FOREWORD

SHOW ME THE MONEY: MAKING MARKETS IN FORBIDDEN EXCHANGE

KIMBERLY D. KRAWIEC*

Of all the aphorisms your parents doubtless taught you, at least one is true: money can't buy everything—at least not legally. The law restricts exchange in many items and activities, but it does not always do so in the same manner, or for the same reasons. We might distinguish three separate categories of items and activities in which the law forbids exchange: (1) illegal ones, (2) inalienable ones, and (3) those that are both legal and alienable, but in which exchange for profit is banned or limited.

Sometimes exchange is forbidden as a means to restrict access to an item or activity considered dangerous or harmful to society. Illegal drugs and some types of weapons fall into this category. In these cases, the ban on exchange is largely incidental to the overriding goal of public protection from harm. As a result of this larger goal, illegal items and activities are simply prohibited altogether—their possession, acquisition, and exchange forbidden whether acquired by gift, purchase, or any other method.

Other items, activities, or entitlements are legal but inalienable. Although possessing these items or participating in these activities is legal—perhaps, admired—the right to possess the item or engage in the activity cannot be transferred to another for any purpose, commercial or otherwise. Falling into this category are certain licenses and awards, as wells as rights, entitlements, and duties incident to one's status as a member of the community or democratic state, such as the right to vote for holders of public office and the right to freedom of speech.[1] Exchange (for any motive) in these items and activities is, therefore, forbidden—not because we consider the items and activities harmful to society, but because they are so closely tied to the individual's rights and responsibilities as a member of the community that the state does not allow their separation.[2]

Finally, commercial exchange is sometimes restricted in items and activities that are neither illegal nor inalienable, but that nevertheless cannot be sold for

---

Copyright © 2009 by Kimberly D. Krawiec.

This Article is also available at http://www.law.duke.edu/journals/lcp.

* Professor of Law, Duke University School of Law. I thank Kate Bartlett, Al Brophy, and Mitu Gulati for helpful comments.

1. MARGARET JANE RADIN, CONTESTED COMMODITIES 19 (1996) (discussing nontransferability and market-inalienability).

2. *Id.*

profit, a trait sometimes referred to as market-inalienability.[3] The law frowns on, or may ban outright, the mixing of items and activities that are viewed as inherently noncommercial—even sacrosanct—with the crasser aspects of pecuniary markets. This third category of "forbidden exchange" has held a particular fascination for researchers across a wide range of disciplines, including the contributors to this symposium, perhaps because it seems so inconsistent with our default norms that the voluntary exchange of goods and services for payment is not only permitted, but encouraged.

In contrast to the first two categories in which exchange is forbidden, the items and activities in this third category of forbidden exchange are not inherently suspect, nor is their exchange forbidden under all conditions. Indeed, in the appropriate context, these items and activities may be considered salutary and necessary. Babies, sex, and human organs, for example, are not in and of themselves evils from which the public must be shielded. Instead, it is commercial markets in these items from which the state specifically seeks to protect its citizens.

Moreover, such exchange for other purposes—altruism, love, desire, or a sense of duty—is not only permitted, but applauded. Indeed, a failure to provide these items and activities in the context of particular relationships may be considered self-indulgent or reprehensible. My decision to carry and give birth to a child for my infertile sister is likely to be commended as a compassionate gesture of love and devotion. Your refusal to donate a kidney to your dying brother may strike some as inexcusably selfish. A decision to sell either to the highest bidder is both illegal and morally condemned.

Thus, the law—in keeping with individual psychology and communal norms—cordons off certain items and activities as being above market influences. In fact, theorists across a range of disciplines, including political philosophy, cultural anthropology, social psychology, sociology, economics, and law have observed that nearly all cultures reserve certain items, activities, and entitlements as inalienable for profit.[4]

---

3. *Id*. at 18 (defining market-inalienability).

