

HUL 258: Special Topics in Philosophy

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Ownership

A. M. HONORÉ

Ownership is one of the characteristic institutions of human society. A people to whom ownership was unknown, or who accorded it a minor place in their arrangements, who meant by *meum* and *tuum* no more than 'what I (or you) presently hold' would live in a world that is not our world. Yet to see why their world would be different, and to assess the plausibility of vaguely conceived schemes to replace 'ownership' by 'public administration', or of vaguely stated claims that the importance of ownership has declined or its character changed in the twentieth century, we need first to have a clear idea of what ownership is.

I propose, therefore, to begin by giving an account of the standard incidents of ownership: *i.e.* those legal rights, duties and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a mature legal system. To do so will be to analyse the concept of ownership, by which I mean the 'liberal' concept of 'full' individual ownership, rather than any more restricted notion to which the same label may be attached in certain contexts. . . .

If ownership is provisionally defined as the *greatest possible interest in a thing which a mature system of law recognizes*, then it follows that, since all mature systems admit the existence of 'interests' in 'things', all mature systems have, in a sense, a concept of ownership. Indeed, even primitive systems, like that of the Trobriand islanders, have rules by which certain persons, such as the 'owners' of canoes, have greater interests in certain things than anyone else.

For mature legal systems it is possible to make a larger claim. In them certain important legal incidents are found, which are common to different systems. If it were not so, 'He owns that umbrella', said in a purely English context, would mean something different from 'He owns that umbrella', proffered as a translation of 'Ce parapluie est à lui'. Yet, as we know, they mean the same. There is indeed, a substantial similarity in the position of one who 'owns' an umbrella in

England, France, Russia, China, and any other modern country one may care to mention. Everywhere the 'owner' can, in the simple uncomplicated case, in which no other person has an interest in the thing, use it, stop others using it, lend it, sell it or leave it by will. Nowhere may he use it to poke his neighbour in the ribs or to knock over his vase. Ownership, *dominium*, *propriété*, *Eigentum* and similar words stand not merely for the greatest interest in things in particular systems but for a type of interest with common features transcending particular systems. It must surely be important to know what these common features are?

* * *

I now list what appear to be the standard incidents of ownership. They may be regarded as necessary ingredients in the notion of ownership, in the sense that, if a system did not admit them, and did not provide for them to be united in a single person, we would conclude that it did not know the liberal concept of ownership, though it might still have a modified version of ownership, either of a primitive or sophisticated sort. But the listed incidents are not individually necessary, though they may be together sufficient, conditions for the person of inherence to be designated 'owner' of a particular thing in a given system. As we have seen, the use of 'owner' will extend to cases in which not all the listed incidents are present.

Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary: this makes eleven leading incidents. Obviously, there are alternative ways of classifying the incidents; moreover, it is fashionable to speak of ownership as if it were just a bundle of rights, in which case at least two items in the list would have to be omitted.

No doubt the concentration in the same person of the right (liberty) of using as one wishes, the

right to exclude others, the power of alienating and an immunity from expropriation is a cardinal feature of the institution. Yet it would be a distortion—and one of which the eighteenth century, with its over-emphasis on subjective rights, was patently guilty—to speak as if this concentration of patiently garnered rights was the only legally or socially important characteristic of the owner's position. The present analysis, by emphasizing that the owner is subject to characteristic prohibitions and limitations, and that ownership comprises at least one important incident independent of the owner's choice, is an attempt to redress the balance.

(1) The Right to Possess

The right to possess, *viz.* to have exclusive physical control of a thing, or to have such control as the nature of the thing admits, is the foundation on which the whole superstructure of ownership rests. It may be divided into two aspects, the right (claim) to be put in exclusive control of a thing and the right to remain in control, *viz.* the claim that others should not without permission, interfere. Unless a legal system provides some rules and procedures for attaining these ends it cannot be said to protect ownership.

It is of the essence of the right to possess that it is *in rem* in the sense of availing against persons generally. This does not, of course, mean that an owner is necessarily entitled to exclude everyone from his property. We happily speak of the ownership of land, yet a largish number of officials have the right of entering on private land without the owner's consent, for some limited period and purpose. On the other hand, a general licence so to enter on the 'property' of others would put an end to the institution of landowning as we now know it.

The protection of the right to possess (still using 'possess' in the convenient, though oversimple, sense of 'have exclusive physical control') should be sharply marked off from the protection of mere present possession. To exclude others from what one presently holds is an instinct found in babies and even, as Holmes points out, in animals, of which the seal gives a striking example. To sustain this instinct by legal rules is to protect possession but not, as such, to

protect the right to possess and so not to protect ownership. If dispossession without the possessor's consent is, in general, forbidden, the possessor is given a right *in rem* valid against persons generally, to remain undisturbed, but he has no right to possess *in rem* unless he is entitled to recover from persons generally what he has lost or had taken from him, and to obtain from them what is due to him but not yet handed over. . . .

* * *

To have worked out the notion of 'having a right to' as distinct from merely 'having', or, if that is too subjective a way of putting it, of rules allocating things to people as opposed to rules merely forbidding forcible taking, was a major intellectual achievement. Without it society would have been impossible. Yet the distinction is apt to be overlooked by English lawyers, who are accustomed to the rule that every adverse possession is a root of title, *i.e.* gives rise to a right to possess, or at least that '*de facto* possession is *prima facie* evidence of seisin in fee and right to possession'.

The owner, then, has characteristically a battery of remedies in order to obtain, keep and, if necessary, get back the thing owned. Remedies such as the actions for ejectment and wrongful detention and the *vindicatio* are designed to enable the plaintiff either to obtain or to get back a thing, or at least to put some pressure on the defendant to hand it over. Others, such as the actions for trespass to land and goods, the Roman possessory interdicts and their modern counterparts are primarily directed towards enabling a present possessor to keep possession. Few of the remedies mentioned are confined to the owner; most of them are available also to persons with a right to possess falling short of ownership, and some to mere possessors. Conversely, there will be cases in which they are not available to the owner, for instance because he has voluntarily parted with possession for a temporary purpose, as by hiring the thing out. The availability of such remedies is clearly not a necessary and sufficient condition of owning a thing; what is necessary, in order that there may be ownership of things at all, is that such remedies shall be available to the owner in the usual case in which no other person has a right to exclude him from the thing.

(2) The Right to Use

The present incident and the next two overlap. On a wide interpretation of 'use', management and income fall within use. On a narrow interpretation, 'use' refers to the owner's personal use and enjoyment of the thing owned. On this interpretation it excludes management and income.

The right (liberty) to use at one's discretion has rightly been recognized as a cardinal feature of ownership, and the fact that, as we shall see, certain limitations on use also fall within the standard incidents of ownership does not detract from its importance, since the standard limitations are, in general, rather precisely defined, while the permissible types of use constitute an open list.

(3) The Right to Manage

The right to manage is the right to decide how and by whom the thing owned shall be used. This right depends, legally, on a cluster of powers, chiefly powers of licensing acts which would otherwise be unlawful and powers of contracting: the power to admit others to one's land, to permit others to use one's things, to define the limits of such permission, and to contract effectively in regard to the use (in the literal sense) and exploitation of the thing owned. An owner may not merely sit in his own deck chair but may validly license others to sit in it, lend it, impose conditions on the borrower, direct how it is to be painted or cleaned, contract for it to be mended in a particular way. This is the sphere of management in relation to a simple object like a deck chair. When we consider more complex cases, like the ownership of a business, the complex of powers which make up the right to manage seems still more prominent. The power to direct how resources are to be used and exploited is one of the cardinal types of economic and political power; the owner's legal powers of management are one, but only one possible basis for it. Many observers have drawn attention to the growth of managerial power divorced from legal ownership; in such cases it may be that we should speak of split ownership or redefine our notion of the thing owned. This does not affect the fact that the right to manage is an important element in the notion

of ownership; indeed, the fact that we feel doubts in these cases whether the 'legal owner' *really* owns is a testimony to its importance.

* * *

(4) The Right to the Income

To use or occupy a thing may be regarded as the simplest way of deriving an income from it, of enjoying it. It is, for instance, expressly contemplated by the English income tax legislation that the rent-free use or occupation of a house is a form of income, and only the inconvenience of assessing and collecting the tax presumably prevents the extension of this principle to movables.

Income in the more ordinary sense (fruits, rents, profits) may be thought of as a surrogate of use, a benefit derived from forgoing personal use of a thing and allowing others to use it for reward; as a reward for work done in exploiting the thing; or as the brute product of a thing, made by nature or by other persons. Obviously the line to be drawn between the earned and unearned income from a thing cannot be firmly drawn.

* * *

(5) The Right to the Capital

The right to the capital consists in the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of it: clearly it has an important economic aspect. The latter liberty need not be regarded as unrestricted; but a general provision requiring things to be conserved in the public interest, so far as not consumed by use in the ordinary way, would perhaps be inconsistent with the liberal idea of ownership. . . .

An owner normally has both the power of disposition and the power of transferring title. Disposition on death is not permitted in many primitive societies but seems to form an essential element in the mature notion of ownership. The tenacity of the right of testation once it has been recognized is shown by the Soviet experience. The earliest writers were hostile to inheritance, but gradually Soviet law has come to admit that citizens may dispose freely of their 'personal property' on death, subject to limits not unlike those known elsewhere.

(6) The Right to Security

An important aspect of the owner's position is that he should be able to look forward to remaining owner indefinitely if he so chooses and he remains solvent. His right to do so may be called the right to security. Legally, this is in effect an immunity from expropriation, based on rules which provide that, apart from bankruptcy and execution for debt, the transmission of ownership is consensual.

However, a general right to security, availing against others, is consistent with the existence of a power to expropriate or divest in the state or public authorities. From the point of view of security of property, it is important that when expropriation takes place, adequate compensation should be paid; but a general power to expropriate subject to paying compensation would be fatal to the institution of ownership as we know it. Holmes' paradox, that where specific restitution of goods is not a normal remedy, expropriation and wrongful conversion are equivalent, obscures the vital distinction between acts which a legal system permits as rightful and those which it reprobates as wrongful: but if wrongful conversion were general and went unchecked, ownership as we know it would disappear, though damages were regularly paid.

In some systems, as (*semble*) English law, a private individual may destroy another's property without compensation when this is necessary in order to protect his own person or property from a greater danger. Such a rule is consistent with security of property only because of its exceptional character. Again, the state's (or local authority's) power of expropriation is usually limited to certain classes of thing and certain limited purposes. A general power to expropriate any property for any purpose would be inconsistent with the institution of ownership. If, under such a system, compensation were regularly paid, we might say either that ownership was not recognized in that system, or that money alone could be owned, 'money' here meaning a strictly fungible claim on the resources of the community. As we shall see, 'ownership' of such claims is not identical with the ownership of material objects and simple claims.

(7) The Incident of Transmissibility

It is often said that one of the main characteristics of the owner's interest is its 'duration'. In England, at least, the doctrine of estates made lawyers familiar with the notion of the 'duration' of an interest and Maitland, in a luminous metaphor, spoke of estates as 'projected upon the plane of time'.

Yet this notion is by no means as simple as it seems. What is called 'unlimited' duration (*perpétuité*) comprises at least two elements (i) that the interest can be transmitted to the holder's successors and so on *ad infinitum* (The fact that in medieval land law all interests were considered 'temporary' is one reason why the terminology of ownership failed to take root, with consequences which have endured long after the cause has disappeared); (ii) that it is not certain to determine at a future date. These two elements may be called 'transmissibility' and 'absence of term' respectively. We are here concerned with the former.

No one, as Austin points out, can enjoy a thing after he is dead (except vicariously) so that, in a sense, no interest can outlast death. But an interest which is transmissible to the holder's successors (persons designated by or closely related to the holder who obtain the property after him) is more valuable than one which stops with his death. This is so both because on alienation the alienee or, if transmissibility is generally recognized, the alienee's successors, are thereby enabled to enjoy the thing after the alienor's death so that a better price can be obtained for the thing, and because, even if alienation were not recognized, the present holder would by the very fact of transmissibility be dispensed *pro tanto* from making provision for his intestate heirs. Hence, for example, the moment when the tenant in fee acquired a heritable (though not yet fully alienable) right was a crucial moment in the evolution of the fee simple. Heritability by the state would not, of course, amount to transmissibility in the present sense: it is assumed that the transmission is in some sense *advantageous* to the transmitter.

Transmissibility can, of course, be admitted, yet stop short at the first, second or third generation of transmittes. The owner's interest is char-

acterized by *indefinite* transmissibility, no limit being placed on the possible number of transmissions, though the nature of the thing may well limit the actual number.

In deference to the conventional view that the exercise of a right must depend on the choice of the holder, I have refrained from calling transmissibility a right. It is, however, clearly something in which the holder has an economic interest, and it may be that the notion of a right requires revision in order to take account of incidents not depending on the holder's choice which are nevertheless of value to him.

(8) The Incident of Absence of Term

This is the second part of what is vaguely called 'duration'. The rules of a legal system usually seem to provide for determinate, indeterminate and determinable interests. The first are certain to determine at a future date or on the occurrence of a future event which is certain to occur. In this class come leases for however long a term, copyrights, etc. Indeterminate interests are those, such as ownership and easements, to which no term is set. Should the holder live for ever, he would, in the ordinary way, be able to continue in the enjoyment of them for ever. Since human beings are mortal, he will in practice only be able to enjoy them for a limited period, after which the fate of his interest depends on its transmissibility. Again, since human beings are mortal, interests for life, whether of the holder or another, must be regarded as determinate. The notion of an indeterminate interest, in the full sense, therefore requires the notion of transmissibility, but if the latter were not recognized, there would still be value to the holder in the fact that his interest was not due to determine on a fixed date or on the occurrence of some contingency, like a general election, which is certain to occur sooner or later.

* * *

(9) The Prohibition of Harmful Use

An owner's liberty to use and manage the thing owned as he chooses is in mature systems of law, as in primitive systems, subject to the condition that uses harmful to other members of society are forbidden. There may, indeed, be much dispute

over what is to count as 'harm' and to what extent give and take demands that minor inconvenience between neighbours shall be tolerated. Nevertheless, at least for material objects, one can always point to abuses which a legal system will not allow.

I may use my car freely but not in order to run my neighbour down, or to demolish his gate, or even to go on his land if he protests; nor may I drive uninsured. I may build on my land as I choose, but not in such a way that my building collapses on my neighbour's land. I may let off fireworks on Guy Fawkes night, but not in such a way as to set fire to my neighbour's house. These and similar limitations on the use of things are so familiar and so obviously essential to the existence of an orderly community that they are not often thought of as incidents of ownership; yet, without them 'ownership' would be a destructive force.

(10) Liability to Execution

Of a somewhat similar character is the liability of the owner's interest to be taken away from him for debt, either by execution of a judgment debt or on insolvency. Without such a general liability the growth of credit would be impeded and ownership would, again, be an instrument by which the owner could defraud his creditors. This incident, therefore, which may be called *executability*, seems to constitute one of the standard ingredients of the liberal idea of ownership.

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(11) Residuary Character

A legal system might recognize interests in things less than ownership and might have a rule that, on the determination of such interests, the rights in question lapsed and could be exercised by no one, or by the first person to exercise them after their lapse. There might be leases and easements; yet, on their extinction, no one would be entitled to exercise rights similar to those of the former lessee or of the holder of the easement. This would be unlike any system known to us and I think we should be driven to say that in such a system the institution of ownership did not extend to any thing in which limited interests existed. In

such things there would, paradoxically, be interests less than ownership but no ownership.

This fantasy is intended to bring out the point that it is characteristic of ownership that an owner has a residuary right in the thing owned. In practice, legal systems have rules providing that on the lapse of an interest rights, including liberties, analogous to the rights formerly vested in the holder of the interest, vest in or are exercisable by someone else, who may be said to acquire the 'corresponding rights'. Of course, the 'corresponding rights' are not the same rights as were formerly vested in the holder of the interest. The easement holder had a right to exclude the owner; now the owner has a right to exclude the easement holder. The latter right is not identical with, but corresponds to, the former.

It is true that corresponding rights do not always arise when an interest is determined. Sometimes, when ownership is abandoned, no corresponding right vests in another; the thing is simply *res derelicta*. Sometimes, on the other hand, when ownership is abandoned, a new ownership vests in the state, as is the case in South Africa when land has been abandoned.

It seems, however, a safe generalization that, whenever an interest less than ownership terminates, legal systems always provide for corresponding rights to vest in another. When easements terminate, the 'owner' can exercise the corresponding rights, and when bailments terminate, the same is true. It looks as if we have found a simple explanation of the usage we are investigating, but this turns out to be but another deceptive short cut. For it is not a sufficient con-

dition of A's being the owner of a thing that, on the determination of B's interests in it, corresponding rights vest in or are exercisable by A. On the determination of a sub-lease, the rights in question become exercisable by the lessee, not by the 'owner' of the property.

Can we then say that the 'owner' is the ultimate residuary? When the sub-lessee's interest determines the lessee acquires the corresponding rights; but when the lessee's right determines the 'owner' acquires these rights. Hence the 'owner' appears to be identified as the ultimate residuary. The difficulty is that the series may be continued, for on the determination of the 'owner's' interest the state may acquire the corresponding rights; is the state's interest ownership or a mere expectancy?

A warning is here necessary. We are approaching the troubled waters of split ownership. Puzzles about the location of ownership are often generated by the fact that an ultimate residuary right is not coupled with present alienability or with the other standard incidents we have listed. . . .

We are of course here concerned not with the puzzles of split ownership but with simple cases in which the existence of B's lesser interest in a thing is clearly consistent with A's owning it. To explain the usage in such cases it is helpful to point out that it is a necessary but not sufficient condition of A's being owner that, either immediately or ultimately, the extinction of other interests would enure for his benefit. In the end, it turns out that residuary is merely one of the standard incidents of ownership, important no doubt, but not entitled to any special status.

* * *

Notes and Questions

JOHN LOCKE, from *Second Treatise of Civil Government*

1. John Locke's basic project here is to show how private property can be justified, even if we start with the basic assumption that all people intrinsically are, or at least originally were, equally entitled to the land and fruits of the earth. Or as Locke might have put it, we are all the children of God. Locke uses religious-sounding language, but all religious references can easily be translated into the language of objective morality. Do not be fooled by the style: That is the way people talked in seventeenth-century England. Nothing in Locke's argument depends on a religious claim. It relies only on reason. Three conditions have to be true for Locke to be right: (1) Morality is objective—that is, there is such a thing as right and wrong; (2) we can figure out what is moral, or right and wrong, by the use of reason; and (3) Locke's analysis is the one supported or compelled by reason.

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soon be exchanged more widely, behind the backs of the police if necessary. And Timon would reappear, digging for buried chits.

What Shakespeare and Marx objected to is the universality of the medium, not the medium itself. Timon thinks that universality is of the nature of money, and perhaps he is right. Conceived abstractly, money is simply a representation of value. Hence, it's not implausible to hold that every valued thing, every social good, can be represented in monetary terms. It may be that a series of translations are necessary in order to get from this valued thing to that cash value. But there is no reason to think that the translations can not be made; indeed, they are made every day. Life itself has a value, and then eventually a price (different conceivably for different lives)—else how could we even think about insurance and compensation? At the same time, we also experience the universality of money as somehow degrading. Consider the definition of the cynic attributed to Oscar Wilde: "A man who knows the price of everything and the value of nothing." That definition is too absolute; it's not cynical to think that price and value will sometimes coincide. But often enough money fails to represent value; the translations are made, but as with good poetry, something is lost in the process. Hence we can buy and sell universally only if we disregard real values; while if we attend to values, there are things that cannot be bought and sold. Particular things: the abstract universality of money is undercut and circumscribed by the creation of values that can't easily be priced or that we don't want priced. Though these values are often in dispute, we can investigate what they are. It is an empirical matter. What monetary exchanges are blocked, banned, resented, conventionally deplored?

What Money Can't Buy

I have already referred to the sin of simony, which we might take as a paradigmatic example of a blocked exchange. God's offices are not for sale—not, at least, so long as God is conceived in a certain way. In a culture different from that of the Christian Middle Ages, the block might be broken: if the gods can be appeased by sacrifices, why can't they be bribed by glittering gold? In the church, however, this sort of bribery is ruled out. Not that it doesn't occur, but everyone knows that

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it ought not to occur. It is a clandestine trade; buyer and seller alike will lie about what they have done. Dishonesty is always a useful guide to the existence of moral standards. When people sneak across the boundary of the sphere of money, they advertise the existence of the boundary. It's there, roughly at the point where they begin to hide and dissemble. But sometimes it takes a fight to mark off a clear line, and until then trade is more or less open. Money is innocent until proven guilty.

Conscription in 1863

The Enrollment and Conscription Act of 1863 established the first military draft in American history. From colonial times, militia service had been compulsory, but that was a local and neighborly compulsion, and it was generally thought that no one was bound to fight far from home. The Mexican War, for example, was fought entirely with volunteers. But the Civil War was a struggle on a different scale; enormous armies were massed for battle; fire power was greater than ever before; casualties were high; and the need for men grew as the fighting dragged on. The War Department—and President Lincoln, too—thought that a national draft was the only way to win the war.⁴ The draft was bound to be unpopular, given the localist traditions of American politics and the deep anti-statism of liberal thought (and the extent and depth of anti-war feeling). And, in fact, its enforcement was bitterly and often violently opposed. But it set a precedent. Compulsion was definitively lifted from the local to the national level where it has sat ever since; and service in the federal army, rather than the local militia, was established as the obligation of citizens. One provision of the 1863 act, however, set only a negative precedent—the exemption of any man whose name was drawn in the lottery if he was willing and able to put up three hundred dollars to pay a substitute.

Exemptions could be purchased for three hundred dollars. The practice was not entirely new. The local militias fined men who did not turn out for muster, and it was a matter of some resentment that well-to-do citizens often treated the fine as a tax in lieu of service (while impoverished citizens were threatened with debtor's prison).⁵ But now the war and the bloodiness of the war sharpened the resentment. "Does [Lincoln] think that poor men are to give up their lives," asked one New Yorker, "and let rich men pay three hundred dollars in order to stay home?"⁶ It's not clear what part such opinions played in the anti-draft riots that rocked Manhattan in July of 1863, after the first

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drawing of lots. In any case, it was an opinion reiterated across the country that poor men should not have to give up their lives; and though the law was enforced, nothing like it was ever re-enacted. Was the trade innocent in the militias, when little more was involved than a few hours of drilling and marching? Certainly, a Rousseauian political theorist would say No, and he could once have made a strong appeal to the republican convictions of ordinary Americans. But militia service was radically devalued in the years before the Civil War, and the Rousseauian punishments for non-attendance—ostracism or expulsion from the community—would have seemed excessive to most Americans. Perhaps the fine captured the meaning of the service. The case was different, however, when life itself was at stake.

It's not that three hundred dollars was too cheap a price, or that dangerous jobs could not be sold for more or less than that amount on the labor market. Rather, the state could not impose a dangerous job on some of its citizens and then exempt others for a price. That claim spoke to a deep sense of what it meant to be a citizen of the state—or better, of this state, the United States in 1863. One could make the claim good, I think, even against a majority of the citizens, for they might well misunderstand the logic of their own institutions or fail to apply consistently the principles they professed to hold. But in 1863 it was the resistance and resentment of masses of citizens that drew the line between what could be sold and what could not. The War Department had acted casually, and Congress had barely attended to the legislation. They meant, it was later said, only to provide an "incentive" for enlistment.⁷ In fact, they counted on a double incentive: the danger of death was an incentive for some men to pay three hundred dollars to other men, for whom three hundred dollars was an incentive to accept the danger of death. It was a bad business in a republic, for it seemed to abolish the *public thing* and turn military service (even when the republic itself was at stake!) into a private transaction.

That the law was never re-enacted is not to say that similar effects have not been sought. Only the methods have been less direct and the results less efficiently achieved, as in the case of draft deferrals for college students or of bonuses for conscripts who re-enlist. But we acknowledge now the principle of equal treatment—because of the political struggles of 1863; and we know roughly where the boundary is that it marks out. So we can oppose even roundabout and clandestine crossings, re-enactments through legislative subterfuge of what cannot be re-enacted openly. The sale of exemptions is a blocked exchange; and there are many other sales similarly blocked, at least in principle.

Blocked Exchanges

Let me try to suggest the full set of blocked exchanges in the United States today. I will rely in part on the first chapter of Arthur Okun's *Equality and Efficiency*, where Okun draws a line between the sphere of money and what he calls "the domain of rights."⁸ Rights, of course, are proof against sale and purchase, and Okun revealingly recasts the Bill of Rights as a series of blocked exchanges. But it's not only rights that stand outside the cash nexus. Whenever we ban the use of money, we do indeed establish a right—namely, that this particular good be distributed in some other way. But we must argue about the meaning of the good before we can say anything more about its rightful distribution. I want now to postpone most of the arguments and simply provide a list of things that cannot be had for money. The list repeats or anticipates other chapters, for it is a feature of the sphere of money that it abuts every other sphere; that's why it is so important to fix its boundaries. Blocked exchanges set limits on the dominance of wealth.

1. Human beings cannot be bought and sold. The sale of slaves, even of oneself as a slave, is ruled out. This is an example of what Okun calls "prohibitions on exchanges born of desperation."⁹ There are many such prohibitions; but the others merely regulate the labor market, and I will list them separately. This one establishes what is and is not marketable: not persons or the liberty of persons, but only their labor power and the things they make. (Animals are marketable because we conceive them to be without personality, even though liberty is undoubtedly a value for some of them.) Personal liberty is not, however, proof against conscription or imprisonment; it is proof only against sale and purchase.

2. Political power and influence cannot be bought and sold. Citizens cannot sell their votes or officials their decisions. Bribery is an illegal transaction. It hasn't always been so; in many cultures gifts from clients and suitors are a normal part of the remuneration of office holders. But here the gift relationship will only work—that is, fit into a set of more or less coherent meanings—when "office" hasn't fully emerged as an autonomous good, and when the line between public and private is hazy and indistinct. It won't work in a republic, which draws the line sharply: Athens, for example, had an extraordinary set of rules designed to repress bribery; the more offices the citizens shared, the more elaborate the rules became.¹⁰

3. Criminal justice is not for sale. It is not only that judges and juries

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cannot be bribed, but that the services of defense attorneys are a matter of communal provision—a necessary form of welfare given the adversary system.

4. Freedom of speech, press, religion, assembly: none of these require money payments; none of them are available at auction; they are simply guaranteed to every citizen. It's often said that the exercise of these freedoms costs money, but that's not strictly speaking the case: talk and worship are cheap; so is the meeting of citizens; so is publication in many of its forms. Quick access to large audiences is expensive, but that is another matter, not of freedom itself but of influence and power.

5. Marriage and procreation rights are not for sale. Citizens are limited to one spouse and cannot purchase a license for polygamy. And if limits are ever set on the number of children we can have, I assume that these won't take the form that I imagined in chapter 2: licenses to give birth that can be traded on the market.

6. The right to leave the political community is not for sale. The modern state has, to be sure, an investment in every citizen, and it might legitimately require that some part of that investment be repaid, in work or money, before permitting emigration. The Soviet Union has adopted a policy of this sort, chiefly as a mechanism to bar emigration altogether. Used differently, it seems fair enough, even if it then has differential effects on successful and unsuccessful citizens. But the citizens can claim, in their turn, that they never sought the health care and education that they received (as children, say) and owe nothing in return. That claim underestimates the benefits of citizenship, but nicely captures its consensual character. And so it is best to let them go, once they have fulfilled those obligations-in-kind (military service) that are fulfilled in any case by young men and women who aren't yet fully consenting citizens. No one can buy his way out of these.

7. And so, again, exemptions from military service, from jury duty, and from any other form of communally imposed work cannot be sold by the government or bought by citizens—for reasons I have already given.

8. Political offices cannot be bought; to buy them would be a kind of simony, for the political community is like a church in this sense, that its services matter a great deal to its members and wealth is no adequate sign of a capacity to deliver those services. Nor can professional standing be bought, insofar as this is regulated by the community, for doctors and lawyers are our secular priests; we need to be sure about their qualifications.

9. Basic welfare services like police protection or primary and second-

SPHERES OF JUSTICE

ary schooling are purchasable only at the margins. A minimum is guaranteed to every citizen and doesn't have to be paid for by individuals. If policemen dun shopkeepers for protection money, they are acting like gangsters, not like policemen. But shopkeepers can hire security guards and nightwatchmen for the sake of a higher level of protection than the political community is willing to pay for. Similarly, parents can hire private tutors for their children or send them to private schools. The market in services is subject to restraint only if it distorts the character, or lowers the value, of communal provision. (I should also note that some goods are partially provided, hence partially insulated from market control. The mechanism here is not the blocked but the subsidized exchange—as in the case of college and university education, many cultural activities, travel generally, and so on.)

10. Desperate exchanges, "trades of last resort," are barred, though the meaning of desperation is always open to dispute. The eight-hour day, minimum wage laws, health and safety regulations: all these set a floor, establish basic standards, below which workers cannot bid against one another for employment. Jobs can be auctioned off, but only within these limits. This is a restraint of market liberty for the sake of some communal conception of personal liberty, a reassertion, at lower levels of loss, of the ban on slavery.

11. Prizes and honors of many sorts, public and private, are not available for purchase. The Congressional Medal of Honor cannot be bought, nor can the Pulitzer Prize or the Most Valuable Player Award, or even the trophy given by a local Chamber of Commerce to the "businessman of the year." Celebrity is certainly for sale, though the price can be high, but a good name is not. Prestige, esteem, and status stand somewhere between these two. Money is implicated in their distribution; but even in our own society, it is only sometimes determinative.

12. Divine grace cannot be bought—and not only because God doesn't need the money. His servants and deputies often do need it. Still, the sale of indulgences is commonly thought to require reform, if not Reformation.

13. Love and friendship cannot be bought, not on our common understanding of what these two mean. Of course, one can buy all sorts of things—clothing, automobiles, gourmet foods, and so on—that make one a better candidate for love and friendship or more self-confident in the pursuit of lovers and friends. Advertisers commonly play on these possibilities, and they are real enough.

Money and Commodities

For money has a power above
The stars of fate, to manage love.¹¹

But the direct purchase is blocked, not in the law but more deeply, in our shared morality and sensibility. Men and women marry for money, but this is not a “marriage of true minds.” Sex is for sale, but the sale does not make for “a meaningful relationship.” People who believe that sexual intercourse is morally tied to love and marriage are likely to favor a ban on prostitution—just as, in other cultures, people who believed that intercourse was a sacred ritual would have deplored the behavior of priestesses who tried to make a little money on the side. Sex can be sold only when it is understood in terms of pleasure and not exclusively in terms of married love or religious worship.

14. Finally, a long series of criminal sales are ruled out. Murder, Inc., cannot sell its services; blackmail is illegal; heroin cannot be sold, nor can stolen goods, or goods fraudulently described, or adulterated milk, or information thought vital to the security of the state. And arguments go on about unsafe cars, guns, inflammable shirts, drugs with uncertain side effects, and so on. All these are useful illustrations of the fact that the sphere of money and commodities is subject to continuous redefinition.

I think that this is an exhaustive list, though it is possible that I have omitted some crucial category. In any case, the list is long enough to suggest that if money answereth all things, it does so, as it were, behind the backs of many of the things and in spite of their social meanings. The market where exchanges of these sorts are free is a black market, and the men and women who frequent it are likely to do so sneakily and then to lie about what they are doing.

What Money Can Buy

What is the proper sphere of money? What social goods are rightly marketable? The obvious answer is also the right one; it points us to a range of goods that have probably always been marketable, whatever else has or has not been: all those objects, commodities, products, services, beyond what is communally provided, that individual men and women find useful or pleasing, the common stock of bazaars, emporiums, and trading posts. It includes, and probably always has included,

Repugnance as a Constraint on Markets

Alvin E. Roth

Why can't you eat horse or dog meat in a restaurant in California, a state with a population that hails from all over the world, including some places where such meals are appreciated? The answer is that many Californians not only don't wish to eat horses or dogs themselves, but find it repugnant that anyone else should do so, and they enacted this repugnance into California law by referendum in 1998. Section 598 of the California Penal Code states in part: "[H]orsemeat may not be offered for sale for human consumption. No restaurant, cafe, or other public eating place may offer horsemeat for human consumption." The measure passed by a margin of 60 to 40 percent with over 4.6 million people voting for it (see <http://vote98.ss.ca.gov/Returns/prop/00.htm>)).

