THE LAW OF THE MARKET

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I

INTRODUCTION

Much contemporary discussion of "the market" assumes that it has an immanent logic that leads inexorably to runaway inequality, an erosion of corporate accountability, and the commodification of education, health, politics, and other basic goods. However, markets arise out of and operate through law—not just through public regulation but also through private law regimes (in property, contract, and tort) that create entitlements, enforce market exchanges, and limit expropriation. Appreciating the significance of law as the infrastructure of markets reveals that no particular market structure is inevitable. Instead, every market order is the result of a complex set of legal and political choices.

This Issue of *Law and Contemporary Problems* investigates the legal foundations of market orders. In this Foreword, we rely upon the Articles that follow to offer an intellectual roadmap for a legally-informed study of the market. These rich and thought-provoking Articles underscore the fundamental role of law in the constitution of markets, as well as the options, limits, dangers, and responsibilities that the legal construction of markets entails.

One lesson that we take from these writings is that the market can be thought of as a thick ethical concept that can be understood only by combing facts and norms, which cannot be prised apart without doing damage to both. This means that different forms of the market in fact instantiate differing normative visions of the market. To flesh out and generalize these evaluative aspects, we conclude in Part VI with a sketch of three competing visions: efficient markets, democratic markets, and liberal markets. We acknowledge that real markets are imperfect instantiations, and at times hybrids, of these ideal-types. In addition, the types may be further divided, oftentimes with crucial distinctions among their rival variants. But for purposes of this Foreword, our goal is modest: we have no ambition to offer a complete taxonomy of market orders or to resolve the debate over the market's normative foundations. We hope only to bring home our

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conclusion that any adequate inquiry into the market must take this normative debate into account.

II

MARKETS AND LAW

The markets that saturate modern life come in various forms: in goods and in services, domestic and transnational, off-line and on-line. Their pervasive presence produces two understandable but unfortunate effects on discourse, both public and academic. First, at times the discourse sounds as if markets are simply part of our natural environment, a brute given of the human condition, like our need for air to breathe. Second, even where no such naturalization takes hold, another form of reification often arises: a presupposition that "the market" necessarily follows one form that, at its core, possesses a given set of necessary and sufficient features. Both champions and critics tend to celebrate or criticize *the market*, implying that we all know what this means and that it necessarily means that one thing.

The notion of "intervention in the market" vividly manifests both tendencies. Intervention may have both negative and positive connotations. So-called market fundamentalists typically emphasize the negative: they tend to perceive any rule or regulation intended to affect the existing operations of a given market as *a priori* suspect, either because it artificially meddles with the market's operations or because it might distort the market's natural, and by extension beneficial, tendencies. Market skeptics, on the other hand, apply an almost mirror-image presumption against markets, treating the market as a wild force against which we should guard.

Because markets are powerful institutions that significantly impact individuals, affect relationships, and shape societies, their design should be carefully scrutinized. And because markets are the creation of human societies, and the shape of any market depends heavily on the legal rules that guide nearly every step in market actors' behavior, this scrutiny must be particularized. Lawyers and legal scholars ought to be especially attentive to particulars in framing and evaluating these legal rules. A proposed new rule for the law of the market may be troublesome or it may be desirable, but the idea that any new rule intervenes (for better or for worse) in *the* market makes no sense. Instead, markets necessarily depend on well-designed and well-enforced rules of the game: they rely on, and are constituted by, a legal infrastructure.

Markets, in other words, are at least in part legal constructs. And the law influences their construction. Evaluating the merits of any proposed legal reform in this space necessarily relies on particular normative conceptions of the good that markets, or the particular market in question, might supply. But the fact that a given rule or doctrine is (or is not, or is not yet) part of the law of the market does not make it more (or less) interventionist, because the existing rules of a given market do not epitomize the necessary configuration of *the* market. The status quo, being itself a legal construct, cannot serve as a baseline against which to measure legal intervention.

Markets are varied, and talking of *the* market counterproductively essentializes or reifies the status quo. But this should not be taken to suggest that analysis of markets' principal features is a pointless exercise. While variations are crucial, markets typically revolve around certain basic features worth emphasizing. Markets are complicated "social and institutional arrangements through which goods [and services] are regularly produced for, distributed by and subject to contractual forms of exchange in which money and property rights over goods [or rights to services] are transferred between agents."[1] Markets are robust infrastructures that enable systemic, repeatable acts of exchange, and especially exchange among strangers. Smoothly functioning markets rely on defined and respected property rights and rest on the idea that contracts should be honored and, if necessary, enforced. Moreover, while some types of trade—ranging from primitive forms of barter to intricately developed gift exchange—are possible without markets, trading systems that become sufficiently widespread such that they reasonably establish *market societies* must rely on a common, acceptable, liquid currency—namely, money—to facilitate trade.

