

# AGAINST MARKET INSULARITY: MARKET, RESPONSIBILITY, AND LAW

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*In this Article, I take stock of some leading attempts to drive a wedge between distinctively market reasoning and practical (including moral) reasoning. Although these attempts focus on different normative foundations—the epistemology of market interaction, the autonomy of its participants, the stability-enhancing quality of markets, and the authority of democratic decision-making—they are of a piece insofar as they seek to trivialize the role of private responsibility for realizing the demands of morality and justice. Essentially, they seek to insulate, at least to an important extent, the market practice of doing well from the demands of doing right. I argue that they each fail, and that their respective failures motivate the pursuit of a more successful conception of the interaction between markets and morality. I argue that the key to developing this conception is law and, in particular, the legal forms of interaction that lie at the center of economic markets. Rather than merely facilitating any number of desirable goals, these legal forms construct the moral landscape within which market participants act. This observation opens the door for a better account of the ineliminable place of moral responsibility in and around the market.*

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## INTRODUCTION

The market organizes human activity by allocating goods in ways that can support efficient production, investment, and consumption. Market allocation is the result of individual *exchanges*, rather than the outcome of collective decision-making processes or the exercise of bureaucratic expertise. In this Article, I seek to debunk the conventional wisdom about the characteristic relations that generate such exchanges: that they are impersonal. The conventional wisdom casts characteristically market relations in terms of a detached form of social coordination. By implication, market relations can or should bracket out, and to this extent depersonalize, any and all information about the parties to the interaction that is not necessary to get their transaction going. Some take this wisdom to reflect the nature of market relations.<sup>1</sup> Others proceed by supposing that it is the inevitable outcome of the internal workings of the market under conditions of modernity.<sup>2</sup> And yet others take the conventional wisdom to be a normative judgment concerning the desirable form of interaction for market participants.<sup>3</sup>

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<sup>1</sup> See, e.g., MAX WEBER, *ESSAYS IN ECONOMIC SOCIOLOGY* 76 (Richard Swedberg ed., 1999) (“Where the market is allowed to follow its own autonomous tendencies, its participants do not look toward the persons of each other but only toward the commodity”); ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 145 (1993); DEBRA SATZ, *WHY SOME THINGS SHOULD NOT BE FOR SALE* 29 (2010) (noting the “anonymous nature of market exchanges”); MARGARET JANE RADIN, *CONTESTED COMMODITIES* 6 (1996); JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY* 17 (1975). A similar picture of the characteristically market relation is also familiar in neoclassical economics. See Samuel Bowles & Herbert Gintis, *The Revenge of Homo Economicus: Contested Exchange and the Revival of Political Economy*, 7 *J. ECON. PERS.* 83, 85 (1993) (associating “the anonymity of the market” with “the representation of exchange relationships in the textbook neoclassical model”).

<sup>2</sup> F. A. Hayek, *The Moral Imperative of the Market*, in *THE UNFINISHED AGENDA: ESSAYS ON THE POLITICAL ECONOMY OF GOVERNMENT POLICY IN HONOUR OF ARTHUR SELDON* 143, 146 (Martin J. Anderson ed., 1986).

<sup>3</sup> The *doux-commerce* thesis (the idea, crassly put, that commerce softens conflicts) can be cast in these terms. See generally ALBERT O. HIRSCHMAN, *RIVAL VIEWS OF THE MARKET SOCIETY* (1992). Leading private law theorists defend (otherwise very different) variations on the market impartiality theme. See J. E. PENNER, *THE IDEA OF PROPERTY IN LAW* 24–27 (1997); Henry E. Smith, *Emergent Property*, in *PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW* 320 (J. E. Penner & Henry E. Smith eds., 2013); DORI KIMEL, *FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT* (2003); cf. HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* 103 (2017) (noting, with respect to consumer transactions, as opposed to some other market settings such as the labor market, that “individual autonomy is enhanced insofar as law helps people make such transactions quickly, any-”).

I devote the first half of these pages to showing that the conventional wisdom is indefensible. I make this showing in two steps. Concerning the phenomenology of market relations, I argue that the connection between impersonality and market relations is highly contingent. Concerning the desirability of impersonal market relations, I argue that the normative arguments in its favor suffer from certain structural and substantive deficiencies.

The conventional wisdom, on its different versions, carries any number of implications. I am currently interested in considering just one: that of insulating market participants from the responsibility to realize the demands of morality and justice (and, in particular, respect for the rights and well-being of others). In debunking the thought that market relations are characteristically impersonal, I seek to show that the familiar case for driving a wedge between doing well in the market sphere by satisfying one's preferences and doing right fails.

Apart from criticizing the conventional wisdom on both phenomenological and normative grounds, the latter half of these pages identifies two key aspects that support a better understanding of market relations. The first aspect is law and, in particular, its role in the market. The conventional wisdom concerning the impersonality of market relations contains an implicit or explicit view about the normative status of law in market orderings: that law enforces and facilitates commercial transactions. By contrast, I argue that the law governing market relations assumes a qualitatively different role—it forms, rather than merely facilitates or enforces, certain market relations. The formative role of law suggests that law partially constructs the *moral* landscape and the *moral* demands that apply to market participants by virtue of participating in market transactions that take the legal forms associated with contract and property (et alia). The second aspect takes up the notion of personal responsibility in the market sphere. If market relations do not and should not insulate people from the demands of right reason, it becomes necessary to delineate the limits of the responsibility participants should assume in their market engagements. Let me emphasize that the responsibility at the center of my analysis is strictly moral, not legal. It means that there can be a gap between the moral and legal requirements that apply to people by virtue of participating in market transactions: on the one hand, legal permissions (say, to engage in certain forms of trade that are rightly viewed as immoral) cannot crowd out or override the

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mously, and securely so they can focus their time and attention instead on more valuable projects”).

demands of morality; on the other hand, moral duties are not automatically incorporated into legal prescriptions.<sup>4</sup>

### I. WHAT ARE MARKET RELATIONS? THE ANALYTICAL METHOD

The analysis going forward focuses on the *character* of market relations or the *characteristically* market relation. By this I mean to refer to the *analytically*, rather than empirically, core case of market interaction—the bare bones of any market exchange, consisting in no more, and no less, than the twin powers associated with making contracts and owning property.<sup>5</sup> For instance, consider a discrete sale of a widget between complete strangers participating in a highly competitive market. The reason for making this move is to isolate the market relation from, and thereby avoid its assimilation into, richer social contexts that may emerge out of antecedent shared backgrounds, preexisting social networks, or even expectations for long term reciprocity.<sup>6</sup> This way of proceeding can be contrasted with the way sociological and institutional economists have understood the phenomenology of market relations.<sup>7</sup> Economic sociologists have done so, most notably, by assimilating market interactions into thicker forms of social embeddedness or by uncovering the social meaning that market exchange can *sometimes* carry. And

