

28-SPG Kan. J.L. & Pub. Pol'y 426

Kansas Journal of Law & Public Policy
Spring, 2019

Featuring
Sam Fox Krauss ^{a1}

Copyright © 2019 by the Kansas Journal of Law & Public Policy; Sam Fox Krauss

MORAL MARKET DESIGN

We often encounter people who we believe are behaving immorally. We routinely try to change minds and often donate to charitable organizations that do the same. Of course, this does not always work. In a liberal, rights-based society, we have to tolerate this. But legal entitlements to act in ways that others find immoral are inefficiently allocated. For example, some meat-eaters value eating meat less than some vegetarians would be willing to pay them to stop. While many have written about the limits of the market, market design, and abuse of right, few have considered the sale of these entitlements. This article proposes a market-based solution, encouraging the sale of these entitlements under certain conditions. This would lead to improvements both on an economic efficiency analysis and on a moral analysis.

*427 INTRODUCTION

People have legal entitlements to act in ways that others regard as morally impermissible. When they do, others have a defeasible reason to stop them. Circumstances will dictate whether others should try to inhibit such behavior, and, if so, the best method: one might convince such people that what they are doing is wrong; one might explain that others will dislike them if they persist; one might ask them nicely, or threaten them; or, one could pay them.

I argue that we ought to pay people to stop behaving in ways we believe are immoral but toward which they are morally indifferent. I argue for the creation of a *moral market*, where people buy and sell the cessation of such behavior. Properly regulated, this market would have two significant upsides, noted here, and few downsides. First, it would allow people to trade in a way that would make them better off. Second, it would bring about a moral improvement.

Of course, this is a highly theoretical, academic proposal. Before designing a new market, experts outside of philosophy need to weigh in. ¹ I aim merely to draw attention to the inefficient allocation of certain entitlements and to offer a framework to address this problem.

The article proceeds as follows: first, I use the case of the ethical vegetarian to motivate the proposal and articulate the positive argument for creating a moral market; second, I refine the proposal and set limits to the market; third, I consider several objections; fourth, I offer two additional proposals in the same spirit, which those initially unconvinced of the desirability of the moral market, may find more palatable.

I. MORAL INDIFFERENCE AND ALLOCATIVE INEFFICIENCY

MORAL MARKET DESIGN, 28-SPG Kan. J.L. & Pub. Pol'y 426

Moral disagreement is ubiquitous, but it is nevertheless striking that everyone is surrounded by people who believe that morality requires them to act in ways incompatible with what they believe morality requires. There is a large literature on the problem of disagreement and what to do about it.² Chiefly, however, this article *428 considers cases of disagreement in which one party is morally indifferent toward their own behavior while the other party believes that they act impermissibly. *This* kind of moral disagreement allows for both increased economic efficiency and moral progress, so far not discussed.³

Moral disagreement may be (generally) intractable, and therefore so too are the actions that follow from disagreeing parties. But when the actions stem from non-moral reasons, the actor can be deterred with financial incentives or in-kind payments. And, while people should not allow financial incentives to outweigh moral reasons, financial incentives often do outweigh non-moral reasons--innocuously so. One ought not, say, accept money to paint a racial slur on a building, but painters earn a living painting buildings they otherwise have no reason to. To motivate the proposal for the moral market, consider the case of the ethical vegetarian and the omnivore.

A. The Vegetarian and the Omnivore

Ethical vegetarians believe that eating meat is morally impermissible.⁴ Omnivores, (at least those who are not akratic), believe that eating meat is morally permissible but not obligatory.⁵ That is, while omnivores believe that there's nothing wrong with *429 eating meat, they do not believe that they *ought to* eat meat, just as they do not believe they *ought to* go to a Yankees game, or wear a blue shirt.⁶ One can say that omnivores are *morally indifferent* toward eating meat and watching baseball and wearing blue shirts. Of course, there are non-moral reasons to eat meat, watch baseball, and wear blue. To give up those activities might come at a cost, but not a moral cost.

However much vegetarians detest meat-eating, they cannot just force meat-eaters to stop eating meat: people have a legal entitlement to do so. However, there are some meat-eaters who, for a price, would become vegetarians for a period of time.⁷ And, presumably, there are some people willing to pay that price.⁸ If one owns the entitlement to eat meat, then one can sell that entitlement to the vegetarian. In effect, the vegetarian is contractually binding the meat-eater to become a vegetarian.

Entitlement is a notoriously elusive concept.⁹ Let entitlement, here, mean the legal ability to engage in a behavior or activity. Ignore the distinction between conduct to which people have an enumerated right--say, to vote--and conduct that no law currently prohibits, but easily could--say, the right to park on a certain street. Thinking about the ability to eat meat as an entitlement, and arguing that, in some cases, it ought to be for sale does not entail that all entitlements are, or ought to be alienable or salable.¹⁰ One cannot, for example, give or sell oneself into slavery.

*430 It might seem odd to think about buying and selling the entitlement to eat meat. After all, people are legally permitted to eat as much meat as they want, so, one might say, acquiring someone else's entitlement does not get them anything. But that is wrong. While in some cases of transfer of ownership one acquires a new good, or the ability to engage in a behavior one otherwise could not, here the buyer pays the seller to lose the legal ability to perform some behavior. In the meat-eating case, the vegetarian buys the entitlement from the omnivore not because the vegetarian wants to eat meat, but precisely because they want the omnivore not to.

A trade on the moral market would make both parties by their own estimation better off: the omnivore values the entitlement to eat meat less than the vegetarian values the omnivore becoming a vegetarian. Without this trade, some

people to whom the entitlement was granted will not derive the full value of the entitlement.¹¹ That is, if the entitlement to eat meat would be worth \$100 on the moral market, but someone values their entitlement at only \$50, then they are effectively out \$50.

The moral market is not necessarily shielded from regulation. While there is a presumption in favor of voluntary transactions, this presumption can be overcome in the case of market failure, in which case the state can regulate or prohibit trade.¹² The argument in favor of trades on the moral market is the same as the argument for trade, generally, with the added benefit that it would make things *morally* better, as well.¹³ Given certain restrictions, trades on the moral market can withstand the objections that are made to limit trade in other goods *431 and services, like organs and sex, as well as objections unique to this market.

B. Paying for Behavior, and “Type-1” Cases

In the vegetarianism case, the buyer wants the seller to cease immoral behavior. One can also imagine cases in which the buyer pays the seller to do something rather than to stop doing something. In particular, one can imagine cases where the buyer believes that the seller is failing to engage in morally obligatory behavior, and the seller believes that they are failing to engage in morally permissible, but not obligatory, behavior. Imagine, for example, that environmentalists believe that it is morally obligatory to recycle; others believe that it is morally permissible, but not obligatory, to recycle. On the moral market, the environmentalist could pay the non-recyclers to recycle.

These two kinds of cases, paying someone to cease immoral behavior and paying someone to engage in morally obligatory behavior, though structurally distinct, are not morally distinct. Assume that to fail to engage in morally obligatory behavior just is to act immorally. With this taxonomy in mind, note that the two cases share the following structure, which will be called a “Type-1” case:

Type-1 Case

A believes B's #-ing is impermissible. B believes their #-ing is permissible but not obligatory.

For the purposes of this article, “#-ing” will be used to represent doing or failing to do something, such as, eating meat or failing to recycle. Furthermore, for purposes of later discussion, A will be interchangeably associated with the identity of the individual named Adam and similarly B with Bethany. Given some assumptions, when the case has the above structure there is reason to think that A ought to pay B to stop #-ing.