Notice that this law does not seek to protect the safety of *consumers* by governing the slaughter, sale, preparation, and labeling of animals used for food. It is different from laws prohibiting the inhumane *treatment* of animals, like rules on how farm animals can be raised or slaughtered, or laws prohibiting cockfights, or the recently established (and still contested) ban on selling *foie gras* in Chicago restaurants (Ruethling, 2006). It is not illegal in California to kill horses; the California law only outlaws such killing "if that person knows or should have known that any part of that horse will be used for human consumption." The prohibited use is "*human* consumption," so it apparently remains legal in California to buy and sell pet food that contains horse meat (although the use of horse meat in pet food has declined in the face of the demand in Europe for U.S. horse meat for human consumption).

The repugnance of eating horses is not limited to California. On September 7,

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2006, the U.S. House of Representatives passed by a vote of 351–40, and sent to the Senate, H.R. 503: “To . . . prohibit the shipping, transporting, moving, delivering, receiving, possessing, purchasing, selling, or donation of horses and other equines to be slaughtered for human consumption.” (That bill seems unlikely to pass into law, however.)

Apparently, some kinds of transactions are repugnant in some times and places and not in others. This essay examines repugnance and its consequences for what transactions and markets we see. When my colleagues and I have helped design markets and allocation procedures, we have often found that distaste for certain kinds of transactions can be a real constraint on markets and how they are designed, every bit as real as the constraints imposed by technology or by the requirements of incentives and efficiency. In this essay, I’ll first consider a wide range of examples, including slavery and indentured servitude, lending money for interest, price-gouging after disasters, selling pollution permits and life insurance, and dwarf tossing.

This discussion will bring me naturally to the laws against the buying and selling of kidneys for transplantation, which will connect this essay with the others on organ transplantation in this issue. Because healthy people have two kidneys and can remain healthy with only one, kidneys from living donors are now widely used for kidney transplantation, the preferred treatment for end-stage renal disease. The laws against buying or selling kidneys reflect a reasonably widespread repugnance, and this repugnance may make it difficult for arguments that focus only on the gains from trade to make headway in changing these laws. That does not mean that no gains from exchange can be realized; in fact some gains are beginning to be realized in the kidney exchange programs that Tayfun Sönmez, Utku Ünver, and I helped to design in New England and elsewhere. In the simplest form of kidney exchange, a patient with a willing donor who has an incompatible blood type (or who is incompatible for another reason) can exchange a kidney with another such incompatible patient–donor pair. (That is, the pairs are matched so that the donor from one pair is compatible with the patient from the other, and each patient receives a kidney from the other patient’s donor.) This sort of “in kind” exchange has gained acceptance in the transplant community.¹

More generally, this essay will explain why I think economists need to understand better and engage more with the phenomenon of repugnant transactions. Attitudes about the repugnance (or other kinds of inappropriateness) of transactions shape whole markets, and therefore shape what choices people face.

¹ See Roth, Sönmez, and Ünver (2004, 2005a, b, forthcoming), Saidman, Roth, Sönmez, Ünver, and Delmonico (2006), and Roth, Sönmez, Ünver, Delmonico, and Saidman (2006) for discussions of the issues involved in organizing kidney exchange on an efficient scale. A very small number of individual kidney exchanges had been conducted before the issue of efficient organization was raised, giving an early indication that this kind of exchange did not arouse the repugnance associated with monetary payments for organs.

Table 1
Markets In Which Some Transactions Are, or Were Once, Repugnant

<i>Human remains</i>	<i>Finance</i>
Cadavers for anatomical study, organ donation, bone and tissue	Short selling, currency speculation
Live donor organs (kidneys, livers)	Interest on loans
<i>Labor</i>	<i>Pollution markets</i>
Indentured servitude, slavery	Tradable emissions entitlements
Volunteer army, mercenary soldiers	Dirty industries in less developed countries
Discrimination based on race, gender, handicap, marital status, etc.	<i>"Price gouging"</i>
<i>Reproduction and sex</i>	After natural disasters
Adoption	Ticket scalping
Surrogate mothers, egg and sperm donation, abortion, birth control	<i>Religion/Sports</i>
Prostitution, pornography	Sale of indulgences and ecclesiastical offices ("simony")
Brideprice, dowry	Endorsements/payments for amateur versus pro athletes
Polygamy, gay marriage, incest	Drugs and sports
<i>Words, ideas, and art</i>	<i>Food, drink, and drugs</i>
Obscenity, profanity, and blasphemy	Horse and dog meat
Cultural treasures, art, and antiquities	Alcohol (Prohibition)
<i>Risk</i>	Marijuana and narcotics
Life insurance for adults, children, and strangers	<i>Vote selling and bribery</i>
Gambling	<i>Dwarf-tossing</i>
Prediction markets	

Repugnant Markets

Table 1 lists some examples of transactions in which repugnance has established important constraints, presently or at some time in the past. The arrow of time points in both directions: some markets that are repugnant today, once were not (or not sufficiently to serve as a binding constraint). Other markets are not widely repugnant today, but once were.

Slavery is an obvious example of a market that is now repugnant and illegal even in places like the United States where such markets were once openly conducted. Slavery was forbidden by the 13th amendment to the U.S. Constitution in 1865, which states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Courts have interpreted this amendment as also outlawing indentured servitude, and today we find servitude so repugnant that a person may not even sell him- or herself into slavery or indentured servitude. But indentured servitude was once one of the common ways for Europeans to buy passage across the Atlantic to America (Galenson, 1981).

Lending money for interest was once widely repugnant and no longer is (with the important exception that Islamic law is commonly interpreted as prohibiting it). State usury laws in the United States and Islamic banks in some countries are

examples of modern expressions of this repugnance.² The changing repugnance of debt and of involuntary servitude have even interacted in changes to bankruptcy law. In colonial America and the early years of the Republic, insolvent debtors could be imprisoned, or sentenced to indentured servitude (Coleman, 1974 [1999]). But as involuntary servitude became more repugnant and debts less repugnant, bankruptcy laws were rewritten to be less punitive to debtors.

The examples in Table 1 and others I will discuss reflect that, even where there may be willing suppliers and demanders of certain transactions, aversion to those transactions by others may constrain or even prevent the transactions. For many of the examples in Table 1, “repugnance” or even “revulsion” is exactly the right word for how the transactions are or were once regarded. For the rest, a milder word might be more apt—some transactions may be called distasteful, inappropriate, unfair, undignified, or unprofessional.

Of course, there may also be other reasons to object to markets that some people find repugnant, and so it may be difficult to attribute only to repugnance the limits on these markets. For example, while hiring mercenaries was once an accepted way of dealing with military affairs (and although there has once again been increasing use of private security firms to perform defensive military functions), mercenaries have largely fallen out of favor. The declining use of mercenaries is due not only to repugnance at the fact that mercenaries kill for pay, rather than for state-sanctioned duty or patriotism. But that such repugnance plays a role is strongly suggested by the lesser protection mercenaries receive under international law. For example, Article 47 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts states: “A mercenary shall not have the right to be a combatant or a prisoner of war.”

How Repugnance Combines With Other Factors

Some markets are banned or limited for combinations of reasons that include both repugnance and also concerns about negative externalities. For example, limits on prostitution or pornography depend in part on revulsion at commercializing sex. Fiske and Tetlock (1997) talk about “taboo tradeoffs between different spheres of justice” to discuss why bringing to the market activities or goods that are customarily provided in other settings, like within families, may seem inappropriate or worse. But concern also arises about the negative effects pornography or commercial sex may have on the quality of life in neighborhoods where it is sold.

² Near the beginning of his essay “The Spirit of Capitalism,” Max Weber quotes Benjamin Franklin on the virtues of responsible lending and borrowing, and near the end of the essay, Weber ([1905] 1930, p. 74) asks, “Now, how could activity, which was at best ethically tolerated, turn into a calling in the sense of Benjamin Franklin?” Hirschman (1977, p. 9) paraphrases Weber’s question as: “How did commercial, banking, and similar money-making pursuits become honorable at some point in the modern age after having stood condemned or despised as greed, love of lucre, and avarice for centuries past?” In this journal, see Persky (2007) on the Jeremy Bentham/Adam Smith arguments about usury, and Kuran (1995) on Islamic banks.

In addition, prostitution and pornography may not always involve transactions between willing parties.

Bans on commerce involving material judged to be obscene may also involve concerns about externalities, as in Federal Communications Commission regulations regarding certain words forbidden on radio and television broadcasts, or voluntary regulations concerning whether children can see certain movies; for example, Fairman (2006) discusses the laws and jurisprudence concerning the word “fuck.” But repugnance can be present even when externalities are minimal. For example, in 1959 the U.S. Post Office imposed a ban on sending copies of D. H. Lawrence’s *Lady Chatterley’s Lover* through the mail (this story and several related obscenity trials are recounted in Rembar, 1968). Similarly, bans in various times and places on profane language may primarily concern externalities, but bans on blasphemy—like banning the sale of Salman Rushdie’s *Satanic Verses* in a number of Islamic countries—seem also to be aimed at limiting private consumption (and production).

Limits on the sale of alcohol and various drugs, and on gambling, may also be complicated in this way. (The sale of alcohol was banned throughout the United States from 1920 to 1933 by the 18th amendment to the Constitution, known as “Prohibition,” which was repealed by the 21st amendment, although individual states and counties still retain a variety of restrictions.) When addiction is an issue, even apart from the negative externality imposed on third parties (through increases in bankruptcy and crime, for example), we may question whether the parties to the transaction are willing in the sense that economists normally mean when we discuss voluntary transactions.

Some kinds of repugnance are also intermixed with concerns about providing incentives for bad behavior. The very idea of life insurance (“You want to set a *price* on your life, and then place a *bet* on your date of death?”) seems to have had to overcome initial repugnance in the early 1800s (Zelizer, 1979). The incentive issue was often addressed by “insurable interest” laws specifying who could be a beneficiary of life insurance. As discussed by Justice Oliver Wendell Holmes Jr. in a 1911 Supreme Court case: “A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end” (*Grigsby v. Russell*, 222 U.S. 149 [1911]). Even today, life insurance for small children raises questions about motives. The insurance industry lobbies against Stranger (or Investor) Owned Life Insurance (SOLI) and “viatical settlements,” which are third party markets and funds that purchase life insurance policies from elderly or terminally ill patients who wish to realize the cash value of their policies while still alive. The arguments against such funds often focus on the repugnance of having life insurance held by an entity that profits from deaths (in contrast to insurance companies, which make money when their customers continue living). Of course, sellers of annuities also profit from untimely deaths. To get a flavor of the discussions about these issues, see Silverman (2005).

Repugnance to betting on life and death also shows up in other contexts. In July 2003, a proposed U.S. government-funded “prediction market” for terrorism-related events was scrapped amidst much publicity, with the Senate Minority Leader (Tom Daschle) saying, “I can’t believe that anybody would seriously propose that

we trade in death.” Senator Barbara Boxer was quoted as saying, “There is something very sick about it,” and adding that those responsible should be fired. In this discussion, there was also some concern that terrorists themselves shouldn’t be encouraged to play such markets (CNN.com, 2003).

To clarify ideas about repugnance, it may be helpful to look at a relatively uncomplicated case, in which little else besides repugnance seems to be at work. Dwarf tossing seems like a market whose widespread banning involves no more than simple repugnance.

Dwarf Tossing

Dwarf tossing is an activity in which a large person throws a small person. The venue often is one in which alcohol is served. It is often a source of livelihood for the small person, with the large person paying for the privilege. While dwarf-tossing is legal in many places, it is sometimes banned by law. These bans suggest a concern quite different from occupational health and safety regulations that might attempt to regulate how to conduct such an event (for instance, by requiring the wearing of helmets and kneepads). For example, the summary of the Ontario Dwarf Tossing Ban Act of 2003 states: “The Bill bans dwarf tossing in Ontario and makes it an offence to engage in dwarf tossing.”

The matter came before the United Nations Human Rights Committee after the French Ministry of the Interior in 1991 issued a statement saying that “dwarf tossing should be banned on the basis of, among other things, article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.” After bans were subsequently enforced in some municipalities, a French dwarf, who had been employed by a company called Société Fun-Productions, successfully sued in French courts to have the bans overturned. However, the bans were upheld on appeal in 1995 by the French Council of State on the grounds that “dwarf tossing . . . affronted human dignity.” The dwarf then brought his complaint to the United Nations, asserting that he was the victim of a discriminatory violation by France of his right to employment. A report from the Office of the United Nations High Commissioner for Human Rights (2002) further notes that he stated “that there is no work for dwarves in France and that his job does not constitute an affront to human dignity since dignity consists in having a job.” However the UN committee found in favor of France: “The Committee considers that [France] has demonstrated . . . that the ban on dwarf tossing . . . did not constitute an abusive measure but was necessary in order to protect public order, which brings into play considerations of human dignity that are compatible with the objectives of the Covenant.” Thus the UN committee, like the French Council of State, essentially concluded that dwarf tossing was so repugnant that it imposed a negative externality by diminishing human dignity, a public good.

Repugnance Is Hard To Predict

Repugnance, whether alone or in alliance with other objections, can impose serious constraints on various transactions. However, predicting when repugnance

will play a decisive role is difficult, because apparently similar activities and transactions are often judged differently. For example, while dwarf tossing is repugnant in many places, wife carrying, another sport that involves persons of disparate stature, has North American and world championships. In wife carrying, large men carrying small women (not necessarily their wives) race to complete an obstacle course in the fastest time, with the prize traditionally including the “wife’s” weight in beer. The website of the world championship in Finland is at <http://www.sonkajarvi.fi/?deptid=15136>.

Many other examples of apparently similar activities have elicited very different reactions regarding their repugnance.

The proposed prediction market for terrorist events met with vigorous denunciation, but general prediction markets have thrived, including some that include bets on various aspects of current events, as discussed by Wolfers and Zitewitz (2004) in this journal.

In 1990, the Clean Air Act was amended to allow trading of rights to pollute through tradable emissions entitlements. In 1991, the World Bank issued a memo under the signature of its then–chief economist Lawrence Summers, suggesting that it would be efficient for polluting industries to be located in low-income countries. Both policies involve relocating pollution. Although some critics found “selling a right to pollute” to be repugnant, the 1990 law passed as an efficiency-enhancing measure with relatively little public controversy (Schmalensee, Joskow, Ellerman, Montero, and Bailey, 1998). However, the World Bank memo set off a firestorm of public controversy (*Harvard Magazine*, 2001). Similar controversies have erupted around issues such as whether New York City can send its garbage to landfills in other states.

There are laws criminalizing kickbacks offered by vendors to purchasing agents, and such behavior is viewed with repugnance. However, no legal and few corporate restrictions exist on frequent flier miles given to business travelers, who book their flights in their capacity as purchasing agents for their companies. Frequent flyer miles are not viewed as a repugnant kickback, but as an appropriate reward.

There are laws against various forms of “price gouging,” and ticket scalping remains illegal in many places. However, Ticketmaster has recently started auctioning some tickets just before the time of the event (Smith and Silver, 2006).

Payment to a birth mother for a child to whom she is genetically related is widely regarded as repugnant, and is forbidden both internationally by the Hague Convention on Intercountry Adoption and in the United States though the Intercountry Adoption Act of 2000. However, largely unregulated markets have developed for many relatively new forms of reproductive technology, from markets for sperm and eggs, to the hiring of surrogate mothers who have a fertilized egg implanted and carry out the pregnancy of a child to whom they are genetically unrelated (Spar, 2006).

Finally, the sale of food crops that have been modified by traditional methods of cross breeding do not seem widely repugnant anywhere. However, food crops genetically modified by recombinant DNA technology are not accepted nearly as

widely. See, for example, the European Union's wide array of regulations limiting genetically modified crops, listed at http://ec.europa.eu/food/food/biotechnology/gmfood/legisl_en.htm.

Cash Payments and Repugnance

One often-noted regularity is that some transactions that are not repugnant as gifts and in-kind exchanges become repugnant when money is added. The historical repugnance to charging interest for loans seems to fall into this class as do prohibitions on paying birth mothers of children put up for adoption; perhaps, prostitution also falls into this class. That is, loans themselves and adoption and love are widely regarded as good things when given freely, even when their commercial counterparts are regarded in a negative way. Similarly, in Massachusetts and California, it is legal to sell human eggs for fertilization but illegal to sell them for research purposes, although it is legal to donate them for research (Associated Press, January 20, 2007). And widespread outrage in Britain greeted the decision to allow sailors recently released from captivity in Iran to sell their stories to the news media: after two sailors had done so, the remaining sailors were no longer allowed to receive money for interviews (Peck, 2007).

Offering money is often regarded as inappropriate even when not repugnant. For example, dinner guests at your home may respond in-kind, by bringing wine or inviting you to dinner in return, but they would likely not be invited back if they offered to pay for their dinner. Sometimes the level of the price is regarded as repugnant rather than the existence of a price: after a natural disaster it is often regarded as acceptable to sell supplies at their pre-disaster price, but as repugnant *price-gouging* to raise the price (for example, Kahneman, Knetsch, and Thaler, 1986). Also, there may be resistance to charging for goods that have previously been provided for free or at low cost, like water or the right to drive in cities during rush hours.

Of course, sometimes laws or public outrage focus on monetary transactions only because they are easier to ban than nonmonetary transactions. For example, the supporters of the law that forbids restaurants from selling horsemeat in California aren't trying to preserve the sanctity of the family barbecue; they find eating horses repugnant, but regulation of restaurants is easier than passing laws about what can be cooked at home.

Concerns about the monetization of transactions fall into three principal classes. One concern is *objectification*: that is, the fear that putting a price on certain things and buying or selling them might move them into a class of impersonal *objects* to which they should not belong. The sociology literature has shown a longstanding interest in how the introduction of money changes many kinds of social relationships and their meanings (as a starting point, see Simmel, 1990). A second concern is that offering substantial monetary payments might be *coercive*, in the sense that it might leave some people, particularly the poor, open to *exploitation* from which they deserve protection. A third concern, sometimes less clearly artic-

ulated, is that monetizing certain transactions that might not themselves be objectionable may cause society to slide down a *slippery slope* to genuinely repugnant transactions. Let's consider these three concerns in more detail as they apply to paying organ donors.

Compensating Organ Donors

Objectification

Many people clearly regard monetary compensation for organ donation as something that transforms a good deed into a bad one. In both Western Europe and the United States, governments strongly encourage organ donation, but forbid monetary payments to donors or their heirs. For example, Article 21 of the Council of Europe's (2002) *Additional Protocol to the Convention on Human Rights and Biomedicine, on Transplantation of Organs and Tissues of Human Origin* states: "The human body and its parts shall not, as such, give rise to financial gain." However, the European legislation does exempt from this prohibition compensation to donors for expenses and loss of earnings. The U.S. National Organ Transplant Act of 1984 states: "[I]t shall be unlawful for any person to knowingly acquire, receive or otherwise transfer any human organ for valuable consideration for use in human transplantation." This law also exempts payment of expenses directly incurred by organ donors, like travel expenses.

The feeling that virtuous organ donations are transformed into immoral commercial transactions by the introduction of monetary payments is clearly enunciated in the writings and speeches of Pope John Paul II. In his 1998 encyclical letter *Evangelium Vitae* (paragraph 86), the Pope mentions the donation of organs as a "particularly praiseworthy example" of an action that builds "an authentic culture of life." But in an address to transplant surgeons in Rome, John Paul II (2000) warned that "any procedure which tends to commercialize human organs or to consider them as items of exchange or trade must be considered morally unacceptable, because to use the body as an 'object' is to violate the dignity of the human person." The Lutheran Church in America (1984) expresses a similar sentiment.

I note in passing that other religious traditions view the matter very differently. The emerging Jewish consensus on live kidney donations, for example, is that donation of organs is a good thing, and that under some circumstances, it would be allowable to offer and accept compensation.³ This opinion reflects the tremendous

³ While there is no central authority on the application of Jewish law to modern concerns such as transplantation, the most authoritative opinions are contained in various "*responsa*" or answers to particular questions by rabbis acting as legal "deciders" (*poskim*), whose authority arises from the respect of their peers. The consensus on the matter of live kidney donation, for example, seems to be that live donation is allowed (since it saves lives), but it is not required (since the donor becomes wounded and takes some risk to his own life), and hence it falls into the category of things for which compensation could be offered and accepted (unlike actions that are either forbidden or required). See, for example, Eisenberg (2006), Grazi and Wolowelsky (2004), Kunin (2005), and Israeli (1997) who cite eminent modern *poskim* such as Rabbi Shlomo Zalman Auerbach and Rabbi Moshe Feinstein.

importance that Jewish law gives to saving a life, which can overturn many more mundane prohibitions. For example, Avraham (2004, p. 271–2) reports the opinion of the eminent Rabbi Shlomo Zalman Auerbach that someone who sells a kidney with the intention of saving a life does a good deed “even if he would not have donated his kidney only to save life.” But he goes on to note, “[I]n spite of all that has been said above, it seems to me that it is the community that needs soul-searching for allowing a person to reach such a depth of despair that he must sell a kidney, either because of poverty, debts, or the inability to pay for a relative’s medical expenses.”

I am less familiar with Islamic thought on the matter, but I surmise that it is in some respects similar, since the Islamic Republic of Iran presently allows live kidney donors to receive monetary payments (Bagheri, 2006; Ghods and Savaj, 2006).

Coercion

A different concern, quite common in the organ transplant literature and elsewhere, is that money may be coercive, so that allowing kidneys to be sold would allow the poor to be exploited. Even in the absence of money, transplant surgeons are eager to avoid accepting organs from donors who may feel coerced, perhaps by family pressure. Contract law in general holds that contracts may be voidable by the courts in case of coercion due to, among other things, “undue influence” by parties with special relationships (Farnsworth, 1990, section 4.20). (I am not aware, however, of any part of contract law that views excessive monetary compensation as a source of coercion.) Interestingly, Ghods and Savaj (2006) express the view that the availability of paid unrelated kidney donors in Iran has reduced the coercion of unpaid related donors.

In a recent exchange, Gaston, Danovitch, Epstein, Kahn, Matas, and Schnitzler (2006) proposed in the *American Journal of Transplantation* that it might be possible to avoid the repugnance of outright payments for kidneys, while “limiting financial disincentives in live organ donation,” by providing a fixed package of benefits to kidney donors, including insurance, compensation for expenses and lost wages, and a fixed payment (they suggest \$5,000) to compensate donors for pain and suffering. In response, in an editorial in the same issue of the journal, Fox (2006) writes of the “moral cost of living donor inducements.” Fox argues, “While the proposed benefit may not be a deciding factor to the CEO of a Fortune 500 company, to someone earning only minimum wage, the compensation may represent several months’ pay. To deny the potential of this proposal to ‘coerce an otherwise unwarranted decision to donate’ reflects the folly of the privileged, not the reality of the poor.” Similarly, Kahn and Delmonico (2004) summarize their opposition to buying and selling organs by saying, “It is an unethical approach to shift the tragedy from those waiting for organs to those exploited into selling them.”

This viewpoint is not restricted to the transplant community. The National Bioethics Advisory Commission (2001), writes that paying subjects to participate in

medical experiments may be coercive.⁴ They go on to say that, if an institutional review board is concerned that the subjects in an experiment may be economically disadvantaged, it may require that the researchers reduce the payments they make to participants. The concern here is not to protect the research design against the possibility that rich and poor participants might self-select differently into the experiment for a given participation fee, but rather to protect low-income participants from being faced with such a high participation fee that they would feel coerced to participate. Baron (2006) offers a critical view of this line of argument.

Slippery Slope

Concern that monetizing some transactions might lead to other changes seems to lurk beneath the more explicit concerns. Some critics fear a commercial dystopia in which kidney sales would enter into contracts: for example, as collateral, or as payment for other medical services, or to repay debts, or as means tests for eligibility for social services and financial aid. Such scenarios have found their way into fiction and movies also (Ishiguro, 2005; Picoult, 2004; Farmer, 2002).

This concern is not altogether different from concerns about how legalizing certain kinds of voluntary transactions may change the terms of trade so as to disadvantage those who don't wish to participate in them. In this journal, Basu (2003) uses sexual harassment as an example and argues that legalizing labor contracts that allowed sexual harassment would put workers who did not wish to be party to such contracts at a disadvantage relative to the status quo in which such contracts are illegal. Similarly, for example, bans on polygamy might be understood as outlawing certain kinds of competition that would disadvantage some men and some women relative to the monogamous status quo, even while allowing others to engage in welfare-improving transactions.

Some (but by no means all) of the opposition to monetary compensation for *deceased* donor organs seems also to be of the slippery slope variety, with the concern being that it might pave the way for live organ sales. Accounts of black markets for kidney transplants lead to concerns about whether legal markets would inevitably be similar. In this connection, Scheper-Hughes (2003, p. 1645) summarizes the black market experience as follows: "In general, the circulation of kidneys follows established routes of capital from South to North, from East to West, from poorer to more affluent bodies, from black and brown bodies to white ones, and from female to male or from poor, low status men to more affluent men." She concludes (p. 1648): "The division of the world into organ buyers and organ sellers is a medical, social, and moral tragedy of immense and not yet fully recognized proportions."

A related concern is that monetary markets might crowd out altruistic giving and that this might both reduce the supply of transplantable kidneys (Howard, this issue; Institute of Medicine, 2006) and harm other characteristics of the organ

⁴ In contrast, experimental economists often think that paying subjects in economic experiments, based on their performance, is an essential element in creating an economic environment in the laboratory in which the experimenter can exercise some control over subjects' preferences.

transplantation process. For example, Danovitch and Leichtman (2006) worry that monetary markets could reduce the incidence of deceased donation, which supplies not only kidneys but other organs as well. A related literature in economics and psychology is concerned with the loss of intrinsic motivation that might accompany the introduction of monetary payments (for example, Gneezy and Rustichini, 2000).

The medical literature encompasses broad views on these subjects and also contains arguments in reply. For example, Hippen (2005) notes that regulated legal markets might be quite different from illegal ones, and that similar slippery slope fears were expressed about allowing live kidney donations from unrelated donors, but that unrelated donors are now a substantial percentage of all donors. Matas and Schnitzler (2004) argue that allowing kidney sales would be socially cost effective. (Matas is the current president of the American Society of Transplant Surgeons.)

Other Sources of Repugnance Toward Paying For Live Donor Kidneys

Although I have argued that the repugnance felt with regard to kidney sales shares characteristics with repugnance for the monetization of other kinds of transactions, the case of kidneys may also have some unique features.

For example, taking a kidney from a healthy donor holds little appeal to surgeons trained in the Hippocratic tradition of “first, do no harm.” While live donor kidney transplants save lives, it is not the life of the donor that is being saved. A surgeon who is already overcoming some distaste for performing a nephrectomy (kidney removal) on a healthy person may find the distaste more difficult to overcome if he views himself as facilitating a commercial transaction. However surgeons may not (or may no longer) be the primary locus of repugnance to kidney sales. In an informal poll following a debate on the subject at a recent meeting of the American Society of Transplant Surgeons, a majority of those polled expressed a willingness to contemplate a trial or demonstration project involving compensation for organ donors (personal communication, Arthur Matas, 1/27/07).

Overall, Boulware, Troll, Wang, and Powe (2006) report on the basis of a telephone survey of randomly selected households: “The U.S. public is not generally supportive of incentives for DD [deceased organ donation], but is supportive of limited incentives for LD [live donation]. Racial/ethnic minorities are more supportive than Whites of some incentives. Persons with low income may be more accepting of certain monetary incentives.”

Historical Perspective

To put the debate about organ donation into some historical context, consider the case of cadavers. When the British medical journal *The Lancet* published its first volume in 1824, its pages reflected a concern that too few cadavers were available for anatomy classes. The main source of cadavers was an illegal black market supplied by so-called “resurrection men,” and an editorial by that name opens with the news that a reliable resurrection man had recently been arrested and sentenced. The editorial goes on to suggest—in an early observation that how issues

are framed may influence how they are perceived—that the government policy of only allowing the bodies of executed murderers to be used for anatomy studies “tends to keep up . . . the prejudice which is at present so strong against the obtaining of bodies for dissection” (Lancet, 1824).

The situation has changed, slowly but profoundly. In Britain, the Anatomy Act of 1832 considerably expanded the source of legal cadavers for dissection. Today, the “Bodyworlds” exhibits that have been touring museums worldwide feature partially dissected cadavers in artful poses. Such exhibits do arouse some repugnance, although not at the level that prevents the company from obtaining cadavers, or the shows from attracting large audiences (<http://www.bodyworlds.com>); Barboza, 2006). There are also today legal, regulated international markets for various storable transplantable cadaver tissues (for example, bones), that can be used in surgical procedures such as hip replacements (Mahoney, 2000). Opponents of regulated markets for organs will not be reassured: there have been some notable abuses in the market for cadaver tissues, including the widely publicized scandal (and subsequent prosecutions) associated with the fraudulent sale of some of the body parts of Alistair Cooke, host of the television show “Masterpiece Theater,” who died of cancer at the age of 95. Bone (2006) discusses how the family authorization to harvest Cooke’s body parts was falsified, and so was Cooke’s age and cause of death, thus interfering with medical decision making on appropriate use of body parts (see also Howley, 2007).

Economists’ Voices in the Debate About Organ Sales

Sandel (2005) begins this way: “My topic tonight is ‘The Moral Limits of Markets.’ My question is: Are there some things that should not be bought and sold, and, if so, why?” His talk was introduced by Stanley Hoffmann, who wrote: “The topic falls a bit between the cracks of business school professors, who often hate to raise ethical problems, and economists, who don’t always know what ethical problems are!” While Hoffman’s jibe overstates the case, it does seem true that when confronted with repugnance toward a market transaction, economists often respond as if a sufficiently clear argument focused on the welfare gains due to trade will overcome that repugnance.

Becker and Elias in this issue present many of the arguments with which economists and others often respond to concerns over the repugnance of paying live kidney donors. The claim that organ sales “objectify” people is met by noting that in labor markets generally, poorer workers tend to take more dangerous and less pleasant jobs in return for wages, and that we mostly think they do not diminish their humanity by doing so. The response to arguments about “coercion” is typically that voluntary transactions increase welfare of both the seller and the buyer, if the transaction is truly voluntary. The response to “slippery slope” arguments is that markets can be regulated if necessary. Sometimes these arguments are supplemented by the observation that organ donation itself, even with a ban on monetary payments, could be criticized with some of the same objections made to organ sales. For references to both sides of the debate, particularly in the medical literature, see

McCarrick and Darragh (2003) and Nadel and Nadel (2005), and also Leonard (2004).

In making such arguments, the role of repugnance *per se* is often regarded as a side issue. For example, Radcliffe-Richards et al. (1998) conclude their “case for allowing kidney sales” with the following statement: “The weakness of the familiar arguments [against kidney sales] suggests that they are attempts to justify the deep feelings of repugnance which are the real driving force of prohibition, and feelings of repugnance among the rich and healthy, no matter how strongly felt, cannot justify removing the only hope of the destitute and dying. This is why we conclude that the issue should be considered again, and with scrupulous impartiality.”

Some discussion has focused on thinking about how the worst abuses of unregulated markets could be reduced by regulations. Such regulations might include restrictions on compensation (Gaston, Danovitch, Epstein, Kahn, Matas, and Schnitzler, 2006); allowing outright purchases but only by a single authorized governmental buyer (Satel, 2006); requiring an above-market-clearing price (that might be bundled with insurance or annuities); mandatory standards for the health and postoperative care of donors; or perhaps bans on international trade (since the thought of rich Americans importing kidneys from the third world seems to arouse a repugnance distinct from that toward the kidney sales themselves). Of course, how many new kidneys would be elicited at what price depends on whether the market would be international, and how perceptions of repugnance (and not just of risk) would influence the willingness to sell.

