

## Bodies and Markets: Ethical Arguments and Choices

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1. In my 35 years as a law professor, I have been primarily interested in the legal institutions of property and contract. I have been especially interested in the limits of these institutions. What makes a contract unenforceable? What kinds of things are not allowed to become property? These questions led me to investigate commodification and its limits.

2. Objects that can be owned and can be freely traded in markets through exchange transactions are commodities.

i. Property is limited (among others things) by a widespread ethical or cultural commitment to the idea that some things should not be treated as ownable objects.

ii. Contract is limited (among other things) by a widespread ethical or cultural commitment to the idea that some things should not be traded in exchange transactions.

iii. The word “commodification” refers to the treatment of things as objects of property and contract, and their exchange in markets as commodities. The word “commodification” also refers to the process by which things that people value in non-market ways transition into market commodities subject to exchange transactions. This is the transitional process that we are seeing as more and more aspects of our bodies, such as organs or reproductive material, become objects of trade.

3. The question before us today is to what extent aspects of our bodies can be treated as ownable and tradeable objects. Commodification has long been a serious concern for those who think about biomedical ethics. (I am limiting my investigation to secular ethics, but I do recognize that many people have religious commitments about the proper limits of commodification. For democratic governments committed not to favor any religion, the secular arguments are the significant ones.)

i. In the US, college newspapers are routinely running advertisements offering large sums of money in return for young women’s eggs—provided they meet certain criteria such as athletic ability or test scores.

ii. The international trade in kidneys and other organs is flourishing.

iii. The international trade in children for adoption is also flourishing.

iv. The use of contracts involving pregnancy for hire—often called “surrogacy” or “womb rental”—has moved toward commodification by commercializing the decision to bear a child as well as the decision to release a child for adoption.

v. More and more technological methods of making babies have been commercialized, including artificial insemination by a donor; egg removal from one woman and transfer to another; in vitro fertilization (embryo storage and/or embryo transfer). Perhaps the future will bring us a commercial cloning industry.

4. Commodification creates ethical dilemmas. It is both “promise” and “threat.”

i. Commodification often seems threatening to humanity. Objections to commodification of things close to personhood, such as our bodies, are often based on an ethic of respect for persons. When attributes that form aspects of our humanity—attributes that are constitutive of ourselves—become reduced to monetary value, do we remain human?

ii. On the other hand, the onset of market trading often seems like an opportunity or a promise, not a threat. Indeed some economists, and some feminists, say that sex work (prostitution) is no different from any other kind of wage labor, and should be available to those whose other employment opportunities are much less able to support the worker and his or her family.

iii. Because commodification can be both threatening and promising—both oppressive and liberating—it generates conflicted ethical reasoning. The analysis of commodification is not a clearcut ethical field.

iv. Later in my talk I will elaborate to some extent on some of the conflicted ethical reasoning. Before doing that, I want to add that the ethical dilemmas are further complicated by the phenomenon I call market rhetoric or market discourse.

5. Market rhetoric, or market discourse, is the practice of conceiving of things in market terms—that is in terms of their monetary exchange value-- even if they are not actually bought and sold.

i. For example, some economists of the Chicago School are famous for conceptualizing children in market rhetoric. In his book, *A Treatise on the Family*, Gary Becker said, “The demand for children would depend on the relative price of children... An increase in the relative price of children... reduces the demand for children and increases the demand for other commodities....”

And a distinguished US jurist, Richard Posner, published a book entitled *Sex and Reason*. He conceives of all aspects of sexual experience and practice in market terms.

ii. Market rhetoric conceives of all values as “commensurable”—that is, capable of being reduced to one kind of value so that trade-offs are possible. If we are committed instead to value “incommensurability,” then we do not think that such trade-offs are possible. The “value” of our children is not part of our financial net worth, but rather a different kind of value.

iii. Value incommensurability is a difficult philosophical topic, and philosophers do not come to consensus. Our intuitions remain divided about it.

iv. Is mere commodification in discourse, without actual trading in markets, harmful to humanity? That is a difficult question. So is the question whether market rhetoric will lead to commodification in practice. Will conceiving of children in monetary value lead to baby markets? This dilemma complicates the ethical evaluation of commodification.

v. Moreover, the question whether or not regulation is necessary and justified is complicated because some laws may be mostly symbolic or expressive. Such regulations use the law to make a statement that ideally we would adhere to non-market values and keep such values separate from the infiltration of market valuation, even when we know that is not actual reality.

