

MARKETS FOR SELF-AUTHORSHIP

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INTRODUCTION

Markets serve goals such as efficiently allocating resources and entitlements, rewarding desert, inculcating virtues, and spreading power. This Article focuses on another—arguably the most fundamental—goal: markets can serve our right to self-authorship (or self-determination). The aim of this Article is to study the market’s autonomy-enhancing *telos*.

Markets are potentially conducive to people’s self-determination because alienating resources and entitlements enables geographical, social, familial, professional, and political mobility, which is often a prerequisite of meaningful autonomy. Markets are also important to self-authorship because they facilitate people’s ability to legitimately enlist one another in the pursuit of private goals and purposes, both material and social, thus enhancing our ability to be the authors of our own lives.

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Appreciating these two autonomy-enhancing roles of the market entails important lessons for liberal law, because a liberal polity is expected to found its major institutions on the commitment to people's autonomy. Most of these lessons take the form of interpretive recommendations regarding the market's desirable design as well as instructions as per the background regime it requires. But the status of self-authorship as the ultimate commitment of liberal law suggests that some lessons may go further than that. It implies that at times autonomy may function as a constraint that trumps the market's other goals when they conflict.

Markets with the primary goal of autonomy-enhancement will have several characteristics. Autonomy-enhancing markets must allow universal participation since exclusion and discrimination would undermine their *raison d'être*. They should also set limits on the power to alienate whenever it erodes our ability to rewrite our life-story and start anew. Such markets should proactively ensure meaningful choices in each major sphere of human action and interaction; however, this injunction of intra-sphere multiplicity must be curtailed where cognitive, behavioral, structural, and political economy reasons imply that more choice may actually reduce autonomy. Moreover, when markets are structured to serve autonomy, market relationships are governed by rules that comply with the prescription of reciprocal respect for self-determination, meaning that party interactions in the market are governed by the maxim of relational justice. Finally, since utility is understood to be instrumental to the markets' ultimate value, which is autonomy, the law of the market must avoid the commodification of people and interpersonal relationships. It should thus employ, in some subsets of the settings it governs, techniques of incomplete commodification ensuring that, while entitlements are exchanged, interactions retain a personal aspect.

I. THE TASK

Markets are complex social institutions which heavily rely on, if they are not strictly constituted by, a thick legal infrastructure. In the various shapes and forms they take, markets play a key role in the fabric of both domestic and transnational interactions. The omnipresence of markets in society today may account for their tendency to attract both avid advocates and enthusiastic critics.¹ This Article has no pretense to summarize or evaluate this voluminous literature, let alone the multifaceted reality which it analyzes.

My task is different. I take it for granted that—like other major social institutions (states, communities, etc.)—market mechanisms are

¹ See ALBERT O. HIRSCHMAN, *RIVAL VIEWS OF MARKET SOCIETY AND OTHER RECENT ESSAYS* 105–24 (1986).

here to stay. And while I do not deny that markets serve various goals such as those noted at the outset, I seek to explore their justification, and thus their proper constitution, from the standpoint of the ultimate liberal commitment to individual self-authorship. This Part studies the two main roles markets play in facilitating people's self-authorship. The next Part explores the ways these autonomy-based justifications can and should inform the legal design of the market.

A. *Markets*

To elucidate the putative contribution of markets to autonomy, we need to have at least a rough account of what a market is, and some understanding of why self-authorship should be the liberal litmus test for markets' legitimacy. I begin with an account of the market, which—interestingly enough—turns out to be a tricky business.

Some accounts of the market are built around a model of an ideal market. This strategy often makes sense. Thus, given the assumption that markets are aimed at maximizing efficiency, it is reasonable for economists to (explicitly or implicitly) treat the perfectly competitive market, typified by perfect information, full rationality, and no transaction costs, as the ideal market.² Similarly, an account that highlights the moral virtues markets tend to inculcate would sensibly opt for a somewhat different picture of the ideal market, one that revolves around institutionalizing civilized exchange amongst strangers.³

This Article, which begins with the question of how markets can facilitate autonomy, cannot follow this strategy. Instead, I need to resort to a broader and less judgmental account to flesh out the common distinctive properties of the heterogeneous trading activities we typically call markets. With that baseline (pre-theoretical) account in mind, I can then form the conception of the ideal market from an autonomy perspective.⁴ This is why I begin with John O'Neill's definition of markets as "social and institutional arrangements through which goods [or services] are regularly produced for, distributed by and subject to contractual forms of exchange in which money and property rights over goods are transferred between agents."⁵

² See, e.g., FRANK H. KNIGHT, *RISK, UNCERTAINTY, AND PROFIT* 76–77, 79 (1921); George J. Stigler, *Perfect Competition, Historically Contemplated*, 65 J. POL. ECON. 1, 14 (1957).

³ See, e.g., NATHAN B. OMAN, *THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW* 23–30 (2016).

⁴ Cf. William A. Jackson, *On the Social Structure of Markets*, 31 CAMBRIDGE J. ECON. 235, 249 (2007).

⁵ JOHN O'NEILL, *THE MARKET: ETHICS, KNOWLEDGE AND POLITICS* 4 (1998). I think that my addition of "services" does not deviate from the thrust of this definition and is required in order to properly cover all market activities. For a somewhat similar definition, see GEOFF-

As this definition clarifies, markets are robust infrastructures that enable systemic, repeatable acts of exchange. For markets to function, property rights and modes of their legitimate transfer need to be defined and respected and contracts should be honored and enforced. For markets to go beyond barter exchanges, they also need to rely on a common, acceptable, liquid currency, namely: money (widely understood as any generic means of exchange). Highlighting the crucial role property, contracts, and money play in the constitution of contemporary markets is important. Although it does not imply that markets cannot exist without law—law-like social conventions can, and have, facilitated markets⁶—this simple observation does mean that where law exists, its prescriptions provide at least some of the foundations of the market.

O'Neill's definition also helpfully emphasizes that markets institutionalize specific types of transactions. Market transactions are voluntary, rather than compulsory, undertakings; and they are “two-way transfers, leaving no doubts about reciprocity or future payments (unlike one-way transfers such as gifts, which may or may not carry an implicit duty to reciprocate).”⁷ Both of these features point to core characteristics of the market. The voluntariness of market transactions implies that “[m]arkets call up our power as individual decision makers who can veto as well as sign on to exchanges, and they give scope to the exercise of these powers.”⁸ The distinction between a market and a gift exchange suggests that while the latter “aims to realize a shared good in the relationship itself,” the former—exchange through market transaction—focuses on realizing “distinct goods for each party.”⁹

Markets' focus on voluntary exchanges will occupy much of the following discussion.¹⁰ At this stage, the exclusion of gift exchanges from our definition of markets deserves a closer examination. Some

FREY HODGSON, *ECONOMICS AND INSTITUTIONS: A MANIFESTO FOR A MODERN INSTITUTIONAL ECONOMICS* 174 (1988).

⁶ Cf. OMAN, *supra* note 3, at 34–35.

⁷ Jackson, *supra* note 4, at 236.

⁸ DEBRA SATZ, *WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS* 22 (2010).

⁹ ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 151 (1993).

