Perfecting Criminal Markets

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David Michael Jaros*

ABSTRACT

From illicit drugs to human smuggling to prostitution, legislators may actually be perfecting the very criminal markets they seek to destroy. Criminal laws often create new dangers and new criminal opportunities. Criminalizing drugs creates the opportunity to sell fake drugs. Raising the penalties for facilitating illegal immigration increases the risk that smugglers will rely on dangerous methods that can injure or kill their human cargo. Banning prostitution increases the underground spread of sexually transmitted disease. Lawmakers traditionally respond to these “second order” problems in predictable fashion—with new waves of criminalization that impose additional penalties on fake drug dealers, dangerous human smugglers, and HIV-positive prostitutes.

But what lawmakers fail to recognize is that the criminalization of these second order activities also improves the criminal markets that gave them birth. Criminalizing the sale of fake cocaine improves the market for genuine drugs by reducing users’ risk that they will be sold “bad product.” When the law increases the penalties for dangerous human smuggling, those contemplating illegal immigration may actually pay more for assistance across the border. The total quantity of prostitution will rise when the law makes sex-for-hire safer. In sum, efforts to criminalize and punish second order crimes may, inadvertently, bolster the very criminal markets that legislatures originally sought to eradicate.

This article suggests that the perfection of criminal markets is not just a quirky economic irony. The dynamic relationship between first and second order crimes is relevant to the formation of sound criminal justice policy, and it can help explain the rapid expansion of the criminal code and the growing complexity of federal and state sentencing guidelines. Moreover, acknowledging the degree to which criminal laws facilitate antisocial activity can promote a normative shift in our understanding of criminal law and may de-stigmatize alternative policies that improve public welfare by making illegal activity safer.

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INTRODUCTION

Can criminal laws improve existing black markets? An unexamined category of crimes may actually make black markets more efficient. Laws that criminalize the sale of fake cocaine can improve the market for genuine drugs by reducing the risk that users will buy “bad product.” Laws that enhance penalties for alien smugglers who injure or kill their human cargo may improve immigrants’ willingness to pay “coyotes” or “snakeheads” to transport them across the border. From prostitution to human smuggling to back alley abortions, legislators may actually be bolstering the very criminal markets that they seek to destroy.

The fact that the criminalization of one activity may actually improve related criminal markets has profound implications for criminal justice policy and our normative understanding of criminal law. By recognizing the impact that new criminal laws can have on existing black markets, policy makers can design more effective criminal justice policies and better evaluate the true cost of criminalization. Moreover, acknowledging that criminal law can facilitate crime may change how society perceives alternatives to criminalization. Critics often disparage harm reduction strategies such as needle exchange programs because they, theoretically, encourage illegal activity. But if criminal laws similarly foster illegal behavior, than neither criminalization, nor its alternatives should be accused of condoning crime.

In one sense, lawmakers are in the business of creating criminal markets. All forms of regulation have the potential to drive unwanted behavior underground. Criminalizing the sale of illicit drugs creates the drug black market. Closing the borders creates a market for human smuggling. But criminal laws create secondary dangers and new criminal opportunities as well. Criminalizing drugs creates the opportunity to sell fake drugs. Raising the penalties for facilitating illegal immigration increases the risk that smugglers will rely on dangerous methods that can injure or kill their human cargo. Lawmakers respond to these new problems in predictable fashion— with a second wave of criminalization and enhanced penalties. It is a crime in more than 35 states to sell fake drugs. If a smuggler causes his human cargo “serious bodily injury,” the maximum sentence he faces increases from ten years to twenty. Should the

1 See, e.g., Alabama, ALA CODE § 20-2-143 (2011); California, CAL. HEALTH & SAFETY CODE § 11355 (West 2011); Florida, FLA. STAT. §831.31 (West 2012); Georgia, GA. CODE ANN. § 16-13-30.2 (2011); Kentucky, KY. REV. STAT. ANN. § 218A.140 (West 2012); Maryland, MD. CODE ANN., CRIM. LAW § 5-617 (West 2011); Michigan, MICH. COMP. LAWS ANN. §333.7402 (West 2012); Missouri, MO. ANN. STAT. § 195.242 (West 2011); New York, N.Y. PUB HEALTH LAW § 3383 (McKinney 2011); Pennsylvania, 35 PA. CONS. STAT. § 78-113 (West 2011).
2 8 U.S.C.A. § 1324(B)(iii) (West 2012)
immigrant die in transit, the smuggler can receive a life sentence or even the death penalty.³

What lawmakers fail to recognize is that the criminalization of these “second order” activities, while perhaps protecting society from significant harm, also corrects inefficiencies in the criminal markets that gave them birth. By criminalizing and enhancing the penalties for activities like selling fake drugs, dangerous human smuggling, HIV-aware prostitution, armed drug dealing, and deadly back alley abortions, lawmakers may strengthen the very criminal markets that they originally sought to eliminate.

Drawing on economic theory, cognitive psychology, and game theory, this article examines the complicated dynamic between related criminal markets. Many scholars and policy makers have presumed that criminal laws deter bad behavior by increasing the cost of engaging in antisocial activity.⁴ This view has led policy makers to avoid alternative forms of regulation for fear that they would encourage undesirable activities. By taking this theory of deterrence on its own terms and accepting its assumption that potential criminals are “rational, econometrically grounded actors who weigh the qualities and probabilities of punishment before acting”⁵ this article demonstrates that criminal laws can encourage unwanted behavior in much the same way. As a result, policy makers need to account for the impact that criminalization has upon related criminal markets when they consider new criminal laws. One of the great benefits of applying economic theory to the study of law is its capacity to identify unexamined assumptions and open uncultivated subjects to further inquiry. An examination of the impact of second order crimes on first order criminal markets raises basic questions about the practical and normative implications of using the criminal law to fight antisocial behavior.

This Article proceeds in three parts. Part I explores how criminal laws create new opportunities to engage in antisocial behavior. While numerous scholars have explored the degree to which the criminal justice

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³ 8 U.S.C.A. § 1324(B)(iv) (West 2012)
⁴ See Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169, 176 (1968) (“When all other variables are held constant, an increase in a person’s probability of conviction or punishment if convicted will generally decrease… the number of offenses he commits.”); see also RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 219 (7th ed. 2007) (“A person commits a crime because the expected benefits exceed the expected costs.”).
⁵ Jeffrey Fagan & Tracey L. Meares, Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities, 6 OHIO ST. J. CRIM. L. 173, 181 (2008). ("According to [deterrence theory], increasing the penalty for an offense will decrease its frequency because deterrence theory conceives potential criminals as rational, econometrically grounded actors who weigh the qualities and probabilities of punishment before acting.")
system increases individuals’ propensity to commit crime, few legal scholars have examined the role that the criminal law plays in creating new criminal markets. This occurs in two distinct ways. First, criminal laws can create demand for new types of harmful goods and services that are subsequently criminalized. Second, criminalization can create new criminal opportunities by pushing markets underground where the government is unable to use regulatory tools that might prevent the new antisocial activity from occurring.

Part II, examines how lawmakers inadvertently improve criminal markets when they seek to deter harmful second order activities. While imposing considerable costs on society generally, second order criminal conduct can create inefficiencies in related criminal markets by generating asymmetries of information, diminishing competition, and increasing the cost of illegal activity. By deterring second order crimes, policy makers inadvertently strengthen the very criminal markets that they originally sought to eradicate.

Part III describes some of the broad implications of perfecting criminal markets. The dynamic relationship between first and second order crimes is not only relevant to the formation of sound criminal justice policy; it also can help explain the rapid expansion of the criminal code that has been the subject of considerable consternation and academic debate. Moreover, the recognition that criminal laws actually improve black markets may change how we think about criminalization in relation to other policy options. Focusing attention on the ways in which criminal laws facilitate crime may help to de-stigmatize alternative harm reduction policies that improve public welfare by reducing the social costs of illegal activity.

I. THE CRIMINOGENIC EFFECTS OF CRIME

“You murder me now and steal my throne—but one of your own sons will dethrone you, for crime begets crime.”

One of the core goals of the criminal law is to deter antisocial behavior. On its face, deterrence appears simple and straightforward. In

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6 See, e.g., id. at 176 (suggesting that more punitive criminal justice policies may actually raise the crime rate by undermining social controls and reducing the stigma associated with engaging in illegal behavior); see also Martin H. Pritikin, Is Prison Increasing Crime?, 2008 Wis. L. Rev. 1049 (2008)(cataloging the crime-causing effects of incarceration).
8 Uranus to his son Cronos, who will later be overthrown by his own son, Zeus. See Bernard Evslin, heroes, Gods and Monsters of the Greek Myths 3 (1966).
his seminal article applying economic theory to the analysis of criminal law, Gary Becker posited that criminals, like any other “rational actors,” weigh the expected benefits of their actions against the expected costs. The criminal law thus aims to deter crime by raising the costs of certain antisocial activities, thereby diverting rational criminals from the undesirable activity to other less harmful (and legal) pursuits. In practice, however, the use of the criminal law to deter antisocial behavior is fraught with difficulty. In fact, there are times when the criminal law is, itself, criminogenic.

Crime is capable of begetting more crime in a number of subtle ways. Noted scholar and former Acting Solicitor General Neal Katyal has observed that the criminalization and harsh penalization of one antisocial activity may encourage offenders to switch to other endeavors that may be equally or even more harmful. Thus, when Congress raised the penalties for possessing five grams of crack to a mandatory-minimum of five years, it inadvertently may have induced dealers to substitute the sale of heroin for the sale of cocaine. Professor Katyal further hypothesized that the increased criminalization of certain kinds of illegal activity (like heroin use for addicts) could actually increase the consumption of those activities. Likening heroin to a Giffen good, a good which people consume more of as the price rises, Professor Katyal suggested that increased prices for heroin could actually induce users to consume more drugs as they deal with the misery of lost income by using even more drugs.

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10 See Becker, supra note 4, at 176; Miriam Baer, Cooperation’s Cost, 88 WASH. U. L. REV. 903, 918 (2011) (“Under Gary Becker’s famous formulation, the rational actor refrains from wrongdoing when the expected costs of such conduct outweigh its expected benefits.”).

11 Criminogenic is defined as “[t]ending to cause crime or criminality.” See BLACK’S LAW DICTIONARY 403 (8th ed. 2009).

12 See Neal Kumar Katyal, Deterrence’s Difficulty, 95 Mich. L. Rev. 2385, 2402-08 (1997) (using the sale of crack cocaine and heroin to describe substitution effects in criminal law).

13 Id. at 2403 (Note: Neither Professor Katyal nor myself make any empirical claim as to the relative harm of selling crack as opposed to heroin. The point is simply that the criminalization and penalization of one crime may lead to the substitution of other crimes.)

14 The term “giffen good” comes from the 19th century economist Sir Francis Giffen, who observed that Irish families paradoxically increased their consumption of potatoes during the Irish potato famine, despite a dramatic rise in the price of potatoes. Giffen surmised that the rise in potato prices left families substantially poorer, so that they could no longer afford to substitute meat for potatoes. As a result, families ate more potatoes than they had in the past, despite the fact that meat had become relatively cheaper. See LLOYD G. REYNOLDS, MICROECONOMICS: ANALYSIS AND POLICY 51 (3d ed. 1979).

15 See Katyal, supra note 12, at 2436.
Crime also begets incarceration and incarceration, in turn, can beget more crime. 16 Prisons act as schools for inexperienced criminals, inculcating low level offenders with criminal values as well as educating them on the means to commit more serious crimes. 17 By separating prisoners from their families, incarceration can also weaken the social ties that act as “informal social controls” to deter criminal activity. 18 Moreover, a criminal record can make it substantially harder for an individual to obtain legal employment, thereby increasing the chances that a convicted person will have to rely on crime for income in the future. 19 This dynamic is exacerbated by the fact that incarceration tends to strengthen a convicted person’s connection to criminal networks, thereby expanding the person’s opportunities to engage in further criminal activity. 20

Incarceration (and thus criminal law) can result in the increased criminal activity of third parties as well. Not only does the disruption of family ties that results from incarceration make those in prison more likely to recidivate, it makes their children more likely to engage in criminal activity as well. 21 Without the supervision of their parents, the children of convicted persons have increased opportunities to become involved in

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16 See Jeffrey Fagan, Valerie West & Jan Holland, Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods, 30 FORDHAM URB. L.J. 1551, 1554 (2003); Pritikin, supra note 6, at 1102-03 (“[C]onsidering the full panoply of prison's criminogenic effects, our system of incarceration may not even be yielding a nationwide net benefit in terms of simple crime prevention itself.”). David E. Patton, Guns, Crime Control, and a Systemic Approach to Federal Sentencing, 32 CARDOZO L. REV. 1427, 1436 (2011) (“[I]mprisonment itself has criminogenic effects.”).

