

# FOREWORD: HOW TO THINK ABOUT LAW AND MARKETS

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## I

### INTRODUCTION

We started the Law and Markets Project at Duke Law School in the summer of 2015 in an effort to better understand the relationship between the legal system on the one hand and markets on the other. That relationship is central to understanding the nature and practical impact of legal rules, the degree to which those rules are shaped by economic forces, and the ways in which law and markets should or can operate independently. Further, it inevitably raises foundational and difficult questions. What are (or should be) the limits of markets? When, and through what mechanisms, should the law restrict the free exchange of goods and services? To what extent, and how, should the legal system address market driven inequalities in income, wealth, or access to goods and services like health care and education?

By addressing these questions, we hoped to generate interesting conversations that would deepen people's understandings of their own and each other's work and set the stage for collaboration going forward. We chose to focus our efforts on the Duke community, so as to help build those conversations and relationships. Given our colleagues' broad and deep substantive and methodological expertise, this hardly felt like a limitation.

This breadth of expertise quickly became apparent during the first stage of the Project: a summer discussion series in which colleagues helped lead conversations about classic works and debates in law and markets<sup>1</sup>—from the foundational debate over altruism and markets in Richard Titmuss's *The Gift Relationship*,<sup>2</sup> to the role of markets as engines for development in Amartya Sen's

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1. For a full list of readings, see The Duke Project on Law & Markets, *Readings and Resources*, <https://law.duke.edu/lawmarkets/readings/> [<https://perma.cc/Z5ZY-6XM2>].

2. See generally RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP* (1970) (contrasting voluntary and compensated systems of blood donation, and arguing that a nonmarket, altruistic system may be more effective in some ways). For two leading responses, see generally Kenneth J. Arrow, *Gifts and Exchanges*, 1 PHIL. & PUB. AFF. 343 (1972); Peter Singer, *Altruism and Commerce: A Defense of Titmuss Against Arrow*, 2 PHIL. & PUB. AFF. 312 (1973).

*Development as Freedom*,<sup>3</sup> to the relationship between the constitutional status of corporations and Milton Friedman's *The Social Responsibility of Business is to Increase Its Profits*.<sup>4</sup> We particularly thank our colleagues Jonathan Wiener, Barak Richman, Wayne Norman, Sam Buell, and Rachel Brewster for leading the discussions, which were enlightening, engaging, and occasionally involved pointed disagreement.

The conversations continued throughout the year with a seminar and colloquium, which gave us a chance to bring in outside scholars—including Alvin Roth, co-recipient of the 2012 Nobel Prize for Economics—whose work addresses the relationship of law and markets from a variety of substantive, moral, and methodological angles.<sup>5</sup> Our colleagues and students provided probing questions.<sup>6</sup> We provided food and wine.

The seminar speakers included Guy Charles (Duke), Maggie Lemos (Duke), Kara W. Swanson (Northeastern), Jason Brennan (Georgetown), Larry Zelenak (Duke), John Michaels (UCLA), Katherine Bartlett (Duke), Mitu Gulati (Duke), Mario Macis (Johns Hopkins), Frank Dobbin (Harvard), Marcia Yablon-Zug (South Carolina), James Hathaway (Michigan), Alvin Roth (Stanford), and Lisa Griffin (Duke). They presented articles and book chapters on bride-selling,<sup>7</sup> the history of selling body parts,<sup>8</sup> the tax implications of selling body parts,<sup>9</sup> the moral limits (if any) of markets,<sup>10</sup> kidney exchanges,<sup>11</sup> common but differentiated responsibility for refugees,<sup>12</sup> discrimination by customers,<sup>13</sup>

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3. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999) (describing development as a series of linked freedoms, including economic freedom).

4. See generally Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970. As a means of framing Friedman's argument, we also discussed Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1 (Winter 2014/15).

5. For an accessible introduction to market design, including but not limited to Roth's own contributions, see Alvin E. Roth, *Who Gets What - and Why: The Hidden World of Matchmaking and Market Design* (2016).

6. The students who signed up for the yearlong course were Trevor Chenoweth, Christian Coyne, Theodore Edwards, Alex Joseph, Alisha Mehta, Sanaz Oskouy, Marcelo Prates, Matthew Skrzyński, and Andrew Whitworth. We thank them for their participation and contributions.

7. See generally MARCIA YABLON-ZUG, *BUYING A BRIDE: AN ENGAGING HISTORY OF MAIL ORDER MATCHES* (2016).

8. See generally KARA SWANSON, *BANKING ON THE BODY: THE MARKET IN BLOOD, MILK, AND SPERM IN MODERN AMERICA* (2014).

9. See generally Lawrence Zelenak, *The Body in Question: The Income Tax and Human Body Materials*, 80 LAW & CONTEMP. PROBS., no. 1, 2017.