¹⁰ Nathan Oman suggests that voluntariness need not be “an attribute of well-functioning markets.” OMAN, *supra* note 3, at 27. Part of his argument relies on the familiar difficulties in defining consent, and thus voluntariness, which are real, but cannot imply the detachment of markets from voluntary transactions. Another premise of this purported disconnection is the suggestion that consumer transactions cannot plausibly be understood as premised on contractual consent. *Id.* at 29. But a proper understanding of consumer contracts implies, as I argue elsewhere, that in this context voluntariness is secured by ensuring that the non-bargained terms correspond to (or exceed) consumers' typical expectations, so that attributing consent to the consumer is no more objectionable than attributing consent to a buyer of a car who lacks knowledge of its mechanical features. See HANOCH DAGAN & MICHAEL A. HELLER, *THE CHOICE THEORY OF CONTRACTS* 83 (2017).

scholars, including O'Neill, learn from this exclusion that "market relations are essentially impersonal."¹¹ Elizabeth Anderson's influential account of the "norms structuring market relations" goes even further than that. These norms, Anderson claims, "embody the economic ideal of freedom: they are impersonal, egoistic, exclusive, want-regarding, and oriented to 'exit' rather than 'voice'."¹² Some markets are indeed typified by a few of these characteristics. But my definition of the market does not resort to any one of them as the *sine qua non* of the market.

I appreciate the role Anderson's definition plays in her account, which is analogous to the role of an ideally efficient or virtuous market in the accounts with which I have started. Anderson's account highlights the dangers of market imperialism and, thus, focuses on those market interactions that are as different as possible from other types of interactions. But for the purposes of this Article Anderson's definition is unduly restrictive. As William Jackson notes, alongside markets of impersonal trading "such that sellers and buyers compete anonymously and aim only to obtain the best available price," oftentimes "traders take part in relational exchange": they "develop personal relationships going beyond their impersonal roles" and thus "no longer respond to price alone." Therefore, there is no reason to assign anonymous trading a privileged status in "a 'marketness' scale."¹³

B. *Self-Authorship*

In what follows, I hope to highlight the main ways in which markets can, if properly configured and calibrated, contribute to our freedom. The claim that connects markets and freedom is, of course, not innovative. But usually the freedom that is associated with markets is negative: it is freedom as independence; freedom from the interference of others, either individuals or the state. (This may explain the frequent association between libertarianism and free market advocacy.)

Many have criticized the claim (or, more often, implicit presupposition) that markets can be free in this way by highlighting how markets

¹¹ O'NEILL, *supra* note 5, at 12.

¹² ANDERSON, *supra* note 9, at 144–45.

¹³ Jackson, *supra* note 4, at 236–37, 239, 241. O'Neill recognizes the heterogeneity of markets, but nonetheless insists on the impersonality of market relations by relegating the personal bonds of the less impersonal market formations to the status of "accidental features," which are "eroded" as trading transcends historic small-knit communities. O'NEILL, *supra* note 5, at 12. As the text suggests, relational contracts are far from being marginal or declining in modern, developed markets economies, and the relational setting in which these contracts are situated affects their structure and content. See Robert E. Scott, *The Promise and the Peril of Relational Contract Theory*, in REVISITING THE CONTRACT SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 105, 108 (Jean Braucher et al. eds. 2013).

depend upon the power of law.¹⁴ My observations regarding the legal foundations of the market¹⁵ follow a somewhat refined version of this critique, which is why I will not attempt to rehabilitate the libertarian, or “neoliberal,” understanding of the market.¹⁶ Indeed, my account of the market is diametrically opposed to the one celebrated by neoliberals. But tracing the roots of its error is still worthwhile, because it can point to a more promising conceptualization of the relationship between markets and freedom.

Linking markets with negative liberty echoes the association of the market’s building blocks—property and contract—with independence, manifested in theories that view property and contract as fundamentally duty-imposing. This understanding holds if claims of owners and of promisees towards (respectively) non-owners and promisors can be conceptualized as extensions of the natural duty to refrain from interfering with the external freedom of others. But both property and contract work differently: rather than vindicating existing rights, they are both primarily power-conferring.

As power-conferring legal doctrines, both property and contract “attach legal consequences to certain acts” in order “to enable people to affect norms and their application in such a way if they desire to do so for this purpose.”¹⁷ To be sure, duties not to interfere with people’s rights are of course also relevant to both property law and contract law. But these piggy-backing (duty-imposing) rules would be meaningless in the absence of the power-conferring institutions of property and contract because their role is to protect our ability to apply the powers enabled by these institutions. They rely on, and should thus be circumscribed by, the normative commitments that explain and justify the legal powers characteristic of property or contract in the first place.¹⁸

Thus, contract is “a particularly valuable means for pursuing ends,” because, by recognizing people’s power to undertake obligations, it allows individuals to provide credible assurances “to induce promisees to assist them in realizing their ends.”¹⁹ Property is similarly empowering: the unusual authority it confers on owners with regard to certain re-

¹⁴ See CASS SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 5 (1998). See also, e.g., ANDREW SAYER, *RADICAL POLITICAL ECONOMY: CRITIQUE AND REFORMULATION* 93 (1995).

¹⁵ See *supra* text accompanying note 3.

¹⁶ See DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 2 (2005); David Singh Grewal & Jedediah Purdy, *Law and Neoliberalism*, 77(4) *L. & CONTEMP. PROBS.* 1, 6 (2014).

¹⁷ Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 *N.Y.U. L. REV.* 1726, 1739 (2008) (citing JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 102 (1975)).

¹⁸ See DAGAN & HELLER, *supra* note 10, at 37–39; Hanoeh Dagan & Avihay Dorfman, *The Human Right to Private Property*, 18 *THEORETICAL INQ. L.* 391, 398–400 (2017).

¹⁹ Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 *COLUM. L. REV.* 1603, 1608–09 (2009).

sources is best justified by reference to the respect ownership garners from other individuals and the polity as a whole. This respect is for the owner's right to self-determine according to her own conception of the good.²⁰

In other words, at least in their best light, both contract and property are understood as frameworks of respectful interaction conducive to self-determining individuals.²¹ Self-determination represents a rich conception of freedom: its value is what makes our independence worthwhile. We are all entitled to be free from coercion because this freedom is necessary for each of us if we are to each write individually the story of our (separate but interdependent) lives.²²

This is why liberals insist that an individual person is free, not merely in the formal sense of not being subordinated to the choices of another, but also in the more robust sense of being able to make meaningful choices about how his or her life should go. Free individuals, John Rawls writes, act on their capacity "to have, to revise, and rationally to pursue a conception of the good."²³ A person can be "free" in the formal sense simply because no one else is in a position of domination over her. But this conception is too narrow because it fails to ensure an opportunity for that person to form and pursue a conception of the good. As H.L.A. Hart observed, self-determination is necessary for people to lead the fully human life they are entitled to; while this requires a measure of independence, it "is not something automatically guaranteed by a structure of negative rights."²⁴

Understanding contract and property as empowering devices places self-determination, rather than independence, at the moral core of the market. This is significant because in a liberal polity, in which law is legitimate only if it may be acceptable to free and equal persons, conceptualizing the market around the conception of property as a stronghold of independence undermines its legitimacy. As critics have noted, it is not merely hypothetical, but rather counterfactual to submit that non-owners (to whom the argument for the system's legitimation is first and foremost owed) freely consent in any form to *that* understanding of the market. By contrast, a private law regime, and thus a conception of the market, pre-

²⁰ See generally Dagan & Dorfman, *supra* note 18.