Not only would trades on the moral market increase economic efficiency, but such exchanges would make things morally better, at least from the buyer's perspective, and morally worse according to neither. Consider the perspectives of a buyer and seller, respectively, contemplating such a transaction. The buyer believes that the seller is engaging in immoral behavior, say, eating meat, and after the trade, would no longer. Assuming that the buyer does not give up anything of comparable moral value by spending the money, from their *432 perspective this is a moral improvement.¹⁴ The seller believes that they are engaging in morally permissible, but not obligatory, behavior-- eating meat, and after the trade, would no longer. From the seller's perspective, the trade is morally neutral. Note two features of the views of the parties: first, from the perspective of the buyer and seller in aggregate, the trade constitutes a moral improvement; second, neither party thinks that the trade constitutes a moral loss. Granted, that neither party believes things are morally worse does not mean that they are not. I'll address this point in Section II.

MORAL MARKET DESIGN, 28-SPG Kan. J.L. & Pub. Pol'y 426

If a voluntary transaction can make both buyer and seller better off, from their own point of view, and can produce, from their aggregate perspectives, a net moral improvement, and neither party thinks there was a moral loss, then barring significant market failure it seems that people ought to engage in these kinds of trades. In Section II, I'll consider limitations to trades on the moral market and refine the proposal to take them into account. In Section III, I'll consider and respond to several objections. However, none of the objections are sufficient to undermine this central piece of the argument: given some assumptions, if Adam believes that Bethany is acting immorally, and Bethany is morally indifferent to her own behavior, then Adam should pay Bethany to cease her behavior.

II. REFINING THE PROPOSAL

A. *Different Kinds of Permissible Behavior*

I noted that the cases I described had the following, Type-1 structure:

<u>Type-1 Case</u>	A believes B's #-ing is impermissible. B believes their #-ing is permissible but not obligatory.
--------------------	--

But this case is underspecified: people are not morally indifferent to all behaviors they believe are permissible but not obligatory. Consistent with the seller believing that #-ing is permissible but not obligatory, there are several different ways to classify the behavior: it ^{*433} could be morally neutral, a morally permissible moral mistake, supererogatory, or sub-erogatory.

An action is morally neutral just in case either there are no moral reasons that weigh in favor or against that action, or the reasons for and against balance each other out.¹⁵ People ought to be morally indifferent toward morally neutral actions. The vegetarian example is just this kind of case: omnivores are morally indifferent toward meat-eating. Paying someone to cease behavior that they regard as morally neutral was the impetus for this project. Both parties benefit and, in aggregate, from their perspective, the trade constitutes a moral improvement without either party thinking that things are morally worse off.

But not all morally permissible actions are morally neutral. Supererogatory and sub-erogatory actions, and morally permissible moral mistakes, though morally permissible, are not morally neutral.¹⁶ People have moral reasons to save others from burning buildings, and to change seats so a couple can sit together, though it is usually considered morally permissible to do neither.¹⁷

^{*434} Even if the case involves paying people to do things that the recipient believes they ought to do, there are reasons to be wary, especially in the moral case.¹⁸ See Section II.D for further discussion of this objection. There is reason to be concerned about paying someone to engage in behavior they believe they have moral reason not to, or paying someone to desist from behavior they believe they have moral reason to engage in. I exclude from consideration those cases in which the seller would be paid to do things they believe they have moral reason not to do, or to cease behavior they believe they have moral reason to do.

B. *Type-2 Cases*

So far, discussion has been limited to circumstances where the seller regards the behavior they engage in as permissible but not obligatory. But the reader need not limit themselves to these cases: imagine cases in which the buyer pays the

MORAL MARKET DESIGN, 28-SPG Kan. J.L. & Pub. Pol'y 426

seller to cease behavior that the seller believes is morally *obligatory*, or, equivalently, to engage in behavior that the seller believes is morally impermissible. Thus, *Type-2* cases:

Type-2 Case

A believes B's #-ing is impermissible. B believes their #-ing is obligatory.

What should the reader make of these cases? Imagine adherents of two different religions, each of which requires that all people belong only to it. Adam believes that Bethany's membership in Religion B (and lack of membership in Religion A) is morally impermissible. Bethany believes that her membership in Religion B (and lack of membership in Religion A) is morally obligatory. Stipulate that there is some amount such that Adam is willing to pay so that Bethany would be willing to convert to Religion A. While some people might be unwilling, at any price, to convert, this is not the case for everyone, even if they might feel torn, or, after the fact, guilty.

Many who were persuaded of the desirability of the moral market to handle at least some Type-1 cases will balk at Type-2 cases. Sure, they might say, pay someone who does not care to switch from Big *435 Macs® to veggie burgers, but to pay someone to violate their moral beliefs is too much!

The proposal, then, is strictly limited to Type-1 cases, and specifically when the seller believes that they are engaging in morally permissible, but not morally good, behavior. Leave it an open question whether one ought to pay people to cease behavior that they regard as morally impermissible--that is, whether one ought to pay others to stop acting akratically. For the remainder of the article, then, I will consider objections only to the limited positive proposal that follows: that one ought to pay people to cease behavior they believe is impermissible and toward which they are morally indifferent.

C. Legality

Only legal entitlements are traded on the moral market. Two kinds of transactions are excluded from consideration: paying people to cease immoral, illegal activity, and paying people to engage in morally obligatory, illegal activity. People do not have a legal entitlement to engage in illegal activity, and so there is no entitlement to sell. For example, on the moral market one cannot pay someone else not to use illegal drugs. No one has a legal entitlement to use drugs, so, at least on this framework, they have nothing to sell.¹⁹ Also excluded from the proposal is paying people to engage in illegal activity that the buyer believes is morally obligatory. For example, on the moral market one cannot pay someone else to, say, remove animals from a research facility.²⁰

D. Moral Progress

In addition to increased allocative efficiency, the moral market will bring about moral progress, according to many views of what that could mean.

The proposal endorses trades on the moral market only in a subset of Type-1 cases: those in which the seller is morally indifferent toward *436 their own behavior. The vegetarian and the omnivore represent a paradigm case. The trade constitutes a moral setback according to neither party, and a moral improvement if readers consider their views in aggregate.²¹ If, in aggregate, the parties believe that things are morally better, and no party to the transaction believes that things are morally worse, then there is some reason to think that things are, actually, morally better off. This is why trades on the moral market would lead to moral progress.

MORAL MARKET DESIGN, 28-SPG Kan. J.L. & Pub. Pol'y 426

There are two kinds of objections. The first is that people's moral beliefs are not reliable, and thus one cannot infer from the beliefs of the parties that the trade constituted a moral improvement to a claim that it did. The second is that, even if people's moral beliefs are, in general, reliable, trades on the moral market will be overrepresented by those with unreliable moral beliefs, and therefore a market in entitlements will not lead to moral progress.

If the objection to this argument is that people, generally speaking, have unreliable moral beliefs, then the objection runs far deeper than a mere opposition to the moral market. If people have unreliable moral beliefs, and therefore should not make trades informed by them, it seems also that we have reason to doubt whether they ought to act on them. Granted, there is reason to take this objection seriously, but this objection is not unique to the moral market proposal; and if it is a good objection, it raises serious doubts about whether people have reason to act in accordance with their moral beliefs.

But if the objection to this argument is, however, not that people are generally unreliable in their moral beliefs, but that unreliable believers would be overrepresented in the market, then there might be cause for concern. Perhaps the wealthy will participate more in the market, and the wealthy are more likely to have mistaken moral beliefs. But why should one think that the wealthy have comparably unreliable moral beliefs? One might say that this is because the wealthy tend to act immorally. Or, one might say that the wealthy necessarily act immorally--by not giving away their money and *437 thereby becoming not-wealthy. However, this explanation is orthogonal to the original objection: even if the wealthy act immorally, this does not mean that their moral beliefs are unreliable. It may mean, instead, that the wealthy act akratically.

In addition, even if wealthy buyers are unreliable, the transaction would also require unreliable sellers. The proposal, as the author has limited it, does not allow people to act akratically. Buyers have to believe the seller is acting immorally, and the seller has to believe that what they are doing is permissible but not morally good. The moral market does not allow the buyer to pay the seller, or the seller to accept money, to do something that either party believes the seller ought not.