[1] Black markets exist in prostitution, and in human organs, and in children for adoption. Is it worth tolerating corrupt black markets just to make a symbolic statement of our ideals?

[2] Some jurisdictions have legalized prostitution in order to protect sex workers from disease, violence, and routine robbery. (More can be said about the successes and failures of such regulation in our discussion later.) No jurisdiction has legalized baby-selling. Although jurisdictions have taken different positions on organ harvest after death, jurisdictions have not legalized market trading among the living.

6. Because commodification of the body is a complex ethical question, I believe that there is probably no general answer that can apply to all types of commodification. In other words, I think that prostitution, organ selling, baby selling, surrogacy, embryo transfer, and the possibility of cloning, must be evaluated separately.

7. I will offer a brief survey of the complexities of ethical evaluation of two of the many kinds of commodification of the body: markets for organ transplantation and markets for surrogacy (which I consider a form of commissioned adoption). Before doing so, I want to review the ethical framework that is generated from the idea of respect for persons. This idea of personhood, related to the ideal of freedom, was crystallized by Immanuel Kant in the late 1700's.

i. In the Kantian world view, the universe is divided into the categories of persons and objects, and the moral law involves maximization of the freedom of persons.

ii. In the context of a society of many persons, each person's freedom is maximized by legal rules institutionalizing maximal freedom to use objects but prohibiting any use of another person.

iv. Assimilation of persons to the realm of objects is ethically wrong in this world view. Making a living person into a market commodity would be the quintessential instance of this wrong. This is therefore one of the primary arguments against establishing (or condoning) a market in children for adoption.

8. Consider the market in human organs for medical implantation. What is the promise of such a market?

In addition to avoiding the horrors of the black market through authoritative policing, legalized markets in organ sale and transplantation would perhaps lead to an increase in supply. Such markets would be expected to provide more ready access to transplants needed by people who are desperately ill.

9. What is the threat of a market in human organs? Should we consider that organs inside the living body are inherently off limits to being excised and turned into commodities (products for profit)?

i. In ideal theory the case for the threat to personhood is not so clear, because the person and her organs are not identical. A person with an artificial hip or even an artificial heart is not considered less of a person.

ii. In my opinion, however, the threat looks more serious in our non-ideal world. Organ sales have been troubling to many people primarily because, to use the terminology of Michael Walzer in his book *Spheres of Justice*, they seem like "desperate exchanges." Kidney sales occur in a nonideal world of desperation caused by poverty. Although in ideal theory we could alleviate the

severe maldistribution of wealth currently existing in our world, non-ideal analysis tells us that it is extremely unlikely that we will do so.

iii. What should we make of the idea that people's desperate economic condition motivates them to believe that selling a kidney is preferable to doing without the things they cannot otherwise buy in the markets we do sanction? [Such commodities, for example, as food, shelter, medical care for children?]

iv. In my view it adds insult to injury to prohibit the sale that is disliked by the more wealthy people who don't find themselves in these desperate straits, while at the same time making no move to change the conditions that give rise to the desperate straits. Global wealth redistribution is very unlikely at this point in our history, but punishing the poor for what they do in desperation, without attempting to alleviate their desperation, seems hypocritical.

v. More idealistically, we could argue that we don't want to create property entitlements to people's internal organs (or for that matter to their eggs, blood, or other biological material), because then those things become a financial asset that counts as part of the owner's total wealth, and if the owner's family members are without food, shelter, or medical care the owner could be faulted for NOT selling.

vi. It would be undesirable to end up with the even worse situation in which poor people "donate" biological material and receive only "expenses," and then middlemen make most of the profit. In some areas of biomedical practice, it seems this is what is happening. A famous example is the *Moore* case in California, where doctors developed a valuable cell line from a patient, but the patient got no nothing.

