

Commodification in law: ideologies, intractabilities, and hyperboles

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Abstract In this paper I first aim to identify, from a perspective mindful of both analytic and Continental traditions, the central normative issues at stake in the various debates concerning commodification in law. Although there now exists a wealth of thoughtful literature in this area, I often find myself disoriented within the webs of moral criteria used to analyze the increasingly ubiquitous practice of converting legal goods into monetary values. I therefore attempt to distinguish and organize these often conflated conceptual distinctions across several registers of moral analysis. Second, I formulate what I consider the most illuminating questions regarding the criteria used to evaluate commodification in law. Critiques of commodification in law face what I call problems of ideology, intractability, and hyperbole, and identifying these issues helps to explain the momentum of the law and economics movement.

Keywords Commodification · Law · Marx, Karl · Adorno, Theodor · Simmel, Georg

“A commodity appears, at first sight, an extremely obvious, trivial thing. But its analysis brings out that it is a very strange thing, abounding in metaphysical subtleties and theological niceties.”

Marx, *Capital*¹

¹ Marx (1977, p. 163).

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1 Introduction

In this paper I attempt to make some progress toward two rather modest goals. I first aim to identify, from a perspective mindful of both analytic and Continental traditions, the central normative issues at stake in the various debates concerning commodification in law. Although there now exists a wealth of thoughtful literature in this area—including Margaret Radin’s *Contested Commodities*, Martha Ertman and Joan Williams’ recent anthology *Rethinking Commodification*, and numerous books and articles on human organ sales—I often find myself disoriented within the webs of moral criteria used to analyze the increasingly ubiquitous practice of converting legal goods into monetary values.² I therefore attempt to distinguish and organize these often conflated conceptual distinctions across several registers of moral analysis. Second, I formulate what I consider the most illuminating questions regarding the criteria used to evaluate commodification in law. Critiques of commodification in law face what I call problems of ideology, intractability, and hyperbole, and identifying these issues helps to explain the momentum of the law and economics movement.

Why do I find this a worthwhile undertaking? In legal handbooks such as *Valuing Children in Litigation: Family and Individual Loss Assessment*, attorneys find tables with titles such as “Benefits from a Child to Parents from Ages 19–58 Based on a Child Born in 1977,” “Lost Earnings Capacity and Contribution,” and “Investment Value of Indirect Costs of Generic and Marginal Children for Working and Non-Working Mothers by Level of Mother’s Education.”³ These studies determine the legal value of dead children, and they are conducted exclusively in the language of U.S. dollars. As courts routinely reduce the particularities of one’s flesh, bone, thoughts, and emotions to a monetary value, it seems that everything now has a price under the law. Something like universal commodification can result: nearly all valuable goods and services become alienable commodities, we understand freedom primarily as the freedom to exchange these goods, we view maximum efficiency in the production of wealth as a primary social objective, and we typically conduct evaluative discourse in cost-benefit analysis. Richard Posner summarizes his position in his 1973 *The Economic Analysis of Law*:

If every valuable (meaning scarce as well as desired) resource were owned by someone (universality), if ownership connoted the unqualified power to exclude everybody else from using the resource (exclusivity) as well as to use it oneself, and if ownership rights were freely transferable, or as lawyers say alienable (transferability), value would be maximized.⁴

Here all goods can be reduced to a price, all prices can be compared, and all value is transitive and commensurable. Labeling goods with exchange values produces the fungibility necessary to administer a comprehensive cost-benefit analysis, and nothing is so sacred as to stand beyond the scope of market logic.

² See, for example Radin (1996), Ertman and Williams (2005), and Wilkinson (2003).

³ Ireland and Ward (1995). See, Manderson (2009). A volume on Derrida’s contributions to legal philosophy also appeared in 2008. See Goodrich et al. (2008).

⁴ Posner (1998, p. 34).

We should not underestimate the utility of commodification, as it provides a medium that allows for convenient transactions between vast ranges of goods. Money seems to offer a relatively neutral measure of worth for an increasingly secular and pluralistic world, and Ayn Rand has warned that “so long as men live together on earth and need means to deal with one another—their only substitute, if they abandon money, is the muzzle of a gun.”⁵ For Rand, commodification stands as the crowning achievement of the United States: “To the glory of mankind, there was, for the first and only time in history, a *country of money*—and I have no higher, more reverent tribute to pay to America, for this means: a country of reason, justice, freedom, production, achievement.”⁶ From this perspective, commodification is the engine of modern progress.

For many of us, however, Posner’s argument that rape should be forbidden primarily because it “bypasses the market in sexual relations” and his comparison of “thousands of children in foster care” to “unsold inventory in a warehouse” just seem to miss the point in so many ways.⁷ The economic analysis of law can seem so wrongheaded that we might be tempted to dismiss it altogether so as not to lend it legitimacy. Yet despite the ease with which we can criticize the economic analysis of law, it is arguably the most influential jurisprudence of our time. I measure the power of law and economics not only by the attention it receives, but also by the fact that it seems to embody the *Zeitgeist* of contemporary law and culture. Law and economics is a theory for the times.

Perhaps the brute cultural and economic forces promoting law and economics overwhelm ethical argumentation, and perhaps the ascendance of this movement provides another example of the irrelevance of moral philosophy to law. I expect, however, that arguments against commodification would benefit from some conceptual clarification and meta-conceptual analysis. The commodification debate too often swings between rhetorical flourishes, with “root of all evil” claims countering dogmatic faith in free markets. By classifying the different types of arguments against commodification, distinguishing these issues to the extent possible, and identifying how the normative criteria typically deployed may in fact bootleg pro-market bias into the discourse, I hope to lend some clarity to a set of problems that will be with us for some time. Recent discussions of law and economics—even those that aggressively criticize commodification in law—often operate within the liberal tradition of ethical analysis. The built-for-capitalism ethical concepts of liberalism can betray even the most zealous anti-commodification positions. Because of this, I find it crucial to supplement these arguments with critiques inspired by Marx, Simmel, Pashukanis, and Adorno. Although these alternative perspectives on commodification suffer from various problems of vagueness and hyperbole, the binocular view from the two traditions offers a clearer view of the commodified world unfolding before us.

To the extent possible, I aim to limit my discussion to commodification in law as one feature of capitalism. Of course one cannot isolate commodification from the

⁵ See Rand (1957, pp. 410–415).

⁶ Ibid.

⁷ Landes and Posner (1978, pp. 324–325).

economic system in which we find it, but note that I attempt to emphasize the particular features of commodification rather than enumerate the full range of ethical issues presented by the whole of capitalism. I should also reiterate the modesty of my goal to merely identify, distinguish, and render problematic the criteria used to evaluate commodification in law. I reserve my attempts to render evenhanded judgment on the legitimacy of the various forms of commodification for another day.

2 The issues

2.1 Ideological reflexes: the default presuppositions and the burden of proof

The vast majority of discussions of commodification in law presuppose that individuals and institutions should be free to commodify whatever they wish unless a compelling argument rebuts this claim. Rather than require potential commodifiers to justify the practice, the burden of proof falls on those who seek to block the exchange. Thus, the prevailing questions might be whether “people have a moral right to sell their kidneys” or whether a government can legitimately interfere with such exchanges.⁸ These, I believe, are the wrong questions to ask within an ideological framework that presumes the legitimacy of alienability within free markets. Several recurrent problems result.

First, concepts friendly to the prevailing ideology fill our theoretical toolbox. As Marx warns in passages from *The German Ideology* that lend themselves to overstating the case for economic determinism but produce an appropriate level of suspicion regarding our moral discourse, “the ideas of the ruling class are in every epoch the ruling ideas, i.e. the class which is the ruling material force of society, is at the same time its ruling intellectual force.”⁹ Those who control the means of production also control the production of ideas, and they will cultivate ideas that legitimate and increase their power. Here intellectual work is rooted in material conditions like all other labor, and a culture manufactures concepts of morality, religion, and metaphysics while attempting to give them the appearances of having descended from the heavens. These concepts provide the background for all normative discussions and feel instinctual, and Marx describes these tendencies as the “ideological reflexes” of our body politic.¹⁰

Wealthy Western institutions produce the vast majority of analyses of commodification, and we have reasons to wonder about their independence from and complicity with ideology production. One need not be a full-fledged dialectical materialist to notice that Kantianism and Utilitarianism—the two ethical philosophies most often applied in the commodification debate—came to prominence with the development of industrial capitalism in Germany and England in the eighteenth

⁸ The first line on the jacket of Wilkinson’s *Bodies for Sale* asks “Do people have a moral right to sell their kidneys, or other body parts?” Wilkinson (2003).