²¹ As the text implies, I do *not* argue that serving autonomy is, or should be, invoked as the justification for deciding individual cases in either contract or property. Rather, my claim is that the doctrinal components (concepts and rules) of both fields are best understood as means for serving their autonomy-enhancing *telos*. See DAGAN & HELLER, *supra* note 10, at 37–39; HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY (forthcoming 2019).

²² As the text implies, the following paragraphs assume a certain (liberal) conception of the self, which is admittedly not universally embraced. For an extended discussion and defense of this assumption, see DAGAN, *supra* note 21, at ch. 2.

²³ JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 19 (2001).

²⁴ H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 836 (1979).

mised on the liberal commitment to self-determination (and thus guided by the prescriptions developed below) is a more plausible candidate for a self-imposed law. Conferring on individuals the power to participate in the various practices constituted by property and contract has a better chance of gaining support in a liberal polity due to the contribution of these legal (or law-like) conventions to people's right to self-authorship.²⁵

C. *Two Roles*

This understanding of property and contracts points to the two main ways in which markets are potentially conducive to people's autonomy: they allow individuals the mobility that is a prerequisite for self-determination, and they expand the options available to individuals to function as the authors of their own lives.

Markets enable mobility through the alienation of resources and entitlements. By facilitating the liquidation of existing holdings markets facilitate people's right to exit: to withdraw or refuse to further engage, to dissociate, to cut themselves out of a relationship with other persons. At a minimum, exit serves a protective function. Leaving is a form of self-defense, and the mere possibility (and thus implicit threat) of one's exit plays an important disciplinary function. Moreover, even with no concern of mistreatment, exit is crucial to autonomy because open boundaries enable geographical, social, familial, professional, and political mobility, which is, in turn, a prerequisite for a self-directed life.²⁶

The robust mobility of the market is famously contrasted with social relationships of servility. As Adam Smith (as well as John Stuart Mill and Karl Marx) argued, markets substitute the fixity of status and command with relations based on interest, persuasion, and consent. They, therefore, tend to undermine hierarchies in which loyalty is taken for granted and need not be enlisted and accounted for. The market can thus liberate individuals from predetermined roles and social positions and emancipate them from relationships of excessive dependency on the authority of others.²⁷

²⁵ See Hanoah Dagan, *The Utopian Promise of Private Law*, 65 U. TORONTO L.J. 392, 410–12 (2016). See also Dagan & Dorfman, *supra* note 18, at 401–04.

²⁶ See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 21–29 (1970); Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165, 176 (1998); cf. Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 11–12, 15–16, 21 (1990).

²⁷ See ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 4, 17–22 (2017); O'NEILL, *supra* note 5, at 71, 77–78; JEDEDIAH PURDY, THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION 16–17 (2010); SATZ, *supra* note 8, at 24–25, 41–42. This argument is related to, but nonetheless distinct from, the celebration of the market as a regime of polycentric governance. See MILTON FRIEDMAN, CAPITALISM AND FREEDOM 7–21 (1962); RANDY BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 139–42, 238 (1998).

Some critics of the choices markets open up present them as a post-modern game with one's identity, in which people playfully slip off any commitment they have to other persons and projects and move into another, just as they easily change clothes with changing fashions. They note that a constantly changeable individual—whose life is a “series of unrelated episodes”—is “not an autonomous individual, but rather one who lacks any sense of self and whose life lacks any narrative form.” Because the market tends to undermine in this way the necessary conditions for having settled dispositions and commitments that define what it is to have a self, so the argument goes, it endangers, rather than fosters, autonomy.²⁸

Some (extreme) forms of consumerism may deserve this critique. But the idea of the market does not. To begin with, recall that markets are not uniformly responsive to price only, and that market governance does not necessarily imply impersonality. So the critique confuses one market form, which typifies certain one-shot exchanges and the norms governing consumer goods, for the essence of the market.²⁹ Numerous market transactions, however, are relational: they rely on robust interpersonal commitments and a good dosage of voice, and thus create thin, and in certain cases even thick, communities.³⁰ Exit is preserved, as it should be, in these contractual communities, but its phenomenology is very different from the post-modern caricature of the market: it is premised on an intermittent critical perspective on the relationship and its continuous value in the parties' lives.³¹

Still, there are surely many market formations, which are typified by anonymous one-shot trading; however, even they need not necessarily endanger autonomy. Indeed, insofar as these strictly calculative market types govern strictly utilitarian interactions, they often contribute to autonomy, rather than threatening it. Thus, for example,³² facilitating a purely instrumental conception of consumer contracts allows people to make quick and *secure* consumption decisions, which frees them up to engage in their other, more valuable projects.³³ More generally, trading

²⁸ O'NEILL, *supra* note 5, at 75–77, 79–80, 82–83.

²⁹ See *supra* text accompanying note 13.

³⁰ See DAGAN & HELLER, *supra* note 10, at 58–63.

³¹ Cf. HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 69 (2011).

³² Another example for an indirect contribution of market behavior to autonomy comes up in the context of investment decisions of pension funds that transcend pure preference satisfaction and implicate investors' pursuit of non-financial goals. See Roy Kreitner, *Money Talks: Institutional Investors and Voice in Contract*, 20 THEORETICAL INQ. L. (forthcoming 2019).

³³ See DAGAN & HELLER, *supra* note 10, at 73, 81–82. This virtue of consumer contracts need not absolve consumers from moral responsibility where the seller's use of contract undermines the autonomy of third parties. See Avihay Dorfman, *Against Market Insularity: Market, Responsibility, and Law* (in this issue).

that does not rely on prior social bonds is important even outside the consumer context because, as noted, it opens opportunities for self-determination that might otherwise be unavailable.

Moreover, markets are not only about exit and mobility; they are just as much about entry and commitments. The moral significance of contract—the queen of the market—is exactly that “it allows persons to create obligation where there was none before,” thereby giving free individuals “a facility for extending their reach by enlisting the reliable collaboration of other free persons.”³⁴ Contract is conducive to self-determination because it enables people to recruit others to advance their own goals, purposes, and projects—both material and social. Contract expands the range of meaningful choices people can make to shape their own lives. It enhances our ability to be the authors of our own lives by expanding our repertoire of secure interpersonal engagements beyond the realm of gift-based interactions.

The market extends these autonomy-enhancing functions by further broadening the scope of choices between differing projects and ways of life. Markets create a structure that respects and facilitates divergent ends. Individuals can unbundle their resources according to their own priorities and “gain from the skill and knowledge of others [they] need not even know and whose aims could be wholly different from [their] own.”³⁵ Because “[i]n a market system there is no preordained pattern of value to which individuals must conform,” markets multiply the alternatives people can choose from and facilitate experimentation; they “allow people to make their own judgments about what they want to buy or sell, how hard they want to work, how much they want to save, what they value and how they value it, and what they wish to consume.”³⁶ At its best, the market functions as an enabling device which serves self-authorship: it enables the individual to act upon his own goals and values, his objective and his plan of life, without subordination to any other individual or subjection to any collective decision-making procedure.³⁷

D. *Autonomy Beyond the Market*

Nothing in these claims regarding the role of the market in enabling mobility and expanding options suggests that markets are sufficient to facilitate, enable, or even secure people’s self-determination, as many

³⁴ Charles Fried, *The Ambitions of Contract as Promise*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT* 17, 20 (Gregory Klass et al. eds., 2014).