Would the transfer of organs between living humans best be accomplished through a regulated market in which the regulatory authority tries to make sure the money actually goes to the seller rather than an entrepreneurial intermediary? This is not a question from abstract principle, but contextual to our nonideal world.

10. Now let us take up pregnancy for hire. In order to analyze this situation, I will begin by trying to clarify terminology. There are different kinds of circumstances that could be called commercialized adoption or baby-selling. One kind of circumstance is paid adoption of "unwanted" children, but another circumstances is commissioned adoption, that is production of children for transfer in exchange for money. Commissioned adoption gives rise to the situation sometimes called "womb rental," in which a woman, for pay, becomes pregnant with a child to be yielded up to someone else.

i. Paid adoption of “unwanted” children describes the situation in which a child has been brought into the world and the birth mother (or birth parents) cannot (or does not want to) raise the child. Market forces are not the immediate cause of the pregnancy. The cause of pregnancy may be failure of birth control or lack of birth control. Lack of birth control may be due to lack of education, lack of access to birth control providers, religious commitments, incapacity such as drunkenness, etc.

ii. Commissioned adoption describes the situation in which a child is brought into the world for the purpose of transfer to someone else in return for payment. Here the immediate cause of the pregnancy is market demand. In the purest kind of baby market, a woman might produce a baby “on spec” (believing that someone will want to purchase the child when she is born). The market I am calling commissioned adoption would involve a woman producing a baby in response to a specific request, much as art works are commissioned.

iii. Commercial “surrogacy” (or “womb rental”) is a special case of commissioned adoption; that is, the special case in which one or both commissioning parties deliver genetic material to the woman who is hired to produce a child. In the US we have cases where a would-be father is the sperm supplier but the birth mother’s own eggs are used (for example, *Baby M* in New Jersey), and cases where both the would-be mother and the would-be father supply their genetic material (*Johnson v. Calvert* in California).

11. Once we realize that commercial surrogacy is a form of commissioned adoption, we immediately must ask a legal question:

--Commissioned adoption is illegal in every jurisdiction of the US, and in the rest of the world, as far as I know. In fact, paid adoption of “unwanted” children is illegal as well. . Does this mean that commercial surrogacy is illegal under these regulations unless they are amended to make an exception? US courts found this question unclear; some US states have made some regulatory moves toward legalization, but the US situation varies from state to state.

12. Beneath the legal question there is an ethical question. This is the question on which I now wish to focus. What—if anything—could ethically distinguish commercial surrogacy from the general category of commissioned adoption?

If there is no ethically significant difference between commercial surrogacy and any other kind of commissioned adoption, then various reasons brought forward in favor of permitting commercial surrogacy are actually also reasons to permit the general practice of commissioned adoption; i.e. the hired production of children in response to market demand.

Let's take a look at those reasons brought forward for and against permitting commercial surrogacy. (Here, as before, I am omitting religious reasons and sticking to the secular.)

13. First pro-market argument: Liberty of persons in a market society

i. Chicago economists' branch: everything can be understood in market terms; no markets should be foreclosed or regulated unless there is some kind of market failure

[Contra:] Freedom of the person is diminished if things "internal" to the person are sold off

[2] Feminist liberationists' branch: women themselves, not the government, should be able to decide whether or not to sell their children

[Contra:] Women's freedom is not enhanced by reinforcing their historical image as breeders (or providers of sexual services, etc.)

[3] Realist branch: If the market is not allowed, there will be a black market, which will be much worse; markets will always spring up where there is desire (e.g., gambling; drugs; alcohol; prostitution; political contributions; etc....).

[Contra:] Unless the regulatory authority makes some commitment to bettering the situation, even if only a symbolic one, commodification will become more and more entrenched, which becomes more and more threatening to our humanity.

