

Making Abuse Offenses in the Modern Criminal Law

Galia Schneebaum*

Abstract

The following essay discusses abuse offenses as a means to explore and criticize Lindsay Farmer's *Making the Modern Criminal Law*. Specifically, it considers the civil order framework and shows how the book's contextual and institutional approach enables developing fresh perspectives on abuse offenses that are largely absent from contemporary accounts. The essay concludes by addressing the broader concept of a descriptive theory of criminal law, and highlights the value of the descriptive account of criminalization that is offered in the book.

* * *

Recent years have seen a renaissance of criminalization theory in legal scholarship.¹ In light of this revival, and since *Making the Modern Criminal Law* was published as part of a *Criminalization Series* in OUP, it may seem natural to consider the book as yet another instance of the contemporary trend to theorize criminalization. Such a characterization, tempting as it may be, would nevertheless be mistaken. Significantly, it would obliterate two important senses in which *Making the Modern Criminal Law* is unique among contemporary studies of criminalization. First, instead of turning to moral or political philosophy (or political theory), which are currently the mainstream positions of most contemporary theories of criminalization, *Making the Modern Criminal Law* draws on sociology and history, thus refraining from constructing a normative theory of criminalization. Secondly, instead of constructing a criminalization theory around general principles that supposedly cut across the entire criminal law (typically using such concepts as harm, wrong, or some combination of the two²), *Making the Modern Criminal Law* dedicates much attention to discussing specific offenses (or categories of offense) and to uncovering the distinct

* Assistant Professor, Interdisciplinary Center Herzliya (IDC), Radzyner Law School. I thank Stav Lavi for excellent research assistance.

¹ See, e.g., Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (2007); *Criminalization: The Political Morality of the Criminal Law* (R.A. Duff et al. eds., 2014).

² See e.g., 1 Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984); A.P. Simester & Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (2011). *Making the Modern Criminal Law* explicitly challenges the tendency to interpret the criminal law as enforcing several “core” wrongs: “Criminalization is about challenging and justifying ‘peripheral’ crimes which do not fit the paradigm of criminal wrongs. In part the aim here is to challenge this kind of thinking, to show that there are no core values, and that patterns of criminalization in these areas demonstrate that the law develops in response to specific social needs.” Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* 8 (2016).

criminalization theories of said categories.³ These two interrelated features, while singling the book as an exceptional project indeed, instantly bring up two questions: First, what is the value of a descriptive account of criminalization? Particularly, can such projects be significant or useful for lawyers (as opposed to sociologists or criminologists)? Secondly, what are the possible advantages of providing such a detailed account of specific offenses? With this in mind, are we still entitled, in light of a polycentric (and some might claim fragmentary) account of criminal offenses, to even speak about “the criminal law” or “the modern criminal law,” as the title of the book aspires to do?

Inspired by the book’s commitment to the study of offenses, the following essay addresses the above questions through the discussion of an emerging⁴ category of criminal offenses: the prohibition of abuse in relationships of asymmetrical power, such as domestic violence, child abuse, and sexual or non-sexual harassment in the workplace (also known as “moral harassment” or “workplace bullying”).⁵ Discussing abuse offenses through the book’s framework of civil order, the essay highlights the potential contribution of a descriptive theory of criminalization. Particularly, I demonstrate how the book’s framework of analysis invites us to observe abuse offenses from a critical vantage point, and to voice skepticism that is largely absent in contemporary accounts. Moreover, I shall emphasize the contribution of a contextual study of criminal offenses, and show how the book inspires us to develop novel methodologies for studying distinct offenses. I will, at the same time, question the extent to which the book consistently follows its polycentric plan. Specifically, I will challenge the adequacy of “the civilizing process”—an overarching sociological and historical narrative discussed in the book—for capturing the essence of abuse offense in contemporary criminal law.

I. The Civil Order of Abuse Offenses

The central theme of *Making the Modern Criminal Law* engages the relationship between modern criminal law and civil order. While contemporary theories often reduce the functions of the criminal law to claims about the justification of punishment,⁶ Farmer contends that criminal law’s main purpose should be reconceived in terms of securing civil order.⁷ Examining some well-known conceptions of civil order (civil order as the op-

³ About a third of the book is dedicated to the study of specific offenses—divided into the categories of property, person, and sex. Farmer, *supra* note 2, at 201-96.

