

2008

## Neoliberal Penalty: The Birth of Natural Order, the Illusion of Free Markets

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### Recommended Citation

Bernard E. Harcourt, *Neoliberal Penalty: The Birth of Natural Order, the Illusion of Free Markets*, U OF CHICAGO LAW & ECONOMICS OLIN WORKING PAPER NO. 433; U OF CHICAGO PUBLIC LAW WORKING PAPER NO. 238 (2008).

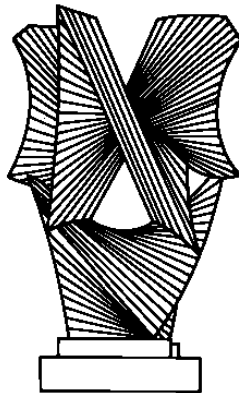
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# CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 433  
(2D SERIES)

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 238



NEOLIBERAL PENALTY:  
THE BIRTH OF NATURAL ORDER,  
THE ILLUSION OF FREE MARKETS

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Septemer 2008

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# NEOLIBERAL PENALITY: THE BIRTH OF NATURAL ORDER, THE ILLUSION OF FREE MARKETS



Mia Ruyter, "Henry Paulson" (2008)

*oil paint on leather*

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Paper presented at the University of California, Los Angeles  
September 26, 2008

# NEOLIBERAL PENALITY: THE BIRTH OF NATURAL ORDER, THE ILLUSION OF FREE MARKETS

Bernard E. Harcourt

*The major function of criminal law in a capitalist society is to prevent people from bypassing the system of voluntary, compensated exchange—the “market,” explicit or implicit—in situations where, because transaction costs are low, the market is a more efficient method of allocating resources than forced exchange... When transaction costs are low, the market is, virtually by definition, the most efficient method of allocating resources. Attempts to bypass the market will therefore be discouraged by a legal system bent on promoting efficiency.*

Richard Posner (1985)

## *Preface*

**W**e face today one of the greatest financial crises in Western capitalism. The collapse of Bear Stearns and Lehman Brothers, the nationalization of Fannie Mae and Freddie Mac, the federal bailouts of A.I.G. and Washington Mutual, the fire sale of Merrill Lynch, and the ongoing federal rescue program all attest to the magnitude of our current crisis.

In this sense, the timing of this essay—the culmination of over two years of ongoing historical research—could hardly be worse. The central premise of the essay is that most people in the United States believe that the market is the most efficient mechanism to allocate resources. The events of 2008 challenge this central premise and are

forcing the American people, more than ever, to reexamine *the need for the regulation of the free market*.

In another sense, however, the timing of this essay is, sadly, perfect. Perfect because its purpose is precisely to question the meaning of the very phrase “*the need for the regulation of the free market*” and to suggest that it is the belief in the duality of those two central terms—*regulation* and *free market*—that is one of the greatest problems we face today. The terms, as well as their companion expressions, “market efficiency,” “natural order,” “self-adjusting markets,” etc., are illusory and misleading categories that fail to capture the individual distinctiveness of different forms of market organization and mask the redistributions of wealth that characterize our peculiar mode of market organization.

This essay asks the question, what work do these categories of “natural order” and “market efficiency” *do* for us? What do we achieve when we distribute regulatory market mechanisms into the two categories—the free and the constrained—and then judge them on that basis alone? The answer: We have developed these categories in order to place what are in fact irreducibly individual phenomena in a coherent frame and to deploy simplistic heuristic devices to expedite our evaluation of different forms of economic organization. In the process, we have created categories that are responsible, first, for facilitating our growing penal sphere, and, second, for naturalizing and thereby masking the redistributive consequences associated with different methods of organizing markets.

The idea of natural order, born in the eighteenth century, is precisely what gave birth to *neoliberal penalty*, a discourse on economy and society in which the government is pushed out of the economic sphere, relegated to the boundary, and given free rein there—and *there alone*—to expand, intervene, and punish, often severely. The concept of market efficiency also *naturalizes* and thereby hides the choices, policies, norms, regulations, and laws that we use to administer markets, and as a consequence, makes us not analyze neutrally and open-mindedly the mechanisms that regulate the market.

The ultimate aspiration of this essay is to cease using those terms—*natural order*, *market efficiency*, *the free market*, or even *regulated markets*—and instead begin the arduous task of evaluating different proposals for the organization of society based on a meticulous comparison of the distributional effects associated with competing mechanisms necessary to supervise and administer a system of economic and social exchange.

The story begins, though, very far away in time and place, in the Parisian markets of the eighteenth century, with the establishment of the *lieutenant générale de police du Châtelet de Paris* and the “police” of bakers, grain merchants, and markets.

## I.

In early May 1739, commissioner Emmanuel Nicolas Parisot was doing his rounds in the *Marais*. As the investigator, examiner, and royal counselor responsible for the Saint-Antoine district, Parisot reported to René Hérault, *lieutenant général de police* at the Châtelet of Paris, the royal palace of justice. Parisot was at the Saint-Paul market going from baker to baker, weighing their bread, when he discovered at Jean Thyou’s stand “four three-pound breads each light one-and-a-half ounces.”<sup>1</sup> At about the same time, commissioner Charles, also doing his rounds, discovered at Courtois’ bakery on *rue de Chantre* “one bread labeled eight pounds in weight, light two ounces, two others marked the same weight one ounce light each, six labeled four pounds in weight each one ounce off, another six pound bread light one ounce and a half, two others labeled six pounds in weight, eight others marked four pounds in weight, all a half ounce light.”<sup>2</sup> Another commissioner, Delespinay, found a cache of underweight breads in a small room hidden in the back of Aublay’s bakery shop on the *vieille rue du Temple*. Delespinay immediately seized the bread and had it sent to the Sisters of the Charity of the Saint-Gervais parish.<sup>3</sup> (Commissioner Charles had sent his confiscated bread to the Capuchin friars on the *rue Saint Honoré* and to

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<sup>1</sup> Freminville 1758 :78.

<sup>2</sup> Freminville 1758 : 78-79.

<sup>3</sup> Freminville 1758 :79.

the poor at the parish of Saint-Germain l’Auxerrois.)<sup>4</sup> When the *lieutenant de police* held court the following May 5th, 1739, Hérault condemned the bakers but showed mercy and “this time only” sentenced each to only fifty *livres* in fines.<sup>5</sup>

Later the same month, the 29th of May, master baker Amand, an elected syndic in charge of his community of master bakers, found himself accused of selling a loaf of bread in his shop—specifically, “one white bread weighing four pounds, at eleven *sols*”—at a higher price than market—to be exact, “three *deniers* for each pound above the common market price.”<sup>6</sup> Hérault declared Amand guilty, fined him three hundred *livres*, and stripped him of his elected office. In the sentencing order, Hérault ordered the other syndics to assemble within three days of the publication of his sentence and to proceed in their office to the election of a new syndic.<sup>7</sup> A week earlier, Hérault had convicted Marie-Hebert Heguin of buying grain at market for resale and fined her 1,000 *livres*.<sup>8</sup> A royal ordinance prohibited buying grain with the intention of reselling it: “It is permitted to purchase grain at market for one’s use; however, it is not permitted to buy grain for resale: the reason, very simply, is that he who buys for purposes of resale must necessarily gain from the transaction and, as a result, will sell it at a higher price than market rate, which constitutes a punishable monopoly.”<sup>9</sup>

It is in these terms that Me. Edme de la Poix de Freminville described the Parisian grain markets in his *Dictionnaire ou traité de la police générale* published in 1758, in which he collected, assembled, organized, classified, reported and reprinted a myriad of these sentences and royal ordinances. A manual of policing, a compendium of disciplinary practices, Freminville’s dictionary codified alphabetically a gamut of rules and prescriptions covering not only subsistence—grains, bread, meats, fish, poultry, oysters, and legumes—but also gaming, sanitation, religious practice, guilds, sexual mores, even the *charivaria*.

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<sup>4</sup> Freminville 1758 :79.

<sup>5</sup> Freminville 1758 :79.

<sup>6</sup> Freminville 1758 :73.

<sup>7</sup> Freminville 1758 :73.

<sup>8</sup> Freminville 1758:502.

<sup>9</sup> Freminville 1758 :501. This ordinance was also enforced by sentences on July 8, 1740, and August 11, 1741 – fining for 1,000 *livres*. See Freminville 1758 :503-505.



Advertised as a “Work necessary to all officers of the police and officers of justice, where they will find each and every one of their obligations and functions classified by each term, necessary as well to all prosecutors and practicing attorneys; & equally useful to priests, churchwardens, ... merchants, ... & others,”<sup>10</sup> the dictionary contained 564 pages of the most minute regulation of, well, practically everything.

Freminville was intimately familiar with these ordinances. Himself a *bailli* for the village and surroundings of Lapalisse in the Auvergne region of central France, Freminville had similar magisterial powers in his countryside as a *lieutenant général de police* would have had in Paris.<sup>11</sup> Freminville published his dictionary more than fifty years after the first volume of Delamare’s famous *Traité de Police* had appeared in 1705—the first of four massive *in-folio* tomes documenting and tracing in intricate detail the history of the police of Paris. Freminville, though, targeted a wider audience with his dictionary. Whereas Delamare had written for the urban police officer—especially the Parisian police administrator—Freminville pitched his treatise to the far more numerous country magistrates and prosecutors—the many *procureurs fiscaux*, who resided in each village in France and administered the police function, meting out justice and regulating all aspects of daily life. By alphabetizing the rules and making them available in a more concise, single volume, *in-quarto*, Freminville sought to disseminate the disciplinary rules further, to publicize them, to make them known—in their finest detail.<sup>12</sup>

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<sup>10</sup> Freminville 1758 :i (cover page).

<sup>11</sup> A *bailli* was the functional equivalent of a *lieutenant général de police* or an English sheriff in more rural areas outside of Paris. It was an office retained important regulatory and administrative functions throughout the *ancien régime*—including the authority to set market prices. See generally Olivier-Martin 1988:66-73. For a biographical entry on Freminville, see des Essarts 1800, vol.3, p. 153-154.

<sup>12</sup> Freminville prefaces his work with an acknowledgement to Delamare’s famous treatise, all the while signaling the broader reach of his own text and the greater practicality or applicability of his treatise: « Il semblerait qu’après le *Traité de Police* de M. de Lamare, personne ne devrait hasarder d’écrire sur cette matière, qui est approfondie avec toute l’érudition & la science que l’on peut desirer,” Freminville began. « Mais si l’on considère que ... quatre gros volumes *in-folio* que contiennent ce *Traité* ne se trouvent pas aisément chez tous les Officiers de Police de la campagne... [et] en y ajoutant ceux qui sont intervenus depuis trente-quatre ans de l’impression de ce *Traité*, c’est ce que j’ai tâché de ramasser ; & afin d’en faciliter la lecture, je l’ai mis

“Transgression of laws and ordinances are crimes both large and small, but however slight they may be, the ministry of the *procureur fiscal* must not tolerate them,” Freminville observed. “To despise but ignore small mistakes is to allow larger ones, and impunity throws villains into new infidelities.”<sup>13</sup> Quoting Saint-Bernard, from Book 3 of *de Consideratione*, Freminville declared that impunity is the “daughter of negligence, mother of insolence, source of impudence, nurse of iniquity and of transgressions of law.”<sup>14</sup> He concluded: “The officer whose role is to suppress anything that deviates from what is prescribed as orderly must not neglect, even with respect to minor things, to punish those who contravene.”<sup>15</sup>

Oddly, Freminville himself was deeply skeptical of these ordinances and opposed the restrictions on commerce associated with the regulation of the grain and bread markets. Freminville was a partisan of free trade, he professed. “It is indeed a delicate matter to tinker with the price of grain and its commerce, because he who regulates with an eye to reducing the market price often discovers that, as a result of unforeseen circumstances, the very regulations that he crafted, far from reducing it, raise the price and reduce the supply of the goods in question.”<sup>16</sup> To Freminville, the little-known author of the well-known *Essai sur la Police générale des Grains, sur leurs prix, &c.*, published anonymously in London in 1753, was entirely right when he declared that “by far the wisest and best policy to adopt is to grant merchants who commerce in grain absolute liberty, and to allow them to transport grain from one province to another, which is most fortunately what is now currently allowed under the King’s declaration of September 17, 1754.”<sup>17</sup>

Freminville was a free trader and believed that self-interest would serve to ensure an abundant supply of wheat and barley. This, he

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par forme de Dictionnaire, & ai rapporté à chaque terme les Ordonnances & Arrêts qui en font la décision. » (Freminville 1758 :iii).

<sup>13</sup> Freminville 1758:vii.

<sup>14</sup> Freminville 1758 :vii-viii.

<sup>15</sup> Freminville 1758 :viii.

<sup>16</sup> Freminville 1758 :267.

<sup>17</sup> Freminville 1758 :267 (the author of the anonymous text was Claude-Jacques Herbert).

thought, was self-evident and demonstrated practically every day: whereas, for instance, the grain reserves maintained by the state and provinces had to be thrown in the river, rotten and infested, private individuals preserved their stock well in their granaries. “Such waste would never happen with an individual,” Freminville observed, “because it is their own property.”<sup>18</sup> Private property and personal interest would help forestall such sordid outcomes and prevent the recurring grain shortages—*les disettes*, as they were called—that plagued France.

Many other historians of the Parisian grain and bread markets would share Freminville’s curious, almost morbid fascination with the intricate details of the ordinances, royal declarations, and sentences. Though they too often favored free commerce, they were seduced by the maze of market regulations—as if they couldn’t *not look*. The leading historical treatment from the nineteenth century on the *police des grains*—the treatise most often cited in later works—is itself the product of an arch opponent of market regulation. Georges Afanassiev, the *privat-docent* at the University of Odessa in Russia, was a scholar of Turgot who later turned to the commerce of grain. Afanassiev spent two years conducting archival research in Paris in the early 1890’s and produced a thorough and well-documented text, *Le Commerce des céréales en France au dix-huitième siècle*, originally printed in Russian, translated into French, and published in Paris in 1894. Afanassiev opposed these market regulations, yet studied them in an equally obsessive manner, captivated by their intricacy and complexity. The leading contemporary treatment of the *police des grains*, Steven Kaplan’s magisterial two-volume book, *Bread, Politics and Political Economy in the Reign of Louis XV*, though remarkably balanced and erudite, also discloses a slight preference for liberalization. “In many of its particulars,” Kaplan admitted, “the liberal bill of indictment [of the *police des grains*] was well founded.”<sup>19</sup> Kaplan adds, “The [liberal] grain reforms were a devastating critique of the police practices we have discussed.”<sup>20</sup>

Despite his free trade ideology, then, Freminville dissected and catalogued, reported, cried—much like the sentences themselves were

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<sup>18</sup> Freminville 1758 :267.

<sup>19</sup> Kaplan 1976:Vol.2:680.

<sup>20</sup> Kaplan 1976:Vol.2:682.

cried at market—and decried the intricate details of myriad rules and regulations. Of Fremenville’s lengthy book, ninety pages concern the cultivation and commerce of grain, the sale of bread, the regulation of the *boulangers*, *meuniers*, etc. That represents a full *sixth* of the entire dictionary. And it covered everything from prohibiting the purchase of grain on the stalk to prohibiting anyone from walking in fields that have been sown (especially to pick flowers); from fixing the hours of sale to fixing the dates for harvesting; from prohibiting speech that would tend to raise grain prices to requiring seminaries and colleges to warehouse three years worth of grain at all times.

