Civil Order, Markets, and the Intelligibility of the Criminal Law[*]

Lindsay Farmer

I. Introduction: Civil Order and the Criminal Law

> "An effective and properly functioning system of criminal law and criminal justice is essential for the relative security of mutual expectations which is a condition of the civility of civil society. Criminal law becomes fully intelligible only from this perspective."[1]

Criminal law is, in an important sense, as this quote from Neil MacCormick suggests, concerned with the question of how we live together with others. There is, though, disagreement over the nature of the contribution that criminal law makes to social life: does the criminal law simply maintain a pre-established peace or order, or does it make a more substantial contribution to the ongoing maintenance of social relations? Thus, for some the contribution of criminal law is expressed in the claim that punishment restores civil peace.[2] While it is not entirely clear how punishment, or the threat of punishment, performs (or could perform) this function, it appears that it is understood largely at an individual level: either the justified punishment of an individual offender by the state prevents others from taking the law into their own hands, or the restoration is largely symbolic as the justified punishment of the offender restores the order/peace that has been breached by the commission of a crime. While preventing vigilantism and redressing wrongdoing are undeniably important, this seems to be an overly reductive account of the social functions of criminal law. It focuses primarily on punishment as retribution, says little about how something as coercive as punishment might contribute to civil peace, and pays little attention other possible functions of criminal law such as establishing norms of conduct.[3] The alternative view is that criminal law contributes to "a collective life under stable public institutions … providing crucial support to shared attitudes of reciprocity".[4] This second version is concerned with the contribution of criminal law to building and sustaining particular kinds of civil order but, even so, the precise nature of its contribution to, or support for, civil order remains unclear. My aim in this paper is to contribute to our understanding of this function of criminal law by looking at some historical and theoretical dimensions of the relationship between criminal law and civil order.

One of the problems, however, is that the meaning of the term 'civil order' – though it is of increasing currency – is unclear, and so it is necessary to start by exploring what this might mean. A starting point must be the recognition that order is not an abstract quality but

[*] I am especially grateful to Catherine Evans for her comments on my draft paper and to the participants in the workshop for their feedback.

[1] N MacCormick, *Institutions of Law* (Oxford: Oxford UP, 2007), p.293 going on to point out that it also requires confidence that wrongdoers will be tried and prosecuted fairly.

[2] See e.g. C Roxin, "Prevention, Censure and Responsibility. The Recent Debate on the Purposes of Punishment" in AP Simester et al, *Liberal Criminal Theory. Essays for Andreas von Hirsch* (Abingdon: Hart Publishing, 2014) at p.26: "The will of its citizens obliges the state to safeguard our communal life in peace and freedom".

[3] We might also ask what happens when the excessive punishment of certain communities threatens social order: see V Chiao, "Mass Incarceration and the Theory of Punishment" (2017) 11 *Criminal Law and Philosophy* 431.

[4] V Chiao, "What is Criminal Law For?" (2016) 35 *Law and Philosophy* 137-63 at p.138.

depends particularly on the understanding of what (or who) is to be ordered, and the means available for ordering. And the quality or nature of that order is given a particular shape or content by the qualifier 'civil'.[5] Equally, it is not clear what makes an order 'civil', as this might range from the creation of formal structures which permit individuals to live together in society to more mundane (but no less important) beliefs about civility, in the sense of expectations about how we should behave towards others in a range of different contexts.[6] I shall argue here that we can only really access these questions by understanding the meaning of civil order as a historically situated question – that is to say that both the question of what amounts to order, and conceptions of civility depend on the exploration of particular historical contexts. However, rather than focusing (at least initially) on the meaning of civil order, I want instead to look at a different part of the quotation from MacCormick with which I began. This is the final sentence, where he makes the, perhaps slightly odd-looking, claim that criminal law only becomes "fully intelligible" from the perspective of the securing of civil order. I want to start, then, by asking what is meant by intelligibility in this context. I shall then go on, first, to explore the particular significance of civil order in modernity: how order was conceived of as a specific kind of problem in modernity, and how this has shaped the modern understanding of the criminal law. And then, in the final section I shall look at a neglected dimension of this understanding of civil order by looking at understandings of the relation between the market and the criminal law.

II. Civil Order and the Intelligibility of the Criminal Law

What does it mean to claim that criminal law only becomes "fully intelligible" from the perspective of securing civil order? In attempting to answer this, we can begin by distinguishing two possible meanings of intelligibility: criminal law's intelligibility to itself, and criminal law's intelligibility as a social practice.[7]

The first of these is concerned with the internal ordering of criminal law. This might raise questions such as, by what criteria are rules recognised as being part of the criminal law, rather than another body of rules? (Is it criminal law or is it tort law? Is it a rule of criminal law or an administrative regulation? Criminal or civil?). What is the internal relation between diverse rules of criminal law? (General part and special part, rules and principles, substantive law and procedure?). How are the different kinds of rules understood as being linked together into some sort of system? There are any number of different ways of answering these kinds of questions, and this project of exploring the internal intelligibility of criminal law has arguably dominated modern criminal law theory. These are, in a broad sense, questions of classification and coherence: what counts as a rule of criminal law, and what is its relation to other rules of criminal law. There is nothing *a priori* or necessary about these classifications – what we think of as 'criminal law' is rather the product of an immense amount of theoretical labour to establish and naturalise these sorts of inner connections, to establish the conceptual schema and shared language that allow us as criminal lawyers to treat criminal law as (at least in principle) an internally coherent and unified body of law.[8]

---

[5] For further discussion see L Farmer, *Making the Modern Criminal Law. Criminalization and Civil Orde*r (Oxford: Oxford UP, 2016) ch.2. The same point might be made about the term 'civil peace'. For a discussion of the concept of peace, see LF Edwards, "The Peace: The Meaning and Production of Law in the Post-Revolutionary United States" (2011) *University of California, Irvine LR* 565-85.

