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CIVIL ORDER, MARKETS, AND THE INTELLIGIBILITY OF THE CRIMINAL LAW†

This article explores the meaning of the term 'civil order' by asking what it means to claim that criminal law is only 'intelligible' from the perspective of civil order. In Part II, I examine different possible meanings of the term intelligibility. In Part III, I go on to look at ways of understanding the term 'civil order,' arguing that it must be seen primarily as a historically situated question – that is to say, both the question of what amounts to order, and conceptions of civility, depend on particular historical contexts. I illustrate this point by looking at how order was conceived of as a specific kind of problem in modernity and how this has shaped the understandings of the scope and the function of the criminal law. In Part IV, I look at a neglected dimension of this modern understanding of civil order by looking at the way that the relation between the market and the criminal law – that is to say, between a sphere of social life ordered by contract or civil law and those spheres ordered by criminal law – has been conceived of in modernity. I conclude that this distinction between market and civil society underpins the thinking about the proper scope of the criminal law but that, 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 civil order but also on how we understand the scope of civil order in modern society.

Keywords: civil order, criminal law, criminal law theory, history of criminal law, markets

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.

– Neil MacCormick, *Institutions of Law*[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

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1 Neil MacCormick, *Institutions of Law* (Oxford: Oxford University Press, 2007) at 293 (going on to point out that it also requires confidence that wrongdoers will be tried and prosecuted fairly).

2 See e.g. Claus Roxin, 'Prevention, Censure and Responsibility: The Recent Debate on the Purposes of Punishment' in Andrew P Simester et al, eds, *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Abingdon, UK: Hart Publishing, 2014) 23 at 26: 'The will of its citizens obliges the state to safeguard our communal life in peace and freedom.'

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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 to 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 article 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 depends particularly on the understanding of what (or who) is to be ordered as well as 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 the 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

3 We might also ask what happens when the excessive punishment of certain communities threatens social order. See Vincent Chiao, 'Mass Incarceration and the Theory of Punishment' (2017) 11 Criminal L & Philosophy 431.

4 Vincent Chiao, 'What Is Criminal Law For?' (2016) 35 Law & Phil 137 at 138.

5 For further discussion, see Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press, 2016) at 37–60 [Farmer, *Making the Modern*]. The same point might be made about the term 'civil peace.' For a discussion of the concept of peace, see Laura F Edwards, 'The Peace: The Meaning and Production of Law in the Post-Revolutionary United States' (2011) UC Irvine L Rev 565.

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

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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 securing 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, in the final Part, 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 recognized 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; is it 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 numbers 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 naturalize 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]

The second sense of intelligibility, I think, is what 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 law 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

7 See also the discussion in Farmer, *Making the Modern*, supra note 5 at 140–4.

8 Cf. Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (London: Routledge, 1970) at xix–xx. See also Alice Ristroph, 'Criminal Law as Public Ordering' (2020) 70:Suppl UTLJ 64.

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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 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, 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. Nicola Lacey has described these as issues of coordination and legitimacy, with questions of coordination 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 coordinated 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-criminalization; 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-criminalization' thus takes the form that it is necessary to stabilize 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 the internal and the 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

9 Nicola Lacey, *In Search of Responsibility: Ideas, Interests and Institutions* (Oxford: Oxford University Press, 2016) at 1–24 [Lacey, *In Search of Responsibility*].

10 See notably Douglas Husak, *Overcriminalisation* (Oxford: Oxford University Press, 2007).

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or the question of how the internal and external orders of the criminal law are related. However, as a first step in seeking 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 the criminal law secures order.

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] In Michael 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 recognize 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

11 See Michael Oakeshott, 'On the Civil Condition' in Michael Oakeshott, *On Human Conduct* (Oxford: Oxford University Press, 1975) at 111–12 [Oakeshott, 'On the Civil Condition'], on the idea of '*civitas*.'

12 Oakeshott, 'On the Civil Condition,' supra note 11 at 121–2, though his sense of equality is probably closer to the idea of common participants, discussed below.

13 See Malcolm Thorburn, 'Criminal Law as Public Law' in Antony Duff & Stuart P Green, eds, *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2010) 21; Antony Duff, *The Realm of Criminal Law* (Oxford: Oxford University Press, 2018) at 146–84.

14 See Frank Trentmann, ed, *Paradoxes of Civil Society*, rev ed (Oxford: Berghahn Books, 2003).

15 For discussion of the historical origins of these different senses of civility, see Keith Thomas, *In Pursuit of Civility: Manners and Civilization in Early Modern England* (New Haven, CT: Yale University Press, 2018).

16 Oakeshott, 'On the Civil Condition,' supra note 11 at 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 Philip Smith et al, *Incivility: The Rude Stranger in Everyday Life* (Cambridge, UK: Cambridge University Press, 2010).

