


RESEARCH ARTICLE

Markets, repugnance, and externalities

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(Received 20 October 2021; revised 27 June 2022; accepted 27 June 2022; first published online 25 July 2022)

Abstract

This Article considers one aspect of the ongoing debate about the moral limits of markets – namely, the purported harmful effects of market transactions on particular relations, goods, services, or society at large, due to an inappropriate valuation. In other words, the argument is that some markets are ‘repugnant’ because they degrade and corrupt a variety of nonmarket values and relations, not just to the willing parties to the exchange, but to larger segments of society. This objection contains both a (frequently unacknowledged) empirical component and a moral component. This Article critiques these empirical claims on two grounds. First, market skeptics fail to provide evidence of the negative effects they hypothesize, despite widespread variation over time and across legal regimes. Second, these objections fail to account for the well-documented human tendency to fashion repugnant exchanges in a manner that reinforces – rather than undermines – deeply held values and relationships.

Keywords: Corruption; externalities; markets; repugnance

1. Introduction

Sandel (2012) opens his New York Times best-selling book with the observation that ‘There are some things money can’t buy, but these days, not many. Today almost everything is up for sale.’ (p. 42) Regardless of the validity of this claim, it captures an enduring belief – that certain items, activities, and relationships should be beyond the reach of the marketplace.¹

But how do we, as a society, determine what is up for sale and what must be immune from market forces? Although all cultures and time periods have proclaimed some transactions too sacred for the marketplace, those boundaries vary greatly across times and cultures and are often contested at the margins (Fiske and Tetlock, 1997). Once-common practices such as slavery, commutation (a direct payment to the government in exchange for relief from military service), substitution (paying another for military service in one’s place), and the purchase of indulgences are no longer acceptable in most societies (Krawiec, 2009a; NY Times, 1864). At the same time, formerly taboo practices, such as charging interest on a loan or accepting money in exchange for the practice of law are now widespread – although, in the case of charging interest, not universally so (Rossman, 2014).

Even within the same time period, societies show marked differences in their repugnance to certain transactions, as measured by their legality. Prostitution is legal in much of the world and illegal in most of the United States (World Population Review). Meanwhile, commercial surrogacy and paid egg donation are legal in much of the United States but illegal in many other parts of the world (Western Fertility Institute).

¹Sandel’s claim is anecdotal, rather than empirical, and as others have argued is neither new (similar claims can be found dating back at least to Dickens) nor accounts for a longer historical period that has seen the disappearance of many markets, including those in slaves, military commutations, indulgences, and public office, among others (Gintis, 2012; Sternberg, 2013; Wells, 2013).

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These contests about market boundaries are sometimes referred to as the ‘moral limits of markets’ (MLM) debate, and center, not on the dangers of markets *per se*, but on the dangers of exchanging particular items and activities through the marketplace (Wempe and Frooman, 2018). Advocates of such limits – ‘market skeptics,’ as I will refer to them for simplicity – thus do not want to eliminate markets entirely. They instead seek to identify the moral and ethical boundaries of the marketplace by considering which specific goods and services are inappropriate for market trading, offering explanations and, sometimes, justifications for restricting these transactions, even among apparently willing buyers and sellers (Panitch, 2020; Satz, 2010).

Many justifications have been offered for limits on ‘repugnant’ (Roth, 2007) or ‘taboo’ (Fiske and Tetlock, 1997) markets. This article considers a single, but prominent, objection – that some markets degrade and corrupt a variety of nonmarket values and relations, not just to the willing parties to the exchange, but to larger segments of society.² This objection often involves concerns about the purported harmful effects of market transactions on particular relations, goods, services, or society at large due to an inappropriate valuation and has both a (frequently unacknowledged) empirical component and a moral component.

The objection is empirical because it contends that markets in certain items and activities change the way in which society and its members perceive those items and activities or the non-market relationships through which they would otherwise be supplied. It is also a moral claim, because it rests on a contention that the change is inevitably negative – that certain modes of valuation and visions of the world are superior to others, or at least unsuitable to certain situations (Anderson, 1993).

For example, prostitution, it is alleged, changes the way in which society conceives of all intimate relations, not just sex for hire. Gamete and surrogacy markets may change the way in which we view children, parenthood, or the family more generally, not just those families created through such arrangements (Anderson, 1993; Radin, 1987, 1996). And markets in organs may cause us to view all of our fellow humans, not merely organ sellers, as collections of body parts, rather than as persons with independent moral worth (Sandel, 2012).

This Article critiques these empirical claims on two grounds. First, as noted by others, market skeptics fail to provide evidence of the negative effects they hypothesize, despite widespread variation over time and across legal regimes. Second, and more importantly, these objections fail to account for the well-documented human tendency to fashion repugnant exchanges in a manner that reinforces – rather than undermines – deeply held values and relationships. The fact that a particular transaction is deemed morally repugnant by large swathes of society does not, after all, mean that such transactions disappear, even in the face of strong legal sanctions and criminal prohibitions. But it does mean that such exchanges may be managed, obfuscated, or reframed in some way, acknowledging and reinforcing the taboo in the process.