4. *See generally* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993) (discussing the ethical limits of markets and the need to compartmentalize exchange in some areas of life from market forces, including gift exchanges among personal relations, political goods, reproductive labor, and children); JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND (2008) (warning of an impending enclosure of the commons of the mind and exploring the transition of various items and activities once thought uncommodifiable and outside of the marketplace into privately owned property); MARCEL MAUSS, THE GIFT (W.D. Halls trans., 1990) (distinguishing the realm of gift exchange from that of market exchange, and arguing that gift exchange creates a form of social solidarity because the gift must be reciprocated, creating a continuing cycle of social bond between giver and recipient); RADIN, *supra* note 1 (discussing a range of "contested commodities," including babies, reproductive services, human organs, sperm, eggs, embryos, blood, human pain, and human labor); MICHAEL WALZER, SPHERES OF JUSTICE (1983) (describing fourteen categories of "blocked exchanges"—items, services, and entitlements that cannot be bought or sold); VIVIANA ZELIZER, THE PURCHASE OF INTIMACY (2005) (demonstrating that the intermingling of economic transactions with intimate relations causes discomfort both for individuals and for U.S. law, despite the fact that such intermingling occurs with great frequency); Michael J. Sandel, What Money Can't Buy: The Moral

Philosophers, for example, have long maintained that certain items and activities are incommensurable at a very deep level. As Joseph Raz observes,

> [I]t is typical, where options of this kind [that is, constitutive incommensurables] are involved, for agents to regard the very thought that they may be comparable in value as abhorrent. There are many gradations of lesser or greater reluctance to undertake such comparisons. But for almost every person there are comparisons that he will feel indignant if asked to make, and which he will, in normal circumstances, emphatically refuse to make.[5]

Cognitive theorists have contributed to this research by empirically documenting the human tendency to mentally compartmentalize, noting the extent to which people organize money, objects, relationships, and exchanges into distinct mental accounts.[6] Alan Page Fiske, for example, develops four categories of social relationships, or "relational schema"—communal sharing, authority ranking, equality matching, and market pricing—that individuals employ to determine how benefits, rights, and responsibilities are allocated within a given relationship.[7]

Fiske and Philip Tetlock find that people are capable of making value comparisons within any one category with ease, but have trouble making such comparisons across categories.[8] The intensity of the resistance to contemplating a cross-category value comparison depends on both the distance and the direction between the two schemas involved in the calculation.[9] Most mentally troubling are value comparisons that require the subject to apply market-pricing norms to communal-sharing relationships—in other words, invasions of the market into gift, intimate, or similarly sacred territory. Such questions elicit more than the mere confusion or inability to compare values associated with

---

Limits of Markets, The Tanner Lectures on Human Values Delivered at Brasenose College, University of Oxford (May 11–12, 1998) (criticizing the encroachment of markets and market-oriented thinking into areas of life traditionally immune from such influences).

5. JOSEPH RAZ, THE MORALITY OF FREEDOM 346 (1986); *see also* ANDERSON, *supra* note 4, at 44–64 (discussing incommensurability of this sort); *infra* notes 8–12 and accompanying text (discussing incommensurability in more detail, and distinguishing cognitive incommensurability from constitutive incommensurability).

6. *See generally* Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-Offs: Reactions to Transactions that Transgress the Spheres of Justice*, 18 POL. PSYCHOL. 255 (1997) (discussing the mental and social categorization of objects, activities, relationships, and transactions); Richard H. Thaler, *Mental Accounting Matters*, 12 J. BEHAV. DEC. MAKING 183 (1999) (summarizing the research on the mental compartmentalization of funds into separate accounts for different purposes).

7. Fiske & Tetlock, *supra* note 6, at 258. The communal-sharing schema dictates that benefits and responsibilities are shared among the group. Familial relationships are typically characterized by communal-sharing norms, as are certain specific items or benefits that have been designated as belonging to a communal-sharing regime, such as national defense or the right to vote. Authority ranking ordinally ranks individual access to benefits according to some hierarchy, such as status or seniority, as would be typical in the military, for example. Equality matching allocates rights and responsibilities according to "tit for tat" rules. Many friendships and casual acquaintances are organized in this manner. Finally, the market-pricing schema dictates that goods and services are allocated according to the rules of commerce. *Id.*; *see also* ALAN PAGE FISKE, STRUCTURES OF SOCIAL LIFE: THE FOUR ELEMENTARY FORMS OF HUMAN RELATIONS (1991).

8. Fiske & Tetlock, *supra* note 6, at 258.

9. *Id.* at 278.

cognitive incommensurability, instead engendering anger, moral outrage, and a desire for norm enforcement.[10] In other words, some trades are *constitutively* incommensurable—not just confusing, but so immoral that merely to consider them compromises the individual's self-image as a member of the relevant social community.[11] Fiske and Tetlock explain that "attach[ing] a monetary value to one's friendships or one's children or one's loyalty to one's country . . . demonstrates that one is not a true friend, or parent, or citizen."[12]

It would be incorrect to assume, however, that the individual mental accounting, social norms, and laws regarding the proper scope of commercial activity are universal, preordained, or inflexible. In fact, researchers across disciplines have demonstrated both the malleability and context-dependency of individual mental accounting, and the socially constructed nature of relational boundaries, which vary across time and cultures.