Contract is the key mechanism for exchanging entitlements, and this makes contract central to markets, however conceived. Accordingly, many of the Articles in this Issue consider how the law of various contract types—involving, for example, commercial dealings, consumer goods, or employment relationships—plays a crucial role in the construction of commercial, consumer, and labor markets, respectively.[2] Similarly, law can variously prescribe the scope and content of the property rights of owners over the means of production, which dramatically affects the contours of our labor markets.[3]

Often, even cursory attention to law suffices to realize its indispensable work in the construction of the market (or, more precisely, of a given market, since different markets are differently designed). But at times law's constructive role is more opaque, for two distinct reasons. First, the role of law may be such an entrenched aspect of background understandings that its arrangements seem axiomatic, or even conceptually necessary. Second, law's work may be indirect. Its effect may be an offshoot, or an unintended consequence of a legal doctrine whose raison d'être actually lies elsewhere. Two of the Articles in this Issue offer telling examples.

Christine Desan's *The Key to Value: The Debate over Commensurability in Neoclassical and Credit Approaches to Money*[4] highlights this first aspect of law's

1. JOHN O'NEILL, THE MARKET: ETHICS, KNOWLEDGE AND POLITICS 4 (1998).

2. *See, e.g.*, Christine Desan, *The Key to Value: The Debate over Commensurability in Neoclassical and Credit Approaches to Money*, 83 LAW & CONTEMP. PROBS., no. 2, 2020, at 1; Robert E. Scott, *The Paradox of Contracting in Markets*, 83 LAW & CONTEMP. PROBS., no. 2, 2020, at 71; Kathleen Thelen, *Employer Organization and the Law: American Exceptionalism in Comparative Perspective*, 83 LAW & CONTEMP. PROBS., no. 2, 2020, at 23.

3. *See* HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY ch. 7 (forthcoming 2020).

4. Desan, *supra* note 2.

opacity by exposing law's often obscured role at the most elemental level of constructing markets: creating the money that generates commensurable value that in turn facilitates ordered and preference-maximizing trade. On Desan's account, market economies cannot get off the ground without money that makes otherwise random desires into ordered and comparable values. Money is thus the condition of possibility for the emergence of widespread markets. But money is not a project conducted in pure abstraction. Instead, the concrete legal arrangements that form money's design inevitably push and pull people towards specific activities. A money system based on commercial banking privileges profit-making activity with relatively short time horizons. A system based solely on government-issued money would (and historically did) push towards different goals. Markets based on differently designed moneys do not simply facilitate pre-existing preferences; they participate mightily in the very formation of values that people will pursue and through which they will understand themselves as individuals and as societies.

Kathleen Thelen's *Employer Organization and the Law: American Exceptionalism in Comparative Perspective*[5] highlights the second aspect of law's opacity in our understanding of markets: how law's indirect effects can become central for resulting market frameworks. Her comparison of Germany and the United States traces the collaborative relationship between labor unions and employers' associations of small entrepreneurs. In both settings, small- and medium-sized manufacturers saw organized labor as a potential partner in protecting themselves against cutthroat competition from marginal producers. In Germany, trade associations succeeded in coordinating strategy and negotiating with unions. In the United States, however, the loosely coordinated legal activism of small proprietary capitalists undermined burgeoning coalitions between employer organizations and unions. That legal activism took the form of anti-union litigation based on antitrust law, and it was successful enough to weed out the kinds of sectoral employer and trade organizations that survived in the European legal context. American antitrust law was born out of concerns about large concentrations of capital, but it was instead successfully directed against the unions. This shift in orientation pulled the rug out from under the cooperative frameworks developing between unions and employers.

III

ARCHITECTURE

The notion of a legal construct does not imply that law's architects can design the market in whatever shape they choose, as if writing on a blank slate. To be both legitimate and effective, law must face (respectively) justificatory and instrumental constraints. Consider first the instrumental constraints, which the architects of the law must recognize if they are to rise to the challenges of

5. Thelen, *supra* note 2.

constructing successful markets. Both the constraints and the challenges derive from the same truism: law's prescriptions are not self-executing. They are mediated by legal institutions, and their effects depend on the responses both of their addressees and of third parties who may be interested in the subject matter at hand. Appreciating the significance of these two dimensions is key to understanding the constraints and the challenges faced by the law of the market.

The institutional dimension is particularly acute in the common law tradition, which strongly associates private law with adjudication. Court proceedings are sometimes perceived as an obvious home for the law of the market, since adjudication is designed to assess the parties' behavior vis-à-vis their interpersonal rights and obligations as well as to refine the rules that delineate these rights and obligations to begin with. But in a complex and interconnected society, it is increasingly difficult to expect courts to be solely responsible for the provision of the infrastructure needed for a secure marketplace. This is a mission that often requires general legislation, and at times a full-blown administrative apparatus, to supplement or even supplant courts. The law of the market is therefore a product of a joint venture among legislatures, administrative agencies, and a host of quasi-public and even fully private organizations, all working alongside courts.[6]

There is widespread agreement that regulation should attempt to address systemic market failures.[7] When monopolies, externalities, or informational inadequacies are rampant, an "uncontrolled marketplace" will likely "fail to produce behavior or results in accordance with the public interest."[8] But often regulation is also useful—and sometimes indispensable—for another purpose: the articulation, development, and vindication of market actors' interpersonal rights. It may be necessary for ensuring the generality of legal prescription, allowing people to adjust their behavior to conform to the rule of law, maintaining the required technological expertise for legal decision making, and establishing effective tools for proactive (as opposed to reactive) ex ante guarantees of people's interpersonal rights.[9]