All sales, naturally, were to take place at market. “It is forbidden, first, to sell or buy grains outside the market. The age-old prohibitions on this question, which dated back to the fourteenth century, had never been repealed, and since 1709 had been taken up again and applied more or less strictly.”<sup>21</sup> Fremenville reported that the police of the Châtelet, by sentence dated February 20, 1728, convicted a man named Lorillard for having sold “two *muids* of quality flour . . . outside of the market square.”<sup>22</sup> Another police sentence, dated May 27, 1729, condemned several merchants—Petit, Chateaudun, and the son, René Petit—for having sold sixteen *muids* of wheat elsewhere than at market, and fined them each a thousand *livres*.<sup>23</sup> There are similar sentences recorded for February 29, 1731, January 31, 1738, and August 3, 1742 – all for selling grain or flour off-market.<sup>24</sup> In the police sentence dated January 11, 1737, the *lieutenant général* “renewed the prohibitions applicable to all bakers, millers, brewers, and the like, against buying any grain or flour, and to all farmers, farm laborers, and the like, against selling the same, by specimen or sample, anywhere within eight leagues of Paris.”<sup>25</sup>

To ensure that all sales were conducted at market, other regulations imposed an obligation to certify market sales. A sentence issued in the police tribunal of the old Châtelet, dated October 10, 1681, confirms the confiscation of a “*muid* (measure) of flour in fifteen bags” for not having obtained a “certificate from where such merchandise was

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<sup>21</sup> Weulersse 1910, vol. I :534.

<sup>22</sup> Fremenville 1758: 451.

<sup>23</sup> Fremenville 1758: 451-52.

<sup>24</sup> Fremenville 1758 :452.

<sup>25</sup> Fremenville 1758 :454.

bought,” and for failing to turn over the goods “to the measurers upon arrival at the doors and barriers” of the city.<sup>26</sup> It is interesting to note that the inspection here had been conducted by “Marie Claude Croisette, the elder, agent of the guild (Communauté) of the elected syndics of measurers of grain and flour of the city, *fauxbourgs*, and *banlieus* of Paris.”<sup>27</sup> The police were not the only investigators but were assisted by the syndics of the merchant communities—and often, it was the other way around too.

Once at the market, producers were forbidden to sell their grain and flour before a specified hour—an hour that varied according to the season. The eighteenth-century regulations followed daylight savings time.<sup>28</sup> “The opening of trading day in the markets and ports of Paris was fixed by a series of ordinances,” Afanassiev tells us. “From Easter to Saint-Rémy, sales began at eight o’clock in the morning; from Saint-Rémy to Easter, at nine o’clock. In the provincial markets, market days and opening hours were determined the same way.”<sup>29</sup> There were also rules about who could buy first at market. “Typically, the opening [of the market] was reserved for private individuals,” Afanassiev writes, “that is to say, those who were neither bakers nor traders. Members of this latter group were not admitted until later. In Paris, they did not have the right to come to the market or be represented there before noon, nor could they even talk with vendors near the perimeter of the market.”<sup>30</sup> Freminville adds: “It is forbidden for all innkeepers, hoteliers, and cabaret owners to buy on days of markets and fairs . . . before eight o’clock in the morning from Easter to the first of October, and before nine o’clock from the first of October to Easter.”<sup>31</sup>

Other ordinances punished speech that could tend to increase the price of grain: “It is not permitted to hold, spread, or publish any speech that could prevent [the sale of grain] at the fixed price, nor to suggest

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<sup>26</sup> *Sentence de la Chambre de police du Châtelet, qui déclare valable une saisie d’un muid de farine, à la requête du procureur des jurés mesureurs de grain*. 10 octobre 1681. Paris : M. Le Prest (s.d.).

<sup>27</sup> Id.

<sup>28</sup> See *Ph. Rur.* Chap. XI, p. 364; *Lettre a un ami*, pp. 90-93.

<sup>29</sup> Afanassiev 1894:71 (relying on Delamare, t. II, p. 81).

<sup>30</sup> Afanassiev 1894:71 (relying on *Ordonnance de décembre 1672*).

<sup>31</sup> Freminville 1758:468.

that the cost of grain will increase, that there isn't any grain at such and such place, or that it is worth a lot more elsewhere; speech of this nature tends to cause the price to increase," Freminville explained.<sup>32</sup> A police sentence of the Châtelet dated July 22, 1740, fined a man named Fieffé 2,000 *livres* for having "held in the Gonesse market speech that tended to alarm the public and to raise the price of grain."<sup>33</sup> What, exactly, was the nature of his speech? The squire Martin Rulhier, the sheriff of the *Île-de-France* and commander of the brigade of Saint Denis, had gone to the Gonesse market to "investigate any violations that could have been committed against the spirit of the king's declarations, the judgments of parliament, and the regulations and sentences of the police..."<sup>34</sup> The widow Bethemont, baker at Gonesse, told him that a certain Fieffé, a farmer, had refused to sell her his nine *septiers* of wheat at the common market price. "He would only sell the wheat thirty *livres*, whereas the highest price that day had been twenty-six *livres*; she [the widow Bethemont] had offered twenty-seven, at which he replied that for that price he would prefer to pack it up, especially since he had gotten thirty-three *livres* at Pont, twenty-eight at Dammartin, and thirty-two at Nanteuil-le-Hardouin. He said he would sell it on at the next market, and in effect packed up his nine *septiers* of wheat."<sup>35</sup> The police lieutenant characterized this speech as "tending to alarm the public, cause sedition, increase the price of grain, and consequently that of bread."<sup>36</sup>

According to Freminville, the grain trade had to be one of the main concerns of the county prosecutor. Freminville repeatedly underscored the importance of the market regulations: grain and grain markets, he affirmed, "should constitute the largest and principal responsibility of the *Procurer Fiscal*."<sup>37</sup> "We are dealing here with the lives of our fellow humans, and it is imperative that they not be sacrificed to the monopolists who meddle in selling and reselling grain."<sup>38</sup> Freminville's dictionary covered the grain industry exhaustively, and there were in fact so many regulations of the market

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<sup>32</sup> Freminville 1758:213.

<sup>33</sup> Freminville 1758:213.

<sup>34</sup> Freminville 1758:213.

<sup>35</sup> Freminville 1758:214.

<sup>36</sup> Freminville 1758:214.

<sup>37</sup> Freminville 1758:166.

<sup>38</sup> Freminville 1758:266.

that, for the dictionary entry on “Marchés”—the entry on *markets*—Fremenville merely refers the reader, by cross reference, to another entry.<sup>39</sup> His dictionary reads:

MARKETS. *SEE* POLICE.

To our modern eyes, the Parisian *police des grains*—that intricate and extensive web of royal decrees and ordinances that governed every minute aspect of the commerce of grain under the *ancien régime* and that gave rise to what has been called “the grain wars of the eighteenth century”<sup>40</sup>—has come to symbolize excessive government control and intervention. The policing of the grain trade—that tangled lattice of edicts and decrees intended to keep down the price of bread in Paris and the provinces—stands today as a labyrinth, a maze, a morass of regulations, of minute government tinkering in the most atomic details of the commercial exchange.

Codes, dictionaries, and treatises of the police would proliferate in the mid-eighteenth century to catalogue and disseminate these ordinances. The 1750s and 60s were an important period—not, naturally, for the codification of rules themselves. That had been recurring since at least the sixteenth century and the important dates were well known: the *règlements* of 1567 and 1577, the *déclaration* of August 31, 1699 or April 19, 1723. No, the mid-eighteenth century was an important period for the *dissemination* of the rules, for the *cataloguing*, for *publicizing* the regulations. 1758 marked not only the publication of Fremenville’s *Dictionnaire*, but also of Duchesne’s *Code de la police, ou analyse des réglemens de police, divisé en douze titres*. Originally published in Paris the year before, Duchesne’s popular treatise would already be reprinted a year later and it compiled, in over 480 pages, all the police rules and regulations that extended over the areas of religion, customs, health, science and liberal arts, commerce, manufacture, mechanical arts, servants, domestics, and the poor. Within the policing of commerce alone, Duchesne had chapters on weights and measures, on fairs and markets, on the commerce in grain, wine, livestock, candles, wood and

<sup>39</sup> Fremenville 1758:367 (« MARCHÉS. v. POLICE. »).

<sup>40</sup> “La guerre du blé au XVIIIe siècle” is the very title of an excellent collection of writings on the topic. See Gauthier and Ikni 1988.

wool—to name a few—and on merchants, their agents, currency exchanges, and banks. 1758 also marked the publication of the first volumes of the *Code Louis XV: Recueil des principaux Edits, déclarations, Ordonnances, Arrêts, Sentences et réglemens concernant la justice, police et finances depuis 1722 jusqu'en 1740*. The *Recueil* would assemble all the important ordinances and sentences on policing and grow to a twelve volume set, in-12.<sup>41</sup> Numerous other codes, including Deslandes' 1767 *Code de la police ou analyse des réglemens de police, divisé en douze titres*, would be published and reprinted in Paris during the period.

It was precisely this maze of ordinances that Adam Smith, in *The Wealth of Nations*, castigated as “such absurd regulations, as frequently aggravate the unavoidable misfortune of a dearth, into the dreadful calamity of a famine”<sup>42</sup> or as “the folly of human laws.”<sup>43</sup> It was an economic approach, Smith would famously suggest, that “embraced all the prejudices of the mercantile system, in its nature and essence a system of restraint and regulation.”<sup>44</sup> And still today, we characterize the period as excessively regulated, over-regulated, a frenzy of market intervention—the minute regulation of the smallest infraction. Order-maintenance at the most micro level.

## II.

The contrast could not be greater with our perception of contemporary markets—whether in grain or more broadly. Today we tend to view modern markets and commodity exchanges as relatively free. Commerce has been liberalized, the forces of free market exchange have been unleashed, and the constraints of the past lifted. Self-adjusting market mechanisms have replaced the *police des grains* and, in a far more efficient manner, ensure reasonable prices and abundant supply. Though globalization and population growth loom on the horizon as a potential

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<sup>41</sup> *Code Louis XV*: 1758-60.

<sup>42</sup> Smith 1976 II:48 [Bk. IV, Ch. V].

<sup>43</sup> Smith 1976 II:50.

<sup>44</sup> Smith 1976 II:182 [Bk. IV, Ch. IX].



threat to the adequate supply of commodities, voluntary and free market exchange at home is the model of choice.

“[T]he close of the twentieth century saw a virtual canonization of market organization as the best, indeed the only effective, way to structure an economic system,” observes professor Richard Nelson at Columbia University.<sup>45</sup> As J. Rogers Hollingsworth and Robert Boyer add, “Throughout Eastern and Western Europe as well as in North America during the 1980s, there was a dramatic shift toward a popular belief in the efficacy of self-adjusting market mechanisms. Indeed, the apparent failure of Keynesian economic policies, the strains faced by the Swedish social democratic model, and the collapse of Eastern bloc economies led many journalistic observers to argue that capitalism is a system of free markets that has finally triumphed.”<sup>46</sup> Nelson captures the dominant, orthodox view succinctly:

For-profit firms are the vehicles of production. They decide what to produce and how, on the basis of their assessments about what is most profitable.... Competition among firms assures that production is efficient and tailored to what users want, and prices are kept in line with costs. The role of government is limited to establishing and maintaining a body of law to set the rules for the market game and assuring the availability of basic infrastructure needed for the economy to operate.<sup>47</sup>

Nelson concedes that this is a simplified version of “the standard textbook model in economics,”<sup>48</sup> perhaps even a bit “folk theory.”<sup>49</sup> But it is, in broad outline, an accurate description of a dominant view that has had a powerful influence on the latter part of the twentieth and early twenty-first centuries. As Boyer suggests, accurately I believe, “The market is now considered by a majority of managers and politicians as

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<sup>45</sup> Nelson 2005a:1. Leading exponents of this view include Francis Fukuyama (1992), Daniel Yergin and Joseph Stanislaw (1998), and others.

<sup>46</sup> Hollingsworth and Boyer 1997a:1.

<sup>47</sup> Nelson 2005a:1.

<sup>48</sup> Nelson 2005a:1.

<sup>49</sup> Nelson 2005a:1.

the coordinating mechanism ‘par excellence.’”<sup>50</sup> The financial crisis of 2008 has shaken these beliefs, but has not displaced them.

This standard view generally traces to the Chicago School of Economics and its founders, Milton Friedman and George Stigler. For the educated reader of the *New York Times*, the tenets of the Chicago School are usefully summarized by the economics columnist, David Leonhardt, in the following terms: “The Chicago School believes that markets—that is, millions of individuals making separate decisions—almost always function better than economies that are managed by governments. In a market system, prices adjust whenever there is a shortage or a glut, and the problem soon resolves itself. Just as important, companies constantly compete with each other, which helps bring down prices, improves the quality of goods and ultimately lifts living standards.”<sup>51</sup>

To be sure, many commentators today, especially law scholars and lawyers who toil in the regulatory domain, consider this “free market libertarian” version of the Chicago School a bit of an extreme position. Even some of the staunchest Chicago School adherents have themselves softened their claims to allow for slightly more governmental intervention in cases of market failure due to collective action, monopolistic, or other coordination problems. Richard Epstein, for instance, has softened his libertarian edge with age and embraced a more welfarist position. “My ideal government is not quite as small as [I suggested in the 1970s], but it is still much smaller than the massive government in place today,” Epstein states. “Thus it is not sufficient to assume that the only forms of conduct accompanied by undesirable social consequences are those involving the use of force or fraud.... [A] more comprehensive social statement seeks to maximize social welfare, embracing the libertarian prohibitions, but going beyond them to allow certain forms of regulation and taxation to overcome these otherwise intractable coordination problems.”<sup>52</sup> Similarly, Richard Posner has softened his libertarianism with pragmatism.<sup>53</sup>

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<sup>50</sup> Boyer 1997:57.

<sup>51</sup> Leonhardt 2008:31.

<sup>52</sup> Epstein 1996:2.

<sup>53</sup> Harcourt, *UC Law Review* 2007.

Nevertheless, the more extreme market libertarian position has helped shape a more moderate view that is dominant today: the view that government intervention in the economic domain *tends to be inefficient* and should therefore be avoided. What characterizes this more moderate view is a set of softer *a priori* assumptions that are reflected, especially, in the rhetoric of economic debate. In contrast to the more extreme rhetoric of the Chicago School—for instance, the argument that the free market is practically always more efficient—market liberals suggest that government intervention tends to be less efficient; that it is generally the case that market mechanisms work better, in part because of lower transaction costs, but also because market participants are better information gatherers and tend to be more invested in the ultimate outcome; and that government agencies suffer from greater principal-agent problems, are less nimble at adjusting to changing market conditions, and become more entrenched and subject to interest group capture. These are familiar arguments and, together, they tend to promote a loose default position that favors market mechanisms over “regulation”—a tilt in favor of markets. For simplicity, I will refer to this set of ideas as “neoliberalism.”<sup>54</sup>

During the late 1970s and early 1980s, this view helped bring about a wave of privatization in the United States and abroad, in Great Britain.<sup>55</sup> The momentum has continued since that time and the effects of

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<sup>54</sup> The term “neoliberal” is used in this essay to capture at least four important dimensions. The first is the simplest and represents a historical element. It distinguishes late twentieth century thinkers like Milton Friedman and George Stigler from early liberal thinkers like Adam Smith and François Quesnay. The second dimension is more ideological. Early liberal thinkers had a set of ideas that were not yet proven or demonstrated; they were, in a sense, more utopian. Neoliberals are contemporary and thus come after a lot of history, including the Great Depression and New Deal. Neoliberalism has an ideological element because it tries to minimize historical market failures and continue to believe in the same principles as early liberals. The third dimension has to do with convictions about the present: neoliberalism here is the belief that we actually live in a free market system and that this system has triumphed. In other words, despite all the repeated government bail-outs, we are really in a free market; and despite all the repeated crises and bail-outs, free markets have prevailed. The final dimension is related to the central thesis of this project: neoliberalism is the belief that the early markets of the 18th century were completely regulated and that ours today are free. Neoliberalism in this fourth sense is best defined precisely as the belief that our markets today are free, whereas the earlier ones were excessively regulated.