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<sup>4</sup> One particular manifestation of the latter qualification is the asymmetry in the manner in which law enforces duties of anti-discrimination and, less explicitly, anti-boycotting: receivers of goods and services are normally not subject to these duties whereas their providers are (save for certain narrowly delineated exceptions). Morally speaking, there is no qualitative difference, say, between consumers refusing to buy a piece of furniture from a seller on account of the latter's ethnic affiliation and the opposite case of sellers denying goods or services from possible consumers for similar reasons. (A similar analysis seems to hold in the employment context as well.) This analysis, however, cannot determine *legal* duties in a liberal society. As I explain elsewhere, the structure of the transaction, and especially the kind of undertaking on the part of each party in a transaction, warrants the asymmetric treatment of the participants in market transactions. This asymmetry falls within a broader set of doctrines, the purpose of which is to limit the law's reach to *outward* manifestation of illicit attitudes (as in the doctrine of *locus poenitentiae* that figures, in different ways, in criminal and contract law). See Avihay Dorfman, *Tolerance in Law* (Jan. 30, 2018) (unpublished manuscript)(on file with author) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3113822](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3113822) ; see also *infra* note 36 and accompanying text.

<sup>5</sup> Strictly speaking, it is not clear that the normative powers associated with ownership of external objects are in fact necessary for an economic market to get going. This doubt, however, does not bear on the argument in the main text.

<sup>6</sup> The latter may include expectations for trust generated from scratch by entering a contractual interaction as exemplified by the practice of creating innovation networks through relational contracts. See Ronald J. Gilson et al., *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377 (2010); Matthew Jennejohn, *The Private Order of Innovation Networks*, 68 STAN. L. REV. 281 (2016).

<sup>7</sup> The *blat* economy of the former USSR and, to some extent, the *guanxi* economy of China represent powerful illustrations of economic exchange that is inextricably interwoven with thick social practices. See ALENA LEDENEVA, *RUSSIA'S ECONOMY OF FAVOURS: BLAT, NETWORKING AND INFORMAL EXCHANGE* (1998); MAYFAIR MEI-HUI YANG, *GIFTS, FAVORS AND BANQUETS: THE ART OF SOCIAL RELATIONSHIPS IN CHINA* (1995).

institutional economists have defended the instrumental rationality of trust, reciprocity, and informal dependence among market participants under *some* conditions (such as high uncertainty in a rapidly developing Hi-Tech industry). Both have sought to show how actual markets are, sometimes and perhaps most of the time, far less a-historical, formal, and discrete than the conventional wisdom suggests.<sup>8</sup>

But these ways of debunking the received wisdom suffer from two related shortcomings. First, both of the methodologies just mentioned focus on market relations that either supervene on or participate in thicker forms of social and economic engagements. These are “thicker” engagements in the sense that they accompany, or serve as add-ons to, the bare bones of market exchange. And second, by focusing on these thicker forms that *may*—that is, occasionally, not systematically—go with market exchange, these studies implicitly acknowledge that market relations, at least when devoid of preexisting thick contexts or prospects of long-term trust and collaboration, are by default an impersonal way of being with others in the world. As I shall seek to show, the conventional wisdom about the market should be reconsidered, but not for the reason that market relations may sometimes, or even oftentimes, be influenced by supervening factors or rich contexts, but rather because an impersonalized form of interaction is not a property of market relations at all.

## II. MARKET RELATIONS ARE NOT IMPERSONAL IN NATURE

The market is a powerful magnet for substantive disagreements for and against market orderings and their desirable scope. Two principal patterns of disagreements have so far emerged. One approach—most closely associated with classical and modern liberalism—concentrates its normative effort on the desirable *scope*, rather than the character, of the market.<sup>9</sup> Whereas the other—typically Marxist—pursues a more fundamental critique, namely, against the very *character* of markets and market relations. What is most striking about these two patterns is that most participants in these disagreements are in more or less complete agreement when it comes to the phenomenological question of how markets operate and, in particular, the character of market relations. Thus, the familiar debates between classical and modern liberals, on the one hand,

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<sup>8</sup> Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 *AM. J. SOC.* 481 (1985); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991). The *locus classicus* is KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944).

<sup>9</sup> MICHAEL WALZER, *SPHERES OF JUSTICE* 51–67 (1983); JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM—A CRITIQUE OF FUNCTIONALIST REASON* 327 (Thomas McCarthy trans., 1989); MICHAEL J. TREBLICOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (1993); RADIN, *supra* note 1; SATZ, *supra* note 1; MICHAEL SANDEL, *WHAT MONEY CAN'T BUY* (2012).

and Marxists, on the other, occur at the normative, rather than phenomenological, level of analyzing the market. Both sides of the disagreement seem to share a somewhat similar phenomenology of the characteristically market relation, casting it in terms of a thin and detached form of social coordination. Proponents of market orderings take the impersonal market exchange to be by and large an asset.<sup>10</sup> Critics, by contrast, suggest that impersonal relations are, at bottom, a form of dehumanizing the parties.<sup>11</sup> Both sides in this debate, however, are of a piece insofar as they take market relations to be fundamentally impersonal.<sup>12</sup>

The basic question I seek to explore is what explains this view. Market relations are subset of human relations and, for that reason, may consist in both contingent and non-contingent aspects. The conventional wisdom associates impersonality with the class of non-contingent aspects of market relations. Most likely, proponents of this wisdom proceed by drawing inferences from observed reality.<sup>13</sup> A typical case would be a casual purchase of a generic product, say, a bottle of water from a street vendor. In our lived experience, let's assume, this transaction is just the formal execution of the parties' interlocking wishes, including in particular to move from one state of the world, in which the vendor owns the bottle, to another, in which the buyer owns it. Market relations are attractive (for liberals) or distractive (for Marxists) precisely because they allow strangers to complete this transaction and, at the same time, remain fundamentally strangers.<sup>14</sup>

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<sup>10</sup> For some different accounts of the *freedom*-based defense of depersonalized exchange: ANDERSON, *supra* note 1, at 145; SATZ, *supra* note 1, at 21; ERIC MACGILVRAY, *THE INVENTION OF MARKET FREEDOM* 109, 145 (2011); Avner Offer, *Between the Gift and the Market: the Economy of Regard*, 50 *ECON. HIS. REV.* 450, 455 (1997). *Equality*-based defense: SATZ, *supra* note 1, at 99; Elizabeth Anderson, *Ethical Assumptions in Economic Theory: Some Lessons from the History of Credit and Bankruptcy*, 7 *ETHICAL THEORY AND MORAL PRACTICE* 347, 357–59 (2004). *Stability*-based defense (which is a sophisticated reconstruction of the traditional *doux-commerce* thesis) can be found in Frank H. Night, *The Role of Principles in Economics and Politics*, reprinted in *ON THE HISTORY AND METHOD OF ECONOMICS* 251, 267 (1956); JULES L. COLEMAN, *RISKS AND WRONGS* 5–6, 67–70, 436 (1992); Jules L. Coleman, *Markets, Morals, Methods, and the Law*, 66 *ALA. L. REV.* 169 (2014); Nathan B. Oman, *Markets as a Moral Foundation for Contract Law*, 98 *IOWA L. REV.* 183, 193–97 (2012); Daniel Markovits, Guido Calabresi Professor of Law, *Market Solidarity: A Paper Presentation* at Tel Aviv University (Jan. 1, 2014).