One last response to this line of objection is regulation. An argument for the moral market does not require that every conceivable trade be a good idea; it may require regulation. Even the market for bread, for example, is regulated.²²

In a series of articles, Glen Weyl and Eric Posner argue that our system of one-person, one-vote is inefficient because it does not allow people to register the intensity of their preferences, and that this allows an indifferent majority to outweigh a passionate minority.²³ To solve this problem, Weyl and Posner argue that society should instead adopt quadratic voting, a system in which people buy as many votes as they want at the cost of the number of votes, squared. Quadratic voting both allows people to register the intensity of their preferences and prevents the wealthy from having too much control: assuming one dollar per vote, for one person to buy 100 votes it would cost \$10,000, whereas it would cost 100 people only \$101, in total, to outvote the wealthy voter. Some similar procedure could work for regulating the market for entitlements. How exactly this would work is beyond the scope of this article.

Writing on a different, but related topic, Eric Posner and Cass Sunstein argue that when regulatory agencies conduct cost-benefit analyses, they fail to take into account peoples' moral commitments. They argue that people suffer a welfare loss because of the suffering of other people, and that this welfare loss ought to be taken into *438 account, as well, in regulation.²⁴ Further, they argue that this welfare loss can be estimated by peoples' willingness to pay to avoid the state of affairs they detest.²⁵

This is all to say that regulation may be a powerful tool in responding to problems with the moral market, just as it is for the problems with the market for any good. It is odd, though, especially in a regulatory framework, to think about the welfare loss of one person because of the damage to another. This oddness has been discussed in the literature on the

right to destroy: scholars have debated whether the right to destroy persists even if destroying property would cause a welfare loss in others, say, by destroying a work of art,²⁶ or killing a companion animal.²⁷ This theme will be taken up in Section III.C, when discussing an objection to the moral market: that it could lead to extortion.

III. OBJECTIONS

Before beginning, note that the moral market's desirability does not require that every possible trade be wholly unproblematic: some trades may be prohibitively costly, or unwise, or repugnant. Those cases ought to be either regulated or prohibited. Other trades may be good on the whole, even if there are costs. As mentioned above, a market for bread, for example, does not require the sale of *all* bread and does not require that the market be problem-free. This project merely provides the framework for encouraging and regulating moral market trades, not to justify every possible trade.

A. *The Limits of the Market*

The scholarly literature includes many different arguments for including or excluding certain goods and services from trade. The aim in this section is to briefly explicate the best exclusionary arguments *439 to show that even if one or more arguments for excluding, say, organs from the market are sound, similar arguments would not work against most trades on the moral market.

One might object that moral decision-making is one of a number of activities that should not be subject to market forces. One might worry that alienating moral deliberation violates an important feature of autonomy.²⁸ This objection extends familiar arguments against sex-work and the sale of human organs, among other exchanges, to moral decision-making. Scholars have articulated different versions of the anti-commodification and coercion objections.²⁹ Michael Sandel, for instance, argues that market values are “corrosive” of certain goods. When some goods are subjected to market forces, he writes, “markets change the character of the goods and social practices they govern.”³⁰ He describes how a market-based system of offsets can make some people think that they can absolve themselves from immoral actions, and gives as examples websites for paying for offsets for carbon use and for cheating on exams. In the latter case, people who cheat on exams think they can restore moral balance by making donations.³¹

Margaret Jane Radin argues for the market-inalienability of certain goods and services while rejecting both universal commodification and universal non-commodification.³² According to Radin, market-inalienability is justified to protect those things that are important to personhood.³³

*440 Sandel and Debra Satz both argue that *fairness* should constrain what markets we allow.³⁴ Satz describes the market for organs where sellers are often worse off for losing an organ and sellers are usually poor, without option and subject to dangerous procurement methods. Furthermore, markets for organs and the like “undermine the social framework needed for people to interact as equals, as individuals with equal standing.”³⁵ Satz says that this is indicative of obnoxious markets.³⁶ One might, with Sandel and Satz, think that transactions made under coercive circumstances, in particular, undermine fairness and equality.

Subjecting things like sex and organs to market forces may be problematic because the sellers in those cases are often coerced. The thought is that buyers of sex and organs take advantage of the poverty and desperation of sellers in those

MORAL MARKET DESIGN, 28-SPG Kan. J.L. & Pub. Pol'y 426

markets. The extent of coercion is so great, the argument goes, that the would-be sellers are better off if the market for such goods did not exist.

Even if these arguments succeed against the sale of child labor, or organs, or sex, they do not succeed against all transactions on the moral market. It is incorrect to characterize the trade as the sale of moral autonomy. In the vegetarian case, the meat-eater believes that it's neither morally good nor morally bad to continue eating meat. The seller already made up their mind about the morality of eating meat and decided that it is morally neutral.

The heft of any coercion argument is that the seller, but for their dire circumstances, would not engage in the trade because of the harmful or degrading nature of the sale, or because they lack information. This might be right for many instances of sex work or the sale of organs, but in the vegetarianism case, this objection does not work because the seller regards the switch to vegetarianism as, at worst, an inconvenience. That the buyer regards the switch as morally obligatory should not bear on whether the offer of a trade would coerce the buyer--at least, not more than any other service that sellers are morally indifferent toward, like painting a house or preparing a tax return.

On the other hand, cases that would involve paying people to do what they believe is morally impermissible would be susceptible to *441 these worries. These are Type-2 cases, discussed above. The article's proposal excludes these. Even if there were some price at which Bethany would be willing to stop praying, or to pray to a different god, one might think that because prayer is important to personhood - or human flourishing or because a market to get people to stop praying would be coercive - one ought not facilitate a market for this type of exchange.

B. Doing the Right Thing for the Wrong Reasons

A Kantian might object that if a seller ceases moral behavior for money, not a sense of duty, then the cessation lacks moral value. So, participating in the market for entitlements is not morally good. First, even if the seller's action lacks moral value because they become vegetarian for money and not, say, because they are convinced by Tom Regan,³⁷ the action of the buyer may yet have moral value. The buyer, we might think, pays the seller to go vegetarian out of their sense of duty. Thus, even on a Kantian picture, it seems that trades on the moral market could have moral value.

Even if the Kantian is not persuaded, a trade's lacking moral value is a not a reason against it. Kantians presumably think that buying a chocolate bar lacks moral value, and yet Kantians do not generally object to buying chocolate. A Kantian might press that exchanges on the moral market are a violation of the Principle of Humanity.³⁸ But, as argued above, if one constrains the moral market to just those cases in which the seller regards their behavior as permissible but not morally good, then it is difficult to see how paying someone to become vegetarian constitutes using them as a mere means any more than paying them to paint a house. Were the buyer paying the seller to engage in behavior that the seller themselves regarded as immoral, then a plausible case could be made that the exchange violates the Principle of Humanity.

Others may make similar objections. Sandel's warning about the market's corrosive effect on some goods could be a serious problem. *442 As he puts it, the presence of financial incentives may "crowd out" moral or civic norms.³⁹

Samuel Bowles is similarly concerned that market values will crowd out moral values. He argues that economists and policy-makers are wrong to think that people are entirely self-interested and amoral. Rather, he argues, there is a substantial body of psychological studies that show that while people care about acting ethically, when given financial incentives to act ethically, those financial incentives crowd out the intrinsic moral norms people already have.⁴⁰ Here,

MORAL MARKET DESIGN, 28-SPG Kan. J.L. & Pub. Pol'y 426

crowding out can mean either replacing the intrinsic ethical motivation many of us have, or it could mean that our moral decision-making would be adversely affected.⁴¹ Among other possible explanations,⁴² Bowles describes “moral disengagement,” a phenomenon in which “moral reasons become less salient,” in particular, when financial incentives are present.⁴³

Even if Bowles and Sandel are right that encouraging ethical behavior through financial incentives is problematic, the way the proposal is restricted avoids these concerns. It may very well be problematic to pay people to behave as they might otherwise out of goodwill, or as they know they ought to. But if the concern is that incentives crowd out morals, the morals have to be there in the first place. On the moral market, buyers pay seller to cease or engage in behavior toward which the seller is morally indifferent. One cannot then say that paying an omnivore to be vegetarian crowds out what otherwise would have been moral motives to become vegetarian, because no such motives exist. Thus, while the crowding out objection may provide a good reason not to pay people to do what they know they ought to do, it does not provide a good reason not to pay people to do what they are morally indifferent toward.

