BLACK MARKETS AND THE EXCHANGE STRUCTURE

RICHARD R.W. BROOKS*

I
INTRODUCTION

Laws do not prevent crime. They create it. Volitional acts causing harm to persons and their interests of course occur with and without law (though presumably more often without) but to see these actions as criminal, to identify them properly as such, is possible only through law. So stated, the point is rather bromidic, and yet it does hint at a more profound question. Why *make* any conduct criminal? Answers to this question would appear obvious and overdetermined, at least, for some conduct. Victims of assaults, thefts, and other gross invasions of their persons and property needn't testify as to the most patent reasons for criminalizing the behavior causing them harm. For so-called victimless crimes, however, the obvious answers are less compelling.[1] Why criminally prohibit consensual exchanges that might otherwise occur in an open marketplace?

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* New York University School of Law (richard.brooks@nyu.edu). My sincere thanks to Eleanor Fox, David Garland, Lewis Kornhauser, Liam Murphy and Carol Rose for detailed comments on earlier drafts of this Article, as well as to Tom Christiano, Hanoch Dagan, Avihay Dorfman, Gerard Gaus, Andrew Gold, Turan Khaitan, Roy Kreitner, Arthur Lau, Ding Li, Daniel Markovits, Melissa Murray, Erin Murphy, Burt Neuborne, Barak Orbach, Przemysław Pałka, Shitong Qiao, Simone Sepe, Katherine Strandberg, Frank Upham, and other generous workshop participants at Brooklyn Law School, New York University, University of Arizona and Yale University. Finally, I would like to express my appreciation to Roxanne Degens and her colleagues, whose editorial efforts greatly improved the clarity and content of this Article. All errors and misstatements, of course, are attributable to me alone.

1. Broadly speaking, a criminal transaction is "victimless" if two conditions are met. First, all parties to the transaction (nominally 'a crime') must consent. Second, no third-parties should suffer harm from its occurrence; in other words, there should be no negative externalities. This second condition touches on a "deep problem in the interpretation of externalities," as Kenneth Arrow long ago observed:

> If we take a hard-boiled revealed preference attitude, then if an individual expends resources in supporting legislation regulating another's behavior, it must be assumed that that behavior affects his utility. Yet in the cases that students of criminal law call "crimes without victims," such as homosexuality or drug-taking, there is no direct relation between the parties. Do we have to extend the concept of externality to all matters that an individual cares about?

Kenneth J. Arrow, *Political and Economic Evaluation of Social Effects and Externalities*, *in* THE ANALYSIS OF PUBLIC OUTPUT 1, 16 (Julius Margolis ed., 1970). As a possible answer to this unsettling question, Arrow suggested, "in the spirit of John Stuart Mill," that (through some "second-order value judgment") preferences which are deemed as "illegitimate infringements of individual freedom" may simply be excluded from the calculus of socially cognizable externalities. *Id.* That would not appear to provide a complete or easy escape from the problem he identified, however, as it simply shifts the difficult questions to the domain of the second-order value judgments.

Observing the way in which black markets come into being offers insight into this question. While some suggest that "the market" is a legal construct, only a part of the market, the black part, is created by law. Laws, to be sure, facilitate licit market transactions by establishing and clarifying entitlements—including their proper claims, uses, and legitimate modes of transfer—as well as by backing their enforcement with the power of the state.[2] Without denying these important legal contributions to the marketplace, let's not forget that exchanges pervaded long before the state and its laws. People have been buying, selling, swapping, and trading goods and services from time immemorial. Try to imagine the first human exchange, the primordial *quid pro quo*. Whatever it is that you are picturing, is law present? Is it necessary to facilitate that exchange? Although law and legal practice unquestionably reduce the barriers and costs of exchange, every day countless exchanges—both "contractable"[3] and "noncontractable"[4]—occur without the benefits of legal recognition or enforcement.[5] Traffic in trade-not-unlawful is no creature of law. No doubt the scale and scope of trade in these markets are significantly influenced by law, but their existence is not determined by it. Only black markets owe their existence to law.

Without law there could be no such thing as a black market. The black market *is* a legal construct. Black market exchanges come into existence only through the laws of a state or other comparable authority.[6] These authorities and their

2. *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 27–35 (1990) (describing the essential role played by institutions, particularly legal institutions, in measuring, enforcing and policing exchanges).

3. In the literature on the economics of contracts, an exchange is "contractable" when its terms and performance are verifiable and therefore enforceable by a court or other third-party enforcers. *See* Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORG. 5 (1985) (describing the absence of state enforceability as the quintessential "state of nature"). Third-party enforcement needn't be carried out by courts or other legal officials. Thus, law and legal institutions may coordinate and facilitate exchanges that are themselves unenforceable, as a matter of law, by the state. *See* Richard R.W. Brooks, *Covenants without Courts: Enforcing Residential Segregation with Legally Unenforceable Agreements*, 101 AM. ECON. REV. PAPERS & PROC. 360 (2011).

4. An exchange is "noncontractable" when its terms are, for whatever reason, "indescribable" or its performance is unverifiable. *See* PATRICK BOLTON & MATHIAS DEWATRIPONT, CONTRACT THEORY 554 (2005); Eric Maskin, *On Indescribable Contingencies and Incomplete Contracts*, 46 EUR. ECON. REV. 725, 726 (2002); *see generally* Oliver Hart & John Moore, *Foundations of Incomplete Contracts*, 66 REV. ECON. STUD. 115 (1999); Eric Maskin & Jean Tirole, *Unforeseen Contingencies and Incomplete Contracts*, 66 REV. ECON. STUD. 83 (1999).

5. Formal legal enforcement is not the only means through which law facilitates exchange. Even when exchanges are contractable, parties often rely on nonlegal means of enforcement when the costs of legal enforcement exceed its benefits. *See* AVINASH K. DIXIT, LAWLESSNESS AND ECONOMICS 15 (2004) ("[S]ignificant aspects or components of economic activity are conducted without direct reference or recourse to the state's laws."). Further, law's normative force, by itself, is often sufficient to compel enforcement for those who accept the legitimacy of legal authority. *See* Douglass C. North, *Institutions and a Transaction-cost Theory of Exchange*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 182, 189 (James E. Alt & Kenneth A. Shepsle eds., 1990) (noting that effective "[e]nforcement can come from the first party's internally enforced codes of conduct, from the second party's effective retaliation, or from a third party's imposition of costs on the first party").

6. The default legal permissibility of exchanges, unless prohibited by law or force, has been recorded since Justinian and remains valid today. *See* J.B. MOYLE, THE INSTITUTES OF JUSTINIAN 18

officials, and *not* the felons and other criminals they create, make markets black. Yet the making of black markets occurs not only, or even primarily, through criminal penalties, but also through legal powers and disabilities. That is, the law disables actors from realizing transactions that they would be otherwise empowered to undertake, thereby rendering those would-be market transactions legally void, voidable, or unenforceable. Only thereafter, if at all, are legal penalties or sanctions imposed. Law's disabling blow is the formative maneuver in the creation of black markets. Legal disabilities, moreover, are also the primary means through which law and legal officials maintain societally established rules of exchange. These rules, which come from a variety of normative sources—legal and nonlegal—bring about a vaguely defined *exchange structure*.[7] Delimiting the exchange structure is beyond the scope of this (or maybe any) Article, although Part II provides a cursory sketch. Instead, this Article advances a more limited claim: legal disabilities, rather than criminal penalties, are the principal restraints deployed through law to preserve the overall structure of economic exchange. It is a claim that goes beyond black markets, though it is perhaps best illustrated in that context. To reveal this insight, however, it may useful to first specify what, exactly, black markets are.

At the risk of tautology, black markets may be characterized simply as the domain of legally prohibited exchanges. Adopting this characterization serves two functions.[8] First, it shifts the unit of analysis away from *markets* to *exchanges*. Prohibited exchanges occur not only in markets, but also in hierarchies (such as firms and ecclesiastic orders) and solidaristic groupings (such as political or trade associations). That an exchange is *legally prohibited* is what's key, not whether it takes place in a marketplace, a corporation's boardroom, a church, a union backroom, or any other social setting or institution. Second, this characterization helps to avoid conflating prohibited exchanges with other legally prohibited activities. For example, theft of goods, unauthorized growth or manufacturing of controlled substances, and production of counterfeit products—including false or misleading labeling of products—are all legally prohibited activities. Law renders these activities illegal or criminal (as it does, say, murder) irrespective of any associated exchanges. Only when these illegal goods and activities are linked to

(J.B. Moyle trans., 5th ed. 1913) ("Freedom, from men which are called free, is a man's natural power of doing what he pleases, so far as he is not prevented by force or law . . . .").

