

*Chapter Four: Noxious Markets**Abstract Markets versus Noxious Markets*

I began this book by noting that there are heated social controversies about the morality of markets in goods such as body parts, reproductive services, diamonds which fuel bloody civil wars, sex, weapons, life saving medicines and toxic waste. I now return to the questions that I posed in my introduction: What considerations ought to guide these debates? What is it about the nature of particular exchanges that concerns us, to the point that markets in some goods appear to be clearly undesirable? How should our social policies respond to such markets? Where and for what reasons is it appropriate to regulate a market and when should we seek to block it? These are the difficult but important questions that this chapter attempts to answer.

Several brief clarifications about my scope and aims here. First, as is evident from the discussion thus far, my project does not involve an overall assessment of “the market system.”¹ Markets allow people to accomplish many important social and individual tasks under modern conditions of interdependence and diversity. In previous chapters I argued that markets make important contributions not only to social efficiency, but also to liberty and equality. The point of this inquiry, then, is not to raise general questions about the market system or about markets in the abstract. Rather, I am concerned here with the differing characteristics of very particular markets –e.g., markets in human body

¹ See also Ravi Kanbur [2004.]

parts, sex, and life saving medicines. These markets provoke reservations even among those who are otherwise great enthusiasts about the market system.

Second, I put aside questions concerning the rationing of essentials in cases of extreme scarcity –“tragic choices” as they are referred to in the legal literature.² These are cases where no amount of money or effort will produce enough of urgently needed goods.

Market allocations in tragic choice cases raise distinct considerations from the examples considered here, as such cases do for all the alternative systems of allocation including those using lottery, or age, or merit.

Let me recap the discussion so far. Chapter one focused on the dominant framework of contemporary economics that supports market interventions only where markets fail to be efficient.³ Proponents of this approach can be divided between those who believe that perfectly efficient markets are “moral-free zones”⁴ to which morality simply does not apply, and those who believe that it is simply not the place of economists to evaluate the morality of differing markets.⁵ But, when particular markets fail, this approach does not tend to support the *elimination* of the market. Indeed, economic theory is inherently imperialistic about the scope of the market: as we have seen, the solution to market failure is often taken to consist in the *enlargement* of the scope of the market. (Consider

² Guido Calabresi and Philip Bobbitt, *Tragic Choices* [1978].

³ The rationale for intervention in the case of market failure is only prima facie: a little market inefficiency might be preferable to a lot of bureaucratic red tape.

⁴ Cf. David Gauthier, *Morals By Agreement*, Oxford University Press [1986.]

⁵ While most economists concentrate on designing an efficient market, their approach does not preclude arguments in favor of the state’s redistribution of wealth for equity or other reasons. There may nevertheless be a tension between the two approaches, given that all actual tax systems impose inefficient distortions on taxpayer behavior.

the introduction of markets in pollution to incorporate pollution's costs to third parties.) There are no theoretically set limits for the scope of the market. In addition, markets and the corresponding idea of market failures are everywhere conceived of in the same terms. This stands in sharp contrast with the approach of the classical political economists that I explored in chapter two.

Chapter three examined important contemporary approaches to the limits of the market. Drawing on the work of Ronald Dworkin, I critically examined the view that markets have a necessary *moral* role to play in egalitarian theory, because markets make each of us responsible for the allocation of effort and resources in our own lives, while at the same time ensuring that the benefits that we derive from our choices depend on how important our effort and resources are to others. Dworkin's theory gives us no principled reasons to set limits to the scope of the market with respect to goods and services, except perhaps for paternalistic considerations.

I also explored the prevalent "general" egalitarian approach that, while critical of the economist's exclusive focus on market efficiency and market failure, accepts the legitimacy of relying on markets in most domains. Proponents would use markets to produce efficient outcomes and then support *ex post* transfers of income to achieve their desired egalitarian distribution. Like contemporary economics, its proponents tend to treat most markets as the same: markets in soybeans are not fundamentally different than markets in body parts. The basic default strategy employed for dealing with market

problems is to redistribute income and not to block particular markets or to redistribute specific goods in kind.

Another contemporary approach grounds a distinction in markets –between those that are acceptable and those that are not --based on the *nature of the goods being traded*. The idea here is that distribution should track our conventional or best understandings of the goods we seek to distribute. As we saw, these authors argue that markets in certain goods corrupt the nature of those goods, trading in things that money should not buy. Closely connected to the corruption view is the view that some goods need to be protected from market distribution if human beings are to flourish.

The theories considered in chapter one and chapter three have some plausibility and I will draw on many of their insights: in particular, market failures [including externalities], distributional equality and the importance of access to specific goods are important considerations in assessing markets.⁶ Yet my approach also differs from the contemporary approaches I have surveyed so far in this book, exploring the ways that some markets need to be blocked in order to allow for the formation of an agent who is able to confront other agents on a more or less equal footing. On my view, an especially important consideration in evaluating particular markets has to do with the standing of the parties before, during and after the process of exchange. A market exchange based in

⁶ See also Michael Trebilcock, *The Limits of Freedom of Contract* (Harvard UP, 1993), and Ravi Kanbur, “On Obnoxious Markets,” in ed. Stephen Cullenberg and Prasanta Pattanaik, *Globalization, Culture and the Limits of the Market*, (India: Oxford University Press, 2004). Trebilcock’s approach to markets stresses externalities, information failures and coercion; Kanbur’s account stresses extreme outcomes, information failures [linked to extreme outcomes] and inequality.

desperation, humiliation, or begging and whose terms of remediation involve bondage or servitude is not an exchange between equals.