***443 C. Moral Extortion**

One might be concerned that the moral market creates an opportunity for *moral extortion*. Imagine that an omnivore wants to get higher than market price for their entitlement to eat meat. So, they artificially inflate its value by threatening to buy hundreds of pounds of meat and throw it away unless someone pays them a great deal not to. Or, imagine that the non-recycler threatens to rent out the local Hertz' fleet and let the cars idle in the parking lot. Or, the non-theist threatens, not only to fail to pray to God, but to pray to the devil. The concern is that by commodifying the entitlement to engage in behavior others believe is morally impermissible, the moral market allows the opportunist to engage in moral extortion. The opportunist preys on the anxiety that their legally permitted behavior will cause others to feel.

One might think that if each individual owns the right to engage in legal behavior that others find immoral, one can do anything one wants with the entitlement: after all, the foregoing argued that readers should think about it as something they can sell. If this were the case, it would be a powerful objection, though not necessarily decisive, against the moral market. Fortunately, there is reason to think that this kind of behavior is, or could be, illegal.

It could be, but is unlikely, that moral extortion is extortion as it is legally understood under federal⁴⁴ or state law.⁴⁵ Under the Hobbes Act, extortion is the “consensual obtaining of property from another induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”⁴⁶ It is often invoked to prosecute public officials for corruption. There is reason to think that moral extortion might not quite fall under the legal meaning of extortion as it is currently understood: the courts would have to interpret “fear” very broadly. Nevertheless, scholars have offered different arguments about how this kind of behavior may yet be illegal. Broadly, there is wide agreement on the following: a person's reasons for using their property in a particular way can affect whether they are legally allowed to do so.⁴⁷ As Stephen Sachs puts it, “the law may legitimately *444 hold that it is unlawful to threaten maliciously what would, under other circumstances, be entirely lawful to do.”⁴⁸

Sachs argues for the creation of a new kind of extortion: extortionate destruction. He describes the odd case of Toby the Bunny: in 2005, someone made a website with photos of his rabbit and threatened to kill and eat him unless people sent him \$50,000.⁴⁹ While this might appear extortionate, extortion statutes protect people from threats against their property. And, while it's possible that the court could construe the dislike that people have of others killing rabbits as “fear,” this would, according to Sachs, be overbroad.⁵⁰ Indeed, even if we ought to take seriously the welfare costs of

MORAL MARKET DESIGN, 28-SPG Kan. J.L. & Pub. Pol'y 426

Bethany's immoral actions on Adam,⁵¹ it is not the case that any time someone does something others dislike, even for moral reasons, that behavior is or should be illegal. However, when done specifically to cause harm, or to get money, what would otherwise be legal activity, can be illegal.

Moral externality is not altogether a new concept. Daniel Kelly discusses what he calls “strategic spillovers,” which are negative externalities intentionally generated by a party’s “use of property to extract payments from victims in exchange for desisting.”⁵² He describes how opportunistic parties generate strategic spillovers in many areas of law: environmental law, intellectual property law, corporate law, legislation and regulation, and litigation and settlement. He does not offer one solution to this problem but indicates that the most promising might be the abuse of right doctrine.⁵³

*445 According to the abuse of right doctrine, while in general people have freedom to use their property as they see fit, when owners use their property precisely to cause harm, either as a means to extract payment or simply for spite, this constitutes an abuse of the right of ownership, and in so doing the owner exceeds her jurisdiction. As Larissa Katz puts it, “owners lack the jurisdiction to exercise their authority just for the reason that it will cause harm to another.”⁵⁴

In some cases, the courts have found strategic spillovers to be illegal, if not extortionate. So-called “spite fences” are just one illustration of this. Generally speaking, people can build fences on their property even if their neighbors find them ugly, or block their views, or their sunshine. However, when built for the purpose either to spite the neighbor, or to extract payment, building them can be illegal.⁵⁵ Katz argues that the court’s willingness to find these practices illegal is both explained and justified by the abuse of right doctrine. Even if the abuse of right doctrine is not explicit in the common law, Katz and others have argued that the doctrine nevertheless permeates American law.⁵⁶

Even though the prospect of moral extortion is daunting, there is reason to be hopeful that this isn’t too great a problem for the moral market. First, in many cases it may be illegal, as are spite fences and blackmail. Second, even if not illegal now, many have argued that similar cases not currently illegal, ought to be. Were trades on the moral market to flourish, there would be increased pressure on courts and legislatures to protect against moral extortion. Third, problems with the moral market are not decisive against it. Kelly describes the existence of strategic spillovers in many areas of the law, and yet the solution to the problem is not to eliminate all the very many kinds of interactions that bring it about.

D. Unconscionability

The proposal excludes both paying someone to engage in and desist from illegal activity. The proposal has assumed that contracts on the moral market would be legally binding and enforceable. However, some contracts, though legally valid, will not be enforced in courts of equity if they are unconscionable.⁵⁷ While not precisely *446 defined, a contract is said to be unconscionable if “it was ‘such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other’”⁵⁸ The courts employ a two-pronged test to determine whether a contract provision is unconscionable--it tests for both procedural and substantive unconscionability.⁵⁹ The former tests for unfairness in the way the contract came about; the latter tests for unfairness in the exchange itself. Unconscionability has been invoked in instances of vastly unequal bargaining power,⁶⁰ where all of the parties offering the service include the same clause,⁶¹ and where it provides for under-compensation in the case of a breach.⁶² It has also been invoked where one of the contracting parties doesn’t know what they’re doing.⁶³ In general, unconscionable contracts are those that are grossly unfair.⁶⁴

MORAL MARKET DESIGN, 28-SPG Kan. J.L. & Pub. Pol'y 426

Some trades on the moral market might be susceptible to conscionability worries, but the likelihood is low, both because the standard for unconscionability is high, and because the market is limited to those trades in which the seller believes they are being paid to do something toward which they are morally indifferent. Where the contract is abhorrent to the court, for unconscionability reasons it may refuse to enforce the terms. Given the constraints enumerated, there is reason to think that these cases will be rare.

*447 In addition, the unconscionability doctrine may be a tool for regulating the unsavory borders of the moral market. Some argue that the doctrine reflects society's unwillingness to endorse socially destructive agreements, especially when those agreements may undermine equality.⁶⁵ Debra Satz makes a related point, arguing that the threat to equality is one indication of an “obnoxious market.”⁶⁶ And, it is well-documented both that the courts are increasingly willing to refuse to enforce contracts as unconscionable, and that more litigants are bringing claims.⁶⁷ Parties are less likely to form contracts they doubt courts will enforce.

E. The Wealth Effect

The market allocates resources more efficiently than their initial allocation. When Adam values Bethany's entitlement to eat meat more than she does, a trade leads to greater efficiency (absent market failure). And, intensity of preference determines the allocation of goods: the person deriving the most from a good will end up with it, at least in theory. But one might worry that, as Saul Levmore puts it, “wealth effects might dominate preference intensities.”⁶⁸ Call this the wealth effect.⁶⁹

Of course, the wealth effect is not limited to the moral market. It is problematic, also, in the market for concert tickets, health care, and *448 diamond jewelry. Is it then, especially problematic in a way that constitutes an objection to the proposal? The proposal is already limited to cases where the buyer pays the seller to cease behavior toward which the seller is morally indifferent. Thus, one need not worry that the wealth effect would induce a poor seller to do something they believe they ought not. Perhaps, then, the worry is that the wealth effect will crowd out poor buyers. This unfairness is neither unique to the moral market, nor a good objection to it. After all, poor buyers are crowded out from many markets.

