

## **Does Commodification Corrupt? Lessons from Paintings and Prostitutes**

*Stephen Clowney\**

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\* Professor of Law, University of Arkansas. I wish to thank Kim Krawiec, Jordan Woods, Nicole Clowney, Debbie Becher, Kara Swanson, Nestor Davidson, John Infranca, Christopher Serkin, Sara Schindler, Ken Stahl, Tim Mulvaney, Lisa Alexander, and all the participants at the 2017 Property-Works-in-Progress Conference for their helpful comments and suggestions.

## I. INTRODUCTION

Most people believe that sacred goods—things like organs, babies, and sex—should not be for sale.<sup>1</sup> Social critics,<sup>2</sup> moral philosophers,<sup>3</sup> and legal scholars<sup>4</sup> have all defended this position, sounding alarms whenever commerce threatens to creep into spheres of life traditionally governed by altruism and social norms. The distrust of markets, however, is not costless. It imposes serious—sometimes life altering—harms on those forced to endure the scarcity of goods deemed inalienable. Each year, for instance, thousands of people die awaiting organ transplants because of the lack of willing donors.<sup>5</sup> And each day, millions of couples search

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<sup>1</sup> In this Article, I am using the word sacred as shorthand for a bundle of civic, moral, and sacred goods upon which the commodification debate is normally centered—things like sex, organs, blood, and votes. See Kieran Healy, *Sacred*, in THE INTERNATIONAL ENCYCLOPEDIA OF ECONOMIC SOCIOLOGY 588, 588 (Jens Beckert & Milan Zafirovski eds., 2005) (discussing the meaning of sacred).

<sup>2</sup> See, e.g., ROBERT KUTTNER, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS (1998); ROBERT LANE, THE LOSS OF HAPPINESS IN MARKET DEMOCRACIES (2001); JEREMY RIFKIN, THE AGE OF ACCESS: THE NEW CULTURE OF HYPERCAPITALISM (2000); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 97 (1983) (arguing that “if we attend to values, there are things that cannot be bought and sold”).

<sup>3</sup> See, e.g., MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS (2012); DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS (2010).

<sup>4</sup> See, e.g., MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES 92–95 (2001) (critiquing baby markets because they could lead to certain physical characteristics being worth more than others); Tsilly Dagan, *Itemizing Personhood*, 29 VA. TAX REV. 93, 100 (2009) (“When market norms apply with respect to non-market goods, they violate the way we properly value them.”); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 493 (2005) (“The law’s regulation of economic exchange between intimates, which restricts but does not bar economic transfers, helps to define and construct the legal understanding of intimacy, and to mark the dignity and specialness of intimate relations.”); Don Herzog, *How to Think About Equality*, 100 MICH. L. REV. 1621, 1633 (2002) (arguing that the commodification of political power is inappropriate); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 782–89 (1994) (arguing that commodification of certain goods “is inconsistent with and may even undermine their appropriate kind (not level) of valuation”). See also Jennifer Nedelsky, *Property in Potential Life? A Relational Approach to Choosing Legal Categories*, 6 CAN. J. L. & JURIS. 343, 348 (1993) (arguing against the commodification of certain reproductive materials); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1928–30 (1987).

<sup>5</sup> Roughly, 7,300 people die every year due to the lack of available organs for transplant. See Health Research & Services Administration, *Organ Donation Statistics*, ORGANDONOR.GOV (July 22, 2019), <https://organdonor.gov/statistics-stories/statistics.html>. Most die while waiting for kidneys. Philip J. Cook & Kimberly D. Krawiec, *A Primer on Kidney Transplantation: Anatomy of the Shortage*, 77 L. & CONTEMP. PROBS. 1 (2014) (“5000 people on the waiting list [for kidneys] die each year, and thousands of other are removed because they become too sick to receive a transplant.”).

fruitlessly for a child to adopt—”a gift so precious it cannot be priced.”<sup>6</sup> Given the pain these shortages create, what underlies the continued resistance to commerce in sacred goods?

One central worry is that sacred things are tarnished when bought and sold for money. This occurs, according to observers, because markets are not inert. They do not simply allocate resources—but also promote certain understandings of the goods being sold.<sup>7</sup> Commentators fear that when we treat priceless things like fungible commodities—reducing them to dollar figures, putting them in advertisements, and stocking them on shelves—it becomes difficult to appreciate their higher order values.<sup>8</sup> Examples of the lurking danger abound. Take, for instance, the debate surrounding modern surrogacy. Anti-commodification thinkers have long opposed the idea of for-profit gestational services because they worry it would sully how we think about women and motherhood.<sup>9</sup> Specifically, they intuit that the buying and selling of surrogacy would promote a degraded view of women as “baby factories” whose bodies are subject to the control of outsiders.<sup>10</sup> Policymakers also condemn less controversial practices like paying grade-school students to read books.<sup>11</sup> They argue that money defiles the educational process and teaches children to regard reading as a chore rather than as an inherent source of wonder.<sup>12</sup> As Professor Sandel summarizes

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<sup>6</sup> Jennifer Gilmore, *The Dark, Sad Side of Domestic Adoption*, ATLANTIC (Apr. 30, 2013), <https://www.theatlantic.com/sexes/archive/2013/04/the-dark-sad-side-of-domestic-adoption/275370/>. Estimates about the number of American families waiting to adopt generally range from 500 thousand to two million. See Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD & FAM. ADVOC. 323, 345 (2005) (listing estimates); Jeff Katz, *Adoption’s Numbers Mystery*, WASH. POST, Nov. 8, 2008, at A17 (“[A] government agency has found that there are far more women seeking to adopt children than there are children awaiting adoption.”).

<sup>7</sup> SANDEL, *supra* note 3, at 9.

<sup>8</sup> See Carol M. Rose, *Afterword: Whither Commodification*, in RETHINKING COMMODIFICATION 402 (Martha M. Ertman & Joan C. Williams eds., 2005) (summarizing the work of Margaret Jane Radin).

<sup>9</sup> See, e.g., PHYLLIS CHESLER, SACRED BOND: THE LEGACY OF BABY M (1988) (discussing a famous American legal case about the validity of surrogacy and further arguing that surrogacy is a form of patriarchy); SATZ, *supra* note 3, at 117 (“Markets in women’s reproductive labor are troubling to the extent that they reinforce gender hierarchies . . .”); Scott Altman, *(Com)Modifying Experience*, 65 S. CAL. L. REV. 293, 318 (1991); Radin, *supra* note 4, at 1928–30.

<sup>10</sup> Elizabeth S. Anderson, *Is Women’s Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 71 (1990). See also JANICE G. RAYMOND, WOMEN AS WOMBS xxii (1993) (arguing that surrogacy contracts are “reproductive purchase orders where women are procured as instruments in a system of breeding”); Nedelsky, *supra* note 4, at 344 (discussing fear of women being treated as “baby-making machines”).

<sup>11</sup> See SANDEL, *supra* note 3, at 9.

<sup>12</sup> KJ Dell’Antonia, *The Right Way to Bribe Your Kids to Read*, N.Y. TIMES, July 24, 2016, at SR1 (discussing the argument that monetary rewards “encourage children to think

the problem: “[p]utting a price on the good things in life can corrupt them.”<sup>13</sup>

These arguments are widely accepted, intuitive, and remain deeply influential in law and policy circles. But are they correct? The purpose of this Article is to find out. In the pages that follow, I pursue two related strategies to assess the merits of the corruption objection. First, I evaluate the evidence that anti-commodification scholars offer in support of their theory about the market’s corrosive power. In the last decade, anti-commodification scholars have focused particular attention on the empirical foundation of their claims.<sup>14</sup> Opponents of markets now routinely invoke experimental work from both sociology and behavioral economics to shore up their argument that “certain moral and civic goods are diminished or corrupted if bought and sold for money.”<sup>15</sup> Among the market skeptic crowd, there is a growing sense of exuberance that social science research has validated their moral stance against unregulated commerce.

This Article explores whether the skeptics have indeed uncovered the kind of heavy artillery that will scatter objections of more market-oriented thinkers. I argue that they have not. This Article presents fresh evidence that, during the last decade, anti-commodification scholars have routinely and reflexively cited research that is riddled with flaws. More specifically, the work that purports to show the corrosive nature of markets is either outdated, ambiguous, or plainly contradicted by the lived experiences of those affected by commodification. This is not a minor point. Theorists advancing corruption arguments assert that government should ban (or heavily regulate) the sale of sacred things because markets inevitably undermine our moral commitments and coarsen human relationships.<sup>16</sup> If

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of reading as something you have to be paid to do, not something that brings pleasure in itself”). Other examples abound. Hawking things like advertising space on the skin, immigration visas, and genetic materials have all come under attack as encouraging an understanding of the human body as a fungible good rather than as a thing “worthy of love and care.” MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 97 (2009) (discussing surrogacy). See also Michael J. Sandel, *What Isn’t for Sale*, ATLANTIC, Apr. 2012, at 62; Elizabeth E. Appel Blue, *Redefining Stewardship over Body Parts*, 21 J.L. & HEALTH 75, 86 (2008) (“[T]reating body parts as property poses significant risk to our notions of what it means to be human . . .”).

<sup>13</sup> SANDEL, *supra* note 3, at 9. See also John A. Robertson, *Human Flourishing and Limits on Markets*, 95 MICH. L. REV. 2139, 2140 (1997) (reviewing MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996)) (“[O]pponents of markets claim . . . money payments and the logic of bargain and sale cheapens fundamental aspects of human relations.”).

<sup>14</sup> SANDEL, *supra* note 3, at 111.

<sup>15</sup> *Id.*

<sup>16</sup> Of course, most market skeptics are not completely anti-market. Even diehard anti-commodificationists concede that markets remain “important forms of social and economic

this argument does not stand up to careful scrutiny, then commentators should acknowledge that the intellectual sinews of the anti-commodification movement are not as strong as they appear.

Market skeptics will certainly push back against my claims. Some will complain that their arguments do not *require* hard data to have meaning, and that the core anti-commodification message can be defended from other parapets. For instance, before the rise of law and economics scholarship, market skeptics typically relied on arguments marinated in theory and philosophy—rather than empirical observation—to buttress the idea that markets remain inherently degrading.<sup>17</sup> Drawing on that more philosophical work,<sup>18</sup> a staunch anti-commodificationist might argue that the potential danger of corruption remains so great that governments should continue to prohibit organ sales and paid sex work—even in the absence of definitive proof.<sup>19</sup>

This Article anticipates that objection. In response, in the second half of this piece I attempt to generate new empirical evidence to assess the consequences of allowing markets in sacred things to germinate. Are markets truly harmless? Or do they, like gravity, invisibly warp all around them? Methodologically, the most rigorous test of any claim about the

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organization.” SATZ, *supra* note 3, at 3.

<sup>17</sup> Consider, for example, the claim that prostitution should remain illegal because it disparages human dignity and commodifies ideals about sex. Commentators have repeated this charge enough to become mantra. Yet, in the legal literature such assertions are generally unsupported by data.

<sup>18</sup> Just as all roads lead to Rome, all discussions of commodification in the legal literature quickly lead to the work of Margaret Jane Radin. Radin’s 1987 article *Market-Inalienability* is the classic citation for any critique of the market. The breadth of the piece and the strength of its insights are reflected in the fact that, thirty years after its original publication date, it remains one of the most cited law review articles. See Stephen Clowney, *Most Cited Property Law Professors, 2011–2015*, PROPERTYPROFBLOG (Dec. 9, 2015), <https://lawprofessors.typepad.com/property/2015/12/most-cited-property-law-professors-2011-2015.html>. The work of Elizabeth Anderson also features heavily in the debate over commodification. See, e.g., ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 168–75 (1993) (defending bans against surrogacy and baby selling because they commodify women’s labor and children). Both Radin and Anderson, however, attack commodification from a philosopher’s perch, employing little data to defend their arguments.

<sup>19</sup> These claims have been heavily criticized by more market-oriented thinkers. See JASON F. BRENNAN & PETER JAWORSKI, MARKETS WITHOUT LIMITS: MORAL VIRTUES AND COMMERCIAL INTERESTS 21 (2016) (arguing that the theorists “lack sufficient . . . evidence to justify their claims”). See also Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2360 (1995) (arguing that there is no evidence “that the couple who pays \$10,000 to a surrogate is any more likely to treat the child as a commodity than the couple who pays \$10,000 for a biological mother’s expenses during an adoption, or the couple who pays much more than \$10,000 to an in vitro fertilization doctor”); Timothy Caulfield & Ubaka Ogbogu, *Stem Cell Research, Scientific Freedom and the Commodification Concern*, 13 EUR. MOLECULAR BIOLOGY ORG. 12, 14 (2012) (“[E]mpirical evidence of actual harm is rarely, if ever, presented.”).

consequences of selling things like organs or babies would involve setting up an active bazaar in these items and then monitoring how people's attitudes and behaviors change over time. It takes little imagination to see that crafting any such controlled experiment is impossible. So instead, this project takes as its central investigative tool, a series of extensive interviews with participants in more accessible markets for "priceless" goods. Specifically, my research focuses on the work of high-end art appraisers and male escorts. I broadly explore how these professionals attach dollar figures to unique goods. And, more importantly, I investigate how the process of constantly commodifying sacred items transforms the texture of their inner-worlds.

This study is one of the very first attempts to generate on-the-ground evidence about whether markets diminish the ability to fully experience sacrosanct values like intimacy, beauty, and spirituality. This research also sheds new light on longstanding questions swirling around the debate over commodification. Do markets really change how people understand commodities? Do people who directly and repeatedly sell their bodies eventually struggle to experience sexual acts as part of the realm of love and affection?<sup>20</sup> Is there any reason to think that a market in organs would undermine altruism? Stated most rashly, the purpose of the research project is to ask: are there some things that just should not be bought and sold?

Sifting through the interview data, one dominant finding emerged. Almost unanimously, the art appraisers and escorts revealed that the commodification embedded in their work did not blunt their receptiveness to the transcendent joys of art and sex. The interviewees reported that they comfortably toggled between commodified and non-commodified understandings of the goods they handled. While the border between the respondents' market duties and their personal lives is not completely impermeable, escorts routinely experience sexual intimacy with loved ones and art appraisers find pleasure in visiting museums. Respondents spoke emphatically on this point. In fact, many interviewees indicated that contact with the market actually enhanced their appreciation for truly hallowed things. Learning to accurately price sacred goods, for example, required developing critical appreciation, discernment, and a deep understanding of nuance—skills that spilled into participants' non-market activities and positively impacted how they experienced the world. As should be clear, this finding provides a stiff challenge to the ascendant narrative that free markets inevitably corrupt the good things in life and

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<sup>20</sup> See SATZ, *supra* note 3, at 46 ("Work and the preparation for work significantly influence who we are.").

overwhelm non-market ways of thinking.

The remainder of this Article proceeds in three parts. Part II provides some necessary background information; I outline the contours of the larger debate over commodification, provide greater density of detail about corruption objection, and discuss some of the limits of my claims. Part III critiques the empirical evidence that market skeptics deploy in support of their views. Part IV then turns toward the assembled interview data. I explain the basic methodology (and discuss its shortcomings). Most of the spotlight, however, falls on my conversations with art appraisers and sex workers. The interviews explore how they approach their work and the effect of constant commodification on their lives. This Article concludes by briefly considering some of the practical and theoretical implications of this study.

## II. UNFAIRNESS AND CORRUPTION

My argument that scholars have exaggerated the market's power to corrupt sacred things requires some preliminary groundwork. Before jumping into an analysis of the empirical data, it will be useful to pause and provide a fuller account of the wide-ranging criticisms of commodification.<sup>21</sup> The purpose of this section is not to offer a lengthy

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<sup>21</sup> It is worth noting that in the academic literature, commodification is a rather murky term with multiple meanings. Timothy Caulfield and Ubaka Ogbogu have written a very good piece that tracks the (contradictory) uses of the term in the biological sciences. See Caulfield & Ogbogu, *supra* note 19. See also Kimberly D. Krawiec, *The Dark Side of Commodification Critiques: Politics and Elitism in Standardized Testing*, 35 WASH. U. J.L. & POL'Y 349, 361 (2011) (showing that the term "commodification" often "operates as a catch-all complaint to encompass a variety of concerns"). Nevertheless, most market skeptics employ the term commodification to communicate the same basic set of ideas. See Oren Bracha, *The Commodification of Patents 1600–1836: How Patents Became Rights and Why We Should Care*, 38 LOY. L.A. L. REV. 177, 179–180 (2004). Commodification, boiled down to its essence, is the process of turning something into an object of exchange on a market. See, e.g., Michael Ralph, *Commodity*, 27 SOC. TEXT 78, 78 (2009); Michele Garfinkel, *Stem Cells, Morals, and the Courts*, 13 EUR. MOLECULAR BIOLOGY ORG. 2, 2 (2012) (arguing that commodification refers to "turning something that is not regarded as a commercial product into a product"). This basic approach to thinking about commodification has two strengths. First, it should encourage debate and ethical reflection. As Professor Cohen notes, opponents often talk past each other because the terms of the debate remain so spectacularly imprecise. I. Glenn Cohen, Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689 (2003). A clear definition focused solely on market exchange—and not its ideological accoutrements—should help establish a platform for adversaries to recognize their affinities and identify key points of contention. Second, this view allows a value-neutral examination of the growth of commerce into spheres once governed by norms alone. Unlike some definitions advanced by anti-commodificationists, the proposed take leaves open the question of whether the exchange of any particular object is good or bad. For other takes on the definition of commodification, see Altman, *supra* note 9, at 299–300; Radin, *supra* note

intellectual history of the market-skeptic position. Rather, my intent is to provide a basic topography of the anti-commodification arguments, explaining the dangers that market skeptics foresee in a world of unregulated commerce. A brief examination of this background material will provide essential context about the debate over markets and reveal some important limits of the arguments put forth in this Article.

