

# The Legitimate Scope of Criminal Law: A Question for Legal History?

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## Abstract

Lindsay Farmer argues that criminal law theory is too abstract and decontextualized to achieve the task it sets for itself. In order to articulate the legitimate boundaries of criminal law, theorists must consider specific legal rules in historical context. Farmer declines to announce a new, universal theory of the proper scope of criminal law, but he shows that studying the institutions and social functions of criminal law over time can generate normative insights. This review uses the example of prostitution to explore these claims. The changing cultural figure of the sex worker—from public nuisance, to autonomous free agent, to vulnerable and in need of protection—has figured in both the contraction and expansion of criminal law. Equally significant to prostitution debates is Farmer’s claim that criminal law emerged as a branch of public law, rather than through state appropriation of private vengeance.

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Theories of criminalization typically aim to distinguish conduct that is properly subject to criminal prohibitions from conduct that should be left to, say, tort law, or to the social realm. Lindsay Farmer’s *Making the Modern Criminal Law*<sup>1</sup> is primarily an argument for, and illustration of, a specific methodology for analyzing the legitimate scope of criminal law. Farmer calls out for scholarship that retains a focus on law’s legitimacy, but with a heightened sense of the historical location and the institutional realities of how criminal law actually works. Farmer’s methodological approach flows from his central thesis that the aim of the modern criminal law is to secure civil order, the concerns of which differ across historical periods.

For Farmer, the problem with much contemporary criminal law theory is that it is abstract and decontextualized, and neglects the distinct social, legal and political settings within which the concerns of modern criminal law arose. One consequence is that certain orthodox commitments—the idea of a core of wrongs, or of criminal law as a form of rational coercion of moral agents—are too divorced from the world to generate “critical bite” (34). Farmer argues against the ahistorical framing of questions about the role and limits of state coercion, and he advocates for theories of criminalization that would give “greater attention to the distinctive character and aims of the criminal law” (13). The an-

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

swers to these inquiries are bound to change over time, since criminalization is a “social activity” that responds to social and economic transformations (297).

At various moments in this complex work, Farmer’s reader may find herself wondering: what does the history and sociology of criminal law have to do with the project of criminal law theory, given that the latter is aimed at deciding which principles must govern any legitimate legal system?<sup>2</sup> A standard division of labor might suggest that ideal theory generates the principles, legal history tells the stories of contingency and structure, and sociology points out the functions. But Farmer argues that we need all three in criminalization debates, and that greater attention to the “nature and function of the modern criminal law” will contribute positively to “normative theories of criminalization” (14). *Making the Modern Criminal Law* is both novel and disorienting for its merging of criminal law theory with historical and sociological approaches that many might think are simply asking different questions.

In this review, I aim to do two things. First, I expand upon these introductory remarks and carefully track Farmer’s critique, set out mostly in Part I of the book, of the prevailing scholarly approaches and methods on the topic of criminalization. My goal with this part of the review is to grasp Farmer’s claims about the shortcomings of current approaches, and trace the details of his call for the integration of criminal law theory with empirical work on the institutions of criminal justice and the social functions of criminalization. The most radical element of the book might be Farmer’s rejection of the very prospect of a unifying theory of criminal law, at least in terms of a comprehensive theory that will generate a consistent set of answers to questions about what kinds of conduct can be criminalized and to what ends.

At the same time, Farmer’s work still has normative stakes. His treatment of the emergence of modern criminal law—explored in this book with a focus on the English criminal law from the eighteenth century onward—aims to show that normative arguments can and do emerge from the kind of thing that criminal law actually is over different times and places. There are several dimensions to Farmer’s historical treatment, but I will focus on the claim that when criminal law is seen as constitutive of the project of public law, it helps to shake loose some implications about what criminal law can legitimately do. This is one example of how the historical work generates normative insights.

Second, I take Farmer’s central claims and apply them to a debate that he mentions but does not explore in depth. Prostitution is a standard topic in the criminalization literature, and it tends to attract well-known philosophical arguments about autonomy, choice and harm. I argue that Farmer’s distinct mix of historical and sociological perspective, when grounded in a particular legal setting, generates a number of fresh insights into whether and how prostitution can or should be criminalized. Specifically, the Farmer method can be used to justify the contestation and striking down of Canada’s prostitution law in recent years, while also shedding light on its subsequent re-criminalization.

