Markets and Justice
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The conventional market transaction takes many forms. One person sells a commodity to another who is willing to pay for it; the commodity may be a job, a part of the body, an artistic work, or an opportunity to advertise on television. Disruption of arrangements of this sort is the exception in most Western legal systems, and it is usually described as “paternalism,” a term that serves as a pejorative. But the rise of modern regulation, especially since the New Deal, offers numerous illustrations of legal rules that ban voluntary transactions. Even in circumstances in which the legal system permits such arrangements to go forward, people sometimes invoke notions of justice in order to doubt that they should.

The purpose of this essay is to set out and evaluate various reasons for prohibitions on voluntary transactions even when there is no harm to others. The discussion is schematic, tentative, and exploratory, categorizing various arguments rather than deciding particular cases. I suggest that there is good reason for a presumption of respect for voluntary transactions, but that in certain identifiable cases, that presumption can be rebutted. Those cases are sufficiently numerous to allow considerable scope for collective intervention. A position of this sort is superior, I contend, to its two principal rivals. The first, built on the “revealed preference” tradition, treats harm to others as the only legitimate basis for governmental intervention. The second
disregards existing preferences altogether—for reasons, for example, of "false consciousness" or of what might be called the social construction of preferences—and affords no presumption in favor of voluntary transactions. The more differentiated approach set out here is preferable to these approaches, whether the evaluation is based on welfare, autonomy, or some other ground.

I. Why Respect Voluntary Agreements?

Approaches to law that grow out of social contract theory tend to treat voluntary transactions as the starting point for both private and public ordering. Individual actors, autonomous and independent of social ties, are the foundation for discussion. But no obvious reason supports this starting point. It would be equally natural to take collective action as the norm, or to start from a premise of mutual responsibility and care. In either case, protection of voluntary transactions would be thought to be an exception, permitted where adequate justification could be found.

An approach that treated voluntary transactions as the exception to be justified rather than the starting point might also appear sensible from the standpoint of explaining current practice in most Western countries, let alone political systems in which voluntary transactions are given only occasional protection. But in spite of the large territory captured by collective control, most democracies appear to begin with a presumption of respect for voluntary transactions. Without biasing the discussion in any particular direction, or accepting such a presumption without argument, we might start by untangling the reasons for respecting voluntary transactions. Later we will return to the question of foundations.

The argument for respecting voluntary transactions appears to be rooted in three distinct intuitions. The first is a belief in rights; the second refers to utilitarian or welfarist concerns; the third invokes, somewhat loosely, fears of self-interest and factionalism in governmental processes.

A belief in individual autonomy often underlies respect for voluntary agreements on the theory that without harm to others, government ought to respect divergent conceptions of the good life. Respect of this sort is sometimes described as govern-
ment “neutrality,” which is seen as an important guarantor of liberty. In this view, there is simply no predicate for collective intervention if the relevant actors are content. The position of course can be associated both with Mill’s conception of liberty and with understandings arising out of the contractarian tradition.

A related but distinct argument for respecting voluntary transactions is based on utilitarian concerns. Claims from autonomy are considered quite secondary. The basic position is that people know what is in their own best interests and that respect for preferences, as expressed in market transactions, is the best way to promote aggregate social welfare. As a general rule, this argument is quite strong because voluntary agreements by hypothesis make both parties better off. Such agreements, almost by definition, lead to Pareto-superior positions. Mutually advantageous relations cannot, it is said, be disrupted without some kind of welfare loss.

Moreover, disruptions of such relations will, in this view, tend to prove futile. The preferences whose expression is suppressed by regulation are likely to manifest themselves in other, more destructive forms. Consider the claim that regulation of the landlord-tenant relation in the form of minimum conditions of habitability, has served to hurt tenants, because landlords simply raise rents in response; or the idea that the minimum wage has increased unemployment. The central claim is that interference with voluntary transactions will both produce welfare losses and, in the end, hurt the very people that intervention is intended to help.

A final argument for respecting voluntary transactions is somewhat loose, but it serves to account for some of the remaining intuitions behind the idea that government should not disrupt relations deemed mutually advantageous. The concern is that government interference in such situations presents a grave danger of distortion. This is because the government’s own incentives may be parochial or perverse. Government decisions may be infected by factional pressures from narrow groups or by the self-interest, venality, or confusion of public officials. Consider, for example, the possibility that if government is permitted to regulate the consumption of sugar, salt, or alcohol, interest groups will influence regulatory decisions in such a way
as to undermine whatever gains the system of regulation might provide if it were operating optimally. This position is buttressed by social choice theory, which has revealed that majoritarian processes have a high degree of arbitrariness built into them and that they are highly imperfect mechanisms for aggregating preferences.¹ In this view, the best approach is a bright-line rule prohibiting collective intervention into voluntary transactions unless there is harm to others.