<sup>55</sup> See, generally, Osborne and Gaebler 1993; Guttman 2000; Kosar 2006; Savas 1999.

privatization have been significant in a wide range of industries, from airlines and communications to what were often viewed as more traditional state and local services. The global embrace of privatization strengthened in the 1990s with the collapse of the former Soviet Union and of its political and economic influence over Eastern Europe. Today, the call for privatization is no longer limited to Reaganites and can be heard across the political spectrum—even among younger Democrats.<sup>56</sup>

And this view today has infiltrated the public imagination and shaped public opinion. This is evident in public opinion polls—at least prior to the 2008 financial crisis. In a *Financial Times/Harris Poll* opinion poll conducted September 6 and 17, 2007, 49% of respondents in the United States answered affirmatively—in contrast to 17% who responded negatively—to the question “Do you think a free-market, capitalist economy (an economic system in which prices and wages are determined by unrestricted competition between businesses, with limited government regulation or fear of monopolies) is the best economic system or not?”<sup>57</sup> In another poll, a twenty-nation poll conducted by the Program on International Policy Attitudes (PIPA) at the University of Maryland, researchers found that an average 71% of respondents in the United States agree with the statement that “The free enterprise system and free market economy is the best system on which to base the future of the world;” only 24% of respondents disagreed with that statement.<sup>58</sup>

Until very recently, this dominant view was reinforced daily in the leading newspapers, in the media, and through the voice of our

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<sup>56</sup> President Bill Clinton’s administration supported a large number of alternatives to standard governmental delivery services—thirty-six, in fact—in its “Reinventing Government” strategy. See generally Manta 2008; Guttman 2000:861. In terms of younger Democrats, Democratic presidential candidate Barack Obama in fact partially embraces Reaganomics in his book, *The Audacity of Hope*, see Leonhardt 2008:31, adding that “Reagan’s central insight—that the liberal welfare state had grown complacent and overly bureaucratic, with Democratic policy makers more obsessed with slicing the economic pie than with growing that pie—contained a good deal of truth.” Obama 2006.

<sup>57</sup> See *The Harris Poll* #94, September 27, 2007 (available at [http://www.harrisi.org/harris\\_poll/index.asp?PID=810](http://www.harrisi.org/harris_poll/index.asp?PID=810)).

<sup>58</sup> See *20-Nation Poll Finds Strong Global Consensus: Support for Free Market System But Also More Regulation of Large Companies* (available at [http://www.globescan.com/news\\_archives/pipa\\_market.html](http://www.globescan.com/news_archives/pipa_market.html)).

national leaders both on the right and on the left—often in the most unexpected places. “The market is the best mechanism ever invented for efficiently allocating resources to maximize production,” presidential candidate Barack Obama tells the *New York Times*. Obama adds, “I also think that there is a connection between the freedom of the marketplace and freedom more generally.”<sup>59</sup> Here is an excerpt from another *New York Times Magazine* article, this time on the economist and former Harvard University President, Larry Summers, that also recites the boilerplate history and the dominant view: “The decades after World War II were dominated by the Keynesian notion—shaped in part by one of [Summers’] Nobel-Winning uncles, Paul Samuelson—that government was good. But the stagflation of the 1970s caused a whole generation of economists to look instead toward the market, which seemed far more efficient at allocating resources.”<sup>60</sup> Larry Summers stands in for this dominant view: “Today Summers says he believes in markets as much as ever, and he begins almost any discussion of globalization by pointing out its benefits. Food, clothing, furniture and dozens of everyday items are more affordable than they once were. Interest rates are low, as is inflation, and recessions come less often. Bringing down the deficit in the ‘90s, he argues, helped make this possible.”<sup>61</sup> According to Summers, “I think now the challenge is, again, to protect a basic market system based on open trade and globalization, to make it one that works for everyone or almost everyone, at a time when market forces are often producing outcomes that seem increasingly problematic to middle-class families.”<sup>62</sup>

Contemporary self-adjusting market mechanisms have triumphed, and we are no longer at the mercy of the minute disciplinary regimentation characterized by the Parisian *police des grains* of the mid-eighteenth century. At least, that’s what we like to tell ourselves.

### III.

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<sup>59</sup> Leonhardt 2008:32.

<sup>60</sup> Leonhardt 2007:26.

<sup>61</sup> Leonhardt 2007:26.

<sup>62</sup> Leonhardt 2007:26.

In the wheat pits at the Chicago Board of Trade, 12:01 P.M., March 20, 1996, following a period of tight supplies in the wheat market. Loud buzzers and Board staff visually signaled the close of the market for the March 1996 wheat futures. The closing period—which spanned from 12:00 P.M. to 12:01 P.M. on March 20th—had just expired. There were sixty-one buy order contracts that were still unfilled at the end of the closing period, and the last contracts had traded at \$5.30 to \$5.35 a bushel, in line with the morning’s trades. Two traders who held market-on-close orders, George F. Frey and John C. Bedore, bid up the price through closing to approximately \$6.00 per bushel, but they were met with no responses from other members of the pit.

At 12:02 P.M., one minute past the close, J. Brian Schaer, a local in the pit, offered to sell contracts at \$7.00, and approximately twelve seconds later, at 12:02:12 P.M., sold thirty-one contracts at that price to Frey and Bedore—who had been bidding up the price hoping to close their open orders. Donald W. Scheck, another local, then offered contracts at \$7.50, with Brian Schaer matching that offer. In the next half a minute, Scheck sold fourteen contracts to a broker Jay P. Ieronimo and Schaer sold another sixteen contracts to Frey and Ieronimo, with the final trades taking place at 12:02:50 P.M.—one minute and fifty seconds past closing.

Rule 1007.00 of the Chicago Board of Trade provides that the pit committee—in this case, the “Wheat Pit Committee” chaired by Jay Ieronimo, who had just traded post-closing—could authorize an extension of one minute only of the closing period in the case of an extraordinary expiration. That never happened,<sup>63</sup> but even if it had, it would only have extended the trading period to 12:02 P.M., which would not have covered the trades contracted after that. A number of Board officials, including Chicago Board of Trade chairman, Patrick Arbor, and the Exchange Pit Reporter Floor Supervisor, Patrick Sgaraglino, gathered to discuss whether any trades after 12:02 P.M. should be honored and cleared through the house. They decided the trades would stand because of “special circumstances” surrounding the March wheat futures.

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<sup>63</sup> CFTC 1997:\*17 n.17.

Ieronimo, in his capacity as chair of the Wheat Pit Committee, then began asking around to find out if any of the traders were interested in holding a modified closing call—known in the trade as an “MCC” and consisting of “a two-minute post-close trading session which may occur after the end of a trading session and allows market users to close out unliquidated positions. Pit committees schedule MCC sessions only when there is an expression of interest. The MCC settlement price, which serves as the basis for the trading range during the MCC session, is selected by the pit committee.”<sup>64</sup> Brian Schaer, who had sold contracts past 12:02 P.M., was apparently the only trader who expressed interest in an MCC.

Ieronimo decided to hold the MCC. “A bull horn was used to announce that an MCC would be held from 12:14 P.M. to 12:16 P.M. A few seconds before the start of the MCC, an Exchange official announced that the MCC price range would be \$5.30 to \$5.32 per bushel.”<sup>65</sup> Ray Czupek, the floor manager and broker for Louis Dreyfus Corporation—which still held a significant long position in March wheat—offered contracts at \$5.32 per bushel—thus entering the market for new business in violation of the Board rule against entering new orders during an MCC. Brian Shaer and Donald Scheck, who had both sold contracts ranging between \$7.00 and \$7.50 after the one-minute extension to closing, were the only ones to bite. Schaer and Scheck both bought contracts sufficient to offset the entire positions that they had just created post-closing, and made profits on their trades of, respectively, \$434,800 and \$152,600. There were no other trades made during the MCC. Others involved in the earlier trading saw large losses, some as high as \$300,000.

The Office of Investigations and Audits of the Chicago Board of Trade conducted a quick review of the March futures expiration, and about a month later the Business Conduct Committee of the Board issued charges against Schaer, Scheck, Ieronimo, Frey, Bedore, and Czupek, as well as Dreyfus and two other firms. They were charged with violations of Chicago Board Rules 1007.00, 350.05(h), 1007.02, and 425.02, proscribing after-hours trading, MCC conventions, and hedging rules.

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<sup>64</sup> CFTC 1997:\*9 n.10.

<sup>65</sup> CFTC 1997:\*9.

Board Rules 1007.00 and 1007.02, for instance, set forth the following restrictions on trading:

On the last day of trading in an expiring future, a bell shall be rung at 12 o'clock noon designating the beginning of the close of the expiring future. Trading shall be permitted thereafter for a period not to exceed one minute and quotations made during this time period shall constitute the close. When in the opinion of the relevant Pit Committee extraordinary conditions prevail any such one minute period may be extended to two minutes by special authorization of the relevant Pit Committee...

Immediately following the prescribed closing procedure for all contracts, there shall be a two (2) minute trading period (the "modified closing call"). All trades which may occur during regularly prescribed trading hours may occur during the call at prices within the lesser of the actual closing range or a range of three (3) official trading increments, i.e., one (1) increment above and below the settlement price, or at prices within the lesser of the actual closing range or a range of nine (9) official trading increments, i.e., four (4) increments above and below the settlement price, as the Regulatory Compliance Committee shall prescribe; (ii) no new orders may be entered into the call; (iii) cancellations may be entered into the call; (iv) stop, limit and other resting orders elected by prices during the close may be executed during the call; and (v) individual members may trade as a principal and/or agent during the call. In accordance with the determination of the Regulatory Compliance Committee, CBOT contracts shall be traded during the Modified Closing Call as follows: Lesser of actual closing range or nine trading increments [for] Wheat Futures and Options.<sup>66</sup>

During the summer of 1996, the Board entered into settlement negotiations with Schaer, Scheck, and the other individuals and firms,

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<sup>66</sup> CFTC 1997:\*12-13, n.13 and 14.



and resolved the charges by way primarily of written reprimand. Settlements were reached with Schaer, Scheck, Ieronimo, Frey and Bedore by issuing letters of reprimand against each of them, and with Dreyfus Corporation by means of an admission of wrongdoing and a \$10,000 fine.

The Divisions of Enforcement and Trading & Markets of the Commodity Futures Trading Commission, however, recommended that the Commission review the six settlements because they did not believe that the written sanctions were “commensurate with the gravity of the alleged violation and otherwise failed to conform to Commission guidance on sanctions.”<sup>67</sup> In light of the Commission’s decision to review, the Chicago Board of Trade conducted additional investigations and interviewed 38 persons, had the interviews transcribed and then reviewed by the staff of the Commodity Futures Trading Commission, which oversees the Board; the Board prepared follow-up questions for 19 persons at the request of the Commission staff, and resubmitted the second round of interviews to the Commission. The Board also submitted documentary evidence of trading cards, order tickets, and other reports.

The Commission conducted additional investigation of its own, reviewing—in addition to the Board documents, the record of the disciplinary proceedings, and written argument by the parties—“observations of Commission floor surveillance staff during the expiration” and “information independently obtained by the Commission staff.”<sup>68</sup> The latter included “interviews with commercial participants, market analyses, trading profiles of the two locals [Shaer and Scheck] involved in the expiration, a trade practice investigation, review of data to determine compliance with speculative position limits, and a review of the ‘gap’ function in the CBOT’s price reporting system.”<sup>69</sup>

The Commission set aside the sanctions and remanded the cases back to the Board of Trade because the penalties had not been severe enough. “In order to protect the integrity of the markets, the exchanges must vigorously enforce their rules concerning trading hours and impose

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<sup>67</sup> CFTC 1997:\*1.

<sup>68</sup> CFTC 1997:\*3.

<sup>69</sup> CFTC 1997:\*4 n.2.

meaningful sanctions in disciplinary proceedings alleging trading after the close,” three Commissioners declared. “We believe that imposing reprimands for misconduct as serious as that alleged here, even in the context of settled proceedings, reflects an apparent unwillingness on the part of the CBOT to enforce its rules in the manner necessary to ensure an effective self-regulatory disciplinary program.”<sup>70</sup>

The notion of “self-regulation” is critical in the commission’s written opinion. The very term “self-regulatory” is used seven times in the main text, another five times in the margin and twice in the dissenting opinion: strict sanctions are “necessary to ensure an effective self-regulatory disciplinary program,”<sup>71</sup> reflect the Board’s “critical self-regulatory responsibilities,”<sup>72</sup> and whether the Board “adequately fulfilled its self-regulatory responsibilities,”<sup>73</sup> indicate “the seriousness with which the self-regulatory organization views its rules,”<sup>74</sup> and are crucial for such “self-regulatory organizations.”<sup>75</sup> In this case, the Commission concludes, “the sanctions chosen by the CBOT are inadequate in light of ... their reflection of an apparent failure in the self-regulatory system.”<sup>76</sup> “In exercising their self-regulatory responsibilities,” the Commission emphasizes, “exchanges should take vigorous action against those who engage in activities which violate their rules...”<sup>77</sup> In conclusion, the Commission notes, “The CBOT’s approach in these cases could seriously undermine its ability to operate effectively as a self-regulatory organization.”<sup>78</sup>

The Commission justifies their concern with the following:

[A]ny disregard of established trading hours should be viewed as a significant violation. Rules governing the time, place, and manner of trading help to ensure a fair and open market. No one of these requirements is less important than the others, and

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<sup>70</sup> CFTC 1997:\*2.

<sup>71</sup> *Id.* at \*3.

<sup>72</sup> *Id.* at \*4 n.3.

<sup>73</sup> *Id.* at \*40.

<sup>74</sup> *Id.* at \*51.

<sup>75</sup> *Id.* at \*17 n.19 and \*43 n.34.

<sup>76</sup> *Id.* at \*40.

<sup>77</sup> *Id.* at \*41.