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<sup>2</sup> The idea being that ideal theory is meant to generate a conception of what criminal punishment ought to be and, ideally, supplies a critical standard for existing practices. See Antony Duff, *Punishment, Communication and Community* 175 (2001).

The prostitution case study also highlights a central concern in *Making the Modern Criminal Law* with *overcriminalization*, which also runs through other leading contributions in this field.<sup>3</sup> Farmer notes a central but neglected puzzle. Normative work on criminalization is shaped by a strong liberal sensibility concerned with limits on state power and respect for individual liberty, and yet the criminal law in the modern period has one characteristic trait: a tendency toward growth (298). Farmer notes a general “unease about the growth of the criminal law,” but laments that the reaction of theorists has seemingly been to “seek security in an ideal account of the law” (302). In sharp contrast, Farmer wants to make the expansion trait more visible to normative inquiry. The prostitution example is one instance of how criminal law can both contract and expand in response to wider processes of cultural change. To Farmer, these kinds of case studies are relevant to the normative concerns of criminal law theory.

### I. The Standard Criminalization Debate

Farmer argues that much of today’s criminalization theory takes a “fundamental approach” that is concerned with the basics of the relationship between state and citizen (2). The question of the legitimate subject matter of criminal law is thought of as a general problem for moral and political philosophy, and one that can be addressed *a priori* and without recourse to law itself. One result is that the main approaches to criminalization often contain sophisticated accounts of concepts such as harm and wrong, but frequently rely on surprisingly unsophisticated accounts of the criminal law, “reducing the aims or function of a complex social institution to claims about the justification of punishment” (13). A focus on the formal aims of punishment neglects a great deal about the character and functions of criminal law in particular times and places.<sup>4</sup>

Farmer notes some striking similarities—and shared shortcomings—between the two main competing schools of liberal thought on criminalization. The first school emerges from John Stuart Mill’s harm principle, which is generally taken to hold that the only legitimate role for criminal law is to prevent harm to others, rather than to pursue a more ambitious morality.<sup>5</sup> Today’s advocates make use of Mill to argue against, for example, the criminalization of marijuana.<sup>6</sup> Debates focus on what types of harms qualify, and whether a paternalistic concern with self-harm might be warranted. Critics of the harm

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<sup>3</sup> For example, Doug Husak describes how US criminal law has steadily expanded both in quantity of offenses and in terms of new types of liability: Doug Husak, *Overcriminalization: The Limits of the Criminal Law* (2008); see also Andrew Ashworth, *Is the Criminal Law a Lost Cause?*, 116 *L.Q. Rev.* 225 (2000).

<sup>4</sup> For another perspective on the shortcomings of ideal theory, compatible with Farmer’s historical focus, see the call for attention to “lived realities” and the “experience of power” under law in Benjamin Berger, *Law’s Religion: Religious Difference and the Claims of Constitutionalism* 35 (2015).

<sup>5</sup> John Stuart Mill on Liberty and other Essays 14 (1859) (John Gray ed., 1992) (“the only purpose for which power can be rightfully exercised against any member of a civilized community, against his will, is to prevent harm to others”).

<sup>6</sup> See, e.g., the mobilization of Mill and the harm principle in the plaintiff’s argument in *R. v. Malmø-Levine*, 2003 SCC 74.

principle have tracked how harm arguments can be mobilized by both sides in criminalization debates.<sup>7</sup>

The other main school has a different starting point. What Farmer calls the approach of “legal moralism” argues for a conception of criminal law that emphasizes the significance of wrongdoing and the necessity of just deserts.<sup>8</sup> Legal moralists would punish on the basis of culpability rather than harm, and would likewise refrain from criminalizing or punishing conduct that was not wrongful in itself, no matter the harm caused.<sup>9</sup>

The commitments of these two schools have distinct implications for issues associated with the scope of criminal law and for the law of defenses and sentencing. But Farmer argues that they also have a great deal in common. First, the initial category (harm or wrong) is defined independently of law. Second, the aim of criminalization is understood to be an aim of punishment (deterrence or retribution). Third, members of each school concede that their category would ultimately be too broad and, for that reason, grant limiting principles. They also each acknowledge that the eventual content of criminal law will depend on factors that have little to do with categories of moral thought. For Farmer, this is part of why these theories fail—the debate is about theoretical principles but it tends not to grapple with doctrinal or institutional details (15-16).