These arguments against banning organ sales leave many opponents unpersuaded. For example, Harmon and Delmonico (2006) write: “The Transplantation Society, the American Society of Transplantation, the American Society of Transplant Surgeons, the European Union, Eurotransplant, the National Kidney Foundation, the World Health Organization, and more have long recognized the unethical realities regarding a regulated market, and each organization has consistently opposed it.”

Readers who want to test their own potential repugnance to voluntary transactions by well-informed, consenting adults might note that most of the arguments designed to disarm repugnance to legalizing the sale of a kidney would also, in principle, apply to a live donor who was willing, for a sufficiently high price, to sell an eye, an arm, a leg—or a heart.

Market Design When Repugnance Matters

My colleagues and I have encountered resistance to certain kinds of transactions when helping design both markets that involve monetary transactions, like labor markets, and allocation procedures that do not, like allocating public school places to children. Our experience suggests that ideas about the inappropriateness of certain kinds of transactions—even when this inappropriateness falls short of outright repugnance—can constrain market design.

Many labor markets for entry-level professionals have suffered market failures

Blocked Exchanges: A Taxonomy*

Judith Andre

In *Spheres of Justice* Michael Walzer lists fourteen “blocked exchanges”: things which in the United States cannot be bought or sold.¹ He does so out of concern about domination; although his title refers to justice, his target is oppression rather than inequality as such. It lessens domination, Walzer argues, to recognize different spheres—aspects of life in which different principles of distribution are appropriate. Separating these spheres limits the power any one person can acquire; even the greatest wealth, for instance, should not be able to buy human beings, political office, criminal justice, and so on.

But in fact, of course, money is vastly powerful. If not human beings, it can buy us servants; if not political office, the attention of elected officials; if not criminal justice, the best lawyer in the country. And every day, it seems, there is more and more that money can buy. Some of the new commodities are inventive: singing telegrams, time-slices of condos; even the mortgage itself could be sold. Other commodities, actual or suggested, are more frightening. In Europe one can sell one’s own kidney: for a few thousand dollars some people will have one kidney surgically removed and implanted in someone else’s body.² Richard Posner and William Landes have suggested a market in babies in the United States.³

Walzer would impede this march toward commodification. His list of blocked exchanges is rough and unorganized, suggestive rather than conclusive. It includes human beings; political power and influence;

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1. Michael Walzer, *Spheres of Justice* (New York: Basic, 1983), pp. 100–103.

2. J. Harvey, “Paying Organ Donors,” pp. 117–19; and Bob Brecher, “The Kidney Trade: Or, the Customer Is Always Wrong,” pp. 120–23—both in *Journal of Medical Ethics*, vol. 16 (September 1990). See also Terry Trucco, “Sales of Kidneys Prompt New Laws and Debate,” *New York Times* (August 1, 1989), p. C1.

3. Richard A. Posner and William A. Landes, “The Economics of the Baby Shortage,” *Journal of Legal Studies* 7 (1978): 323.

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criminal justice; freedom of speech, press, religion, and assembly; marriage and procreation rights; the right to emigrate; exemptions from military service, jury duty, and other communally imposed work; political office; basic welfare services like police protection and education; desperate exchanges, such as those involved in accepting dangerous work; prizes and honors; divine grace; love and friendship; and criminal acts. He believes the list is complete but leaves open the possibility that it is not. His general position is that different kinds of goods carry with them different criteria of distribution.

Walzer is not alone in wanting to limit the market. Several theorists have offered other approaches to restricting it. Margaret Jane Radin, for instance, distinguishes personal from fungible property: personal property is bound up with one's being the person one is; it is valued for its own sake and cannot be replaced with money alone. Laws may therefore, she argues, prohibit its sale.⁴ Elizabeth Anderson argues not just from the nature of the goods in question but also from the nature of commerce and argues that some good things cannot survive therein. Only those things should be for sale "whose dimensions of value are best realized within market relations." That is not true of gifts, shared goods, ideals, and objects of need, all of which require other kinds of social relations.⁵

Walzer, Radin, and Anderson each offer us a single principle with which to bound the market. Radin's is broad and basic: protect human flourishing by shielding nonfungible property from the full force of the market. Walzer, too, works from a broad and basic principle—lessen oppression by using different grounds for distribution in different spheres of life—but he also lists in detail what belongs outside the sphere of money. Anderson's perspective is in one sense plural, since markets have a number of characteristics (impersonality, self-interest, want-regardingness, etc.), each of which might be destructive of different things. Yet ultimately she too is working with a single principle: protect from the market those things to which it is essentially inhospitable.

Mark Nelson takes a somewhat different approach: he lists ten examples of blocked exchanges and derives from them nine principles. The principles are only loosely related to one another.⁶

4. Margaret Jane Radin, "Market-Inalienability," *Harvard Law Review* 100 (June 1987): 1849–1937. In an earlier article she argues that personal property should also be privileged against government control; i.e., the government needs more justification to take or redistribute or control it (Margaret Jane Radin, "Property and Personhood," *Stanford Law Review* 34 [May 1982]: 957–1015).

5. Elizabeth Anderson, "The Ethical Limitations of the Market" (paper presented at the international meeting of the Conference for the Study of Political Thought on Markets and Political Theory, Williams College, Williamstown, Mass., April 1989).

6. Mark Nelson, "The Morality of a Market in Transplant Organs," *Public Affairs Quarterly* 5 (January 1991): 63–79. Nelson considers one principle, then notes an exception to it and formulates a principle to account for the exception. To that, in turn, there is an exception; and so forth.

In this article I present a new approach, neither a list (whether of blocked exchanges or of unrelated principles) nor a single overarching principle but a set of logically related considerations: a framework for thinking about the issue. Once we understand what a sale is and look closely at Walzer's useful list, we find that there are a number of distinct grounds for blocking exchanges. Divine grace, for instance, should not be sold because it cannot be, and pretending to do so is a fraud. The right to marry should not be sold because it should be inalienable. Criminal justice should not be sold because a bribed decision is not justice at all.

Perhaps every intermediate principle I uncover here could in turn be explained by Walzer's, Radin's, or Anderson's accounts; I do not try to settle that here. Since much theory works directly from examples, organizing those examples should help us evaluate any theories—Walzer's, Radin's, Anderson's, or others.

First, some background. We can be confused by a mental picture of a sale as primarily a physical exchange. We imagine one person handing another an object, say a pencil, while the second hands the first money. Now we all know that this change of physical relationship, of what object is in whose hand, is neither necessary nor sufficient to a sale. What is essential is that a set of rights, duties, and liabilities pass from one person to the other.⁷ The transfer depends on words or symbolic actions, and these may or may not include a physical exchange.

When we buy a physical object or a piece of land, we acquire a set of legal rights and duties concerning it, and the previous owner has the money we once had. (The legal statuses include, for instance, the right to use what is owned, the rights to its fruits, liability for upkeep and taxes, and so on.)⁸ After the sale each party has something the other had before the sale: the rights, privileges, liabilities, and so on which are constitutive of the legal status of ownership transfer without alteration to the buyer; rights over a sum of money pass unchanged to the seller.

Once we understand this, we see something else crucial: nothing can literally be sold unless someone has certain prior legal relationships to it. Roughly, nothing can be sold unless it is first owned. Ownership

7. I will use the phrase "rights, duties, and liabilities" and similar phrases to indicate a full Hohfeldian set of legal statuses: claim rights, duties, privileges, powers, liabilities, and immunities (Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal*, vol. 23 (1913), and an article by him of the same title in the same journal, vol. 26 (1917), pp. 710–67.

8. The locus classicus is A. M. Honore's "Ownership," in *Oxford Essays in Jurisprudence*, ed. A. G. Guest (Oxford: Clarendon, 1961), pp. 107–47. His list includes rights to possession, use, management, income, capital, security, transmissibility, and others. In "Full Ownership and Freedom" (1992, typescript), I develop what I think is a more ordered list.

admits of degrees; I can own a sewing machine more completely than I can own historic buildings, for instance, since the law allows me to do whatever I want to the machine but not to the building. Not every set of rights, duties, and so on concerning an object constitutes ownership. Full ownership includes the privilege of using something, a claim to state assistance in excluding others, and the right to alter and destroy what is owned. Some subsets of the rights which constitute full ownership also count as ownership; I will not try to explore the precise boundaries of the concept here.

Nothing can be sold, then, unless rights over it can and do exist. Nor can anything be sold unless it is possible to separate those rights from the person who has them. Unobjectionable sales concern rights which not only can exist but also morally may; and which it is not only possible but proper, as well, to separate from the owner. This supplies four different grounds on which an exchange might be blocked; and of course there is a fifth, for possibly something which is appropriately owned and given should nevertheless not be sold. Some people believe this about blood and kidneys.⁹ The same can be said of certain actions, such as sex (which, done for money, becomes prostitution) and judicial decisions (which cease being just).

In this article I identify these considerations, flesh them out, and organize them logically. I do not try to refine them or defend them.

WHAT CANNOT OR SHOULD NOT BE OWNED

Some Things by Their Nature Cannot Be Owned

Some of Walzer's blocked exchanges concern things over which legal rights are not possible. The clearest examples are friendship, love, and divine grace.

Friendship and love.—An essential element in friendship is spontaneous mutual appreciation; love is a matter of joy in the other's presence (at least sometimes) and concern for his welfare. These attitudes cannot be willed. The law cannot guarantee that they continue.

That is not to say the law is helpless; it could punish breach of promise and adultery, and the fear of punishment might lead to some curbing of desire. But the connection would be contingent and indirect. The essence of friendship and love is an inner attitude beyond the reach of the law. Of course one could have legal rights to their simulacra, to companionship or service. But those are not the same thing.

9. There is a different set of questions about ownership, having to do with language, which is beyond the scope of this article. I have an exclusive right to the use of my kidney, and the law will help keep away anyone who wants to take it without my consent. Whether we should call that relationship ownership, whether we should call our bodies property, is a question I do not address here. I will use the language of ownership for convenience, but I mean the words only to refer to legal states of affairs.

Divine grace.—By definition no one can have legal rights to the pleasure of God or gifts from God. An omnipotent God is beyond the reach of the state. It is meaningless to talk of protecting with force one's status before God. The reason one cannot sell divine grace is that one does not own it to begin with.

Again, however, we could have a legally constituted right to simulacra, to the performance of certain actions by priests. Failure to perform and interference with performance could be punishable by law. But whether these actions bring with them grace is not up to human beings.

If we move from secular to ecclesiastical law, things get murkier. Some churches hold that some of their officers have special powers. The church decides who holds those positions, and then God works through these people in special ways. In such a case the church claims control over a conduit of divine grace and indirectly over the grace itself. (There may be theological objections to this picture, but I want to set those aside.) What is claimed here is a kind of ownership, and therefore the later questions of how these offices can and should be transferred can sensibly be asked.

From this discussion we can formulate a general principle: nothing can be owned unless it is something over which laws can be effective. Affection and divine grace are not ownable because our having them is not subject to law.

(We might also ask why anyone would bother to forbid a market which is impossible anyway. The answer must have to do with our fear of simulacra, which are quite possible and are degradations of something important and good.)

There is a second way in which things can be not-ownable: the use of some things cannot be confined to any individual or group. Some public goods are by their nature nonexclusive: the air we breathe, the climate of trust in which we operate, quiet. To some of these things we can have enforceable rights, and conceivably those rights could be owned and sold. But since those rights are not rights to exclusive use, nor to alteration or destruction, they do not constitute ownership.

Some Things Could Be (Fully) Owned, But Should Not Be

Human beings.—People should not be owned. The Kantian reasons are familiar: people have purposes (and, neo-Kantians might add, feelings and desires), and these must be treated as valuable in themselves. Persons can and must take responsibility for some of the shape their lives take; respect demands that they be allowed to. Ownership makes the subjective lives of others into means only.

In fact, it might seem that people not only should not be owned, they cannot be. Power over objects is direct: we can pick them up, move them, change them, destroy them. But power over people is

ordinarily indirect: we influence their choices. Legal power over people is usually a matter of threatened punishment. The justice system does sometimes physically restrain or confine people, but the system would not work unless most people were dissuaded from even trying to break the law.

Nevertheless, this picture is misleading, not in what it says about the way law influences people, but in what it suggests about owning objects. Property is not a relation between a person and an object, it is a relation among people about that object. Something is legally mine only if I can call in the police to keep others from taking it. Titles to diamonds, like titles to slaves, are effective because threat of legal punishment influences the choices people make.¹⁰

In slavery, of course, people were owned. A set of legal arrangements existed between people about other people. Because even an owned person makes choices, the slave owner had to use different means of control than a tractor owner would; he had to influence the choices that the slaves made. The law, too, punished actions by slaves (and of course tractors perform no actions); there is a difference in property laws about machines and those about people. But a major element in slavery was that other people—nonowners—could not interfere with what a slave owner did and could not legally help the slaves escape. The state did not (much) limit what the owner could do and did limit what nonowners could do about it.¹¹

People, then, can be owned. In fact many rights over others falling far short of slavery have been called property rights. Some arise from contract; employers and employees have rights over one another. Some arise from status: parents can make many decisions about their children, and in turn children (through representation) have enforceable rights to support and proper treatment. Alimony has been called one spouse's property right in the other. In all of these cases people can use some of the power of the state to persuade others to act.

Perhaps these arrangements should not be called property rights at all. But questions of language aside, these other rights over persons help us define by contrast what should not exist: no one should fully own—have a complete legal right to dispose of—any other human being.

Public goods.—Although they disagree about details, most political theorists agree that some public goods should be beyond private control, for reasons of efficiency, justice, or community. Earlier I spoke of

10. So, too, is the lack of legal recourse for a thief, who could not call in the law to keep others away, nor sell it and depend on keeping the proceeds.

11. This of course differed from regime to regime. For a comprehensive study of slavery in many different cultures, see Orlando Patterson, *Slavery and Social Death* (Cambridge, Mass.: Harvard University Press, 1982).

public goods that cannot be privately owned, like quiet; here I refer to things that could be but should not be privately owned. I use the term ‘public goods’ roughly and stipulatively to include those things that are preconditions of community life, such as defense and roads, as well as those that preserve community resources, like wetlands that protect biological diversity and forests that maintain the ozone layer. Furthermore some of the necessities of individual life—food, water, and shelter—need to be publicly available, but the prohibition here is against full ownership not of any particular loaf of bread but of the whole supply.

Art and historical objects partially constitute the life of the community, and some of these need to be kept from total private ownership. A Rembrandt, the original Declaration of Independence—these must be protected. If they go into private ownership, then it cannot be full ownership: the person who paid money for the sake of private enjoyment should not have the right to deface or destroy it. Furthermore, some things which merely adorn community or private life also should be kept public, things like beaches and parks.

The general principle here is that for the good of the community the individual ownership of some things must be limited or prohibited. Obviously there is a great deal of debate about what specifically falls under this principle, far more debate than I can address here. My purpose is only to identify the principle and relate it to others. So far I have named two major categories of blocked exchanges: those things which, by definition, cannot be owned (subject to legal control), and those things which should not be, for their own sake (e.g., human beings) or for ours (e.g., public goods).

WHAT CANNOT OR SHOULD NOT BE ALIENATED

Some Things Cannot Be Alienated

To alienate, to make other, refers to several different things. In one sense something is alienable if it can be disconnected from the person it is now connected to and yet go on existing. In this sense we can alienate land—transfer its ownership to someone else—but not our memories.

In another sense to alienate something means simply to cease to have it, whether or not another acquires it. When Jefferson wrote of inalienable rights, he meant rights which not only could not be transferred to another person but also could not be lost.

One party might be able to alienate an object which another party could not. Honors, for instance, can be refused, but once given and received cannot be put aside by the recipient. Once a Nobel laureate, always a Nobel laureate. But the committee who awarded the honor could withdraw it, as they do when they discover fraud.

Few of the things about which market theorists worry are incapable of alienation. Nothing, for instance, on Walzer's list belongs here. His list concerns exchanges which have threatened to happen, and need to (continue to) be obstructed. Or, as in the case of divine grace, realms in which we fear counterfeit and deception. There seems to be nothing of either kind to fear here.

Some Things Could Be Alienated but Should Not Be

Natural rights may be inalienable, but legal rights are not. They can be lost, and conceivably they could be transferred to another. Much of Walzer's list belongs in this category: things that not only should not be alienable for money but should not be alienable at all. We should not be able to sell our freedoms of speech, press, religion, and assembly, our right to emigrate, to marry, to procreate—but neither should we be able to renounce them or give them away. The general principle is that persons should be in some respects invincibly armored against the state and other potentially oppressive agents.¹² This principle draws from an understanding of basic human flourishing—of the independence needed for moral growth, the privacy needed for intimacy. It also assumes the equal worth of all persons.

Something similar is true of our welfare rights to education and to police protection. It is not just that we should not be able to sell them; we should not be able to lose them or transfer them to another. The general principle is that states should provide everyone with what is essential for life and growth. That principle in turn appeals either to general beneficence, to the preconditions of genuine democracy, or to the just distribution of what communal efforts make possible.

Principles of justice and democracy also apportion some duties equally. No one can fulfill another's military duty, for instance.

All of these restrictions on alienability have to do with our rights against the state and our duties toward it. Again, I do not try to refine or defend the principles at stake. Instead I want to identify objections to alienability *qua* alienability and separate them from objections to alienation for gain.

WHAT SHOULD NOT BE EXCHANGED FOR GAIN

When there is no objection to giving some particular thing away, we may still object to its being given in return for something—particularly when what we gain is money. Two general concerns figure here. (1) Concerns about the entity sold or traded: babies, for example. (2) Concerns about those who are doing the exchanging; objections to a market in organs fit here. Finally, sale strictly so-called—as opposed

12. The transfer of marriage rights may be forbidden on additional grounds. Suppose someone does not want to marry; should she be able to hand over her particular right to a friend who wants to be bigamous?

to barter—raises specific questions. Does money make an exchange for gain worse? What is so filthy about filthy lucre?

Some Markets Mistreat What Is Sold

Babies can be given away. True, not even parents can simply transfer to someone else their legal rights concerning a child. All adoptions must be approved by the state. But parents (unless they've lost their own rights) can decide whether to release a child for adoption and, often, to whom. In these ways, not absolute but not trivial, parents can give children away. And they could do so in return for gain.

Many people hold that doing so would be trafficking in human beings, a form of slavery. But the rights and responsibilities transferred from birth parents to adoptive parents are very different from what is transferred among slave traders. The state bars itself and others from interfering with most of what slave owners do to their slaves; the primary purpose of the laws is to protect the owners. Laws respecting parental rights primarily seek the welfare of the children. Slaves are said to be owned because there is little restriction on what may be done to them. Children cannot be said to be owned.

But at least two legitimate worries about market in babies arise. One has to do with consequences: new incentive structures have unpredictable results. But there is a quite different objection, independent of whether the effects of the market would be good: is it right to treat babies as a crop?

First, the concern about results. When something acquires exchange value, people have new reasons to acquire and protect it. A market in babies would not change the motivations of adoptive parents, since babies would be what anthropologists call terminal commodities: once acquired, rights over children could not again be traded. Adoptive parents' motives would be what they are now, desires to love and be loved, to nurture, to pass on one's name, perhaps to be cared for in one's old age and remembered after death. (Note that some of these desires treat the child as an end, some treat it as a means.)

Biological parents, however, would have new reasons for what they do. Some would begin pregnancies simply for what they could gain from trade. One result, the one emphasized by market theorists, is that the supply of babies would be more likely to match demand. Even the "perfect" market, however, has results beyond itself. In this case there would be more babies available for adoption. Perhaps more of these would be "desirable": healthy white infants. But perhaps not; people who turn to this livelihood are likely to be desperate, quite possibly sick or users of drugs. In either case the number of "less desirable" babies that go unadopted would be likely to increase.

No one knows for sure; economic analysis is partly made up of speculation. But it's worth noting some of the other situations in which

altered incentives have had unexpected results. One is the story of tobacco in America in the seventeenth century. For the Indians tobacco had ceremonial value; for the Europeans it had exchange value. Once tobacco could earn money (or copper or guns) more of it was grown. Tobacco exhausts land, and new fields have to be begun every few years, so the demand for tobacco created a demand for land—and that led to conflict and violence.

One reason, then, to hesitate about giving babies—or anything else—exchange value is that doing so alters incentive structures, a change with unforeseeable results. Some consequences could hurt children, those conceived to be traded as well as those who result from miscalculation or misfortune. Yet powerful as this objection is, it doesn't seem to capture our real concerns. There is something stubbornly untranslatable in our objection to treating babies as commodities. Even if we could be sure that no one would be worse off, and everyone better off, human beings may not be treated simply as means.

As Kant said, human beings should not be treated “as means only.” But the phrase needs unpacking,¹³ since people virtually always are useful to one another, and paying attention only to that usefulness can be morally unproblematic. We can ask someone the time of day, or stand so that he blocks the sun from our eyes, without doing anything wrong.

“Treating someone as a means only” is not just an ignoring of someone's intrinsic value but a denial of it as well. Affirming their intrinsic value includes acknowledging their worth; allowing them to be, to function, and to grow; and fostering all of that. Endangering, hurting, and destroying people are obvious cases of treating them as if they had no intrinsic value.¹⁴ Failure to acknowledge their worth is a more complicated subject.

Not-attending-to implies “you are worthless” in some situations but not in others. Richard Wasserstrom gives a vivid example of the former: a southern newspaper reported that “all the children in town” took part in a festival, when only the white children had participated. A factory that puts waste in local water and never asks whether the waste is dangerous treats its neighbors as if they did not matter, even if it turns out that the waste is harmless.

Treating someone “as a means only,” then, should be understood as actions inconsistent with valuing people in themselves: harm; coercion; deception; and those actions that imply that someone has no intrinsic value. With that clarification, let us return to the question of markets

13. My treatment is neo-Kantian rather than an exegesis of Kant himself.

14. Strictly speaking this is true only if nothing else is gained by the harm, force, or deception. But it is true then, and my purpose is only to illuminate the connection between these wrongs and the failure to treat people as ends.

that demean what is sold, using as our example a market in babies. Exchange value is a particular form of instrumental value. Like other forms of instrumental value it coexists easily with intrinsic value; recognizing exchange value does not eliminate an appreciation of something's intrinsic value. The dealer in oriental rugs or in renaissance paintings may fully appreciate the beauty of his stock. But the decision to sell something is a decision about its whole future, made purely on the grounds of gain to the seller. If the "stock" is babies, the state might hedge the transaction with safeguards, and the birth parents might choose the buyer carefully. But if you conceive a child you do not mean to keep, you may be forced to let it go to an unsatisfactory home—or keep it where it is unwanted. You have done something with profound implications for another person's future, and your most important motivation had nothing to do with that person's welfare. You have treated a human being as a means only.

Now in most actual cases of contracted motherhood the biological mother has been confident that there is a family eager and able to care for the child; although these women would not have conceived unless money were offered, neither would they have done so if a home were not available.¹⁵ It is just because their motivations are mixed that we are unclear how to respond. If they believed they were not endangering the baby, then *they* were not treating it as if it had no intrinsic value. Yet a publicly sanctioned market in babies, of the kind for which Posner argues, would allow conceptions where neither the mother nor father intended to raise the baby. Whether or not that ever happened, providing the legal space for it would be tantamount to approval of it.

In any case my purpose here is not to resolve the dispute about contracted motherhood but to isolate and explicate one kind of objection to markets. A different example of the objection arises for scholars. We study and write for many different reasons; in part we want a secure job and the respect of others, but we also do it for the sake of the work: we want something important to be better understood.¹⁶ Inevitably, though, work earns rewards, and the reward can become too important. The more we shape our work to earn money or attention, the more uncomfortable we (should) become; when the pursuit of money or glory dominates, then our work has been demeaned. (I give more attention later, in the fourth section, to the ways in which actions change their meaning when done for money.)

15. I owe the term 'contracted motherhood' to Sara Ann Ketchum. As she points out, "surrogate" mothers are just mothers who have agreed to transfer their rights over their children to others, usually the biological father ("Selling Babies and Selling Bodies," *Hypatia* 4, no. 3 [Fall 1989]: 116–27).

16. We also want to be its author; this is a desire for personal worthiness. Some might call that an admixture of egoism; I would not, but that is a subject for another day.

Some Markets Are Bad for Seller and Buyer

The suggestion of a market in human organs excites similar opposition. Yet a part of a human being is not a human being; treating hair, for instance, as a commodity is not treating a human being "as a means only." But fears about altering incentive structures, mentioned above because of consequences for the object of exchange, also fit here; if money can be made from selling organs, a lot more of them will be offered. That would seem to be good for those who need transplants, but not unequivocally; people offering their organs for profit would have a reason to conceal facts making their organs unsuitable. Beyond that, we all know that those most likely to submit to painful and invasive surgery, and to accept the risks involved, will be the poor. In contracted motherhood in the United States poor women offer their wombs and their babies, rich women pay for them. In other words, we wonder about endangering buyers and exploiting sellers.

Besides the question of unfair treatment of one party, objections to exchange sometimes concern the nature of the relationship involved. In *The Gift Relationship* Richard M. Titmuss argued that a gift relationship is superior to a commercial one, since gifts essentially involve concern for other people, while the market demands only rational self-interest.¹⁷ He held that putting something on the market destroys the "deeper freedom" to give what is priceless.¹⁸ Defending this position, Peter Singer talks about changes in social understanding: "The idea that others are depending on one's generosity and concern, that one may oneself . . . need the assistance of a stranger, . . . [that] we must rely on the good will of others rather than the profit motive—all these vague ideas and feelings are incompatible with the existence of a market in blood."¹⁹

Some of these concerns are easier to specify and to remedy than others. Diseased and defective organs can often be identified and discarded.²⁰ Exploitation and injustice are far trickier to deal with; the philosophical literature on these issues is large. The same is true of claims about lost freedom,²¹ and of fears about changes in social re-

17. Richard M. Titmuss, *The Gift Relation* (New York: Pantheon, 1971).

18. Peter Singer, "Altruism and Commerce: A Defense of Titmuss against Arrow," *Philosophy and Public Affairs* 2 (1973): 312–20, and "Freedom and Utilities in the Distribution of Health Care," in *Market and Morals*, ed. Gerald Dworkin, Gordon Bermant, and Peter G. Brown (Washington, D.C.: Hemisphere, 1977), pp. 163–64; cited in L. Lomasky, "Gift Relations, Sexual Relations and Freedom," *Philosophical Quarterly* 33 (July 1983): 250–58.

19. Singer, "Altruism and Commerce."

20. Public discourse is overly optimistic about this. For instance, HIV often is not detectable until months after it has been contracted. Furthermore this solution is possible only when we're talking about organs. If someone conceives a baby in order to sell it, then discovering its medical problems only reveals the problem. It solves nothing.

21. I examine this issue in detail in my "Full Ownership and Freedom" (n. 8 above).

lationships and in cultural climate. In this article I only locate those concerns; I do not refine or defend them.

Money Adds Particular Problems

The objections I have identified so far apply to barter as well as to sale. But sale—exchange for money—creates several particular problems.

Money is a peculiar thing. By definition it is highly abstract and makes a fully ordered set with no highest number; its distribution tends to be highly uneven and based on limited characteristics. Each of these dimensions has ethical implications.

First, prices are fully ordered: every price is either equal to, less than, or more than every other price. Everything priced is commensurable: this diamond ring is worth four thousand roller skates; that airplane cost twice what this house did. Should rights over babies be put on the market, a child would know that she cost, say, about what a second car for the family would have cost. She might also know that she cost more, or less, than other children. One moral danger, then, is an erosion of our sense of the uniqueness of what once was “priceless.”²²

Second, money accumulates. It is a form of power, as are physical strength, talent, legal status, and social standing. Like these, money begets more power: markets can be cornered, resources bought, political influence cultivated. But unlike most other forms of power, money can be accumulated endlessly: there is no highest number. Furthermore, preserving it is relatively simple; money does not rot, it takes up no room, and it can often be guarded more efficiently than objects.

Third, money accumulates unevenly. Not only do some people have vastly more than others, they collect it through various combinations of good fortune, hard work, and native ability. Moral desert is at best one of the factors at work. Perhaps luck, effort, and ability are good reasons for allowing someone to travel more widely and live more comfortably than others can. But it is not clear that they justify a greater chance at surviving disease or at establishing a family.

22. It is not my purpose in this article to evaluate these possibilities. For further discussion, see Nancy C. Hartsock, *Money, Sex, and Power* (New York: Longman, 1983), p. 98 and passim; Erick Mack, “Dominos and the Fear of Commodification,” in *NOMOS XXXI: Markets and Justice*, ed. John W. Chapman and J. Roland Pennock (New York: New York University Press, 1989), pp. 198–225, esp. p. 217; Jan Narveson, “The Justice of the Market: Comments on Gray and Radin,” in Chapman and Pennock, eds., p. 271; and Margaret Jane Radin, “Justice and the Market Domain,” in Chapman and Pennock, eds., pp. 165–97, esp. p. 171. Many have argued recently that we humans are far too arrogant about the differences between ourselves and the nonhuman world. But the thrust of those arguments is almost always to give greater status to the nonhuman rather than less to the human.

Fourth, money is purely instrumental. Assigning a monetary value to something emphasizes its instrumentality and makes it more likely that that thing be treated simply as a means.

Fifth, money provides diminishing marginal utility. One hundred dollars means less to a Rockefeller than to a postal clerk. And some things, perhaps, should cost us roughly equally.

The abuse of indulgences illustrates some of this. Suppose we accept for a moment some theological presuppositions: that after death people will suffer for a while in purgatory until, purified, they are allowed into heaven, and that voluntary penance on earth can reduce time in purgatory. Suppose we accept, too, that the church can designate that some actions are equivalent to others: that saying certain prayers, for instance, reduces purgatory time as much as one hundred days of penance would. From here it's an easy step to rewarding certain helpful actions with indulgences, actions such as cleaning the sacristy or embroidering vestments. And after that comes the fall: what is more helpful than money? Why not reward contributions to the church with indulgences? (On this interpretation the church did something it should not have done, rather than claimed to do something it could not have done. The second question raises quite different issues.) The church should not have sold indulgences because money is too far removed from the sphere of personal desert to which indulgences are properly attached. A cost in dollars is not the same as cost in sincere prayer or bodily service.

Another example is the legal obligation to serve one's country. No kind of contribution would cost everyone exactly equally; time means more to some people than others, physical effort comes more or less easily. Still, time and effort burden people more equally than monetary expense does. So we forbid buying one's way out of service in order to make more equal demands on each person.

If we turn to what should not even be owned, much less transferred to others, money darkens that picture, too. Is it worse to sell slaves than to give them away? Yes, other things being equal, and for some of the reasons just given. If it is degrading to be owned—to be fully subject to the will of another—being priced adds insult to injury: the slave is one commodity among others, worth perhaps less than a house and more than a horse. Furthermore, the slave being sold is treated as “a means only.” In an auction or purely commercial sale, the seller must yield to the highest bidder or the first offer. The decision about the slave's new owner, one which deeply affects the slave, is not made for the sake of the slave. Seller and buyer need only be moved by their own self-interest.

WHEN ACTIONS ARE “FOR SALE”

When contracts, promises, and agreements to act involve money, we sometimes use the language of sales: “He sold his talents to Exxon.”

“MGM has bought her next two performances.” This is especially true when we disapprove of what happened: “She sold out.” “The senator has been bought.”

From Walzer’s list, the following concern actions done for money: “desperate exchanges” such as dangerous or degrading work, “selling” political power and influence, public office, and criminal justice, and agreements to break the law.

Are Agreements to Act a Form of Sale?

