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The ‘Market’ in Criminal Law Theory

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Abstract

This paper makes the case for criminal law theory to engage with the market and to reflect on the ways that it shapes the role played by criminal law in a market society. It is also an attempt to explore ways in which an engagement with and critique of the market can be made more central to criminal law theory. The paper begins by reviewing the different ways in which the market currently makes (often fleeting) appearances in criminal law theory. The second part then looks at some common themes of this work, as well as the limitations of these approaches. The third part argues that by understanding the market as a form of social ordering it is possible to begin to think more systematically about the relationship between the market and the criminal law. The fourth and final part, then goes on to explore the question of how criminal law theory might engage in a more systematic and critical way with the market.

Keywords:

Criminal law theory – markets – moral order – market crimes – market manipulation – criminalisation – economic rationality.

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I. Introduction

The market is a central institution to most, if not all, modern societies. There are, to be sure, different kinds of market societies, and there is widespread dispute over whether the market is a good or bad thing, but the centrality of markets in one form or another is taken for granted. Indeed, it is hardly an exaggeration to suggest that the question of the proper role of the market – its impact on sovereignty, social life, the environment and more – is one of the key issues of our time. Surprisingly, however, one would scarcely be able to tell that we live in a market society of any kind from reading works on criminal law or criminal law theory where references to the market are few and far between. Textbooks remain focused on forms of interpersonal wrongdoing – crimes against the person and property. Discussions of fraud or financial crime might acknowledge the economic impact of some financial frauds, but these are understood largely within the dominant paradigm of property crime as a crime against the individual. ‘Market’ crimes, such as insider dealing or market manipulation, are a niche area of interest, viewed as a form of ‘regulatory’ criminal law, and not regarded as either practically or normatively significant for the wider criminal law. Criminal law theory is conducted against a reference point of ‘liberal democratic’ society, as a broad description of the kind of society that we are taken to live in – or that we might aspire to live in. This also rarely refers explicitly to the market, though it is fair to assume that the ‘market’, in some form or other, is taken to be one of the central institutions of that liberal democratic society. The market, then, has a ‘taken-for-granted’ quality, occupying space in the way that we think about our social order even if this is not explicitly engaged with.¹ The nature and scope of the market and its possible relevance for how we think about criminal law is rarely acknowledged.

My aim in this paper is to make the case for criminal law theory to engage with the idea of the market and to reflect on the ways that the market shapes the role played by criminal law in a market society – and I want to argue that this is necessary even when not

¹ See also L Herzog, *Inventing the Market. Smith, Hegel and Political Theory* (Oxford: Oxford UP, 2013):

“Often, the market seems to be the ghostly ‘other’ of the institutions political theorists focus on, something that needs to be tamed and restricted, but not itself made an issue.” (p.3).

explicitly engaging with specific areas such as ‘market’ crimes.² The aim is, in part, to unpack some of the assumptions that underlie much contemporary criminal law theory to show how the market occupies space, even when its presence is not acknowledged. However, it is also an attempt to develop a broader ‘market-critical’ criminal law – to reflect on the ways that an engagement with, and critique of the market, can be made more central to criminal law theory.³ The market is central to the political liberalism that is at the heart of much contemporary political theory, seen as a broadly ‘democratic’ institution which can act as a bulwark against the consolidation of state power. At the same time, though, markets are also criticised for entrenching social and economic inequalities through the unequal distribution of goods and property. Whichever view is taken, criminal law is seen as one of the social and political institutions which structure and sustain the market in contemporary society. It is thus important to reflect on the way that the operation of the market shapes (and has shaped) liberal criminal law theory.

Although I will have more to say about the concept of the market later in the paper, I begin with a brief definition of what I understand by this term. In an important overview of the literature, Herzog defines markets as:

“[I]nstitutions in which individuals or collective agents exchange goods and services. They usually use money as a medium of exchange which leads to the formation of prices.”⁴

² I discuss the concept of ‘market crimes’ below, but in general terms it might be understood as crimes relating to market conduct. This is sometimes referred to by terms such as financial crime, economic crime, white-collar crime or business crime, though each of these may be over- or under-inclusive.

³ The term ‘market-critical’ comes from the work of the German criminal lawyer Wolfgang Naucke. The aim is not to be anti-market as such, but to develop a critical understanding of criminal law and criminal theory which engages with the impact of markets on social relations.

⁴ L Herzog, “Markets” in EN Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition), (<https://plato.stanford.edu/archives/fall2017/entries/markets/>). Cf. P Aspens & J Beckert, “Value in Markets” in Aspens & Beckert, *The Worth of Goods. Valuation and Pricing in the Economy* (Oxford: Oxford UP, 2011) p.4: “Markets are arenas of social interaction in which rights for goods and services are exchanged for money under conditions of competition.”

This points to certain key features shared by different kinds of markets: they facilitate exchanges between individual or collective producers and consumers, who may or may not be strangers to each other; they are institutions, understood in terms of the aggregate of exchanges, which may be more or less formally constituted; they operate under conditions of competition, as market actors are presumed to be pursuing self-interest; and the use of money as a standardized medium of exchange enables the communication of information through prices, which reflect the changing balance between supply and demand. It is also worth noting that the ‘market’ is somewhat narrower than concepts such as the economy, which refers to the way that different markets are integrated together and organised, and capitalism which refers to a particular historical form of socio-economic organisation based on the private ownership of capital in which markets are understood to play a particular role. In both instances markets can be understood as a conceptually independent element of the social or economic system.⁵ There are different ways of thinking about the market, from looking at operations at the micro-level to understanding the market as a principle of social order.⁶ And there are also different disciplinary approaches to understanding markets, from contemporary economics which views them in terms of disembodied exchanges to more sociological approaches which see markets as social structures and institutions.⁷ My aim is not to advocate any particular account or disciplinary approach, but to try and map the different ways in which the concept of the market registers in criminal law theory and to explore how we might begin to bring these together to think more systematically about the place of the market in criminal law theory.

The paper is in four parts. In the first part I will critically review the different ways in which the market currently makes (often fleeting) appearances in criminal law theory. In the second part I draw together some common themes from this work and begin to look at how

⁵ That is to say that markets pre-existed their organisation into an economy, and there may be ‘market societies’ which are not necessarily capitalist (as well as there being different conceptions of the market in capitalist society). See Herzog, “Markets” §1.

⁶ “The market concept thus calls to mind the image of a coordinating mechanism that can bring about overall systemic coherence without the need to plan that coordination into existence.” See M Watson, *The Market* (Newcastle: Agenda Publishing, p.7); FA Hayek, *Law, Legislation and Liberty* (London: Routledge, 1982) ch.10.

⁷ See N Fligstein & L Dauter, “The Sociology of Markets” (2007) 33 *Annu. Rev. Sociol.* 105-28 at pp.112-3.

we might build on these to develop a broader understanding of the relevance of the market to criminal law theory. In the third part I will argue that by understanding the market as a form of social ordering it is possible to begin to think more systematically about the relationship between the market and the criminal law. In the fourth and final part, I then go on to explore the question of how to develop a more ‘market-critical’ criminal law.

II. Criminal Law and the Market

i) Legitimate and illegitimate markets.

The primary way in which criminal law theory has engaged with the question of markets is that of the boundaries between legitimate and illegitimate markets. This is classically seen in discussions such as whether or not the sale of sex or drugs should be criminalised. In these discussions, although there may be disagreement over which conduct should or should not ultimately be permitted, there are certain well-established positions.⁸ On the one hand, it is argued that this is a matter of freedom of choice. A person has a right to sell their body and, provided that this is freely agreed to, the state has no business in prohibiting this kind of transaction.⁹ The taking of drugs, it might be argued, is a harmless, self-regarding, act and so should be permitted – and by implication the sale of (non-harmful) drugs should be legalised. These approaches assume then that there is a market – or that one can be created – and that the market enables a certain kind of freedom. On the other hand, it is often argued that there are limits to what can be bought or sold – and that markets must be kept within their proper

⁸ There is a huge literature on this question. For a discussion within liberal criminal law theory that focuses on the question of free consent see P de Marneffe, *Liberalism and Prostitution* (Oxford, 2009). See also SP Green, “What Counts as Prostitution?” (2016) *Bergen Jnl of Criminal Law and Criminal Justice*, 65-101. Much feminist literature takes a different kind of approach, focused on the gendered nature of sex-work and the question of exploitation. On drugs see e.g. D Husak, *Drugs and Rights* (Cambridge: Cambridge UP, 2012).