Sifting through the increasingly voluminous anti-commodification literature reveals that criticisms of markets break into two broad categories.<sup>22</sup> This Article has already introduced one objection, which will be the central focus of the text going forward: Commerce inevitably corrupts sacred things. In short measure, this section will demonstrate the breadth and ubiquity of corruption arguments, and argue that such claims are the foundation of the market skeptic position. But first, I propel to center stage the other major complaint about the creep of commerce. Anti-commodification theorists contend that introducing sacred objects into the marketplace also upends deep-seated notions of fairness.

#### A. *The Fairness Concern*

Although corruption arguments lay at the heart of this Article, appeals to fairness feature prominently in the discourse over markets and, thus, deserve brief mention.<sup>23</sup> The fairness objection, at base, maintains that the unchecked growth of commerce undermines the principle of distributive justice. Specifically, there is a deep concern that in a world where everything is for sale, the poor will suffer. Scholars worry that economic pressures will force disadvantaged populations to sell their bodies, their votes, their babies, and their blood—often against their wishes.<sup>24</sup> Some

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4, at 1859.

<sup>22</sup> BRENNAN & JAWORSKI, *supra* note 19, at 7 (“There seems to be a limitless market for books about the moral limits of markets.”). See, e.g., ANDERSON, *supra* note 18; BENJAMIN BARBER, *CONSUMED* (2008); MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (2001); GEORGE RITZER, *THE MCDONALDIZATION OF SOCIETY* (2007); SANDEL, *supra* note 3; SATZ, *supra* note 3; ROBERT SKIDELSKY & EDWARD SKIDELSKY, *HOW MUCH IS ENOUGH? MONEY AND THE GOOD LIFE* (2012). For discussion about the two broad category of objections, see SANDEL, *supra* note 3, at 8; Cohen, *supra* note 21.

<sup>23</sup> Gloria J. Banks, *Legal and Ethical Safeguards: Protection of Society’s Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 100 (1995) (“The most often repeated criticism of a legalized market in human organs is its impact on those persons who are most vulnerable in society.”). For examples of the fairness argument, see SANDEL, *supra* note 3, at 9–10.

<sup>24</sup> Worries about fairness show up with regularity in the literature on organ sales. See, e.g., Gary S. Becker & Julio Jorge Elias, *Introducing Incentives in the Market for Live and Cadaveric Organ Donations*, 21 J. ECON. PERSPS. 3, 21–22 (2007) (discussing criticisms of an organ market); Francis L. Delmonico et al., *Ethical Incentives—Not Payment—for Organ*



observers contemplate dystopian scenarios where the underclass could become a paid reservoir of spare kidneys and unwanted children.<sup>25</sup> Others foresee lower moral stakes, but still worry that sophisticated vendors will take advantage of information asymmetries to pinch organs at cut-rate prices from uneducated sellers.<sup>26</sup> These arguments are not purely theoretical. As Richard Titmuss has argued, “virtually all the [people] who give [blood] . . . for money . . . are poor people[,] the indigent, the deprived.”<sup>27</sup> A fulsome literature also supports the intuition that women in dire economic circumstances are far more likely become prostitutes and sell access to sexual acts.<sup>28</sup> This evidence reveals that the unregulated exchange of sacred goods may not be as voluntary or welfare-enhancing as market triumphalists have indicated.

Market skeptics also point out that even when transactions do not directly exploit the poor, impoverished communities will struggle to obtain priceless things once they become fully commodified. Consider Professor Sandel’s concern that campsites in America’s national parks have become

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*Donation*, 346 N. ENG. J. MED. 2002, 2004 (2002) (“In the final analysis, we believe that a market system of organ donation fosters class distinctions (and exploitation) . . .”); H. Tristram Engelhardt, Jr., *Giving, Selling, and Having Taken: Conflicting Views of Organ Transfer*, 1 IND. HEALTH L. REV. 31, 47 (2004); Christian Williams, Note, *Combating the Problems of Human Rights Abuses and Inadequate Organ Supply Through Presumed Donative Consent*, 26 CASE W. RES. J. INT’L L. 315, 316 (1994) (stating that “it is the poorer citizens of developing countries who are supplying organs for the members of the upper class who can afford them”).

<sup>25</sup> See Ranee Khooshie Lal Panjabi, *The Sum of a Human’s Parts: Global Organ Trafficking in the Twenty-First Century*, 28 PACE ENVTL. L. REV. 1, 2–3, 43 (2010) (suggesting that international organ sales are “medical apartheid” and “biological colonialism”); Patricia J. Williams, *Babies, Bodies, and Buyers*, 33 COLUM. J. GENDER & L. 11, 16 (2016) (worrying that a market for babies would be “driven by wealthy consumers—largely in the United States and Europe—and fed by wombs in poorer parts of the global economy”).

<sup>26</sup> See I. Glenn Cohen, *Regulating the Organ Market: Normative Foundations for Market Regulation*, 77 L. & CONTEMP. PROBS. 71, 75–80, 88–95 (2014) (discussing exploitation of the poor in organ markets and some potential solutions).

<sup>27</sup> RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 219–20 (1971). See also Madhav Goyal et al., *Economic and Health Consequences of Selling a Kidney in India*, 288 J. AM. MED. ASS’N 1589, 1591 tbl.2 (2002) (showing that ninety-six percent of those individuals selling a kidney on India’s black market did so to relieve debt).

<sup>28</sup> See Ine Vanwesenbeeck, *Another Decade of Social Scientific Work on Sex Work: A Review of Research 1990–2000*, ANN. REV. SEX RES. 242, 262 (2001) (“Generally speaking, when prostitutes in the non-Western world are studied for their motives to work sex, the most common and obvious factor emerging is economic necessity . . .”); Wulf W. Rössler et al., *The Mental Health of Female Sex Workers*, 122 ACTA PSYCHIATRICA SCANDINAVICA 143, 146 (2010) (explaining that many women enter prostitution because they cannot find another job, need to support their families, and have unmanageable debts).

items of market exchange.<sup>29</sup> Yosemite National Park, for example, attracts over 4 million tourists every year but maintains only 900 campsites, which visitors can reserve in advance.<sup>30</sup> The Park Service rents most sites for a nominal fee of twenty-six dollars per night.<sup>31</sup> In 2014, demand for space became so intense that scalpers began buying campground tickets in bulk and selling them on the internet for large mark-ups.<sup>32</sup> Sandel argues that this practice is wrong.<sup>33</sup> “Scalping,” he writes, “is unfair to people of modest means” who cannot afford higher prices but have equally valid moral claims to enjoy their country’s natural wonders.<sup>34</sup> Anti-commodification theorists argue that surrendering body parts or gestational services to the churn of the free market would produce similar inequitable results—wealthy (mostly white) people would horde the best organs, the healthiest gametes, and the most reliable surrogates for their own advantage.<sup>35</sup>

There is, however, a looming difficulty for anti-commodificationists who hitch their wagons to fairness objections: Creative regulations can allay concerns about distributive justice.<sup>36</sup> For example, if commentators worry that unscrupulous buyers will swindle the impoverished, then the law could require sellers to meet certain income requirements. If observers fear that sellers might make rash decisions to feed some debilitating addiction, we could impose a waiting period on sales. The government could also provide subsidies for buyers in organ markets to overcome objections about access to life-saving transplants. At base, concerns about the fairness of selling sacred objects remain firmly rooted in economic inequality.<sup>37</sup> The

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<sup>29</sup> See SANDEL, *supra* note 3, at 35–37.

<sup>30</sup> See Lewis Griswold, *Yosemite National Park Posts Record Number of Visitors*, FRESNO BEE (Mar. 17, 2017), <https://www.fresnobee.com/sports/outdoors/article137880893.html>.

<sup>31</sup> See *Yosemite National Park Overview*, RECREATION.GOV, <https://www.recreation.gov/camping/gateways/2991> (last visited Feb. 29, 2020).

<sup>32</sup> Marjie Lundstrom, *Not Even Yosemite National Park Is Sacred to Scalpers*, MODESTO BEE (Apr. 17, 2011), <https://www.modbee.com/latest-news/article3134545.html>.

<sup>33</sup> See SANDEL, *supra* note 3, at 36–37.

<sup>34</sup> *Id.*

<sup>35</sup> Margaret Bichler, *Lesson Learned: Why Federal Stem Cell Policy Must Be Informed by Minority Disadvantage in Organ Allocation*, 27 B.C. THIRD WORLD L.J. 455, 462 (2007) (“The organ shortage does not just harm people of color in need of transplants; it also leads to the exploitation of minority organ ‘donors’ in foreign markets.”); Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children*, 26 WHITTIER L. REV. 429, 476 (2004) (“Given the financial pressures racial minorities experience . . . these pressures may result in reproductive slavery for non-whites who will become surrogates for whites.”).

<sup>36</sup> See Cohen, *supra* note 26, at 88–95.

<sup>37</sup> SATZ, *supra* note 3, at 5. (“[W]hat underlies noxious markets . . . is a prior and unjust

transactions seem inappropriate because of the uneven distribution of resources within society, not because the sales are fundamentally immoral.

Understanding the shape of the fairness objection—both its strengths and weaknesses—not only provides important context for the debate about markets, but also reveals the limitations of the arguments advanced in this Article. In the pages that follow, I contend that market skeptics have overstated the power of commerce to corrupt the meaning of sacred goods. If that point holds water, then the anti-commodification position is weaker than many scholars believe. But notice, my claim does not address or undermine the fairness objections described above. Observers can accept my critique of corruption and still believe that some markets so recklessly erode distributive justice that governments must intervene. Although market triumphalists will be disappointed by this admission, I offer no final victory for the ideology of unfettered and unregulated commerce. Rather, this Article seeks a modest recalibration of how observers and officials evaluate the dangers of commodification. In its strongest form, my argument suggests that policymakers should wean themselves from corruption arguments and reevaluate regulations that hinge on the corrosive tendency of markets.

#### B. *The Corruption Concern*

This brings us to the core concern of this Article. Other than the fairness objection, the principal argument against commodification is that markets have a congenital power to corrupt, tarnish, and degrade items of exchange. Although I have already introduced the basic concept of corruption, it is worth spending some time with the details. How do markets debase things? How do corruption arguments differ from fairness objections? And why do policymakers increasingly rely on ideas about corruption to justify market regulations?

To recap, the basic notion is that exposing certain goods to the marketplace sullies our view of them and changes how we experience the world.<sup>38</sup> Imagine, for example, that Beyoncé decides to sell one of her children to George Clooney for \$10 million (in a world where everyone has access to infertility treatments). Commentators could not meaningfully attack this transaction with arguments grounded in fairness—no one is exploited or lacks access to essential goods. Yet many would still object to the sale. Critics charge that attaching a dollar figure to a newborn girl

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distribution of resources, particularly of income and wealth.”).

<sup>38</sup> See SATZ, *supra* note 3, at 95 (“[P]articular markets may condition people to be docile or servile, shape them into passive accepters of the status quo.”).

would demean her and value her in the wrong way.<sup>39</sup> And establishing a market for children, so the argument goes, would disparage human dignity and corrupt our otherwise homogenous understanding of parental love.<sup>40</sup> Moreover, commentators have expressed concerns that the inevitable differences in sale price between children of different ethnicities and abilities would undermine the principle that all human lives are infinitely valuable and reinforce the idea that person's worth is dependent on characteristics such as race, sex, intellectual ability, and physical prowess.<sup>41</sup>

These are powerful ideas. Unlike fairness objections, appeals to corruption are moral claims that do not dissolve in the presence of fair bargaining conditions. This explains, in part, why anti-commodification theorists increasingly ground their attacks on things like prostitution and organ markets in the language of corruption and degradation.<sup>42</sup> Notice, too, the breadth of the market skeptics' arguments. They posit that sales of organs and other sacred goods would not only transform the views of market participants, but also trigger a domino effect, impairing the perceptions of those who observe the contested transactions.<sup>43</sup> According to some anti-commodificationists, just knowing that a commercial exchange has occurred can infect a person's ability to experience a sacred good's higher order values. Professor Radin explicitly warns about this danger in her writing on surrogacy: "We must also consider the commodification of children. The risk is serious indeed because, . . . if there is a significant domino effect, commodification of some children [through surrogacy] means commodification of everyone."<sup>44</sup> Thus, for market skeptics, the best way to protect intimacy, friendship, and other non-market ideals is to construct secure walls around them.<sup>45</sup> These

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<sup>39</sup> See, e.g., RADIN, *supra* note 22, at 139 ("[W]e would know that the adoptive parents valued the child as much as a Volvo but not as much as a Mercedes."); SANDEL, *supra* note 3, at 53. See also Anderson, *supra* note 10, at 72 ("In Kantian theory, the problem with slavery is that it treats beings worthy of respect as if they were worthy merely of use.").

<sup>40</sup> See David Gamage & Allon Kedem, *Commodification and Contract Formation: Placing the Consideration Doctrine on Stronger Foundation*, 73 U. CHI. L. REV. 1299, 1330 (2006) ("For people or goods with inherent dignity, this assertion of fungibility offends the sense of uniqueness and self-worth."); J. Robert S. Pritchard, *A Market for Babies?*, 34 U. TORONTO L.J. 341, 352 (1984). See also Barbara K. Kopytoff, *Surrogate Motherhood: Questions of Law and Values*, 22 U.S.F. L. REV. 205, 239-46 (1988).

<sup>41</sup> SANDEL, *supra* note 3, at 111.

<sup>42</sup> See e.g., Ann Lucas, *The Currency of Sex: Prostitution, Laws, and Commodification*, in RETHINKING COMMODIFICATION 248, 248 (Martha M. Ertman & Joan C. Williams eds., 2005) (arguing that most objections to prostitution are corruption based).

<sup>43</sup> See Dagan, *supra* note 4, at 99-100 ("Commodification can impact not only the meaning of things for individuals, but also the meaning of social interaction.").

<sup>44</sup> See RADIN, *supra* note 22, at 145. See also Dagan, *supra* note 4, at 100.

<sup>45</sup> See Dagan, *supra* note 4, at 100 ("[F]or people to be able to wield full autonomy

scholars remain vigorously committed to the idea that once commodification oozes into the spheres of altruism and reciprocal relations, market notions will inevitably overwhelm or crowd-out non-market thinking.<sup>46</sup>

Importantly, these theories about the danger of commodification are not confined to dreary academic monographs. They have escaped the scholarly backwaters and gained currency amongst policymakers at the highest level. Congressional representatives, courts, and government committees have all invoked corruption-based arguments when crafting policy about the ownership of sacred things. For instance, the President's Council on Bioethics used concerns about corruption and dignity to justify a ban on human cloning: "[W]e find it difficult to imagine that biotechnology companies or scientists who routinely engaged in cloning-for-biomedical-research would evince solemn respect for human life each time a cloned embryo was used and destroyed."<sup>47</sup> The Council continued, "[t]hings we exploit even occasionally tend to lose their special value. It seems scarcely possible to preserve a spirit of humility and solemnity while engaging in routinized (and in many cases corporately competitive) research that creates, uses, and destroys them."<sup>48</sup> Similarly, in a canonical opinion rejecting strong property rights in the human body, Justice Arabian of the California Supreme Court argued that commodification of organ tissue poses a threat to our fundamental values. "I speak of the moral issue," he writes, "[Plaintiff] entreats us to regard the human vessel—the single most venerated and protected subject in any civilized society—as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much."<sup>49</sup> Corruption arguments have also featured heavily in recent debates about organ sales,<sup>50</sup> the design of the

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over their resources, they require, in addition to the free market, a market-free environment, where their interactions are not valued by market tools.").

<sup>46</sup> See, e.g., Igor Kopytoff, *The Cultural Biography of Things: Commoditization as Process*, in *THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* 64, 85–87 (Arjun Appadurai ed., 1986) (discussing some of the fears of market skeptics); SATZ, *supra* note 3, at 193 ("For an intrinsically motivated agent, performing an act for money is simply not the same act when it is performed for free."); Anderson, *supra* note 10, at 73; Radin, *supra* note 4, at 1926 ("In the worst case, market rhetoric could create a commodified self-conception in everyone . . .").