I also argue that particular markets need to be blocked or regulated if the parties are to be equals in a broader sense, as democratic citizens. In making this argument, I'll draw on the writings of Adam Smith and the other classical political economists discussed in chapter two. As you will recall, these thinkers recognized that markets require certain background conditions –entitlements and property rights–in order to support relations of freedom and equality. The markets of the classical political economists were not populated by the abstract individuals with given wants that tend to characterize contemporary economic theory, but by landless peasants and feckless landlords, and by groveling and impoverished workers who stood in asymmetrical power relations with their employers. Moreover, agents' preferences, capacities, and relationships were understood as shaped by the structure and nature of particular markets. Writing in condemnation of feudalism's unequal relations, the classical political economists held up another ideal of human relations, founded on the freedom and equality of the parties, and made possible, in part, through particular market exchanges. Like these theorists, the approach to markets I defend here recognizes market heterogeneity and stresses the need to consider other values besides efficiency and distributional equality narrowly conceived. But, I also reject the main contemporary alternative arguments for limiting markets based on the social meaning of goods or on particular conceptions of human flourishing. As I see it, a major problem with noxious markets is not that they make people unhappy [as Radin might claim] or represent inferior ways of valuing goods [as

Walzer and Anderson might claim] but that they undermine the conditions that people need if they are to relate as equal citizens. At any rate, so I shall argue.

Noxious markets: The Basic Parameters

I begin with a characterization of four parameters in terms of which I think that we can differentiate the markets that people find especially objectionable from other types of markets. Several of these parameters are “internal” to the perspective of economics in that scoring “high” on them will often undermine efficiency. However, as we shall see, there are also political and moral rationales for limiting noxious markets. That is why the addition of “more markets” is not always the appropriate response to market failure. In some cases, our goal should be to curtail a particular noxious market, not to make it work better.⁷

The first two parameters characterize the *consequences* of particular markets.⁸

a. Some markets produce extremely *harmful outcomes*. That is, the operation of some markets lead to outcomes that are extremely deleterious, either for the participants themselves or for third parties.⁹ Consider market exchanges that lead to the depletion of the natural resource base of a country, or to the fueling of a genocidal civil war. Or consider a stock market transaction that wipes out a person’s resources.

⁷ This appeal to moral and political rationales for limiting markets makes my approach distinct from that of Michael Trebilcock and Ravi Kanbur, although we overlap in our view of the parameters we think are relevant to market assessment.

⁸ Thanks to Josh Cohen for helping me to see the way that my parameters separate the consequences of a market from the sources of a market.

Of course, many markets have poor outcomes without eliciting our revulsion: we think that the ups and downs of prices come with the territory. But some market outcomes are so negative –so harmful –that they almost always evoke a strong reaction. How harmful is that? Following up on a suggestion by Ravi Kanbur, we might consider as a natural starting point for answering this question: a market result that leaves a person destitute.¹⁰ For example, a grain market whose operation leaves some people starving –because they cannot afford the price at which grain is set through supply and demand- is bound to make us feel uncomfortable.

b. In addition to leading to individual harms, certain markets can also be *harmful for the standing* of the parties *as equals*. Consider labor markets where workers function as hired “hands” without any rights to protect them on the job and where they are tossed aside like so much scrap metal when they are no longer needed. Other labor markets may operate so as to undermine the capacities that a person needs to claim her rights or to participate in society: this is a problem with child labor markets, a case I discuss in chapter seven.

Some markets are harmful for the standing of the parties as equal citizens in a democracy. As James Tobin once noted, “any good second year graduate student in economics could write a short examination paper proving that voluntary transactions in

⁹ Of course, as I have stressed, many markets *promote* access to goods and services –decreasing their price and making them more available to more people than do other systems of distribution.

¹⁰ Kanbur [2004] p. 44.

votes would increase the welfare of the sellers as well as the buyers.”¹¹ Nevertheless, the legitimacy of the democratic process depends on the prohibition of such transactions. A market in votes –so-called vote trafficking –would undermine the ability of voters to *collectively* exercise influence and control over government.¹² Such a market would turn groups of voters into consumers and not citizens, with predictable results for members of less privileged social groups including the poor. I’ll discuss this example in more detail below.

The next two parameters characterize the *sources* of particular markets.

c. Some markets are characterized by *insufficient or highly asymmetric knowledge and agency* on the part of market participants. The Pareto efficiency results assume that agents are fully aware of the consequences of their actions and have complete information about the goods exchanged.¹³ But, as is widely noted, in many circumstances these assumptions do not hold. Agency failures can occur because some of the direct participants lack important knowledge or because the market has serious indirect effects on people who are not involved in the market transactions.¹⁴ If one or both of the parties to a contract are mistaken about the material facts or about the future consequences of their contract, we cannot assume that the exchange is a Pareto improvement.

¹¹ Tobin [1970], p. 269.

¹² Karlan [1994].

¹³ In Milton Friedman’s words, “The possibility of coordination through voluntary cooperation rests on the elementary –yet frequently denied–proposition that both parties to an economic transaction benefit from it, *provided the transaction is bilaterally voluntary and informed.*” *Capitalism and Freedom* (1962) p. 13.

¹⁴ Kanbur []

In some contracts, there is a significant time lag between the initiation and the completion of a transaction, and this opens a space for an individual to change her mind about what is best for her.¹⁵ Consider the case of a woman selling her ability to have a child. In this case, we might suspect that a woman cannot really know the consequences of selling the right to the child she bears before she has actually had the child, gone through the pregnancy. Of course, the fact that a contract has potential risks for an agent does not mean that the contract should not bind the agent, or else most contracting would fail. Nevertheless, information failures are clearly relevant to our assessment of particular markets and some markets are more likely to have such failures than others. Even in cases where “weak” agents are not necessarily harmed, we are likely to view such markets with suspicion: think about product markets that target children.¹⁶

A second case where “agency” problems arise are markets in which one of the effected parties is not directly involved in the transaction, but depends on others to transact for her. In such cases, we cannot be certain that the party herself actually benefits from the transaction. In the majority of cases of child labor, for example, parents are transacting on behalf of the children whose time and labor is traded. Many forms of child labor give little or no benefit to the working child and in some cases significantly interfere with the child’s ability to grow up into a healthy functioning adult.¹⁷ Other markets in which some of the effected parties are not directly involved as participants include international

¹⁵ I discuss commercial surrogacy in chapter five.