17 Pritikin, supra note 6, at 1054-55; Katyal, supra note 12, at n.32 (“[W]e must add to this cost of punishment the fact that imprisonment often breeds crime because of the unsavory contacts one meets while imprisoned, contacts that may reduce the cost of further criminal activity.”).

18 Fagan & Meares, supra note 5, at 196-202; Pritikin, supra note 6, at 1055 (“It may be not merely the strengthening of deviant bonds within prison that leads to increased criminality, but also the weakening of social bonds with family and community on the outside.”).

19 Fagan & Meares, supra note 5, at 203 (“The assignment of a criminal record places concrete and lasting barriers to future employment, and for former inmates, reduces their choices with respect to avoiding crime and entering positive social roles.”); Pritikin, supra note 6, at 1061-62 (identifying the various ways in which a period of incarceration can reduce employment opportunities); James Jacobs & Tamara Crepet, The Expanding Scope, Use, And Availability Of Criminal Records, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 179 (2007-2008) (“Persons stigmatized with a criminal label face de jure and de facto discrimination in employment, housing, and access to government social welfare benefits.”); Devah Pager, The Mark of a Criminal Record, 108 AM. J. SOC. 937, 961 (2003).

20 Fagan & Meares, supra note 5, at 209; see also JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 166 (2005).

21 Pritikin, supra note 6, at 1066-67.
delinquency and crime. Moreover, the deleterious economic impact of a parent’s incarceration may increase the likelihood that a child will pursue the financial benefits of criminal activity. Indeed, incarceration can have a broad criminogenic effect on entire communities as high rates of imprisonment exacerbate the social and economic disadvantages that plague impoverished communities where former inmates are concentrated. Thus, incarceration is not merely a consequence of neighborhood crime, but instead a critical piece of the “ecological dynamics of neighborhoods that may actually elevate crime.”

Yet despite the rich scholarly literature on the sociological, psychological, and economic impact of criminalization and incarceration and their criminogenic effects, one important dynamic has been overlooked. Scholars have observed that efforts to restrict the supply of illegal goods (like drugs) tend to raise the price of those goods. As prices rise, criminals have greater incentive to engage in the illegal activity and to utilize violence to maintain their market position. Criminalization, however, does more than simply create imperfect markets that reward illegal behavior. Sometimes criminalization creates “second order criminal markets”—new criminal opportunities that would not exist but for the criminalization of the initial antisocial activity. This dynamic is critically important. First, it suggests the possibility that legislators and law enforcement grossly underestimate the social costs of criminalizing some activities. Second, and more importantly, close examination of the relationship between first order and second order criminal markets suggests that lawmakers and law enforcement officials must carefully craft the systemic response to second order crimes. Otherwise, in their effort to combat the second order crime, policy makers may, unwittingly, improve the market for the original crime, thereby raising their enforcement costs and increasing the level of the very activity they initially sought to suppress.

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23 Pritikin, supra note 6, at 1065.
24 See Fagan & Meares, supra note 5, at 205; Fagan et al., supra note 16, at 1552-1553 (describing how high rates of incarceration can undermine local social and economic stability, thereby contributing to a rise in crime).
25 Fagan et al., supra note 16, at 1552.
26 See Stephen J. Schulhofer, Solving the Drug Enforcement Dilemma: Lessons from Economics, 1994 U. Chi. Legal F. 207, 223-24 (1994); Charles Whitebread, Freeing Ourselves From the Prohibition Idea in the Twenty-First Century, 22 SUFFOLK UNIV. L. REV. 235, 252 (2000) (“Indeed, enforcement may increase the profits for many of these drug traffickers and may, as it often does, operate to increase the levels of violence.”) The increase in the price of drugs resulting from criminalization may lead also to an increase in property crimes as drug users seek to fund their addiction through more crime. See Shawn Bushway & Peter Reuter, Economists’ Contribution to the Study of Crime and the Criminal Justice System, 37 CRIME & JUST. 389, 425 (2008).
A. The Creation of Second Order Crimes

Second order crimes are the product of two unfortunate consequences of criminalizing “first order antisocial conduct.” First, the criminalization of a first order activity can create demand for new types of goods and services that impose their own costs on society. For example, by criminalizing unauthorized entry across US borders, Congress essentially created the demand for human smuggling services. Second, criminalization can create the opportunity for second order crimes by pushing the undesirable activity underground where the government is unable to use regulatory tools that might prevent the crime from occurring. The combination of these two effects serves to multiply the growth of the criminal law, as the symptoms of criminalization lead to more criminalization—expanding the criminal code, contributing to the complexity of the sentencing guidelines, and, perversely, adding to the enforcement costs associated with preventing the initial first order crime.

1. Creating Demand for Criminal Markets

It’s not easy to eliminate crime. For some, the threat of criminal penalties will be sufficient to deflect them towards legal options. Others will be deterred, not by the fear of criminal sanction, but because they simply do not want to break the law. In this respect, the criminal law doesn’t simply increase the cost of consumption; it shapes consumer preferences and effectively devalues the criminalized conduct. However, while criminalization will tend to reduce the prevalence of an undesirable activity, it will rarely be sufficient to eradicate that activity entirely. In fact, while criminalization may deter some consumers from participating in a socially undesirable activity, it can also generate demand for goods and services that lead to the formation of new criminal markets.

Criminalization increases the price of an illegal good in two distinct ways. First, it adds the expected cost of punishment to the price of the

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27 Here I define “anti-social” as any activity in which the net social benefit is negative. That is, the total costs associated with the activity outweigh the benefits. “First order” is used to differentiate the initial primary crime from the new anti-social opportunity that results from the criminalization of that first order activity.

28 See Kenneth Dau-Schmidt, An Economic Analysis of the Criminal Law as a Preference-Shaping Policy, 1990 DUKE L. J. 1, 2 (1990) (“[I]n addition to creating disincentives for criminal activity, criminal punishment is intended to promote various social norms of individual behavior by shaping the preferences of criminals and the population at large.”).

29 But see Katyal, supra note 12, at 2435 (describing instances in which criminalization or increased penalties can actually increase the incidence of an illegal activity).

30 In fact, given the exorbitant enforcement costs associated with erasing the last vestiges of crime, in most cases the complete elimination of the activity will be economically inefficient even if we assume it is practically possible. See Becker, supra note 4, at 170 (suggesting that an optimal level of deterrence would “permit” a certain number of offenses and leave a certain number of offenders unpunished).
criminalized good. For example, assume the penalty for possession of a small quantity of marijuana was a $100 fine and there was a 5% chance of detection. If it cost $10 to purchase a bag of marijuana, then criminalization would raise the total expected cost of consumption to $15. \(^{31}\) Criminalization also raises the price of illegal consumption by eliminating legal avenues to obtain the good. Consumers must expend additional resources to find and safely access criminal markets. For example, by criminalizing unauthorized entrance into the United States, it became more difficult for undocumented individuals to cross the border. While it is relatively inexpensive for individuals to drive through legal checkpoints, it is far more expensive to avoid the authorities and enter via remote routes that are physically dangerous and require considerably more planning and supplies.

A rise in the price of an illegal good resulting from criminalization is generally considered a good thing-- this is how the criminal law is typically credited with deterring antisocial behavior.\(^{32}\) However, the rise in prices and the elimination of legal avenues of access also create the opportunity for entrepreneurs to offer services or goods that facilitate the cheap and successful completion of the crime. These might be services which lower the risk of detection (think radar detectors) or services that directly facilitate the commission of the crime (as in human smugglers). The secondary market may not always impose new social costs. The imposition of a speed limit gave rise to a rich market in radar detection technology. However, while radar detectors may hamper the effort to lower the costs of speeding, radar detectors do not impose their own independent costs on society.\(^{33}\) Unfortunately, this is not true for every secondary criminal market. In many instances, the new activity carries its own social costs, separate and apart from its effect on the first order criminal market. As discussed below, the smuggling of illegal aliens not only frustrates government efforts to keep the border closed, it can also increase the risk that would-be immigrants will die. As I discuss below, the political response to such independent costs is often to criminalize the secondary activity. It is this second wave of criminalization that can perversely improve the market for the crime the legislature originally tried to prohibit.

Creating demand for secondary goods and services is not the only way that criminalization generates new criminal markets. Criminalization can also engender second order crimes by eliminating barriers that prevent secondary criminal markets from forming in the first place.

\(^{31}\) $10 + ($100)(.05) = $15. This calculation, of course, assumes for simplicity’s sake that there are no costs other than the actual fine of $100 associated with a marijuana conviction.

\(^{32}\) See Becker, supra note 4, at 176. But see Dau-Schmidt, supra note 28, at 2 (suggesting that the criminal law deters by shaping preferences).

\(^{33}\) See Nikolaus F. Schandlbauer, Busting the “Fuzzbuster”: Rethinking Bans on Radar Detectors, 94 DICK. L. REV. 783, 797 (1990) (citing a national study concluding that radar detectors do not diminish highway safety).
2. The Criminogenic Effect of Deregulating Criminal Markets

Criminalization is often described as another form of regulation. In some cases, criminal law and administrative law work side by side, overlapping and complementing each other’s efforts. Securities markets are governed not only by civil regulations but by the criminal law as well. When Bernie Madoff committed the largest fraud in United States history, he was violating both civil and criminal statutes. However, at times, the opposite is true--often the criminal law deregulates by pushing markets underground, beyond the reach of traditional civil regulatory tools. In many respects, criminalization represents a policy choice to eschew other methods of controlling antisocial behavior. By eliminating other regulatory options, criminalization can create the space for secondary criminal markets to develop—markets which might have difficulty forming in actively regulated industries.

Take the sale of fake illegal drugs. While the legal pharmaceutical market is subject to strict licensing, labeling, and inspection requirements, the illegal drug market is unfettered by such restrictions. Drug dealers are not subject to surprise visits by FDA inspectors. Similarly, the tiny plastic glassine bags that typify drug packaging on the street are not labeled with

34 See NICOLA LACEY, CRIMINALIZATION AS REGULATION: THE ROLE OF CRIMINAL LAW IN REGULATING LAW 144 (2004); see also PETER REUTER, THE ORGANIZATION OF ILLEGAL MARKETS: AN ECONOMIC ANALYSIS 17 (1985) (“All illegal businesses, like most legal business in contemporary America, are subject to regulation by government authority. For illegal businesses, the regulators are the police.”).


36 See, e.g., Amanda Dumey, The Sex Worker’s Dilemma; Keeping Cambodia’s Sex Trafficking Law from Negating the Successes of the 100% Condom Use Program, 16 TULSA J. COMP. & INT’L L. 215, 241 (2009) (“By criminalizing solicitation of prostitution, the Cambodian government has essentially deregulated the industry.”).

37 See discussion infra Part III. The difficulty of regulating criminalized markets is amplified by concerns that the regulation of anti-social behavior will be perceived as tacit social acceptance of that activity. Id.

38 This is not to suggest that active regulation will always prevent criminal markets from forming. The regulation of the pharmaceutical industry has not entirely eliminated the problem of fake prescription drugs. See Press Release, FDA, Counterfeit Version of Avastin in U.S. Distribution (Feb. 12, 2012), available at http://www.fda.gov/Drugs/DrugSafety/ucm291960.htm. In fact, the penalty enhancement for causing serious bodily harm or death in the trafficking of counterfeit goods is another example of a crime that resolves a source of inefficiency in a related criminal market. See infra note 107 and accompanying text.

39 See id.

40 See Jennifer Slosar, Committee Okays Ban on Tiny Plastic Bags, THE CHI TOWN DAILY NEWS (Mar. 5, 2008, 8:03AM).
the drug’s “active ingredients.” By criminalizing and thus deregulating the drug trade, it is far easier for a dealer to sell fake drugs to an unsuspecting customer. The criminalization of real drugs thus gives rise to a new criminal opportunity and a secondary market—the sale of fake illegal drugs.