⁹ Marx (2000c, p. 192). For an extended discussion of Marx on money, see De Brunhoff (1973).

¹⁰ Marx (2000c, p. 180).

century. This is not to say that aspects of prevailing moral philosophies cannot be used to criticize commodification. Jesus chased the money changers from the Temple in Jerusalem and warns in various texts against the dangers of money, and Kant provides one of the most categorical condemnations of commodification: “In the kingdom of ends, everything has either a price or a dignity. Whatever has a price can be replaced by something else as its equivalent; on the other hand, whatever is above all price, and therefore admits of no equivalent, has a dignity.”¹¹ What we find, as I will repeatedly suggest in this essay, is that the concepts developed within these traditions ultimately support commodification because of their fundamental commitments to a certain version of rational, autonomous, individual agents.

Second, because the burden of proof falls on critics of commodification and they must prove why some particular good is unlike all of the other commodities and deserves special protections, inconclusive arguments favor free markets. Without a decisive argument to stop commodification, the momentum toward commodification pushes forward. For the obviously intractable issues—the nature of freedom, equality, justice, *et cetera*—intractability favors the status quo. Considering that we very rarely reach definitive conclusions when debating interesting philosophical problems, pro-commodification arguments can usually force a draw. Ties go to the home team. The population sees commodification not only as a normatively neutral default position, but as the *natural* position. We describe blocking exchanges as interfering with the natural economic order, as if capitalism is an eternal reflection of universal laws rather than a constructed artifact of social engineering. Taking the long view of history, capitalism is a recent development and we do not need to rule on the relative merits of capitalism to appreciate commodification as a product of a certain form of human culture.

Third, proponents of commodification can cite compelling benefits of commodification *within* a predominantly free market system. If prostitution presents a woman’s best option for feeding her children, then criminalizing this exchange seems especially cruel. If a free market in human kidneys increases the pool of organs available for transplant, then commodification prevents death. What objection could trump saving lives? Rather than providing economic compensation to the families of civilian casualties lost during the Iraq war, is it really preferable for the U.S. government not to commodify the victims? If cash awards for medical malpractice or environmental degradation compensate victims and provide incentives for industry reform, complaints against commodifying such injuries can seem opposed to advancing just causes. When we frame the issues in terms of treating the symptoms of free markets, commodification may indeed offer some relief without addressing the cause of these ills. Perhaps the central question is not, for instance, whether individuals should be allowed to sell their organs, but rather how to remedy the economic conditions that create such desperate individuals. Similar issues arise with respect to commodifying women’s household labor.¹² Without quality education and healthcare, both of which can be very expensive, women are much more vulnerable to various forms of oppression. Paying women for domestic work,

¹¹ Kant (1959, p. 47).

¹² Silbaugh (1997).

in this respect, affords them more power to buy their freedom or otherwise protect themselves from subordination. But this particular argument is only relevant in a culture where goods essential to flourishing are already commodified. If all women could rely on free education and healthcare, then concerns regarding payment for domestic labor would look quite different. This reminds me of the situation faced by *New York Times* reporter Nicholas Kristoff who bought, for \$200 each, the freedom of Cambodian women who had been sold into sexual slavery.¹³ Money can provide the antidote when it is also the poison.

2.2 The background conditions of global inequality

I find it difficult to accept Marx's characterization of moral philosophy as merely producing and defending bourgeois ideology, but discussions of commodification often lend credibility to his view given the extent to which they frame the analyses in terms that ignore the economic conditions in which these exchanges occur. The full extent of global poverty can be difficult to comprehend from the privileged position of most commodification scholars. According to a recent United Nations report, the top 1% of the world's adult population owned about 40% of the world's total net worth.¹⁴ The bottom half of the world's population owned only 1.1% of the world's wealth. According to figures provided by the World Bank, my 2008–2009 base salary as an associate professor places me in the top 0.86% of the world's wealthiest people.¹⁵ Approximately 2.7 billion people struggle to survive on less than two dollars per day, which is less than I spend *per diem* to feed my dog.¹⁶

These grave statistics inform every aspect of commodification. It may occasionally prove useful to isolate moral questions from the complexities of their social context in order to draw conceptual distinctions, but ignoring global inequality in favor of parsing the finer points of ethical theory has become the rule rather than the exception in discussions of commodification. Many interesting questions arise when a wealthy Ivy League student wishes to sell his semen and donate the proceeds to charity, and surely commodification would be less problematic in various respects if we eliminated global poverty. Stacking the hypotheticals in such a manner to argue that commodification could—in the abstract—be justifiable can divert our attention from the brutal realities of the situations confronted by the billions for whom this debate is most salient. It might also be possible to imagine an alternate universe where racial segregation resulted in better education for minorities or where prostitution empowered women, but we should be mindful of the political ends that such thought experiments might serve in this world.

This leads us to wonder about the sorts of questions we tend to ask about commodification. Rather than direct our attention to issues regarding whether

¹³ Kristof (2004).

¹⁴ Davies et al. (2008). See also Porter (2007).

¹⁵ You can calculate your own position at www.globalrichlist.com. Notice that Davies et al. (2008) provide different criteria for determining one's statistical rankings.

¹⁶ For an overview of these and related statistics, see United Nations Millennium Project (2008).

people should be allowed to sell their organs or what constitutes fair economic compensation for suffering racial discrimination in the workplace, perhaps we should focus on the underlying social conditions that lead to these problems. Instead of asking whether it should be legal to sell human organs or how we might regulate such markets, we can determine why selling their innards or children seems like the best option for so many people. To borrow Margaret Radin's analogy, it is as if we are debating how to stop people with guns pointed at their heads from executing the orders of their abductors rather than determining how to free them from such a predicament.¹⁷ Neglecting these structural conditions risks legitimating them.

2.3 Commodification as cause of inequality

In addition to remaining focused on the structural context in which we find examples of contested commodities, we can also ask whether and to what degree commodification *contributes to* such inequality. This presents empirical questions that may prove difficult to separate from the more general issues regarding inequality caused by capitalism, but several lines of analysis seem worthy of investigation.

When we open or fail to close markets in various goods, questions arise regarding both the production and distribution of those goods. If we legalize organ sales or adoption markets, for example, these "natural resources" will likely come disproportionately from the poor. How might this burden compound their disadvantage and result in even greater inequality? In Marx's terms, does this provide the capitalist "vampire" another vein to suck profits from the workers? Consider the commodification of warfare in the form of mercenary soldiers and private military companies. Unlike a draft where citizens fulfill a civic duty to serve their nation with fair shares of labor and risk, commodified military service allows the rich to pay others to battle and die on their behalf.¹⁸

Along with the new forms of labor that will be shouldered by the poor and the additional opportunities for exploitation that will arise, will the disadvantaged become increasingly and disproportionately vulnerable to related harms? Those without quality health care face greater medical risks when selling a kidney or sexual services, and these vulnerable populations are the most likely participants in such markets of last resort. The burden of producing contested commodities might be forced on some groups in the most literal and brutal sense, as the recipients of payments for civilian casualties or wrongful death caused by faulty products will have had little choice but to enter into the transaction. Providing economic compensation for such damage can even lend legitimacy to the harmful practice—as paying a parking ticket would absolve legal debt—in the sense that damages of various kinds come to be seen as adding a tariff to discouraged activities rather than

¹⁷ See Radin (1987, p. 1911).

¹⁸ See Rousseau (2004, p. 62): "As soon as public service ceases to be the chief business of the citizens and they would rather serve with their money than with their persons, the state is not far from its fall. When it is necessary to march out to war, they pay troops and stay at home...In a country that is truly free, the citizens do everything with their own arms and nothing by means of money; so far from paying to be exempted from their duties, they would even pay for the privilege of fulfilling them themselves."

banning them outright. Just as a wealthy driver can afford to pay many parking tickets for illegally occupying prime spots, wealthy nations and corporations can effectively buy the right to kill. Whatever ills result from producing goods for new markets, we should be concerned that the poor will disproportionately bare these burdens.