⁴ Some of these offenses are entirely new (e.g., workplace bullying); some include conduct that has been historically exempted from punishment but no longer is (e.g., the corporal punishment of children); and some proscribe conduct that was criminalized in the past under different titles and is currently being reconceptualized as abuse (e.g., intergenerational incest).

⁵ While domestic violence and child abuse are criminal virtually everywhere, the criminalization of sexual harassment and workplace bullying is more selective and more common in Europe (the UK included) than in America.

⁶ Farmer, *supra* note 2, at 13.

⁷ *Id.* at 5.

posite of barbarism;⁸ order as the opposite of chaos⁹), Farmer seeks to charge the familiar concept with new meaning, which involves reference to the state and its central institutions as ordering the lives of individuals.¹⁰ Farmer successfully discards common understandings, but the exact contours and significance of his alternative notion of civil order remain vague: Farmer explains well what civil order is *not*, but it is less clear what civil order *is*. In what follows, I will not try to criticize or defend the framework of civil order in an abstract or theoretical manner. Instead, I will explore the implications, the advantages, and the disadvantages of the civil order framework, by discussing a particular category of offenses: abuse offenses. The book specifically refers to the criminalization of interpersonal abuse as part of its discussion of offenses against the person. I should emphasize that the ensuing analysis is deliberately not limited to evaluating those explicit comments. Rather, I use abuse offenses as a means for a broader consideration of themes that cut across the book. Thus, the following analysis of abuse offenses moves beyond, and at times disagrees with, the specific comments listed in the book regarding abuse offenses.

The criminalization of interpersonal abuse marks a contemporary trend in many legal systems, with lawyers and legal thinkers struggling to make sense of the term *abuse* and to capture the unique wrongfulness of these offenses.¹¹ An impressive body of statutes and case law dealing with abuse has emerged, though its basic features and foundational assumptions are yet to be explored. Whatever these might be, standard or mainstream theories of criminalization clearly have trouble conceptualizing abuse offenses. There are two reasons for this, one methodological and the other more substantive. First, the study of specific offenses has generally been neglected by criminal law theorists, who have focused mostly on the theory of the “general part” rather than the “special part” of the criminal law.¹² Secondly, a flagrant tension is discerned between the commitment of classic criminal law to the vindication of individual autonomy and the often more protective nature of abuse offenses.¹³ While allegedly defensible in cases involving minor victims (i.e., children or youth), such protectionism is harder to justify in cases involving

⁸ Id. at 38.

⁹ Id. at 41.

¹⁰ Id.:

Civil order can thus 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 burden of guaranteeing social and normative order is taken on by centralized institutions, what Roberts has referred to as the “aspiration to ‘govern.’”

¹¹ E.g., Victor Tadros, *The Distinctiveness of Domestic Abuse: A Freedom-Based Account*, in *Defining Crimes: Essays on the Special Part of the Criminal Law* 119 (R.A. Duff & Stuart Green eds., 2005); Galia Schneebaum, *What Is Wrong with Sex in Authority Relations? A Study in Law and Social Theory*, 105 *J. Crim. L. & Criminology* 345 (2016).

¹² *Defining Crimes: Essays on the Special Part of the Criminal Law* 1 (R.A. Duff & Stuart Green eds., 2005).

¹³ For a classic rejection of paternalism in criminal law theory, see 3 Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* (1986).

adults.¹⁴ Even in cases of non-consensual physical contact or violence—a wrongdoing supposedly fitting the standard liberal conception of assault—it is often felt that the criminal wrong required for abuse entails more than just the transgression of autonomy (e.g., domestic violence). Moreover, many abuse offenses proscribe speech rather than action,¹⁵ thus challenging liberals' cherishment of free speech and the traditional disinclination to censure "only words,"¹⁶ especially through the coercive machinery of the criminal law.