Notably, unlike the secondary markets that develop in response to the demand created by criminalization, those markets that form in response to criminal deregulation do not necessarily increase the incidence of the first order crime. While radar detectors lead to more speeding and human smuggling leads to an increase in illegal immigration, sales of fake cocaine, made possible by the deregulatory effect of criminalizing drugs, do not increase the number of real cocaine sales. However, regardless of their origin, many second order criminal markets impose costs on society that are wholly independent of their impact on the incidence of the original crime. It is often these independent costs that induce legislators to engage in a second round of criminalization.

B. The Independent Costs of Second Order Crimes

Consider again the fake illegal drug market. A drug user who purchases fake drugs cannot go to the authorities for legal redress.

http://www.chitowndailynews.org/Chicago_news/Committee_okays_ban_on_tiny_plastic_bags.12559 (describing Chicago ordinance banning sale of plastic baggies that typify small scale drug transactions).

41 The sale of fake drugs does not appear to be limited to the occasional street corner transaction. In February of 2011, a large scale drug ring attempted to sell a New York City gang $16,000 of fake cocaine made up of a combination of baking soda and crushed sheetrock. See 18 People Busted on LI for Selling Real and Fake Cocaine: DA, N.Y. POST (Feb. 3, 2011), http://www.nypost.com/p/news/local/people_busted_on_li_for_selling_BPufWnjLZbn95A Vk1ITcYQ. In 2008, a multiagency East End Drug Task Force recovered two kilograms of fake cocaine along with an Uzi submachine. See Luis Perez, RIVERHEAD: Cops Bust Two Separate Cocaine Rings, NEWSDAY, July 30, 2008.


43 By human smugglers I am referring to individuals that facilitate illegal entry into the United States. These are often referred to as “snakeheads” or “coyotes” depending on the country of origin. See Ian Peck, Removing the Venom from the Snakehead: Japan’s Newest Attempt to Control Chinese Human Smuggling, 31 VAND. J. TRANSNAT’L L. 1041, 1043 (1998). This type of human smuggling should be distinguished from human traffickers that deal in the market for human slavery. See The Trafficking Victims Protection Act, 118 HARV. L. REV. 2180, 2184 (2005).

44 See Bob Ross, Drug Suspect Really Selling Sheetrock, NEW ORLEANS TIMES PICAYUNE, May 25, 1989, at B3 (reporting police officer’s view that fake drug sales create danger that
Without legal recourse, such buyers are apt to resort to “self-help” measures which can involve violent, even deadly assault. While the prospect of violent retribution may deter many drug sellers from offering fake products, other sellers accept this risk. The violent self-help response that follows the sale of fake illegal drugs imposes its own costs on society, independent from the market for real drugs. Some might question whether society should care about violence inflicted upon a dealer of “fake drugs.” Put another way—some would debate whether social utility should include the utility lost by the criminal when he is injured by a private party as retribution for his shady dealings. However, given the impact of neighborhood violence on third parties—the danger of innocent bystander injuries, increased fear in the community, and other “broken windows effects,” one need not be concerned with the costs imposed on the criminals themselves to conclude that fake illegal drug sales impose costs on society as a whole.

Like the market for fake drugs, the human smuggling market entails costs that are independent from its impact on the number of immigrants who illegally cross the border (human smuggling’s first order crime). In an effort to avoid detection and maximize profits, smugglers ship their human cargo in squalid conditions that can be hazardous and even deadly. In May 2003, 19 illegal immigrants suffocated to death in the back of a smuggler’s truck when the temperature inside his sealed tractor-trailer reached 173 degrees. In January 2000, 15 badly dehydrated Chinese immigrants were discovered crammed into a metal freight container in a Seattle port.

sellers will be killed by angry buyers because “[a]fter all, who is going to call the police and complain that the man they were buying cocaine from didn't sell them the real thing.”).

Simon & Burns, supra note 42, at 69 (describing how sellers of fake drugs face violent retribution from defrauded customers as well as other dealers who sell real drugs); see also See Jonathan Eig, Dealing Fake Crack A Risky Business, NEW ORLEANS TIMES PICAYUNE, Aug. 27, 1989, at A1 (attributing a rash of drive-by shootings to the rise of phony drug sales); John O’Brien, 2 Teens Charged In Stabbing Death Syracuse Police Say The Pair Murdered Eastwood Man On June 27 Over Fake Cocaine, SYRACUSE POST STANDARD, July 6, 2008, at B8.

While interning for The Defender Service in Seattle in the summer of my second year of law school, I represented just such a dealer. At the time, the prosecutor remarked that my client was “lucky to have sold to an undercover officer” rather than a potentially violent user.

This is arguably distinct from the question as to whether or not the positive utility derived by the criminal as a result of his crime should be included in the calculation of socially optimal level of crime. See Harold Winter, The Economics of Crime: An Introduction to Rational Crime Analysis 4-6 (2008).


Sam Howe Verhovek, Deadly Choice of Stowaways: Ship Containers, N.Y. TIMES, Jan. 12, 2000, at A1; see also Cleo Kung, Supporting The Snakeheads: Human Smuggling From
dead bodies were discovered decomposing in the rear of the container amidst the garbage and human waste that had accumulated during their fifteen day voyage from China.51 Officials reported that the deaths were the result of either exposure to the cold in the unheated container, lack of water, or a combination of the two.52 These human tragedies illustrate the considerable cost human smuggling exacts on society that is independent of its effect on the number of illegal immigrants who gain access to U.S. borders.

The independent costs associated with second order crimes like human smuggling or the sale of fake illegal drugs trigger a predictable legislative response--a second wave of criminalization and enhanced penalties. More than 35 state legislatures have criminalized the sale of fake illegal drugs.53 In 1994, Congress passed the Violent Crime Control and Law Enforcement Act, which increased the maximum term of imprisonment for alien smuggling to 20 years if the smuggler either caused a person serious bodily injury or placed the life of any person in jeopardy.54 Under the Act, a smuggler who causes the death of any person is eligible for the death penalty or life imprisonment.55 It’s hardly surprising that legislatures would respond to the problems produced by criminalization with more criminalization. Scholars have long observed that the criminal law seems to act as a “one way ratchet”56 perpetually expanding its scope and enhancing its penalties.57 Given the significant and even tragic independent costs associated with many second order crimes, increased criminalization would appear to be a reasonable response. If the logic of deterrence was persuasive for the first order crime, why shouldn’t it apply to the second order crimes as well? Unfortunately, criminalization in these circumstances is a double edged sword. While second order crimes impose costs on society as a whole, they also create imperfections in the first order criminal market. The result is that legislatures face a difficult paradox. They can combat the second order harms with a new wave of...
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criminalization, but, in doing so, they risk improving the first order criminal market they originally sought to eliminate. In effect, by criminalizing the secondary harm, they help perfect the original criminal market.

II. PERFECTING CRIMINAL MARKETS

To understand how lawmakers inadvertently “perfect” criminal markets, one must appreciate the ways in which second order crimes promote first order market failures. 

There is a certain incongruity in describing the failure of a criminal market. In one sense, one might expect a perfectly efficient criminal market to internalize the ill effects of the criminalized good or activity and thus, naturally produce zero crime. However, for the purpose of this paper, it is more useful to momentarily exclude the fact that crimes are, on the whole, harmful to society, and instead think of the market for crime as no different from the market for legalized goods and services. A perfect market for crime, like a perfect market for apples, computers, or the imaginary widget, is thus one in which supply meets demand and the marginal cost of producing the good is equal to the price charged to the consumer.

Critically, while the failure of an ordinary market involves an inefficient use of resources and a net loss to society, a criminal market failure generally leads to an underproduction of crime—a net gain. Thus, while policy makers generally seek to eliminate market failure in the legal economy, one would expect them to promote failure in criminal markets.

A. How Second Order Crimes Promote Market Failure, Impose Costs, and Generate Weakness In First Order Criminal Markets

By their nature, second order crimes are intimately connected to first order criminal markets. As a result, second order crimes can exact costs on

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58 Economist and Nobel Prize winner Paul Samuelson suggested that market failures simply describe markets that do not “lead to efficient outcomes.” See PAUL SAMUELSON & WILLIAM NORDHAUS, MICROECONOMICS 30, 4 (8th ed. 2005). An efficient outcome, in turn, can be defined as the “most effective use of society’s resources in satisfying people’s wants and needs.” Id.

59 In fact, even in an idealized (completely efficient) criminal market, the optimal quantity of crime would likely be greater than zero. This is because some crimes, such as stealing a small quantity of food to save a life, or speeding to get a pregnant mother to the hospital on time, will likely be “value maximizing.” See POSNER, supra note 4, at 220.

60 By necessity this also suggests a perfectly competitive market in which suppliers are “price takers.” Otherwise, the marginal cost of production would not equal the price for consumers.

61 Niva Elkin-Koren & Eli M. Salzberger, Law and Economics in Cyberspace, 19 INT'L REV. L. & ECON. 553, 554 (1999) (“The tools of microeconomic theory—the curves of supply and demand—can be applied to analyze the market of children for adoption, the market of crimes, or the market of laws in general, as they are applied to the market of apples or cars.”).
first order criminal markets that weaken demand and promote market failure. They do so by creating the very same conditions that lead to weakness or failure in ordinary markets—they eliminate competition, exploit information asymmetries, and introduce new types of risks and costs into the first order market.

1. Criminal Exploitation of Asymmetric Information

In his 1970 article, The Market for “Lemons”: Quality Uncertainty and the Market Mechanism, George Akerlof demonstrated how asymmetric information can lead to market failure by describing a used automobile market in which buyers cannot distinguish between good cars and “lemons.”

Akerlof explained that the seller of a used car possesses greater information about the car’s quality than potential buyers. Unable to distinguish between good cars and “lemons,” buyers refuse to offer full price for a car that might not be of high quality. Sellers, in turn, refuse to sell good cars for less than their full value, so the only cars offered for sale are likely to be low value lemons. The result is a downward spiral of lower prices and lower quality, as the asymmetry of information between buyers and sellers causes the “bad cars to drive out the good.”

When asymmetric information threatens legitimate markets, the government is often willing to intervene to prevent inefficiency or market failure. Mandatory labeling requirements and government factory inspections build consumers’ confidence that they are getting what they believe they have paid for. State consumer protection laws, such as “lemon laws” that govern automobile markets, diminish the risk that buyers will overpay for defective products. Notably, such regulation serves the interests of both buyers and sellers—without some intervention to correct the problems created by asymmetric information, the market could fail.

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62 George A. Akerlof, The Market for “Lemons”: Quality Uncertainty and the Market Mechanism, 84 Q.J. ECON. 488, 488 (1970); see also Bruce Mann & Thomas J. Holdych, When Lemons Are Better Than Lemonade: The Case Against Mandatory Used Car Warranties, 15 YALE L. & POL’Y REV. 1, 2 (1996) (“Informational asymmetry arises when one party to a bargain, usually the seller, has more and better information about the condition of a product than does the buyer.”).

63 Akerlof, supra note 62, at 490 (“[B]ad cars sell at the same price as good cars since it is impossible for a buyer to tell the difference between a good and a bar car; only the seller knows.”).

64 Id.


66 Patrick J. Glen, Law as Asymmetric Information: Theory, Application, and Results in the Context of Foreign Direct Investment in Real Estate, 8 BERK. BUS. L.J. 116, 122 (2011) (“These laws do not eliminate the potentialities of asymmetric information, but, rather, provide recourse to a buyer if he happens to buy a “lemon” rather than a good car.”).
altogether to the detriment of all parties.\textsuperscript{67} Indeed, there are occasions when overt government intervention may not even be required. In some circumstances, sellers will be sufficiently motivated to privately initiate measures to counter the ill effects of asymmetric information. For example, even without lemon laws, car dealers may offer warranties to reassure buyers that they are not being swindled.\textsuperscript{68} Yet even private measures, such as a voluntary seller warranty, require the backing of a legal system to be effective. When asymmetries of information cause a failure in a criminal market, they are far more difficult to resolve.