More specifically, these frames both posit that criminal law is about the protection of a set of private, individual rights that can be defined *a priori*, independently of law. They share what Farmer calls an “adjectival” view of criminal law—a view that it protects “goods, interests or rights that have been defined elsewhere, as pre-legal wrongs or in civil law, against certain kinds of serious and/or culpable interferences” (16). Because of this framing, the problem of overcriminalization is typically focused on crimes that are not directly linked to individual rights (17). Wrongs against individuals are thought of as fundamental to criminal law, but it seems more difficult to explain the collective or welfare interests that underpin a substantial amount of criminal regulation today.

Farmer explains that these views also focus on the ends of punishment, but that the aims of deterrence or retribution do not tell us much about why criminal law, as opposed to some other mechanism, is the appropriate response to a wrong. The ends of punishment might *contribute* to a discussion about the moral or political justification of criminal law, but this perspective “radically underdetermines the scope of the criminal law” (18). Farmer notes that the work of Antony Duff addresses this issue to an extent, as Duff agrees that an aim like moral censure does not necessarily require criminal punishment. Resort to criminal law, Duff says, should depend on an assessment of particular wrongs as “public wrongs”—the kind of wrongs based in the political values of a given

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<sup>7</sup> See, e.g., Bernard Harcourt, *The Collapse of the Harm Principle*, 90 *J. Crim. L. & Criminology* 109 (1999); Hamish Stewart, *The Limits of the Harm Principle*, 4 *Crim. L. & Phil.* 17 (2010).

<sup>8</sup> See, e.g., Michael Moore, *Placing Blame* (1997).

<sup>9</sup> See Farmer, *supra* note 1, at 103-15 (discussing the work and motivations of Andrew Ashworth, the most prominent representative of these views).

community. The conduct in question must violate the public values such that public condemnation is required.<sup>10</sup>

Farmer endorses Duff's public wrong account to the extent that it goes beyond narrow accounts of criminal law as the protection of private interests (18). But once again, Farmer says that it is not clear why criminal law is required to protect these public values, and that the account could condone overcriminalization. It might be possible to justify the criminalization of an extensive range of conduct if only the appropriate public consensus could be produced; "if, for instance, a political community were to adopt a repressive penal measure to punish minor public disorder; or if a community were to seek to criminalize conduct retrospectively" (19). These accounts miss something about the "appropriate uses, values and ends" that "underlie or constrain debates about criminalization" (19). Duff's theory starts by identifying a "specific quality of the wrong" but stops short of developing "an account of the place of criminal law in modern society" (19).

For a fuller perspective, Farmer turns to criminological approaches that highlight the social functions of criminal law rather than just the possible justifications for it. Much of this work examines *who* is criminalized, with research focused on policing and the experience of particular groups, communities, and locations in the actual application of criminal law.<sup>11</sup> This field tends to produce a "powerful empirical picture of state practices of criminalization," including the double standards of under-enforcement or under-criminalization for certain powerful quarters of society (20). A focus on groups or communities who are either criminalized or neglected by law allows questions of criminalization to be linked to broader social and economic developments in a way that is "often absent from the perspective of more traditional normative approaches to criminalization" (20). Farmer writes:

A theory of criminalization must thus address the fact that conduct to be criminalized cannot always be identified independently of other legal, social, and institutional structures. The use of criminal law in these circumstances is about more than just the punishment of individual wrongs. Censure is a social process in which powerful social groups can and do use the symbolic value and power of the criminal law for certain self-interested purposes (20).

Empirically grounded work on criminalization-in-action shows how criminal law and punishment are often used instrumentally, to repress dissent or bolster the position of the state or other powerful groups.<sup>12</sup> But Farmer sees shortcomings here too in terms of a normative perspective on criminalization. Insight into discriminatory police practice might tell us something about what is wrong with policing, but may say little about the accepta-

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<sup>10</sup> Id. at 18 (citing Antony Duff, *Answering for Crime* 142 (2007)).

<sup>11</sup> Id. at 19 (citing as an example Phil Scraton, *Power, Conflict and Criminalisation* (2007)).