6. Think of the International Financial Reporting Standards Foundation (IFRS), a not-for-profit corporation whose standards govern accounting in over 140 jurisdictions. *About us*, IFRS, https://www.ifrs.org/about-us/ [https://perma.cc/CFX2-ETPA]. Additional examples of "private" lawmaking, especially in the transnational sphere, could be multiplied with ease. For examples including banking, money laundering, insurance, and securities regulation, see generally DAVID ANDREW SINGER, REGULATING CAPITAL: SETTING STANDARDS FOR THE INTERNATIONAL FINANCIAL SYSTEM (2007); Chris Brummer, *How International Financial Law Works (And How It Doesn't)*, 99 GEO. L.J. 257 (2011); Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J.L. & SOC'Y 20 (2011); David Zaring, *Rulemaking and Adjudication in International Law*, 46 COLUM. J. TRANSNAT'L L. 563 (2007).

7. *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 55–63 (1990).

8. ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 15 (2d ed. 2012); *see id.* at 15–22 (discussing market failure rationales for regulating markets).

9. *See* Hanoch Dagan & Roy Kreitner, *The Other Half of Regulatory Theory*, 52 CONN. L. REV. (forthcoming 2020).

Institutional considerations figure importantly in effective regulation. Those who design the law of the market should attend to the virtues, limitations, and possible pitfalls of the expected performances of the various institutions involved in regulating market life. Moreover, law—especially the law of the market—must also anticipate and consider the expected responses of the pertinent private actors. Well-informed and sophisticated parties are especially likely to take law's prescriptions as incentives rather than norms. In other words, legally-informed actors—both law's potential addressees and interested third parties—may act in ways that circumvent the law's intended effects and thus possibly undermine its normative underpinnings. If the architects of the law of the market are interested in law's expected consequences, they must take seriously its incentive effects and be particularly attentive to the concern of counterproductive legal prescriptions.[10]

Consequently, designing the law of the market is a complex task. The designers must examine the likely responses and counter-responses of market actors in order to foresee the ultimate outcomes of the competing legal regimes. These complications are further exacerbated in a globalized environment, which is increasingly typified by international regulatory competition.[11] At times, these complications might frustratingly suggest that certain objectives or normative commitments are elusive. More often, they imply that achieving a normative goal is not as straightforward as it may seem; that choices must be made among competing *imperfect* alternatives, each of which must be carefully designed and institutionalized.

Kim Oosterlinck, Joseph Blocher, and Mitu Gulati's Article, *Why Did Belgium Pay Leopold's Bonds?*,[12] draws on Belgian King Leopold II's reign over the Congo Free State (CFS) to study the interactions among market forces and legal doctrines that might police illicit conduct. King Leopold II, effectively the private owner of the CFS, relied heavily on issuing bond obligations to establish, run, and brutally exploit his private colony. Sovereign borrowing markets could have reacted to his horrific abuse of his Congolese subjects in at least two ways. First, the markets could have raised the costs of the loans issued by Leopold II on behalf of the CFS. Second, Belgium, the successor government to this despot, could have repudiated King Leopold II's debt by invoking the doctrine of odious debts. The two reactions are intimately related as the former might follow from the possible occurrence of the latter. Hence, the legal doctrine of odious debts may put economic, not merely moral, pressure on the market standing of a malevolent despot.

However, the authors find no evidence of any market penalty on the debt that funded Leopold's wicked rule. Nor did Belgium invoke the odious debts doctrine

10. *See generally* Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991).

11. *See, e.g.*, Bruce G. Carruthers & Naomi R. Lamoreaux, *Regulatory Races: The Effects of Jurisdictional Competition on Regulatory Standards*, 54 J. ECON. LIT. 52 (2016); Tsilly Dagan, *The Global Market for Tax and Legal Rules*, 21 FLA. TAX REV. 148 (2017).

12. 83 LAW & CONTEMP. PROBS., no. 2, 2020, at 49.

upon purchasing the CFS from Leopold; instead, it accepted responsibility for his debts and paid them. What makes these outcomes possible is the legal design of the securities markets on which the debt traded. In particular, presenting the doctrine of odious debts as an option held by the successor government opens the way for lenders to base their borrowing decisions on financial, rather than moral, reasons. As a result, the otherwise important distinction between sinful and virtuous bonds becomes optional as well.

Robert Scott's Article, *The Paradox of Contracting in Markets*,[13] in turn, demonstrates both the challenge of setting up the rules of the law of the market so that they properly serve a desired normative goal (in Scott's case, efficiency) and the institutional dimension that must accompany such inquiries. Efficiency, he claims, implies two quite different objectives: improving contractual incentives that motivate parties to invest and trade; and economizing on the production costs of contracts by facilitating the parties' abilities to realize the scale advantages of standardization. The difficulty is that these two objectives conflict. Standardization and economies of scale, which are key to the efficient production of contracts, tend to undermine the efficiency of contractual incentives. And bespoke efforts to motivate efficient investment and trade generate a loss of scale and thus inefficient production of contracts.

