

No Money Allowed

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I. INTRODUCTION

Observers have long debated the propriety of certain market exchanges involving the body, including prostitution, organ and gamete selling, commercial surrogacy, and blood and plasma markets, so called “contested commodities” or “taboo trades.”¹ Although such disputes about the nature of market boundaries are long-standing, particularly in the context of the human body, recent years have seen a renewed focus on the ways in which attitudes about the proper scope of commercial exchange shape markets—and, indeed, dictate whether exchange for money occurs at all.

While the parameters of (and participants in) that debate have shifted over the years, one unifying theme is the argument that, although the market is a suitable mechanism for the allocation of many goods and services, other goods and services are not properly the subject of market trading. For simplicity, I will refer to such theorists as “market skeptics,” although it should be noted that these authors do not reject markets per se, but only markets in certain contested or taboo goods and services. These authors thus share a commitment to defining the moral limits of markets by identifying those goods and services inappropriate to market trading and providing a justification for state limitations on such transactions, even among apparently willing buyers and sellers.²

This Article considers one aspect of the ongoing debate about market trading in the body—namely, the purported harmful effects of market transactions on particular relationships, goods, services, or society

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¹ See generally Kimberly D. Krawiec, *Show Me the Money: Making Markets in Forbidden Exchange*, 72 LAW & CONTEMP. PROBS. i (2009) (using the phrase “taboo trade” and describing some of these debates); MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996) (coining the term “contested commodities”).

² Vida Panitch, *Liberalism, Commodification, and Justice*, 19 POL., PHIL. & ECON. 62, 63 (2020).

at large, due to an inappropriate valuation. Often referred to as “commodification” or “corruption,” this critique asserts that market trading in the body is degrading or corrupting, not just to the willing parties to the exchange, but to society at large because such trading values the human body as a commodified economic asset rather than as the subject of love, reverence, or respect.³ A common critique of prostitution, for example, has been that legalized prostitution might cause us to evaluate all persons (but especially women) and all intimate relations in sexual dollar terms.⁴ A prominent critique against human organ markets has been that it would encourage us to value all humans as a collection of body parts with price tags attached, as opposed to full human beings, valuable in their own right without regard to what organs they can provide.⁵ More generally, some argue that the provision of certain goods and services through the marketplace, as opposed to through non-market relations, corrupts deeply held values and relationships.⁶ For example, paying for blood might weaken altruism in society and destroy the bonds of community that tie us to each other.⁷

To be sure, other objections have been levied against market trading in the body. Many objections to markets in the body and its parts, for example, rest on paternalistic concerns about dangers to the parties to the transaction, such as that particular exchanges are coercive or exploitative.⁸ Other objections rest on more concrete externalities allegedly posed by markets in the body and are the subject of robust empirical study—for example, that markets in sex will increase the transmission of disease, or that payments for blood or plasma will make the blood or plasma supply less safe.⁹ Still others worry that market

³ Although some authors treat these as distinct objections, I address them together in this Article, due to their shared focus on the potential harms of market trading in the body on important relations and social institutions. See I. Glenn Cohen, *Regulating the Organ Market: Normative Foundations for Market Regulation*, 77 LAW & CONTEMP. PROBS. 71, 73–74 (2014) (discussing the terms commodification and corruption and their use among market skeptics).

⁴ See *infra* note 26 and accompanying text (discussing corruption objections to prostitution).

⁵ MICHAEL J. SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* 110 (2012) (describing one prominent objection to organ markets as the argument that “such markets promote a degrading, objectifying view of the human person, as a collection of spare parts (the corruption argument)”).

⁶ *Id.* at 122–25 (describing and elaborating on Titmuss’s arguments against blood markets).

⁷ See generally RICHARD MORRIS TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971).

⁸ See, e.g., Stephen Wilkinson, *The Exploitation Argument Against Commercial Surrogacy*, 17 BIOETHICS 169 (2003) (discussing exploitation arguments against commercial surrogacy); STEPHEN WILKINSON, *BODIES FOR SALE: ETHICS AND EXPLOITATION IN THE HUMAN BODY TRADE* (2003) (discussing coercion, exploitation, and other objections to various market transactions in the body).

⁹ Nicola Lacetera et al., *Rewarding Volunteers: A Field Experiment*, 60 MGMT. SCI. 1107, 1124 (2014) (finding no evidence in reduction of supply or quality of donated blood after the introduction

trading in the body undermines equality or could only be justified in a world of more equal access.¹⁰

Of note, however, is that many observers—including many market skeptics—do not believe that these objections fully explain (or *should* fully explain) legal limits on markets in the body. In other words, many of the most prominent and influential opponents of market trading in the body contend that even if problems of coercion, exploitation, safety, and inequality could be fully addressed, we should still limit certain market transactions in the body and its parts because to do otherwise reflects and fosters an inappropriate market conception of the body, with attendant negative effects on us all.¹¹

Although some of these objections represent independent moral claims about the inherent wrongness of certain markets, other objections—those that are the focus of this paper—contain both a (frequently unacknowledged) empirical component and a moral component. These objections are empirical in the sense that they involve claims that markets in certain items and activities change the way in which society and its members perceive those items and activities or the non-market relationships through which they would otherwise be supplied. They are also moral claims because they rest on a contention that the change is inevitably negative—that certain modes of valuation and visions of the world are superior to others, or at least are inappropriate in certain settings.

The moral component of this argument has been critiqued at length by others.¹² This Article will focus primarily on the empirical component, making two general points. First, market skeptics fail to provide evidence of the negative effects they hypothesize, despite widespread variation over time and across legal regimes. Prostitution is legal in much of the world and illegal in most of the United States.¹³ Paid egg

of financial incentives in the form of gift cards); Nicola Lacetera et al., *Economic Rewards to Motivate Blood Donations*, 340 SCI. 927, 927 (2013) (reviewing the evidence on reduced safety and quantity of paid blood supply and finding it lacking); Scott Cunningham & Manisha Shah, *Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health*, 85 REV. ECON. STUD. 1683, 1683–84 (2018) (noting that the risk of disease transmission is an animating policy concern behind laws criminalizing prostitution, but finding that legalized indoor prostitution in Rhode Island decreased, rather than increased, gonorrhea rates).