<sup>78</sup> *Id.* at \*52.

noncompliance with any one of them may be as damaging to the market as noncompliance with all of them. Even when done in the pit by “open outcry,” post-close trading threatens an open and competitive market because a large segment of the market—those who obey the rules governing trading hours—are excluded from participating. As former Commission Chairman Philip Johnson has observed, the rationale for prohibiting trading other than during official trading hours is that “true competition is only present in the marketplace during normal hours of trading.” The absence of “true competition” calls into question the price discovery role of the exchange and could result in loss of confidence in CBOT prices. As we recently stated, “open and competitive execution is the bedrock underlying public confidence in the objectivity and fairness of futures trading.”<sup>79</sup>

Trading-hour infractions are extremely significant, the Commission emphasized. In fact, “Congress has determined that activities like [these] are *malum in se*, and it is our duty to assure that this legislative determination is effectuated.”<sup>80</sup>

The United States Attorney’s Office in Chicago began investigating trading-hour infractions on the Chicago Board of Trade. In order to preempt further federal intervention, the Board revised its rules regarding the possible extension of the closing period. “Most notably, the CBOT deleted the provision under which the close of an expiring contract could be extended from one minute to two minutes, thus eliminating potential confusion among floor members about the appropriate duration for a close in an expiring contract. The CBOT also now precludes the pit reporters from accepting price quotations more than 30 seconds after the close for futures in order to assure that trading is halted on time.”<sup>81</sup>

#### IV.

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<sup>79</sup> CFTC 1997:48-49.

<sup>80</sup> CFTC 1997:\*50 n.45.

<sup>81</sup> CFTC 1997:\*54.

More than two centuries separate the *police des grains* and these enforcement proceedings at the Chicago Board of Trade. The two periods bear important similarities and differences. Yet our perception of the two could not be more radically divergent. The Paris markets of the mid-eighteenth century represent to us today the epitome of excess regulation—of government intervention gone awry, of authoritarian control of the economy. In contrast, the Chicago Board of Trade reflects, to our modern eyes, the epitome of the free market in the western world, the pinnacle of free trade, the zenith of late-modern capitalism. Simply put, the Chicago Board of Trade *is* the free market. When we look at the Chicago Board or the New York Stock Exchange, we do not see the intricate web of regulations regarding closing periods and trading hours, access, surveillance, and computer monitoring. We do not see Chicago Board Rules 1007.00, 350.05(h), 1007.02, and 425.02, proscribing after-hours trading, MCC conventions, and hedging rules. We see the *free market* at work. How did that come about?

At both times, the market was the exclusive venue in which to exchange the desired commodities and the markets were highly administered. Who, when, where, how—the hours of opening and closing, the identity of the merchants, traders, and buyers, the means of delivery, controls on variations in pricing—all aspects of trading on the markets were regulated. Our contemporary markets—whether the Chicago Board of Trade, the New York Mercantile Exchange, the New York Stock Exchange, or any of the other exchanges—are shot through with layers of overlapping governmental supervision, of exchange rules and regulations, of federal and state criminal investigations, and of exchange self-policing and self-regulatory mechanisms—as evident in the case of Schaer and Scheck. Our contemporary markets, like the Parisian markets of the eighteenth century, are policed.

Naturally, there are also marked differences. No police prefect or *procureur fiscal* sets the right price of a loaf of bread or a stack of wheat today—the *prix commun du marché*—although the commission for trading the goods may be fixed and, of course, the most important commodity of all—money—is set by the central bank both in the United States and in the European Union. No *huissard* patrols the exchange floor conducting inspections and ferreting out fraud or deception today—although computer algorithms, federal investigators, and the exchanges

themselves monitor each and every trade to detect suspicious activity, often on “a customer-by-customer basis.”<sup>82</sup> Contemporary enforcement proceedings are more likely to involve self-regulatory mechanisms—self-monitoring by the exchange itself, a chartered corporation not formally part of the state—though the earlier markets were also heavily self-policed under a guild system that functioned by means of elected syndics who policed and monitored the commercial activities of guild members.

There are indeed important similarities and significant differences. As a practical matter, it would be extraordinarily difficult, if not infeasible to determine with exactitude whether the differences—with all their related technological transformations and metamorphoses—outweigh the similarities. It is impossible to quantify the uniform and gaze of the *huissard* and measure it against the electronic impulse that reads every single stock trade on a high volume alert. It is impracticable to weigh the impact of prohibiting *la vente par échantillons*—the sale by samples—against the effect of shutting down a thriving secondary market in mutual fund shares. “Royal ordinances first specified a ‘circle of prohibition’ around Paris having a radius of eight *lieues* (leagues). Inside this circle, any purchase of grain by bakers or traders, whether at market or in the growers’ storehouse, was forbidden”<sup>83</sup>; how do we measure the effect of this *ordonnance* and weigh it against the fixed delivery locations and the limited space for warehousing wheat in Chicago? How do we weigh the requirement that all grain be sold at the Paris markets against the contemporary requirement that all grain futures be traded at the Chicago Board of Trade?

These questions have no answer, and yet we continue to perceive the two periods as radically different. How did it come about, exactly, that we would perceive the first economic regime—the Paris markets circa 1750—as governed by, to borrow Adam Smith’s words, “such absurd regulations” and yet view the second regime, the Chicago Board of Trade of today, as “free”? What has shaped our perception so, that we

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<sup>82</sup> Friedman 2002:798.

<sup>83</sup> Afanassiev 1894 :73.

would label one “regulated” and the other “free”? How did that come about? And at what price?

## V.

First, how did we come to see the Parisian *police des grains* as the epitome of disciplinary regulation and the Chicago Board of Trade as the bastion of freedom? The answer, I believe, turns on the emergence in the eighteenth century of the idea of *natural order*—the notion of an economic system that is autonomous and achieves equilibrium *without government intervention*—and the eventual metamorphosis of this idea, over the course of the twentieth century, into the concept of *market efficiency*. It is the idea of *natural order* that renders coherent and makes possible the belief in self-adjusting and self-sustaining markets. The idea of self-stabilizing internal flows that function best when left alone—this conceptualization of natural orderliness, of spontaneous equilibrium, of natural harmony in the economic realm, is what allowed eighteenth century thinkers to reimagine social reality, and it is what facilitates the understanding we have today. The idea of natural order also made possible the shift in semiotic meaning of the *police des grains*—from a policy viewed as necessary and freedom-enhancing to a policy viewed as oppressive and misguided. In addition, it also helped displace an earlier belief that all men naturally tend toward criminal deviance, one that remains strong today *only* in the penal domain.

The emergence and triumph of the idea of natural order was influenced greatly by François Quesnay, the Marquis de Mirabeau, Dupont de Nemours, Le Mercier de la Rivière and other early French economists during the period 1756 to 1767. François Quesnay, a highly accomplished physician at Versailles, the first doctor to Mme. De Pompadour and first ordinary to Louis XV, and a prolific writer in the medical field, turned his attention to economics in 1756 and founded an intellectual circle that became known as “*les économistes*” or “*les Physiocrates*.” Quesnay and his disciples promoted the idea of an “*ordre naturel*” in the field of political economy. Their writings were highly influential both in France and abroad, and it is precisely their notion of natural order that metamorphosed, over time, into the modern economic notion of market efficiency that is at the heart of neoliberal thought. The

Physiocrats' idea of an "*ordre naturel*" helped make it possible for us today to believe that the Parisian markets were overregulated and that our contemporary markets are free. It is this notion that has shaped the way we see the world.

*Of Public Economy and Police*

But it was not always so. Although today we tend to characterize the regulation of Parisien markets as excessively disciplinary and repressive, there was an earlier time when these same regulations formed part of a more coherent understanding that fell under an earlier rubric of "police" and that formed an integral part of the field of public economy. One central task of public economy, in the eyes of its earliest exponents, was precisely to ensure the abundance and cheapness of food and consumable goods at market—what was called, at the time, providing for "*bon marché*."

The younger Adam Smith understood this well and in fact used the discourse of *bon marché* in his lectures on moral philosophy and jurisprudence in the early 1760s. It was precisely under the rubric of "police" that Smith lectured on public economy, on the regulation of markets, on monopolies, money, and trade: on how best to regulate agricultural production and manufacturing; on how to encourage the division of labor; on what to do with foreign trade; on how to manage currency, banking and interest rates—in sum, on how to render the state more opulent, on how to increase the wealth of a nation, or, which was the same thing for Smith, on how to enable citizens to obtain needed and desired food, clothes, and lodging—to satisfy the necessities of life.<sup>84</sup> Smith placed his entire discussion of public economy under the rubric of "police" and he identified the principal task of "police" as facilitating *bon marché*.

In his *Lectures on Jurisprudence*, which he delivered at Glasgow University during the period 1762 to 1764—after the publication of *The Theory of Moral Sentiments* in 1759 but before the *Wealth of Nations* in 1776—the young Adam Smith used—and used exclusively—the rubric

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<sup>84</sup> Smith viewed luxuries as a waste of resources, as he did hoarding or saving, which he perceived as removing currency and wealth from the circulation and therefore viewed as decreasing the opulence of the state.

of “police” to discuss public economy. Once the internal security of a nation was ensured and subjects could benefit from their private property, Smith reportedly lectured in 1762-63, the state’s attention should turn to the task of promoting the state’s wealth. “This produces what we call police,” Smith said. “Whatever regulations are made with respect to the trade, commerce, agriculture, manufactures of the country are considered as belonging to the police.”<sup>85</sup>

The young Smith traced the notion of police to French administration, citing the folklore that the king of France demanded three services from his *lieutenant général de police*—namely, that he assure the cleanliness and security of the nation and the abundance and cheapness of goods at market. Smith referred specifically to the famous *lieutenant de police*, Marc René de Voyer de Paulmy, marquis d’Argenson, chief of police in Paris from 1697 to 1718, and to the story that, upon acceding to the post, d’Argenson was told that the king of France expected him to take care of three things: “1<sup>st</sup>, the cleanliness or neteté; 2<sup>nd</sup>, the *aisance*, ease or security; and 3<sup>rd</sup>, *bon marché* or cheapness of provisions.”<sup>86</sup> Smith lectured that the goal of police is “the means proper to produce opulence,”<sup>87</sup> and that “the objects of Police are the cheapness of commodities, public security, and cleanliness.”<sup>88</sup> Under the heading of police, Smith stated in his 1763-64 lectures, “we will consider the opulence of a state,”<sup>89</sup> or, more specifically, “the consideration of cheapness or plenty, or, which is the same thing, the most proper way of procuring wealth and abundance.”<sup>90</sup>

To the early public economists, including the young Smith, “police” was what ensured the abundant provision of necessary foods and commodities. As Michel Foucault, Pasquale Pasquino, and others

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<sup>85</sup> Smith 1978:5 [i.1-2].

<sup>86</sup> Smith 1978:5 [i.2]; *see also* 331 [vi.2] [“he was to provide for the neteté, surete, and bon marché in the city”]. Smith had in his library Bielfield’s *Institutions politiques*, which quotes the chief of police in Paris in 1697: “Le Roi, Monsieur, vous demande sûreté, netteté, bon-marché. En effet ces trois articles comprennent toute la police, qui forme le troisième grand objet de la politique pour l’intérieur de l’Etat” (*see generally* Cannan 1976 : xxv-xxvi).

<sup>87</sup> Smith 1978:333 [vi.8].

<sup>88</sup> Smith 1978:398 [5].

<sup>89</sup> Smith 1978:398 [5].

<sup>90</sup> Smith 1978:487 [205].



have shown, this early notion of “police” conveyed a number of meanings—not just the enforcement function associated with the *lieutenant général de la police* that, at least in some respects, resembles more closely our contemporary understanding of law enforcement, blue uniforms, and order maintenance.<sup>91</sup> The term “police” also captured, in broader terms, what we could call today “administration,” but administration limited to the subdivisions of the state; the term *gouvernement* or governing, in contrast, covered the administration of *l’Etat* or the state.<sup>92</sup> But the different meanings were imbricated: the administration of subsistence and markets fell under the jurisdiction of policing functions and were perceived as calling for surveillance. As the early Smith lectures demonstrate, public economy and “police” were continuous.

Among the champions of the *police des grains*—for instance, commissioner Nicolas Delamare,<sup>93</sup> author of the *Traité de la police*—the policing of markets reduced the price of bread and ensured *bon marché*. Delamare had seen famine and food shortages close up, he explained. A hands-off approach was the ideal, he suggested, but some oversight and administration was necessary especially in times of scarcity. True liberty required government organization. In order to achieve cheapness and plenty—the central goal of public economy—it was necessary to calibrate the market. On this earlier view, *policing* and economic welfare were one.

It would take but a small step to extend this logic directly to the field of crime and punishment. The young Milanese aristocrat, Cesare Beccaria, would do just this in his concise yet seminal tract, *Dei delitti e delle pene* (*On Crimes and Punishments*)—published anonymously in 1764. The new field of public economy, Beccaria boasted, had tamed and civilized nations through commerce. “We have discovered the true relations between sovereign and subjects,” Beccaria declared, “and there is waged among nations a silent war by trade, which is the most humane

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<sup>91</sup> Foucault STP 2004:320-322; Pasquino 1991:109-116; Kaplan 1976:Vol.I:11-14; Napoli 2003:8; Dubber and Valverde 2006:1-2. For an excellent early treatment of this issue, see Olivier-Martin 1988 [1945]:13-22.

<sup>92</sup> Olivier-Martin 1988 [1945]:13.

<sup>93</sup> Nicolas Delamare signed his name in one word and so I will use that form (Olivier-Martin 1988:8).

sort of war and more worthy of reasonable men.”<sup>94</sup> The same lessons, Beccaria believed, could tame and civilize our punishment practices, and, in the process, eliminate the brutal excesses of seventeenth century penalty. Under Beccaria’s influence, the field of public economy would colonize the penal domain and impose the same logic of measured and proportional responses to the same problem of man’s natural tendency toward deviance. In Beccaria’s eyes, men behave the same way in economic and in social exchange: they privilege their own self-interest and always tend to break the rules. In the penal sphere—just as in the economic domain—the solution Beccaria proposed was to properly administer a rational framework of tariffs and prices. For Beccaria, “police” was an integral part of public economy. As a result, Beccaria’s lectures in public economy delivered in Milan in 1769—the notes of which were published posthumously as his *Elementi* or *Elements of Public Economy*—covered five areas: agriculture, arts and manufacturing, commerce, finance, and *police*. “Of Police” constituted an integral part of the study of public economy—an entire section alongside commerce and finance—because it shared the same rationality, namely that of public administration.

The common thread in the young Adam Smith and in Beccaria is the continuity between “police” administration and economics. For both, the two spheres were completely overlapping. To Smith, the umbrella category is “police,” and that category subsumes the discussion of public economy and the wealth of a nation. To Beccaria—and other *cameralists* of his time—the overarching category is public economy, within which “police” forms one important sector alongside commerce and finance. In both, though, the two domains are seamless and continuous. The two fields overlap and overlay. There is no alterity between them.

#### *Of Physiocrats, Natural Order, and Market Efficiency*

It is precisely this vision of a seamless relation between the field of public economy and the realm of “police” that gives way in the second half of the eighteenth century to a far different ideal. If cheapness and plenty, if *bon marché* was the goal of public economy and of the *police des grains* at mid-century, things could hardly have been more

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<sup>94</sup> Beccaria 1995:8.

different only a decade later. The contrast is striking and captured by the new dogma of François Quesnay:

*Abondance et non-valeur n'est pas richesse.  
Disette et cherté est misère.  
Abondance et cherté est opulence.*<sup>95</sup>

In other words, abundance and plenty do not translate into the wealth of a nation. Scarcity and high prices, of course, are misery. It is abundance *and* high prices that produces opulence.