In the aggregate, considerations of this sort provide plausible reasons for a general rule that government should respect voluntary transactions if there are no adverse effects on third parties. But the argument for that general rule is far from invulnerable. An initial set of responses would point to the possibility that both autonomy and welfare might be promoted, not undermined, by collective intervention.

The argument would begin by suggesting that the satisfaction of private preferences, whatever their content, does not respond to a persuasive conception of autonomy. The notion of autonomy might refer instead to decisions reached with a full and vivid awareness of available opportunities, or with all relevant information. When decisions are not so informed, they might be described as nonautonomous. Consider, for example, a decision to purchase cigarettes by someone unaware of the health risks. One goal of a legal system is to ensure autonomy not merely by allowing satisfaction of preferences, but also and more fundamentally in the processes of preference formation. This understanding responds to a prominent strand in liberal thought and is associated with Kant; freedom is seen in the free formation rather than the implementation of preferences. For the moment it is not clear how much in the way of interference with voluntary transactions such an argument will justify. At a minimum, it will furnish cause for occasional intervention.

A more dramatic set of responses to the argument counselling respect for voluntary transactions would be critical of the notion of autonomy itself. Preferences, it is claimed, are socially (or biologically) constructed; they are never autonomous. In this view, the social construction of preferences makes it chimerical to rely on neo-Kantian conceptions of autonomy as a basis for evaluating government intervention into mutually advantageous arrangements. Those conceptions are based on myths. I take up this view below.
With respect to welfare, the response to the case for respecting voluntary agreements would begin by observing that preferences are not static and fixed, but shifting. In particular they are endogenous rather than exogenous—endogenous to, or a function of, consumption patterns, legal rules, and social pressures most generally. If preferences are endogenous, legal rules that treat them as fixed will lose important opportunities for welfare gains.

Consider, for example, the possibility that legal rules prohibiting or discouraging behavior that is potentially addictive may produce significant advantages in terms of welfare. Regulation of such substances as heroin—at least if the regulation can be made effective—might well increase aggregate social welfare. Consider too the possibility that government regulation of broadcasting—encouraging or requiring, for example, nonentertainment broadcasting or high-quality programs—may in the end generate new preferences, providing increased satisfaction and in the end producing considerable welfare gains. Here too it is unclear how much in the way of collective intervention is desirable, but it is possible that the amount will be quite substantial.

That preferences are endogenous also weakens the objection that legal disruption of voluntary transactions will be futile. If the preference is itself a function of the legal rule, or of consumption patterns, legal barriers will not be circumvented, for the preference in question will be diminished or eliminated. Thus, for example, a law preventing sexual harassment is designed to, and may in fact, reduce the willingness of employers and teachers to harass employees and students. If so, the law will not be evaded by contracting parties. Similar points apply to laws prohibiting discrimination on various grounds.

The argument from factional intrigue and self-interested representation also depends on empirical judgments and contingencies that are highly speculative. It is both true and important that government action may be distorted by irrelevant or impermissible considerations and that it may make things worse rather than better. Considerations of this sort suggest that the possibility of identifying welfarist and nonwelfarist reasons for disruption of voluntary agreements creates only a prima facie case. Just as government action might not be on balance justifiable to correct a market failure—because of the risk that such action
may make the situation even worse than the status quo—the existence of deficiencies in voluntary agreements may be on balance an insufficient reason for collective control. But the risk that intervention will make things worse rather than better is far too crude a reason for an across-the-board prohibition on interference with voluntary agreements. In some circumstances, interference may produce significant benefits and may have minimal costs. But it is time to explore the problem in more particular settings.

II. Disrupting Agreements: A Catalogue

The purpose of this section is to catalogue, with some particularity, a set of arguments for disrupting voluntary transactions. In the cases to be discussed, considerations of justice argue against rather than in favor of market ordering. Many of the examples might also be thought to involve harm to others; for present purposes, however, that possibility will be put to one side, and the cases will be explored as if others were unaffected. Moreover, I need not, for present purposes, make a choice between arguments from welfare and arguments from autonomy. Even competitors to those arguments—stressing virtue or certain forms of community—fit congenially with the various suggestions put forth below. The basic goal is to set out a range of reasons for disrupting voluntary transactions, even if such transactions deserve prima facie respect.