In addition to problems regarding the production of commodified goods, we should ask how these goods will be distributed. If markets in human kidneys result in the poor selling their kidneys to the highest bidders, we face a situation parallel to that confronted by many of the world's factory workers who create products they could never afford. Like the workers who are unable to purchase the computers or shoes that they manufacture, the poor may not be able to afford their own organs. We can imagine how this inequality in production and distribution might extend to all newly commodified goods, including drinking water, clean air, or reproductive technologies. Will there come a time when the poor cannot afford to breathe or procreate, and the rich can take their breath and children? As more goods become commodified, more goods are distributed according to wealth. Considering the rise of incarceration as a for-profit service industry and arguments like Randy Barnett's for commodifying criminal penalties, it seems increasingly difficult to maintain what Michael Walzer describes as spheres of justice.¹⁹ Economic wealth translates into power across spheres that we historically attempted to preserve as distinct and incommensurable, creating new means of extending financial privilege and compounding inequality. Kant's proclamation that "justice ceases to be justice if it can be bought for a price" seems increasingly irreconcilable with the common knowledge that wealth buys nearly everything, including better attorneys and thus favorable legal outcomes.²⁰

I discuss later the expressive consequences of referring to various goods as commodities, but we can ask here how such discourse contributes to inequality. When Posner argues that "thousands of children in foster care...are comparable to an unsold inventory in a warehouse," might describing children in this manner contribute to a decline in their self-perception and value? If markets indicate that one infant is worth X\$ and another 100X\$, how does assigning value in this respect undermine conceptions of human equality?

It also seems important to examine the opposite causal direction: to what extent does poverty cause commodification? Desperate populations often must liquidate every last asset in the struggle for survival, creating a cycle of suffering where commodification leads to poverty, which in turn requires the poor to sell whatever remains. Consider a study of 305 Indian kidney donors, which found that the donors received an average of \$1070 for the organ and suffered an average income decline of one-third six years after the procedure.²¹ If the poor auction their flesh to the rich and thereby become poorer, this may leave little option but to continue selling in a downward spiral.

¹⁹ See Barnett (1977).

²⁰ Kant (1998, p. 138).

²¹ Goyal et al. (2002).

2.4 Objectification and offenses against dignity

The argument for dignity and against objectification claims that some things should not be bought and sold regardless of the fairness of the transaction. According to Michael Sandel, “even in a society without unjust differences of power and wealth, there would still be things that money should not buy.”²² From this perspective, entering certain cherished goods into the stream of commerce degrades them and treats them inappropriately. Whether motivated by a belief that we must not desecrate the sacred or a commitment to Kant’s practical imperative, we find these arguments on the frontlines of commodification research.

Many competing versions of objectification exist, including Martha Nussbaum’s compelling “loose cluster concept” theory that understands objectification as covering a range of interrelated issues and John Harris’ notion of “wrongful use exploitation.” Most accounts converge on the practical imperative: never to treat humans as *mere* means. Significant problems arise here for the commodification debate. We first face questions regarding what class of things can be objectified. If we should not treat ends as mere means, what qualifies as ends? We know that Kant intends to include only humans in this category of ends, leaving us unencumbered when commodifying everything else in the world. Forests or endangered species cannot be wrongly objectified or suffer affronts to their dignity on this account, limiting the ability of this argument to protect many contested commodities. One can also bend arguments for dignity around attempts to commodify humans. If humans deserve treatment as ends within the Kantian framework because of their status as rational moral agents, can we consider the portions of our bodies inessential to those cognitive capacities to be mere objects? Kant’s readers disagree about his position here,²³ but Stephen Wilkinson has used this line of argument to support markets in human kidneys and DNA.²⁴ As we increasingly understand the human mind and body as material processes replicable by synthetic substitutes, where will dignity reside? If an artificial heart now supports my rational faculties, what reason remains for treating the original as somehow sacred or otherwise non-commodifiable? If we are the sum of alienable parts, what prevents the sale of the whole package?

Even as the class of entities deserving protection as dignified ends appears to shrink, these defenses may alternatively prove too weak or too strong. If we take inspiration from the practical imperative, the “mere” in Kant’s injunction that we not use others as mere means opens the door to even human commodification. Kant has no objections with us using each other, for instance as the student uses the professor to learn philosophy, so long as also we treat each other with dignity while doing so. Might markets in nearly any commodity, human or otherwise, build just enough dignity-recognition into the transaction to conform to the letter of the practical imperative? If the organ buyer provides the organ seller with displays of

²² Sandel (1998).

²³ See Morelli (1999).

²⁴ See Wilkinson (2003). I elaborate several of my claims regarding Wilkinson’s analysis in Smith (2004).

gratitude or “gifts” of scholarship money, does this sufficiently honor her as an end-in-herself? If a court explains in its ruling that the economic compensation provided for the wrongful death of a child does not intend to objectify the deceased but rather offers an incommensurable means to recognize her sanctity, can this successfully rebut charges that the court has violated the child’s dignity? We find little consensus regarding what treating someone as an end requires of us, and here again I worry that the absence of a clear standard favors commodification. Without a decisive argument that commodification unjustifiably objectifies, market forces advance deeper into the territories of human values.

Inversely, arguments for dignity may “prove too much.” Most of us treat the vast majority of people with whom we exchange as mere means within global markets. Like most of the goods I consume, I do not know the faces or names of the people who produce most of the clothes I wear. It would be difficult to claim that I have treated them as more than mere means, and most modern labor may violate the practical imperative. Arguments for dignity pose such an extensive challenge to the basic structure of modern markets in this respect that they risk being written off as irrelevant for life within those economies. We will repeatedly come up against this “proving too much” problem in analyses of commodification.

2.5 Exploitation

As with objectification, many theories of exploitation apply to commodification. “Disparity of Value” theories of exploitation are most easily distinguished from theories of objectification, as they consider the fairness of how much one is paid rather than argue that money is inappropriate to the exchange. In the case of the September 11th Victim Compensation Fund, a disparity of value analysis might take issue with the injustice of awarding the families of deceased investment bankers with much larger financial compensation packages than those of janitors. An objectification analysis might challenge the very conversion of the value of the dead into a dollar amount.

Disparity of value accounts of exploitation have no inherent objections to commodification, as long as the transaction does not lead to impermissible harms. Differences regarding what qualifies as such harm, however, create the possibility for what Wilkinson describes as “mutually advantageous exploitation.”²⁵ If we understand harm as rendering someone “worse off” than they were before the transaction rather than according to some normative baseline—such as a belief that everyone deserves the equivalent of a living wage—we can claim that the impoverished person is better off having received some money for her kidney even if she continues to exist far below a living wage. Returning to the point above regarding the benefits of commodification *within* capitalism, legal prohibition of such “mutually advantageous exploitation” loses support when we focus on the individual and short term consequences of the transaction. The pimp, the organ buyer, and the mine owner provide opportunities. Without a clearly established and enforced normative baseline, these opportunities may well present the sex worker,

²⁵ Wilkinson (2003, pp. 57–59).

organ seller, and miner with their best options even as they spiral into poverty and illness. On any given day, the option that will leave them poorer and sicker may be their best choice relative to the alternatives. Mutually advantageous exploitation is therefore one of the most effective concepts in capitalism's ideological toolbox because it justifies and perpetuates globally inequality for a significant portion of humanity.

Of course we often aggressively block certain exchanges, such as markets in narcotics, because of their long-term harms to individuals and collectives. This is often not a matter of wrongful use exploitation (heroin is too sacred to be commodified) or disparity of value exploitation (if only heroin traded at a fair price), but rather a belief that certain markets cause other kinds of harm. I worry, however, that we are losing the ability to think of "other kinds of harm" in non-economic terms.

2.6 Consent and coercion

I first pieced together many of the concerns expressed in this paper when reviewing Wilkinson's *Bodies for Sale*, a book so clear and thoughtful in its arguments for commodification that it renders explicit its own underlying presuppositions.²⁶ This was most striking in Wilkinson's discussion of consent and coercion. Wilkinson claims that "we should reserve the word 'coercion' for a particular kind of threat: those cases in which (1) A proposes (threatens) to harm B if B doesn't comply with A's wishes, and (2) the proposed harm to B is harm relative to a relevant normative baseline."²⁷ According to this account, someone coerces me if they threaten to kill my dog unless I pay them \$5000. If a veterinarian refuses to treat my fatally injured dog unless I pay her \$5000, she does not coerce me because she does not threaten my dog but rather offers to help me for a fee.