10. See generally JASON BRENNAN & PETER M. JAWORSKI, *MARKETS WITHOUT LIMITS: MORAL VIRTUES AND COMMERCIAL INTERESTS* (2015).

11. See generally Afshin Nikzad, *Financing Transplant Costs of the Poor: A Dynamic Model of Global Kidney Exchange* (Working Paper, Jan. 2016).

12. See generally James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997).

13. See generally Katherine T. Bartlett & Mitu Gulati, *Discrimination by Customers*, 102 IOWA L. REV 223 (2016).

running government like a business,<sup>14</sup> the market dimensions of plea bargaining,<sup>15</sup> empirical research on the effect of financial incentives on blood collection,<sup>16</sup> and derivatives trading.<sup>17</sup>

We had every reason to expect good things, because ours was not the first such initiative at Duke. In the summer of 2011, our colleagues Curt Bradley and Mitu Gulati launched the Custom and Law Project, which brought together scholars within and without the law school to discuss the influence of custom on law.<sup>18</sup> They were, as we are, fortunate to have extraordinary support from Dean David Levi, who made both Projects possible. The Custom and Law Project included faculty discussions, workshops, a seminar, and culminated in the spring of 2012 with an excellent symposium.<sup>19</sup>

Following a similar approach, and confident of similar success, we held a symposium in early May 2016, the proceedings of which are collected in this issue. Duke faculty authored or co-authored all of the pieces, and the breadth of the topics demonstrates some of the many facets of the relationship between law and markets—from the sale (and tax treatment of) body parts<sup>20</sup> to moral economies in the early Chinese land market;<sup>21</sup> from the supply and demand of anticorruption enforcement<sup>22</sup> to evaluating financial regulation;<sup>23</sup> from markets and the environment<sup>24</sup> to markets for sovereignty itself.<sup>25</sup>

Neither the articles individually nor the symposium as a whole attempt to precisely define or fully describe the relationship between law and markets. Nor did we necessarily set out to identify new perspectives on the matter. But despite their different subjects and their varying economic, legal, political, and even moral suppositions, the papers engage some non-obvious themes and show a variety of ways to think about law and markets.

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14. See generally JON D. MICHAELS, *THE SECOND PRIVATIZATION REVOLUTION: THE UNMAKING OF THE AMERICAN STATE* (forthcoming, Harvard University Press).

15. See generally Lisa Kern Griffin, *State Incentives, Plea Bargaining Regulation, and the Failed Market for Indigent Defense*, 80 *LAW & CONTEMP. PROBS.*, no. 1, 2017.

16. See generally Nicola Lacetera et al., *Economic Rewards to Motivate Blood Donations*, 340 *SCI.* 927 (2013).

17. See generally Kim Pernell et al., *The Rise of Risky Derivatives: Chief Risk Officers, CEOs, and Fund Managers* (University of Toronto Department of Sociology, Working Paper, 2016).

18. See generally DUKE LAW, *The Duke Project on Custom and Law*, <https://law.duke.edu/customlaw> [<https://perma.cc/M883-B7U2>].

19. See generally Special Symposium, *The Duke Project on Custom and Law*, 62 *DUKE L.J.* 3 (2012).

20. See generally Zelenak, *supra* note 9.

21. See generally Taisu Zhang, *Moral Economies in Early Modern Land Markets: History and Theory*, 80 *LAW & CONTEMP. PROBS.*, no. 1, 2017.

22. See generally Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 *LAW & CONTEMP. PROBS.*, no. 1, 2017.

23. See generally Steven L. Schwarcz, *Changing Law to Address Changing Markets: A Consequence-Based Inquiry*, 80 *LAW & CONTEMP. PROBS.*, no. 1, 2017.

24. See generally Jonas J. Monast et al., *On Morals, Markets, and Climate Change: Exploring Pope Francis' Challenge*, 80 *LAW & CONTEMP. PROBS.*, no. 1, 2017.

25. See generally Joseph Blocher & Mitu Gulati, *Forced Secessions*, 80 *LAW & CONTEMP. PROBS.*, no. 1, 2017.

## II

## LAW AND NEW OR UNEXPECTED MARKETS

One of the most common initial questions we received about the Project was, “Well, what about X? Isn’t that a market?” Indeed, one of the foundational questions we confronted throughout the year is what constitutes a market, and—somewhat to our surprise—we found that project participants tended to share expansive definitions and intuitions.