Collective action problems and the prisoners' dilemma. It is a familiar point that voluntary transactions that are individually rational will sometimes produce collective irrationality. A conventional example involves the decision whether to pollute the environment. In individual cases, pollution may be entirely reasonable in light of the subjective costs and subjective benefits, but collective action—in the form of legal proscriptions or private organization—may increase social welfare. Government intervention may be necessary to disrupt voluntary agreements when there is some such problem. Many areas of legal regulation may be thus understood. This ground for disruption of voluntary transactions is of course well established in both theory and practice, and it is not necessary to dwell on it in detail here.\(^2\)
Preferences about preferences. People do not simply have preferences; they also have preferences about preferences. Some people may, for example, want nonentertainment broadcasting on public television, even though their own consumption patterns favor situation comedies; they may seek stringent environmental laws even though they do not use the public parks; they may approve of laws calling for social security and welfare even though they do not save or give to the poor. In all of these settings, the notion that voluntary agreements should be respected is complicated by the fact that people sometimes do or would decide to foreclose their own voluntary choices.

If the ultimate goal is autonomy, regarded in a Kantian fashion, there are powerful reasons to respect second-order over first-order preferences. Second-order preferences fit comfortably with understandings that see autonomy in the selection rather than mere implementation of ends. The second-order preference is of course a self-conscious selection of ends. One might therefore favor laws or private arrangements vindicating second-order preferences against voluntary behavior involving environmental harms, racist and sexist behavior, or consumption choices in the broadcasting area. In such cases, there is a good reason to reject voluntary transactions.

The notion that individual freedom might consist in self-determination through individual preferences about preferences is naturally, though not inevitably, allied with the idea that political freedom consists in collective self-determination, embodied in social decisions about what courses to pursue. This idea, reflected in republican theories of politics, places a high premium on citizen selection of laws that decide on values rather than simply implement preferences. On one view, the role of government might be limited to the provision of education, a range of information, and many available opportunities. But such an approach would forbid the public from enacting its own second-order preferences through legislation, and that prohibition is not simple to justify.

In some circumstances, however, the notion that collective second-order preferences should be vindicated seems weak. Consider, for example, the fact that some second-order preferences are objectionable. An example is a desire not to prefer to marry someone of another race, reflected in a miscegenation
law; or a desire not to want to allow women to act on a plane of equality with men. Such examples suggest that it would be a large mistake to claim that all second-order preferences should be respected simply because of their status as such. Sometimes the vindication of second-order preferences will itself be troublesome on independent substantive grounds.

Moreover, second-order preferences, when enacted into law, coerce a minority whose members want to vindicate their own first-order preferences. Consider a law prohibiting the purchase of alcohol, adopted by a group some of whose members seek the coercive force of the law to vindicate their second-order preferences. Such a law necessarily affects a minority that would prefer to have alcohol freely available. In general, the coercion of a minority is not a sufficient reason to rule such measures off-limits. Majority rule is the ordinary governing principle, and in the absence of special considerations it ought to control here. But measures that are least restrictive of the desires of the minority are preferable if they are possible, and the vindication of second-order preferences through law may remove desirable incentives for self-control.

Finally, the notion that second-order should be preferred to first-order preferences might be criticized on the ground that it is unduly Kantian, depending on controversial distinctions between “reason” and “passion” and favoring the former over the latter. The presumption in favor of second-order preferences is associated with a doubtful tradition that understands some desires to reflect disembodied reason, and others to be based on mere drives. Moreover, the possibility of third- and n-order preferences complicates the inquiry considerably.

The existence of second-order preferences also makes it much more problematic to decide when and whether respect for voluntary agreements will promote welfare. It is unclear how the process of aggregation of preferences can occur in the face of second-, third-, and n-order preferences about preferences.\(^5\) From one point of view, however, respect for second-order preferences might produce significant welfare gains. Such preferences exist; they are sometimes quite intense; the failure to vindicate them will yield welfare losses.

The basic point is that sometimes laws that forbid voluntary transactions might plausibly be understood as reflections of col-
lective second-order preferences. It will be difficult to be certain whether this understanding is accurate in particular cases. In many contexts, regulation that is defensible in terms of second-order preferences might in fact reflect simple paternalism or distaste on the part of the majority. The movement for prohibition is an example. But when second-order preferences are at work, disruption of voluntary transactions will generally be justified.

**Adaptive preferences.** Sometimes preferences are a product of the absence of available opportunities. Consider, for example, the possibility that the preference of some women for traditional sex roles is an adaptation to a system in which other opportunities have been unavailable. In order to reduce cognitive dissonance—the constant and irremediable frustration of attempting to change a seemingly intractable status quo—people adapt their preferences and beliefs to current options. Other examples are easy to find. Some of the newly freed slaves were ambivalent about their freedom; workers may not seek self-government because it has traditionally been unavailable; adjustment to widespread differentials in wealth might reflect efforts to reduce cognitive dissonance. The central point is this: When preferences are a product of the existing legal rule or an existing social practice, the legal rule or existing practice cannot, without circularity, be justified by reference to the preferences.