This leads Wilkinson to reject the World Medical Association's rationale for prohibiting organ sales: money "compromises the voluntariness of the choice," encourages people to do things they would not do otherwise, can be coercive, and can make people less free even if its force does not amount to coercion.²⁸ This cannot be relevant, Wilkinson claims, because capitalism is built on the belief that money will entice people to perform risky or unpleasant labor they otherwise would not. If this were a legitimate worry, "consent problems would be endemic and would occur every time someone was 'encouraged' by payment to go to work for wages or to hand over property for a fair price."²⁹ The "proving too much" problem resurfaces.

Because coercion requires a threat, in Wilkinson's view, only agents can coerce. Poverty cannot coerce. Wilkinson considers the possibility that individuals could collectively coerce if they are responsible for creating the poverty causing a person to sell her kidney. He reaches the following conclusion:

²⁶ See Smith (2004).

²⁷ Wilkinson (2003, p. 97).

²⁸ Ibid. (pp. 117–118).

²⁹ Ibid. (p. 117).

The Westerner, it is said, uses poverty to “force” (coerce) the poor person into giving up the organ. On the picture sketched so far, this coercion claim is true only if the Westerner in question is responsible for the vendor’s property. But is she responsible? This question is simply too big to be taken on in any detail here, raising as it does fundamental issues in political philosophy about the distribution of goods and about duties of rich to the poor.³⁰

Here Wilkinson invokes the burden of proof privileges referenced above. If nations have created the impoverished conditions that make selling organs a desirable option for a desperate person, then by his own account they would be required to remedy that harm with nothing in return. While others debate these “big” issues—which we can read as the “intractable issues” of collective causation and responsibility—we should presume innocence and not impede commodification.

One might alternatively argue that wealthy nations have an affirmative duty to alleviate poverty even if they are not responsible for it. Wilkinson believes this cannot be correct because “if the rich nations have a duty to give resources to poor nations, then any time that the rich nations insist on trading rather than donating, they will be practicing omissive coercion—threatening to withhold money that they should be giving anyway...”³¹ If this is right, he claims, there is no reason to stop at organs. He finds this objection decisive: “Either it doesn’t work at all, or it works but ‘proves too much’ and gives us no reason to single out organ sale for condemnation and/or prohibition.”³² In other words, this must be wrong because it conflicts with capitalism’s core ideology.

2.7 Instrumentalizing tendencies

Like most of the issues discussed in this paper, what I call “instrumentalizing tendencies” applies to several related concerns.³³ I understand the problem of instrumentalizing tendencies to claim that the process of commodification creates conditions that *tend to* lead us to objectify the good for sale even if commodifying something does not *necessarily* objectify it. If something is for sale, the argument goes, our sense of responsibility toward it wanes and we are more likely to treat it as a mere means. Commodification trains our focus on the instrumental value of the good for sale, leading us to undervalue or disregard its inherent worth. I need not necessarily treat the person who serves my food or sews my clothes as mere means, but the worry here is that we tend to do just that. Modern markets place us in competition and operate on a scale that leaves us so distant from each other that interacting in non-instrumental ways becomes impractical. In Marx’s terms, an “intention to plunder and deceive is necessarily in the background, for since our exchange is a selfish one on both your side and mine...of necessity we try to deceive

³⁰ Ibid. (pp. 129–130).

³¹ Ibid.

³² Ibid. (p. 129). Wilkinson also uses the “proving too much arguments” against challenges to paid surrogacy. See *ibid.* (pp. 173–174).

³³ Wilkinson names a version of this problem the “displacement thesis.” See *ibid.* (pp. 36–37).

each other.”³⁴ Treating others as mere means may seem hard-hearted, but not doing so can seem naive.

Simmel argued a century ago that commercial culture dictates that we view each other as numbers and turn the world into an “arithmetical problem.”³⁵ Simmel unites many of the concerns addressed throughout the following portions of this paper in his 1900 *Philosophy of Money*, and like Marx he understands commercialization as a worldview rather than a mere means of exchange. Unlike the intimate economies of rural society where small circles of acquaintances engaged in the sorts of face-to-face exchanges that created a “warmer tone of behavior,” most modern transactions occur “between unknown purchasers who never personally enter the producer’s actual field of vision.”³⁶ Empathy declines as a result: “Through this anonymity the interests of each party acquire an unmerciful matter-of-factness; and the intellectually calculating economic egoisms of both parties need not fear any deflection because of the imponderables of personal relationships.”³⁷ We can grow callous to the “complete heartlessness of money” and understand the requisite attitudes as “just business.”³⁸ Again, this is not so much an ethical argument that commodification necessarily leads to objectification but rather a sociological claim that it in fact often does.

2.8 Reductionism and identity thinking

With Simmel we begin to shift from criticisms of commodification found within analytic ethics to those more commonly leveled from the Marxist and continental traditions. For Marx, the ideology of capitalism reduces all goods to a universal common denominator which allows them to be “measured against each other and substituted for one another” and requires that “all of its natural properties are extinguished.”³⁹ Simmel, and later the Frankfurt School, extend Marx to understand commodification as symptomatic of the positivistic worldview reducing existence to a one-dimensional mechanical system. Here we begin to see commodification as the economic branch of the scientific perspective.

Although Simmel finds a kind of chicken and egg problem because “nobody can say whether the intellectualistic mentality first promoted the money economy or whether the latter first determined the former,” Adorno views commodification as the latest stage in a long history of what he names “identity thinking.”⁴⁰ Identity thinking processes concrete and particular objects through systems of abstract classification in order to categorize and control our environment. Commodification is one form of conceptualization for Adorno, and conceptualization always rests on

³⁴ Marx (2000b, p. 130).

³⁵ Simmel (1990, p. 444). For an extended discussion of Simmel on money, see Poggi (1993).

³⁶ Simmel (1997, p. 176).

³⁷ Ibid.

³⁸ Simmel (1990, p. 346).

³⁹ Marx (1973, p. 141).

⁴⁰ Simmel (1997, p. 177).

a cognitive error because it “arises through the equating of what is not the same.”⁴¹ Identity requires us to reduce all things to the prevailing conceptual system—capitalism in our case—and whatever cannot be translated into that framework becomes nonsensical. “Bourgeois society is ruled by equivalence” as a result because our cognitive habits routinely render “the dissimilar comparable by reducing it to abstract quantities.”⁴² From this perspective, an argument that something is not commodifiable will seem irrational because we understand the kind of reductive classification that drives capitalism as synonymous with clear thinking. Humans are not immune to this process for Adorno, and in modernity “any person signifies only those attributes by which he can replace everybody else: he is interchangeable, a copy.”⁴³ Like everything else, “[s]cience in general relates to nature and man only as the insurance company in particular relates to life and death. Whoever dies is unimportant: it is a question of ratio between accidents and the company’s liabilities.”⁴⁴ Although disagreements exist regarding the causal direction—does capitalism cause reductive thinking or does reductive thinking cause capitalism?—the central point here is to draw the cognitive, historical, and sociological connections between the rise of modern science with its mechanistic theory of the world and instrumental view of the body with the advance of commodification. From this perspective, we can consider the relationship between the advent of coinage in ancient Greece with the prominence of abstraction in pre-Socratic philosophy.⁴⁵

I have emphasized the Marxist perspective here, but readers would recognize similar arguments from many philosophers within the Continental tradition. Despite his unpopular willingness to speak positively about money as medium of sociality, Levinas’ phenomenological account of our egocentric tendency to reduce all things to goods for our use, for instance, shares a close kinship with these critiques of commodification as he traces the brutalities of the 20th century to the totalitarian tendencies of theoretical systemization.⁴⁶ Although many theorists share these critiques, identifying precisely what is wrong with such reductive practices requires considerable unpacking. Given that these traditions typically challenge liberal ethical concepts as ideological reflexes or as complicit with prevailing violence, we cannot simply invoke notions of objectification, exploitation, or other normative concepts referred to above. Such theorists often draw from the cultural reservoir of normative concepts and therefore precisely parsing their intended meanings for these terms can prove difficult. They can also tend toward hyperbole. I attempt to distinguish these issues succinctly as they apply to commodification in the following sections.