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spaces, 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 also 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]

To continue, an older meaning of civil order understands it as something which is opposed to that which is uncivilized or barbarous. Used in this sense, civility is a measure by which we might compare one order, or type of order, to others. While this usage is perhaps not as widespread as was once the case, it continues to appear in claims about the penal practices of civilized nations – often in relation to the practices of some putatively less civilized 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 Thomas Hobbes. What is significant here is to recognize 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 'civilized' 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 article, 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 Part III, I will look at how civil order was understood and at the role of the criminal law in securing that order. In Part IV, I will 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

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 Lindsay Farmer, 'Civility, Obligation and Criminal Law' in Daniel Matthews & Scott Veitch, eds, *Law, Obligation, Community* (London: Routledge, 2018) 219 at 227–31.

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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 striking to note, for example, that over 50 per cent of the world's population is now estimated to live in cities, a trend that began when Britain became the first predominantly urban society in 1871, with more than 50 per cent 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 transport, each of which pose massive challenges of coordination both in terms of infrastructure – how spaces and modes of transport are organized and maintained – and of behaviour as individuals continually have 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, and this 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 and organized around the city, the market, the workplace, the home, and so on, each of which are ordered in their own distinctive way, entail different kinds of contact or engagement with others, and encompass different spheres of life that each 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

19 See Marvin B Becker, *Civility and Society in Western Europe, 1300–1600* (Bloomington: Indiana University Press, 1988) at 1–42. The distinction between traditional and modern societies is central to modern social theory – for example, from status to contract (Henry Maine), between mechanical and organic solidarity (Émile Durkheim), or between *gemeinschaft* and *gesellschaft* (Ferdinand 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 'World's Population Increasingly Urban with More Than Half Living in Urban Areas' (10 July 2014), online: United Nations DESA <www.un.org/en/development/desa/news/population/world-urbanization-prospects-2014.html>; James Vernon, *Distant Strangers: How Britain Became Modern* (Berkeley: University of California Press, 2014) at 17–33 [Vernon, *Distant Strangers*].

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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 offence 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, rather, 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 coordination of complex societies composed of a range of entities or legal persons that are responsible, in different ways, for their own conduct, for the well-being 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. Therefore, it 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 is governed or administered and, thus, for the criminal law.

We can note a number of specific implications of this conception of civil order 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, 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

21 Charles Taylor, *Modern Social Imaginaries* (Durham, NC: Duke University Press, 2004) at 3–30.

22 James S Coleman, 'Prologue: Constructed Social Organization' in Pierre Bourdieu & James S Coleman, eds, *Social Theory for a Changing Society* (New York: Russell Sage Foundation, 1991) 1. Cf. Oakeshott, 'On the Civil Condition,' supra note 11, which takes a local, traditionally structured community as its foundation for understanding civility.

23 See generally Farmer, *Making the Modern*, supra note 5.

24 See John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003); David JA Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800–1865* (Oxford: Oxford University Press, 1998).

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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 persons who were deemed to have the capacity to adapt their conduct to general norms and to plan their future conduct.[26] Third, this was accompanied by large changes to the substance of the criminal law as it aimed at altering standards of behaviour. 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] Broadly, the focus 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 by 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 Part, 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.

25 Farmer, *Making the Modern*, supra note 5 at 139–62.

26 Lacey, *In Search of Responsibility*, supra note 9; Farmer, *Making the Modern*, supra note 5 at 163–97.

27 J Carter Wood, *Violence and Crime in Nineteenth-Century England: The Shadow of Our Refinement* (London: Routledge, 2004); Katherine D Watson, *Assaulting the Past: Violence and Civilization in Historical Context* (Newcastle: Cambridge Scholars Publishing, 2008); Farmer, *Making the Modern*, supra note 5 at 234–63.

28 See e.g. Adam Ferguson, *An Essay on the History of Civil Society* (Edinburgh: Edinburgh University Press, 1966) at 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.'

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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 the government of civil society, a number of well-established criminal laws relating to the governance of markets were being abolished. Consider Sir James Fitzjames Stephen's *History of the Criminal Law of England* (1883), which 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 was 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 of 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 class 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 largely included 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 served to prevent merchants from buying up grain and storing it until the price rose and selling it at a higher price, buying and reselling it at a higher price in the same market, or moving grain out of particular localities to areas where they might sell it for a higher price.[34] They were thus linked to a medieval practice whereby, 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

29 See principally Joel Mokyr, *The Enlightened Economy: An Economic History of Britain, 1700–1850* (New Haven, CT: Yale University Press, 2009) [Mokyr, *Enlightened Economy*]. See also Vernon, *Distant Strangers*, supra note 20 at 96–118.