Contemporary accounts have not been unaware of the tension between libertarian conceptions and abuse offenses. A common response has been to turn to progressive-liberal conceptions such as equality, dignity, or trust. Thus, for example, sexual harassment has been conceptualized in the US as a form of discrimination¹⁷ and in Europe as an offense to dignity.¹⁸ Whether these have shown success or not,¹⁹ *Making the Modern Criminal Law* offers a new perception of the underlying rationale of modern law, one that is premised on the formation of order, rather than the vindication of rights (or the prevention of harm). A major challenge undertaken by the book is constructing a jurisprudence of order that does not surrender the centrality of the individual—such a position would seem hardly imaginable in any account of modern law—but that is not consumed by the atomistic imagery of individuals. Reading the definition offered in the book for civil order, namely as representing "a kind of ideal or social imaginary of modern law where self-governing individuals are guided by general rules and interact in civil society and the market" (6), it may be concluded that the challenge of such an endeavor is heavy indeed. What, one might ask, possibly distinguishes between the standard liberal jurisprudence of law-as-vindication-of-rights and the book's suggested jurisprudence, if it too revolves around, and serves, "self-governing individuals"?

Abuse offenses may serve to demonstrate the potential of the book's civil order framework for analyzing emerging conceptions of criminal wrongdoing. In the case of abuse offenses, the potential lies not in reaching sharp conclusions regarding the type of order constituted by abuse prohibitions, but in adopting a host of non-trivial methodological choices to reflect upon abuse offenses. The essence of these methodologies lies in

¹⁴ For example, some offenses prohibiting sexual contact in authority relations apply exclusively to minor victims (e.g., offenses prohibiting sexual abuse in guardianship) while others apply more broadly to adult, as well as minor victims (e.g., offenses prohibiting sexual abuse by the clergy or by mental health professionals).

¹⁵ For example, sexual harassment and workplace bullying.

¹⁶ Catharine A. MacKinnon, *Only Words* (1996).

¹⁷ Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979).

¹⁸ Maria Isabel S. Guerrero, *The Development of Moral Harassment (or Mobbing) Law in Sweden and France as a Step Towards EU Legislation*, 27 *B.C. Int'l & Comp. L. Rev.* 477, 487, 491 (2004).

¹⁹ These conceptualizations have been criticized on different grounds. For a critique of the equality jurisprudence of sexual harassment in American law, see Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 *Stan. L. Rev.* 691 (1997); for a critical account of the European jurisprudence of dignity, see Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 *Colum. J. Eur. L.* 241 (2003).

contextualizing the study of abuse to specific social institutions, their present and historical structures, as well as the relationship between their past and present forms. Contextualization is not foreign to criminal law theorists. The concept has been introduced in the past, often in an attempt to supersede abstractionist tendencies to view the whole criminal law through one value or another, or in an attempt to develop a critical appraisal of contemporary criminal laws.²⁰ Farmer however does not engage in contextualization as such. He speaks more specifically about the importance of institutions and stresses the potential contribution of institutional theory. Although he does not give a full account of social institutions²¹ and concentrates mainly on legal institutions (or law as an institution),²² the book does inspire us to think in that direction.²³ In the context of interpersonal abuse the book's suggested framework allows us to see that abuse offenses deal with new regulations engaging the abuse not only of the victim, but of the power vested in the offender, which may be viewed as an essentially institutional power. Thus, abuse offenses cannot be properly accounted for, without attending to the social institutions wherein the relationships between parent-child, employer-employee, husband-wife subsist.

Under a liberal conceptualization, abuse offenses take place in the private sphere—the family, the workplace, the school—where individuals interact and sometimes hurt each other. Abuse is understood as a wrong perpetrated by one individual (the offender) towards another (the victim), a violation that might call for criminal sanction whenever it causes harm and is performed intentionally (or at least recklessly). Farmer, however, advises us to inquire after the specific social context in which an offense to others takes place, and to avoid simplistic divisions of public and private.²⁴ Such an examination would consider the family, the workplace, the hospital, and the school as social institutions and would pay attention not only to inter-subjective relationships but to the basic structure of power wherein these interactions nestle. Viewed from this angle the family, the workplace, and the school entail not only power—the family or the workplace as locations of unequal social power have long been noticed by Marxist and Marxist-

²⁰ Lacey, Wells and Quick, *Reconstructing Criminal Law: Text and Materials* (4th ed. 2010), is a prominent example, offering an alternative criminal law textbook which combines traditional legal materials with sociological and criminological accounts relating to crime and punishment.