⁴¹ Adorno and Horkheimer (1972, p. 7).

⁴² Ibid. (p. 7).

⁴³ Ibid. (p. 145).

⁴⁴ Ibid. (p. 84).

⁴⁵ See the fascinating analysis of related issues in Seaford (2004).

⁴⁶ See Smith (2007).

2.9 Concrete particularities and the cognitive errors of commodification

For Adorno, identity thinking and its practical apotheosis in universal commodification commit cognitive errors by translating concrete particulars into abstract classifications. By emphasizing similarities and minimizing differences, we lose the full range of complexity and individuality of things. Forgetting that our concepts are artifacts of intellectual organization that simplify the world for our limited minds, we believe in our concepts too much and operate with a radically oversimplified yet overconfident view of the world. The idea that things possess auratic individuality—meaning because of their very particularity—will seem irrational. Such attitudes pave the way for universal commodification. Just as everything has an adequate concept, everything has a price.

Concerns regarding concrete particularity, which present a version of the problems of otherness and alterity so central to contemporary continental philosophy, receive very little attention within liberal ethical analyses of commodification. Radin considers “mere commodification”—what she understands as commodification without attendant social injustice—to be a “professor’s hypothetical.”⁴⁷ Although Radin believes that “commodification of a significant attribute of personhood cannot be easily uncoupled from wrongful subordination,” she does not track how the very processes of commercial conceptualization lead to the sorts of ills that concern her.⁴⁸ For thinkers like Adorno and Levinas, social injustice grows from the roots of egoistic conceptual frameworks. Liberal analyses only trim back the branches of commodification.

2.10 “Violence” and “domination”

Violence is a term of art within these traditions, referring to anything from the violence of conceptualizing to the violence of genocide. The central issue here, I believe, is that the conceptual reduction inherent in the prevailing modes of thinking contributes to injustice in a broad range of ways. The process of conceptualization is not normatively neutral. We—and the members of this “we” are disproportionately rich—create and perpetuate concepts because of their instrumental value. Concepts allow us to use to world and each other. Economic concepts organize our existence toward certain kinds of use, which Adorno names domination:

Above and beyond all specific forms of social differentiation, the abstraction implicit in the market system represents the domination of the general over the particular, of society over its captive membership. It is not at all a socially neutral phenomenon, as the logistics of reduction, of uniformity of work time, might suggest. Behind the reduction of men to bearers of exchange value lies the domination of men over men.⁴⁹

⁴⁷ Radin (1996, p. 161).

⁴⁸ Ibid. (p. 163).

⁴⁹ Adorno (1992, p. 271).

Adorno does not explain with any degree of precision what he means by domination here, but it provides a broad umbrella for the range of normative concepts discussed in this paper and we can appreciate his sentiment even if we find it overstated. When we reduce the world to a concept, a tool, a resource, and ultimately a commodity, everything risks becoming a mere means to be exploited for the ends of profit maximization.

Two orders of reductive violence appear to be at issue. First, we can call the initial reduction of objects to concepts “formal reduction.” Levinas and Adorno meditate on the ethical and cognitive difficulties that arise in this first order. The second order of reduction concerns the undesirable social, political, and legal consequences of the use of reductive categories. Second order reduction necessarily requires first order reduction. The question receiving far too little attention is whether the first order necessarily, and to what extent, entails the second order.⁵⁰ Failing to draw these distinctions gives the impression of hyperbole.

2.11 Commensurability, fungibility, and homogenization

Incommensurability has received considerable attention in the past twenty years from various theoretical perspectives.⁵¹ Analytic theories of value incommensurability deny that we can or should reduce all goods to a single metric of worth. From this perspective, some goods possess distinct kinds of inherent value that cannot be reduced to a common denominator and therefore we commit an ethical or cognitive mistake, for example, if we attempt to determine whether a parcel of land is more valuable as a wildlife reserve or an oil field by applying a one-dimensional cost-benefit analysis. Aristotle’s claim that no amount of one virtue can compensate for a lack of another in response to Plato’s theory that all goods are ultimately instantiations of one essential good provides an early example of these debates. Continental theories of incommensurability also challenge monistic worldviews, resisting the impulse to understand concrete particulars as mere instantiations of their abstract classifications. Here the emphasis is on the incommensurability between objects and their concepts, a problem which underlies incommensurability between goods. All theories of commensuration were born in part from the facility derived from ordering the world into a unified whole, and the theories of incommensurability expose the price of that gain and feature rather than suppress the losses that accompany even the best choices.

Marx found both senses of incommensurability at stake in commodification. “In becoming an exchange value,” he writes, “a product (or activity) is not only transformed into a definite quantitative relation, a relative number—that is, a number which expresses the quantity of other commodities which equal it, which are its equivalent, or the relation in which it is their equivalent.” The commodity must also, he continues, “be transformed qualitatively, be transposed into another element, so that both commodities become magnitudes of the same kind, of the same unit, i.e. commensurable.”⁵² Capitalist ideology suffers from a kind of fetish of equivalence, unifying all things through the lens of money.

⁵⁰ See Smith (2009).

⁵¹ For the leading anthology in incommensurability, see Chang (1997).

⁵² Marx (1973, p. 143).

Fungibility identifies a closely related problem wherein we perceive money and commodities as interchangeable. Viviana Zelizer doubts the seriousness of this concern, arguing that “in their everyday existence, people understand that money is not really fungible,” for example because we earmark different streams of income with distinct meaning and I might reserve a cash gift from a relative for a special purpose.⁵³ Most of us, however, see most money exchanges as utterly interchangeable. I care deeply about whether my savings accumulate from “ethical investments,” but it does not matter to me which banknotes are deposited into my account. In the vast majority of cases vendors find any legal tender of the same quantity as good as the next, and with electronic banking the digits that comprise our portfolios seem perfectly abstract.

At one level, fungibility speaks only to trading a unit of one commodity for another unit of that commodity. One bottle of soda from the vending machine is interchangeable with another of the same brand, size, quality, *et cetera*, and I have no investment in which bottle I receive. *Prima facie*, this appears distinct from a claim that the soda is fungible with other goods, such that one soda is fungible with a loaf of bread and a truck full of sodas is fungible with a few months of childcare or a human kidney. Some assert, perhaps with intentional hyperbole, that markets insist on the ultimate interchangeability of all things converted to economic measures. If we view economic objectives in term of gross domestic product or other similarly abstract measures, X units of soda sales and Y units of childcare services do indeed take on an air of fungibility as means to the stated end.

Commensurability and fungibility often create problems in legal contexts when determining remedies for injuries that appear qualitatively distinct. As mentioned above, courts routinely calibrate value and assign cash awards for wrongful death claims. Courts convert the value of human life, limbs, sexual intimacy, companionship, emotions, and just about everything else into the same cash nexus. The unique dead child is processed by the court as a generic member of the class of dead children determined to be worth X units of value, and these are the very same units of value applied to a destroyed shipping container full of soda. Thus before the courts the “good” of the child and the “good” of the vehicle become qualitatively equivalent. Although a vehicle may be worth \$25,000 and the child \$4,000,000, this difference is primarily a matter of quantity. If an entire lot of 160 vehicles is destroyed, then that injury would appear equivalent to the death of the child in the analysis of the court. One kind of good—monetary value—dominates in law, leading legal institutions to ignore or suppress the particularity, incommensurability, and nonfungibility of their subjects.

This relates to problems of cultural homogenization. Due to the force of global markets, commodifying a good allows it to spread around the world and into local cultures. Such products can then supplant traditional goods and ways of life, leading to a global monoculture that replaces diverse systems of meaning.

Such criticisms can seem overdemanding, as we now expect legal institutions to provide remedies for such a vast range of damages that we can hardly expect them to attend to every nuance of incommensurable meaning. Converting injuries to

⁵³ Zelizer (1997, p. 5).

monetary values may use blunt tools for a sensitive job, but judicial efficiency should have some place in our evaluation of legal processes. Considering that continental theorists often understand the ethical requirement that we attend to concrete particularity as an interminable and inexhaustible responsibility—see Adorno and Levinas, for example—perhaps we should not fault courts for expending their energies on more manageable problems.