[6] See N Elias, *The Civilising Process* (Oxford: Blackwell, 1994) for a discussion of how these different senses are related to each other.

[7] See also the discussion in L Farmer, *Making the Modern Criminal Law* at pp.140-44.

[8] Cf. M Foucault, *The Order of Things. An Archaeology of the Human Sciences* (London: Routledge, 1970) pp.xix-xx. See also Ristroph, in this issue.

The second sense of intelligibility is, I think, that which MacCormick is primarily referring to in the passage quoted. This is the matter of the 'social' intelligibility of criminal law. Here the question of intelligibility relates to the social function of the criminal law: how should we understand what criminal does (or purports to do) in our society? Does it make sense as a social practice? His answer is that criminal law contributes to the securing of mutual expectations, and that this in some way contributes to what he calls the civility of civil society. His account is thus focused on the role of criminal law in establishing norms of conduct, and in ensuring that our expectations about the stability of those norms can be maintained, even in cases where the norms themselves have been breached. There might be other kinds of responses to this question of the social function of the criminal law, including those which link social peace and just punishment but, as I suggested above, if we are to make such claims it is necessary to say more about how the criminal law performs this function. It is also important to note that it has also been argued that criminal law does not represent such communal or shared interests at all, that it secures the interests of powerful social or ethnic groups, that it is a tool of state or gender repression, or that it is an ideological system which masks the unequal application of the law through a focus on abstract concepts of responsibility, and so on. Far from securing civil order, it is argued that the order it secures lacks those basic qualities of civility or engagement in a shared project. Whether we agree or disagree with this, the 'intelligibility' of the criminal law requires the recognition that criminal law is always also a social practice, and that understanding it as a social practice requires that we pay attention to the function of the law and the degree of social acceptance or legitimacy of the criminal law. (Does it in fact secure trust? Do people trust the criminal law?). It is, in short, necessary to ask what kind of civil order is being secured and how the criminal law does this.

In addition to this, I would argue that understanding the intelligibility of the criminal law also depends on the relation between these two senses of intelligibility – between what we might call the internal and external order of the criminal law. Lacey has described these as issues of co-ordination and legitimacy, with questions of co-ordination referring to the internal coherency or functioning of the law, and legitimacy referring to the external authority and social acceptance of the system of criminal law.[9] And there may be tension here in that a system might be internally coherent and co-ordinated but might lack legitimacy or trust – or indeed *vice versa*. This relationship between internal and external order or intelligibility has also, in a certain sense, structured recent debates about over-criminalisation: the argument is that the extension of the criminal law to certain kinds of conduct, or the development of new kinds of offence structures, are inconsistent with the internal order, or core, of the criminal law and that this in turn challenges the legitimacy or social function of the law.[10] The argument against 'over-criminalisation' thus takes the form that it is necessary to stabilise the relation between the internal and the external by making the external order conform to the internal. The 'proper' scope of the criminal law is conceived in terms of an ideal relationship between internal and external – though it need hardly be pointed out that there might be many other ways of conceiving of this relationship. We can thus see that these different dimensions of intelligibility bring into focus different dimensions of the relationship between order, civil order and criminal law. To speak only of order in the sense of internal coherence is insufficient, because it does not engage either with the social function of law or the question of how the internal and external order of the criminal law are related. However, as first step in seeking to these aspects of the criminal law it is necessary to focus on the meaning of civility so as to identify some of the specific means by which criminal law secures order.

[9] N Lacey, *In Search of Responsibility. Ideas, Interests and Institutions* (Oxford: Oxford UP, 2016) ch.1

[10] See notably D Husak, *Overcriminalisation* (Oxford, Oxford UP, 2007).

At its widest, the civil in 'civil order' denotes a relatively structured normative order; in this sense it refers to an ongoing process of 'civil' ordering, concerned with the ways that humans live together in communities.[11] On Oakeshott's influential account, this civil condition is to be understood primarily in terms of the rules which are the conditions of the practice of living together in a community as equals.[12] While his account of rules is broadly framed to include a range of formal and informal norms, writings about civil order in this sense have tended to focus on the constitutive rules and institutions of the state, understood as the framework that enables individuals as moral agents to live together in a political community with equal amounts of freedom.[13] This understanding of civil order is also linked to the concept of civil society, understood as the kind of public space created by liberal institutions which accommodates the kinds of meaningful public discourse that sustain and reproduce those institutions.[14] Civil order from this perspective can be distinguished by the existence of legal rules and institutions, but it is important to remember that its meaning is not exhausted by this, and to focus exclusively on the law may be to risk overlooking other significant dimensions of the term 'civil'.[15]

First of all, that something is civil suggests a quality of civility; this is less a matter of formal (legal) order than of norms of conduct. Such rules of civil conduct imply some sort of relationship between persons – that we recognise each other as common participants in that civil community, as 'citizens' in a broad sense.[16] These norms govern how we present ourselves to others in different social settings and interactions – whether this be sharing public spaces (such as buses and trains, roads and pavements or cafes and pubs) or interacting in more formal settings such as public meetings or workplaces.[17] Such practices might be underpinned by more formal legal norms – say those prohibiting smoking in enclosed spaces, or dangerous driving, or laws against racial or sexual discrimination – but we would not normally explain the practices in terms of those norms. This understanding of civility, then, is not simply an alternative to the first sense of civil order but is complementary to it. The institutions and norms of the political order depend on and also foster the existence of social norms governing speech and conduct; and the relationship between formal and informal norms might vary according to the different kinds of community. There is thus a relationship between civility and the maintenance of a broader kind of civic space or civic identity – even if we should note that the relationship between these kinds of standards of civility and community is not unproblematic.[18]

Going on, an older meaning of civil order understands it as something which is opposed to that which is uncivilised or barbarous. Used in this sense civility is a measure by

---

[11] M Oakeshott, "On the Civil Condition" in *On Human Conduct* (Oxford: Oxford UP, 1975) pp.111-2 on the idea of '*civitas*'.

