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FOREWORD: ALTRUISM, COMMUNITY, AND MARKETS

KIMBERLY D. KRAWIEC*, JULIA D. MAHONEY** & SALLY L. SATEL***

I

INTRODUCTION

From the nineteenth century until the final decades of the twentieth, the notion that Adam Smith's two leading works—*The Theory of Moral Sentiments* and *The Wealth of Nations*—stood in opposition to one another was widespread.¹ *The Theory of Moral Sentiments*² depicts a civil society in which human conduct is grounded in sympathy, while the market economy portrayed in *The Wealth of Nations*³ is seemingly based on the pursuit of individual self-interest. Yet upon careful inspection, the two works form a coherent whole, with *The Theory of Moral Sentiments* “focusing on mankind’s inner life and the cultivation of the virtues that undergird the dynamic commercial society celebrated in *The Wealth of Nations*.”⁴ In short, both altruism and self-interest are crucial for constituting society.

That human motivations can be complicated and that the concerns of individuals for both self and others shape communities—local, national, and global—are simple observations. It is much harder to grasp the complexities of a rapidly changing world in which human beings with their varying commitments continually interact. Our desire to better understand how and in what ways the

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1. See generally Leonidas Montes, *Das Adam Smith Problem: Its Origins, the Stages of the Current Debate, and One Implication for Our Understanding of Sympathy*, 25 J. HIST. ECON. THOUGHT 63 (2003).

2. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (1759).

3. ADAM SMITH, *THE WEALTH OF NATIONS* (1776).

4. Julia D. Mahoney, *The Struggle for America’s “Fiscal Soul,”* THE NEW RAMBLER (Jan. 4, 2016), <http://newramblerreview.com/book-reviews/political-science/the-struggle-for-america-s-fiscal-soul> [<https://perma.cc/6X4S-XNT4>]. See also Joseph Blocher & Kimberly D. Krawiec, *Foreword: How to Think About Law and Markets*, 80 LAW & CONTEMP. PROBS., no.1, 2017, at 6 n.33 (observing that *The Theory of Moral Sentiments* “provided much of the intellectual architecture” for *The Wealth of Nations*); Ronald Coase, *Adam Smith’s View of Man*, 19 J. L. & ECON. 529 (1976) (detailing Adam Smith’s depictions of the complex motivations for human behavior); Paul G. Mahoney, *Adam Smith, Prophet of Law and Economics*, 46 J. LEGAL. STUD. 207, 221–22 (2017) (describing Adam Smith’s view of human nature).

forces of self-interest and altruism intersect—and at times collide—in the early twenty-first century inspired us to organize a symposium on “Altruism, Community, and Markets.” The proceedings of that conclave are published in this issue. Held in Washington, D.C. in October 2017 and sponsored by the American Enterprise Institute, Duke Law School, and the University of Virginia School of Law, the symposium brought together scholars in law, public policy, economics, medicine, and related fields to examine the institutions⁵ that promote and restrict market and nonmarket interactions. The group also explored how the powers of altruism and self-interest are (and have the potential to be) harnessed to create and distribute goods and services.

The articles produced for the symposium cover a wide range of subjects and are of exceptional depth and intellectual ambition. All address topics of current importance while situating their analyses in the broader context of the symposium’s theme. Taken together, the articles contained in this issue provide a snapshot of a world grappling with the challenges of “institutionalizing”⁶ human cooperation in the face of evolving social attitudes and technological advances.

II

ALTRUISM, RISK, AND COMPENSATION

One theme of the symposium was the question of risk. The degree of hazard and form of hazard that people should be permitted or encouraged to undertake—for either monetary gain or for free—engender fierce controversy.⁷ The availability of compensation for non-traditional work or production, many fear, may spur some individuals—particularly those who are vulnerable due to youth, poverty, or other factors—to make choices that are self-sabotaging or that they regret. At the same time, bans on payments to organ donors, athletes, and others who incur risks while engaging in activities of social benefit can lead to exploitation. Of particular concern are situations in which individuals are willing (or even eager) to be altruistic and forego payment in order to transact with firms that aim to maximize the firm’s own financial returns.

In *If We Allow Football Players and Boxers to be Paid for Entertaining the Public, Why Don’t We Allow Kidney Donors to be Paid for Saving Lives?*, Philip J. Cook and Kimberly D. Krawiec contrast the compensation ban on providers of kidneys for transplantation with the legal treatment of participants in football,

5. Our definition of “institutions” is a broad one, encompassing the “humanly devised constraints that structure political, economic and social interaction.” Douglass C. North, *Institutions*, 5 J. ECON. PERSP., no. 1, 1991, at 97–112.