I would argue that these transactions are not really sales: that the “seller” does not hand over, unchanged, a bundle of legal rights and liabilities which had made him an “owner.” Others, however, hold that these agreements are a kind of sale: that, for example, when a ballplayer signs with a team, he sells it exactly what it can then sell to another team: rights over the use of his time.

In opposition I would note, first, that it is often a struggle to say clearly what has been sold. Time? Effort? Ability? Freedom? (Honor?) Second, whatever it is that has been sold, it was not originally “owned” in the same sense that land and licenses are. Third, there is not just a trade in legal statuses. Typically the employee must now seek the employer’s goals, the employer must provide for and protect the employee. None of these obligations existed before the initial agreement was struck. Compare this with the sale of a house, or of a player’s contract: the new owner now has exactly those rights and liabilities which the previous owner had. In contrast, most of the legal rights, liabilities, and so on that result from contracts of service arise *de novo*. They do not preexist the arrangement and thus are not transferred from one party to the other.

Finally, the courts treat contracts for personal service quite differently than they do sales. When a sale is held to be valid, the seller must relinquish what she sold. But when the courts enforce a contract of service, the “seller” (the person who received money) is rarely required to do what he promised to do (although he will have to make recompense of some kind).

I think the attractiveness of the “sale” paradigm reflects the extent to which exchange theory, and neoclassical economics, operate as unchallenged assumptions. Note, for instance, the persistent tendency to think of gifts as disguised sales.

However, I need not settle the disagreement here. Whether agreements to act really are sales or only metaphorically so, certain interesting questions arise within them, and only within them.

The Moral Considerations

Before presenting the questions specific to the “sale of actions,” let me note that many of the problems I have identified in ordinary sales also crop up here. We block employment contracts for dangerous and

degrading work out of fear of injustice and exploitation, the same reasons for which we block the sale of organs.

Most contracts for service which are blocked, however, are blocked for a different reason. They concern actions, and actions inherently involve purposes. When something is done for money, it is done for a different purpose than it otherwise is, and the change in purpose can change the nature of the action. To use an example of Eric Mack's, sexual love is not simply a "fee-free version" of prostitution.²³ Many interactions change so radically when they are done for money that they need new names. Take the court system: a judge whose decisions have been bought is no longer dispensing "justice," because he or she is no longer deciding on the basis of evidence and law.

The new institution—criminal injustice, let us call it—is inferior to the one it replaces. Of course the judge has broken promises and broken the law, which adds to her wrongdoing; but it is not just the fact of her promise that matters, but its substance as well. Criminal justice, ideally, treats people equally; in it (again, ideally) people determine their own futures by the choices they make.²⁴ Bribery destroys all this.

The special characteristics of money highlight some of what has been lost. For one thing, since money accumulates so unevenly, no kind of equality before the law survives. For another, one's fate before the law depends not on one's conformity to it, but on the luck and effort which brought one money. Those qualities which lead to wealth, even the most admirable of those qualities, are only a subset of what makes people worthy.

The same is true of democratic office. When the person in office is chosen by the voters, the office is democratic; when the person in office is chosen by people with the most money, the office is not.

Sex is a borderline case of this kind of essential change. Ordinarily sexual interaction expresses many things, among them desire, affection, love, or commitment. The lovers may be set on exploitation, mutual reverence, pleasure, determined dedication, or some combination of these and other purposes. All of this informs what they do and what they experience.

In commercial sex the partners need to care only about themselves. Each wants one thing—money, satisfaction, domination—and each agrees to give what the other wants. Neither needs to care about the other. Objections to prostitution assert that sexual interaction should not be a meeting of mutually self-interested parties, treating one another only as a means to their own ends. Objectors hold that mutual concern is central to sex as it should be and that any arrangement which makes mutual concern unnecessary and unlikely should not exist.

23. Mack, pp. 198–211.

24. Herbert Morris, "Persons and Punishment," *The Monist* 52 (1968): 475–501.

Divine favor is something else which would not be what it is if it could be bought. I suppose a deity is imaginable who looks with favor upon the wealthy²⁵ or upon those who support his work with the most money. But that could not be the God of the Judaeo-Christian-Islamic tradition, loving all equally, responding to purity of soul.

Respect is another interesting case. On the face of it we cannot respect someone because of the amount of money she has. Yet in a way we do; we can certainly be impressed. And we might well respect the effort and ability which brought her wealth. Still, that would not be respecting her for her money, but for what the money represents. And it's hard to imagine one person paying another for respect; one would get instead respectful actions, what MacIntyre calls 'simulacra', not the same thing at all.

And so for prizes and honors: they represent accomplishment and merit. If they could be bought, they would represent something else: the luck, particular effort, and specific abilities which give one wealth. When a prize is bought, it is not really a prize at all.

Prohibitions on doing something for pay, then, usually concern actions whose very nature changes when money motivates them. Our language suggests that it is the presence of money which contaminates the interaction. Almost always phrases like "X is for sale," when they are not literally true, are pejorative. My analysis suggests that it is not so much the presence of money as the absence of other things to which we object; but that is not quite the whole picture. Take, for instance, a recent article praising Jimmy Carter for his work in conflict resolution. In saying "For Carter the presidency has a 'Not for Sale' sign," the writer implicitly criticizes Ronald Reagan, who accepted a million dollars for a brief appearance in Japan. The implicit criticism was not just of the former president's doing nothing, but of his using his office for self-interest.

We use terms like buying and selling, then, partly to lament the extinction of something good but also to rebuke the substitution of self-interest for the other, preferable, motives. If what Reagan had received were a priceless *netsuke* I suspect there would have been less outcry. Money seems to us the capital occasion for selfishness, because—I think—of its pure instrumentality. Desire for money has no admixture of appreciation of something's intrinsic value, as would desire for an exquisite carving.

CONCLUSION

Questions about the proper scope of the market will always be with us. Money is so powerful that the borders between its domain and others will always need defense. At the beginning of this article I

25. Calvin's God, I believe, rewarded the worthy with prosperity. The wealth was a sign, not a cause, of divine favor.

described a number of perspectives which have been offered to help us draw the borders clearly. Margaret Jane Radin protects nonfungible property from the full force of the market; Michael Walzer limits the market in order to lessen oppression; Elizabeth Anderson analyzes market relations (impersonality, self-interest, and so on) and shows that some good things cannot survive within them. Mark Nelson derives a number of principles from a set of examples; the examples are not logically generated, and the principles are only loosely related to one another.

The perspective I offer here is more complex. There are many reasons why some sales cannot or should not take place. The questions we need to ask include the following:

The possibility of ownership.—Is it possible for this entity to be controlled by legal arrangements? (Divine grace and friendship cannot be.)

The morality of ownership, that is, exclusive control.—Is this the kind of thing which may legitimately be controlled? (No person should be completely subject to another.) Is this the kind of thing which may legitimately be kept from others? (Public goods should be available to all.)

The possibility of alienation, that is, separation.—Can this thing be separated from the person to whom it now attaches? (Moral rights cannot be lost.)

The morality of alienation.—Should it be possible for anyone to lose this? (Basic civil rights should be inalienable.)

The impact of the market on what is exchanged.—Does exchanging this thing for gain endanger or demean it? (Some babies conceived for sale would suffer; some would be treated “as means only.”)

The impact of the market on buyer and seller.—Does exchanging this thing for gain exploit, endanger, or demean anyone? (Commercially obtained organs may be contaminated; sellers are poor and desperate.) To what extent does the market relationship of mutual self-interest crowd out other relationships of mutual concerns?

The way money shapes an interaction.—Everything priced is commensurable. (Can we retain an understanding of a child’s immeasurable worth if the child was purchased?) Money is unevenly distributed; accumulating it depends upon luck, work, and ability. (Should civic duties be distributed upon different criteria, perhaps equally?)

The fact that accepting money essentially changes some actions.—Does allowing people to do this for the sake of money destroy something of value (democratic office, prizes, criminal justice) or replace a desirable institution with a less desirable or bad one (prostitution)?

I doubt that any single principle or perspective can synthesize all these questions. Yet they are more than simply a list. They form a logically related set which can help us think in an orderly way about the questions which steadily confront us.

POSTSCRIPT

Many audiences have pointed out to me that these questions are double-sided. A relationship can be improved, for instance, by being commercialized: money can counter social prejudice and bring it about, for example, that racists sell to and behave civilly toward minorities. The positive side of commodification could be approached through the same taxonomy with which I have here sketched the negative side.

The Ethical Limits to Markets

In [Chapter 5](#), we considered whether moral norms constrain what people do and whether they constrain, or ought to constrain, what it is rational to do. In this chapter, we turn from questions about how morality affects individual behavior to questions about how morality limits and ought to limit the use of and scope of markets.

Markets are, of course, the central institution that economists study. Despite this, there is little attention paid to explaining exactly what a market is: most introductory economics textbooks do not even bother to define it. Markets may seem simple – a set of easy equations that can be depicted by supply and demand curves – and natural – a spontaneous form of ordering relationships between people. But in reality, Adam Smith’s “simple system of natural liberty” is a complex social institution. Any market presupposes property rights, so that trade and theft can be distinguished. All markets are governed by rules. These rules specify what the basic elements of a market are: Who counts as a trader? What counts as a commodity? What counts as a contract? These rules also specify how these elements may interact: How frequently may any one individual make trades? What kinds of actions may traders take against one another? In every developed economy that uses markets, law plays an important coordinating, regulating, and enforcing function ([Satz 2010](#)). The completely “free market” is an illusion.

Most market transactions are also “arm’s length” in that the players in a market are strangers to one another. Because of this, and because it is often hard to judge the quality of tradable goods (think of used cars), markets depend on the availability of information and on social norms demanding trustworthiness. While *Homo economicus* may be self-interested, he must not lie, cheat, or steal if markets are to function well. This point is often overlooked, but it is important, especially when exchanges are spread out in time and space. The creation of the more or less trustworthy, self-interested

trader is a social achievement, which plays an important role in the functioning of contemporary markets; untrustworthy agents can undermine markets, especially when they have disproportionate market power.

6.1 Are There Any Limits to the Reach of the Market?

From the standpoint of modern economics, in theory almost any good or service can be distributed through a market, as long as the good or service in question is scarce, and it is possible to define and enforce property rights to it. Thus, air is not bought or sold on the market (since it is in effect limitless),¹ but clean water is. Some goods are best distributed by nonmarket mechanisms or in highly regulated markets because of their technical features: for example, goods that form natural monopolies. It makes little sense to build two competitive water-pipe systems for a village, even though it is possible to do so. But aside from such cases, standard economics argues that efficiency provides a reason to distribute goods through the market, whether the goods in question be guns or butter, human hearts or automobiles, slaves, pencils, or toxic waste. The equations that will appear on the economist's blackboard are indifferent to what is being equated. In fact, in its most abstract form, general equilibrium theory presupposes complete markets – a price for anything and everything in all possible present or future states of the world.

All societies have, however, limited what can be bought and sold. Human beings, votes, national sovereignty, human organs, criminal justice, and religious salvation are some of the items that many societies distribute, if at all, by nonmarket means. Whether to allow trades of some of the items on this list, such as human kidneys, are matters of current debate, and some have tried to extend the market's reach as far as possible. Even as we write, there are online Web sites where adulterers can buy an alibi, individuals can offer their foreheads as advertising space for companies in return for a fee, and “immortal souls” have been for sale on Ebay. This expansionist philosophy contrasts with older views like those of Aristotle and Aquinas, who regarded some transactions as impermissible and some ways of making money as unnatural or as a form of vice.

In addition to debates about particular markets and particular transactions, some social theories express a more generalized anxiety toward the market as an agent of social corruption: as undermining a sense of the

¹ Although see <http://blogs.wsj.com/chinarealtime/2014/03/31/bags-of-mountain-air-offered-in-smog-addled-chinese-city/>

sacred, as eroding the value of altruistic actions, as alienating and facilitating exploitation, and as weakening important human solidarities (see G. A. Cohen (2009), Hirschman (1985), Marx (1977), and Polanyi (1944)). We can see these anxieties at work in such cultural touchstones as Arthur Miller's *Death of a Salesman*, where Willy Loman's dismissal by his boss is depicted as both cruel and driven by a relentless market logic, "cause you got to admit, business is business."

6.2 Market Virtues

Notwithstanding these criticisms, a great deal can be said ethically on behalf of markets. First, markets are often the most efficient way to allocate goods and services. Through their reliance on a division of labor, markets allow people to specialize in distinct tasks and enhance efficiency. Although a focus on efficiency can narrow ethical considerations, efficiency is of great moral importance. An inefficient medical system means that people have to pay more for treatment or that they receive fewer treatments. Economic decline and stagnation seem invariably to hit the poor the hardest.

Second, markets permit the simple freedom of being able to choose among alternatives as one pleases (provided that one has the means, of course). Because markets operate through millions of individual decisions, they empower people to act as choosers, at least within this domain. For example, you do not typically need anyone else's permission in a market situation to decide to buy one type of food over another. You can be a vegan, consume nothing but meat, keep a kosher kitchen, or eat no grains. This makes market transactions an ideal form of social interaction among people who disagree with one another or have different tastes – whether the disagreements are about food, or religion, or music, or the aims of life.

When markets function well, they display important virtues, in addition to efficiency. Because there are consequences to each individual market choice, markets encourage a calculating rationality. It makes little sense for a person on the market to hold the intransitive preferences that would turn him into a "money pump." In addition, the fact that markets depend on the behavior of a very large number of transacting actors has the effect of making no one dependent on any single overlord. Adam Smith observed that this erosion of "servile dependency" was among the market's most powerful effects: "Each tradesman or artificer derives his subsistence from the employment, not of one, but of a hundred or a thousand different customers. Though in some measure obliged to them all, therefore, he is not absolutely dependent on any one of them" (*Wealth of Nations*, p. 420). However, when markets are close to

being monopolies, or when what is traded is urgently needed by one of the trading parties, then this independence is threatened.

Markets also distribute information to people in the form of prices. Hayek exaggerated when he saw this mechanism as enabling a form of “spontaneous order,” since regulations are needed to deal with everything from transaction costs – for example, with the frictions that arise when information is costly to obtain – to specifying and enforcing property rights. Nevertheless, markets do decentralize many decisions and permit price information to influence the production and distribution of many goods. By providing the trading parties with all the relevant information (which sometimes is a big assumption), markets make it likely that they will only enter into trades of benefit to each of the traders.

6.3 Market Limits

In an ideal market transaction, individuals are free to exchange or not to exchange, and their interactions have no effects on others. Many actual markets are, however, not like this. Interactions among individuals who are exchanging goods and services may provide benefits to third parties or impose costs on them. Some market exchanges generate externalities – that is effects on others who are not party to the exchange. Climate change is an example of a massive externality; every time we drive our cars we contribute to what appears to be a significant and harmful change in the Earth’s climate. In addition, some goods are indivisible and nonexcludable, such as military defense, and some markets are characterized by asymmetric information between the suppliers and consumers, such as health care and used cars. Where markets are inefficient for one or another of these reasons, freedom may be threatened, and it may be possible to make people better off by interfering with and regulating or preventing certain market interactions. Whether market regulation or alternative forms of allocation can in fact improve on outcomes needs to be considered on a case-by-case basis. Sometimes a little bit of inefficiency is preferable to a lot of centralized oversight, and government has its own inefficiencies and poses its own threats to freedom.

Limiting markets limits some individual freedoms. People who have things they want to sell and the others who want to buy them are prevented from doing as they like. Sometimes such limitations may wind up enhancing freedom overall – some people argue that this is the case with enforcing a minimum wage – but the immediate direct effect of limiting markets consists in making some choices unavailable to people.

Sometimes these limitations of freedom can be justified on the grounds of efficiency. When voluntary transactions cause harmful externalities – that is, negative consequences on third parties – then there is a trade-off between protecting an individual's freedom to engage in a particular transaction and protecting third parties from harm. In assessing this trade-off, one needs to consider the costs of enforcing the limitations on individual interactions, which may be significant.

Some markets that are limited, such as the purchase and sale of marijuana, involve few significant externalities, and the case for these limitations is more fragile. John Stuart Mill famously argued in *On Liberty* that if the voluntary interactions between competent individuals do not harm or risk harming third persons, then those interactions should not be limited by law or public opinion. Mill's argument against interfering in actions that do not harm others remains controversial, and he himself pointed to some qualifications when he argued, for example, that individuals should not be allowed to sell themselves into slavery.

Economic analysis cannot by itself resolve the major questions of whether and when to limit the use of markets for *ethical* reasons. For example, it might be objected that many of the problems with markets can be solved through markets themselves. Thus, we can price the externalities generated by pollution and sell the rights to pollute to companies. Once it is properly priced, the externality from pollution disappears. Ronald Coase argued that once property rights are clearly defined, transacting agents may be able to negotiate a mutually beneficial solution in the face of externalities and other market failures (1960). Some economists argue that most externalities can be dealt with in this way.

The theory of market failure does not tell policy makers what the limits of the market *should* be. The fact that legislators can, at least in principle, respond to market failures by introducing new markets does not tell us whether it is a good thing to do so. Are there *moral* reasons to limit certain markets? For example, representative governments do not allow the buying and selling of votes even though there could be efficiency gains from allowing this sale, with those who do not value their right to vote exchanging it for a fee. Concerns about democracy rather than efficiency ground the objection to vote selling. Concerns about inequalities also ground objections to leaving the distribution of goods such as schooling or health care to the market, while market distribution of other goods, no matter how unequal, may seem unproblematic. Why? And what follows from this about redistribution? These are questions for moral and political philosophy.

Before turning to issues of ethics, however, it is important to note the contribution that economics makes to these debates about the moral limits of markets, by empirically assessing the costs and benefits of different allocation systems. Such assessment is hard to come by, since it will often involve some factors that are hard to measure as well as counterfactual effects. What, for example, would be the consequences of allowing a widespread market in women's reproductive labor ("surrogate motherhood")? It is difficult to determine this, but once determined, it can contribute to ethical debate and discussion.

We can see one economic approach to the ways that moral values influence markets in recent work by the Nobel laureate Alvin Roth (2007). Roth argues that economists can treat the fact that people view certain markets as "repugnant" as a constraint on market design, akin to a technological or information constraint. He believes that economists should take this repugnancy constraint into account when studying how to improve certain markets, but should also challenge it: economists have "an important educational role of pointing to inefficiencies and trade-offs, and costs and benefits [of the persistence of such repugnancy]" (p. 54).

Consider the fact that many people view kidney markets as repugnant and most countries prohibit them. The one exception at the present time is Iran. (We should also note that, although illegal, the purchase and sale of kidneys happen anyway, especially in India, where there is a large black market.) At the same time, the number of people on transplant lists in the United States keeps growing; it was more than eighty-five thousand in 2014. Our repugnance at selling organs is not only inefficient; it costs human lives. Roth's work seeks to work around our repugnance to kidney markets by trying to design a system of kidney exchange that does not elicit repugnance – for example, a system of exchange that does not rely on prices. Most people admire living donors who give one of their kidneys to others; it is only when money or material reward is involved that repugnance is elicited. While it is in principle easy to arrange a one-for-one trade (for example, when two women, each of whom needs a kidney, has a donor incompatible with herself, but compatible with the other recipient), arranging a large number of matches poses a logistical problem coordinating hospital surgeries. Notice that working around people's repugnance demands that economists understand the grounds for it. Presumably in designing a system about which people will feel a lesser repugnance, economists should attempt to respect those grounds that have the strongest ethical rationale. Roth's kidney matching proposal eliminates the objection to markets in

kidneys grounded in the unfairness of the rich being able to outbid the poor for kidneys.

Market designers are now, in the age of the Internet and increased computing power, better able to engineer the platforms governing transactions among market participants. As a consequence, they can control variables such as pricing, liquidity, visibility, information disclosures, terms of trade, and transaction fees. Some examples of market design, associated with the work of Roth and others, include auctions for electricity and other commodities, tradable permit systems for pollution abatement, labor market clearinghouses, centralized systems for the allocation of organs such as kidneys, procedures for student assignment among urban schools, and other related matching and trading processes.

Notice, however, that “market design,” like economics in general, cannot itself answer the ethical questions about what sorts of goods *should not* be traded. Moral analysis is crucial to understand “repugnance” to certain markets. Without having an explicit understanding of which values are relevant to which markets, it is impossible for economists to decide which allocation mechanisms are most desirable (whether the market, regulation, lotteries, rationing, etc.). When do we want to work around a restriction on market allocation, and when do we want to accept it? Should our repugnance to kidney markets be worked around, and if so in what ways? For example, should the state pay people to give up a kidney to a central distribution system, or should kidneys be allocated to the highest bidder? On the other hand, no one thinks that the repugnance to slavery should be treated by finding a “work-around” to overcome our repugnance: slavery is instead rightly condemned.

6.4 Morals and Markets

In the twentieth century, political philosophy had little to say about the nature of particular markets: most philosophers who have written about markets have defended or criticized the market system as a whole. Egalitarians have concentrated on the role of markets in generating income and wealth inequality; libertarians have been concerned to show that markets protect and enhance freedom and promote wealth.

In the past two decades, however, a significant literature has grown up around the topic of whether and why certain specific goods should not be allocated by market mechanisms. Some of the new theories proffer reasons that are consequentialist and contingent, while others draw categorical

distinctions between different kinds of goods or between the spheres of social life in which different goods belong.

Theories that make categorical distinctions point out that our best understanding of certain goods is incompatible with trading these goods on the market. For example, Michael Sandel (2013) points out that a person who tries to buy a friend would by that very act transmute the nature of friendship: whatever was bought, it would not be what most people mean by the term “friend.” Or, to use a more political example, consider criminal justice. If defendants could buy judicial decisions in the marketplace, justice would disappear. The market itself seems to depend for its stability on the fact that laws cannot be bought or judges bribed. (In fact, to our common shame, in reality, justice can to some extent be bought: when charged with the same crime, those who are poor are more likely to be convicted and, if convicted, are likely to face harsher punishments.) Proponents of the categorical nature of nonmarket goods have argued that goods such as justice, health care, basic sustenance, sexual and reproductive services, body parts such as kidneys or corneas, and even a clean environment are by their nature corrupted if market mechanisms are used in their allocation.

The corruption charge against certain markets is intriguing, and it seems to apply powerfully to certain goods, such as human beings. But there are problems with citing risks of corruption as a general strategy to prohibit markets in certain goods. People disagree about the best understanding of goods. Consider sex. Some people think of sex as a sacred act, tied to marriage, while those who use the Internet to “hook up” for a night view it simply as a casual source of pleasure. How should policy makers determine whose view is better?

The fact that views of goods are often controversial threatens another promising view of the moral limits of markets that attempts to tie certain goods closely to “personhood” and argues that goods of this kind should not be turned into commodities. Not only is there considerable disagreement about what goods are involved in personhood, but as one of the advocates of such a view herself notes, banning such markets in order to protect personhood can wind up threatening personhood instead. Prostitution might be objectionable, but banning prostitution can eliminate the best available option for a person and exacerbate her plight (Radin 1996; Nussbaum 1998).

Elizabeth Anderson (1993) argues that markets are not appropriate vehicles for goods that should be honored or respected. In her view, certain markets should be limited because valuing certain goods appropriately

rules out treating them as commodities. Thus, it should not be legal to buy and sell parenting rights, because doing so would fail to value children as they ought to be valued.

As in the case of the corruption view, the expressive theory of goods powerfully illuminates certain cases. But there is often little direct connection between the way people view particular goods and their sale on the market. One of the great virtues of markets, noted previously, is that they allow people with sharply different views of goods to cooperate with one another. One person might view the Bible as the path to God, and another as a way to generate an income, but they can participate in exchange with each other. Jill can buy a Bible from Jack without accepting his particular understanding of its value. So it is not clear that the expressive view throws light on many of the cases when legislators limit or might want to limit markets.

Libertarians argue that forbidding what Robert Nozick (1974, p. 163) refers to as “capitalist acts between consenting adults” interferes with their freedom and insults their dignity. While this may be true in some cases, it is false as a general statement. Nozick’s view overlooks the fact that, in an interdependent social environment, allowing two individuals to engage in a voluntary transaction can have harmful effects on others. Allowing Jill to sell her vote to Jack might be advantageous to each of them, but a large number of similar actions would undermine democracy. Legalizing prostitution could put pressure to turn to prostitution on women who are in need of funds. Allowing some people to work for whatever salary they want (e.g., having no minimum wage) affects the wages that *other* people are able to command. Since all market exchange presupposes property rights that restrict the freedom of nonowners, the important normative question is not how free individuals are to make whatever deals they please, but which system of entitlements increases net freedom and well-being.

Richard Titmuss (1971) argues that paying individuals for carrying out certain actions undermines their sense of civic duty. In particular, he claims that paying blood donors diminishes their willingness to donate blood, “crowding out” altruistic donors, by undermining altruistic motivations. Although Titmuss does not identify a mechanism that produces this effect, more recent empirical work suggests that the possibility of the crowding out of civic virtue should be taken seriously. For example, Gneezy and Rustichini (2000) report an experiment in which the introduction of a fine for parents who collected their children late from Haifa day care centers increased rather than decreased the rate of late collection (a phenomenon they interpret as being due to the fact that the possibility of paying for late

collection legitimizes doing so and reduces the perceived element of social disapproval). In other work, Bruno Frey and coauthors (Frey et al. 1996; Frey and Oberholzer-Gee 1997) have suggested that willingness of individuals to contribute to public goods may be undermined by monetary payment. In particular, they draw on survey evidence of people's willingness to accept privately noxious but socially necessary facilities (such as nuclear waste recycling plants). Surveys show that offering compensation does not increase the acceptability of such projects and sometimes decreases it.

Where markets crowd out altruistic behavior, they will not necessarily increase efficiency. Perhaps if a market for kidneys were introduced, then the supply would decrease (although this seems unlikely given the low rates of altruistic donation). At the same time, carefully designed markets can sometimes "crowd in" socially responsible behavior. An interesting example is the use of monetary incentives to induce people to carpool. Not only did allowing people to buy access to carpool lanes in San Diego lead to increased revenue for the state, but it was correlated with increased use of the carpool lane by people who drove together and did not buy access (Strahilevitz 2000). At least one hypothesis about the increased number of nonpaying carpoolers is that people now felt good about getting something for free that others (the suckers?) were paying for.

The crowding out literature does not provide categorical reasons to refrain from marketing certain types of goods. Instead it provides possible empirical and contingent reasons to be concerned about the effects of markets on civic values and prosocial behavior. And it underscores the importance of having a nonmarket realm to counteract these effects. The rule of law and civil and political equality are allocated on a nonmarket basis; these provide places where people can join together not as traders but as citizens.

While some theorists offer what we have been calling categorical arguments that certain goods should not be for sale, others locate the problems with certain kinds of markets in their contingent features. While the textbook market features rational adult traders with full information and a multitude of options, many real world markets are not like this. Consider in this context most child labor markets in the developing world. Child labor markets depart from the idealized textbook market in at least four ways. In the first place, children generally do not offer their own labor on the market. As the economic historian Jane Humphreys (1999) has noted, there is no *Infans economicus* responding to market signals. Children are put to work by their parents, some of whom might not have the child's best interests in mind. In the second place, parents in these contexts often lack knowledge of the true costs of taking their children out of school. They may

be motivated only by a short-term perspective, even though possibly the family would be better off in the long run if children were educated. In the third place, many parents of child laborers are in desperate circumstances, one step away from destitution. In some cases, the family's survival may depend on the child's labor. This is quite different from the usual assumption that the participants in a market are able to walk away. Finally, there are significant third-party effects from the existence of child labor, in addition to the harms suffered by the children themselves. Not only does child labor help produce a group of illiterate adults who cannot contribute to social development or organize for and demand their rights, but it also inhibits the growth of the nation's economy.

One further third-party effect of child labor is worth noting: when child labor is a widespread practice, this drives down the price of unskilled adult labor. This means that poor families who do not want to put their children to work will have a more difficult time doing so since their own income may be lower than it would have been had child labor been banned.

6.5 Policy Implications: How Should Policy Respond to Morally Problematic Markets?

The fact that markets are morally problematic – either because of the categorical reasons mentioned previously, such as corruption or the undermining of personhood, or because of their harmful consequences for participants or third parties – does not determine what the best policy response to morally problematic markets should be. It is easy to think that morally problematic markets should be banned, but in some cases, it may be better to tolerate a morally problematic market, such as the market in addictive drugs and alcohol, because the consequences of banning the market are worse. At their best, those who offer categorical reasons against certain markets realize this. Most of those who propose categorical moral objections to various markets leave the policy questions to one side, but they must be faced.

In some cases, it may be best to ban the markets even if the costs of doing so are high. Those who argued for the eradication of slavery often recognized that there might be significant costs to doing so, but they believed that social justice or merely minimal decency required all to work toward the immediate end of slavery. In other cases, it might be possible to address the underlying problem that gives rise to the morally problematic market. For example, if the problem that leads to parents' pulling their children out of school to go to work is the family's dire poverty, then perhaps social policy should pay parents to keep their children in school. Such a policy, in

contrast to banning child labor, does not run the risk of driving child labor into a black market with even worse outcomes for children. If, on the other hand, the problem that leads to so much child labor is poor information about the long-term benefits of education, then society can direct its efforts to increasing parents' knowledge of this (Satz, 2010).

As these last examples show, in addition to simply permitting markets and banning them, policy can aim to limit or undermine them by, for example, increasing the information that buyers and sellers have about the long-term consequences of their transactions, or weakening the incentives for the problematic buying and selling. The provision of a generous safety net can be a far more effective response to exploitative labor practices than direct regulation of labor contracts.

In the context of thinking about how to respond to morally problematic markets, it is helpful to make use of Hirschman's (1970) important distinction between "exit" and "voice." "Exit" occurs when consumers stop buying a firm's product or when its employees quit their jobs. If enough consumers exit and enough revenue is lost, the firm may modify its product or methods, even in the absence of government regulation. Idealized markets rely on exit to control the behavior of traders. Another way, however, that potential buyers can express their dissatisfaction with a particular product market is by the "voice" option. In this case, consumers directly express their dissatisfaction to the firm. Examples of voice include protests, sit-ins, and letter writing campaigns. Voice is amplified by the possibility of exit, and exit is made articulate by voice.

6.6 Market Alternatives

One final response to morally problematic markets involves creating nonmarket alternatives. Although inadequate, the national kidney allocation system each year provides kidneys for thousands of individuals, who might otherwise seek kidneys on the black market. The inequalities resulting from private health care can be mitigated by government provision or insurance for those who lack resources. Public schools arguably provide for somewhat more equal educational opportunity than market provision of education would achieve. In many cases, allowing multiple forms of provision for a good addresses the problems that might occur if the good were provided in one way alone.

While much of the debate in the last two centuries has focused on market versus state provision, there are an array of other options for producing and distributing goods. We have each taught in universities that admit students on the basis of test scores and high-school performance rather than

ability to pay. Scarce goods are sometimes allocated by lottery, as was the exemption from military service during the Vietnam War; access to tickets to concerts can depend on queuing on a line; friends exchange gifts without worrying about pricing. There are many ways to allocate benefits and burdens, and there is no one way that is best for all goods.

6.7 Conclusions

We have argued that moral considerations bear on the acceptability of markets. These considerations provide reasons to regulate and in some cases block certain market exchanges. One worthwhile exercise is to think through how the various approaches we have catalogued in this chapter would apply to two markets that are currently the subject of debate: markets in human kidneys and markets in women's reproductive labor (as in commercial surrogacy). Whatever you think about these issues, one thing is clear: policy makers and their economic advisers cannot sidestep ethical questions in thinking about markets.

Suggestions for Further Reading

A good overview of the issues and the different approaches to the limits of the market is found in Satz (2010). Sandel (2013) and Anderson (1993) discuss the idea that some goods are not appropriately distributed by markets. Walzer (1983) argues that justice requires that goods be distributed according to their social meanings and that maintaining distinct social meanings requires the existence of separate spheres. Radin (1996) criticizes the separate spheres argument and proposes that "human flourishing" should be the touchstone for our decisions about the permissibility of different markets.