[12] Oakeshott, "Civil Condition" pp.121-2, though his sense of equality is probably closer to the idea of common participants, discussed below.

[13] See M Thorburn, "Criminal Law as Public Law" in RA Duff & SP Green (eds.), *Philosophical Foundations of Criminal Law* (Oxford: Oxford UP, 2010); RA Duff, *The Realm of Criminal Law* (Oxford: Oxford UP, 2018) ch.4.

[14] See F Trentmann (ed.), *Paradoxes of Civil Society* (revised edn.)(Oxford: Berghahn Books, 2003).

[15] For discussion of the historical origins of these different senses of civility, see K Thomas, *In Pursuit of Civility. Manners and Civilization in Early Modern England* (New Haven, Co: Yale UP, 2018).

[16] Oakeshott, "Civil Condition" p.127: "Agents acknowledging themselves to be *cives* in virtue of being related to one another in the recognition of a practice composed of rules".

[17] P Smith et al, *Incivility. The Rude Stranger in Everyday Life* (Cambridge: Cambridge UP, 2010).

[18] While they may help to constitute a community, they may also exclude those who are unfamiliar with those norms, or who are unwilling or unable to comply with them. See L Farmer, "Civility, Obligation and Criminal Law" in D Matthews & S Veitch (eds.), *Law, Obligation, Community* (London: Routledge, 2018) 219 at pp.227-31.

which we might compare one order, or type of order, to others. While this usage is perhaps not a widespread as was once the case, it continues to appear in claims about the penal practices of civilised nations – often in relation to the practices of some putatively less civilised country. And it might also be seen as implicit in the claim that some sort of civil order is better than no order at all, or even more specifically than the barbarous state of nature envisaged by Hobbes. What is significant here is to recognise that a claim about the civility of a civil order is not always, or exclusively, a claim internal to that order, but frequently rests on a comparison, the terms of which are not always articulated. If a civil order is understood as a 'civilised' order, then it is necessary to be clear about what is at stake in such a comparison. Also resting on comparison is a further sense of the term civil as meaning 'not criminal'. A civil order, therefore might be one where there is no crime – whether because the criminal law is unnecessary or because the criminal law offers a means of responding to crime is unclear. However, it might also be an order in which conduct is governed by principles or rules of civil or private law, and which is accordingly not seen as falling within the proper scope of the criminal law. Rules of criminal law might thus have a role to play in defining the boundaries of 'civil' conduct but would not necessarily be understood as implicated in ongoing civil relations.

In the next two parts of this paper I shall explore how these different factors shaped the conception of civil order that emerged in the late eighteenth- and early nineteenth centuries, and how the criminal law changed in response to these new demands for securing order. In the first part I will look at how civil order was understood and at the role of the criminal law in securing that order. In the following part I will then look at how the question of market regulation was understood. Broadly speaking, in modernity the market has been understood as 'self-regulating', or as an area of social life that has not required regulation by the criminal law. This raises the questions of intelligibility in a particularly acute way, as it becomes necessary to ask why 'market' crimes are not normally seen as a core part of the modern criminal law (internal intelligibility) and how changes in the social function of the criminal law in relation to certain kinds of market crime (social intelligibility) can be seen as opening up this question of the relation between internal and external order.

III. Civil order in modernity

As contrasted with smaller more traditional communities, society in modernity is understood as a system of common life where individuals of roughly equal status have social relationships with comparative strangers.[19] Where traditional social forms were primarily based on kinship and hierarchy in small, geographically co-located, communities, modern society is based on changed social geographies that raise different kinds of questions of order. It is, for example, striking to note that over fifty percent of the world's population are now estimated to live in cities, a trend that began when Britain in 1871 became the first predominantly urban society, with more than 50% of its population living in cities or large towns.[20] The population, moreover, is both larger and more mobile. Individuals move between cities, and even countries, in forms of mass public transport or by means of private

[19] See MB Becker, *Civility and Society in Western Europe, 1300-1600* (Bloomington: Indiana UP, 1988) ch.1. The distinction between traditional and modern societies is central to modern social theory e.g. from status to contract (Maine), between mechanical and organic solidarity (Durkheim) or between *gemeinschaft* and *gesellschaft* (Tönnies). These accounts all capture the idea of movement from a fixed 'traditional' society to a more fluid and individualistic modern society – and are seeking to explain how it is that modern societies are ordered.

[20] http://www.un.org/en/development/desa/news/population/world-urbanization-prospects-2014.html; J Vernon, *Distant Strangers. How Britain became Modern* (Berkeley, CA: Univ. of California Press, 2014) ch.1

transport, each of which pose massive challenges of co-ordination both in terms of infrastructure – how spaces and modes of transport are organized and maintained – and of co-ordination, as individuals have continually to adjust their conduct to the conduct of others. The problem of order in modern societies is thus one of living in close proximity to strangers, which gives rise to new challenges for the conduct of social, political and economic life. In place of the household, which was the model of order in pre-modern societies, modern society is fragmented, organized around the city, the market, the workplace, the home and so on, each of which are themselves ordered in their own distinctive way and which entail different kinds of contact or engagement with others, and in which different spheres of life have their own codes of trust and civility. This means that in different social contexts it can become necessary to project oneself and to establish social relations in a range of different ways: to show authority, to establish new kinds of shared rights and interests (sociability), to bargain and exchange, and so on. In each of these spheres of life there are different kinds of expectations about conduct and credibility. Codes of civility – understood in terms of changing norms of individual conduct, such as controlling one's body, adjusting one's conduct to accommodate others, establishing trust, and avoiding giving offense to others – can thus become complex and differentiated, and the individual in modern society must learn how to negotiate different kinds of context. Such codes and norms of conduct are not natural or inherent, and do not arise by chance, but are actively constructed, and institutions such as the state can play a crucial role in their establishment.