⁹ Note also that the Wolfenden Committee followed this approach, though without explicitly referring to markets. Their concern was with the public nuisance of ‘soliciting’, but in arguing that transactions which took place in private were not the law’s business they conflated the private (law) transaction with the literal privacy of the home (*Report of the Committee on Homosexual Offences and Prostitution* (Cmnd.267)(London: HMSO, 1957)).

boundaries. Most obviously, a person cannot sell themselves into slavery, but there are other things which, because of their moral quality or their intrinsic connection with human dignity, should not be capable of being bought or sold. Sex is regarded as one of these goods, as is political office, which cannot be bought and sold without corrupting other social goods such as human dignity or political life. The market, on this account, does not necessarily bring freedom and should only operate within boundaries determined by pre-existing moral commitments.¹⁰ Alongside these approaches, there are those who argue that the proper approach is to decriminalise or legalize the conduct, which would entail replacing the criminal prohibition with some form of ‘regulation’. It is acknowledged that this would effectively entail the creation of legal or regulated ‘markets’ in these areas – licensing producers and sellers, setting standards, taxing income, and so on.¹¹ At this point, though, the question passes beyond the scope of criminal law theory; regulation is the generic term used to describe such measures, and even when this entails the creation of offences these are not regarded as ‘proper’ criminal law.¹²

This question of legitimate and illegitimate markets also arises in the literature on the trafficking (of persons, drugs, human organs, antiquities, wildlife and so on), though it is formulated in a slightly different way.¹³ Trafficking is illicit commerce – other forms of

¹⁰ See M Walzer, *Spheres of Justice. A Defense of Pluralism and Equality* (Basic Books, 1983) ch.4; M Sandel, *What Money Can't Buy. The Moral Limits of Markets* (Harmondsworth: Penguin, 2012). For more nuanced accounts see D Satz, *Why Some Things Should not be for Sale. The Moral Limits of Markets* (Oxford: Oxford UP, 2010) and M Radin, *Contested Commodities. The Trouble with Trade in Sex, Children, Body Parts and Other Things* (Princeton NJ: Princeton UP, 2001).

¹¹ For an account of the difficulties with the creation of a market see <https://www.theguardian.com/society/2020/apr/05/stoners-cheered-when-canada-legalised-cannabis-how-did-it-all-go-wrong>.

¹² Though some scholars are now starting to engage with these questions. See T Seddon, “Markets, Regulation and Drug Law Reform: Towards a Constitutive Approach” (2020) 29 *Soc. & Leg. Stud.* 1-21; E Aaronson, “The Strange Career of the Transnational Legal Ordering of Cannabis Prohibition” (2019) 4 *UC Irvine Journal of International, Transnational and Comparative Law* 78.

¹³ See R Haverkamp et al., *What is Wrong with Human Trafficking. Critical Perspectives on the Law* (Hart Publishing, 2019); P Khotiswaran (ed.), *Revisiting the Law and Governance of Trafficking, Forced Labor and*

commerce are, by definition, not trafficking – and so the subject matter of the criminal law relating to trafficking is those things which cannot be legally sold, or which are being sold in illicit markets. However, the problem of trafficking is primarily conceived of as relating to boundaries rather than objects: the illicit crossing of national (and transnational) boundaries by persons and objects; and the boundaries between licit and illicit markets – in particular the need to insulate legitimate markets against organised crime.¹⁴ This last is understood through the lens of exploitation, which increasingly does the work of distinguishing between legitimate and illegitimate forms of transaction.¹⁵ Crucially, in law the consent of the ‘victim’ is irrelevant – a feature which distinguishes the discourse on sex trafficking from the traditional debates about prostitution.¹⁶ What matters here is a judgment about the practice (and hence the illegitimacy of the market) as a whole – that is to say the focus is primarily on the features of the illegitimate market and its relationship to the legitimate one rather than on the question of consent or autonomy which is central to traditional debates about prostitution/sex work.

ii) An interest to be protected

This leads to the second way in which the market has become increasingly prominent in criminal law which is in relation to offences which seek to protect ‘market integrity’. The first offences against insider dealing (or trading) were created in the US on the basis that it was a breach of the fiduciary relationship between a company and their employee (or the

Modern Slavery (Cambridge: Cambridge UP, 2017). See also A Bogg et al., *Criminality at Work* (Oxford: Oxford UP, 2020).

¹⁴ This is also the problem with money laundering – not only that illicit money (raised from activities such as trafficking) will be ‘cleaned’ but that in the process it will ‘contaminate’ the legitimate market.

¹⁵ Modern Slavery Act 2015, s.2 (trafficking is arranging travel for the purposes of exploitation) & s.3 (defining exploitation).

¹⁶ Modern Slavery Act 2015 ss.1(5) and 2(2). For discussion see L Farmer, “Trafficking, the Anti-Slavery Project and the Making of the Modern Criminal Law” in Haverkamp, *What is Wrong with Human Trafficking?* 13-35.

person entrusted with the inside financial information).¹⁷ However, the crime has been reconceived in terms of taking advantage of others by not respecting the rules according to which the market is conducted.¹⁸ This has subsequently been generalised in the EU provisions against market abuse or manipulation which criminalise the use or dissemination of information which may misinform or deceive others into making ill-considered investment decisions.¹⁹ The aim of the offence is thus primarily to protect the market against manipulation or abuse, rather than protecting the interests of individuals against harm resulting from the fraudulent conduct of others. This is justified on the basis that:

“An integrated and efficient financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities and derivatives.”²⁰

This focus on market integrity has also been replicated in the UK in newly created offences against anti-competitive (or cartel) agreements, and underpins the reform of the law of commercial bribery, both of which are directed at conduct which interferes with the proper competitive operation of the market.²¹

¹⁷ KL Scheppele, “It’s Just Not Right: The Ethics of Insider Trading” (1993) 56 *Law & Contemporary Problems* 123-73; H McVea, “What’s Wrong with Insider Dealing?” (1995) 11 *Leg. Stud.* 390.

¹⁸ Companies Act 1980 ss.69-73 (consolidated in the Company Securities (Insider Dealing) Act 1985; Financial Services Act 1986; European Directive 1989, embodied in provisions of Criminal Justice Act 1993 pt.V.

¹⁹ Market Abuse Regulation: Regulation (EU) No 596/2014 [2014] OJ L173/1; Directive on Criminal Sanctions (Market Abuse Directive) Directive 2014/57/EU [2014] OJ L173/179. See generally E Herlin-Karnell & N Ryder, *Market Manipulation and Insider Trading. Regulatory Challenges in the USA, EU and UK* (Hart Publishing, 2019); H McVea, “Supporting Market Integrity” in N Moloney et al, *The Oxford Handbook of Financial Regulation* (Oxford UP, 2015).

²⁰ From Market Abuse Directive 2003 (2003/6/EC).

²¹ Enterprise Act 2002 s.188; reformed by Enterprise and Regulatory Reform Act 2013 s.47. R Williams, “Cartels in the Criminal Law Landscape” in C Beaton-Wells & A Ezrachi, *Criminalising Cartels. Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011); B Wardhaugh, “A Normative Approach to the Criminalisation of Cartel Activity” (2012) 32 *Legal Studies* 369-95. On bribery see Law

What these various initiatives have in common is a focus on market ‘integrity’, understood in terms of the efficiency of the market and its ability to process information and reflect that in prices.²² This appeals to an idea of the implicit orderliness of the market – that it would function in this way were it not for the distorting or manipulative conduct. In criminal law terms this is significant because it makes the integrity of the market – conceived of as something which is independent of the interests of particular individuals – an interest to be protected by the criminal law.²³

iii) *Economic rationality and criminal law.*

A third way in which criminal law theory has engaged with the market is in what is known as the economic theory of crime. This approach is associated, in particular, with the work of Gary Becker, notably his 1968 paper: “Crime and Punishment: An Economic Approach”.²⁴ Becker, a Nobel Laureate in economics and member of the Chicago School of economics, argued in this paper that the operation of criminal law and punishment could be understood in strict ‘cost-benefit’ terms. His aim in doing so was to cut through some of the rhetoric surrounding crime and punishment – the moral and psychological language – to ask the question of how to minimise the costs of crime.

Commission, *Reforming Bribery* (Consultation Paper 185) (London: HMSO, 2007) Appendix D, leading to Bribery Act 2010.

²² This is presumably an appeal to the efficient capital market hypothesis, though this is nowhere formally articulated. See *infra*. For discussion see S Deakin, “The Evolution of Theory and Method in Law and Finance” in N Moloney et al. (eds), *The Oxford Handbook of Financial Regulation* (Oxford: Oxford UP, 2015).

²³ Cf. P Alldridge, *Relocating Criminal Law* (Dartmouth: Ashgate, 2000) ch.6 (discussed *infra*).

²⁴ (1968) 76 *Journal of Political Economy* 169-217. See also N Garoupa, “Economic Theory of Criminal Behavior” in G Bruinsma & D Weisburd (eds) *Encyclopedia of Criminology and Criminal Justice* (Springer: New York, 2014); A Harel, “Criminal Law as an Efficiency-Enhancing Device. The Contribution of Gary Becker” in MD Dubber (ed), *Foundational Texts in Modern Criminal Law* (Oxford: Oxford UP, 2014); B Harcourt, *The Illusion of Free Markets. Punishment and the Myth of Natural Order* (Harvard: Harvard UP, 2012) ch.6.