<sup>47</sup> THE PRESIDENT'S COUNCIL ON BIOETHICS, *HUMAN CLONING AND HUMAN DIGNITY: AN ETHICAL INQUIRY* 157 (2002).

<sup>48</sup> *Id.*

<sup>49</sup> Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 497 (Cal. 1990) (Arabian, J., concurring).

<sup>50</sup> See Appel Blue, *supra* note 12, at 93 ("[T]reating body parts as property poses significant risk to our notions of what it means to be human by starting us on a path that virtually commodifies everything."); Julia D. Mahoney, *The Market for Human Tissue*, 86

September 11 Memorial Museum,<sup>51</sup> an exhibition of Auschwitz artifacts,<sup>52</sup> the allocation of visas into the U.S.,<sup>53</sup> the conservation of endangered species,<sup>54</sup> pollution,<sup>55</sup> and access to Papal Masses.<sup>56</sup>

It takes little cognitive muscle to see that the stakes of the debate over corruption remain especially high. It is not entirely melodramatic to say that skirmishes over the propriety of organ markets can determine who lives and who dies. Or that assessments of paid surrogacy and gamete sales affect who gets to raise children. And it seems apparent that the recent push to sell immigration visas and establish a “market for refugees” may determine which oppressed peoples find a safe port of call.<sup>57</sup> Despite the ubiquity of corruption arguments, some intriguing questions remain unanswered. Why do policymakers seem so confident relying on corruption arguments? Are their beliefs rooted in on-the-ground realities? Or are regulators just following the music of their own hunches and intuitions?

### III. DAYCARES, NUCLEAR WASTE, AND BLOOD

Having dispensed with the preliminaries, this Article now begins to

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VA. L. REV. 163, 173 (2000) (“Some express fears that applying the language of property and the market to parts of the human body could diminish our sense of uniqueness and lead to a conception of humans as fungible, interchangeable objects of trade.”).

<sup>51</sup> In May of 2014, the National September 11 Memorial Museum in New York revamped its gift shop policies after complaints that selling Twin-Towers-themed trinkets and stuffed animals contaminated the meaning of the site where 3000 Americans died. See Abby Phillip, *Families Infuriated by ‘Crass Commercialism’ of 9/11 Museum Gift Shop*, WASH. POST (May 19, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/05/19/families-infuriated-by-crass-commercialism-of-911-museum-gift-shop/>; Jennifer Maloney, *9/11 Museum Takes Action on Criticisms*, WALL ST. J. (May 28, 2014), <https://www.wsj.com/articles/9-11-museum-takes-action-on-criticisms-1401324223>. As one critic charged, “Here is essentially our tomb of the unknown. To sell baubles I find quite shocking and repugnant.” Susan Edelman, *The 9/11 Museum’s Absurd Gift Shop*, N.Y. POST (May 18, 2014), <https://nypost.com/2014/05/18/outrage-over-911-museum-gift-shops-crass-souvenirs/>.

<sup>52</sup> Joanna Berendt, *Auschwitz Artifacts to Go on Tour, Very Carefully*, N.Y. TIMES (July 26, 2017), <https://www.nytimes.com/2017/07/26/arts/design/auschwitz-exhibit-tour-holocaust.html>.

<sup>53</sup> See Eleanor Marie Lawrence Brown, *Visa as Property, Visa as Collateral*, 64 VAND. L. REV. 1047, 1101–03 (2011).

<sup>54</sup> See Hope M. Babcock, *Putting a Price on Whales to Save Them: What Do Morals Have to Do With It?*, 43 ENVTL. L. 1, 19–20 (2013).

<sup>55</sup> See Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 NOTRE DAME L. REV. 313, 328–34 (2006).

<sup>56</sup> See SANDEL, *supra* note 3, at 37.

<sup>57</sup> See Joseph Blocher & Mitu Gulati, *Competing for Refugees: A Market-Based Solution to a Humanitarian Crisis*, 48 COLUM. HUM. RTS. L. REV. 53, 54–59 (2016) (explaining how international law currently fails millions of refugees).

evaluate the merits of the corruption objection. To properly appraise the market skeptics' position, it is useful to probe around a bit into its underpinnings and examine its foundations. Thus, the purpose of this section is to appraise the evidence that purports to show that markets corrode and degrade sacred things. Importantly, market skeptics do not rely solely on moral suasion and philosophical pronouncements to advance their claims about the proper role of commerce. Empirical evidence has become a cornerstone of the campaign against the expansion of markets into new territories. In particular, scholars who champion anti-commodification arguments have repeatedly deployed three studies to bolster their claims: (1) an analysis of Israeli daycare facilities,<sup>58</sup> (2) research on the siting of nuclear waste facilities in Switzerland,<sup>59</sup> and, (3) Richard Titmuss' classic volume on blood donations.<sup>60</sup> In the market skeptic camp, these studies have firmly established that the logic of bargain and sale coarsens the meanings of sacred things and impoverishes civic life. Professor Sandel's comments reflect the common wisdom. He argues that the authors of these case studies "illustrate the way introducing money into a non-market setting can change people's attitudes . . . ."<sup>61</sup>

However, the view that these scholarly works are unambiguous triumphs for the anti-commodification position is very much open to doubt. First, market skeptics often conflate two closely related but distinct phenomena lurking in the studies: corruption and crowding out. Corruption, as discussed earlier, concerns the degrading effects of markets on our understanding of sacred things. Crowding out, in contrast, happens when market incentives displace purer, more altruistic motivations. To illustrate the difference, imagine that a foreign government suddenly begins to offer Sunday school teachers a small stipend. If the introduction of cash tarnishes how people view religious instruction that would be an example of corruption. Crowding out, on the other hand, occurs if some of the teachers resign because they prefer to work on a purely volunteer basis. The introduction of money, in effect, pushes out the instructors who want

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<sup>58</sup> Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1 (2000).

<sup>59</sup> Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding-Out*, 87 AM. ECON. REV. 746, 748 (1997). See, e.g., ADRIAN KUENZLER, RESTORING CONSUMER SOVEREIGNTY: HOW MARKETS MANIPULATE US AND WHAT THE LAW CAN DO ABOUT IT, 106-07 (2017) (discussing all three studies). There are over 800 law review articles that cite all three studies.

<sup>60</sup> RICHARD TITMUSS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY (1971). Sandel calls Titmuss' work, "the best-known illustration of markets crowding out non-market norms." SANDEL, *supra* note 3, at 122.

<sup>61</sup> SANDEL, *supra* note 3, at 119. Sandel also discusses another famous study by Uri Gneezy and Aldo Rustichini, entitled *Pay Enough or Don't Pay at All*. Uri Gneezy & Aldo Rustichini, *Pay Enough or Don't Pay at All*, 115 Q. J. ECON. 791 (2000).

to engage in untainted altruism. The studies about daycares, nuclear facilities, and blood donations implicate both crowding out and corruption. Allowing the sale of blood, for example, can both tarnish how we view the human body and crowd out volunteers who enjoy the social esteem of making uncompensated blood donations. Too often, however, market skeptics fail to highlight that these are different phenomena. They cite evidence in the studies about crowding out as proof of their ideas about corruption.<sup>62</sup> This is a sizable weakness that lies at the heart of the anti-commodification argument.

More importantly, a close examination of the three studies reveals that market skeptics have unwittingly smuggled erroneous interpretations of the data into the legal literature and distorted the terms of the corruption debate. The findings of the Titmuss piece on blood donations, for example, have been overturned by more recent (but less well-known) scholarship. The article on Swiss nuclear facilities suffers from a number of methodological and interpretive problems that cast doubt over its conclusions. And the conclusions of the Israeli day care study—a careful and nuanced piece of scholarship—simply do not support the bold propositions that legal scholars attribute to it. Taken together, it appears that the empirical foundation of the market skeptic position argument is weaker than many realize.

#### A. *Daycare Pickups*

For those who believe in the corrosive effects of markets, nothing captures the imagination quite like Uri Gneezy's and Aldo Rustichini's paper on Israeli daycares. The authors studied ten childcare facilities in Haifa that faced a recurring problem: Parents frequently arrived late at the end of the day to collect their children, forcing staff to stay on campus after working hours.<sup>63</sup> Under the direction of Gneezy and Rustichini, the facilities began to impose a small fine (approximately \$3.50) on parents who arrived more than ten minutes late. The researchers anticipated that the number of late pickups would decrease because the penalty increased the cost of tardiness. As the researchers explain it, "[w]hen negative consequences are imposed on a behavior, they will produce a reduction of that particular response."<sup>64</sup> After the imposition of the fine, however, the

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<sup>62</sup> See, e.g., SANDEL, *supra* note 3, at 64–65. When discussing the daycare study Sandel mixes arguments about corruption (the “changing norms”) and crowding out (the replacement of altruism with commerce).

<sup>63</sup> See Gneezy & Rustichini, *supra* note 58, at 1–3.

<sup>64</sup> See Gneezy & Rustichini, *supra* note 58, at 2. The researchers imposed a fine of twenty Israeli shekels. I converted the value of twenty shekels in 1998 into dollars and then adjusted for inflation.



percentage of parents who arrived late actually increased—it nearly doubled.<sup>65</sup> When the facility managers lifted the penalty three months later, the elevated level of late arrivals continued.<sup>66</sup>

Anti-commodification scholars persistently cite the daycare study as a powerful example of how markets can permanently contaminate spheres of life governed by sacred values. As one academic summarized: “[i]ntroducing the monetary payment changed the norms.”<sup>67</sup> Other scholars avow that the imposition of the fine: “transform[ed] a noneconomic relationship into an economic one,”<sup>68</sup> undermined the parents’ moral obligations,<sup>69</sup> and “dissipate[ed] a regime of reciprocal cooperation and replac[ed] it with a self-sustaining atmosphere of distrust.”<sup>70</sup> The market skeptics’ basic argument is that before the introduction of the fine, there existed a shared understanding that tardiness imposed unreasonable costs on daycare workers. As a result, parents felt a deep sense of shame when they arrived late. The penalty, however, melted this ethic of consideration. As parents began to see late pickups as a service they could purchase, their sympathy for the teachers turned to vapor—and they came late more and more often.<sup>71</sup> This vignette fits neatly with the basic story told in the anti-commodification literature. Viewed from a certain angle, it appears that human relationships bent under the pressure of market forces.

The difficulty for market skeptics is that Gneezy’s and Rustichini’s paper, entitled *A Fine Is a Price*, simply does not support the lattice of anti-commodification arguments that legal scholars have constructed around it. Indeed, my suspicion is that the many commentators who trumpet the study as a sweeping victory for anti-commodification theory have not read closely its pages. Nowhere do Gneezy and Rustichini make the definitive claim that markets degrade altruism. Nowhere does the text decisively

<sup>65</sup> See Gneezy & Rustichini, *supra* note 58, at 3.

<sup>66</sup> *Id.*

<sup>67</sup> SANDEL, *supra* note 3, at 64–65.

<sup>68</sup> Berno Buechel & Gerd Muehlheusser, *Black Sheep or Scapegoats? Implementable Monitoring Policies Under Unobservable Levels of Misbehavior*, 45 J. LEGAL STUD. 331, 337 (2016).

<sup>69</sup> See Andrew Green, *You Can’t Pay Them Enough: Subsidies, Environmental Law, and Social Norms*, 30 HARV. ENVTL. L. REV. 407, 434 (2006) (“Arriving on time was no longer a question of courtesy or responsibility . . .”).

<sup>70</sup> Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 340 (2001).

<sup>71</sup> See, e.g., Rachel Brewster, *Pricing Compliance: When Formal Remedies Displace Reputational Sanctions*, 54 HARV. INT’L L.J. 259, 280–81 (2013) (“That the rate of late pickups increased after the system of fines was imposed suggests that formal rules decreased the pre-existing informal sanctions for lateness.”); Mark T. Kawakamia, *Pitfalls of Over-Legalization: When the Law Crowds Out and Spills Over*, 24 IND. J. GLOB. LEGAL STUD. 147, 170 (2017).

state that money corrupts moral virtue. Rather, the authors present two plausible theories to explain their counter-intuitive results. At the tail end of the paper, Gneezy and Rustichini mention the *possibility* that the fine corrupted a norm about the obligation to arrive on time.<sup>72</sup> The introduction of money, they write, *may* have permanently transformed after-hours care into a commodity—a thing that could be purchased in large quantities without guilt.<sup>73</sup> Market skeptics have latched onto these few paragraphs, chiseling this account into their tablets.

But Gneezy and Rustichini do not seem nearly so confident that their research exposes the dangers of commodification. Immediately preceding their discussion of corruption, the authors suggest a detailed alternative explanation for the parents' behavior—one grounded in information theory.<sup>74</sup> Gneezy and Rustichini contend that before the imposition of the fine, the contracts for daycare services contained important ambiguities. While the facilities certainly discouraged tardiness, they never disclosed the penalty for habitual delays. To avoid the unspecified but potentially significant consequence, parents abstained from repeated late pickups.<sup>75</sup> The introduction of the fine, however, dramatically changed the cost-benefit analysis. The penalty clarified previously opaque terms, revealing detailed information about the severity of the sanction for consistent late pickups. Parents who once diligently arrived on time because they feared a stern rebuke or dismissal from the daycare, suddenly realized that their transgressive behavior had only mild consequences—a three-dollar slap on the wrist.<sup>76</sup> It takes little imagination to see that some parents may have become less punctual in response to the new disclosure. They internalized the message—encoded in the small fine—that the facilities did not regard tardiness as a serious offense. This also explains why parents continued to arrive late in large numbers after the daycares removed the penalty. As the authors write, “[n]one of the explicit terms of the contract [had] been modified, nor [had] any of the . . . widely accepted social norms: but the parents . . . now [had] reason to believe that a fine is the worst that [could] happen.”<sup>77</sup>

As should be clear, the theory of incomplete contracts and differential information provides a convincing account of the parents' behavior. Nevertheless, this explanation for the increase of late pickups often goes

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<sup>72</sup> See Gneezy & Rustichini, *supra* note 58, at 13–14.

<sup>73</sup> See Gneezy & Rustichini, *supra* note 58, at 14.

<sup>74</sup> See Gneezy & Rustichini, *supra* note 58, at 10–13.

<sup>75</sup> See Gneezy & Rustichini, *supra* note 58, at 10.

<sup>76</sup> See Gneezy & Rustichini, *supra* note 58, at 10–11.

<sup>77</sup> See Gneezy & Rustichini, *supra* note 58, at 10.

unacknowledged in the anti-commodification literature. Professor Sandel, for instance, completely ignores the evidence from the daycare study that contradicts his preferred narrative.<sup>78</sup> He reads the data in the way most sympathetic to his ideas about the danger of corruption, even though other interpretations are equally or more plausible. Sandel's work is not an outlier—many articles in the legal literature elide the nuance of the childcare study. The silence is particularly egregious because the authors of the study prefer the information-based interpretation of the data over the norm-corruption theory. Professor Gneezy explains over email, “20 years later, and after many studies (not popular books . . . but research papers), my belief in the information explanation is stronger. People simply don't know how bad it is to break the norm (come late in this case); introducing the fine ‘teaches’ them that it is not that important.”<sup>79</sup> Professor Rustichini agrees, “[o]f the two interpretations suggested in the paper, the incomplete contract theory is my favorite.”<sup>80</sup>

Despite the authors' views, the study of Israeli daycares has become a talisman of the anti-commodification argument over the last two decades. For scholars of a certain worldview, the data on late pickups definitively establishes the market's proclivity to contaminate the meaning of transcendent moral virtues. A close reading of the Gneezy and Rustichini's work, however, reveals that this argument is ill-hung. Their paper, entitled *A Fine Is a Price*, simply does not support the propositions that market skeptics have attributed to it. In the article, the authors present two plausible explanations for their counterintuitive findings—a corruption claim and an argument grounded in information-theory. Anti-commodification thinkers have taken one possible interpretation of an inconclusive data set—an interpretation the authors disfavor—and pounded it into dogma. These facts challenge the well-accepted idea that corruption arguments are supported by unimpeachable empirical evidence.

#### B. Nuclear Waste Facilities

Bruno Frey's and Felix Oberholzer-Gee's research on Swiss nuclear waste facilities is considered another feather in the cap of the anti-commodification camp.<sup>81</sup> Across disciplines, commentators confidently cite the Swiss noxious facility experiment as a paradigmatic example of

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<sup>78</sup> See SANDEL, *supra* note 3, at 119 (discussing only one interpretation of Gneezy and Rustichini's data).

<sup>79</sup> E-mail from Uri Gneezy to Stephen Clowney (Aug. 4, 2017) (on file with author).

<sup>80</sup> E-mail from Aldo Rustichini to Stephen Clowney (Aug. 3, 2017) (on file with author).