Criminal markets are particularly likely to involve information asymmetry. As stated above, government interventions that help ensure quality in markets for legal goods and services, such as labeling requirements and the promise of frequent government inspections, aren’t available in black markets. Moreover, private enforcement through the legal system isn’t an option for criminal market participants.\textsuperscript{69} A defrauded purchaser of heroin, for example, cannot simply take his dealer to small claims court or report him to the police for fraud. The characteristics of criminal transactions—primarily the need to avoid detection by law enforcement—also inhibit the flow of information. While purveyors of legal goods and services can use advertising to inform their customers about the quality of their offerings,\textsuperscript{70} black market sellers must weigh the economic benefit of advertising against the risk of attracting the attention of law enforcement. Advertising for illegal goods not only raises the risk of detection—in some cases it can be used as evidence of guilt in a subsequent criminal prosecution.\textsuperscript{71}

The difficulty of eliminating asymmetries of information in criminal markets does not necessarily mean that criminal markets are prone to fail altogether. While criminal markets are limited in their legal avenues to correct for asymmetric information, other methods exist to deter individuals

\textsuperscript{67} See Kabir Masson, \textit{Paradox of Presumptions: Seller Warranties and Reliance Waivers in Commercial Contracts}, 109 Colum. L. Rev. 503, 507 (“Seller warranties are a common feature of commercial contracts because they are often in the interests of both the buyer and the seller.”). But see Mann & Holdych, \textit{supra} note 62, at 2.

\textsuperscript{68} See Mann & Holdych, \textit{supra} note 62, at 26 (describing how warranties in private marketplaces exist to combat lemons problem).

\textsuperscript{69} See, e.g., Bovard v. Am. Horse Enter., Inc., 201 Cal. App. 3d 832, 838 (Cal. Ct. App. 1988) (“Whenever a court becomes aware that a contract is illegal, it has a duty to refrain from entertaining an action to enforce the contract.”).

\textsuperscript{70} Government intervention in the form of prohibitions against false advertising, such as those embodied in the Lanham Act, helps sellers counter problems of asymmetric information by increasing consumer confidence in the truth of the statements. See 15 U.S.C.A. § 1125(a)(1)(B) (2006).

\textsuperscript{71} See, e.g., Helms v. State, 38 So.3d 182, 185 (Fla. Dist. Ct. App. 2010) (state allowed to offer sexually suggestive advertisement on Craigslist as evidence of defendant’s intent to profit from prostitution).
from exploiting such imbalances.\(^72\) For example, the threat of retributive violence may deter some individuals from taking advantage of asymmetric information. Moreover, while a stranger may take advantage of an ignorant customer, repeat players have less incentive to exploit their informational advantage.\(^73\) As a result, criminal markets may tend to rely more heavily on repeat relationships that foster trust between market participants.\(^74\) For this reason, it is possible that one’s reputation as an honest businessperson may actually matter more in criminal markets than it does in the legitimate business world. Yet the ability to prevent some criminal exploitation of asymmetric information does not mean that information imbalances aren’t taxing criminal markets. In fact, the opposite is quite literally true—by imposing additional costs on the criminal market, information asymmetries act as a tax on the crime itself.

This tax occurs in two ways. First, efforts to eliminate information asymmetries such as doing business only with people you know, exacting violent retribution on defrauders, etc. can be costly. These expenses increase the cost of committing crimes for criminals just as a literal tax would. Second, while strategies that rely on violent retribution, reputation, and doing business with repeat players may reduce the chances that a seller is ripping off his customers, they will not entirely eliminate cheating. In “The Corner, A Year in the Life of an Inner City Neighborhood,” David Simon and Edward Burns describe how some drug dealers regularly defraud their customers.\(^75\) According to Simon and Burns, the dealers “stand where they want, sell what they want, and risk only the rage of their victims or in a rare instance, the ire of a street dealer whose business reputation suffers from proximity.”\(^76\) As a result, buyers must internalize some risk that sellers are taking advantage of them. (According to Simon and Burns, sellers also may have to expend additional resources eliminating dishonest sellers who indirectly damage the reputation of honest dealers.)\(^77\) Buyers in criminal markets cannot entirely avoid the “lemon problem.” Faced with the possibility that sellers are taking advantage of them, buyers will lower the price they are willing to pay just like they would if there was a literal tax placed on their purchase.

Many second order crimes involve the exploitation of asymmetric information in criminal markets. The sale of fake drugs is one example of a second order crime that takes advantage of the asymmetry of information

\(^72\) See Reuter & Caulkins, supra note 42, at 160.
\(^73\) See generally ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984) (demonstrating the benefits of adopting cooperative strategies in situations involving repeat transactions as well as the long term costs associated with “cheating” repeat players).
\(^74\) Id.; see Reuter & Caulkins, supra note 42, at 160.
\(^75\) SIMON & BURNS, supra note 42, at 69; see also Reuter & Caulkins, supra note 42, at 160.
\(^76\) SIMON & BURNS, supra note 42, at 69.
\(^77\) Id.
between sellers (dealers) and buyers (users). However, second order crimes may involve asymmetric information in less obvious ways that still produce inefficiencies in the first order criminal market. A “coyote” or “snake head” who promises a would-be undocumented immigrant a safe voyage may have an incentive to misrepresent how safe his services are as well as the likelihood that their venture will succeed. Snakehead customers, who possess less information than the smugglers themselves, are likely to demand a discount and may even refuse to participate in the market at all rather than accept the risk that the smuggler has misrepresented the quality of his services. Like drug dealers and used car salesmen, human smugglers may find that possessing superior knowledge of their operations and its attendant dangers actually translates into fewer transactions and lower profits.

2. Second Order Crimes Can Impose Costs That Weaken First Order Criminal Markets

Guns are often regarded as essential tools of commerce in illegal markets. In the absence of legal systems to resolve disputes, guns may be used by market participants to enforce contracts, guarantee physical safety, and ensure the quality of goods and services. Yet the use of gun violence (or the threat of gun violence) in illegal markets as a substitute for legal mechanisms of dispute resolution does not necessarily mean that guns improve the ability of illegal markets to function properly. In fact, gun possession and gun violence, like many second order crimes, can impose significant costs on first order criminal markets.

78 See Reuter & Caulkins, supra note 42, at 160 (examining variation in drug quality and the implications of the “lemon effect” in drug markets).
80 See Lance Lindeen, Keep Off The Grass!: An Alternative Approach To The Gun Control Debate, 85 IND. L.J. 1659, 1687-88 (2010); see also Peter Reuter, Disorganized Crime 132 (1983) (“Violence or its threat (intimidation) may constitute the only method of resolving disputes in [illegal markets].”).
82 Strictly speaking, adding such costs does not technically suggest that the first order criminal market is inefficient. Indeed, it is often the failure of market participants to properly internalize the true cost (or benefits) of their actions that produces inefficiency. See Samuelson & Nordhaus, supra note 58, at 36. Thus, rather than describe the imposition of new costs as causing the first order criminal to “fail,” it is more accurate to say that the second order crime “weakens” the first order market.
As an initial matter, it is by no means assured that guns are needed for illegal markets to function. It’s possible that gun possession may present market participants with a prisoner’s dilemma—a situation in which participants would prefer a world in which no one carries a gun to a world in which everyone carries gun. However, because coordination is difficult and each participant cannot afford to be the only one who isn’t “packing,” all participants may be forced to arm themselves. As a result, the fact that illegal market participants tend to rely heavily on guns does not necessarily suggest that the existence of guns generally lowers the cost of conducting illegal business.

Moreover, gun possession almost certainly imposes significant costs on criminal activity. Drug dealers, aware that the presence of guns increases their chance of being injured or killed have to be compensated for the risks that they take. This additional compensation is often described as a “risk premium.” The need to pay dealers a risk premium will shift the supply curve to the left, raising the price of drugs and reducing the total quantity of drug crimes committed. To the extent that buyers are also threatened by the proliferation of guns, the demand curve will be shifted to the left as well, again resulting in a further decrease in drug crimes. As discussed below, laws that enhance the penalties for possessing a fire arm while engaging in drug related activities may well be justified by society’s interest in reducing gun violence. However, it is also true that the same

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83 See Axelrod, supra note 73 at 7 (explaining how game theorists use the “prisoner’s dilemma” to model situations in which “what is best for each person individually leads to mutual defection, whereas everyone would have been better off with mutual cooperation.”)


85 Some economists estimate that compensation for the risk of physical injury and death accounts for as much as 33% of the cost of cocaine, while the expense of importing the drug into the country accounts for only 12% of its price. See Jonathan Caulkins & Peter Reuter, Illicit Drug Markets and Economic Irregularities, 40(1) SOCIOECONOMIC PLAN. SCI. 1, 10 (2006).

86 See Juan R. Torruella, The “War on Drugs”: One Judge’s Attempt at a Rational Discussion, 14 YALE J. ON REG. 235, n. 132 (1997) (suggesting that poor individuals are paid a “risk premium” for engaging in the drug trade); Steven D. Levitt & Stephen J. Dubner, FREAKONOMICS 107 (2005) (describing street dealer’s insistence that he receive more money from his boss during a period of increased violence due to a drug war); Reuter & Caulkins, supra note 42, at 144 (suggesting that high drug prices reflect, in part, the substantial risk that a seller will be victimized by other market participants).

87 Steven D. Levitt & Sudhir Alladi Venkatesh, An Economic Analysis of a Drug-Selling Gang’s Finances, 115 Q. J. ECON. 755, 777 (2000) (“Customers are afraid to come purchase drugs, as evidenced by the following observation by a gang officer: ’Ain’t no way nobody gonna come ’round here looking for their rock [crack] if they know they gonna get shot.”).

88 In their study of drug finances, Levitt and Venkatesh observed that the average price for drugs fell significantly (even below marginal cost) during periods of escalated violence due to gang warfare over drug territory. See Levitt & Venkatesh, supra note 87, at 778.
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enhancements may lower the costs of engaging in the first order criminal drug market.

Some second order crimes, like the smuggling of illegal aliens,\textsuperscript{89} undeniably increase the total quantity of first order crimes committed. Yet even these second order crimes can impose costs on the first order market that complicate criminalization efforts. As described above, there are enormous risks associated with using the services of a human smuggler. When smugglers fail to take sufficient precautions to protect their customers it is the would-be immigrants who pay the sometimes fatal price.\textsuperscript{90} While tragic, the risks associated with utilizing the services of a human smuggler also have the effect of raising the cost of attempting to enter the country illegally (the first order crime). Thus even those second order offenses that are essential to the commission of a first order crime entail costs that have deterrent value. This complex relationship between first and second order crimes greatly complicates efforts to regulate antisocial behavior with the criminal law.

3. Second Order Crimes Can Weaken Competition In First Order Criminal Markets

The basic criticism of imperfectly competitive markets is that such markets (usually) fail to allocate resources efficiently by producing less than the optimal amount of a given good.\textsuperscript{91} The result is a net loss to society that is often referred to as “dead weight loss.”\textsuperscript{92} Imperfectly competitive criminal markets are more difficult to evaluate. On the one hand, imperfect criminal markets in which sellers possess pricing power likely under produce crime.\textsuperscript{93} Given the negative impact of crime, this would suggest that an imperfect criminal market is preferable to a perfectly competitive one. Similarly, some have suggested that criminal monopolists and cartels have both the incentive and the ability to impose a certain level


\textsuperscript{90} See Verhovek, supra note 50, at A1; Kung, supra note 50, at 1283; Carroll, supra note 49, at B2.

\textsuperscript{91} Of course, like every statement in economics, the claim that imperfect markets lead to inefficient allocation of resources is based upon certain assumptions. According to the “Theory of Second Best,” it is possible that, in a world in which all markets are equally imperfect, resources can be allocated efficiently. See Posner, supra note 4, at 357.

\textsuperscript{92} See Samuelson & Nordhaus, supra note 58, at 198.