30 Sir James Fitzjames Stephen, *History of the Criminal Law of England*, vol 3 (London: Macmillan, 1883) at 199–233 [Stephen, *History of the Criminal Law*].

31 Ibid at 192.

32 Ibid at 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 Stephen, *History of the Criminal Law*, supra note 30 at 192–3, 228.

34 Edward Coke, *Institutes of the Laws of England: Third Part Concerning High Treason and Other Pleas of the Crown* (London: E & R Brook, 1747) at 194–5; William Blackstone, *Commentaries on the Laws of England*, vol 4 (Chicago: Chicago University Press, 1979) at 158–9. See also (UK) 5 & 6 Edw VI, c 14, though it is likely that this was merely restating the common law.

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'police' of grain.[35] This 'moral economy' had survived on the grounds that it was necessary not only 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 to prevent 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 if it meant they were in breach of 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]

This came to a head in the case of *Waddington* (1800), which arose from the dearth and high food prices 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 this 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

35 James Davis, *Medieval Market Morality: Life, Law and Ethics in the English Marketplace 1200–1500* (Cambridge, UK: Cambridge University Press, 2012) at 55–65, 117–20, 440–7 [Davis, *Medieval Market Morality*].

36 Edward P Thompson, 'The Moral Economy of the English Crowd' in Edward P Thompson, *Customs in Common* (Harmondsworth, UK: Penguin, 1993) 185 [Thompson, 'Moral Economy'; Thompson, *Customs in Common*]; Edward P Thompson 'Moral Economy Reviewed' in Thompson, *Customs in Common*, ibid, 259

37 (UK) 12 Geo III, c 71.

38 There were in fact two separate cases reported: *Waddington*, (1800) 1 East 143, 102 ER 56; *Waddington* (1800) 1 East 168, 102 ER 65 [*Waddington*]. See also *Rex v Rusby* (1800) Peake Add Cas 189, 170 ER 241. The cases and their background are discussed in detail in Douglas Hay, 'The State and the Market in 1800: Lord Kenyon and Mr Waddington' (1999) 162:1 Past & Present 101 [Hay, 'State and the Market']. For a discussion of comparable Scottish case law, see Christopher Whatley, 'Custom, Commerce and Lord Meadowbank: The Management of the Meal Market in Urban Scotland, c. 1740–*c.*1820' (2012) 32:1 J Scottish Historical Studies 1.

39 *Waddington*, supra note 38 at 59.

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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 five hundred pounds sterling 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 toward 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 times of shortage posed a risk to the 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 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

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 61).

41 He was fined a further five hundred pounds sterling 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 64).

42 Hay, 'State and the Market,' supra note 38 at 145–6.

43 (UK) 7 & 8 Vict, c 24; Hay, 'State and the Market,' supra note 38 at 153–6 (suggests that the laws were in practice a dead letter after 1802).

44 See Istvan Hont & Michael Ignatieff, 'Needs and Justice in the Wealth of Nations: An Introductory Essay' in Istvan Hont & Michael Ignatieff, *Wealth and Virtue* (Cambridge, UK: Cambridge University Press, 1983) 1 [Hont & Ignatieff, 'Needs and Justice']; Emma Rothschild, *Economic Sentiments: Adam Smith, Condorcet and the Enlightenment* (Cambridge, MA: Harvard University Press, 2001) at 72–86 [Rothschild, *Economic Sentiments*]; Mike Hill & Warren Montag, *The Other Adam Smith* (Stanford, CA: Stanford University Press, 2015).

45 See Hay, 'State and the Market,' supra note 38 at 109–10.

46 Adam Smith, 'Digression on Corn Laws' in Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, book 4 (Harmondsworth, UK: Penguin, 1999) at 102–23 [Smith, 'Digression on Corn Laws']. This was cited in *Waddington*, supra note 38, and also in the contemporaneous Scottish case *Leishman v Magistrates of Ayr*, [1800] 12 FC 391, Mor No 2 Public Police.

47 Smith, 'Digression on Corn Laws,' supra note 46 at 106.

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that dearths were caused by natural shortages rather than by 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 'the 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, one that takes place over a longer period of time – of 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, which prohibited combinations of workers to improve the conditions of their labour, were seen as being linked to old laws protecting markets, specifically the idea that the 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, this was severely limited, in practice, 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 the courts expanded the scope of the doctrine of conspiracy in a series of decisions in the 1840s and 1850s.[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 argues

48 Ibid at 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 (at 113).

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

50 (UK), 1799, 39 Geo III, c 81; (UK), 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.' Stephen, *History of the Criminal Law*, supra note 30 at 209.