For example, despite the cognitive resistance to value comparisons across relational schema and the frequent insistence that some values, relationships, or activities are sacred or priceless, individuals frequently make such trade-offs—particularly trade-offs that cause an encroachment of the market-pricing schema into the other relational schema.[13] Although this is especially true for those charged with decisionmaking authority over social policy, scarce resources force each of us to at least implicitly attach dollar values to theoretically nonfungible items and activities, and to sacrifice supposedly priceless values to the cold realities of finite economic resources, with some frequency. For example, although most parents would find the notion of trading any increment in their child's safety or welfare for a monetary price abhorrent, in reality parents regularly make such trade-offs—a failure to do so would entail a dedication of the parent's entire net worth to her child, thus impoverishing herself.[14] People adopt a variety of coping strategies to relieve the cognitive discomfort caused by such choices and comparisons, including the ready acceptance of smoke screens designed to obfuscate the fact that a trade-off across boundaries has occurred, redefining the transaction as one that involves a routine trade-off (for example, one market-pricing relation for another), or a tragic trade-off (the sacrifice of one sacred value for another, such as putting one child's needs before those of another child).[15]

---

10. When values are cognitively incommensurable, people are unable or unwilling to evaluate certain comparisons because they have no basis by which to determine how much of *X* to give up in exchange for *Y*. *Id.* at 256; RAZ, *supra* note 5, at 321–57 (defining and discussing incommensurability in great detail).

11. RAZ, *supra* note 5, at 345–53 (introducing the concept of constitutive incommensurables).

12. Fiske & Tetlock, *supra* note 6, at 256.

13. Philip E. Tetlock, *Thinking the Unthinkable: Sacred Values and Taboo Cognitions*, 7 TRENDS COGNITIVE SCI. 320, 320 (2003).

14. *Id*. at 321.

15. *Id*.

Similarly, policymakers are regularly faced with choices that cross relational boundaries. When determining the legal status of insurance contracts,[16] the prospect of tort damages for various injuries or loss of life,[17] or conducting cost–benefit analysis to choose among policies regarding public health, safety, and environmental quality,[18] policymakers are at least implicitly valuing in economic terms items and ideals that many contend are irreducible to monetary values. In other words, they are transgressing important social norms regarding the way in which we account for certain items, ideas, and values. For their own political survival, successful policymakers adopt a variety of tactics to deflect blame for such transgressions, including decision-avoidance tactics, such as buck-passing and procrastination, and obfuscation tactics designed to mask the trade-offs.[19]

In a similar vein, Viviana Zelizer has noted that the numerous vigorous debates on the propriety of markets in eggs, blood, human organs, sexual relations, and other arenas traditionally thought too sacred to be governed by market-pricing norms rarely appreciate the extent to which intimate and economic activity already commingle in daily life.[20] These invasions of the profane (market pricing) into the sacred are not only common, but have significant macroeconomic consequences, including large wealth transfers from rich to poor nations and from one generation to the next.[21]

Moreover, when a relationship or transaction in one relational schema closely resembles one in another, individuals go to great lengths to distinguish them, including through adherence to transaction-exchange rules appropriate to that relational schema.[22] Although one's relations with a wife, a date, a girlfriend, a mistress, and a prostitute may have similarities, the participants can and do define and distinguish the boundaries of the relationship, in part, through the type of exchange principles that operate in each. What is the appropriate thank you for an enjoyable evening? Flowers, jewelry, cash, or doing the dishes? The choice of exchange terms signals much about the nature of the relationship itself.

---

16. *See generally* VIVIANA A. ROTMAN ZELIZER, MORALS & MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES (1983) (tracing early opposition to life insurance in the United States to cultural beliefs that prohibited the valuation of human life in monetary terms, and attributing the market's phenomenal success after 1840 to changes in these attitudes); Roy Kreitner, *Speculations of Contract, or How Contract Law Stopped Worrying and Learned to Love Risk*, 100 COLUM. L. REV. 1096 (2000) (discussing early legal opposition to life insurance and attributing its eventual acceptance to various legal doctrines, including the doctrine of insurable interest, that distinguished insurance from gambling on death).