¹⁶ Industry spending on advertising to children under the age of 12 has exploded in the past decade, increasing from a mere \$100 million in 1990 to more than \$2 billion in 2000.

¹⁷ See my “Child Labor: A Normative Analysis,” *World Bank Economic Review*. Also chapter 7 of this book.

arms markets, and markets in a nation's important scarce natural resources (such as timber in a rain forest) which effect subsequent generations.

d. Some markets reflect the *underlying vulnerabilities* of one of the transacting parties.

Rousseau wrote that no citizen should “be wealthy enough to buy another, and none poor enough to be forced to sell himself.”¹⁸ When people come to the market with widely varying resources, or widely different capacities to understand the terms of their transactions, they are unequally vulnerable to one another. And when trades are entered into from a position of asymmetric vulnerability, the weaker party is at risk of being exploited. For example: when a desperately poor person agrees to part with an asset at a ‘fire sale’ price, even if the exchange improves his well-being, we are rightly concerned with the fact that his circumstances made him willing to accept an offer for his asset that no one with a decent alternative would ever accept. When a person enters a contract from a position of extreme vulnerability, he is likely to agree to almost any terms that are offered. Other examples of markets that exploit the vulnerability of transacting agents include markets in urgently needed goods where there is only a small set of suppliers; and markets where the participants have highly unequal needs for the goods being exchanged.¹⁹

Some markets not only *reflect* the different and unequal underlying positions of market agents but may also *exacerbate* them through the way that they operate. For example, in Bangladesh, a recent famine arose when the price of the main food, rice, rose very

¹⁸ Rousseau, *Social Contract*, book 2, ch. 11, p. 225.

rapidly and became too expensive for the poor to purchase. By contrast, rich households were insulated from the risks of rising prices, because they generally receive rice from their tenants as payment for the use of land so that they have rice for their own needs and surplus to sell.²⁰ Or, consider that particular markets may condition women to be docile, or shape individuals into passive accepters of a status quo. While contemporary economics sees the capacities and preferences of agents in a market as givens, particular markets –think of media, campaign finance, education, and care-giving -- shape us. Moreover, they may shape not only our preferences, but also what we can be and do.

“High” scores along one of these dimensions, or several of them together, can put a market in *any* good into the “noxious” category where it now evokes our discomfort. Consider the market in “blood diamonds,” diamonds whose sale is used to fund brutal and bloody civil wars. Many people find such a market abhorrent. On the analysis offered here, the best way to understand our negative reaction to this market has to do with its *harmful* outcome -- prolonging civil war-- and with the *weak agency* of so many who are affected by that war. Our discomfort with such markets has nothing at all to do with the social meaning of diamonds, nothing to do with the inefficiency of the diamond market, and little if anything to do with the underlying income inequality of buyers and sellers.

¹⁹ See Stuart White, *The Civic Minimum*, for an illuminating discussion of market vulnerability.

²⁰ See Ben Crow, *The Diversity of Markets: How the Grain Trade Shapes Wealth and Poverty in Rural South Asia*, MacMillan, 2001.

At the same time, while in theory markets in any good can become noxious, markets in some goods are much more likely to score higher on these parameters than others. Consider the case of markets in goods that no one but the desperate would ever exchange. Some people think that desperation is a necessary feature of organ markets, a case that I discuss in chapter nine. Or consider markets in goods in which there is a considerable lag between the beginning and end of the sale so that an agent may not be aware of how she will react in the future to the loss of the good she has sold. Some people think that weak agency is a necessary feature of surrogacy markets, a case I discuss in chapter five. Finally, consider markets in votes, or in basic political freedoms, each of which would undermine the ability of citizens to relate to one another as equals.

A number of these parameters are easily incorporated within the approaches of contemporary economics—for example, concerns with harmful outcomes and weak agency or asymmetric information can be incorporated into the perspectives of welfare and neo-classical economics.²¹ Several authors—notably Ravi Kanbur and Michael Trebilcock—have done just that. Nevertheless, these economic theories would have difficulty in incorporating a concern with an agent’s underlying vulnerability since such theories tend to take the position of the exchanging agents as more or less given [although they may allow for changes in that position if it yields potential Pareto improvements] along with agent’s preferences. And while it is possible to make a concern with equal status a welfare value—something that [for example] satisfies

²¹ Kanbur, Trebilcock

individual preferences—and thereby to incorporate this concern in economic reasoning, it is not easy to see how this would be done.

Indeed, we need to ask whether the failure of efficiency captures all of the concerns raised by high scores along the four parameters. Is the problem with child labor only a problem of its possible inefficiency? Is inefficiency or potential welfare loss the problem with a market in votes?²² From the point of view of economics, the solution to market failure is to make those markets work better. But if someone thinks that the problem with a market in votes is that it turns acts of co-deliberation into individual property and thus undermines democratic legitimacy, then fixing the market is not the solution: if we care about such legitimacy, we will need to ban the monetary exchange of votes.

Regulating markets/blocking markets

How should we decide what approach to take to a noxious market? Obviously, what policies it makes sense to adopt depends on the source of the market's noxiousness – which of the four parameters is in play. We need to tailor our response to the particular problems with that market. For example, if weak agency is the problem with a particular market, then we may want to undertake measures that increase information. If underlying vulnerability is a problem, we may want to redistribute income. Nevertheless,

²² Of course, a broader conception of human welfare might be better able to address these cases. For example, Amartya Sen has argued that in evaluating institutions and policies we should focus on their consequences for the capabilities that they enable, for what they allow individuals to be and do.

some problems may require closing off the ability of agents to engage in particular markets. This is most likely to be the case when those exchanges undermine the ability of people to interact on terms of equality –in markets, as well as in a democratic society of equal citizens. Let me try to explain why I think this is so.