Central to our understanding of modern society is that it is made up of individuals who are rational, social, agents who live together and collaborate for mutual benefit.[21] However, our understanding of the 'civil condition' should not be built up from the idea of a notional small community but should be understood in terms of the distinctive challenges of modern society.[22] Civil order in this sense is not primarily a matter of the organization of moral community but is concerned with the ongoing co-ordination of complex societies composed of a range of entities or legal persons that are responsible, in different ways, for their own conduct, for the wellbeing of others and for the maintenance of social institutions. The problem of order is thus that of governing individual conduct across the range of institutions and contexts which make up modern society. This, I would argue, is distinctively civil because people must be addressed as responsible, autonomous self-governing subjects who both pursue their own interests and recognize the obligations that we owe to each other. The quality of 'civility' is linked to the framework of law, which not only provides a framework which secures individual freedoms, but also subjects the process of government to specific requirements and constraints, precisely because modern law addresses citizens as responsible, autonomous, self-governing subjects. Civil order is thus a particular kind of institutional order in which the burden of guaranteeing social and normative order is taken on by centralized institutions. This then is important for thinking about social relations ('the civility of civil society') in a modern industrial and urban society, and it has implications for how society was governed or administered, and thus for the criminal law.

We can note a number of specific implications of this for the development of the modern criminal law.[23] First, in modernity the criminal justice system moved away from institutions based on localized or community knowledge towards more bureaucratic institutions, operating according to more abstract standards. As is well known, for example,

---

[21] C Taylor, *Modern Social Imaginaries* (Durham, NC: Duke UP, 2004) chs.1 & 2.

[22] JS Coleman, "Prologue: Constructed Social Organization" in P Bourdieu & JS Coleman, *Social Theory for a Changing Society* (New York: Russell Sage Foundation, 1991). Cf. Oakeshott, "Civil Condition" which takes a local, traditionally structured, community as its foundation for understanding civility.

[23] See generally Farmer, *Making the Modern Criminal Law*.

the criminal trial shifted from the 'altercation' trial, reliant on local knowledge of the character of an accused, to a more formal adversarial trial, controlled by lawyers.[24] Informal systems of watchmen and peacekeepers, were replaced by a professional police force, which was subject to increasingly standardized rules about the appearance and conduct of officers. Criminal laws, together with rules of evidence and procedure, were themselves increasingly 'codified' or formulated as abstract general rules. These formulated clear standards of conduct which were capable of general application, while at the same time subjecting the criminal justice system itself to a new kind of ordering.[25] Second, clearer standards of responsibility were formulated in criminal law, in the sense both of identifying conditions for the attribution of liability, and in the prospective sense of imposing obligations and duties on a persons who were deemed to be capable of adapting their conduct to norms and to plan over time.[26] Third, this was accompanied by large changes to the substance of the criminal law as it aimed at altering standards of behavior. In the area of offences against the person, for example, the criminal law was part of a civilizing initiative, criminalizing a greater range of forms of interpersonal violence and codifying new standards of self-control.[27] The focus broadly of the criminal law was less on dealing with one-off breaches of the king's peace than with regulating irresponsible or anti-social conduct. Finally, we should note that there were significant changes to the internal ordering of law. This is a shift that is reflected not only in the focus on individual conduct, rather than offences against the state or religion, but also in the fact that social wrongs were reconceived in terms of the harms or wrongs that are done to the interests of individuals.[28] Criminal law was thus reconceived as a framework for protecting a certain kind of social individuality.

Overall, we can see how the criminal law was transformed to secure social interests by establishing measures civilizing conduct, by building and reinforcing trust between individuals – and responding to situations where the appropriate standards of conduct had not been met. The modern criminal law is intelligible as a social practice which aims at regulating the social conduct of individuals through law.

IV. Civil Markets?

In the last section I argued that the emergence of the 'society of strangers', in the late eighteenth century was accompanied by a huge drive to transform, and indeed 'civilize', civil society, and that the criminal law played a central role in this process by defining new standards of conduct and responsibilities for legal subjects. Economic historians have noted that a parallel process of dealing with strangers was occurring with markets and market transactions.[29] However, in contrast to the developing role of criminal law in relation to government of civil society, a number of well-established criminal laws relating to the governance of markets were being abolished.

---

[24] See J Langbein, *The Origins of the Adversary Criminal Trial* (Oxford: Oxford UP, 2003); DJA Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* (Oxford: Oxford UP, 1998).

[25] Farmer, *Making the Modern Criminal Law*, ch.5

[26] N Lacey, *In Search of Responsibility*; Farmer, *Making the Modern Criminal Law*, ch.6.

[27] J Carter Wood, *Violence and Crime in Nineteenth-Century England. The Shadow of our Refinement* (London: Routledge, 2004); KD Watson, *Assaulting the Past. Violence and Civilization in Historical Context* (Newcastle: CSP, 2008); Farmer, *Making the Modern Criminal Law*, ch.8.