17. RADIN, *supra* note 1, at 184–205 (categorizing compensation for harms suffered as a contested commodity).

18. ANDERSON, *supra* note 4, at 190–216 (arguing that the reduction of these values to monetary terms for purposes of choosing among competing policies expresses an attitude toward those values that most people find deeply disturbing).

19. Fiske & Tetlock, *supra* note 6, at 257.

20. ZELIZER, *supra* note 4, at 27.

21. *Id.*

22. *Id*. at 34.

In addition, social norms regarding the contours of these relational boundaries and the proper means of exchange within them are permeable and changing. Although relational schema and rules of proper exchange within and across them are a feature of all cultures and civilizations, implementation rules specify when and how each schema applies.[23] Cultural norms provide most of these implementation rules, meaning that the rules vary over time and across societies, and may be ambiguous or contentious at the margins.[24] Moreover, technological innovation, social or political change, or other developments may create previously unknown circumstances for which no existing implementation rule exists, causing social strain.[25]

To illustrate, when people encounter others from another culture that applies different implementation rules, these new contacts may seem strange or savage. When the French colonized the Moose people of western Africa, for example, they were befuddled by the Moose application of communal-sharing norms to agricultural land, which the Moose treated as a commons. The French forced market-pricing norms on the colony through a variety of mechanisms, including per capita flat taxes and mandated cash crops. Similarly, the Moose were so disturbed by the western application of market-pricing mechanisms to areas such as work and the distribution of food that a Moose myth developed that French parents kept careful accountings throughout their children's lives and presented them with an itemized bill for the expenses associated with their upbringing at maturity.[26]

Finally, even within a given society, social norms and legal rules regarding relational boundaries and proper valuation and exchange terms within them evolve over time. Sometimes, for example, a trade or market once considered commonplace and legitimate becomes forbidden. Both slavery and military conscription, for example, would fall today into our second category of forbidden exchange—rights, obligations, or items that are inalienable and cannot be transferred to another for profit or any other motive. Yet slavery and indentured servitude were once legal—and economically important—markets, including in the United States, until forbidden by the Thirteenth Amendment.[27]

Similarly, it was historically commonplace, both in the United States and elsewhere, for the wealthy to buy their way out of military service through either commutation (a direct payment to the government) or through substitution (paying another to serve in one's stead).[28] Originally arising out of

---

23. Fiske & Tetlcok, *supra* note 6, at 259.

24. *Id.*

25. *Id.*

26. *Id.* at 274.

27. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as punishment for a crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

28. Margaret Levi, *Conscription: The Price of Citizenship*, *in* ANALYTIC NARRATIVES 109, 109 (Robert H. Bates et. al eds., 1998); *The Draft; The Three Hundred Dollar Exemption*, N.Y. TIMES, Aug.

obligations feudal subjects owed to their lord, the practice was defended in the nineteenth century by a variety of rationales, including the greater burden military service imposed on the privileged as compared to those more accustomed to hardship, and on the efficiency advantages of allowing those who could better serve their country through other productive means to do so, while still contributing to the war effort through payments to the government war chest or through the provision of a suitable substitute for service.[29] These defenses eventually lost favor, however, and by the end of the nineteenth century both commutation and substitution had disappeared throughout the United States and Europe.[30] In the United States, commutation disappeared after the second Civil War draft, and substitution (although eliminated by the Confederacy in December of 1863 and replaced with occupational exemptions) endured until sometime near the end of the century.[31] However, the practice continued to fall out of favor to the point that, by World War I, substitution was not merely disfavored, but unthinkable.[32]

By contrast, some markets once forbidden, or at least contested, eventually become commonplace or less contested. For example, lending money for profit was frequently considered illegal or sinful during ancient and medieval times.[33] With the possible exception of Islamic law, this traditional hostility to for-profit money lending has largely vanished, and interest on loans is now charged as a matter of course, although some restrictions on the practice are still evident through usury laws.[34]

Meanwhile, severe organ shortages and advances in medical science have deeply strained the traditionally forbidden status of markets in human organs.[35] Amid increasing calls from researchers, medical professionals, and others to

---

7, 1863, at 2 (discussing differences between commutation and substitution under the Conscription Act of 1863).

29. Levi, *supra* note 28, at 109–10.

30. *Id*. at 110.