There is a large literature on the effects of market exchange and in particular monetary payments on motivations. See Frey et al. (1996) for an overview of the literature. Titmuss (1971) conjectured that markets undermined altruistic behavior with respect to blood donation. Arrow (1972) has a skeptical response.

Questions for Study and Discussion

1. How might economists respond to the idea that the market has "moral" limits? Do markets need moral limits in order to function? What would a society in which everything was for sale be like?

2. Do you think that there are moral limits to markets – why or why not? How can it be morally permissible to prevent competent individuals from engaging in the voluntary exchange of some rights, goods, or services?
3. To what extent might the problems with certain markets that seem problematic be redressed through redistribution?
4. What do you think the most powerful arguments are on behalf of not treating health care as a market good? Do you think those arguments are successful? Why or why not?
5. Do you think there should be a legal market in the following? Why or why not? Would you give the same answer in each case? If not, what explains why your answers to different cases differ?
 - a. Human kidneys
 - b. Sex (prostitution)
 - c. Radar detectors (if their sole purpose is to enable drivers to violate the speed limit with fewer risks of being caught)
 - d. Recreational drugs
 - e. Term papers
6. In [Chapter 5](#), we argued that economic models that treat tax evasion as depending exclusively on the probability of being caught and the severity of the penalties contain the implicit message that moral commitments are not relevant to explaining an individual's behavior. Does the assumption that markets are always the preferred mechanism for allocating benefits and burdens in a society have similar moral implications?
7. Do you think that, on the whole, living in societies where most goods and services are bought and sold undermines morality or strengthens it? Or does living in a market society instead change the nature of society?
8. One notorious historical market, which helped to provoke the Protestant Reformation, was the sale of “indulgences” by the medieval Catholic Church. By good works or by cash payment, individuals were able to purchase a reduction in the time that, owing to their sins, they would have to spend in purgatory. What, if anything, is objectionable about this market?
9. Sometimes markets have limits simply because they do not “work,” while in other cases markets would function efficiently; yet there is a social choice not to permit them to function. Give examples of cases of these two kinds and explain why the distinction is important.

10. What do you think of the proposal to expand the use of markets by finding ways to lessen people's repugnance to them? How could we lessen our repugnance to buying and selling kidneys or rearing rights? Could we lessen our repugnance to slavery? Should we?
11. Give examples of markets that corrupt certain relationships or goods and markets that do not do so. What explains why some markets appear to corrupt goods and relationships and why some markets do not do so?
12. Until recently, most children in most societies worked. Affluent societies now have the luxury of allowing children not to work. But is it justified to prohibit child labor, even if the parents believe that their children ought to work or their families need the income their children provide?
13. Banning certain markets has proven to be costly or of limited effectiveness. (Consider, for example, Prohibition or attempts to ban prostitution or recreational drugs.) Should attempts to limit these markets be abandoned? What alternatives are there?

Good Blood, Bad Blood, and the Market: *The Gift Relationship* Revisited*

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ABSTRACT

The Gift Relationship (Titmuss, 1970) argued that the UK system of voluntary blood donation was economically, medically, and morally superior to the American system, in which many blood suppliers are paid. The argument was badly put and fiercely attacked, but substantially correct. Developments since Titmuss wrote, especially AIDS, have tragically reinforced his main point: more than half of the severe haemophiliacs in the UK have been infected with the AIDS virus, almost certainly through imported blood products. Titmuss's normative argument is reconstructed, and defended against neoclassical economists who have been his fiercest critics. Finally, policy implications are briefly discussed.

Richard Titmuss's *The Gift Relationship* (1970) is a fierce and emotional book which prompted fierce and emotional reactions on both sides. Titmuss claimed to show that a system of blood supply solely by voluntary donation, with market dealings banned (as in the United Kingdom) was both morally and economically superior to a system in which the purchase and sale of blood exists alongside a system of donations (as in the United States). In this paper we shall try to show that Titmuss was right, although it has taken the tragedy of AIDS to underline it.

Titmuss's argument

The Gift Relationship is a heady but confusing mixture of the empirical and normative. The empirical part collects the scattered information available

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in 1970 about the quality and quantity of blood for transfusion in different countries; the only sustained comparison is that between Britain and the USA. In Britain, the only organisation collecting blood is the National Blood Tranfusion Service (NBTS), which collects it from volunteers, who get no material reward except a cup of tea and a biscuit. They are not normally eligible even to claim travelling expenses to a donor session. Titmuss estimated that 99 per cent of blood supplied in the United Kingdom came from uncoerced volunteers; the rest comes from prisoners, who receive no official reward from contributing, but may feel informal pressure to contribute. In the USA, blood is supplied in a number of ways. There are paid suppliers, who may be subdivided into the casual and the regular. There are two types of ‘reciprocal’ donor. Under the responsibility fee system, a patient who has had a transfusion is charged for it; the fee may be paid in money or in a replacement donation, which may come from a member of the patient’s family. Under the family credit system, the donation comes first. A donation entitles the donor or a member of his family to have the charges for the first so many units of blood waived if they later have to have a transfusion. There are various ways of giving with some (small) material reward, and there is, as in the United Kingdom, the option of giving without reward, credit, or payment of debt. Titmuss estimated that less than one-tenth of blood supplied in the USA was without reward (Table 1)

TABLE 1: *Estimates of Source of Blood Collected by Type, USA, 1965–67*

	Whole blood %	Whole blood and plasmapheresis ¹ %
Paid donors	29	47
Responsibility Fee/ Family Credit	52	39
Other, rewarded	10	7
Without reward	9	7
	100	100

Source: Titmuss (1970), condensed from Tables 4 and 5, pp. 94, 96.

In the United Kingdom, the quantity of blood supplied, both absolutely and per head of population, rose continuously from the foundation of the NBTS in 1921 to the time Titmuss wrote (Table 2). There were no nationally collected statistics for the USA before 1968. Titmuss (1970, pp. 53–54, 58) estimated that the total supply of blood was 3.0 units per 100 population annually in 1956, a proportion which appeared to be static or slightly declining for the next ten years.

As with any other medical resource, it is extremely hard to estimate the demand for blood. New treatments may increase the demand

TABLE 2: Blood donations, England and Wales since 1948

Year	Units (1 unit = 440 ml) issued, 000s	Donations per 100 population
1948	371	0.9
1958	828	2.0
1968	1,274	3.0
1978	1,663	n.a.
1983 (latest published)	1,830	n.a.

Source: 1948–68 Titmuss (1970) from Table 1, pp. 42–43; 1978, *Health and Personal Social Services Statistics for England 1982* (HMSO 1984) Table 13.2, p. 142; 1983. *Ibid.*, 1984 (HMSO 1986) Table 13.1, p. 142.

for blood either directly, as with liver transplants, or by keeping patients alive who would previously have died, as with thalassaemias and leukaemias. Titmuss claimed that there was no evidence of shortage of blood for transfusion in the United Kingdom since 1948, but cited some reports of shortages in the United States (e.g. Jennings, 1966, p. 60). He also reported a striking difference between the proportions of blood wasted through going out of date in the two countries: under 1 per cent in the United Kingdom and some 15–20 per cent in the USA (1970, pp. 48, 57). He attributed this to the contrast between a centralised distribution system in the United Kingdom and a decentralised one in the USA, noting that American hospitals might have a glut of blood one week and a famine the next, had no regular means for transferring surpluses, and thus had an incentive to hoard blood.

Blood may carry infection from the donor to the recipient. Most such infections can be identified in the blood. The most important one which could not in 1970 was the hepatitis B virus. There was clear evidence that blood from paid suppliers carried a greater risk of infecting the recipient with hepatitis B than blood from unpaid suppliers. In a controlled prospective study of cardiac patients in a major American hospital, 53 per cent of patients receiving paid-for blood contracted hepatitis, but no patients at all receiving non-paid-for blood were infected. All authorities put this discrepancy down to the prevalence of intravenous drug users and Skid Row types, who have a high risk of being hepatitis B carriers, among paid blood suppliers. Titmuss noted that a paid supplier has an incentive to conceal his personal medical history, lest it debar him from selling his blood, whereas a donor has none.

Titmuss (1970, 159–71) reported at length a legal dispute in Kansas City. In 1958 there were two commercial blood banks in Kansas City, one of them drawing from suppliers described as Skid-Row derelicts. The local hospitals refused to accept blood from these sources to pay off patients’ blood fees, and therefore a not-for-profit community blood bank

was started. The commercial banks complained that the hospitals' refusal to do business with them was a conspiracy in restraint of interstate commerce, contrary to antitrust law. The Federal Trade Commission agreed, and issued a cease and desist order against the hospitals and the community blood bank. This was upheld at two appeals, although it was finally rejected by the US Circuit Court of Appeals in 1969. Meanwhile, bills to exempt voluntary blood banks from antitrust had failed in both houses of Congress.

The normative part of Titmuss's argument is interwoven with the empirical. 'The study originated', he wrote, 'from . . . attempts to distinguish the "social" from the "economic"'. He believed that blood should not be subject to economic analysis: 'All policy would in the end become economic policy and the only values that would count are those that can be measured in terms of money and pursued in the dialectic of hedonism' (1970, pp. 11–12, 158, 195). The gift relationship was a central part of social life in many primitive societies, as witness the elaborate codes of reciprocal giving called 'kula' and 'potlach', reported by anthropologists. The highest form of giving is anonymous giving to an unknown stranger. Introducing a market to such a gift economy could destroy it. Titmuss therefore believed that it was imperative that no market element whatever be introduced to the NBTS, and attributed all the ills of the American blood transfusion network to the existence of a market.

The reception of The Gift Relationship

Titmuss's friends praised the book, but did not analyse it in detail. The most detailed analysis of the argument came from laissez-faire economists, lawyers, and American medical writers hostile to 'socialised medicine'. Cooper and Culyer (1968, esp. pp. 21, 35) argued *a priori* that a good supplied 'free' (e.g. blood to British hospitals) was bound to be wasted more than a good supplied at a price (e.g. blood to American hospitals). If a good is free to a user, he has no incentive to economise, and the price signals needed to bring supply and demand into equilibrium are not sent. They also complained that Titmuss failed to allow for the opportunity cost of donors' time in a 'free' system.

Laissez-faire economists conceded that bought blood was of lower quality than donated blood. They responded in various ways. One was to say that more must be better. They assumed that adding a market to a gift relationship would not reduce gifts, and therefore that increasing the total supply of blood, even though some of it would be contaminated, would still lead to a net increase in lives saved (Culyer, 1973, pp. 48–50). Another was to say that the American blood supply system was *insufficiently*

market-oriented. In this view, the remedy for dirty blood lies in the courts. If suppliers could be held fully liable for damage done by their defective products, the market would do the rest by driving low-quality producers out of business. A number of legal quirks prevented this from happening when Titmuss wrote. They are inaccurately described by Titmuss's critics, but can be summarised as the difficulty of proving negligence, and the pressure from doctors, hospitals, and blood suppliers against the strict liability (or no-fault compensation) approach. The only consumer group which might have lobbied effectively for strict liability, the National Hemophilia Foundation, was no match for the producer groups on the other side (Franklin, 1972, 475; Keeton, et al., 1984, 1069–70).

Another laissez-faire economist attributed the admitted waste of blood in the United States to market imperfections: 'Pressures to eliminate "blood commercialism" emanating from the Red Cross . . . and the bad press resulting from Congressional committees and the . . . media have limited entry of firms'. Further, most hospitals, being not-for-profit, 'thus do not have the incentive to economise' (Johnson, 1973, p. 163). Nobody seems to have defended the actions of the Kansas City blood banks or the Federal Trade Commission, which Titmuss's most distinguished opponent called 'genuinely horrifying' (Arrow, 1972, 358). Arrow (1972, 355) conceded most of Titmuss's facts, but not his interpretations. He admitted that the market may fail to promote the virtue of truthfulness, and compared the incentive of the blood seller to tell lies with that of the seller of a used car. To an economist, they are alike instances of 'adverse selection'. But he stoutly resisted Titmuss's central claim that markets may damage altruism. There is, he said, no evidence that they do, and in any case, 'we do not wish to use up recklessly the scarce resources of altruistic motivation'.

Peter Singer (1973) came to Titmuss's defence. There is no evidence, he says, that altruism is scarce and should be rationed out. Perhaps it is, rather, like (male) sexual potency: the more you use it, the more you have. The very knowledge that there was no other way to get blood in the United Kingdom seems to have prompted some respondents to Titmuss's survey to donate:

You cant get blood from supermarkets and chaine stores. People themselves must come forward, sick people cant get out of bed to ask you for a pint to save thier life, so I came forward in hope to save somebody who needs blood (Titmuss, 1970, p. 227)

Some of the laissez-faire economists, indeed, present evidence that damages their own case on this point. One asked a large class of economics students how many would be prepared to supply blood at each of a number of specified prices per pint. Fewer students, it emerged, were

prepared to supply blood at \$1 a pint than to donate it (Ireland and Koch, 1973, pp. 152–153). This captures part, but not all, of the point Titmuss was making. It is not just that people are unwilling to donate for a small sum, perhaps because selling blood for a small sum is thought to be degrading. It is also that the knowledge that others are selling blood may dissuade some donors from giving it. To concede this point is to undermine the *laissez-faire* assumption that adding a market relationship to an extant gift relationship necessarily increases the supply of blood.

The final point on which Titmuss was challenged was the hepatitis risk from paid-for blood. Nobody tried to challenge his facts. But commentators pointed out that new tests were being developed to screen for the presence of a substance called Australia antigen, which was a fairly reliable marker for serum hepatitis. This, it was argued, ‘will, within a few years, almost certainly make of post-transfusion hepatitis no more than old nightmare like the scourges of the great infectious diseases’ (Cooper and Culyer, 1973, p. 122). Unfortunately, this optimistic prediction has been proved wrong, especially by the rise of non-A non-B hepatitis (Hagen, 1982, pp. 20–1, 48–50).

Developments from 1970 to 1982

Up to 1982, there were no dramatic changes in the operation of the United Kingdom blood services. Whole blood donations continued to increase, although not as fast as in the 1960s (Table 2). The United Kingdom was self-sufficient in whole blood, but not in blood products. There was unfulfilled demand for a substance called Factor VIII, which is essential for blood clotting, and which sufferers from ‘haemophilia A’ lack. When these patients begin to bleed they are given Factor VIII to prevent catastrophic haemorrhage. Consumption of Factor VIII per haemophiliac in the United Kingdom is much less than in West Germany or the USA, because leading United Kingdom haematologists believe that higher doses than the minimum required to control bleeding are of little benefit to the patient (Jones, 1980). Contrary to Cooper and Culyer’s (1968) view, the clinical judgement of haematologists in the NHS, with its non-market allocation of scarce resources, can ration Factor VIII more severely than the market-driven allocation in West Germany.

Factor VIII is obtained by treating plasma obtained by a process called plasmapheresis.¹ During this period the NBTS started to enrol some donors purely for plasmapheresis (NBTS 1984). The United Kingdom became self-sufficient in plasma, but not in Factor VIII (or other plasma products) because the necessary fractionation plant was not provided at the National Blood Products Laboratory, Elstree. David Owen, then Minister of State for Health in the Labour government, promised in 1976

Richard Titmuss is justly distinguished for his devotion to the welfare of society at large and particularly to those who have received the least of society's benefits. He has not rested content with the moral satisfaction of advocating the good but has immersed himself in the detailed factual analysis and speculative thinking needed if good intentions are to become good deeds. The gift he has made of his talents has now found an appropriate embodiment in his latest and much-noticed study, *The Gift Relationship: From Human Blood to Social Policy*.² The study focuses specifically on the workings of a particular supply system, that by which blood is made available for transfusions in the United States and in the United Kingdom, with some reference to other nations. But this close study is intended as something of a searchlight to illuminate a much broader landscape: the limits of economic analysis, the rival uses of exchange and gift as modes of allocation, the collective or communitarian possibilities in society as against the tendencies toward individualism. Most of the discussion takes place in the precise and objective language of empirical sociology: surveys and tables are presented, the limits of the data are stated with the utmost care, but every now and then the strength of Titmuss' convictions shines forth. Perhaps the flavor of the lessons

1. Presented at the Conference on Altruism and Economic Theory held by the Russell Sage Foundation, 3-4 May 1972 (prepared with the partial support of NSF Grant GS-28626X, Harvard University).

2. (London and New York, 1971.) All page references in the text are to *The Gift Relationship*.

he wants us to learn can best be suggested by a somewhat lengthy quotation of his final two paragraphs:

From our study of the private market in blood in the United States, we have concluded that the commercialization of blood and donor relationships represses the expression of altruism, erodes the sense of community, lowers scientific standards, limits both personal and professional freedoms, sanctions the making of profits in hospitals and clinical laboratories, legalizes hostility between doctor and patient, subjects critical areas of medicine to laws of the marketplace, places immense social costs on those least able to bear them—the poor, the sick, and the inept—increases the danger of unethical behavior in various sectors of medical science and practice, and results in situations in which proportionately more and more blood is supplied by the poor, the unskilled, the unemployed, Negroes and other low-income groups, and categories of exploited human populations of high blood yielders. Redistribution in terms of blood and blood products from the poor to the rich appears to be one of the dominant effects of the American blood-banking systems.

Moreover, on four testable non-ethical criteria the commercialized blood market is bad. In terms of economic efficiency it is highly wasteful of blood; shortages, chronic and acute, characterize the demand-and-supply position and make illusory the concept of equilibrium. It is administratively inefficient and results in more bureaucratization and much greater administrative, accounting, and computer overheads. In terms of price per unit of blood to the patient (or consumer), it is a system which is five to fifteen times more costly than voluntary systems in Britain. And, finally, in terms of quality, commercial markets are much more likely to distribute the contaminated blood; the risks for the patient of disease and death are substantially greater. Freedom from disability is inseparable from altruism.

The present essay is a series of reflections on the descriptive and prescriptive issues raised by Titmuss' evidence and assertions. It is obvious on the most superficial observation that the allocation of goods and services is not accomplished entirely by exchange, as standard economic models would hold. Clearly this is true for such palpable

goods as respect, love, or status, but even when we confine ourselves to goods whose allocation the economist believes himself capable of analyzing with his tools, the donation of blood for transfusions is only one example of a large class of unilateral transactions in which there is no element of payment in any direct or ordinary sense of the term. Formal philanthropy has always been a prominent element of all economic systems and has shown no signs of diminution. Long ago Kropotkin pointed out the vast amount of informal and irregular mutual help given in times of need.³ Of course, the whole structure of government expenditures is a departure from the system of mutual exchange. It is true that it has its own logic of coercion, so that it is not quite an example of pure altruism, but in a democratic society the voting of expenditures for the benefit of others plainly constitutes an institutionalization of giving. Nor are gifts solely in the form of money. The contribution of personal services, services which may well involve significant personal costs or which could command a considerable market value, for voluntary cooperative efforts of one kind or another remains a prominent feature of social life, even—or perhaps especially—in the United States, a country that Titmuss holds up as the very model of a society atomized by excessive reliance on the dictates of the marketplace.

There is another and very important sense in which a more subtle form of giving affects the allocation of economic resources. It can be argued that the presence of what are in a slightly old-fashioned terminology called *virtues* in fact plays a significant role in the operation of the economic system. Titmuss calls attention to the great value of truthfulness on the part of blood donors; the most serious risk in blood transfusion is the possible transmission of serum hepatitis from donor to recipient. Since no adequate test has yet been devised for the presence of hepatitis in the blood, its detection depends essentially on the willingness of the donor to state correctly whether or not he is suffering from that disease. This is a prototype of many other similar situations in economic life. Many of us consider it possible that the process of exchange requires or at least is greatly facilitated by the presence of several of these virtues (not only truth, but also trust,

3. Petr A. Kropotkin, *Mutual Aid: A Factor of Evolution* (London, 1902), chap. VIII.

loyalty, and justice in future dealings). Now virtue may not always be its own reward, but in any case it is not usually bought and paid for at market rates. In short, the supply of a commodity in many respects complementary to those usually thought of as economic goods is not itself accomplished in the marketplace but rather comes as an unrequited transfer.

Finally, there is a broader set of issues raised by Titmuss. The picture of a society run exclusively on the basis of exchange has long haunted sensitive observers, especially from the early days of the capitalist domination. The ideas of community and social cohesion are counterposed to a drastically reduced society in which individuals meet only as buyers and sellers of commodities. Of course, giving is not the only alternative to a system of pure exchange. Authority and hierarchy constitute one alternative system, rational bureaucracy with place determined by merit another; but certainly the role of free giving in producing a more humanitarian social order is worth considering.

The points raised above determine the organization of the rest of this discussion. I shall consider in turn the role of giving as an expression of individual volition, as a contribution to economic efficiency, and as a determinant of social cohesion.

One further remark. As Titmuss indicates very clearly, the giving of blood is giving not to specific individuals but to an anonymous recipient. The motives for such giving are regarded as more definitely altruistic than those for giving to individuals. In what follows the discussion is therefore confined to impersonal giving.

I shall take for granted in most cases that Titmuss' empirical analysis is correct and concentrate rather on setting it in other contexts, though some comment on the evidence is unavoidable. I shall conclude with a further, though still cursory, examination of the extent to which in fact the empirical evidence he advances proves or at least strongly supports his various theses.

I. THE INDIVIDUAL'S DESIRE TO GIVE

The starting point of Titmuss' analysis and reflections is the basic fact that in the United Kingdom the supplying of blood for transfusions is completely voluntary and unpaid, while in the United States

there is a mixed system with both commercial and noncommercial blood banks and with payments of various kinds. According to Titmuss' estimates, based on admittedly unsatisfactory surveys, about one-third of the United States supply (including derivatives such as plasma, plasma fractions, and red blood cell concentrates) comes from paid blood donors. Nor are the rest considered to be truly voluntary; by Titmuss' standards a donor is considered to be voluntary only if the recipient is unknown to him and there are no social sanctions enforcing the donation. Thus only 9 percent of the United States donors are regarded as voluntary. About one-half give blood free of charge, but in most cases they are in effect replacing blood given to relatives.

These figures, needless to say, are subject to a wide margin of error (the categories above are not completely exhaustive; I omit a few minor ones for the sake of simplicity). In the United Kingdom there are, of course, no paid donors. However, Titmuss has not attempted to classify the British donors in a comparable way, though in fact he has better evidence (mainly the results of a questionnaire survey which he himself developed). It does turn out that in the case of 28 percent of the British donors either they or their families have received blood transfusions.

As might be supposed, the distribution of blood donations between paid and unpaid donors influences the distribution of blood-giving among socio-economic categories. A rough impression of the fragmentary United States data together with that for the United Kingdom suggests that unpaid donations are distributed among socio-economic classes more or less in proportion to the relative size of each class. Paid donors, on the contrary, are drawn almost exclusively from the lower-income categories, including the unemployed.⁴

Even in the United Kingdom the percentage of the eligible population that gives blood is actually very small, only 6 percent according to Titmuss' estimates. Titmuss does not comment on this fact. The picture of a broadly altruistic society seems somewhat blurred when

4. One curious piece of data is that in the United States blood donors are overwhelmingly male, even among unpaid groups, while in the United Kingdom the donors are distributed between the sexes in the same proportion as that of men to women in the general population. Titmuss does not remark on this, and I have no explanatory hypothesis.

we realize what a small fraction of the population is in fact functioning altruistically.

It may be inferred from Titmuss' presentation that the motives for giving blood can be divided into three types: a generalized desire to benefit others, a feeling of social obligation, and a response to personal social pressures, as in the case of donations to known recipients or responses to institutional blood drives. I suggest here a reformulation of the first two of these motives in the language of utility theory. I find three classes, which do not correspond precisely to those of Titmuss:

(1) The welfare of each individual will depend both on his own satisfaction and on the satisfactions obtained by others. We here have in mind a positive relation, one of altruism rather than envy.

(2) The welfare of each individual depends not only on the utilities of himself and others but also on his contributions to the utilities of others.

(3) Each individual is, in some ultimate sense, motivated by purely egoistic satisfaction derived from the goods accruing to him, but there is an implicit social contract such that each performs duties for the other in a way calculated to enhance the satisfaction of all.⁵

This classification is not exhaustive, or even exclusive.

In (1) and (2), one is to distinguish between two levels of utility: each individual may be regarded as deriving satisfaction from the goods he receives, but his overall aim is to maximize welfare, a function of the satisfactions of all; he derives a utility from seeing someone else's satisfaction increased. The second version differs from the first only in that welfare is derived not merely from an increase in someone else's satisfaction but from the fact that the individual himself has contributed to that satisfaction. The first hypothesis has been used occasionally by economists in trying to explain why people give to others or why they vote for redistribution of income. But it does not seem very appropriate for the case of giving blood, especially with anonymous recipients. The utilities of all others would have to enter the welfare function in a completely symmetrical fashion. It does appear necessary to supplement this motivation with the additional

5. I am indebted to Thomas Nagel for some illuminating comments on these points.

measure of satisfaction derived from the fact that I, rather than someone else, have brought about the improvement in social welfare. Put another way, under the first hypothesis I would prefer that you rather than I give to a third individual, but in the second case I might well prefer to give myself, because I would have the satisfaction of personal participation in social welfare.

The third possible hypothesis is, according to my understanding, in the spirit of Kant's categorical imperative or Rawls's theory of justice. In real life, however, emphasis must be put on the implicit nature of the social contract. One might be thought of as giving blood in the vague expectation that one may need it later on. More generally, perhaps, one gives good things, such as blood, in exchange for a generalized obligation on the part of fellow men to help in other circumstances if needed. Some of the subtleties of the social contract theory are seen when the anonymous recipients in question are future generations or indeed the sick and poor of the present generation. Actual behavior, as reflected in decisions of democratic governments, shows that individuals are in fact willing to sacrifice present satisfactions for future generations, as in the case of public investments, or even for others living in the present, as evidenced by willingness on the part of middle-class citizens to vote for county hospitals while they themselves in fact use voluntary hospitals. Similarly, in voting for educational expenditures, there must be many advocates of greater expenditure who do not have children who will benefit. One can try to rationalize their behavior either in terms of one of the first two hypotheses or in terms of the social contract made with previous and future generations. How such a social contract is in fact carried out is another matter. There are, of course, cultural institutions which reinforce it; Kropotkin argued that there is a built-in evolutionary mechanism to this end, for altruism aids in the survival of the species, a thesis repeated more recently by Wynne-Edwards.⁶

Titmuss makes explicit a feeling held by many, I think, in his discussion of what he calls in a chapter title "The Right to Give." Economists typically take for granted that since the creation of a market increases the individual's area of choice it therefore leads to higher

6. V. C. Wynne-Edwards, *Animal Dispersion in Relation to Social Behavior* (New York, 1962).

benefits. Thus, if to a voluntary blood donor system we add the possibility of selling blood, we have only expanded the individual's range of alternatives. If he derives satisfaction from giving, it is argued, he can still give, and nothing has been done to impair that right. But this is emphatically not the view held by Titmuss. On the contrary, he states, "as this study has shown comparatively, private market systems in the United States and other countries . . . deprive men of their freedom to choose to give or not to give" (p. 239). Shortly thereafter he continues: "In a positive sense we believe that policy and processes should enable men to be free to choose to give to unnamed strangers. They should not be coerced or constrained by the market. In the interests of the freedom of all men, they should not, however, be free to sell their blood or decide on a specific destination of the gift. The choice between these claims—between different kinds of freedom—has to be a social policy decision; in other words, it is a moral and political decision for the society as a whole" (p. 242). I can find no support in the evidence for the existence of such a dilemma. Indeed, it is not easy to see what kind of evidence would be relevant. Presumably the best that could be done would be to show that the amount of blood given in the United States is less than it would be if commercial blood-giving were prohibited. In turn, this might be inferred from a comparison of the number of donors in the United States and in the United Kingdom. Titmuss nowhere makes any explicit comparison of this kind. I would in fact gather from his figures that the percentage of donors in the United States is lower than that in the United Kingdom, but since the figures are not presented in comparable form I am not at all sure of the accuracy of my inferences. In any case, there is so much in the way of historical development that is not covered that one cannot arrive at any relevant answer. It may be that the spread of commercial services in the United States was itself due to the failure of the voluntary services to supply enough blood, to give one simple hypothesis. The comparison might indeed indicate that the United States is a less altruistic society than the United Kingdom, but it would not show that commercial blood-giving was a cause rather than an effect.

In any case the empirical evidence can only be made meaningful

with at least a minimum of theoretical analysis. *Why* should it be that the creation of a market for blood would decrease the altruism embodied in giving blood? I do not find any clear answer in Titmuss. He does make the following statement: "In not asking for or expecting any payment of money, these donors signify their belief in the willingness of other men to act altruistically in the future, and to combine together to make a gift freely available should they have a need for it. By expressing confidence in the behavior of future unknown strangers, they were thus denying the Hobbesian thesis that men are devoid of any distinctive moral sense" (p. 239). The statement does indeed imply that individuals will be willing to give without payment. But it does not explain why this willingness should be affected by the fact that other individuals receive money for these services, especially when the others include those whose need for financial reward is much greater. Evidently Titmuss must feel that attaching a price tag to this activity anywhere in the system depreciates its value as a symbolic expression of faith in others. But note that this is really an empirical question, not a matter of first principles. Do people in fact perceive the signals as Titmuss suggests? Would they, were the moral questions expounded with greater clarity?

II. GIVING AND EFFICIENCY

The aspect of Titmuss' work that will probably have the most striking effect both immediately and in the long run is his argument and evidence that a world of giving may actually increase efficiency in the operation of the economic system. This is on the face of it a dramatic challenge to the tenets of the mainstream of economic thought. Since the time of Adam Smith, economists have preached the virtues of the price system in enforcing efficiency and penalizing waste. To be sure, there has grown up a tradition, stemming from Alfred Marshall and developed by A. C. Pigou, Allyn Young, F. H. Knight, and more recent writers, which emphasizes that the price system does not always work satisfactorily. There are, in the language of welfare economics, "externalities," benefits and costs transmitted among individuals for which compensation in price terms is not and perhaps cannot be obtained. The problem of pollution has always been a standard example; the

endorse and not as comprehensive evaluations of the practices in question.

THE VALUES OF PERSONAL RELATIONSHIPS AND THE MARKET

The sphere of personal relationships is in many ways the polar opposite to that of market relationships. For, as we shall see, the ideals of personal relationships are embodied in norms of exchange that directly conflict with market norms. Two of many ideals central to the personal sphere of life are intimacy and commitment. Living on intimate terms with another person involves a mutual revelation of private concerns and sharing of cherished emotions that are responsive to the other's personal characteristics. This is the romantic side of personal relations, which involves passion, affection, and trust but not necessarily devotion or long-term commitment to the other person, for the romantic relationship may end as soon as the passions that animate it cool.

The deepest ideal of commitment involves dedicating oneself to living a shared life with another person on a permanent basis. A shared life is not simply a life of long-term cooperation on mutually advantageous terms, as might be true of a business partnership. It is founded on values that the persons committed to each other hold together. The central goods realized in such a life are shared in at least two senses. First, their goodness for each partner partially consists in the facts that the other partner also enjoys them, and that each partner knows this fact and knows that the other knows. One committed and loving partner could not rejoice in living with the other if he knew that the other found the relationship to be oppressive. The goods of intimacy are also shared in this first sense. Second, the realization of the good requires an expansive understanding of the self as including another person. The persons to whom the good is good are not selves regarded as isolated individuals, but selves regarded as members of the committed relationship. Commitment to a shared life, such as a marriage, requires redefining one's interests as interests of the *couple* in the marriage. Insofar as one has this commitment, one's interest in the aims of the marriage can neither be defined nor satisfied independently of one's being joined with one's spouse in marriage.⁴ This is why marrying just for money is base: it takes advantage of an institutional form of commitment merely for the sake of lower goods definable independently of it.

