

forthcoming in L. & CONTEMP. PROBS. (2020)

THE LAW OF THE MARKET

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January 9, 2020

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ABSTRACT

Much contemporary discussion of “the market” assumes that markets have a true nature or immanent logic. In fact, however, markets arise and operate through law, so that no particular market structure is inevitable and every market order is the result of a complex set of legal and political choices. This introductory Essay organizes the Articles that comprise this Issue of Law and Contemporary Problems, in the light of the legal construction of markets and offers an intellectual roadmap for a legally informed study of the market. Drawing on the insight that markets are plural and open to variable design, we reflect on both the options and constraints faced by law’s architects. We discuss certain risks in market design, including the familiar dangers of unjust distribution and excessive commodification, and the less familiar danger that markets might prove self-undermining. In order to understand the risks and rewards of market orderings and to take on the responsibility of market design, we close by identifying three ideal-typical visions of markets – as efficient, democratic, and liberal – and summarizing the values that these ideal-types deploy to addresses these challenges.

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THE LAW OF THE MARKET

*Hanoch Dagan**, *Avihay Dorfman***, *Roy Kreitner*** & *Daniel Markovits***

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. In fact, however, markets arise 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 Introductory Essay we rely upon the Articles that follow in order 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 one should think about the market 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. To flesh out and generalize the evaluative aspects, we conclude with a sketch of three competing visions of markets: 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

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this Essay, 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 only hope to bring home our conclusion that any adequate inquiry into the market must take this normative debate into account.

MARKETS AND LAW

The markets that saturate modern life come in various shapes and 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 about markets in both public and academic discourse, without and within law. 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 breath. And 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, for example, 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, just as we protect ourselves against other phenomena that threaten our most important normative commitments.

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, 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 literally 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. Law can do better or worse in their construction. Therefore, a proposed legal reform may deserve either critique or praise – evaluations that must rely 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 base-line against which to measure legal intervention.

Our claim that markets are varied and that talk of *the* market may be counterproductively essentializing or reifying 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 that is, 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 intricately developed gift exchange and running through primitive forms of barter – are possible without markets, trading systems that become sufficiently

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

widespread that they reasonably establish *market societies*, must rely on a common, acceptable, liquid currency, namely, money.

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 legal constitution 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. Property rights can also be variously defined, so – to take an example one of us discusses elsewhere – law’s prescriptions as to the scope and the content of the property rights of owners of the means of production can dramatically affect the contours of our labor markets.²

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, even conceptual necessities. Second, law’s work may be indirect, 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* exposes 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 very likely (and historically did) push in different directions. Markets based on differently designed moneys do not

² See HANOCH DAGAN, *A LIBERAL THEORY OF PROPERTY* *, * (2020).

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* highlights the second aspect of law's opacity in our understanding of markets, which is how law's indirect effects can become central for resulting market frameworks. Her comparison of Germany and the US 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 "cut throat" competition from marginal producers. In Germany, trade associations succeeding in coordinating strategy and negotiating with unions; in the US, however, loosely coordinated legal activism of small proprietary capitalists managed to undermine 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 a concern over large concentrations of capital, but it was successfully directed against the unions. Its initial orientation was shifted, pulling the rug out from under the cooperative frameworks developing between unions and employers.

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. Law is always subject to external constraints. One important constraint that law ought to embrace, to which we will turn momentarily, is justificatory. But first, we focus on instrumental constraints, which the architects of the law must recognize if they are to rise to the instrumental challenges of 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 both dimensions is key for 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 environment, it is increasingly difficult to expect courts to be solely responsible for the provision of an infrastructure for a secure marketplace. This is a mission that often requires general legislation, and at times a full-blown administrative apparatus, supplementing or even supplanting courts. The law of the market is therefore a product of a joint venture among legislatures at various levels, administrative agencies, and a host of quasi public and even fully private organizations, all working alongside courts.³

There is widespread agreement that regulation should attempt to address systemic market failures. 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."⁴ But often regulation is also useful and sometimes indispensable for the articulation, development, and vindication of market actors' interpersonal rights. It may be necessary for ensuring the generality of legal prescription so as to guide people's behavior as required by the rule of law, for maintaining the required technological expertise for legal decisionmaking, and in order to establish effective tools for

³ Think of the International Financial Reporting Standards Foundation (IFRS), a not-for-profit corporation whose standards govern accounting in over 140 jurisdictions. Additional examples of "private" lawmaking, especially in the transnational sphere, could be multiplied with ease.