As I acknowledge in the main text, using the qualifier *by and large*, proponents of market orderings insist on delimiting the desirable *scope*, rather than the character, of the market.

<sup>11</sup> The most illuminating variation on this Marxist theme seems to be the argument from reification developed in GEORG LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS* 83 (Rodney Livingstone trans., 1971).

<sup>12</sup> See *supra* note 1.

<sup>13</sup> SATZ, *supra* note 1.

<sup>14</sup> ANDERSON, *supra* note 1, at 145; SATZ, *supra* note 1, at 21. Social scientists have defended different versions of this view. See, e.g., WEBER, *supra* note 1, at 76.

I suspect, however, that this attempt to move from lived experience to the nature of market relations fails. It produces a mere rationalization of contingent facts about this interaction and, in particular, contingent gaps in the parties' mutual knowledge of each other. Suppose the buyer comes across morally important information, say, concerning the unethical way in which the vendor treats his or her co-worker or the environment. Further assume that the buyer feels obligated to respond properly to this information, say, by balking at the transaction with the vendor. To this extent, it is an error of attribution to identify the impersonal form of interaction with market orderings. The erroneous attribution occurs when the reason for invoking impersonality is explained by reference to the idea, or nature, of market exchange when, in fact, it is the upshot of certain surrounding circumstances that may limit the resort to morally relevant information.<sup>15</sup> Hence, the phenomenological version of the conventional wisdom fails to identify what market relations simply as such are. Like sociological and institutional economists, the conventional wisdom fails because it identifies the character of market relations with its contingent aspects. However, unlike sociological and institutional economists who emphasize social embeddedness, the conventional wisdom's failure lies in associating market relations with impersonal interactions.

### III. FREEDOM, SOLIDARITY, AND DEMOCRACY DO NOT ESTABLISH MARKET IMPERSONALITY

The argument so far has addressed the view that impersonal interactions are in their nature, or character, impersonal. I now wish to take up another version of the conventional wisdom—that impersonality does not concern the “is,” but rather the “ought.” In particular, people should, or may permissibly, relieve themselves of the personal responsibility to set the world right through their market affairs. The impersonal market relation is a surface manifestation of this argument. Impersonality permeates the market sphere by choice, rather than by default. Freedom, stability, and democracy are, separately and jointly, among the most familiar grounds for this view. Before I take them up, it will be apt to make two

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<sup>15</sup> Although I emphasize epistemic gaps as the main contingent hurdle, I do not deny that other contingent hurdles may also be at play. In particular, it may be possible to suspect that human psychology is another important factor, at least with respect to some people. It is well documented that for some people empathy is being experienced in a flatly parochial and morally arbitrary manner. The worry could then be that market participants might not open themselves up to the injustices inflicted by other participants on remote third parties. For recent studies indicating that parochial empathy is a problem of motivation, rather than that of ability, see Daryl Cameron & B. Keith Payne, *Escaping Affect: How Motivated Emotion Regulation Creates Insensitivity to Mass Suffering*, 100(1) J. PERS. & SOC. PSYCHOL. 1 (2011). See also Karina Schumann, Jamil Zaki, & Carol S. Dweck, *Addressing the Empathy Deficit: Beliefs about the Malleability of Empathy Predict Effortful Responses When Empathy Is Challenging*, 107(3) J. PERS. & SOC. PSYCHOL. 475 (2014).

observations. First, the shift from the phenomenology to the normativity of impersonal market relations presupposes that it is up to market participants to decide how impersonal they want their interactions to go. The second observation is that the moral desirability of impersonal relations in the market gives rise to a series of second-order questions concerning implementation: for instance, must law facilitate or even enforce impersonal forms of market transactions? I set these observations to one side because my ambition in this Part is to show that freedom, stability, and democracy do not provide moral insulation from the demands of personal responsibility in the market sphere. I return to the first observation in Part IV.

#### A. *Freedom and Market Impersonality*

Part of what makes the market so attractive from the point of view of freedom pertains to its efficiency. By economizing on the time and resources, the market enhances people's ability to lead their autonomous lives. For instance, if I need to get a new refrigerator, a competitive market makes it relatively easy and safe to purchase one that best suits my needs and resources without detracting my attention from the more important projects I seek to pursue in life and without forcing me to engage in long-term, meaningful relations with suppliers. This point seems to support the view that market relations sustain freedom by satisfying preferences without further moral and epistemic demands. Participants should care about what goods to exchange, rather than *whose* goods warrant exchange (so that the latter question can have only instrumental value in the course of addressing the former). On this view, freedom calls for impersonal market relations.

However, this perceived connection between freedom and impersonality doubly fails. The first failure is this: it is one thing to argue that people should not be expected (on grounds of freedom) to invest *too* much time, energy, and thought into the persons with whom they interact in the marketplace; it is quite another to argue that they should not make *any* effort of this kind whatsoever. Accordingly, the conventional argument from freedom is not an argument for impersonal market relations. Rather, it is best reconstructed as a constraint on the scope and extent of market relations taking a certain personal form (in the appropriate sense to be discussed below). Accordingly, the conventional argument from freedom is not an argument for doing away with private responsibility for realizing the demands of morality (as defined at the outset).

The second failure lies in the conception of valuable projects implicit in the argument that grounds impersonal market relations in the demands of freedom. The distinction between pursuing one's grand projects (say, academic career or family life) and buying a refrigerator



captures the qualitative difference between intrinsically and instrumentally valuable projects, respectively. Impersonal market relations, one might argue, uphold this distinction by minimizing the burdens of engaging in purely instrumentally valuable projects.