7. Here, exchange structure is meant to capture the sum or overall matrix of norms guiding and directing exchanges. Any exchange may be subject to multiple normative orders—including law, of course, but also usages and practices of trading communities, conventional morality, social norms, taboos, religion, etiquette, etc.—and the exchange structure reflects this complexity and frequent indeterminacy. *See infra* notes 27–29 and accompanying text.

8. One may quite sensibly argue that characterizing any market as merely the sum of exchanges that occur under its auspices is inadequately descriptive. A stock market, for instance, is usefully characterized by a variety of features beyond the individual trades that occur through its established exchanges. By characterizing black markets in terms of "legally prohibited exchanges," the intention here is less to impose a narrow definition than to focus the analysis that follows. Adopting a broader (or simply a different) view of "black markets" will not hinder this basic analysis so long as we don't lose sight of the essential role of *legal prohibition on exchanges* in all black markets.

exchanges—buying and selling stolen, counterfeit, or otherwise unlawfully procured goods, for example—are black markets at issue.[9]

It is the prohibited nature of exchanges that gives rise to black markets, not necessarily the marketplace or the objects exchanged. By legally restricting the terms of exchange, authorities can create black markets for anything if, given the prescribed terms, the resulting demand meets or exceeds supply. Often these restrictions are spatial or temporal in nature,[10] concern the "type" of persons permitted to transact,[11] or occasionally the purpose of the transaction.[12] Sometimes, as suggested above, restrictions are based on trading in certain goods or services (such as stolen merchandise or murder-for-hire). Most commonly, however, it is a legally mandated price term that gives rise to black markets. Legislators and other legal officials may stipulate a zero price (allowing gifts and donative transfers only), a maximum price (preventing price gouging during war or a pandemic, for instance), a minimum price (prohibiting, for example, employers from paying a wage below a stipulated amount), a reasonable price (regulating rates of utilities and common carriers, for instance, or policing unconscionable price terms in contract), or an implicit price associated with exchanges in the form of tariffs, taxes, or fees.[13] Thus, law and legal officials give rise to black markets by first restricting the terms of exchange.

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9. Of course, black market exchanges may also include some goods and services that are otherwise unobjectionable.

10. Take, for instance, so-called "blue laws," restricting, among other things, when and where alcohol may be sold or purchased. *See, e.g.*, Neil J. Dilloff, *Never on Sunday: The Blue Laws Controversy*, 39 MD. L. REV. 679 (1980).

11. Restrictions based on "types" or attributes of persons are less common today than they were in earlier periods when, for instance, the common law doctrine of coverture denied married women the capacity to contract, or when, in the wake of the American Civil War, "Black Codes" were enacted in a number of southern states to restrict the forms of legal exchanges available to the freedmen. *See generally* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1999). Contemporary versions of such status-based restrictions may be found in legal practices related to released felons and convicted sex offenders. *See, e.g.*, Elizabeth Esser-Stuart, "*The Irons Are Always in the Background": The Unconstitutionality of Sex Offender Post-Release Laws as Applied to the Homeless* 96 TEX. L. REV. 811 (2018); Bruce E. May, *The Character and Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187 (1995). Some status-based exchanges are policed by law, but not strictly prohibited. Exchanges with minors or wards subject to guardianship and conservatorship, for instance, are often not illegal so much as voidable or unenforceable.

12. Malice or some wrongful motive or purpose, if established, may criminalize an otherwise lawful exchange (for example, buying or selling securities with the intention of manipulating the market). A classic discussion of motive and purpose is found in Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

13. *See generally* Kenneth E. Boulding, *A Note on the Theory of the Black Market*, 13 CAN. J. ECON. & POL. SCI. 115 (1947). For literature on tariffs, taxes, and fees, see generally Jagdish Bhagwati & Bent Hansen, *A Theoretical Analysis of Smuggling*, 87 Q.J. ECON. 172 (1973). For a summary of the literature on tax, see Joel Slemrod & Shlomo Yitzhaki, *Tax Avoidance, Evasion, and Administration*, *in* 3 HANDBOOK OF PUBLIC ECONOMICS 1423 (Alan J. Auerbach & Martin Feldstein eds., 2002). For fees associated with currency exchanges, see Asif Dowla, *Efficiency of the Black Market for Foreign Exchange*, 9 INT'L ECON. J. 89 (1995); Mark M. Pitt, *Smuggling and the Black Market for Foreign Exchange*, 16 J. INT'L ECON. 243 (1984).

Responding to exchanges that transgress prescribed terms is a separate, and secondary, step that must be taken by officials. Depending on the policy or prejudice animating the prescribed terms, official intercession may occur in the early stages of the exchange (such as when parties are searching for trading partners or bargaining with each other) or in the later stages (after formation, performance, sought out enforcement, or reliance on the agreement). In addition to the timing of intervention, there is also the manner in which officials respond to prohibited exchanges. Authorities may choose to ignore transgressive transactions entirely or treat them as mere "technical violations" that are nonetheless enforceable. For violations regarded as more serious, including those deemed illegal against public policy or criminal, officials will normally declare those exchanges void, or voidable at the election of one or both parties, or simply unenforceable (whether or not void or voided).[14] Finally, there is the matter of how officials respond to the parties themselves. Parties to prohibited exchanges are often simply denied legal recourse. In some instances, persons on one or both sides of a prohibited exchange will also face civil or criminal fines or even imprisonment for pursuing, forming, or performing the agreed upon exchange. All considered, the range of legal responses is quite broad, from fully recognizing and enforcing nominally prohibited exchanges to voiding the transactions and criminally punishing the transactors.

We are returned to our initial question—why criminally prohibit consensual transactions?—to which there is no shortage of answers. Yet among the countless reasons why states and societies respond more or less severely to voluntary exchanges, one appears common, if not universal. Society's exchange norms (so established for whatever reason) are less likely to endure if its members can arbitrarily rewrite the rules of exchange though their actions. Preserving these established exchange norms requires some means of disciplining or discouraging transgressions of the system's recognized rules. These means, when triggered, are essentially the system's survival impulse. A legal order, for instance, that seeks to channel certain exchanges through agreements based on mutual consent and backed by the state's police powers (that is, through property rules) would be undone if individuals could nonetheless pursue those exchanges nonconsensually and with minimal cost or consequence beyond payment of

14. An important distinction should be observed between transactions that are unenforceable as a consequence of failing to follow proper form, and transactions that are unenforceable because they are prohibited or illegal (which is the concern here). On the one hand, for example, a promise secured without consideration is unenforceable under the legal form that requires it. But failure to satisfy the form known as the "consideration doctrine" leads to neither a wrong nor any other legally cognizable consequence. It is a nullity, void *ab initio* (from the start), although application of some other doctrine (say, promissory estoppel) may give the promise legal effect. On the other hand, a promise secured without genuine consent—but rather through a threat of violence, for instance—is unenforceable under the doctrine of duress. Whereas securing a promise without consideration is an entirely permissible mode of transacting (neither required nor prohibited); securing a promise through duress is a prohibited mode of exchange (like offering an illegal bribe for some promised conduct). In both situations the promise is not legally enforceable, but for importantly different reasons.

compensation (liability rules).[15] Building on this premise, Guido Calabresi and Douglas Melamed proposed that some transactions are criminalized—over and above payment of fines, punishment, and retribution for actions that contravene conduct rules—for the distinct purpose of preventing a conversion of society's established norms of exchange.[16]

Some law and economics scholars have argued that criminalizing attempts to convert society's established rules of exchange is justified based on efficiency concerns. Yet this argument can only go so far. For instance, snatching someone's property without permission (theft) is bad enough, but stealing property with the knowledge and intent of only having to pay a court-ordered fine (if caught) is a far cry from common thievery. Snatching property is an act in contravention of the laws against theft, but doing so with the plan of paying a fine as a preemptive alternative to negotiating with the property-owner is an act against society's established norms of exchange. It is a private taking, or a forced exchange—looting and paying for property without the owner's prior consent. Criminally sanctioning these types of forced exchanges—where consensual bargaining and other market alternatives are reasonably available—may be explained as a means of promoting efficiency, argued Richard Posner.[17] However, efficiency provides an inadequate explanation: were fines for private takings fully compensatory and always paid, all but the most committed utilitarians (which is not to say Posner) would still hesitate to promote efficient theft. Calabresi and Melamed, for their part, combined considerations of fairness with efficiency in their argument for imposing criminal sanctions against those who act, as Alvin Klevorick put it, "contrary to the transaction structure society has established."[18] Building arguments of fairness on top of efficiency, as Ronald Dworkin has written, still leaves the economic account lacking.[19]

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15. Property rules and liability rules are characterized more explicitly *infra* Part II.C.

16. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1126 (1972) ("In other words, we impose criminal sanctions as a means of deterring future attempts to convert property rules into liability rules.").

17. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 165 (Little, Brown & Co. 2d ed. 1977) (1973) (arguing that criminal enhancements can discourage coercive exchanges when voluntary transaction may be effectively pursued).

18. Alvin K. Klevorick, *On the Economic Theory of Crime, in* CRIMINAL JUSTICE: NOMOS XXVII 289, 303 (J. Roland Pennock & John W. Chapman eds., 1985). In this Article, I differentiate "transaction structure" from "exchange structure" in order to stress the latter as a more general class of rules that include but are not limited to more formal, official, and legally recognized rules of exchange. In employing the usage "transaction structure," Alvin Klevorick did not adopt the narrow definition which I am now attributing to it. In fact, his characterization of the "transaction structure" was quite generic: "Society (or *the* collectivity or the state) establishes *a* 'transaction structure' that stipulates the terms on which particular transactions or exchanges are to take place under different circumstances." *Id.* at 301 (emphasis added). Yet because the "transaction structure" has become so closely associated with the juridical architecture of property rules, liability rules, and inalienability (an association affirmed, if not necessarily implied, by Klevorick's treatment), I find it useful to adopt the usage "exchange structure" when speaking generically and "transaction structure" when referring to the rules of exchange recognized by law.

19. Ronald Dwirkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563, 569, 577 (1980). Moreover, appeals to liberty and autonomy among other claims beyond

Actions contrary to the "transaction structure" may be efficient, fair, socially valuable, or just, but these are all secondary concerns from the parochial perspective of system survival. Continuity is the ultimate imperative of any established exchange structure. To persist, it must solve the first order "social problem [of] preserv[ing] respect for the rules . . . ."[20] Without widespread respect for its rules among participants, no society or structure of exchange can long survive. Criminal penalties, as Calabresi, Melamed and others have argued, may be usefully deployed to preserve respect for the rules of exchange.[21] Beating in respect for rules through criminal law, however, is not the only (or even the primary) means employed by legal authorities to channel exchange and secure compliance with accepted forms. Private law, Lon Fuller wrote, is well-adapted to these purposes, and often law is not needed at all: "Where life has already organized itself effectively, there is no need for the law to intervene."[22] When law does intervene to preserve the "already organized" rules of exchange, criminal penalties are largely afterthoughts.

In fact, criminal penalties play a relatively minor role in maintaining the overall exchange structure. This may be inferred from the following points, each of which were sketched briefly here and are also developed further in the remainder of this Article. First, criminal law is but one of many normative regimes operating over and providing structure to society's rules of exchange.[23] Second, in order for exchange structures to persist, their rules must be able to bend or evolve, which cuts against strict criminal enforcement in some cases and over time. Persistence and evolution are not mutually exclusive. Third, criminal penalties serve as part, but only part, of the legal apparatus that preserves the exchange structure.[24] Likewise, civil penalties and nonlegal sanctions play

consequential considerations of efficiency and fairness also provide strong justifications for sanctioning those who transgress the "transaction structure."

20. FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT xxxi (Augustus M. Kelley 1964) (1921); *see id.* at 374 (stating that systems of exchange in every society, culture, or going-concern must, first and foremost, address themselves to "the problem of [their] social continuity"). Even systems of exchange that are principally grounded on higher motivations (such as fairness, justice or welfare, however defined) must secure norms and other mechanisms for self-maintenance.

21. *See infra* Part II.C.

22. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806 (1941).

23. In addition to other bodies of law, both public and private, numerous others normative orders contribute to and sustain exchange structures, including (to reference a few) "morality, conventional morality, etiquette, religion, thieves' honour, military codes, club rules, and so on." Liam Murphy, *The Artificial Morality of Private Law: The Persistence of an Illusion*, 70 U. TORONTO L.J. (forthcoming 2020) (manuscript at 26).

24. Why any particular exchange is selected or seen as contrary and threatening to the exchange structure is a separate and important question. As are questions concerning the beliefs and arguments that give rise to "outlawing" a given transaction, to say nothing of the legitimacy of the exchange structure itself within which a prohibited transaction might occur. Why is the chosen transaction structure legitimate? Klevorick argues that "an answer to that question is a necessary component of an explanation of why some acts are treated as crimes." Klevorick, *supra* note 18, at 304. Providing answers to these questions is beyond the scope this Article, which is more concerned with the mechanisms (many non-criminal) through which secondary rules evolve to preserve the fundamental rules of exchange. *See* H. L. A. HART, THE CONCEPT OF LAW 91–98 (2d ed. 1994) (discussing the role, weaknesses, and remedies of

comparable roles in maintaining the exchange structure. Call these role responses "kickers"—a shorthand for describing supracompensatory awards, penalties, and sanctions (whether criminal, civil or nonlegal) that are used to deter transgressive exchanges.[25] Fourth, apart from deterrence through kickers, transgressive exchanges are effectively cabined through disabilities. These two operations, importantly, target different subjects, and prompt distinct responses from authorities.[26] Legal sanctions are deployed to deter and punish only those seen as *transgressors*, while legal disabilities aim simply at tying the hands of otherwise empowered subjects, who remain in good standing even as they pursue *transactions* that are contrary to the exchange structure. Kickers are for the bad men. Hands-tying is for the good subjects (tempted by moral hazard); it is how law restrains them from subverting the established rules of exchange. These claims are clarified and elaborated in Part III, but first a brief sketch of the exchange structure is presented in Part II.

II
THE EXCHANGE STRUCTURE

No society can exist without exchange, and every society has rules of exchange. These rules, supplied by multiple, often competing, sources and authorities, comprise the structure through which exchanges occur. More than merely regulating the transfer of things, however, the exchange structure constitutes and rationalizes the very subjects and objects of exchange. Superficially, it may determine whether an exchange takes place between, for instance, "merchants" or "racketeers," and whether they are trading "commodities" or "contraband." Making such exchanges legally cognizable is but a later gloss on prior sensibilities necessary for exchanges to occur. Each and every exchange, including the most complex and sophisticated contract, is less a matter of law than normal nonlegal social practice, without which the underlying transaction would be incomprehensible.

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primary rules of obligation as a social structure which binds groups to standards of conduct even absent law).

25. Calabresi and Melamed introduced the term "kickers," describing them as "undefinable" sanctions that society (or the state) imposes for the purpose of maintaining existing rules of exchange. Calabresi & Melamed, *supra* note 16, at 1126. Third-party penalties and sanctions also, of course, serve other broader purposes, such as retribution.

26. To be sure, bad actors are also formally disabled from engaging in prohibited exchanges, but the conduct rules were never really binding on them in the first place. Bad actors here are strictly rational actors, like the Holmesian bad man "who cares nothing for an ethical rule which is believed and practised by his neighbors [yet] is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897). The "bad" label attached to these actors is misleadingly pejorative. Similarly usages, such as "transgressors," "criminals," "deviants," and the like are not generally used here to carry any moral or ethical weight. They are simply actors who have not internalized the conduct rules dictated by the relevant normative order. For an elaboration on different degrees of internalization of conduct rules, see Rebecca Stone, *Economic Analysis of Contract Law from the Internal Point of View*, 116 COLUM. L. REV. 2005 (2016); and Rebecca Stone, *Legal Design for the "Good Man"*, 102 VA. L. REV. 1767 (2016).

Trade always takes place under presuppositions that make sense of the exchange. As Adam Smith famously quipped: "Nobody ever saw a dog make a fair and deliberate exchange of one bone for another with another dog."[27] A normative framework is always required to apprehend self-conscious reciprocal exchanges as something other than people simply moving objects around amongst themselves. For even in a Hobbesian state of nature, not to mention those imagined by Rousseau or Kant, a party to an exchange is never imagined merely as an "exchanging animal."[28] On most accounts, it is the exchange structure itself that makes the state and civil laws conceivable as a social contract. Yet, going from a state of nature to a civil state—*from trade to contract*— at most alters without abandoning the inherited conceptual framework of exchange.[29] Frameworks that make sense of exchange, with the presence of law or in its absence, can vary widely in their application, yet they appear to share several basic forms. These forms may be called elemental conceptions of exchange. Metaphorically, they are building blocks or scaffolding around which exchange structures are erected and maintained.