These ideals inform the ways we value the people with whom we have personal relationships and the ways we value the goods we exchange with them. In this sphere love, affection, trust, and devotion supercede the formal respect of useful persons (acknowledgment of their

4. I owe this account of shared goods to Rawls (1971, pp. 523–26) and Taylor (1987).

autonomy) characteristic of the marketplace. The goods exchanged and jointly realized in friendship are valued less through use than through appreciation and cherishing, for they are tokens of shared understandings, affections, and commitments.

If the ways we value the goods proper to friendship differ from the ways we value commodities, then we should expect that the norms that govern the exchange of these goods should also differ; for different modes of valuation are embodied in different norms of exchange, production, and enjoyment. This is what we do find. A fundamental contrast between the sphere of personal relations and that of the market is that the former is properly governed by the spirit of the gift rather than the spirit of commercial exchange. The goods proper to the personal sphere can only be fully realized if they are given as gifts or established through the exchange of gifts. They are goods that cannot be genuinely procured for oneself by paying others to produce them or by appealing to another's merely personal advantage to provide them. The authenticity and worth of these goods depend on the motives that people have in providing them. Among these goods are trust, loyalty, conviviality, sympathy, affection, admiration, companionship, and devotion. None of these goods can be bought (or extracted by threats), although people often deceive themselves in the attempt, mistaking flattery for admiration and subservience for devotion.

The significance of gift exchange differs from that of market exchange in several respects (Hochschild, 1983; Hyde, 1983; Mauss, 1967; Sahlins, 1972; Titmuss, 1971). In the first place, the exchange of gifts affirms and continues the ties that hold the donor and recipient together. This is why refusing a gift is often an insult to a friend, but refusing a trade is merely an unrealized financial gain to a retailer. To reject an appropriate gift is to refuse to acknowledge or sustain a friendship. One point of gift exchange is to realize a shared value in the relationship itself, whereas the point of a market relationship is purely instrumental and realizes distinct goods for each party. Moreover, while both forms of exchange involve reciprocity, the shape and timing of the return of goods differ in the two cases. In market exchange, a delay in reciprocation (unless explicitly arranged in a contract) is cause for legal action. But the exchange of gifts among friends usually incorporates an informal understanding of reciprocity only in the long term. To be anxious to "settle accounts," as when one person insists upon splitting a restaurant tab exactly in half, calculating sums to the penny, or paying a friend for returning a library book, is to reject the logic of friendship. The delay in reciprocation symbolizes the fact that goods are given for the friend's sake, not for the sake of obtaining some good for oneself in return. Moreover, the accounting mentality reflects an unwillingness to be in the debt of another and hence an unwillingness to enter into the longer term commitments that such debts entail. For the debts of friendship -

that is, the goods friends owe to one another – are not of a kind that they can be repaid in such a way as to leave nothing between the friends.

Friendly gift exchange is responsive to the personal characteristics of the friends involved and to the particular qualities of their relationship. We seek to give to our friends gifts that have more than merely generic meaning, gifts whose full meaning is conditioned by who gave the gift, to whom it was given, and the character of their friendship. For the gift is a vehicle for the expression of the friends' mutual understanding of how their relationship stands (or how the giver wishes it to be), and not merely a good of impersonal use value to the receiver. This fact is evident not only in cases of such material gifts as engagement rings and Valentine's Day chocolates, but also in the exchange of compliments, affections, and jokes. Max knows that Adam is just the person to appreciate *this* practical joke coming from *him*, but takes care to offer a more serious expression of affection to his girlfriend Marsha, who finds practical jokes rather vulgar. This is why cash is usually such an inappropriate gift between friends. Since it can be used by anyone to acquire any commodity, it expresses nothing of the giver's personality, of any particular thought the giver had for the receiver, or of the receiver's interests.

In the light of this brief account of some fundamental differences between the norms of the market and of personal relations, we can explore some of the ways values are undermined when the norms of the market come to govern the exchange of goods proper to personal relations. Consider the following cases of the importation of market norms in the exchange of personal values: prostitution, the exploitative manipulation of gift relations in commercial transactions, the detailed marriage contract advocated by *Ms. magazine*, and the practice of making loans between friends.

Prostitution is the classic example of the debasement of a gift value through its commodification. But what is base about buying and selling sexual "services" on the market? One cannot understand what makes this practice base without understanding the specifically human good achieved when sexual acts are exchanged as gifts. This good is founded on a mutual recognition of the partners as sexually attracted to each other and as affirming an intimate relationship in their mutual offering of themselves to each other. This is a shared good: one and the same good is realized for both partners in their action, and part of its goodness lies in the mutual understanding that it is shared. The couple rejoices in their *union*, and not simply each in his or her own distinct physical gratification. As a shared good, it cannot be realized except through each partner reciprocating the other's gift *in kind*, offering his or her own sexuality in the same spirit in which the other's sexuality is received – as a genuine offering of the self.

When sexual "services" are sold on the market, the kind of reciprocity required to realize human sexuality as a shared good is broken.

The prostitute does not respond to the customer as a sexually attractive person, but merely as someone willing to put down the cash. So it is not the customer as a person that attracts the prostitute, but only his or her wealth. This is simply the counterpart to the impersonality of the market: one need not display any personal characteristics to obtain the goods sold there. And the customer seeks only sexual gratification from the prostitute, not a physical union. Sexuality as a specifically human, shared good cannot be achieved except through gift exchange; market motives cannot provide it.

The failure of reciprocity implied in the sale of sexual services signifies not simply a failure to realize a good, but a degradation of the prostitute, whose sexuality is reduced to the status of a mere service to the customer: sexuality is equated with the lesser good of money.⁵ The prostitute's subordination is expressed in the fact that (except in the most blatantly alienated and sterile encounters), he or she must confer on the customer all manner of personal attentions, while the customer need pay attention only to him- or herself, recognizing the prostitute only as an object for satisfaction.

The problems entailed by explicitly exchanging sexual acts for money arise in part because sexual acts, insofar as they are more than means for sheer physical gratification, are valuable as expressions of underlying noncommercial motives and understandings. Since the expressive content of actions cannot be traded on the market, only those goods that are valuable to the receiver apart from their being expressions of the giver's motivations are genuine commodity values. The attempt to sell gift values on the market makes a mockery of those values and subordinates the provider of them.⁶

5. This implied hierarchy of values, according to which one's sexuality is a higher and deeper (more intimate) value than any commodity, is founded on the public meanings embodied in our social practices and not on the possibly idiosyncratic intentions or feelings of individuals who may engage in them. The understanding that a person's sexuality reaches deeper into the self than money, that it is therefore a good that is different in kind from and higher than money, also lies behind our judgment that rape is a deeper violation of the person than robbery. One who would deny that prostitution is degrading would thus be hard pressed for an explanation of why rape is a more serious crime than robbery. To claim simply that rape results in more "disutility" than robbery is not enough – the question is why this is true, and how the claim can be substantiated. Since no one has provided an adequate account of how interpersonal comparisons of subjective utility can be made, it would seem that the basis for the judgment about utilities lies not in such a comparison, but rather in the publicly accessible meanings of the acts themselves: the shared understanding that rape is more degrading than robbery.
6. One could imagine forms of "prostitution" that, while offered on the market, diverge from market norms in ways that could rescue the practice from the criticisms made here. For example, Schwarzenbach (1990) defended a conception of prostitution as a form of sex therapy practiced by professionals who help people liberate themselves from sick, patriarchal forms of sexuality. Such a practice would diverge from the ideal

Other values are undermined when goods offered in the spirit of the gift have been solicited in the spirit of commercial exchange. These arise because the forms of reciprocity appropriate to gift (personal) relationships differ from those appropriate to market relationships. One basic kind of exploitation occurs when one party to an exchange gives goods to the other in accordance with the norms of gift exchange, while the other party returns goods in accordance with the norms of market exchange. Since gift exchange does not involve the demand for an immediate quid pro quo, the party taking a market orientation to the transaction can extract a greater share of goods from the gift giver than one returns.

This kind of exploitation occurs when firms attempt to establish a paternalistic relationship with their employees. By putting them in a dependent position and providing, however meagerly, for their needs, the firm can engender feelings of gratitude and loyalty on the part of its employees. These feelings can then be exploited to extract more labor and obedience from the employees. This has been a common practice of employers of migrant farm workers and sharecroppers. The latter are placed in the position of children to their parents because they have nowhere else to turn for the provision of basic needs. This dependency is reinforced by the fact that wages are paid largely in kind rather than cash. Cash payment would free the worker to purchase his needs from another source and thereby enable him to affirm at least some minimal autonomy from the employer.⁷ Paternalistic practices are not confined to backward commercial enterprises. Young women training to be flight attendants are housed by airlines in airport dormitories and encouraged to regard their supervisors as substitute parents to whom they can come to confide any personal problems. They are thus encouraged to develop ties of loyalty and trust with their employers and to work for them in this spirit. But at the same time they are constantly reminded that these ties are not reciprocal: poor performance or disobedience can lead to

type of market relations presented here in many ways, especially insofar as it is informed by the norms and ideals of a profession. Professional services, such as legal, medical, and educational services, provide a classic case of "mixed" goods whose production and distribution is determined partly by market norms and partly by nonmarket, professional norms. Notoriously, market norms pose a constant threat to the integrity of professional norms. Yet, market norms may still be needed to ensure the efficient production and allocation of professional services, or to realize certain freedoms for their practitioners or customers.

7. Of course, the mere substitution of cash for in-kind payment does not obviate the exploitative character of such relationships. The firms still take advantage of their employees' duress and lack of decent alternatives; but they would be less likely to be able to evoke the ties of children to parents, from which an extra margin of effort or obedience can be extracted from workers, if their dealings with employees were blatantly self-interested instead of ingratiatingly paternalistic.

immediate dismissal, since the tight job market ensures no shortage of job applicants (Hochschild, 1983, pp. 89–101).⁸

Even the impersonal exchanges of civility follow the norms of gift exchange and consequently can be exploited in commercial transactions. One common sales technique is to take advantage of people's desire to be polite, by manipulating them into a position in which it seems that they can back out of a deal only by risking offense or awkwardness. So car salesmen ask reluctant customers questions such as, "Do you doubt the integrity of our dealership?" knowing that most people will go to great lengths to avoid giving offense, and that each "no" they receive to questions like this undermines their ability to explain their reasons against signing the dotted line. The salesman's advantage consists in the fact that he participates in the negotiation strictly in accordance with market norms of pursuing maximum personal advantage, while the customer is manipulated into conceding his bargaining edge because he views some of their verbal exchanges as merely polite ones. Since civility often requires that we hide our frank opinions, we feel uncomfortable in explaining exactly why we don't want to buy. The remark delivered in the spirit of civility ("No, I don't mistrust your dealership") is then seized in the spirit of negotiation and used to the salesman's advantage by being interpreted as a literal expression of the customer's belief.

In these cases of exploitation, one party uses the norms of the market to manipulate the exchange of sentiments and civilities that are properly governed by the norms of gift exchange. When both sides adopt the norms of the market to govern the exchange of gift values, we no longer have a case of exploitation, but other losses still occur. Such is the case with the kind of detailed marriage contract advocated several years ago by *Ms. magazine*.⁹ In the interests of avoiding the exploitative tendencies of traditional marriages, in which most of the drudgery involved in maintaining a household and raising children is left for the wife to perform, *Ms.* proposed to place the marriage relationship on an explicit basis of exchange. Henceforth, the duties of husband and wife with respect to the household, children, and sexual interactions were to be laid out in detail in the marriage contract.

While the intentions of *Ms.* in promoting equality in marriage are noble, the attempt to enforce this equality by remaking the marriage on the same terms as a business partnership threatens to undermine the goods of commitment and intimacy proper to marriage. For the realization of these goods depends on each partner carrying out the projects and tasks constitutive of their shared life in a spirit of trust and love

8. While gift norms can be used by employers for exploitative purposes, there may be cases where employers themselves come to be guided by them. See Akerlof (1982).

9. "To Love, Honor, and . . . Share: A Marriage Contract for the Seventies," *Ms.* vol. 1, no. 12 (June 1973), pp. 62–64, 102–3.

rather than of contractual obligation and the piecemeal calculation of individual advantage. Giving and receiving in a spirit of trust is itself one of the goods of marriage. The point of marriage in realizing shared goods is obscured by tending to the terms of the explicit marriage contract, which evaluates the marriage in terms of the distinct advantages accruing to each party. And fixing the terms of exchange in advance undermines the responsiveness of the marriage to the changed needs of the partners, as well as the promise it holds out for deepening their commitment in the light of a more articulate understanding of their shared project, which may require a new division of activities between them. Being open to the possibility of renegotiating the contract in the light of changed wants is not the same thing as committing oneself to love and care for one's spouse "for better, for worse" (Hirsch, 1976, pp. 87-88, 99-101).¹⁰

These examples show how the norms of the market and of personal relationships are not easily mixed, because adherence to these norms secures quite different kinds of goods. Consider, as a final example of this problem, the basis for discouraging friends from making substantial long-term loans to one another.¹¹ Lending money to a friend threatens the friendship in at least two ways. By undermining the equality of friends, it fosters resentment on the part of the debtor. And by tying down his financial resources without prospect for gaining from his friend, it undermines the capacity of the creditor to pursue successfully his advantage on the market and thus fosters resentment on his part. It might be thought that charging interest between friends would restore equality and prevent the creditor from thinking he is losing out by lending to a friend. But this expedient threatens the friendship even more deeply than a loan without interest. To charge the prevailing interest rate is to permit the norms of strangers interacting merely from self-interest to govern the interactions of friends. Such an act encourages the friends to view their interests as sharply divided and to view them-

10. My claim here is not that bargaining can never take place in a worthwhile marriage, but that where the norms of bargaining predominantly govern the relations of the partners, the integrity of their marriage is threatened.
11. It seems obvious to us that friends are not liable for each others debts. Yet, it was not until the sixteenth century that in England it came to be seen as a foolish act rather than an act of true friendship to guarantee a friend's debts. This change is due to the fact that the present radical separation of the spheres of personal relationships and economic relationships is the product of a long historical development. For some of the details of this history, see Nelson (1969, esp. pp. 142-43). Of course, it is possible that we could rework our practices and understandings of friendship and credit, so that the threats posed to success in each of these practices by combining them would not come about. Ideal-typical analysis does not preclude the reformation or combining of practices in new ways. It simply points out the conflicts and tensions among our present practices, and the conceptions of value they reflect, which would have to be adequately dealt with by any proposal to combine them.

selves as having to be on their guard in protection of their interests when dealing with friends. But friendship is supposed to preserve a sphere of relationships in which one does not have to be on one's guard. Successful participation in both spheres of life thus requires an isolation of their respective concerns.

POLITICAL VALUES AND THE MARKET

The preceding section emphasized two qualitative distinctions among goods to which the market is insensitive: between gift values and ordinary exchange values, and between shared goods and divisible goods. I argued that the goods of the personal sphere, which are shared gift values, cannot be adequately realized within the norms of the market. This section will emphasize two further qualitative distinctions among goods that the market does not acknowledge: between ideals and ordinary goods, and between the objects of need and of desire. I shall argue that these distinctions support the application of several norms of democratic political life to the production, distribution, and enjoyment of a variety of goods that could also be provided by the market. As in the case of the economic and personal spheres, the significance of these norms must be understood in the light of the ideals they are supposed to embody. In this section, I focus on two ideals of social democracy: fraternity and democratic freedom.

The ideal of fraternity, while rather vague, seems to involve the following notions. Citizens have fraternal relations with one another when they agree to refrain from making claims to certain goods that come at the expense of those less well off than themselves and when they view the achievement of such relations with their fellow citizens as a part of their own good.¹² People express relations of fraternity with one another in part through providing certain goods in common. Whereas distributing goods through a system of bilateral transactions tends to emphasize either the separateness of persons (in the market) or some special relationship between the two traders (in personal gift relationships), providing goods out of pooled resources obliterates any connection of specific donors with specific recipients. It thereby expresses the idea that the goods are provided by the community as a whole to its members, rather than by some specific individuals to others. Furthermore, where the goods in question are not public but distributed, distribution takes place in accordance with some conception of members' needs. Fraternal relations are need-regarding, not only want-regarding.¹³

Another aspect to the intuitive idea of fraternity connects it to the democratic tradition. This is the idea that citizens are equals engaged in

12. Here I am generalizing John Rawls' account of fraternity and of the good of a social union (1971, pp. 105ff, 520-29).

13. On the significance of communal provision, see Sahlins (1972, pp. 188-91).

though we may continue to share these attitudes at times; certainly we are not likely to think them a good basis for public policy.

When we consider our views about sexual and reproductive services, then, we must be on our guard against two types of irrationality: aristocratic class prejudice and fear of the body and its passions.

III

Prostitution is not a single thing. It can only be well understood in its social and historical context. Ancient Greek *hetairai*, such as Pericles' mistress Aspasia, have very little in common with a modern call girl.¹⁷ Even more important, within a given culture there are always many different types and levels of prostitution: in ancient Greece, the *hetaira*, the brothel prostitute, the streetwalker; in modern America, the self-employed call girl, the brothel prostitute, the streetwalker (and each of these at various levels of independence and economic success). It is also evident that most cultures contain a continuum of relations between women and men (or between same-sex pairs) that have a commercial aspect—ranging from the admitted case of prostitution to cases of marriage for money, going on an expensive date where it is evident that sexual favors are expected at the other end, and so forth. In most cultures, marriage itself has a prominent commercial aspect: the prominence of dowry murder in contemporary Indian culture, for example, testifies to the degree to which a woman is valued, above all, for the financial benefits one can extract from her family.¹⁸ Let us, however, focus for the time being on contemporary America (with some digressions on India), on female prostitution only, and on explicitly commercial relations of the sort that are illegal under current law.

It will be illuminating to consider the prostitute by situating her in relation to several other women who take money for bodily services:

1. A factory worker in the Perdue chicken factory, who plucks feathers from nearly frozen chickens.

¹⁷ Aspasia was a learned and accomplished woman who apparently had philosophical and political views; she is said to have taught rhetoric and to have conversed with Socrates. On the one hand, she could not perform any of the functions of a citizen both because of her sex and because of her foreign birth. On the other hand, her son Pericles was subsequently legitimated and became a general. More recently, it has been doubted whether Aspasia was in fact a *hetaira*, and some scholars now think her a well-born foreign woman. But other *hetairai* in Greece had good education and substantial financial assets; the two women recorded as students in Plato's Academy were both *hetairai*, as were most of the women attested as students of Epicurus, including one who was apparently a wealthy donor.

¹⁸ See Martha Nussbaum, Religion and Women's Human Rights, in *Religion and Contemporary Liberalism* 93–137 (Paul Weithman ed. 1997).

2. A domestic servant in a prosperous upper-middle-class house.
3. A nightclub singer in middle-range clubs, who sings (often) songs requested by the patrons.
4. A professor of philosophy, who gets paid for lecturing and writing.
5. A skilled masseuse, employed by a health club (with no sexual services on the side).
6. A person whom I'll call the "colonoscopy artist": she gets paid for having her colon examined with the latest instruments, in order to test out their range and capability.¹⁹

By considering similarities and differences between the prostitute and these other bodily actors, we will make progress in identifying the distinctive features of prostitution as a form of bodily service.

Note that nowhere in this comparison am I addressing the issue of child prostitution or nonconsensual prostitution (for example, young women sold into prostitution by their parents, forcible drugging and abduction, and so forth). Insofar as these features appear to be involved in the international prostitution market, I do not address them here, although I shall comment on them later. I address only the type of choice to be a prostitute that is made by a woman over the age of consent, frequently in a situation of great economic duress.

1. *The Prostitute and the Factory Worker.* Both prostitution and factory work are usually low-paid jobs; but, in many instances, a woman faced with the choice can (at least over the short-haul) make more money in prostitution than in this sort of factory work. (This would probably be even more true if prostitution were legalized and the role of pimps thereby restricted, though the removal of risk and some stigma might at the same time depress wages, to some extent offsetting that advantage for the prostitute.) Both face health risks, but the health risk in prostitution can be very much reduced by legalization and regulation, whereas the particular type of work the factory worker is performing carries a high risk of nerve damage in the hands, a fact about it that appears unlikely to change. The prostitute may well have better working hours and conditions than the factory worker; especially in a legalized regime, she may have much more control over her working conditions. She has a degree of choice about which clients she accepts and what activities she performs, whereas the factory worker has no choices but must perform the same motions again and again for years. The prostitute also performs a service that requires skill and responsiveness to

¹⁹ Although this profession, as described, is hypothetical, medical students do employ "models" to teach students how to perform pelvic and other internal exams: see page 706 and note 27 *infra*.

new situations, whereas the factory worker's repetitive motion exercises relatively little human skill²⁰ and contains no variety.

The factory worker, however, is unlikely to be the target of violence, whereas the prostitute needs—and does not always get—protection against violent customers. (Again, this situation can be improved by legalization: prostitutes in the Netherlands have a call button wired up to the police.) This factory worker's occupation, moreover, has no clear connection with stereotypes of gender—though this might not have been the case. In many parts of the world, manual labor is strictly segmented by sex, and more routinized, low-skill tasks are given to women.²¹ The prostitute's activity does derive some of its attraction from stereotypes of women as sluttish and immoral, and it may in turn perpetuate such stereotypes. The factory worker suffers no invasion of her internal private space, whereas the prostitute's activity involves such (consensual) invasion. Finally, the prostitute suffers from social stigma, whereas the factory worker does not—at least among people of her own social class. (I shall return to this issue, asking whether stigma too can be addressed by legalization.) For all these reasons, many women, faced with the choice between factory work and prostitution, choose factory work, despite its other disadvantages.

2. *The Prostitute and the Domestic Servant.* In domestic service as in prostitution, one is hired by a client and one must do what that client wants or fail at the job. In both, one has a limited degree of latitude to exercise skills as one sees fit, and both jobs require the exercise of some developed bodily skills. In both, one is at risk of enduring bad behavior from one's client, although the prostitute is more likely to encounter physical violence. Certainly both are traditionally professions that enjoy low respect, both in society generally and from the client. Domestic service on the whole is likely to have worse hours and lower pay than (at least many types of) prostitution, but it probably contains fewer health risks. It also involves no invasion of intimate bodily space, as prostitution (consensually) does.

Both prostitution and domestic service are associated with a type of social stigma. In the case of domestic service, the stigma is, first, related to

²⁰ It is probably, however, a developed skill to come to work regularly and to work regular hours each day.

²¹ Consider, for example, the case of Jayamma, a brick worker in Trivandrum, Kerala, India (discussed by Leela Gulati, *Profiles of Female Poverty* 35–62 (1981)), whom I met on March 21, 1997, when she was approximately 65 years old. For approximately 40 years, Jayamma worked as a brick carrier in the brick-making establishment, carrying heavy loads of bricks on her head all day from one place to another. Despite her strength, fitness, and reliability, she could never advance beyond that job because of her sex, whereas men were quickly promoted to the less physically demanding and higher-paying tasks of brick molding and truck loading.

class: it is socially coded as an occupation only for the lowest classes.²² Domestic servants are in a vast majority of cases female, so it becomes coded by sex. In the United States, domestic service is very often racially coded as well. Not only in the South but also in many parts of the urban North, the labor market has frequently produced a clustering of African American women in these low-paying occupations. In my home in suburban Philadelphia in the 1950s and 1960s, the only African Americans we saw were domestic servants, and the only domestic servants we saw were African American. The perception of the occupation as associated with racial stigma ran very deep, producing difficult tensions and resentments that made domestic service seem to be incompatible with dignity and self-respect. (It needn't be, clearly; and I shall return to this.)

3. *The Prostitute and the Nightclub Singer.* Both of these people use their bodies to provide pleasure, and the customer's pleasure is the primary goal of what they do.²³ This does not mean that a good deal of skill and art isn't involved, and in both cases, it usually is. Both have to respond to requests from the customer, although (in varying degrees depending on the case) both may also be free to improvise or to make suggestions. Both may be paid more or less, have better or worse working conditions, and more or less control over what they do.

How do they differ? The prostitute faces health risks and risks of violence not faced by the singer. She also allows her bodily space to be invaded, as the singer does not. It may also be that prostitution is always a cheap form of an activity that has a higher, better form, whereas this need not be the case in popular vocal performance (though of course it might be).²⁴ The nightclub singer, furthermore, does not appear to be participating in, or perpetuating, any type of gender hierarchy—although in former times this would not have been the case, singers being seen as “a type of public prostitute,” and their activity associated, often, with anxiety about the con-

²² Indeed, this appears to be a ubiquitous feature: in India, the mark of “untouchability” is the performance of certain types of cleaning, especially those dealing with bathroom areas. Mahatma Gandhi's defiance of caste manifested itself in the performance of these menial services.

²³ This does not imply that there is some one thing, pleasure, varying only by quantity, that they produce. With Mill (and Plato and Aristotle), I think that pleasures differ in quality, not only in quantity.

²⁴ This point was suggested to me by Elizabeth Schreiber. I'm not sure whether I endorse it: it all depends on whether we really want to say that sex has one highest goal. Just as it would have been right, in an earlier era, to be skeptical about the suggestion that the sex involved in prostitution is “low” because it is nonreproductive, so too it might be good to be skeptical about the idea that prostitution sex is “low” because it is nonintimate. Certainly nonintimacy is involved in many noncommercial sexual relationships and is sometimes desired as such.

trol of female sexuality. Finally, there is no (great) moral stigma attached to being a nightclub singer, although at one time there certainly was.

4. *The Prostitute and the Professor of Philosophy.* These two figures have a very interesting similarity: both provide bodily services in areas that are generally thought to be especially intimate and definitive of selfhood. Just as the prostitute takes money for sex, which is commonly thought to be an area of intimate self-expression, so the professor takes money for thinking and writing about what she thinks—about morality, emotion, the nature of knowledge, whatever—all parts of a human being's intimate search for understanding of the world and self-understanding. It was precisely for this reason that the medieval thinkers I have mentioned saw such a moral problem about philosophizing for money: it should be a pure spiritual gift, and it is degraded by the receipt of a wage. The fact that we do not think that the professor (even one who regularly holds out for the highest salary offered) thereby alienates her mind or turns her thoughts into commodities—even when she writes a paper for a specific conference or volume—should put us on our guard about making similar conclusions in the case of the prostitute.

Other similarities are that in both cases, the performance involves interaction with others, and the form of the interaction is not altogether controlled by the person. In both cases, there is at least an element of producing pleasure or satisfaction (note the prominent role of teaching evaluations in the employment and promotion of professors), although in philosophy there is also a countervailing tradition of thinking that the goal of the interaction is to produce dissatisfaction and unease. (Socrates would not have received tenure in a modern university.) It may appear at first that the intimate bodily space of the professor is not invaded—but we should ask about this. When someone's unanticipated argument goes into one's mind, is this not both intimate and bodily? (And far less consensual, often, than the penetration of prostitute by customer?) Both performances involve skill. It might plausibly be argued that the professor's involves a more developed skill, or at least a more expensive training—but we should be cautious here. Our culture is all too ready to think that sex involves no skill and is simply “natural,” a view that is surely false and is not even seriously entertained by many cultures.²⁵

The salary of the professor, and her working conditions, are usually a great deal better than those of (all but the most elite) prostitutes. The professor has a fair amount of control over the structure of her day and her work-

²⁵ Thus the *Kama Sutra*, with its detailed instructions for elaborately skilled performances, strikes most Western readers as slightly comic since the prevailing romantic ideal of “natural” sex makes such contrivance seem quite unsexy.

ing environment, although she also has fixed mandatory duties, as the prostitute, when self-employed, does not. If the professor is in a nation that protects academic freedom, she has considerable control over what she thinks and writes, although fads, trends, and peer pressure surely constrain her to some extent. The prostitute's need to please her customer is usually more exigent and permits less choice. In this way, she is more like the professor of philosophy in Cuba than like the U.S. counterpart²⁶—but the Cuban professor appears to be worse off, since she cannot say what she really thinks even when off the job. Finally, the professor of philosophy, if a female, both enjoys reasonably high respect in the community and also might be thought to bring credit to all women in that she succeeds at an activity commonly thought to be the preserve only of males. She thus subverts traditional gender hierarchy, whereas the prostitute, while suffering stigma herself, may be thought to perpetuate gender hierarchy.

5. *The Prostitute and the Masseuse.* These two bodily actors seem very closely related. Both use a skill to produce bodily satisfaction in the client. Unlike the nightclub singer, both do this through a type of bodily contact with the client. Both need to be responsive to what the client wants and to a large degree take direction from the client as to how to handle his or her body. The bodily contact involved is rather intimate, although the internal space of the masseuse is not invaded. The type of bodily pleasure produced by the masseuse may certainly have an erotic element, although in the type of "respectable" masseuse I'm considering, it is not directly sexual.

The difference is primarily one of respectability. Practitioners of massage have fought for, and have to a large extent won, the right to be considered as dignified professionals who exercise a skill. Their trade is legal; it is not stigmatized; and people generally do not believe that they degrade their bodies or turn their bodies into commodities by using their bodies to give pleasure to customers. They have positioned themselves alongside physical therapists and medical practitioners, dissociating themselves from the erotic dimension of their activity. As a consequence of this successful self-positioning, they enjoy better working hours, better pay, and more respect than most prostitutes. What is the difference, we might ask? One is having sex, and the other is not. But what sort of difference is this? Is it a difference we want to defend? Are our reasons for thinking it so crucial really reasons, or vestiges of moral prejudice? A number of distinct beliefs enter in at this point: the belief that women should not have sex with strangers, the belief that commercial sex is inherently degrading and makes a woman a degraded woman, the belief that women should not have to have sex with strangers

²⁶ We might also consider the example of a skilled writer who writes advertising copy.

if they do not want to, and in general, the belief that women should have the option to refuse sex with anyone they do not really choose. Some of these beliefs are worth defending, and some are not. (I shall argue that the issue of choice is the really important one.) We need to sort them out and to make sure that our policies are not motivated by views we are not really willing to defend.

6. *The Prostitute and the Colonoscopy Artist.* I have included this hypothetical occupation for a reason that should now be evident: it involves the consensual invasion of one's bodily space. (The example is not so hypothetical, either: medical students need models when they are learning to perform internal exams, and young actors do earn a living playing such roles.)²⁷ The colonoscopy artist uses her skill at tolerating the fiber-optic probe without anaesthesia to make a living. In the process, she permits an aperture of her body to be penetrated by another person's activity—and, we might add, far more deeply penetrated than is generally the case in sex. She runs some bodily risk, since she is being used to test untested instruments, and she will probably have to fast and empty her colon regularly enough to incur some malnutrition and some damage to her excretory function. Her wages may not be very good—for this is probably not a profession characterized by what Smith called “the beauty and rarity of talents,” and it may also involve some stigma, given that people are inclined to be disgusted by the thought of intestines.

And yet, on the whole, we do not think that this is a base trade or one that makes the woman who does it a fallen woman. We might want to ban or regulate it if we thought it was too dangerous, but we would not be moved to ban it for moral reasons. Why not? Some people would point to the fact that it does not either reflect or perpetuate gender hierarchy; and this is certainly true. (Even if her being a woman is crucial to her selection for the job—they need to study, for example, both male and female colons—it won't be for reasons that seem connected with the subordination of women.) But surely a far greater part of the difference is made by the fact that most people do not think anal penetration by a doctor in the context of a medical procedure is immoral,²⁸ whereas lots of people do think that vaginal or anal penetration in the context of sexual relations is (except

²⁷ See Terri Kapsalis, *Public Privates: Performing Gynecology from Both Ends of the Speculum* (1997); Terri Kapsalis, *In Print: Backstage at the Pelvic Theater*, Chi. Reader, April 18, 1997, at 46. While a graduate student in performance studies at Northwestern, Kapsalis made a living as a “gynecology teaching associate,” serving as the model patient for medical students learning to perform pelvic and breast examinations.