However, the intrinsic/instrumental distinction captures only one dimension of what counts as morally important.<sup>16</sup> Indeed, buying a refrigerator, or running other errands, can be important in a *different* sense, one which reinforces the normative significance of assuming private responsibility in the market context. Suppose that the refrigerator's water inlet valve has been assembled by workers who have been subjected to exploitative conditions. Further suppose that this piece of information is easily verifiable so that considering whose goods warrant exchange does not overwhelm the buyer. Although contracting for a refrigerator is not intrinsically valuable, it is not clear why freedom must require or even merely make it permissible that the buyer overlook the unjust work relations between the seller and its workers. More generally, it is not clear whether the argument from freedom—as opposed to *bourgeois* freedom—can escape the demands of private responsibility simply by making a distinction between intrinsically and instrumentally valuable projects.

### B. *Stability and Market Impersonality*

Impersonal market relations are often justified on account of their contribution to stability. The argument does not single out the good of market stability as such but rather supposes that the market-generated stability is key to achieving overall social and political stability.<sup>17</sup> Its stabilizing effects are predicated upon its ability to coordinate sectarian-free exchange, which is to say coordination *across* sectarian difference. Impersonal market relations facilitate such coordination because it purports to reduce all value disagreements into disagreements concerning economic value. Thus, impersonality ensures against isolating people in their sectarian corners. To this extent, it is the market analogue to the political practice of public reason famously defended by Rawls.<sup>18</sup> However, the argument from stability suffers at the hands of its own speculative nature. In particular, the thought that there is a necessary positive connection between impersonal market relations and sustaining overall

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<sup>16</sup> Hanoch Dagan and myself elaborate and defend this dimension in connection with duties of accommodation (in employment and other settings). Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 L. & PHIL. 171 (2018).

<sup>17</sup> Montesquieu, for example, suggested that “[t]he natural effect of commerce is to lead to peace.” CHARLES LOUIS DE SECONDAT & BARON DE MONTESQUIEU, *COMPLETE WORKS VOL. 2: THE SPIRIT OF LAWS* 14 (1748).

<sup>18</sup> See JOHN RAWLS, *THE IDEA OF PUBLIC REASON REVISITED* (1921), *reprinted in* JOHN RAWLS, *THE LAW OF PEOPLES* 131–80 (1999).

stability in society turns on psychological assumptions and changing circumstances. It may be true that for some people, an impersonalized engagement generates a quietening effect. Bracketing out how a seller has treated his or her employees or the environment may help to facilitate interactions that would otherwise not have occurred. However, other people would presumably have the opposite reaction, perhaps because they would suspect that an impersonal market relation has the potential to serve as a sham laundromat of injustices. Identifying which of these vectors dominates turns on a variety of factors, including the psychological makeup of market participants.

Furthermore, the argument from stability is speculative in another, more troubling way. As mentioned a moment ago, the good of stability, if it is a good at all, is not limited to the domain of the market. Rather, the underlying aspiration is that the calming effect produced by market participation would manifest itself in other social and political spheres. However, the connection between impersonal market relations and the goal of overall stability is contingent upon the particularities of the relevant society. This contingency can be introduced by reference to the distinction between isolation and integration. The argument from stability suggests that impartial market relations are conducive to social integration while non-impartial market relations will likely result in isolating participants in their respective sectarian corners. This is false, however. Different causal factors separate the starting point—market relations—and the outcome—stability. One possible causal story is that bracketing out value disagreements might entrench sectarian difference among members of civil society which, in turn, imposes greater threats to social and political stability. The opposite causal story is that non-impersonal market relations would give its participants incentives to be more attentive to the judgments of others and, if necessary, modify their ways of lives accordingly. Some proponents of the notion of *doux-commerce* (concerning markets' ability to soften disposition and behavior) advance precisely this hypothesis about the connection between market orderings and overall stability. Now, adjudicating between these (and other) causal hypotheses depends on empirical questions—demographics (the size of each of the competing sectarian groups); political economy considerations pertaining to the forms of sectarian leadership (how authoritative are they); constitutional protection against assimilation and availability of exemptions from laws of general applicability; social conventions concerning the appropriateness of acting on one's conception of the good in the course of participating in the market, and so on. It is therefore impossible to find a relationship of entailment (or even likelihood) between impersonality and stability. And for this reason, solidarity cannot serve as a principled justification for engaging in impersonal market rela-

tions. If anything, solidarity may figure as a constraint on the character and the scope of the conception of responsibility appropriate to market relations (on which more below). And even this must come with all the caveats arising from the contingent nature of the argument from stability as just discussed.

### C. *Democracy and Market Impersonality*

According to a familiar liberal-egalitarian tradition, the basic responsibility to set the world right is held by the people acting collectively through the state. In that, private persons are not required, as a matter of law and of justice, to adopt this end in their market (and other private) affairs.<sup>19</sup> More specifically, their being legally relieved of this responsibility is not due to some pragmatic considerations; rather, it finds its grounding in political *morality*.<sup>20</sup> One interpretation of this moral prescription lies in the ideal of democracy as collective self-rule. In assuming responsibility to realize the demands of morality, market participants engage in a form of usurping the power of democratic decision-making processes to decide how to address injustices. Stripping market relations of their impersonal character for the purpose of subjecting them to the demands of morality and justice, the argument goes, is an instance of illegitimate privatization of democratic rule.<sup>21</sup>

However, this line of reasoning mischaracterizes market participants in terms of citizens of a state, rather than mere private persons. Accordingly, it reduces the question of justice to the vertical dimension in which the state, acting on behalf of the polity, addresses instances of injustice. It therefore overlooks the horizontal domain of inter-personal justice (which is a subset of the morality).

The view that market activity is essentially mediated through the notion of citizenship (or even residency) is difficult to maintain precisely because this practice is not sufficiently related to the participants' national affiliation. In particular, it is both under- and over-inclusive. There are two ways to demonstrate the tenuous connection between market re-

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<sup>19</sup> I do not mean to suggest that on this picture individuals are absolutely absolved of any demand of justice. The point, instead, is that their responsibility to realize the demands of justice (beyond the point of fraud, violence, and illegal price manipulation) is fundamentally accessory. It is accessory in the sense that social and political institutions, rather than private persons, are in charge of realizing the demands of justice so that these demands are fully specified *apart* from private individuals' role as supporters and compliers.

<sup>20</sup> The economic orientation of the market further strengthens the argument from moral division of responsibility. Indeed, in a sufficiently competitive market, each participant ought to care *only* for his or her interests. The reason, sometimes associated with the notion of the invisible hand, is *not* that of egoism, but rather that of improving the interest of all (at least in the aggregate).