[28] See e.g. A Ferguson, *An Essay on the History of Civil Society* (1767) (Edinburgh: Edinburgh UP, 1966) p.156: "From whatever motive wrongs are committed, there are different particulars in which the injured may suffer. He may suffer in his goods, in his person, or in the freedom of his conduct."

[29] See principally J Mokyr, *The Enlightened Economy. An Economic History of Britain, 1700-1850* (Yale UP, 2009). See also Vernon, *Distant Strangers*, ch.4.

This can be illustrated by Sir James Fitzjames Stephen's *History of the Criminal Law of England* (1883). This contains an important chapter on 'Offences relating to Trade and Labour' which both documents changes in this area and offers some explanation as to why these had come about.[30] Stephen introduced the chapter by noting that this was an area in which the law had changed greatly. He argued that, on the one hand, when England had been mainly agricultural, and commerce undeveloped, many of the present day laws had not existed because they were not needed; and on the other hand, "proceedings which we now regard as part of the common course of business were treated as crimes."[31] He accordingly divided the offences under discussion into three broad classes. The first class was made up of offences consisting in a "supposed preference of private to public interest" – usury, forestalling and regrating and labour combinations – which he argued had mainly been abolished and were of historical interest only.[32] The second was made up of offences against laws regulating particular trades and labour practices, which he suggested were mainly obsolete.[33] And the third class was commercial frauds, which were largely newer offences to deal with the new challenges posed by the spread of commerce.

The controversy around crimes of forestalling, regrating and engrossing – the hoarding or buying up goods (primarily foodstuffs) during a time of shortage in order to exploit the situation and sell for a higher price – illustrates how practices and understandings were changing in this area in the late eighteenth century. The crimes aimed at preventing speculation on price – so merchants could not buy up grain and store it until the price rose and sell it at a higher price, buy and resell at a higher price in the same market, or move grain out of particular localities to areas where they might sell it for a higher price.[34] The crime was thus linked to the medieval practice according to which, during times of food shortages, magistrates could seize grain being stored by merchants and sell it for what they determined to be a fair or just market price – the so-called 'police' of grain.[35] This 'moral economy' had survived on the grounds that it was necessary to ensure that the price of grain was fair and to protect the subsistence of all parts of the community (particularly in times of dearth), but also thereby preventing riots due the shortage of food in particular localities.[36] The legality of this practice had begun to be challenged over the course of the seventeenth and eighteenth centuries partly as a matter of practicality: as larger towns had started to grow, it was necessary to ensure that grain and other foodstuffs were moved from rural areas – and this required the corn merchants to be active in buying up supplies before they could reach local markets even in breach of the these laws. Parliament abolished the statutory offences in a statute of 1772, but in spite of this the common law continued to be enforced in some localities at times of particular shortage.[37]

---

[30] 3 vols (London: Macmillan, 1883) III, ch.XXX.

[31] Ibid, p.192.

[32] Ibid. p.193.

[33] Though he noted a tendency for the legislature to introduce new offences aimed at particular branches of trade and manufacture notwithstanding that these might conflict with the views of political economists. See History, III, pp.192-3 and 228.

[34] E Coke, *Third Institute*, 194-5; W Blackstone, *Commentaries on the Laws of England* (1765-9) (Chicago: Chicago UP, 1979) IV, 158-9. See also 5 & 6 Edw.VI c.14, though it is likely that this was merely restating the common law.

[35] J Davis, *Medieval Market Morality. Life, Law and Ethics in the English Marketplace 1200-1500* (Cambridge: Cambridge UP, 2012) pp.55-65, 117-20 & 440-7.

[36] EP Thompson, "The Moral Economy of the English Crowd" and "Moral Economy Revisited" in *Customs in Common* (Harmondsworth: Penguin, 1993).

[37] 12 Geo.III c.71.

This came to a head in the case of *Waddington* (1800) arising from the dearth and high food prices between in the late 1790s.[38] Waddington was a hop merchant from Kent who was convicted of a number of offences relating to 'engrossing' (or withholding from market) a quantity of hops in both Kent and Worcester. He brought an appeal to the court of King's Bench. For his part, Waddington sought to argue (amongst other things) that the facts did not disclose a crime known to the law and that, even if this had formerly been the case, the crime had been abolished by the Act of 1772 which regarded the laws as "detrimental to the supply of the labouring and manufacturing poor of the kingdom."[39] The court, led by Lord Kenyon who was strongly resistant to the idea of dismantling traditional protections, disagreed, arguing that the various statutes had merely altered the penalties for these offences, leaving the common law untouched. After commenting that he had read Adam Smith, amongst others, on this topic he went on to argue that if his conduct was carried on:

> "with a view to enhance the price of the commodity; to deprive people of their ordinary subsistence, or else to compel them to purchase it at an exorbitant price; who can deny that this is an offence of the greatest magnitude?... It is our duty to take care that persons in pursuing their own particular interests do not transgress those laws which were made for the benefit of the whole community."[40]

Waddington's conviction was accordingly upheld, and he was fined £500 and sentenced to imprisonment for one month.[41] Paradoxically, as Hay has shown, these and other convictions were met with riots and attacks on the property of merchants and middlemen, giving rise to concerns on the part of the authorities that too-rigid an enforcement of the traditional laws might be counter-productive.[42] On Kenyon's death in 1802, he was succeeded as Lord Chief Justice by Edward Law, Lord Ellenborough, who had enthusiastically led Waddington's defence. The courts quietly gave up on the idea of penalties for forestalling and the offence itself was finally abolished in 1844.[43]