Nevertheless, the boundaries of permissible market activity tend to raise particularly difficult questions, not just definitionally, but also for law. Changes in technology, social norms, and even law itself often give rise to—or at least generate demand for—new markets and market mechanisms, which in turn present novel challenges. Where exchange is technically forbidden, how can and should law protect the interests of the would-be transactors? When parties engage in exchanges that look like market activity, how should the tax system treat them? And when the deal is not self-consciously a market transaction—as in the case of plea bargaining<sup>26</sup>—how can the market frame help make sense of party incentives, particularly in response to legal change? Such questions lie at the heart of the papers by Kim Krawiec, Wenhao Liu, and Marc Melcher; Larry Zelenak; and Lisa Griffin.

Building on their prior work,<sup>27</sup> and combining different scholarly and practical perspectives, Krawiec, Liu (Stanford—Department of Management Science and Engineering), and Melcher (Stanford—Department of Surgery) analyze kidney exchange as a matching market. In doing so, they detail the development of kidney exchange from straightforward barter-type arrangements in which formal contract is of little relevance because exchange is simultaneous, to more complex intertemporal exchanges that pose risks to both transplant centers and donors.

Their article focuses specifically on a new transplant innovation—Advanced Donation, referred to by some as a kidney gift certificate, layaway plan, or voucher—as a case study offering insights on both market and contract development. Advanced Donation provides an unusual window into the evolution of the exchange of a single good—a kidney for transplantation—from gift, to simple barter, to exchange with a temporal separation of obligations that relies solely on trust and reputational constraints for enforcement, to a complex matching market in which the parties rely, at least in part, on formal contract to define and clarify their obligations to each other.

However, the transplant community has historically viewed formal contracts in the transplant setting with suspicion, and that traditional suspicion remains evident in current Advanced Donation practice. Krawiec, Liu, and Melcher conclude that the use of formal contracts in Advanced Donation is likely inadvertent, and the contracts, in a number of ways, are inadequate to tackle the

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26. See generally Griffin, *supra* note 15.

27. See generally Wenhao Liu et al., *Is Informed Consent Enough?*, 16 AM. J. TRANS. 1038 (2016).

complex, non-simultaneous exchange of kidneys in which a patient donates a kidney before their intended recipient has been matched with a potential donor.

Larry Zelenak's paper focuses on another legal aspect of the trade in human body materials—their tax treatment.<sup>28</sup> This presents a particularly difficult challenge for tax law, he shows, because even basic elements of the analysis are ill-suited to the task. How is one to determine the holding period for body materials, given the different rates at which they grow and regenerate? Should blood be treated differently than hair, because it is so short-lived? And should the basis in those materials be zero, fair market value, or something else entirely?

Zelenak disclaims having “one true answer”<sup>29</sup> either to the best interpretation of current law or to the most appropriate legislative reforms. He demonstrates, however, that some answers—including those that have been adopted by courts in prominent cases—are unsatisfying, and he suggests better alternatives. In doing so, Zelenak shows that the important and growing market in human body parts not only raises difficult interpretive questions, but exposes key structural tensions in the federal income tax. As is true for many of the articles, then, exploration of a particular market-based problem sheds light on more general challenges for the substantive legal doctrine itself.

Whereas Zelenak focuses on how existing legal principles can or should respond to a new development in the outside world, Lisa Griffin takes the inverse approach, asking how a widespread practice in criminal law will respond, in market terms, to a change in constitutional law.<sup>30</sup> She is specifically interested in the political economy of plea bargaining, which scholars have long analyzed in market terms. With some oversimplification, the basic notion is that defendants trade something of value to them (the right to go to trial) and the state gives them something in return (a theoretically lessened sentence). There is, of course, a lively debate about whether this is a fair or acceptable market. Griffin adduces some evidence that it is not.

Her main focus, however, is how that market—and especially the state actors who fund all the main players—will respond to the Supreme Court's recent decisions in *Lafler v. Cooper*<sup>31</sup> and *Missouri v. Frye*.<sup>32</sup> Those decisions treat plea bargaining as a critical stage of the criminal justice process (which it is, as Griffin shows), and raise the bar for constitutionally effective counsel by clarifying their duty to inform defendants of plea bargains and counsel them about whether to accept. Griffin suggests that states now face a new set of constraints and incentives—in order to continue prosecutions as before, they will need to dedicate more funds to public defense. That, Griffin argues, could have positive systemic effects.

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28. See generally Zelenak, *supra* note 9.

29. *Id.* at 38–39.