Section 2 defines the term ‘repugnant market,’ as employed here, noting that the lack of consistent terminology has sometimes led to unintended disagreement, and even offense. Section 3 outlines the most common corruption objection, which focuses on the purported harms to nonparties to repugnant exchange, even if trading partners are left better off from trading. Section 4 levies two critiques against this form of corruption argument. First, market skeptics who claim that markets degrade or corrupt societal values and relationships fail to provide evidence of such corruption, despite the wide availability of comparison points afforded by variation across legal regimes. Second, and more importantly, these objections fail to account for the human tendency – long noted within psychology, anthropology, and sociology – to refashion contested exchanges in a manner that reinforces, rather

²Cohen (2014) distinguishes ‘consequentialist corruption’ from ‘intrinsic corruption’ arguing that the former ‘is contingent and to be successful must rely on empirical evidence, in that it depends on whether attitudes actually change.’ With intrinsic corruption, in contrast, ‘the wrongfulness of the action is completed at the moment of purchase . . . even if the act remains secret or has zero effect on anyone’s attitudes.’ (p. 74). As demonstrated in Section 3, the most influential corruption arguments are of the consequentialist/empirical variety. See also Bertrand (2021), Besley (2013). In any event, weaknesses in the intrinsic corruption argument are well covered in the literature, including by Cohen (2003, 2014) himself.

than undermines, deeply-held values and relationships. Section 5 addresses burdens of proof and tensions with liberal values.

Section 6 concludes that the social, cultural, or legal acceptance of a particular transaction does not also render it moral. But to the extent that moral objections themselves depend on a corruption or cheapening of values or relationships, the actual operation of those values and relationships should be relevant. Moreover, to the extent that some, including Sandel (2012), have explicitly contended that ‘market creep’ has occurred without public awareness or debate, that claim is undermined by the full extent to which participants in and third-party observers of repugnant exchange have, in fact, debated, modified, and managed those exchanges over time.

2. Repugnance as an objection to markets

It seems appropriate in an article dedicated to repugnance to first clarify the meaning of that term as used here. The term ‘repugnance’ does not have a consistent meaning in the literature, at times contributing to unnecessary confusion and debates in which the speakers talk past one another. Leon Kass famously lauded the virtues of repugnance – ‘the emotional expression of deep wisdom, beyond reason’s power fully to articulate it’ – as a tool to evaluate the propriety of new biomedical technologies (Kass, 1997, p. 20). Given Kass’s conception of repugnance as emotional and ‘beyond reason,’ it is perhaps understandable that some observers object – or even take offense – to the use of the term ‘repugnance’ to describe objections to market trading. Some observers, for example, argue that it conflates reasons and judgments with ‘an emotional reaction’ that is ‘irrational’ – a mere feeling of ‘urghh.’ (Lubbe, 2019, p. 30)

Repugnance, however, has a different meaning among many scholars working on repugnant exchange, especially those whose work is grounded in, or influenced by, market design. Alvin Roth adopts a broad definition – one subsequently employed by many economists, market designers, and legal scholars – which considers markets repugnant if:

they are attractive to some participants, [but] others not only don’t wish to participate themselves but think that such marketplaces should not operate at all. This kind of repugnance can occur even in the absence of easily measurable negative externalities to those who would like to eliminate such a marketplace (citations omitted) (Roth, 2018, p. 1616).

This definition would include the type of visceral objection endorsed by theorists such as Kass, but would also include coercion or exploitation worries (both of which are specifically addressed in Roth, 2007) as well as societal corruption and other concerns. In short, this definition does not consider ‘repugnance’ something necessarily irrational or emotional, as acknowledged (critically) by leading market skeptic Michael Sandel:

[Roth] does not treat repugnance as an irrational, utility-destroying taboo; he simply accepts it as a social fact and devises work-arounds. Roth does not morally assess the repugnant transactions he discusses. He does not ask which instances of repugnance reflect unthinking prejudice that should be challenged and which reflect morally weighty considerations that should be honored. This reluctance to pass judgment on repugnance may reflect the economist’s hesitation to venture onto normative terrain (Sandel, 2013, p. 124).

The term ‘repugnance,’ as used here, thus encompasses a variety of objections that have been levied against market exchange in particular items and activities. For example, many contend that repugnant transactions are coercive, exploitative, or involve an undue inducement (Wertheimer and Miller, 2008). More rarely (at least today) restrictions on repugnant exchange are justified as a means of preserving the moral worth of the parties to the exchange (Cserne, 2012). These objections fall under the

general heading of paternalism, in the sense that they seek to protect the willing participants in these activities rather than prevent harm to third parties.

Other objections involve third-party effects. Some argue, for example, that markets in sex will increase the transmission of disease (Posner and Silbaugh, 1996) or that payments for blood or plasma will make the blood or plasma supply less safe (Titmuss, 1970). These objections rest on concrete externalities allegedly posed by certain markets and are the subject of robust empirical study.

Still other concerns, such as crowding out, are more difficult to categorize and may depend on the particular definition employed. Economists who study, ‘crowding out’, for example, are typically interested, not in a moral debate, but in the empirical question of whether paying for a particular good or service reduces the tendency to provide that good or service for free, possibly reducing the total amount supplied (Frey and Oberholzer-Gee, 1997). Sandel’s (2012) argument that markets crowd out morals, in contrast, sometimes echoes the economists’ concerns about reduced altruism or reduced supply, but also repeats his more general argument, detailed in Part 3 below, about societal corruption.