Perhaps the worry is that the buyers will be comparably wealthy, and that the wealthy on average have impoverished moral beliefs. It is unclear why we should think this is the case. Any explanation that makes reference to the wealthy's poor behavior might be better explained by enhanced opportunity to act akratically.

The best objection invoking the wealth effect is that the wealthy would have comparably greater control of the moral landscape, which is inegalitarian even if they are no less likely to have the correct moral views.⁷⁰ Note that this seems to be what happens already.⁷¹ And, while many charitable donations go toward aid; such as food, medicine, disaster relief, and the like, this is not the case for all charities. Consider any charitable organization that, in part or in whole, is devoted to changing people's minds. If the wealth effect is problematic for the moral market, it seems similarly problematic for at least some kinds of tax-deductible charitable giving.

However, the proposal for a moral market is not a proposal for an unregulated market. The market ought to be limited--to exclude, for example, paying people to do things they believe they ought not, and to exclude those cases likely to involve coercion. As Saul Levmore writes, “... there are ways of limiting wealth effects, and clever ideas for limited markets may soon begin to surface.”⁷²

As discussed in Section II.D, quadratic voting could work as a check on the influence of the wealthy, while at the same time allowing people to register the intensity of their preferences. As will be discussed in Section IV.B, market design may prevent some of the wealth effect: markets for kidneys, for example, operate without money, and we are all equally endowed with kidneys. As Tsilly Dagan ^{*449} and Talia Fisher emphasize, imposing different kinds of inalienability mechanisms can promote efficiency while blunting the effects of inequality. They suggest a modified inalienability rule, for example, unrestricted barter for school vouchers. ⁷³ Further methods of regulation include progressive taxation on trades on the moral market or transfer payments.

F. Transaction Costs

There is reason to wonder whether this proposal is feasible, given transaction costs. Finding willing participants and drawing up and enforcing contracts might make these trades too expensive. If a buyer pays a meat-eater to stop eating meat, how will they know whether the seller honored the contract? Call this the enforcement problem. That this problem exists, however, is not decisive against the moral market. That some trades will be too costly does not undermine the proposal altogether. Transaction costs make lots of trades that would otherwise be wise, unwise.

For some trades the enforcement problem would be small. Imagine a trade where the buyer pays the seller to go to church. Enforcement would be a matter of taking attendance or checking in on one's phone using GPS tracking. Generally speaking, then, trades on the moral market ought to be limited to those cases in which the transaction costs are not prohibitive. I discuss ways to decrease transaction costs in Section IV.A.

IV. TWO SIMILAR PROPOSALS

If the moral market is a good idea, one would have to come up with a plan. The author is inclined to punt to entrepreneurs, choice architects, and the like. ⁷⁴ However, the author anticipates that many will dislike the proposal, perhaps not only because of objections to specific parts of the argument, but rather because of a general dislike toward the nature of the proposal: paying people to behave how they ought to. The remainder of the article, then, will consist of two, similar ^{*450} proposals, in the same spirit, but which may be more palatable for those put off by the idea of selling entitlements.

A. Pay to Pray

Instead of paying people to cease immoral behavior, one might instead pay people to do the thing that would convince them to cease immoral behavior. For example, the vegetarian, instead of paying the omnivore to give up meat, could pay the omnivore to read *Animal Liberation*, ⁷⁵ or watch a documentary about animal agriculture, in the belief and hope that some people would thereby become convinced to become vegetarian. Note that this tactic is employed by VegFund, which provides money to animal rights groups to pay people to watch videos of the workings of animal agriculture. ⁷⁶ Mercy for Animals and Compassion for Animals also employs this tactic. ⁷⁷ Arguably, this is part of the motivation for Birthright Israel, an organization that takes young Jews on a free trip to Israel to "... motivate young people to continue to explore their Jewish identity and support for Israel" ⁷⁸

This method would be a valuable tool especially in cases where it may be impossible to pay someone to do what we believe is morally obligatory. For example, some believe that it is morally obligatory to convert to Christianity. However, these same people might believe that conversion requires belief that Christ is the lord and savior, and that, because belief

MORAL MARKET DESIGN, 28-SPG Kan. J.L. & Pub. Pol'y 426

is involuntary, you can't simply pay people to be Christian. But, one could pay someone else to do the things that would maximize that person's chance of acquiring the necessary beliefs and then converting: like attending church services, or reading the Bible.

If someone who hands out religious literature thinks that someone's reading it will increase their chance of converting, then increasing the percent of people who read it presumably would increase the number of converts. Note that outside the author's office, from time to time a member of a local church hands out granola bars wrapped in Bible verses and the time and location of church services. Each time a student takes a granola bar, they are being paid with a *451 snack to have to at least glance at a Bible verse and information about the church service. This church member must believe that people will be more inclined to read the note if it is wrapped in a granola bar. On the same quad, a student group offers an electronic coupon for a free coffee to any student who sends, as a text message to the group, a "question you have for God." The student thereby joins the mailing list, and, perhaps, gets an answer to their question, presumably from a student in the group. Here, the group is paying students with drinks to be exposed to their emails in the hope that some students will become interested, join, and, perhaps, convert.

The weakness of this alternative proposal is that it does not guarantee compliance. On the moral market, compliance is contractual. However, this proposal does have several benefits. First, it is a good alternative when it is not possible to pay someone to engage in the desired behavior, itself, as in the religion case above. Second, it more closely resembles the deliberative process some might feel should uniquely determine the means by which we make moral decisions.⁷⁹

Not only this, but the buyer might have reason to believe the change will be longer-lasting. If the buyer pays someone to become a vegetarian for a week, the seller has no reason to continue after the contract expires. However, if the seller is paid to read arguments in favor of vegetarianism, there is a greater likelihood that some percent of sellers will become vegetarians for longer than they would have otherwise.

Third, the transactions costs would likely be lower. Imagine the difference between tracking compliance on whether someone remains a vegetarian for a week, on one hand, and whether they have read a book or watched a film, on the other. On a website, it would be easy to provide an article or film about vegetarianism, or the environment, or Christianity, and then administer a quiz to test understanding. Certainly, Silicon Valley could create such a platform. Or, one could use existing infrastructure and methodology. Human Resources and IT offices routinely provide training through videos about various company policies: harassment, FERPA compliance, copyright, etc. *452 Amazon Mechanical Turk, for example, is routinely used to find and pay people willing to participate in all sorts of tasks.

For a forum in which to present the information, Reddit's "Change My View" might provide a model.⁸⁰ On this website, someone poses a question, and then various commentators give arguments for or against. People then indicate if they change their minds. It has roughly half a million subscribers.⁸¹ This shows that some people are willing, for free, to be convinced that they are mistaken.

Pay to Pray more closely resembles the way we normally try to convince people to change their views. It is difficult, however, to get people to listen; the attention of the public is a valuable commodity after all. By compensating people for their time, they would theoretically be more willing to engage in a deliberative practice similar to the one that the buyer engaged in initially.

B. Market Design

MORAL MARKET DESIGN, 28-SPG Kan. J.L. & Pub. Pol'y 426

For those opposed to paying others to engage in or desist from behavior, for moral reasons, alternative market design might yield an answer. Economists have written extensively on repugnance and the way that it constrains markets. Repugnance is meant to reflect, as Julio Jorge Elias calls it, the “yuck factor” and is distinct from a belief that the good or service traded would cause harm, as it might with some drugs or guns.⁸² Alan Roth offers repugnance as the explanation for California's ban on horse meat, for example.⁸³ Thus, an argument that a market in some good would make people better off is not sufficient to overcome the repugnancy objection. In some cases, the transactions are repugnant precisely because of the introduction of money. Roth writes, although transactions can be repugnant for different reasons, “[o]ne often-noted regularity is that some transactions that are not repugnant as gifts and in-kind exchanges become repugnant when money is added.”⁸⁴ Sometimes, then, the repugnance can be overcome *453 through strategic market design; for example, by replacing financial transactions with in-kind payments.⁸⁵ This happened in the market for kidneys.