³⁵ 2 F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 109 (1982).

³⁶ SATZ, *supra* note 8, at 8. For the market to entail this liberating function, law should also facilitate the possibility of at least partially exiting the money-based valuation of the market itself. *See infra* note 64.

³⁷ JOHN GRAY, *THE MORAL FOUNDATIONS OF MARKET INSTITUTIONS* 25 (1992).

friends and foes of the market seem to assume.³⁸ Quite the contrary: understanding the market as a means for self-determination implies that markets *cannot* function well as a standalone autonomy-enhancing device. If markets are to serve people's self-authorship, the expanded choice afforded by the market must rely on and be guided (at times even delimited) by its autonomy-enhancing *telos*. This means that a liberal regime which endorses markets in the service of self-determination *must* be committed to secure the minimal social and economic conditions (or capabilities) needed to enable individuals to make autonomous choices.³⁹ I will say no more regarding the implications of this important proposition for health, education, housing, and welfare policy, which go beyond the realm of the market.⁴⁰ Rather, the discussion in the second part of this Article will assume such a background regime and will turn our focus inward: to explore the proper architecture of the market, that is: to study how it can—indeed should—be shaped so as to optimally serve self-determination.

Acknowledging the insufficiency of markets for the task of securing our self-authorship, however, may suggest that the division of labor between the market and this background regime can go even further, so that the law of the market can avoid taking *any* responsibility for self-determination. This challenge to the mission of this Article is ultimately misguided. Still, addressing it is helpful given both the significance of its excesses and the importance of the leeway it leaves the liberal conception of the law of the market.

Radical division of labor, which leaves self-determination solely with the background regime and not with the market, is misguided for two reasons. The privileged position of the individual right to self-determination in liberal thought implies that at some point the impact of *any* major legal institution—including the market—on individuals must affect its legitimacy irrespective of its contributions to the public good. Setting up the threshold of this constraint is a complex matter, especially

³⁸ See, e.g., O'NEILL, *supra* note 5, at 68, 70. Furthermore, as the previous text clarifies, the market is also not strictly necessary for securing autonomy. My argument is more modest: that markets can be devised in a way in which they can significantly contribute to autonomy.

³⁹ See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 207 (1986) ("The provision of many collective goods is constitutive of the very possibility of autonomy and it cannot be relegated to a subordinate role, compared to some alleged right against coercion, in the name of autonomy."). Cf. GRAY, *supra* note 37, at 37–38, 57–58, 72. For a powerful account of the devastating failures of the attempt to adhere to the liberal conviction to respect choices about obligations while abdicating the responsibilities of the liberal state by privatizing dependency, see Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C.L. REV. (forthcoming 2018).

⁴⁰ The state, to be sure, can choose to employ market mechanisms for some of these tasks. See Tsilly Dagan, Hila Shamir & Ayelet Carmeli, *Questioning Market Aversion in Gender Equality Strategies: Designing Legal Mechanisms for the Promotion of Gender Equality in the Family and the Market* (in this issue).

in contexts where the public good at hand (say: education) is itself a prerequisite to autonomy. But even though we may lack an account of when autonomy should *literally* function as a side-constraint, recognizing its status as our ultimate right throughout the legal terrain is valuable. It guides us to take seriously the distinction between self-determination and other goals that the market serves and to engage in *qualitative* judgment where self-determination conflicts with these goals, which are (by definition) either constitutive of it or instrumental to it.⁴¹

The idea of strict division of labor between the market and its background regime is problematic for yet another reason. The law of the market is—at least in modern complex societies—a significant subset of the private law. This means that a strict division of labor, which renders the most fundamental liberal commitments irrelevant to the law of the market, eliminates them from a large portion of our interpersonal relationships. As Avihay Dorfman and I argue elsewhere, the significance of human interdependence to our human condition implies that such a legal architecture is profoundly unsatisfying. While the justice of the law of the market is certainly partially dependent on background justice, its dependence cannot relieve it from complying with the distinctive chore of private law: the construction of ideal frameworks for respectful interaction of self-determining individuals.⁴²

Implicit in these observations is both the conclusion that the radical division of labor which makes self-authorship marginal to the law of the market is unacceptable, and the acknowledgement that *some* division of labor may well be necessary for the market's legitimacy. This last point is particularly important given the inherent imperfections of market mechanisms, which go beyond the externalities certain market interactions generate.

Consider, for example, changes in supply or demand triggered by technological transformations, which may leave very few options to workers who developed skills that become unnecessary. More generally, consider the dependence of the market's currency of willingness to pay not only on people's preferences, but also on their ability to pay, as well as the role that both luck and misfortune play in the operations of the market. These features of the market imply that markets often generate consequences which diverge from their autonomy-enhancing *telos*. This divergence can be quite significant and thus might threaten to reintroduce new forms of hierarchical relations, which are the antithesis of the autonomy-enhancing ideal of the market. Therefore, these imperfections *must*

⁴¹ See DAGAN & HELLER, *supra* note 10, at 43–45, 84–85.

⁴² See Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1460 (2016). See also Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 36 L. & PHIL. 171 (2018).

be understood and treated as distortions. Insofar as they cannot be properly addressed within the law of the market, these imperfections need to be remedied by its background regime, which thus becomes essential to the market's legitimacy, or at least its normative desirability.

II. AUTONOMY-ENHANCING MARKETS

As noted, the doctrines which prescribe the specific contents, scope, and implications of the powers conferred by the various property and contract types law promulgates shape—and not merely reflect—the interpersonal practices of the market.⁴³ This means that the relevant question to an autonomy-based law of the market does not touch on the legitimate *constraints* to people's autonomy (as it does for many aspects of tort law), but on the ways that law should *enhance* people's self-authorship. That is necessarily an *ex-ante* discussion, about how law can facilitate forms of holdings and interpersonal interactions concerning holdings that are conducive to its autonomy-enhancing *telos*. This inquiry—the mission of what follows—is qualitative rather than quantitative.⁴⁴ It is not focused on maximizing the extent of autonomy in the world but is still teleological, seeking the system that generates the most autonomy-friendly consequences.⁴⁵

A. Inclusion

The first—and (maybe surprisingly) straightforward—consequence of understanding markets as means for self-determination is that they need to be inclusive. Recall my claim that the legitimacy of the law of the market depends on the crucial role it plays in serving people's right to self-authorship.⁴⁶ Conceptualizing the right of self-authorship as the ultimate value of the market means that the law's support for certain interpersonal interactions needs to be justified by reference to their role in providing people with choices. Given that autonomy as self-authorship is a general, right-based justification,⁴⁷ this proposition implies that

⁴³ See *supra* text accompanying notes 14–15.