<sup>12</sup> The ability of powerful groups to harness the symbolic power of punishment—and mercy—is forcefully conveyed in Douglas Hay, *Property, Authority and the Criminal Law*, in *Albion's Fatal Tree* 17 (Douglas Hay et al. eds., 1975).

bility of criminal law norms more generally.<sup>13</sup> Farmer is hunting for a “conceptual language that can bring together the normative and empirical dimensions of criminalization.”<sup>14</sup> A focus on social power and the administration of criminal law is important, but a theory of the proper boundaries of criminal law will have to cover more ground.

Farmer turns to Neil MacCormick’s “institutional theory of law,” and spends much of the book elaborating on MacCormick’s idea that the basic purpose of criminal law is “to secure the conditions of civil society, understood in terms of facilitating relative peace and mutual trust between strangers.”<sup>15</sup> On this view, civil peace is not a side effect but the aim of criminal law. MacCormick also emphasizes that the dominant form of institutionalization for modern criminal law is state law (23). Criminal law may well speak “in a moral voice” and express “community disapproval of conduct” but this expression “is always mediated through the institutions of law” (23). This perspective helps to generate some limits for criminal law, both in terms of institutional competence and the wider values of public law.

At this point, however, one begins to wonder whether the new theory that Farmer elaborates—where the modern criminal law pursues civil order—does not suffer the same deficiencies that he sees elsewhere. After all, a focus on civil order seems potentially just as under-specific as a focus on deterrence or retribution, in that it fails to endorse criminal law as opposed to some other mechanism. In responding to that concern, Farmer seems to opt out, to a significant degree, from the kind of liberal theory project that Duff and others are engaged in. He concedes that his aim “is not necessarily to identify a single defining characteristic” that will delineate the constant, principled borders of criminal law (33). The idea, instead, is to “recognize that there are different kinds of norms in the criminal law and that the range of conduct regulated, the scope of wrongs that have been criminalized and so on, have changed over time” (33). “Rather than producing an *a priori* definition of criminal law,” he writes, “the first task of the theorist should be to trace the range of possible factors and justifications and their changing relation to the justification of punishment” (33).

Thus, Farmer’s aim is not to advance yet another unifying theory of criminal law, but to treat both our theories of criminalization and the particular features of law at different moments in time as objects of study. Farmer seems to be arguing for criminalization debates to be approached from a history of ideas perspective—an unusual lens for a field concerned with identifying the legitimate boundaries of crime and punish-

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<sup>13</sup> Consider for example the argument from James Forman, Jr. that racial critiques of mass incarceration often neglect black agency and the fact of support from African-American leaders for criminal law enforcement that would improve the safety of their communities. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 101 (2012).

<sup>14</sup> Farmer, *supra* note 1, at 21 (citing Nicola Lacey, *Historicising Criminalisation: Conceptual and Empirical Issues*, 72 Mod. L. Rev. 936, 944 (2009)).

<sup>15</sup> *Id.* at 22 (citing Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* 207-08 (2007)).

ment. A contemporary criminal law theorist might argue, in response, that her views don't rest on particular historical claims. But Farmer would likely be skeptical about that. Historical study reveals that normative theories are never a matter of pure principle, but are themselves a product of time and place. Even the emergence of the criminalization debate itself is a matter of historical significance in Farmer's hands.

## II. Polycentric Criminal Law as Public Law

In arguing that criminal law is part of a public project of securing civil order—and to extract the normative consequences of that view—Farmer rejects the “conventional historiography” (42) that sees modern criminal law as the outcome of a shift from private revenge or feud to state justice. This shift is thought to have occurred when the modern state asserted its monopoly over legitimate violence.<sup>16</sup> On this conventional view, the state's authority to punish stems from the taking over of private vengeance and replacing it with a public system of prosecution and punishment.<sup>17</sup> But Farmer argues that private vengeance and public criminal law are very different. Revenge was about making peace between social equals, while the violation of the rules that established the king's peace was a “violation of the obligation of fidelity owed to the king” (43).

Criminal law did not, then, “derive from private revenge” (43). Rather, criminal law “emerges together” with centralized state institutions; and for state punishment to be justified it must be justified “as a form of state power” (43). That punishment has its origins in “public rather than private right” means that a theory like retributivism might play a role, but cannot simply be equated to moral ideas of retaliation (43). The public element is tied to prominent features of the modern criminal law, including the formulation of rules addressed to the individual and in the development of limitations for the “institution of law” so as to secure a particular kind of civil order (59).