Thousands of Americans die every year while waiting for kidneys.⁸⁶ While under some conditions people can donate organs, their sale is prohibited in the United States.⁸⁷ Were there a legal market for kidneys, fewer people would die for want of a transplant. The lack of a (legal) market is problematic not only for people who have no willing donors, but also for those in need of an organ with willing, but medically incompatible donors. Economists designed a market without money to solve the problem of willing but incompatible donors, without changing the law.

Kidney exchanges allow a workaround to the repugnancy problem. In one kind of exchange, a paired donation, Patients A and B each have willing but medically incompatible donors. Through a database, doctors determine that A's donor is compatible with B, and B's donor with A, and carry out the surgeries accordingly. Thus, it is as if A's donor has given to A, when in fact their kidney went to B. This solves two problems: first, it allows people who otherwise could not to donate organs to their family members; second, it does so without using money.⁸⁸ In another kind of exchange, a non-directed donor gives a kidney and the reciprocity comes at a future, uncertain time from an uncertain source--when a compatible kidney becomes available, their friend or relative is entitled to it.⁸⁹ The chain could involve a large number of donations. Alvin Roth explains it this way: “... exchanges could be a cycle of incompatible patient-donor pairs of any size such that the donor in the first pair donated a kidney to the *454 patient in the second, the second pair donated to third, and so on until the cycle closed, with the last pair donating to the first.”⁹⁰

Kidney exchange might provide a model for getting around repugnancy worries about the moral market. Rather than buying and selling entitlements, people could trade them--through either paired or chain “donations.” If the vegetarian cannot buy the omnivore's entitlement to eat meat, they could instead trade either through a paired donation, if the two parties are compatible, or through a chain donation, if they are not. There might be something that the vegetarian does that the omnivore believes is morally impermissible and toward which the omnivore is morally indifferent.⁹¹

This is all meant just by way of example, and not as advocacy for a particular kind of market design. Trades are a kind of payment, of course, but they get around some repugnancy problems and might be a good response to an objection that one might have thought inherent to the moral market.⁹²

CONCLUSION

This article presents what some may consider a radical proposal: that people ought to pay others to do what they themselves believe others ought to do. In some ways, though, the view is not all that radical--people pay others to do what they want them to do all the time. Properly limited, and regulated, the moral market would allow parties to trade in a way that makes them better off, and, according to at least one party, things would be morally better. In addition, one

has reason to believe the market would contribute to actual moral progress. The intuition that moral decision-making ought not be commodified is, in this author's view, the right one. However, the kinds of trades permitted by the proposal cannot properly be described as paying someone to give up their moral autonomy. Paying someone to do something they are morally indifferent toward is as common a feature of the market as the sale of bread.

*455 As said at the outset, the proposal is highly speculative. The purpose of this article is to draw attention to the inefficiency of one kind of entitlement and to suggest a framework for addressing it. That this proposal is imperfect, or that the moral market would have problems, is not definitive against it.

Footnotes

^{a1} Ph.D. Candidate 2019, Department of Philosophy, The University of Texas at Austin; J.D. Candidate 2022, New York University School of Law. For helpful conversations and suggestions, the author would like to thank Sosseh Assaturian, David Christie, Bryce Dalbey, John Deigh, Josh Dever, Matt Evans, Jeremy Evans, David Fort, Colton Heward-Mills, Andrew Ingram, Cory Juhl, Amelia Kahn, Richard Langlois, Daniel Rauch, Zayn Siddique, Nicole Smith, and William Wagner. For their generosity in reviewing drafts of this article, the author would like to thank Ahson Azmat, Sinan Dogramaci, Nancy Fox, Elliot Goodine, Simone Gubler, Ron Krauss, Simon Fox Krauss, Donald Regan, Jason Schukraft, Scott Simmons, Galen Strawson, and Paul Woodruff. The author would like to thank audiences at UT-Austin, Bowling Green State University, the Association for the Study of Law, Culture and Humanities Conference, and the Michigan Law School Junior Scholars Conference. The author would like to thank Paula Bustamante and, for astute comments and suggestions, Lauren Johannes and the Article Editor team at the *Kansas Journal of Law and Public Policy*. Also, the author would like to thank Elizabeth Grossman for her encouragement.

¹ See Nathan Ballantyne, *Epistemic Trespassing*, MIND (forthcoming 2018).

² See generally David Enoch, *How is Moral Disagreement a Problem for Realism?*, 13 J. ETHICS 15 (2009) (arguing that moral disagreement does not pose a problem for moral realism); Robert Audi, *Intuition, Inference, and Rational Disagreement in Ethics*, 11 ETHICAL THEORY & MORAL PRAC. 475 (2008) (arguing that intuitionism can allow for rational disagreement); Adam Elga, *Reflection and Disagreement*, 41 NOÛS 478 (2007) (arguing for a broadly conciliationist view); Sarah McGrath, *Moral Disagreement and Moral Expertise*, 4 OXFORD STUD. METAETHICS 87 (2008); Katia Vavova, *Moral Disagreement and Moral Skepticism*, 28 PHIL. PERSP. 302 (2014) (discussing the extent to which moral disagreement gives cause for skepticism); Miriam Schoenfield, *Permission to Believe: Why Permissivism Is True and What It Tells Us About Irrelevant Influences on Belief*, 48 NOÛS 193 (2014) (defending a permissive view of epistemic rationality and discussing its connections to disagreement); Richard Feldman, *Reasonable Religious Disagreements*, in PHILOSOPHERS WITHOUT GODS: MEDITATIONS ON ATHEISM AND THE SECULAR 194 (2007) (arguing for a moderate skepticism in light of religious disagreement).

³ One notable exception is Toby Ord, *Moral Trade*, 126 ETHICS 118 (2016) (arguing that differences in two parties' moral views allows for trades that constitute moral and prudential improvements over the status quo).

⁴ Granted, it's a bit more complicated than this. On the most plausible consequentialist views, it's not the *eating* of meat that is morally impermissible--it's killing (and/or causing suffering) that's wrong. I'd like to put this aside and let "eating meat" stand in for whatever it is that ethical vegetarians of any stripe think that omnivores do wrong.

⁵ An action is akratic just in case the party who takes the action believes they ought not.

⁶ With some exceptions. See, e.g., CD. Meyers, *Why it is Morally Good to Eat (Certain Kinds of) Meat*, 29 S.W. PHIL. REV. 119 (2013); Donald Bruckner, *Strict Vegetarianism is Immoral*, in THE MORAL COMPLEXITIES OF EATING MEAT 30 (Ben Bramble & Bob Fischer ed. 2015) (arguing that under certain conditions vegetarianism is immoral).