<sup>81</sup> See Frey & Oberholzer-Gee, *supra* note 59.

how money can crowd out civic duty.<sup>82</sup> Yet, despite the accolades, a familiar note hangs in the air. In the ample literature that has sprouted up around the nuclear facility case study, academics have—once again—overstated the strength of the empirical evidence.

Some context is necessary. In the early 1990s, the Swiss government designated the village of Wolfenschiessen as a potential site to build an underground nuclear waste repository.<sup>83</sup> The Parliament considered the facility a worthwhile project, necessary for the success of the Swiss nuclear program. However, the government also anticipated that the repository would face significant resistance from the prospective host community. Many Swiss citizens believed the facility would expose locals to harmful toxins and unleash irreversible environmental degradation.<sup>84</sup> At the zenith of the debate over the waste repository, economists Bruno Frey and Felix Oberholzer-Gee saw an opportunity to conduct a natural experiment.<sup>85</sup> The researchers canvassed residents of the Wolfenschiessen area and inquired whether they would accept the facility if the government decided the location best served the nation's interest. Despite the perceived threats to the villagers' health and property values, roughly half of the respondents declared they would willingly endure the presence of the nuclear materials repository.<sup>86</sup> Frey and Oberholzer-Gee then surveyed the region a second time, asking citizens whether they would accept the facility if the government offered them a yearly stipend of a few thousand dollars. Surprisingly, support for the repository plummeted. The addition of a financial incentive reduced the level of assent by half, from fifty-one to twenty-five percent.<sup>87</sup>

Anti-commodificationists find comfort in these results. They argue that the introduction of money corrupted the respondents' sense of civic

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<sup>82</sup> See Jonathan M. Barnett, *The Rational Underenforcement of Vice Laws*, 54 RUTGERS L. REV. 423, 459 n.132 (2002); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 86 (2003); Kawakami, *supra* note 71, at 171 (calling the Swiss study one of the "most often cited examples"); Kristen Underhill, *When Extrinsic Incentives Displace Intrinsic Motivation: Designing Legal Carrots and Sticks to Confront the Challenge of Motivational Crowding-Out*, 33 YALE J. REG. 213, 234 (2016) (calling study "notable").

<sup>83</sup> See KJELL ANDERSON, *TRANSPARENCY AND ACCOUNTABILITY IN SCIENCE AND POLITICS: THE AWARENESS PRINCIPLE* 49 (Palgrave MacMillan 2008).

<sup>84</sup> See Frey & Oberholzer-Gee, *supra* note 59, at 749 ("Nearly 40 percent of all respondents believed the risk of serious accident in the facility and groundwater contamination to be considerable.").

<sup>85</sup> Frey & Oberholzer-Gee, *supra* note 59, at 748–49.

<sup>86</sup> Frey & Oberholzer-Gee, *supra* note 59, at 749.

<sup>87</sup> *Id.* Professor Sandel discusses this example at length in his book-length project on commodification. See SANDEL, *supra* note 3, at 114–17.

duty and “reduced people’s willingness to host the nuclear waste site.”<sup>88</sup> According to the authors, the villagers who were not offered monetary compensation had to answer a difficult moral question: Did their obligation to the national community outweigh the hassles of living near a silo of toxic waste? A slim majority answered affirmatively.<sup>89</sup> The citizens who were offered compensatory payments, however, framed the question differently. They pushed aside notions of civic responsibility and instead assessed the dilemma in purely economic terms: Did the stipend offset the risks associated with the proposed undesirable land use? Most of the respondents found the payment inadequate and reported that they would resist the siting of the repository.<sup>90</sup>

Do the results of these surveys from Wolfenschiessen provide a lifeboat for anti-commodification theory? Are market skeptics correct that money coarsened Swiss ideals about civic duty? I think we should be skeptical, for at least three reasons. First, it’s possible to account for the villagers’ behavior without reliance on corruption theory. One alternative explanation: The offer of money communicated an unintended message about the hazards of living near the nuclear facility.<sup>91</sup> More specifically, the researchers’ questions about compensation may have convinced local residents that the repository posed a greater threat to their health and property values than previously understood. Why else would the government willingly ply them with such large handfuls of money? This refashioning of the cost-benefit analysis—and not any concerns about corruption—plausibly explains the substantial drop in support for the storage site in the group offered compensation. It should hardly need to be pointed out that even the most patriotic citizens will resist land uses that may expose their families to dire safety risks.

A second problem also looms. There’s evidence that the hobgoblin of “social desirability bias” may have tainted Frey and Oberholzer-Gee’s research.<sup>92</sup> Social desirability bias, in short, is the natural tendency of survey respondents to answer questions in a way that will be viewed

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<sup>88</sup> SANDEL, *supra* note 3, at 115.

<sup>89</sup> See Frey & Oberholzer-Gee, *supra* note 59, at 749.

<sup>90</sup> See Frey & Oberholzer-Gee, *supra* note 59, at 749–50. See also KUENZLER, *supra* note 59, at 106–07 (explaining the Swiss nuclear waste study).

<sup>91</sup> The authors acknowledge this possibility in their study but ultimately brush aside the risk-signaling hypothesis. To justify their skepticism, the authors point out that interview respondents said they perceived no link between higher offers of compensation and the level of risk. The authors, however, ignore that it might be the initial large offer of compensation—not the incremental increases—that does most of the signaling work. See Frey & Oberholzer-Gee, *supra* note 59, at 750.

<sup>92</sup> See BRENNAN & JAWORSKI, *supra* note 19, at 81.

favorably by others, regardless of the accuracy of the responses.<sup>93</sup> Across specialties, social scientists have discovered that people consistently present themselves as more generous and less biased than they actually are. The problem is particularly acute when researchers use in-person interviews to gather information, as Frey and Oberholzer-Gee did in their research.<sup>94</sup> Recall the authors' basic argument: Money warped the Swiss sense of altruism and civic duty. It may be, however, that the villagers of Wolfenschiessen only seemed altruistic in the original survey because they were answering hypothetical survey questions. With nothing at stake, the desire to demonstrate patriotism and civic-mindedness may have compelled survey respondents to both overstate their willingness to accept the waste repository and downplay their readiness to accept cash "bribes" in exchange for their acquiescence to the repository. Thus, according to social desirability theory, the Swiss citizens were probably never as altruistic as Frey and Oberholzer-Gee reported.

This hypothesis has some basis in fact. In the decades since Frey and Oberholzer-Gee published their study, the Swiss Canton of Nidwalden—home of the village of Wolfenschiessen—has held multiple binding referendums about the fate of the proposed underground waste repository.<sup>95</sup> In 1995, 2002, and 2011, a majority of the citizens from Nidwalden voted against siting the facility in their region.<sup>96</sup> The most recent campaign seems particularly damaging for Frey and Oberholzer-Gee's theories about the corruption of civic duty. The 2011 referendum turned into "a fiasco" for its proponents: the people of Nidwalden rejected the storage facility by

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<sup>93</sup> See Jon A. Krosnick & Stanley Presser, *Question and Questionnaire Design*, in HANDBOOK OF SURVEY RESEARCH 263, 285 (Peter V. Marsden & James D. Wright eds., 2010); MARK L. MITCHELL & JANINIA M. JOLLEY, RESEARCH DESIGN EXPLAINED 285 (Wadsworth, Cengage Learning 2013).

<sup>94</sup> PATRICIA A. GWARTNEY, THE TELEPHONE INTERVIEWER'S HANDBOOK: HOW TO CONDUCT STANDARDIZED CONVERSATIONS 16 (2007) ("Face-to-face interviews are more susceptible to social desirability bias than telephone interviews because respondents can see and react to interviewers' social characteristics . . . as well as perceived social class and education attainment."). Frey & Oberholzer-Gee's survey team met with interviewees in their homes. Frey & Oberholzer-Gee, *supra* note 59, at 748.

<sup>95</sup> Nicolas Schmitt, *Environmental Governance in Switzerland*, in ENVIRONMENTAL PROTECTION IN MULTI-LAYERED SYSTEMS: COMPARATIVE LESSONS FROM THE WATER SECTOR 83, 98 (Mariachiara Alberton & Francesco Palermo eds., 2012) ("The Canton of Nidwalden has voted four times against the storage of nuclear waste in its territory . . .").

<sup>96</sup> Achim Brunnengräber & Miranda Schreurs, *Nuclear Energy and Nuclear Waste Governance: Perspectives After the Fukushima Nuclear Disaster*, in NUCLEAR WASTE GOVERNANCE: AN INTERNATIONAL COMPARISON 47, 66 (Achim Brunnengräber et al. eds., 2015) ("Eighty percent of the voters refused the nuclear waste disposal project."); Pius Krütli et al., *Distributive Versus Procedural Justice in Nuclear Waste Repository Siting*, in THE ETHICS OF NUCLEAR ENERGY: RISK, JUSTICE, AND DEMOCRACY IN THE POST-FUKUSHIMA ERA 119, 125 (Behnam Taebi & Sabine Roeser eds., 2015); Schmitt, *supra* note 95.

an overwhelming 4-to-1 margin.<sup>97</sup> It appears that when confronted with actual binding votes about the presence of nuclear facilities, the people responded more selfishly than they did in the hypothetical surveys.

Sifting through the fine-grain data from these referendums provides even more clues that Frey and Oberholzer-Gee's conclusions about commerce may need to be rowed back. For example, in the run-up to the 1995 vote, Nagra—the company responsible for the disposal of radioactive waste in Switzerland—decided to offer the people of Wolfenschiessen a financial incentive to host the storage repository.<sup>98</sup> According to Frey and Oberholzer-Gee, this overture should have corrupted the villager's fundamental values and disrupted support for the facility.<sup>99</sup> Instead, election results show that the strongest level of support came from the area where Nagra offered payments.<sup>100</sup> The areas *farther away* from the proposed repository, which received no guaranteed compensation, “strongly rejected” the project.<sup>101</sup> The 2002 referendum produced nearly identical results—communities left out of the payment scheme tipped the balance against the repository.<sup>102</sup> Thus, contra Frey and Oberholzer-Gee, compensation played an essential role in building support for the nuclear repository site in Switzerland.

Finally, Frey and Oberholzer-Gee's central claim—that commercial values corrupt notions of civic duty and make siting waste facilities more difficult—also seems at odds with a growing body of research about how governments and private businesses actually site noxious land uses.<sup>103</sup> Professor Jenkins-Smith and Professor Kunreuther, for example, have extensively studied the siting of prisons, landfills, incinerators, and radioactive waste disposal plants. Their data reveals that for “all the facilities, including the repository, the majority of respondents are likely to view the facility more positively” when presented with an offer of

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<sup>97</sup> Brunnengräber & Schreurs, *supra* note 96.

<sup>98</sup> ANDREW NEWMAN & GERRY NAGTZAAM, *DECISION-MAKING AND RADIOACTIVE WASTE DISPOSAL* 231 (2016) (“The municipality council and Canton Nidwalden negotiated a compensation package . . .”).

<sup>99</sup> See Frey & Oberholzer-Gee, *supra* note 59, at 749–50.

<sup>100</sup> NEWMAN & NAGTZAAM, *supra* note 98, at 232 (explaining that the strongest level of support came from Wolfenschiessen).

<sup>101</sup> Krütli et al., *supra* note 96, at 125.

<sup>102</sup> Krütli et al., *supra* note 96, at 125–28.

<sup>103</sup> See, e.g., Hank Jenkins-Smith & Howard Kunreuther, *Mitigation and Benefits Measures as Policy Tools for Siting Potentially Hazardous Facilities: Determinants of Effectiveness and Appropriateness*, 21 *RISK ANALYSIS* 371, 372 (2001). See also Chang-Tay Chiou et al., *Negotiated Compensation for NIMBY Facilities: Siting of Incinerators in Taiwan*, 28 *ASIAN GEOGRAPHER* 105 (2011) (arguing that negotiated compensation processes increase the level of acceptance of LULUs).

compensation.<sup>104</sup> Other researchers have confirmed these experimental results, concluding that compensation processes are “a key element” in successful siting decisions.<sup>105</sup> Offers of compensation increase the level of acceptance of noxious uses among neighbors<sup>106</sup> and weaken opposition from NIMBY groups.<sup>107</sup> Indeed, compensation has become such a vital part of the process that a number of state legislatures have formally adopted payment schemes as part of their hazardous waste siting programs. Rather than destroying people’s sense of civic duty, it appears that compensation has become integral to increasing support for unpopular projects and infusing affected communities with the sense that they have been treated fairly in the siting process.

### C. Blood Donations

As the analysis of daycare pickups and nuclear facilities begins to cast doubt on the strength of the corruption argument, anti-commodificationists may turn to an iconic study of blood donation as the last and best illustration of the market’s power to contaminate the sacred. In his 1971 book, *The Gift Relationship*, Richard Titmuss compared the system of blood procurement in the United Kingdom, which relied solely on unpaid volunteers, to the practice in the United States, which allowed hospitals to pay donors for their blood.<sup>108</sup> According to standard economic theory, the presence of monetary incentives in America should have swelled the number of willing donors.<sup>109</sup> *The Gift Relationship*, however, presents evidence that blood banks in the United States collected less blood and created more waste than their English counterparts.<sup>110</sup> From this

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<sup>104</sup> Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention*, 21 *FORDHAM URB. L.J.* 787 (1994); Jenkins-Smith & Kunreuther, *supra* note 103, at 372. The Jenkins-Smith & Kunreuther study does specify that the timing of the compensation offer is extremely important. To gain support for a noxious use, local governments should offer benefits packages upfront. Last minute offers of compensation can lead residents to believe that a facility is not as safe as they have been told and undermine support.

<sup>105</sup> Rodney Fort & Lynn Scarlett, *Too Little Too Late? Host Community Benefits and Siting Solid Waste Facilities*, REASON FOUND. (Apr. 1993), <https://reason.org/policy-study/too-little-too-late-host-commu/>.

<sup>106</sup> Chiou et al., *supra* note 103.

<sup>107</sup> Thomas Rasmussen, *Not in My Backyard: The Politics of Siting Prisons, Landfills, and Incinerators*, 24 *ST. & LOC. GOV’T REV.* 128, 131 (1992). NIMBY stands for “Not in My Backyard.” NIMBYs oppose most development that is proposed in their area.

<sup>108</sup> TITMUSS, *supra* note 60, at 90–141.

<sup>109</sup> See, e.g., Kenneth J. Arrow, *Gifts and Exchanges*, 1 *PHIL. & PUB. AFF.* 343, 350 (1972) (“[I]f to a voluntary blood donor system we add the possibility of selling blood, we have only expanded the individual’s range of alternatives. If he derives satisfaction from giving, it is argued, he can still give, and nothing has been done to impair that right.”)

<sup>110</sup> Technically, Titmuss talked about the “economic efficiency of paying for blood and



observation, Titmuss concluded that the injection of cash corrupted the beliefs and behavior of otherwise altruistically-minded folks.<sup>111</sup> When presented with financial incentives, potential volunteers came to view giving blood through a dark lens and refused to donate.<sup>112</sup> They understood the act not as a generous and life-affirming gift, but rather as money-raising strategy of the desperately poor.<sup>113</sup> Indeed, Titmuss hypothesized that the net result of introducing a market for blood in England would be the erosion of the moral responsibility to donate, the decline of the generalized desire to help others, and, ultimately, less blood in hospitals.<sup>114</sup>

It is impossible to overstate the influence of *The Gift Relationship* in the anti-commodification literature.<sup>115</sup> Legal academics have consistently cited Titmuss to support claims that commerce disrupts social norms.<sup>116</sup> Scholars have described the book as “the seminal work against paying for blood,”<sup>117</sup> “a famous *magnum opus*,”<sup>118</sup> “the classic work on blood donation,”<sup>119</sup> and “a passionate indictment of the corrupting influence of competitive markets across the whole field of social policy.”<sup>120</sup> Additionally, the ideas that Titmuss advanced in *The Gift Relationship* encouraged Congress to enact the National Organ Transplant Act—a federal law that prohibits the commodification of organs for the purpose of human transplantation.<sup>121</sup> In short, no work of scholarship has done more

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the cost per unit of blood, which he claimed was higher in countries that paid donors because of a higher waste of blood and administrative cost.” Claudia Niza et al., *Incentivizing Blood Donation: Systematic Review and Meta-Analysis to Test Titmuss’ Hypotheses*, 32 HEALTH PSYCHOL. 941, 941 (2013).

<sup>111</sup> TITMUSS, *supra* note 60, at 198 (“The evidence in the preceding chapters shows the extent to which commercialization and profit in blood has been driving out the voluntary donor.”).

<sup>112</sup> See TITMUSS, *supra* note 60, at 198–99.

<sup>113</sup> TITMUSS, *supra* note 60, at 119, 198–99, 223, 245–46.

<sup>114</sup> TITMUSS, *supra* note 60, at 245–46.

<sup>115</sup> See Natalie Ram, *Body Banking from the Bench to the Bedside*, 129 HARV. L. REV. 491, 500 (2015) (reviewing KARA W. SWANSON, *BANKING ON THE BODY: THE MARKET IN BLOOD, MILK, AND SPERM* (2014)) (describing Titmuss’ influence).