¹⁰ See generally DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS (2010).

¹¹ See *infra* note 2327, and accompanying text (discussing corruption objections in more detail).

¹² See, e.g., JASON BRENNAN & PETER JAWORSKI, MARKETS WITHOUT LIMITS: MORAL VIRTUES AND COMMERCIAL INTERESTS (2016); Ben Wempe & Jeff Frooman, *Reframing the Moral Limits of Markets Debate: Social Domains, Values, Allocation Methods*, 153 J. BUS. ETHICS 1, 2 (2018); Panitch, *supra* note 2.

¹³ *Countries Where Prostitution is Legal 2021*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/countries-where-prostitution-is-legal> [https://perma.cc/5JE4-UGTX] (last visited Mar. 1, 2022).

donation and commercial surrogacy are legal in most of the United States and illegal in much of the rest of the world.¹⁴ This has been the case for decades. What are the societal changes supposedly wrought by these differing regimes? How are we to observe and measure them, and when will they appear? Do Australians, Germans, and Swiss, for example, find it more difficult to form committed and intimate relationships than Americans?¹⁵ Are children and/or motherhood more revered in Europe, where commercial surrogacy is prohibited in most jurisdictions, than in the United States?¹⁶ Indeed, these now long-standing legal differences appear to undermine claims regarding some of the more dramatic effects hypothesized by market skeptics.¹⁷

Second, and more importantly, these objections fail to account for the human tendency—long noted within psychology, anthropology, and sociology—to fashion contested exchanges in a manner that reinforces—rather than undermines—deeply held values and relationships.¹⁸ This is not to suggest that the social, cultural, or legal acceptance of a particular transaction renders it moral. But to the extent that moral objections themselves depend on a corruption or cheapening of values or relationships, the actual operation of those values and relationships should be relevant. Moreover, the contention that “market creep” has occurred without public awareness or debate is undermined by the full extent to which participants in and third-party observers of

¹⁴ *Rules and Regulations for Surrogacy Around the World*, W. FERTILITY INST. (July 30, 2019), <https://www.westernfertility.com/uncategorized/rules-and-regulations-for-surrogacy-around-the-world/> [<https://perma.cc/8K5W-A6KV>].

¹⁵ Prostitution in some form is legal in each of these countries. *What Are the Prostitution Laws in Australia?*, COAL. AGAINST TRAFFICKING WOMEN AUSTRAL., <https://www.catwa.org.au/prostitution-laws-in-each-state/> [<https://perma.cc/283U-AHXA>]; *Countries Where Prostitution is Legal 2021*, *supra* note 13.

¹⁶ Some countries, including Italy, Spain, France, and Germany, prohibit surrogacy entirely. Others, such as the UK and Denmark, permit surrogacy, but prohibit payment to the surrogate, other than the reimbursement of medical expenses. *Rules and Regulations for Surrogacy Around the World*, *supra* note 14. Although there is great variation in laws governing surrogacy in the United States, most states permit commercial surrogacy. *The United States Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> [<https://perma.cc/DH33-Y5CG>] (last visited Mar. 1, 2022) (detailing surrogacy laws across U.S. states).

¹⁷ See *infra* notes 28–33 and accompanying text.

¹⁸ See Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-Offs: Reactions to Transactions that Transgress the Spheres of Justice*, 18 POL. PSYCH. 255, 291–94 (1997) (discussing the mental and social categorization of objects, activities, relationships, and transactions and the ways in which people deal trade-offs across categories); Philip E. Tetlock, *Thinking the Unthinkable: Sacred Values and Taboo Cognitions*, 7 TRENDS COGNITIVE SCI. 320, 320–21 (2003) (discussing cognitive coping strategies for taboo trades); Marion Fourcade & Kieran Healy, *Moral Views of Market Society*, 33 ANN. REV. SOCIO. 285 (2007) (discussing this literature); Gabriel Rossman, *Obfuscatory Relational Work and Disreputable Exchange*, 32 SOCIO. THEORY 43 (2014) (discussing strategies for managing contested exchanges).

repugnant exchange have, in fact, debated, modified, and managed those exchanges over time.¹⁹

Part II describes the corruption critique. Part III invokes egg donation and kidney exchange as examples of the type of values preservation that the corruption critique ignores. Part IV situates the corruption critique within the crowding out literature and addresses the problem of misplaced generality. Part V concludes.

II. COMMODIFICATION, CORRUPTION, AND THE MORAL LIMITS OF MARKETS

As noted, debates about the moral limits of markets are longstanding. Although the roots of this debate can be traced back at least to the classical political economists of the early 19th century, the contours of modern debate about the moral limits of markets are often traced to Michael Walzer, who argued that the distribution mechanism for any good must be derived from its social meaning.²⁰ He identified eleven distinct spheres, each of which he argued must remain autonomous from the others, in the sense that a person's relative advantage or disadvantage in one sphere should not determine their status in another sphere.²¹

Building on this theme, other scholars have attempted to distinguish those goods and services properly the subject of market trading from those that are not. As already noted, prominent among these critiques are objections to the commodification and potential corruption of items and activities through inappropriate valuation. Many of these items and activities involve the human body ("physical goods"), such as prostitution, commercial surrogacy, gametes, blood, plasma, and human organs.²²

Although commodification and corruption critiques are not the only objections to market trading in the body, they are prominent ones, made by nearly every market skeptic to consider the issue. Notably, externalities are prominent in many of these critiques. In other words, although some market skeptics contend that market trading in the body is corrupting to the participants in the exchange, this need not be necessary. Even if the exchange is welfare enhancing for the parties involved, the

¹⁹ See SANDEL, *supra* note 5, at 7–11 (making this market creep argument).

²⁰ Wempe & Frooman, *supra* note 12, at 2 (attributing the origins of the moral limits of markets debate to classical political economists such as Smith, Ricardo, and Marx).