MORAL MARKET DESIGN, 28-SPG Kan. J.L. & Pub. Pol'y 426

- 7 If the reader finds this is implausible, consider the many boring, painful, risky things people do for money, and that being vegetarian is far easier than many (if not most) of them.
- 8 If the reader finds *this* is implausible, consider: 1) that the price some people would be willing to accept to become vegetarian might be quite low; 2) that (some) people who donate to People for the Ethical Treatment of Animals, for example, do so for this very reason; and 3) that committed vegetarians spend money on far less worthwhile things: in 2016 the average American spent \$388 on shoes. U.S. BUREAU OF LABOR STATISTICS, CONSUMER EXPENDITURE SURVEY (2016).
- 9 See Ian Ayres & Jack M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703, 704 (1996).
- 10 See Tsilly Dagan & Talia Fisher, *Rights for Sale*, 96 MINN. L. REV. 90, 106-124 (2011); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 933 (1985) (discussing helpful taxonomies of alienability).
- 11 See Dagan & Fisher, *supra* note 10, at 96.
- 12 For a discussion of the presumption of free trade, see, e.g., Rose-Ackerman, *supra* note 10, at 932; see generally Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994) (arguing that the government should respect individual autonomy in valuation); Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111, 119 (2000) (noting the common justification that voluntary trades increase utility). For discussion of government *regulation* of trade in response to market failure, see, e.g., Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 134 (1994). For discussion of government *prohibition* of trade in response to market failure, see, e.g., Rose-Ackerman, *supra* note 10, at 933.
- 13 For a recent, robust defense of the market, see generally NATHAN B. OMAN, THE DIGNITY OF COMMERCE (2016) (arguing that well-functioning markets are essential to liberal society).
- 14 For a discussion of sacrifices of comparable moral importance, see Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 231 (1972) (arguing that we ought to help others unless doing so would require us to sacrifice something of moral importance comparable to the good we would do by such a sacrifice).
- 15 Others have used *morally neutral* in a similar way. See, e.g., Hallie Rose Liberto, *Denying the Suberogatory*, 40 PHILOSOPHIA 395, 396 (2012); Michael Pace, *The Epistemic Value of Moral Considerations: Justification, Moral Encroachment, and James' 'Will to Believe'*, 45 NOÛS 239, 266 (2011); Thomas Nadelhoffer, *The Butler Problem Revisited*, 64 ANALYSIS 277, 277 (2004); John Broome & Adam Morton, *The Value of a Person*, 68 PROCEEDINGS ARISTOTELIAN SOC'Y SUPP. VOLUMES 167, 179 (1994); Julia Driver, *The Suberogatory*, 70 AUSTRALASIAN J. PHIL. 286, 294 (1992). Dale Dorsey discusses the closely related concept, *amorality*; see generally Dale Dorsey, *Amorality*, 19 ETHICAL THEORY & MORAL PRAC. 329, (2016) (arguing that, in addition to obligatory, permissible, impermissible, supererogatory, and suberogatory actions, there are also *amoral* actions, which lack moral status).
- 16 On the supererogatory, see J.O. Urmson, *Saints and Heroes*, in ESSAYS IN MORAL PHILOSOPHY 198 (1958) (arguing for the classification of some action as supererogatory, although, without using that name); Joe Horton, *The All or Nothing Problem*, 114 J. PHIL. 94, (2017) (describing and offering a solution to a dilemma that arises for supererogation). On the suberogatory, see Justin A. Capes, *Blameworthiness Without Wrongdoing*, 93 PAC. PHIL. Q. 417, (2012) (arguing that moral permissible does not entail lack of blameworthiness); Driver, *supra* note 15, (calling attention to this class of action). On morally permissible moral mistakes, see Elizabeth Harman, *Morally Permissible Moral Mistakes*, 126 ETHICS 366, (2016) (arguing for a new classification of actions, *morally permissible moral mistakes*, that we ought not do, for moral reasons, but doing them is not morally wrong).
- 17 See Driver, *supra* note 15, at 291.
- 18 See SAMUEL BOWLES, THE MORAL ECONOMY: WHY GOOD INCENTIVES ARE NO SUBSTITUTE FOR GOOD CITIZENS (2016) (arguing that we ought not incentivize with money, conduct people know they morally ought to do).

MORAL MARKET DESIGN, 28-SPG Kan. J.L. & Pub. Pol'y 426

- 19 This is not to say, however, that private citizens have no reason to try to get others to obey the law, and it's not to say that paying people to obey the law is a bad idea. But I don't endorse this idea, and the moral market, as I propose it, cannot handle these kinds of cases.
- 20 Here again, this is not to say that private citizens never have a reason to try to get others to break the law, and it's not to say that paying people to break the law is always a bad idea. In some exceptional circumstances, perhaps in an unjust society or under an oppressive regime, it may be warranted. But, I don't here endorse this idea, and it is not part of the proposal for the moral market.
- 21 See Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the court*, 96 YALE L.J. 82 (1986) (applying concepts of aggregation to judicial decision-making); see also Christian List, *The Theory of Judgment Aggregation: An Introductory Review*, 187 SYNTHÈSE 179 (2012) (providing an introduction to the philosophy of judgment aggregation); Christian List & Ben Polak, *Introduction to Judgment Aggregation*, 145 J. ECON. THEORY 441 (2010) (providing a technical introduction to judgment aggregation).
- 22 See, e.g., 21 C.F.R. § 136.110 (2005).
- 23 See Eric A. Posner & E. Glen Weyl, *Quadratic Voting and the Public Good: Introduction*, 172 PUB. CHOICE 1, 17 (2017); Eric A. Posner & E. Glen Weyl, *Voting Squared: Quadratic Voting in Democratic Politics*, 68 VAND. L. REV. 441, 470 (2015).
- 24 One might expand their thought about the welfare loss people suffer because of the (knowledge of the) pain and suffering of others to include, not only the pain and suffering of others, but knowledge of immoral activity, generally speaking.
- 25 Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis* (Coase-Sandor Inst. For L. and Econ. 3, Working Paper No. 802 (2017)). They note, however, some reasons to be wary of willingness-to-pay analyses. See *id.* at 9.
- 26 See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 828 (2005).
- 27 See Stephen E. Sachs, *Saving Toby: Extortion, Blackmail, and the Right to Destroy*, 24 YALE POL'Y REV. 251, 251 (2006).
- 28 See, e.g., Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 215 (1972) ("To regard himself as autonomous ... a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action. He must apply to these tasks his own canons of rationality, and must recognize the needs to defend his beliefs and decisions in accordance with these canons."); Arthur Kuflik, *The Inalienability of Autonomy*, 13 PHIL. & PUB. AFF. 271(1984) (discussing the alienability of moral autonomy); Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y 179 (1986) (discussing alienable rights and contracts).
- 29 See ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 141-167 (1993).
- 30 MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 120 (2012).
- 31 See *id.* at 77.
- 32 See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (arguing that thinking about human flourishing can provide insight into the limits of the market).
- 33 MARGARET JANE RADIN, CONTESTED COMMODITIES 193 (1996).
- 34 SANDEL, *supra* note 30, at 110-11.
- 35 DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKET 95 (2010).
- 36 *Id.* at 93-95.

MORAL MARKET DESIGN, 28-SPG Kan. J.L. & Pub. Pol'y 426

- 37 See generally TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* (1983) (giving a now famous rights-based defense for animals).
- 38 See generally IMMANUEL KANT, *THE GROUNDWORK OF THE METAPHYSICS OF MORALS* (1785) (a Kantian might argue that paying someone to do what one believes is morally required is to treat them as a mere means).
- 39 See SANDEL, *supra* note 30, at 16; Michael Sandel, *How Markets Crowd Out Morals*, BOSTON REV. (2012), http://bostonreview.net/archives/BR37.3/ndf_michael_j_sandel_markets_morals.php [<https://penna.ccAJCQ9-NVHA>].
- 40 BOWLES, *supra* note 18, at 41.
- 41 *Id.* at 21.
- 42 Bowles also mentions dual process theory as an explanation. He says that the presence of incentives stimulates deliberation, which, some scholars think, is bad for moral reasoning.
- 43 BOWLES, *supra* note 18, at 96; see generally Albert Bandura, *Social Cognitive Theory of Moral Thought and Action*, in HANDBOOK OF MORAL BEHAVIOR AND DEVELOPMENT: THEORY 45 (William M. Kurtines & Jacob L. Gewirtz ed. 1991) (explaining the phenomenon of moral disengagement).
- 44 Hobbs Act, 18 U.S.C. § 1951 (2000).
- 45 MODEL PENAL CODE § 223.4 (AM. LAW INST. 1962).
- 46 Hobbs Act, 18 U.S.C. § 1951 (2000).
- 47 See Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1649 n.22 (2011); Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444, 1448 (2013); Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37, 37 (1995); Sachs, *supra* note 27, at 260.
- 48 Sachs, *supra* note 27, at 260 (adding that this is what happens in the case of blackmail).
- 49 *Id.* at 251.
- 50 *Id.* at 251-52 (“Current extortion statutes, however, generally do not prohibit the threatened destruction of one’s own property, even if they prohibit endangering property owned by someone else. The law thus provides insufficient protection to a variety of resources on which others might place value, including historical buildings, treasured paintings, and adorable bunny rabbits.”).
- 51 See Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-benefit Analysis* (Coase-Sandor Inst, for Law and Econ. 3, Working Paper No. 802, 2017).
- 52 Kelly, *supra* note 47, at 1667.
- 53 *Id.*; see also *id.* at 1710 (noting that “Unlike the United States, many civil law countries attempt to address explicitly the type of opportunism inherent in strategic spillovers.” And continuing, “Under the abuse of right doctrine, a court may prohibit an individual from engaging in what would otherwise be a valid exercise of a legal right if the person is exercising the right for an illegitimate reason.”).
- 54 Katz, *supra* note 47, at 1468.
- 55 See Kelly, *supra* note 47, at 1667-68; Sachs, *supra* note 27, at 259-60.
- 56 See Perillo, *supra* note 47, at 38.
- 57 See Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine and Accommodation*, 29 PHIL. & PUB. AFF. 205, 207 (2000) (defending the doctrine against a charge that it is overly paternalist); see also Aditi Bagchi, *Distributive Justice*