Of note, however, is that many observers – including many market skeptics – contend that these objections do not (and *should not*) fully explain societal limits on repugnant exchanges. Indeed, many of the most prominent and influential market skeptics contend that, even if problems of coercion, exploitation, reduced supply, and safety could be fully addressed, we should still limit certain market transactions, because to do otherwise reflects and fosters an inappropriate market conception of items, activities, or relations that should be treated with reverence, pride, or respect, with attendant negative effects on us all (See, for example, Anderson, 1993; Hodgson, 2021; Radin, 1996; Sandel, 2012; Walzer, 1983).

This article focuses on corruption arguments that envision negative societal or third-party effects for a number of reasons, including widespread doubt, even among some market skeptics, that paternalistic concerns can fully justify market repugnance. Radin (1987), for example, is skeptical of market limits based on economic coercion; Nussbaum (1998) argues that prostitution is no more exploitative or coercive than other tasks regularly performed in exchange for money, especially by the poor; and Cook and Krawiec (2018) conclude that kidney donation poses fewer health risks and the donation process provides more and better information about those risks than is the case with the comparatively uncontroversial activities of professional football and boxing.

In addition, many of the safety and supply justifications for limiting repugnant transactions have been challenged by recent empirical research. Lacetera et al. (2014), for example, find no evidence of crowding out or increased deferrals when those presenting for blood donation are compensated with gift cards. Cunningham and Shah (2018) (among others) contend that legalized prostitution reduces disease risk, rather than increases it. If future research continues to undercut objectively measurable externalities associated with repugnant transactions, then corruption objections are likely to become even more prominent.

3. Corruption and externalities

As noted in Part 2, the corruption critique, though far from the only objection to repugnant markets, is a prominent one, made by nearly every market skeptic to consider the MLM. Notably, externalities are prominent in many of these critiques. In other words, although some market skeptics contend that market trading in the body is corrupting to the participants in the exchange, this need not be the case. Even if repugnant markets are welfare enhancing for parties to the exchange, the corruption critique contends that limits on repugnant markets may be justified by the harms that the market valuation of sacred goods and services imposes on nonparties to the exchange or on society at large.

Elizabeth Anderson (1993) typifies this approach when writing about commercial surrogacy, arguing that ‘[w]hile contract pregnancy brings financial rewards to a few women, it reinforces gendered relations of inequality and stereotypes that undermine the status of women in general.’ (p. 185) Anderson also argues that ‘the widespread acceptance of contract pregnancy could psychologically threaten *all* children’ by changing how society values children generally (p. 172, emphasis added).

Radin (1987) is similarly critical of paid surrogacy arrangements, raising the possibility of a ‘domino effect’ in which:

all women’s personal attributes will be commodified. The pricing of surrogates’ services will not immediately transform the rhetoric in which women conceive of themselves and in which they are conceived, but that is its tendency (p. 1933).

Both Anderson and Radin object to prostitution for similar reasons. Radin (1996), for example, argues:

If sex were openly commodified in this way, its commodification would be reflected in everyone’s discourse about sex, and in particular about women’s sexuality ... The open market might render an understanding of women (and perhaps everyone) in terms of sexual dollar value impossible to avoid. It might make the ideal of nonmonetized sharing impossible (p. 133).

And Anderson (1993) specifically points to the corrosive effect of prostitution on the intimate relations of nonparties to the exchange in support of prohibition when she says:

This argument shows that commodified sex is degraded and degrading to the prostitute. It does not show that the sale of sexual services should be prohibited. Why shouldn’t people have the freedom to enjoy inferior goods?

...

If women’s sexuality is legally valued as a commodity anywhere in society, it would be even more difficult than it already is to establish insulated social spheres where it can be exclusively and fully valued as a genuinely shared and personal good, where women themselves can be sexually valued in ways fully consonant with their own dignity. The full realization of significant opportunities to value heterosexual relationships as shared and personal goods may therefore require that women’s sexuality not be commodified (pp. 154–55).

More recently, Sandel (2012) raises the corruption objection, focusing in particular on potential changes to social norms and societal values:

[M]arkets are not mere mechanisms. They embody certain norms. They presuppose – and promote – certain ways of valuing the goods being exchanged. Economists often assume that markets do not touch or taint the goods they regulate. But this is untrue. Markets leave their mark on social norms (p. 64).

4. Corruption as an empirical claim

4.1 Lack of evidence

As noted, the corruption objection to markets contains an empirical assumption that markets in certain items and activities change the way that society and its members perceive those items and activities or the non-market relationships through which they would otherwise be supplied. These claims can be difficult to refute, given the inherent difficulties of measuring such amorphous concepts.

Nonetheless, there is reason to doubt some of these claims. Critics, for example, point to the great variation across legal regimes in the treatment of repugnant exchanges, such as prostitution, commercial surrogacy, and payment for gametes, suggesting that (1) corruption advocates could, but have not, employed that variation to mount evidence in favor of their claims and (2) that this vast variation, seemingly unaccompanied by dramatic societal deterioration, undermines at least some of the more draconian corruption claims.

Nussbaum (1998) makes this argument, for example, when she says:

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. 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. 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 (p. 713).

Oman (2016) makes a similar point in critiquing Radin's (1996) treatment of surrogacy contracts:

We no longer need to speculate about the social effects of surrogacy agreements. Such contracts will be honored in at least some states, and we now have more than a generation of experience with their effects. The dystopian, commodified future feared by Radin has not materialized (p. 171).