²¹ See generally MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1984).

²² Panitch, *supra* note 2, at 63 (dividing contested commodities and markets into "Social Goods (love, friendship, kinship); Honorific Goods (prizes, awards, offices); Civic Goods (votes, citizenship, speech); Necessary Goods (education, health care, shelter); and Physical Goods (sex, gestation, body parts)").

corruption critique contends that prohibitions on market trading may be justified by the harms that the market valuation of sacred goods and services imposes on nonparties to the exchange and/or on society at large.

Writing about surrogacy, for example, Elizabeth Anderson argues that “[w]hile contract pregnancy brings financial rewards to a few women, it reinforces gendered relations of inequality and stereotypes that undermine the status of women in general.”²³ It also harms children, not only because those born through a surrogacy relationship may fear resale, but because “the widespread acceptance of contract pregnancy could psychologically threaten all children” by changing how society values children generally.²⁴

Margaret Jane Radin is similarly skeptical of paid surrogacy, focusing, as does Anderson, on the potential corruption to societal values and perceptions of women and arguing that “[t]he most credible fear of a domino effect . . . is that all women’s personal attributes will be commodified. The pricing of surrogates’ services will not immediately transform the rhetoric in which women conceive of themselves and in which they are conceived, but that is its tendency.”²⁵

Radin and Anderson express similar worries about sex work. Radin, for example, argues:

If sex were openly commodified in this way, its commodification would be reflected in everyone’s discourse about sex, and in particular about women’s sexuality . . . The open market might render an understanding of women (and perhaps everyone) in terms of sexual dollar value impossible to avoid. It might make the ideal of nonmonetized sharing impossible.²⁶

More recently, Michael Sandel has raised corruption concerns, focusing in particular on potential changes to social norms and societal values. As he explains in his New York Times best-selling book: “[M]arkets are not mere mechanisms. They embody certain norms. They presuppose—and promote—certain ways of valuing the goods being exchanged. Economists often assume that markets do not touch or taint

²³ ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 185 (1993).

²⁴ *Id.* at 172.

²⁵ Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1933 (1987).

²⁶ MARGARET JANE RADIN, CONTESTED COMMODITIES 133 (1996). Radin ultimately argues for an “incomplete commodification” of sexual services in which prostitution would be decriminalized but pimping and advertising would be prohibited. Radin, *supra* note 25 at 1924–25; *see also* Elizabeth Anderson, *Ethical Limitations of The Market*, 6 ECON. & PHIL. 179, 187–89 (1990) (arguing that prostitution debases sexual intimacy and disrupts shared understandings of sex as a reciprocal exchange).

the goods they regulate. But this is untrue. Markets leave their mark on social norms.”²⁷

III. VALUES PRESERVATION

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

Nonetheless, there is reason for doubt. First, there is great variation across legal regimes in the regulation of market trading in the body, including differences in the legality of prostitution, gamete markets, commercial surrogacy, and paid plasma donation.²⁸ Moreover, these differences have persisted for decades, if not longer. At least some of the purported negative effects of inappropriate valuation should be observable by now. The fact that market skeptics have failed to mount an empirical account in defense of their corruption arguments counsels against taking such warnings too seriously. At a minimum, we can conclude that some of the more dramatic effects hypothesized by market skeptics have not come to pass. As noted by Nathan Oman, “[w]e no longer need to speculate about the social effects of surrogacy agreements. Such contracts will be honored in at least some states, and we now have more than a generation of experience with their effects. The dystopian, commodified future feared by Radin has not materialized.”²⁹

Martha Nussbaum makes a similar point. In response to the argument that prostitution undermines the ability to form intimate, committed relationships, she states:

This argument is prominently made by Elizabeth Anderson in defense of the criminalization of prostitution. The first question we should ask is, Is this true? People still appear to fall in love in the Netherlands and Germany and Sweden; they also fell in love in ancient Athens, where prostitution was not only legal but

²⁷ SANDEL, *supra* note 5, at 64.

²⁸ See *supra* notes 15–16 and accompanying text (discussing prostitution, surrogacy, and gamete markets); see also PETER JAWORSKI, BLOODY WELL PAY THEM: THE CASE FOR VOLUNTARY REMUNERATED PLASMA COLLECTIONS (2020).

²⁹ NATHAN OMAN, THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW 171 (2016).

also, probably, publicly subsidized. One type of relationship does not, in fact, appear to remove the need for the other.³⁰

More importantly, it is not surprising that morally contested trades have failed to produce the dramatic corrupting effects hypothesized by market skeptics because such predictions ignore the long-understood human tendency to refashion morally contested exchanges in a manner that reinforces, rather than undermines, deeply held values and relationships. Social scientists have devoted considerable effort to documenting and understanding the process by which market exchange occurs (or not) when markets are morally contested.³¹ Importantly, market exchange does not simply proceed thoughtlessly forward in a manner designed to disrupt shared societal understandings of morality, propriety, and sacredness. Indeed, just the opposite is true—participants in such exchanges go to great lengths to refashion contested exchanges in a manner that preserves and reinforces—rather than destabilizes—deeply held values and relationships.³²

The methods by which this preservation is most commonly accomplished have a long history and typically involve incorporating elements, rhetoric, rituals, or processes of gift exchange or reciprocity into market-based or market-like transactions. To be clear, these devices are not a magic incantation guaranteed to render morally controversial market transactions socially acceptable. As Kieran Healy and I have detailed elsewhere, this very attempt at “repugnance management” has notably failed in some cases, for a variety of reasons.³³ This section explains and elaborates on this process through two examples of successful repugnance management: egg donation and kidney exchange.

A. Egg Donation

Egg donation in the United States, which is nearly always compensated, provides a good example of what has been termed “repugnance management,” accomplished through a blending of market and gift elements and discourse.³⁴ That discourse begins with donor recruitment

³⁰ Martha C. Nussbaum, “*Whether From Reason Or Prejudice*”: Taking Money For Bodily Services, 27 J. LEGAL STUD. 693, 713 (1998).