It is important to acknowledge that all preferences are in some respect a function of the current regime, and that regime includes legal rules. A claim that voluntary transactions should be disrupted whenever preferences are not truly autonomous would therefore be a likely license for tyranny. The argument from adaptive preferences is restricted to desires that are the product of the absence of available opportunities. At least in certain cases, it is possible to identify that phenomenon with some precision. Moreover, the idea of adaptive preferences may carry with it a misleadingly quantitative connotation. In the cases under discussion, the problem is not simply that there are fewer opportunities than there should be simply in terms of numbers, but that preferences have been influenced by unjust background institutions. It is therefore important to understand that the categories of adaptive preferences, and the assessment of available opportunities, have large normative dimensions.
The phenomenon of adaptive preferences is related to but distinct from that of preference change as a result of learning. Sometimes preferences will be altered because new information has come from engaging in a new activity. In practice it will be hard to distinguish the phenomenon of adaptation of preferences to available opportunities and that of preferences uninformed by experience, though they are analytically separate. For purposes of deciding whether collective frustration of voluntary transactions is desirable, it is usually unnecessary to struggle to separate the two.

There is a strong prima facie case for disruption of voluntary transactions that are based on adaptive preferences. (Indeed, the problem of adaptive preferences may help identify the cases in which second-order preferences should not be respected.) The case for disruption may be based alternatively on considerations of welfare or autonomy. It should not be difficult to see that the disruption of adaptive preferences may in the end produce substantial welfare gains. Consider, for example, self-government in an industry in Seattle, Washington, where initially skeptical workers eventually came to consider self-government an important value.

If the goal is autonomy rather than welfare, disruption of choices deriving from adaptive preferences may be highly desirable. A plausible understanding of autonomy would have it that people should not only be allowed to do what they choose, but should also be allowed to have their preferences formed in a system in which a wide variety of options is available. In short, not only the free satisfaction of preferences but also their free formation is a legitimate social goal. Preferences that derive from the absence of available opportunities are hardly autonomous. Legal rules that disrupt those preferences might be thought in this sense to promote autonomy.

It is not clear what follows from the fact of adaptive preferences. The first problem here is that it is possible to identify a parallel problem: some people will want things precisely because they are unavailable. The grass is always greener phenomenon parallels the story of the fox and the sour grapes. A second problem is that it is quite difficult to tell when a preference results from the perceived unavailability of an opportunity. If the fact of adaptive preferences is to be used as a basis
for collective intervention, it is important to be sure that the phenomenon is actually occurring.

Moreover, the appropriate collective response to adaptive preferences is hardly clear. Perhaps the best and certainly the least intrusive response is to make the devalued option available rather than to require people to select it. Thus government might attempt to ensure that women can participate in the workplace or that self-government is available in some firms. Once the option is available, preferences will not be distorted by the absence of opportunities, and in time it will be possible to discover whether people are engaging or refraining from engaging in a practice because they genuinely want to do so. But sometimes mere availability is an insufficient remedy, since the governing preference structure is in place, and people may not take advantage of an opportunity that because of previous deprivation, they do not value.

The more intrusive remedy is not merely to make the opportunity available but also to encourage or force people to sample it. One might understand some of American labor and civil rights law on this ground. But in view of its intrusiveness and the possibility of mistake, this remedy should be used quite sparingly.

The fact of adaptive or endogenous preferences is dealt with only rarely in current academic writing, even that on the intersection of political theory and economics, where one would expect it to be usefully treated. This is an area in which significant advances should be expected in the future. But in any case, collective action in the face of preferences that have adapted to the absence of available opportunities will often be justified.

Intrapersonal collective action problems: addictions, myopia, and others. Many legal rules disrupt voluntary agreements when preferences are endogenous, not to legal rules, but to acts of consumption. It is a familiar phenomenon that consumption itself affects the taste for certain goods. The phenomenon occurs for an exceptionally wide range of commodities, including, for example, classical music, sports events, and literature. Standing by itself, this phenomenon offers no sufficient justification for legal intervention. But in some circumstances, the phenomenon of preferences endogenous to consumption may have distinctive characteristics that strengthen the case.
Consider, for example, the typical pattern with what is usually
denominated an addiction: sharply increasing costs from non-
consumption and decreasing benefits from consumption. If
this pattern is present, government might well intervene on
grounds of welfare or autonomy. The welfare losses from be-

davior that fits this pattern are sometimes enormous. If the goal
is autonomy, collective action might also be desirable. The pat-
tern suggests, though it does not compel, the conclusion that
the person would not choose to become involved with the good
in question at all, were the person perfectly informed. Absence
of information is of course a conventional basis for disruption
of voluntary transactions.