<sup>21</sup> See Waheed Hussain, *Is Ethical Consumerism an Impermissible Form of Vigilantism?*, 40 PHIL. & PUB. AFF. 111, 124–29 (2012).

lations and the notion of political citizenship. First, markets are transnational not merely in their scope but also in their character—they engender cooperation among people whose activities bear no essential relationship to their respective states of citizenship (as when a citizen of X encounters, during her business trip to state Y, a local café decorated with undeniably sexist posters; whether or not she ought to distance herself from the café’s agenda, it seems clear that engaging in such judgment-making has nothing necessarily to do with her being a citizen of X). Indeed, interactions among private individuals give rise to concerns of injustice that are essentially about their relationships *qua* private individuals. Being a citizen of this or that state becomes morally arbitrary for the purpose of identifying the demands that apply to these individuals. The reason why one should balk at participating in a contractual transaction with a sweatshop owner (or its distributor) is not merely because one’s state should have banned this harmful form of employment, but rather simply because it is wrong, and so buying the products manufactured by these employees is an irresponsible exercise of one’s right to enter into a contractual relation with that employer. The moral failure at issue reflects his or her record as an individual person who is required, by virtue of being a person, to respect other persons, irrespective of the demands of citizenship (and the fact that the state establishes or facilitates the private powers associated with contract-making and ownership—the basic pillars of the market—does not make these powers’ holders the mere stewards of the collective). Sweatshops are perhaps a paradigmatic case where the demands of justice are not essentially mediated by a particular state, though other instances of illegitimate conduct share this trans-statist identity. Second, the state may have good pragmatic and principled reasons not to regulate or ban some market-related actions, but these reasons need not apply to the market affairs of its citizens. Suppose the state cannot and should not prohibit certain religious practices of animal slaughter designed for consumption—indeed, religious liberty may count not only as a compelling legal argument, but also as a moral commitment to toleration and impartiality on the part of the liberal *state* (as exemplified by the Free Exercise and Establishment Clauses of the First Amendment of the U.S. Constitution). That said, there still exists ample normative space for its citizens, acting as private individuals, to decide whether or not they, on legitimacy grounds, must forbear from purchasing or even merely consuming the meat at issue.

Thus, it is simply a mistake to reduce the category of market relations into the category pertaining to relations among citizens (or between citizens and their polity). No doubt, these two categories often overlap; but this can hardly warrant the conclusion that they are one and the same. The demands of morality and justice that figure in the market do not

single out *the* state, and certainly not *a* state (such as my state or yours). Accordingly, taking responsibility in the market domain is not (necessarily) an instance of privatization; nor is it a state delegated function.

#### IV. LAW'S NORMATIVE STATUS: THE LEGAL CONSTRUCTION OF MORAL RESPONSIBILITY

Up to this point, I have sought to defeat some influential interpretations of the conventional wisdom about the character of market relations on their own courts. I have argued that it is a mistake to suppose that market relations are impersonal in nature; that there are necessary inconsistencies between freedom or solidarity and non-impersonal market relations; and that questions of morality and justice that arise in connection with market relations are subject to the collective responsibility of the polity. To this extent, the various interpretations of the conventional wisdom fail to make good on their own ambitions to defend the impersonality of market relations.

But there is a deeper difficulty than that of incoherence. These interpretations misunderstand the normative status of law in the theory of the market—the difficulty, in other words, is *meta*-ethical, as it concerns the nature of morality in and around the market sphere. The criticized interpretations proceed by identifying a fundamental value—for instance freedom or solidarity—followed by an attempt to determine what a commitment to this value could possibly require within the particular sphere of market activity. The assumption widely shared by these accounts is that moral analysis (say, of freedom's implications for market relations) can be conducted apart from the law governing the market. Although it is sometimes correct to view law as instrumentally valuable in facilitating antecedently fixed goals (such as protecting bodily integrity by the law of assault and battery), it is not always the case. Law does not merely facilitate goals. Rather, it can sometimes play a formative role by establishing forms of human interaction that would otherwise not have been available.<sup>22</sup>

When it comes to the market, the legal institutions of contract and property play this role. To some extent, the legal construction of the market domain is akin to an *independent* variable in the moral analysis leading up to a conclusion about the desirable shape of market relations (including how impersonal they should go). Accordingly, the question of what market relations consist in and, in particular, how impersonal they ought to be, cannot be addressed prior to legal analysis (of the right kind). The question of personal responsibility for the demands of moral-

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<sup>22</sup> It is important to distinguish this claim about law from the view, most recently defended in JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999), that the procedural aspect of law (such as the legislation process) may be a source of free-standing value.

ity and justice is, therefore, a moral question, but the morality of market activity is not fully specifiable apart from the law that constructs such a sphere of activity in the first place. By implication, the basic question that slips below the conventional wisdom's radar concerns the connection between the legal institutions of contract and property, on the one hand, and moral responsibility of market participants, on the other.<sup>23</sup> I shall argue that there exists such a connection, and its key element is that of recognition.<sup>24</sup> Because contract and property are frameworks of inter-personal recognition, those who participate in them have a reason to engage in market relations in morally responsible ways. A morally responsible agent cannot wash her hands of the conduct of another party to a market transaction (as the conventional wisdom implies); rather, she must decide whether or not to recognize this other party based, in part, on his relevant moral record. Before I get to the question of what moral record counts as relevant—a question pertaining to the scope of the responsibility—the argument going forward seeks to show that contract and property are frameworks of inter-personal recognition.

#### A. *Recognition: Contract, Property, and the Standing to Say So*

*Contract.* Consider the following example. My distribution agreement with a restaurant owner—that I must deliver soft beverages every Tuesday morning—means that it is not within my powers to decide whether or not to change the venue, duration, day, or time of the delivery. This holds true, to an important extent, *even when* the circumstances have changed so that it would be all-things-considered best for *both* parties (and for the restaurant's patrons) to meet every other week (or, for that matter, twice a week). The restaurant owner possesses the normative power to control, in some measure, the conduct *and* the kind of reasons that can be relevant for deciding what to do within the scope of the agreement.<sup>25</sup>

Furthermore, this power is practical, rather than merely epistemic. In occupying the standing at issue, the owner can insist that the *reason* for my conformity with the agreement recognizes that *it is her that decides so*. There may of course be many other reasons that could support my conformity (such as those that pertain to my own short- or long-term

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<sup>23</sup> By emphasizing contract and property, I do not claim that these are the sole legal institutions that play a formative role (fiduciary law, for instance, may also fit in this class). That said, I take them to constitute the basic legal pillars of the market.

<sup>24</sup> For more on the notion of recognition in property and in contractual relations, see Avihay Dorfman, *The Society of Property*, 62 U. TORONTO L.J. 563, 563-607 (2012).

