in Sweden or in the USA?

Secondly, one way of giving more substance to the relations between civilizer and civilized, or to elaborate the ways in which they meet, mix and perhaps partially dissolve, might be to give attention to what, at least today, would be classified as *justifying defenses*. The regulation of, for example, self-defense and necessity can often be made to function as a prism through which one can learn about the political ideology behind the criminal

⁷ Cf. *id.* at 16 (discussing today’s “prescriptive” theorists). Criminal law scholars or theorists—whether from the Anglo-American or German sphere—are in their normative recommendations on criminalization often more or less obsessed with person-to-person crimes. One prominent example is Joel Feinberg, who in his massive four-volume work *The Limits of the Criminal Law* (1984-88), spent—if one removes, for instance, discussions on moralism, a traditionally sexy issue for classical-liberal criminal law scholars—just a few pages on crimes against collective interests, collective goods, that we share in more tangible ways than we might share “morals.”

⁸ See Farmer, *supra* note 3, at 56.

law at a given time and place. Thus, they help tie the criminal law to political surroundings. They could, as Jeremy Waldron suggests, be seen as at the heart of the political project:

Hobbes and Locke discuss self-defense and self-preservation not as specialized topics in the philosophy of law but as pivotal issues in social and political theory. For Hobbes, self-preservation lies at the heart of the social contract; for Locke, self-defense lies at the heart of the theory of justified revolution. Both of them hold theories of self-preservation that have consequences running far beyond the criminal law, into more general issues about the nature and justification of political and economic systems. For this reason, they enable us to explore moral ramifications that might be left unconsidered in a purely legal context.⁹

So how, for instance, self-defense is regulated could reveal something meaningful about the ideology of the particular jurisdiction regulating at a certain time and place. I find it a bit surprising that Farmer does not mention self-defense more than he does. Chapter 8, for instance, on “person” and concerning “civilization” in relation to violence, would have offered several opportunities; self-defense (and also necessity) often provides possibilities for temporary alterations or modifications in role, softening up the often-rigid dichotomies between State and Individual (and also, in at least some senses, between Civilizer and Civilized). Just as food for thought, one could mention the possible varieties in and views on the roles and relations when A attacks B with violence, in terms of (1) what A actually attacks, and (2) *qua* what B defends. One classical-liberal and widely shared view, would be that (1) what A primarily attacks is B *qua* individual of flesh and blood, *qua* him- or herself, and (2) B defends in the same role: *qua* him- or herself. But there are other possible stories. I will mention one. In former communist jurisdictions in Eastern Europe, the view on self-defense was that (1) what A attacks is (also or primarily) *the legal order*, and (2) when B defends, this is not (or not exclusively, or not primarily) done *qua* him- or herself as individual, but instead *qua* vicarious functionary of the state, in a situation where the normal functionary (here: the police) was not present to prevent the attack.¹⁰ A construction of the latter kind softens or dissolves the distinction between civilizer and civilized in potentially creative ways.

B. One or Two Voices?

I would like to continue with “voices” and potential vagueness for a little while longer. In the last sub-section, I gave—at least implicitly—the impression that the “civilizer” (as opposed to those to be “civilized”) in need of more distinctiveness was more or less the political power (the legislator, etc.). In Farmer’s book, however, the presence of the legislator is comparatively small, and this is also the case regarding stages where much of the criminal legislation existed and was produced. Instead, to a rather large extent, the voices given room are those of scholars.

⁹ Jeremy Waldron, Self-Defense: Agent-Neutral and Agent-Relative Accounts, 88 Cal. L. Rev. 711, 713 (2000).

¹⁰ See, e.g., Andrzej Zoll, Notwehr und Notwehrüberschreitung im polnischen Strafrecht, 90 ZStW 521 (1978).