\textsuperscript{93} Bushway & Reuter, supra note 26, at 49 (“[I]n legal markets there is a well-established doctrine that monopoly control or any suppression of competition hurts society . . . [h]owever, the state may actually find itself allied with cartel organizers in illegal markets if that will result in higher prices and thus reduce the production of “bads.”); see also James Buchanan, A Defense of Organized Crime? in The Economics of Crime and Punishment 119 (1973) (“If monopoly in the supply of “goods” is socially undesirable, monopoly in the supply of “bads” should be socially desirable, precisely because of the output restriction.”).
of discipline over criminal activities that is good for both business and for society as a whole.\textsuperscript{94} For example, centralized criminal enterprises may recognize that the sale of drugs to children or the execution of witnesses during a freight hijacking can trigger undesirable police attention and a political backlash that impose substantial costs on their other criminal activities.\textsuperscript{95} In this respect, the public is likely to prefer criminal activity in an imperfectly competitive market to one that is less “organized.” Unfortunately, there are also significant costs associated with imperfect criminal markets. Because producers in imperfect markets make outsized profits, imperfect criminal markets are full of incentives for criminals to enter and fight for market position.\textsuperscript{96} The negative externalities associated with the violent struggle for control of the market may well outweigh the benefits (or reduced costs) that flow from the “under production” of crime.\textsuperscript{97} Moreover, it is not necessarily the case that increased centralization will reduce the number of crimes committed. If centralization reduces the transaction costs associated with coordinating other criminal ventures, it is possible that a reduction in the number of criminals (or criminal organizations) result in an increase in the total quantity of crimes committed. Criminal monopolies can impose other costs on society as well. The successful commission of some crimes (such as some forms of extortion) may require significant resources available only to criminal enterprises of significant size and strength. Similarly, criminal cartels and monopolies are in a better position to corrupt local law enforcement and other public officials.\textsuperscript{98}

It is difficult, if not impossible, to determine with certainty whether society is better off with a centralized imperfectly competitive criminal market or one that is characterized by many small criminal organizations with little individual control over the total quantity of crime produced. However, the difficulty in ascertaining the costs and benefits of competition in criminal markets doesn’t suggest that criminal market structure is irrelevant. The structure of a criminal market clearly has a significant impact on the level of harm inflicted upon society. Consequently, it is


\textsuperscript{95} Id.

\textsuperscript{96} See Bushway & Reuter, \textit{supra} note 26, at 58; see also Levitt & Venkatesh, \textit{supra} note 87, at 773 (describing the incentives associated with participating in the drug market as a “tournament” that rewards the successful utilization of violence); Abdala Mansour, Nicolas Marceau & Steve Mongrain, \textit{Gangs and Crime Deterrence}, 22 J.L. ECON. & ORG. 315, 319 (2006) (observing that reduced competition in a criminal market may result in more violence because there are significant profits at stake).


\textsuperscript{98} See Schelling, \textit{supra} note 94, at 77.
appropriate to identify the impact that second order crimes may have on the structure of criminal markets.\textsuperscript{99}

The most obvious second order crime affecting criminal market structure is the use of violence (often gun violence) to reduce competition in a first order criminal market.\textsuperscript{100} It is not uncommon for criminals to use guns and gun violence to suppress competition and increase their market power.\textsuperscript{101} In their analysis of the finances of a drug selling gang, economists Steven Levitt and Sudhir Venkatesh observed that a violent gang war can substantially increase the prevailing gang’s influence over the price of illegal drugs.\textsuperscript{102} Levitt and Venkatesh observed that the gang in their study was able to charge substantially higher prices for crack cocaine following a gang war that effectively doubled the area under their control.\textsuperscript{103}

The use of violence to seize “drug turf,” like other second order crimes, imposes significant costs on society. It also, however, creates inefficiencies (i.e. a degree of market failure) in the first order drug market. The violent consolidation of the drug market will raise drug prices and reduce the total quantity of drugs sold.\textsuperscript{104} Policy makers thus face a difficult choice. By intervening to prevent the second order crime of drug related violence, policy makers inadvertently perfect the first order illegal drug market—

\textsuperscript{99} One should not assume that all criminal markets are imperfect (in an economic sense). In fact, evidence suggests that many criminal markets, in particular many local drug markets are, in fact, highly competitive and sellers often do not have significant influence over price. See Reuter & Caulkins, supra note 42, at 147 (suggesting that illicit drug markets are rarely subject to monopoly or cartel arrangements because exclusion is too difficult); see also REUTER, supra note 34 (concluding that economic and institutional constraints are likely to limit the ability of criminal enterprises to restrain competition and establish dominance in many illegal markets).

\textsuperscript{100} These are second order crimes because the motivation for illegally possessing and using guns would not exist but for the criminal organization’s interest in gaining market position in the first order criminal market.

\textsuperscript{101} See Mansour et al., supra note 96, at 319 (“criminal organizations can use violence to maintain their market power”); Lawrence Rosenthal, Pragmatism, Originalism, Race, and The Case Against Terry v. Ohio, 43 TEX. TECH L. REV. 299, 310 (2010) (describing the use of violent intimidation by street gangs to suppress competition in local drug markets).

\textsuperscript{102} See Levitt & Venkatesh, supra note 87, at 768.

\textsuperscript{103} Id.; see also Lawrence Rosenthal, Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs, 41 URB. LAW. 1, 13 (2009) (“Moreover, ethnographic research on gang crime concludes that gangs endeavor to organize drug markets in order to maximize the economic benefits of drug dealing while using the threat of violence to police competition.”). But see supra note 100.

\textsuperscript{104} As discussed, it is difficult to ultimately quantify the total impact of a rise in drug prices on total crime. While drug consumption has been shown to be surprisingly elastic, suggesting that a rise in drug prices will reduce consumption, this does not mean the total quantity of crimes in the community will necessarily decline. Users may well commit additional property crimes to fund their addiction. As a result, while the number of drugs sales may fall, total crime may rise.
increasing its efficiency, lowering the price of illegal drugs, and, ultimately, increasing the quantity of drugs sold.

B. How the Criminalization of Second Order Crimes Perfects First Order Criminal Markets

If second order crimes can engender inefficiency and weakness in first order criminal markets it is not surprising that efforts to suppress second order crimes can inadvertently bolster those first order criminal markets. Indeed, it seems likely that policy makers "perfect" first order criminal markets across a broad spectrum of illegal activity. From prostitution to drug markets to back alley abortions, second order crimes create problems for first order criminal markets. By criminalizing related activities, policy makers inadvertently resolve information asymmetries, strengthen competition, and eliminate costs that hinder first order criminal markets.

Lawmakers may rationally criminalize the sale of fake drugs to deter the violence that results when dealers defraud their customers. 105 However, in doing so, they also reduce the asymmetry of information between dealers and buyers that weakens the genuine illicit drug market. Counterfeit pharmaceuticals offer a related example. While counterfeit pharmaceuticals represent a very real health threat, 106 laws which enhance the penalties for serious injuries or deaths resulting from trafficking in counterfeit goods actually increase buyers’ confidence that the counterfeit drugs they purchase will not harm them. 107

Sometimes second order criminalization can correct multiple first order market problems. With the exception of some counties in Nevada, prostitution is a crime everywhere in the United States. 108 Among the many problems associated with prostitution is the concern that "sex work" contributes to the spread of HIV/AIDS. 109 Notably, the criminalization of prostitution is a good example of how first order crimes can create second order problems by deregulating the market. By driving underground an industry that might otherwise have been regulated to prevent the spread of communicable disease, the criminalization of prostitution created a

105 See supra note 45.
106 See note 38 (describing the danger posed by counterfeit versions of the cancer drug Avastin which did not contain the genuine drug’s active ingredient).
107 See 18 U.S.C. § 2320 (West 2012) (increasing the maximum penalty for trafficking in counterfeit goods to 20 years if the defendant’s conduct recklessly causes serious bodily injury and authorizing a life sentence for knowingly or recklessly causing death)
109 See 22 U.S.C.A. § 7601 (2008) (listing in Congressional Findings the assertion that prostitution and the trafficking of individuals for prostitution were “causes of and factors in the spread of the HIV/AIDS epidemic”); see also Bingham, supra note 108, at 95 (“Historically, prostitutes have been scapegoated for the spread of venereal disease.”).
secondary problem—the spread of HIV/AIDS through illegal sex work.\textsuperscript{110} True to form, legislatures across the country have responded to this secondary problem with new statutes criminalizing prostitution with the knowledge that the defendant was aware that he or she had tested positive for HIV.\textsuperscript{111}

As discussed below, one might question whether the second order crime, “HIV aware prostitution,” actually deters HIV positive individuals from engaging in prostitution.\textsuperscript{112} To the degree that the statute either has such an impact or is perceived as having such an impact, it decreases the apparent danger (i.e. lowers the costs) of utilizing the services of a prostitute. Moreover, by harshly penalizing HIV positive prostitution, legislatures may be eliminating an asymmetry of information between “johns” and prostitutes that might impede an “efficient” exchange of money for services. The complex and tragic context in which an HIV positive sex worker sells her services is wholly different from the used car salesman who hawks low quality automobiles. However, just as car buyers might fear that they are purchasing a “lemon,” so, too, are johns concerned that they might be purchasing sex from an infected prostitute. By raising the stakes of engaging in HIV positive prostitution, the HIV aware prostitution statutes decrease buyers concerns that prostitutes are hiding their HIV positive condition.

The fact that the HIV aware prostitution statutes may be perfecting the first order market for prostitution is all the more troubling if the laws don’t actually decrease the incidence of HIV infected individuals from

\textsuperscript{110} In Nevada, the one state that allows local communities to legalize prostitution, individuals engaged in prostitution are required by both statute and the Nevada Administrative Code to submit to HIV testing. See Bingham, supra note 108, at 89. An 18 month mandatory testing program of the state did not reveal any licensed prostitutes who tested positive for HIV. See James Grant Snell, Mandatory HIV Testing and Prostitution: The World’s Oldest Profession and the World’s Newest Deadly Disease, 45 HASTINGS L.J. 1565, 1592 (1994) (citing No Infection in Nevada Brothels, N.Y. TIMES, Nov. 3, 1987, at C3).

\textsuperscript{111} See, e.g., California, CAL. PENAL CODE § 647f (West 2010) (making prostitution a felony if the defendant had previously been convicted of prostitution and he or she committed a second prostitution offense knowing that he or she had tested positive for HIV). See also Arkansas, ARK. CODE ANN. § 5-14-123 (2011); Colorado, COLO. REV. STAT § 18-7-201.7 (2011); Florida, FLA. STAT. § 796.08 (2012); Kentucky, KY. REV. STAT. ANN. § 529.090 (West 2012); Missouri, MO. REV. STAT. § 567.020 (West 2011); Nevada, NEV. REV. STAT § 201.358 (West 2011); New Jersey, N.J. STAT. ANN. § 2C:34-5 (West 2012); Ohio, OHIO REV. CODE AN.N. § 2907.25 (2012); Oklahoma, OKLA. STAT. TIT. 21 § 1031 (2011); Pennsylvania, 18 PA. CONST. STAT. ANN. § 5902 (West 2012); Tennessee, TENN. CODE ANN. § 39-13-516 (2011); Utah, UTAH CODE ANN. § 76-10-1309 (2012).

engaging in prostitution. First there is the possibility that the statutes will deter prostitutes from getting tested. Second, and perhaps even more likely, is the concern that, given the context in which many prostitutes are making the decision to enter into the sex trade, few HIV positive sex workers will be deterred from engaging in prostitution by the increase in penalties associated with the statute. If “johns” incorrectly believe that the HIV positive statutes are effective, it is possible that the statutes will improve the first order prostitution market without actually lowering the risk of contracting HIV at all.

Like the prostitution example, laws criminalizing illegal abortions that result in the death of the mother may actually improve the market for the first order crime of providing illegal abortions. While Roe v. Wade and its progeny held that a woman’s right to an abortion is protected in the first two trimesters, some abortion services can still be criminalized. Thirty-nine states criminalize abortions after a certain point in the pregnancy. Nearly forty states criminalize abortions performed by someone other than a doctor. A variety of factors may contribute to a woman’s decision to pursue an illegal abortion. The pregnancy may simply have progressed to the point of criminalization. Young women required to notify their parents that they plan to terminate their pregnancy may instead seek to obtain one on the black market. Financial pressure may also contribute to the decision to seek an illegal abortion. While the nature of illegal markets tends to make hard data imprecise, one study suggested that states that

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113 See id.

114 Michael L. Closen, Mary A. Bobinski, Donald H.J. Hermann, John F. Hernandez, Gene P. Schultz & J. Kelly Strader, Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws, 46 ARK. L. REV. 921, 964 (1994) (“Therefore, these statutes may actually encourage individuals not to test so that they would not be armed with knowledge that, at another time, could be used against them.”).


117 See Karen Flax, Women's Rights and the Proposed Family Protection Act, 36 U. MIAMI L. REV. 141, 151 (1981) (describing the concern that pregnant minors will attempt to self-abort or to obtain an illegal abortion rather than risk parental notification).

restricted funding for abortion services experienced a significant rise in the number of illegal abortions.\textsuperscript{119}

The substantial health risks associated with illegally terminating a pregnancy likely act as a significant deterrent to pursuing a black market abortion. Individuals providing illegal abortion services are likely to have inferior medical training; the procedures are likely to be performed in unsanitary conditions; and there tend to be fewer opportunities for follow-up care.\textsuperscript{120} The provision of black market abortions is not only illegal; it can also be hazardous to the mother’s health. The criminalization of abortions thus leads to a second order crime-- deaths resulting from illegal abortions.