<sup>116</sup> See, e.g., Gamage & Kedem, *supra* note 40, at 1329 (“Ever since Titmuss’ classic work on blood donation, scholars have recognized that allowing market-form transactions into the nonmarket sphere can undermine the social norms and relationships needed for the nonmarket sphere to function.”).

<sup>117</sup> Niza et al., *supra* note 110, at 941 (describing the influence of Richard Titmuss’s *The Gift Relationship*).

<sup>118</sup> Nicolas Brisset, *What Do We Learn from Market Design?* 14 (2017) (unpublished manuscript) (on file with author).

<sup>119</sup> Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 867 n.154 (2000).

<sup>120</sup> Robert Pinker, *From Gift Relationships to Quasi-Markets: An Odyssey Along the Policy Paths of Altruism and Egoism*, 40 SOC. POL’Y & ADMIN. 10, 13 (2006).

<sup>121</sup> See ALBERT R. JONSEN, *THE BIRTH OF BIOETHICS* 206 (1998).

to nourish the idea that markets corrode our fundamental values.

There is, however, one very conspicuous fly in the ointment. Many scholars argue that Titmuss's claims are "not based on empirical evidence."<sup>122</sup> Nobel-Prize winning economist Kenneth Arrow, for example, has dismissed Titmuss's arguments as naïve.<sup>123</sup> Arrow writes, "I . . . gather from his figures that the percentage of donors in the United States is lower than that in the United Kingdom, but . . . there is so much in the way of historical development that is not covered that one cannot arrive at any relevant [conclusion]."<sup>124</sup> Specifically, Arrow argues that while Titmuss may have exposed the United States as a less altruistic country than England, nothing in *The Gift Relationship* demonstrates that commercial blood-giving is a cause of our national stinginess.<sup>125</sup> Very possibly, the opposite is true. American hospitals may have started paying for blood because unpaid volunteers failed to donate an adequate supply.<sup>126</sup> Titmuss, in short, confuses correlation with causation.

Recent studies more directly challenge Titmuss's assertion that commodification overwhelms our altruistic impulses and undermines the efficient collection of blood. For example, in 2012, economists Nicola Lacetera, Mario Macis, and Robert Slonim published data from their large-scale study of the American blood collection system.<sup>127</sup> The authors conducted an enormous number of field experiments and analyzed over 14 thousand blood drives to determine what motivates people to give blood.<sup>128</sup> They discovered, contrary to Titmuss, that material incentives do not corrode the desire to give blood.<sup>129</sup> In fact, offering compensation such as gift cards substantially increased the amount of blood collected at mobile blood drives with no detectable dip in the quality of the blood units amassed.<sup>130</sup> Additionally, the researchers found a "roughly linear"

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<sup>122</sup> Niza et al., *supra* note 110, at 941.

<sup>123</sup> Arrow, *supra* note 109.

<sup>124</sup> Arrow, *supra* note 109, at 350.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Nicola Lacetera et al., *Will There Be Blood? Incentives and Displacement Effects in Pro-Social Behavior*, 4 AM. ECON. J. 186 (2012).

<sup>128</sup> *Id.* at 187.

<sup>129</sup> *Id.* at 209 ("Compared to the control condition, turnout increased, on average, by 5.5, 6.0, and 14.2 donors when the \$5, \$10, or \$15 gift cards were advertised, respectively.").

<sup>130</sup> *Id.* at 213. It is important to note that the Lacetera study did not make any cash payments to donors. Currently, no blood collection agency will accept blood that has been acquired with cash payments. The authors do discuss how paying donors with cash rather than gift cards may change their results. *See id.* at 220 ("[A]vailable theories and empirical evidence provide mixed results on the difference between cash and noncash incentives."). *See also* SWANSON, *supra* note 115, at 139–40 (2014) (discussing Titmuss' focus on cash payments).

relationship between the monetary value of the incentives and the effect on turnout; the more goodies a blood drive offered, the more blood it collected.<sup>131</sup> This study is not alone in questioning Titmuss. Lacetera's work accords with several other recent papers that find "no support" for the theory that commerce corrodes our sacred values and corrupts our social institutions.<sup>132</sup>

Despite these new findings, Titmuss's influence persists. In large measure, this is well-deserved. His views on the importance of social norms and the value of altruism seem remarkably prescient. Additionally, Titmuss's writings about the limitations of markets and the importance of central governments have proven an important counterweight to libertarian notions about the proper role of the state.<sup>133</sup> Titmuss's legacy, in short, is robust and his ideas have inspired successive generations of philosophers, sociologists, anthropologists, and legal academics. Nevertheless, his criticism of commercial blood procurement systems seems largely incorrect. Recent studies, backed by new and powerful methodologies, undermine Titmuss's contention that market mechanisms inevitably corrode a shared sense of community and civic duty. Moreover, commerce seems capable of delivering blood products safely and with greater efficiency than systems based purely on altruism. Looking at the full weight of the evidence, there is simply no cogent empirical argument that commerce corrupts communal ideas about blood or the blood donation process.

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How does all of this fit in with the larger discussion of markets and corruption? The story of Titmuss's work on blood procurement confirms

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<sup>131</sup> Lacetera et al., *supra* note 127, at 213.

<sup>132</sup> Niza et al., *supra* note 110, at 946. Sociologist Kieran Healy's comprehensive (and cross-national) study of blood procurement organizations expressed similar doubts about Titmuss' work. See KIERAN HEALY, *LAST BEST GIFTS: ALTRUISM AND THE MARKET FOR HUMAN BLOOD AND ORGANS* (2006). He discovered that the culture of bureaucratic institutions—such as hospitals and local Red Cross chapters—plays a uniquely important role in the rate of blood collection. *Id.* at 110–32. "The idea that markets inevitably corrupt," Healy writes, "is not tenable precisely *because* they are embedded within social relations, cultural categories and institutional routines." *Id.* at 121. And, finally, evidence from Poland and Romania indicates that sale and gift exchange can co-exist within a single blood collection system. At least in these Eastern Europe locales, the presence of commercial norms does not drive into wilderness the desire to donate without compensation. See H.J. HEINIGER, *SURVEY OF BLOOD TRANSFUSION SERVICES OF CENTRAL AND EASTERN COUNTRIES AND THEIR CO-OPERATION WITH WESTERN TRANSFUSION SERVICES* 13 (1993); Jeremy Frank Shearmur, *The Gift Relationship Revisited*, 27 *HEC F.* 301, 309 (2014).

<sup>133</sup> See generally Pinker, *supra* note 120 (discussing Titmuss's political orientation and belief in a robust welfare state).

what the Swiss nuclear repository study and the research on Israeli day cares first suggested: anti-commodificationists, determined to dress-up their views about markets in a costume of empirical evidence, have systematically ignored data that contradicts their moral vision. Michael Sandel's bestselling *What Money Can't Buy* exemplifies these failures. Sandel discusses at length all three of the papers reviewed in this section.<sup>134</sup> Yet, he never questions the methodological choices that underlie the research on the Swiss nuclear repositories; there's no mention of social desirability bias, the 2011 repository vote in Nidwalden, or the current practices of siting noxious land uses. Moreover, Sandel fails to cite all of the excellent recent scholarship on compensated blood donations or acknowledges the equivocal findings of the day care study—ambiguities that the authors of the paper plainly emphasize in the text. The book is not alone in these omissions. Again and again, when commentators discuss the dangers of commodification, they portray the evidence of corruption in the most flattering tones. But discordant notes hang in the air. While the corruption argument continues to pack some theoretical punch, a close examination of the canonical texts suggests that anti-commodification theory may run aground when confronted with the on-the-ground experiences of everyday people.

#### IV. PAINTINGS & PROSTITUTES

The previous section demonstrated that the corruption objection has a weaker empirical foundation than scholars generally acknowledge. Specifically, anti-commodification thinkers have tended to rely on outdated sources and ambiguous data to prop up their theories about the corrosive tendency of markets. But this fact, standing alone, does not settle the dispute over corruption.<sup>135</sup> What is needed are new studies. Would a fresh analysis, designed to avoid the pitfalls of earlier research, reveal signs of corruption previously overlooked? Or would it confirm the worldview of the free market triumphalists? This Article attempts to find out. In the remainder of the piece, I present the results of an empirical project devised to test the claim that commerce corrupts. Is it truly harmless to buy and

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<sup>134</sup> SANDEL, *supra* note 3, at 64–65, 113–14, 119, 122–25.

<sup>135</sup> In some corners this is a contested position. Authors Jason Brennan and Peter Jaworski argue that anti-commodificationists have the burden of proof. “They have to prove their hypothesis, the same way that, say, medical researchers who want to claim that a chemical causes cancer have to prove their hypothesis.” BRENNAN & JAWORSKI, *supra* note 19, at 91. According to this viewpoint, if anti-commodificationists cannot prove their theories with solid empirical evidence, then governments should not regulate markets in sacred goods.

sell sacred goods? Or do markets—like some noxious commercial solvent—render everything before them colorless, antiseptic, and fungible?

The premise of the study is simple. Market skeptics insist that commerce inevitably degrades our view of the sacred.<sup>136</sup> They argue, for example, that a market in human organs would cheapen how people think about their bodies,<sup>137</sup> markets in visas would tarnish the relationship between citizen and country,<sup>138</sup> and auctioning seats in Harvard's freshman class would swallow the notion of meritocratic achievement.<sup>139</sup> But if these anti-commodification arguments are correct—if markets contaminate meaning as easily and relentlessly as scholars claim—then we should see abundant evidence of corruption sloshing through the world around us. In particular, markets should leave behind deep scars on merchants who repeatedly buy and sell sacred goods. These individuals should slowly but inexorably lose sensitivity to the emotional, spiritual, and psychological qualities of sacred objects.

To investigate this pillar of the anti-commodification worldview, I interviewed two groups of people deeply immersed in commerce for “priceless” things. Specifically, my research analyzes the experiences of high-end art appraisers and male escorts. These professionals offer several advantages for a study of this type. First and foremost, they routinely and regularly put prices on things that many people regard as sacred. According to anti-commodification theory, this kind of grinding work—fixated on dollar figures and sales—should quickly sully one's moral beliefs and non-instrumental values.<sup>140</sup> Second, market skeptics have warned that commodification poses particularly grave threats to art<sup>141</sup> and sex.<sup>142</sup> Therefore, if corruption exists, we should expect to see it

<sup>136</sup> See *supra* Part III.

<sup>137</sup> See Leon R. Kass, *Organs for Sale? Propriety, Property, and the Price of Progress*, in *POLITICS AND THE HUMAN BODY: ASSAULT ON DIGNITY* 153, 171 (Jean Bethke Elshtain & J. Timothy Cloyd eds., 1995) (arguing that markets degrade our view of the human body).

<sup>138</sup> See Brown, *supra* note 53, at 1099–1100 (summarizing commodification critiques).

<sup>139</sup> SANDEL, *supra* note 3, at 108–10.

<sup>140</sup> See, e.g., Altman, *supra* note 9, at 301 (discussing negative effects of doing art appraisals); Joanna Brewis & Stephen Linstead, “*The Worst Thing Is the Screwing:*” *Consumption and Management of Identity in Sex Work*, 7 *GENDER WORK & ORG.* 84, 93 (2000) (discussing the negative effects of prostitution).

<sup>141</sup> See SANDEL, *supra* note 3, at 10, 202 (mentioning art); John Frow, *Elvis' Fame: The Commodity Form and the Form of the Person*, 7 *CARDOZO STUD. L. & LITERATURE* 131, 132 (1995) (“The classic historical studies of commodification have been directed to land, labor, money, risk, and art.”).

<sup>142</sup> RADIN, *supra* note 22, at 132–36; VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* 3, 20–29 (2005) (discussing the belief that “intimacy corrupts the economy and the economy corrupts intimacy”).

coarsening the ideologies of the workers in these industries.<sup>143</sup> Finally, studying appraisers and prostitutes offers some mundane practical advantages. Unlike black-market organ vendors or baby brokers, the subjects of this study proved surprisingly accessible and willing to speak on the record about their work.

From the interviews, one dominant finding emerged: the prevailing view that markets inevitably infect the meaning of sacred goods is wrong. Contra anti-commodification theory, the data demonstrate that commerce is not an inherently corrosive force. Rather, objects can have multiple stable meanings—sometimes commodified and sometimes not—depending on the context and circumstances. Appraisers do not view art as a fungible commodity stripped of its sublime properties.<sup>144</sup> And prostitutes do not regard sex in their personal lives as a chore.<sup>145</sup> In short, this Article makes the argument that the intellectual ramparts defending our transcendental ideologies are strong—stronger than legal scholars have previously recognized.

## A. *Art Appraisers*

### 1. Background

For many people, wandering through a great art museum remains a powerful experience.<sup>146</sup> Across cultures and through time, art has “stirred emotions,”<sup>147</sup> “lift[ed] the human spirit,”<sup>148</sup> and, “awakened us to realities that we may not have recognized before.”<sup>149</sup> Market skeptics, however, have begun to worry that rampant commodification puts these virtues at risk. Some insist that the explosion of the high-end art market and the emphasis on auction prices threatens our ability to appreciate the more

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<sup>143</sup> See, e.g., Altman, *supra* note 9, at 313 (stating that “considering whether prostitutes who sell sex, and women who are so often portrayed and treated as sexual objects, can still manage intimacy will reveal” the strength of the corruption argument).

<sup>144</sup> See discussion *infra* Part IV.A.3.

<sup>145</sup> See discussion *infra* Part IV.B.3.

<sup>146</sup> See CAROL DUNCAN, *CIVILIZING RITUALS: INSIDE PUBLIC ART MUSEUMS* 12 (1995) (stating that museums “enable individuals to move beyond the psychic constraints of mundane experiences, step out of time, and attain new, larger perspectives”); Judith H. Dobrzynski, *High Culture Goes Hands On*, N.Y. TIMES, Aug. 11, 2013, at SR1 (describing the traditional role of museums: “[p]eople went to see beauty, find inspiration, experience uplift, sometimes in a spiritual sort of way”).

<sup>147</sup> Olga M. Hubbard, “How Does This Artwork Make You Feel?”: A “No-No” Question in *Art Museum Education*, 49 J. AESTHETIC EDUC. 82, 94 (2015).

<sup>148</sup> ALTAF ENGINEER & KATHRYN H. ANTONY, *SHEDDING NEW LIGHT ON ART MUSEUM ADDITIONS* 3 (2017).

<sup>149</sup> RICHARD LEWIS & SUSAN I. LEWIS, *THE POWER OF ART* 19 (2009).

spiritual qualities of art.<sup>150</sup> As one art critic recently lamented, “[the] philistine assumption that the only really interesting thing about art is its financial value is . . . shared by the most powerful people in the art world, on a scale that makes a mockery of any belief in art as a road to revelation . . . .”<sup>151</sup> Others fret that the vast sums of money sloshing through the art world “destroy[s] the traditional artistic ethos,”<sup>152</sup> which values creativity over economic gain. Elizabeth Anderson, for example, has argued that the colorization of black and white films is a form of “crass commercial exploitation”<sup>153</sup> that “debases their aesthetic qualities in the name of profits.”<sup>154</sup> For Anderson—and many others—valuing art according to the dictates of the market “is to embody in one’s life an inferior conception of human flourishing.”<sup>155</sup>

The purpose of this section is to empirically test some of these grim pronouncements and determine whether market thinking truly erodes the ability to enjoy the creative enterprise. To this end, the experiences of high-end art appraisers offer a valuable natural experiment. The professional lives of appraisers are deeply marinated in pricing work. During a typical year, top appraisers assign monetary values to “a tremendously large volume of works.”<sup>156</sup> Ascribing prices to some of these pieces—paintings by old masters, delicate antiquities, historical artifacts—remains extremely difficult because they are so singular. Appraisers must pour over auction records, investigate notable private sales, and rank the quality against similar things that have recently sold.<sup>157</sup> In short, the work

<sup>150</sup> Jerry Saltz, *Has Money Ruined Art?*, N.Y. MAG. (Oct. 5, 2007), <https://nymag.com/arts/art/season2007/38981/> (“High prices become part of its temporary content, often disrupting and distorting art’s nonlinear, alchemical strangeness. Money is something that can be measured; art is not.”). See also Tyler Cowen & Alexander Tabarrok, *An Economic Theory of Avant-Garde and Popular Art, or High and Low Culture*, 67 S. ECON. J. 232 (2000) (discussing how market forces shape artists’ routines); K.J. Greene, *Copyright, Culture, & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339 (1999) (discussing how the commodification of black cultural products has hurt the community).

<sup>151</sup> Jonathan Jones, *Cogs in the Machine: How the Art Market Became Obsessed with Money*, GUARDIAN (Feb. 11, 2015), <https://www.theguardian.com/artanddesign/jonathanjonesblog/2015/feb/11/art-market-obsessed-with-money-richter-gauguin-sale>.