First, some ground clearing. What is required for people’s ability to interact with one another on terms of equality? What is required if people are to be equal citizens? These are complex questions and contests over the best answers lie at the core of much American history. Different political philosophies offer different answers to these questions. Libertarians believe, for example, not only that “individuals have rights, and there are things no person or group can do to them [without violating their rights],”²³ but also that the state is overstepping its bounds when it seeks to transfer resources from those that have to those that have not to bring about more income equality.²⁴ Treating individuals as equals, for libertarians, requires respecting strong individual property rights. Given those rights, the state should simply leave its citizens *equally free* to pursue their own projects and aims, and in the process, reap the rewards that markets throw their way. Yet, as we have seen in chapter one, what markets “throw our way” itself depends crucially on these background property rights. The state cannot simply leave people *equally free* to pursue their own projects and aims because all markets depend on property rules and institutions that are enforced and all property rules interfere with *someone’s* freedom. If you own your car, then I am not free to use it whenever I please.

²³ Nozick [1974], ix.

²⁴ The libertarian objection to economic transfers is quite different than the objection that such transfers should not be granted because they are economically inefficient. See, Nozick (1974).

The ideas of equality and equal citizenship that most libertarians adopt is consistent with some people being so destitute that they will agree to whatever terms of contract others offer.²⁵ Indeed, the libertarian philosopher Robert Nozick believes that in a just society, people would even be allowed to sell themselves into slavery.²⁶ But for slavery contracts to be valid, they must be underwritten by laws and enforced. Runaway slaves must be recaptured; defaulters on terms of agreement must be punished. Although often defended as an ideology that supports free political institutions, libertarian arguments are compatible with the political relationships that characterized feudal society, provided that these relationships arise through private contract and on the basis of legitimate entitlements.

There is a further problem with the libertarian conception of a “free market” society as the key institution that realizes the conditions for our equality as free individuals. Libertarians are strangely blind to the fact that we are not born with all the required capacities for making and exercising choices [including market choices] already developed. Given their emphasis on protecting an agent’s equal freedom to make their own choices and pursue their own projects, libertarian theory’s silence on children is remarkable. Nozick, for example, merely notes in passing:

“Children present yet more difficult problems. In some way it must be ensured that they are informed of the range of alternatives in the world. But the home community might

²⁵ I discuss this case in more detail in chapter eight.

view it as important that their youngsters not be exposed to the knowledge that one hundred miles away there is a community of great sexual freedom. And so on.”²⁷

This cursory indication of the problems posed by children is incommensurable with the enormous difficulty that children actually pose for libertarianism as a theory. Individuals are not born with all the capacities they need to be free already in place, even on the thin libertarian idea of freedom. The achievement of even a minimal threshold level of decision-making powers requires support from a variety of sources, including parents and the state: nurturing, help in developing the capacities for understanding and weighing alternatives, help in developing the ability to see oneself as an agent worthy of having choices, attaining an adequate level of education, and so forth. While the capacity to be a free agent can be developed in a number of ways, it is unreasonable to think that we can rely on markets or on private contracts to do this by themselves. I’ll discuss the implications of this point in chapters seven and eight.

Instead of adopting the libertarian interpretation of our equality as citizens, I propose that we follow the approach of the British social theorist T.H. Marshall. Writing in 1949, Marshall argued that citizenship not only includes formal freedoms, but it also includes a set of social rights with respect to health care, education, housing and a decent minimum of income. These latter rights, he claimed, are needed to make one a full member of one’s society.²⁸ I think Marshall is correct about this: an equal right to vote has little

²⁶ Nozick, p. 331.

²⁷ Nozick, p. 330

²⁸ See T.H. Marshall, “Citizenship and Social Class,” in *Class, Citizenship and Social Development: Essays by T. H. Marshall*, Chicago: University of Chicago Press, 1964.

effective meaning if some voters are too badly educated to read a ballot. Citizenship means little for the destitute if society is so structured that they have no opportunity to share in society's benefits.

According to Marshall's view, the status of equal citizenship requires that all: (1) have equal basic political rights and freedoms, including rights to speech and participation in the political process; (2) have equal rights and freedoms within civil society, including rights to own property; and (3) have equal rights to a threshold of economic welfare and to "share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society."²⁹

Marshall viewed citizenship as a pre-existing status, not something that depends on individual virtue or achievement. While markets can be supportive of equal citizenship understood in this sense, whether or not they are so depends on the background circumstances, property rights and regulations within which they operate. This is a point that, as we saw in chapter two, was not lost on the classical economists. Both Adam Smith and J.S. Mill recognized that in market relationships, people sometimes find themselves in positions of extreme vulnerability and dependency. Such vulnerability not only carries risks of abuse and exploitation, but it also threatens the rights and freedoms that democratic citizenship requires. Someone who is desperately poor, might agree to an exchange that requires her to function as an around the clock domestic servant, or to bond

²⁹ Marshall, *op. Cit.*, p. 78. I discuss the implications of Marshall's view of citizenship for education in "Equality, Adequacy and Education for Citizenship," *Ethics*, 117, July 2007.

her labor to obtain a loan at usurious rates which she can never hope to repay. The fate of such a person may be little different from that of a serf under feudalism.