This shift would radically transform the meaning, the connotation, and the role of *policing*—and it would do so first in the writings of the earliest *économistes*. From François Quesnay's first published contribution to the field of political economy, his encyclopedia entry on *Fermiers* (Farmers) in Tome VI of the *Encyclopédie* in 1756, to his final contributions to economics collected and published in Du Pont de Nemours' *Physiocratie* in 1768, Quesnay would fundamentally reorient the relationship between public economy and “police”: governmental intervention in the markets would become oppressive and interfere with the autonomous functioning of an economic system governed by natural laws and natural order. By 1776, the year *The Wealth of Nations* was published, Adam Smith would no longer use the rubric “police” to discuss public economy. In fact, the word “police” only appear once in the entire text of *The Wealth of Nations*.

A new way of thinking had taken hold, one based on the idea of *natural order*. Natural order reigned in the economic domain—in agriculture and commerce—and thereby obviated the need for “police.” The sphere of public economy came to be viewed as an autonomous, self-adjusting system regulated by natural laws that, if left alone, produced a *net product*.<sup>96</sup> The only way for the state to participate in the

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<sup>95</sup> Quesnay 2005: 570.

<sup>96</sup> “Net product” is defined as “a disposable surplus over necessary cost. Anything which increased this net product would cause an expansion in economic activity, and anything which reduced it would cause a contraction in economic activity.” (Meek 1962:19). Or as Dupont explains: “Il appella *produit net* cette portion des récoltes qui excède le remboursement des fraix de culture, et l'intérêt des avances qu'elle exige » (Dupont 1808 :313). Meek explains that the political implications for Quesnay all

wealth of the nation was not to administer and police, but instead to pull out of the sphere of agricultural production and stop intervening in commerce and trade. The police function was *severed* from the economic domain and relegated to the margin.

François Quesnay presented the idea of natural order to his contemporaries in his *Tableau économique*, first published in an augmented volume of the Marquis de Mirabeau's *L'Ami des hommes* in 1760. The *Tableau* was a graphic depiction of cash and commodity flows between the three principle classes of society—the cultivators, the property-owners, and the manufacturers. By means of a simple graph and its zig-zag lines, Quesnay sought to visualize his main theses, namely that agricultural production is the sole source of all societal wealth, that wealth can only be produced by means of an autonomous system of exchange, and therefore that the state must cease intervening with tariffs, restrictions on the flow of trade, and other regulations. Quesnay's *Tableau économique* received a lot of attention because it attempted to graphically and systematically represent an economic system—what Louis Dumont refers to as “an ordered whole.”<sup>97</sup> This is precisely what Marx found so brilliant. Marx wrote of Quesnay's *Tableau*, in his *Theories of Surplus Value*, that “this attempt to represent the whole in one table that is composed in fact of only five lines, connecting six points of departure to their endpoints, in the second half of the eighteenth century, at the infancy of public economy, was a stroke of genius, without a doubt the most brilliant in the history of public economy.”<sup>98</sup> But what was even more important and influential on future liberal thought was not simply the notion of an economic *system*, it was rather the idea of *natural order*. Systems can function well with external

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derive from his economic idea of increasing the “net product”: “The strategic variable, then, is the magnitude of the net product, and it is to the problem of increasing the net product that the government's policy should be primarily directed. Since the magnitude of the net product depends largely upon the aggregate *output* of corn and upon the *price* of corn, it follows that the government must take all possible measures to increase the first while at the same time increasing or at least maintaining the second. The encouragement of investment in agriculture and the stimulation of demand for agricultural produce must therefore be the main aims of government policy. Most of the specific policy measures advocated by the Physiocrats will be found upon investigation to fit into this simple pattern.” (Meek 1962:22).

<sup>97</sup> Dumont 1977:41.

<sup>98</sup> Marx 1974:399.

calibration and intervention: an engine may function as a perfect whole so long as one adds fuel. What was remarkable about Quesnay's *Tableau* is that his system was governed by natural order and was entirely autonomous of external inputs. What Quesnay really contributed was not just the idea of a system, but that of natural orderliness—an idea that would eventually receive its most elaborate articulation in Le Mercier de la Rivière's 1767 book, *L'Ordre naturel et essentiel des sociétés politiques*.

To be sure, the idea of natural order was not entirely new. The Physiocrats were not the first to draw on or elaborate the concept. Simone Meyssonier, in her history of the origins of French liberal thought in the XVIIIth century, *La Balance et l'Horloge* (1989), traces the idea back to Pierre Le Pesant de Boisguilbert who wrote almost a hundred years earlier in the period 1695 to 1707. Joseph Schumpeter famously traced the notion back to the Scholastics—the theologians of the fourteenth and fifteenth centuries.<sup>99</sup> Schumpeter places Quesnay firmly among the “philosophers of natural law” influenced by Aquinas and the medieval natural order theorists.<sup>100</sup> And Du Pont de Nemours himself—the chief publicist and greatest admirer and disciple of Quesnay—traced the Physiocratic doctrine to, among others, the Marquis d'Argenson, who is credited with the maxim “*Pas trop gouverner*.”<sup>101</sup>

But true originality is not the sole source of influence. Quesnay's obsession with natural order was *perceived* as new—which is often what matters more. As new and radical. Many believed that it inaugurated, in the words of Dupont de Nemours, “a new science in Europe,”<sup>102</sup> and many championed Quesnay as the founding father of that new science.

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<sup>99</sup> Schumpeter 1968:97.

<sup>100</sup> Schumpeter 1968: 223-243; *see generally* Beer 1939.

<sup>101</sup> In a “Notice” entitled *Sur les économistes*, which he published in preface to Turgot's *éloge* to M. de Gournay in his edition of the complete *oeuvres* of Turgot, Dupont traces Physiocratic thought—the thought of “*Les Économistes français, fondateurs de la science modern de l'économie politique*” (Dupont 1808:309)—to three sources or precursors. The first is the duc de Sully who privileged agriculture. It is he who said that “*le labourage et le pasturage sont les mamelles de l'Etat*” (Dupont 1808:309). The second is d'Argenson, discussed in text. The third is Mr. Trudaine le père, who also toiled in these fields (Dupont 1808:309; *see also* Du Pont's *Notice sur les Économistes* reproduced in Turgot 1844 vol. I:258).

<sup>102</sup> Rothschild 2004:4.

As Emma Rothschild suggests, “In an epoch of almost obsessive preoccupation with newness—new sciences, new systems of trade, new music, objects wholly new in the world—the revolution in economic thought was genuinely innovative. Quesnay and his followers conceived of national economies, for the first time, as vast systems of interdependent flows; Turgot described them as constituted by the interconnected transactions of millions of individual agents. All individuals, the poor as well as the rich, the agricultural labourers as well as the great merchants, were identified as part of a single economic system.”<sup>103</sup>

The birth or, perhaps to be fair, the emergence and maturation of the idea of natural order helped shape a vision of the economic sphere as an autonomous, self-adjusting, and self-regulated system that could achieve a natural equilibrium spontaneously and produce increased wealth. No doubt, material shifts in technology, in agricultural and industrial production, and larger changes in demographics and international relations, played important roles in the perceptual change. But what made the notion of a “free market” comprehensible, coherent, and convincing was precisely the idea of *natural order*. It is an idea that fundamentally altered the discourse and the dominant way of reasoning and rationalizing the world. It radically altered the way that contemporaries understood their social surroundings and the relationship between public economy and “police.”

The same notion resurfaces in the work of Adam Smith and Jeremy Bentham, and, today, in the work of contemporary neoliberal thinkers, such as Richard Posner or Richard Epstein. The idea of natural order has metamorphosed today into the belief in the *efficiency of the market*. It is natural order that makes possible Richard Posner’s belief that “When transaction costs are low, the market is, virtually by definition, the most efficient method of allocating resources.”<sup>104</sup> In fact, natural efficiency is so central to Richard Posner’s thought that he *defines* criminal behavior in terms of efficiency: criminal behavior *is* human behavior that is inefficient. As Posner explains, “I argue that what is forbidden is a class of inefficient acts.”<sup>105</sup> The very definition of crime

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<sup>103</sup> Rothschild 2004:4.

<sup>104</sup> Posner 1985:1195-1196.

<sup>105</sup> Posner 1985:1195.

turns on the notion of natural efficiency. In the very same way, the Physiocrats would define criminality as disorder and deviance from natural laws—as we will see shortly.

Today’s neoliberal thought traces back to this severing of “police” and public economy. This discourse and way of reasoning has colonized our perception both of the Parisian markets of the eighteenth century and of our existing markets and exchanges. It is what allows us to believe, despite the mounting evidence to the contrary—despite the bailouts of Bear Stearns or Fannie Mae or A.I.G.—that our current market mechanisms are in fact self-adjusting and self-regulating, and achieve stability without administration.

## VI.

The next question is, then, *at what price?* At what price have we come to believe that the economy is the realm of natural order and that the legitimate sphere of *policing*—of administration and government—lies elsewhere? At the price, first, of significantly distorting and expanding without limit the penal sphere, and, second, of naturalizing and hiding the regulatory mechanisms in our contemporary markets, and thereby masking the enormous wealth redistributions that occur daily.

First, the distortion of the penal sphere. The birth of natural order in the writings of the Physiocrats led seamlessly to the expansion of the penal sphere as the only legitimate space for governmental administration and intervention. The idea of orderliness matured into a political theory that combined *laissez faire* in commercial matters with centralized, authoritarian policing elsewhere—what the Physiocrats referred to as the doctrine of “legal despotism.” Under the rubric “legal despotism,” François Quesnay and Mercier de la Rivière formulated a political ideal of complete governmental inactivity in *all but* the penal sphere. Given the existence of natural laws governing commerce, the *économistes* envisaged no role for the legislature *except* to criminalize and punish severely those who deviate from the natural order.

Natural order in the universe implied legal despotism in human affairs. The Physiocrats embraced this doctrine in 1767 with the

publication that same year of both Quesnay's essay, *Despotisme de la Chine* and Le Mercier's book, *L'Ordre essentiel et naturel*. Their economic writings led them, in a syllogistic manner, to the conclusion that natural order in an autonomous economic sphere demands both that there be no human intervention (in terms of positive law) in the economic realm and that positive law limit itself to punishing deviance from the natural order, in other words theft and violence. The logic proceeded as follows:

1. The economic, agricultural, and commercial realm is governed by fundamental natural laws that best promote the interests of mankind.
2. As a result, positive human-made laws could do no more than merely instantiate the fundamental natural laws. At best, positive law would simply mirror the natural order; any deviation would produce disorder rather than order.
3. Therefore, positive law should not extend to the domain of natural laws, or, as Quesnay stated, "Positive legislation should therefore not reach the domain of physical laws."<sup>106</sup>
4. For this reason there is no need for a separate legislature. All law-making power should be centralized in a unified executive—a legal despot—who learns and implements the laws of nature.
5. It is only those men whose passions are out-of-adjustment with natural order—those whose passions are "déréglées,"<sup>107</sup> as Quesnay wrote—who fail to see and appreciate the fundamental laws of natural.
6. The only object of positive man-made laws, then, should be to severely punish those whose passions are out-of-order, as a

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<sup>106</sup> Quesnay 2005 :1017 (« La législation positive ne doit donc pas s'étendre sur le domaine des lois physiques »).

<sup>107</sup> Quesnay 2005:1017.



way to protect society from these thieves and derelicts—“des voleurs et des méchants,” as Quesnay would say.<sup>108</sup>

The notion of natural order does all the work in this logical argument, and it leads inexorably to a penal sphere that is, on the one hand, marginalized, but on the other hand unleashed and allowed to expand without any limitation. Since some men’s passions are out-of-order and these men cannot appreciate the natural order, the legal despot has full and unlimited discretion to repress and punish. Man-made, positive law serves only one legitimate function: to punish those who violate the natural order.

Notice that the penal sphere, on this view, is portrayed as exceptional. It is the only domain where natural order does not autonomously produce the best result for mankind. It is the only place where order does not reign. It is entirely other, in this sense. It is the space outside the dominant realm of natural orderliness, the extremity where one finds, in Quesnay’s words, the *passions dérégées* and the *hommes pervers*.<sup>109</sup> The contrast with Beccaria and other *cameralists* could not be more pronounced: their seamless web of public economy and “police” gives way to a sharp distinction between a realm of economic order, where *laissez faire* must govern, and a realm for positive laws and penal sanctions, where the government must and may only legitimately intervene. The Physiocrats invent natural order in the economic domain but in the process, establish the penal sphere as the outer limit of the system, as the only legitimate realm for administration and repression, as the zone of *policing*.

Notice also that this view segments an earlier, more unified conception of man’s natural tendency to deviate from the rules of society. In Beccaria’s writings, there was a conception of the self-interested individual who tended to deviate and commit crimes in all aspects of life, especially in commerce. Beccaria sought to formalize the relationship of deviance by discovering mathematical relations between gain and self-interest. His underlying assumption, though, was that all merchants will deviate—and their self-interested deviations do not

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<sup>108</sup> Quesnay 2005:1017.

<sup>109</sup> Quesnay 2005:1017.

necessarily serve the public good. This was also *not* a story of private vices, public virtues. In contrast, here, only those who are *déréglés* have a natural tendency toward unproductive deviance. The pursuit of self-interest is no longer viewed as a *criminal* tendency.

This new penal paradigm significantly influenced nineteenth century liberal and modern neoliberal thought. Although Adam Smith and Jeremy Bentham would reject Physiocratic thought—primarily because of Quesnay’s devotion to agriculture as the sole means of creating national wealth—both Smith and Bentham embraced and developed a notion of *natural order* in their economic writings and reproduced—by the odd conjunction of liberal economic theory and Beccarian punishment theory—the same relationship between markets and punishment: natural order in the economic sphere but government intervention in the penal sphere.

This is most evident in Jeremy Bentham’s work. On the public economy side, Bentham embraced Adam Smith’s liberalism. In his *Manual of Political Economy* written in 1793-95, Bentham rehearses the liberal doctrines of self-interest and social welfare—of private vices and public virtues: self-interest in the economic context, rather than leading to disorder and crime, promotes the greatest economic advantage for all. Because human wisdom is tied to self-interest, governmental interference, Bentham suggested, could only result in less wealth being created.<sup>110</sup> And to help explain this, Bentham appeals to nature: “Nature gives a premium for the application of industry to the most advantageous branch, a premium which is sure to be disposed of to the best advantage.”<sup>111</sup> Bentham completes the argument suggesting that, not only will giving individuals the greatest freedom to pursue their own self-interest result in the greatest advantage for themselves, but it will also produce the greatest happiness and advantage for society as a whole.<sup>112</sup> In his public economy, Bentham favored Smith’s liberalism.

On the punishment side, however, Bentham embraced Beccaria whole cloth. In all matters penal, Bentham aligned himself with Beccaria’s notion of *policing* and administration—of a sphere of human

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<sup>110</sup> Bentham 1952 Vol. 3: 233-235.

<sup>111</sup> Bentham 1952 Vol. 3: 236.

<sup>112</sup> Bentham 1952 Vol. 3: 246-248.

activity that must be shot through with government intervention. In fact, the criminal code, for Bentham, was precisely a “grand catalogue of prices” by means of which the government set the price of deviance. The penal code was a menu of fixed prices, the exact opposite of *laissez faire*.