²⁸ The same goes for vaginal penetration, according to Kapsalis: she says that the clinical nature of the procedure more than compensates for “society's queasiness with female sexuality” (Kapsalis, *In Print*, *supra* note 27, at 46).

of kidnapping, coercion, and fraud to entice women into prostitution. For these reasons, international human rights organizations, such as Human Rights Watch and Amnesty International, have avoided taking a stand against prostitution as such and have focused their energies on the issue of trafficking and financial coercion.³⁴

It appears, then, that the stigma associated with prostitution has an origin that feminists have good reason to connect with unjust background conditions and to decry as both unequal and irrational, based on a hysterical fear of women's unfettered sexuality. There may be other good arguments against the legality of prostitution, but the existence of widespread stigma all by itself does not appear to be among them. So long as prostitution is stigmatized, people are injured by that stigmatization, and it is a real injury to a person not to have dignity and self-respect in her own society. But that real injury (as with the comparable real injury to the dignity and self-respect of interracial couples or of lesbians and gay men) is not best handled by continued legal strictures against the prostitute and can be better dealt with in other ways: for example, by fighting discrimination against these people and taking measures to promote their dignity. As the Supreme Court said in a mixed-race custody case, "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."³⁵

V

Pervasive stigma itself, then, does not appear to provide a good reason for the continued criminalization of prostitution, any more than it does for the illegality of interracial marriage. Nor does the stigma in question even appear to ground a sound *moral* argument against prostitution. This is not, however, the end of the issue: for there are a number of other significant arguments that have been made to support criminalization. With our six related cases in mind, let us now turn to those arguments.

1. *Prostitution Involves Health Risks and Risks of Violence.* To this we can make two replies. First, insofar as this is true, as it clearly is, the problem is made much worse by the illegality of prostitution, which prevents adequate supervision, encourages the control of pimps, and discourages health checking. As Corbin shows, regimes of legal but regulated prostitu-

³⁴ See A Modern Form of Slavery: The Human Rights Watch Global Report on Women's Human Rights 196–273, esp. 270–73 (1995). The pertinent international human rights instruments take the same approach, including the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others.

³⁵ *Palmore v. Sidoti*, 466 U.S. 429 (1984).

tion have not always done well by women: the health checkups of the *filles soumises* were ludicrously brief and inadequate.³⁶ But there is no reason why one cannot focus on the goal of adequate health checks, and some European nations have done reasonably well in this area.³⁷ The legal brothels in Nevada have had no reported cases of AIDS.³⁸ Certainly risks of violence can be far better controlled when the police is the prostitute's ally rather than her oppressor.

To the extent to which risks remain an inevitable part of the way of life, we must now ask what general view of the legality of risky undertakings we wish to defend. Do we ever want to rule out risky bargains simply because they harm the agent? Or do we require a showing of harm to others (as might be possible in the case of gambling, for example)? Whatever position we take on this complicated question, we will almost certainly be led to conclude that prostitution lies well within the domain of the legally acceptable: for it is probably less risky than boxing, another activity in which working-class people try to survive and flourish by subjecting their bodies to some risk of harm. There is a stronger case for paternalistic regulation of boxing than of prostitution, and externalities (the glorification of violence as example to the young) make boxing at least as morally problematic, probably more so. And yet I would not defend the criminalization of boxing, and I doubt that very many Americans would either. Sensible regulation of both prostitution and boxing, by contrast, seems reasonable and compatible with personal liberty.

In the international arena, many problems of this type stem from the use of force and fraud to induce women to enter prostitution, frequently at a very young age and in a strange country where they have no civil rights. An especially common destination, for example, is Thailand, and an especially common source is Burma, where the devastation of the rural economy has left many young women an easy mark for promises of domestic service elsewhere. Driven by customers' fears of HIV, the trade has focused on increasingly young girls from increasingly remote regions. Human rights interviewers have concluded that large numbers of these women were unaware of what they would be doing when they left their country and are kept there through both economic and physical coercion. (In many cases,

³⁶ In Paris, Dr. Clerc boasted that he could examine a woman every 30 seconds and estimated that a single practitioner saw 400 women in a single 24-hour period. Another practitioner estimated that the average number of patients per hour was 52. See Corbin, *supra* note 29, at 90.

³⁷ For a more pessimistic view of health checks, see Posner, *supra* note 32, at 209, pointing out that they frequently have had the effect of driving prostitutes into the illegal market.

³⁸ See Richard A. Posner, *Private Choices and Public Health: The AIDS Epidemic in an Economic Perspective* 149 (1993), with references.

family members have received payments, which then become a “debt” that the girl has to pay off.)³⁹ These circumstances, terrible in themselves, set the stage for other forms of risk and violence. Fifty percent to seventy percent of the women and girls interviewed by Human Rights Watch were HIV positive; discriminatory arrests and deportations are frequently accompanied by abuse in police custody. All these problems are magnified by the punitive attitude of the police and government toward these women as prostitutes or illegal aliens or both, although under both national and international law trafficking victims are exempt from legal penalty and are guaranteed safe repatriation to their country of origin. This situation clearly deserves both moral condemnation and international legal pressure; but, it is made worse by the illegality of prostitution itself.

2. *The Prostitute Has No Autonomy; Her Activities Are Controlled by Others.* This argument⁴⁰ does not serve to distinguish prostitution from very many types of bodily service performed by working-class women. The factory worker does worse on the scale of autonomy, and the domestic servant no better. I think this point expresses a legitimate moral concern: a person’s life seems deficient in flourishing if it consists only of a form of work that is totally out of the control and direction of the person herself. Karl Marx rightly associated that kind of labor with a deficient realization of full humanity and (invoking Aristotle) persuasively argued that a flourishing human life probably requires some kind of use of one’s own reasoning in the planning and execution of one’s own work.⁴¹ But that is a pervasive problem of labor in the modern world, not a problem peculiar to prostitution as such. It certainly does not help the problem to criminalize prostitution—any more than it would be to criminalize factory work or domestic service. A woman will not exactly achieve more control and “truly human functioning” by becoming unemployed. What we should instead think about are ways to promote more control over choice of activities, more variety, and more general humanity in the types of work that are actually available to people with little education and few options. That would be a lot more helpful than removing one of the options they actually have.

3. *Prostitution Involves the Invasion of One’s Intimate Bodily*

³⁹ See A Modern Form of Slavery: The Human Rights Watch Global Report on Women’s Human Rights, *supra* note 34, at 1–7.

⁴⁰ See E. Anderson, Value in Ethics and Economics, *supra* note 7, at 156: “Her actions under contract express not her own valuations but the will of her customer.”

⁴¹ This is crucial in the thinking behind the “capabilities approach” to which I have contributed in *Women, Culture, and Development* (M. Nussbaum & J. Glover eds. 1995) and other publications. For the connection between this approach and Marx’s use of Aristotle, see my Aristotle on Human Nature and the Foundations of Ethics, in *World, Mind, and Ethics: Essays on the Philosophy of Bernard Williams* (J. E. J. Altham & R. Harrison eds. 1993).

Space. This argument⁴² does not seem to support the legal regulation of prostitution so long as the invasion in question is consensual—that is, that the prostitute is not kidnapped, fraudulently enticed, a child beneath the age of consent, or under duress against leaving if she should choose to leave. In this sense, prostitution is quite unlike sexual harassment and rape and far more like the activity of the colonoscopy artist—not to everyone's taste, and involving a surrender of bodily privacy that some will find repellant, but not for that reason necessarily bad, either for self or others. The argument does not even appear to support a moral criticism of prostitution, unless one is prepared to make a moral criticism of all sexual contact that does not involve love or marriage.

4. *Prostitution Makes It Harder for People to Form Relationships of Intimacy and Commitment*. This argument is prominently made by Elizabeth Anderson in defense of the criminalization of prostitution.⁴³ The first question we should ask is, Is this true? People still appear to fall in love in the Netherlands and Germany and Sweden; they also fell in love in ancient Athens, where prostitution was not only legal but also, probably, publicly subsidized.⁴⁴ One type of relationship does not, in fact, appear to remove the need for the other—any more than a Jackie Collins novel removes the desire to read Proust. Proust has a specific type of value that is by no means found in Jackie Collins, so people who want that value will continue to seek out Proust, and there is no reason to think that the presence of Jackie Collins on the bookstand will confuse Proust lovers into thinking that Proust is really like Jackie Collins. So too, one supposes, with love in the Netherlands: people who want relationships of intimacy and commitment continue to seek them out for the special value they provide, and they do not have much trouble telling the difference between one sort of relationship and another, despite the availability of both.

Second, one should ask which women Anderson has in mind. Is she saying that the criminalization of prostitution would facilitate the formation of love relationships on the part of the women who were (or would have been) prostitutes? Or is she saying that the unavailability of prostitution as an op-

⁴² Made frequently by my students, not necessarily to support criminalization.

⁴³ See Anderson, *Value in Ethics and Economics*, *supra* note 7, at 150–58; Anderson pulls back from an outright call for criminalization, concluding that her arguments “establish the legitimacy of a state interest in prohibiting prostitution, but not a conclusive case for prohibition,” given the paucity of opportunities for working women.

⁴⁴ See K. J. Dover, *Greek Homosexuality* (2d ed. 1978); and David Halperin, *The Democratic Body*, in *One Hundred Years of Homosexuality and Other Essays* (1990). Customers were all males, but prostitutes were both male and female. The evidence that prostitution was publicly funded is uncertain, since it derives from comic drama; but it is certain that both male and female prostitution enjoyed broad public support and approval.

tion for working-class women would make it easier for romantic middle-class women to have the relationships they desire? The former claim is implausible, since it is hard to see how reinforcing the stigma against prostitutes or preventing some poor women from taking one of the few employment options they might have would be likely to improve their human relations.⁴⁵ The latter claim might possibly be true (though it is hardly obvious), but it seems a repugnant idea, which I am sure Anderson would not endorse, that we should make poor women poorer so that middle-class women can find love. Third, one should ask Anderson whether she is prepared to endorse the large number of arguments of this form that might plausibly be made in the realm of popular culture and, if not, whether she has any way of showing how she could reject those as involving an unacceptable infringement of liberty and yet allowing the argument about prostitution that she endorses. For it seems plausible that making rock music illegal would increase the likelihood that people would listen to Mozart and Beethoven, that making Jackie Collins illegal would make it more likely that people would turn to Joyce Carol Oates, that making commercial advertising illegal would make it more likely that we would appraise products with high-minded ideas of value in our minds, and that making television illegal would improve children's reading skills. What is certain, however, is that we would and do utterly reject those ideas (we do not even seriously entertain them) because we do not want to live in Plato's *Republic*, with our cultural options dictated by a group of wise guardians, however genuinely sound their judgments may be.⁴⁶

5. *The Prostitute Alienates Her Sexuality on the Market; She Turns Her Sexual Organs and Acts into Commodities.*⁴⁷ Is this true? It seems implausible to claim that the prostitute alienates her sexuality just on the grounds that she provides sexual services to a client for a fee. Does the singer alienate her voice, or the professor her mind? The prostitute still has her sexual-

⁴⁵ For a similar point, see Radin, *Market-Inalienability*, *supra* note 7, at 1921–25; and Radin, *Contested Commodities*, *supra* note 7, at 132–36; Anderson refers to this claim of Radin's, apparently as the source of her reluctance to call outright for criminalization.

⁴⁶ I would not go quite as far as John Rawls, however, in the direction of letting the market determine our cultural options. He opposes any state subsidy to opera companies, symphony orchestras, museums, and so forth, on the grounds that this would back a particular conception of the good against others. I think, however, that we could defend such subsidies, within limits, as valuable because they preserve a cultural option that is among the valuable ones and that might otherwise cease to exist. Obviously, much more argument is needed on this entire question.

⁴⁷ See Radin, *Contested Commodities*, *supra* note 7; and Anderson, *supra* note 7, at 156: "The prostitute, in selling her sexuality to a man, alienates a good necessarily embodied in her person to him and thereby subjects herself to his commands."

ity; she can use it on her own, apart from the relationship with the client, just as the domestic servant may cook for her family and clean her own house.⁴⁸ She can also cease to be a prostitute, and her sexuality will still be with her, and hers, if she does. So she has not even given anyone a monopoly on those services, far less given them over into someone else's hands. The real issue that separates her from the professor and the singer seems to be the degree of choice she exercises over the acts she performs. But is even this a special issue for the prostitute, any more than it is for the factory worker or the domestic servant or the colonoscopy artist—all of whom choose to enter trades in which they will not have a great deal of say over what they do or (within limits) how they do it? Freedom to choose how one works is a luxury, highly desirable indeed, but a feature of few jobs that nonaffluent people perform.

As for the claim that the prostitute turns her sexuality into a commodity, we must ask what that means. If it means only that she accepts a fee for sexual services, then that is obvious; but nothing further has been said that would show us why this is a bad thing. The professor, the singer, the symphony musician—all accept a fee, and it seems plausible that this is a good state of affairs, creating spheres of freedom. Professors are more free to pursue their own thoughts now, as moneymakers, than they were in the days when they were supported by monastic orders; symphony musicians playing under the contract secured by the musicians union have more free time than nonunionized musicians and more opportunities to engage in experimental and solo work that will enhance their art. In neither case should we conclude that the existence of a contract has converted the abilities into things to be exchanged and traded separately from the body of the producer; they remain human creative abilities, securely housed in their possessor. So if, on the one hand, to “commodify” means merely to accept a fee, we have been given no reason to think that this is bad.

If, on the other hand, we try to interpret the claim of “commodification” using the narrow technical definition of “commodity” used by the Uniform Commercial Code,⁴⁹ the claim is plainly false. For that definition stresses the “fungible” nature of the goods in question, and “fungible” goods are, in turn, defined as goods “of which any unit is, by nature or usage of trade, the equivalent of any other like unit.” While we may not think that the soul or inner world of a prostitute is of deep concern to the customer, she is

⁴⁸ On this point, see also Schwarzenbach, *supra* note 9, with discussion of Marx's account of alienation.

⁴⁹ See Richard Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 Va. L. Rev. 2305–41, 2327 (1995).

usually not regarded as simply a set of units fully interchangeable with other units.⁵⁰ Prostitutes are probably somewhat more fungible than bassoon players, but not totally so. (Corbin reports that all *maisons de tolérance* standardly had a repertory of different types of women, to suit different tastes, and this should not surprise us.) What seems to be the real issue is that the woman is not attended to as an individual, not considered as a special unique being. But that is true of many ways people treat one another in many areas of life, and it seems implausible that we should use that kind of disregard as a basis for criminalization. It may not even be immoral: for surely we cannot deeply know all the people with whom we have dealings in life, and many of those dealings are just fine without deep knowledge. So our moral question boils down to the question, Is sex without deep personal knowledge always immoral? It seems to me officious and presuming to use one's own experience to give an affirmative answer to this question, given that people have such varied experiences of sexuality.

In general, then, there appears to be nothing baneful or value-debasing about taking money for a service, even when that service expresses something intimate about the self. Professors take a salary, artists work on commission under contract—frequently producing works of high intellectual and spiritual value. To take money for a production does not turn either the activity or the product (for example, the article, the painting) into a commodity in the baneful sense in which that implies fungibility. If this is so, there is no reason to think that a prostitute's acceptance of money for her services necessarily involves a baneful conversion of an intimate act into a commodity in that sense. If the prostitute's acts are, as they are, less intimate than many other sexual acts people perform, that does not seem to have a great deal to do with the fact that she receives money, given that people engage in many intimate activities (painting, singing, writing) for money all the time without loss of expressive value. Her activity is less intimate because that is its whole point; and it is problematic, to the extent that it is, neither because of the money involved nor because of the nonintimacy (which, as I have said, it seems to me officious to declare bad in all cases) but because of features of her working conditions and the way she is treated by others.

Here we are left with an interesting puzzle: for my argument about professors and painters certainly seems to imply that there is no reason, in principle, why the most committed and intimate sex cannot involve a contract and a financial exchange. So why does it not, in our culture? One reply is

⁵⁰ Moreover, the Uniform Commercial Code does not cover the sale of services, and prostitution should be classified as a service rather than a good.

that it quite frequently does when people form committed relationships that include an element of economic dependence, whether one-sided or mutual; marriage has very frequently had that feature, not always for the worse. But to the extent that we do not exchange money for sex, why do we not? In a number of other cultures, courtesans, both male and female, have been somewhat more common as primary sexual partners than they are here. Unlike quite a few cultures, we do not tend to view sex in intimate personal relationships the way we view an artist's creation of a painting, namely as an intimate act that can nonetheless be deliberately undertaken as the result of an antecedent contract-like agreement. Why not? I think there is a mystery here, but we can begin to grapple with it by mentioning two features. First, there is the fact that sex, however prolonged, still takes up much less time than writing an article or producing a painting. Furthermore, it also cannot be done too often; its natural structure is that it will not very often fill up the entire day. One may therefore conduct an intimate sexual relationship in the way one would wish, not feeling that one is slighting it, while pursuing another line of work as one's way of making a living. Artists and scholars sometimes have to pursue another line of work, but they prefer not to. They characteristically feel that to do their work in the way they would wish, they ought to spend the whole day doing it. So they naturally gravitate to the view that their characteristic mode of creative production fits very well with contract and a regular wage.

This, however, still fails to explain cultural differences. To begin to grapple with these, we need to mention the influence of our heritage of romanticism, which makes us feel that sex is not authentic if not spontaneous, "natural," and to some degree unplanned. Romanticism has exercised a far greater sway over our ideas of sex than over our ideas of artistic or intellectual production, making us think that any deal or antecedent arrangement somehow diminishes that characteristic form of expression.

Are our romantic ideas about the difference between sex and art good, or are they bad? Some of each, I suspect. They are problematic to the extent that they make people think that sex happens naturally, does not require complicated adjustment and skill, and flares up (and down) uncontrollably.⁵¹ Insofar as they make us think that sex fits badly with reliability, promise-keeping, and so forth, these ideas are certainly subversive of Anderson's goals of "intimacy and commitment," which would be better served, probably, by an attitude that moves sex in intimate personal relationships (and especially marriages) closer to the activity of the artist or the professor. On

⁵¹ It is well known that these ideas are heavily implicated in the difficulty of getting young people, especially young women, to use contraception.

the other hand, romantic views also promote Anderson's goals to some degree, insofar as they lead people to connect sex with self-revelation and self-expression rather than prudent concealment of self. Many current dilemmas concerning marriage in our culture stem from an uneasy struggle to preserve the good in romanticism while avoiding the dangers it poses to commitment. As we know, the struggle is not always successful. There is much more to be said about this fascinating topic. But since (as I have argued) it leads us quite far from the topic of prostitution, we must now return to our primary line of argument.

6. *The Prostitute's Activity Is Shaped by, and in Turn Perpetuates, Male Dominance of Women.*⁵² The institution of prostitution as it has most often existed is certainly shaped by aspects of male domination of women. As I have argued, it is shaped by the perception that female sexuality is dangerous and needs careful regulation, that male sexuality is rapacious and needs a "safe" outlet, that sex is dirty and degrading, and that only a degraded woman is an appropriate sexual object.⁵³ Nor have prostitutes standardly been treated with respect or been given the dignity one might think proper to a fellow human being. They share this with working-class people of many types in many ages; but, there is no doubt that there are particular features of the disrespect that derive from male supremacy and the desire to lord it over women—as well as from a tendency to link sex to (female) defilement that is common in the history of Western European culture. The physical abuse of prostitutes, and the control of their earnings by pimps—as well as the pervasive use of force and fraud in international markets—are features of male dominance that are extremely harmful and that do not have direct parallels in other types of low-paid work. Some of these forms of conduct may be largely an outgrowth of the illegality of the industry and closely comparable to the threatening behavior of drug wholesalers to their—usually male—retailers. So there remains a question about how far male dominance as such explains the violence involved. But in the international arena, where regulations against these forms of misconduct are usually treated as a joke, illegality is not a sufficient explanation for them.

Prostitution is hardly alone in being shaped by, and in reinforcing, male dominance. Systems of patrilineal property and exogamous marriage, for example, certainly do more to perpetuate not only male dominance but also female mistreatment and even death. There probably is a strong case for making the giving of dowry illegal, as has been done since 1961 in India

⁵² See Shrage, *supra* note 9; Andrea Dworkin, Prostitution and Male Supremacy, in *Life and Death* (1997).

⁵³ An eloquent examination of the last view, with reference to Freud's account (which endorses it) is in William Miller, *The Anatomy of Disgust*, ch. 6 (1997).

and since 1980 in Bangladesh⁵⁴ (though with little success): for it can be convincingly shown that the institution of dowry is directly linked with extortion and threats of bodily harm and ultimately with the deaths of large numbers of women.⁵⁵ It is also obvious that the dowry system pervasively conditions the perception of the worth of girl children: they are a big expense, and they will not be around to protect one in one's old age. This structure is directly linked with female malnutrition, neglect, noneducation, even infanticide, harms that have caused the deaths of many millions of women in the world.⁵⁶ It is perfectly understandable that the governments of India, Bangladesh, and Pakistan are very concerned about the dowry system, since it seems very difficult to improve the very bad economic and physical condition of women without some structural changes. (Pakistan has recently adopted a somewhat quixotic remedy, making it illegal to serve food at weddings—thus driving many caterers into poverty.) Dowry is an institution affecting millions of women, determining the course of almost all girl children's lives pervasively and from the start. Prostitution as such usually does not have either such dire or such widespread implications. (Indeed, it is frequently the produce of the dowry system, when parents take payment for prostituting a female child for whom they would otherwise have to pay dowry.) The case for making it illegal on grounds of subordination seems weaker than the case for making dowry, or even wedding feasts, illegal; and yet these laws are themselves of dubious merit and would probably be rightly regarded as involving undue infringement of liberty under our constitutional tradition. (It is significant that Human Rights Watch, which has so aggressively pursued the issue of forced prostitution, takes no stand one way or the other on the legality of prostitution itself.)

More generally, one might argue that the institution of marriage as has most frequently been practiced both expresses and reinforces male dominance. It would be right to use law to change the most iniquitous features of that institution—protecting women from domestic violence and marital rape, giving women equal property and custody rights, and improving their

⁵⁴ The Dowry Prohibition Act of 1961 makes both taking and giving of dowry illegal; in Bangladesh, demanding, taking, and giving dowry are all criminal offenses: see Nussbaum, *supra* note 18.

⁵⁵ It is extremely difficult to estimate how many women are damaged and killed as a result of this practice. It is certainly clear that criminal offenses are vastly underreported, as is domestic violence in India generally, but that very problem makes it difficult to form any reliable idea of the numbers involved. See Indira Jaising, *Justice for Women* (1996); and Nussbaum, *supra* note 18.

⁵⁶ See Amartya Sen & Jean Drèze, *Hunger and Public Action* 52 & ch. 1 (1989). Kerala, the only Indian state to have a matrilineal property tradition, also has an equal number of men and women (contrasted with a 94:100 sex ratio elsewhere), and 97 percent both male and female literacy, as contrasted with 32 percent female literacy elsewhere.

exit options by intelligent shaping of the divorce law. But to rule that marriage as such should be illegal on the grounds that it reinforces male dominance would be an excessive intrusion on liberty, even if one should believe marriage irredeemably unequal. So too, I think, with prostitution: what seems right is to use law to protect the bodily safety of prostitutes from assault, to protect their rights to their incomes against the extortionate behavior of pimps, to protect poor women in developing countries from forced trafficking and fraudulent offers, and to guarantee their full civil rights in the countries where they end up—to make them, in general, equals under the law, both civil and criminal. But the criminalization of prostitution seems to pose a major obstacle to that equality.

Efforts on behalf of the dignity and self-respect of prostitutes have tended to push in exactly the opposite direction. In the United States, prostitutes have long been organized to demand greater respect, though their efforts are hampered by prostitution's continued illegality. In India, the National Federation of Women has adopted various strategies to give prostitutes more dignity in the public eye. For example, on National Women's Day, they selected a prostitute to put a garland on the head of the Prime Minister. In a similar manner, UNICEF in India's Andhra Pradesh has been fighting to get prostitutes officially classified as "working women" so that they can enjoy the child-care benefits local government extends to that class. As with domestic service, so here: giving workers greater dignity and control can gradually change both the perception and the fact of dominance.

7. *Prostitution Is a Trade That People Do Not Enter by Choice; Therefore the Bargains People Make within It Should Not Be Regarded as Real Bargains.* Here we must distinguish three cases. First is the case where the woman's entry into prostitution is caused by some type of conduct that would otherwise be criminal: kidnapping, assault, drugging, rape, statutory rape, blackmail, a fraudulent offer. Here we may certainly judge that the woman's choice is not a real choice and that the law should take a hand in punishing her coercer. This is a terrible problem currently in developing countries; international human rights organizations are right to make it a major focus.⁵⁷

Closely related is the case of child prostitution. Child prostitution is frequently accompanied by kidnapping and forcible detention; even when children are not stolen from home, their parents have frequently sold them

⁵⁷ See, for example, A Modern Form of Slavery: Trafficking of Burmese Women and Girls into Brothels in Thailand, *supra* note 33; A Modern Form of Slavery: The Human Rights Watch Global Report on Women's Human Rights, *supra* note 34, at 1273–296; Human Rights Are Women's Rights 53–56 (1995).

without their own consent. But even where it is not, we should judge that there is an impermissible infringement of autonomy and liberty. A child (and because of clients' fears of HIV, brothels now often focus on girls as young as ten)⁵⁸ cannot give consent to a life in prostitution; not only lack of information and of economic options (if parents collude in the deal) but also absence of adult political rights makes such a "choice" no choice at all.

Different is the case of an adult woman who enters prostitution because of bad economic options: because it seems a better alternative than the chicken factory, because there is no other employment available to her, and so forth. This too, we should insist, is a case where autonomy has been infringed, but in a different way. Consider Joseph Raz's vivid example of "the hounded woman," a woman on a desert island who is constantly pursued by a man-eating animal.⁵⁹ In one sense, this woman is free to go anywhere on the island and do anything she likes. In another sense, of course, she is quite unfree. If she wants not to be eaten, she has to spend all her time and calculate all her movements in order to avoid the beast. Raz's point is that many poor people's lives are nonautonomous in just this way. They may fulfill internal conditions of autonomy, being capable of making bargains, reflecting about what to do, and so forth. But none of this counts for a great deal if in fact the struggle for survival gives them just one unpleasant option or a small set of (in various ways) unpleasant options.

This seems to me the truly important issue raised by prostitution. Like work in the chicken factory, it is not an option many women choose with alacrity when many other options are on their plate.⁶⁰ This might not be so in some hypothetical culture in which prostitutes have legal protection, dignity, and respect and the status of skilled practitioner, rather like the masseuse.⁶¹ But it is true now in most societies, given the reality of the (albeit irrational) stigma attaching to prostitution. But the important thing to realize is that this is not an issue that permits us to focus on prostitution in isolation from the economic situation of women in a society generally. Certainly it will not be ameliorated by the criminalization of prostitution, which reduces poor women's options still further. We may grant that poor women do not have enough options and that society has been unjust to them in not ex-

⁵⁸ On Thailand, see *A Modern Form of Slavery: The Human Rights Watch Global Report on Women's Human Rights*, *supra* note 34, at 197.

⁵⁹ Joseph Raz, *The Morality of Freedom* 374 (1986).

⁶⁰ See Posner, *supra* note 32, at 43, on the low incidence of prostitution in Sweden, even though it is not illegal; his explanation is that "women's opportunities in the job market are probably better there than in any other country."

⁶¹ See Schwarzenbach, *supra* note 9.

tending more options, while nonetheless respecting and honoring the choices they actually make in reduced circumstances.

How could it possibly be ameliorated? Here are some things that have actually been done in India, where prostitution is a common last-ditch option for women who lack other employment opportunities. First, both government and private groups have focused on the provision of education to women, to equip them with skills that will enhance their options. One group I recently visited in Bombay focuses in particular on skills training for the children of prostitutes, who are at especially high risk of becoming prostitutes themselves unless some action increases their options. Second, nongovernmental organizations have increasingly focused on the provision of credit to women in order to enhance their employment options and give them a chance to “upgrade” in the domain of their employment. One such project that has justly won international renown is the Self-Employed Women’s Association (SEWA), centered in Ahmedabad in Gujarat, which provides loans to women pursuing a variety of informal-sector occupations,⁶² from tailoring to hawking and vending to cigarette rolling to agricultural labor.⁶³ With loans they can get wholesale rather than retail supplies, upgrade their animals or equipment, and so forth. They also get skills training and, frequently, the chance to move into leadership roles in the organization itself. Such women are far less likely to need to turn to prostitution to supplement their income. Third, they can form labor organizations to protect women employed in low-income jobs and to bargain for better working conditions—once again making this work a better source of income and diminishing the likelihood that prostitution will need to be selected. (This is the other primary objective of SEWA, which is now organizing hawkers and vendors internationally.) Fourth, they can form groups to diminish the isolation and enhance the self-respect of working women in low-paying jobs; this was a ubiquitous feature of both government and nongovernment programs I visited in India, and a crucial element of helping women deliberate about their options if they wish to avoid prostitution for themselves or their daughters.

These four steps are the real issue, I think, in addressing the problem of prostitution. Feminist philosophers do not talk a lot about credit and employment;⁶⁴ they should do so far more. Indeed, it seems a dead end to con-

⁶² An extremely high proportion of the labor force in India is in the informal sector.

⁶³ The Self-Employed Women’s Association was first directed by Ela Bhatt, who is now involved in international work to improve the employment options of informal-sector workers. For a valuable description of the movement, see Kalima Rose, *Where Women Are Leaders: The SEWA Movement in India* (1995).

⁶⁴ But see, here, Schwarzenbach, *supra* note 9; and Shrage, *supra* note 9. I have also been very much influenced by Martha Chen, *A Quiet Revolution: Women in Transition in Rural*

sider prostitution in isolation from the other realities of working life of which it is a part, and one suspects that this has happened because prostitution is a sexy issue and getting a loan for a sewing machine appears not to be. But philosophers had better talk more about getting loans, learning to read, and so forth if they want to be relevant to the choices that are actually faced by working women and to the programs that are actually doing a lot to improve such women's options.

VI

The stigma traditionally attached to prostitution is based on a collage of beliefs, most of which are not rationally defensible and which should be especially vehemently rejected by feminists: beliefs about the evil character of female sexuality, the rapacious character of male sexuality, the essentially marital and reproductive character of "good" women and "good" sex. Worries about subordination more recently raised by feminists are much more serious concerns, but they apply to many types of work poor women do. Concerns about force and fraud should be extremely urgent concerns of the international women's movement. Where these conditions do not obtain, feminists should view prostitutes as (usually) poor working women with few options, not as threats to the intimacy and commitment that many women and men (including, no doubt, many prostitutes) seek. This does not mean that we should not be concerned about ways in which prostitution as currently practiced, even in the absence of force and fraud, undermines the dignity of women, just as domestic service in the past undermined the dignity of members of a given race or class. But the correct response to this problem seems to be to work to enhance the economic autonomy and the personal dignity of members of that class, not to rule off-limits an option that may be the only livelihood for many poor women and to further stigmatize women who already make their living this way.

In grappling further with these issues, we should begin from the realization that there is nothing per se wrong with taking money for the use of one's body. That is the way most of us live, and formal recognition of that fact through contract is usually a good thing for people, protecting their security and their employment conditions. What seems wrong is that relatively few people in the world have the option to use their body, in their work, in what Marx would call a "truly human" manner of functioning, by

Bangladesh (1983); Martha Chen, *A Matter of Survival: Women's Right to Work in India and Bangladesh*, in Nassbaum & Glover, eds., *supra* note 41; Bina Agarwal, *A Field of One's Own: Gender and Land Rights in South Asia* (1994); and Bina Agarwal, "Bargaining" and Gender Relations: Within and beyond the Household, 3 *Feminist Econ.* 1–51 (1997).

Introduction

The market is perhaps the most commonly used mechanism for allocating scarce resources. As an allocative mechanism it has many attractive features which permit it to predominate over other systems such as bureaucracies, regulatory agencies, lotteries, juries, queues, and the like. But despite its predominance, the market is far from universal in its use. As a result, an important aspect of economic analysis is to examine the characteristics of situations in which the market is not used as the primary allocative device in order to illuminate the limits and implications of the market as an allocative mechanism.