One initial reaction to this is that had an investigation such as Farmer's instead focused on Sweden, the law and (not least) the legislative history (the latter having had a significant role at least since the second half of the nineteenth century—and a successively more central one) would have been a central source when trying to give *Gestalt* to the civilizer. But there were also scholars and writers working at the time. Such an investigation probably would have been structured in the shape of *parallel voices*: on the one hand the legislator, on the other hand the scholars, often with their own agendas, partly in conflict with those of the legislator. In Farmer's book, such conflicting voices are more distinct at a later stage, when he discusses the history of the present, including contemporary scholars' prescriptive agendas (see 103-15, 188-92; see also Section IV below). Regarding the book as a whole, though, I'm not quite sure what to make of the scholars as a potentially distinct voice. Given that it is possible to frame things, as I have, in terms of a "civilizer" and those to be "civilized," one possible interpretation of Farmer's tale is that the scholars and those with political power join forces, both actors being *über*, belonging to those already civilized enough to be able to civilize the rest in a kind of joint effort. Basically, only the view that the "civilization" was and is such a joint effort—that there ever actually was only *one* voice in the relevant sense—could make it intelligible to talk, as Farmer does, in terms of a "paradox" of modern criminal law: "The paradox of the modern criminal law is that despite being shaped by a liberal sensibility about the scope of state power and the desire to respect individual rights and liberties, it has expanded in scope, more or less continually, since the late eighteenth century" (298).

To the extent that we think of legislator and scholars as distinct, as different from each other, it is difficult to see any paradox. The scholars make their "system(s)" of criminal law, and the legislator makes partly another system (including, for example, a large amount of "vertical" behavior being criminalized). At times, one wonders whether Farmer might have become slightly trapped, in his tight tying of the modern criminal law to a civilizing almost exclusively concerned with "horizontal" relations, by the choice to let scholars partly represent something more neutral.

III. Rules for Ascription of Responsibility: Guilt Presumption and Backward vs. Forward

As Farmer shows in a fascinating way in his chapter on "Responsibility" (ch. 6), one particularly interesting part of the "civilizing" took place in and through the rules for ascription of responsibility. These rules were not used (at least not primarily) to decide issues regarding what we perhaps might call "real" blameworthiness (or its absence) by the defendant, but instead to establish objective standards of behavior for the future, much in the same way as particular criminalizations were thought to do. Oliver Wendell Holmes, when explaining why "ignorance of the law is no excuse," exhibits this kind of ambition, while also revealing his awareness that there *is* a tension there, provoking what some would define as difficult choices between black-and-white or at least difficult "balancing" acts:

The true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties and so forth. Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.¹¹

To the quite small interest, on the side of the civilizer, in searching for “real” blameworthiness, should be added what I increasingly have come to think about in terms of a “presumption of guilt” present in certain parts of the rules for ascription of responsibility: the demand for a controlled act, the demand for consciousness (and a conscious act), and the demand for intent in relation to what one “does” in a narrow sense. What signifies this presumption—which as a matter of principle is awkward in itself, and gets painfully awkward not least in relation to defendants at the time of the crime suffering from some kind of mental disorder or otherwise mental abnormal states—is the view that the inside could be completely diagnosed from what can be seen on the outside: if something from the outside looks like it is willed, conscious, done with intent, etc., then for the criminal law so it is. I am here talking not only about what might flow from procedural law regulation, but also about general and basic points of departure regarding existence, points of departure not-always-optimally spilled into criminal law's judgments of individuals. It is fascinating to see how *formalized* and openly held such presumptions once were (see, e.g., 172-73, 178-79).

If one turns to today's standpoints on the two matters touched upon in this section—the setting of (more or less “objective”) forward-looking standards for behavior and the “guilt presumption”—one could probably say that the “guilt presumption” today is not as openly visible as it once was. The presumption persists, though, not as much in procedural law as in our way of generally looking at persons in situations where certain signs or patterns signal “there was agency.” However, conclusions drawn from such a “non-legal” way of looking at a situation affect the way the procedural rules (even if good in principle) are applied in the individual case. Turning to the idea that the rules for ascription of responsibility are *forward*-looking, by setting standards for the future, one might as a foreigner be a bit surprised that such ideas still seem to be relatively strong in the Anglo-American world, not having been criticized as much as one perhaps would expect (for not sufficiently respecting backward-looking demands for blameworthiness).

It is interesting to note here by way of comparison that systems which to a higher extent work with “two-step” standards—the first step having a more objective standard, and the second step a more “personalized” one—will not and do not have to focus as much on figures like the “reasonable person,” including their characteristics. On the one

¹¹ Oliver Wendell Holmes, *The Common Law* 48 (1881) (ignorance of law).

hand, if one works with a more flexible or two-step standard, one will—arguably—lose in standard-setting. On the other hand, one will gain in terms of respect for “blameworthiness” as a demand for just conviction.¹²

IV. Last Stop? The Last Decades and the Present

Finally, I would like to touch upon a few themes related to Farmer’s thoughts on present-day writers on criminal law. Farmer notes, among other things, a growing interest in criminalization issues and a successively stronger view according to which such issues are proper to deal with for someone writing on criminal law. Having noted above the normative-prescriptive tendencies (or perhaps “turn”), let me here elaborate on this, starting with a quote from Farmer, describing recent criminal law theory as problematic in terms of what he sees as

a turning inwards to prescriptive definitions and a search for conceptual coherence. There is unease about the growth of the criminal law, but this has led many theorists to seek security in an ideal account of the law While this approach produces a certain internal clarity and coherence, safe from the messy complexities of social life and change, it comes at the cost of an understanding of the diversity of norms and the complex institutional structure of the criminal law (302-03).