²¹ I use the term “social institutions” according to its typical use in sociology, where the term is not limited to state institutions or formal organizations but extends to every enduring form of social structure, which involves the accordance of roles and positions, as well as the prevalence of stable norms. See Jonathan H Turner, *The Institutional Order: Economy, Kinship, Religion, Polity, Law, and Education in Evolutionary and Comparative Perspective* (1997).

²² Farmer, *supra* note 2, at 22-26 (outlining an institutional theory of law, which is then developed into an institutional theory of the criminal law, *id.* at 27-35).

²³ For example, in the chapter developing the theoretical foundation of the book—civil order theory—Farmer acknowledges the importance of non-state social institutions. *Id.* at 45.

²⁴ Thus, throughout the book Farmer treats the public-private distinction not as a given, but as constructed by criminal laws. *Id.* at 56.

oriented accounts²⁵—but more specifically they entail an asymmetry of authority relations. These are institutionalized power relations backed by legitimacy,²⁶ if not by legality.

Hierarchy and institutionalized asymmetry of power are the basic assumptions underlying abuse offenses. Reflecting on these laws through the book's framework of civil order, we are able to observe more clearly, and more realistically, the law's fundamental assumptions regarding the relationships among individuals, and between individuals and the state. As to the relationships among individuals, abuse offenses presume an order of hierarchy rather than an order of equality: their basic premise is that parents routinely exercise authority over their children, that employers routinely exercise authority over employees, and that physicians and other therapists routinely exercise authority and power over patients. Consequently, the role of the state towards citizens is not reckoned, under these offenses, as that of an invisible hand, nor an abstract law that is servient of self-governing individuals or protects their self-rule (i.e., autonomy). Rather, its role should be acknowledged as that of a centralized institutional power that regulates the exercise of sub-institutions of power and authority. Abuse offenses tell the story of a state that not only monopolized the use of physical violence,²⁷ but has more broadly centralized the exercise of authority, and is now in the process of heavily regulating it in numerous social spheres.

Even a case of abuse involving physical violence, namely one that could be understood as an offense to autonomy (or "harm") under a standard liberal conceptualization, is seen in a new light under the book's civil order framework. As Farmer shows, violence is never regulated as violence in all social contexts: its regulation is related to the meaning ascribed to specific cultural and institutional practices.²⁸ In the case of domestic abuse—whether in spousal relationships or in parent-child relations—the prohibition against using physical violence is related to significant changes in the domestic regime of authority. While liberals might consider the criminalization of domestic violence as a local application of a general rule against the use of violence ("violence is violence is violence"), and

²⁵ See, e.g., Catharine MacKinnon, *Toward a Feminist Theory of the State* (1989). Farmer generally questions the sufficiency and adequacy of social power theories for theorizing the criminal law. Discussing some of the advantages of criminological accounts of social power he observes that "notwithstanding these strengths, there are problems with this approach in terms of thinking about criminalization more generally." Farmer, *supra* note 2, at 20. For an account of the incorporation of social power insights into criminal law doctrine, see Galia Schneebaum & Shai J. Lavi, *Criminal Law and Sociology*, in *The Oxford Handbook of Criminal Law* (Markus D. Dubber & Tatjana Hörnle eds., 2014).

²⁶ Weber famously characterized authority as power which is sustained because of the followers' belief in the authority's legitimacy. Max Weber, *Economy and Society: An Outline of Interpretive Sociology* 213 (Guenther Roth & Claus Wittich eds., 1978) (1922).

²⁷ Max Weber, *Politics as Vocation*, in *From Max Weber: Essays in Sociology* 78 (H.H. Gerth & C. Wright Mills eds., 1948).