³¹ See generally Kieran Healy & Kimberly D. Krawiec, *Repugnance Management and Transactions in the Body*, 107 AM. ECON. REV. 86 (2017) (discussing this literature).

³² See *supra* note 18.

³³ Kieran Healy & Kimberly D. Krawiec, *Organ Entrepreneurs*, in THE CAMBRIDGE HANDBOOK OF LAW AND ENTREPRENEURSHIP IN THE UNITED STATES (D. Gordon Smith et al. eds., forthcoming 2022).

³⁴ Healy & Krawiec, *supra* note 31, at 87. Egg donation in Spain follows a similar pattern, combining a (gendered) gift framing with financial compensation. See generally Sara D. Esposti & Vincenzo Pavone, *Oocyte Provision as a (Quasi) Social Market: Insights from Spain*, 234 SOC. SCI. & MED. 112381 (2019).

materials, which nearly always reference helping others, altruism, or gift giving as a prominent reason to become an egg donor.³⁵ It extends through the language, actions, and attitudes of fertility center and agency staff, intended parents, and egg donors themselves.

Despite the fact that egg donors are paid thousands of dollars, fertility organizations, donors, and intended parents conceptualize the transaction as a priceless gift.³⁶ Rene Almeling, for example, found that payments to egg donors sometimes take the form of voluntary “thank you” gestures, such as gifts of jewelry or money, rather than payment terms negotiated *ex ante*.³⁷ Other times, payments are characterized as partial reimbursement for time and discomfort that could never—and are not expected to—fully compensate the donor who bestows the “gift” of parenthood.³⁸ Such characterizations are strongly encouraged by fertility center staff, who urge donors to focus on helping others, rather than on monetary payment, and express disdain and disgust for donors who appear overly interested in money.³⁹

Although Almeling’s research was limited to egg and sperm donation in the United States, other researchers have documented remarkably similar phenomena in other parts of the world, including some European countries.⁴⁰ As noted by one group of researchers (discussing egg donation in Belgium, Spain, and the United Kingdom):

Strongly engrained ideas around the “gift of life” underpin and legitimate the exchange of human bodily tissues, including eggs, preconfiguring tissue provision as altruistic ‘donation’ and obfuscating the work and (often commercial) interests of mediating organisations . . . Prior analyses of fertility clinic websites, egg donor recruitment agency websites and social media have found that egg donation is presented to potential donors as a safe and

³⁵ Although this remains true, the past decade has seen a change in much of the discourse and attitudes surrounding egg donation, which may be reflected in recruitment materials. Kimberly D. Krawiec, *Gametes*, in *THE ROUTLEDGE HANDBOOK OF COMMODIFICATION*, (Elodie Bertrand & Vida Panitch eds., forthcoming 2022). Although appeals to altruism are still common, egg donor advertising appears to feature monetary compensation more prominently than was once the case. *Id.*

³⁶ Healy & Krawiec, *supra* note 31, at 88.

³⁷ See generally RENE ALMELING, *SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM* (2011).

³⁸ *Id.*

³⁹ *Id.*; see also Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market In Genetic Material*, 72 *AM. SOCIO. REV.* 319, 327 (2007).

⁴⁰ Diana Marre et al., *On Reproductive Work in Spain: Transnational Adoption, Egg Donation, Surrogacy*, 37 *MED. ANTHROPOLOGY* 158, 165 (2018).

fulfilling—even life-changing — journey, an altruistic act of reciprocal giving where the egg provider receives emotional benefits in exchange for providing eggs.⁴¹

The authors report a gendered altruistic framing of egg donation as outside of the commercial sphere across all three jurisdictions, despite payments of varying levels and differing legal rules governing the recruitment and payment of egg donors.⁴²

This framing is troubling in many ways, relying as it does on gendered stereotypes of female altruism and helpfulness that aren't present in the sperm market, but it nonetheless plays an important role.⁴³ Donors don't want to "sell a baby," nor do intended parents want to "buy" their child. Instead, donors, intended parents, and fertility centers prefer a vision of egg donation as a gift-like exchange in which some money is passed on as a gesture of gratitude and appreciation. Indeed, the viability of the fertility industry arguably depends on it—if the transaction is perceived as too repugnant to donors, would-be parents, potential regulators, or society at large, then the market will fail.⁴⁴ In contrast to Sandel's claims that market creep is occurring without notice or discussion, egg markets developed over time in a manner designed to preserve notions of the sacredness of motherhood and children, as well as the dignity of egg donors, and it is unlikely that the market could have succeeded in the absence of such efforts. It didn't materialize overnight with no discussion. Instead, negotiations regarding what sort of transaction egg donation *is* took place over a long period of time, accompanied by several lawsuits and a public and professional discourse that continues to this day.⁴⁵

B. Kidney Exchange

Kidney exchange, which involves in-kind exchange, rather than monetary compensation, is a good example of a previously repugnant transaction that now enjoys wide appeal in many parts of the world.⁴⁶

⁴¹ Catherine Coveney et al., *From Scarcity to Sisterhood: The Framing of Egg Donation on Fertility Clinic Websites in the UK, Belgium and Spain*, 296 SOC. SCI. & MED. 114785 (2022) (references omitted).

⁴² *Id.*

⁴³ Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete Market*, 72 L. & CONTEMP. PROBS. 59, 71 (2009) (contrasting the altruistic framing of egg donation with the framing of sperm donation as waged labor).

⁴⁴ Healy & Krawiec, *supra* note 31; Marre et al., *supra* note 40, at 165.

⁴⁵ See generally Kimberly D. Krawiec, *Markets, Morals, and Limits in the Exchange of Human Eggs*, 13 GEO. J.L. & PUB. POL'Y 349 (2015).