This returns us once again to the intractability problem: given the legal system's limited resources and the demands it faces, law is not the place to resolve complicated and contested problems of incommensurability. Commitments to inherently meaningful or sacred goods that derive meaning from their non-commodifiability create difficulties for the prevailing economic order and its legal system, and we relegate such views to private assessments of value as if they rest on dogmatic beliefs more suitable to a house of worship than to rational public discourse.

2.12 The expressive force of commodification in law

The law's claim to passive inadequacy regarding its inability to address incommensurability can become an active endorsement of commensurability. From the practical need for compensation and the use of monetary awards we can become committed to the legitimacy of commodification in law. Even in the face of obviously incommensurable choices such as deciding whether to suspend our careers to raise our children, the very act of decision-making seems to dissolve the incommensurability. Choosing creates not only an inductive belief in the adequacy of the solution, but also amplifies our sense of justification and suppresses the fact that loss accompanies even the most thoughtful choices. Commensurating metaphors like "balancing the scales of justice" become predominant cultural tropes, leading us to concerns regarding the expressive power of trends in law and economics.

Courts project an air of moral authority, and opinions expressed by the legal system play a role in the formation of a culture's interpretation of the proper respect for and evaluation of a variety of goods. Cass Sunstein provides several examples of how the law communicates such ideas, including its stance on issues such as capital punishment, school prayer, and discrimination.⁵⁴ "A society might protect endangered species," for example, "partly because it believes that the protection makes best sense of its self-understanding, by expressing an appropriate valuation of what it means for one species to eliminate another."⁵⁵ In other words, the law expresses and transmits broad cultural values that reach beyond their application to narrow sets of facts. Legal opinions become popular opinions, and what begins as the law's attempts to justify its crude remedies can reinforce the cultural attitude that money provides the most accurate measure of value.

The law exerts expressive power not only when it permits outright sales of goods or draws a direct equivalence between an injury and a cash award, but also when it

⁵⁴ Sunstein (1994, p. 852).

⁵⁵ Ibid.

conducts its analyses in commercial language. When officials conduct policy analysis in commercial language, the “metaphorical” equation of goods with financial variables can be as influential as an actual sale. Radin explains this important point: “Commitments to facts and values are present in the language we use to reason and to describe, and they shape our reasoning, our description, and the shape (for us) of reality itself. The way we conceive of things matters to who we are.”⁵⁶ Posner’s description of rape as sanctionable because it “bypasses the market in sexual relations” demonstrates Radin’s point: “Even if everybody agrees that rape should be punished criminally, the normative discourse that conceives of bodily integrity as detached and monetizable does not reach the ‘same’ result as the normative discourse that conceives of bodily integrity as an integral personal attribute.”⁵⁷ Metaphorical commodification sends the message that inherently valuable goods can be effectively reduced to a uniform economic measure, and this rhetoric can reinforce suspect ethical and metaphysical presuppositions.

Discourse transforms how we conceptualize, and the world will appear quite different for those looking through the lens of commensurating ethical sciences as compared to those committed to incommensurability. As several of the perspectives on commodification thus far have claimed, how we conceptualize the world influences how we treat it. Those committed to incommensurability ask not only about the proper values of things, but also what it means to value and discuss things in certain ways. If an injury is suffered to one’s reproductive capabilities, for instance, how should a court determine a remedy that will both compensate for such a loss and recognize the belief that the human body has meaning beyond a cash value?

As with many of the issues raised in this paper, concerns regarding the causal relationship between commodifying discourse in law and a population’s beliefs and actions present empirical questions. If a legal system values life in even the most egregiously offensive financial terms, is it really more likely that we will come to understand each other and relate to each other in financial terms? How so, and to what extent? Measuring these relationships seems like an important and formidable undertaking.

2.13 The Gateway Theory of Commodification in law

What I describe as the “Gateway Theory of Commodification” refers to a specific worry regarding the expressive power of law and economics. When we conduct legal analysis in economic concepts and routinely translate injuries into cash remedies, this may cause the general population as well as legal actors to think of all goods as potentially commodifiable. The gateway theory asserts that universal commodification in law opens the doors for universal commodification in markets. If the law can determine a price for all things, free markets will soon follow. A stronger version of the gateway theory, attributable to Lukács, asserts that introducing commodification of anything will eventually result in the

⁵⁶ Radin (1996).

⁵⁷ Ibid. (p. 88).

commodification of everything.⁵⁸ Radin has described this effect as the domino theory of commodification: “there is a slippery slope leading from toleration of any sales of something to an exclusive market regime for that thing; and there is a further slippery slope from a market regime for some things to a market regime encompassing everything people value.”⁵⁹ On this view commodification is a contagion, spreading from a market for a particular good to a market for all goods. Here we can ask whether commodification in law creates commodification in markets or whether market economies create law and economics. For a dialectical materialist, the causal direction flows from structure (markets) to superstructure (legal justifications of those market activities), but I expect there is a more nuanced relationship at work.

The problem of “line-drawing” also supports the gateway theory. Ethical theorists face considerable difficulty demarcating clear lines between what is and what is not permissible in many matters. Determining exactly what should and should not be commodified is no exception. If I can buy my child organic foods to promote her health, why can I not genetically engineer her to be healthy? Lines between corrections and enhancements tend to blur—we can appreciate the difficulty of determining what size is “abnormal” enough for parents to administer human growth hormone to their children—especially when those selling the goods and services under review invoke the values of autonomy, competition, and market progress. Although we can find some conviction at the extremes and ban sexual slavery or human cloning, determining exactly where to draw the line between the commodifiable and the noncommodifiable creates endless debate. And once again, intractability favors free markets. Attempts to draw clear lines, such as those arrived at by George W. Bush’s Council on Bioethics, can seem indefensible and against reason. I appreciate the irony of citing Bush as an opponent of free markets in this respect, but my point is that closing the gates on commodification may require the force of religious fundamentalism. We can trace this concern to Bentham’s progressive rejection of metaphysical first principles in his *Introduction to the Principles of Morals and Legislation*.⁶⁰ To be sure, advocates for universal commodification like Posner understand themselves as Bentham’s heirs, debunking the pretensions of anything beyond one-dimensional life while citing the failure of the history of philosophy to produce any convincing alternative to hedonism. What we gain by having a public philosophy neutral with respect to ultimate meaning may come at the price of forfeiting values strong enough to resist commercial logic.

⁵⁸ See Lukács (1971).

⁵⁹ Ibid. (p. 99).

⁶⁰ Bentham (1879, p. 4). Bentham famously states: “Has the correctness of the principle of utility been ever formally contested? It should seem that it had, by those who have not known what they have been saying. Is it susceptible of any direct proof? Apparently not: for that which is used to prove every thing else, cannot itself be proved. A chain of proof must have a commencement somewhere. To give a proof of that is as impossible as it is needless.”

2.14 Waning of legal institutions as home of substantive justice

By looking to market values to determine the worth of injuries, courts can simply *calculate* rather than *judge* in any substantively rich sense of the term. The law functions more like a bank than a public forum for tarrying with questions of justice. Although a judicial system's neutrality on issues of ultimate worth offers benefits within a secular and pluralistic society, we should ask if these advantages outweigh the resulting impoverishment of public discourse. For better or for worse, nearly all valuable goods now come before courts and the law is a primary venue for discussions regarding the meaning and value of these diverse goods. Instead of engaging in substantively robust analyses of the value of these goods, courts resort to default monetary valuation. In addition to the expressive effects of such commodification, the law misses the opportunity to engage in multi-dimensional discussions about the complexities of valuation. Again, quantitative reasoning eclipses qualitative reasoning.

