

# Making Modern Criminal Law Theory: Reflections on Farmer

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Vincent Chiao\*

## Abstract

This brief review essay is devoted to a discussion of Lindsay Farmer's recent book, *Making the Modern Criminal Law*. I focus on the following themes: a formal and material interpretation of criminal law in facilitating "civil order"; the relation between criminal law's history and its justification; and the idea that the criminal law forms a sufficiently cohesive and distinctive body of law that it makes sense to ascribe moral principles to it that we would not be prepared to ascribe to public institutions, and public law, more generally.

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As has often been observed, it can be a difficult thing to write a critical essay in response to a book that one admires. So it is in this case. Lindsay Farmer's *Making the Modern Criminal Law: Criminalization and Civil Order* (2016) is a novel, erudite and wide-ranging rethinking of the field of criminal law theory. As is typical of Farmer's work, his contribution manages to be fundamental, raising challenges to basic presuppositions of contemporary criminal law theory, while also attentive to the fine-grained nuances of how the criminal law has been subtly and overtly transformed by courts, legislatures, treatise writers and theorists.

As I find myself in the position of having learned from much of the book, and being in agreement with most of the rest, there may not be much left over for productive disputation. In particular, I am fully onside with Farmer's insistence that normative theorizing about the criminal law should take into account its institutional character, and that an important part of this institutional character has to do with the criminal law's role in securing the conditions of what Farmer calls "civil order." I also agree with Farmer that much contemporary theorizing about the criminal law—including the main topic addressed in this book, criminalization—has instead operated as if the criminal law were simply moral philosophy in disguise. Often, criminal law theory seems to give the impression that once one has satisfied oneself about the interpersonal morality of, say, property or sexual autonomy, or the nature of moral responsibility, the only remaining question is how to operationalize those concepts in positive law, with occasional accommodations made for "practical" or "administrative" concerns.<sup>1</sup> I find Farmer's skepticism about this

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\* Associate Professor, University of Toronto, Faculty of Law.

<sup>1</sup> Two otherwise quite different examples of this tendency can be found in Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (1997), and Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (2011).

approach to criminal law theory compelling. Finally, I am very sympathetic to Farmer's insistence that theorizing the criminal law requires attending to its history.

I won't be discussing any of those areas of agreement. I will instead focus on the following three themes. First, I will unpack Farmer's conception of "civil order" and the criminal law's role in sustaining it. Second, I turn to the perennially vexed question of what normative theory has to learn from history, and where I believe Farmer's contribution to this issue lies. Finally, drawing inspiration from Farmer's observations about what is implied in the thought that "should X be criminalized?" is a meaningful question, I conclude with some speculations about why the contemporary criminalization literature has taken the rather weird shape that it has.

### I. Criminal Law and Civil Order

As Farmer makes clear in the opening chapters of *Making the Modern Criminal Law*, the historical investigations he pursues are in service of an overarching account of criminal law—or perhaps, of law in general—as an institution oriented at securing what (following Neil MacCormick) he refers to as "civil order." What is "civil order"? Perhaps what is sometimes said about "the rule of law" (or "dignity") could also be said about "civil order": it seems to have an indeterminately wide range of connotations, resisting canonical formulation. Farmer is certainly alive to this concern, and is at pains to single out three conceptions of civil order as having special importance: civil order as civil peace; civil order as life under stable public institutions; and civil order as broadly shared expectations about how people are to interact with each other ("civility"). Farmer also points out that, in his view, civil order is a sub-species of social order, in that a group of people only live together under conditions of *civil* order if their collective lives are structured by authoritative public institutions rather than informal social rules, norms and expectations, even if those more informal rules, norms and expectations define a kind of social order.

Perhaps more could be said about why Farmer focuses on these three conceptions of "civil order," and how they are related to each other. Clearly, these conceptions overlap. For instance, a function of complex public institutions is to establish civil peace. A "failed state" is, among other things, a state whose institutions have collapsed, leading to violence and disorder. In addition to creating peace, a society's institutions can entrench, modify or, in some cases, create social expectations about how people are to conduct themselves relative to others.<sup>2</sup> Consider, for instance, the battles being waged on university campuses across North America about "trigger warnings," "safe spaces," "micro-aggressions," elective pronouns and so forth. Yet what connects the evolving standards of polite discourse among urban elites to a society's attempts to stave off the state of nature? To be sure, both are tied up with public institutions. But that seems worryingly general.