There are also examples where an exchange that appears to be compatible with the conditions for maintaining citizen's equality when considered as a single act, becomes problematic when it is considered as a widespread social practice. For example, while there may seem to be no problem with allowing a person to work for whatever wages and hours she chooses, the existence of minimum wage laws and maximum hours laws may be necessary to preserve a threshold of economic welfare "according to the standards prevailing in the society,"³⁰ and to enhance the bargaining power of the poorest people in society to protect them from exploitation and abuse.³¹ Or consider another example: even if it makes sense in an individual instance for a poor family to put its children to work, when child labor is adopted as a widespread social practice it drives down adult wages making it virtually impossible for poor parents to refrain from sending their children to work. Rather than seeing a person's market choices as exogenous variables, the choices we actually have open to us may depend on other market choices being blocked.³²

But: why *block* the market and not simply *redistribute income* –to the unskilled worker or the poor family? As we saw in chapter three, a general egalitarian would argue that if we can use taxation to redistribute the results of markets we can maintain the conditions that

³⁰ Marshall, *op. Cit.*, p. 78. I discuss the implications of Marshall's view of citizenship for education in "Equality, Adequacy and Education for Citizenship," *Ethics*, 117, July 2007.

³¹ See chapters X and Y

³² See also Basu

people need to interact as equals without otherwise blocking these markets. A person who has adequate resources will not be desperate; such a person can protect herself from abuse and exploitation in exchange. But, contrary to the general egalitarian's approach, I think that redistributing income will not always be sufficient to protect an individual citizen from market vulnerability, weak agency or harmful outcomes.

Consider the case of distributing primary and secondary school education through a market. Lack of education is a harmful outcome in terms of democratic citizenship: a very poorly educated person will be incompetent as a juror and a voter, and have little or no access to the basic opportunities and liberties associated with full membership in her society. It's easy to see, I think, that giving money –even a great deal of money -- to a child that has not been educated does not compensate for her lack of education, even if cash is what she [as an adult] now herself prefers. Not only does it not replace the personal and social development that education might have enabled for her, but also it does not turn her into a citizen who can participate competently and meaningfully in a democratic self-governance. Nor can we be sure that if money were transferred to a parent then he would choose to use that money to keep his children in school. While some data suggests that many parents do keep their children in school when they have enough money to feed their families, some parents are selfish or shortsighted; perhaps lacking information about education's true costs and benefits because they had little formal education themselves.

The above are all reasons for *not* distributing primary and secondary education through a market system, but enforcing it as a mandatory requirement. This perspective is hard to capture within the preference-based framework that most economists employ for thinking about outcomes. If our concern is with avoiding outcomes that undermine the conditions for citizens to interact as equals, then there is a powerful argument for guaranteeing access to a certain level of goods –education, healthcare, opportunities, rights, liberties, and physical security—even if some citizens would prefer to have cash with which to build a vacation home.³³ While markets can supplement the supply of these goods in many cases, my point is that access to these goods should not depend only on individual preferences or income. The conditions for equal citizenship cannot be “cashed out” in terms of money: they require that some goods be distributed in kind.

At the same time, unlike the arguments I looked at in chapter three, I would not defend the distribution of education or healthcare in terms of the meaning of these goods, or the idea that they are corrupted through sale. A public right to education is in theory compatible with the existence of a complementary or supplementary private education system. Instead, my argument hinges on the way that these goods function as prerequisites for *full inclusion* in society, for counting as an equal member. A person who lacks a certain level of education, or access to medical care, or physical security, is not only ill-equipped to navigate her own life and values, but also faces substantial impediments to participation in the economy and to participating in public debates about

³³I leave aside for the moment the issue of where and when the wealthy should be permitted to buy better quality versions of these goods: at this point, I am simply stipulating an adequacy level that is relationally and dynamically defined.

social choices. Such a person is vulnerable to exploitation and manipulation by others, and dependent on luck or the will of benefactors to meet her basic needs.

In addition to supplementing market distributions in goods such as education and health care, we may have reason to *block certain market exchanges altogether* if citizens are to be equals: think about markets in votes, in civil and political rights, in slavery, in child labor, and in sexual harassment. These contracts are incompatible with the equality of democratic citizens, since they support and reproduce objectionable relations of subordination. Let us consider these cases in more detail.

Blocking particular markets tout court

Consider votes. The regulative idea of democracy is that citizens are equals engaged in a common cooperative project of governing themselves together. As free individuals, citizens participate with others on an equal footing in deciding on the laws and policies that will govern them. A market in votes would have the predictable consequence of giving the rich disproportionate power over others since the poor would be far more likely to sell their political power than the rich. Indeed, one rationale for secret ballots is to make contracts about votes unenforceable, thus protecting the poor and vulnerable from pressure to sell. If political, regulatory, judicial and legal decision mechanisms were literally up for sale, this would concentrate political power in the hands of a few.

But vote trafficking is not only problematic because of its likely effects on the poor, some of which might be mitigated through income transfers. If democracy rests on the

decisions of “we, the people,” then votes are not simply pieces of individual property. *Votes are acts of political co-deliberation between citizens.* Even if a vote market was not monopolized by the rich—admittedly a big if -- we would still have a reason to proscribe vote trading on the grounds that it undermines the aggregative function of voting. Voting is, at least in large part, a delegation of power from the community to ensure that popular sovereignty actually underwrites the behavior of public officials. But when votes are traded and sold, there is no reason to think that votes are tracking voter’s views of the common good. When others sell their votes, it undermines the signal that citizen’s aggregative votes send to their representatives about what policies the public thinks are best for the country.³⁴

What about voluntary, contractual slavery? Such contracts are widely condemned. The interesting question is why. John Stuart Mill believed that slavery contracts were incompatible with freedom—he claimed it is a contradiction in terms to value the freedom not to be free --but it is not clear that Mill’s claim can be defended.³⁵ After all, every contract places some restrictions on a person’s freedoms –yet since these restrictions are self-imposed, contracts are generally seen as expressing freedom, not defeating it. Furthermore, we might even imagine an example of a slave contract in which a benevolent master tries to ensure that his slave is content by satisfying many of his preferences.

³⁴ We do not allow people to give away votes on similar grounds.