Beccaria’s influence on Bentham was formative. Beccaria’s small tract, *On Crimes and Punishments*, had been translated into English in 1767—at which point Bentham would have been 19 years old. Bentham wrote the main manuscript of his first work on the same topic, *Rationale for Punishment*, in 1775 when he was, in H.L.A. Hart’s words, “fresh from the study of Beccaria’s already famous book.”<sup>113</sup> Bentham agreed with Beccaria on all major aspects of his theory of punishment: they both viewed deviance and rule-breaking in this domain as natural and universal—as the basic condition of man; they both critiqued the brutalizing effect of excessive punishment and endorsed marginal deterrence as a limiting principle on punishment; they both favored speedy and certain punishments as a way to reinforce the associations of punishment with crime; and more generally they both agreed on the need for formal law and “legality” as giving legitimacy to the criminal justice system and the sovereign. Naturally, Bentham did have some reservations about Beccaria,<sup>114</sup> but on the whole, those pale in comparison to the debt Bentham properly acknowledged. In fact, Bentham took pains to express how much Beccaria had contributed to his own intellectual development. Speaking of Beccaria, Bentham exclaimed:

Oh my master, first evangelist of Reason, you who have raised your Italy so far above England. . . [Y]ou who have made so many useful excursions into the path of utility, what is there left for us to do? —Never to turn aside from that path.<sup>115</sup>

But in Bentham’s work, the relationship between political economy and the criminal sanction had radically changed. The penal sphere had been pushed outside political economy and served the function of a police barricade: the bulk of economic exchange was

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<sup>113</sup> Hart 1982:45.

<sup>114</sup> See Hart 48-52.

<sup>115</sup> Quoted in Young 1983: 318; also in Halévy 1955:21.

viewed as orderly, voluntary, and tending toward the common good; only in the case of deviance did the state step in, using the mechanisms of punishment to regulate human conduct. The penal sanction was marked off from the dominant logic of economics as the only space where those older notions of public economy prevailed.

This vision of an ordered market delimited by the penal sanction dominates the public imagination today. We tend to view criminal law as the exceptional extremity to an otherwise unregulated orderly market, where there—and there alone—the state must intervene to calibrate the calculations of rational actors. This is reflected in the pervasive idea that fraud and coercion are the one major exception to unregulated markets. It is this precisely combination—order in the market and government at the border—that helped shape the modern neoliberal vision of penality. This is the view of Richard Posner, eloquently formulated on the front-piece of this manuscript and reproduced here:

The major function of criminal law in a capitalist society is to prevent people from bypassing the system of voluntary, compensated exchange—the “market,” explicit or implicit—in situations where, because transaction costs are low, the market is a more efficient method of allocating resources than forced exchange... When transaction costs are low, the market is, virtually by definition, the most efficient method of allocating resources. Attempts to bypass the market will therefore be discouraged by a legal system bent on promoting efficiency.<sup>116</sup>

In this passage, the idea of market efficiency leads into a penal theory akin to legal despotism: the only legitimate space where government can intervene is in the penal sphere. Elsewhere, it must leave alone voluntary, compensated exchanges—as if the space of the market existed somehow independently of the policing, as if the two domains were distinct. Richard Posner’s idea that crime can be defined as that which is not naturally efficient maps on remarkably to the Physiocratic idea that the *homme pervers*—the perverted man—is the one who does not abide by the natural order of the universe. Posner’s vision of the criminal law is incipient in the writings of the Physiocrats. Neoliberal

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<sup>116</sup> Posner 1985.

penalty traces to the legal despotism of François Quesnay and Le Mercier de la Rivière.

The new discourse of neoliberal penalty facilitates the growth of the penal sphere. It makes it easier to resist government intervention in the marketplace and to embrace criminalizing any and all deviations from the market. It facilitates passing new criminal statutes and wielding the penal sanction more liberally—*because that is where administration is necessary; that is where the state can legitimately act; that is the proper sphere of policing*. In other words, the neoliberal vision not only goes hand-in-hand with a certain way of perceiving markets and history—of believing, for instance, that the early markets of the eighteenth century were regulated excessively and that ours today are free. It also facilitates the growth of the penal sphere. By marginalizing and pushing punishment to the outskirts of the market, the neoliberal discourse fertilizes the penal sphere.

Modern penal practices in the West are consistent with this, though I must emphasize that my intention is neither to make, nor to demonstrate a causal empirical link. The size and the cost of our neoliberal penal sphere in the West far exceeds those of earlier periods.<sup>117</sup> In the United States, for instance, the twentieth century

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<sup>117</sup> This project focuses on a shift over time from an earlier penal rationality to neoliberal penalty. As a result, it is important to compare *modern* neoliberal penal practices to earlier periods in the *same* neoliberal countries, such as the United States, Britain, or France. It is often tempting to compare *modern* neoliberalism to other *contemporary* discourses—such as socialist, or communist, or fundamentalist, or authoritarian—and to suggest that neoliberalism may be *worse*—or not. That it produces a *larger* penal sphere, *more* punishment, *more* incarceration—or not. For these comparisons, many rely on the fact that the United States leads the world in its rate of persons behind bars, and even in the raw number of persons in prison—taking the gold medal even in competition with a country like China that has a population over one billion, three hundred million, or about three-and-a-half times larger than the United States. Those comparisons between neoliberalism and *other* existing discourses, though, is not what motivates this project. This study is, in this loose sense, an internal critique of the direction that *our* discourse has taken, suggesting that it has gone in a direction that facilitates the growth of the penal sphere and that it could have gone in a very different direction, that it was in a very different place to begin with. It is not, again in a loose sense, an external critique in that it does not compare neoliberalism with *other* contemporary discourses and does not evaluate whether the former is “better” or “worse” in terms of its effects on the penal sphere.

experienced very high rates and costs of institutionalization—in both prisons and asylums. Prison populations skyrocketed beginning in 1970, rising from under 200,000 persons to more than 1.3 million in 2002. That year, our prison rate surpassed for the first time the 600 mark—600 inmates per 100,000 adults. Including inmates in jail, the incarcerated population exceeded two million in 2001. In the 1930s, 40s and 50s, the United States also institutionalized people at high rates, but in state and county mental hospitals, institutions for “mental defectives and epileptics” and “the mentally retarded,” psychiatric wards in VA hospitals, as well as “psychopathic,” city, and private mental hospitals. When the data on these mental institutions are combined with the data on prison rates for 1928 through 2000, the rates of overall institutionalization in this country are staggering: in the period between 1935 and 1963, the United States consistently institutionalized (in mental institutions and prisons) at rates above 700 per 100,000 adults—with highs of 778 in 1939 and 786 in 1955.

In 2001, the fifty states spent a combined \$38 billion on prisons alone.<sup>118</sup> These numbers continue to rise sharply. California's annual prison budget for 2007-08 was almost \$10 billion dollars in 2007, nearly twice as large as it was in 2001.<sup>119</sup> For many states, the annual budget allocates *more* funding for prisons than for education.<sup>120</sup> The numbers are often staggering. According to a study released by the Department of Justice in 2004:

Correctional authorities spent \$38.2 billion to maintain the Nation's State correctional systems in fiscal year 2001, including \$29.5 billion specifically for adult correctional facilities. Day-to-day operating expenses totaled \$28.4 billion, and capital outlays for land, new building, and renovations, \$1.1 billion. The average

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<sup>118</sup> Bureau of Justice Statistics, US Department of Justice, "Special Report: State Prison Expenditures, 2001," June 2004. Available at <<http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf>>.

<sup>119</sup> California Department of Corrections and Rehabilitation, "2007-08 Budget Overview." Available at <<http://www.cdcr.ca.gov/BudgetRegs/budgetOverview0708.html>>.

<sup>120</sup> Massachusetts Taxpayers Foundation, "Bulletin: State Spending More on Prisons than Higher Education," Nov 24, 2003. Available at <<http://www.masstaxpayers.org/data/pdf/bulletins/11-24-03%20Corrections%20Bulletin.PDF>>

annual operating cost per State inmate in 2001 was \$22,650, or \$62.05 per day. Among facilities operated by the Federal Bureau of Prisons, it was \$22,632 per inmate, or \$62.01 per day.<sup>121</sup>

With about one percent of the adult population in the United States behind bars, the size and cost of our penal sphere is undoubtedly greater than it was in earlier periods. And by “penal sphere,” I do not mean to create or reify a new category. I only mean to denote the costs and human capital associated with the criminal sanction. Those costs and that human capital are exceedingly large. This is consistent with the neoliberal penal vision: we are far more willing to spend dollars and allow the state to intervene in the penal sphere than we are in education or elsewhere, because that is where the government has a legitimate role. The federal bailouts of 2008 represent an exception to this logic;<sup>122</sup> but they are exceptional and, in that sense, they prove the rule. Both sides of the political spectrum view the bailouts as “outrageous,” though necessary in a time of crisis to boost public confidence in the financial markets and ensure the continuing flow of credit to American homeowners.<sup>123</sup> Most believe that the bailouts are temporary measures that will be followed by a return to normal. Even the *New York Times* editorial page assumes, for instance, that the nationalized Fannie and Freddie enterprises will eventually be privatized again.<sup>124</sup>

I must emphasize that I am not making a causal claim. I do not contend that it is the discourse of neoliberalism that has fueled the

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<sup>121</sup> Bureau of Justice Statistics, US Department of Justice, “Special Report: State Prison Expenditures, 2001,” June 2004. Available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf>.

<sup>122</sup> The federal bailout of Bear Stearns cost approximately \$29 billion; and as of the writing of this Article, the Treasury had spent approximately \$6 billion on the Fannie and Freddie bailouts (\$1 billion in preferred stock and \$5 billion in mortgage-backed security buy-backs) and had committed to cover another \$200 billion for future losses of debt holders and investors in junk mortgage-backed securities. The A.I.G. bailout is expected to cost \$85 billion. Finally, the larger bailout proposal made on September 19, 2008, is estimated at over \$700 billion.

<sup>123</sup> Presidential candidate John McCain specifically referred to the federal bailout of Fannie Mae and Freddie Mac as “outrageous” in his *Wall Street Journal* op-ed on September 8, 2008; presidential candidate Barack Obama used similar language in his comments in Ohio that day.

<sup>124</sup> See *New York Times* editorial on the Monday following the Fannie and Freddie bailout announcements on September 8, 2008.

growth of our prison populations. It is not the logic that has *caused* mass incarceration; the war on drugs, the embrace of selective incapacitation theory, mandatory minimum sentences, and other practices are directly responsible for the exponential growth of our prisons, as other factors were directly responsible for the expansion of asylums and institutions for “the mentally defective.” My point, instead, is that the logic of neoliberalism facilitates these punishment practices by encouraging the belief that the legitimate space for government intervention is in the penal sphere—and *there alone*. The empirical evidence is at least consistent with this genealogy and does not, straight out, nullify the hypothesis.

## VII.

**S**econd. The rhetoric of neoliberalism naturalizes the market and thereby hides the massive redistribution that takes place there. It masks the state’s role, the state’s ties to non-state associations—associations such as the Chicago Board of Trade—and the extensive legal and regulatory framework that encases those associations. But it also hides the freedom that existed before. In other words, it masks *both* the amount of freedom in the earlier eighteenth century *and* the amount of regulation today.

On the one hand, there was far more “freedom” in the Parisian markets of the eighteenth century than we tend to acknowledge today. The ordinances and royal edicts were perceived as freedom enhancing by their defenders, especially Delamare and *cameralists* such as Beccaria. But even setting that aside, there were so many of these rules and regulations that they were, in fact, ineffective and hardly enforced. As Professor Olivier-Martin suggests, “the *police* regulations were innumerable under the *ancient régime*... and as a result, the relative impotence of the police is well established.”<sup>125</sup> This is a phenomenon we know well in the criminal law context, where there has been such a proliferation of penal statutes that most are not enforced regularly and those that are, are often used for selective prosecutions. The Parisian ordinances were enforced mostly during times of scarcity, and there is good reason to believe that what the police was trying to achieve, more

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<sup>125</sup> Olivier-Martin 1988 :30.



than anything, was the appearance that they were doing *something* in response to a crisis. It should come as no surprise that during times of crisis, the state would intervene a bit more; that is precisely what happens in modern neoliberal states, such as in the United States during the savings and loan crisis or with the 2008 bailouts. Those interventions, while they temporarily weaken the claim that markets self-adjust, are fleeting and have little impact on the discourse of neoliberalism.

But even more important, the police matters in eighteenth century Paris were trivial. They involved fines only, and mostly minor fines, and triggered relatively minimal process. The police jurisdiction was essentially a civil, not a criminal, matter and for most of the seventeenth and eighteenth centuries was part of the civil chamber. At various times, such as during the reforms of the Bureau de Police of 1572, the police was reduced essentially to street cleaning.<sup>126</sup> The history of the founding of the police chamber reflects its secondary status. Louis XIV, after taking power in his own hands, turned first to finances, but then to justice and police matters. He created two special sessions of his council, one for matters of justice and one for matters of police. The first, the council on justice, he presided over himself on numerous occasions. It produced in 1667 the codification of rules of civil procedure, what was referred to as ‘ordonnance civile’, as well as, in 1670, the codification of criminal procedure—‘l’ordonnance criminelle.’ The second council on police, we know far less about, because it received so much less attention and Louis XIV never presided over the sessions. It was simply far less important.<sup>127</sup> Louis XIV ultimately carved out the police chamber from within the civil lieutenant’s job description and second-seated the *lieutenant de police*.<sup>128</sup> “The *lieutenant de police* will seat ordinarily at

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<sup>126</sup> Olivier-Martin 1988:99.

<sup>127</sup> Olivier-Martin 1988:103. Its sessions began in October 1666, and they met weekly until February 1667. Louis wanted reports and claimed that he was very interested in their deliberations—but did not preside. Colbert was present as well as le maréchal de Villeroy, and it contained eight counselors.

<sup>128</sup> According to Olivier-Martin, Louis eliminated the previous position of lieutenant civil du prévot de Paris and creates two positions: “deux offices de lieutenants du prévot de paris: ‘notre conseiller et lieutenant civil dudit prévot... et notre conseiller et lieutenant du prévot de Paris pour la police.’” (104). « Le lieutenant civil sera chargé de la réception de tout ce qui concerne ‘la juridiction contentieuse et distributive’, à

the Châtelet in the chamber *dite Chambre civile*, and will dispose of a small office adjacent.”<sup>129</sup> The police of the Châtelet was *by no means* what we could consider a criminal jurisdiction, levied only minor fines, if that, and took a second seat to both the criminal chamber and the civil chamber.

A review of the archives of the Châtelet of Paris at the National Archives of France, the *Série Y*, reveals that the leading recurring violation that the commissioners noted on their rounds was the failure to sweep one’s storefront—the entry read “*non balayé*.” The papers, reports, and records of the *police* chamber read like those of a small claims court and present predominantly trivial matters. For instance, the carton of papers for the first six months of 1758—the carton labeled Y9459/A—contains month-by-month reports of the daily activity of the police commissioners and lists all the violations — the *contraventions* — that the commissioners observed. Most of the contraventions are for failure to sweep the side-walk. They read as follows: “Police des 8 et 9 février 1758: Le devant de la porte du cabaret au merle blanc *non balayé*. Rue des francs Bourgeois: Le devant du cabaret de tardif aux fontaines de bourgogne *non balayé*.” And the list of “*non balayé*” goes on and on, interspersed with violations for individuals found gaming or drinking in cabarets past the closing hour. Here is the report of commissioner Dubuisson, returned at the audience of the police chamber on July 21, 1758, archived in carton Y9459/B which covered the last six months of 1758—a relatively typical entry:

8 July 1758 – *no violations*  
 10 said month – *no violations*  
 11 said month – *no violations*  
 12 s.m. – *3 cases of failure to sweep the street*  
 13 – *nothing*  
 14 – *nothing*  
 15 – *nothing*  
 17 – *nothing*  
 18 said month of July – *4 cases of failure to sweep*  
 19 s.m. – *8 cases of failure to sweep*

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l’exception de ce qui concerne la police Il précèdera le lieutenant de police dans toutes les assemblées, mais sans aucune dépendance ni autorité de l’un sur l’autre. » (104).