Becker's argument has two levels. The first concerns the factors that impact on individual decision making. This, he argued, should follow economists' 'normal' assumptions about choice:

“that a person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities.”²⁵

Crime was thus understood as equivalent to any other social activity – which is to say that he did not assume that the 'criminal' had any special motivations – merely that the prospective criminal would seek to maximise 'profit' from their conduct. Thus, the actor would take into account the expected benefit from the crime, weighed against the likely amount of punishment and the expected likelihood of conviction.²⁶ The individual decision whether or not to commit a criminal act was therefore understood as a form of cost-benefit analysis equivalent to any other transaction. The second level was then concerned with the social costs of crime. Here it was necessary to factor in the social costs of enforcement – the costs of policing, courts and punishment, as well as any private expenditure on enforcement – in order to determine the optimal amount of crime that might be tolerated (or afforded) by any society. While Becker argued that it might, in principle, be possible to reduce crime to zero by increasing the likelihood of punishment (and hence cost to the individual), the social costs of doing so (in terms of enforcement and punishment) would be prohibitive. The question of the optimal level of crime was thus a matter of welfare economics: measuring the impact of individual preferences at an aggregate level to improve overall utility.²⁷

Becker's contribution is often understood primarily in terms of the first part of this argument – the individual as a rational utility-maximiser – and he perhaps encouraged this by pointing to what he saw as the intellectual connections with the work of Bentham and Beccaria, who he suggested were also applying an economic calculus.²⁸ Criticism has accordingly been directed at the unrealistic psychological assumptions about the calculating

²⁵ Becker, "Crime and Punishment", p.176.

²⁶ Various background factors, such as the availability of other (legitimate) opportunities, were also factored in.

²⁷ Ibid. p.181. Welfare economics is understood in terms of Pareto efficiency: where (assuming perfect information) no one allocation of resources can make one person better off without leaving another worse off. See Herzog "Markets" §3.

²⁸ Cf. Harcourt, *The Illusion of Free Markets*, ch.6 which develops this argument.

individual which underpin this model.²⁹ However, it is arguable that this criticism misses the point because, from the perspective of Becker's neo-classical welfare economics, the focus is less on individuals and how they make decisions than on the aggregate preferences revealed by the 'market'. It is thus the market mechanism that is the central feature of this account. The market renders the different dimensions of decisions in terms of costs (price), making crime commensurable to other activities, and making possible the calculation of marginal efficiency gains. The aim is not to reconstruct the actual decision-making processes of individuals but to use a model which stands as a proxy for these processes – and which can be used to assess particular policies. Crime is thus plotted on a demand curve which is assumed to slope downwards as it becomes more 'expensive'.³⁰ The policy maker would set a tariff or sentence for a particular crime (the price), in the same way that a producer would price a new product which they were introducing to the market and would then measure the 'return' in terms of its impact on the incidence of the targeted anti-social conduct. They could then marginally adjust the tariff, as necessary, to reflect the preferences revealed by the efficient 'market' to establish an equilibrium between the costs of conduct and enforcement.³¹

There is much that can be said about this kind of approach, but I want to confine my comments to the conception of the market that is operating here. First, the 'market' is primarily a heuristic device: assumptions are made about conduct and pricing and the flow of information as a way of understanding and explaining the social world. As I noted above, the calculating individual – or *homo economicus* – is not taken to represent any actually existing individual, just as the economists' understanding of the market is an abstract model representing an ideal order. However, it is also more than a model as it assumes that the model in fact reflects an underlying order – one of the key tenets of neoliberalism.³² There is thus an elision between the assumption of efficiency (for the purpose of constructing the

²⁹ This, for example, is the main focus of Harel's critique and the literature which he discusses which is focused on the behaviouralist turn in economics.

³⁰ Becker, "Crime and Punishment" Pt.III. i.e. it is assumed that the amount of crime will decrease as the 'cost' (punishment) increases.

³¹ With efficiency understood as the equilibrium position in a perfectly competitive market (i.e. with no transaction costs). For further discussion and examples see SD Levitt & TJ Miles, "Economic Contributions to the Understanding of Crime" (2006) *Annual Rev. of Law and Soc. Sci.* 147-64.

³² Hayek, *Law, Legislation and Liberty*, ch.10.

model) and the commitment to the belief that the market is in fact the most efficient means of distributing social goods. This assumption about the market is then extended to explain other areas of social life. As an example of the application of the logic of the market to non-economic conduct, the implication of Becker's position is the "radical instrumentalization" of criminal law.³³ From his perspective, neither criminal law nor punishment could be seen as a distinct body of moral and expressive norms. Communication of norms, such as it is, takes place through the 'pricing' process of the market, reflecting the social costs of conduct and enforcement, and criminal law does not express any independent or intrinsic moral values or norms. Society is, in effect, conceived of as a market and all conduct can be 'priced'.

iv) *Free market criminal justice*

A more critical account of the relation between markets and criminal justice is explored in Darryl Brown's *Free Market Criminal Justice* (2016) which looks at the affinities between the structure of American criminal justice institutions, democracy and markets, and how these have been distorted by a growing 'marketisation' of criminal justice.³⁴ His concern is with how these public institutions have been conceived of as being like markets – in the sense that they were understood as operating according to a logic of competition and with how this has corrupted the 'public goods' that these institutions should serve.³⁵

The core of Brown's argument is that US criminal justice institutions were originally shaped by a desire to avoid excessive state supervision and control, instead emphasising local democratic political accountability. Thus, prosecutors were made accountable to local electorates, rather than to the courts, and rules of evidence and procedure were developed in ways which emphasised individual control and responsibility rather than the ability of the institutions to produce particular outcomes.³⁶ This emphasis on private ordering has led to the

³³ Harel, "Criminal Law as an Efficiency-Enhancing Device" p.315. This position has not been followed by all law and economics scholars - see infra for further discussion.

³⁴ *Free Market Criminal Justice: How Democracy and Laissez Faire Undermine the Rule of Law* (Oxford: Oxford UP, 2016). Cf. W Stuntz, *The Collapse of American Criminal Justice* (Cambridge: Harvard UP, 2013).

³⁵ Citing Adam Smith's original formulation of the 'invisible hand'. Cf M Fourcade, "Price and Prejudice: On Economics and the Enchantment (and Disenchantment) of Nature" in Aspers & Beckert, *The Worth of Goods* at p.49 suggesting that the American legal system has been "uniquely open" to economists.

³⁶ Brown, *Free Market Criminal Justice*, chs.2 & 3.

process of criminal justice being seen as if it were a market: it is organised around negotiation, the making of bargains, and the drive for efficiency and cost-reduction. This is exemplified by the contemporary American practice of plea-bargaining.³⁷ In the US, he contends, plea bargaining has developed in ways in which negotiation practices have been justified in terms of market norms: the process is party-driven, and regulation focuses on the enforcement of formal requirements relating to the voluntariness of the agreement rather than just outcomes. The plea bargain, ultimately, is viewed as a contract – an agreement which is mutually beneficial to each party – which, Brown suggests, grounds the normative appeal of the process.³⁸ However, this dependence on plea-bargaining – as a low cost, mutually beneficial, and therefore ‘efficient’, alternative to the trial – produces perverse effects. These include the increasing rates of prosecutions, rising imprisonment rates, wrongful convictions, and more broadly the enhancement of state power which undermine the rule of law as ‘bargains’ increasingly lead to substantively unjust outcomes. These are exacerbated under neo-liberalism as ‘market’ efficiency is treated as an end in itself without wider consideration of the ends that efficiency might serve, or the values that it displaces. Free market criminal justice is ultimately exploitative and unjust.

While much of Brown’s argument is specific to the development of criminal justice in the US, its broader significance lies in its critique of the ‘marketisation’ of criminal justice. While there are affinities between a certain understanding of the market, political liberalism and the rule of law, he argues that criminal justice values – of fairness or equal treatment – are in practice undermined by the spread of market thinking.³⁹ His argument thus suggests that there might be limits to the efficiency or utility of markets, and that institutions such as criminal law have a role to play in protecting individual liberty against the possibility of coercive or exploitative bargains.

³⁷ Brown, *Free Market Criminal Justice*, ch.4. This is compared to the practice in other jurisdictions where the court retains control over the process.

³⁸ Brown, *Free Market Criminal Justice*, p.99, pointing out that such ‘bargains’ are frequently coercive and produce oppressive sentences.

³⁹ See C Taylor, *Modern Social Imaginaries* (Durham, NC: Duke UP, 2004) p.71, suggesting that we see political society through a quasi-economic metaphor i.e. that liberalism sees the problem of politics as that of co-ordinating self-interested individuals and that this is somehow a collective good.

v) *Market as context*

I want, finally, to draw attention to some theories of criminal law where the market is seen as a kind of social context influencing the operation of the criminal law – often this is also where we find a particular kind of ‘market-critical’ criminal law. The focus here is usually on the specific impact of (neoliberal) economic policies, or the impact of economic developments on the use or enforcement of criminal law, rather than the more abstract understandings of the market discussed up to this point. This kind of market-critical work can be characterised in one of two ways.⁴⁰ First, there is work which looks explicitly at (usually financial) markets and crime. This kind of work often focuses on specific areas such as corporate fraud or on crimes which are committed by corporate actors or corporations in the course of their business – often contrasting its treatment to that of ‘ordinary’ or ‘street’ crime. This is also sometimes looked at under the heads of financial crime, or white-collar or corporate crime.⁴¹ Second, there is work which looks at the social impact of markets – specifically the impact of markets on social life and the way that the criminal law has been used either to protect those markets or to deal with the social consequences of market operations.⁴² This might take the form of the analysis of high imprisonment rates and the ways that the ‘prison-industrial complex’ reproduces itself, the ways that criminal law is used to police social exclusion, or even the creation of specific offences in response to particular social developments or the impact of marketisation.⁴³

⁴⁰ Cf. H Mannheim, *Criminal Justice and Social Reconstruction* (London: Routledge & Kegan Paul, 1946) p.83 on the distinction between economic crime and the economic causes of crime.