⁴⁶ Monetary payment for a kidney, in contrast, remains illegal throughout the world with the notable exception of Iran. See generally Ahad J. Ghods & Shekoufeh Savaj, *Iranian Model of Paid and Regulated Living-Unrelated Kidney Donation*, 1 CLINICAL J. AM. SOC'Y NEPHROLOGY 1136

In its simplest form, kidney exchange allows patients to “swap” their willing donors when a donor in one pair is a match with a patient in another pair and vice versa. Non-simultaneous, Extended, Altruistic Donor (NEAD) chains build on this idea through the use of a nondirected donor who agrees to donate her kidney to a stranger, setting off a chain of donor pairs in which each paired recipient receives a kidney either simultaneously with or before her paired donor’s donation, in a “pay it forward” chain.⁴⁷ In all of its forms, kidney exchange seeks to overcome barriers to related-party transplantation that arise from immune-system or blood-type incompatibility.

Today, organ transplantation (and in much of the world, kidney exchange) is so widely accepted that it is easy to forget the fear and skepticism with which this medical innovation was greeted.⁴⁸ But removing an organ from one person and transplanting it into another initially seemed unnatural, even ghoulish, and prompted fears of a morally transgressive interference with fate.⁴⁹ Social acceptance was won only after intense debate among the medical community, religious leaders, ethicists, and the general public. An important weapon in overcoming this early opposition to transplantation was a “gift of life” narrative, still prevalent today, that emphasizes organ donation as a morally worthy act.⁵⁰ This gift framing, which emphasizes both the satisfaction of helping another and the social and moral obligations that members of society owe one another, has been powerful, despite the fact that transplantation lacks the direct reciprocity of a true gift exchange structure.⁵¹ Moreover, it remains persuasive, even as transplantation has become more complicated and incorporates increasingly market-like features.⁵²

But kidney exchange is a very different transaction than the simpler directed donations that preceded it. When a donor in a kidney exchange (other than the altruistic donor who initiates a NEAD chain)

(2006).

⁴⁷ See generally Kimberly D. Krawiec & Michael A. Rees, *Reverse Transplant Tourism*, 77 LAW & CONTEMP. PROBS. 145 (2014) (explaining various types of kidney exchange).

⁴⁸ Kidney exchange remains illegal in a number of countries, most notably Germany, because donations are limited to people only in certain types of close relationships. These rules effectively prohibit kidney exchange, as well as altruistic donations to strangers. Philippe van Basshuysen, *Kidney Exchange and the Ethics of Giving*, 18 J. ETHICS & SOC. PHIL. 85, 94–95 (2020).

⁴⁹ KIERAN HEALY, LAST BEST GIFTS: ALTRUISM AND THE MARKET FOR HUMAN BLOOD AND ORGANS 23–35 (2006) (describing initial challenges to the social acceptance of organ transplantation).

⁵⁰ *Id.*

⁵¹ Kieran Healy & Kimberly D. Krawiec, *Custom, Contract, and Kidney Exchange*, 62 DUKE L.J. 645, 653–55 (2012) (discussing various models of gift exchange).

⁵² *Id.*

transfers her kidney to a designated recipient, it is done on the condition that her loved one receive a compatible kidney in exchange. Each donor's promise is undertaken for the purpose of inducing the other party's promise. This creates tensions between the metaphor of gift and the increasingly complicated business of transplantation, and also raises the question of whether "valuable consideration" has been received in violation of The National Organ Transplant Act (NOTA) § 301.⁵³

For this reason, kidney exchange was initially met with resistance from medical professionals, as well as moral and legal objections, on the grounds that the donation was not a gift, but a payment. The fact that the payment was in-kind rather than monetary was not, in the eyes of critics, enough to redeem what was viewed as essentially a market transaction. The British Medical Association, for example, refused to approve kidney exchange in 2000 for a variety of reasons, including that it was illegal under then-existing law, that "the donation is made with the expectation of receiving some benefit in return," and that "there are commercial overtones."⁵⁴ Similarly, a 1999 Hastings Report referred to kidney exchange as "a hidden type of organ sale."⁵⁵ Perhaps most dramatically, *Der Spiegel* called it "a form of organ trafficking."⁵⁶

The transition from repugnance to acceptance followed a familiar pattern, similar to that described in Part III.A above with respect to egg donation, of understanding and addressing objections, debating, reframing, and relational and moral entrepreneurial work.⁵⁷ Kidney exchange, like many taboo transactions, doesn't map cleanly onto the standard cultural understandings of either markets or gifts. On the one hand, gifts are not explicitly bargained for. On the other, each participant in kidney exchange is acting out of love, generosity, or altruism of some sort—no one is in this to make a profit. Ultimately, kidney exchange won wide appeal in most countries, through preservation and reinforcement of the "gift of life" metaphor on which organ donation had always relied for acceptability. Although different in form from the simpler directed donations that preceded it, kidney exchange broadly resembles a form of generalized exchange, which emphasizes norms of reciprocity, commitment, and solidarity.⁵⁸

⁵³ The National Organ Transplant Act (NOTA) prohibits the knowing acquisition, receipt, or transfer of "any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." 42 U.S.C. § 274e(a).

⁵⁴ BRIT. MED. ASS'N. MED. ETHICS COMM., ORGAN DONATION IN THE 21ST CENTURY: TIME FOR A CONSOLIDATED APPROACH 21 (2000).

⁵⁵ Jerry Menikoff, *Organ Swapping*, 29 HASTINGS CTR. REP. 28, 28 (1999).

⁵⁶ See generally Udo Ludwig, *Organspende: Türchen zum Kommerz*, 7 DER SPIEGEL 62 (2001).

⁵⁷ See generally Healy & Krawiec, *supra* note 31 and 33.

⁵⁸ Healy & Krawiec, *supra* note 33, at 10.