²⁸ For example, Farmer show how the attitude towards the use of violence in semi-organized and consensual fight to settle disputes, or prize fighting, have changed through the course of the eighteenth and nineteenth centuries. While initially such fights were widely acceptable, "as the century progressed, there was a greater tendency to see such fights as unprovoked and avoidable and to characterize any violence as unlawful." Farmer, *supra* note 2, at 246-47.

might explain the former permission to use violence in the home as an (undeserved) exemption of the private-sphere family from the purview of public criminal laws, the civil order analysis offered by Farmer would characterize the old regime in terms of the prerogatives enjoyed by authority figures within the family as part of a larger understanding of the family as a social institution of authority. Suggestively, such an understanding would perceive the new prohibitions against using violence in the home as testifying to the transformation of domestic authority regimes. While the authority of husband over wife has lost its formal status altogether, parents still possess authority over children, only the permission to use physical violence as means of discipline is in the process of losing its legitimacy.²⁹ Indeed, the prohibition against using parental corporal punishment testifies not merely to the monopolization of violence by the state, but rather to the monopolization of physical punishment, bestowing state authorities with an exclusive license, denied to any other entity, to exercise physical punishment.³⁰

In the context of employer-employee relationships the historical permission to use corporal discipline has long ago lost its legitimacy. But other, non-violent aspects of exercising authority in the workplace are now being scrutinized by the state. Sexual and non-sexual harassment have been innovatively defined as legal wrongs, even if typical harassment cases lack coercion in the traditional sense of the word, and often involve mere speech (or other means of expression). A civil order framework may shed new light on these laws. Instead of focusing exclusively on individuals and their harms, harassment laws should be conceived as ordering particular social spheres wherein social roles are being accorded to human beings for the purpose of carrying out professional activity, and where authority figures are expected to use the power vested in them rationally and in accordance with professional standards, rather than as vehicles for serving their own self-interest (such as sexual gratification). Under new anti-bullying legislation, authority figures in the workplace are similarly required to restrain their overbearing or domineering personality, assuming such tendencies may carry the effect of oppression.

The danger of employee-oppression is what underlies the new workplace bullying regulation, and it is worth paying attention to a change of emphasis that is offered by Farmer's civil order framework, when compared to existing accounts dealing with workplace bullying. While the latter have focused on the harm and dignity of bullied employees, Farmer's civil order framework requires a broader outlook on the relationship between bully and victim—a relationship that cannot be summed-up in purely psychological terms (the problematic personality of the bully and the vulnerability of the bullied), but one that is constructed and embedded in the workplace as a distinct institutional setting. A civil-order mode of inquiry neglects the assumption—so common in liberal

²⁹ See, e.g., Deanna Pollard, *Banning Child Corporal Punishment* 77 *Tul. L. Rev.* 575 (2002); see also States Which Have Prohibited All Corporal Punishment, <http://www.endcorporalpunishment.org/progress/prohibiting-states/>.

³⁰ James Q. Whitman, *The Transition to Modernity*, in *The Oxford Handbook of Criminal Law* 84, 109 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

accounts—that “dignity is dignity is dignity” and that the law seeks to protect the dignity of all humans at all contexts in all times (or at least from now on). A civil-order mode instead favors an inquiry that notes particular social contexts in which dignity is being summoned at certain points in time to address specific concerns, and asks why this is so. Rather than instantly celebrating the progressiveness of anti-bullying laws, such inquiry would first aim to consider the emergence of anti-bullying laws in certain social contexts and in certain times, and strive to understand what—other than a sudden (and enlightened) realization of the importance of “dignity”—might explain new sensibilities regarding employee oppression in the workplace.³¹ Questions of this sort should guide future research studying anti-bullying regulation.

II. Abuse Offenses and the Civilizing Process

So far, I have discussed the civil order argument and demonstrated its potential through the analysis of abuse offenses. It is now time to consider a more particular contention which is offered in the book as a complementary argument to the civil order framework. I refer here to Farmer’s discussion of the “civilizing process” as an overarching historical and sociological narrative, supposedly accounting for many developments in the criminal law and particularly in the area of offenses against the person. The civilizing process narrative strikes the reader as an important addition to the civil order framework, as it injects the order framework with substance, without which the civil-order argument might appear as mere form. Under the civilizing process argument, the order that is established by the modern criminal law follows a certain pattern: it requires individuals to control their desires and passions “through a tightening of controls imposed on individuals by society” and through an attack on “practices deemed to be immoral or uncivilized—often or usually led by cultural elites against practices of the lower orders” (52).