Drawing on the way contracting parties in thick, multilateral markets optimize between these two conflicting effects, Scott claims that the key to efficiency lies in creating a functioning network of effective coordination, which can overcome the collective action problem that entrenches inefficiencies and is endemic to the process of producing contracts in thick markets. This solution, however, is unavailable in multilateral consumer markets. But it can be, and to some extent has been, substituted with a regulatory structure that can coordinate efforts to produce more efficient consumer contracts, thus avoiding the existing pricing errors that end up as rents that producers currently capture.

IV

DANGERS

Some observers believe that central planning does not present a viable alternative for organizing large-scale economies, which means that the market economy is the only game in town.[14] Others, of course, disagree.[15] But even if, or

13. Scott, *supra* note 2.

14. *See, e.g.*, ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 48 (2018).

15. The government of Cuba, for example, instituted a planned economy following the 1959 Revolution and continues to plan much of the island's economic activity even today. *See generally* JONATHAN C. BROWN, CUBA'S REVOLUTIONARY WORLD (2017).

maybe especially if, the former view is correct, it is important to identify the immanent risks that market modes of organization typically raise.[16]

Market essentialists view this inquiry as the battlefield over whether market ordering is acceptable at all (either generally, or in one specific realm of activity). In certain contexts, this may be the right question to ask. But most cases do not raise the dramatic binary choice of either market or no market. Instead, appreciating a risk that a market structure might bring about in a certain setting may help to refine the law that governs that setting. Or, there may be a way to at least ameliorate the risk by deploying countervailing legal devices. Even risks that cannot be eradicated without sacrificing the advantages of market structures can generally be managed. While such managing measures should not make market designers complacent, the possibility of addressing the pertinent pitfalls invites a more refined analysis, which may yield better results than a binary decision.

In this Foreword, we inevitably draw an abstract and imprecise picture. Nonetheless, it seems safe to state that the two main hazards that the market is said to produce are maldistribution and the commodification of human affairs. Both concerns are significant, and neither can be fully eliminated. And yet—at least in certain settings—recognizing them as potential pathologies may indeed help to identify acceptable legal responses.

Consider first the distributive injustices that markets produce. The market's currency of willingness to pay depends not only upon people's preferences, but also upon their ability to pay. In certain contexts, this truism is largely inconsequential, since the pertinent parties' ability to pay is roughly equal (or equal enough). But in other contexts, markets "systematically tend to distribute legal entitlements to the rich, exacerbating inequality."[17] For reasons of political economy, a subset of these unfortunate distributional consequences are likely to be rather sticky.[18] Regressive consequences threaten to defy any plausible normative foundation of the law of the market. Therefore, friends of the market must not perceive these regressive consequences as part of the market's appeal, but rather as unfortunate pathological effects that ought to be mitigated where possible.[19]

Addressing distributive distortions through the law of the market is a tricky challenge, especially given the expected responses of legally-informed actors, noted above in Part III. This means that oftentimes properly confronting this

16. We deliberately use here the term "immanent." The idea that we can fix the bugs of a certain contingent market structure by adopting one that better responds to the market's legitimate normative underpinnings is already implicit, of course, in the previous Parts.

17. Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1703 (2018).

18. *Id.* at 1703–04.

19. At least with regard to some accounts of the ideal market, a similar analysis should apply to luck, which for Frank Knight is the most important feature of the market. *See* Frank H. Knight, *The Ethics of Competition*, 37 Q.J. ECON. 579, 609 (1923) ("The luck element moreover is so large—far larger than fairly successful participants in the game will ever admit—that capacity and effort may count for nothing.").

challenge requires a broader toolkit, including a background public regime of tax and redistribution.[20] The recursive nature of the game between lawmakers and the addressees of their prescriptions, as well as the political economy of tax and welfare legislation, imply, however, that this route is no panacea.

A similar analysis applies to the concern of commodification of people and their interpersonal relationships. This concern arises most forcefully when market mechanisms are introduced into a realm of life previously outside the sphere of commodities. Commodifying personal relations, such as friendship or romance, or practices with independent logics of value, such as art, sports, or politics, into the thin monetary terms that typify the market is troublesome, on this view. Commodification threatens to undermine these independent norms and to flatten or even efface worthy aspects of a world characterized by plural normative systems.[21] The gravity of this risk of commodification and its scope of application are disputed.[22] For our purposes it is enough to observe that, as with the concern that markets can be regressive, the risk of devastating commodification need not imply wholesale rejection of market mechanisms. The law of the market can employ techniques of incomplete commodification, which aim at ensuring that, while entitlements are exchanged, interactions retain their personal aspect or their non-commodity logic of relations.[23]

These risks of market formations are more or less familiar. Two of the Articles in this Issue raise another risk, one that may be conceptually different, in the sense that it might not be similarly ameliorated. In their Articles, both Katharina Pistor and Przemysław Pałka focus on some of the implications of the recent rise of online markets, highlighting the danger that these developments might cause the market to undermine itself. What might seem at first glance to be a perfection of market logic, they warn us, might end up as a market façade that is in essence a new form of social planning.

Katharina Pistor's Article, *Rule by Data: The End of Markets?*,[24] considers the possible implications of technology—the rise of big data and artificial

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20. We use the conventional term, "redistribution," but must note that it is—at least here—patently misleading, given that the task is to remedy the distortions that the market's regressive distribution may yield.