But the category of addictions does not form a discrete class.
It is simply a special case of what might be called intrapersonal
collective action problems. The central problem here is that for
some activities, the short-term costs are high relative to the
short-term gains, but the long-term gains dominate the long-
term costs. Consider efforts to break certain habits. Habitual
behavior may produce long-term welfare losses for the relevant
person, but the short-term costs of breaking habits may be quite
high. Or consider myopic behavior, which reflects an undue
concentration on the short-run. A related case is that of akrasia,
or weakness of will. Here people choose certain options even
though in a sense they know that their choices make them worse
off.

Some of these cases are taken care of in most legal systems,
which control a wide range of possible distortions in individual
consumption patterns. Regulation of addictive substances is the
most familiar example. Similarly, mandatory use of seatbelts
might be justified in part on the ground that the subjective costs
of buckling up decrease dramatically once people are in the
habit of doing so; those costs are shifting rather than fixed, and
people may be enthusiastic about regulation once they are in
the habit.

The case for intervention here cannot, however, depend solely
on habituation to the regulatory regime. Such an approach
would be a license for tyranny—a point confirmed by the ear-
lier discussion of adaptive preferences. The case for interven-
tion will be most forceful if there are asymmetries, those subject
to an intrapersonal collective action problem might well be able
to take care of themselves. Their willingness to engage in a process in which their tastes will change might be regarded as a reason for praise—as "character planning"—rather than public interference. Consider the decision to purchase classical music records, with full knowledge that the (subjective) value of the records will increase over time as appreciation increases, with the ultimate consequence of significant expenditures. If the purchaser knows what she is getting into—in particular, if she is aware that the preference may change as a result of consumption, and proceeds happily regardless—the argument for government action is weaker.

These considerations suggest that government action may be justified to disrupt voluntary transactions when preferences are endogenous to consumption; when information is asymmetrical; and when the benefits of consumption decrease over time, as the costs of nonconsumption increase.

Absence of information. When those who participate in voluntary transactions lack relevant information, collective action is justified on grounds of both welfare and autonomy. It is no violation of autonomy to bar a person from doing something that she would not do were she armed with perfect information; and if the costs of government action are sufficiently low, intervention will be justified on welfare grounds. That intervention may take one of two forms. The first and less intrusive would be a disclosure requirement. This is the most direct remedy for an absence of information, and it is imposed in many contexts, most notably in cigarette advertising. Sometimes, however, public provision of information may be costly or ineffective. Here the best remedy is a flat ban on the conduct in question.

Such an approach has risks. Government may have less information than affected citizens, and its own incentives may distort the regulatory process. There is always a risk of factional intrigue and self-dealing on the part of governmental actors. But such risks hardly justify an across-the-board rule against either provision of information or prohibition of certain transactions in cases of lack of information.

The largest question for practical politics has to do with the size of the category of cases in which an absence of information justifies government action. Recent evidence suggests that the category is larger than has been suspected thus far. For ex-
ample, people tend to have severe difficulty in assessing low-probability events. Sometimes they act as if a low probability is in fact zero. Such mistakes may account for such phenomena as the failure to buckle seatbelts, continued smoking of cigarettes, and the failure to exercise. (Such phenomena are also examples of intrapersonal collective action problems.) On the other hand, sometimes the risks from low probability events are dramatically overstated. People tend, in short, to rely on heuristics that can produce serious mistakes.

There are characteristic dangers in grounding governmental action on this concern. What appears to be an irrational evaluation of a danger may in fact be a subjective attraction to risk, and it is not clear that government should interfere with the latter. The line between an irrational discount and attraction to risk can be drawn sharply in theory, but it will be hard to do so in practice. If, however, it is clear that irrational discounting is occurring, government intervention may well be justified.

Inalienable goods. In some circumstances, goods should not be treated as commodities; they should not be marketable at all. A conclusion of this sort represents a rejection of the notion that private preferences, as expressed in markets, should be even the starting point for analysis. Possible examples, derived from current practice, are easy to provide, though the underlying rationale is not always clear. Consider trading of the vote; of body parts; of the physical capacities needed to produce children; of sexual services; of children themselves.