MORAL MARKET DESIGN, 28-SPG Kan. J.L. & Pub. Pol'y 426

and Contract, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 193, 193 (2014) (“[Principles of distributive justice] are among the moral considerations that appropriately inform rules of validity, interpretation, and remedy.” He continues, “[c]ontracts that take place against a backdrop of distributive *injustice* may be subject to further ... constraints.”).

- 58 RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b (AM. LAW INST. 1981) (citing  *Hume v. United States*, 132 U.S. 406 (1889)).
- 59 See Colleen McCullough, *Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779, 781 (2015) (providing an excellent overview of the topic).
- 60 U.C.C. § 2-302 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 1951) (“The principle is one of the prevention of oppression and unfair surprise”).
- 61 WILLISTON ON CONTRACTS, § 18:13 (4th ed. 2017).
- 62 See, e.g., Charles Fried, *The Ambitions of Contract as Promise*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 17, 27 (2014) (citing U.C.C. § 2-718 cmt. 1. (AM. LAW INST. & UNIF. LAW COMM'N 1951)).
- 63 WILLISTON ON CONTRACTS, § 18:8 (4th ed. 2017); see, e.g., Radin, *supra* note 32, at 228.
- 64 See Nicolas Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. PA. L. REV. 1131, 1146 (2015); Shiffrin, *supra* note 57, at 209.
- 65 See, e.g., Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105, 109 (2008); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 752 (2007).
- 66 DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE 95, at 95 (2010) (explaining that “[t]he operation of these markets can undermine the social framework needed for people to interact *as equals*, as individuals with equal standing”); see also, Jonathan Quong, *Cultural Exemptions, Expensive Tastes, and Equal Opportunities*, 23 J. APPLIED PHIL. 57, 57 (2006) (“I believe that principles of justice should have a fundamentally different purpose, which is to create a system of regulation for political society that enables all persons to live as free and equal citizens.”).
- 67 See McCullough, *supra* note 59, at 786-87 and accompanying text.
- 68 Levmore, *supra* note 12, at 160.
- 69 See Dagan & Fisher, *supra* note 10, at 98-99; Levmore, *supra* note 12, at 118 (“Where wealth differentials are present, A might buy B's vote (if legally permitted to do so) even though B is an equal or higher valuing user of that vote. And wealthy people like A might systematically favor different political outcomes than would people with endowments more like B's, so that there is at least an argument for barring trades despite the fact that the buyer and seller are made better off than before. This argument applies to some but not most other inalienable commodities.”); Sunstein, *supra* note 12, at 849.
- 70 See Anna Stilz, *Is the Free Market Fair?*, 26 CRITICAL REV. 423, 432 (2014).
- 71 See generally, JANE MAYER, DARK MONEY (2016) (describing the machinery of lobbying by America's wealthiest residents).
- 72 Levmore, *supra* note 12, at 160.
- 73 Dagan & Fisher, *supra* note 10, at 114--16.
- 74 See generally RICHARD THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008) (arguing that because people behave in predictably irrational ways, those with power can change defaults and make better choices easier to make).

MORAL MARKET DESIGN, 28-SPG Kan. J.L. & Pub. Pol'y 426

- 75 Peter Singer's *Animal Liberation*, originally published in 1975, makes the argument for why humanity should not use animals for food. *See generally* PETER SINGER, *ANIMAL LIBERATION* (4th ed. 2009).
- 76 VEGFUND, <https://vegfund.org/category/grant-programs/paid-per-view-ppv/>
- 77 Nathan Runkle, *Farm to Fridge Inspires Students to Boycott Factory Farm Cruelty*, *MERCY FOR ANIMALS* (Apr. 8, 2011), [<https://perma.cc/J7RZ-3WCC>].
- 78 *Our Story*, BIRTHRIGHT ISRAEL, https://www.birthrightisrael.com/about_us_inner/52?scroll=art_1 [<https://perma.cc/6MGE-USUK>].
- 79 *But see generally* JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012) (arguing that there is reason to doubt that our moral beliefs are formed exclusively through deliberative processes).
- 80 *See generally* REDDIT, <https://www.reddit.com/r/changemyview/> [<https://perma.cc/J45S-43RP>].
- 81 REDDIT, <http://redditmetrics.com/r/changemyview> [<https://perma.cc/7T4F-3VBL>].
- 82 Julio Jorge Elias, *The Role of Repugnance in the Development of Markets: The Case of the Market for Transplantable Kidneys*, in *SOCIAL ECONOMICS: CURRENT EMERGING AVENUES* 233, (Joan Costa-Font & Mario Macis, ed. 2017) at 234.
- 83 Alvin E. Roth, *Repugnance as a Constraint on Markets*, 21 *J. ECON. PERSP.* 37, (2007) at 37-38.
- 84 *Id.* at 44.
- 85 *Id.* at 52 (noting that while an article suggesting modest payments for organ donation received a negative reaction, his proposal for kidney exchange did not).
- 86 *The Kidney Project*, UCSF, <https://pharm.ucsf.edu/kidney/need/statistics> [<https://perma.cc/HT8U-28KX>]. In 2014, over 100,000 patients were on the transplant waitlist, and only roughly 17,000 donor kidneys were available.
- 87 National Organ Transplant Act, 98 Stat. 2339 (1984). Using Rose-Ackerman's terminology, organs are controlled with a *modified* inalienability rule because they can be given, but not sold. In contrast, votes are controlled with a *pure* inalienability rule, because one can neither sell nor give away their vote (at least in elections for government positions).
- 88 *See* Roth, *Repugnance as a Constraint on Markets*, *supra* note 85, at 45-52.
- 89 *See, e.g.*, E.S. Woodle, et al., *Ethical Considerations for Participation of Nondirected Living Donors in Kidney Exchange Programs*, 10 *AM. J. TRANSPLANTATION* 1460, 1461 (2010).
- 90 Roth, *Repugnance as a Constraint on Markets*, *supra* note 85, at 86.
- 91 Stephen Choi, et al., *Altruism Exchanges and the Kidney Shortage*, 77 *L. & CONTEMP. PROBS.* 290, 292 (2014) (making a similar proposal to alleviate the kidney shortage by proposing trading kidneys for non-kidney altruistic donations).
- 92 *See, e.g.*, Richard L. Hasen, *Vote Buying*, 88 *CAL. REV.* 1323, 1339 (2000) (describing the feature of Congressional logrolling).

28-SPG KSJLPP 426