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

52 Stephen, *History of the Criminal Law*, supra note 30 at 217–22. He cites, in particular, *R v Rowlands*, [1851] 2 Den 364; *Hilton v Eckersley*, [1857] 8 E & B 47; *R v Druitt*, [1867] 10 Cox 592. See also Patrick S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon, 1979) at 532–3 [Atiyah, *Rise and Fall*].

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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 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 since the former would combine to increase wages, while the latter would combine 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 toward 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

53 Stephen, *History of the Criminal Law*, supra note 30 at 223. He argues that, in fact, there was little evidence that combinations of workers had been treated as conspiracies at common law (at 210). He cites Robert Samuel Wright, *The Law of Criminal Conspiracies and Agreements* (London: Butterworths, 1873). Cf. John V Orth, *Combination and Conspiracy: A Legal History of Trade Unionism 1721–1906* (Oxford: Clarendon, 1991) ch 3 [Orth, *Combination and Conspiracy*], who argues that common law conspiracy was recognized as early as 1721.

54 *Conspiracy and Protection of Property Act* (UK), 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*, supra note 53.

56 (UK), 1562, 5 Eliz, c 4. See also Robert J Steinfeld, *The Invention of Free Labour: The Employment Relation in English and American Law and Culture, 1350–1870* (Chapel Hill: University of North Carolina Press, 1991).

57 Adam Smith, *Wealth of Nations*, vol 1, book 1, cap 8 (London: W Strahan & T Cadell, 1776) at 167–90, 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* (UK), 1800, 39 & 40 Geo III, c 106, s 17, did criminalize combinations by masters aimed at reducing wages, altering the hours of work or increasing the quantity of work.

58 Stephen, *History of the Criminal Law*, supra note 30 at 211–12. On the conservative turn in political economy, see Rothschild, *Economic Sentiments*, supra note 44 at 87–115.

59 Stephen, *History of the Criminal Law*, supra note 30 at 203.

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development of the political economy.[60] The control and regulation of these markets, moreover, went beyond narrow questions of supply and demand and were a matter of competing conceptions of social order. Edward 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 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, rather, 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 Joel 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, not only 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

60 See Hont & Ignatieff, 'Needs and Justice,' supra note 44 at 14, describing Smith's proposals for the grain market as the 'most radical' of all his claims.

61 Thompson, 'Moral Economy,' supra note 36.

62 Thompson, *Customs in Common*, supra note 36 at 260–1.

63 See the discussion in Davis, *Medieval Market Morality*, supra note 35 at 59–64.

64 Mokyr, *Enlightened Economy*, supra note 29 at 3. See also Vernon, *Distant Strangers*, supra note 20 at 96–118.

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

66 Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (New York: Beacon Press, 2002) at 71–2.

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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 cooperation 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 James Vernon has argued, the focus of law moved to securing general standards – in money, in weights and measures, and so on – that would enable 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. In the long term, a market or commercial society would be a more civil society.[69]

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 being '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

67 Mokyr, *Enlightened Economy*, supra note 29 at 384.

68 Vernon, *Distant Strangers*, supra note 20 at 96–118.

69 See also Christopher Berry, *The Idea of Commercial Society in the Scottish Enlightenment* (Edinburgh: Edinburgh University Press, 2013) at 90–123; Geoffrey R Searle, *Morality and the Market in Victorian Britain* (Oxford: Oxford University Press, 1998) at 27–47 [Searle, *Morality and the Market*].

70 Stephen, *History of the Criminal Law*, supra note 30 at 196.

71 Ibid at 192–3. See also Hay, 'State and the Market,' supra note 38 at 155 (pointing out that Joseph Chitty made an oblique reference to Adam Smith and the division of labour in his discussion of forestalling).

72 Stephen, *History of the Criminal Law*, supra note 30 at 193; see also 203.

73 Ibid at 231–2. See generally Sarah Wilson, *The Origins of Modern Financial Crime* (London: Routledge, 2014); James Taylor, *Boardroom Scandal: The Criminalization of Company Fraud in Nineteenth Century Britain* (Oxford: Oxford University Press, 2013).

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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 decriminalization 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 that leads to the dismantling of traditional protections.[74] What I have attempted to show here is that the consequences of decriminalization should be understood not only 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 decriminalization of conduct did not merely mean a reduction in the scope of the criminal law but also 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.

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 which secures 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 – namely, as the sphere of private law and private relations.[75] However, as we have seen, this 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 in civil society – indeed, arguably underpinning the development of the kind of individualism that was central to the emergence of a 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

74 Notably, Atiyah, *Rise and Fall*, supra note 52 at 361–9.

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. Oakeshott, 'On the Civil Condition,' supra note 11.

76 See generally Searle, *Morality and the Market*, supra note 69.

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himself recognized) 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.

77 See e.g. Stuart P Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime* (Oxford: Oxford University Press, 2007).

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