⁴¹ See e.g. S Platt, *Criminal Capital. How the Financial Industry Facilitates Crime* (London: Palgrave, 2015); N Ryder, *The Financial Crisis and White Collar Crime. The Perfect Storm?* (Edward Elgar, 2014); B Rider (ed), *Research Handbook on International Financial Crime* (Edward Elgar, 2015).

⁴² There is also important historical work exploring the impact of the emergent capitalist economy on property and criminal law. See e.g. D Hay et al (eds), *Albion’s Fatal Tree* (London: Allan Lane, 1975); EP Thompson, *Whigs and Hunters. The Origin of the Black Act* (Harmondsworth: Penguin, 1977).

⁴³ See e.g. M Alexander, *The New Jim Crow. Mass Incarceration in the Age of Colorblindness* (Revised edition)(New York: The New Press, 2012); B Harcourt, *The Illusion of Free Markets*; L Wacquant, *Punishing the Poor. The Neoliberal Government of Social Insecurity* (Durham NC: Duke UP, 2009); P Squires & J Lea,

These ostensibly different areas of work have some common themes. A central one is the focus on the corrosive social impact of markets. This is articulated in different ways. At its broadest the concern is with the impact of neoliberal economic policies on society – widening inequalities and creating new ghettos as certain social and ethnic groups are forced into increasingly precarious living conditions.⁴⁴ People are pushed into activities like drug dealing or petty crime as a response to economic exclusion; and repressive social policy such as mass incarceration is seen as a response to the problems of social order created by free markets.⁴⁵ Criminal law is seen as a labour market institution, criminalising those unable or unwilling to work in a neoliberal economy while providing ideological support for the idea of a ‘free’ market.⁴⁶ There is also a concern with impact of neoliberalism in terms of the ‘marketisation’ of society: introducing a short term profit and loss mentality into affective social relationships, breaking down other kinds of social bonds and moral values.⁴⁷ There is work which traces the impact of globalisation and global markets, particularly in the opportunities this creates for organised crime on the margins of legitimate markets.⁴⁸ Markets, from this perspective, are seen in terms of class, rather than individual relationships: they create and reinforce class relationships as the criminal law applies differently to financial elites and the working classes. The market on these accounts is a malign force, constantly growing and constantly making demands on society, and the criminal law

Criminalisation and Advanced Marginality: Critically Exploring the Work of Loic Wacquant (Bristol: Policy Press 2012); I Taylor, *Crime in Context. A Critical Criminology of Market Societies* (Cambridge: Polity, 1999).

⁴⁴ See esp. T Shelby, *Dark Ghettos. Injustice, Dissent and Reform* (Cambridge MA: Harvard UP, 2016) Pt.III.

⁴⁵ Harcourt, *The Illusion of Free Markets*; A de Giorgi, *Rethinking the Political Economy of Punishment. Perspectives on Post-Fordism and Penal Practices* (London: Routledge, 2006); N Lacey, *The Prisoner's Dilemma. Political Economy and Punishment in Contemporary Democracies* (Cambridge: Cambridge UP, 2011).

⁴⁶ See N Zatz, “Better than Jail: Social Policy in the Shadow of Racialized Mass Incarceration” (2021) 1 *Jnl of Law and Polit. Econ.* 212.

⁴⁷ See classically J Habermas, *The Theory of Communicative Action* (2 vols)(Cambridge: Polity, 1986) on the colonization of the lifeworld by system rationalities of bureaucracy and economy. This, in turn is reminiscent of Karl Marx’s theory of alienation.

⁴⁸ V Ruggiero, *Crime and Markets. Essays in Anti-Criminology* (Oxford, Oxford UP, 2000).

responds to and serves the needs of the market. Significantly, markets are seen, in different ways, as criminogenic. This may be direct, where the unregulated nature of markets is seen as encouraging participants to run unnecessary, and frequently criminal, risks with other people's money.⁴⁹ Or it may be indirect, as those who do not have access to markets, or who can only access illegitimate markets, engage in criminal conduct. But from this point of view, the market makes demands of the criminal law, but the criminal law has little, if any, control over the market.

III. Market and Moral Order

This brief survey has shown that, notwithstanding a general neglect of the market by criminal law theorists, there are areas where scholars have engaged in more piecemeal ways with the relationship between criminal law and markets. The problem, however, is that the work discussed in the last section is neither engaging with other work on markets and criminal law nor developing a framework for engaging with criminal law theory more generally. The challenge, then, is to identify and draw out common themes, if these in fact exist, and to connect these to larger debates about the market that will allow for the insights from discrete areas to develop into a more systematic engagement and critique.

The first point to note is that in spite of the fact that there seem to be different understandings of the market at play in these discussions – ranging from the abstract to the more concrete – the discussions are generally organised around positions in a well-established debate about whether the market is a liberating or a destructive force.⁵⁰ Thus, for some the market is seen as a civilising force, leading to liberty or freedom from constraint, while others see the market as a force that corrodes moral and social values and ways of life and argue that its scope must be limited. The former is the view of the market implicit in many of the arguments for decriminalisation of sex work or drugs, where the market stands for an idea of liberty: a person should be free to buy or sell, and so consume, certain goods. The core belief here is that markets liberate by challenging anachronistic or moralistic

⁴⁹ V Ruggiero, *Dirty Money. On Financial Delinquency* (Oxford: Oxford UP, 2017).

⁵⁰ The classic discussion is AO Hirschman, "Rival Interpretations of Market Society: Civilizing, Destructive or Feeble?" (1982) 20 *Jnl. of Economic Literature*, 1463-1484. See more recently M Fourcade & K Healy, "Moral Views of Market Society" (2007) 33 *Annu. Rev. Sociol.* 285-311.

barriers. They are freedom promoting, so far as individual economic actors can pursue their own choices, but do not guarantee any particular distributive outcome – and indeed to the extent that any government attempted to produce a particular set of outcomes this would interfere with individual choice.⁵¹ Markets are thus seen as contributing to freedom by allowing individuals equal opportunity to pursue their own ends or choices to the extent that they are not harming others. The role of the criminal law on this account is to protect the freedom of individuals to pursue their self-interest and, to the extent that this is done through the market, to ensure that conditions for the freedom of choice are maximized. This is also, to some extent, the position of those such as Becker, for whom the economic analysis of law, viewing social relations on the model of the market, is a way of cutting through moralistic understandings of crime which stand in the way of more socially efficient approach to the problem of crime.

From the latter perspective, the market and criminal law are seen as operating according to different, and conflicting, logics. The central feature of the market is its efficiency in the distribution of goods but the concern is that markets entrench existing social and economic inequalities and shape and distort the preferences of consumers.⁵² Certain political and social goods are, moreover, seen as liable to be corrupted by market exchange as the commodification of social goods from labour to the body undercuts human dignity.⁵³ Amongst these goods is criminal law, both in the sense that it should not be possible to use money to influence the outcomes of criminal trials and because the law itself is seen as resting on moral values which are independent of markets.⁵⁴ Criminal law, on this view, draws on and expresses a distinct moral order, which articulates values about persons which

⁵¹ Walzer, *Spheres of Justice*, p.21: “the market is radically pluralistic in its operations and its outcomes, infinitely sensitive to the meanings that individuals attach to goods.”

⁵² See Fourcade and Healy, “Moral Views of Market Society” pp.291-5, drawing on work by Marx, Veblen and others.

⁵³ Walzer, *Spheres of Justice*, chs.1 & 4 arguing that such things as public office and affective relations should be beyond markets. See also Sandel, *What Money Can't Buy*; K Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time* (1944)(Boston: Beacon Press, 1989) who argued that land, labour and money were “fictitious commodities” and so should not be capable of being bought and sold in markets.

⁵⁴ This is a variant of Brown’s argument about the impact of bargaining on criminal justice.

are non-instrumental.⁵⁵ This is the kind of understanding which runs through the literature on the limits of markets: the market should be kept within its proper sphere and the role of the criminal law is to maintain those boundaries. Sex, for example, should not be capable of being bought and sold because to permit this is to corrupt human dignity. Trafficking in persons or bodily organs should be ‘blocked’ because they do not respect the dignity of persons.⁵⁶ Criminal laws thus mark the limits of permissible market conduct (and legitimate markets) and play an important role as a bulwark against market encroachment on social life. Where such offences do potentially engage conduct which takes place in markets, they are conventionally analysed in terms of moral wrongdoing.⁵⁷ Thus, Green’s influential account of ‘white collar’ crime analysed offences such as insider dealing or corporate fraud in terms of foundational ‘moral’ categories of interpersonal wrongdoing, such as lying or cheating, rather than paying attention to any institutional features of markets which either made such conduct possible or gave it a distinctive character.⁵⁸ This opposition also shapes the more specific critique of neoliberalism, where there is a more direct challenge to the supposedly neutral qualities of the market.⁵⁹ It is not the market in general which is seen as criminogenic but the creation of particular kinds of financial markets or the commodification of social relations. The market in neoliberal society is seen as exploitative, coercive and corrupting— and criminal law itself can be corrupted if it is used to protect the sectional interests of market users.