<sup>152</sup> Derek Fincham, *Authenticating Art by Valuing Art Experts*, 86 MISS. L.J. 567, 578 n.46 (2017).

<sup>153</sup> Anderson, *supra* note 10, at 73.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> Jessica L. Furey, *Painting a Dark Picture: The Need for Reform of IRS Practices and Procedures Relating to Fine Art Appraisals*, 9 CARDOZO ARTS & ENT. L.J. 177, 186 (1990).

<sup>157</sup> For more on art appraising, see APPRAISERS ASSOCIATION OF AMERICA, APPRAISING ART: THE DEFINITIVE GUIDE TO APPRAISING THE FINE AND DECORATIVE ARTS (2013).

requires these professionals to be “intimately involved”<sup>158</sup> with the market and pricing at all times.

According to anti-commodificationists, such exhaustive firsthand experience with valuation and exchange should tarnish how appraisers think about art. Scott Altman, a legal scholar who has studied commodification, perfectly captures the standard market skeptic position: “[s]omeone who spends all day estimating the value of art might eventually have difficulty appreciating art in any way other than as worth a certain amount.”<sup>159</sup> The difficulty for anti-commodificationists, however, is that their concerns about the market’s power to tarnish art have little empirical foundation. Academic hunches about the danger of commerce have been accepted as gospel, while the actual lived experiences of appraisers and other market participants have been ignored. To add some needed experimental weight to the debate over corruption, this Article now reports the results of a qualitative study that I conducted with art appraisers about their work and experiences looking at art.

## 2. Methodology

During the Fall of 2015, I conducted extensive interviews with twenty professional art appraisers. To solicit participation in the study, I emailed a group of highly respected and experienced professionals.<sup>160</sup> In addition to contacting a number of the well-known generalists, I reached out to assessors who specialize in American paintings, folk art, rugs, furniture, fine silver, photography, East Asian art, antiquities, and gilded frames. Between them, this group of appraisers have put values on Monets, Renoirs, Picassos, Warhols, Rothkos, Ghandi’s spinning wheel, the original Batmobile, the first purpose-built mountain bike, and Kaiser Wilhelm’s taxidermy collection. My initial communication explained the purpose of the study and asked the appraisers for insight about how their professional experiences affects their private enjoyment of art. The contact email generated a surprising sixty-eight percent response rate—fourteen women and six men responded.<sup>161</sup> Interviews were conducted over the telephone

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<sup>158</sup> *Id.*

<sup>159</sup> See e.g., Altman, *supra* note 9, at 301.

<sup>160</sup> I emailed top authorities in the field, as determined by the major appraisal accrediting organizations. Three of the foremost associations are the American Society of Appraisers, Appraisers Association of America, and International Society of Appraisers. Najmeh Mahmoudjafari, *What Is the Bottom Line? Valuing Art, Antiques, and Other Personal Property in a Divorce*, 26 J. AM. ACAD. MATRIM. L. 465, 470 (2014). I compiled a list of respected appraisers by looking at the associations’ annual award winners and by reading through the authoritative book, APPRAISING ART. See *supra* note 157.

<sup>161</sup> I contacted twenty-nine appraisers, twenty replied.



using a semi-structured format. Participants did not receive compensation for their time.

Critics could certainly quibble with some of the assumptions and methodical choices that underlie my approach. Most obviously, I did not attempt to interview a randomized sample of appraisers. By design, the data I gathered reflects the perspective of successful veteran appraisers.<sup>162</sup> Only one interviewee had less than a decade of experience, and a majority of respondents had worked in the business for over twenty-five years. Arguably, these individuals—who deal almost exclusively with wealthy collectors and large institutions—have a professional stake in appearing enthusiastic about art. I note anecdotally that the interviewees did not seem very concerned with the consequences or fallout from the interviews—only three respondents asked to see a final copy of the study. Moreover, I did not sense any hesitation or reluctance in the appraisers' answers. Indeed, many of the interviewees freely shared their aversion for particular subgenres of art. Experienced appraisers also seemed instrumental to the success of the project; a proper test of anti-commodification theory demands studying appraisers who have consistently put prices on artistic masterworks over a period of years.<sup>163</sup>

### 3. Results

Does commodification corrupt? The central finding of my research is that putting prices on creative masterworks does not diminish appraisers' ability to experience the transcendent values of art. Of the twenty assessors interviewed for this study, not one reported that market work disfigured their ability to enjoy the emotional, spiritual, and aesthetic qualities of artistic masterworks. In fact, most appraisers insisted they can easily and completely compartmentalize their professional duties from their private encounters with art. This finding challenges the panicked rhetoric of many anti-commodification theorists who continue to insist that commerce diminishes the meaning of sacred things.

Contrary to the predictions of market skeptics, the appraisers in this

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<sup>162</sup> Many of the appraisers had garnered significant professional accolades. Todd Sigety, for example, has won an extensive list of awards from the International Society of Appraiser, including the ISA President's Award, multiple Leadership Awards, and several important Lamp of Knowledge Awards. Mr. Sigety has also served on the ISA board of directors and the executive committee for multiple years.

<sup>163</sup> Of course, critics may argue that this study could have been enriched by interviewing appraisers who abandoned the field because they found the work unsatisfying or onerous. I acknowledge that talking with "quitters" or part-time "toe-dippers" may have produced a different set of responses—such appraisers seem less likely to have selected in to the field because of an intense personal interest in art.

study spoke with joyful enthusiasm about their experiences viewing exceptional works of art. Even the most senior appraisers—those who have monetized thousands and thousands of objects—remain passionate consumers of art in their personal lives. The professionals I interviewed all reported visiting museums for pleasure, and many collect art to display in their homes. As a group, they described seeing beautiful pieces as “a charge,”<sup>164</sup> “a rush,”<sup>165</sup> “a thrill,”<sup>166</sup> “fabulous,”<sup>167</sup> “a giggle fest,”<sup>168</sup> “exciting,”<sup>169</sup> and “delight[ful].”<sup>170</sup> Many of the respondents—twenty five percent—dubbed their experiences with great art as either “magic” or “magical.”<sup>171</sup> Todd Sigety, a past president of the International Society of Appraisers, succinctly captured the dominant sentiment that emerged from the appraisers: “[i]t really is magic when you see a really good piece. When you see something special, that’s marvelous . . . . [Y]ou bounce.”<sup>172</sup>

Importantly, the respondents insisted that appraisal work had not dampened their appreciation of art’s non-instrumental virtues. Jane C.H. Jacob, an appraiser with thirty-five years of experience, explained, “[the appraisal work] does not corrode my enjoyment at all. I never get tired of looking at art. Never bored. I love art more now than I did 20 years ago.”<sup>173</sup> She continued, “[f]or me, the joy is being able to experience it and inspect it. Listen, I don’t love art because of the price, but because of the

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<sup>164</sup> Telephone Interview with Allison Gee, Senior Appraiser, Allison Gee Fine Art Appraisals (Jan. 25, 2016).

<sup>165</sup> Telephone Interview with Joseph P. Brady, Metalwork Expert, Joseph P. Brady Appraisal Services (Nov. 11, 2015); Telephone Interview with Helaine Fendelman, Appraiser, Helaine Fendelman & Associates Fine Art Appraisals (Nov. 11, 2015).

<sup>166</sup> Telephone Interview with Debra Force, Appraiser, Debra Force Fine Art (Nov. 10, 2015).

<sup>167</sup> Telephone Interview with Howard Nowes, Appraiser, Ancient Art Services (Nov. 23, 2015).

<sup>168</sup> Telephone Interview with James Supp, Appraiser, Coronado Trading Company (Nov. 6, 2015).

<sup>169</sup> Telephone Interview with Suzanne Smeaton, Frame Historian and Consultant, Suzanne Smeaton LLC (Nov. 16, 2015); Telephone Interview Allison Gee, *supra* note 164; Telephone Interview with Karen McManus, President, Jacqueline Silverman & Associates (Jan. 22, 2016).

<sup>170</sup> Telephone Interview with Susan McDonough, Appraiser, McDonough Fine Art Appraisals (Nov. 10, 2015).

<sup>171</sup> Telephone Interview with Suzanne Smeaton, *supra* note 169. Telephone Interview with Jennifer Carmen, Appraiser, J. Carman Fine Art Advisory and Appraisal Services (Oct. 29, 2015); Telephone Interview with Howard Nowes, *supra* note 167; Telephone Interview with Todd Sigety, Appraiser, WSA Appraisals (Nov. 6, 2015); Telephone Interview with Laurie Triplette, Senior Appraiser, Laurance Triplette Fine Art Services (Jan. 20, 2016).

<sup>172</sup> Telephone Interview with Todd Sigety, *supra* note 171.

<sup>173</sup> Telephone Interview with Jane C.H. Jacob, President and Managing Partner, Jacob Fine Art (Nov. 18, 2015).

way I respond to it. When I see [Monet's] Water Lilies I never don't get excited. A tear comes to my eye."<sup>174</sup> Edward Yee, arguably the nation's top assessor of photographs, expressed a nearly identical opinion: "[w]hen I see a great photograph, I love that. The wow factor is still there . . . I can easily compartmentalize [my appraisal work]. If I'm in a museum as a tourist, I totally shut it off. I'm there for the enjoyment. I'm not thinking about value."<sup>175</sup>

Jacob and Yee were not alone in their assessments. Every appraiser reacted negatively to the suggestion that pricing work might dampen their enjoyment of great art. "I keep it separate," said Susan McDonough, "[t]he monetary value is *only* meaningful when the object is used in a certain way. When that's not happening, the monetary value goes away for me. The value of the object is far beyond its monetary value. There's historical value, educational value, aesthetic value, sentimental value."<sup>176</sup> Debra Force, a former head of the American painting division at Christie's auction house, concurred: "[w]hen I'm at a museum by myself, value doesn't come into play. It's all about the thrill of looking at art."<sup>177</sup> Other assessors were similarly blunt. One exclaimed, "[i]n no way does pricing dominate my enjoyment. The objects have magic!"<sup>178</sup> Another said, "I can turn off the appraiser part of my brain."<sup>179</sup> And yet another: "I don't think about prices when wandering through a museum."<sup>180</sup>

Many of the respondents buttressed their broad claims about finding pleasure and meaning in artistic works with specific examples. James Supp, a popular contributor to the *Antiques Road Show* television program, spoke at length about stumbling across a piece of early video game history: "[w]e found the original graph-paper design of the video game, *Asteroids*. It's incredibly cool! I'm just looking at it and thinking about how awesome it is. It's a piece of computer gaming history. In that moment, I'm not thinking about the monetary value at all. Value is transitory."<sup>181</sup> Joseph Brady, the foremost American appraiser of silver, recalled a comparable episode. While trying to inspect Benjamin Franklin's silver spoon in a Philadelphia museum, Brady's enthusiasm for the piece engulfed him—he

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<sup>174</sup> *Id.*

<sup>175</sup> Telephone Interview with Edward Yee, Vice President, Penelope Dixon & Associates (Nov. 9, 2015).

<sup>176</sup> Telephone Interview with Susan McDonough, *supra* note 170.

<sup>177</sup> Telephone Interview with Debra Force, *supra* note 166.

<sup>178</sup> Telephone Interview with Jennifer Carmen, *supra* note 171.

<sup>179</sup> Telephone Interview with Patricia J. Graham, Appraiser, Asian Art Research and Appraisals (Nov. 9, 2015).

<sup>180</sup> Interview with Shannon Dillard Mitchell, Appraiser, Aux Art (Oct. 28, 2015).

<sup>181</sup> Telephone Interview with James Supp, *supra* note 168.

bent over too close to the display and unwittingly triggered a museum security alarm. Brady said, “[w]hen I walk through a museum with a great silver collection I’m not thinking, ‘oh this thing is worth \$65,000.’ I’m looking at what it is and trying to appreciate it. I’m the guy who gets down on his hands and knees to look under these things.”<sup>182</sup> Even after twenty years of doing appraisals, Edward Yee could easily conjure examples of how art still inspires him. “I was at the Met for their Civil War photography show. And I saw this hand-painted albumen print. I’d seen my fair share, but this image was so good. It ruined albumen prints for me. The collections I see, they still move me.”<sup>183</sup>

For the appraisers in this study, it is clear that market work has *not* undermined their ability to enjoy the more sacred values of artistic masterpieces. In fact, the opposite appears true. A majority of the assessors stated that ascribing values to art actually increased their admiration for paintings, photographs, sculptures, and other creative work. But how could that be so? Given the widely reported dangers of commodification, how could non-instrumental values blossom in the hard soil of the marketplace? Anti-commodification scholars, it seems, have failed to appreciate that market work is a powerful educational agent that breaks the stale cake of ignorance, turns apathy into understanding, and nurtures new insights about the sacred. Imagine, for example, an appraiser confronted with attaching value to Mary Cassatt’s painting, *Young Mother Sewing*. Anyone attempting to price such an object must, at the outset, become well-versed in the artist’s career, the provenance of the work, and the ethos of the larger impressionist movement.<sup>184</sup> Then, the appraiser must probe to explain whether the painting is a “good, better, or best” example of Cassatt’s work.<sup>185</sup> Would it fetch more at auction than *Child in a Straw Hat*, *Girl Arranging Her Hair*, or *The Boating Party*? This is a

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<sup>182</sup> Telephone Interview with Joseph Brady, *supra* note 165.

<sup>183</sup> Telephone Interview with Edward Yee, *supra* note 175.

<sup>184</sup> For more on art valuation, *see generally* APPRAISERS ASSOCIATION OF AMERICA, *supra* note 157; Rachel Corbett, *How Do You Price a Masterpiece*, ARTSPACE (Aug. 14, 2013), [https://www.artspace.com/magazine/art\\_101/art\\_market/anatomy\\_of\\_an\\_art\\_appraisal-51564](https://www.artspace.com/magazine/art_101/art_market/anatomy_of_an_art_appraisal-51564). *See also* Anne-Marie Rhodes, *Valuing Art in an Estate: New Concerns*, 31 CARDOZO ARTS & ENT. L.J. 45, 68–72 (2012) (discussing how the IRS does art valuations for tax purposes); John G. Steinkamp, *Fair Market Value, Blockage, and the Valuation of Art*, 71 DENV. U. L. REV. 335, 340–63 (1994) (same).

<sup>185</sup> Many of the appraisers spoke about using the good/better/best standard to judge works in an artist’s oeuvre. *See, e.g.*, Telephone Interview with Susan McDonough, *supra* note 170; Telephone Interview with Meredith Meuwly, Director of Appraisal Services, Heritage Auctions Appraisal Services (Nov. 2, 2015); Telephone Interview with Laurie Triplette, *supra* note 171.

challenge to the appraiser's discernment and reason giving abilities.<sup>186</sup> They must ascertain how the brushwork compares to the artist's other efforts. Is it noticeably energetic? Is the color palette harmonious? Is the composition distinctive? Does the piece say anything about Gilded Age femininity? Finally, the appraiser must record all of this information—the entire basis for the valuation—in a written report prepared for the client.<sup>187</sup>

Market skeptics see little good in any of this. They argue that such pricing decisions fail to value artwork in the right way. Markets, so their argument goes, transform unique things into soulless commercial products. Arch-anticommodificationist Elizabeth Anderson even suggests that those who engage in ranking and valuation of art are “philistines, snobs, and prigs, precisely those least open to a free exploration and development of their aesthetic sensibilities.”<sup>188</sup> But that is quite wrong. Commodification does not render these artworks flat and fungible. And it is not carried out by Philistines. Just the opposite. Putting an accurate price on sacred objects demands education, rigorous training, and cultivation of the eye.<sup>189</sup> Appraisers must understand the objects on an intimate level in order to properly evaluate their quality and make suitable comparisons between seemingly disparate works.<sup>190</sup> Such knowledge only enhances appreciation for the way that creative work can exhilarate, sooth, baffle, enlighten, and uplift.

The interviews are littered with examples of the educational power of markets. As one respondent explained, “[t]he training changed the way I thought about art. I learned about history and context, and my whole vision of what was ‘art’ changed. I became interested in regular items. And craft. It really opened my eyes to a whole new world.”<sup>191</sup> Another appraiser, Deborah Force, described how her apprenticeship sharpened her eye and

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<sup>186</sup> See WILLIAM IAN MILLER, *EYE FOR AN EYE* 169 (discussing the difficulty of ranking works of art).

<sup>187</sup> See Telephone Interview with Jennifer Carmen, *supra* note 171 (“An appraisal is a written opinion based on facts.”).

<sup>188</sup> Elizabeth Anderson, *Practical Reason and Incommensurable Goods*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 90, 99–100 (Ruth Chang ed., 1997).

<sup>189</sup> Half of the respondents had earned an advanced degree, most in art history.