Eight states have laws which enhance the penalties for abortions that result in the death of the woman.\textsuperscript{121} Under Florida law, the unlawful termination of a pregnancy in the third trimester is classified as a third degree felony. An unlawful termination is a second degree felony, however, if it results in the death of the patient. By increasing the penalty for performing an illegal abortion in which the woman dies, the law should encourage illegal abortion providers to take greater safety precautions to protect their patients. However, just as the HIV aware prostitution statutes reduced the perceived risk of engaging the service of a prostitute, so too do the penalty enhancements for abortions resulting in death improve the market for illegal abortions. The fact that the penalty enhancements help to perfect the market for illegal abortions does not necessarily suggest that they are inappropriate. Rather, it serves as a reminder of how complex and difficult the criminalization of related crimes can be.

The criminalization of second order crimes can even resolve collective action problems that create inefficiencies in first order criminal markets. As discussed above, a drug dealer’s decision to arm himself may represent a classic prisoner’s dilemma-- there are significant benefits to arming oneself when others go unprotected and significant dangers to encountering someone else with a gun while you are unarmed. As a result,


\textsuperscript{121} See, e.g., Colorado, COLO. REV. STATE ANN. § 18-6-102 (West 2011); Florida, FLA. STAT. ANN. § 390.0111 (West 2011); Michigan, Mich. COMP. LAWS. ANN. § 750.14 (West 2012); Mississippi, Miss. CODE ANN. § 97-3-3 (West 2011); New Mexico, N.M. STAT. ANN. § 30-5-3 (West 2011); New York, N.Y. PENAL LAW § 125.20 (McKinney 2011); Vermont, VT. STAT. ANN TIT 13 § 101 (2012); West Virginia, W. VA. CODE § 61-2-8 (West 2011).
every dealer goes armed despite preferring a market in which no one carries a gun. Moreover, the prevalence of guns (and thus, gun violence) likely increases the cost of participating in illegal drug markets, thereby reducing both the supply and demand for drugs.\textsuperscript{122}

In 1986, Congress added an important new weapon against narcotics traffickers by mandating a minimum five year sentence for using or carrying a firearm during or in relation to a drug trafficking crime.\textsuperscript{123} The decision to enhance the penalty for armed drug trafficking as opposed to drug dealing in general suggests that the goal of the statute was to deter gun violence as opposed to simply providing another weapon for the war on drugs. Ironically, it’s conceivable that the act was welcomed by drug dealers. By raising the cost of carrying a firearm during a narcotics transaction, Congress may have helped resolve the dealers’ prisoner’s dilemma and promoted the kind of cooperation that lowered the cost of engaging in illegal drug activity.

III. IMPLICATIONS OF PERFECTING CRIMINAL MARKETS

If lawmakers are, in fact, inadvertently perfecting first order criminal markets, the inevitable question is: does it matter? Surely the need to prevent street violence justifies criminalizing the sale of fake drugs, even if one side effect of such a ban is to improve the first order drug market. The answer is that the relationship between second and first order criminal markets is important even if the criminalization of both activities can ultimately be justified. The perfection of criminal markets is not just a quirky economic irony, but rather an important systemic dynamic with broad implications. An appreciation of the relationship between first and second order crimes is not only essential to the formation of sound criminal justice policy; it may help explain the rapid expansion of the criminal code and the growing complexity of federal and state sentencing guidelines. Moreover, the recognition that criminalization has the capacity to actually improve related criminal markets may promote a normative shift in the perception of regulatory alternatives to criminalization. Regulatory strategies that reduce harm are often criticized for helping individuals engage in socially undesirable behavior.\textsuperscript{124} If the criminal law similarly

\textsuperscript{122} See supra notes 81-82.
\textsuperscript{124} See, e.g., Lawrence O. Gostin & Zita Lazzarini, Prevention of HIV/AIDS Among Injection Drug Users: The Theory and Science of Public Health and Criminal Justice Approaches to Disease Prevention, 46 EMORY L.J. 587 (1997) (“[Opponents of needle exchange programs] believe that the state should send a consistent message about the harms of drug use and should not directly facilitate drug injection by making injection equipment readily available . . . When the state permits or condones the distribution and
“assists” other antisocial activity, then perhaps those harm reduction strategies will no longer be accused of tacitly condoning bad acts and instead the costs and benefits of such policies will be evaluated on the same footing as the criminalization option.

A. Perfecting Criminal Justice Policy

The possibility that legislators are inadvertently increasing criminal activity has profound implications for criminal justice policy. While there is growing recognition that institutional interests play a significant role in shaping criminal laws,125 few scholars dismiss the claim that legislators generally seek to act in the public’s interest.126 Even those critics who allege that many recent federal and state criminal justice initiatives are “contrary to what almost everyone with close knowledge of the topic thinks makes much sense,” do not attribute the failings of the criminal justice system to bad intentions.127 In fact, evidence suggests that persuasive policy arguments that are grounded in concerns shared by the general public can have a powerful influence on legislators.128 As a result, law makers are likely to be particularly interested to learn that the criminalization of one activity may improve a related criminal market. Moreover, there are increasingly urgent calls for other actors in the criminal justice system—prosecutors, judges, and law enforcement officials—to rationalize their own

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125 See Stuntz, supra note 7, at 510 (describing the institutional incentives of prosecutors and legislators to push for policies which consistently expand criminal liability).
126 Id. (acknowledging that criminal justice policies can be powerfully affected by ideology and public-interest goals, despite the role that institutional interests often play in the “pathological politics of crime”).
127 Beale, supra note 7, at 23-24 (1997) (offering various explanations for the politicization of crime and the prevalence of counter-productive criminal justice policies). Beale acknowledges that some scholars have challenged her claim that current criminal justice policies are irrational, suggesting instead that the majority of experts are wrong about what’s best for society. See Beale, supra note 5, at 32 (citing John J. Dilulio, Jr., Help Wanted: Economists, Crime and Public Policy, 10 J. ECON. PERSP. 3, 7-15 (1996); James Q. Wilson, Crime and Public Policy, in CRIME 449 (James Q. Wilson & Joan Petersilia, eds., 1995)).
128 See Rachel E. Barkow, Administering Crime, 52 UCLA L. REV. 715, 719-20 (2005) (concluding that legislators can be swayed by policy arguments when they are grounded in concerns shared by the general public).
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decision making processes. Just as understanding the dynamics of first and second order criminal markets will help legislators make informed decisions, so too can it help these actors improve the implementation of criminal justice policy.

1. Cost Benefit Analysis and Criminal Law

Criminal laws are rarely evaluated based on their broad social impact. Instead, a criminal law is typically assessed in terms of the particular harm caused by the offender and the goals of deterrence, retribution, and moral judgment. This focus, alone, may explain the failure of commentators and policy makers alike to recognize the critical relationship between first and second order criminal markets. However, there is growing recognition that policy makers face multiple options for combating criminal harms, and that the larger question of the public’s welfare is an important consideration in determining which strategy to pursue. While the criminal justice system has yet to embrace cost benefit analysis as a methodology for evaluating criminal law and policy, other regulatory regimes have adopted it as a useful mechanism for “improving the effectiveness of government action.” There is a mounting consensus that criminal policies need to be more rational and that an attempt to fully assess the social costs and benefits of criminal laws, while daunting, may be productive nonetheless. Even if policy makers, prosecutors, judges, and members of law enforcement refrain from formally adopting cost benefit analysis, to the extent they want to evaluate the broad impact of their choices on social welfare, they must take into account the dynamic relationship between first and second order criminal markets.

2. Perfecting the Legislative Process

The possibility that new penal statutes will improve related criminal markets should certainly be of interest to legislators as they seek to promote

130 See id. at 335. (“We do not usually focus on criminal law as part of a complex system with multiple cause-and-effect relationships. Instead, we focus on the state’s response to individual offenders and the direct harm caused by the offense.”).
131 See id.
132 See id. at 326.
133 Id. at 333; see also Cass R. Sunstein, Congress, Constitutional Moments, and the Cost-Benefit State, 48 STAN. L. REV. 247, 252 (1996) (describing the advantages of a “cost-benefit state” but also suggesting that officials must be nuanced in their approach to assigning value).
134 Rachel E. Barkow, Our Federal System of Sentencing, 58 STAN. L. REV. 119, 129 (2005) (arguing that cost-benefit analysis could improve decision making about sentencing); see also Brown, supra note 129, at 343.
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the public’s interest. First, legislators choosing among various policy options will be interested to learn that some criminal statutes carry hidden costs that may offset some of the public safety benefits that the laws were intended to engender. By taking into account a statute’s impact on second order criminal markets, the legislature will be better equipped to decide whether the statute will actually promote the public interest. More importantly, by understanding the relationship between first and second order criminal markets the legislature can begin to calibrate the penalties associated with each criminal statute. While economists (and law scholars who consider themselves economists) have long advocated for “optimal penalties” that are calculated to deter crime efficiently,135 such proposals realistically are difficult to implement.136 It is one thing to develop a formula which, if theoretically optimized, would lead to an efficient level of crime. It is another thing entirely to identify actual values for the formula’s variables and to calculate an appropriate sanction. By recognizing the dynamic relationship between first and second order crimes, legislators can begin to fashion a more integrated structure of criminal sanctions. If criminalizing the sale of fake illegal drugs inadvertently improves the market for genuine drugs, a legislature might consider offsetting the impact of the new law by strengthening the penalty for the first order crime. The result is a system of penal sanctions that, while perhaps not truly “optimized” to produce the most efficient level of crime, at least are structured to work together in concert.

Focusing legislative attention on the potential for second order crimes to perfect first order criminal markets may have the added benefit of shifting the political discourse in a way that will promote more rational criminal justice policies. For several decades,137 the politics of crime have been dominated by forces which tend to promote punitive approaches that have been regarded as unproductive by many criminal justice experts.138

135 See, e.g., Becker, supra note 4, at 172; A. Mitchell Polinsky & Steven Shavell, The Optimal Use of Fines and Imprisonment, 24 J. of PUB. ECON. 89 (1984). The idea that criminal penalties should be calculated to provide sufficient incentive to deter crime dates (at least) to Jeremy Bentham who suggested that “the value of the punishment must not be less, in any case, than what is sufficient to outweigh that of the profit of the offence[].” See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 179 (1907); see also JEREMY BENTHAM, Principles of Penal Law, in THE WORKS OF JEREMY BENTHAM 365, 399 (1962).


138 Beale, supra note 7, at 25; see also Michael Tonry & David P. Farrington, Strategic Approaches to Crime Prevention, 19 CRIME & JUST. 1, 6 (1995)(“There is widespread
Several scholars have suggested that the perceived need for politicians to appear “tough on crime,” and the “culture of fear” created by the graphic depictions of crime in news and entertainment media have combined to ensure that the political response to crime consistently is to increase sanctions and expand criminal liability. More recently, psychological research has identified various cognitive biases which may amplify these forces, further distorting criminal justice policy in ways that are ultimately unlikely to increase public safety. Cognitive errors resulting from the “availability heuristic,” “over confidence,” “over generalization,” the inaccurate estimation of risks and benefits, and biased information processing combine to skew judgments in ways that are unlikely to agreement over time and space that alterations in sanctioning policies are unlikely substantially to influence crime rates . . . this was the conclusion of the President’s Commission on Law Enforcement and Administration of Justice (1967), the National Academy of Sciences Panel on Research on Deterrent and Incapacitative Effects (Blumstein, Cohen, and Nagin 1978), and the National Academy of Sciences Panel on the Understanding and Control of Violent Behavior (Reiss and Roth 1993)."

See Chernoff et al., supra note 137, at 532.

Beale, supra note 7, at 45 (describing the meteoric rise of depictions of crime in the news media and the development of the industry adage “If it bleeds, it leads”); see also JONATHON SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 114, 208, 239 (2007) (describing how media images of crime have created a public perception of an extreme danger of criminal violence in many aspects of daily life).

Beale, supra note 7, (describing various explanations for the punitive nature of American criminal justice policy).

Brown, supra note 129, at 341 (describing how cognitive bias skew judgments about criminal law and policy); Beale, supra note 7, at 52 (suggesting that the psychology of cognition and risk assessment may explain the divergence between public and expert opinion on criminal justice policy). CBA can help counter several well-established cognitive biases that skew judgments about criminal law policy and how it may be improved.