A. Elemental Conceptions of Exchanges

To view transactions as *contractual* or *criminal*, or more broadly as *legal* or *illegal*, already presumes a juridical order tending to conceal more fundamental features of reciprocal exchange. These fundamental features have been characterized from various disciplinary perspectives.[30] For example, building on

27. 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 12 (J.M. Dent & Sons 1964) (1776).

28. To be sure, Archbishop Whately did propose that "Man might be defined, 'An animal that makes *Exchanges*.'" RICHARD WHATELY, INTRODUCTORY LECTURES ON POLITICAL ECONOMY 7 (Augustus M. Kelley 1966) (1832). Yet he did not mean that persons were merely "exchanging animals," but rather that exchange was a defining feature of humanity: "[N]o other, even of those animals which in other points make the nearest approach to rationality, having, to all appearance, the least notion of bartering, or in any way exchanging one thing for another. And it is this point of view alone that Man is contemplated by Political Economy." *Id.* Whether exchange is unique to humanity (a dubious proposition, which Adam Smith also embraced), there is no doubt of the pervasive influence of exchange on self-understanding and the understanding of others.

29. The term *trade* is used here to stand for exchanges occurring independent of state-based law, while *contract* is used a shorthand for exchanges organized or enforced through state law. These usages are conveniences not meant to define "trade" or "contract" necessarily in terms of the state. *See infra* Part II.B. To be sure, state and state-approval are neither necessary nor sufficient to create contractual obligations. Against this claim, much is often made of Hobbes's observation that "[i]f a Covenant be made . . . in the condition of meer Nature . . . upon any reasonable suspition, it is Voyd," in contrast to civil society, wherein suspicion that a counterparty will not perform does not make a covenant void. THOMAS HOBBES, LEVIATHAN 96 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651). But it is important to note that not all covenants entered into in Hobbes's state of nature are void: "Covenants entered into by fear, in the condition of meer Nature, *are obligatory*." *Id.* at 97 (emphasis added). For Hobbes, it is the condition of fear—whether fear of "the state" in a civil society or fear of some other greater force in nature—that secures and organizes obligatory exchange.

30. To mention only the most common perspectives: theories of the exchange structure have been developed in anthropology, economics, history, political science, psychoanalysis and sociology—with these disciplinary perspectives informing each other among other fields not listed. Any effort to catalogue an appropriate set of references would be embarrassingly incomplete. Indeed, many works that

an extensive social scientific literature as well as his own anthropological research, Alan Fiske has devised a thoughtful framework characterizing the exchange structure in terms of four elemental modalities.[31] Fiske has his own distinct terminology that he applies broadly to all social exchanges,[32] but I refer to these modalities as *authority*, *solidarity*, *reciprocity*, and *individuality*.[33] These particular modalities or this characterization is not essential; other perspectives may better carve up and characterize the exchange structure. This is, as it were, just one view of the cathedral, wherein *authority*, *solidarity*, *reciprocity*, and *individuality* are the four pillars.

To illustrate each modality consider, for example, a domestic exchange wherein a parent says to a child "take out the garbage now or no allowance this week" and the child complies and receives an allowance. Quite apart from how the transaction may appear to casual observers, it is important to appreciate how the parties themselves see it in order to grasp the influence of the exchange structure. Between the parties, their view of the exchange may be principally based on any one of the four modalities: authority ("do as I say"), whereby the child follows the command and the allowance follows from the parent's benevolence; solidarity ("one-for-all and all-for-one"), wherein the parent and child understand themselves as together engaged in care-taking tasks for the family and household; reciprocity ("tit-for-tat"), wherein an expectation of future in-kind reciprocation encourages compliance with present demands; or individuality ("give and get in-return"), wherein the child's contingent performance turns on the parent's payment of an allowance and both performance and payment are based on their individual rationality, along with their preferences, passions, and desires.

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established these fields looked to the exchange structure, in novel and distinctive ways, as the basic phenomenon to address. In much the same way that Adam Smith's *Wealth of Nations* introduced a distinctively economic view on structures of exchange, foundational work by Sigmund Freud, Emile Durkheim, and Max Weber initiated distinctively psychological and sociological perspectives on the exchange structure. *See* SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 80 (James Strachey trans., W. W. Norton & Co. 1962) (1930) (bringing psychoanalysis to bear on "the manner in which the relationships of men to one another, their social relationships, are regulated"). On the sociological foundations see Richard Swedberg, *Major Traditions of Economic Sociology*, 17 ANN. REV. SOC. 251 (1991) (offering a brief but broad introduction on the origins of sociological scholarship on structures of exchange.).

31. ALAN P. FISKE, STRUCTURES OF SOCIAL LIFE: THE FOUR ELEMENTARY FORMS OF HUMAN RELATIONS 3 (1991). Individuals employ these modalities "to plan possible actions and anticipate others' future actions, and above all to coordinate action so that dyads and groups act in concert—undertaking complementary actions that mesh" and "make sense" of their social interactions and relationships. *Id.*

32. Social exchange may be broadly understood in terms of social interactions. The modalities as developed by Fiske are meant to address such a broad understandings of exchange to include insults, persuasion, demands, platitudes, moral judgement, critiques, and so on. Fiske's modalities also address the more conventional notion of exchange involving the giving or getting of one thing for another, "bi-directional transfers (or 'reciprocal exchange')." *Id.* at 16. The discussion of the exchange structure in this Article is largely focused on reciprocal exchanges.

33. Fiske's labels for these four modalities are authority ranking, communal sharing, equality matching, and market pricing. *Id.* at 13–15.

These modalities, illustrated in the context of a parent-child relationship above, apply equally well to market-based relationships between buyer and seller, creditor and debtor, principal and agent, as well as among business partners, joint-venturers, and long-term relational contractual counter-parties. In each of these exchange relations one can find authority, solidarity, reciprocity, and individuality (to varying degrees)—although we might expect relatively more authority in principal-agent and master-servant relationships, more solidarity in partnerships, more reciprocity among long-term relational contractors, and more individuality in arms-length sales and credit transaction. Furthermore, within a given hierarchical firm-based relationship, for instance, modes of fiat and authority may give way to team production and solidarity, or special dispensations and anticipation of future reciprocal favors, or well-defined hard-bargained transfer pricing or bonus schemes that harness the individual rationality of relevant actors in a given transaction. Moreover, mismatches between parties or a mix of modalities for either or both parties will complicate this simple framework, not to mention mismatches given the multiplicity of conventions, customs, habits, manners, and norms operating at any given time within and between these basic modalities. To this complicated mix, let's now add the influence of contract law and then criminal law.

B. Contract Law and the Exchange Structure

Contract law, broadly understood, does not characterize some specific and limited set of doctrines,[34] but rather the sum of all legally-sanctioned rules, norms, and practices constituting private exchange.[35] No one has time to read all the

34. In the American tradition, these doctrines are often associated with a nineteenth century vision of contract law identified with Langdell, Holmes, and Williston. Grant Gilmore placed this tradition in proper context when he observed: "[T]he common law had done very nicely for several centuries without anyone realizing that there was such a thing as the law of contracts . . . . [T]he idea that there was such a thing as a general law—or theory—of contract seems never to have occurred to the legal mind until Langdell somehow stumbled across it." GRANT GILMORE, THE DEATH OF CONTRACT 5–6 (1974).

35. As an initial matter, though not necessarily the most decisive one, official laws and government-sponsored rules of exchange must be understood more broadly than narrowly conceived "contract law." The understanding should shift to a multiplicity of "contract *laws*" regulating private exchange. The shift is from a singular legal framework to a plural one. *See* IAN R. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS 12 (Foundation Press 2d ed. 1978) (1971) ("Contractual ordering of economic activity takes place on a spectrum of transactional and relational behavior."); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854, 855 (1977) (exploring the relation between classical and neoclassical contract law "and the organization of production and distribution in flexible patterns that stress discrete transactional characteristics"); Clyde W. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L.J. 525, 525–26 (1969) (discussing the perceived distinction between "ordinary contracts" and "special contracts"); Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LIT. 595, 599 (2000) (stressing the singular-plural usage). Moreover, contract norms contain not only the legislative statutes, judicial rulings, and agency regulations at the municipal, state, national, international, and transnational levels, but also rules and practices of notaries, registries, titling, and search firms among others, which track and maintain records of transactions for parties in direct exchange as well as third-parties. Additional rules are provided by trade associations, small and large, such as the International Chamber of Commerce (ICC), issuer of the "Incoterms rules," which consist of broadly recognized terms followed in international commercial transactions. Beyond providing terms of

blackletter law and written codes, much less their interpretation in cases and treatises. Doing so, in any event, would provide only partial appreciation of these institutions of exchange, the so-called "rules of the game."[36] According to these "rules," parties subject to contracts, expressed or implied, pursue their transactions while embedded in ongoing relational networks (so-called "going-concerns") with various cultural, economic, political, and religious beliefs and practices *collectively* shaping their actual exchanges.