31. *Id*. at 131–37 (describing this process, and the reasons for the continued existence of substitution, despite the fact that it was less equitable than commutation and available only to the very rich); James M. McPherson, *Battle Cry of Freedom: The Civil War Era*, *in* JUSTICE 131, 132–33 (Michael J. Sandel ed., 2007) (discussing commutation as a means of capping the price of substitution, thus making it more affordable to the middle classes, and also describing the eventual abandonment of both practices).

32. Levi, *supra* note 28, at 137.

33. SIDNEY HOMER & RICHARD SYLLA, A HISTORY OF INTEREST RATES 10 (1996).

34. Alvin E. Roth, *Repugnance as a Constraint on Markets*, 21 J. ECON. PERSP. 37, 39–40 (2007) (discussing the traditional repugnance toward money lending).

35. *See*, *e.g*., KIERAN HEALY, LAST BEST GIFTS: ALTRUISM AND THE MARKET FOR HUMAN BLOOD AND ORGANS (2006) (analyzing the role of procurement organizations in rates of organ and blood donation and urging the necessity of sensitivity to this role if incentive programs to reduce shortages are to be successful); Gary S. Becker and Julio Jorge Elias, *Introducing Incentives in the Market for Live and Cadaveric Organ Donations*, 21 J. ECON. PERSP. 3 (2007) (arguing that financial incentives could address problems of organ scarcity without significantly increasing the cost of organ transplant surgery); Roth, *supra* note 34, at 39–40 (discussing the role of repugnance as a constraint on the market's ability to reduce the kidney shortage and urging the study of in-kind exchange to reduce the current shortage).

reconsider the issue, the American Medical Association voted in June of 2008 to lobby Congress to amend the National Organ Transplant Act to permit study of the impact of financial incentives on rates of cadaveric organ donation.[36] Some medical professionals, including some transplant surgeons, have argued that the proposal does not go far enough and urge the study of financial incentives for live organ donation as well.[37] Similar tensions are evident in the markets for reproductive services and adoptions, causing some researchers to argue—formal bans against baby selling notwithstanding—that a robust and growing international baby market is evident.[38]

The point of the foregoing discussion is that people take their implementation rules regarding relational boundaries and the acceptable means of exchange within them as a given, only rarely reflecting on the reasons for them, and without realizing their socially constructed nature. In the United States (and in many other societies) today, one of the strongest implementation rules is a norm against the application of market-pricing rules to items or relationships that we regard as appropriately governed by the communal-sharing schema.[39] We take as fixed the notion that, with respect to certain basic items, needs, and relationships—our body parts, our sexuality, and our children, for example—distribution must not be dictated by market-pricing norms.[40] It seems intrinsically wrong to us to offer our bodies, our children, or our organs for sale—to even seriously propose such trades marks the proposer as a destabilizer of the social order.[41]

Yet the contributors to this symposium contemplate exactly these kinds of trades, considering at length the consequences of making—and of restricting—markets in various types of traditionally forbidden or contested exchange, including human blood, organs, eggs, sperm, reproductive services, and labor. What are the problems with, objections to, defenses of, impediments for, developments in, and challenges facing markets in these traditionally forbidden or contested areas of commercial exchange? What is the effect of prohibiting or impeding commercially motivated transactions in these areas? As we move toward greater market-based exchange in some of these items and activities,

---

36. JoNel Aleccia, *Docs Push for Tests of Cash Rewards for Organs*, MSNBC.com, June 25, 2008, http://www.msnbc.msn.com/id/25356966/.

37. *Id*. (quoting Benjamin Hippen, a kidney transplant specialist and member of the United Network for Organ Sharing Ethics Committee); Laura Meckler, *Kidney Shortage Inspires a Radical Idea: Organ Sales*, WALL ST. J., Nov. 13, 2007, at A1 (discussing the advocacy of Arthur Matas, former president of the American Society of Transplant Surgeons, on behalf of financial incentives for organ donation).

38. *See, e.g.*, DEBORA L. SPAR, THE BABY BUSINESS: HOW SCIENCE AND POLITICS DRIVE THE COMMERCE OF CONCEPTION (2006) (documenting the global baby business); Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203 (documenting the legal baby trade and arguing that "baby-selling bans" have more in common with the rent seeking observed in other commercial markets than with grand normative statements about sacred values).

39. Fiske & Tetlock, *supra* note 6 at 278.

40. *Id*.

41. *Id*.

what outcomes might we expect? What must those markets look like, who will intermediate them, and how must the legal regime governing the market participants be structured in order to guard against our traditional fears of market-based approaches to exchange in these areas? These are the questions to which our contributors seek, if not answers, at least insight.