Underlying these legal conflicts was an ongoing political debate about controls on trade in foodstuffs, that has come to be seen as central to the emergence of the new 'science' of political economy.[44] Traditionalists, such as Kenyon, defended the idea of the moral economy: that the legislature had a responsibility towards all parts of the community, and that this required them to take measures to regulate prices and food supply by stopping what they saw as profiteering. They recognized, moreover, that in times of shortage posed a risk to social order that could not be ignored. On the other side, the campaign to repeal the statutes on forestalling, led by Edmund Burke, had argued that the offences actually increased prices

---

[38] There were in fact two separate cases reported in (1800) 1 East 143; 102 ER 56 and (1800) 1 East 168; 102 ER 65. See also *Rusby* (1800) Peake Add Cas.; 170 ER 241. The cases and their background are discussed in detail in D Hay, "The State and the Market in 1800: Lord Kenyon and Mr Waddington" (1999) 162 *Past and Present* 101-62. For a discussion of comparable Scottish case law, see C Whatley, "Custom, Commerce and Lord Meadowbank: The Management of the Meal Market in Urban Scotland, *c*.1740–*c*.1820" (2012) *Journal of Scottish Historical Studies* 1-27.

[39] 102 ER 56 at 59.

[40] Ibid at 62. He had earlier in his judgment suggested that this was "a most heinous offence against religion and morality, and against the established law of the country" (at p.61).

[41] He was fined a further £500 and sentenced to another three months imprisonment in the second case. It is noteworthy that Grose J in sentencing compared forestalling to theft, which was a capital felony (at p.64).

[42] Hay, "The State and the Market" pp.145-6.

[43] 7 & 8 Vict. c.24. Hay, "The State and the Market" pp.153-6) suggests that the laws were in practice a dead letter after 1802.

[44] See I Hont & M Ignatieff, "Needs and Justice in the Wealth of Nations: An Introductory Essay" in Hont & Ignatieff, *Wealth and Virtue* (Cambridge: Cambridge UP, 1983) ch.1; E Rothschild, *Economic Sentiments. Adam Smith, Condorcet and the Enlightenment* (Cambridge Mass.: Harvard UP, 2001) ch.3; M Hill & W Montag, The Other Adam Smith (Stanford, CA: Stanford UP, 2015).

and interfered with the food supply.[45] The emblematic figure, though, was Adam Smith who addressed the topic in *The Wealth of Nations* (1776) in a widely read section entitled 'Digression on the Corn Laws".[46] Smith defended the "unlimited, unrestrained freedom of the corn trade", arguing that magistrates should not interfere with the workings of the markets to determine price by artificial means.[47] He claimed that dearths were caused by natural shortages, rather than the actions of merchants, and that famines were caused by "the violence of the government attempting, by improper means, to remedy the inconveniences of a dearth."[48] He thus concluded that:

> "[T]he law ought always to trust people with the care of their own interests, as in their local situations they must generally be able to judge better of it than the legislator can do."[49]

The market, in other words, was the most efficient means for the distribution of goods, and political economy should trump moral economy.

Stephen argued that a similar pattern – albeit taking place over a longer period of time – of the dismantling of traditional protections in favour of the operation of the free market, could be seen in crimes relating to labour. The issue in this area concerned the questions of the legality of trade unions and free bargaining and whether these amounted to conspiracies in restraint of trade. He saw three stages in the development of these laws. The Combination Acts, prohibiting combinations of workers to improve the conditions of their labour, were seen as linked to old laws protecting markets – specifically the idea that levels of wages and hours of work were customary, and that conduct which interfered with these customary levels should be prohibited.[50] In 1824 the Combination Acts were repealed, and replaced in 1825 with new legislation which, while broadly permitting meetings to discuss wages and conditions of work, created a series of new offences around the use of threats, obstruction and intimidation.[51] While this formally recognized an idea of free contract and freedom of association, as workers could negotiate over their terms of work, in practice this was severely limited as a majority could not impose their views on other workers. On top of this, trade unions (combinations) were increasingly prosecuted as common law conspiracies in restraint of trade as, in a series of decisions in the 1840s and 1850s, the courts expanded the scope of the doctrine of conspiracy.[52] While this was done in the name of free contract – the courts claimed to be acting to protect the freedom of individual workers and employers – Stephen

---

[45] See Hay, "State and Market" pp.109-10.

[46] Smith, "Digression on Corn Laws" *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) (Harmondsworth: Penguin, 1999) Book IV ch.5 (pp.102-23). This was cited in *Waddington*, and also in the contemporaneous Scottish case *Leishman v Magistrates of Ayr* (1800)

[47] Ibid, p.106.

[48] Ibid, p.105. This understanding of the natural order of the market, it was suggested, should replace superstitious beliefs about forestalling, which Smith compared to beliefs in witchcraft (p.113).

[49] Ibid, p.110. The empirical basis of this claim has been contested, notably in A Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Clarendon, 1981) on the grounds that it assumes that all, including the poor, have equal access to markets.

[50] (1799) 39 Geo.III c.81; (1800) 40 Geo.III c.60. Stephen concluded: "I should not myself describe it as a system specially adapted and designed to protect freedom of trade. The only freedom for which it seems to me have been specially solicitous is the freedom of the employers from coercion from their men." (*History*, III, p.209).

[51] (1824) 5 Geo.IV c.95; (1825) 6 Geo.IV c.129. The 1824 Act had briefly legalised combinations, until it was replaced by the 1825 legislation.