Part II of the book then focuses on the “general part” of criminal law, with a focus on the topics of jurisdiction, codification and responsibility. Here Farmer traces the process by which “the criminal law was made as a distinct and conceptually unified body of rules” (202). Part III turns to the “special part” and analyzes offenses in the areas of property, the person and sex. Here Farmer emphasizes how patterns of criminalization are marked by significant variation in ways that demonstrate how “the law develops in response to specific social needs” (9). These specific areas of law are thought to contain “core wrongs” based on “stable liberal values” (8). Farmer's treatment shows that “there are no core values” and there is no “single or simple way of expressing an interest in property or the integrity of the person” (203).

Specifically, Farmer's case studies show that changing understandings of civil order affect how these interests are protected in law. The law of property, for example,

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<sup>16</sup> Id. at 42 (citing James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices*, 71 *Chi.-Kent L. Rev.* 41 (1995)).

<sup>17</sup> See also John Gardner, *Crime: In Proportion and in Perspective*, in *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* 31 (Andrew Ashworth & Martin Wasik eds., 2008).

evolves from an eighteenth-century focus on harm to an owner to a late twentieth-century focus on dishonest conduct that poses a threat to the security of property and confidence in the market. What the criminal law has sought to achieve through the criminalization of rape has also changed a great deal over time (30-31). Accordingly, so have the features of the offense. During periods when rape was conceptualized as the theft of sexual property, it was often an element of the offense that the victim not be the spouse of the accused. As the work of late twentieth-century feminism dismantled various myths and stereotypes, the *actus reus* evolved, the wrong was reconceptualized as a violation of sexual autonomy, and trials came to center around the issue of consent.

The point is that reforms in the law of rape cannot be seen as “the gradual working out of an underlying principle” (293). Rather, the law tries to protect different interests at different points in time, according to contemporary understandings of the meaning and significance of sex (293). In sum, Farmer argues that the modern criminal law aims to secure civil order, the meaning of which changes according to wider social developments in a particular period, and that this function has shaped specific legal developments along with ways of arguing about what the law should be.

### III. Should Prostitution Be Criminalized? Trying Out the Farmer Method

The criminalization of prostitution is a standard topic in debates about the scope of criminal law. Much of this work is based in political theory and lacks the interdisciplinary reach that Farmer advocates; theorists tend to play with abstract and decontextualized concepts of autonomy, choice or harm to analyze the legitimacy of criminalizing the exchange of money for sex.<sup>18</sup> But if we try to think through the topic using the Farmer approach, a great deal more comes into sight. This is particularly true if we try to make sense of recent legal battles in Canada regarding the substance and form of the law that governs the selling or purchasing of sex.

In *Canada (Attorney General) v. Bedford*, the Supreme Court of Canada upheld the decision of a trial judge who found three prostitution-related provisions of the *Criminal Code* to be unconstitutional.<sup>19</sup> The trial court considered an extensive evidentiary record about the history and empirical effects of the provisions, with the bulk of the evidence establishing that the laws impaired the ability of sex workers to utilize safety-enhancing measures while engaging in the sex trade.<sup>20</sup> As a result, the court concluded that the laws

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<sup>18</sup> See, e.g., Peter de Marneffe, *Liberalism and Prostitution* 10 (2010) (examining whether criminalization of prostitution is consistent with liberalism, and stating explicitly in his introduction that the book “is primarily a study in political philosophy, not sociology, [or] criminology”).

<sup>19</sup> 2013 SCC 72. The impugned laws prohibited: (i) using an indoor location to conduct prostitution (the “bawdy house” law); (ii) benefiting from the proceeds of prostitution (the “living off the avails” law); and (iii) communicating in public for the purpose of prostitution (the “communicating” law).

<sup>20</sup> The following findings of fact were critical to the court’s conclusion: that the safest form of sex work is indoors from a fixed location; that sex workers can enhance their safety by relying on (and compensating) third parties like receptionists and drivers, and; that the communicating law had the effect of displacing sex workers to secluded locations and compelling them to rush transactions rather than using screening techniques to enhance safety.

were an unjustifiable infringement on the constitutionally protected “security of the person” of sex workers.<sup>21</sup>

Significant to the court’s decision was a finding that the formal purpose of the laws, largely inherited from Victorian England, was to address the “public nuisance” associated with prostitution.<sup>22</sup> In contemporary Canada, the prevention of nuisance seemed a flimsy basis upon which to allow law to impede the survival strategies of a vulnerable population. In sum, the negative effects of the laws were grossly disproportionate in relation to their official aims. One startling empirical reality in the background of the case was that over 90% of criminal law enforcement in this area occurs in relation to the provision that prohibits communicating in public for the purpose of prostitution.<sup>23</sup> Street-based sex workers are among the most vulnerable, and because of their visibility they were bearing the brunt of criminal law enforcement in ways that aggravated their vulnerabilities.