To explore and criticize the extent to which the civilizing process can act as an overarching theme for modern criminal offenses, let me turn again to the specific realm of abuse offenses. At first glance, it might seem that the civilizing process argument is well suited to describe abuse offenses and their underlying logic. In this context, we may be able to phrase the workings of the civilizing process even more specifically, namely—the civilizing process requires authority figures to control their appetite for unrestrained power. Moreover, the civilizing process, while developed and discussed mostly in order to account for the regulation of bodily aspects of human conduct, is able to account for the regulation of conduct that is not (strictly speaking) violent, but is contemporarily viewed as uncivil under the abuse category, such as verbal harassment and the use of obscene or derogatory language.

And yet, reflecting on recent developments in the abuse category it is doubtful whether the civilizing argument would be able to capture their essence. To be sure, a workplace supervisor throwing sharp objects or screaming at a subordinate employee may

³¹ For a critical consideration of the emergence of civility laws in Europe, see James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 *Yale L.J.* 1279, 1285 (2000).

be described as uncivilized; a law banning such conduct may well be contemplated as part of a larger civilizing project. Conversely, laws that ban the overworking of employees when such conduct serves no legitimate professional purpose; or that prohibit the spreading of malicious rumors; or that sanction the systematic ignoring or expropriation of tasks in the workplace (all representative of the evolving workplace anti-bullying regulation) seem to engage something other than the problem of unrestrained power. Rather, such regulation reflects new sensibilities regarding employees' claim to be seen and noticed in the workplace. More than a project of civilization, such regulation might be viewed as a struggle for recognition.³² And, while it may be possible to marry the two narratives together (portraying the bully as being restrained with the purpose of allowing recognition for victims) recognition demands much more than escaping the capture of a domineering boss. And victims' claims and expectations from the law in these contexts are arguably far more ambitious.

The book, it should be noted, is not insensitive to the new emphasis of abuse offenses. Nevertheless, Farmer's analysis does not expressly admit the challenge posed by abuse offenses to the overall argument regarding the civilizing process as a general narrative of the modern criminal law. Sensing that "the civilizing process" might be inadequate for describing contemporary abuse regulation such as phone harassment and stalking, Farmer resorts to the language of autonomy, claiming that these offenses reflect a move from protection of bodily integrity to the protection of autonomy, and testifies to a new understanding of the person.³³ While the conception of the person is certainly worth exploring, focusing on the individual and her autonomy is an awkward retreat from two large—and highly important—positions of the book: the one that urges us to move beyond the individual to inquire the *order among individuals*; and the one emphasizing the importance of attending to the distinct aims and ends of particular areas of criminalization, and of resisting homogenizing tendencies.³⁴ The tensions between social order as the jurisprudence of the modern criminal law and the attention dedicated to the conception of the person in discussing new abuse offenses, on one hand, and between the book's support of a polycentric study³⁵ of criminal offenses and its analysis of abuse offenses in terms of autonomy, on the other, remain unresolved on this point.

³² Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflict* (Joel Anderson trans., 1996).

³³ See Farmer, *supra* note 2, at 254; see also *id.* at 289-90 (discussing broadening the meaning of non-consent, coercion, and violence in sex offenses, for the purpose of protecting vulnerable victims).

³⁴ In the introduction to the book, Farmer states: "I shall show how the patterns of criminalization in particular areas have developed in a way that is relatively autonomous from the development of the criminal law more generally, with the law in each area pursuing slightly different aims or ends, and operating according to different logics or principles." *Id.* at 6.

³⁵ *Id.* at 202.

III. Why a Descriptive Theory of Criminalization Is a Worthy Project

Answering to the narrative of a civilizing process, a struggle for recognition, or some other narrative, prohibitions against interpersonal abuse both assume and enforce a certain order: the order of regulating social institutions and their distinct regimes of authority. What might be the value and what would be the significance of a description of this sort? As Farmer concedes, the book deals with criminalization, but does not offer a normative theory for it.³⁶ The question therefore refers to the possible value and contribution of criminalization projects that do not offer a scheme for the proper limits of the criminal law: of what may legitimately be criminalized, and what may not.

