Making the Modern Criminal Law: A Response

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Abstract

In this short response, I address some of the general themes that have been raised by the commentators. I discuss these under three main heads. These are, first, the relationship between descriptive and normative accounts of the criminal law; second, the meaning of civil order and its place in my argument, and; third, an explanation for my focus on certain types of offenses in the analysis of the special part of the criminal law.

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I am very grateful to the five discussants for the time and the thought they have given to read and reflect on the arguments in my book. In their generous comments, they have given me a great deal to think about and opportunities to explore new ideas. In this short response, rather than engage with each of them point by point, I shall address some of the more general themes that they raise in common. These are themselves, to a great extent, interrelated but I shall discuss them under three main heads: (i) the relationship between descriptive and normative accounts of the criminal law; (ii) the meaning of civil order; and (iii) my focus on certain types of offenses in the special part of the criminal law.

I. Normative and/or Descriptive?

One of the distinctions used by some of the commentators—and indeed one which is found throughout discussions of criminal law—is that between descriptive and normative accounts of the criminal law. Descriptive accounts are statements of what the law is, or of its history, while normative accounts are discussions of what the law ought to be. Descriptive accounts of any particular system might be measured against normative ideals or might provide data for normative theorizing, but are not considered to have any direct normative implications. Conversely, normative theory might draw on accounts of the particular laws and their enforcement, or might be more or less based around the law of any particular jurisdiction, but the tasks of description and normative theorizing are understood as different kinds of exercise.[1] The question that is thus posed, for example by

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[1] For two recent critical discussions, see Emmanuel Melissaris, Theories of Crime and Punishment, in Oxford Handbook of Criminal Law 355 (Markus D. Dubber & Tatjana Hörnle eds., 2014); Nicola Lacey, Historicising Criminalisation: Conceptual and Empirical Issues, 72 Mod. L. Rev. 936 (2009).

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Vincent Chiao (see Chiao at 5-7; see also Schneebaum at 51-52), is what normative theory of the criminal law has to learn from history: that is to say whether the descriptively rich account of the development of the criminal law set out in the book has implications for normative theory and, if so, what these might be.

However, I think that the use of this distinction misrepresents what I am trying to do in the book, which is not only an argument that actual systems of law act as a constraint on normative justifications, or even a plea for normative theorizing to be more aware of the contingency of particular values or understandings of the nature of wrong—important though both of these points are.[2] More radically I would claim that the book *is* making a normative argument, and that the historical account of the development of the law should not only be seen as, in some sense, a precursor to normative argument (something recognized by Kerr, e.g., Kerr at 12). Of course, as a normative argument the book does not take the form which is easily recognizable to criminal law theory—that is to say that it does not engage directly with the arguments of leading normative theorists, and there is little or no explicit discussion of what the law ought to be—a so-called prescriptive account of criminalization. So in what sense is it normative? This is in part an argument that starting points for normative theorizing import certain unexamined assumptions. This is less the claim that the *values* might be contingent, about which I think that Chiao is rightly skeptical, and rather that it is important to understand the kind of social relations or institutions to which the theorist is seeking to apply the values. There is an example of this in the chapter on property offenses where I argue that the standard categorization of property offenses in terms of theft, breach of trust and fraud is less a "universal" way of categorizing the law than a reification of a set of distinctions that were developed to explain the law, and distinguish it from civil law, at the end of the eighteenth century.[3] We should thus not attempt to shoehorn contemporary law, where it relates to the protection of systems of credit, into these categories without first reflecting on whether they are appropriate to modern social relations and what it is that the law is seeking to achieve. These are rarely only abstract questions about values, but also engage with the purposes or aims of certain sets of rules. This point is then connected to the broader argument which is that law should be understood as a form of governmental project which I shall set out in the next section.

II. Civil Order

One of the questions raised by several of the commentators concerns my argument that the modern criminal law aims in a broad sense at the securing of civil order: Is the conception too general and open-ended? Is civil order only about the civilizing of individuals

[2] See, e.g., the argument in my earlier paper, Lindsay Farmer, Criminal Wrongs in Historical Context, in The Boundaries of the Criminal Law 214 (R.A. Duff et al. eds., 2010).