For example, in *Trafficking in Human Blood: Titmuss (1970) and Products Liability*, Clark C. Havighurst notes that in the many debates about the proper roles of altruism versus commercialism in the collection and distribution of human blood prompted by the 1970 publication (and 1997 republication) of Richard Titmuss's *The Gift Relationship: From Human Blood to Social Policy*, discussion of the potential impact of a strict product-liability rule, rather than a fault-based liability rule, has been almost completely absent.[42] Havighurst documents substantial industry collusion among blood fractionators in the face of the emerging HIV/AIDs epidemic in the early 1980s, which he contends limited the swiftness and independence with which blood fractionators might otherwise have responded to the crisis. Havighurst concludes that theories, such as those popularized by Titmuss, that human blood collection should be left to the dictates of personal altruism and professional standards, rather than to market forces, liability rules, and consumer choice, arguably left the public more vulnerable to blood contamination in the face of the HIV crisis than would have been the case if a more commercial approach to the blood industry had been openly accepted.

Moving next to organ markets, Julia D. Mahoney makes the cautious case for the transition to some system of compensated organ procurement. In *Altruism, Markets, and Organ Procurement*, she notes that her advocacy for a measured approach to financial incentives is not motivated by the strength of objections to organ markets.[43] To the contrary, Mahoney dissects with skill and precision traditional objections to organ markets—including objections based on improper commodification, the potential crowding out of donation, safety concerns, increased transplant costs, and the exploitation of the vulnerable—demonstrating that these criticisms "range from the highly contestable to the demonstrably wrong."[44] Instead, Mahoney's measured approach stems from the potential challenge of moving from a procurement system based on altruistic donation to one based on financial incentives, particularly when that transition may meet with resistance from the public, procurement organizations, healthcare professionals, and even potential donors themselves.

Closely related to both the organ markets analyzed by Mahoney and the parenthood markets discussed by other symposium contributors, Rene Almeling, in *Gender and the Value of Bodily Goods: Commodification in Egg*

---

42. Clark C. Havighurst, *Trafficking in Human Blood: Titmuss (1970) and Products Liability*, 72 LAW & CONTEMP. PROBS. 1 (Summer 2009).

43. Julia D. Mahoney, *Altruism, Markets, and Organ Procurement*, 72 LAW & CONTEMP. PROBS. 17 (Summer 2009).

44. *Id.* at 19.

and Sperm Donation,[45] and I, in *Sunny Samaritans and Egomaniacs: Price-fixing in the Gamete Market*,[46] consider the markets for human eggs and sperm. Almeling and I rely on similar data, including prior field research by Almeling, to reach both similar, and quite different, conclusions. We both argue that, for biological and social reasons, the structure of the gamete market is highly gendered. The result is a reliance on stereotypical images of men as dispassionate laborers interested only in financial reward and of women as altruistic "helpers," attracted primarily by the opportunity to aid the infertile, despite the large fees paid to egg donors in exchange for their services.

Almeling and I agree that these gendered market and institutional approaches are more than mere marketing rhetoric—instead, they affect the experiences and expectations of donors and the structure of the gamete market and its participants in profound ways. However, we disagree about the consequences of this state of affairs. Almeling contends that eggs and egg donors are more highly valued than sperm and sperm donors, but concedes that women are required to expend emotional effort not required of men, by "guiltily hiding any interest they might have in the promise of thousands of dollars."[47] She concludes that "it is not just reproductive material, but visions of middle-class American femininity and masculinity, and more to the point, of motherhood and fatherhood, that are marketed and purchased."[48]

In contrast, I conclude that, although the existing evidence suggests that egg donors receive higher per-transaction fees than sperm donors, the hourly rate of egg donor compensation is lower than the hourly sperm donor wage, despite the higher risk, invasiveness, and physical discomfort associated with egg donation. Moreover, this state of affairs is maintained through illegal collusion by the fertility industry. Whereas, as in most other industries, the economic forces of supply and demand are allowed to set sperm prices, egg prices are set through the same type of professional standards and pricing "guidelines" that have been declared per se illegal in other industries. Although biological and economic factors undoubtedly play some role in this difference, I argue that gendered norms regarding women's altruistic nature—particularly in sacred areas, such as reproduction—contribute to the ability to collude on price.