Contract scholars seeking to locate their discipline within this crowded field of exchange norms and rules face a daunting epistemological task. Not only must they determine the legal rules and doctrines that are relevant to contracts (no small matter), they must also figure out which contract rules exert binding force within the overall exchange structure in which they are embedded. Custom, religion, social norms, and taboos—slow-changing and operating at the broadest levels—more or less guide parties in all exchange relations; as do the immediate demands of self-serving preferences, competing priorities, and contextual exigencies calling for quick calculation and marginal calibrations in ever evolving transactional settings. Between the extremes of broad societal forces, at one end, and the constant pull of self-regard or the occasional override of necessity, at the other end, contract law may appear as a "relatively minor legal institution."[37] Given the inestimable influences on everyday exchange, it is no wonder that Stewart Macaulay began his famous study of businessmen and lawyers in Wisconsin by asking, "What good is contract law?"[38]

As characterized here, *contract* entails the sum of all legally sanctioned rules, norms, and practices governing exchange. For present purposes it is of minor theoretical consequence (though pedagogically it's the whole game versus merely the rules) that American law schools teach duress, fraud, and undue influence in their contract law curriculum and reserve blackmail, extortion, and bribery for criminal law courses. Labelling one set "criminal" and the other "contractual"

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exchange, the ICC and numerous other international and domestic arbitration houses also provide their own explicit rules for resolving contractual disputes and facilitating exchange through mediation and conciliation.

36. I hesitate to equate "the exchange structure" with the so-called "rules of the game," in no small part because the latter usage has multiple competing definitions. Douglass North, who popularized the usage "rules of the game," was correct, I believe, in restricting its scope. For North, the rules of the game are *institutions*—including formal and informal rules of exchange—which he distinguished from *organizations*, which he saw more as structural units through which individuals and groups act according to the rules. *See* Douglass C. North, *Institutions and Credible Commitment*, J. INST. & THEORETICAL ECON. 11, 12 (1993) ("Institutions are the rules of the game and organizations are the players."). *Cf.* Avner Greif, *The Fundamental Problem of Exchange: A Research Agenda in Historical Institutional Analysis*, 4 EUR. REV. ECON. HIST. 251, 257 (2000) (treating organizations as a kind, or subset, of institution along with rules, beliefs, and norms); *see also* DIXIT, *supra* note 5, at 5 (noting that institutions may also be usefully described in terms of regularities and equilibria).

37. H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 10 (1968).

38. Stuart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 55 (1963).

tells us nothing about the purported distinction.[39] Coercion and threats are present in all of these legally prohibited exchanges, as well as in exchanges that the law allows; as economists Robert Hale and John Commons long ago demonstrated, no principle separates the economic notion of "holdup" from blackmail.[40] From within the exchange structure, these are all rules defining the mechanisms for both legitimate and illegitimate exchanges. So what, if anything, is the distinctive contribution of criminal law to the exchange structure?

C. Criminal Law and the Exchange Structure

An answer to this question was sketched by Robert Nozick, who asked us to first imagine a "line (or hyper-plane) circumscrib[ing] an area in moral space around an individual."[41] Once inscribed, the line leaves boundaries (or borders) that ought not be crossed.[42] With these imagined borders the question then becomes: why not allow liberal crossings so long as compensatory tolls are paid? That is, "[w]hy is any action ever [criminally] prohibited, rather than allowed, provided its victims are compensated?"[43] One response, suggested in earlier writings by leading late-nineteenth century American equity scholar John Norton Pomeroy, is that "judges have been brought to see and to acknowledge . . . that a remedy which *prevents* a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it."[44] Pomeroy no doubt over-claimed the judicial preference for remedial prevention over payment,[45] and in any case, his suggestion was an argument for equitable discretion more so than criminal prosecution.

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39. I do not in any way intend to suggest that all interactions subject to criminal prohibitions are reducible to transactions in what I am characterizing as the exchange structure. Murder, for example, falls outside of the exchange structure as I understand it, but not murder-for-hire. It is the exchange transaction that is the unit of analysis here, separate from any wrong that precipitates, follows, or coincides with it.

40. *See* JOHN R. COMMONS, THE LEGAL FOUNDATIONS OF CAPITALISM 57–59 (1924) (distinguishing the threat of "withholding" from others as a lawful exercise of economic power in contrast to unlawful duress); Robert L. Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603, 612 (1943) (observing that "all contracts are made, to avert some kinds of threats"). On holdups in economics, see Richard R.W. Brooks, *The Holdup Game, in* THE ELGAR COMPANION TO RONALD H. COASE 131, 131–47 (Claude Ménard & Elodie Bertrand eds., 2016).

41. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 57 (1974).

42. *Id.* How, exactly this "moral space" gets carved-up may be debated. "Locke holds that this line is determined by an individual's natural rights [while] Non-Lockeans view other considerations as setting the position and contour of the line." *Id*.

43. *Id*. at 59.

44. 3 JOHN N. POMEROY, EQUITY JURISPRUDENCE § 1357, at 359 (1st ed. 1887). "[C]ontrary to the opinion of Chancellor Kent, that the common-law theory of not interfering with persons until they shall have actually committed a wrong is fundamentally erroneous." JOHN N. POMEROY, POMEROY'S EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES § 465 (1905).

45. For instance, it is difficult to align Pomeroy's view with the leanings of Justice Holmes, whose permissive option theory would seem to embrace Chancellor Kent's non-interference stance. On the other hand, there is some indication that Holmes favored prevention over permission and payment for matters criminalized. *See* Bailey v. Alabama, 219 U.S. 219, 246 (1911) (Holmes, J. dissenting) ("Breach of a legal contract without excuse is wrong conduct . . . and if a state adds to civil liability a criminal liability to fine, it simply intensifies the legal motive for doing right . . . .").

Criminal prohibitions, argued Nozick, are basically grounded in the terror and incommensurability of border crossings.[46] Yet, while certainly descriptive of some wrongs that are criminalized, this argument concerning terror and incommensurability has been shown to both overstate and understate the worry underpinning many other offenses that are criminalized.[47] As Jeffrie Murphy and Jules Coleman argued:

> [The] claim that criminal prohibitions function to reduce terror and incompensable injuries [omits factors] clearly relevant in favor of criminalizing—namely . . . that a person's moral space not be violated without that person's *consent* (respect for property rules) and that some values are so important that they may not be compromised even with consent (respect for inalienability rules).[48]

Murphy and Coleman's observation that respect for property rules and inalienability are reasons in favor of criminalization derive from Calabresi and Melamed's insight based on their tripartite typology of property rules, liability rules, and inalienability.[49] While property rules condition exchanges on mutual consent of the parties and inalienability restricts exchanges even with mutual consent, liability rules permit exchanges absent consent but conditional on assumption of liability for compensation. In this sense, then, Calabresi and Melamed's typology may be seen as a description of the consent conditions for legally permitted exchanges.[50] Yet, even within this permissive framework, some exchanges may be legitimated neither by consent nor compensation. Calabresi and Melamed address this point in their discussion of crimes against property and bodily integrity, by inquiring into why thieves are subject to more severe penalties than paying compensation for the value of the stolen items.[51]

One explanation they suggest is that the penalty must be increased to account for the fact that the probability of the thief's apprehension is less than certain.[52] Calabresi and Melamed, however, do not regard this explanation as complete, because even if criminals were apprehended every time, it would still be desirable, they argue, to impose a greater penalty than the value of the entitlement to its

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46. NOZICK, *supra* note 41, at 66.

47. *See, e.g.*, JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 117–18 (1984).

48. *Id.*

49. Property rules, liability rules, and inalienability are presented as three distinct modes that a legal regime may choose to enforce or forbid exchanges. However, as the first two impose restrictions (or conditions of alienability), inalienability may be seen as the general mode. *See* Susan Rose-Ackerman, *Inalienability and The Theory of Property Rights*, 85 COLUM. L. REV. 931, 932 (1985) (highlighting that Calabresi and Melamed focus on only one kind of inalienability, "where ownership is legal but sales are not permitted," and the range of restrictions this creates, and developing "normative rationales for some of these restrictions").

50. *See* JULES L. COLEMAN AND JODY KRAUS, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1342 (1986) (observing that since "the property-liability-inalienability rule framework concerns only transactional aspects of institutional entitlements, we conclude that part of the content of a right is a claim specifying the conditions of legitimate transfer").