Setting that issue aside, how does the criminal law figure in securing civil order? At the most general level, Farmer's idea here is that establishing civil order is a matter of

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<sup>2</sup> A theme in the work of Norbert Elias, *The Civilizing Process* (Edmund Jephcott trans., 1976) (1939).

“coordinating individuals and their interests,” and the role of the criminal law is to establish “measures for building and reinforcing trust between individuals” (299). The criminal law contributes to this coordination of individuals and their interests by protecting social order, whether in its most basic form (civil order as opposed to anarchy) or in its most refined (civil order as civility). The role of punishment in establishing trust is familiar from game theory, evolutionary biology, and classical sociology.<sup>3</sup> However, Farmer’s take on the idea is more overtly statist. Farmer insists (42-43) that the criminal law is grounded in sovereignty rather than in private revenge. Punishment, at least as administered by the criminal law, is grounded in a “violation of the obligation of fidelity owed to the king,” rather than an effort by one person to settle a score with someone whom he views as a culpable aggressor. On Farmer’s view, criminal law is public law all the way down: the *nr*-form of criminal law is breach of the King’s peace, not vindication of a private wrong.

This route, while appealing, is not without its dangers—dangers that should be particularly vivid for someone with Farmer’s historicizing tendencies. It is, for instance, surprising to find Farmer claiming that the criminal law is “linked to the emergence of the state . . . as a matter of *conceptual necessity*” (43). On this view, an informally defined group of people could live by a set of social rules and expectations that are in all material respects indistinguishable from the rules and expectations published in some state’s criminal code, but would nevertheless be deemed not true criminal law. Just as a bachelor cannot turn out to be married, a group of people living in non-state conditions simply could not turn out to have a criminal law. But this is a very surprising thing for Farmer to suggest. After all, if it is to be more than simply stipulative (this is how *I* shall use the words “criminal law”), then it seems to amount to a criminal law essentialism of the kind that Farmer is elsewhere at such pains to reject. Not only does the spirit of this kind of claim seem to be in some substantial tension with Farmer’s efforts to resist the essentializing tendencies of contemporary criminal law theory, it also seems to conflict with his claim, quoted above, that the criminal law supports civil order by facilitating social coordination and establishing social trust. After all, informal social rules might sometimes turn out to be as good at facilitating social order as criminal law, and conversely a sovereign’s formally promulgated and authoritative rules might turn out to be completely ineffectual. Indeed, informal social rules and norms sometimes seem to be rather effective at coordinating behavior and building trust.<sup>4</sup> This does not necessarily mean that we should deem them to be “law” (much less criminal law), but it does suggest that if the role of the criminal law in sustaining civil order is understood in terms of coordination and trust, it may be an exag-

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<sup>3</sup> Ernst Fehr & Simon Gächter, Cooperation and Punishment in Public Goods Experiments, 90 *Am. Econ. Rev.* 980 (2000); Samuel Bowles & Herbert Gintis, *A Cooperative Species: Human Reciprocity and Its Evolution* (2013); Émile Durkheim, *The Division of Labor in Society* (W.D. Halls trans., 1984) (1893).

<sup>4</sup> As famously argued, for instance, by Ralph Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1994); see also Elinor Ostrom et al., Covenants With and Without a Sword: Self-Governance Is Possible, 86 *Am. Pol. Sci. Rev.* 404 (1992).

geration to insist that the criminal law is completely discontinuous with non-state forms of punishment.<sup>5</sup>

For my part, I think Farmer would be better off sticking with a more material understanding of the criminal law (as, to be fair, he mostly does through the rest of the book). For one thing, it is far from clear that the kind of conceptual analysis that formalist legal theory goes in for has much use for Farmer's historicism. If the criminal law has a timeless nature discoverable by armchair philosophizing about the meaning of some concepts (e.g., "sovereignty," "rule of law," "authority"), who is to say that it does not have a timeless *content*, also discoverable by armchair philosophizing about the meaning of some more concepts (e.g., "harm" or "wrongdoing")? Yet, if there is a single position that Farmer means to reject in *Making the Modern Criminal Law*, it is surely that the content of the criminal law is determinable by abstract conceptual analysis.