As Fourcade and Healy have noted, the relationship between market and moral order (and by extension the criminal law) in this debate is generally seen in terms of the influence of the market on social and moral values and institutions: markets can either do a tremendous

⁵⁵ See e.g. Harel’s critique of Becker’s radically instrumentalist version of criminal law (“Criminal Law as an Efficiency Enhancing Device” at pp.314-6).

⁵⁶ See e.g. Satz, *Why Some Things Should not be For Sale*, ch.4.

⁵⁷ By which I mean that not all thefts or frauds are necessarily for motives of economic profit or take places in social contexts that we would regard as markets.

⁵⁸ SP Green, *Lying, Cheating and Stealing. A Moral Theory of White-Collar Crime* (Oxford: Oxford UP, 2007). Cf. V Chiao, *Criminal Law in the Age of the Administrative State* (Oxford: Oxford UP, 2018) p.144 criticizing this kind of approach.

⁵⁹ See e.g. the discussion of Brown, *Free Market Criminal Justice*, supra

amount of good, or a terrible amount of harm.⁶⁰ However, they contend that it is not possible to draw such a clear distinction between the market and moral order as markets are “intensely moralized, and moralizing, entities.”⁶¹ That is to say, they argue both that market conduct is always already shaped by, and embedded in understandings of moral (and immoral) conduct, and that the development of markets shapes our understandings of what it means to act in a moral way. The same point can be made about the influence of the market on the criminal law: this is not uni-directional – for good or ill – as the criminal law has shaped, and been shaped by, the market and forms of market conduct. We can see this by looking more closely at some of the work reviewed in the last section where it engages more closely with institutional features of markets and where the focus is less on the value of the market in an abstract sense than how markets do (or do not) work. An example of this is work which is focused on the way that particular objects (or people) get sold or ‘trafficked’. This looks at the way that markets are constituted and regulated – the labour market or the market for drugs, or even financial markets – recognising that markets are constituted in different ways and operate subject to different rules and serve different social purposes. The concern is then with the way that a particular market may be characterised by highly asymmetric knowledge or be set up to exploit the vulnerabilities of one of the parties.⁶² The focus is on concepts such as exploitation or cheating which have both a broad moral content but are also shaped by understandings of the acceptability of particular forms of conduct within specific market contexts.⁶³ The concern is thus the subject matter and practices of the market and the role that criminal law might play in constituting and regulating these practices, rather than broader moral questions about the impact of markets on social life.

⁶⁰ Fourcade & Healy, “Moral Views of Market Society” p.286. As they point out, it is much rarer for participants in the debate to reflect on the influence of moral order on the market.

⁶¹ Ibid.

⁶² See e.g. Satz, *Why Some Things Should not be for Sale*, ch.4 (Noxious Markets); R Kanbur, “On Obnoxious Markets” (<https://www.semanticscholar.org/paper/On-Obnoxious-Markets-Kanbur/a501c03c5248470995175508e8f9d6be39b4c852>).

⁶³ For a general discussion of exploitation see A Wertheimer, *Exploitation* (Princeton: Princeton UP, 1996). For a discussion of exploitation in relation to trafficking or human slavery see essays in Haverkamp et al., *What’s Wrong with Human Trafficking?*

This point can also be illustrated by looking at the example of market manipulation, which shows how an abstract – and moralised – model of market conduct has been used to shape a criminal law response.⁶⁴ As I noted above, the economic analysis of law is based on an idealised conception of the market in which transaction costs are assumed to be minimal. This allows for the representation of the market in terms of mathematical formulae and graphs which plot points on marginal cost curves.⁶⁵ The market is conceived of as a device which co-ordinates behaviour through price signals. This kind of abstract understanding, when linked more directly to theories about the operation of financial markets, shapes the understanding of concepts such as market integrity which is at the heart of the crimes of market manipulation and abuse. The dominant model is what is known as the ‘efficient capital market hypothesis’ (ECMH) which was developed by the economist Eugene Fama – the assumptions of which were built into the forms of financial modelling that then shaped developing financial markets.⁶⁶ This theory postulates that prices in a market always fully reflect all available information. The work of profit-seeking investors seeking out information about past and future performance of stocks and securities is instantaneously ‘priced in’ to the actual price in the market, meaning that the market always reflects ‘true’ value because of the assumption of perfect information.⁶⁷ The hypothesis, thus, counterfactually, builds in the assumption of market efficiency, even in the face of evidence of discrepancies between price and underlying value – most notably in the financial crash of 2008. The market ‘knows’ by

⁶⁴ D Mackenzie, *An Engine, Not a Camera: How Financial Models Shape Markets* (Cambridge MA: MIT Press, 2006) pp.57-105; D Mackenzie, “Is Economics Performative? Option Theory and the Construction of Derivatives Markets” (2006) 28 *Journal of the History of Economic Thought*, 29-55.

⁶⁵ Watson, *The Market*, ch.4.

⁶⁶ Fama was a member of the Chicago School. See E Fama, “Efficient Capital Markets: A Review of Theory and Empirical Work” (1970) 25 *Jnl. of Finance* 383-417. For critical discussion see Deakin, “The Evolution of Theory and Method” pp.16-22; P Mirowski, *Never Let a Serious Crisis Go to Waste. How Neoliberalism Survived the Financial Meltdown* (London: Verso, 2014).

⁶⁷ This has subsequently been developed in stronger and weaker variants, depending on whether prices include only public information or all information, whether public or private.

processing information better and faster than any individual participant.⁶⁸ The market on this view does not correspond (at least initially) to any actual existing market but is a model which has been used to build markets, with discrepancies from the ‘expected’ behaviour of the market then being taken as *ex post facto* evidence of possible misconduct. Criminal law’s function here is to track and reinforce the market model, ultimately creating a newly moralised account of market integrity.

It is important to note that there are crucial differences between the use of an abstract model of the market in the specific example of market manipulation in financial markets, and the argument pressed by those, such as Becker, that the market can operate as a model for all social conduct. In the specific case of market manipulation, the model is being used to construct an account of the operation of a limited, ‘regulated’, market which is then being reinforced by the use of the criminal law. Becker’s claim is that this might be reproduced at the level of society to model the operation of the criminal law but not as a means of institutionalising a certain form of market discipline. Becker rather proposed using his model as a means of ‘testing’ governmental action in relation to crime: was it efficient? might it be dealt with more effectively (cheaply) by other mechanisms?⁶⁹ It is worth noting, though, that other scholars within the law and economics movement have defended more ambiguous positions. Posner’s account of criminal law as ‘market-bypassing’ conduct, for example, sees the function of criminal law as being to set penalties which would make it more efficient to transfer property through the market.⁷⁰ The structure of this argument, though, proceeds on

⁶⁸ See P Mirowski & E Nik-Khah, *The Knowledge We Have Lost in Information: The History of Information in Modern Economics* (Oxford: Oxford UP, 2017) p.70 (emphasis in original): “In this version, not only is much human knowledge unable to be retrieved from within by the individual in question but, indeed, there exists a species of *knowledge not “known” by any individual human being at all.*”

⁶⁹ See M Foucault, *The Birth of Biopolitics* (Basingstoke, Palgrave, 2008) at pp.246-7.

⁷⁰ Richard A. Posner, “An Economic Theory of the Criminal Law,” (1985) 85 *Columbia Law Review* 1193 at p.1195: “The major function of criminal law in a capitalist society is to prevent people from bypassing the system of voluntary, compensated exchange – the ‘market’, explicit or implicit – in situations where, because transaction costs are low, the market is a more efficient method of allocating resources than forced exchange” in; A Klevorick, “The Economic Analysis of Crime” in JR Pennock & JW Chapman (eds), *Criminal Justice: Nomos XXVII* (1985).

the basis that there are already independent norms, in the form of the criminal law, the purpose of which is to deter non-efficient exchanges.⁷¹ Thus, while the function of criminal law norms is to promote economic efficiency, the content of the norms and the distinctive features of criminal punishment derive from pre-existing institutions of contract and property which the criminal law should protect.⁷² Furthermore, in the course of his discussion Posner goes on to argue, on the one hand, that certain ostensibly ‘efficient’ monetary exchanges – of drugs, sex, pornography – are properly criminal and, on the other, that some categories of ‘victimless’ crimes cannot be dealt with by tort law, even where that might appear to be the most efficient form of remedy.⁷³ This is defended because market efficiency is not capable of dealing with problems of social order, or inequalities arising from the ability to pay compensation or fines. These purportedly radical accounts, then, have a remarkably similar structure to more conventional understandings of the separation between markets and moral order and their capacity to influence or shape each other. There is a shared understanding of the autonomous self-governing individual as a rational utility maximiser but, on these accounts, this is accompanied by a recognition that this understanding of the rational or responsible individual is institutionalised in different ways – that is to say that prices and sanctions work in different ways. This assumes that some norms and their accompanying sanctions (punishment) have a different character from the regulatory pricing structure of the market, though it does not seek to explain the difference. However, in the references to the role that criminal law plays in supporting the institutions of contract and property, there are indications of a more complex, and mutually constitutive, relation between criminal law and markets. How we think about what is proper for the criminal law to regulate is profoundly shaped by our understandings of the proper realm of the market, and vice versa.