6. John E. Roemer, *Socialism Revised*, 45 PHIL. & PUB. AFF. 261, 311 (2017) (expressing support in principle for socialism while acknowledging an “essential” role for markets in ordering human societies).

7. See WHEN ALTRUISM ISN’T ENOUGH: THE CASE FOR COMPENSATING KIDNEY DONORS (Sally L. Satel ed., 2009); Kimberly D. Krawiec, *Show Me the Money: Making Markets in Forbidden Exchange*, 72 LAW & CONTEMP. PROBS., no. 3, 2009, at i; Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163 (2000).

boxing, and other violent sports, many of whom suffer serious acute or chronic injury. Cook and Krawiec argue that there is a stronger case for payments to kidney donors than for compensating participants in violent sports, based on the medical risk to participants, the consent process, social justice concerns, and social welfare considerations. The medical risks of a professional career in football, boxing, and other violent sports are much greater both in the near and long term than the risks of donating a kidney. On the other hand, the consent and screening process in professional sports is not as well developed as in kidney donation. The social justice concerns stem from the fact that many players are members of minority groups and some come from impoverished backgrounds. Finally, the net social benefit from compensating kidney donors—namely, saving thousands of lives each year and reducing the suffering of 100,000 more receiving dialysis—far exceeds the net social benefit of entertaining the public through professional sports.

Cook and Krawiec conclude that only three logically consistent positions follow: allow compensation for both kidney donation and for violent sports; allow compensation for kidney donation but not for violent sports; or allow compensation for neither. Current law and practice, however, is “perverse”⁸ in endorsing a fourth regime: namely, allowing compensation for participation in violent sports but not kidney donation.

Beyond Gift and Bargain: Some Suggestions for Increasing Kidney Exchanges, by Nathan B. Oman, advances two novel proposals for alleviating the shortage of transplantable kidneys. Both proposals are designed to ensure that kidney donors achieve their own goals, which generally involve helping a family member or close friend rather than simply donating a kidney to a needy individual. Oman’s proposals build on chains of donation, an existing—and legal—practice in which patients with end-stage renal disease who have willing, healthy, but biologically unsuitable donors are paired with others in similar predicaments. Together, members of these pairs are ordered so as to create a chain of biologically matched dyads, thereby enabling all patients to receive transplants. While in theory these donation chains can be expanded to include numerous links, in practice this is difficult. That is because if the exchange of organs takes place over time rather than simultaneously, those among the first to donate a kidney are “exposed to the risk that a subsequent donor will renege on her commitment,”⁹ resulting in the target of the earlier moving donor’s altruism going without a transplant.

Oman’s innovative approach is to attempt to extend donor chains through two mechanisms. The first is to permit donors to make use of standby letters of credit, which as Oman points out are institutional mechanisms “honed over

8. Philip J. Cook & Kimberly D. Krawiec, *If We Allow Football Players and Boxers to be Paid for Entertaining the Public, Why Don’t We Allow Kidney Donors to be Paid for Saving Lives?*, 81 LAW & CONTEMP. PROBS., no. 3, 2018, at 33.

9. Nathan B. Oman, *Beyond Gift and Bargain: Some Suggestions for Increasing Kidney Exchanges*, 81 LAW & CONTEMP. PROBS., no. 3, 2018, at 38.

centuries of commercial practice”¹⁰ to provide increased assurance of contractual performance and to insure against counter-party risk. Oman’s second initiative is to allow limited financial incentives for donors who agree to make undirected donations in cases where such undirected donations catalyze a donation chain. Oman argues that payments to initial donors in such extended exchanges “nest bargains in a network of altruistic acts and donations”¹¹ and are thus similar to existing (and uncontroversial) donation chains.

III

MARKETS, TRANSPARENCY, AND COMMUNITY

Although markets are powerful instruments for stoking economic growth and forging community ties, the spectacle of markets in operation can elicit discomfort or even hostility. These negative emotions may be rooted in moral qualms about specific market transactions, such as sales of blood products or paying workers extremely low wages. In addition, some may shrink from acknowledging the importance of markets in the distribution of goods and services. There are also situations in which it is rational for those engaged in commerce to downplay or mischaracterize their activities so as to evade legal duties or avoid penalties.