In the wake of *Bedford*, Parliament responded with new legislation, Bill C-36, which claimed a different aim of criminalization.<sup>24</sup> In a lengthy preamble, the new bill emphasized the importance of protecting the “human dignity and the equality of all Canadians by discouraging prostitution” and referred to concerns about the exploitation, objectification, and commodification of the human body and sexuality. The centerpiece of the new law is the criminalization of the purchaser rather than the seller of sexual services. To be sure, the underlying or actual intent of the new bill might be challenged in a future case, as will the question of whether these laws reproduce the unacceptable effects of the pre-*Bedford* regime.<sup>25</sup> For my purposes, the point is to observe the shift in argument or rhetoric regarding the claimed purpose of criminalization in the post-*Bedford* period.

Farmer’s portrait discloses some powerful critiques of the criminalization of prostitution, while also helping to explain the Canadian government’s persistent interest in criminalizing this social field. On the critical side, Farmer reminds us to bring sociological and empirical knowledge to bear in analyzing the legitimacy of criminal law. The realities of law enforcement in this area highlight a distressing irony: it is low-income and vulnera-

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<sup>21</sup> As protected by Section 7 of the Canadian Charter of Rights and Freedoms, which reads “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

<sup>22</sup> The Supreme Court’s discussion of legislative purpose is at *Bedford*, 2013 SCC at paras. 131-32. For detailed historical treatment of the blend of regulatory and criminal measures used to address prostitution in Canada, see Constance Backhouse, Nineteenth-Century Canadian Prostitution Law: Reflection of a Discriminatory Society, 18 *Social History/Histoire sociale* 387 (1985). Farmer’s study of the eighteenth-century history of prostitution confirms a view that “to the extent that prostitution was regarded as criminal, it was in relation to public disorder” (270). The law was aimed less at prostitution itself “than at the associated disorder and crime” (271).

<sup>23</sup> Doreen Duchesne, Street Prostitution in Canada, *Juristat* (Statistics Canada—Catalogue no. 85-002-XPE vol. 17 no. 2) (Feb. 1997), <http://publications.gc.ca/Collection-R/Statcan/85-002-XIE/0029785-002-XIE.pdf>.

<sup>24</sup> Protection of Communities and Exploited Persons Act, SC 2014, c 25 [Bill C-36].

<sup>25</sup> For analysis of the constitutionality of the new legislation, see, e.g., Hamish Stewart, The Constitutionality of the New Sex Work Law, 54 *Alb. L. Rev.* 69 (2016); Angela Campbell, Sex Work’s Governance: Stuff and Nuisance, 2 *Fem. Leg. Stud.* 27 (2015).

ble women (those who are compelled to work outdoors) who must cope with the majority of prosecution and punishment, so as to aid in the expression of larger social values regarding non-commodification and women's equality. In addition, evidence that the risk of violence against sex workers was *heightened* because of the operation of the criminal law was a powerful argument against the validity of these provisions.

Farmer also teaches that we should see modern criminal law as a part of public law: it is about "the establishment and codification of a new form of public rule" rather than an appropriation of private remedies (44). Part of what this means is that a commitment to legal regulation "entails certain constraints and values which reflexively bind, however imperfectly, the state" (38). The relation between criminal law and civility is "not only a question of the substance of the law—what is regulated—but also a question of how it is regulated—why the criminal law is used, and what this means for the self-understanding of the society" (38). Indeed, the *Bedford* court effectively concludes that criminal law *is* a mode of public rule, which means that law must embody a minimal level of rationality. One consequence of the rationality requirement is that negative effects on individuals cannot be grossly disproportionate or unrelated to the official aims of a law.