<sup>25</sup> This observation is meant to be neutral with respect to the choice of appropriate remedy for breach of contract (at least among the traditional candidates). For instance, it is not inconsistent with the expectation remedy (at least when the promise-keeping obligation is a disjunctive one, namely, to perform or pay).

interests). But the contract with the restaurant owner adds another such reason, and—within limits—this reason purports to control my conduct *even when* other reasons cut in the opposite direction.<sup>26</sup> Thus, when the restaurant owner supposedly insists on the terms of our agreement, she does not merely report on existing reasons that apply to my conduct independently of its reporting so. Rather, she generates the reason by claiming that, within limits, it is up to her decision-making authority to decide on the matter. In that, the restaurant owner demands my recognition of the special place of her choice in my practical affairs.

*Property's Recognition.*<sup>27</sup> If I own a copy of *Das Kapital* that you would like to briefly consult, I enjoy an unusual, though not limitless, standing relative to you. If I restrict your access to the copy of the book, saying “That’s mine,” what I really am doing is demanding your recognition of my status as *reason-providing* for you. In particular, by saying “That’s mine” under appropriate circumstances, I intend that the reason for your conformity with my judgment concerning the use of the book be that you recognize that it is I, the owner, who say so. The same holds in the opposite case, that is, when I grant you permission to browse the book—you are entitled to use it *because* of my authorization. This is the precise sense in which private owners hold the special standing not merely to report on the reasons, duties, and norms that, in principle, apply independently of their reporting so, but rather to make a difference in the practical affairs of others by intending to do so.<sup>28</sup> Note that I do not claim that private owners’ standing to say so necessarily makes *all* the difference there is in the practical affairs of non-owners. The latter may also have other reasons to take into consideration and, in some cases such as those of necessity, these reasons may outweigh the reasons generated by the private owner. That said, and setting exceptional cases to one side, the standing that ownership creates makes it the case that the reason given, as opposed to merely reported, by an owner applies to non-owners *even when* other reasons pull in the opposite direction. For instance, the reason why you must return my copy of *Das Kapital* within the next five minutes is that it is not up to you to decide, based on your own reasons, whether it would be all-things-considered best to glance over a few other chapters of the book. The existence of my standing to say so just is the absence of your normative control over this matter. On

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<sup>26</sup> Note that I do not claim that reasons generated by the contract make or should make *all* the difference in my deliberations.

<sup>27</sup> The following discussion draws on my previous studies and, most heavily, on Avihay Dorfman, *Private Ownership and the Standing to Say So*, 64 U. TORONTO L.J. 402 (2014).

<sup>28</sup> The connection between deferring to the owner’s standing and respectfully recognizing her is normative, rather than psychological or empirical—that is, recognition does not require that the actual motive on the part of the deferring person be that of *desiring* to render the owner legitimate.

this characterization, state punishment for interference with the rights of private owners is the law's fallback plan in case the primary reason (to defer to owners' special standing) has been compromised or ignored.

*Deference and the Standing to Say So.* For both contract and property, then, placing oneself under the normative control of another person entails a normative loss: that of giving up on one's control over the matter. That is, giving up on one's entitlement to decide what to do based on the reasons that would have been available had one not entered into a contract or property interaction with another (which is to say, reasons that have been excluded by entering into a contract or a property relation). Now, you cannot submit yourself to the reason-giving standing of another without recognizing her *capacity* to make choices.<sup>29</sup> The "recognition" at issue should not be confused with mere awareness or acknowledgement of the choice of another. Rather, the notion of recognition that operates in connection with contractual or property relations includes an element of *deference* to another's choice. Exercising such deference depends on a prior judgment of this other person as one whose capacity for choice merits some measure of deference. (This is why those who lack this capacity, e.g., infants and animals, are also denied the legal personality to enter into a legally binding contract or to own property. And this is also why deferring to one's pet, say, by taking it out for a long walk on a super cold night, reflect one's recognition of the pet's *needs* and its capacity for experiencing pain and suffering, rather than for making choices.) Note that talk of deference as recognition does not imply endorsement of the projects and personal makeup of the party to whom deference is extended. As I explain below, recognizing another party is a form of inter-personal respect that comes down to purporting to render the other party legitimate (as in legitimate vendor, consultant, employer, and so on).

### B. *Recognition and Responsibility*

The argument from recognition establishes a special link between markets and personal responsibility. In particular, contractual and property-based recognition explain why moral responsibility is *inherent* in market relations. Talk of moral responsibility in and around the market sphere does *not* concern itself with the responsibility market participants have more generally, by which I mean responsibility for the rights and well-being of others that applies to people by virtue of being persons. Nor does it concern people's responsibility *qua* citizens (or, for this matter, *qua* members of expressive associations). Instead, the question at

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<sup>29</sup> Of course, all else is sometimes not equal. Exceptional circumstances, such as those involving coercion and necessity, on the one hand, and infancy, on the other, strip the idea of recognition of its intuitive appeal.



issue concerns the responsibility that is distinctively triggered by the market interaction. I argue that the recognitional effects arising from contract and property interactions implicate their participants simply in virtue of participating in these interactions.

Consider an Airbnb host who regularly discriminates against potential guests on the basis of race or sexual orientation. People in general have a reason to react in the right way against this behavior, irrespective of whether they ever plan to rent this place themselves or even use the Airbnb platform at all. The content of this moral reason will depend on any number of principled and contingent considerations and may range, say, from acquiring reactive attitudes of indignation to picketing the host's apartment or some such. Some people can react more effectively than others for reasons of distance, means, influence, and so on. But the basic point is that the wrongdoing at issue can be the moral business of any person rather than merely the immediate victim.<sup>30</sup> Moreover, we assume civic responsibility as citizens of the state in which the wrongdoing has occurred to reform and enforce the law according to the demands of justice and equality—certainly, a just law of public accommodation should not distinguish between hotels and an Airbnb hosts when it comes to straightforward forms of discrimination. And there are other roles we occupy (for instance, leadership positions in church, community, or politics) that call for addressing the wrongdoing in question. These and other grounds for taking responsibility in the face of wrongdoing have nothing particularly to do with our status as market participants.

However, and this is the important point, those who engage in a contractual or property interaction with our host have an additional, independent reason to act responsibly. That is, a reason to assume responsibility with respect to the question of *whose* goods and services merit exchange. To see that, consider a case in which you have discharged all of your moral obligations as a moral agent, citizen, and community leader appropriately motivated to address the injustice of discrimination in public accommodation (in general and in the host's case, in particular). That said, by deciding to contract for a place at the host's apartment you implicate yourself in recognizing the host as a legitimate businessperson whose policy of excluding people on the basis of race and sexual orientation is taken at face value. Indeed, the recognition effect is not a matter of choice or preference, since it arises out of the contractual *form* of interaction. Thus, contrary to the conventional wisdom's attempt to bracket out the question of personal responsibility in and around the market, market relations are no mere vessels through which participants can satisfy their preferences (which may include preferences to set to one

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<sup>30</sup> This is not to say that the manner and extent of the reaction will be the same whether you react as a stranger, bystander, or the immediate victim.

side questions concerning the other party's moral standing).<sup>31</sup> As mentioned above, the reason why market relations feature this preference-independent effect of recognition is law—more specifically, the legal forms of interaction that shape these relations, namely, the contract and property forms.