Cheap Sentiment, Claire A. Hill’s contribution to the symposium, identifies and critiques a phenomenon that Hill defines as “having a belief that is in some sense self-serving, perhaps even priding oneself on that belief, but not acknowledging or accepting the consequences of policy based on the belief.”¹² In Hill’s account, at the core of cheap sentiment is a determined inconsistency of thought. Examples of cheap sentiment include objecting to the use of cheap labor while buying items crafted by low-wage workers and bemoaning the transplantable organ shortage but rejecting out of hand proposals to offer financial inducements to potential organ sources. Hill notes that the inconsistent beliefs and actions associated with cheap sentiment do not necessarily cause psychological distress and can in fact serve to bolster self-regard by enabling an individual to think of herself as caring and virtuous while doing as she pleases.

Hill characterizes cheap sentiment as a “pathology”¹³ that may contravene John Rawls’ conception of justice and tends to protect the status quo. Cheap sentiment has serious detrimental consequences in that it can significantly impede “sound policymaking in many different spheres.”¹⁴ Especially troubling is the potential of cheap sentiment to “lead market approaches and solutions to be dismissed notwithstanding significant costs of doing so.”¹⁵ That is not to claim,

10. *Id.* at 65.

11. *Id.*

12. Claire A. Hill, *Cheap Sentiment*, 81 LAW & CONTEMP. PROBS., no. 3, 2018, at 68.

13. *Id.*

14. *Id.*

15. *Id.*

Hill emphasizes, that market-based approaches will in all cases be preferable to other options, but only that market approaches and solutions should not be rejected without full account being taken of the costs.

In *Moral NIMBY-ism? Understanding Societal Support for Monetary Compensation to Plasma Donors in Canada*, Nicola Lacetera and Mario Macis examine legal regimes governing blood plasma, noting that while U.S. law allows payments to plasma providers and the establishment of for-profit plasma centers, most Canadian provinces do not. Because the Canadian approach of prohibiting compensation for plasma fails to generate an adequate plasma supply, Canada makes up the resulting (significant) shortfall by importing plasma from paid American donors. Lacetera and Macis question whether this inconsistency provides an example of what they term “moral NIMBY-ism,” in which an individual reaps the benefits of a morally controversial transaction while outsourcing the moral costs of engaging in problematic market behavior.

In an effort to answer this question, Lacetera and Macis conducted a randomized survey experiment with a representative sample of Canadian residents, finding overwhelming support for compensation to plasma donors without regard to geographic location, with only slightly higher support for paying donors in the U.S. and Australia than for paying Canadian donors. Based on their research, Lacetera and Macis conclude that there is very little evidence of moral NIMBY-ism among Canadian respondents with respect to paid plasma donation, and urge that Canadian policymakers consider these findings when formulating policies governing payments for plasma donation.

The Trouble with Gig Talk: Choice of Narrative and the Worker Classification Fights, by Shu-Yi Oei, tackles what has variously been termed the “sharing economy,” “gig economy,” “platform economy,” “1099 economy,” and “peer-to-peer economy.”¹⁶ Oei observes that although “sharing economy” was once the dominant term, its use has decreased in part due to a growing distaste for applying a label intended to connote generosity and altruism to an industry that is so transparently commercial. Other phrases, most notably “gig economy,” have recently gained traction among academics and the press. Oei argues, however, that the terms “gig,” “platform,” and “1099” economy are also loaded with meaning. Specifically, these terms may signify individuals landing a one-off project and carry a freelance connotation, or minimize the role of intermediaries such as Uber in facilitating transactions.

Oei argues that these terms appear to have slipped into popular discourse without much interrogation, though they are just as misleading as “sharing economy” and carry implications for legal areas as varied as worker classification, taxation, public accommodation laws, and product liability laws. Yet these terms, she concludes, are potentially more effective than “sharing economy” in exploiting legal rules and ambiguities to generate outcomes that these new

16. Shu-Yi Oei, *The Trouble with Gig Talk: Choice of Narrative and the Worker Classification Fights*, 81 LAW & CONTEMP. PROBS., no. 3, 2018, at 108–09.

businesses desire, precisely because they are more plausible than the “sharing economy” label.

IV

THE ROAD AHEAD: INSTITUTIONAL CHOICE IN THE TWENTY-FIRST CENTURY

While it is clear that all three sectors of the economy—private markets, government, and the nonprofit or “third” sector—contribute to social and economic health, determining where one ends and the others begin in addition to how they can best interact with each other presents profound challenges.

In *Public Programs, Private Financing*, Margaret H. Lemos and Guy-Uriel Charles explore the relationship between the private provision of public resources and democratic accountability. Seeking to stimulate public discussion about the ramifications of increased reliance by governments on private funding for government objectives, Lemos and Charles note that recent years have seen an influx of private money into government coffers due to public-private partnerships and ostensibly philanthropic donations from private individuals and nonprofit firms. While at first blush these developments may appear to represent “best-of-both-worlds combinations of public capacity and private initiative,”¹⁷ there is reason for caution.