51. *See* Calabresi & Melamed, *supra* note 16, at 1124–27.

52. *See id.* at 1125.

lawful holder.[53] But why the additional penalty, assuming the lawful entitlement-holder is no worse off? After all, as Nozick observes, "[f]ull compensation keeps the victim on as high an indifference curve as he would occupy if the other person hadn't crossed [the border]."[54]

Full compensation may make border crossing a matter of indifference for victims, but not necessarily for society. Merely charging thieves with the value of what they stole "would be to convert all property rule entitlements into liability rule entitlements."[55] In other words, as Calabresi and Melamed wrote:

> The thief not only harms the victim, he undermines rules and distinctions of significance beyond the specific case. . . . Since in the majority of cases we cannot be sure of the economic efficiency of the transfer by theft, we must add to each case an undefinable kicker which represents society's need to keep all property rules from being changed at will into liability rules.[56]

They proposed that criminal sanctions provide a *kicker* for maintaining the integrity of property rules.[57] This proposition is richly elaborated by Klevorick's insightful essay, *On the Economic Theory of Crime*, to which we now turn.[58]

D. Criminal Law as a Kicker

Klevorick begins his analysis by examining three dimensions along which economic analysis has been applied to the theory of crime.[59] First, economists have approached the individual decision to engage in criminal activity by modeling the prospective criminal as a rational actor who compares the potential gain from a given crime with the potential cost of punishment, adjusted by the probability of being detected and punished.[60] Second, economic research on enforcement policy has sought to characterize the optimal severity and likelihood of punishment as that combination which would minimize the social loss from crime, considering the harm inflicted by the offense, the costs of enforcement, and other factors.[61] Third, and most important for present purposes, is the line of economic inquiry concerning the criminal category, which explores why societies designate activities as crimes that are not in and of themselves wrong or evil.[62]

Klevorick generalizes Calabresi and Melamed's framework by conceiving of each form of entitlement protection, whether property rule, liability rule, or inalienability, as an instance of a legally established "transaction structure,"

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53. *See id.*

54. NOZICK, *supra* note 41, at 63. No one, then, in this imagined transaction is worse-off (since, presumably, the "rational" criminal expects to be better off, even after paying compensation).

55. Calabresi & Melamed, *supra* note 16, at 1090–93, 1125.

56. *Id.* at 1126.

57. *Id.* at 1126 n.70.

58. *See* Klevorick, *supra* note 18, at 302–03.

59. *See id.* at 289; *see also* Alvin K. Klevorick, *Legal Theory and the Economic Analysis of Torts and Crimes*, 85 COLUM. L. REV. 905, 907 (1985) (discussing "how a society legitimates its transaction structure forms part of a theory that explains the existence of the criminal category *for that society*").

60. *See* Klevorick, *supra* note 18, at 290–92.

61. *Id*. at 292–95.

62. *Id*. at 295–97.

specifying the terms with which interactions or exchanges among individuals must comply.[63] From this wider perspective, society not only prohibits the conversion of property rules into liability rules on penalty of criminal sanctions, but may likewise prohibit individuals from attempting to convert inalienability rules or liability rules into property rules, for instance by buying and selling votes.

Returning to our basic question—why are some exchanges categorized as crimes—Klevorick's analysis would answer that an act would be deemed a crime when the person so acting violates the transaction structure by undertaking an exchange in a way that society forbids, thus challenging society's authority to govern the relevant interactions.[64] Klevorick, writing as an economist, does not question why society has the right to decide the terms on which transactions among individuals may be conducted. He states simply that these matters involve political and moral considerations, where economists and their conventional methods offer no particular insight.[65]

Yet even taking these matters as given, along with the objective of preserving the "transaction structure," criminal law as a kicker does not appear to be particularly distinctive. This is *not* to question whether criminal law acts as a kicker contributing to the preservation of the exchange structure, which it surely does (while hardly serving as the only purpose for criminal law—take, for instance, retribution). Rather, the point is that criminal law is not the only source of kickers brought to bear on, and used for the purpose of preserving, the exchange structure. Kickers serving this purpose are also found in civil or private law, as well as outside of law entirely. None of this undermines the notion that criminal law significantly participates in this activity, but rather it refutes the suggestion that kickers are a distinctive contribution of criminal law to the exchange structure. Any distinction of criminal law on the exchange structure must be found elsewhere.

E. Civil and Nonlegal Kickers

Kickers are available in civil or private law as punitive damages, disgorgement, treble damages, and others, as well as outside of the law (hence, nonlegal). Consider first private law kickers. Take, for instance, fiduciary law, which provides a structural framework geared toward compensation of some wrongdoings and prevention of others wrongs—namely breaches of loyalty, for which, even among economists, there appears to be little taste for the idea of efficient breaches of this type. As Robert Cooter and Bradley Freedman

63. *Id*. at 301–02.

64. *Id*. at 303 (observing that "one could simply say that the criminal acts contrary to the structure society has established").

65. As Klevorick wrote: "Even if one were to identify the optimal transaction structure in every case by taking [utility or] wealth maximization as the sole standard of evaluation, one would still need a non-economic justification for society's *authority* to pursue such maximization by coercive means. The economic analysis of crime must consequently presuppose 'a certain minimum of political and legal structure.'" *Id.* at 304. "The criminal sanction is then a sanction to enforce the transaction structure that society has chosen as well as to compensate for the harms to individuals within the society." *Id.* at 303.

observed, "[d]isloyalty brings moral condemnation[,]" is "viewed as immoral," and is corrosive to trust and relationships that are valuable to society as a whole.[66] For all these reasons, and others, fiduciary law takes a punitive stance toward breaches of loyalty, exposing disloyal fiduciaries to stricter remedial sanctions (as compared to the usual civil penalty of compensation) including disgorgement and punitive awards.[67] Punitive damages for breaches of trust in exchanges or other transgressions of the exchange structure are found in numerous private law doctrines originating at common law and in equity, not to mention the many statutes providing for punitive damages for contractual and other non-criminal breaches of exchange structure norms.[68]

Penalties and kickers for transgression of the exchange structure are also common in nonlegal social practice. Recall Fiske's modalities of exchange described in Part II.A.: authority, solidarity, reciprocity, and individuality. When the norms of one modality are transferred "inappropriately" to another,[69] Fiske and Tetlock noted that observers may experience it as a transgression of the exchange structure—what they call a "taboo trade-off."[70] A taboo trade-off represents a fundamental "breach of the boundaries among basic relational models" and poses a direct "threat to the social order because it throws into doubt the taken-for-granted assumptions that are constitutive of that order."[71] Hence, observers have strong emotional reactions, ranging "from anxiety and confusion to primitive, punitive rage."[72] Observers, say Fiske and Tetlock, "*should* want to

66. Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045, 1073 n.90 (1991).

67. Cooter and Freedman state that "the economic character of the fiduciary relationship embodies a deterrence problem for which the duty of loyalty provides a special remedy." *Id.* Hence, they do not claim these greater sanctions exist to protect the overall order, so much as to deter breach, but the implication follows nonetheless. Moreover, fiduciary law shift the presumption of innocence in breach of loyalty claims, which can be seen as an additional element of punitiveness. *Id.* at 1074.

68. For instance, punitive damages are provided under 42 U.S.C. § 1981, which prohibits racial discrimination in "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Bains LLC v. ARCO Prods. Co., 405 F.3d 764, 769 n.3 (9th Cir. 2005).

69. While some exchanges are prohibited across all modalities (murder-for-hire), other exchanges are permitted in some modes and restricted or placed on different terms in other modes (money-for-homecare). "'It is impoverishing to compare the value of a marriage with an increase in salary. Likewise, it diminishes one's potentiality as a human being to put a value on one's friendship in terms of improved living conditions.' To transgress this normative boundary, to attach a monetary value to one's friendships or one's children or one's loyalty to one's country, is to disqualify oneself from certain social roles." Alan P. Fiske & Phillip E. Tetlock, *Taboo Trade-offs: Reactions to Transactions That Transgress the Spheres of Justice*, 18 POL. PSYCHOL. 255, 256 (1997) (quoting JOSEPH RAZ, THE MORALITY OF FREEDOM 22 (1986)).

70. *See id.* ("By a taboo trade-off, we mean any explicit mental comparison or social transaction that violates deeply-held normative intuitions about the integrity, even sanctity, of certain forms of relationship and of the moral-political values that derive from those relationships.").

71. *Id*. at 286.