21. One need not develop a deep commitment to plural normative systems to appreciate the simple point we advance here. Even in activities organized by high stakes markets, like professional sports, it would strike any fan as scandalous if an MVP award was simply handed to the player with the highest salary (because of the salary itself, as a sole indication of what it meant to be "the most valuable player"). The example might seem frivolous, but it serves to highlight the fact that market and non-market logic are likely to live side-by-side within many of our everyday practices. The "danger" is usually a question of a contest between logics and the moments of line-crossing. For the basic argument about plural orders of valuation, see generally MICHAEL WALZER, SPHERES OF JUSTICE (1983).

22. *Compare* Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978), *with* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

23. *See generally* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 141–67 (1993); MARGARET JANE RADIN, CONTESTED COMMODITIES 102–14 (1996) (discussing incomplete commodification).

24. 83 LAW & CONTEMP. PROBS., no. 2, 2020, at 101.

intelligence, in particular—for the competition between two forms of economic ordering: market versus hierarchical orderings. Traditionally, this competition is explained by reference to transaction costs.[25] At some point on the transaction cost scale, it is more efficient to organize economic activities hierarchically (for example, by creating a firm) than by way of free and open exchange on the market. Pistor argues that technological transformations might make hierarchical orderings more efficient than market orderings even when transaction costs are rather trivial. Instead of engaging in a bargained-for exchange of goods, consumers would be provided with the goods that best satisfy their bargain-independent preferences. Pistor further worries that economies of scale might make it more beneficial for mega internet firms (or Big Tech) to control the information necessary to run this hierarchy-based economic order. This end-of-markets script is regrettable, Pistor argues, because it undermines the egalitarian foundations of market exchange and subjects people to domination by powerful, private entities. Her solution considers two possible legal avenues. The first builds on property law. Pistor believes that data should have been made *res communis* in the first place. But since lawmakers have failed to do so, she identifies an alternative avenue—business organization law—as a source of recognizing consumers as holders of collective rights in data. This remedy may not bring back market orderings, but it could provide a substantial antidote to consumer domination by Big Tech's data.

Przemysław Pałka's *Algorithmic Central Planning: Between Efficiency and Freedom*[26] also wonders whether big data and algorithmic processing might lead market mechanisms to undermine the practices of individual choice on which conventional market logics depend. By making individual preferences computable, these technological innovations promise—or threaten—to build an effectively-planned economy through the incremental empowering of private central planners rather than through the revolutionary creation of a centrally planning state. Pałka proposes that soon, if not already today, companies such as Google, Facebook, and Amazon will know more about individual people's preferences than will the individuals themselves, and these firms' algorithms will be able to satisfy people's preferences more accurately, and at lower transaction costs, than the people's own choices. This produces a powerful pressure to displace the individual market transactions that presently organize production and consumption with decision-by-algorithm, which is just central planning by another name. Pałka worries both about the processes that will yield this transformation, and about the eventual outcome. Will we choose, with collective or even individual deliberation, to cede our market choices to algorithmic planning? And even if algorithms actually do better satisfy our preferences than our own market choices could, is an algorithmically-planned economy desirable? Or, alternatively, is the act of choosing valuable apart from its results, so that choice is not a transaction cost but rather, as one might say, a transaction benefit?

25. *See generally* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

26. 83 LAW & CONTEMP. PROBS., no. 2, 2020, at 125.

V

RESPONSIBILITY

Some discussions of the market obscure another important proposition. Market forces—the actions of buyers and sellers that affect the availability and price of goods and services—are sometimes presented as or assumed to be either prior to law or beyond law's responsibility. This presupposition is the flipside of the conventional use of government intervention noted above.[27] In this view, law can, for better or for worse, only *respond* to—control, influence, affect—market forces. But it cannot be held responsible for these powers in and of themselves.

If what we have said thus far is correct, the conventional view is partial and misleading. The market is an artifact shaped by humans and can be variously designed. Describing the conventional view as artificial is not a condemnation. After all, most of the important aspects of our social life are human-made. Just like the study of other valuable human-made institutions, a clear-headed understanding and analysis of markets should be careful not to essentialize the current instantiation of the market, as if it were completely beyond human control.

Richard Brooks's Article, *Black Markets and the Exchange Structure*,[28] challenges the central role that we give law in constructing markets while aspiring to avoid the naturalism and essentialism about markets that we reject. Brooks proposes that every society has an "exchange structure"—a set of norms and practices that governs transactions among the society's members with an eye to preserving respect for its own rules. The exchange structure, for Brooks, precedes the state and its laws, and law enters the scene to stabilize and validate this structure. Critically, Brooks insists, the problems of legitimacy and stability never get a conclusive resolution—the need to preserve the exchange structure against decay never subsides. Moreover, Brooks observes, a zero-tolerance policy towards deviants rarely, if ever, best promotes stability. Instead, exchange structures must find ways to de-fang violations of their rules—to cabin deviations—in a manner that supports the survival of the very rules and systems that the deviants challenge. They must, Brooks says, evolve "various strategies allowing transgression while limiting [transgression's] follow-on consequences" in order to maintain the structure's durability.[29] Black markets, for Brooks, serve precisely this role. And a study of their normative structure—their mix of express prohibitions and implicit permissions—reveals something deep about the role of the law in sustaining, and giving a normative frame to, markets generally.