⁷¹ “In classical economic theory, the criminal law is seen as a way to induce individuals to comply with the relevant rules of transfer, that is, to adhere to the property-rule liability rule distinction, or to pursue market solutions to externality problems where they are available and feasible.” J Coleman, *Markets, Moral and the Law* (Cambridge: Cambridge UP, 1988) p.157.

⁷² Cf also R Cooter, “Prices and Sanctions” (1984) 84 *Columbia LR* 1523-60 which in distinguishing between sanctions and prices relies on the assumption that there is realm of conduct (crime?) for which prices are not appropriate – that is that the market cannot be a model for the whole of society.

⁷³ “Economic Theory” pp.1199-1201.

IV. Theorising the Relations between Markets and Criminal Law

Modern theorists of the market, from Adam Smith onwards, have seen markets not only as institutions for the exchange of goods and services, but also as a form of sociality – a means by which the conduct of individuals might be co-ordinated in increasingly socially complex societies.⁷⁴ Earlier theorists had been concerned that the pursuit of individual self-interest, through the market, might lead to social disintegration.⁷⁵ Smith, by contrast, argued that the pursuit of individual self-interest served the public good, as “by pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.”⁷⁶ In other words, self-interest pursued through the mechanism of the market might serve a social function. The market can co-ordinate individual preferences as individuals find buyers and sellers for their goods and services. Crucially, many of these transactions might be with strangers or at a geographical distance but the market nonetheless ensures that this sort of contact is patterned and predictable.⁷⁷ In this way the market manages the complex mutual interdependencies produced by an increasingly sophisticated division of labour, while still maximising and distributing national wealth and security. The market for Smith and his successors thus enabled a certain kind of freedom – interdependent individuals could pursue their own interests without being subject to any over-arching central control.⁷⁸ This, moreover, has been seen as a kind of underlying objective order.⁷⁹ For Smith the market was a form of natural or providential order, as expressed in the formulation of the “invisible

⁷⁴ Taylor, *Modern Social Imaginaries*, ch.5.

⁷⁵ For discussion of earlier arguments see AO Hirschman, *The Passions and the Interests. Political Arguments for Capitalism Before its Triumph* (Princeton NJ: Princeton Classics, 2013).

⁷⁶ A Smith, *The Wealth of Nations* (Harmondsworth: Penguin, 1999) IV, ii, para.9 (p.32).

⁷⁷ For further discussion see L Farmer, “Civil Order, Markets and the Intelligibility of the Criminal Law” (2020)

70 *UTLJ* 123-40; L Farmer, *Making the Modern Criminal Law. Criminalization and Civil Order* (Cambridge, Cambridge UP, 2016) chs.1 & 2.

⁷⁸ For a more recent account, see Hayek, *Law, Legislation and Liberty*, ch.10.

⁷⁹ For discussion see C Smith, *Adam Smith’s Political Philosophy. The Invisible Hand and Spontaneous Order* (Routledge, 2005)

hand”.⁸⁰ For later theorists of the free market, such as Hayek, it was described as a spontaneous order which “results from the individual elements adapting themselves to circumstances which directly affect only some of them, and which in their totality need not be known to anyone.”⁸¹ The market, as an “interlocking set of activities of production, exchange, and consumption” has thus come to be seen as a system which has its own internal laws and its own dynamic.⁸²

There are, however, two further important points to note. First, the market is not the only form of sociality.⁸³ Markets perform an essential function in co-ordinating economic conduct, but they exist alongside, and in relation with, other types of social ordering, and the securing of civil order depends on the relationships between different areas of social life. A key distinction is from forms of political ordering, in and through the state, which are organised around an idea of collective agency, but it is also important to note forms of affective relationships in families, friendship, community and so on.⁸⁴ This much is familiar from the preceding discussion, where the concern was with the impact of markets and market logic on other spheres of social life understood as having their own distinct principles of internal ordering.⁸⁵ However, as we saw, these discussions have tended to reify the boundaries between markets and other forms of sociality, whereas in practice relations are

⁸⁰ See Herzog, *Inventing the Market*, p.33 pointing to the two slightly different senses in which Smith used the term: the coincidence of private interest and common good in the *Wealth of Nations*; and showing how there might be distribution from rich to poor in the *Theory of Moral Sentiments*.

⁸¹ *Law, Legislation and Liberty*, p.39. See generally chs.1 (on spontaneous order in general) & 10 (on the market as a form of spontaneous order).

⁸² Taylor, *Modern Social Imaginaries*, p.76.

⁸³ Taylor, *Modern Social Imaginaries*, ch.1 argues that in modernity our social imaginary has three distinct, but interlocking, elements (the market economy, the public sphere and the self-governing people), and that these are what allow us to differentiate it from earlier, pre-modern understandings of society. See also Herzog, *Inventing the Market*, p.10: “Both Smith and Hegel see the market as part of a differentiated society in which different logics of agency belong to different social spheres.”

⁸⁴ “A self-regulating market demands nothing less than the institutional separation of society into an economic and a political sphere.” (Polanyi, *Great Transformation*, p.74).

⁸⁵ See in particular, Walzer, *Spheres of Justice*, passim.

more fluid. This is in part because, as Granovetter has argued, the market is embedded in social relations: market relations are ‘orderly’ only because of the existence of social relationships of trust between actors who know and rely on each other.⁸⁶ The market, that is to say, is not a sphere of pure economic calculation but is embedded in and draws on other forms of sociality and economic actors engage in conduct which establishes and signals their trustworthiness to strangers.⁸⁷ From a similar perspective, it has been argued that the boundaries between the market and other areas of social life shift over time as the meanings of certain practices have been contested. This was shown in the classic study by Zelizer of the development of a market for life insurance in the US, in which she demonstrated how concerns about ‘gambling’ on the death of the policy holder (or the commodification of death) were reshaped by the argument that life insurance was a responsible form of investment for the future.⁸⁸ The wider point here is that just as market logics might influence other forms of sociality, so too these forms of sociality can shape and influence the market. The boundaries between the market and other spheres of social life are not fixed but depend on wider social and cultural understandings about what can be bought and sold and the meaning of certain kinds of transactions – and are continually being negotiated.

This is linked to the second point, which is the recognition that the market needs to be regulated, both to ensure its own operation and, just as importantly, in its relationship to the

⁸⁶ M Granovetter, “Economic Action and Social Structure: The Problem of Embeddedness” (1985) 91 *Am. Jnl. of Sociology* 481-510. See also general discussion in Fourcade & Healey, “Moral Views of Market Society” pp.299-305. See also J Vernon, *Distant Strangers. How Britain Became Modern* (Berkeley, CA: Univ of California Press, 2014) ch.5.

⁸⁷ The economic historian, Joel Mokyr, has characterised this as the development of the “civil economy” making it possible to trade with strangers in the absence of strong mechanisms of central enforcement. J Mokyr, *The Enlightened Economy. Britain and the Industrial Revolution 1700-1850* (London: Penguin, 2009) ch.16. Cf. A Riles, “The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State” (2008) 56 *Am. Jnl of Comp. Law* 605-30 arguing that participants act as if there is a collective understanding, which operates as a substitute for trust.

⁸⁸ V Zelizer, *Morals and Markets. The Development of Life Insurance in the United States* (New York: Columbia UP, 1979).

wider civil order.⁸⁹ The focus here is often on the needs of the market, and specifically on the role that institutions such as law and government play in constituting the framework within which legitimate economic activity is carried out. Theorists from Smith to Hayek have recognised that even if the market is a natural or spontaneous order, the security of market transactions is nonetheless dependent on laws which protect private property, and which guarantee the enforceability of contracts.⁹⁰ Laws from this perspective are understood as a system of general, purpose-independent, rules which maximise individual freedom by allowing each individual to pursue their own ends. Such laws structure the natural or spontaneous order of the market, stabilising the expectations of participants and guaranteeing individual freedom.⁹¹ However, it is equally important to look at the institutions and rules which manage the relationships between the market and other areas of social and political life. This kind of regulation may take different forms – from seeking to break up monopolies or concentrations of power, to protecting certain groups of economic actors (such as consumers or workers), or taxing market participants in order to fund common goods, such as infrastructure and education. What such initiatives share is the aim of addressing the social dimensions of market conduct in order to maintain the broader legitimacy of the market in society as well as the legitimacy of the state and political actors. The market is thus a form of sociality, but it is embedded in a wider civil order which is secured by the state and law – and this is not a matter of a one-off ‘constitution’ of the market, but the market order is secured through a continual process of adjustments.

This is a necessarily brief overview, but it allows us to address the potential relationships between criminal law and the market in a more systematic way. The market from this perspective is not a self-regulating, abstract system, but is part of a more complex

⁸⁹ “At best, the market’s contribution to the creation of social order is strictly contingent upon its being firmly embedded in constraints, restrictions, regulations, limitations, status rights, and informal social norms imposed upon it from outside.” C Offe, “Civil society and social order: demarcating and combining market, state and community” (2000) 41 *European Jnl. of Sociology* 71-94 at p.89.