Nor did the transition take place in the absence of debate and discourse. It instead involved years of sometimes contentious discussion among medical professionals, ethicists, legal experts, patient advocates, and the general public.⁵⁹ In many countries, including the United States, it also prompted statutory changes designed to clarify the legality of kidney exchange.⁶⁰ In 2007, Congress passed the Charlie W. Norwood Act, which amended NOTA by adding a single sentence: “The preceding sentence [barring valuable consideration] does not apply with respect to human organ paired donation.”⁶¹ Many other countries followed suit—some quickly, and others more slowly.⁶²

IV. MISPLACED GENERALITY AND CROWDING OUT

This Article focuses on corruption arguments as applied to transactions in the body. But it is helpful to think about corruption arguments as applied to other types of goods, specifically “social” (such as friendship and love) and “honorific” (such as prizes and awards) goods, because market skeptics often analogize to those items when applying corruption arguments to physical goods, such as trades involving the body. Sandel, for example, uses friendship as a prominent example to illustrate his corruption argument. Friendship, he reminds us, cannot be bought because “a hired friend is not the same as a real one. . . . Somehow the money that buys the friendship dissolves it, or turns it into something else.”⁶³

This is followed by the example of the Nobel Prize. As an honorific good, the Nobel Prize cannot be bought without undermining its value: “To buy it is to undermine the good you are seeking. Once word got out that the prize had been bought, the award would no longer convey or express the honor and recognition that people receive when they are awarded a Nobel Prize.”⁶⁴

⁵⁹ Blake Ellison, *A Systematic Review of Kidney Paired Donation: Applying Lessons from Historic and Contemporary Case Studies to Improve the US Model* (U. of Pa. Wharton Rsch. Scholars J., Working Paper No. 107, 2014).

⁶⁰ Charlie W. Norwood Living Organ Donation Act, Pub. L. No. 110–144, 121 Stat. 1813 (2007) (codified at 42 U.S.C. §§ 273b, 274e (2006 & Supp. IV 2011)); Krawiec & Rees, *supra* note 47, at 151.

⁶¹ Charlie W. Norwood Living Organ Donation Act § 301(1). This legal certainty was short-lived, as new innovations in transplantation arose that were not addressed by the Norwood Act, because they were unforeseen at the time of the legislation. *See generally* Healy & Krawiec, *supra* note 51 (discussing legal uncertainty caused by transplant innovations).

⁶² Andy R. Weale & Paul A. Lear, *Organ Transplantation and the Human Tissue Act*, 83 *POSTGRAD MED. J.* 141, 141 (2007) (explaining that the U.K.’s Human Tissue Act of 2004 provided legal clarification on the permissibility of kidney exchange).

⁶³ SANDEL, *supra* note 5, at 93–94.

⁶⁴ SANDEL, *supra* note 5, at 94.

These examples, Sandel tells us, provide a clue as to what is wrong with morally controversial transactions like kidney or baby selling. This is despite the fact that, unlike friendship or Nobel Prizes, a kidney still fulfills its intended purpose, regardless of whether one pays for it. Sandel concludes:

So it seems, at first glance, that there is a sharp distinction between two kinds of goods: the things (like friends and Nobel Prizes) that money *can't* buy, and the things (like kidneys and children) that money *can* buy but arguably shouldn't. But I would like to suggest that this distinction is less clear than it first appears. If we look more closely we can glimpse a connection, between the obvious cases, in which the monetary exchange spoils the good being bought, and the controversial cases, in which the good survives the selling, but is arguably degraded, or corrupted, or diminished as a result.⁶⁵

Sandel relies on the crowding out literature to argue that markets can sometimes displace or corrupt nonmarket norms. And, indeed, a large empirical literature supports the theory that monetary incentives may displace intrinsic motivations, such as civic duty or altruism,⁶⁶ although alternative explanations (such as signaling) have been offered for some of these observed phenomena.⁶⁷ Some studies, for example, find that financial incentives may make people less, rather than more, likely to exert effort,⁶⁸ pick up their children from daycare on time,⁶⁹ or accept a nuclear waste facility.⁷⁰ Other studies, however, find that incentives have the desired effect; or that the timing, form, or framing of the incentive matters; or that the person who should be incentivized is different from the one taking the action.⁷¹

But there are reasons to doubt the usefulness of this analogy between things that money can't buy (like friendship or prizes) and the

⁶⁵ SANDEL, *supra* note 5, at 96.

⁶⁶ See generally Bruno S. Frey & Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURVS. 589 (2001) (reviewing this literature).

⁶⁷ Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out*, 87 AM. ECON. REV. 746, 750 (1997) (rejecting signaling explanations for respondents' decreased willingness to accept a nuclear waste facility when told that the Swiss parliament had determined to compensate residents of the host community). See generally Uri Gneezy & Aldo Rustichini, *Pay Enough or Don't Pay at All*, 115 Q. J. ECON. 791 (2000) (providing a variety of interpretations for findings that low amounts of compensation may reduce performance).

⁶⁸ James Heyman & Dan Ariely, *Effort for Payment: A Tale of Two Markets*, 15 PSYCH. SCI. 787, 792–93 (2004).

⁶⁹ Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 11 (2000).

⁷⁰ Frey & Oberholzer-Gee, *supra* note 67.

⁷¹ See generally URI GNEEZY & JOHN A. LIST, *THE WHY AXIS* (2013).

things that money can buy but, according to market skeptics, arguably shouldn't. These reasons include misplaced generality; the need for a justification—rather than just an explanation—for bans on activities between willing participants; and the crowding out literature itself.

First, regarding misplaced generality, the fact that friends, Nobel Prizes, kidneys, and babies are all contested markets does not necessarily mean that they are contested for the same reasons. Why should the same corruption argument explain all contested markets, without regard to their different features, purposes, and participants? Referring to this as a problem of “misplaced generality,” Vida Panitch argues that:

The corruption objection [Sandel] levies against the sale of votes and public office is extended to the sale of kidneys, sex, and surrogacy, and is also used to explain what's wrong with paying others to stand in line for you at public theaters and with sports stadiums taking the name of their corporate sponsors. . . . Why should we expect the same argument that tells us why vote selling is wrong to also be able to tell us why kidney-selling is wrong; or why should we think that the reason we offer against the sale of sex should also apply to the sale of naming rights?⁷²

Second, as Sandel acknowledges, buying friendship or a Nobel Prize destroys the usefulness of it—a purchased friend or Nobel Prize is simply not the same thing as the social or honorific version. Laws preventing such trades are unnecessary. Recognizing that bought friends and Nobel Prizes are poor substitutes for their real versions, most people don't try to buy them. But this is not the case with kidneys, surrogacy, gametes, plasma and other bodily products and services. These items continue to fulfill their useful purpose regardless of whether they are bought on the market, and as a result, people do buy and sell them.⁷³ Even if market skeptics are correct that the same corruption argument that explains the contested status of social and honorific goods also explains the contested status of physical goods, such as kidneys and babies, they need a justification for why such trades should be legally restricted. An explanation is not the same thing as a justification. As noted by Panitch:

The political liberal can offer a corruption argument by way of accounting for the contested status of social and honorific goods. But that is as far as she can go with corruption arguments, because they cannot account for the contested status of the remaining contested commodities, and more importantly, they do not

⁷² Panitch, *supra* note 2, at 66.