The prohibition of purchase and sale of these items depends on a range of concerns. We may group them in three categories: (A) Sometimes the fear is that if a good is made into a commodity, the result will be to diminish the amount of altruism and of donation in society, to the detriment of those who are least well-off or of the activity in question. Suppose, for example, that blood could be purchased and sold on markets. The donation of blood might be decreased as a result; blood would have a price when it had previously been provided gratuitously; poor people might find it harder to obtain blood, and public subsidies would be necessary. But claims of this sort depend on highly contestable empirical judgments. It is hardly clear that a decision to turn something into a commodity will significantly decrease the amount of donation. Moreover, as a general matter a market system accompanied by government
subsidies to the poor is probably superior to one in which goods may be either donated or not transferred at all.

(B) Resistance to purchase and sale of certain goods sometimes depends on the view that if such goods could be purchased and sold, people would have a different and inferior conception of themselves and of other people.\textsuperscript{20} Perhaps the most dramatic example comes from the controversy over whether to allow for markets in babies.\textsuperscript{21} One objection to such a step would be that to put a price tag on babies would alter, for the worse, parents’ conception of their relation to their children. To think of a child as something that might be bought and sold is to change one’s attitude toward it. If babies were freely tradeable on markets, parents would have to regard their children as transferrable and as sources of potential profit. The practice of purchase and sale would thus transform attitude and beliefs, and possibly in highly undesirable directions.

To some degree this objection is based on the possible adverse effects on children. But part of the instinct underlying prohibitions of this sort comes from a desire to ensure that people think of certain items as essentially priceless and nontradeable. Ideas of this kind underlie the notion to allow trade in certain items is to diminish and degrade them. Social attitudes toward sexuality and the right to vote, for example, would be significantly altered if prostitution and vote-trading were legalized.

This point suggests that the claim that prohibitions on sale are paternalistic is wide of the mark.\textsuperscript{22} The choice to allow sale is itself a decision, and it might be objectionable on one of two grounds. First, that choice will intrude on those who would prefer that certain items not be subject to purchase and sale. Many people might find their own attitudes toward those items changed in undesirable ways if purchase and sale were available. A decision not to allow alienation of such items might be understood as a form of explicit or implicit second-order preference.

Moreover, the best substantive theory might hold that the items in question should not be alienable, quite apart from the subjective views of the citizenry. The rejection of efforts to turn certain items into commodities would depend on a conclusion that such items are diminished if they are traded on markets. To spell out such a substantive theory is a large task, but the examples given above might serve as a starting point.

(C) Sometimes goods are not made into commodities because
of the external and systemic effects that purchase and sale might produce. Thus the prohibition of sale of the right to vote might be based on the risk that purchase and sale would place political power in the hands of a wealthy minority or increase corruption. Quite apart from its possibly degrading effects on sexuality, the institution of prostitution is likely to affect how men perceive women and how women perceive themselves. Social stigmatization of the sale of sexual services might therefore be justified on antidiscrimination grounds. A system in which the ability to bear children is subject to purchase and sale might have a similar systemic effect on poor women or on women in general—and such effects are not sufficiently taken account of by the individual seller. The institution of trading may therefore contribute to the social subordination of a particular group. Slavery is the most obvious example here, but the principle is potentially quite broad.

III. Questions and Qualifications

The various categories of prohibition discussed thus far suggest that in a wide range of cases voluntary transactions should be disrupted. The market outcome is distinct from the outcome justice requires. This conclusion is likely to hold regardless of whether one’s ultimate aim is autonomy, welfare, or something else. Governmental or private arrangements that disrupt such transactions might be justifiable even if there is no harm to others. But serious questions remain, and in order to generate a complete theory, such questions would have to be answered. I outline some of the relevant issues here.

The conundrum of autonomy. The first, and one of the largest, has to do with the status of arguments from autonomy. Here the problem stems from the fact that a positive definition of autonomy is exceptionally difficult to provide—especially in light of the social and biological construction of preferences. The notion that people might genuinely select their preferences, during a process of self-creation, is absurd. There must always be some foundation from which to proceed, and that foundation cannot itself be created by the human actor. Numerous modern criticisms of Kantian approaches proceed from perceptions of this sort. They suggest that the notion of auton-
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omy, in its strongest and most rationalistic senses, should be abandoned altogether. 27

In deciding whether and when to disrupt voluntary transactions, it would be a large mistake to believe that there is a pre- or post-social standard of autonomy that might be used as the basis for political criticism. Thus notions of adaptive preferences, or preferences about preferences, must not pretend to depend on a regulative ideal of pure self-creation or of acontexual selection of preferences. A positive definition of autonomy is likely to prove chimerical. 28

But it would be an equally large mistake to abandon the idea of autonomy altogether. 29 There is a substantial difference between a preference that results from the absence of available opportunities, or a lack of information about alternatives, and a preference that is formed in the face of numerous opportunities and all relevant information. The examples of women and sexual equality and workers and self-government may be helpful here, although the latter is a controversial case. The notion of autonomy is probably the best term available for describing this difference, even if its most strongly Kantian forms are implausible.