[3] Lindsay Farmer, Making the Modern Criminal Law: Criminalization and Civil Order 231 (2016).

and do we need to know more about the motivations of the civilizers? Or how does the broad aim of securing civil order relate to the development of particular offenses or categories of offense (see, e.g., Chiao at 3-4; Kerr at 16; Lernestedt at 24; Schneebaum at 43-44)? This argument about securing civil order has various different dimensions, and given that this is perhaps the most theoretically complex (and contested) part of the argument, I welcome the opportunity to try and restate briefly, and to clarify, the nature of the claim that I am making here.

The starting point for my thinking about securing civil order is the suggestion of MacCormick—and it is really no more than a suggestion, as he does not develop this claim—that criminal law only becomes "fully intelligible" from the perspective of understanding the "civility of civil society."[4] This is significant, in my view, because it is distinct from the claim which is the starting point for much contemporary theorizing about criminal law, that criminal law is primarily intelligible from the perspective of the justification of individual punishment. MacCormick thus invites us to look at the criminal law from the perspective of the role(s) that criminal laws play in shaping the civility of civil society. (This, of course, does not mean that the justification of punishment is not significant; but it should not be our starting point.) Criminal law is to be seen from the perspective of the roles and responsibilities that it defines and how, alongside other bodies of law (such as tort, contract or welfare laws) it distributes certain social risks. It follows, of course, from this point, as Chiao also argues, that criminal law should be seen as a form of public law, subject to legitimization through the political process.[5]

In attempting to develop this insight I distinguish between three different dimensions of the idea, each of which play a slightly different role in the overall argument. These are the meaning of civil order itself; civilization and the "civilizing process"; and civility as a form of sociality.[6] These are analytically distinct, though they may overlap in practice. Just as importantly these are not "things" in the sense that civil order or civility may be a matter of degree; hence the argument is not that these can be defined in advance as elements of criminal law, but that these are vectors in terms of which we can "make sense" of the criminal law and its role in society. And in addition these features can provide a critical perspective. The claim is not, for example, that the criminal law, or society, is necessarily becoming more civilized, but that historically criminal law was conceived of as a "civilizing" instrument and that how it was (and is) used for particular purposes or against particular social groups sheds critical light on the broader liberal project.

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[4] Neil MacCormick, Institutions of Law 293 (2007).

[5] Chiao points out that this kind of approach was set out by H.L.A. Hart in his *Punishment and Responsibility* (1968). It is perhaps not a coincidence that the claim was made by MacCormick who was Hart's pupil at Oxford and a leading interpreter of his work.

[6] Farmer, supra note 3, ch.2.

The idea of civil order is linked specifically to the development of the state, and certain features of a legal order (the monopoly of violence; the regulation of jurisdiction; the codification or institutionalization of rules of law as norms of conduct; and the commitment to individual liberty and the rule of law as limits on the power of the state).[7] These, it should be clear, are not advanced as a stipulative definition of criminal law in general, but as features of *modern* criminal law that may be present to a greater or lesser degree in any particular system of modern criminal law at any particular time. Modern criminal law is thus, as stated earlier, a system of public law. This last point is important because it links the idea of modern criminal law to the idea of governance by rules, in the sense of being a governmental project. Thus, although as Chiao points out there may be societies with similar rules which do not have states, this is in practice highly unlikely since it is precisely these institutional features which make the modern criminal law distinctive. It is the development of this modern state project of government through criminal law which I analyze in the book. Thus civil order is conceived not in terms of a "moral community," but as concerned with 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."[8] Within this broad framework, co-ordination through law is subject to specific requirements and constraints, because modern law addresses citizens as responsible, autonomous, self-governing subjects.

This has meant that specification of responsibility, in the sense both of identifying conditions for the attribution of liability (retrospective liability) and in the prospective sense of imposing obligations and duties on a person who can adapt their conduct to norms and plan over time. Of course, while I am primarily concerned in the book with analyzing the role which concepts of responsibility play in criminalizing conduct (responsibility as a legal artifact), through the shaping of norms or rules, and in the co-ordination of the internal structure of the criminal law, as Arlie Loughnan shows, what she calls the "meta-significance" of responsibility (Loughnan at 34) extends well beyond the criminal law to responsibility practices more generally. This is in part because it is a means of articulating moral, social and political values, but also because these responsibility practices draw associations with practices outside the criminal law.[9] This reach contributes greatly to the symbolic power if ideas about criminal responsibility to the wider social order (id. at 38-40). A similar point is made by Claes Lernestedt where he points out that while I have plenty to say about particular civilizing initiatives, I say little about the larger social ideology and political philosophy of the civilizers (Lernestedt at 24). In both cases it is clear that I have somewhat neglected the study of this broader political and social picture

[7] Id. at 43-45.