4.2 Repugnance Management

There are many possible reasons why the negative effects predicted by market skeptics do not appear to have materialized, a topic to which I return in Part 5, below. An important possibility, however, is the long-standing human tendency to structure and frame contested transactions in a manner that reinforces, rather than undermines, sacred values, goods, and relationships.

Social scientists have devoted considerable effort to documenting and understanding the process by which repugnant exchange occurs (or not). The fact that a particular transaction is deemed morally repugnant by large swathes of society does not, after all, mean that such transactions disappear, even in the face of strong legal and social sanctions and criminal prohibitions (Adelstein, 2017; Rossman, 2014). Correspondingly, the fact that a transaction is legally permitted does not, standing alone, render it morally uncontroversial. Prostitution, even in legal jurisdictions, may remain an activity hidden from family and co-workers (or reframed into a less repugnant transaction), and the examples of egg 'donation' and kidney exchange detailed in sections 4.3 and 4.4. below are both morally and culturally fraught, even in the United States, where they are legal.

Sometimes, of course, exchange taboos are honored – perhaps the costs of sanctions (whether formal legal sanctions or informal social ones) exceed the benefits, individuals have internalized the cultural taboo, or exchange is otherwise undesirable. Other times, laws and norms are simply ignored – everyone involved may recognize the transaction as repugnant and simply not care.

Often, however, parties to the exchange or interested observers will seek to minimize cognitive dissonance or the costs associated with norms violations through obfuscation and 'repugnance management.' (Healy and Krawiec, 2017; Rossman, 2014) Pharmaceutical companies don't pay doctors bribes, but may instead sponsor conferences at luxury resorts, pay lucrative speaking and consulting fees, and hire charming and attractive pharmaceutical reps. People do engage in prostitution, both as buyers and sellers, but less repugnant substitutes, such as 'treating,' 'seeking arrangements,' and VIP 'bottle service' at high-end nightclubs abound (Rossman, 2014). In doing so, they acknowledge and reinforce the taboo in question – after all, when there is no taboo there is no need to obfuscate. As noted by Walzer (1983), '[d]ishonesty is always a useful guide to the existence of moral standards.' (p. 98)

The point here, is that repugnant exchange does not simply proceed thoughtlessly forward in a manner designed to disrupt shared societal understandings of morality, propriety, and sacredness. Indeed, just the opposite is true – participants in such exchanges go to great length to refashion contested exchanges in a manner that preserves and reinforces – rather than destabilizes – deeply-held values and relationships. As noted by Healy and Krawiec (2017, p. 87):

The exchange may be shut down, actively reclassified, or reframed (Fiske and Tetlock, 1997). It may take place after substantial ‘relational work’ is done by participants to manage its potentially negative effects (Zelizer, 2005). Or it may be structurally recast and obfuscated, so participants can plausibly claim it is not an exchange at all (Rossman, 2014). The strategies are more stable than the particular sacred things, which – as Durkheim (1997) long ago argued – can be quite arbitrary.

The methods by which sacred values preservation is most commonly accomplished have a long history and typically involve incorporating elements, rhetoric, rituals, or processes of gift exchange or reciprocity into market-based or market-like transactions. To be clear, these devices are not a magic incantation guaranteed to render morally controversial market transactions socially acceptable. Indeed, as argued by Healy and Krawiec (2022), this very attempt at reframing has notably failed in the case of ‘sharing economy’ companies like Uber, Lyft, and AirBnB, both because the transactions are not morally transgressive and because ‘entrepreneurial efforts to introduce gift-like rhetoric into uncontroversially market-like structures tend to lack plausibility.’ (p. 255) The remainder of this section illustrates this type of repugnance management with two examples: kidney exchange and egg donation.

4.3 Kidney exchange

Kidney exchange, which involves in-kind exchange, rather than monetary compensation, is a good example of a previously repugnant transaction that now enjoys wide appeal in much of the world. (Krawiec, 2019) Kidney exchange seeks to overcome barriers to related-party transplantation that arise from immune-system or blood-type incompatibility. But, unlike a traditional organ donation in which the donor expects nothing (concrete) in return,³ a donor in a kidney exchange (other than the altruistic donor who initiates a NEAD chain) who transfers her kidney to a designated recipient does so on the condition that her loved one receive a compatible kidney in exchange.

Kidney exchange initially met with legal and moral objections, as well as resistance from medical professionals, on the grounds that the donation was not a gift, but a payment. The fact that the payment was in-kind rather than monetary was not, in the eyes of critics, enough to redeem what was viewed as essentially a market transaction. Original objections to kidney exchange included that it ‘is made with the expectation of receiving some benefit in return’ (BMA, 2000); that ‘there are commercial overtones’ (BMA, 2000); that it is ‘a hidden type of organ sale’ (Menikoff, 1999); and ‘a form of organ trafficking.’ (Ludwig, 2001)

The transition from repugnance to acceptance followed a familiar pattern of understanding and addressing objections, debating, reframing, and relational and moral entrepreneurial work. Importantly, that transition sought to preserve and reinforce the ‘gift of life’ metaphor on which organ donation had always relied for acceptability and emphasized the reciprocity that community members owe one another. Nor did the transition take place in the absence of debate and discourse. It instead involved years of sometimes contentious discussion and in many countries, including the United States, statutory changes designed to clarify the legality of kidney exchange (Healy and Krawiec, 2012).