If commodified justice arrests the moral development of legal institutions, can we say the same for lawyers? Perhaps this amounts to little more than a nostalgic memory for a time that never existed, but Yale law professor Robert Gordon claims that attorneys were once perceived as servants of the public good. Now, Gordon claims, we understand "what lawyers call professionalism and the professional ideals they articulate as camouflage for narrow economic self-interest."⁶¹ Just as courts look like banks, lawyers look like bankers. Although many young lawyers enter law school with rather vague ambitions to serve justice, the combination of their educational loan debts and the temptation to earn far higher salaries serving commercial interests tends to steer their careers away from public service. According to Gordon, a considerable portion of the legal profession becomes a handmaiden to private industry with an "almost unqualified loyalty" to its clients.⁶² Private interests reward this loyalty handsomely. At large Manhattan law firms in 2008, the going rate for a beginning salary of a first year associate—commonly a twenty-five year old and graduating from law school only months earlier—reached \$160,000 plus approximately \$30,000 in bonuses. Considering that three years at Columbia Law costs \$204,000 according to the school's financial aid office, we can appreciate why young lawyers drift toward their most lucrative options.⁶³

2.15 The decline of inherent value and the sacred

We now come most directly to what I consider "arguments from meaning," an area I have discussed at some length elsewhere.⁶⁴ In this context, these concerns speak to the worry that commodification in law contributes to a deficit in what we can

⁶¹ Gordon (2008, p. 73). See also Kronman (1993).

⁶² Ibid.

⁶³ The web page of Columbia Law School's financial aid web page provides these estimates for students entering in 2009.

⁶⁴ See Smith (2008, pp. 17–27).

loosely refer to as “existential meaning.” Central to these concerns lies a suggestion that by reducing goods that historically may have been considered sacred or inherently valuable to dollar amount, we degrade their perceived worth. On this account, commodification diminishes a culture’s ability to experience inherent value. Marx warned that within capitalism “money is the universal, self-constituted value of all things” and hence “it robbed the whole world, the human world as well as nature, of its proper value.”⁶⁵ Adorno and Horkheimer provide the most full-throated—and probably the most exaggerated—version of these claims: “Everything is looked at from only one aspect: that it can be used for something else, however vague the notion of this use may be. No object has inherent value; it is valuable only to the extent that it can be exchanged.”⁶⁶ Just as scientific explanations supersede mythologies, economic accounts eclipse what are seen to be irrational commitments to residual metaphysical notions of inherent value. In Simmel’s words, money renders the world “colorless” in an “evenly flat and gray tone.”⁶⁷

Whether receiving a gift, admiring a painting, or even donating an organ, we cannot help but understand the good according to market value once we know its price: that was a generous gift, this is an important painting, I could have received X\$ for that organ but instead I give it to you. It seems as if our very sense of wonder dulls when we view the world through economic lenses. As a forager of mushrooms, I am often struck by the utter mystery and strangeness of a spongy fungus blooming from a decaying oak. The fact that earth and water recombine into such a magical thing can provoke genuine awe—how truly amazing is this place and life itself—and these moments can seem downright religious as I imagine a successful hunt would feel holy to our ancestors. Yet I almost immediately think of how much these maitakes would cost at the market. The value of my experience risks becoming primarily economic, as if I had found a few hundred dollars in the woods.

This is not necessarily an argument against markets in mushrooms, but rather a recognition that we stand in a different spiritual relationship to things once we commodify them. The many spheres of value that animate human experience—raising children, serving in the military, caring for the elderly, killing animals and preparing them as food, receiving justice, achieving fame—come to seem like a function of money that can be best understood according to market logic. Here Adorno and Walzer share a sense that pluralistic values collapse into a one-dimensional universe of money where all sources of inherent value seem profaned.

2.16 The rise of instrumental value and materialism

We do not realize the full extent of the erosion of inherent value until we notice what supplants it. If notions of inherent value and the sacred once provided the core meanings for our lives, their decline poses a very serious problem. In the absence of ultimate ends to orient our existence, we pick through the various means in search of

⁶⁵ Marx (2000a, pp. 67–68).

⁶⁶ Adorno and Horkheimer (1972, p. 158).

⁶⁷ Simmel (1997, p. 178).

value. Money is the king of means. If we lack a conviction regarding the true purpose of life, accumulating as much wealth as possible becomes the substitute objective. Means become ends. Money becomes spiritualized. Simmel describes this transformation:

Money all too often easily gives the impression of being the final purpose; for too many people money signifies the end of the teleological sequences, and lends to them such a measure of unified combination of interests, of abstract heights, of sovereignty over the details of life, that it reduces the need to search for such satisfactions in religion.⁶⁸

When the accumulation of money becomes an end in itself, our fellow humans—those who we were supposed to consider the true ends on Kant’s account—can become valued primarily as means to the ends of wealth and object acquisition. In Marx’s terms, we come under the spell of the magic of the fetish and covet objects of extreme exchange value simply because they are worth a lot of money and thus possess meaning. Others understand this as commodification corroding moral character.⁶⁹ Things become more valuable than people or principles, and we devote more energy to acquiring objects than to nurturing relationships and caring for each other. We outsource traditional sources of honor like serving in the military or caring for one’s parents. We measure our wealth by our privately owned commodities—the square footage of our homes, the bottled water in our refrigerator, and the size of our savings accounts—rather than by the quality of our public schools, the beauty of our shared land, and our ability to care for our sick and elderly.

Commodified legal culture underwrites one-dimensional materialism, lending legal authority to the cultural trend of valuing money above all else. Even justice itself, once considered the ultimate unconditional value, can seem like a means to the end of accumulating personal wealth. When legal institutions act as if all injuries are compensable in dollars, the public looks to cash in on its suffering. Especially within an adversarial legal system reliant on contingency fee arrangements in which attorneys receive a percentage of their clients’ winnings rather than a flat fee or an hourly rate, injuries present opportunities to line the pockets of lawyers and litigants. How often does the pursuit of money, rather than the pursuit of justice, provide the primary motivation for legal action? How often does the pursuit of money, rather than the pursuit of justice, provide the primary motivation for entering the legal profession?

2.17 Money as god/money as totality

For Marx, our practices of exchanging goods determine not just how we trade but also how we understand and treat the world. Capitalism supplies a metaphysical

⁶⁸ Simmel (1990, p. 237). Even Ayn Rand, for all of her exultation of money as the “root of all good,” admonishes that it will not “purchase happiness for the man who has no concept of what he wants: money will not give him a code of values, if he’s evaded the knowledge of what to value, and it will not provide him with a purpose, if he’s evaded the choice of what to seek.” See Rand (1957, pp. 410–415).

⁶⁹ See John Templeton Foundation (2008).

theory to order the world's chaos. In a world deeply suspicious of religious doctrine and universal truth yet struggling to fill the vacuum of value once occupied by these sources of ultimate meaning, capitalism and its ideology of material success and consumer freedom has become the primary doctrine through which we interpret the world and give it value. In a passage with a Levinasian tenor, Marx describes commodification as “a circle of exchange, a totality of the same, in constant flux, proceeding more or less over the entire surface of society...”⁷⁰ Money has imperial ambitions, colonizing whatever cannot or should not be subjected to economic discourse into market concepts.

When money offers a totalizing system of value that appears to offer ultimate meaning, it can appear omnipresent and omnipotent and become what Marx described as the “god among commodities...the divine existence of commodities, while they represent its earthly form.”⁷¹ Just as “all estrangements and all irreconcilables of existence find their unity and equalization” in the divine, Simmel believes “money becomes the absolutely commensurate expression and equivalent of all values” where “the most opposed, the most estranged and the most distant things find their common denominator and come into contact with one another.”⁷² Universal commodification offers a kind of cosmic unity.

According to Simmel, the pursuit of money creates a “religious mood”: “excitement and tension in the struggle for money [is] the pre-condition for the blissful peace after the conquest” akin to “the calmness of the soul that religion provides...only at the price of having searched and struggled for God.”⁷³ As Jesus preached that one “cannot serve both God and Money,”⁷⁴ Simmel discusses in some detail the rivalry between money and God where the rules of successful economic competition become life's organizing principles and supplant the old values.⁷⁵ For Adorno and Horkheimer, the battle between God and money began long before nineteenth century metropolis depicted by Simmel and dates to the first sacrifice to the Gods: “All human sacrifices...deceive the god to whom they are made: they subject him to the primacy of human ends, and dissolve his power.”⁷⁶ Like all prevailing mythologies, faith in the free market and its invisible hand comes to be seen as the one true and rational system of belief. Ultimate authority migrates from our holy books to our bank notes, and we leave ambiguous in which “God We Trust.”

2.18 Market culture and market personalities

We can begin to appreciate Simmel's claim that capitalism creates not only a market *economy* but also a market *culture* in which “money becomes the central and

⁷⁰ Marx (1973, p. 188).