The proposition holds at both the individual and collective levels. Deliberation about appropriate ends by individuals may be accompanied by collective deliberation by both small and large groups. Rational agreement on the good life is, to be sure, unlikely to be achieved in a pluralistic society. But examples of measures that involve collective decisions about desirable ends are not difficult to find. Consider laws prohibiting discrimination on the basis of race and gender or those protecting the environment. Such laws need not reflect exogenous interests on the part of the electorate, but may instead be an attempt to select values through a process of deliberation.

The relation between autonomy and welfare. All of the justifications for intervention described thus far can be made out in terms of both welfare and autonomy. But in some circumstances there will be a conflict between the two, at least in the short run. Adaptive preferences, for example, promote welfare even as they reduce autonomy. To make one’s preferences conform to the available opportunities is a sensible and important way of reducing the frustration associated with rebellion against a
seemingly intractable status quo. Efforts to disrupt preferences that have already adapted to the status quo may produce substantial welfare losses, at least in the immediate future, and possibly longer. Efforts to eliminate slavery\textsuperscript{30} and sex discrimination\textsuperscript{31} may produce short-term losses of this sort.

Respect for second-order at the expense of first-order preferences may also, on a certain view, be undesirable from the standpoint of welfare even if it is defensible on grounds of autonomy. Preferences bottled up by second-order rules may simply express themselves elsewhere, and in particularly destructive forms. Consider, for example, the possibility that laws substituting nonentertainment for entertainment programming on television will be counteracted by people who listen to the radio and go to movies.

For present purposes it is unnecessary to choose between welfarist and nonwelfarist approaches to regulation of voluntary transactions. But it is important to understand that the various reasons for disrupting voluntary transactions operate along quite different tracks.

Beyond autonomy: neutrality and substantive conceptions of the good life. To some, the notion that one ought to attempt to promote autonomous preferences is a mistake in light of the chimerical character of the idea of autonomy itself. That preferences are socially or biologically constructed means that the goal of legal policy ought not to be to promote autonomy, but instead to develop and implement substantive conceptions of the good life. In this view, one should not create a presumption in favor of private preferences, or attempt to make a wide variety of options available. Instead, the goal ought to be to generate a substantive theory of good preferences, perhaps based on a notion of what preferences would emerge under ideal conditions.

Such an effort might seem the natural conclusion of some of the arguments spelled out above. Judgments about collective intervention might be based, not on formal ideas of autonomy, but instead on substantive theories about what sorts of preferences will promote what is sometimes described as human flourishing. Under this view, the goal of neutrality is impossible to achieve. Since preferences are a function of the social structure, including the legal regime, a system of prima facie respect for
private preferences combined with selective intervention will hardly be neutral. Consider, for example, the area of television broadcasting: A decision to allow a free market, or even to make a variety of options available, will create a regulatory system with its own effects on formation of preferences. Such a system might be thought inferior to a system that worked out an appropriate substantive theory and implemented it through regulation mandating a certain form of broadcasting.

The difficulty with such approaches lies of course in the problem of identifying what a substantive conception of the good life might entail. The problem is both theoretical and institutional. The theoretical task is to generate an antiliberal theory of the good life that is to be imposed in the face of plural and conflicting conceptions on the part of private citizens. Even if that problem could be solved, the institutional problem remains: To what institution might we give the power to implement decisions of this sort? This problem is no less important for its familiarity. In these circumstances the best strategy, as a general rule, is to create a presumption in favor of private choices and to allow rebuttal in a distinct class of cases. In a pluralistic society, it is better to struggle with the difficulties in the concepts of autonomy and welfare than to permit imposition of unitary understandings of what a good life entails.

The limits of inalienability. The discussion of alienability thus far has left a number of gaps. In particular, it does not identify those items that ought not to be traded on markets. Such decisions are likely to have a measure of relativity over time and across groups and cultures; generalizations will therefore be hazardous here. But we may suggest that the argument from social subordination will be most powerful in cases in which an item to be made alienable is associated with a particular social group. Thus decisions to allow the purchase and sale of reproductive capacities or of sex raise serious issues of equality, since they might perpetuate the social subordination of women.