4.4 Egg donation

Egg ‘donation,’ which in the United States is nearly always compensated, provides another example of ‘repugnance management’ through a blending of market and gift elements and discourse. Despite the

³Donors presumably benefit from the warm glow of an altruistic act and the potentially more tangible benefit of saving another’s life, typically a close friend or family member. Indeed, living donation was originally justified on precisely these grounds. *THE PRESIDENT’S COUNCIL ON BIOETHICS, LIVING DONORS: PROCESS, OUTCOMES, AND ETHICAL QUESTIONS Part III.A* (2006), https://bioethicsarchive.georgetown.edu/pcbe/background/ginger_gruters.html [<https://perma.cc/RH4P-B2JZ>].

fact that egg donors are paid thousands of dollars, fertility organizations, donors, and intended parents all prefer to conceptualize the transaction as a priceless gift. Almeling (2011), for example, found that payments to egg donors are sometimes packaged as voluntary ‘thank you’ gestures, rather than payment terms negotiated *ex ante*, as would be more typical in other types of contracts. Other times, payments are characterized as partial reimbursement for time and discomfort that could never – and is not expected to – fully compensate the donor who bestows the ‘gift of parenthood.’ Such characterizations are strongly encouraged by fertility center staff, who urge donors to focus on helping others, rather than on monetary payment, and express disdain and disgust at donors who appear overly interested in money (Almeling, 2011).

Researchers identify a remarkably similar pattern of the gendered altruistic framing of egg donation as outside of the commercial sphere in many countries, despite widely varying levels of compensation and differing legal rules governing the recruitment and payment of egg donors (Coveney *et al.*, 2022; Marre *et al.*, 2018). As noted by one set of authors (discussing egg donation in Belgium, Spain, and the United Kingdom):

Strongly engrained ideas around the ‘gift of life’ underpin and legitimate the exchange of human bodily tissues, including eggs, preconfiguring tissue provision as altruistic ‘donation’ and obfuscating the work and (often commercial) interests of mediating organisations.... Prior analyses of fertility clinic websites, egg donor recruitment agency websites and social media have found that egg donation is presented to potential donors as a safe and fulfilling-even life-changing – journey, an altruistic act of reciprocal giving where the egg provider receives emotional benefits in exchange for providing eggs (references omitted) (Coveney *et al.*, 2022, p. 114785).

This framing is troubling in many ways, relying as it does on gender stereotypes of female altruism and helpfulness not present in the sperm market, but it nonetheless plays an important role (Krawiec, 2009b). Neither donors nor intended parents want to participate in an exchange that resembles selling babies or body parts. Instead, donors, intended parents, and fertility centers all prefer a vision of egg donation as a gift-like exchange in which some money is passed on as a gesture of gratitude and appreciation. Indeed, the viability of the fertility industry arguably depends on it – if the transaction is perceived as too repugnant to donors, would-be parents, potential regulators, or society at large then the transaction will fail (Healy and Krawiec, 2017).

Importantly, as in the case of kidney exchange, egg markets developed over time in a manner designed to preserve notions of the sacredness of motherhood, rather than undermine them, and it is unlikely that the market could have succeeded in the absence of such efforts. Moreover, again as was the case with kidney exchange, egg donation didn’t materialize overnight with no discussion. Instead, negotiations over what sort of transaction egg donation *is* took place over a long period of time and with a public and professional discourse that continues to this day.

5. Burdens of proof and tensions with liberal values

Corruption theorists might respond, in rebuttal to these criticisms, that the societal-wide effects of market corruption are amorphous, difficult to observe, and even more difficult to measure. Although this may be true, there is a tension between the notion that the negative effects of markets are too subtle to observe yet so dangerous as to justify limitations on otherwise welfare-enhancing transactions (and in the case of organs and plasma, life-saving ones).

To be sure, under the famous (and contested) Calabresi and Melamed (1972) articulation, inalienability rules will frequently govern repugnant transactions. According to Calabresi and Melamed (1972), inalienability rules are efficient when a transaction imposes large enough externalities on third parties, but those externalities are difficult to measure in any objective manner. Because moral sentiments are inherently difficult to price in a non-arbitrary fashion, efficiency-based limits on alienability, they argue, are often found in connection with what they term, ‘moral externalities.’

Calabresi and Melamed don't address how, given the difficulty of objective measurement, policy makers are able to balance such third-party costs against the costs of inalienability, a failing for which they have been criticized (Rose-Ackerman, 1985). And, as emphasized by Adelstein (2017), inalienability rules – like liability and criminality rules – do not mean that exchange no longer takes place (a point discussed at length in section 4, above), it simply means that the market pricing mechanism is replaced by less precise pricing through regulation. Moreover, to the extent these prohibitions are fully effective – what Adelstein (2017) terms 'absolute deterrence of cost-imposing activity':

As a system of externality control, absolute deterrence of ... any ... cost-imposing activity, presumes that the activity can never pay for itself, and thus should be reduced to the lowest practicable level, but leaves no way to determine whether this presumption is correct in any given instance, or in general. Instead, it tries to suppress precisely the social processes that would do this and direct rights accordingly (pp. 117–18).