⁹⁰ A Smith, *Lectures on Jurisprudence* (ed. RL Meek, DD Raphael & PG Stein)(Liberty Fund: Indianapolis, 1982); Hayek, *Law, Legislation and Liberty*, chs.5 & 10; Smith, *Adam Smith’s Political Philosophy*, chs.4 & 8.

⁹¹ It is important for theorists such as Hayek that laws did not interfere with outcomes, or the distribution of wealth, but only established the framework within which the market could operate (*Law, Legislation and Liberty*, ch.2).

civil order which the criminal law plays a role in securing. Rather than the idea of an opposition between criminal law and markets, we can use the above discussion to think more systematically about the different ways that the criminal law contributes to the ordering of markets and to the maintenance of relationships between markets and other areas of social life. It is possible to identify four different ‘types’ of criminal law which are market-related. These might, in practice, overlap with each other, but I have distinguished them here in order to point to different functions which are played by criminal law. In addition, as we shall see, while some of these laws make up what can be described as a distinct body of ‘market’ criminal law, others are not necessarily discontinuous with, or distinct from, the criminal law more generally, although they may have specific applications in the context of market conduct.⁹²

a) Criminal laws which are ‘*constitutive*’, in the sense that they play a role in guaranteeing the order of the market. At the most basic level, these are laws relating to the security of property (against theft) and contract (against fraud).⁹³ These are the criminal laws that are seen as fundamental to securing a stable social order in which individuals can pursue their own interests – and not only in relation to market transactions. In this category there are also the laws relating to the limits of markets: what can be bought and sold, permissible types of transactions, and who can (or cannot) contract. The constitution of markets in drugs or bodily organs (or indeed any other commodity) is not abstract, but depends on understandings of what can be commodified, and the conditions under which it might be bought or sold – and these laws are enforced by means of the criminal law. Finally, in this context we should also note criminal laws which seek to protect the integrity of markets against manipulation. Here, as we noted above, criminal law is constitutive of the very idea of the market: the market depends on criminal laws to ensure its very operation.⁹⁴

⁹² These are not necessarily mutually exclusive but are an initial attempt to distinguish between different types of rules. Cf. Alldridge, *Relocating Criminal Law*, ch.6 identifying crimes which aim to guaranteeing the unit of exchange, crimes which are aimed at preventing the manipulation and exploitation of markets, crimes which regulate the borders of markets, and crimes directed at preventing the commodification of specific areas of human activity.

⁹³ JS Mill, *Principles of Political Economy* (7th edn.)(London: Longmans, Green and Co., 1909)

(https://oll.libertyfund.org/titles/101#Mill_0199_1878).

⁹⁴ *Supra* at p.000.

b) Criminal laws which deal more specifically with forms of *market-generated wrongdoing* – that is to say, conduct which arises in the specific social setting of markets. Examples of this would be criminal laws against cartels, the wrongness of which can only be understood in terms of a prior understanding of ‘proper’ market conduct or how the market ought to function.⁹⁵ While in criminal law terms this might look like, say, a form of conspiracy, the specific kind of wrongdoing is understood in terms of the distortion of price or the information asymmetries which the cartel creates and exploits. The same can be said about certain kinds of fraud, which are less about the traditional idea of the confidence man who deceives another individual than the exploitation of institutional structures.⁹⁶ That is to say that the fraudster aims to conceal fraudulent conduct by making it look like ‘normal’ transactions and exploiting inside knowledge of institutional systems of control. Such crimes are only made possible by the existence of market institutions and the vulnerabilities which are said to exist in all such competitive markets.⁹⁷ This might also be way of characterising a crime such as money-laundering, the ‘wrong’ of which consists in seeking to exploit the market to conceal money derived from criminal activities.⁹⁸ It is conduct which is made possible because of the operation and the vulnerabilities of the market system.

c) Criminal laws which are directed at *embedding trust and standards of conduct*. As we noted above, market conduct is embedded in social relations which help to ensure the stability and predictability of the expectations of participants and which may help to inhibit

⁹⁵ M Furse, *The Criminal Law of Competition in the UK and in the US* (Edward Elgar, 2012) chs.1 & 2; R Williams, “Cartels in the Criminal Law Landscape” in C Beaton-Wells & A Ezrachi, *Criminalising Cartels. Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011).

⁹⁶ On this see D Davies, *Lying For Money. How Legendary Frauds Reveal the Workings of Our World* (London: Profile Books, 2018) ch.1 and ch.6 on so-called ‘control fraud’; EB Harrington, “The Sociology of Financial Fraud” in K Knorr Cetina & A Preda, *The Oxford Handbook of the Sociology of Finance* (Oxford: Oxford UP, 2012).

⁹⁷ GA Akerlof & RJ Shiller, *Phishing for Phools. The Economics of Manipulation and Deception* (Princeton: Princeton UP, 2015) p.166.

⁹⁸ P Alldridge, “Money Laundering and Globalisation” (2008) *Jnl of Law & Soc* 437-63. Cf. SP Garvey, “Was Ellen Wronged?” (2013) 7 *Criminal Law and Philosophy* 185-216 for an account of the difficulties of conceptualizing money laundering within a traditional approach to criminal law theory.

malfaisance.⁹⁹ However, there are types of criminal law which have developed to address the disembedding of economic relations from personal relations of trust.¹⁰⁰ These are laws which, for example, criminalise the forging of currency, the use of false weights and measures or the sale of adulterated food. Such laws aim at standardising currency or weights and measures or food quality so that individual consumers or purchasers do not need to check each individual sale or assess the trustworthiness of the person they are dealing with. As Vernon has argued, in the modernisation of the market, such laws took the emphasis away from who we were dealing with and placed it instead on standardised practices: individual trust is replaced by systemic trust.¹⁰¹ This type of law criminalises conduct which seeks to undermine the trustworthiness or reliability of the system.

d) Criminal laws which deal with ‘*externalities*’ of market transactions. The term ‘externalities’ is one which is used by economists to describe costs which are not reflected in the price of a particular transaction, which would be borne by the wider community.¹⁰² A typical example would be pollution caused by a manufacturing process, and this is also typically conduct that is criminalised both to deter polluters and to encourage them to internalise the cost. However, the term externality might be understood in a wider sense as capturing the role that the criminal law plays in dealing with certain social effects of market conduct, that is to say the securing of civil order more generally. Criminal law here is not merely regulating either civil society or the market, but the relations between them, and both the legitimacy of the criminal law and of the market will depend on perceptions of the fairness of the distribution of these social costs. This term is thus intended to capture the range of ways in which the criminal law is used to respond to the problems of order created by markets. The general point here is that markets are not self-regulating and independent of the criminal law but are part of the wider civil order. As such, we should see criminal laws

⁹⁹ See Granovetter, “Economic Action and Social Structure”, *supra*.

¹⁰⁰ See now E Kadens, “Cheating Pays” (2019) 119 *Columbia LR* 527 arguing that ‘small’ cheats were able to exploit others and that the market did not always ‘discipline’ participants as economists had predicted. It is important to note that this is not only done through criminal law and includes much of contract or commercial law which are designed to ensure the enforceability of commercial relationships even where trust relations are weak. See S Shapiro, “The Social Control of Interpersonal Trust” (1987) 93 *Am Jnl Sociology*, 623-58.

¹⁰¹ Vernon, *Distant Strangers*, p.111.

¹⁰² Campbell, “The Market in the Theory of Regulation” p.6.

which regulate and respond to market conduct as normal, rather than as exceptional. In this next section I want finally to turn to the question of how we might now use this approach to think about developing a ‘market-critical’ criminal law, that is to say a criminal law theory which engages in a more systematic way with the market.

V. Towards a Market-Critical Criminal Law

Criminal law theory has recently taken a ‘political’ turn, challenging the approach which proceeds on the basis that criminal law should primarily be understood through the lens of moral philosophy.¹⁰³ In its place it is argued that the criminal law is an irreducibly political institution, shaped by social and economic interest groups and used by states and governments to enforce social inequalities. It is consequently argued that this has implications for criminal law theory which must reflect critically on some of the foundational distinctions that shape and underpin the discipline of criminal law – looking at the role that concepts such as responsibility or property offences play in reflecting the interests of certain social groups or constructing different versions of order.¹⁰⁴ I would argue that reflecting on the significance of the market for criminal law theory should be fundamental to this project. As I argued at the start, the market is a central institution in contemporary societies, understood both as a way of distributing goods and as a limit to certain kinds of public or state action, and political and social theories engage with the place of the market in society. Criminal law is a fundamental institution of the political arrangement of market society, but there is little engagement from with criminal law theory with the questions of the role that criminal law plays in sustaining markets or with the influence of the market on understandings of the proper scope or role of the criminal law. A political understanding of the criminal law must engage with these issues for the market is not only part of the social context of the criminal law, but also a key part of the theoretical context. In developing a

¹⁰³ See C Burchard, V Chiao, R Lorca & J Wilenmann, “Framing the Political Turn” (m/s). See also papers in (2020) *UTLJ Supplement (Criminal Law Theory)* Vol. 70, Supplement 1. Cf. “Criminal law is a species of political and moral philosophy”: G Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown & Co, 1978), p.xix.