14. Second pro-market argument: Procreation should be understood as a deep desire or aspect of autonomy and self-hood or partnership. Those who are unfortunate enough to be infertile should be able to purchase what they need for fulfillment of their autonomy (and communality).

What anti-market arguments are opposed to these pro-market arguments?

15. First anti-market argument: Self-constitution as a person (not an object). Sale and purchase of children treats children as objects (market commodities) and this undermines the development of a self-conception as a unique person.

i. Sale of (some) children could adversely affect personhood of everyone, if all children conceive of themselves as commodities, and wonder how much money they are worth [that's everyone because we have all been children]

[Contra:] We do not have empirical evidence that establishment of markets would result in undermining the development of a self-conception of personhood.]

ii. In order to evaluate this argument we need to know whether a commodified (objectified) self-conception can stably co-exist with a noncommodified (non-objectified) self-conception.

On this point I am unsure. Since I first started to write about commodification, the level of commodification in practice has increased greatly. Perhaps our self-conception of personhood is robust against the inroads of commodification. But if we don't know, maybe it would be good not to take the risk.

16. Second anti-market argument: Markets will exacerbate the divide between haves and have-nots, and even increase tolerance of racialized discrimination.

The market will likely differentiate between better quality and worse quality children by features of the product (eye color, potential athletic ability, potential IQ, and racial heritage).

[Contra:] Black markets will do this too, and worse.

17. Third anti-market argument: If a market is allowed, "unwanted" children waiting for adoption may remain parentless

Those who desire children and would otherwise adopt "unwanted" children will, if they have enough money, prefer to purchase children to their own specifications.

[Contra:] Welfare will be maximized if those who desire children can purchase children that meet their preferences better than "unwanted" children already available. It would be more efficient to adopt other methods of lowering the number of "unwanted" children.

18. Finally: If we are opposed to the general market in children—either commissioned adoption or only paid adoption of "unwanted" children--can we

find a principled reason to be in favor of commercial surrogacy—that is “womb rental” by would-be parents who supply genetic material?

i. Such a principle cannot be the general principle of freedom of contract [that applies to the general market in children too].

ii. It cannot be the general principle that women in particular should have the right to make their own decisions about what to commodify and produce for sale. [same].

iii. It cannot be the general principle that would-be parents should be afforded every possible avenue of achieving parenthood [same].

iv. So, the only candidate principle that I can see for finding commercial surrogacy to be justified while maintaining that a general commercial market for production of babies is this: Somehow the contribution of genetic material by one or both of the would-be parents takes the transaction out of the category that is ethically prohibited. Is this true? I don't think so. (Your opinions may differ. This is difficult and disputed ethical terrain.)

19. Why do I reject a principle that commercial surrogacy should be distinguished from general production of children for hire, which I have called commissioned adoption?

i. First, because a pregnancy is initiated, and transfer of parental rights is promised, in return for money, it seems wrong to consider this a non-sale rather than at best a desirable sale.

ii. Second, to accept a principle that justifies commissioned adoption only in the special case where a purchasing parent or parents contribute genetic material seems to grant high privilege to genetics and not enough to gestation, and, indeed, to the emotional bonds developed through actual parenting. When the purchasing parents seek primarily to maintain the male genetic lineage, that raises an issue of gender hierarchy as well.

iii. In my view, we tend to overemphasize the abstraction of genetic relationship and undervalue the reality of day-to-day relationship. Genetic parents often abuse their children; adoptive parents often love their children above all else. In any case, the tendency to value genetic relationship very highly is not enough to remove the category of commercial surrogacy from the larger general category of commissioned adoption.

iv. Consequently, I reach the conclusion that people who favor legal validation of commercial surrogacy should in fact favor general markets for children, as do some Chicago economists. At least, not having a strong premise

on which to treat “womb rental” as a special case, we are remanded to the pro- and anti-market arguments that I laid out earlier. There is no easy solution to this debate.