This difficulty of measuring externalities associated with moral offense and societal corruption has generated intense debate about how the law should account for them, particularly among law and economics scholars. Some argue that such amorphous costs should be excluded from the analysis, (Epstein, 1992; Epstein, 1997) while others respond that all externalities must be accounted for, including corruption and 'moral outrage.' (Donohue, 1991; Rasmusen, 1997) To do otherwise, it is argued, 'may be committing the fallacy of equating the inability to understand the value of a social practice with the absence of social benefits.' (Donohue, 1991, p. 1584) Most of these debates take place outside of the markets context and span how (if at all) to balance preferences associated with racial discrimination (Donohue, 1991; Epstein, 1992), homosexuality and gay marriage (Hatzis, 2015; White, 2010), gambling, and drunkenness, among other topics (Rasmusen, 1997).

In any event, this Article's premise is not that corruption theorists must definitively prove their case empirically, but merely that they must acknowledge that the corruption claim is an empirical one and respond to critiques, such as this one, providing reasons for skepticism about those claims. In other words, corruption theorists need to provide *something* to back their empirical claims, if they are to take be taken seriously.

This is not, after all, the first setting in which corruption debates have played out. Many scholars skeptical of same-sex marriage, for example, explicitly raised corruption arguments, leading to heated debates about whether (and, if so, how) such corruption could be measured. As stated by Allen and Price (2015) in a critique of empirical work on same-sex marriage by Langbein and Yost (2009): 'A legal change that recognizes same-sex couples as "married" could change the cultural and social meaning of marriage for everyone, and therefore change both well-being and behavior.' (See also Langbein et al. (2020) reviewing some of these arguments and empirical studies, and their role in U.S. litigation)

Liberal theorists properly took corruption proponents of bans against same-sex marriage to task, not only for inconsistent and empirically unsupported claims about externalities, but for believing that a debate inherently about justice, rights, and dignity could be resolved by reference to externalities (Hatzis, 2015; White, 2010). Indeed, many theorists are skeptical of moral externalities frameworks more generally, precisely because of this tension with liberal values (Claassen, 2016; Feinberg, 1984; Herzog, 2000; Mill 1998; Sen, 1970; Trebilcock, 1997). When the rights at stake are life and death – as is the case with organ markets, for example – commentators have been even more skeptical (Volokh, 2007).

To be fair, nearly all corruption theorists *also* incorporate non-externalities considerations into their account of repugnant markets and are quite clear that corruption is but one factor to consider in decisions about the moral and legal treatment of repugnant transactions. Yet, as already noted, the corruption claim is a prominent one, relied on by the most influential market skeptics. As other

justifications for restrictions on repugnant transactions increasingly come under attack, there is every reason to believe that corruption arguments will become more, rather than less, prominent.

6. Conclusion

The dominant (though always contested) paradigm through much of the 18th century was to view markets as a civilizing force. Under the *doux commerce* thesis:

At mid-eighteenth century it became the conventional wisdom – Rousseau of course rebelled against it – that commerce was a civilizing agent of considerable power and range (Hirschman, 1982, p. 1464).

By the end of the 18th century, that dominant view was under pressure from Marx and others (Hirschman, 1982). Those challenges developed over time ‘into more specific claims that markets undermine social relations, corrupt political life, and corrode character.’ (Fourcade and Healy, 2007, p. 286) More recently, there has been an explosion of work lamenting the expansion of markets into new territory, with corresponding allegations that these developments will change the way in which society and its members perceive those items and activities or the non-market relationships through which they would otherwise be supplied.

This Article has questioned the basis for those claims, noting that corruption theorists advance an (often unacknowledged) empirical argument, yet fail to provide evidence of this predicted corruption, despite wide variation across time and legal regimes. More importantly, I argue that the failure to observe these differences is not particularly surprising, given the long-recognized tendency to refashion contested exchanges in a manner that reinforces – rather than undermines – deeply held values and relationships. Indeed, morally contested markets would likely fail in the absence of this cultural and relational work.

The social, cultural, or legal acceptance of a particular transaction does not render it moral. But to the extent that moral objections themselves depend on a corruption or undermining of shared values or relationships, then the operation of those exchanges in a manner that suggests the preservation – rather than undermining – of those values and relationships should be relevant. Moreover, to the extent that some, including Sandel (2012), have explicitly contended that ‘market creep’ has occurred without public awareness or debate, that claim is undermined by the full extent to which participants in and third-party observers of repugnant exchange have, in fact, debated, modified, and managed those exchanges over time.

References

- Adelstein, R. P. (2017), *The Exchange Order: Property and Liability As an Economic System*, New York: Oxford University Press.
- Allen, D. W. and J. Price (2015), ‘Same-Sex Marriage and Negative Externalities: A Critique, Replication, and Correction of Langbein and Yost’, *Econ Journal Watch*, 12(2): 142–160.
- Almeling, R. (2011), *Sex Cells*, Berkeley and Los Angeles, California: University of California Press.
- Anderson, E. (1993), *Value in Ethics and Economics*, Cambridge, Massachusetts: Harvard University Press.
- Bertrand, E. (2021), “Moralistic arguments against commodification: Repugnance and degradation.” 2021. (working paper on file with author).
- Besley, T. (2013), ‘What’s the Good of the Market? An Essay on Michael Sandel’s What Money Can’t Buy’, *Journal of Economic Literature*, 51(2): 478–495.
- BMA (2000), “Organ Donation in the 21st Century: Time for a Consolidated Approach,” Report, British Medical Association, London.
- Calabresi, G. and A. D. Melamed (1972), ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’, *Harvard Law Review*, 85(6): 1089–1128.
- Claassen, R. (2016), ‘Externalities as A Basis for Regulation: A Philosophical View’, *Journal of Institutional Economics*, 12(3): 541–563.