⁷³ Panitch, *supra* note 2, at 67–68.

provide grounds for imposing restrictions on their sale. With respect to contested commodities for which state intervention may well be required, the requisite arguments need to have justificatory rather than simply explanatory power.⁷⁴

Finally, the crowding out literature itself contains some cautions against the type of sweeping generalizations made by many market skeptics. There are several possible concerns raised by the crowding out concept, and it is worth considering each separately. The first question is whether markets in kidneys, plasma, blood, or other physical goods will crowd out altruistic donations of those goods. This possibility is directly implicated by the crowding out literature and is an empirical question with which many researchers are currently engaged.⁷⁵

But Sandel's concern, relying on Richard Titmuss and already discussed at length in Part II, is not simply that blood (or plasma or kidney) markets displace altruism with respect to the provision of that specific good or service, but that it reduces altruism and social bonds in society more generally.⁷⁶ This is a more general and expansive claim.

Starting first with the more specific claim about crowding out in the markets for physical goods, why should we care whether plasma, blood, organs, or gametes are provided altruistically as opposed to through compensation? After all, numerous goods and services, including those necessary to survival such as food and medicine, are traded in the marketplace and their production incentivized through payment. One possible reason is the fear that payment will reduce the supply or quality of vital goods and services involving the body. Currently, throughout the world, thousands of people donate kidneys and blood each year. Under a paid system, perhaps they would no longer do so and perhaps the shortfall would not be made up through the marketplace. Or perhaps procuring these life-saving goods would cost more than is currently the case under an altruistic system. Sandel explicitly invokes this financial savings rationale when he argues that “[f]rom an economic point of view, social norms such as civic virtue and public-spirit-edness are great bargains. They motivate socially useful behavior that would otherwise cost a lot to buy.”⁷⁷

Although more research is surely needed and is often rendered difficult by legal prohibitions against payment, these fears appear to be unfounded in the case of physical goods—or, at least, dependent on the context, framing, amount, and other factors regarding payment. Much

⁷⁴ Panitch, *supra* note 2, at 68.

⁷⁵ See, e.g., Frey & Jegen, *supra* note 66.

⁷⁶ SANDEL *supra* note 5, at 124.

⁷⁷ SANDEL, *supra* note 5, at 119.

of the research prompting crowding out concerns with blood markets, for example, relied on surveys, lab experiments, and uncontrolled studies. More recent field-based evidence from large, representative samples contradicts these early results.⁷⁸ Indeed, more recent research on incentivizing blood donation finds that incentives increase blood donations, and that higher value incentives increase it more than lower value ones.⁷⁹ These interventions are cost-effective and do not compromise blood safety.⁸⁰ Particularly relevant, given the discussion on “Values Preservation” in Part II of this Article, is the authors’ emphasis on gift framing:

[I]tems offered are framed as gifts or rewards rather than “getting paid.” The early debate on whether incentives undermine motivation to donate blood assumed that the incentives would be perceived as payment, rather than as gifts. Future research can address the importance of this difference in framing. In the meantime, the success of incentives not framed as a payment is strongly supported by the existing studies.⁸¹

As to organs, Iran, the only country to permit legal payments to kidney donors, is also the only country with no waiting list.⁸² And the cost savings of transplantation over dialysis are well-known, meaning that financial savings arguments are almost certainly moot for any measures that increase kidney donation levels.⁸³ Moreover, countries that permit compensation to oocyte and sperm donors face fewer shortages than those that do not.⁸⁴ And only those countries that compensate plasma donors manage to meet domestic demand for plasma-based products.⁸⁵ The fact that so few people are willing to supply these physical goods in the absence of compensation suggests that—unlike social and honorific goods for which no market emerges even in the absence of prohibition—market skeptics have overstated the case for a dominant social understanding of physical goods as being altruistically supplied.

⁷⁸ See, e.g., Lacetera et al., *Economic Rewards to Motivate Blood Donations*, *supra* note 9.

⁷⁹ Lacetera et al., *Economic Rewards to Motivate Blood Donations*, *supra* note 9.

⁸⁰ Lacetera et al., *Economic Rewards to Motivate Blood Donations*, *supra* note 9; see also Lacetera et al., *Rewarding Volunteers: A Field Experiment*, *supra* note 9, at 1108–09, 1126.

⁸¹ Lacetera et al., *Economic Rewards to Motivate Blood Donations*, *supra* note 9, at 928.

⁸² Ghods & Savaj, *supra* note 46, at 1137.

⁸³ Philip J. Held et al., *A Cost-Benefit Analysis of Government Compensation of Kidney Donors*, 16 AM. J. TRANSPLANTATION 877, 877 (2016).

⁸⁴ See Timothy Bracewell-Milnes et al., *Investigating Psychosocial Attitudes, Motivations and Experiences of Oocyte Donors, Recipients and Egg Sharers: A Systematic Review*, 22 HUM. REPROD. UPDATE 450, 452 (2016); Aaron D. Levine, *The Oversight and Practice of Oocyte Donation in the United States, United Kingdom and Canada*, 23 HEC F. 15, 25 (2011).

⁸⁵ JAWORSKI, *supra* note 28, at 50.

This undermines the argument that social understandings of these goods as being supplied only through altruism and shared communal bonds could be displaced or corrupted through markets.