[8] Id. at 193.

[9] See also Nicola Lacey, In Search of Criminal Responsibility: Ideas, Interests and Institutions ch. 2 (2016).

in the book. In the first case this is, at least in part, because of a (possibly misplaced) desire to play down the centrality of responsibility in order to bring out other, more neglected aspects of the modern criminal law. However, Loughnan makes a compelling case for engaging with the broader symbolic significance of responsibility, in particular by going beyond the now familiar moral and political discussions of responsibility to sociological and social scientific work on responsibility.

The second case, that of the broad philosophy of the civilizers, is an interesting point, for it is certainly true that I have focused on particular initiatives or practices rather than tracking shifts in political philosophy more broadly—hiding behind the claim that there is a particular kind of modern sensibility or modern social imaginary that has shaped and provided the context for the development of the law.[10] Indeed, I think that both Lisa Kerr and Galia Schneebaum make a similar point in seeking to develop fuller accounts of the reasons behind the development of particular areas of law. Kerr explores the decriminalization and then recriminalization of prostitution in Canada (Kerr at 18-21), while Schneebaum argues that in the "making" of abuse offenses, it is necessary to give weight to ideas such as human dignity and the way that these have shaped the development of the law (e.g., Schneebaum at 50). That said, my argument in the book is not that there is a direct connection between ideas of civil order and the development of particular crimes such as abuse offenses. It is rather that the development of certain areas of contemporary law such as abuse offenses suggest an increasing concern with the protection of the vulnerable, a concern that is frequently framed in terms of the need to protect certain rights or the autonomy of the victim. The point is that our conception of the civility of civil order is shifting, bringing the demand that criminal law be used in a new way with the criminalization of new forms of "uncivil" conduct. This is thus not a retreat from the arguments of the book as Schneebaum suggests (id. at 50), but rather an illustration of the ways in which relations between individuals might be conceptualized within the broader conception of civil order.

However, while this might pass muster as an explanation of the development, it is clearly inadequate as a full account of the motivations and beliefs of the "civilizers," to use Lernestedt's term. Perhaps for a model of the kind of detailed work that would need to be done to illustrate this it would be appropriate to turn to Peter Ramsay's *The Insecurity State*.[11] This looks at the development of the Anti-Social Behaviour Order in England and Wales—a civilizing initiative if ever there was one, in terms of the aims of politicians to instill values of respect for others and good citizenship through the use of the (criminal) law. However, Ramsay goes beyond the normal condemnations of the ASBO for their departure from liberal requirements of fault and their avoidance of procedural protections. He instead shows how the ASBO can be read as consistent with a different version

[10] See, e.g., Charles Taylor, Modern Social Imaginaries (2004).

[11] Peter Ramsay, The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law (2012).

of liberalism that is concerned to protect the vulnerable and instill a different kind of responsibility for others. The book thus traces in a very detailed way precisely the kind of broader social and political values that legislators and politicians drew on in developing this legal instrument. This, or this kind of work, would be one way of meeting the need for a more complete account of the ideas or beliefs that motivated the civilizers.

III. Special Part

Lernestedt also suggests (Lernestedt at 24-25) that this "space" might have been filled in a different way in the special part of the book had I focused on an area of crimes against the state, rather than focusing exclusively on crimes between individuals—and I very much agree with this point. In my defense here I can only say that the original plan was precisely to include a chapter on the crimes of sedition and blasphemy and hate speech (or speech crimes) but as the book grew ever longer, and publisher's deadlines were repeatedly missed, I had to abandon that original plan. What the chapter would, I hope, have demonstrated was how a more political model of citizenship, based on changing standards of conduct in public spaces and changed relationships to political institutions, has been fostered through criminal laws which have regulated public and private speech. This would both have rounded out the picture in the book focused on interpersonal crimes and demonstrated more clearly how the criminal law has shifted from conceiving crimes as primarily against the state or sovereign, to conceiving even ostensibly political crimes such as hate speech in terms of their impact on individuals.