Hugh V. McLachlan, J. Kim Swales, and Elizabeth S. Scott turn their attention to the issue of surrogacy markets. In *Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts*, McLachlan and Swales defend the legal enforceability of surrogacy contracts, as well as their prior work on commercial surrogacy, against criticisms by others, including Elizabeth S. Anderson, Eric

45. Rene Almeling, *Gender and the Value of Bodily Goods: Commodification in Egg and Sperm Donation*, 72 LAW & CONTEMP. PROBS. 37 (Summer 2009).

46. Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-fixing in the Gamete Market*, 72 LAW & CONTEMP. PROBS. 59 (Summer 2009).

47. Almeling, *supra* note 45, at 56.

48. *Id.* at 57.

Blyth, and Claire Potter.[49] McLachlan and Swales tackle conventional objections to commercial surrogacy, including arguments based on the best interests of the child and improper commodification, concluding that these objections to commercial surrogate motherhood are "based on an irrational prejudice against monetary transactions and a groundless general preference for services that are offered without a financial fee."[50] Instead, McLachlan and Swales contend, rational prospective parents may consider that there are advantages and disadvantages to both altruistic and commercial surrogacy, and intended parents should be allowed to freely choose which system best suits their preferences.

Meanwhile, in *Surrogacy and the Politics of Commodification*, Scott examines the history of commercial surrogacy, from the moral panic seeking to stamp out commercial surrogacy that ensued after the *Baby M* decision, to the more sanguine view evidenced today by many courts and legislatures, which seek primarily to ensure certainty of parentage and to address other policy concerns arising from commercial surrogacy.[51] Scott attributes the changed legal environment to the changed social environment, which eventually repackaged commercial surrogacy from a harmful, destabilizing force that coerced women and commodified children, into an altruistic gift freely offered to sympathetic, deserving, infertile couples unable to reproduce without the surrogate's help. Although Scott traces this change in social norms to a variety of factors, including the advent of gestational surrogacy and the failure of the predicted harms attributed to commercial surrogacy markets to materialize, of particular interest is her analysis of the evolving views of feminists and liberals to the commercial surrogacy question and the resulting demise of the unstable coalition formed among feminists, liberals, and social conservatives in the wake of *Baby M*.

Scott's analysis is particularly salient today: will the more pragmatic contemporary approach to commercial surrogacy continue, or are we potentially poised for a second wave of moral panic? As Scott notes, the recent growth in the "outsourcing" of surrogacy to developing nations, particularly India, seems to have struck a nerve with an American public largely content to support or ignore commercial surrogacy arrangements within the United States.[52] And, even as this symposium goes to press, debate surges over Alex

---

49. Hugh V. McLachlan & J. Kim Swales, *Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts*, 72 LAW & CONTEMP. PROBS. 91 (Summer 2009).

50. *Id*. at 107.

51. Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109 (Summer 2009).

52. *See, e.g.*, Amelia Gentleman, *Foreign Couples Turn to India for Surrogate Mothers*, INT. HERALD TRIB., Mar. 4, 2008, at 1; Abigail Haworth, *Surrogate Mothers: Womb for Rent*, MARIE CLAIRE, http://www.marieclaire.com/world/articles/surrogate-mothers-india (last visited Feb. 15, 2009).

Kuczynski's recent first-hand account of her own commercial surrogacy arrangement in *The New York Times Magazine*.[53]

In *The Debt Financing of Parenthood*, Melissa B. Jacoby considers a vitally important, yet frequently overlooked, aspect of making markets in traditionally forbidden exchange: how such exchange will be financed and the potential policy implications of those financing choices.[54] Jacoby notes that, although discussions of consumer credit as a means to smooth mismatches between income and consumption are standard fare in the context of other commercial markets, discussion of the roles of either debt or credit in the parenthood market rarely rises above the level of anecdotes raised in passing, with most observers assuming that cash or insurance are the only viable options for financing infertility.

Jacoby observes that major lenders have begun to enter the parenthood market, offering separately tailored credit products to those seeking either infertility treatments or adoption, often at high interest rates. Although nonprofits offer a cheaper alternative in the adoption market, their savings often come with their own price tag: credit may be conditioned on the characteristics of the adopted child (disabled, nonwhite, or older) or of the intended parents (such as marital status, sexual orientation, religious affiliation, or the observance of traditional gender roles). Jacoby predicts that the entrance of repeat-player lenders offering specialized fertility credit products is likely both to increase the size of the parenthood market and to alter the market's structure and political economy.