⁴⁴ Working out the criteria of such judgment is an important task, which I cannot venture to undertake here. But it seems safe to claim that an inquiry of relative contribution to self-determination can employ, at least as one of its helpful heuristics, the distinction between our “ground projects”—that is: the choices that reflect the commitments that make us who we are—and “sheer preferences” that bear little, if at all, on our conception of our self. See Dagan & Dorfman, *supra* note 42, at 1419.

⁴⁵ Recall, however, that in addition to self-authorship, markets can—and often do—serve other goals, notably those mentioned at the outset. Regarding these goals, as well as with respect to some (but not all) of the implications of self-authorship, an autonomy-based theory of the market again leaves liberal politics broad leeway for democratic deliberation.

⁴⁶ See *supra* text accompanying note 25.

⁴⁷ General, right-based justifications are distinct from two other types of justifications. As right-based justifications, they rely on an individual as opposed to a collective interest; as

every human being is entitled to such choices and that a sufficiently diverse set of options must be available to all.⁴⁸ Even in its most restrictive interpretation, this injunction proscribes discriminatory limits on participation in market practices.⁴⁹

Antidiscrimination rules are surely not alien to contemporary doctrines governing the market. But they are typically justified quite differently. Antidiscrimination rules in important contexts like the employment and the housing markets are often presented as entailed by the commitments to equal opportunity and to social integration or as a means for improving the efficient functioning of markets. The first two rationales, equal opportunity and integration, perceive non-discrimination as an external imposition on the operation of the market; a price it should pay in the name of exogenous, worthy public causes. Furthermore, all three familiar rationales render any antidiscrimination market rule contingent in the sense that it depends upon the availability of other state-driven means for securing equal opportunity and social integration or for improving the operation of the market. This means that where these public goals are, or can be, otherwise secured, the antidiscrimination rule may not be needed (and thus, on some views, might even become illegitimate).⁵⁰

In an autonomy-based understanding of the market, by contrast, antidiscrimination rules are not external constraints of the market, which limit its putative commitment to independence. To the contrary: antidiscrimination rules that ensure inclusion are necessary measures of perfecting the market's service of its most fundamental *telos*; its own *raison d'être*. If the law of the market is to empower its subjects' self-determination—in order for it to be justified by reference to people's right to self-authorship—it *must* be inclusive. This means that legal reforms that extend autonomy along these lines—reforms that open up markets by alleviating discriminatory barriers—do not require contingent justifications. Rather, they are best understood as devices entailed by the idea of the market, as means for pushing the law of the market to live up to the market's implicit ideals (the very ideals Adam Smith celebrated!). An autonomy-based law of the market must ensure that its rules serve the

general justifications, they rely on the importance of an individual interest as such rather than on a specific event, as do special right-based justifications.

⁴⁸ Cf. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 115–17, 423, 425–27, 430–39, 444–45 (1988).

⁴⁹ More expansive interpretations would imply affirmative duties of inclusion so that, for example, big developers must offer at least some units to the less well-off and big employers must offer professional training to those who were not lucky enough to benefit from proper education. For a preliminary discussion of limits on exclusion generated by poverty, see Dagan & Dorfman, *supra* note 42, at 1420–21.

⁵⁰ See Dagan & Dorfman, *supra* note 42, at 1399, 1439–40; Hanoch Dagan, *Between Regulatory and Autonomy-Based Private Law*, 22 *EUROPEAN L.J.* 644, 657 (2016).

self-determination of all its subjects; it thus cannot authorize the standing of private parties to decide whether or not they can discriminate against their fellow humans.⁵¹

B. *Regret*

Many market advocates perceive regret as a pathology and thus find limits on alienability *prima facie* troubling. To be sure, the familiar reasons for suspecting the efficiency of market transactions—notably imperfect information, strategic barriers, cognitive failures, or externalities—are widely acknowledged as justifications for restricting alienability.⁵² But as such, these rationales are tentative and contingent, subject to the (at least theoretically) possible technologies or legal techniques that would ameliorate impeding rationality deficiencies or overcome other pertinent market failures.

A genuinely autonomy-based law of the market requires a different understanding of regret. Inalienability rules are premised, under this view, not only on a response to these contingent (and surely important) reasons. Rather, they are based also, and perhaps even primarily, on the commitment to self-determination: the conception of individual liberty that puts a high value on people's ability to reinvent themselves.⁵³

In other words, if the ultimate value to which the law of the market must be committed is enhancing people's ability to be the authors of their lives, then facilitating people's ability legitimately to enlist one another in pursuing private goals and purposes must not overwhelm their rights of exit from these relationships. The right to exit is, as noted, one of the foundations of the autonomy-based case for the market, because self-authorship requires the ability to both write and rewrite our life-story.⁵⁴ This means that contract law must both enable us to make credible commitments *and* safeguard our ability to start afresh by limiting the range, and at times the types, of enforceable commitments we can undertake. As Aditi Bagchi notes, “[t]he same ideal of moral agency that makes promise valuable makes the power to revise and reject commitments valuable as well . . . [so that] our interest in moral agency demands both fidelity and rebellion against [our] former self.”⁵⁵

⁵¹ See Dagan, *supra* note 50, at 657; Hanoch Dagan & Avihay Dorfman, *Against Private Law Escapism: Comment on Arthur Ripstein*, Private Wrongs, 14 JERUSALEM REV. LEGAL STUD. 37, 51 (2017). Cf. GRAY, *supra* note 37, at 29.

⁵² See, e.g., Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 937–41 (1985).

⁵³ Cf. RAZ, *supra* note 39, at 384.

⁵⁴ See *supra* text accompanying note 26.

⁵⁵ Aditi Bagchi, *Contract and the Problem of Fickle People* (unpublished manuscript). Bagchi argues that this ideal competes with the promissory principle, which she conceives as uncompromising, and that contract's accommodation of regret is the epitome of the justified

This seemingly simple statement encapsulates one of the most difficult challenges to an autonomy-enhancing contract law: identifying categories of excessive limitations on contractual parties' exit—that is, on promisors' freedom to change their mind—that undermine party autonomy to such a degree that they should not be enforceable.⁵⁶ I do not have or know of a formula for resolving this difficulty in a systemic fashion. But acknowledging the value of regret as one which derives from, rather than competes with, the normative underpinnings of contract at least provides a strong, principled justification for a number of doctrines which otherwise may seem rather puzzling.

Thus, the value of regret justifies some restrictions on enforceability of employee non-compete agreements⁵⁷ and some limits on the advance sale of future wages.⁵⁸ It similarly helps explain the *unilateral* right of termination of long-term contracts, which is semi-inalienable at least regarding certain contract types.⁵⁹ Finally, the value of regret may also help justify rules that ensure that contractual commitments are not overly-dogmatic,⁶⁰ such as the blanket refusal to specifically enforce contracts to render personal service, the duty to mitigate, and the fresh start doctrine in bankruptcy.⁶¹

C. *Intra-Sphere Multiplicity*

A state committed to utilizing market mechanisms in order to enhance autonomy has an affirmative obligation to shape the law of the market. It must be proactive in ensuring availability of a sufficiently diverse range of property and contract types within each important sphere in which the market can perform its autonomy-enhancing function. This

divergence of contract and promise. *Id.* As I argue elsewhere, the purported dogmatism of the promissory principle relies on the misguided transfer theory of promise. Once it is set aside, we see that there need not be any divergence of contract and promise: both can—indeed should—accommodate regret and thus must not be overly dogmatic. See DAGAN & HELLER, *supra* note 10, at 30–32.