³⁵ Mill, *On Liberty*, citation

Some people argue that it is simply incompatible with a person's dignity for him to make himself the slave of another, even if that is what he himself most desires.³⁶ There is surely something to this thought, but my argument here is different. If we place value on having people interact in society as equals, then we will not endorse using our state's power to underwrite even voluntary arrangements that make some people entirely subject to the whims and decisions of others. Democratic citizenship requires, in Marshall's words, "an invasion of contract by status, the subordination of market price to social justice, the replacement of the free bargain by the declaration of rights."³⁷

Just as democracies made up of equal citizens require blocks on markets in votes or people, a related argument might be made that some markets need to be blocked if people are to develop the *capacities* that they need to participate effectively in civil and political society. In later chapters, I will argue that a concern with capacities for citizenship gives us reasons to block markets in child labor and in bondage, both of which are prevalent in parts of the developing world.

Other cases

Even where we do not have reasons to ban markets in certain goods, we may have reasons to limit the role of markets with respect to these goods far more than we do now. Human beings are malleable in a way that goods like apples are not.³⁸ While we do not

³⁶ Meir Dan-Cohen,

³⁷ Marshall, *Op. cit.* pp?

³⁸ Labor markets may be highly constitutive in their effects on the parties involved. A worker who spends her life engaged in menial, servile tasks in which she has no voice or authority is not likely to develop the capacities she needs to function as an active citizen. (Nor is she likely given the chance to be a loyal

need to worry about the non-economic effects of a market on the apples exchanged, we do need to worry about whether a particular kind of market produces or supports passivity, alienation, or a ruthless egoism. Labor markets may be structured so as to accustom people to being pushed around and managed by others. Widespread markets in women's reproductive or sexual capacities (including quid pro quo sexual harassment contracts) might amplify gender inequalities by entrenching and deepening negative stereotypes about women.³⁹ Unregulated child-care markets are compatible with children being treated as and raised as pets. We need to pay special attention to cases like these for they pose potential threats to the stable reproduction of democratic citizenship over time.

With the framework I developed in this chapter in mind, I'd like to return to two examples invoked in chapter three: the Titanic's market in safety and Larry Summer's memo advocating a market in toxic waste. Beginning with the Titanic, recall that individuals booking passage were allowed to buy tickets with or without safety provisions. Their market choices can be understood as a function of their preferences given their resources and their information. In the actual Titanic, there was insufficient agency (based on faulty information about the ship's "unsinkability") and harmful individual outcomes (drowning when the ship went down). These considerations give us good grounds for treating this as an instance of a noxious market.

employee. Indeed, a large body of research shows that high worker effort and loyalty require substantial departures from the treatment of labor as a pure commodity.)

³⁹ see chapters five and six

Certainly then, we should regulate this market. But once we increase agency and redistribute income, is there any reason why it might make sense to prefer a more constrained system for the distribution of safety whereby all are prevented from making choices that they would take as individuals if those options were available?

As I argued in chapter three, I don't think that paternalism gives us a strong reason to forbid people from making decisions to forgo boats on the Titanic. I do think, however, that we could make an argument that citizens have certain rights to a level of safety that they cannot contract away. But note that this floor of provision –a [literal?] safety net --is compatible with large [market generated] inequalities above the floor.

Interestingly, in his discussion of the Titanic example, Thomas Schelling concludes that it is the *inequality* aboard the ship that is problematic, not the inadequate safety floor, writing:

“Those who risk their lives at sea and cannot afford a safe ship should perhaps not be denied the opportunity to entrust themselves to a cheaper ship without lifeboats; but if some people cannot afford the price of passage with lifeboats, and some people can, they should not travel on the same ship.”⁴⁰

In this passage, Schelling seems to be suggesting that if we allow a market to distribute safety, then we must ensure that it gives the same safety to everyone, or at least to everyone within the community. We have already seen that there is an argument that

⁴⁰ Schelling 1984: 115-116.

connects equal provision of votes and basic political rights to democratic citizenship. But it seems puzzling to conclude that we need to equalize safety for the sake of citizenship.

Nonetheless, I can think of two basic reasons for why democratic citizens might want to secure the equal provision of certain specific goods.

The first reason is that inequalities in some goods --like education or political influence sit uneasily with the idea that we are each other's equals. For example, it may be hard to maintain that conviction if excesses of privileged schooling impose great differences on children's future lives. Education is simply too important to participation and inclusion in society's institutions, and relative inequalities can confine the worst off to occupy lowly positions. Significant educational inequalities in K-12 education do not seem fair, because they suggest that some children matter a great deal less to society than others. These children are effectively treated as second-class citizens, not good for anything but subordinate roles in society.⁴¹

The second reason concerns the effects of markets on two variables: exit and the aggregation of interests. As we have seen, markets enable people to opt out of relationships with particular producers and to take up new relationships, to find new ways of satisfying their preferences. Albert Hirschman used the term "exit" to describe this function that markets provide, and it is an important mechanism for enhancing freedom

⁴¹ Sometimes the goods that people see as important for their equal status are conventionally determined. Residents of Palo Alto were outraged when the possibility was raised that people be able to sell their places on the line that people have to wait in to sign their children up for oversubscribed summer camps. Even

as well as economic improvement [since exit signals dissatisfaction, at least relative to available alternatives].⁴² Hirschman counter-posed “exit” with “voice,” by which he had in mind trying to change another person’s behavior by directly alerting them to a problem. But we might think of another function of voice: its role in shaping and aggregating common interests.⁴³ Exit via a market might sometimes enhance common interests (as when consumers withdraw their support for a shoddy product) but it might also diminish the possibility of forming or satisfying those common interests. I earlier suggested how a market in votes might undermine the process of collective deliberation since now what matters for policy outcomes is not political argument but money. [I might have a bad argument for my position but enough money to buy lots of votes.] But markets can also affect the ability of people to achieve a common good, even where it has been articulated. This is because markets where some people can withdraw from common provision, they can affect the ability of those who remain to collectively provide for the good.