30. See generally Griffin, *supra* note 15.

31. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

32. *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

## III

## MORALS, MARKETS, AND INSTRUMENT DESIGN

The relationship between morals and markets has been a matter of debate for as long as either concept has been recognized, from Adam Smith's *The Theory of Moral Sentiments*<sup>33</sup> on through contemporary debates about privatization,<sup>34</sup> commodification,<sup>35</sup> and neoliberalism.<sup>36</sup> In most cases, the question goes beyond the simplistic and unanswerable "Morals or markets?" and includes a more concrete evaluation of the moral limits—if any—on markets, and the degree to which markets and morals can explain one another.

Historians, anthropologists, political scientists, and others interested in the evolution of law have long debated whether there are certain moral economies that restrain the reach of the market, for example by supporting the use of law and custom to render certain goods impossible to commodify. In his article, Taisu Zhang addresses one particularly prominent area of this debate: the common argument that many pre-industrial societies failed to develop markets in land because they rejected the modern notion that selling land is morally permissible.<sup>37</sup>

Surveying the development of land markets throughout Chinese history, Zhang finds little support for this moral economy thesis. He also casts doubt on whether it could hold true for the histories of England, Japan, and parts of Southeast Asia. Moving from specific histories to the frame of the moral economy debate as a whole, Zhang argues that proponents of the thesis may have been focused on the wrong contexts all along.

In their article, Jonas Monast, Brian Murray, and Jonathan Wiener address a contemporary version of this moral economies debate in the context of a uniquely pressing policy question—climate change—and in response to a particularly prominent critic.<sup>38</sup> In the papal encyclical *Laudato Si*, Pope Francis specifically criticized "the strategy of buying and selling 'carbon credits.'"<sup>39</sup> The Pope's

33. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (1759). Smith's "moral sentiments" include but are not limited to what we tend to think of as "morality." The *Theory of Moral Sentiments* provided much of the intellectual architecture for 1776's *Wealth of Nations*, as well as a more nuanced view of the role of regulation than is generally credited to Smith.

34. See generally MARTHA MINOW, *PARTNERS, NOT RIVALRY: PRIVATIZATION AND THE PUBLIC GOOD* (2002); Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003); Symposium, *New Forms of Governance: Ceding Public Power to Private Actors*, 49 UCLA L. REV. 1687 (2002); Symposium, *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1307 (2001).

35. See, e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (exploring, *inter alia*, commodification objection to market alienability).

36. See, e.g., David Singh Grewal & Jedediah Purdy, *Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1 (Fall 2015).

37. See generally Zhang, *supra* note 21.

38. See generally Monast et al., *supra* note 24.

39. POPE FRANCIS, *LAUDATO SI: ON CARE FOR OUR COMMON HOME* 126 (2015), [http://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco\\_20150524\\_encia-lica-laudato-si\\_en.pdf](http://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_encia-lica-laudato-si_en.pdf) [<https://perma.cc/FBW7-8WDQ>].

criticism engages a long-running debate about the ethical, moral, and practical desirability of using markets to address climate change.

But, as Monast, Murray, and Wiener show, the question is not simply one of morals or markets. Even the Pope's encyclical can be understood as a statement only against certain kinds of free markets. And, once one identifies the many different versions of the moral arguments against markets, it becomes easier to ask—as Monast, Murray, and Wiener do—how carbon markets might be designed to address them.

Steven Schwarcz's article directly addresses the question implicit in many discussions of law and markets: whether and how the former should be used to regulate the latter.<sup>40</sup> This question is especially salient in the context of financial markets, which are Schwarcz's focus. One traditional way to evaluate potential regulation is using cost-benefit analysis. However, Schwarcz contends that this traditional approach could be improved by an increased focus on what he calls consequence-based inquiry.

Schwarcz argues that consequence-based inquiry would differ from some versions of cost-benefit analysis in that it would focus not only on the how but the when of regulation, providing lawmakers with a framework for determining when intervention is warranted in the first place. It would also focus on a particular market failure, rather than evaluating the costs and benefits of a presumptive regulation (a process that raises risks of confirmation bias). Consequence-based inquiry would identify a market change, ask whether it causes any market failures (Schwarcz suggests that changes in the bond market might qualify, for example), and then—if those consequences are significantly negative—consider potential legal changes and their consequences.

#### IV

#### MARKETS AND (OR FOR) GOVERNANCE

For the most part, the debates about markets and governance have proceeded as if they involve markets on one side and the state on the other. Under that assumption, the relevant question is how the latter can or should try to facilitate, restrict, or rely on the former. But the relationship need not be so oppositional. Sometimes, the exercise of governing authority—or even government itself—can be analyzed as a product of market forces, rather than as a means of controlling them.