The problem here is that at least for some women, a decision to allow purchase and sale of (for example) reproductive capacities might be regarded as liberating, at least in comparison with the alternatives. That subjective belief is quite powerful in many instances, and the counterargument—that the practice is question contributes to social subordination—is hard to measure in
particular cases. It is therefore necessary to be precise in showing how a decision to allow a certain item to be made alienable will increase inequality, in the face of the gains of a sort to the people sought to be protected.

There is also a severe problem of enforcement. A decision to criminalize prostitution may be even worse than a decision to legalize it, because of the harms to women who will be prostitutes even in a world in which prostitution is unlawful—and the point holds even though the best world would eliminate prostitution altogether. Moreover, some goods may be commodities already, and to bring their quality as such into the open may be desirable. The central point, however, remains: A system that treats reproductive rights and sexuality as commodities will tend to entrench traditional gender hierarchies.

The argument that certain items should not be made into commodities because to do so is to degrade them also requires considerable elaboration. We have seen that this argument might depend either on subjective beliefs of the citizenry or on an independent substantive theory. If subjective beliefs are central, the problem is a variation on that of preferences about preferences. There is by hypothesis a collective decision to prevent certain items from being traded and sold on markets. But the mere fact that there is a collective decision to that effect cannot dispose of the problem, for that decision may be objectionable on separate grounds. Consider the view that certain books ought not to be subject to purchase and sale (a measure favored by those hostile to the books in question) or that a purchase of margarine should be outlawed (a measure sought by butter producers). Perhaps the best conclusion here—a vague one—is that a collective antipathy to the purchase and sale of certain goods should be permitted to control only (1) when the antipathy is based on reasons of the sort outlined earlier, (2) when it is not objectionable on independent substantive grounds, and (3) when it does not merely reflect an interest-group deal.

If subjective collective preferences are put to one side, the case for a refusal to treat certain items as commodities must be based on some separate theory. It is possible to begin the process with some current intuitions—consider the sale of body parts, the ban of prostitution, the problem of vote-trading—but the task is a large one that cannot be carried out here.
Other foundations. The discussion thus far has been cast largely in terms of social efforts to increase welfare or to promote individual and collective autonomy. But other foundations are of course possible. For example, the social goal might be the inculcation of virtue, or the creation of certain forms of community, or expression of an ethics of care and responsibility rather than justice. Systems founded on such goals would provide different foundations from which to decide when government should disrupt voluntary transactions. All of them would be likely to be skeptical of the assumptions that underlie the presumptive respect for voluntary agreements. In particular, the beliefs in rights and welfare that underlie that respect would be substantially revised. These alternative foundations tend to stress the social construction of both preferences and personality; rights and welfare, at least if defended in the preceding terms, are foreign concepts. It is possible that the resulting regime would be fundamentally different.

We may suggest, however, that even if such alternative foundations were used, the resulting regime would ultimately not be far from that suggested here. The point can hardly be proved in this brief space. But the various cases of disruption of voluntary transactions suggested above are apt to be quite similar to those that would be described under different starting points. A system based on virtue, for example, would also place a premium on second-order preferences and at the same time express concern about adaptive preferences. An ethics of care and responsibility would also be troubled by the risks of turning certain items into commodities. There would of course be significant problems of translation, but it would be unsurprising if systems based on the more familiar goals of autonomy and welfare were to reach results broadly in accord with those based on other foundations.

IV. Conclusion

One way to approach the relation between markets and justice is to explore settings in which voluntary transactions should be disrupted even if there is no harm to others. We have seen that it is possible to identify a number of such settings. Sometimes transactions will be individually rational and collectively irra-
tional; sometimes people will seek to vindicate second-order preferences by banning voluntary transactions; sometimes an absence of information will call for regulation; sometimes transactions are based on preferences that have adapted to the absence of available opportunities; sometimes legal regulation can counteract intrapersonal collective action problems, found in preferences endogenous to consumption. For various reasons, moreover, some items should not be treated as commodities at all.

It is important to acknowledge that government action may make things worse rather than better. The case for intervention is therefore only presumptive. But the catalogue offered here suggests that there will be severe problems in a system that permits all voluntary transactions to go forward when there is no harm to others. Such a system is likely to permit considerable injustice, and it will fail to take advantage of opportunities for collective improvements, whether they are measured in terms of welfare, individual or collective autonomy, or on some other ground.

NOTES

10. Ibid.


15. Elster, Sour Grapes.


22. Radin, “Market-Inalienability.”


28. Elster, Sour Grapes.

29. Gauthier, Morals by Agreement.

30. Litwack, Been in the Storm So Long.