The power of the law is not limitless. As we've seen, the law of the market faces constraints. To begin with, for markets to exist as realms of *voluntary* transactions, there must be limits on legal coercion in and around market activities. That said, because it is law that sets up the rules of the game—the

27. *See supra* Part II.

28. 83 LAW & CONTEMP. PROBS., no. 2, 2020, at 151.

29. *Id.* at 171.

contours of people's Hohfeldian powers as owners and promisees, as well as their access to money—law *necessarily* engages in market-making. Therefore, even where its workings should be somewhat constrained, the law cannot be completely detached from responsibility for the transactions it both authorizes and enforces, and from the societal results of that transactional world.[30]

Avihay Dorfman's Article, *The Limited Case for Discrimination's Legality*,[31] considers non-contingent constraints on the legal enforcement of antidiscrimination duties. He asks what principled concerns might justify relieving market actors of the proscriptions of antidiscrimination law. Although there may be any number of epistemic and instrumental hurdles to calling the moral duty against discrimination into law, Dorfman argues for a substantive concern, namely, free agency. On this concern, a liberal law of the market must treat private persons, including those who act from discriminatory motivation, as free and equal agents. Doing so requires recognizing that such persons are entitled to change their minds by revising their discriminatory motivations and acting in conformity with the demands of right reason (narrowly defined to exclude clear instances of bigotry). Dorfman distinguishes between an outward act of refusing to deal with another and its underlying illicit motivation. He then argues that holding a bigot legally responsible for acquiring morally unacceptable motives while executing a perfectly legitimate act undermines the bigot's free agency. The explanation is that the law denies him or her the opportunity to act, including by repeating the refusal to deal with another, on the basis of morally sound motives by revising the current one.

More generally, the law of the market, both when it coerces and when it authorizes, has profound implications for people's lives. Therefore, for the law of the market to be legitimate, let alone just, it should be designed in a way that is both attentive to the dangers and the limitations we've discussed and normatively acceptable.[32]

Recognizing the role of law in shaping markets drives a better understanding of their plasticity and thus helps clarify thinking about how markets might be designed. That has been our primary task, but clarity engenders an additional task. When we recognize the law's role in designing markets and appreciate the

30. The idea of responsibility we use here may strike the reader as a bit unorthodox (it is certainly quite far from the idea of responsibility in say, torts or criminal law). What we have in mind is that designing the law of the market should take into account the expected results of the adopted design. The fact that system design does not ensure particular results with known individuals as winners and losers does not absolve the designer from the task of considering overall effects (just as the designers of highways must take into account actual driving without knowing who in particular will need to use the road-shoulder). We do not intend by this to collapse into one another different levels of responsibility, for instance those of particular actors and those of system designers.

31. 83 LAW & CONTEMP. PROBS., no. 2, 2020, at 175.

32. This requirement of justifiability is shared not only by natural lawyers, but also by positivists, who acknowledge that law's claim to authority implies (as Joseph Raz put it) that "it is essential to the law that it recognizes that its use of power is answerable to moral standards and claims to have reconciled power and morality." JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 1 (2009).

range of choices open to the architects of the law of the market, we must then ask about the normative underpinnings of markets. These architects should evaluate existing market formations and either reject, reform, or perhaps embrace them—but the evaluations must not, and cannot possibly, rest on a merely technical account of what makes a market. Instead, they should realize that different market designs have different normative implications. Indeed, recognizing the crucial role of law in the construction of markets and appreciating that markets are complex phenomena with heterogeneous manifestations does not, and should not, dissipate controversies. Quite the contrary: it highlights the significance of the competing normative ideals for which the market can stand.

VI

NORMATIVE FOUNDATIONS

The Articles in this Issue highlight the options, limits, dangers, and responsibilities that the legal construction of markets entails. These are all necessary aspects of a legally-informed study of the market. But they are still not sufficient. The market, as noted, is a thick ethical concept, which means that such a study necessarily implicates an analysis of the various normative ideals markets can serve. We thus conclude with a brief outline of three normative market ideals: efficient markets, democratic markets, and liberal markets.

Efficient markets are designed so as to maximize economic output. An approach to markets that emphasizes efficiency thus takes an essentially allocative view of markets. It evaluates market orderings neither in light of the relations that they underwrite among traders nor in terms of the relations that they produce between traders and the state, but rather according to the ways in which markets distribute goods in service of investment, production, and, ultimately, consumption.

Efficiency-based approaches therefore treat markets instrumentally, as technologies for producing outcomes that are assessed as desirable (or not) without making any essential reference to their having been produced by means of market exchanges. Typically, these approaches assess market outcomes using the technical language of efficiency developed by economists. This includes, for example, the Kaldor-Hicks conception that dominates both the law and economics of contract, property, and torts and the cost-benefit analysis deployed in administrative law and the study of regulation. This is why we use the term "efficient markets." But the basic structure of these approaches does not require that they evaluate outcomes using precisely this metric. All that is essential is that they view markets as a means to an end. That end might be utilitarian (the greatest good for the greatest number) or even egalitarian (on any one of many conceptions of equality). The core of the view lies in the maximizing, not the maximand.