According to Farmer, one reason for the writers’ interest in issues related to criminalization is that at the present stage it is actually possible to deal with such issues: a criminalization theory has to be linked to “the emergence of the modern criminal law, understood as a unified body of rules, organized according to a conceptual structure which is unique to itself, and which is understood as performing a distinctive social function” (5), and today something like the latter does exist.

This surely contributes to the explanation of why the criminalization question has become central among English (and Anglo-American) writers. I would like to add a few further thoughts in relation to these issues. One factor which should be seen as important is the more frequent contact with criminal law scholars from outside the Anglo-American sphere. Another factor, related to the first one, might be the desire, if one is a criminal law scholar, to change one’s own job description in terms of mandate as well as attitude.

Not much needs to be said about the increasing contact with scholars from outside the Anglo-American sphere. One might mention briefly, however, that in Germany, where normative and prescriptive attitudes have existed among scholars for a long time, various kinds of “limiting” efforts were intensified after the Second World War, with a pronounced over-arching ambition (not only in relation to criminal law) to find ways of binding the legislator (and public power generally) within limits. On a general level, the German Constitution and the Constitutional Court (*Bundesverfassungsgericht*) were given a central role. In the field of criminal law, one could see, for instance, more “expansive”

¹² I have dealt with these issues in greater detail as part of a discussion of “cultural defenses” and other “cultural factors” in criminal law. See Claes Lernestedt, *Criminal Law and “Culture,”* in *Criminal Law and Cultural Diversity* 15 (Will Kymlicka et al. eds., 2014).

views among scholars on what belonged to criminal law's "general part" (such views could also be combined with the view that this general part—to exaggerate a bit—was not for the legislator to (try to) alter or escape). Even if German scholars still disagree whether or not a book on the general part of criminal law written by a "criminal law scientist" (*Strafrechtswissenschaftler*) should address the question of proper criminalization, at least some prominent scholars do this.¹³ And generally, it is not particularly rare that, for instance, a certain branch of science wishes to make its mandate more flexible and bigger (and, in the end, also perhaps to increase its influence). An example not too far away from criminal law is criminology, which has moved away from its initial object of study ("crime," that is, something in principle decided by the legislator) to a more flexible work description (including, e.g., "deviance"). Parts of criminal law doctrine today, in various countries, are showing similar ambitions to expand the mandate.

Ambitious criminal law scholars today tend to think in terms of a "criminal law system," constructed by them and often mixing descriptive and prescriptive elements in ways sometimes difficult to discern. This system can differ significantly from the "system" one would encounter were one to study exclusively law, Supreme Court cases and legislative history. And today, to be a bit ironic (but only a bit), it is perfectly possible—due to more frequent contacts between scholars across borders—to see greater resemblance between the "criminal law systems" produced by two scholars, in different jurisdictions, than between each of the scholars and the national "criminal law system" in a narrower sense (statutes, Supreme Court jurisprudence, etc.) of the country that he or she claims to write about. This is another idea of universality, which—taken to its extreme—means that "the system" (or at least the "correct" system) is (or should be) the same everywhere. In this it connects with the prescriptive, universal propositions regarding permissible criminalization mentioned above. And sometimes, at least rhetorically, the claim is more or less that *my* system—including what it prescribes regarding permissible criminalization, if I have taken my ambitions that far—is more "valid" than the legislator's.

¹³ Compare 1 Claus Roxin, *Strafrecht: Allgemeiner Teil* (Grundlagen: Der Aufbau der Verbrechenslehre) (3d ed. 1997) with Hans-Heinrich Jescheck & Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil* (5th ed. 1996); Günther Jakobs, *Strafrecht: Allgemeiner Teil* (Die Grundlagen und die Zurechnungslehre) (2d ed. 1991) (Studienausgabe 1993).