On the other side of things, Farmer's approach helps us to gain insight into the government's investment in Bill C-36. The new law shifts the focus of criminal law enforcement to the purchasers of sex, who might be more sensible vessels for the attribution of individual responsibility.<sup>26</sup> Bill C-36 also shows the Canadian government seizing a new discourse of legitimacy for criminalization, premised now on the human dignity of sex workers. As Farmer writes, "[S]ome conduct which was previously criminalized on the grounds of being contrary to morals, can be reconceived in terms of exploitation" (290). As the law of rape came to emphasize notions of consent and autonomy in the twentieth century, a complex map of positions regarding prostitution emerged:

While arguments about autonomy and consent might seem to present an argument for decriminalization where a sex worker has chosen freely (where the market is working), it is in fact used to support more intense regulation of sex workers, who are seen as vulnerable and exploited: sex is not for the purpose of intimacy, and hence not fulfilling, and therefore the question of exploitation is present (290).

On this point, Farmer's study is striking in that it traces the emergence of exactly the kinds of arguments that have circulated around the *Bedford* litigation. As early as the campaigns of Josephine Butler in the late nineteenth century, a nuanced picture of the prostitute began to emerge, emphasizing that prostitutes were not simply threats to social order, but "the victims of class and gender iniquities and exploitation" (278). A new understanding of the prostitute would eventually require "a new kind of legal response," although the move is not necessarily toward de-criminalization but can also push in the direction of an attempt to eradicate the exploitation of prostitution through novel forms

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<sup>26</sup> Farmer shows that a prominent feature of modern criminal law is the way that it is directed at individuals, such that law increasingly contemplates the conditions under which "individuals are deemed capable of responding to rules" (44). The evidence canvassed in *Bedford* suggested that many sex workers were not sensible targets for the attribution of individual culpability, given highly constrained life circumstances.

of criminalization (278-79). In his discussion of the evolution of offenses against the person, Farmer notes a tension between the contemporary notion of a person who is free to exercise autonomy in consensual relationships, and the idea of persons as vulnerable and in need of protection (262-63). Legal and political debates about the figure of the sex worker vacillate between these understandings, with clear implications for the question of criminalization.

Related to this shift is Farmer's central concern with *overcriminalization*, namely the expansive tendency of modern criminal law, notwithstanding the commitments of contemporary liberal theory to limits on state power and respect for individual liberty. In the prostitution example, we can see how particular modern arguments gave rise to a successful legal challenge to dated prostitution laws. But we also gain insight into how the law shifted to claim new purposes that worked to motivate re-criminalization.

*Bedford* is often read as a case that was driven by the particular doctrinal details of a single constitutional provision, combined with a well-developed evidentiary record. Farmer helps us to see the case, and the legislative reaction it provoked, more broadly as a rich example of the range of factors and justifications that can bear on questions of the legitimate scope of modern criminal law. For prostitution debates, I think this means one cannot just press for decriminalization by arguing: *prostitution cannot be criminalized because it is a matter of the individual liberty of consenting adults*. Similarly, it's not enough to endorse criminalization by saying: *prostitution can be criminalized because selling sex harms the prostitute, or harms the community, or cannot be done with full agency, or is a moral wrong*.

These arguments for and against miss a great deal about the nuances of the collective interest engaged in the criminalization of prostitution. They ignore how burdens are distributed—among sex workers and their clients—in the actual enforcement of the law. They also fail to contemplate what an acceptable package of criminal laws on this topic must include. Given that criminal law is a branch of public law, laws governing prostitution must embody a proportionate and rational connection between the aims and effects of the law. It follows that an abstract moral theory will do little to speak to the most pressing normative aspects of the question, should prostitution be criminalized?

In closing, Farmer helps us to see that criminal law is not determined by “pre-legal” conceptions of the person or property or autonomy, but is, rather, shaped by “far-reaching social and economic transformations” like the invention of the car, the changing nature of property, or the recognition of equal rights (297-98). With the example of sex, the modern period saw the transformation of a law aimed at limiting sexual freedom and discouraging sex outside marriage, to one aimed at the protection of sexual autonomy and “fulfilling sexual relationships” (292). The implications for both the substantive law of sex offenses and the “public disorder” offense of prostitution have been profound. In this book, Farmer has not generated a comprehensive theory that sets out the fixed, principled borders of criminal law, but rather has shown how institutional and cultural change will affect how we argue about the form and content of the criminal law.