Democratic markets have a very different ideal in mind. Markets are sites for exchanging entitlements over resources. Often, an idealized image of the market presents that exchange as if it could completely circumvent disagreements and disputes about the underlying reasons people have for valuing certain resources or activities above others. The shorthand for that idealization is that the market is a place where the buyer votes with her dollars, and nobody questions why she values one product over another. This shorthand describes some markets quite well. Its underlying normative vision—according to which depersonalized and apolitical markets allow for cooperative behavior among people otherwise potentially disposed to conflict—certainly has its attractions. But it may sell short the potential markets hold for advancing active participation in the value conflicts that govern our lives.

Control over resources implies authority over others, so if markets are the locus of transacting for entitlements to control, then they are intertwined inevitably with authority relations. The design of markets thus necessarily raises questions as to how authority should be allocated, what kinds of authority relationships are acceptable, and what society should demand of authority relations, particularly among strangers. Given the plasticity of markets outlined above, it seems plausible that the law could contribute to market formations with a range of authority relations vis-à-vis various resources. We could imagine authority heavily concentrated, or widely dispersed. We could imagine it protected by substantive and procedural barriers, or porous and open to contestation. Perhaps most concretely, we can imagine authority as established in a sense that closes off disagreement about underlying value, or alternatively as open to challenge precisely on that ground.

Contestation over underlying values need not obviate the market; in certain cases, it might give participation in a market its full meaning. When market participants articulate the contestation over values, they highlight the activity as a social arrangement, as a set of relationships among people, rather than mere exchange of inert objects. If conditions are right (for example, if the law of the market makes it possible), market participants can call into question the givenness of relations that currently govern work and property ownership, breaking down reification. In the best-case scenario, market participants use their market voice to animate their moral and political lives, to assert self-government in contexts crucial for their well-being and flourishing.

Four of the Articles in this Issue put questions of democratic participation in markets into focus. Desan's *Key to Value: The Debate over Commensurability in Neoclassical and Credit Approaches to Money*[33] reminds us that the model of money creation dominated by an independent central bank in cooperation with commercial banks is geared toward a limitation of democratic input. Pistor's *Rule by Data*[34] shows how tech giants have succeeded (so far) in limiting active participation by end users regarding authority over the data mined from their online activity. Pałka's *Algorithmic Central Planning*[35] worries that individual acts

33. *See generally* Desan, *supra* note 2.

34. *See generally* Pistor, *supra* note 24.

35. *See generally* Pałka, *supra* note 26.

could cumulate to produce a planned economy without any collective decision. And Thelen's *Employer Organization and the Law: American Exceptionalism in Comparative Perspective*[36] shows how well-targeted legal activism managed to thwart organizational attempts in one legal context, while similar ventures succeeded in another. Each of these Articles might be generalized thus: one of the features at stake in the design of markets is the allocation of authority. There are ways to allocate that authority that encourage continued participation in the contestation over underlying values, and ways to limit such participation.

We denote the third market ideal-type a *liberal market* since it grounds markets in the moral quality of individual traders rather than in collective benefits. Once again, a range of views all embrace this liberal frame, even as they fill in its details very differently. Three views in particular bear mentioning here.

First, and on the right side of the liberal spectrum, libertarian views emphasize the role that markets play in securing individual freedom. Some (in our minds less plausible) varieties of libertarianism about markets flirt with a naturalized account of property entitlements and even the basic rules of contract. These views propose that markets respect liberty against this naturalized backdrop, by protecting people against involuntary expropriation or enforced exchange. Other varieties of libertarianism (perhaps most profoundly, Hayek's) emphasize both the informational and the normative problems that confront alternatives to market-based ways of organizing economic life.[37] Planning, in particular, requires enormous quantities of information concerning both preferences and capabilities. And even if the purely fact-based informational problems confronting planning can be solved (perhaps through developments in algorithmic data processing), planners still face daunting evaluative and normative challenges. People value different things for different reasons, and planners cannot do their jobs without deciding which values are true and authoritative. But when planners make such evaluative judgments, they wrongfully usurp the proper independence and offend against the dignity of the people whose lives they plan. This is a subtle defense of markets, and far from the market fundamentalism that the other sort of libertarianism invites. In particular, the wrong of planning is tied to the central, authoritative declaration of what is valuable. Therefore, not every state intervention in economic life commits this wrong. That is why Hayek, who abhorred planning, did not object to regulation, especially where regulation serves to promote widespread participation in market life or to prevent private forms of domination from arising.[38]

The problem of disagreement about value that exercises some libertarians also underwrites the second, left-leaning, egalitarian variant of liberal approaches

36. *See generally* Thelen, *supra* note 2.

37. *See generally* F. A. HAYEK, THE CONSTITUTION OF LIBERTY (Univ. of Chi. Press 2011) (1960) [hereinafter THE CONSTITUTION OF LIBERTY]; F. A. HAYEK, THE ROAD TO SERFDOM (Univ. of Chi. Press 2007) (1944).