The “availability heuristic” describes people’s perception that events seem more probable if there is a vivid example of the event. For example, members of the general public may overestimate the probability of their being killed in a terrorist attack because of the vivid example of September 11th. See Brown, supra note 129, at 342.

“Over confidence” describes the tendency for people to base opinions on slim information with great confidence and subsequently resist indications that the initial opinion was incorrect. See Beale, supra note 7, at 59.

“Overgeneralization” describes the excessive degree to which people base general theories on a few or even a single example. For example hearing that a parolee committed a violent crime is likely to foster a generalization for all parolees, so that most people will significantly overestimate the failure rates for parole. See Julian V. Roberts, Public Opinion, Crime, and Criminal Justice, 16 CRIME & JUST. 99, 121 (1992).

Studies have demonstrated that people often underestimate risks when the benefits of an activity seem clear and high and underestimate benefits when risks are perceived as high. See Brown, supra note 129, at 342; Cass R. Sunstein, Cognition and Cost-Benefit Analysis, 29 J. LEGAL STUD. 1059, 1070 (2000).

“Biased Information processing” describes the tendency for individuals to discount new information that challenges their existing beliefs and, similarly, the tendency to give
produce effective criminal justice policy. Fortunately, a deliberate and careful consideration of costs and benefits can provide an institutional check on cognitive biases that often distort policy decisions. Focusing policymakers on second order crimes’ impact on first order criminal markets can supplement and encourage the kind of rational cost benefit analysis that is likely to result in better policy choices. This is not to say that cost benefit analysis should entirely substitute for the intuitive moral judgments of policy makers. But it does suggest that increased attention to some of the overlooked costs of criminalization will do more than just incrementally add to the information at policy makers’ disposal; it will actually encourage a type of analysis that is resistant to cognitive error.

3. Perfecting the Implementation of Criminal Justice Policy

Even if legislators attempt to internalize the impact of second order crimes on first order criminal markets by adjusting the crimes’ respective penalties, the prices they set for crimes are, at best, “suggested retail prices.” In fact, the true price of crime is shaped as much by the actors who implement criminal justice policy as it is by the policy makers themselves. Focusing attention on the potential for second order crimes to perfect first order criminal markets can improve the implementation of criminal justice policy by helping such actors make more informed decisions and optimal allocations of limited resources.

i. Perfecting Prosecutors

Prosecutors play a crucial role in determining the price of crime. They decide whether to initiate or decline a prosecution and whether to offer a defendant the chance to plead to a lesser charge. Prosecutors can recommend a particular sentence to a presiding judge and, in some jurisdictions, make a plea deal contingent upon that recommended sentence being accepted. Prosecutors also enjoy broad discretion to shape criminal

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148 Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 Colum. L. Rev. 1276, 1294 (2005); Brown, supra note 129, at 341 (“Cost Benefit Analysis can rationalize decision making in criminal law by correcting biases that lead to poor public policy and accounting for costs that criminal law neglects.”); Sunstein, supra note 146, at 1096 (“[C]ost-benefit analysis might ensure that policy is driven not by hysteria or unfounded alarm but by a full appreciation of the effects of relevant risks and their control.”).  
149 See ALAN GIBBARD, RISK AND VALUE IN VALUES AT RISK 98 (1986) (“A refined risk-cost-benefit analysis, because it is sensitive to details of the situation in a way that no person’s intuitive picture of the situation could be, cannot be expected to match the clear moral judgments in every case, and anyone who looks long enough should be able to find cases in which risk-cost-benefit analysis fails the test of intuitive moral conviction.”).  
justice priorities and to “move resources effectively from one area to another depending on social need.” They can shape alternative sentencing opportunities by devising or influencing the development of drug and domestic violence treatment programs, juvenile justice facilities, and community-based courts linked to social service agencies. They also coordinate with law enforcement to set policing strategies. Each of these decisions has an impact on the price of crime by either changing the probability of being arrested and charged or by shifting the expected penalty that will be applied to those found guilty. Because prosecutors play such an integral role in setting the price of crime, their decisions regarding one crime have reverberations in other criminal markets. If prosecutors routinely offer lenient pleas to defendants charged with selling fake narcotics, they will lessen the impact that the crime has on the first order drug market. Conversely, the decision to prosecute a crime to the fullest extent of the law may have counter-intuitive implications for the overall crime rate. As prosecutors make decisions concerning second order crimes, they will want to consider carefully the impact those decisions will have on related criminal markets.

Unlike many administrative actors, prosecutors are not obligated by statute to consider the costs and benefits of their decisions. This does not mean, however, that cost benefit analysis cannot assist prosecutors as they implement criminal justice policy. Indeed, the Department of Justice has begun to incorporate an explicit accounting of the costs and benefits of prosecutorial action in its own guidelines. Recognizing the dynamic relationship between first and second order criminal markets is an important step towards successfully utilizing cost benefit analysis to regulate prosecutorial discretion. Moreover, as discussed above, a careful analysis of costs and benefits will not only help insure that prosecutors consider the full implications of their decisions; it may also counter the same cognitive biases that can distort legislative decisions.

**ii. Perfecting Judicial Decision Making**

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151 See Lynch, supra note 150, at 2138; see also Brown, supra note 129, at 367.

152 See Brown, supra note 129, at 367.

153 Id. at 369 (describing how prosecutors can encourage and coordinate with law enforcement agencies to pursue criminal investigations through means that impose the social costs of punishment on stable rather than marginal communities).

154 Id. at 327.


156 See Brown, supra note 129, at 327 (describing the potential for cost benefit analysis to usefully constrain prosecutorial discretion).
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Like prosecutors, judges play an important role in determining the price of crime.\(^{157}\) While the ascendance of plea and charge bargaining and, until recently, the dominance of mandatory sentencing guidelines, helped to shift the locus of power from judges to prosecutors,\(^{158}\) judges still play a critical role in deciding the price that a guilty defendant ultimately pays for his or her crime. As a result, just as legislators will want to consider the dynamic relationship between first and second order criminal markets as they calibrate the statutory penalties for each crime, so too will judges want to consider how their sentencing decisions affect other criminal markets. This does not necessarily suggest that a judge should sentence a defendant charged with a second order crime more leniently. Rather, judges, like legislators, may need to coordinate their sentencing philosophies. It’s possible that the need to harshly penalize a second order crime will sometimes suggest a stronger sentence is needed for the first degree crime as well. Conversely, as judges consider “sending a message” with a severe sentence for a second order crime, they may want to consider what kind of message they will be sending to related criminal markets.

iii. Perfecting the Allocation of Law Enforcement Resources

In his pioneering article introducing his economic approach to crime, Gary Becker explained that deterrence is a function of both the severity of punishment and the probability of detection.\(^{159}\) While Becker’s original work presumed that the probability of detection and the severity of sanctions were largely fungible,\(^{160}\) some studies suggest that an increase in the probability of apprehension is likely to have a greater deterrent effect.

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\(^{157}\) Robinson & Darley, supra note 136, at 997 (“Judges, not legislators, impose sentences, and given the wide sentencing discretion that American judges traditionally have had and continue to have in the vast majority of states, judicial discretion not legislative policy will determine deterrent effectiveness.”).


\(^{159}\) See Becker, supra note 4; see also Chris William Sanchirico, Detection Avoidance, 81 N.Y.U. L. REV. 1331, 1345 (2006) (“[T]he deterrent force exerted by law is viewed as the conjunction of two factors: the probability that violations are “detected” (i.e., investigated, uncovered, and successfully prosecuted) and the magnitude of the sanction imposed in the event of detection.”).

\(^{160}\) See Miriam H. Baer, Linkage and the Deterrence of Corporate Fraud, 94 VA. L. REV. 1295, 1302-03 (2008). While Becker’s analysis treated the probability of detection and the severity of sanctions as fungible, he acknowledged the commonly held view that the probability of detection was likely the stronger variable of the two. See Becker, supra note 4, at 176 (“[A] common generalization by persons with judicial experience is that a change in the probability has a greater effect on the number of offenses than a change in punishment.”).
than a similar increase in the size of the penalty.  

(One possible explanation for this is that criminals may substantially discount the disutility of increases in future punishment.) As a result, decisions shaping the likelihood that a criminal will be detected and apprehended may have a greater deterrent impact than legislative, judicial, and prosecutorial decisions affecting sentencing. The dynamic relationship between first and second order criminal markets is thus just as relevant to decisions affecting the probability of apprehension as it is to decisions regarding the severity of punishment.

The use of high tech mapping and information management systems has been heralded as “the most revolutionary public-sector achievement of the last quarter-century.” In addition to improving accountability, “data driven policing” is intently focused on helping law enforcement efficiently allocate crime fighting resources. Compstat, the pioneering data mapping system implemented in New York City in 1994 and replicated in a number of US cities over the last decade, has been praised for enabling the rapid redeployment of police resources based upon a rise in a particular type of crime or the recognition that a particular area is experiencing increased criminal activity.

Given the amount of money and attention devoted to optimizing the allocation of law enforcement resources, surprisingly little attention has been paid to the impact that allocation decisions have on related criminal markets. If legislators and law enforcement officials want to maximize the impact of their limited resources, they should consider whether the allocation of resources to fight one crime might help to improve the market for a related crime. As discussed above, the criminalization of fake drugs can improve the market for genuine illegal drugs. An increased allocation

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163 See Bruce L. Benson, David W. Rasmussen & Iljoong Kim, Deterrence and Public Policy: Trade-Offs in the Allocation of Police Resources, 18 INT’L REV. L. & ECON. 77, 79 (1998) (“Assume that the police are in the business of producing crime deterrence. By allocating capital and labor to control the various crime types, police influence the level of such crimes.”).


165 See id. (“One of Compstat’s most powerful accomplishments was to yoke crime data and analysis intimately to deployment decisions.”); see also M. Todd Henderson, Justin Wolfers & Eric Zitzewitz, Predicting Crime, 52 ARIZ. L. REV. 15, 29 (2010) (describing police departments’ use of crime-mapping technology to help allocate resources).

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of police officers to seek out and arrest fake drugs dealers can similarly improve the genuine drug market. Just as increased penalties for selling fake drugs increase users’ confidence that they are purchasing “quality product,” the allocation of departmental resources to fighting fake illegal drugs will reduce the costs associated with seeking out known dealers and lower the risk premium users demand from dealers.\textsuperscript{167} At a minimum, the relationship between criminal markets suggests that law enforcement initiatives that seek to broadly reduce individuals’ incentive to engage in crime are likely to have a greater social impact than programs that are targeted against a specific criminal activity. Perhaps more importantly, the relationship between first and second order criminal markets suggest that resources employed to increase arrest rates in a particular criminal market may provide less of a public safety benefit than might initially be presumed. An accurate assessment of the true benefit of allocating resources to increasing arrest rates may ultimately suggest that policymakers should reevaluate the relative merit of alternative crime prevention measures\textsuperscript{168} that may, ultimately, provide a greater public safety “bang for the buck.”

4. Perfecting the Policy Debate

Even if one is skeptical of lawmakers’ and other criminal justice actors’ ability to deter crime by manipulating criminal laws and penalties,\textsuperscript{169} the relationship between related criminal markets is still relevant to current debates over criminal justice policy. The impact of second order crimes on first order criminal markets suggests a level of complexity that has been missing in the public dialogue over criminal law.\textsuperscript{170} At a minimum, the interconnected nature of criminal markets indicates that lawmakers’ perpetual solution --to ratchet up punishment and criminalize antisocial activity many times over--\textsuperscript{171} may appeal to the public’s desire for simple and straightforward solutions, but may do little to promote public safety. Perhaps the recognition that further criminalization can promote crime will lead to a more nuanced discussion about the ways in which society can best deter antisocial behavior.

B. Perfecting Our Understanding of (Over)Criminalization

\textsuperscript{167} Which, in this case, would take the form of a “risk discount.”

\textsuperscript{168} See Brandon C. Welsh & David P. Farrington, Monetary Costs and Benefits of Crime Prevention Programs, 27 CRIME & JUST. 305, 345-46 (2000) (describing six categories of community crime prevention programs ranging from strategies that foster greater youth socialization to order maintenance policies that target physical and personal disorder and petty crimes).

\textsuperscript{169} See Robinson & Darley, supra note 136, at 951 (2003) (describing “growing evidence to suggest skepticism about the criminal law's deterrent effect”).