This essay addresses that task in the context of family law. In particular, I examine the reasons why we are reluctant to use a market mechanism in place of existing bureaucratic procedures for the adoption of newborn babies. The purpose of the essay is to understand the limits of the market rather than to promote its use. However, I pursue the topic by first detailing the affirmative case for a market in babies and then examining its deficiencies. My intention is to use the specific case as a vehicle for a more general understanding of the limits of market mechanisms and concepts in family law and related areas, thus contributing perspective to this symposium issue on the economic analysis of family law.

In proceeding in this way I run the risk of being misunderstood as advocating a market mechanism for allocating newborn babies. The opposite is true. My primary motivation in writing this essay has been a desire to reconcile my intuitive opposition to such a system (opposition which I assume is widely, if not universally, shared) with the analytical

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† This essay was inspired by the provocative argument in favour of a market for babies presented in Landes and Posner, *The economics of the baby shortage* (1978) 7 *J. Legal Studies* 323. That article includes many of the facts and arguments relied on in this essay. In teaching a course in Economic Analysis of Law, I often used the article by Landes and Posner as the basis of a discussion of the limits of markets and the use of market notions in analysing law. Since this essay draws heavily on those class discussions, it includes the comments of numerous students as well as my own thoughts. In addition, I have benefited from the comments of Bernard Dickens, Jack Knetsch, John Palmer, Michael Trebilcock, Cindy Blakely, and participants in the Law and Economics Workshops at the University of Western Ontario and the University of Toronto.

methods of economic analysis of law. Indeed, the purpose runs deeper, extending to the vitality of economic analysis of law. For if economic analysis is to remain a vital and creative role within legal scholarship, its limits must be explored as vigorously as its strengths.

It should also be clear from this statement of purpose that I have no direct interest in criticizing the performance of social workers and other personnel working within the existing system of adoption. While comparison of the existing system and a possible market mechanism inevitably involves some unflattering comments on the former, these are directed not at the participants in the system but rather at the inherent limits of an administrative procedure for allocating babies.

The remainder of the essay consists of four parts. First, a brief review of the current adoption system and the resulting baby shortage is presented. Second, an alternative, market-based mechanism is sketched and its likely effects are suggested. Third, in the most substantial part of the paper, the primary objections that might be made to such a mechanism are listed, categorized, and evaluated. Finally, in the fourth and concluding part, this assessment of a possible market for babies is related back to the central purpose of the paper: an enhanced understanding of the limits of markets.

The present situation

The results of the existing regulatory system governing the allocation and adoption of newborn children are in many respects tragic. At present in Canada and the United States many people unable to have children naturally want to adopt, but there are far too few newborn children to meet the demand, leaving many couples deprived of the privileges and joys of child rearing. In addition, the existing regulatory procedures allocating these scarce newborns subject childless couples to very substantial costs.

The evidence of the tragedy is ubiquitous. Local, national, and international observations confirm the point. For example, in at least one region in Southern Ontario the local Children's Aid Society has simply closed its intake desk because there is already such a backlog of approved applicant couples that it would be useless to process any further applications. In Metropolitan Toronto, there is an enormous disparity between the number of couples seeking to adopt a child and the available supply. The current situation in Toronto involves a minimum wait of one and a half to two years for a childless couple after they first contact the Children's Aid Society. Furthermore, although some couples do receive a child within two years, many wait much longer. In other parts of the province, the wait

is now approximately ten years. Similarly, in 1980 in Vancouver there were thirty newborn children available for adoption, while one thousand couples were approved and ready to receive an adopted child.¹

The evidence of the tragedy can also be found in increasing evidence of black market activity in the sale of babies. News reports from Vancouver,² Toronto,³ and the United States⁴ are unanimous in reporting increasing black market activity characterized by very high prices for newborns (as much as \$40,000) but continued interest on the part of childless couples. However, these reports also suggest that most of the economic rewards derived from these transactions are being gathered by the physicians and the lawyers involved in arranging them and not by the mothers who bear the children.

The reasons for the shortage are simple. The supply of newborns has decreased dramatically primarily as a result of the increased availability of contraceptive devices and legal abortions. A statistic indicative of the change in availability of newborns can be found in Metropolitan Toronto. In 1969, the Protestant Children's Aid Society placed approximately 1000 children, while in 1979 it placed only 179 children of which only 71 were less than one year old.

The consequences of this very substantial undersupply of adoptable babies are varied. The primary effect is that many couples who desire children are left childless. While accurate statistical information is not available, it has been estimated that up to 6 per cent of couples who desire children are unable to have them naturally.⁵ Given the existing short supply of babies, the magnitude of the social tragedy from the perspective of childless couples is readily apparent. The other consequences are somewhat less obvious. Childless couples are tempted to use fertility drugs and other fertility increasing treatments which necessarily increase the risk of children being born with various kinds of infirmities. Couples are also tempted to have children naturally even in circumstances where genetic counselling indicates they should not, since the alternative of adoption is so unavailable. On the supply side, there is no incentive for mothers to give up their newborns since at present those who do so are not remunerated in any way for their children. As a result the decision that the child is unwanted is often delayed for a year or two until the opportunities for and desirability of adoption are substantially decreased. Furthermore, the pregnant woman who plans to give up her child is under no

¹ *The Province* 7 April 1980

² *Ibid*

³ *Sunday Star* 6 April 1980

⁴ Louenheim, Innocence Inc. *Student Lawyer* (Dec 1977) at 23

⁵ Landes and Posner, The economics of the baby shortage (1978) 7 *J. of Legal Studies* 323

economic incentive to care for her child while it is in utero since no reward is paid for producing a well cared for child. Thus, injury-reducing abstinence such as forgoing smoking and drinking is not economically encouraged by the present system.

In Ontario the present scheme of regulation is created by the Child Welfare Act.⁶ This statute creates a virtual monopoly in the adoption business for certain licensed agencies, although it does permit individually licensed adoptions under restrictive conditions. Under the statute, the Children's Aid Societies which are the primary agencies charged with adoption regulation must screen and approve prospective adopting couples. Once a couple is approved, they join a queue formed at a central registry in each geographic district in the province. When a newborn becomes available, three couples who might be appropriate parents for the child are selected administratively. Then the social worker assigned to each couple engages in an advocacy process within the agency to determine which of the three couples should succeed. As a general rule, there is an attempt to match the educational backgrounds and economic circumstances of the couples and the natural mother. In addition, subject to the best interests of the child, an attempt is made to respect the desires of the natural mother as to the type of home environment she wishes for her child.⁷

One's ability to qualify or even be screened by a Children's Aid Society is determined by the geographic location of one's residence. Thus, in order to qualify for Metropolitan Toronto's Children's Aid Society, a couple must maintain a residence in Metropolitan Toronto. Since some districts in Ontario have considerably shorter waiting lists than others, an incentive is created to maintain a second residence in a district with a shorter list merely to qualify for an adoption. It has thus been reported that couples from districts outside Toronto where the intakes are closed or very limited maintain apartments for a period of years in Toronto in order to qualify for Metro's Children's Aid Society.

In addition to creating this regulatory scheme, section 67 of the Child Welfare Act provides that 'no person, whether before or after the birth of a child, shall make, give or receive or agree to make, give or receive a payment or reward for or in consideration of or in relation to' an adoption or a proposed adoption. As a result, market transactions in babies are strictly prohibited.

6 s.o. 1978, c 85 as amended s.o. 1979, c 98

7 While I am not familiar with solid evidence on this point, anecdotal evidence suggests that this consideration further diminishes any arguments that to vary the existing scheme of distributing babies would necessarily be counter to the child's best interests. In one case I am familiar with, the choice of the successful adopting family was made on the basis that the natural mother wished for an outdoor style of life for her child and the adopting family had submitted a photograph of the parents posing with a canoe.

Similar administrative and regulatory schemes are in place across Canada. Their details vary substantially but their essential characteristic – administrative allocation – remains constant. A clear alternative would be a market-oriented system in which babies would be allocated to couples based on the prices the couples were prepared to pay. In the section which follows, the possible advantages of such a mechanism are set out.

The market mechanism

At first blush the market mechanism might seem to be considerably more attractive than the existing regulatory scheme in that it appears to be able to make most people better off. The reasons are numerous.

First, one would anticipate an increase in the quantity of babies supplied in order to meet the demand, thus eliminating the present queue and satisfying the desires of virtually all the childless couples left unsatisfied by the present system and shortage. Women would engage in the production of children for adoption, responding to the financial incentives of the market-place.

Second, one would anticipate that the market would lead to the realization of comparative productive advantages in that the supply of newborns would be undertaken by those best able to produce, satisfying the needs of those unable to have children and providing a realistic alternative for those for whom childbirth is possible but genetically unwise. Furthermore, one might anticipate some substitution of producers with relatively low opportunity costs for those with high opportunity costs. That is, persons for whom pregnancy comes only at the cost of substantial disruption of their other activities (for example, employment) might well decline to carry a child, opting to purchase a baby from a substitute carrier whose opportunity costs would be lower. This effect would be limited, of course, by the extent to which mothers derived positive utility (and paid maternity leaves) from carrying their own children and by the extent to which parents preferred natural to purchased children.

Third, one would anticipate that the market would generate information about the pedigrees of newborns which would permit the matching of couples' desires and the newborns' attributes. One would anticipate that there would be an incentive to disclose the quality of the newborns and that information certification procedures and agencies would develop to enhance the information market.

Fourth, one would expect the newborns to be of a higher quality than the existing newborns available for adoption. The promise of remuneration for prospective mothers would lead to an incentive for the appropriate care of children in utero since a warranty of such behaviour would attract a positive reward in the market-place. In addition, one would

anticipate that prospective mothers would exercise greater care in the selection of their sexual mates since the quality of the mate would also influence the price to be obtained upon birth.

Fifth, one would expect an extremely competitive market structure. There would be extremely low entry barriers, a very large number of producers, both actual and potential, slight economies of scale, and enormous difficulties in cartelization. While there might be some brand name identification over time, one would not anticipate that this would lead to significant barriers to entry.

Sixth, the market process would provide an incentive for parents to correct errors in judgment and shortcomings in contraceptive devices since they would be in a position to sell the child for a positive reward rather than simply give it away. This should reduce the number of foster-children since the market for newborns would create an incentive to make the disposal at the time of birth. At the same time, however, reducing the cost of errors in judgment and inadequate contraceptive techniques and devices might lead to a corresponding decrease in the care exercised by sexually active friends and couples.

Seventh, one would expect the market to produce the children at a relatively low cost and certainly a cost much below the existing black market prices. The market would be free from the costs of hiding transactions from law enforcement officials, from substantial legal penalties, and from fraudulent practices and the like which at present permeate the black market. Furthermore, one would anticipate that the suppliers of the children would get a substantial portion of the economic return and that lawyers and physicians would be in a less strong position to take advantage of their clients and patients. With respect to price, one would anticipate that it would approximate the opportunity cost of a woman's time during pregnancy. It should be stressed that this need not by any means equal the amount of compensation that a person would earn in other market activities for the full nine months since pregnancy is far from totally disabling. Therefore, it would not be surprising if a price as low as \$3000 to \$5000 per child were common in some segments of the market.

Eighth, the market could develop various efficiency enhancing mechanisms. In particular, one might anticipate that a futures market would develop in which children in utero could be traded, permitting the reallocation of the risks inherent in childbirth so as to better reflect the various tastes for risks of different participants in the market. Furthermore, one might imagine that market intermediaries might form so as to hold portfolios of children in utero, thus diversifying and reducing the non-systematic risk.

Ninth, on the distributive side, the market would be likely to display

qualities considerably more attractive than the existing system. One would expect that the producers would be persons with relatively low opportunity costs who at present have very limited opportunities for income earning activities. This would present a new source of productive activity at a reasonable level of reward. Furthermore, one could anticipate that this would result in some shift of wealth away from the purchasers of babies to the producers, who would presumably be from less advantaged circumstances. In addition, the distributive effects of devoting some of the economic returns to the mothers and taking it away from those at present able to exploit the illegality of the black market would surely be attractive.

The objections

In sum, quite a robust case for the market can be made. It would appear to work well. It would satisfy a lot of unsatisfied people, have attractive distributive results, and increase the degree of individual freedom and choice in the adoption process as the monopolistic regulatory powers at present enjoyed by the Children's Aid Societies would be eliminated.

Despite these attractions, and despite the inadequacies of the present system, most would find the prospect of a market for babies to be grotesque. Indeed, the mere description has a ring of parody to it as the incongruity of market notions and babies jars the reader. Somewhere within most of us there is at least an intuitive reaction that there is something indecent about the prospect of a market for babies.⁸ The prospect of prices, contracts, advertising, credit, discounts, specials, and all the other attributes of consumer transactions seems disquieting. But when asked for an explanation for this reaction, can one do better than simply assert its unacceptability? In what follows, I consider a number of possible objections.

There are three categories of objections to relying on a market mechanism. The first might be termed market failure concerns. Here the argument meets the proposal on its own terms, not objecting to the market in principle but stressing that the market would not work well in this particular context. The second category of objections concedes that the market would work essentially as I have suggested, but that, as a market mechanism, it would possess one or more objectionable characteristics which

⁸ The proposal for a market for babies has provoked even academic emotion. For example, see Kelman, *Consumption theory, production theory and ideology in the Coase theorem* (1979) 52 *So. Cal. L.R.* 669, at 688, n 51: 'As always, Posner poses as the tough rationalist fending off sissified moralists; his "rationalism," though is spotty, incomplete, and misleading. He thus manages to be both irrational and immoral, which may have been his aim in this little parody of Jonathan Swift's "Modest Proposal."'

cause us to reject the mechanism as a whole. The third category of objections attacks the entire proposal, not just its market aspects, arguing that it fails in its essential conception.

MARKET FAILURE OBJECTIONS

The first line of reaction to the proposal for a baby market is to meet it on its own terms. That is, a critic might ask whether or not this is a situation in which the market would in fact produce optimal results even if the other categories of objections canvassed below are found unpersuasive. A number of doubts might be raised.

First, there is the problem that 'good' babies may drive out the 'bad.' At present, given the shortage of babies, childless couples are prepared to adopt children who are available although, in the eyes of the adopting parents, less than perfect. If the market proposal were adopted, the supply of children with highly desired characteristics would increase and the demand for other children would diminish. This would presumably increase the number of unadopted children suffering from retardation, birth defects, and other undesired characteristics who would subsequently become foster-children. This would presumably reduce the level of welfare of both these children and society in general and must be counted as a substantial negative effect of the market proposal.

Second, there may be some significant information imperfections in the proposed market. While the market mechanism would encourage the disclosure of information concerning the newborns, there would, of course, be an incentive for mothers to disclose the good information and withhold the bad. To the extent that lies and inadequate disclosure cannot be discovered until after the transaction has taken place, a 'market for lemons' problem may arise. In some ways this is analogous to concerns about the commercialization of blood donations.⁹ It is alleged that a market mechanism for blood donation increases the percentage of donors carrying hepatitis since the donors have a positive incentive to conceal their knowledge that they have had the disease, an incentive not present in a system of collection based on gifts. However, it must be recognized that the continued existence of this phenomenon depends on the absence of a relatively low cost means of screening potential donors for hepatitis. Similarly, the extent to which the 'lemon' phenomenon would infect the baby market depends on the possibility and cost of tests designed to verify pedigree information proffered by the mother. Furthermore, since the purchase of a baby is a much more substantial purch-

9 Akerlof, The market for 'lemons': Quality uncertainty and the market mechanism (1970) 84 *Q.J. of Econ.* 488

ase than the purchase of a pint of blood, the costs that a prospective purchaser would rationally be prepared to bear in screening the donor would be proportionately increased. Thus, while there is undoubtedly a potential problem of information deficiency, its magnitude may not be overwhelming and may diminish with further scientific and technological advances.

A third concern with the market solution may be that it would generate a higher total population since one would anticipate there would be some increase in the supply of newborns. It might be argued that this population increase is an externality which the individual market decisions would fail to recognize, leading to what in social terms may be an over-supply of babies. While it is certainly true that the population should increase with the adoption of this proposal, it is enormously difficult to make any judgment as to whether this is a good or bad thing, and even if it is a bad thing whether or not that is cause to reject the proposal. If there is a concern with the total level of baby production, there is a wide range of existing social policies which create financial incentives and disincentives for the production of children. It would seem more appropriate to control the overall level of population through these mechanisms rather than through depriving some small segment of the community of the ability to experience the joys of raising a family. If society must bear a burden with respect to the control of population, it would seem only just that this burden be spread relatively equally across the population.

The fourth concern relates to the possibility that this scheme might permit or indeed encourage genetic breeding in that people would be able to 'order' the baby they desire as opposed to merely relying on the genetic lottery that natural parents face. While hypothetically plausible, it does not seem probable in reality that there would be serious breeding effects. While some couples may favour blue-eyed, blond-haired boys and others dark-haired girls, no one set of tastes is likely to dominate, for the same reason that no particular colour or make of car seems to capture universal approval. One would anticipate a full range of tastes with respect to children's characteristics as with other commodities, and so while there should be a better matching of couples' preferences with the children they would actually receive through the market, the total distribution of children by type should remain relatively unchanged.

A fifth concern expressed by some critics is that permitting a market in newborns might also encourage a market in 'used' children as people would be tempted to 'trade in' unsatisfactory children and 'trade up' by purchasing a newborn. If the state did not regulate parental obligations with regard to child support, this concern would no doubt be realized. However, under the market for babies proposal, once a couple has pur-

chased a child they could be required to assume the same obligations, liabilities, and responsibilities that accrue to couples who now adopt children or have children naturally. To the extent there is a trade-in phenomenon at present, it would be continued, but it seems unlikely that it would be substantially increased. Indeed, one might deny entry to the market to any couple who traded in their child if this were thought to be a serious social problem so as to eliminate that couple's access to the market for a second purchase.

OBJECTIONS IN PRINCIPLE

Distributive concerns

A common critique of market oriented solutions relates to their distributive consequences. That is, the typical critic will concede that the market would be efficient, but then stress that its impact on the distribution of wealth would be so unacceptable that the efficiency advantages should fade into insignificance. In essence, the distributive consequences are said to be so strong as to dominate any possible efficiency gains. Is that concern well founded with respect to a proposal for a market for babies? Some might argue that the effect of such a market would be that some people would be so impoverished by having paid for their baby that they would be unable to provide sufficiently high quality care for the child. This seems implausible. It would appear to assume an extremely high price for children, an assumption which would ignore the realities of the low opportunity cost of likely mothers. Furthermore, it ignores the costs incurred by persons attempting to manipulate the existing regulatory system, whether by maintaining a second residence or by spending money to impress social workers as to their ability to provide a comfortable home environment for the child. In addition, it ignores the cost of childbirth which all natural parents go through. The opportunity costs incurred by most natural parents would not be substantially less than the market price I would anticipate for a child under the market system. In sum, this concern built around the cost of the child seems unpersuasive.

An alternative formulation of the distributive concern is that the rich would get all the 'good' babies. In response it should first be noticed that the objection seems to assume that this does not happen already, thus ignoring the reality that one's income and wealth are generally thought by adoption agencies to be important variables in determining one's suitability for parenthood. The objection also seems to ignore the prospect of an increased supply of 'good' babies which one would anticipate under the market system. That is, if supply were held fixed, the concern might be persuasive in that the rich would presumably be better able to pay in order

to satisfy their desires for children with characteristics found most desirable by adopting parents. However, under the market system the supply of such children would presumably be dramatically increased, leaving the rich with what they want but also leaving many others fully satisfied. Again, the objection seems unpersuasive.

Any arguments as to distributive effects of the proposal must also be counterbalanced by the distributive effect identified earlier of a shift in rents to the suppliers of children, that is, mothers, who would be drawn from a generally poorer class and away from the crooks, shady lawyers, shady physicians, and others who at present trade on the tragedy of the existing regulatory failure and the fears of pregnant women.

One way of testing whether the issue of the distributive impact of the market proposal goes to the core of one's objection to it is to ask whether one would feel better about the proposal if the market were made wealth neutral as opposed to wealth sensitive.¹⁰ If not, then distributive arguments are probably not the central source of one's intuitive opposition to the proposal.

*Cost of costing*¹¹

Another principled objection to the market focuses on one of its inevitable aspects: the creation of prices. The concern is that a market for babies would generate negative secondary consequences as a result of the fact that a market mechanism by definition generates explicit prices. In particular, the pricing of babies might violate two principles, each of which we hold dear. The first is that life is infinitely valuable – 'a pearl beyond price.' With prices of \$3000 per baby, the reality of the limited price of life (at least at the point of creation) and the ideal of the infinitely valuable would contrast starkly. The second principle is that all lives are equally valuable. With higher prices for white than non-white children, and higher prices for healthy than sick children, and other similar forms of price differentials, the reality and the ideal would again clash.

The concern here is real but difficult to evaluate. It is but one example of a much more general problem of public policy. Whenever life is at stake the difficulties of pricing and of costing must be faced. Thus, whether it is the standard of care in tort law, the design of a Pinto, highway design, or medical research one cannot avoid implicitly or explicitly dealing with the price of life. Perhaps it is the degree of explicitness that would be inherent in this scheme that gives rise to the vigour of the opposition. It may also be that the differences in prices would correspond with differences which we strive particularly hard to overcome by means of other social policies.

10 See Calabresi and Bobbitt *Tragic Choices* (1978) 98–103.

11 The phrase is Calabresi's; for a discussion of the issue, see *ibid.*, at 32.

That is, to the extent that differences in price fell along racial grounds, to adopt a policy of a market for babies would be directly contradictory to the wide range of social policies designed to minimize discrimination on racial grounds.

Commodification

While related to the previous concern regarding the costs of costing, the concern here is that trading in certain commodities degrades the commodities themselves.¹² That is, certain things should be above the hustle and bustle of the market-place so as to preserve their dignity, leading to the conclusion that trading in such commodities is inherently bad. That is, by creating a market one would commodify something – life – which should not be treated as a commodity. Put even more strongly, the concern is that the special value we attribute to children depends in part on the fact they cannot be traded. Thus, trafficking in lives becomes presumptively bad. There is a dynamic dimension to this concern as well, since trading activity would alter our views regarding the nature of the commodity at stake, reducing over time our aversion to engaging in this form of trade.

Again, the difficulty in evaluating this concern is that it is hard to know which goods fall within this category of goods that should not be commodified. Trading in babies is not directly analogous to slavery. Is it more closely analogous to long-term contracts for services? If so, why do we not have the same sense of concern about the multi-year contracts of professional athletes as we do about a market for babies?

In addition, in the midst of whatever reactions one has along this line or some of the earlier lines of objection, it is important that they not be treated in isolation from some of the compensating effects of the market proposal. That is, unless these concerns are made absolutes they must be considered in the context of a probable substantial reduction in the number of abortions performed and of the very substantial increase in happiness for previously childless couples. How these compensating effects should be weighed in the balance is unclear, but absent the most extreme forms of rejection of the utilitarian calculus some consideration must be given to them.

Oppression

Put bluntly, the proposal for a market for babies smacks of slavery. More broadly, the concern is that such a scheme would oppressively and involuntarily relegate poor women to an occupation which we do not wish to

¹² See generally, Kelman, *supra* note 8, at 687–8.

promote (or to be seen to promote) and which would deprive the participants of their dignity. This concern may be similar to concerns about prostitution, wet nurses, and markets for blood. However, it is not entirely clear what makes this matter oppressive when other lines of poorly paid work are seen to be less so. If the concern is simply that wages will be low, regulatory intervention is possible. If the concern is that this type of production takes advantage of the women's low opportunity cost, the response must be to recognize the truth of that proposition but to ask how this differs from any other situation of employing someone with a low opportunity cost.¹³ If it is a concern for the nature of the work, what is it about child-bearing that makes it somehow dishonourable when done for money but most honourable when done for other reasons? Why does paying for childbirth or engaging in child-bearing for the sake of money convert a dignified activity into a despised one? The answer must lie in one of the other concerns, for example, commodification rather than in oppression per se. That is, we may object to the commodification of sex (prostitution), blood donation, or mothers' milk production (wet nurses) not only because of the low opportunity cost, but because of the combining of low opportunity cost with an opportunity to engage in market activity in an area where commodification itself is objectionable.

At the same time it is not entirely clear exactly what the focus of the concern is in this respect. Some would argue that it is women who are being oppressed, but others might argue that it is the newborns who are being oppressed. One way to test this proposition might be to ask whether the concern would be the same if the market were in test tube babies, so as to relieve any concern about a class of women being oppressed. If the concern remains, it seems that it must be broader than merely the oppression of women.

The absence of a relationship between willingness to pay and quality of parent

Another line of attack on the proposal would be to point out that while willingness to pay for a commodity may be the best measure of desire, people may desire children for the wrong reasons. That is, someone may wish to acquire a child for the purpose of beating or otherwise abusing it, rather than loving it or caring for it. This is no doubt true, but again does it go to the heart of the problem? Presumably the same perverted desires motivate people to give birth naturally. We do not in Canadian society require an ex ante check on the reasons for having natural children, and thus one must question why ex ante review of suitability for parenting should be required under the market scheme. However, even if some ex

¹³ See the discussion in Kelman, Choice and utility (1979) *Wis. L.R.* 769, at 788 ff. citing Nozick, Coercion, in Morgenbesser et al *Philosophy, Science and Method* (1969).

ante scheme is desired (as it is under the existing regulatory mechanism), it is, of course, not inconsistent with having a market scheme of allocation. That is, it would be quite simple to require anyone wishing to make a bid in the baby market first to obtain a parenting certificate from some regulatory agency. This licence would be granted or denied on the basis of whether or not one met the minimum necessary qualifications for parenting. There would be no limit on the number of certificates granted. If this step were adopted, it is difficult to see how the divergences of willingness to pay and quality of parent would be any more extreme under the market for babies proposal than under the existing regulatory mechanism.

MISCONCEPTION OBJECTIONS

The first category of objections focused on market failure and the second on principled objections to the use of the market in the context. The third category, while related to the second, attacks the proposal as being wrong in its very conception of the problem. This objection can be stated in three ways.

The improper objective

The market for babies proposal would meet what is at present the unmet demand of childless couples who wish to adopt a child and are unable to do so as a result of the insufficient supply of children. A critic might suggest that the proposal is directed towards a social end which is misconceived from the start. That is, it can be argued that the purpose of the existing process is not to meet the desires of childless couples for children, but rather to take care of a limited number of unwanted newborns, with the merely incidental side effect of bringing great joy and happiness to childless couples. Under the latter formulation the number of couples satisfied or left dissatisfied is largely irrelevant to our judgment about the allocative mechanism, since it is assumed that the function of the system is to distribute those babies which are produced as a by-product of the existing sexual and marital activities and rules. The success of the mechanism should therefore be judged in terms of the welfare of the unwanted newborns, not that of childless couples. Furthermore, any system which would increase the supply of such children requiring adoption would be directly counter-productive in terms of the objective of designing a system whose sole function is the distribution of unwanted babies.

This line of argument is compelling if it is accepted that no weight should be given to the preferences of childless couples. How such a judgment could be taken, though, is somewhat more problematic, since it is not at all clear what value is being preserved or promoted by means of denying this fundamental happiness to the large number of couples left childless under the existing scheme. If it were possible to identify that

value, perhaps all the other concerns about the market solution might be derived from it.

The second best argument

Another response to the market for babies proposal is to acknowledge that it would be better than the existing situation but to argue that that does not make it the best possible mechanism. That is, alternatives such as banning abortion or prohibiting contraceptive devices might be better responses in that they would increase the supply of babies. Or it may be argued that leaving the supply fixed and instituting a pure lottery might be better than the existing distribution mechanism. Or indeed, it might be argued that an alternative source of supply – foreign babies from third world countries with excess newborns – might represent a better and distributively more attractive source of babies. All these possibilities have merit. However, none of them seem to go to the heart of the matter, which is why the market itself is seen to be so objectionable. That is, most people's reaction to the market for babies proposal is that it is bad per se, not bad relative to alternative mechanisms. The interesting question remains why the market is seen to be bad per se.

Jonathan Swift's 'Modest Proposal'

Swift's satirical solution to the problem of starvation in Ireland may be thought to be analogous to the market for babies proposal.¹⁴ One need not do more than read Swift's proposal in order to be confident of its unacceptability; it is a classic satire. Thus, if the analogy is compelling, one must dismiss a market for babies with similar dispatch. However, to draw the analogy between the two proposals one must find the essence of each to be the *marketing* of babies, thus giving less weight to the distinction between killing and giving life to babies. To me this is not an entirely satisfactory characterization of the two proposals. It fails to distinguish between the giving of life and the taking of life. That is, the Swift proposal depends on terminating a life after its successful creation. That would appear to be so fundamentally in contradiction with the right to life, which is accepted by essentially everyone to be above any utilitarian calculus, that any set of potential benefits becomes irrelevant to the merits of the proposal. However, in the case of a market for babies there is no deprivation of life but rather the creation of new life, and it is only possible objections to this creation of new life that must be offset against the obvious benefits of the scheme. At this point it is more difficult to identify any absolute right equivalent to that of preserving life that would be violated by creating more life.

14 A colleague, E. Weinrib, and Kelman, *supra* note 8, have both suggested the analogy.

Conclusion

I end where I started, focusing on the limits of markets by asking whether these objections to a market for babies are persuasive. To the extent that they are, they may help define the limits of markets in other situations requiring an allocative device.

The need for a coherent appreciation of the limits of market-based allocative mechanisms is enhanced at a time when we are being inundated by signs of the increased commercialization of activities closely related to a market for babies. Campus newspapers advertisements seek sperm donors: 'Semen will be used for artificial insemination for couples who cannot have children due to male infertility. Men of all backgrounds are needed and in particular of Chinese, Japanese, Black and East Indian backgrounds. Donors ... will be paid for their involvement.'¹⁵ A couple having a child but wanting a new car are reported to have traded in their baby for a used Corvette.¹⁶ News reports tell of surrogate mothers who charge a fee for carrying a child for a couple who are not otherwise able to produce their own child but who desire the injection of at least the husband's genes: '[Through] Surrogate Parenting Associates, Inc. ... an infertile couple and their surrogate can be matched for a fee of between \$15,000 and \$20,000 which covers payment to the surrogate as well as medical, incidental, and legal fees.'¹⁷ Speculation is common that the near future holds promise of commercial banks for sperm, body parts, and other life-creating products.¹⁸

In many of these situations, a market mechanism may offer the promise of increased supply. For example, kidneys, livers, hearts, and other body parts would no doubt be far more available – at a price – if financial rewards could be paid to the donors. But despite this promise of supply, the predominant reaction is to resist and to look to alternatives. This common pattern of resistance surely reflects concerns of the kind identified in this essay. At the same time, I believe that these concerns should be understood as to some extent contingent upon cultural and social values that themselves change over time. Transitions in these values can and do occur, responding to a complex shifting social consensus.

We may well be in just such a period of transition to a society in which the objections to the baby market will lose much of their force. Such a

¹⁵ *Varsity* (Toronto) 9 March 1981

¹⁶ *Toronto Star* 5 September 1980

¹⁷ Hammond, Mothers and child, *Quest* March 1981 at 68

¹⁸ At present in Ontario section 10 of the Human Tissue Gift Act, s.o. 1971, c 83, prohibits commercial trafficking in human tissues and body parts. Interestingly, this prohibition arguably does not include either sperm or children.

transition was experienced in the late nineteenth century with respect to life insurance, which was thought for a time to represent a form of trafficking in and valuing of lives.¹⁹ Whether or not the same transition is about to occur with respect to the market for babies, semen, surrogate mothers, body parts, and the like may well depend in part on the strength, coherence, and nature of the objections to the market for babies proposal and the extent to which we can identify them and commit ourselves to the preservation of the values which inform them.

¹⁹ See Zelizer *Morals and Markets, The Development of Life Insurance in the United States* (1979) at 62–3 cited in Gordon, Book review (1980) 94 *Harv. L.R.* 903, at 912.