Additionally, there doesn't seem to be any reason to believe that acknowledging a functional congruence between non-state punishment and state punishment under the criminal law means that the norms that apply to evaluate the one should necessarily also apply to evaluate the other. Perhaps it is true that the criminal law and private punishment are alike in that they both contribute to stabilizing social order, public institutions and practices. But that doesn't mean that whatever makes private punishment appropriate could simply be transposed to state punishment under the criminal law. The criminal law might be subject to a fully political mode of evaluation even if it is in some respects simply the state taking over a function that private actors might themselves perform in the absence of a state.

## II. The History of the Criminal Law and Its Justification

Let me turn to a second theme in *Making the Modern Criminal Law*: the idea that, as Farmer is fond of putting it, the criminal law is an "institution." The criminal law might be an institution in something like the way that universities, marriage and Thanksgiving are institutions: they are ongoing patterns of conduct, norms, and social roles that manifest characteristic values and sentiments, while also constraining them by forcing them to be expressed in particular ways. To say that the criminal law is an institution is thus to emphasize that while the criminal law might manifest a social conception of, say, harm, wrongdoing, autonomy and so forth, it does so in historically contingent and highly path-dependent manner. So the criminal law as an institution might be thought of as something like this: the criminal law manifests a society's conception of civil order (its understanding of security, government and interpersonal relations), but at the same time, it provides a particular social context in which arguments about civil order are hammered out over time. It is not, by Farmer's lights, simply up to a philosopher of criminal law to settle on the conception of "harm" or "autonomy" that happens to be most appealing to her. Legal

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<sup>5</sup> For an elaboration of this argument, see Vincent Chiao, *What Is the Criminal Law For?*, 35 *Law & Phil.* 137 (2016).

doctrines and practices shape how those conceptions are articulated and what kinds of claims about them will be considered plausible.

For example, consider Farmer's discussion of sexual offenses. Farmer observes that the category of "sexual offenses" is a relatively recent categorization in English law, arising as a separate classification of offenses only in the 1956 Sexual Offences Act. Farmer traces the evolution of a sundry list of what we now consider to be sexual offenses—notably including rape, sodomy, prostitution—from the early common law's concern with physical violence and the protection of property, the natural order of sexual desire and public disorder, through to Victorian concerns with moral corruption and the protection of women and children and, more recently, an expansive conception of sexual autonomy. Farmer observes not only that the concern with sexual autonomy has led to significant growth in criminalization in this area of the law (292-93), but also that it was not a concern that, like Athena, sprang full grown from the brain of some torpid philosopher, but rather an idea that developed out of a rather motley attempt to consolidate provisions of the Sexual Offences Act 1956 into an overarching and expansive narrative, linking together prostitution, sexual assault, sodomy, child exploitation and various other offenses.<sup>6</sup>

Few would deny that the criminal law has a history, and that its history reflects both changing social values and changing conceptions of how legal institutions might respond to protect or promote those values. In some broad sense, it is hardly a surprise to learn that the content of the criminal law—even of so-called "core" crimes like theft, murder and rape—has varied across time and place. So why does Farmer spend so much effort reminding us of this fact? In addition to a long chapter considering themes from Blackstone, James Fitzjames Stephen, and Glanville Williams (as well as, to be fair, our contemporary Andrew Ashworth), Farmer devotes fully a third of the volume to detailing the history of property offenses, homicide and sexual offenses in English law. Moreover, several of the remaining chapters pick up other historical themes, notably including the efforts to codify the criminal law and the impact of changing conceptions of responsibility.

In light of Farmer's aim to contribute to the ongoing debates about criminalization as well as to historical legal scholarship, it seems fair to ask: what has normative theory to learn from history? Farmer seems to me of two minds on this point. On the one hand, he argues that thinking of criminal law as an institution oriented toward the establishment of civil order (in the broad range of senses alluded to earlier) is meant to show how a range of otherwise apparently disparate topics cohere with each other as discrete points in how a society has sought to shape its self-image through law, and is not meant to provide prescriptive answers to the kinds of questions that criminal law theorists are preoccupied with (301-02). At other points, he insists that his argument is meant to speak

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<sup>6</sup> Farmer's approach deepens the account (focused on "female virtue") recently sketched by Jed Rubenfeld. See Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 *Yale L.J.* 1372 (2013). Like Farmer, Rubenfeld points out the potentially rather expansive implications of a "sexual autonomy" theory of the sexual offenses.

to “what and who should be treated as criminal under the law and the ways that this can be justified” (297).