<sup>190</sup> See, e.g., Telephone Interview with Helaine Fendelman, *supra* note 165 (explaining that she developed her connoisseurship by buying and selling furniture over a decades long period); Telephone Interview with Debra Force, *supra* note 166 (discussing the extensive training she underwent as a junior appraiser); Telephone Interview with Suzanne Smeaton, *supra* note 169 (discussing her forty years of experience working with frames and the difficulty of developing a critical eye for the important details).

<sup>191</sup> See also Telephone Interview with Mark Topalian, President, M. Topalian Fine Antique Carpets (Nov. 23, 2015) (explaining that the appraiser work changes the way you see the objects).

developed her connoisseurship of modern paintings. “I’ve learned so much about new areas,” she said, “[w]hen I was at Christie’s, my boss would quiz me all the time. Is this good? Is this good? It was often things I’d never seen, and artists I’d never seen. I had to try and articulate what I liked about it or why it failed. Sometimes I got it right. Sometimes wrong. But I looked at as much as I could.”<sup>192</sup> Suzanne Smeaton, the foremost American appraiser of antique frames, related a similar experience that occurred at the beginning of her career. “The hardest thing to learn was whether gilded surfaces were original or restorations. When I started, I couldn’t tell the difference.”<sup>193</sup> But, slowly, things changed. Smeaton recalled, “You learn by looking and seeing many, many objects and many surfaces. And seeing the finest examples of the type gives context. You start to see that gold leaf takes on this particular patina over time. It has a richness and beauty . . . . I’m hyperaware of it.”<sup>194</sup> Far from turning paintings into fungible commodities—as many anti-commodificationists warn—putting prices on artistic masterpieces forces appraisers to consider what makes them distinctive. As one interviewee explained, even the most renowned painters have good days and bad days in the studio.<sup>195</sup> It is the appraiser’s job to understand the subtle differences and explain why the gems should not sell for costume jewelry prices.

This study of art appraisers suggests that commodification poses few real dangers to our moral commitments and transcendental ideologies. Nevertheless, participating in the market for sacred goods did not have completely salubrious effects for all respondents. First, a small minority of appraisers did not experience a complete separation between their professional work and their private enjoyment of art. One related, “I can’t always turn [the appraiser part of my brain] off, not completely. I recently went to a museum in Vienna. It was *lovely*. I walked around and picked out all of my favorite things. Now, the things I choose weren’t all the most valuable things in the museum. But while I was doing it, I did think about prices.”<sup>196</sup> Another appraiser had similar feelings, “[the professional work] does leak in a little. Because I follow the market, I know what Alice Walton paid for Asher Durand’s *Kindred Spirits*. So when I visit Crystal Bridges [a prominent museum of American art], it’s in the back of my mind: ‘God, she paid too much.’”<sup>197</sup>

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<sup>192</sup> Telephone Interview with Debra Force, *supra* note 166.

<sup>193</sup> Telephone Interview with Suzanne Smeaton, *supra* note 169.

<sup>194</sup> *Id.*

<sup>195</sup> Telephone Interview with Todd Sigety, *supra* note 171 (“Monet had bad days.”).

<sup>196</sup> Telephone Interview with Elizabeth Von Habsburg, Managing Director, Winston Art Group (Sept. 11, 2015).

<sup>197</sup> Interview with Shannon Dillard Mitchell, *supra* note 180.

Market skeptics might be tempted to latch onto these quotes as evidence of corruption. After all, they demonstrate that concerns about monetary value can seep across internal barriers and touch the appraisers' intimate experiences. The appraisers themselves, however, push back on the notion that thinking about price somehow demeans or devalues the paintings they love. Howard Nowes is typical of the minority who could not "tone down" or "turn off" their training. He admitted that when he looks at art "[t]he dealer/appraiser part of the brain is always whirling."<sup>198</sup> He maintained, however, that he could simultaneously appreciate an object's higher order values and contemplate its price. "When I'm in a museum," Nowes said, "I'm looking at how magic the object is. But, at the same time, I'm also thinking about its value."<sup>199</sup> Likewise, Allison Gee insisted that she can see art "both ways"—in purely monetary terms and as "provocative," "poignant," and brimming with "social significance."<sup>200</sup> For these appraisers, discussions of price and value do not degrade creative masterpieces.<sup>201</sup> Rather, artworks exist like a kind of rabbit-duck illusion; the objects' two aspects may momentarily blend together, but neither ultimately undermines or overwhelms the other.

One other small concern emerged from the interviews. While all appraisers had cultivated deep appreciation for best-of-type works, some evidenced a rather dim view of lower grade artistic efforts. "At a really good exhibition, I feel refreshed," said Karen McManus, "but you do get a little jaded against the \$500 pieces after you've been doing it a while."<sup>202</sup> Joseph Brady, the silver appraiser, agreed: "[seeing art] is still a rush. Oh, yes. Every time. [pause] Well, maybe not when I get called in to appraise 1950s flatware."<sup>203</sup> One appraiser put things quite candidly, "It's . . . made me snobby. Prints from Target don't cut it anymore."<sup>204</sup> Can market skeptics use these sentiments to prop up their arguments about corruption? Perhaps. Seen through one lens, it appears that pricing work has tarnished

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<sup>198</sup> Telephone Interview with Howard Nowes, *supra* note 167.

<sup>199</sup> *Id.*

<sup>200</sup> Telephone Interview with Allison Gee, *supra* note 164. *See also* Telephone Interview with Mark Topalian, *supra* note 191 (expressing continued enchantment with art but a recognition that appraisal work had permanently altered how he viewed objects).

<sup>201</sup> For another example of viewing a sacred thing as both commodified and not, *see* Kimberly D. Krawiec, *Markets, Morals, and Limits in the Exchange of Human Eggs*, 13 *GEO. J. L. & PUB. POL'Y* 349, 354–56 (2015) (discussing the cultural understanding of the market for human eggs).

<sup>202</sup> Telephone Interview with Karen McManus, *supra* note 169.

<sup>203</sup> Telephone Interview with Joseph Brady, *supra* note 165.

<sup>204</sup> Telephone Interview with Meredith Meuwly, *supra* note 185. *See also* Telephone Interview with Kirsten Smolensky, Appraiser, Minerva Appraisal (Nov. 17, 2015) ("I've seen so much really good stuff that the average stuff isn't as exciting.").

the appraisers' enjoyment of some accessible, blue-collar forms of art.<sup>205</sup> But is that the best reading of the interview data? Might it not be that appraisers have simply developed enough critical appreciation to accurately evaluate the quality of Ikea bedroom sets and mass-produced dorm posters? After all, it is not "corruption" when we feel disappointed by a Kit-Kat bar after tasting a Teuscher chocolate truffle. Similarly, our opinions about cheaply-made jean shorts are not "defiled" by an encounter with high-end denim. It seems more accurate to say that new insights and improved discernment enable more exacting judgements. This—and not corruption—is the dark side of appraisal work. The training bestows added appreciation for best-of-type works, but it also reveals the limitations of average things and everyday objects.<sup>206</sup>

Pulling all of this together, even if we regard a certain amount of snobbishness as a cost of the appraisers' market work, the interviews do not support the dominant theory that commodification despoils sacred goods, moral beliefs, or fundamental values. The professionals that I spoke to proclaimed—often vigorously—that they remained passionate about art and the creative process. Not one respondent conceded that the market corrupted their views. Even decades-long immersion in the world of commerce seemed to have little effect on the ability to see meaning, beauty, and spiritual import in artistic masterworks. In fact, the appraisers described their pricing work as a lifelong educational boot camp, which deepened their understanding of art and their appreciation for artistic accomplishment. Suzanne Smeaton, the frame appraiser, summarized the findings: "[s]eeing a terrific marriage of frame and picture is still a moving experience after all these many years. It's magical and I never tire of it. Actually, if anything, I'm more susceptible to being enchanted by great frames now, because I know more."<sup>207</sup> Thus, in the realm of appraisal work, commodification does not appear to corrupt the sacred, but rather provides an augur where new insights can grow.

## B. *Male Escorts*

### 1. Background

The art world is not the only locus of the market skeptics' worries. Among anti-commodification scholars, nothing causes more consternation

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<sup>205</sup> See Telephone Interview with James Supp, *supra* note 168 ("Ninety percent of the stuff I see is Ikea bedroom sets. You get tired of that.").

<sup>206</sup> See Telephone Interview with Suzanne Smeaton, *supra* note 169 (admitting that her four decades of experience in the art world had transformed her into something of a "frame snob").

<sup>207</sup> Interview with Suzanne Smeaton, *supra* note 169.



than sex work and the status of prostitutes.<sup>208</sup> In a sprawling literature, commentators have argued that exchanging sex for money “commodif[ies] sexuality,”<sup>209</sup> degrades intimacy,<sup>210</sup> “impedes human flourishing,”<sup>211</sup> and foments attitudes that undermine the sacredness of the body.<sup>212</sup> In short: market skeptics believe that prostitution corrupts the meaning of sex.<sup>213</sup> Physical intimacy becomes something far grimmer and more transactional for both escorts and their customers. And, over time, market thinking can spread like a virus—seeping into the larger culture and driving out non-commodified understandings of physical love.<sup>214</sup>

Despite the sustained attention on commercial sex and its dangers, the same problem that plagued academic analysis of art appraisers reappears in the literature about escorts; scholars have gorged themselves on theoretical arguments but have largely failed to test their theories with any empirical rigor. The data on the private lives of escorts is “very limited.”<sup>215</sup> In particular, the romantic relationships and sexual satisfaction of prostitutes, outside of work, have “not been studied extensively . . . .”<sup>216</sup> As one research team noted, “[w]e are not aware of any research which explores

<sup>208</sup> See, e.g., SATZ, *supra* note 3, at 119; Jennifer Nedelsky, *Property in Potential Life?: A Relational Approach to Choosing Legal Categories*, 6 CAN. J.L. JURIS. 343, 348 (1993) (“[B]eing a commodity, is of course, the opposite of empowerment. It is not only being subject to someone else’s power and control, but being denied the status as a person.”).

<sup>209</sup> PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT* 145 (1990). See also Melissa Farley, *Prostitution and the Invisibility of Harm*, 26 WOMEN & THERAPY 247, 263 (2003) (“In all prostitution there is commodification of the woman’s body.”).

<sup>210</sup> See SATZ, *supra* note 3, at 143. See also Radin, *supra* note 4, at 1908 (“Commodified sex leaves the parties as separate individuals and perhaps reinforces their separateness . . . .”); Kate Holmquist, *Does Prostitution Demean, Degrade and Dehumanise the Buyers of Sex?*, IRISH TIMES (Nov. 11, 2014), <https://www.irishtimes.com/news/social-affairs/does-prostitution-demean-degrade-and-dehumanise-the-buyers-of-sex-1.1996462>.

<sup>211</sup> Lucas, *supra* note 42, at 250.

<sup>212</sup> The theologian Thomas Merton has laid out an idealized vision of non-commercial Christian eros. He says, “[t]he act of sexual love should be by its very nature joyous, unconstrained, alive, leisurely, inventive and full of a special delight which the lovers have learned by experience to create for one another.” THOMAS MERTON, *LOVE AND LIVING* 117 (1965).

<sup>213</sup> Feminist scholars have been particularly harsh in their judgement of prostitution. See SATZ, *supra* note 3, at 147 (arguing that “prostitution embodies an idea of women as inferior”). See also COLLINS, *supra* note 209, at 144–45 (1990) (discussing the racial dimensions of prostitution and commodified sex).

<sup>214</sup> See Martha M. Ertman, *Mapping the New Frontiers of Private Ordering: Afterword*, 49 ARIZ. L. REV. 695, 704 (2007); Lucas, *supra* note 42, at 250.

<sup>215</sup> Clare Bellhouse et al., *The Impact of Sex Work on Women’s Personal Romantic Relationships and the Mental Separation of Their Work and Personal Lives: A Mixed-Methods Study*, 10 PLOS ONE 1, 1 (2015).

<sup>216</sup> *Id.* at 4.

how sex with paying customers is related to a prostitute's private sex life . . . ."<sup>217</sup> In the face of this scholarly lacuna, it appears that anti-commodification scholars have uncritically accepted the prevailing view that commercial sex work taints the sacredness of intimate acts. This exploratory study now erects an experimental scaffolding to test that assumption. Is sex work harmless? Or does exchanging sex for money corrupt important values and moral beliefs?

## 2. Methodology

To better understand the potential dangers, I interviewed ten male escorts from around the United States about their experiences in the commercial sex market. To recruit participants, I contacted escorts through the website *rentmen.com*, which facilitates the provision of erotic services.<sup>218</sup> Websites like *rentmen.com*, *squirt.org*, and *boytoy.com* allow male prostitutes to display photographs of themselves and post advertisements that disclose the variety of services they provide. My contact message briefly described the project, asked the escorts to share how their work affected their private romantic relationships, and offered a \$100 recruitment incentive to spur participation.<sup>219</sup> To better protect the identities of the sex workers, the initial email also invited the respondents to use a pseudonym in all communications with me. The experimental design produced an exceptionally good response rate. Over eighty-five percent of the male escorts that I contacted agreed to a telephone interview.<sup>220</sup> Ultimately, the men I spoke with ranged in age from twenty-two to forty-four (the average age was thirty).<sup>221</sup> They generally visited

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<sup>217</sup> Leonard Savitz & Lawrence Rosen, *The Sexuality of Prostitutes: Sexual Enjoyment Reported by Streetwalkers*, 24 J. SEX RES. 200, 202 (1988).

<sup>218</sup> For more on the escort website market, see Navin Kumar et al., *A Global Overview of Male Escort Websites*, 16 J. HOMOSEXUALITY 1731 (2017).

<sup>219</sup> Among scholars, recruiting prostitutes to talk openly about their experiences remains a notoriously difficult task. Sex work in the United States is heavily stigmatized and criminal laws subject prostitutes to steep penalties. As a result, few individuals are willing to discuss their involvement in the sex trade with a stranger—especially one armed with a recording device. In this context, the payment served several important functions; it provided an important spur to participate, verified that I was not a voyeur looking to hear about their sexual experiences (a surprisingly common problem for escorts), and demonstrated respect for the time and efforts of the sex workers.

<sup>220</sup> I attribute the high rate of response to both the generous compensation and to the design of the *rentmen.com* website. *Rentmen* allows “clients” to contact sex workers through a web-based messaging tool rather than confronting them on the street or surprising them with a phone call. The ability to craft written messages allowed me to carefully explain the study and build some rapport with the participants ahead of the interview. Potential interviewees could also confirm my identity and the legitimacy of my project before responding to my request.

<sup>221</sup> This figure comports with other studies of male escorts. In a demographic study of 2

between two and four clients in a week and had an average of 2.5 years of experience in the business.

Unfortunately, like all research on prostitution, this study has a number of serious limitations. Foremost, the results are based on a small sample of unrepresentative sex workers.<sup>222</sup> The findings may not be generalizable to the larger population. Additionally, the men I interviewed did not have the same kind of rich market engagement as the art appraisers. I sought out escorts with significant experience, using the number of their client reviews as a proxy for longevity. Nevertheless, the men I spoke with had an average of only 2.5 years of experience in the business—not ideal for a study of the long-term effects of commodification.

Some commentators will also object to the decision to focus on male sex workers. Most prostitutes—the overwhelming majority—are women.<sup>223</sup> For this reason, “gender is considered a central issue in commercial sex.”<sup>224</sup> I concede at the outset that the results of this study would likely have been different if I had interviewed women. Further, I acknowledge that lawmakers cannot design thoughtful policy about prostitution without understanding the perspectives of female sex workers. So why study male escorts?

Interviewing men offers one absolutely critical advantage: the market for male sex workers is more open, efficient, and well-developed than the market for female prostitutes. As a result of gendered norms among law enforcement officers, male prostitution “has received little intrusion from legal authorities.”<sup>225</sup> Male escorts have more freedom to advertise

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thousand escorts, Trevon Logan found that the average male sex worker is twenty-eight years old. TREVON D. LOGAN, *ECONOMICS, SEXUALITY, AND MALE SEX WORK* 31 (2017).

<sup>222</sup> My sample was slightly older and slightly whiter than the national pool of male escorts. Professor Logan’s large-scale study of escort advertisements found that approximately “54 percent of male escorts are white, 22 percent are black, 14 are Hispanic, 8 percent are multiracial, and 1 percent are Asian.” LOGAN, *supra* note 221, at 34. Of the men I interviewed, seven were white, one was Hispanic, one was black, and one was Asian.

<sup>223</sup> The exact “ratio of female to male prostitutes is unclear.” Jacqueline Cooke & Melissa L. Sontag, *Prostitution*, 6 *GEO. J. GENDER & L.* 459, 470 (2005). Some estimates put the proportion of female prostitutes at around eighty percent of the total. *See, e.g.*, Gus Lubin, *There Are 42 Million Prostitutes in the World, and Here’s Where They Live*, *BUS. INSIDER* (Jan. 17, 2002), <https://www.businessinsider.com/there-are-42-million-prostitutes-in-the-world-and-heres-where-they-live-2012-1>. Almost all authorities agree that “most prostitutes are women.” *See, e.g.*, Ole Martin Moen, *Is Prostitution Harmful*, 40 *J. MED. ETHICS; LONDON* 73, 77 (2014). *See also* CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 160 (2005) (discussing prostitution through the lens of gender and civil rights); Catherine A. MacKinnon, *Prostitution and Civil Rights*, 1 *MICH. J. GENDER & L.* 13 (1993) (same).