⁵⁶ Cf. Dori Kimel, *Promise, Contract, Personal Autonomy, and the Freedom to Change One's Mind*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT 96, 101–03 (Gregory Klass et al. eds., 2014).

⁵⁷ See Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 594–619 (1999); see also ANDERSON, *supra* note 27, at 66.

⁵⁸ See, e.g., Douglas Belkin, *More College Students Selling Stock—in Themselves*, WALL ST. J., Aug. 5, 2015, <https://www.wsj.com/articles/more-college-students-selling-stock-in-themselves-1438791977>.

⁵⁹ See, e.g., Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 321, 333–36 (Andrew Gold & Paul Miller eds., 2014).

⁶⁰ It may also further substantiate Robert Scott and Jody Kraus's understanding of some decisions to breach in benign terms of "a cry for help." See ROBERT E. SCOTT & JODY S. KRAUS, *CONTRACT LAW AND THEORY* 113–15 (5th ed. 2013).

⁶¹ See Bagchi, *supra* note 55.

obligation of intra-sphere multiplicity, as Michael Heller and I call it,⁶² has the most traction in the less commercial spheres of the market, especially in the labor and the housing markets. Private entrepreneurs predictably under-supply property and contract types in these markets; and existing law seems to fail to properly address this shortfall.

To be sure, sometimes cognitive, behavioral, structural, and political economy reasons imply that more choice may actually be autonomy-reducing, and in these cases intra-sphere multiplicity should be curtailed. But outside the limited circumstances in which these reasons apply, an autonomy-based justification of the market implies that freedom of contract may be threatened not only by having too much law, but by having too little as well. An autonomy-enhancing law of the market should accordingly support establishment of emerging types even when demand for the new types is low.⁶³

It is difficult to expect that legal systems would routinely invent new property and contract types. Indeed, carrying out the state's obligation to enhance choice in such a top-down fashion is not necessarily desirable given the comparative disadvantage of state institutions vis-à-vis contractual parties in coming up with appropriate innovations. For this reason, at least in typical cases, the carriers of the law of the market need not (maybe even should not) engage in innovative design. They should, however, proactively look out for innovations—such as those based on minority views and utopian theories—that have some traction but would fail if left to people's own devices due to predictable market failures. The state should be favorably predisposed to such innovations insofar as these outliers have the potential to add valuable options for human flourishing that significantly broaden people's choices.⁶⁴

Take the labor market as an example. The prevailing structure of employment contracts offers a binary choice between employee and independent contractor status. But emerging forms on the ground—such as

⁶² See DAGAN & HELLER, *supra* note 10, on which this section relies.

⁶³ Pursuing this agenda requires reliance on systemic behavioral and institutional economics studies that could be informative as to the optimal number of contract and property types and the optimal degree of variance among them. Similar studies are also required in order to properly consider other factors—such as market structure and political economy—that may necessitate, as noted in the text, actively limiting multiplicity or at least guarding against its potential pitfalls.

⁶⁴ As the text implies, part of the task of facilitating intra-sphere multiplicity involves the provision of options for “partial exit” from the market itself: frameworks that support business models which are based less on competition and profit maximization and more on sharing and collaboration. See RASHMI DYAL-CHAND, *COLLABORATIVE CAPITALISM IN AMERICAN CITIES: REFORMING URBAN MARKET REGULATIONS* (forthcoming 2018) (Dyal-Chand contrasts these formations with “liberal market economy”; as the text clarifies, I claim that their facilitation is in fact required by liberalism, properly interpreted). Cf. Gar Alperovitz, *The Pluralist Commonwealth and Property-Owning Democracy*, in *PROPERTY-OWNING DEMOCRACY: RAWLS AND BEYOND* 266 (Martin O’Neil & Thad Williamson eds., 2012).

workers who provide their own equipment and control their own hours but are still subject to others' authority (such as Uber) or workers seeking the creation of specifically designated worker co-ops—may call for additional categories and thus additional choice. There are also other possibilities that diverge even further from the existing employment landscape. For example, law can be instrumental in facilitating job-sharing arrangements that stabilize norms of responsibility, attribution, decision-making mechanisms, time division, shared space and equipment, and availability on off days. By the same token, an autonomy-based approach to employment contracts would suggest that instead of choosing between the 'at will' and the 'for cause' regimes as defaults, states would be advised to promulgate two parallel employment types, so that employers would need to opt in to one or the other.

Pursuing this prescription of securing such intra-sphere multiplicity can also be invaluable in the housing market. Consider, for example, the benefits of providing 'off-the-rack' contractual arrangements for the emerging insurance and financial products that allow homeowners to share or offload the risk that the value of their home will decrease due to changes in the state of the neighborhood or in the overall housing market.⁶⁵ Helping middle-income households separate house-as-home from house-as-investment along these lines is not just a good policy response to public macro-concerns; it is also an important tool for complying with the prescription of intra-sphere multiplicity.

Unfortunately, for lower-income households who cannot afford to buy in the first instance, this tool does not offer a viable alternative to renting. For people of modest means the commitment to choice requires the law of the market to facilitate models of shared equity homeownership. These models—notably community land trusts, limited equity co-operatives, and deed-restricted homes—link “low- and moderate-income people with affordable owner-occupied housing” by combining three features: “(1) they lower the initial cost of purchasing a home; (2) they limit the gain a homebuyer can receive on resale, thus generating a relatively affordable price for a subsequent buyer; and (3) they frequently provide stewardship to maintain community values and help homeowners retain and maintain their homes.”⁶⁶

⁶⁵ See generally Lee Anne Fennell, *Homeownership 2.0*, 102 Nw. U. L. REV. 1047 (2008).

⁶⁶ Brett Theodos et al., Urban Institute, *Affordable Homeownership: An Evaluation of Shared Equity Programs* 3–4, 56 (2017), www.urban.org/sites/default/files/publication/88876/affordable_homeownership_0.pdf. See also, e.g., Michael Diamond, *The Meaning and Nature of Property: Homeownership and Shared Equity in the Context of Poverty*, 29 ST. LOUIS U. PUB. L. REV. 85, 88–89, 102–03 (2009).

For these models of tenure to thrive, they should overcome the occasional monitoring problem⁶⁷ and typically need to rely on some public (or public-spirited) sponsorship.⁶⁸ Friends of the market who understand that oftentimes the autonomy-enhancing *telos* of the market requires a supportive background regime that ensures the minimal conditions of choice⁶⁹ should not be deterred by these challenges.⁷⁰ Rather, they should embrace such initiatives that “may produce near-term financial benefits for those who would otherwise be unable to buy a home,” and “help individuals purchase homes in neighborhoods with higher home values and education levels than they would have been able to otherwise.”⁷¹

D. Relational Equality

If markets are to serve people’s self-determination, and not only their independence, the law of the market cannot rely, as it is conventionally portrayed, on a formal conception of equality that seeks to abstract away the particular features distinguishing one person from another. To sharpen the point, respecting each other’s independence does not require any consideration of any individual’s features—it merely prescribes a negative duty of noninterference. By contrast, respect for self-determination is hollow without *some* attention to our distinctive features, which make us who we actually are.⁷²

Indeed, reciprocal respect for party autonomy requires that we view parties as more than mere bearers of a generic human capacity for choice. In addition, for the interacting parties meaningfully to treat each other as free and equal persons, law must ensure, at least to an extent, their equal standing regarding their interaction. Such a view of relational equality is substantive and not just formal. Admittedly, in a significant subset of the law of the market—dealing notably with business contracts, that is, contracts between firms—formal equality is the all-things-considered best proxy for a state of affairs in which the participants are, more

⁶⁷ See John E. Davis, *More than Money: What is Shared in Shared Equity Homeownership?*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L., Spring/Summer 2010, at 259, 268.