Recent research by Susanna Loeb on school financing provides a good illustration of this phenomenon.⁴⁴ Among the funding models for education that she considers is one in which school districts receive a uniform per pupil funding grant from the state and then are allowed to raise unlimited additional funds. Although this system looks attractive, because it allows voters to pursue their preferred spending levels while maintaining a

though no one would be worse off as an individual if one person was paid to stand in line for another, people I talked to felt that this was just one instance to many where having money gave people power.

⁴² Albert Hirschman, *Exit, Voice and Loyalty*

⁴³ Wolf paper

⁴⁴ Susanna Loeb, “Estimating the Effects of School Finance Reform: A framework for a Federalist System,” *Journal of Public Economics*, 80 (2001) pp. 225-247.

minimum funding level for all students, she argues that it may not be sustainable because the high wealth districts may lose their incentive to support state funding. People in these districts might be rationally motivated to vote for politicians who support lower levels of state provision –since much of their aid is based on their own fundraising and local taxes --and the ability of those who are left to provide for public education on the basis of state provision declines.

The stratification and sorting inevitably produced by a market will be especially problematic in cases where one person's prospects for attaining some important good are closely connected to another person's decisions. For example, when politicians can insulate their own children from the effects of poor public schooling or unsafe neighborhoods, they may find it easier to support cuts to state budgets in those areas than they would if their own families were affected by such cuts.

In a recent paper on risk and safety, Jonathan Wolff points out that the stratification of interests can have consequences for safety. He cites work by John Adams that showed that the initial effect of mandating seatbelts for car drivers but not for passengers was an *increase* in the number of passenger deaths.⁴⁵ Since the drivers were now safer, they took more risks, which fell on others for whom the risks had not changed.

Wolf points out that this analysis also applies to the case of safety aboard ships, he writes:

“... if the Captain was assured of a place in the lifeboat, or even that the people he most cared about were assured of their place, then he may well have steered a riskier course

⁴⁵ Adams, 1995, 121ff. The example is cited in Wolff.

than otherwise. This is an analogue to the familiar problem of ‘moral hazard’ in insurance, reducing people’s incentives to take care. This may well be why the Captain is supposed to go down with the ship, or, at least, be the last one off.⁴⁶”

When decision-makers can buy private solutions for themselves in education, police protection, and even garbage collection, this may have problematic consequences for the public provision of these goods. To the extent that this is true, it may be that the best way to ensure that the public’s interests are taken into account may be to give both public and decision-maker the same interests.⁴⁷

Mandating the equal provision of goods is at least theoretically compatible with having those goods supplied through markets. Moreover, banning a market will sometimes have costs in terms of other values people care about: there will be trade offs. As I have repeatedly stressed, markets are engines of growth and have important roles to play with respect to our equality and freedom. But some markets trade in things that no democratic society can countenance, while others need to be regulated, constrained or supplemented with other mechanisms.

Now, let us return to the toxic waste market proposed in Larry Summers’ memo that I discussed in chapter three to see what my approach would say about this market.

Summers’ argued that trade in toxic waste would benefit the poor countries and indeed, make both the less developed countries and the developed countries better off. The

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⁴⁷ Jonathan Wolff, “Market Failure, Common Interests and the Titanic Puzzle,”

exchange would be, in the terminology introduced in chapter one, a Pareto improvement.⁴⁸ Why, then, did the public release of the memo occasion such uproar? Why did so many people view the proposed market as clearly noxious? How does the framework in this chapter throw light on the public response? There are three reasons for thinking that a toxic waste market is noxious:

In the first place, there is the unequal *vulnerability* of the bargaining positions of the rich and poor countries. Trade in toxic waste holds up a mirror to global inequality. Because of that disparity, the rich countries are able to exploit the vulnerabilities of the less developed countries (LDCs). Critics might suspect that, were they not so poor, the LDCs would not consent to the transfer of toxic waste to their lands, or perhaps they would hold out for better terms.⁴⁹

In the second place, there is likely to be *insufficient agency*. Many poor countries are run by corrupt governments that do not represent the interests of their citizens. When accepting toxic waste in exchange for money, the interests of these citizens, or at the least the poorest and most vulnerable citizens, might well be neglected. As Daniel Hausman and Michael McPherson note in their discussion of it, Summers' memo implicitly applies the Pareto criterion to the rich and poor nations as a whole. This is, as they write, a "cheat:" if we apply the Pareto criterion to individuals, some individuals –very poor individuals within the LDCs into whose neighborhoods the waste is likely to be dumped -

⁴⁸ For some doubts about whether the exchange would actually be Pareto improving see Hausman and McPherson, p. 198ff.

⁴⁹ See also Kanbur, p. 52

-might be made very much worse off by the trade.⁵⁰ In addition to the weak agency of the poor, the leader of these countries [and the leaders of the rich countries] may not have adequate knowledge about the long-term effects of storing toxic waste.

Vulnerability and weak agency concern the *sources* of an international market in toxic waste. But we may also worry about the *consequences* of such a market. So in the third place, there is the possibility for *harmful outcomes*. Some of the long-term consequences of transporting and storing toxic waste –at least some forms of it –are likely to be very bad.⁵¹ For other forms of toxic waste, there may be a small risk of serious future harm. If this is so, then future generations –who are not themselves parties to the agreement -- might bear the costs of the bad outcomes. Additionally, if toxic waste is exported to poor countries that have less capacity to monitor and regulate pollution, then this may lead to more pollution, and more harm, overall.

On the other hand, both democratic and authoritarian governments can buy and sell toxic waste and it is hard to connect such sales directly to democratic citizenship. At the same time, we might wonder if the readiness of country A to transfer toxic waste to country B fails to show equal concern and respect for the citizens of country B. Would citizens be as likely to transfer toxic waste to those in their own backyard, that is, to themselves?

Limits of my approach

⁵⁰ Hausman and McPherson, p. 201.