[52] *History*, III, pp.217-222. He cites, in particular, *R v Rowlands*, 2 Den 364 (1851); *Hilton v Eckersley*, 8 E & B 47 (1857); and *R v Druitt*, 10 Cox 592 (1867). See also PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon, 1979), pp.532-3.

argues that the effect was that the law was protecting employers.[53] Stephen accordingly argues that it was not until 1871, when it was established that combinations should not be treated as an indictable conspiracy (unless the act would be criminal if done by a single person), that the principles of the free market were established in relation to labour.[54]

While Stephen's reading of this history has been contested, its significance here lies in the fact that he played down wider political debates and framed the development of the law in terms of an unfolding logic of political economy.[55] From this perspective the Combination Acts, along with other measures such as the Statute of Apprentices and the Statute of Artificers, were seen as an interference with freedom of contract and an impediment to the free operation of the market in labour.[56] This argument, once again, drew on Adam Smith who had noted that the interests of workmen and masters were not the same, as the former would combine to increase wages, the latter to decrease them. However, he had also pointed out that the masters had the advantage because they were fewer in number and had greater resources – and because the law did not prohibit their combinations.[57] By the 1820s, though, it was workers' combinations that were seen as the larger problem, as political economy took a more conservative turn, and they were condemned for interfering with the laws of supply and demand, and the use of secrecy and illicit means to obtain their ends.[58] However, the law was inexorably moving towards the position that labour was a form of property and that "each individual man and every body of men, however constituted, is the best judge of his or their own interests, and ought to be allowed to pursue those interests by any method short of violence or fraud".[59]

What is significant about these areas more broadly is that they concern the markets for food and labour, areas that had been at the heart of controversies over the development of political economy.[60] The control and regulation of these markets, moreover, went beyond narrow questions of supply and demand and was a matter of competing conceptions of social order. EP Thompson, for example, in his famous account of food riots, describes the systems as moral economy versus political economy.[61] The former was a paternalist model in which the aristocracy and landed gentry bore responsibility for providing the necessaries of life (a fair wage and fairly priced food), backed by a protective institutional expression in law, and

---

[53] *History*, III, p.223. He argues that, in fact, there was little evidence that combinations of workers had been treated as conspiracies at common law (*History*, III, p.210). He cites RS Wright, *The Law of Criminal Conspiracies and Agreements* (London: Butterworths, 1873). Cf. JV Orth, *Combination and Conspiracy. A Legal History of Trade Unionism 1721-1906* (Oxford: Clarendon, 1991) ch.3 who argues that common law conspiracy was recognised as early as 1721.

[54] The Conspiracy and Protection of Property Act 1875 (38 & 39 Vict. c.86).

[55] This might have included wider discussion of master and servant laws, the system of apprenticeships, the poor law and trade unions as well as the growth of factories and so on. For a review of the historical sources see Orth, *Combination and Conspiracy*.

[56] See also R Steinfeld, *The Invention of Free Labour. The Employment Relation in English & American Law and Culture, 1350-1870* (Chapel Hill, NC: UNC Press, 1991).

[57] Smith, *Wealth of Nations*, Book I, cap.8 (Vol I, pp.167-90). This was part of a more general critique of restrictions of monopolies and in favour of higher wages as the "cause of the greatest public prosperity". It is worth noting that the Combinations Act of 1800 (39 & 40 Geo.III c.106) did criminalise combinations by masters aimed at reducing wages, altering the hours of work or increasing the quantity of work (s.17).

[58] Stephen, *History*, III, pp.211-12. On the conservative turn in political economy see Rothschild, *Economic Sentiments*, ch.4.

[59] Stephen, *History*, III, p.203.

[60] See Hont & Ignatieff, "Needs and Justice", p.14 describing Smith's proposals for the grain market as the "most radical" of all his claims.

[61] Thompson, "Moral Economy".

emergency routines in times of dearth.[62] The older offences thus presupposed a certain understanding of the market. The market was less a regulatory idea than a particular place where bargains could be struck between producers and consumers who were bound together by their place in the local community. The 'fair' price was not an outcome of bargaining but something that was determined outwith the market, taking into account social relations and obligations within the community.[63] However, this 'market' had been changing over a long period of time. The growth of cities required intermediaries – grain merchants – to buy up local supplies and transport them to urban centres – in order to ensure food supplies. Labour practices were changing as people moved to work in new industrial areas and workshops. This meant, as Mokyr has commented, that the market was no longer within a small community: "People not only bought their daily bread, clothing and houses, but also sold their labor and invested their savings through markets, in all aspects of economic life dealing with strangers."[64] This clearly then had consequences for how markets were understood. In Edmund Burke's words:

> "Market is the meeting and conference of the *consumer* and *producer*, when they mutually discover each other's wants. Nobody, I believe, has observed with any reflection what market is, without being astonished at the truth, the correctness, the celerity, the general equity, with which the balance of wants is settled."[65]

Here we see that 'market' is presented as an abstract idea, a mechanism for balancing wants, rather than a particular place or trade. It is not regulated, but is self-regulating as, in the classical conception of Adam Smith, allowing the public interest to be served by the pursuit of individual interests.[66]

The transition to this new kind of market raised questions of civil order notably, as we have seen in relation to food and labour, but also more generally. Commerce required predictability, but how was this to be secured when dealing with strangers. These issues were in part addressed through the development of new civil institutions, what Mokyr has described as a 'civil economy' that made it possible to "trade with strangers, deal with people with whom there might not be repeated transaction at arm's length, without trying to take advantage of the situation."[67] He describes the development of new norms of gentlemanly conduct as ways of sending signals about trustworthiness and reliability, as well as the emergence of clubs, friendly societies and associations which sustained networks of co-operation and trust – at least within certain social classes. Laws were also transformed, moving from the regulation of particular trades or markets to the regulation of the market more generally. As Vernon has argued, the focus of law moved to securing general standards – in money, in weights and measures and so on, that would enable sustain the reliability of commerce.[68] However, this was also seen as a problem that could be solved by the market itself, which was understood as promoting freedom and moral progress. Free labour was seen as morally superior to slavery or indentured labour free labour. In the long term a market or commercial society would be a more civil society.[69]

---

[62] Thompson, "Customs in Common", pp.260-1.