38. *See* THE CONSTITUTION OF LIBERTY, *supra* note 37, at 193–210.

to markets. When people value different things for different reasons, economic and social coordination depend on establishing a shared language of value that people can deploy for purposes of their commercial lives. Market prices establish this language of value. The price of a good (at least in an idealized pure exchange economy) equals what everyone else must give up for its owner to possess it, as measured by a formally equal amalgam of all of their preferences. This thought leads some left-liberals (perhaps most notably, Ronald Dworkin) to insist that, far from being forces against equality, markets are essential for economic equality to be intelligible at all.[39] Without prices and the commensuration of value that they make possible, it is impossible to know who has how much. It is therefore also impossible to say who has more, and who has less, than justice requires. One of us has gone even farther, to argue that the normative structure of market exchange, and in particular the authority relations produced by the contracts through which market exchange occurs, establishes a form of valuable market solidarity that stands beside the political solidarity produced by democratic politics in the liberal states in which markets typically thrive.[40] Of course, this approach faces challenges just like any other, perhaps most notably the challenge that fiat money's connection to politics and the state (not least through modern central banking) deprives prices of the egalitarian quality and commensurate power on which equality of resources or market solidarity depend.[41] Here, a great deal will turn on whether some version of Hayek's distinction between regulation and planning may be introduced into left-liberal theory, to renovate prices in the face of the challenge posed by money's political nature.

Finally, the third variation of liberal markets relies on individual autonomy, rather than independence. It thus begins with the proposition that for people to lead the fully human life they are entitled to, law must be committed to *enhancing* their self-determination (or self-authorship).[42] Markets are potentially conducive to people's self-determination because they allow individuals the mobility necessary for self-determination, and since they expand the options available to individuals to function as the authors of their own lives.

Markets, more specifically, enable the liquidation of existing holdings and thus facilitate people's right to exit: to withdraw or refuse to further engage, to dissociate, to cut themselves out of a relationship with other persons. Exit, in turn, is crucial to autonomy because open boundaries enable geographical, social, familial, professional, and political mobility, which are prerequisites for a self-directed life. Markets further extend this autonomy-enhancing function by

39. *See generally* Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

40. *See* Daniel Markovits, Market Solidarity, Inaugural Lecture as Guido Calabresi Professor of Law at Yale Law School (Apr. 9, 2012).

41. This challenge is developed in Christine Desan's contribution to this Issue, *supra* note 2.

42. The remainder of this Part summarizes Hanoch Dagan, *Why Markets? Welfare, Autonomy, and The Just Society*, 117 MICH. L. REV. 1289 (2019); Hanoch Dagan, *Markets for Self-Authorship*, 28 CORNELL J.L. & PUB. POL'Y 577 (2018).

broadening the scope of choices between differing projects and ways of life. By facilitating people's ability to legitimately enlist one another in the pursuit of private goals and purposes and creating a structure that multiplies the alternatives people can choose from, markets enable the individual to act—on her own or with the cooperation of others—upon her own goals, values, objectives, and her plan of life, without subordination to any other individual or subjection to any collective decision making procedure.

Markets with the primary goal of autonomy enhancement will have several characteristics. Autonomy-enhancing markets must allow universal participation since exclusion and discrimination would undermine their raison d'être. They should also set limits on the power to alienate whenever it erodes our ability to rewrite our life stories and start anew. Such markets should proactively ensure meaningful choices in each major sphere of human action and interaction. However, this injunction of intra-sphere multiplicity must be curtailed where cognitive, behavioral, structural, and political economy reasons imply that more choice may actually reduce autonomy.[43] Moreover, when markets are structured to serve autonomy, market relationships are governed by rules that require reciprocal respect for self-determination, meaning that party interactions in the market are governed by the maxim of relational justice.[44] Furthermore, since utility is understood to be instrumental to the markets' ultimate value—autonomy—the law of the market must avoid the commodification of people and interpersonal relationships. It should thus employ, in some subsets of the settings it governs, the techniques of incomplete commodification, noted earlier, which ensure that these market interactions retain a personal aspect.[45]

Finally, an autonomy-based law of the market must be particularly careful not to marginalize the broader picture, in which the justice of the market is partially dependent upon a background regime that guarantees the conditions of individual self-determination. Rather than striving to exclusivity, the law of the market, in this view, is attuned to its distinct autonomy-enhancing tasks of enabling mobility and expanding choice, while acknowledging the indispensable role of other social institutions in enabling these vital functions.

VII

CONCLUSION

Every market order is the result of a complex set of legal and political choices. This Foreword has offered an intellectual roadmap for a legally informed study of the market. Drawing on the insight that markets are plural and open to

43. For the prescription of intra-sphere multiplicity, see HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 67–134 (2017).

44. *See generally* Hanoch Dagan & Avihay Dorfman, *Just Relationships,* 116 COLUM. L. REV. 1395 (2016); Hanoch Dagan & Avihay Dorfman, *Justice for Contracts* (Aug. 11, 2019) (unpublished manuscript), https://ssrn.com/abstract=3435781 [https://perma.cc/9Q3S-RU2X].

45. *See supra* text accompanying note 23.

variable design, it reflects on both the options and constraints faced by law's architects. It discusses certain familiar and less familiar risks in market design. In order to understand the risks and rewards of market orderings and to take on the responsibility of market design, this Foreword identifies three ideal-typical visions of markets—efficient, democratic, and liberal—and summarizes the values that these ideal-types deploy to address these challenges.