The danger with the first line of response is that it runs the risk of failing to speak to the normative questions that Farmer insists his account is meant to speak to. It runs the risk of boiling down to an immensely erudite recommendation that criminal law scholarship be more historically informed. That is a valuable and important contribution, but Farmer aspires to say more than that. He wants also to diagnose how prevailing approaches to the theory of the criminal law have gone astray, which of course presumes that they *have* gone astray. Showing this requires more than pointing out that the way in which contemporary legal theorists think about the criminal law reflects the prejudices of their times. They do, of course, but that doesn’t show that there is anything wrong with doing so, nor that there is a meaningful alternative to working from one’s own place in an ongoing moral tradition.

But to really make good on the claim that his approach engages with normative criminal law theory, Farmer likely needs to do more to show where his approach diverges substantially from the positions taken by established theorists such as Joel Feinberg, Antony Duff, or A.P. Simester and Andreas von Hirsch. While no other theorist of whom I am aware has shown as deep an awareness of the historical contingency of the criminal law, one might worry that, ultimately, Farmer’s approach contextualizes the ongoing controversies about the harm principle, the status of regulatory offenses, negligence and subjective fault, overcriminalization and so forth, without staking out a distinctive position on those issues. Is it a good idea to think of sexual offenses as a category subsumed under a general principle of sexual autonomy? Farmer may well be right that the idea of grouping the sexual offenses together as a discrete legal category is a recent innovation, and that in earlier times what we now think of as sexual offenses were variously treated as offenses against the person, property, honor or religion. Yet what does that tell us about whether or not we should, today, continue to think of the sexual offenses in terms of sexual autonomy?

Hence, I think that the normative theorist’s question, “what should we criminalize?” is not answered by a historical recounting of how we have come to understand the criminal law to be the kind of institution it is, with the kind of functions and doctrines we believe it to have. For the historical analysis in *Making the Modern Criminal Law* to speak to the normative theorist’s question, Farmer needs to show how the historical inquiry supports the civil order thesis, and how the civil order thesis distinguishes his view from those who view the criminal law in more straightforwardly moralized terms.

As it happens, I think Farmer’s approach has the resources to support a more robust response to this line of objection. This arises from a passage at the very end of the book. There, Farmer suggests that understanding the criminal law “as a form of public law and as a governmental project” opens up a perspective on criminalization that engages “questions of politics and power” rather than abstract questions about moral rights and what people who violate those moral rights deserve by way of punishment (303). Focus-

ing on criminal law as a form of public law and as a governmental project brings questions about institutional design (“distributing roles and responsibilities”) and social cooperation (“laying down rules to guide the conduct of citizens”) to supplement more familiar questions about punishment. One way of interpreting Farmer’s suggestion in this passage is: in asking whether X should be criminalized, we should not stop with asking whether X is a moral wrong that harms some legally protected interest (e.g., a wrong of invading someone’s sexual autonomy). We should also consider how decisions about whether X should be criminalized are made, who is given an opportunity to be heard on that question, how differences of opinion are aggregated into a social decision, and whether that type of decision-making procedure is fair to all affected, according to an appropriately political conception of fairness (303). We should, in other words, treat the question of criminalization as subject to the same demands for political justification that apply to public decisions generally.

What is notable about this recommendation is that it breaks with what I have elsewhere referred to as the “subject matter” approach to criminalization—that whether we should criminalize X depends on whether X is an instance of the criminal law’s appropriate subject matter.<sup>7</sup> More fundamentally, it suggests that how we answer the question, “should X be criminalized?” has to do with specifically political values—the processes by which a law criminalizing X is made, notably including that process’s democratic *bona fides*.