As Lemos and Charles observe, private financing of public projects is in important respects an uncomfortable fit with key assumptions about how government should work. That is in large part because private money can transform, and not just augment, what government does. Such transformation, in turn, can lead to the erosion of civic values and render government less responsive to the needs of the electorate. *Public Programs, Private Financing* expresses skepticism about the claim that the “best way to think about financing questions is from a utilitarian perspective,”¹⁸ and commends the value of robust democratic process for making hard choices about how government will collect and spend money.

Dayna Bowen Matthew’s contribution to this volume, *Health and Housing: Altruistic Medicalization of America’s Affordability Crisis*, examines the problem of affordable housing from a public health perspective. Documenting the strong connection between quality housing and community health, Matthew concludes that market solutions in and of themselves are unlikely to satisfactorily address problems of shortfalls in housing supply. What is required, argues Matthew, is a comprehensive approach that includes the deployment of public funds to ensure affordable housing for all populations. Of particular importance is restructuring government expenditures on housing programs to devote additional resources to low-income families.

17. Margaret H. Lemos & Guy-Uriel Charles, *Public Programs, Private Financing*, 81 LAW & CONTEMP. PROBS., no. 3, 2018, at 138.

18. *Id.* at 160.

In offering these policy prescriptions, *Health and Housing: Altruistic Medicalization of America's Affordability Crisis* builds on America's strong tradition of communal altruism aimed at improving the living conditions of the poor. At the same time, the article emphasizes the need for housing policies that go beyond the "selective, conditional altruism" that has historically "identified some but not other populations as worthy recipients of housing assistance."¹⁹ Such an expanded set of housing policy initiatives promises to result in an American population that is not just better housed but also healthier. The potentially enormous benefits of housing policy underscore an important consideration in institutional design, namely that spending on social interventions other than direct medical care can be a very effective strategy for improving public health.

Beyond Nature? Genetic Modification and the Future of Humanity, by Julia D. Mahoney and Gil Siegal, details the recent technological breakthroughs that have moved heritable human genetic modification from the realm of science fiction to the cusp of reality, thereby lending urgency to questions regarding "when, where, how, by whom, and for what purposes these new technologies will be deployed."²⁰ Mahoney and Siegal take issue with the conventional wisdom that extreme caution is warranted, arguing that support for this approach is "rooted in flawed assumptions, including ones about how the current generation can best safeguard and promote the interests of future ones."²¹ What is more, a "go very slow if at all approach" may now be infeasible as a practical matter, for the ease and low cost of gene editing technologies may enable scientists and others to evade legal prohibitions. These developments, Mahoney and Siegal explain, threaten to erode the power of government regulators and prominent nonprofit organizations to restrict the creation and dissemination of knowledge.

Beyond Nature also pushes back against the claim that extensive public deliberation about the ethics of heritable genome editing must necessarily precede consumer access. Mahoney and Siegal endorse a different approach, one that entails recognizing how market activity can inform democratic deliberation about novel biomedical technologies.

V

CONCLUSION

"Altruism, Community, and Markets," brought together scholars in law, economics, public policy, and other disciplines to examine how the forces of altruism, community and self-interest are (and have the potential to be) harnessed to create and distribute goods and services. The goal was to go beyond

19. Dayna Bowen Matthew, *Health and Housing: Altruistic Medicalization of America's Affordability Crisis*, 81 LAW & CONTEMP. PROBS., no. 3, 2018, at 193.

20. Julia D. Mahoney & Gil Siegal, *Beyond Nature? Genetic Modification and the Future of Humanity*, 81 LAW & CONTEMP. PROBS., no. 3, 2018, at 197.

21. *Id.*

questions of whether particular items “belong” in the market domain and to analyze the institutions that promote and restrict market and nonmarket interactions.

Our contributors were up to the challenge. Participants explored, for example, how institutions, governments, and communities can overcome deficits in altruism that limit the supply of bone marrow, blood products, and transplantable organs. Others investigated the sharing economy, controversial gifts to the government, affordable housing, the market’s role in guiding developments in genetic modification, and the hypocrisy of “cheap sentiment.”

The “Altruism, Community, and Markets” volume examines in depth the legal and social frameworks that govern gifts and sales. Of particular interest are societal expectations regarding who should be generous and under what circumstances; the organizational and institutional challenges of coordinating altruism and community-minded behavior; and how market participation empowers and subordinates.