⁷¹ Ibid. (p. 221).

⁷² Simmel (1990, p. 236).

⁷³ Ibid. (p. 237).

⁷⁴ Matthew 6:24.

⁷⁵ See Simmel (1990, pp. 236–237).

⁷⁶ Adorno and Horkheimer (1972, p. 50).

absolute value.”⁷⁷ Citizens of market cultures tend toward certain personalities. Simmel predicts that we will become excessively calculating time managers, and the modern mind will demand from social relations “the same precision, reliability, [and]...lack of ambiguity” that we expect in the natural sciences.⁷⁸ We come to share a “matter of fact attitude in dealing with men and with things” and take up “a formal hardness” in our relations.⁷⁹ For Simmel, the “whole heartlessness of money mirrors itself” in the commodified personality and we become cold and calculating people.⁸⁰

We are crammed into cities, yet most of our interactions occur over commercial distances in which “man is reckoned with like a number, like an element which is in itself indifferent.”⁸¹ We apply our keen instrumental rationality toward means disguised as ends. Unlike the desire for particular kinds of wealth in the form of jewels, fine food, and other concrete goods, the quest for money is not limited by our ability to use, store, or even see it. More is always better, leading Marx to claim the money is not only *an* object of greed but *the* object of greed—“the fountainhead of greed”—that makes possible unprecedented degrees of hoarding.⁸² The profile of the market personality is grim: cold, calculating, greedy, materialistic, selfish, individualistic, disconnected, lacking compassion, and worshipping the money god. In Marx’s terms, the more we commodify, “the more egotistical, antisocial, and alienated from his own essence man becomes.”⁸³

If this sounds depressing, Simmel thinks it is. Because of the “heartlessness” required to compete in market society, passion itself wanes. The “blasé” person has nothing left to care deeply about—compare the passion of religious zeal with the passion for one’s financial portfolio—because the money she chases is only a means rather than an end. A life pursuing money lacks inherent value, but where else can we look for thick existential meaning? What could be more real than money? We attempt to fill this void of meaning with “closely compressed contrasting stimulations of the nerves,” but a “life in boundless pursuit of pleasure makes one blasé because it agitates the nerves to their strongest reactivity for such a long time that they finally cease to react at all.”⁸⁴ Although Simmel worried most for the urban children coming of age at the turn of the century, we cannot help but recognize our own children, hyper-stimulated with chemical cocktails and immersed in a media culture—including the perpetually accessible commercial cultures of pornography and video games—yet desensitized to existence.

Simmel believes these “physiological” attacks on our senses leave us especially vulnerable to apathy, which he describes as “the blunting of discrimination.”⁸⁵

⁷⁷ Simmel (1990, p. 279).

⁷⁸ Ibid. (p. 445).

⁷⁹ Simmel (1997, p. 176).

⁸⁰ Simmel (1990, p. 346).

⁸¹ Simmel (1997, p. 176).

⁸² Marx (1973, p. 222).

⁸³ Marx (2000b, p. 128).

⁸⁴ Simmel (1997, p. 178).

⁸⁵ Ibid.

Once we internalize the cognitive habits of the money economy and accept that the worth of all things is best understood as expressions of economic value, they will seem qualitatively insubstantial. By providing the “common denominator of all values,” money “hollows out the core of things, their individuality, their specific value, their incomparability.”⁸⁶ Like spoiled children, nothing excites us as genuinely new because it all looks like more or less the same stuff: different colors and shapes of things bought and sold for money.

Money becomes the “most frightful leveler” when we turn the commodifying gaze on ourselves. We buy the convenience and efficiency of commodification “at the price of devaluating the whole objective world, a devaluation which in the end unavoidably drags one’s own personality down into a feeling of the same worthlessness.”⁸⁷ Just as the natural sciences chip away at our self-understanding as beings somehow spiritually distinct from the rest of the material in the universe and we begin to look like merely another physical system, commodification drains metaphysical meaning from our lives, bodies, thoughts, and loves. With his sociological analysis bridging Marx’s theory of commodification to Adorno’s critique of identity thinking, Simmel sees modern life as vicious, pointless, boring, and depressing.

Surely this account, like many of the aforementioned points, is exaggerated. But surely there is some truth here as well, and I have difficulty imagining a process that could quantify the relative veracity of these claims. Rates of existential meaning are difficult to measure, especially when compared with nostalgic memories of the past. Sophisticated social scientists could provide illuminating studies of this constellation of issues, but for the moment we have little but our senses and experiences to rely on. It seems indisputable that we suffer, to some extent, from the hardness that Simmel describes. Whether discussing professional sports, management strategy, or family budgets, we cannot help but think of our values and each other in numbers. My mother—like her father, husband, and eldest son—worked at Eastman Kodak for most of her life. She became seriously ill, and her boss came to her hospital bed to lay her off. She understood. This is how the world works now. The days of thinking of one’s employer as family were over, and it had been a bad analogy for a long time. She was not angry with Kodak or her boss, and she actually felt sympathy for the middle manager required to come to the hospital to fire a sick woman. No one wants to do that, but this is just business.

On the other hand, as a husband and a new father I feel anything but blasé. I seem to suffer from an abundance, rather than a deficit, of meaning and in this respect I feel like Sartre admitting that he personally never felt despair. I have worked in the belly of the beast of legal commodification, and I have an acute awareness that everything in my life—my wife, my son, my dog, my teeth, my sentences, *et cetera*—can be reduced to a cash equivalent. I also understand that I regularly decide to take on work for extra money rather than spending time with my family. If I can earn one thousand dollars for giving an evening talk at a neighboring university, that is usually worth more than participating in the nightly rituals at

⁸⁶ Ibid.

⁸⁷ Ibid. (p. 179).

home with my family. Despite telling myself that every moment is priceless and organizing my life around the inherent value of my relationships with loved ones, I live uneasily with the knowledge that my own first principles suppress the realities of decision-making within the cash nexus. As noted above, my choices also reflect the privileges of living within the wealthiest 1% of the world's population. Billions of people would be willing to sell much more than an evening—perhaps years of hard labor, an organ, or even a child—for one thousand dollars. While consuming too many calories constitutes the greatest threat to my health, approximately six million children under five years old die from malnourishment each year. In this context many of the concerns regarding market culture can seem like the petty complaints of someone with the luxury to worry about the side-effects of his affluence.⁸⁸ While rich Westerners bemoan the emptiness of their materialistic lives, they can expect to live about twice as long as citizens of the world's poorest nations.⁸⁹

3 Conclusion

Providing an evenhanded evaluation of the relative costs of commodification against its benefits with respect to each issue would probably require multiple volumes of analysis, and compelling conclusions would benefit from empirical research that has yet to begin. I could also add to this list concerns regarding patriarchy, racism, agency, alienation, corruption, degradation, subordination, and many others.

In this respect, it seems entirely premature to say with conviction that commodification in law is, on balance, good or bad. Commodification brings different concerns in different contexts and when applied to different goods, and it probably makes good sense for the legal actors to commodify in certain situations. It also seems unlikely that definitive conclusions on any one of these issues—for example proving that commodification does or does not objectify or corrode moral character—resolves the arguments. Whether to commodify or not to commodify also depends on the available alternatives. Incarcerating the offender provides one obvious substitute for converting legal damages into cash awards, and given this choice commodification may often prove the lesser evil. We might also find the ills attributed to commodification turning up in the alternatives—bartering systems can also insist on universal fungibility and restricting commodity exchange might result in more seizures by warfare. Commodification may cultivate greed and the blasé attitude, but it may also promote self-discipline and innovation while undermining conformist values. And as noted above, commodified law can provide many significant benefits *within* free markets. A holistic view of commodification in law cannot ignore these complexities.

Considering that I began by noting that intractability tends toward capitulation, I would prefer to avoid concluding with hand-wringing about the nuances and difficulties of debates regarding commodification in law. The task is truly daunting,

⁸⁸ United Nations Millennium Project (2008).

⁸⁹ Angolans, for example, can expect to die before their forty-third birthday. These statistics reading life expectancies are available via United Nations (2006).

but I hope that organizing these concerns makes a small contribution toward thinking clearly about this ubiquitous social issue.

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