¹⁰⁴ N Lacey, *In Search of Criminal Responsibility. Ideas, Interests and Institutions* (Oxford: Oxford UP, 2016); Farmer, *Making the Modern Criminal Law*.

market-critical criminal law theory, then, I would argue that there are four key areas which need to be addressed.

First, it is important to address the question of how modern criminal law theory has been shaped by the market. I have argued in this paper that mainstream criminal law theory has tended to take the presence of the market for granted and has not really engaged with the question of its significance for criminal law theory's understanding of the kind of society that it seeks to regulate – and I have shown how it is possible to build on some existing work to approach this issue in a more systematic way. In mainstream criminal law theory questions about the proper scope of the criminal law are concerned in large part with substantive norms: what kind of conduct is wrongful or harmful in the necessary degree and should be prohibited by the criminal law. This, though, is treated as a matter of the internal logic of the criminal law – identifying the principle or principles that might define and limit the criminal law. This process is often further structured by the assumption that the criminal law is primarily concerned with forms of interpersonal wrongdoing – conduct that takes place in public or in intimate spheres, but not in the 'private' space of the market. The significance of this is not only that it leads to a neglect of certain crimes, as not 'proper' criminal law, but also that the focus on certain areas does not reflect on the way that our understanding of the proper scope of the criminal law is, at least in part, defined by understandings of the boundaries of the self-regulating market.

A key challenge then for criminal law theory is to engage with the kind of work on markets that I have identified and to integrate these accounts into more mainstream theoretical accounts. This is in part a matter of engaging with the normative significance of 'market crimes' and integrating them into criminal law theory. This requires that we develop and explore the kinds of general themes linking criminal law and institutional features of markets that I identified in the last section as ways of connecting up disparate areas of work. In addition, though, it is important that we give the market a more central place in criminal law theory. When theorists make claims about criminal law as part of a liberal democratic society, this must explicitly acknowledge the extent to which the market is seen as part of that society and explore the relationships between the organisation of economic institutions and

the scope of the criminal law.¹⁰⁵ At its broadest this can even be seen as raising questions of citizenship and sovereignty, as our understanding of the governability of the market is a question of the limits of sovereign power. Understanding the criminal law as a body of public law requires us to think in a more systematic way about the extent and limits of that public power. The main point is that the market is central to how we think of civil order – and that it plays a role in shaping the scope of the criminal law without necessarily being theorised (and vice versa). The challenge then for criminal law theory is that of making more visible and reflecting on some of these choices and assumptions and the way that they have shaped its understanding of the proper scope of the criminal law.

The second area follows from, and is related to, this point. Following the suggestion of Peter Alldridge I would argue that an important step towards taking market crimes more seriously would be to think about the market as an interest to be protected by the criminal law.¹⁰⁶ Criminal law theory is organized around the interests that are to be protected by the criminal law, but these are usually understood in terms of individual interests (in the person, sexual autonomy, property and so on).¹⁰⁷ Treating the market as a distinct interest to be protected by the criminal law would, as Alldridge has argued, provide the opportunity to think more systematically about the range of different crimes related to markets, increasing their visibility and making it easier to think about them in more conventional theoretical terms. However, it would also offer the opportunity to engage with some larger questions about the value of markets and their place in our society.

Criminal law is concerned with public wrongs – that is to say wrongs which engage with or concern the community as a community.¹⁰⁸ Market transactions are usually seen as a matter of private interest (and private law), but recognizing that certain market conduct is a

¹⁰⁵ See e.g. N Lacey, *The Prisoners' Dilemma. Political Economy and Punishment in Contemporary Democracies* (Cambridge: Cambridge UP, 2008); N Lacey, "The Rule of Law and the Political Economy of Criminalisation: An Agenda for Research" (2013) 15 *Punishment & Society* 349-66.

¹⁰⁶ See Alldridge, *Relocating Criminal Law*, ch.6.

¹⁰⁷ For discussion of the structure of criminal law theory see Farmer, *Making the Modern Criminal Law*, ch.1. There are other collective interests protected by criminal law e.g. public order, the environment etc. There is some discussion of this in J Horder, *Ashworth's Principles of Criminal Law* (9th edn)(Oxford: Oxford UP, 2019).

¹⁰⁸ See RA Duff, *The Realm of Criminal Law* (Oxford: Oxford UP, 2018) ch.2.

matter of public wrong, whether that be in terms of the serious financial consequences or the types of conduct, is to make explicit the ways in which certain forms of private conduct are a matter of wider public concern and the ways that the market conduct of others has an impact on our collective life. Seeing the market as an interest to be protected then would require articulating what we are protecting and why: looking at features such as the value of markets for society or the distinction between good and bad markets. This can build on the existing work which discusses the boundaries between licit and illicit markets, and how we might draw the boundaries between them. It would require that we make more explicit what we see as valuable in functioning markets and how exactly the criminal law might help to protect values such competition or market integrity against forms of manipulation or exploitation. And this would also require that we engage with the question of how we might best protect against such misconduct. Here there are a range of important questions from ones which are internal to criminal law, such as how particular offences might be formulated or the forms of liability that are appropriate as a criminal law which is primarily focused on individuals and isolated incidents seeks to respond to the conduct of corporations and extended sequences of transactions.¹⁰⁹ There are also wider issues such as the relationship between criminal law and ‘regulation’ or regulatory offences, or indeed how areas of private law might interact with criminal law.¹¹⁰ Here it is necessary to reflect on questions of how and when it is appropriate to resort to criminal law and, indeed, whether criminal law might be effective in certain situations.

Third, a market-critical criminal law must be attentive to the institutional dimensions of markets. A key part of the argument that I have made in this paper is that if we are to go beyond positions which simply see an opposition between markets and moral order or markets and criminal law it is necessary to look at the specific ways in which criminal law can moralise markets – and that markets can reshape our understanding of what might be properly criminalised. We have seen this, for example, in the crime of market manipulation

¹⁰⁹ See e.g. the discussion in G Lynch, “The Role of Criminal Law in Policing Corporate Misconduct” (1997) 60 *Law and Contemporary Problems* 23-65; J Coffee, *Corporate Crime and Punishment. The Crisis of Underenforcement* (Oakland, CA: Berrett-Koehler Publishers, 2020).

¹¹⁰ See e.g. Campbell, “The Market in the Theory of Regulation”; J Black, “Regulating Financial Markets”; N Moloney et al, “Introduction” in N Moloney et al (eds), *The Oxford Handbook of Financial Regulation* (Oxford: Oxford UP, 2015).

and the concept of market integrity on which it is based where the model of the market is being used to try and establish a moralised concept of ‘market integrity’. Likewise, as I have argued, certain kinds of wrongdoing (‘control’ frauds, insider dealing, money laundering etc.) are generated by markets themselves, and so in thinking about these crimes there is little prospect of access to ‘natural’ moral categories to understand or classify conduct. The moral understandings of the wrongdoing depend on and are shaped by changing understandings of permissible conduct in that market situation.¹¹¹ Finally, a market-critical criminal law of this kind can open out to theories of political economy. This means not only exploring the political uses of the criminal law, and the interests that it protects, or the political and economic context in which the law is enforced, but the more systematic linkages between states, laws, markets and systems of governance.¹¹² This can build on existing work on the political economy of critical criminal law, by integrating understandings of the market into criminal law theory and addressing the role that theories of political economy shaped thought about the role of government and the criminal law.¹¹³

VI. Conclusion

I began this paper with the limited aim of mapping some of the different ways in which criminal law theory makes reference to the market and to ask whether there is something that these different senses and usages might have in common. At the same time, I have asked the more ambitious question of how we might begin to think more systematically and critically about the place of the market in criminal law theory. And in doing this I have identified an agenda for research for a new kind of ‘market-critical’ criminal law which is not only narrowly focused on so-called ‘market’ crimes, but which engages in a deeper way with how

¹¹¹ It is worth noting here that some recent work on the limits of the market and markets for drugs has made efforts to engage with economic literature. See e.g. Satz, *Why Some Things Should Not Be For Sale*; Seddon, “Markets, Regulation and Drug Law Reform”.

¹¹² N Fligstein & L Dauter, “The Sociology of Markets” (2007) 33 *Annu. Rev. Sociol.* 105–28 at pp.107-8.

¹¹³ See this discussion in L Farmer, “Responsibility, Criminalisation and Political Economy” in I Solanke (ed.), *On Crime, Society, and Responsibility in the work of Nicola Lacey* (Oxford: Oxford UP, forthcoming 2021). See also N Lacey, “The Rule of Law and the Political Economy of Criminalisation: An Agenda for Research” (2013) 15 *Punishment & Society* 349-66.

the concept of the market shapes theory. All too often, as we have seen, the understanding of the role of criminal law has been limited by the belief that these are separate social spheres and that criminal law is at most concerned with boundary work – or even that criminal law should resist engaging with the market for fear that it might be reduced to a kind of instrumental rationality. In this paper I have argued that rather than accepting the division of labour that we are presented with we need also to challenge and explore it. This, of course, is only a first step and there are numerous other important issues which have not even been touched on here, from corporate crime to the globalisation of markets to the impacts of technology. What I have tried to show, however, is the centrality and importance of the concept of the market to criminal law theory.