Now what is morally problematic with proceeding in a business-as-usual mode in the case of that host? No doubt, the normative loss occasioned by deferring to the standing to say so of another party to a contractual or property interaction may prove beneficial to the deferring person. However, it also has the ability to generate effects in the world to which the person whose normative loss it is must attend *even when* they do not bear on his or her own self-interest and self-determination. The effects come down to the alleged moral status of the recognized party within the relevant class of reference—a purportedly legitimate host in the hypothetical case of Airbnb or a purportedly legitimate vendor in the case of the seller who engages in unethical employment practices mentioned at the outset.<sup>32</sup> And since the contract and property forms of interaction create this possibility, there is a reason to care about the moral standing of the person to whom contractual or property recognition is extended. That is, there is a reason to display an appropriate degree of respect and consideration toward the relevant others—to treat them as equals—insofar as entering or refusing to enter contractual or property interactions undermines their status as free and equal persons.

The guest of our hypothetical Airbnb host is required to act responsibly in her encounter with the host because the purported inclusion of the latter in the class of legitimate hosts would fail to respect the direct victims (either actual or potential) of maintaining a discriminatory renting policy. A similar assessment applies in the case of rendering legitimate the street vendor by recognizing him through the contract or

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<sup>31</sup> I develop and defend this argument in Avihay Dorfman, A Legalistic Conception of the Market: Beyond Efficiency (Jan. 18, 2018) (unpublished manuscript) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3104942](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104942).

<sup>32</sup> *Purporting* to render one legitimate is not the same as rendering one legitimate. Should it concern us that the proposed account cannot get us beyond the point of purporting to render, rather than simply rendering, some of each other's choices legitimate? I do not think so. Making "purporting-to" decisions is normatively important because it can sometimes implicate the decision-maker in moral and legal wrongdoing. That is, treating another person *as though* he or she is legitimate can be morally offensive even if so treating cannot amount to rendering him or her legitimate. Thus, the provision of technological services to Nazi Germany by IBM could not have rendered the former legitimate. Nonetheless, by doing so, IBM displayed a lack of respect for the rights and well-being of others by treating Nazi Germany *as if* it was legitimate. See Edwin Black, *IBM's Role in the Holocaust: What the New Documents Reveal*, HUFFINGTON POST, [https://www.huffingtonpost.com/edwin-black/ibm-holocaust\\_b\\_1301691.html](https://www.huffingtonpost.com/edwin-black/ibm-holocaust_b_1301691.html) (last visited Dec. 21, 2017).

property transaction of purchasing a bottle of water.<sup>33</sup> Thus, the recognitional effect to which the contractual and property interactions give rise invites responsibility: the decision whether to enter a contractual or property relation with another should take into account, among other things, considerations pertaining to the person whom the other party is. Hence, contrary to the conventional wisdom, a decision of this sort is not morally costless precisely because it implicates the decision maker in purporting to render legitimate another market participant.<sup>34</sup>

The preceding discussion has focused on responsibility in connection with decisions of *inclusion*. There, responsibility was linked to third parties—the frustration of their reasonable expectations and the display of disrespect by purporting to render legitimate their perpetrator or offender. Purporting to *deny* legitimacy, however, is not merely the mirror image of purporting to render legitimate another person. This is because decisions of *exclusion* change the preceding analysis by adding the person whose legitimacy is denied to the circle of immediate victims. Thus, a decision not to host a wedding celebration of a same-sex couple on account of the couple's sexual orientation or conception of marriage is not merely disrespectful of third parties (although it is this also). Rather, it harms this couple, and it offends against their respective equal dignity to be placed in the class of the illegitimate. Accordingly, the power that comes with the contract and property forms of interaction—the power of purporting to deny legitimation—calls for responsibility. Its demandingness is not a matter of choice; it is a structural upshot of the contract and property forms of interaction.

A structural argument from responsibility cannot tell us what would be the normative baseline against which to decide whether purporting to deny or confer legitimacy is justified or otherwise permissible as a matter of morality and, separately, of law. A substantive theory of legitimation must therefore be developed in order to help identifying the right answers. As in many cases, these answers can be identified straightforwardly with respect to the two extremes situations. On one extreme, there is absolutely no *moral* doubt that the relevant party cannot be rendered legitimate; to this extent, it is not up to people's judgments—ar-

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<sup>33</sup> The otherwise important classificatory question of whether purchasing a bottle, or renting a place on Airbnb, represents a property or contractual transaction (or a combination of both) remains immaterial for the present argument.

<sup>34</sup> My use of *legitimacy* departs from two familiar senses in which this concept is being used in contemporary literature. First, it is a normative, rather than a descriptive or Weberian concept of legitimacy. Thus, it is not about what people happen to believe, but rather what reasons do they have to conceive of something as legitimate. Second, within the domain of the normative concept of legitimacy, I depart from the view that narrows our views of legitimacy to the right to rule. This right may form a private case of the larger notion of legitimacy as a certain judgment of properness.

guably, contracting with IBM for technological services can never render the Nazi regime legitimate.<sup>35</sup> The opposite extreme features cases in which there is no *moral* doubt that the relevant party is beyond reproach, in which case purporting to render or deny legitimation should not be up to people's judgments (can one deny legitimation based on another person's gender or sexual orientation?). It is possible to understand one of the roles of basic moral (and legal) rights as ensuring that no one can deny another person his or her legitimacy on account of some basic immutable and mutable traits he or she possesses.<sup>36</sup>

However, the thought that principles of abstract moral theory could then fully determine for us highly particularistic questions, on a case-by-case basis, seems incredibly unrealistic. This is not to deny that applied ethics, morality, and political morality have no added value or, more profoundly, that there are no right answers to these questions; rather, the point is that the ad-hocism built into the moral practice of purporting to render or deny legitimacy in the context of free market exchange places severe limitations on the ambition of a general theory of legitimation to possess a recursive structure that would enable it to identify definitive answers to every particular question. By implication, commonsense morality can (arguably) capture much of what a market practice of purporting to confer or deny legitimation can appeal to in order for it to count as an adequate instantiation of the correct theory of recognition as rendering (or denying) legitimation. I leave this task for another occasion.