[63] See the discussion in Davis, *Medieval Market Morality*, at pp.59-64.

[64] Mokyr, *Enlightened Economy*, p.3. See also Vernon, *Distant Strangers*, ch.4.

[65] E Burke, *Thoughts and Details on Scarcity* (London: F & C Rivington, 1800) pp.25-6 (emphasis in original).

[66] K Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time*, (Beacon Press: New York, 2002) pp.71-2.

[67] Mokyr, *Enlightened Economy*, ch.16 at p.384.

[68] Vernon, *Distant Strangers*, ch.4.

[69] See also C Berry, *The Idea of Commercial Society in the Scottish Enlightenment* (Edinburgh: Edinburgh UP, 2013) ch.4; G Searle, *Morality and the Market in Victorian Britain* (Oxford: Oxford UP, 1998) ch.3.

This did not remove the need for the criminal law, but it reshaped its role – something acknowledged by Stephen, who explained the changes that he described in terms of the development of commercial society. While the criminalization of forestalling and combinations had generally been justified on the grounds that private interests should be limited where the public interest demanded it, the recognition of principles of political economy had led to the awareness that such restrictions were wrong because they made commerce and the investment of capital impossible.[70] The earlier protective legislation, he argued had come to be regarded as "opposed to the principles of political economy" and abolished.[71] The consequence of this was that he saw only a limited role for the criminal law in relation to the market: it should not limit private interests except where there was "actual force, or the threat of such force and the grosser kinds of fraud".[72] This then led to his discussion of the final class of offences against trade, which were commercial frauds and fraudulent bankruptcy. These could be seen as crimes of commerce, practices which arose as a consequence of the development of commercial society, rather than as practices which hindered its emergence. Interestingly, the discussion here is not explicitly framed in terms of political economy; the crimes are explained in terms of individual greed and "reckless trading and extravagance", which he argued were equivalent to the "worst kind of theft" and should be punished severely.[73] Their criminality thus rested on the fact that they could be seen as individual wrongdoing, equivalent to other forms of property crime as attacks on private interests in civil society.

Stephen's account thus demonstrates the impact of political economy on thinking about the criminal law. There was a clear separation between market and civil society, as different spheres of social life. Markets were assumed to be self-regulating, if not actually civilizing, and the role of criminal law was thus limited to the protection of individual interests in civil society. What we see here is the emergence of a particular scheme of intelligibility which is characteristic of the modern criminal law. According to this understanding the market is self-regulating, and so what might be termed 'market crimes' are no longer integral to the modern criminal law.

V. Conclusion

The decriminalisation of market and labour offences have traditionally been studied from the perspective of the rise of freedom of contract: an ideology of freedom to contract leading to the dismantling of traditional protections.[74] What I have attempted to show here is that the consequences of decriminalisation should not only be understood in terms of their impact on contract law and the market, but also in terms of their consequences for the criminal law itself. Crucially in this case the decriminalisation of conduct did not merely mean a reduction in scope of the criminal law, but should be understood as part of a more systematic restructuring – what we might call the emergence of a new scheme of intelligibility. In concluding I want to reflect briefly on the question of how it affected the internal and external 'intelligibility' of the criminal law.

---

[70] Stephen, *History*, III, p.196.

[71] Stephen, *History*, III, pp.192-3. See also Hay, "The State and the Market" p.155 pointing out that Chitty made an oblique reference to Adam Smith and the division of labour in his discussion of forestalling.

[72] Stephen, *History*, III, p.193. See also p.203.

[73] *History*, III, pp.231-2. See generally S Wilson, *The Origins of Modern Financial Crime* (London: Routledge, 2014; J Taylor, *Boardroom Scandal. The Criminalization of Company Fraud in Nineteenth Century Britain* (Oxford, Oxford UP, 2013).

[74] Notably, Atiyah, *Rise and Fall*, pp.361-9.

Internally, the distinction between market and civil society underpins thinking about the proper scope of the criminal law, while externally the social function of criminal law is seen as that securing the civility of civil society only. Criminal law should protect private interests against certain kinds of threats as 'public' wrongs; but wrongs in the market are understood as private. Markets, then, are seen as 'civil' in the non-criminal sense, as the sphere of private law and private relations.[75] This, however, as we have seen, was not simply a matter of laissez-faire in the law more generally, as the criminal law took on an increasing burden in terms of establishing proper standards of conduct on civil society, indeed arguably underpinning the development of the kind of individualism that was central to the emergence of market society. This process has not been simple since there are always boundaries to be negotiated between understandings of legitimate and illegitimate transactions and ambivalence about the social effects of competition.[76] Indeed, the claim that criminal law is not concerned with market conduct may be more of a myth, as it was doubtful (as Stephen himself recognised) that criminal law ever adhered completely to the precepts of political economy. Nevertheless, what is important here is that this conception of different social spheres continues to shape our understanding of the proper scope of the criminal law. The modern understanding of the social role of criminal law confines its sphere of operation to civil society and rules of criminal law which relate to markets (of which there are many) are not considered to be part of the 'proper' criminal law.[77] However, if we are properly to understand the role of criminal law in securing civil order it is necessary to reflect not only on the civility of that civil order, but also on how we understand the scope of civil order in modern society.

[75] We should note, for example, that Oakeshott sees markets as a form of "enterprise association", as association for a purpose, for the common satisfaction of wants, which is distinct from civil order ('On the Civil Condition').

[76] See general Searle, *Morality and the Market*.

[77] See e.g. SP Green, *Lying, Cheating and Stealing. A Moral Theory of White-Collar Crime* (Oxford: Oxford UP, 2007)