Analyzing governing authority in market terms does not require one to adopt radical libertarianism—none of the articles in this issue do. Nor does it mean that the government does, or should, exercise authority only when and how the market demands it. Rather, it means thinking about governance as the good that is subject to market forces, as well as to legal and political constraints.

In their article, Rachel Brewster and Sam Buell show how thinking about governance in a market frame can help explain an otherwise puzzling legal

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40. See generally Schwarcz, *supra* note 23.

development: the incredible increase in global anticorruption enforcement over the past few decades.<sup>41</sup> As they show, the federal government pursued more Foreign Corrupt Practices Act prosecutions in 2010 alone than it did between 1977 and 2000, combined. What can account for this dramatic change?

Brewster and Buell tell a nuanced story that explains the development of this market at the global political and domestic professional level. At the global level, the emergence of the Foreign Corrupt Practices Act in the United States had to be met with changes in international law, economics, and politics. That set the stage for active anticorruption enforcement. But the play only began because the primary actors—American prosecutors—were also responding to professional powers (their traditionally broad discretion, for example) and new incentives (such as developments in the American corporate bar).

Joseph Blocher and Mitu Gulati make the state itself the subject of analysis.<sup>42</sup> Many of the central challenges in international law arise from bad relationships between regions and the nations in which they are located. Some scholars and advocates argue for a right of remedial secession for regions facing oppression. Should states be able to claim an analogous right of remedial expulsion against malefactor regions? If it is an act of self-determination for the people of a region to leave a nation against the nation's wishes, is the same thing true when they wish to stay against its wishes? Since acquisition and possession of territory is no longer the national priority it once was, can nations simply let go of undesirable regions?

These questions are increasingly pressing. Perhaps the most salient examples involve former imperial powers, some of whom would like to discard costly colonial outposts whose residents oppose independence. Historically, nations have done as they pleased with constituent regions, and particularly their colonies. But do those rules still apply? Can such a position be reconciled with the ascendant principle of self-determination? Building on prior work,<sup>43</sup> Blocher and Gulati propose a framework that would accommodate both principles, imposing restrictions on nations seeking to expel regions in most cases, but preserving the option of remedial expulsion.

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41. See generally Brewster & Buell, *supra* note 22.

42. See generally Blocher & Gulati, *supra* note 25.

43. See also Joseph Blocher & Mitu Gulati, *A Market for Sovereign Control*, 66 DUKE L.J. 797 (2017); Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 COLUM. HUM. RTS. L. REV. 53 (2016); Joseph Blocher, Mitu Gulati & Laurence R. Helfer, *Can Greece be Expelled from the Eurozone? Toward a Default Rule on Expulsion from International Organizations*, in FILLING THE GAPS IN GOVERNANCE: THE CASE OF EUROPE 127 (Franklin Allen et al. eds., 2016).



## V

## CONCLUSION

From the Great Recession to exponential spikes in the price of a drug,<sup>44</sup> to the contours and content of political-economic unions,<sup>45</sup> to the provision of life-saving treatments,<sup>46</sup> the role that law and legal institutions can and should play in shaping markets is one of the most important issues currently confronting lawmakers and legal scholars. The other side of the relationship is just as important: what role can and should markets play in impacting the law?

The Law and Markets Project brought together scholars across disciplines to explore these issues in depth. In doing so, it forced an explicit consideration of the ways in which law and markets intersect, bringing to the fore concepts and processes that are often hidden or simply assumed. This symposium issue presents important and timely contributions to what we hope and expect will be a lively and ongoing scholarly conversation.

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44. See, e.g., Andrew Pollack, *Drug Goes From \$13.50 a Tablet to \$750, Overnight*, N.Y. TIMES (Sept. 20, 2015), [http://www.nytimes.com/2015/09/21/business/a-huge-overnight-increase-in-a-drugs-price-raises-protests.html?\\_r=0](http://www.nytimes.com/2015/09/21/business/a-huge-overnight-increase-in-a-drugs-price-raises-protests.html?_r=0) [<https://perma.cc/Y4KN-2KLE>].

45. See, e.g., *Theresa May kicks off Brexit*, ECONOMIST (Oct. 2, 2016), <http://www.economist.com/news/britain/21708078-prime-minister-promises-invoke-article-50-end-marc-h-just-how-hard-brexit> [<https://perma.cc/A4BU-29F7>].

46. See, e.g., Shmuly Yanklowitz, *Give a Kidney, Get a Check*, ATLANTIC (Oct. 27, 2015), <http://www.theatlantic.com/business/archive/2015/10/give-a-kidney-get-a-check/412609/> [<https://perma.cc/N4T7-GUCG>].