In *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, David E. Bernstein and Thomas C. Leonard consider the original contested commodity—human labor.[55] Bernstein and Leonard argue that immigration, working poverty, and the relationship of women to the marketplace are not simply modern political and economic issues, but were vital and contentious issues a century ago, laying the groundwork for American

---

53. Alex Kuczynski, *Her Body, My Baby—My Adventures with a Surrogate Mom*, N.Y. TIMES MAG., Nov. 30, 2008, at MM42. *The New York Times* printed a number of letters received in response to the piece, nearly all of them negative, which included statements that the article "inspire[d] contempt and ridicule in the blogosphere," left "the Times open to the charges of elitism," and

> represents what the rich have become: an elite fringe that is so far flung from the majority of society as to seem freakish. And Cathy, the surrogate mother, represents how the once-stalwart middle class has diminished: an educated person who is relegated to selling space in her body to help pay for her own child's education.

Letters, N.Y TIMES MAG., Dec. 14, 2008, at MM16. Other letters complained, "I am filled with revulsion by Alex Kuczynski's cover story"; "there is something profoundly wrong with our educational and economic systems when a middle-class, two-income family has a daughter selling her eggs and a mother selling her uterus to pay for college"; and "morality seems so malleable in the hands of those who feel entitled." *Id*.

54. Melissa B. Jacoby, *The Debt Financing of Parenthood*, 72 LAW & CONTEMP. PROBS. 147 (Summer 2009).

55. David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 LAW & CONTEMP. PROBS. 177 (Summer 2009).

labor reforms, including minimum-wage laws, that had previously been considered unthinkable government limitations on free exchange in the labor market. Bernstein and Leonard analyze the history and impact of three legislative movements—the Davis–Bacon Act, the New Deal minimum-wage legislation, and single-sex minimum-wage laws—concluding that both the intent and the ultimate impact of the laws were to eliminate from the marketplace African Americans, immigrants, women, and other "substandard" workers unable to command a "living wage."

The Bernstein and Leonard article readily evokes the problem of the "double bind" introduced by Margaret Jane Radin, although it should be noted that Radin ultimately supports minimum-wage laws and other forms of work regulation.[56] However, Radin recognized that restricting or forbidding certain forms of exchange for fear that they inappropriately commodify or coerce a subset of the population—such as women in the case of prostitution, or the poor in the case of organ selling—may have the effect of eliminating the only viable economic opportunity for an already-disadvantaged class of persons. Bernstein and Leonard demonstrate that many progressive and New Deal reformers believed that the lowest-wage workers—African Americans, immigrants, women, and other undesirables—drove down wages for everyone, since they were willing to work for wages and under conditions that white union men were not. They conclude that much labor-reform legislation was not designed to bring the wages of these groups up to those of white men, but to exclude them from the marketplace altogether by making it illegal to work for less than a "living wage," defined by reference to what a white, male worker could command in the marketplace.

In conclusion, perhaps money can't buy everything, but as the contributors to this volume demonstrate, it buys more than is commonly assumed. From blood and organs to eggs, sperm, and parenthood, money is closely intertwined with numerous items, activities, and relationships that many contend should be impervious to, or even sacredly immune from, market forces. In other words, the market-pricing schema invades our other relational schema, including the communal-sharing schema, with a great deal of frequency. As resource scarcity and scientific, medical, and technological advancement continue to expand, this trend is likely to continue.

Moreover, attempts to limit these incursions of market forces into other arenas may not operate uniformly. As argued by some of our contributors, attempts to forbid or restrict market exchange may disproportionately harm those already disadvantaged in the marketplace. Rather than reject the possibility of commercial exchange in traditionally forbidden or contested areas, the contributors to this symposium face the challenge head on, seriously considering the costs, consequences, benefits, and dangers of the complicated overlap between communal sharing and market pricing, gift and commerce,

56. RADIN, *supra* note 1, at 108–10.

altruism and profit-seeking, sacred and profane. This is no easy task. As demonstrated by our contributors, popular notions regarding the existence of sacred spheres of life immune from market forces are, at a minimum, overstated and, in some cases, wholly false. Such beliefs, nonetheless, are genuine formal and informal constraints on the development of markets in forbidden exchange. Negotiating the boundaries and limits of legal and societal definitions of forbidden exchange in the face of resource constraints, scientific innovation, and changing social mores will be the future challenge for scholars in these fields.