Although Farmer does not draw the connection, this approach to criminalization falls in the footsteps of H.L.A. Hart’s approach in *Punishment and Responsibility* (1968). Hart there sought to find an alternative to the moralizing retributivists on the one hand and the modern Woottonite skeptics on the other: the former, like many contemporary retributivists, interpreted the criminal law’s doctrines about fault and responsibility as simply further exemplifications of interpersonal morality, whereas the latter saw them merely as superstitions. Hart’s solution was to ground the criminal law’s concern with fault and responsibility in specifically political principles—in his case, liberty as the ability to plan one’s affairs—as a constraint on social policy. Unfortunately, perhaps due to the collapse of faith in the scientific/rehabilitative ideal shortly after the publication of *Punishment and Responsibility*, and the resurgence of retributivist conceptions of criminal law in the intervening decades, Hart’s attempt to politicize the criminal law has largely faded into the background. One way of understanding Farmer’s civil order approach is, in part, as an effort to emphasize what should have been obvious all along but seems somehow to have been forgotten during the retributivist revival: the criminal law is a *public* institution and it should be evaluated as such. What an understanding of the criminal law as “a form of public law and as a governmental project” (303) suggests is a less piously moralistic, and more process-oriented (even: democratic) approach to the theory of criminalization.

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<sup>7</sup> Vincent Chiao, *Criminal Law in the Age of the Administrative State* ch. 5 (forthcoming 2017).

### III. Why Is There a Theory of “Criminalization”?

Farmer notes within the first few pages of *Making the Modern Criminal Law* that the very idea of “criminalization” as a distinct topic of normative inquiry presupposes a “prior understanding of the existence of the criminal law as a distinct area of law with a discrete area of application (or jurisdiction) and an understanding of ‘crime’ as the object to be regulated” (5). But, as Farmer goes on to observe, this idea of the criminal law as a “distinct body of rules with a defined area of application” (298) is itself an idea with a history. In particular, Farmer traces it to the development of the “modern legislative state” toward the end of the eighteenth century. It was at that point, Farmer suggests, that the conception of “criminal law” as a discrete body of law oriented toward condemnation and deterrence of anti-social conduct solidified (298). Hence, even the very generic question, “should X be criminalized?” arises within a definite (and rather recent) tradition in thinking about the law. This is the tradition that has come to take for granted the idea that “the criminal law” represents more than a conventional way of grouping sundry legal topics together—that it is more than a further volume in Borges’s *Celestial Emporium of Benevolent Knowledge*.<sup>8</sup> It also suggests that the criminal law is defined, in some way, by its subject matter rather than, as in the early common law period, by the type of remedy it authorized.<sup>9</sup>

Might one go further than Farmer does? Here, I embark upon rampant speculation. Consider that although some conception of the criminal law (“pleas of the Crown”) goes back centuries, the idea that there might be distinctive moral principles applicable specially to the criminal law appears to be of a more recent vintage; and indeed, possibly even more recent than the development of representative government. Notably, in *On Liberty*, John Stuart Mill did not present the harm principle as a principle of distinctive application to the criminal law, but rather as a *general* principle of political morality—applicable to coercive social power quite generally, whether in the form of the criminal law or in some other guise. Today, of course, the harm principle is strongly associated with the criminal law in particular rather than state action in general. At some point in the century or so separating the publication of Mill’s *On Liberty* (1859) and Feinberg’s *Harm to Others* (1987), the idea took hold that the harm principle was especially applicable to the criminal law—Feinberg’s four-volume work referred, after all, to the “Moral Limits of the *Criminal Law*,” not the moral limits of political authority *generally*.

Farmer argues that the question, “should X be criminalized?” presupposes a prior understanding of the criminal law as a distinctive body of law covering a discrete range of topics. But one might go further and ask: what led philosophers to believe that the princi-

<sup>8</sup> Jorge Luis Borges, *The Analytical Language of John Wilkes*, in *Other Inquisitions: 1937-1952*, at 101 (Ruth L.C. Simms trans., 1964) (1952) (“Dividing animals into those that belong to the Emperor, embalmed ones, those that are trained, suckling pigs, mermaids, fabulous ones, stray dogs, those included in the present classification, those that tremble as if they were mad, innumerable ones, those drawn with a very fine camelhair brush, others, those that have just broken a flower vase and those that from a long way off look like flies.”).