⁴ ROBERT BALDWIN ET AL., UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE 15 (2nd ed., 2012).

proactive (as opposed to reactive) *ex ante* guarantees of people's interpersonal rights.⁵

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, even if presented as reasons for action, as incentives rather than norms. Simply put, the point is that legally-informed actors – both law's potential addressees and interested third parties – may act in ways that circumvent its intended effects, and thus possibly undermine its normative underpinnings. If the architects of the law of the markets 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.⁶

These considerations pervade the law of the market and make its design a complex task in which likely responses and counter-responses must be examined in order to foresee the ultimate incidents of the competing legal regimes. These complications are further exacerbated in a globalized environment, which is increasingly typified by international regulatory competition.⁷ At times, they might frustratingly suggest that certain objectives or normative commitments are elusive. More often, they imply that achieving normative goals 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?*, draws on Belgian King Leopold II's reign over the Congo Free State to study the ability of market forces to undermine legal

⁵ See Hanoch Dagan & Roy Kreitner, 52 *The Other Half of Regulatory Theory*, 52 CONN. L. REV. * (2020).

⁶ See Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991).

⁷ See Tsilly Dagan, *The Global Market for Tax and Legal Rules*, 21 FLORIDA TAX REV. 148 (2017).

constraints on illicit conduct. King Leopold II, the effectively private owner of the Congo Free State, relied heavily on issuing bond obligations to establish and run his private colony. Sovereign borrowing markets could have reacted to his horrific abuse of his Congolese subjects in (at least) two ways: first, by raising the costs of the loans issued by Leopold II on behalf of the Congo Free State; and second, the successor government to this despot (i.e., Belgium) could repudiate his debt by invoking the doctrine of odious debt. The two are intimately related as the former might reflect the possible occurrence of the latter. Hence, the legal doctrine of odious debt 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 debt doctrine upon purchasing the Congo Free State 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. In particular, presenting the doctrine of odious debt as an option right held by the successor government opens the way for lenders to base their borrowing decisions on strictly-speaking 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*, 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 his 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 ability of parties to realize the scale advantages of standardization. The difficulty is that these two objectives run at cross purposes: standardization and economies of scale, which are key to the efficient production of contracts, tend to undermine the efficiency of contractual incentives, and vice versa: bespoke efforts to motivate efficient investment and trade generate the 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 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 by a regulatory structure that can coordinate efforts to produce more efficient consumer contracts and thus avoid the existing pricing errors that end up as rents that producers currently capture.

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;⁸ others, of course, disagree. But even if, or maybe especially if, the former view is correct, it is important to identify the immanent risks that market modes of organization typically raise.⁹

Essentialist approaches to the idea of the market 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 dramatic binary choices, 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 point to other countervailing legal devices that can be deployed – in a way that can at least ameliorate the risk. Even risks that cannot be eradicated (without sacrificing the advantages of market structures) can generally be managed. While such measures should not make market designers complacent, the possibility of addressing the pertinent pitfalls invites a more refined analysis, which may yield better results.

As usual in this Essay, we inevitably draw an abstract and imprecise picture. But it seems nonetheless safe to state that the two main hazards that the

⁸ See ERIC A. POSNER & E. GLEN WEYL, *RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY* 48 (2018).

⁹ 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 sections.

market is said to produce are distributive injustice 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 ability to pay of the pertinent parties is roughly equal (or equal enough). But in other contexts, resorting to market formations "systematically tend[s] to distribute entitlements to the rich, exacerbating inequality," and a subset of these unfortunate distributional consequences are likely to be – for reasons of political economy – rather sticky.¹⁰ Regressive consequences threaten to defy (almost?) any plausible normative foundation of the law of the market. Therefore, friends of the market must not perceive them as part of their ideal, but rather as its unfortunate pathological effects that ought to be mitigated where possible.¹¹

Addressing distributive distortions through the law of the market is a tricky challenge, especially given the expected responses of legally-informed actors, noted above. This means that oftentimes properly addressing this challenge requires a broader toolkit, including in particular a background public regime of tax and redistribution.¹² 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.

Structurally similar analysis applies to the concern of commodification of people and their interpersonal relationships. This concern arises most forcefully

¹⁰ Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1703-04 (2018).

¹¹ 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, 607-12 (1923).

¹² We use this conventional term, 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.

when market mechanisms are introduced into a realm of life previously outside the sphere of commodities. Commodifying personal relations (like friendship or romance) or practices with independent logics of value like 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 lifeworld characterized by plural normative systems.¹³ The gravity of this risk of commodification and its scope of application are disputed. 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.¹⁴

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 Przemyslaw Palka focus on some of the implications of the recent rise of on-line markets, highlighting the danger that these developments might lead to the predicament in which the market undermines itself. What might seem at first sight

¹³ 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 MICHAEL WALZER, *SPHERES OF JUSTICE* (1983).

¹⁴ See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993); MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).

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?*, considers the possible implications of technology – the rise of big data and artificial 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.¹⁵ At some point on the transaction-cost scale, it is more efficient to organize economic activities hierarchically (e.g., 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 because it 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 *ius 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.

Przemyslaw Palka's *Algorithmic Central Planning: Between Efficiency and Freedom* 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, by the incremental empowering of private central planners rather than through the revolutionary creation of a centrally planning state. Palka

¹⁵ R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

proposes that soon, if not already today, companies such as Google, Facebook, and Amazon will know more about individual people's preferences than the people themselves, and these firms' algorithms will be able to satisfy people's preferences more accurately, and at lower transactions 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. Palka worries both about the processes that will yield this transformation, and about the eventual outcome. Will we choose, with collective or even just 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 transactions cost but rather, as one might say, a transactions benefit?