<sup>129</sup> Olivier-Martin 1988:105.

20 s.m. – *nothing*

Here is the report of the same commissioner Dubuisson submitted to the police chamber the following week, July 28, 1758 :

21 July – *no violations*

22 same month – *vehicle without plates or a number blocking public access ; stones left in disarray by a master mason blocking the streams ; neglected mound of gravel ; 2 cases of failure to sweep*

24 – *nothing*

25 – *nothing*

26 – *wood and stones blocking the public way ; 4 cases of failure to sweep;*

28 s.m. – *3 cases of neglected gravel ; manure causing bad odors ; garbage thrown in our presence from the window of the second floor of the house occupied by the baker near the rue de la tinerandrie ; failure to sweep.*

No need to belabor the point: the records reflect predominantly minor and trivial violations when they reflect any at all. The contrast with the records of the criminal jurisdiction of the Châtelet of Paris is striking. A review of the carton for January and February 1760—carton Y9650—discloses far more serious cases, with lengthy informations, interrogatories, and long indictments with numerous witnesses. The process and types of cases in the criminal files make the police chamber look like child’s play.

Moreover, a careful review of the sentences meted out by the police chamber of the Châtelet reveals that the *police des grains* constituted a minor function of the chamber’s jurisdiction. These are preliminary findings from a larger on-going quantitative study of a collection of 932 sentences and ordinances from the police chamber meted out over the period 1668 to 1787, contained in two cartons, Y-9498 and 9499 at the National Archives.<sup>130</sup> Of the 932 records, 580 are

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<sup>130</sup> The data source are the 934 sentences and ordinances contained in the cartons and listed in the 1993 monograph by Henri Gerbaud and Michèle Bimbenet-Privat, *Châtelet de Paris : Répertoire numérique de la série Y. Tome premiers. Les chambres. Y1 à 10718 et 18603 à 18800* (Paris : Archives Nationales. At present, I am trying to unearth

police sentences, and of those, only 77 or 8.40% are related in some way to the cultivation and commerce of grain, to the market in grains, to bakers, millers, or other activities that have a bearing on bread, flour, or grain; with another 27 or 2.94% very tangentially related or touching in any way whatsoever on grain or bread. Of the 77 relevant sentences, only sixty resulted in fines. Within the category of the highest fines meted out—3,000 *livres* or more—grain-related offenses represented a small fraction of the whole, only 2 (or 5.4%) of 37 such fines. There was only one sentence of imprisonment meted out in the entire period, and it was for a servant who did not deliver goods—unrelated to the grain trade. I will be conducting far more research on this sample, but a preliminary assessment is that the *police des grains* represented a small fraction of the business of the *lieutenant de police*.

Overall, the archival records reveal a disproportionate number of terribly minor infractions and a relatively small place for the *police des grains*. As noted earlier, most of our knowledge of the Parisian grain and bread markets comes to us primarily through the eyes of liberal opponents of the regulations—Freminville and Afanassiev. They did a skilled job of picking out the sentences related to the *police des grains* from the haystack of police records. But we should be weary that so much of our understanding of the *police des grains* is filtered through the lens of these opponents—which seems to have produced such a morbid fascination with regimentation. Our perceptions of the importance of grain regulation may well be distorted by the personal biases of the historians and narrators of the field, either because they were ideologically opposed to the *police des grains* and had an interest in inflating the appearance of excessive regulation, or because they were themselves commissioners or lieutenants of the police—such as Delamare—and invested in the importance of their own functions.

On the other hand, there is also far more “constraint” in our contemporary markets than we typically tend to acknowledge today. The truth is, every action of the broker, buyer, seller, investment bank,

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exactly how this collection was compiled since it does not contain *all* of the sentences and ordinances. There are several existing theories as to how the items were collected and they each impact differently on the randomness of the sampling. More on this soon, I hope. For the moment, I am going on the assumption that the items are relatively randomly sampled, though that ultimately may not be the case.

brokerage firm, exchange member—even non-member—is scrutinized and regulated. The rules, oversight committees, advisory letters, investigations, as well as the legal actions, abound. The list of do’s and don’ts is extensive. Brokerage firms may combine and use black-lists to restrict retail buyers from reselling their public offering stock during a “retail restricted period” of between 30 and 90 days following their purchase of newly offered stock, but the same brokerage firms may allow large institutions to dump their stock in the aftermarket at any time.<sup>131</sup> Exchange members on the New York Stock Exchange may get together and fix the commission rate on stock transactions of less than \$500,000—i.e. set the price of buying and selling stock—but freely negotiate commissions in larger stock transactions.<sup>132</sup> The National Association of Securities Dealers may combine and agree to restrict the sale and fix the resale price of securities of open-end management companies—“mutual funds”—in the secondary market between dealers, between dealers and investors, and between investors, thereby eliminating the secondary market in mutual funds—a market which was significant prior to 1940;<sup>133</sup> and competing corporate take-over bidders may join together and make joint take-over offers to stockholders, even if it means that together they reduce the offering price for the stock purchase.<sup>134</sup> But exchange members may not get together and disallow exchange members to share commissions earned from the purchase or sale of stock with non-member broker-dealers;<sup>135</sup> and an exchange may not order its members to remove private telephone connections to the offices of nonmember brokers—unless the Securities and Exchange Committee reviews and approves such a policy.<sup>136</sup>

The rules and regulations surrounding our modern markets are intricate and often arcane, and they belie the simplistic idea that our markets are “free.” The reality is far more complex. It is interesting to note that this may also have been true with regard to the *actual practices* of the Physiocrats. They may have been far more constrained in their *actions* than they were in their *rhetoric*. This is certainly true of Le

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<sup>131</sup> Friedman 2002.

<sup>132</sup> Gordon 1975.

<sup>133</sup> NASD 1975.

<sup>134</sup> Finnegan 1990.

<sup>135</sup> Thrill 1970.

<sup>136</sup> Silver 1963.

Mercier de la Rivière, who served as *intendant*—administrative governor—of Martinique on two occasions during the early 1760s. By the time Mercier returned to Martinique on his second tour of duty in 1763, he knew François Quesnay and had been converted to Physiocracy. In fact, Quesnay had originally recommended Mercier for the post in Martinique in 1759.<sup>137</sup> At a time, then, when Mercier was preaching free markets, he was in fact practicing the *police des grains*. He was setting the price of bread and meat in Martinique, as evidenced by this fascinating ordinance signed by Mercier himself in 1763:

No 271. Ordinance of MM., the General and Intendant (royal administrator), increasing the price of bread. September 24, 1763.

The current price of wheat flour making it impossible for bakers to provide bread to the public at the specified price of 7 *sols 6 deniers* per pound, at the ordinary weight of 16 ounces, we order that from this day forward, bakers will be held to furnish their bread at the weight of 14 ounces for 7 *sols 6 deniers*, and this shall continue until otherwise ordered by us...

We promulgate this to the king's prosecutors, etc.  
 Rendered at Martinique, September 24, 1763.  
 Signed, Marquis de Fenelon, et De La Rivière<sup>138</sup>

Like Mercier de la Rivière, we today *want* to see freedom even when there is nothing but constraint in front of us. That desire, that urge to believe is precisely what masks the redistribution that accompanies the actual administration of contemporary markets. Because we want to believe that the markets are operating on their own, we let slide the actual cash flows and fail to properly scrutinize how the administration of the markets actually redistributes wealth. Because we want to believe in self-adjusting markets, we do not adequately investigate the consequences of our choices. There is a paragraph in the standard commodities futures contract on the Chicago Board of Trade that

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<sup>137</sup> May 1932:4.

<sup>138</sup> Durand-Molard 1807:Vol. II: 253-54.

provides that all grain shall be delivered in the City of Chicago. The City of Chicago has a finite capacity for warehousing grain, and is at a good distance from the corn, wheat, and soybean fields of Nebraska. That may increase the relative costs for the Nebraska farmer. The mere existence of standardized commodities futures contracts—which were first permitted in the twentieth century—tends to slightly reduce the mean price of commodities. This too may work to the detriment of the producer. These are some of the distributional consequences that go unexamined, precisely because we do not want to see all the choices that organize the market—because the market has been *naturalized*. The idea of natural order and, today, of market efficiency obfuscates these redistributions of wealth and resources.

## VIII.

**A** word on method. I am by no means the first to toil in these fields and this project owes much to the ground-breaking work of Louis Dumont, Albert Hirschman, Karl Polanyi, Joseph Schumpeter, Luc Boltanski, and Michel Foucault, who have all contributed in important ways to our understanding of late modern capitalism. The objective of this particular project may be different, but naturally builds on their insights. This study seeks to explore the mode of rationality that made neoliberalism “natural” today—that naturalized our conception of the penal sphere as the outer limit of the free market, as the unique location where government intervention is automatically legitimate. The goal is not to offer a historical explanation why this mode of rationality developed, nor to propose a material explanation—whether economic or political—as to how the idea of natural order emerged. It is instead to trace how certain beliefs—for instance, the idea that the Parisian markets were overregulated and that our modern exchanges are free—became believable. How they became so obvious. And at what price.

Let me emphasize this last question—*at what price*—in part by drawing a contrast to Albert Hirschman’s brilliant essay, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph*. In his essay, Hirschman demonstrates how ideas evolve over time and argues that the “spirit of capitalism” grew and changed from *within*. The process, Hirschman argues, was “endogenous” to the reasoning and

rationality of the period. In contrast to Marxian analyses, which trace the emergence of capitalism to changes in material processes and class structures—to the end of feudal land relations and the rise of new modes of production—and in contrast to Weber, who traced the rise of capitalism to a new ethic of Protestantism, Hirschman traces a more continuous or seamless history of ideas, wherein self-interest came to be perceived as the useful passion that could be counted upon to rein in the less productive passions—like the passion for glory or lust. The theory of interests—and especially, the theories of self-interest represented in the “private vices-public virtues” of Mandeville and the “hidden hand” of Adam Smith—evolved as one conceivable way, a more auspicious way of dealing with excessive cultures of glory and passions such as lust. The other means that had been developed—such as repression of the passions or rehabilitation of the passions—were discussed, but seemed less likely to succeed than to pit one passion against the others.

Hirschman’s story traces the history of how an idea became popular, and I embrace that method in one sense—insofar as this project too explores how the idea of natural order became dominant in our contemporary neoliberal imagination. At the same time, however, this project seeks to push the analysis further; to explore *how* the acceptance of those beliefs—beliefs in natural order and legal despotism—affects our contemporary social distributions. In other words, *at what price?* Ways of reasoning and seeing the world, I contend, facilitate certain material developments—whether inadvertently or knowingly. They make possible, they ease certain types of redistribution. We come to believe certain ideas, as Hirschman demonstrates well, but those beliefs have significant consequences.<sup>139</sup> It is crucial not to lose sight of those.

At the same time, however, I acknowledge the limitations of pure idealism: I do not believe that ideas have such real impacts on the world that they *themselves* or *alone* necessarily transform our practices. I do not believe that a new idea can change the way we produce, the way we work, the amount of work we do. I am not Weberian in the hard sense of

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<sup>139</sup> I should not that, as a substantive matter, in contrast to Albert Hirschman, I trace the shift most fundamentally to the birth of an autonomous, self-sustaining, and self-regulating system that is *naturally ordered*—which, I argue, goes hand-in-hand with a transformation of the penal sphere. Punishment is necessary to enforce the borders of the system under this view.



*The Protestant Ethic and the Spirit of Capitalism*. Although this project focuses predominantly on the development of the ideas of natural order and legal despotism, and on their potential impact on our social distributions, this is not to deny the important influence of material changes, economic and technological shifts, and political transformation. The project does not centrally address those larger material transformations. That would simply be another project. In this sense, this project is neither merely a history of ideas nor an intellectual history, but also not a material explanation of how ideas evolve over time. It is instead a tracing—I might say genealogy—of how a certain set of beliefs became common and an analysis of how those beliefs might influence our practices.

Luc Boltanski and Ève Chiapello's *The New Spirit of Capitalism* is particularly enlightening in this respect. Boltanski and Chiapello's work focuses precisely on the intersection of how new ideas—in their case, the 1960's artistic and creativity critiques of fordist capitalism, with its principles of hierarchical organization—reshaped work practices into more fluid networks with greater roles for individual initiative, creativity, and autonomy, and thereby helped neutralize the thrust of the original critiques themselves. Boltanski and Chiapello take seriously how new ideas translate into practices, conducting a close reading of modern business management manuals to demonstrate how the ideas permeated the reasoning of management and influenced institutional organization.

Michel Foucault's lectures at the Collège de France in 1978 and 1979 are also enlightening. Not only did Foucault specifically address the Parisian bread markets of the eighteenth century, the birth of Physiocratic thought, and post-War American neoliberalism—including the seminal work on crime and punishment that Gary Becker penned in 1968—but he also related neoliberal thought back to the early development of public economy. In his method too, Foucault drew, at least on one reading, on an age-old strain of nominalist thought that influences my work as well—a strain of thought that runs through the work of thinkers as far back as the Medieval Franciscan friar William of Occam, to the sixteenth century Renaissance essays of Michel de Montaigne, to the nineteenth century polemics of Friedrich Nietzsche.

This project continues in the furrow of that lengthy nominalist tradition. It starts by conceptualizing “natural order” and “market efficiency” as what William of Occam would have called “universals,” and then explores what work those universals are accomplishing. The answer that I develop in these pages reflects this nominalist influence: we have developed and deployed these universals to make sense of what are in fact irreducibly individual phenomena, to place discreet and divergent practices into a coherent framework, to deploy simple heuristic devices or stereotypes to expedite our evaluation and judgment. In so doing so, we have created structures of meaning that do work for us—at *a steep price*.

The historian, Paul Veyne, in his recent book *Foucault: Sa pensée, sa personne* (2008), excavates a similar nominalist influence in the work of Foucault, drawing particular attention to the opening passage of Foucault’s 1979 lectures, *Naissance de la biopolitique*.<sup>140</sup> In that opening lecture, Foucault steps back to explain and reframe his larger intellectual project and to place his writings within a methodological framework. The method in all his work, Foucault explains, had always been to start by *doing away* with the central explanatory concept, as a way to reexamine the work that the concept accomplished. Foucault lectured:

I start from the decision, both theoretical and methodological, which consists in saying: suppose that the universals do not exist, and then I ask the question to history and historians: how can you write the history if you do not admit *a priori* that something like the state, society, the sovereign, subjects exist? It is the same question that I posed when I asked: ... suppose that madness does not exist.<sup>141</sup>

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<sup>140</sup> I discuss this at greater length in my essay, “*Supposons que la discipline et la sécurité n’existent pas* ~ Rereading Foucault’s Collège de France Lectures (with Paul Veyne),” Paper prepared for *Le Carcéral, Sécurité, and Beyond: Rethinking Michel Foucault’s 1978-1979 Collège de France Lectures*, Conference at the Paris Center of the University of Chicago, June 5, 2008 (available here: [http://www.thecarceral.org/Harcourt\\_Foucault\\_Carceral\\_Notebooks\\_Draft.pdf](http://www.thecarceral.org/Harcourt_Foucault_Carceral_Notebooks_Draft.pdf)).