72. *Id*. Anthropological, historical and experimental evidence "confirm that punitive attributions, aversive emotional reactions, and social ostracism all rise together in response to trade-offs that violate relational boundaries." *Id.*

punish those who breach normative boundaries," not only for retribution and deterrence, but also out of *concern for the structure of relationships*.[73]

Concern for the structure of relationships recalls private law's deviation from its normal mode of compensation to punitiveness for breaches of loyalty and trust in fiduciary and confidence relationships.[74] Folks seldom wait, however, for law's permission to kick transgressors when they can get away with it. They seek to punish transgressors even in the absence of law allowing such punishment and sometimes in spite of laws (or because of laws) preventing private or public retribution or other sanctions.[75] Much more may be said about the roles of social disapprobation and public scorn as punitive mechanisms (or kickers) for preserving exchange structures. The point here, however, is simply to demonstrate that kickers of many forms exist outside of the criminal category and that kickers themselves (whether defined by criminal penalties or otherwise) do not play a singular role in preserving the exchange structure. More important are powers and disabilities.

III
POWER AND DISABILITY IN THE EXCHANGE STRUCTURE

Whether the aim of kickers is to deter transgressors from pursuing legally or socially disfavored activities or to deter them from subverting the exchange structure, the subject is the same: the transgressor. Criminals, disloyal fiduciaries, and other social deviants are the subjects to be constrained, while their victims sit like objects. Nobody advocates kicking the victim, which is not to say some people will not do so anyway (commonly through victim-blaming). Victims are persons in good standing, at least with respect to the transaction at issue, and it would be an unforgivable betrayal to kick them when they fall prey to transgressors. Yet, if we look more closely we can observe law's coercive authority directed at victims, along with other subjects in good standing, specifically for the purpose of preserving the exchange structure.

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73. *Id.* (emphasis added). Note the difference between the Nozickian ex ante deterrence orientation to punishment—where its anticipation deters the criminal and *prevents* "fear" and "anxiety" that would otherwise result—and the ex post emphasis by Fiske and Tetlock—who discuss punishment working to restore the "moral status quo" and reduce the "emotional unease" caused by the transgression. Of course, this is an old idea: "[O]nly reassurance that the wrong-doer has indeed been punished by the collective (whose norms have been violated) should be sufficient to restore the moral status quo ante and to reduce whatever cognitive and *emotional* unease was produced in individual observers by the original trade-off transgression." *Id.*

74. *See* Cooter & Freedman, *supra* note 66, at 1070; s*ee also* Fiske & Tetlock, *supra* note 69, at 286 ("Transgression threatens or actually destroys a relationship; punishment restores that relationship.").

75. *See* Fiske & Tetlock, *supra* note 69, at 286 ("Indeed, punishments are forceful impositions of the relational models themselves, reestablishing their validity and hegemony. Thus, for example, corporal punishment reasserts the authoritative power of the punitive agent and the subordination of the criminal. When deviance disrupts the integrity of a communal group, ostracism—with or without subsequent rites of reintegration—reestablishes it. In each case, a definition of social reality is effectively imposed on the transgressor: his subjugation in the one case and his dependence on the group in the other.").

Law enables persons in good standing to exercise powers like sovereigns within specific domains of the exchange structure. These granted powers, however, may threaten the exchange structure itself. To forestall this threat, in certain contexts law disables the powers and privileges it grants to subjects in good standing. Importantly, law does *not* turn victims into criminals and rarely makes them subject to kickers. Rather, law ties their hands (in both criminal and civil proceedings) to constrain these otherwise empowered subjects from subverting from within the exchange structure. It can hardly be overstated how essential this hands-tying strategy is for the preservation of the exchange structure.

Disabilities, more than punishment, are the essential means by which law prevents its subjects from undermining the exchange structure. Criminals and the Holmesian "bad men" are expected to act contrary to established conduct rules. Sanctions and rules directing punishment are put in place to respond to this anticipated threat from those indifferent to or contemptuous of society's rules of conduct. Yet, when persons in good standing—including those who are inclined to abide by the exchange structure due to its perceived legitimacy, or those who, in Hart's phrasing, accept this legitimacy from "an internal point of view"—contravene the exchange structure, the boundaries of acceptable conduct are blurred.[76] When they are lost, so too is the structure of exchange.

Power and disability are also mechanisms employed within criminal law itself to preserve the exchange structure. Unlike civil law, where victims are given exclusive legal control to decide how to remedy their harm and, in this sense, the civil victim is a "small scale sovereign[,]"[77] criminal victims are disabled from exercising exclusive decision-making authority: the state retains power over criminal matters. Whether this is efficient or not, "[a] person protected *only* by the criminal law has no power to release anyone from its duties."[78] Thus, any privilege or power Hart's small-scale sovereign may have had to dispense with a matter is disabled when the exchange is deemed criminal. With powers, privileges, and disabilities in mind, criminal law's operation to preserve the exchange structures may be appreciated in a light quite distinct from that suggested by Calabresi and Melamed, Klevorick, and Nozick.

A. Liberating Criminals

As between criminal and victim, it is not entirely obvious who poses a greater threat to the exchange structure. Criminals are not wholly antithetical to societal structures and values. Broad refusal to recognize value derived *by* criminals from the activities that define them as such (a non-obvious conclusion at least for some

76. *See* HART, *supra* note 24, at 55–56.

77. H. L. A. HART, ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL PHILOSOPHY 183 (1982).

78. *Id.* at 184.

crimes)[79] does not require a denial of *any* value from criminal activity.[80] Third parties may benefit (not wrongly) even though victims are harmed.[81] Some criminal activity may usefully counter other criminal activity. Some crimes have no victims, but rather only have beneficiaries who are not themselves treated as criminals (for example, certain prohibited transactions where the offense is asymmetric in that it criminalizes selling but not buying or vice versa). Additional examples of criminals creating net social value may be imagined.

Criminals, moreover, can also contribute to the preservation and improvement of the exchange structure itself. Structures that are too rigid tend to break. All sustainable exchange structures must be dynamic and allow for adjustments through evolution, or else revolution. For this reason, Friedrich Hayek observed that "it is, in fact, desirable that the rules should be observed only in most instances and that the individual should be able to transgress them when it seems to him worthwhile to incur the odium this will cause . . . ."[82] Let the criminal suffer the "the odium" of transgressing the exchange structure, since that is itself a useful screen and diagnostic. Beyond that, however, Hayek made a good case for liberating transgressors, not because victims are made whole and the transgressors are sanctioned accordingly—though that may be the case—but rather because the freedom to comply or not (while withstanding the odium) is beneficial and perhaps essential for the exchange structure.[83]

That most people comply most of the time is all any good rule of human conduct ought to aspire toward. A disjunctive suggestion—telling prospective transgressors to "conform or pay [the odium]"—needn't pose a threat to the rules of exchange guiding most people. Most people conform to conduct rules without any thought to the sanctions for nonconformity. For a minority willing to weigh and "pay the price" (suffer the odium) of nonconformity, their deviation from society's conduct rules may in fact affirm the normativity of the exchange structure for those in the majority who accept society's rules: deviation reminds the conforming majority that noncompliance is an option. Commitment or loyalty to a society's rules of exchange can only be revealed by "the possibility of disloyalty."[84] Furthermore, positive adjustments are sometimes realized by visible noncompliance, such as through public acts of civil disobedience.

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79. Consider a terminally ill patient illegally buying marijuana, where no lawful options are available, for pain relief.

80. *See generally* Klevorick, *supra* note 18 (stressing, as other careful economists have, the important distinction between the *personal value* or utility derived by criminals and the *social value* of their criminal activity).

81. Say someone takes your car without permission to drive to someone's rescue (assume conditions of necessity neither allow nor excuse the wrongful appropriation) and returns the vehicle shortly thereafter with your only indication of its removal being that "someone" topped off the gas.

82. F. A. HAYEK, THE CONSTITUTION OF LIBERTY 63 (1960) (emphasis added).

83. *See id*. ("It is this flexibility of voluntary rules which in the field of morals makes gradual evolution and spontaneous growth possible, which allows further modifications and improvements.").