RESPONSIBILITY

Our previous observations point to another important proposition that some discussions of the market unfortunately obscure. Market forces – the actions of buyers and sellers that affect both the availability of goods and services and their prices – are sometimes presented or assumed to be either prior to law or, in any event, beyond its responsibility. This presupposition is the flipside of the conventional use of government intervention noted above. In this view, law can, for better or for worse, only *respond* to – control, influence, affect etc. – 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 revealed as partial and misleading. The market is an artefact, which is humanly shaped and can be variously designed. This proposition of artificiality is not a condemnation, as is sometimes mistakenly perceived. After all, most of the important aspects of our social life are not part of naked nature, but rather humanly made. Just like the study of other valuable humanly 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 Brook's Article, *Law & the Exchange Structure: The (Black) Market as Legal Construct*, 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 to 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." Black markets, for Brooks, serve precisely this role. And a study of their normative structure – its convolutions of express prohibitions and implicit permission – 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 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 the societal results of that transactional world.¹⁶

¹⁶ 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

Avihay Dorfman's Article, *The Limited Case for Discrimination's Legality*, 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 (and liberal legal order, more generally) must treat private persons, including those who act from discriminatory motivation, as free and equal agents. Doing so requires the recognition of such persons as entitled to change their minds by revising their discriminatory motivations and, so, 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, both when it coerces and when it authorizes, the law of the market has profound implications for people's lives (some say that it even affects agents' inner-imaginary). 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 is normatively acceptable.¹⁷

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.

¹⁷ 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).

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, we must then ask about the normative underpinnings of markets. Architects of the law of the market should evaluate existing market formations and either reject, reform, or perhaps embrace them – but the evaluations cannot 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 ideals for which the market can stand.

NORMATIVE FOUNDATIONS

We thus conclude with a brief outline of three such normative 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 not in light of the relations that they underwrite among traders or 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, in particular the Kaldor-Hicks conception that dominates both the law and economics of contract, property, and torts and cost-benefit analysis of the sort 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 to value certain resources or activities as opposed to 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, and 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 a different aspect of the good life, which arises in 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, 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 should society 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 as interaction with inert objects. If conditions are right (i.e., if the law of the market

makes it possible), market participants can use voice to call into question the givenness of relations that currently govern work and property owning, breaking down reification. In the best case scenario, they partake in 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* 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* 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. Palka's *Algorithmic Central Planning* worries that individual acts could cumulate to produce a planned economy without any collective decision. And Thelen's piece on employer organizations shows how well-targeted legal activism managed to thwart organizational attempts in one legal context, while similar ventures succeeded in another. Each of those pieces takes steps in a direction that 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 (to 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. Planning, in particular, requires

enormous quantities of information concerning both preferences and capabilities. And even if (perhaps through developments in algorithmic data processing) the purely fact-based informational problems confronting planning can be solved, planners still face daunting evaluative and normative challenges. People value different things for different reasons, and planners cannot do their job 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 in fact object to regulation, especially where regulation serves to promote widespread participation in market life or to prevent private forms of domination from arising.

The problem of disagreement about value that exercises some libertarians also underwrites the second, left-leaning and egalitarian variant of liberal approaches to markets. When people value different things for different reasons, economic and social coordination depend on establishing a shared language of value that they can deploy for purposes of their commercial lives. Market prices establish this language of value, as 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. A thought such as this 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.¹⁸ Without prices and the commensuration of value that they make possible, it is impossible to know who has how much and therefore to say who has more, and who 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

¹⁸ See generally Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

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.¹⁹ Of course, this approach faces challenges just like any other, perhaps most notably the challenge (developed by Desan's contribution to this issue), that fiat money's connection to politics and the state (not least through modern central banking) deprives prices of the egalitarian quality and commensurating power on which equality of resources or market solidarity depend. 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, and thus begins with the proposition that for people to lead the fully human life they are entitled to, law must be committed to *enhance* their self-determination (or self-authorship).²⁰ Markets are potentially conducive to people's self-determination, because they allow individuals the mobility that is a prerequisite 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 is a prerequisite for a self-directed life. Markets further extend this autonomy-enhancing function by 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 multiply the alternatives people can choose from, markets enable the individual to act – on her own or with

¹⁹ See Daniel Markovits, *Market Solidarity*, inaugural lecture as Guido Calabresi Professor of Law, April 9, 2012.

²⁰ The remainder of this section 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).

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 decisionmaking 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-story 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. Moreover, when markets are structured to serve autonomy, market relationships are governed by rules that comply with the prescription of reciprocal respect for self-determination, meaning that party interactions in the market are governed by the maxim of relational justice. Furthermore, since utility is understood to be instrumental to the markets' ultimate value, which is 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.²¹

Finally, an autonomy-based law of the market is 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 confidently 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.

²¹ See *supra* text accompanying note 14.