- Cohen, I. G. (2003), 'The Price of Everything, the Value of Nothing: Reframing the Commodification Debate', *Harvard Law Review*, **117**(2): 689.
- Cohen, I. G. (2014), 'Regulating the Organ Market: Normative Foundations for Market Regulation', *Law & Contemporary Problems*, **77**(3): 71.
- Cook, P. J. and K. D. Krawiec (2018), 'If We Allow Football Players and Boxers to Be Paid for Entertaining the Public, Why Don't We Allow Kidney Donors to Be Paid for Saving Lives', *Law & Contemporary Problems*, **81**(3): 9.
- Coveney, C., N. Hudson, S. Lafuente-Funes, L. Jacxsens and V. Provoost (2022), 'From Scarcity to Sisterhood: The Framing of Egg Donation on Fertility Clinic Websites in the UK, Belgium and Spain', *Social Science and Medicine*, **296**: 114785.
- Cserne, P. (2012), *Freedom of Contract and Paternalism: Prospects and Limits of an Economic Approach*, New York, NY: Springer.
- Cunningham, S. and M. Shah (2018), 'Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health', *The Review of Economic Studies*, **85**(3): 1683–1715.
- Donohue III, J. J. (1991), 'Advocacy Versus Analysis in Assessing Employment Discrimination Law', *Stanford Law Review*, **44**(7): 1583.
- Durkheim, E. (1997), *The Elementary Forms of Religious Life: A New Translation by Karen Fields*, New York: Free Press.
- Epstein, R. A. (1992), *Forbidden Grounds: The Case Against Employment Discrimination Laws*, Cambridge, Massachusetts: Harvard University Press.
- Epstein, R. A. (1997), 'Externalities Everywhere: Morals and the Police Power', *Harvard Journal of Law and Public Policy*, **21**(1): 61.
- Feinberg, J. (1984), The moral limits of the criminal law: Offense to others.
- Fiske, A. P. and P. E. Tetlock (1997), 'Taboo Trade-Offs: Reactions to Transactions That Transgress the Spheres of Justice', *Political Psychology*, **18**(2): 255–297.
- Fourcade, M. and K. Healy (2007), 'Moral Views of Market society', *Annual Review of Sociology*, **33**: 285–311.
- Frey, B. S. and F. Oberholzer-Gee (1997), 'The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out', *The American Economic Review*, **87**(4): 746–755.
- Gintis, H. (2012), 'Giving Economists Their Due: How Markets Crowd Out Morals', *Boston Review*.
- Hatzis, A. N. (2015), 'Moral Externalities: An Economic Approach to the Legal Enforcement of Morality', in Aristides N. Hatzis & Nicholas Mercurio (eds.), *Law and Economics: Philosophical Issues and Fundamental Questions*, London/New York: Routledge, pp. 226–244.
- Healy, K. and K. D. Krawiec (2012), 'Custom, Contract, and Kidney Exchange', *Duke Law Journal*, **62**(3): 645–670.
- Healy, K. and K. D. Krawiec (2017), 'Repugnance Management and Transactions in the Body', *American Economic Review*, **107**(5): 86–90.
- Healy, K. and K. D. Krawiec (2022), 'Organ Entrepreneurs', in D. Gordon Smith, Brian Broughman, and Christine Hurt (eds), *The Cambridge Handbook of Law and Entrepreneurship in the United States*, Cambridge: Cambridge University Press, pp. 268–282.
- Herzog, D. (2000), 'Externalities and Other parasites', *The University of Chicago Law Review*, **67**(3): 895–923.
- Hirschman, A. O. (1982), 'Rival Interpretations of Market Society: Civilizing, Destructive, or Feeble?', *Journal of Economic Literature*, **20**(4): 1463–1484.
- Hodgson, G. M. (2021), 'On the Limits of Markets', *Journal of Institutional Economics*, **17**(1): 153–170.
- Kass, L. R. (1997), 'The Wisdom of Repugnance: Why We Should Ban the Cloning of Humans', *New Republic*, **216**(22): 17–26.
- Krawiec, K. D. (2009a), 'Foreword: Show Me the Money: Making Markets in Forbidden Exchange', *Law and Contemporary Problems*, **72**(3): i–xiv.
- Krawiec, K. D. (2009b), 'Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete market', *Law & Contemp. Probs.*, **72**: 59.
- Krawiec, K. D. (2019), 'Kidneys Without Money', *Journal of Institutional and Theoretical Economics*, **175**(1): 4–19.
- Lacetera, N., M. Macis and R. Slonim (2014), 'Rewarding Volunteers: A Field Experiment', *Management Science*, **60**(5): 1107–1129.
- Langbein, L. and M. A. Yost Jr (2009), 'Same-sex Marriage and Negative externalities', *Social Science Quarterly*, **90**(2): 292–308.
- Langbein, L., B. Ranallo-Benavidez and J. E. Palmer (2020), 'The Anti-Social Effects of Legalizing Same-Sex Marriage: Fact or Fiction?', *Sexuality Research and Social Policy*: 1–18.
- Lübbe, W. (2019), 'Understanding (One's own) Repugnances', *Journal of Institutional and Theoretical Economics*, **175**(1): 27–32.
- Ludwig, U. (2001), Organspende: Türcchen zum Kommerz, *Der Spiegel*, July, p. 62.
- Marre, D., B. San Román and D. Guerra (2018), 'On Reproductive Work in Spain: Transnational Adoption, Egg Donation, Surrogacy', *Medical Anthropology*, **37**(2): 158–173.
- Menikoff, J. (1999), 'Organ Swapping', *Hastings Center Report*, **26**(6): 28–33.
- Mill, J. S. (1998), *On Liberty and Other Essays*, New York, NY: Oxford University Press.
- Nussbaum, M. C. (1998), "'Whether From Reason or Prejudice": Taking Money for Bodily services', *The Journal of Legal Studies*, **27**(S2): 693–723.