⁶⁸ See John E. Davis, *Shared Equity Homeownership*, in NATIONAL HOUSING INSTITUTE 75 (2006), <http://www.nhi.org/pdf/SharedEquityHome.pdf>; Diamond, *supra* note 66, at 87–89; Edwin Stromberg & Brian Stromberg, *The Federal Housing Administration and Long-Term Affordable Homeownership Programs*, 15(2) CITYSCAPE 247, 248–50 (2013).

⁶⁹ Cf. Ryan Sherriff, *Shared Equity Homeownership State Policy Review*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L., Spring/Summer 2010, at 279 (discussing state and local laws that hinder or support shared equity homeownership programs).

⁷⁰ See *supra* text accompanying notes 38–43.

⁷¹ REPORT ON AFFORDABLE HOMEOWNERSHIP, *supra* note 66, at 45; cf. Susan Saegert et al., *Longing for a Better American Dream: Homeowners in Trouble Evaluate Shared Equity Alternatives*, 96 (2) SOC. SCI. Q. 297 (2015).

⁷² See Dagan & Dorfman, *supra* note 42, at 1413–20.

or less, in a relationship of substantive equality. But elsewhere the relationships aren't substantively equal, which means that an autonomy-enhancing law can no longer legitimately use this proxy.⁷³

An important example for this comes from the law governing the employment market; indeed, commitment to relational equality is the essence of labor law: the law dealing with collective forms of employment.⁷⁴ As the introductory section to the Wagner Act makes explicit, the purpose of allowing labor unions to flourish is to address “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association.”⁷⁵ Labor law attempts to solve this inequality by giving employees the chance to bargain collectively and thus to place themselves on more equal footing with their employers—with the goal that their resulting contracts embody the voluntariness that is fundamental to real market choice.⁷⁶

One may worry that the mere possibility of workers' unionization cannot be enough to meet relational equality concerns in employment markets, and that to distinguish contract from subjugation, individualized contracting should be effectively abolished.⁷⁷ But this concern is exaggerated. While current labor law may not be fully successful in equalizing bargaining power between employers and employees, the ability of individual employees—either unionized or not—to bargain in the shadow of labor law makes a real difference.⁷⁸ So long as unionization remains a realistic possibility, non-union employee contracts may fall beneath the protective shadow of labor law.⁷⁹

⁷³ *Id.*, at 1424–25.

⁷⁴ See Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 2, 9 (2016).

⁷⁵ National Labor Relations Act, 29 U.S.C. § 151 (1935).

⁷⁶ See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 *HARV. L. REV.* 1379, 1423 (1993).

⁷⁷ Cf. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561, 629–30 (1983).

⁷⁸ See Paul Weiler & Guy Mundlak, *New Direction for the Law of the Workplace*, 102 *YALE L.J.* 1907, 1911 (1993).

⁷⁹ See *id.* at 1912–13. For labor law to function this way—supporting relational equality of both union and non-union employees—unions should be able to negotiate so-called “agency shop” contracts that require employees to pay union dues as a condition of employment. To the extent “right to work” laws in some states now prohibit agency shop, these laws *limit* the contractual freedom of both union and non-union employees. Moreover, and more importantly, agency shop does not meaningfully reduce individual autonomy. It results in an *ex ante* reduction in the amount of money belonging to an employee who has to pay dues, in return for higher wages and benefits and better working conditions. Even assuming that there are employees who are unwilling third-party beneficiaries to agency shop provisions, a sufficient multiplicity of contract types ought to empower employees to seek out employers with desirable union agreements. Mandatory rules are particularly justified where they are needed in order

To be sure, even though labor law is a significant means for reinstating relational equality in the labor market, it cannot be enough. The hierarchical organization that typifies the workplace explains employment law's insistence on an inalienable infrastructure of just relationships, dealing with topics like workplace safety and nondiscrimination.⁸⁰ It may well justify further reinforcement of workers' autonomy by entrenching a workplace bill of rights that would protect them against managers' arbitrary and unaccountable authority, particularly insofar as they purport to regulate workers' off-hour lives.⁸¹

Indeed, these and other doctrines and contract types courts use narrow the permitted gap between the (required) commitment to substantive equality and the (pragmatic) use of formal equality as an imperfect proxy.⁸² They help effectuate a proper ideal of the market as underwriting horizontal relationships based on free interaction, substantive equality, and thus (most fundamentally) reciprocal respect for self-determination.⁸³ In other words, markets that diverge too much from the prescription of relational equality are not only "noxious markets [that] undermine the conditions that people need if they are to relate as equals."⁸⁴ Rather, they are also fundamentally markets which structure interpersonal relationships in a way that undermines the very ideal of interaction as equals on which the *telos*—and indeed the legitimacy—of the market is based.

E. *Incomplete Commodification*

Founding the value of markets on self-determination implies that market transactions must be voluntary undertakings and that the market should open up a sufficiently robust set of contractual options. It also implies that the utility surplus—the material benefits which such transactions generate—must be understood as an *instrumental* value, a means to the superior end of promoting the parties' autonomy.⁸⁵ Facilitating parties' preference satisfaction is important, in this view of the market, because and to the extent that it is conducive to people's self-

to sustain the viability of intra-sphere multiplicity. See DAGAN & HELLER, *supra* note 10, at 87–88.

⁸⁰ See Hanoch Dagan & Roy Kreitner, *The Bureaucrats of Private Law*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3031886; Dagan & Dorfman, *supra* note 42, at 1442–45.

⁸¹ See ANDERSON, *supra* note 27, at 39–40, 48–54, 60, 62–64, 67–69. Cf. Jeff Spinner-Halev, *The Limits of Liberal Opportunity Arguments* (unpublished manuscript).

⁸² See generally Dagan & Dorfman, *supra* note 42, at 1425; Avihay Dorfman, *Private Law Exceptionalism? Part II: A Basic Difficulty with the Argument from Formal Equality* CAN. J.L. & JURISP. (forthcoming 2018); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U.L. REV. 195 (1987). Cf. PURDY, *supra* note 27, at 112.

⁸³ Cf. SATZ, *supra* note 8, at 42–43, 95, 99.

⁸⁴ *Id.* at 94, 97.