To be clear, more high-quality research is needed on the possibility of crowding out and ways to preserve the quantity and quality of precious physical goods. But even if market skeptics are correct to worry about the effects of markets on the cost and/or supply of physical goods, as already detailed in Part II, that does not support broader critiques regarding the crowding out of altruism or other values in society more generally.

David Faraci and Peter Jaworski refer to this objection as “leaving space for altruism.”⁸⁶ This argument played out in a famous exchange among Titmuss, Kenneth Arrow, and Peter Singer,⁸⁷ and is heavily relied on by Sandel, who writes:⁸⁸ “[a]t some point, Titmuss worried, market-driven societies might become so inhospitable to altruism that they could be said to impair the freedom of persons to give. The ‘commercialization of blood and donor relationships represses the expression of altruism,’ he concluded, and ‘erodes the sense of community.’”⁸⁹

But why is it necessary to preserve gametes or kidneys as an altruistic space for exercising these values, rather than food and housing? Why is it necessary to preserve blood, plasma, or kidneys as a space for altruism, in addition to the ability to altruistically deliver meals, volunteer at soup kitchens, build houses, or mentor at-risk youth? Altruistic opportunities abound in our society, regardless of whether goods and services involving the body are supplied altruistically or through the marketplace. As noted by Faraci and Jaworski, who levy a series of critiques against this line of argument, “what virtue can be developed or exercised only through the free donation of plasma or the charitable giving of resources in particular?”⁹⁰

V. CONCLUSION

This Article has considered a single aspect of debates about moral limits of markets in the body, sometimes referred to as the “corruption critique.” Although this is far from the only objection levied against

⁸⁶ David Faraci & Peter M. Jaworski, *On Leaving Space for Altruism*, 35 PUB. AFFS. Q. 83 (2021).

⁸⁷ See generally Titmuss, *supra* note 7; Kenneth J. Arrow, *Gifts and Exchanges*, 1 PHIL. & PUB. AFFS. 343 (1972); Peter Singer, *Altruism and Commerce: A Defense of Titmuss Against Arrow*, 2 PHIL. & PUB. AFFS. 312 (1973).

⁸⁸ SANDEL, *supra* note 5, at 122–130.

⁸⁹ SANDEL, *supra* note 5, at 124–25 (quoting Titmuss).

⁹⁰ FARACI & JAWORSKI, *supra* note 86, at 87 (emphasis omitted).

such markets, it is a prominent one, made by many of the most influential authors on this topic. Some have critiqued this position on moral or philosophical grounds. This Article, in contrast, has largely focused on the empirical case, noting that those who would limit markets in the body on corruption grounds make an (often unacknowledged) empirical argument, yet fail to provide evidence of this predicted corruption, despite wide variation across time and legal regimes. Indeed, this variation appears to undermine at least the most dramatic predictions of market skeptics.

Granted, market skeptics may contend that the corrupting effects of markets in the body are difficult to observe and even more difficult to measure. Nonetheless, there is a tension in the notion that markets portend ill effects too subtle to observe yet so threatening that otherwise welfare-enhancing transactions (and, in the case of organs, plasma, and blood, life-saving ones) must be curtailed. In other words, market skeptics must provide *something* to back up their claims, if they are to be taken seriously. This is not, after all, the first setting in which corruption debates have played a major role. Same-sex marriage opponents in the United States explicitly raised corruption arguments in favor of their case and were taken to task, both for empirically unsupported claims and for a belief that a debate about fundamental rights and human dignity could be answered by appeals to amorphous externalities.⁹¹

More importantly, I argue that the failure to observe these predicted effects is not particularly surprising, given the long-recognized tendency to refashion contested exchanges in a manner that reinforces—rather than undermines—deeply held values and relationships. Indeed, morally contested markets would likely fail in the absence of this cultural and relational work.

Critics of markets in the body claim that these measures (such as the framing of egg markets as altruistically driven or the in-kind exchange of kidneys), by definition, imbed a prior view about which contested exchanges are morally acceptable. As stated by Sandel, “[t]he economic literature that acknowledges stigma and repugnance makes

⁹¹ For corruption arguments against same-sex marriage, see, e.g., Douglas W. Allen and Joseph Price, *Same-Sex Marriage and Negative Externalities: A Critique, Replication, and Correction of Langbein and Yost*, 12 *ECON. J. WATCH*, 142, 146 (2015) (“A legal change that recognizes same-sex couples as “married” could change the cultural and social meaning of marriage for everyone, and therefore change both well-being and behavior”). For a critique see, e.g., Mark D. White, *Same-sex Marriage: The Irrelevance of the Economic Approach to Law*, 6 *INT’L J. L. CONTEXT* 139, 149 (2010); Aristides N. Hatzis, *Moral Externalities: An Economic Approach to the Legal Enforcement of Morality in LAW AND ECON.; PHIL. ISSUES FUNDAMENTAL QUESTIONS*, 226, 244 (Aristides N. Hatzis & Nicholas Mercuro, eds., 2015).

implicit judgments about these questions; otherwise, it would be unable to propose either market solutions or quasi-market alternatives.”⁹²

This is true insofar as objections to contested exchanges rely on a free-standing moral objection. Quite obviously, the social, cultural, or legal acceptance of a particular transaction doesn't render it moral. But to the extent that moral objections themselves depend on a corruption or undermining of shared values or relationships, the actual operation of those values and relationships is important and undermines the corruption claims of market skeptics. Moreover, to the extent that some, including Sandel, have explicitly contended that “market creep” has occurred without public awareness or debate, that claim is undermined by the full extent to which participants in and third-party observers of morally contested exchange have debated, modified, and managed those exchanges over time. Although it is surely possible to organize contested markets in a manner that realizes the worst fears of market skeptics, it is not necessary to do so and, in fact, would be contrary to the interests of all parties involved.

⁹² Michael J. Sandel, *Market Reasoning as Moral Reasoning: Why Economists Should Re-Engage with Political Philosophy*, 27 J. ECON. PERSP. 121, 125 (2013).