84. ALBERT HIRSCHMAN, EXIT, VOICE AND LOYALTY 82 (1970).

Authorities (legal, religious, and otherwise) are often more forgiving of deviants than they let on. Policy-makers, priests, and other authorities all know that trade-offs are inevitable and often desirable. They cannot make too much of this, however, for a number of obvious reasons. First, endorsing flagrant transgression of the exchange structure can undermine the internalized norm compliance of most subjects. Second, acknowledging transgression can generate widespread dissonance because those who conform to conduct rules will often respond to nonconformity with anxiety, confusion, and "primitive, punitive rage."[85] That's bad enough, but it raises a third concern: because anxious and angry conformists often direct their rage toward deviants and those who condone their actions, officials must protect themselves (as well as the transgressors) from censure and retribution of the majority mob. Hence, various strategies allowing transgression while limiting these follow-on consequences evolve within exchange structures so as to maintain the structure's durability.[86] Transgressors are welcomed additions to the exchange structure, but its guardians are cautioned against openly embracing them.[87]

B. Tying the Hands of Victims

Criminals, deviants, and other transgressors may provide a useful diagnostic and calibrating service to an exchange structure. Exchange structures (non-functionally) at odds with themselves are at best inefficient. Allowing, enlisting, and even encouraging criminal or otherwise noncompliant activity can help preserve an exchange structure.[88] But one ought not overclaim this equilibration function. Inefficiency is inevitable in all social structures and collapse (or revolution) has occurred in many, and is expected in more still. More generally, though, transgressions of conduct rules by criminals, deviants, and other "outsiders" pose less of an existential threat to exchange structures than transgressions by victims, innocents, and others who take an internal point of view.

To illustrate, imagine the following scenario. One morning you wake up to discover that a criminal has converted an entitlement protected by property rule

85. Fiske & Tetlock, *supra* note 69, at 288; *see also* Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 740 (2007) (explaining the outrage a consumer feels when a contractor fails to provide services, in a timely manner or at all).

86. *See generally, e.g.*, Robert K. Merton, *The Role-Set: Problems in Sociological Theory*, 8 BRIT. J. SOC. 106 (1957); *see also* Fiske & Tetlock, *supra* note 69, at 257 ("These tactics include following common-sense practices that compartmentalize social life, explicitly invoking distinctions among spheres of justice (for example, family versus work), obfuscating the trade-offs, and adopting decision-avoidance tactics such as buckpassing and procrastination.").

87. *See* Fiske & Tetlock, *supra* note 69, at 257 ("From the standpoint of political expediency or even social peace, honest, integratively complex reasoning that renders the trade-offs transparent is likely to be the least effective strategy.").

88. *See, e.g.*, Ronald J. Daniels et al., *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, 59 AM. J. COMP. L. 111, 168 (2011) (describing efforts by the British to incorporate the feedback of (rather than fight) agitators and transgressors of the colonial administration's imposed transaction structure after experiencing a number of local revolts).

or inalienability rule. Say, you were seduced the evening before, drugged, and woke to the frightful discovery that your kidney was removed and there's no getting it back.[89] You are handcuffed to the bed in a vaguely familiar hotel room, unable to reach the phone, and too weak to cry for help. All you can do is sit with the shock and the natural but still unimaginable emotions that would follow such a violation. From the adjoining room, you are approached by your seducer, attractive as last night, who calmly says:

> You can live with your one remaining kidney. My client, whose identity I do not know, can live with neither of his. He has arranged through a secret bank account to transfer $\$x$ to you every year on this date for the rest of your life so long as you neither seek to nor assist in further prosecution of the matter. As a sign of good faith, the first installment has already been deposited into your account.

With that the seducer hands you a phone—your phone, showing the funds present in your bank account—and before leaving, issues a final statement: "You may now call the police if you wish, but I can assure you that you will be no better off physically or financially."

Say you are convinced by each and every one of the seducer's statements. What would you do? What would anyone who, after overcoming the initial shock and appall, rationally considered the proposal choose to do? Who knows? It would no doubt depend on the amount of money offered, preferences, passions, and desire for retribution or vindication of entitlement, and maybe even an internalized preference to validate the transaction structure. Among all those factors, it is difficult to imagine that the last one would receive top priority. If you, or the rational actor, retained the power of the small-scale sovereign over this matter, the threat to the exchange structure would be undeniable. Criminals will be criminals, but the law cannot let victims exposed to moral hazard use their legal powers to undermine the exchange structure. Civil law's small-scale sovereign is stripped of its authority and standing in this criminal context. The law disables and ties the hands of small-scale sovereigns to prevent settlements and exchanges contrary to the exchange structure.[90]

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89. This fanciful account is not intended to make light of the awful and extensive illegal trade in human organs. A significant amount of black market activity supports this trade. "A recent report by Global Financial Integrity estimates that the illicit organ trade generates illegal profits between $600 million and $1.2 billion per year." F. Ambagtsheer & W. Weimar, *A Criminological Perspective: Why Prohibition of Organ Trade Is Not Effective and How the Declaration of Istanbul Can Move Forward*, 12 AM. J. TRANSPLANT 571, 571 (2012). Notwithstanding growing legislation and regulation aimed at curbing the worse abuses in the organ trade, there remain significant distributional and dignitarian concerns even in the regulated lawful trade. *See* Tazeen H. Jafar, *Organ Trafficking: Global Solutions for a Global Problem*, 54 AM. J. KIDNEY DISEASES, 1148 (2009) ("There are entire villages in Pakistan in which it has become normal practice to sell kidneys.").

90. Hands-tying is an ancient strategy. Homer described its value in *Odysseus*. For more recent accounts, see generally THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT (1960); Randall L. Calvert, *The Rational Choice Theory of Social Institutions: Cooperation, Communication, and Coordination*, *in* MODERN POLITICAL ECONOMY: OLD TOPICS, NEW DIRECTIONS 216 (Jeffery S. Banks & Eric A. Hanushek eds., 1995); Hilton L. Root, *Tying the King's Hands: Credible Commitments and Royal Fiscal Policy during the Old Regime*, 1 RATIONALITY & SOC'Y 240, 247 (1989); Thomas C. Schelling, *An Essay on Bargaining*, 46 AM. ECON. REV. 281, 300 (1956); Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519, 519 (1983).

IV
CONCLUSION

Black markets are far from lawless spaces. They are, in fact, created by law: they exist only to the extent that law defines the contours of illicit transactions or prohibited conduct. Black markets are constituted by a variety of legal entitlements, but most significantly they are created by legal disabilities. In this sense, looking at black markets from a legal-analytic perspective can provide broader insight into why societies criminally prohibit and variously sanction consensual transactions that might otherwise occur in an open marketplace: to preserve the established exchange structure. And, the rules of exchange are principally preserved by disabilities.

Criminal law is not the only basis for disabling private powers and privileges. By their very nature, private rights "place the claimant in a powerful position relative to the defendant."[91] To prevent abuse of that power and subversion of expectations within the exchange structure, various legal doctrines may be enlisted. Courts of equity, for example, as Smith has emphasized, often limit legal rights to counter opportunistic exercises of private power and privilege.[92] Laches will disable power even absent opportunism. McFarlane, like Smith, stresses equity's response when the small sovereign-claimant exercises a right wrongfully over her subject-defendant.[93] This operation is observable in estoppel-like doctrines—both legal and equitable—as well as in a number of other doctrines in restitution and trust law. These are just some of the primary means through which law preserves the exchange structure, not by punishing subjects through criminal law, but by disabling their inherent power to rework the rules of exchange from within the legal system itself. Much the same holds outside of law; normative disabilities are deployed in all orders contributing to the exchange structure for the purpose of preserving it.[94]

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91. Ben McFarlane, *Equity and the Justification of Private Rights, in* JUSTIFYING PRIVATE RIGHTS (S. Degeling et al. eds.) (forthcoming) (manuscript at 6) (on file with author).

92. *See* Henry E. Smith, *The Equitable Dimension of Contract*, 45 SUFFOLK U. L. REV. 897, 914 (2012) ("Equity is the missing dimension in contract theory. Despite parties' ability to freely contract within the confines of contract law and moral institutions of promising, equity relies on overarching, but simple, everyday morals in order to provide the guideposts necessary to police potentially boundless opportunistic behavior."); *see also* Ben McFarlane, *Form and Substance in Equity, in* FORM AND SUBSTANCE IN THE LAW OF OBLIGATIONS 197, 197 (Andrew Robertson & James Goudkamp eds., 2019) (citing Hughes v. Metro. R y. Co. [1877] 2 App. Cas. 439 (HL) 448) ("'The first principle upon which all Courts of Equity proceed,' Lord Cairns famously observed '[is that] . . . the person who might otherwise have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings between the parties.'"); Kenneth Ayotte, Ezra Friedman & Henry E. Smith, *A Safety Valve Model of Equity as Anti-Opportunism* (Nw. Law & Econ. Research Paper No. 13-15, 2012).

93. McFarlane, *supra* note 91 (manuscript at 6).

94. Some of these other normative orders are referenced *supra* notes 7, 27–29 and accompanying text. *See generally* Joseph Raz, *Normative Powers (revised)* (Oxford Legal Studies Research Paper No. 36/2019, 2019).