⁸⁵ Cf. T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 118–23 (1998).

determination.⁸⁶ Thus, utilitarian considerations—even those that pertain only to the contracting parties—must generally be subservient to the market’s ultimate value of autonomy.⁸⁷ This means that preferences that undermine self-determination should be generally overridden. The law of the market cannot legitimately facilitate types of transactions in which the parties’ welfare-enhancement threaten their self-determination.⁸⁸

My discussion of regret already captures a subset of these cases, but it does not exhaust this category. There are certain types of contract—even beyond the obvious example of slavery—which instrumentalize people to such an extent that might efface their humanity by erasing their ability to self-determine.⁸⁹ This risk of allowing the means (utility) to overwhelm the end (self-determination) is particularly acute in the context of employment. Although Marx’s account of the proletariat’s predicament in labor markets may not be an accurate description of many post-industrialized labor markets, there are still—unfortunately not negligible—employment settings in which workers are dehumanized and treated as “fungible gears in a huge machine.”⁹⁰ Sweatshops are extreme cases,⁹¹ but there are probably many others in which workers are treated as disposable commodities. While there may be hard cases in which such employment conditions may be legitimate,⁹² in most contexts an autonomy-enhancing market cannot sanction transactions that involve such illegitimate commodification.⁹³

Addressing this crucial aspect of the labor market is obviously an enormous task that—like the other features of an autonomy-enhancing market discussed earlier—cannot be fully undertaken in this short Arti-

⁸⁶ Cf. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 42–45 (1974) (outlining a thought experiment of an experience machine).

⁸⁷ Party sovereignty, in other words, is significant not only due to epistemological reasons—in which parties are perceived as carriers of the best information regarding their preferences—but also, indeed primarily, due to its intrinsic value. See Hanoch Dagan, *Why Markets? Welfare, Autonomy, and The Just Society*, 117 MICH. L. REV. (forthcoming 2019).

⁸⁸ See DAGAN & HELLER, at 90–91.

⁸⁹ See MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS 9 (2012). As the text implies, the pertinent risk I discuss need not, although it often does, involve also violations of the parties’ relational equality. For a famous example of such a case, see Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 209–12 (1980) (discussing the case of the enlightened slave owner).

⁹⁰ Cf. OMAN, *supra* note 3, at 171.

⁹¹ See generally LYN K.L. TJON SOEI LEN, MINIMUM CONTRACT JUSTICE: A CAPABILITIES PERSPECTIVE ON SWEATSHOPS AND CONSUMER CONTRACTS 60–64 (2017).

⁹² The cautionary language of the text refers paradigmatically to cases in which one generation voluntarily undertakes certain derogatory obligations in order to secure the prerequisites of autonomy to its successor.

⁹³ Notice that this anti-commodification rationale is immune from the critique of other “corruption” arguments that may violate the injunction of equal concern and respect. See Lyn K.L. Tjon Soei Len, *Equal Respect, Capabilities and the Moral Limits of Market Exchange*, 2017 TRANSNATIONAL LEGAL THEORY 1, 115–16.

cle. But three preliminary observations may nonetheless be made. The first is by now familiar: although the perspective advanced in these pages surely does not exhaust the moral qualms we should have with certain contemporary labor markets, the critique it may generate seems uniquely powerful. Certain labor markets undermine the very autonomy-enhancing ideal of the market itself and are thus condemnable *qua* markets. This is the case in markets that involve unskilled, fungible work, which—when combined with the workplace hierarchical structure—might become so alienating given the number of hours one spends at work each day that they can no longer be reasonably understood as a means to, let alone components of, workers' self-determination.⁹⁴ Therefore, proponents of the market who celebrate its contribution to people's self-authorship cannot but object to these practices and work to eradicate or transform them.

My second observation is that the context of labor markets seems particularly inviting to what Margaret Jane Radin calls the "incomplete commodification" strategy, in which money exchanges hands but the interactions retain a personal aspect. As Radin notes, complete de-commodification of work is not now possible (and may not be desirable). But the labor market can be regulated in a way that prevents workers from deteriorating into the status of completely monetizable and tangible objects of exchange. By so doing, the labor market can take into account their personal contribution and recognize, even foster, the noncommodified significance of their work and of their relations with other people in the workplace.⁹⁵

The important point here, and my third (and final) observation, is that such regulation should ameliorate workers' voiceless position. This observation relies on the claim that the idea of the market does not necessarily imply impersonality and thus need not always preclude voice.⁹⁶ As noted, in many market contexts the hegemony of exit over voice and the impersonal nature of the interaction need not be troubling to their function in service of self-determination. But in the specific subset of the labor markets addressed now, epitomized by "grinding assembly-line jobs that hardly anyone could treat as humane work,"⁹⁷ this feature be-

⁹⁴ Cf. Nien-hê Hsieh, *Work, Ownership, and Productive Enfranchisement*, in PROPERTY-OWNING DEMOCRACY, *supra* note 64, at 149, 153.

⁹⁵ See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 103–10 (1996). Radin treats the adjectives "noncommodified" and "non-market" as interchangeable. As is clear by now, I disagree. But this disagreement has no bearing on the current claim.

⁹⁶ See *supra* text accompanying notes 12–13. See generally Roy Kreitner, *Voicing the Market: Extending the Ambition of Contract Theory* (unpublished manuscript) ("[M]arkets potentially provide extensive room for discussion of the reasons to value a product, a service, or an investment. Contracting in markets can be a site of reasoned discussion about what the market should achieve, rather than exclusively a single-minded means to maximize returns.").

⁹⁷ RADIN, *supra* note 95, at 106.

comes particularly troubling because with it these types of workers no longer have any control over a significant subset of their day.⁹⁸ Therefore, rehabilitating these labor markets—bringing them back to the universe of at least potentially autonomy-enhancing markets—requires ameliorating the voiceless position of these workers,⁹⁹ either by facilitating their union representation or by assuring through other means that they have some say in workplace decisions so their nonfungible status within the enterprise can be recognized.¹⁰⁰

CONCLUDING REMARKS

Markets are complex phenomena with heterogeneous manifestations. They involve different types of goods and services and can be structured around different property and contract types. This plurality of markets justifies a careful attitude towards the definition of a market. It also counsels some suspicion towards overly-broad normative judgments, be they celebratory or critical, launched at markets-as-such.

But markets are powerful institutions that significantly impact individuals, affect relationships, and shape societies. They should thus be subject to critical scrutiny vis-à-vis the various goals that justify the complex legal arrangements which sustain them. Promoting social welfare, rewarding desert, inculcating virtues, and spreading power are all worthy objectives that deserve their prominent status in this crucial exercise. But at least for a liberal polity, facilitating our self-authorship must be *the* fundamental goal.

Markets play a vital autonomy-enhancing role of enabling mobility and expanding options. Appreciating the significance of these functions and their emancipatory potential implies that liberal polities should strive to shape markets in line with this *telos* of the market. I do not pretend to have offered an exhaustive treatment of this challenge in this short Article;¹⁰¹ but I do hope that I have made some progress and, even more significantly, demonstrated the promise of this endeavor.

⁹⁸ See ANDERSON, *supra* note 27, at 128–30.

⁹⁹ Cf. Anderson, *supra* note 9, at 146.

¹⁰⁰ See RADIN, *supra* note 95, at 110; ANDERSON, *supra* note 27, at 69–70.

¹⁰¹ Shifting from local to global markets adds a further layer of complexity. See Hanoch Dagan & Avihay Dorfman, Interpersonal Human Rights, 51 CORNELL INT'L L.J. (forthcoming 2018).