⁵¹ Kanbur,

My account analyzes noxious market in terms of: harmful outcomes –for individuals and for a democratic society of equals; weak agency [and incomplete information]; and vulnerabilities that give some people significant power over others. It grounds a moral distinction between types of markets, but one which is not primarily based on the special nature of certain goods, but rather on considerations which cut across goods. (Thus on my account credit or housing markets may become more objectionable than sex markets.) But my account is also limited in certain crucial respects.

First, as I have emphasized we cannot immediately conclude from the fact that a market is noxious that we ought to ban it. Our policy response must depend on what the alternative to a market is likely to be, as well as on the particular problematic parameters in play. Some markets are simply incompatible with securing the equality of democratic citizens and should be prohibited: slave markets, votes markets and bonded labor markets are examples. Other cases are more complex. Some markets may be noxious only in a given context: instead of changing the market we might try and change the context. Even in cases where there does not seem to be good reasons in favor of allowing a particular noxious market, it may be impractical to ban it. For example, in the case of drug markets such as heroin and cocaine, where the transaction costs are low and the market exchange is easy to enforce,⁵² a rich black market can and does exist even in the presence of state attempts to block such markets. Thus, while there will be cases in which we will want to ban the particular noxious market, while in other cases it will make sense to respond to a noxious market by legislating a safety net, or by educational policies designed to increase

information, or by mechanisms aimed at increasing accountability, or by tax and transfer schemes to reduce inequality. Sometimes we will simply want to ensure that non-market mechanisms for providing a good exist side by side with market mechanisms.

Second, some of the parameters I have appealed to are in conflict with each other or with other values. I have not specified how to rank these parameters-- what to do for example, if decreasing vulnerability turns out to require blocking certain kinds of information for market participants. The process of ranking the trade offs between the different values is a political process that must be worked out among people with different views about the relative importance of these four parameters.

Third, I have not settled on exactly how to operationalize these values; for example, I have not here specified a numerically precise interpretation of what how much underlying vulnerability agents must have for a market to become noxious. The characterizing parameters plainly admit of degrees and, again, there is room for reasonable disagreement as to when a particular market is no longer acceptable. Additionally, context matters a great deal for the noxiousness of any particular market-- for example, large inequalities of wealth might be blocked from translating into harmful outcomes for individuals and for a democratic society by laws regulating the financing of political campaigns, by ensuring a fair distribution of educational resources and by regulations aimed at securing a high enough minimum income so that no one is impoverished, and so forth.

⁵² Such markets are easy to enforce because market exchange is close to instantaneous in time, and there

Fourth, it should be evident that my account is sensitive to changing circumstances so that markets that are currently noxious may emerge under other conditions as perfectly acceptable (or the reverse).

Finally, it must be admitted that other accounts of noxious markets are possible: I have surveyed some of them in earlier chapters. Some may wish to question placing so much moral weight on our intuitive reactions to markets as I have done, pointing out that people were once horrified by the idea of life insurance. Still others may find particular markets objectionable that do not seem to run afoul of any of the criteria that I have proposed: for example, a market in super-model eggs⁵³ or Nobel Prize winner's sperm or a market in a good whose sale violates their deeply held religious values. By contrast, my account focuses on explaining reactions to markets that citizens –with differing moral frameworks and conceptions of life -- have reason to find especially problematic.

Looking Forward to Part Three

In addition to identifying four parameters along which to evaluate particular markets, my argument has stressed two main points. The first point is that not all markets are the same – some markets have features that serve to differentiate them from other markets. I have thus argued against the reductionist tendencies on the part of many market

are effective private sanctions for non-compliance.

⁵³ Eric Rakowski raised this example in conversation. A Web auction site purported to sell the eggs of beautiful women models to the highest bidder. Although the Web site was later exposed as a fraud, the site got bids of up to \$42,000, proving that some people were willing to be part of such a market.

defenders and market detractors. Labor markets differ in profound ways from apple markets: they can affect the capacities and preferences of their participants. Second, I have stressed that philosophical arguments about problematic markets do not directly enable us to conclude that such exchanges should be blocked. Even if a market interfered with or failed to promote certain values, banning it might be worse overall from the point of view of those same values. A full assessment of a use of market allocation for a particular good must take into account the possible alternatives.

Central to my approach is the claim that while markets can support egalitarian relationships between people, whether or not they do so depends on the background property rights people have and the nature of their institutions. Indeed, I have argued that if we want to maintain equality in social relations, there are strong reasons for making some property rights inalienable. Such property rights –including bans on self enslavement, rights to a basic income, maximum hours laws, and rights to an adequate education –may be necessary to make people independent of the whims of others and to preserve the conditions for people to interact as equals.

My analysis also has some implications for the role of markets in theories of equality. Egalitarians should focus on more than the distribution of things, but also attend to the people who have those things and their relationships with one other. Markets that reflect significant power asymmetries, or presuppose weak agency, or allow people to alienate goods that correspond to urgent needs, or compromise their capacities to function as equal citizens, are noxious. Many markets can realize relations of freedom and equality,

but only against a background of specific regulations. Other markets, like markets in slave labor, are simply incompatible with the conditions for people to interact as equals.

Unfortunately, many proponents and critics of markets have operated on a high level of abstraction in which all markets function in more or less the same way. But different markets have particular features and raise different moral concerns. While many markets are rightly celebrated as mechanisms of freedom and efficiency, some markets traffic in things that no decent society should allow its members to be without, some deepen objectionable hierarchies of class and privilege, some markets undermine democratic values. In thinking about the scope of markets, we need to pay attention not only to the distributive outcomes of different markets but also the relationships between people that these markets enable and support.⁵⁴ The second part of this book examines particular markets—in reproduction and sex, in child labor and bonded labor, and in human body parts --that many people find problematic in more detail.

⁵⁴ It is important to keep in mind that many allocative decisions are shaped neither by government nor by the market. These include distribution through gift, lottery, merit, the intra-family regulation of work and distribution and other principles such as seniority and need.