- Oman, N. B. (2016), *The Dignity of Commerce*, Chicago, Illinois: University of Chicago Press.
- Panitch, V. (2020), 'Liberalism, Commodification, and Justice', *Politics, Philosophy, and Economics*, **19**(1): 62–82. <https://phil-papers.org/rec/PANLCA-3>.
- Posner, R. A. and K. B. Silbaugh (1996), *A Guide to America's Sex Laws*, Chicago, Illinois: University of Chicago Press.
- Radin, M. J. (1987), 'Market-inalienability', *Harvard Law Review*, **100**(8): 1849–1937.
- Radin, M. J. (1996), *Contested Commodities*, Cambridge, Mass: Harvard University Press.
- Rasmusen, E. (1997), 'Of Sex and Drugs, and Rock'n'Roll: Does Law and Economics Support Social Regulation', *Harvard Journal of Law and Public Policy*, **21**(1): 71.
- Rose-Ackerman, S. (1985), 'Inalienability and the Theory of Property Rights', *Colum. L. Rev.*, **85**(5): 931.
- Rossmann, G. (2014), 'Obfuscatory Relational Work and Disreputable Exchange', *Sociological Theory*, **32**(1): 43–63, doi:10.1177/0735275114523418
- Roth, A. E. (2007), 'Repugnance as A Constraint on Markets', *Journal of Economic Perspectives*, **21**(3): 37–58.
- Roth, A. E. (2018), 'Marketplaces, Markets, and Market Design', *American Economic Review*, **108**(7): 1609–1658.
- Sandel, M. J. (2012), *What Money Can't Buy: The Moral Limits of Markets*, New York, NY: Macmillan.
- Sandel, M. J. (2013), 'Market Reasoning as Moral Reasoning: Why Economists Should Re-engage with Political Philosophy', *Journal of Economic Perspectives*, **27**(4): 121–140.
- Satz, D. (2010), *Why Some Things Should Not be for Sale: The Moral Limits of Markets*, Oxford: Oxford University Press.
- Sen, A. (1970), 'The Impossibility of A Paretian Liberal', *Journal of Political Economy*, **78**(1): 152–157.
- Sternberg, E. (2013), 'What Money Can Buy: Michael Sandel's Intuitions of Injustice and Inferiority', *Economic Affairs*, **33**(3): 391–399.
- The New York Times (1864) "The Draft and Commutation" (July 28, 1864).
- Titmuss, R. M. (1970), *The Gift Relationship: From Human Blood to Social Policy*, London: Allen & Unwin.
- Trebilcock, M. J. (1997) *The Limits of Freedom of Contract*, Cambridge, Mass: Harvard University Press.
- Volokh, E. (2007), 'Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs', *Harvard Law Review*, **120**(7): 1813–1847.
- Walzer, M. (1983), *Spheres of Justice: A Defense of Pluralism and Equality*, New York: Basic Books.
- Wells, T. (2013), 'Why Michael Sandel is Wrong About Markets, but Right About capitalism', *ABC Religion and Ethics*. <https://www.abc.net.au/religion/why-michael-sandel-is-wrong-about-markets-but-right-about-capita/10099664> (August 27, 2013).
- Wempe, B. and J. Frooman (2018), 'Reframing the Moral Limits of Markets Debate: Social Domains, Values, Allocation methods', *Journal of Business Ethics*, **153**(1): 1–15.
- Wertheimer, A. and F. G. Miller (2008), 'Payment for Research Participation: A Coercive Offer', *Journal of Medical Ethics*, **34**(5): 389–392.
- Western Fertility Institute, *Rules and Regulations for Surrogacy Around the World*, (July 30, 2019), <https://www.westernfertility.com/uncategorized/rules-andregulations-for-surrogacy-around-the-world/>.
- White, M. D. (2010), 'Same-sex Marriage: The Irrelevance of the Economic Approach to law', *International Journal of Law in Context*, **6**(2): 139–149.
- World Population Review, Countries Where Prostitution Is Legal, <https://worldpopulationreview.com/country-rankings/countries-where-prostitution-is-legal>.
- Zelizer, V. A. (1994), *Pricing the Priceless Child: The Changing Social Value of Children*, Princeton, New Jersey: Princeton University Press.
- Zelizer, V. (2005), *The Purchase of Intimacy*, Princeton: Princeton University Press.