<sup>141</sup> Foucault NB 2004b:5.

The use of the term “universals” is revealing and, as Paul Veyne suggests, the passage links Foucault back to the tradition of nominalism.<sup>142</sup> Foucault’s method was to critically examine the very conceptions that we construct in order to learn something about ourselves.<sup>143</sup> Foucault’s nominalism was fed, in part, by a large dose of skepticism—especially, of skepticism of the constructs of others, of those many universals. It is in this sense that Veyne correctly characterizes Foucault as a skeptic<sup>144</sup>—although it is important to keep nominalism and skepticism distinct and separate. In a similar vein, this project asks: suppose that “natural order” or “market efficiency” does not exist. What does that tell us about the way that we now understand the world? What work do those concepts perform? These questions too are nominalist and build on a centuries-old tradition of thought.

Although this project shares a methodological sensibility with Foucault, this project breaks sharply from his analysis. More than anyone, Foucault reified the idea that the *police des grains* under the *ancien régime* was regulated excessively and he also strongly intimated that the modern economic sphere has been liberalized. Even though Foucault’s overarching project was to show that both were forms of governance, Foucault nevertheless created and deployed categories in a manner that is completely antithetical to this project. In his 1978 lectures, Michel Foucault specifically deployed the category of *discipline* in its purest, most pristine form, to describe the grain trade.

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<sup>142</sup> Veyne 2008:19 (« Foucault est nominaliste comme Max Weber et comme tout bon historien. Heuristiquement il vaut mieux partir du détail des pratiques, de ce qui se faisait et se disait, et faire l’effort intellectuel d’en expliciter le discours. »)

<sup>143</sup> Foucault *Dits et Ecrits IV*: 726. Returning to this point several years later, in January 1984, Foucault emphasized in an interview: « on m’a fait dire que la folie n’existait pas, alors que le problème était absolument inverse: il s’agissait de savoir comment la folie, sous les différentes définitions qu’on a pu lui donner, à un moment donné, a pu être intégrée dans un champ institutionnel qui la constituait comme maladie mentale ayant une certaine place à côté des autres maladies. »

<sup>144</sup> Of his skepticism, Veyne recalls : « Un soir où nous parlions du mythe, il me disait que la grande question, pour Heidegger, était de savoir quel était le fond de la vérité ; pour Wittgenstein, c’était de savoir ce qu’on disait lorsqu’on disait vrai ; ‘ mais à mon avis, la question est : d’où vient que la vérité soit si peu vraie ? ’ ; la vérité ou du moins les grandes vérités de chaque époque. » (Veyne 2008:63).

*La police des grains*, Foucault explained in his lecture of January 18, 1978, is the quintessential *example of discipline* and satisfies all three dimensions of the concept, *discipline*. First, the centripetal nature of disciplinary force: as Foucault explained, “discipline functions to the extent that it isolates a space, that it determines a segment. Discipline concentrates, focuses, and encloses. The first action of discipline is in fact to circumscribe a space in which its power and the mechanisms of its power will function fully and without limit.”<sup>145</sup> *La police des grains* was centripetal precisely in this sense, Foucault maintained. It turns inward onto a determined space and seeks to control, to dominate that circumscribed field. “It isolates, it concentrates, it encloses, it is protectionist, and it focuses essentially on action on the market or on the space of the market and what surrounds it.”<sup>146</sup>

Second, the exhaustive nature of discipline: it seeks to regulate everything, to the smallest and most minute details. “Discipline allows nothing to escape,” Foucault explained. “Not only does it not allow things to run their course, its principle is that things, the smallest things, must not be abandoned to themselves. The smallest infraction of discipline must be taken up with all the more care for it being small.”<sup>147</sup> This is the notion of discipline as order maintenance.<sup>148</sup> The *police des grains* is precisely about letting nothing escape the view of regulation, Foucault declared.

Third, the prohibitive nature of discipline. “How basically does discipline, like systems of legality, proceed?” Foucault asked. “Well, they divide everything according to a code of the permitted and the forbidden. Then, within these two fields of the permitted and the forbidden, they specify and precisely define what is forbidden and what

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<sup>145</sup> Foucault 2007 STP:44-45 ; Foucault 2004 STP:46.

<sup>146</sup> Foucault 2007 STP:45; Foucault 2004 STP:46.

<sup>147</sup> Foucault 2007 STP:45; Foucault 2004 STP:47.

<sup>148</sup> This is the moment of discipline captured so well by Foucault in *Discipline and Punish* 1979:34—the moment, for instance, of the official opening on January 22, 1840, of Mettray, that juvenile prison *qua* home, school, military compound, courthouse and factory described in such chilling detail by Foucault in *Discipline and Punish*. It is discipline as originally described in the words of Ducpétiaux in 1852: “The least act of disobedience is punished and the best way of avoiding serious offences is to punish the most minor offences very severely.”

is permitted, or rather, what is obligatory.”<sup>149</sup> Again, the *police des grains* could not come closer, Foucault maintained. It seeks to define these two spheres and then determine exactly which types of commercial behaviors are allowed and which prohibited.

Foucault, more than anyone, reified the idea that the Parisian markets were excessively regulated with his use of the expression, “la police *disciplinaire* des grains”: “if we take again the example of the *disciplinary* police of grain as it existed until the middle of the eighteenth century, as set out in hundreds of pages in Delamare’s *Traité de la police*, we see that the *disciplinary* police of grain is in fact centripetal.”<sup>150</sup> This project seeks precisely to demystify that claim.

Similarly, with regard to modern markets, Foucault also reified the difference with the *ancien régime*. To describe modern market practices, Foucault abandoned the paradigm of discipline and fashioned a new category: *sécurité*. In his 1979 lectures, *Naissance de la Biopolitique*, Foucault analyzed the modern mode of rationality, which he called “liberalism,” under the rubric of *sécurité*—what he later called “gouvernementalité.”<sup>151</sup> In his lectures, Foucault traced liberalism to the idea of “laissez-nous faire”: the idea of a self-limitation on governance. Liberal practices are characterized, according to Foucault, by explicit self-limitation, in contrast to the “raison d’État” of the sixteenth and seventeenth centuries, which sought an infinite objective. It is the project of “not governing too much,” in the words of Benjamin Franklin and the marquis d’Argenson.<sup>152</sup> It traces back, Foucault said, to the birth of political economy: “Political economy, I think is fundamentally what has ensured the auto-limitation of governmental reason.”<sup>153</sup> Listen to that: *l’autolimitation de la raison gouvernementale*. Even for Foucault, one of the sharpest critics of neoliberalism, there is a tangible substratum of liberty at play. There are new practices of *liberalization*. There are free movements and processes of free circulation of goods. “[L]iberalism – not interfering, allowing free movement, letting things follow their

<sup>149</sup> Foucault 2007 STP:46; Foucault 2004 STP: 47.

<sup>150</sup> Foucault 2007 STP:45 (emphasis added); Foucault 2004 STP: 46.

<sup>151</sup> Foucault 2004 STP:111 (substituting *gouvernementalité* for the term *sécurité*).

<sup>152</sup> Foucault 2004 NB:27 n.10.

<sup>153</sup> “L’économie politique, je crois que c’est fondamentalement ce qui a permis d’assurer l’autolimitation de la raison gouvernementale” (Foucault 2004NB:1).

course; *laisser faire, passer et aller* – basically and fundamentally means acting so that reality develops, goes its way, and follows its own course according to the laws, principles, and mechanism of reality itself.”<sup>154</sup>

It is this “auto-limitation” that leads Foucault to name and deploy the new category of *sécurité*, which is different precisely in those three ways from discipline. First, whereas discipline cabined, concentrated, and enclosed its space of operation, *sécurité* is centrifugal: “The apparatuses of security . . . have the constant tendency to expand; they are centrifugal. . . . Security therefore involves organizing, or anyway allowing the development of ever-wider circuits.”<sup>155</sup> Second, whereas discipline focused on even the smallest infractions, *sécurité* lets the small things go. “The apparatus of security . . . lets things happen. . . . allowing prices to rise, allowing scarcity to develop, and letting people go hungry . . .”<sup>156</sup> Third, whereas discipline sought to eliminate and eradicate completely, *sécurité* in contrast tries only to minimize—to seek an optimal level of the targeted behavior, to achieve a certain equilibrium. Not to eliminate, but to regulate to an optimal level. *Sécurité* is pragmatic. It tries to figure out how to optimize. In sum, *sécurité* differs dramatically from *discipline* in its modes of functioning. For Foucault, the practices *differ* in fact. As Foucault explained: “An apparatus of security . . . cannot operate well except on condition that it is given freedom, in the modern sense that it acquires in the eighteenth century: no longer the exemptions and privileges attached to a person, but the possibility of movement, change of place, and processes of circulation of both people and things.”<sup>157</sup>

My project is markedly different. The point is not to show that both the *police des grains* and neoliberalism are both forms of governmentality, but rather to show that *neither can be categorized in those ways* and that the categories of overly-disciplined and liberalized *themselves* are meaningless and obfuscate the real work that needs to be done. In this project, it is crucial to distinguish and carefully delineate practice from rhetoric—though they may well both constitute discourse—and to make sure we know exactly which one we are

<sup>154</sup> Foucault STP 2007 :48; Foucault STP 2004: 49.

<sup>155</sup> Foucault STP 2007 :45 ; Foucault STP 2004 :46.

<sup>156</sup> Foucault STP 2007 :45 ; Foucault STP 2004:47.

<sup>157</sup> Foucault STP 2007 :48-49 ; Foucault STP 2004 : 50.

describing and comparing. It is, for example, far too easy to discuss Mercier de la Rivière's written text, but ignore his actions as *intendant* of Martinique. One repeated difficulty with Foucault's analysis in his 1978 and 1979 lectures is that he contrasts the *practices* of the *police des grains* with the *rhetoric* of the Physiocrats. Foucault uses the concept of discipline to understand the *practices* as opposed to the rhetoric, of the *police des grains*; yet he uses the concept of liberalism as a way to understand the *rhetoric* of the Physiocrats and ignores their practice. The trouble is, the *rhetoric* of the *police des grains* was different than its *practice*, and the *practices* of the liberals were often different than their *rhetoric*. There is a sense that Foucault took neoliberals too much at their word. It is almost as if he suggested that liberal practices *were in fact more liberal* but that they should be understood as just another form of governmentality.

This project is premised on the belief that we have no way of knowing whether our contemporary practices are more or less liberal, more or less freedom enhancing, more or less regulated. We have far more administration today than meets the eye or that we tend to recognize. Whether it amounts to more or less is impossible to quantify. But the fact is, we *characterize* these contemporary practices as more liberal—which is precisely the problem.

## IX.

Under the entry “Grains” of the *Encyclopédie* volume published in 1758, François Quesnay proposed that “It is quite sufficient that the government simply not interfere with industry,” “suppress the prohibitions and prejudicial constraints on internal commerce and reciprocal external trade,” “abolish or diminish tolls and transport charges,” and “extinguish the privileges levied on commerce by the provinces.”<sup>158</sup> Quesnay's vision of an economic system governed by natural order led to a political theory of “legal despotism” that would radically unbundle the earlier understanding of a overlapping relationship between public economy and the penal sphere. By relegating the state to the margins of the market and giving it free rein there *and*

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<sup>158</sup> Quesnay 2005:204-205.

*there alone*, the idea of natural order facilitated the unrestrained expansion of the penal sphere. It gave birth to neoliberal penalty.

The hitch is that the foundational categories of, on the one hand, “natural order,” “market efficiency,” or “the free market,” and, on the other hand, “excessive regulation,” “governmental inefficiency,” or “discipline,” are illusory and misleading categories that fail to capture the irreducibly individual phenomena of different forms of market organization. In all markets, the state is present. Naturally, it is present when it fixes the price of a commodity such as wheat or bread. But it is also present when it subsidizes the cultivation or production of wheat, when it grants a charter to the Chicago Board of Trade, when it permits trading of an instrument like a futures contract, when it protects the property interests of wheat wholesalers, when it facilitates the river transport of wheat, when it criminalizes the coordination of prices, when it allows the merger of grain companies, when it polices the timing of trades, etc. In addition, whenever the government is not itself regulating a market, it implicitly or explicitly delegates that authority to another entity. All markets are highly regulated. At the same time, in all markets, there is freedom. Even in a controlled economy where the price is fixed, there are variations in the quality of the goods sold and along other dimensions that create product differentiation. These produce cues at certain stores and not at others. Even in a highly criminalized economy where certain goods are outlawed, there are black markets that emerge and develop into robust trading markets where those illegal goods can be purchased and sold.

In the economic sphere, there is freedom and there is constraint. What we see is a reflection on us, not of the market. It makes little sense to describe one regime as free and another as regulated. All systems have complicated regulatory mechanisms that make the market function and dysfunction. What is most important is to remember that the categories we use to organize, understand, discuss, categorize, and compare the different organizing principles are just that—labels. They do not capture the true individuality of the objects described. And they have the unfortunate effect of obscuring rather than enlightening. They obscure by making one set of objects seem natural and necessary, and the other naturally unnecessary.



This essay is a prolegomenon, a necessary first step in the direction of properly assessing modern forms of social and economic organization. Necessary, because of the deafening and dominant discourse of natural order and market efficiency. The very idea that we would use the term “free” to describe our current market system—a system which is regulated through and through—is a testament to the work that needs to be done. It may be fair to say that the Chicago School has so deeply and fundamentally warped our understanding of economic systems that it will take a lot of work to reach the point where we can properly assess different alternatives for the administration of markets and punishment, and dismantle our neoliberal penalty.

#### NOTE

This project has benefitted immensely from generous conversations and insightful comments from a number of remarkable colleagues to whom I am deeply grateful, especially Susan Silbey, Pasquale Pasquino, Bill Sewell, Andrew Abbott, Jan Goldstein, Robert Morrissey, Mariana Valverde, Steve Sawyer, Richard Epstein, Eric Posner, Noah Zatz, Adam Samaha, David Strauss, Lior Strahilevitz, Cass Sunstein, Jerry Lopez, Steve Yeazell, Jennifer Mnookin, Eugene Volokh, Andrew Dilts, Olivier Cayla, Pascal Beauvais, and Michel Troper.

This research has been supported by a Fulbright research grant and by the generous support of my dean, Saul Levmore, at the University of Chicago. I thank Jan Thomas and Olivier Cayla at the *Centre des normes juridiques* of the *École des Hautes Études en Sciences Sociales* and Pierrette Poncela, Elisabeth Fortis, Florence Bélivier, and Pascal Beauvais at the *Centre du droit pénal* at the *Université Paris X—Nanterre* for their hospitality and intellectual companionship during the Fulbright.

I thank Elisabeth Geoffroy for providing outstanding assistance on the archival data set. For excellent research in the history of political theory, I am deeply grateful to James Johnston, Brett Reynolds, and Jon Jurich; and for excellent research on the grain trade, to Sam Lim, Dan Montgomery, and Matt Johnson. Special thanks to Diana Watral on the final version of the draft.

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