That said, the focus on crimes relating to person, property and sex in part III of the book was deliberate. While I hesitate to describe what I have done as the "Farmer method" (see Kerr at 12)—not because there is no method but because my method follows in the footsteps of others—the purpose of the focus on these supposedly "core" areas of criminal law based on the interests of individuals was precisely to bring a different kind of focus to bear on these areas. If my direct inspiration in trying to identify patterns in the development of particular crimes was the work of George Fletcher in his seminal book, *Rethinking Criminal Law* (1978), my aim was rather different. For all of the vast range of erudition displayed in this book, Fletcher's aim was the rather narrower one of identifying patterns of liability in theft and in homicide, and in the course of doing this he paid little attention to either the question of what it was that was being protected by the criminal law (the content of concepts of property or person) or to the question of whether or not there was any kind relation between the object of the law and the forms of liability. Thus I quickly found that while Fletcher's "model" might be a starting point, it could only be that and it was necessary to supplement this with the more contextual histories of property, personhood or sexuality which have been developed by social historians and anthropologists. The aim was then to explore these kinds of links and to show how these patterns of criminalization responded to different kinds of social pressures and aims and that it was not clear that a single "model" of criminalization theory would fit them all. The aim, in short, was to show that there was no core and that there is a need to reflect criti-

cally on the relationship between general principles and particular areas of the criminal law. This does not mean that there is not also a need to reflect critically on other areas or categories of law—those which are perhaps rather condescendingly viewed as "peripheral" or merely *mala prohibita*—and, if there is a method, I would hope that others are inspired to develop this kind of analysis.

In the light of this I am delighted that Lisa Kerr has taken up this thought so enthusiastically, and her account of recent development in prostitution/sex work laws in Canada sheds further light on the risks thrown up by an uncritical application of liberal principles such as harm or autonomy. Indeed, she demonstrates clearly how different interests are articulated in the proposed justifications for criminalization, and argues that in place of this there is a need for "laws governing prostitution [to] embody a proportionate and rational connection between the aims and effects of the law" (Kerr at 21).

IV. Conclusion

In concluding I want to make two further comments. The first is to acknowledge that there is indeed a tension, as Lernestedt suggests, between legislators and courts or academics "making" the modern criminal law—and this may be more marked in a common law system than in a country like Sweden, as he suggests. While my aspiration was to track these equally, and to explore the productive tension between the two, I would concede that the book in the end has focused more on the role of academics or theorists in making criminal law as an academic discipline. This perhaps comes at the cost of a fuller exploration of the law making process, and also of the analysis of power in the enforcement of the criminal law. However, given the starting point of trying to understand how the "criminalization question" developed in criminal law theory, it was perhaps inevitable that this is where I would end up. Notwithstanding this I hope that there is much to be learned from this account of the processes through which theorists have sought to "civilize" the criminal law, through the categorization of offenses and the development of general principles which seek to define the discipline—and of the achievements and costs of this approach. There is no question that thinking about criminalization should be central to criminal law theory but, as Loughnan stresses, there is also a need for greater reflexivity about the development of theories of criminalization.

In closing I want to note one final aspect of the idea of securing civil order which I have not yet discussed, which is where I claim that the aim of securing civil order provides a kind of normative horizon for the criminal law—a claim that provides the overall normative framework of the book. As I said earlier, while I consider my book to be advancing a normative argument, this is not normative theory in the sense in which it is conventionally understood. My aim is rather to place discussion of the modern criminal law within the broader framework of discussions about the kind of society in which we want to live. This, as I argue in chapter 10 of the book, is a matter of discussion of the kind of civil order, the distribution of responsibilities, of when it is appropriate to resort to criminal law and so on. It is precisely because the concept of civil order (or the role of

the criminal law in securing it) is not defined in any prescriptive way that I would argue that this is a matter for public debate about the kind of criminal law that we wish to have. It is not, in my view, for the theorist to provide a prescriptive account of what the law should be on any topic, but rather in a range of different ways to provide critical resources that have the potential to enhance or deepen that broader public conversation. And that is what I have sought to do in the book.