### C. *The Scope of Responsible Market Agency*

The preceding discussion has sought to identify the character of moral responsibility in distinctively market interactions. The argument going forward seeks to define the scope of this notion of responsibility. The challenge is to locate a steady state equilibrium between two extremes—that is, between the conventional wisdom's marginalization of moral responsibility in market relations and the notion that market relations are simply the continuation of political, religious, and social relations by other means. The answer is that the object of the recognition to which market relations give rise is limited to the actual choices that are *sufficiently integral* to the market operation of a participant in a contractual or property interaction. And the baseline against which to determine this much is given by the distinction between incidental and non-incident-

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<sup>35</sup> Note, however, that the impossibility of rendering the Nazi regime legitimate does not mean that it is not irresponsible on the part of IBM to *purport* to render that regime legitimate by contracting with it.

<sup>36</sup> As I argue elsewhere, therefore, market participants *cannot* refuse to host a same-sex marriage (or, for that matter, do the flower arrangement or bake a cake for a same-sex marriage, as in the pending U.S. Supreme Court case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*). See Dorfman, *supra* note 4.

tal aspects of the transaction. The distinction at issue is an interpretation of the broader notion that the scope of the legitimation generated by contractual or property recognition is defined by the context of the interaction.

For instance, by selling lettuce to a restaurant whose owners are avid pro-life adherents, I do not thereby purport to render legitimate the owners' political agenda. This is because it is purely incidental to their commercial operation and, therefore, to my transaction with them. The analysis might change, however, if it turns out that this choice informs the owners' business operation—say, they serve and hire pro-lifers only (suppose the case occurred before the enactment of the Civil Rights Act's Titles II and VII).

At an abstract level, the distinction between incidental and non-incidental aspects helps to single out choices concerning production, investment, employment, and consumption that are sufficiently integral to the business model and operation of the market actor whose recognition is at issue. That said, it may be difficult to locate clear guidelines that tell, in each and every case, non-incidental from incidental features. A particularistic inquiry would invite interpretive judgments based on contingent circumstances and specific contexts. Even a restaurant's name can sometimes pose difficult interpretive questions when it comes to the incidental/non-incidental distinction—suppose there is another restaurant on my lettuce delivery list, and it carries the (legally permitted) name “The Third Reich.”<sup>37</sup> Can I hide behind the conventional wisdom and wash my hands of the owner's choice of name (or can you do the same regarding your decision to dine at this restaurant in a non-emergency situation)?<sup>38</sup> On the proposed account, the answer turns on whether the choice of name is non-incidental to the business operation of the restaurant. I would answer in the affirmative because using this name is sufficiently integral to the marketing model of this restaurant. Accordingly, accepting the owner's invitation to access the place or contracting with him will implicate me in purporting to render legitimate his choice of name.

The case of the Third-Reich also serves to distinguish between the notion of recognition I have been invoking here and the different conception of recognition familiar from the writings of modern-Hegelians such as Peter Benson, Alan Brudner, and Daniel Markovits.<sup>39</sup> Their otherwise different accounts of contract attempt to reduce the object of contractual

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<sup>37</sup> This has been the case of a South Korean bar. See *South Korea: Bar Called the Third Reich*, ASSOCIATED PRESS ARCHIVE (Sept. 3, 2000), <http://www.aparchive.com/metadata/you-tube/2e19ad842415f462f8cc5d6e02971606#>.

<sup>38</sup> Of course, these are questions of moral, not legal, permissibility.

<sup>39</sup> See Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract*, 10 CARDOZO L. REV. 1077, 1177 (1989); ALAN BRUDNER & JENNIFER M. NADLER, *THE UNITY OF THE COMMON LAW* 171 (2d ed. 2013); Daniel Markovits, *Promise as an*

recognition to the generic capacity for choice, rather than the actual choice made by the other party (say, the choice to name the restaurant Third Reich). This reductionist stance can account for the distinction between a person and a dog (or a mature adult and an infant), but does not concern itself with the distinction *among persons*, say, based on their particular choices or situations. Focusing on the capacity for choice is counterintuitive precisely because it obscures the crucial difference between the Third Reich's owners and most other restaurant owners. The source of the modern-Hegelian's failure to identify the correct object of contractual (and property) recognition is the thought that respect for another's capacity for choice does not implicate one in respecting at least some of the choices this person makes. By contrast, my account of contractual and property recognition rejects the wedge between respecting the capacity for choice and choice itself; it insists, instead, that respecting a person's capacity for choice *requires* respect for some of this person's choices. The discussion in the main text above (between non-incident and incidental features) has sought to explain how to distinguish between choices for which recognition is required and choices that make no such demand on a party to a market transaction.

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Against the backdrop of this analysis, it will be apt to end this part of the argument by returning to the notion of impersonality to address the question of what to make of its proposed rejection. More specifically, the question is what to make of the distinction between impersonal relations and whatever else it is with which they are supposed to contrast. Recall that the argument commenced with criticizing the most prominent interpretations of the conventional wisdom about the impersonal character of market relations. This step has created the opening for redefining the precise sense in which market relations are not impersonal. Certainly, they are not personal in the intimate or familial sense; nor are they personal in the way that college applicants' résumés might be. Instead, they are personal in the limited sense that the particular moral standing of each party, insofar as it is not incidental to his or her market activity, figures in the decision of whether or not to engage him or her in a market transaction.

#### CONCLUSION

The view that society is composed of different spheres, the market being one of them, is a modern one, and especially a liberally modern

one.<sup>40</sup> The market sphere, it is sometimes thought, carves out a space in which people enlist each other in the service of pursuing their own well-being.<sup>41</sup> The impersonal character of market relations is a key important manifestation of this view. In these pages, I have sought to demystify this manifestation and, in this respect, cast doubt on the possibility of maintaining a strict separation between distinctively market reasoning and practical reasoning. I have challenged the coherence of the view that market relations are or should remain impersonal. I further developed a meta-ethical argument concerning the nature of moral inquiry in market settings. In particular, law does not merely facilitate market activity; rather, it forms it. Accordingly, the argument from moral responsibility has focused on the legal forms of market interactions, contract and property, in an attempt to understand their qualities and immediate implications. These forms, I have argued, can shape the nature of the market exchange so that its object spans reciprocal recognition, rather than merely the market good on demand (and supply). This way of establishing a structural connection between market exchange and judgments of recognition and legitimacy creates the opening for a new philosophy for the market, one which takes more seriously the importance of moral responsibility and, more generally, the ineliminable role of *private* responsibility for realizing (some of) the demands of morality and justice. To this extent, I have argued that market ordering predicated on the contract and property forms of coordination is just another sphere of life in which doing well does not crowd out the imperative of doing right. On the contrary: doing well, because it depends on proprietary rights and contractual arrangements, calls for doing right.

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<sup>40</sup> Michael Walzer's observation—concerning liberalism and the art of separation—is perhaps the most familiar variation on this theme. See Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315 (1984).

<sup>41</sup> ANDERSON, *supra* note 1, at 145.