\textsuperscript{170} Id. at 952 (“The deterrent process involves complex interactions, like substitution effects, that make deterrent predictions enormously difficult.”).

\textsuperscript{171} Stuntz, supra note 7, at 509.
The potential for second order crimes to perfect first order criminal markets may provide some valuable insight into the “overcriminalization crisis” that has been the focus of legal scholars for the last 50 years. Criminal law has been described as a “one way ratchet,” constantly expanding the scope of criminal liability and perpetually increasing the penalties associated with each crime. As discussed above, various theories have been offered to explain this unremitting expansion. Some scholars blame institutional interests that encourage prosecutors and legislators to push for broad criminal liability. Others have pointed to a legislative process that exaggerates the temporary passions of the electorate. The rising influence of media images of crime has also been blamed for contributing to increased efforts to expand the criminal code. Finally, some academics have suggested that cognitive psychology can explain the public’s, and thus elected officials’, penchant for punitive and expansive approaches to fighting crime. Ultimately, the explosive growth of the criminal code is likely due to some combination of the many explanations offered by scholars. The relationship between first and second order criminal markets should not wholly supplant the theories that purport to explain the expansion of the criminal law. Indeed one of the chief aspects of the “overcriminalization phenomenon” is the dramatic growth of regulatory crimes—an aspect of the expansion of the criminal code that is likely unrelated to the impact of second order crimes on first order criminal markets. However, the perfection of criminal markets suggests a “multiplier effect” that magnifies the impact of those factors that scholars argue explain the dramatic expansion of the criminal code. Media stories detailing the horrific and dangerous conditions that surround human smuggling were likely the catalyst for Congress’ decision to enhance the

172 Sanford Kadish, The Crisis of Overcriminalization, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1957); Stuntz, supra note 7, at 507 (“Of course, criminal law's breadth is old news. It has long been a source of academic complaint; indeed, it has long been the starting point for virtually all the scholarship in this field, which (with the important exception of sexual assault) consistently argues that existing criminal liability rules are too broad and ought to be narrowed.”).


174 See, e.g., Beale, supra note 7.

175 See supra notes 139-144.

176 Stuntz, supra note 7, at 510.

177 Brown, supra note 173, at 224.

178 Beale, supra note 7, at 52.

179 See Sara Sun Beale, The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization, 54 AM. U. L. REV. 747, 748 (2005) (describing the growth in regulatory crimes or “mattress tag offenses” as an aspect of overcriminalization that is distinct from the increase in “morals offenses.”)

180 See, e.g. Verhovek, supra note 50; see also Kung, supra note 50.
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penalties for alien smugglers who injure or kill their human cargo.\textsuperscript{181} However, if the effect of such laws is to increase other criminal activity, they may instigate further rounds of criminalization and penalization as the legislature seeks to undo the effects of second order criminalization on related criminal markets. As a result, the relationship between second and first order crimes may help explain why seemingly weak influences may in fact have a substantial impact on both the “breadth” and “depth” of the criminal law.\textsuperscript{182}

The idea that first order crimes create the opportunity for second order criminal markets to emerge, offers a partial explanation for the increase in the number of crimes on the books. If the politics of crime push legislatures to expand the criminal code, each expansion plants the seeds for new antisocial activity to be criminalized. Moreover, if the subsequent criminalization of second order crimes offsets some of the disincentives to commit the first order crime, then it is not surprising that the legislature’s response would be to either enhance the penalties for the first order crime or to attack the first order problem with a second wave of criminalization. The perfection of criminal markets thus helps to explain not only the expansion of the criminal code but also why legislatures see fit to return to the same antisocial conduct and criminalize it “many times over.”\textsuperscript{183}

C. Perfecting Criminal Norms

Criminal law does not govern conduct solely by increasing the penalties for engaging in antisocial activities; it also has the capacity to promote social norms of behavior.\textsuperscript{184} In this regard, the law does not simply extract a price for undesirable conduct; it also regulates the social meaning of such activity.\textsuperscript{185} This expressive function of criminal law is considered by many to be a critical (and cost effective) aspect of the law’s ability to deter harmful behavior.\textsuperscript{186} Yet this expressive function can, itself, have

\begin{itemize}
  \item \textsuperscript{182} See Stuntz, supra note 7, at 512 (“Criminal law is both broad and deep: a great deal of conduct is criminalized, and of that conduct, a large proportion is criminalized many times over.”).
  \item \textsuperscript{183} Id.
  \item \textsuperscript{184} Dau-Schmidt, supra note 28, at 2 (“I argue that in addition to creating disincentives for criminal activity, criminal punishment is intended to promote various social norms of individual behavior by shaping the preferences of criminals and the population at large.”); Dan M. Kahan, Social Influence, Social Meaning, and Deterrence, 83 V A. L. REV. 349, 351 (1997); Cass R. Sunstein, Social Norms and Social Roles, 96 COLUM. L. REV. 903, 964 (1996).
  \item \textsuperscript{185} Kahan, supra note 184, at 351.
  \item \textsuperscript{186} Id. (“Given the power of social influence, laws that shape individuals' perceptions of each others' beliefs and intentions, for example, may often turn out to be the most cost-effective means of deterring crime.”); Stuntz, supra note 7, at 520 (“The past few years have seen a growing interest in the expressive potential of criminal law--the use of the
\end{itemize}
hidden costs. Society largely benefits from the prevailing norm that criminalization imbues an activity with negative moral value. However, the corollary to that norm—that policies which facilitate an activity convey a message that the activity is morally acceptable—may not always promote social welfare. Consider the opposition to harm reduction programs that allow intravenous drug users to exchange dirty needles for sterile ones. Critics of needle exchange programs typically argue that, by facilitating the safe use of intravenous needles, exchange programs implicitly condone drug use and, thus, promote an activity that is both harmful and illegal. Importantly, while this argument is ultimately consequentialist—the concern focuses on the overall welfare loss resulting from increased drug use, it is the norm that equates facilitation with condonation (the “facilitation norm”) that causes the undesirable outcome.

Were needle exchange programs the sole casualty of the facilitation norm, one might be tempted to simply accept the elimination of one seemingly viable strategy for fighting the spread of communicable diseases, as a necessary cost of keeping the social meaning of criminalization unambiguous. However, the facilitation norm may foreclose other interesting policy interventions that might improve social welfare despite supporting criminal activity. Imagine providing mediation services to resolve gang turf disputes, helping sex workers obtain documentation that indicate regular HIV testing, or free lab testing for illegal narcotics to ensure purity. Consider some of the benefits of allowing individuals who

criminal justice system not primarily to make and carry out threats, but to send signals … [according to some] this signal-sending is the most important thing criminal law does.”).

187 See Eric A. Posner, Law, Economics, and Inefficient Norms, 144 U. PA. L. REV. 1697 (1996) (arguing that the under a variety of plausible conditions social norms may reduce social welfare).

188 Kahan, supra note 184, at 362 (“Economists speak of criminal law as a mechanism for pricing misconduct, but ordinary citizens think of it as a convention for morally condemning it.”)

189 See Merrill, supra note 124, at 941 (“First, and probably the most significant problem for the opponents of needle exchange programs, is a fear that it condones, if not promotes, drug abuse.”); Salbu, supra note 124, at 129 (“Some will receive this signal as government condonation or countenance—if drug injection is seriously forbidden, why would the government be giving people implements for the express and admitted purpose of injecting drugs?”).

190 There is an alternative argument that the risks associated with dirty needles are an important disincentive to engaging in intravenous drug use. To the extent that one believes that the dangers associated with dirty needles deter drug use, one might oppose needle exchange programs regardless of their normative impact.

191 The non-profit Dancesafe currently sponsors a lab testing service (ecstasydata.org) that allows individuals to anonymously submit samples of “club drugs” (particularly the drug ecstasy) for free lab testing. The ingredients and the physical description of the drugs are then posted on the organization’s website. Dancesafe’s efforts to improve drug safety in the Rave community are described in detail in an article by Robert J. MacCoun titled, “Testing Drugs Versus Testing for Drug Use: Private Risk Management in the Shadow of Criminal Law.” 56 DEPAUL L. REV. 507, 538 (2007); see also www.dancesafe.org.
engage in criminal activity to use the legal system to resolve their “business” disputes, so that they don’t have to resort to violent self-help measures. There are excellent reasons for not providing such services-- the inability to use the legal system to resolve disputes is an important economic cost that may make criminal activity less attractive to profit seeking actors. However, to the extent that such policies are unacceptable simply because they suggest that society condones the criminalized activity, then the facilitation norm may be foreclosing valuable opportunities to improve social welfare.

Scholars have long recognized the tension between the expressive function of criminal law and efforts to improve social welfare by reducing some of the collateral costs of committing crimes. It is difficult to simultaneously facilitate and condemn an activity. However, the perfection of criminal markets suggests that there is less of a difference between harm reduction strategies and criminalization than many people might assume. Just as the distribution of clean needles makes it cheaper and easier to use illegal drugs, so too does the criminalization of fake drugs make it cheaper and easier to sell real drugs. If the criminalization of the second order crime does not signal social approval of the first order criminal market, than harm reduction policies similarly need not be regarded as sanctioning bad behavior.

Focusing on the ways in which the criminalization of one behavior can facilitate other criminal activity need not undermine the expressive value of criminalizing conduct. The fact that an effort to reduce the harm caused by criminal conduct unintentionally boosts related criminal markets need not dilute the law’s moral message. However, it does suggest that alternative policy efforts to reduce harm should similarly be interpreted as not condoning the unlawful activity. By recognizing the ways in which criminalization facilitates other criminal activity, the social meaning of facilitating crime can become more nuanced and harm reduction strategies will, hopefully, entail fewer normative costs to society.

The benefits of destigmatizing harm reduction strategies are not limited to the drug context. Despite the fact that the Uruguayan Penal Code criminalizes abortion, the government passed a law authorizing physicians to counsel women on the various methods of obtaining the safest illegal abortion. The Uruguayan policy has been lauded for saving lives.

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192 See REUTER, supra note 80, at 113-31 (describing some of the economic costs associated with running an illegal business).
193 See MacCoun, supra note 191, at 538 (“The expressive and crime-controlling functions of criminal law are often in tension with other social goals, including distributive justice, restorative justice, and risk regulation.”).
195 Id. at 421.
but faces criticism for delivering a mixed message as to the morality of obtaining abortions.\textsuperscript{196} One benefit of highlighting criminalization’s capacity to facilitate crime is that, to the extent that the facilitation norm is weakened, such harm reduction policies will entail fewer normative costs. As discussed above, the increased penalties for illegal abortions that result in the death of the patient may improve the market for safe illegal abortions. Perhaps recognizing the impact that the criminalization of dangerous abortions has on the first order illegal abortion market can diminish the degree to which alternative harm reduction strategies like the Uruguayan model are criticized for condoning illegal abortions. By recognizing that criminalization and harm reduction strategies have similar impacts on criminal markets, it may be possible to obtain the life saving benefits of some harm reduction strategies without paying the cost of sending an ambiguous moral message about the underlying crime.

IV. CONCLUSION

The fact that the criminalization of one activity may actually improve related criminal markets has profound implications for criminal justice policy and our normative understanding of criminal law. It is highly unlikely that policymakers will ever be able to fashion an optimal scheme of crimes and punishments that maximize the law’s deterrent effect. However, the recognition that second order crimes can perfect first order criminal markets may encourage lawmakers to more fully evaluate the costs and benefits of using the criminal law to resolve social problems. Moreover, a deeper understanding of the impact that such crimes have on related criminal markets may improve lawmakers’ accuracy as they seek to calibrate criminal penalties in a way that more fully promotes the public welfare. At a minimum, recognizing criminal law’s capacity to improve criminal markets should improve the public discourse about crime and raise some skepticism about simplistic “tough on crime” solutions to complex social concerns.

Acknowledging the degree to which criminal laws facilitate antisocial activity can also promote a normative shift in our understanding of harm reduction policies that reduce the social and personal costs of committing crimes. Rather than undermine the moral authority of the criminal law, highlighting the degree to which such laws facilitate criminal activity can destigmatize policies that may be useful alternatives to criminalization.

\textsuperscript{196} Some prochoice advocates see this ambiguity as a positive step toward changing social attitudes about abortion. \textit{See id.} To the extent that highlighting criminalization’s capacity to facilitate crime weakens the facilitation norm, it is possible that harm reduction strategies will be less likely to change social attitudes about the underlying criminal activity.