<sup>9</sup> See David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. Rev. 59 (1996).

ples applicable to criminalization are fundamentally different from those that apply to state action in general? Feinberg was one of his generation's finest legal philosophers. Uncharacteristically, however, Feinberg has little to say about why he thinks the harm principle is specific to criminal law.<sup>10</sup>

What might have brought about this change? Surely it is significant that this same period—from the end of the nineteenth century and the first half of the twentieth—also saw the creation and development of modern welfare and regulatory states. These states developed massive and powerful new bureaucracies that used state power to redistribute wealth, provide unemployment and old age insurance, public education, health care and other goods and services in an unprecedented manner.<sup>11</sup> For a political liberal who does not harbor fundamental doubts about the legitimacy of the welfare state, the harm principle is a non-starter as a general principle of political morality. After all, what the welfare state does is precisely to use coercive social power to intrude in a person's affairs either for his own good (for instance, by requiring him to purchase health insurance or contribute to his own retirement through a social security scheme) or for the good of others (for instance, through tax and transfer policy). The welfare state would be in deep trouble if we took seriously Mill's dictum that coercive social power is only justifiably used to prevent harm to others, since the state would no longer be in a position to coercively enforce a wide range of legal prohibitions that are essential to the operation of the welfare state.

Hence, assuming that the harm principle nevertheless still retains some rhetorical appeal—as it presumably did, given its association with sexual liberation movements in the mid-twentieth century—it would have to be cabined in some way. A conception of “the criminal law” as a distinctive body of law with its own “inner” morality would conveniently fit that bill. This would allow a political liberal to draw upon the liberationist associations of the harm principle in opposing vintage common law sexual offenses, while leaving the welfare state to operate according to its own principles of distributive justice. A sharp distinction between the criminal law and the welfare state more generally—facilitated, no doubt, by legal theorists' abiding fascination with a very small group of crimes against the person—would allow a liberal political theorist to rely on the harm principle to criticize outdated sexual and morals offenses in the criminal law, while safely ignoring it when thinking about the welfare state more generally.<sup>12</sup>

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<sup>10</sup> What he does say is that taking seriously the criminal law's role in stabilizing public institutions would mean that a theory of criminalization “would wander over the entire range of economic and political policy,” and that in any case criminal punishment is often more severe than other forms of state coercion. Joel Feinberg, *Harm to Others* 21 (1987). But the former is no reason at all to limit the theory of criminalization to “direct prohibitions,” and is in fact a reason to doubt that any such theory would deliver a full theory of the “moral limits of the criminal law”; the latter is a reason to include heavy tort damages, injunctive remedies, family law, housing law, bankruptcy and other such areas in the ambit of one's theory, rather than a reason to limit the theory to the criminal law specifically.

<sup>11</sup> For a brief historical overview, see David Garland, *The Welfare State: A Very Short Introduction* (2016).

<sup>12</sup> For what remains, to my knowledge, the most thoughtful explication of this idea, see Samuel Scheffler, *Justice and Desert in Liberal Theory*, 88 *Cal. L. Rev.* 965 (2000).

Even if true, none of this shows that the criminal law as we now conceive of it does not in fact have a distinctive morality, as retributivists continue to insist. But it might deepen Farmer's point by suggesting that the naturalness of that thought is historically contingent. It might provide further support for Farmer's claim that the very idea that criminalization constitutes a distinctive topic in normative legal theory arises out of a particular way of thinking about civil order, rather than alleged conceptual truths about the criminal law as such.

#### IV. Conclusion

I have focused on three issues in this essay. First, I suggested an interpretation of criminal law's place in civil order that emphasizes the continuities between legal punishment and other forms of facilitating social cooperation over the formal relations between legal punishment and sovereignty. Farmer's overall skepticism toward essentializing the criminal law should, I have suggested, favor a more material, and less formal, interpretation of the criminal law's role in establishing civil order. Second, I have suggested that a focus on criminal law as a form of governance makes the history of criminal law crucial, for it raises questions of the criminal law's legitimacy. The question of legitimacy, unlike the question of whether the criminal law conforms to a theorist's first-order moral preferences, requires attending to how the criminal law came to have the content it does. Finally, I have drawn on Farmer's thinking about the origins of the idea of "criminal law" as a cohesive body of law in speculating about why it might have seemed attractive to philosophers in the generations after Mill to treat the criminal law as a legal and institutional subsystem subject to its own very particular morality. All this said, it remains only to state the obvious. *Making the Modern Criminal Law* is a significant contribution. With it, Farmer has developed a historically rich, theoretically sophisticated and comprehensive view of criminal law as a form of public law. He has demonstrated how we might go about thinking about criminal law as a historically, politically and culturally specific form of governance, rather than simply abstract moral principle made real.