To lawyers, who hold justice a precious endeavor, a descriptive account of criminalization might appear unhelpful or even worse: tedious or uninspiring. If the most important question is what *should* we criminalize (and what we should not) than a descriptive theory of criminalization might at best help detect gaps between ideal and reality, between what is worthy of criminalization and what in fact is being criminalized. This, however, is not the main contribution of the book. *Making the Modern Criminal Law* is not a study in legal realism. What, then, might be its value? Anticipating the challenge, Farmer occasionally refers to his project as critical.³⁷ Under this understanding, to the extent a descriptive theory of criminalization studies contemporary criminal laws, the subject of inquiry is not what these laws do (“law in action”), but what they profoundly mean, what’s their underlying logic, and how they came to acquire legitimacy at certain points in time and in certain societies. Describing the modern criminal law in terms of order implicates the state as a dominant governing power which, as Farmer keeps reminding us, does not necessarily follow coherent maxims of moral justice, but responds to specific social needs.³⁸

One might wonder, however, whether reference to the contingency of criminal laws³⁹ and to the governing power of the state⁴⁰ in constituting criminal laws, genuinely exhausts the critical power of a descriptive account of criminalization—and of *Making the Modern Criminal Law* for that matter. I suggest there is more to be said for the critical force of descriptive studies of criminalization. By way of conclusion, I wish to emphasize the book’s critical potential with respect to abuse offenses, thus moving beyond what Farmer himself is ready to say on harassment or abuse laws. The point could be illustrated through discussing abuse or harassment laws relating to the workplace. Considering these offenses in terms of civil order, and particularly under a “civilizing process” narrative, adds an important dimension to their standard liberal conceptualization. Importantly, it

³⁶ Id. at 302.

³⁷ Farmer describes the potential of understanding the institutions of the criminal law in terms of the “critical space which is always opened between the institution and its values” and “the process of reflecting on both the ideals and the practice in order to produce a critical understanding of the modern institution of the criminal law.” Id. at 35.

³⁸ Id. at 8.

³⁹ Id. at 6.

⁴⁰ See, e.g., Farmer’s depiction of civilization as a “particular kind of governing project.” Id. at 50.

might help reevaluate the effects of anti-bullying laws, diverting the discussion from their familiar (and optimistic) portrayal as progressive, to the relatively unexplored (and gloomier) route of considering some of their downsides. While these laws are commonly celebrated as “civil”⁴¹ the point of considering them as part of a “civilization process” is to generate doubts as to whether they are truly emancipating. Acknowledging the centrality of authority relations to the emerging anti-bullying regulation, and conceiving such regulation as engaging the centralization, the rationalization, and the bureaucratization of authority, might raise a whole host of questions that are largely absent in contemporary accounts of anti-bullying laws and policies. For example: Is there a bright-line distinction between civilizing the workplace and sanitizing it?⁴²; What might be the profound meaning of employee’s demand for, and dependence on, recognition from workplace authority figures?; Will employees’ need for recognition be served, or rather undermined, by the enforcement of such recognition through state laws?; Will employees be emancipated by anti-bullying laws, or rather have their dependence reinforced by referring it to a higher authority—the all-encompassing authority of the state? Making room for questions and doubts of this sort, *Making the Modern Criminal Law*, while it may be considered “descriptive,” is not a-normative.⁴³ It uncovers aspects of contemporary criminal laws that might not be noticed through standard theories of criminalization, and which may serve future researchers in constructing fresh normative evaluations. Inspired by the book, such future projects should favor ad-hoc normative assessments rather than ones deduced from general principles that are insensitive to specific social contexts and institutions. The kind of description offered by *Making the Modern Criminal Law*, in any case, should prove highly valuable not only for sociologists, historians, or other critics, but for lawyers and policy-makers as well.

⁴¹ Whitman, *supra* note 31.

⁴² Vicky Schultz, *The Sanitized Workplace*, 112 *Yale L.J.* 2061 (2003).

⁴³ Farmer expresses a similar instinct, referring to the book’s descriptive account as refining “the potential for a normative theory of criminal law by clarifying the relation between normative theory and the development of law.” Farmer, *supra* note 2, at 35. My analysis of abuse offenses is an attempt to go a step further and demonstrate the point more concretely, with respect to a certain category of criminal offenses.