<sup>224</sup> Giulia Garofalo, *Sex Work Through Gender*, ICRSE, [http://www.sexworkeurope.org/sites/default/files/resource-pdfs/sexwork\\_thru\\_gender.pdf](http://www.sexworkeurope.org/sites/default/files/resource-pdfs/sexwork_thru_gender.pdf) (last visited Feb. 28, 2020).

<sup>225</sup> LOGAN, *supra* note 221, at 2. *See also* Cooke & Sontag, *supra* note 223, at 473

aggressively, catalogue their prices, and openly list their contact information. Moreover, “unlike their female counterparts, male sex workers usually work independently.”<sup>226</sup> In the male sex trade, individual escorts rather than pimps or traffickers remain broadly responsible for setting prices and developing marketing strategies. Thus, male sex workers are, on average, more directly enmeshed in the market than their female counterparts—a vital fact for a study about commodification.<sup>227</sup>

### 3. Results

The experiences of male sex workers call into question some of the more harrowing predictions of the anti-commodification literature. As discussed above, market skeptics have long theorized that active sex markets would coarsen relationships, cheapen the meaning of sex,<sup>228</sup> and undermine human flourishing.<sup>229</sup> Yet, the escorts I interviewed insisted that selling physical intimacy did not corrupt their understanding of sex. While the physical demands of the job often left the interviewees feeling exhausted, each of the prostitutes revealed that they continued to experience the loving (and joyfully profane) virtues of the sexual act. Indeed, a majority of escorts confided that their market work positively impacted their private lives—commercial sex honed their sexual skills, boosted their confidence, and deepened their understanding of other men. Based on the data gathered here, it appears that anti-commodificationists have exaggerated the strength of their claims: sex is not some delicate crystal whose meaning shatters on impact with the market.

All of the prostitutes in this study insisted that they still derive real

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(stating that “police more aggressively target female sex workers as opposed to male sex workers”).

<sup>226</sup> Trevon D. Logan, *Personal Characteristics, Sexual Behaviors, and Male Sex Work: A Quantitative Approach*, 75 AM. SOC. REV. 679, 681 (2010).

<sup>227</sup> Centering male escorts provides another important benefit; it removes the stubbornly perverse gender dynamics that accompany the typical transaction for sexual services between a female escort and male client. For female prostitutes, the specter of rape and patriarchal domination always looms. This ever-present threat of physical violence can make it difficult to untangle and analyze prostitutes’ attitude toward the sexual act. Does commodification affect their views about intimacy? Or have their ideas about sex been shaped by the gendered violence they experience, the economic forces that push them into the business, and the unfair cultural stigmas that attach to women who have casual relationships with multiple partners? Focusing on male escorts eliminates some of these exogenous variables. Although data about prostitution is always murky, when both buyer and seller are men it allows a sharper focus on the role of markets and commodification in shaping attitudes about sex.

<sup>228</sup> See SATZ, *supra* note 3, at 142 (explaining how prostitution may “obscur[e] the nature of sexual relationships”).

<sup>229</sup> Professor Radin posits that unchecked commodification “could destroy personhood as we know it.” Radin, *supra* note 4, at 1926.

pleasure and intimacy from sleeping with men in non-commercial settings. Jake, a married thirty-year-old from New Orleans, found that the paid sex work did little to dampen his enthusiasm for recreational sex. “I engage in different types of sexual activity,” he said, “just for my own fun and pleasure, whether that’s a dark room in a bar, or picking guys up on Grindr and having them over for the morning.”<sup>230</sup> While the other interviewees may have lacked Jake’s zeal for causal encounters, they concurred that sex remained an affirming and welcome part of their relationships. Steve, a forty-four-year-old married Texan who supplements his family’s income with escort work, still relishes sleeping with his husband. “Oh, yes. I like to have sex. Absolutely. I mean, it’s a good thing . . . . [W]e still have a healthy sex life and [we’re] still kind of exploring and getting adventurous at home as well.”<sup>231</sup> Oliver, who also has a long-term partner, agreed that it is “definitely” possible to engage in commercial sex while having a fulfilling private sex life. “Yeah,” he said, “I can’t really think of many ways which [commercial sex] might be negative.”<sup>232</sup> Other respondents affirmed that they continued to value non-commercial sexual encounters, saying things like: “I do have good sex,”<sup>233</sup> “[t]here’s definitely a passion [for sex],”<sup>234</sup> and “[the work] hasn’t impacted my enjoyment.”<sup>235</sup>

A majority of the men also asserted that they could easily erect and maintain boundaries between their market roles and their private selves.<sup>236</sup> Tyler summarized the views of many of the informants. “For me it is really easy to keep the two separate,” he said, “[w]ith [my partner] . . . it feels a lot more intimate.”<sup>237</sup> Steve also had become adept at maintaining a separation between his work role and responsibilities at home. “I’m very good at compartmentalizing,” he insisted, “[t]here’s a difference between sex and love . . . . There’s a huge difference between going through the motion versus actually being in love with someone. That’s something that I feel internally . . . .”<sup>238</sup> Harry, too, said that work sex is a “separate”

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<sup>230</sup> Telephone Interview with Jake, Male Escort (Mar. 10, 2017).

<sup>231</sup> Telephone Interview with Steve, Male Escort (Mar. 10, 2017).

<sup>232</sup> Telephone Interview with Oliver, Male Escort (Mar. 13, 2017).

<sup>233</sup> Telephone Interview with Alvin, Male Escort (Mar. 6, 2017).

<sup>234</sup> Telephone Interview with Ty, Male Escort (Mar. 13, 2017).

<sup>235</sup> Telephone Interview with Tyler, Male Escort (Mar. 8, 2017).

<sup>236</sup> *But see* Gillian M. Abel, *Different Stage, Different Performance: The Protective Strategy of Role Play on Emotional Health in Sex Work*, 72 SOC. SCI. & MED. 1177, 1182 (2011) (discussing sex workers who formed unreciprocated emotional attachments to clients); Brewis & Linstead, *supra* note 140, at 84 (“Prostitutes, due to the intensity and intimacy of their physical involvement in their work, do not necessarily find the distancing process easy.”).

<sup>237</sup> Telephone Interview with Tyler, Male Escort (Mar. 8, 2017).

<sup>238</sup> Telephone Interview with Steve, *supra* note 231.

thing.<sup>239</sup> He elaborated: “[y]es, it is different, because there’s not, typically, emotional connection. It’s strictly business.”<sup>240</sup> For these men, the boundary between personal sex and commercial sex seemed like a natural divide that required only light policing.

This finding may surprise anti-commodificationists. How have escorts managed to so easily resist the pull of market thinking? The answers varied significantly between individuals. Some embraced the use of an escort pseudonym to help cement the distance between home and work spheres—a common practice among escorts around the globe.<sup>241</sup> Another group manufactured a work identity fundamentally different from the persona they presented in private domains.<sup>242</sup> Tyler, for instance, crafted a swashbuckling personality that he could slip into during work hours: “I put on at least a little bit of persona, a little extra bravado or something. I stay maybe a bit more active when I’m working. At that point I’m trying to really please the customer.”<sup>243</sup> Alvin assumed a similarly assertive identity when escorting, “[i]t’s a lot of work,” he said, “and it’s a lot of acting.”<sup>244</sup>

Other men eschewed such performative masks, and focused instead on creating tactile, physical differences between their commercial and non-commercial encounters.<sup>245</sup> Tyler, for instance, did not adopt an outrageous

<sup>239</sup> Telephone Interview with Harry, Male Escort (Mar. 15, 2017).

<sup>240</sup> *Id.*

<sup>241</sup> See Teela Sanders, “*It’s Just Acting: Sex Workers’ Strategies for Capitalizing on Sexuality*,” 12 GENDER, WORK & ORG. 319, 330 (2005) (“The pseudonym, which is universal in the sex industry, is an important stage prop that sex workers adopt in order to act their role . . .”). See also Brewis & Linstead, *supra* note 140, at 90 (discussing actions sex workers take to separate work from personal life). *But see* Telephone Interview with Ken, Male Escort (Mar. 4, 2017) (discussing how he does not bother to use a pseudonym).

<sup>242</sup> Other researchers who study prostitution have noted that such self-programming helps to preserve the distinction between work and the private sphere. See Jan Browne & Victor Minichiello, *The Social Meanings Behind Male Sex Work: Implications for Sexual Interactions*, 46 J. SOC. 598, 611 (1995); Sanders, *supra* note 241, at 322 (“These processes produce emotional management strategies that protect individual women from the potential stresses of selling sex . . .”).

<sup>243</sup> Telephone Interview with Tyler, *supra* note 206. Professor Sanders has discussed extensively how prostitutes create their work identities. See Sanders, *supra* note 241, at 328.

<sup>244</sup> Telephone Interview with Alvin, *supra* note 233. Ken, on the other hand, took on a more submissive role. “When I’m with a client, I’m more likely to be more quiet. But in my dating life, when I’m out for sex, it’s like all bets are off. I feel more comfortable. Like, game for whatever. I think when I’m with clients, I’m more reserved and kinda more quiet . . .” Telephone Interview with Ken, *supra* note 241.

<sup>245</sup> Some sociologists see these distancing strategies as essential to maintain the mental health of sex workers. See Deborah J. Warr & Priscilla M. Pyett, *Difficult Relations: Sex Work, Love & Intimacy*, 21 SOC. HEALTH & ILLNESS 290, 301 (1999) (“The integral connection between sexuality and sense of self necessitates the adoption of strategies by the

persona or stage name when at work. Instead, he only had unprotected sex with his private partner—his husband.<sup>246</sup> The presence or absence of a condom marked a clear boundary between his nurturing relationship sex and his commercial endeavors.<sup>247</sup> Similarly, Shawn, a twenty-nine year old from Oklahoma City, actively structured his personal sexual encounters to conform with social expectations of “normality.”<sup>248</sup> “When I do decide to have sex in my private life,” he said, “it’s more so geared to the things that make me more comfortable . . . . I like a little bit of ambiance.”<sup>249</sup> He continued, “[i]f I’m going to have sex in my private life, I don’t want to rush it. I don’t want to look at the clock and know how much time I have left . . . . You know, that sort of thing. I like for things to be a little bit more relaxed.”<sup>250</sup> Vincent, a twenty-seven year old with two years of experience, employed the most radical strategy to demarcate work sex from personal sex. In his private life Vincent identified as heterosexual and only had sex with women. “I can keep them separate,” he said, “because I’m straight. With women, sex is a totally different thing.”<sup>251</sup> Thus, it appears sex work is not the mere transference of personal sexual behaviors into the commercial setting, but rather, a type of sexual performance distinct from the norms and routines of the private bedroom.<sup>252</sup> The two can be kept apart.

This negotiability of sexual meaning undermines one of the market skeptics’ core claims. Recall that much of the campaign against prostitution rests on the premise that commerce inescapably tarnishes the sacredness of sex. Yet, the data from this study show that corrosion is not inevitable.<sup>253</sup> The interviewees stress that they successfully cordoned off

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sex worker to distance herself from the sexual uses that are made of the body in prostitution.”).

<sup>246</sup> Telephone Interview with Tyler, *supra* note 235. It is not uncommon for female escorts to keep some parts of their bodies off limits. See Abel, *supra* note 236, at 1180; Brewis & Linstead, *supra* note 140, at 90; Warr & Pyett, *supra* note 245, at 301.

<sup>247</sup> Recent scholarship on female sex workers confirms the symbolic importance of the condom. Interviews consistently show that women in the sex industry use condoms to maintain a distinction “between sex with clients and sex with private partners.” Warr & Pyett, *supra* note 245, at 299, 304. See also Abel, *supra* note 236, at 1182; Bellhouse et al., *supra* note 215, at 3; Brewis & Linstead, *supra* note 140, at 89.

<sup>248</sup> See Abel, *supra* note 236, at 1177.

<sup>249</sup> Telephone Interview with Shawn, Male Escort (Mar. 8, 2017).

<sup>250</sup> *Id.*

<sup>251</sup> Telephone Interview with Vincent, Male Escort (Mar. 6, 2017).

<sup>252</sup> Sanders, *supra* note 241, at 329.

<sup>253</sup> Although she did not investigate the commodification of sex, Gillian Abel’s study of female prostitutes emphasized the women’s ability to separate home and work. Abel, *supra* note 236, at 1181 (finding that “most participants in this study were adept at maintaining the separation of their public and private roles”). See also Browne & Minichiello, *supra* note

their commercial activities and protected the intimacy of their private worlds. For these men, sex remained a joyful and cherished activity, even after years of selling their bodies. In truth, the lack of contamination should not entirely surprise anti-commodificationists. Decades of research from psychology and sociology have established that employees in many other industries “effectively separate [the] self from the role they play at work.”<sup>254</sup> Doctors, entrepreneurs, and service workers all maintain psychological boundaries that distance the home sphere from occupational pressures.<sup>255</sup> The interviews compiled here provide evidence that escorts, too, effectively protect their inner worlds from the threatening effects of bargain and sale. Market skeptics, in their rush to promote the idea that commerce inevitably coarsens the good life, seem to have overlooked this nuance.

Anti-commodificationists have also ignored the possibility that prostitution might, on balance, have valuable long-term impacts on the inner-worlds and relationships of sex workers. On first blush, this may seem unlikely. Is it really possible that selling intimacy—getting naked with strangers in exchange for money—could bolster appreciation for fundamental values? The respondents in this study largely answered in the affirmative. A strong majority of the escorts reported that engaging in commercial sexual activities actually *improved* the quality of their private lives and their appreciation for sacred things.<sup>256</sup> Just as appraisal work

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242, at 606–11 (discussing how male prostitutes categorize their sexual interactions); Joanna Phoenix, *Prostitute Identities*, 40 BRIT. J. CRIMINOLOGY 37, 43 (2000).

<sup>254</sup> Abel, *supra* note 236, at 1178.

<sup>255</sup> See generally CHRISTENA W. NIPPERT-ENG, HOME AND WORK: NEGOTIATING BOUNDARIES THROUGH EVERYDAY LIFE 7–17 (1996) (discussing different approaches to separating work and home); Sue Campbell Clark, *Work/Family Border Theory: A New Theory of Work/Family Balance*, 53 HUM. REL. 747, 756 (2000) (examining the types of borders between home and work).

<sup>256</sup> Of course, it should be noted that the most commonly reported benefit of escort work was the rather mundane acquisition of additional income. The funds generated from selling sex bestowed new economic opportunities and a greater sense of financial independence. Steve applied the extra money to his mortgage, Tyler funded a career change, Ty paid off debt, and Shawn bankrolled some business ventures. Telephone Interview with Steve, *supra* note 231; Telephone Interview with Tyler, *supra* note 235; Telephone Interview with Ty, *supra* note 234; Telephone Interview with Shawn, *supra* note 249. Oliver noted that he felt more confident in his relationship because of the money he earned through massage and escort activities. “I’m able to be more of a breadwinning part of the relationship,” he said, “which has been good, I think, for the relationship . . . I never want to be in this relationship because I feel like I owe someone or it’s convenient financially or that sort of thing, so this sort of removed that out of the equation.” Telephone Interview with Oliver, *supra* note 232. For men who lacked a deep social safety net, forays into prostitution often allowed them to keep a firm grip on their middle-class aspirations in times of upheaval. It is worth noting that none of the respondents viewed escort work as a long-term path to financial prosperity. Rather, they used sex work as a flexible supplement to other jobs or as an emergency source



revealed new insights about the creative process, prostitution taught the interviewees about the complexity of desire, gave them a deeper understanding of the sexual act, and enhanced their ability to satisfy a private partner.<sup>257</sup> The interviews are rich in significant details on this point. As Jake pithily explained, “I’m really good at [sex]. [I]t’s just like any skill. It takes practice.”<sup>258</sup> He elaborated,

I’m a top, and it’s just like I’m a lot more in-tune with what people want . . . . Different people want different things. Picking up on different body language. Some people want it really rough and hard, and other people want it a little more delicately. I think one thing is . . . just having the confidence of knowing, like, when you start to do the foreplay, when the foreplay becomes heavy, and when you can transition into sex. You know, it’s almost just like an experience thing.<sup>259</sup>

Shawn agreed that the commercial work had a positive impact on his understanding of sex. “I think having to be so many different things to so many different people—you know, when you’re working—I think that’s kind of made me better at sex overall.”<sup>260</sup> Ken, too, argued that he benefited from the sexual knowledge he acquired during work. He said, “[y]ou definitely learn to do things that maybe you didn’t think about . . . . [Y]ou definitely learn what everyone’s flavor is.”<sup>261</sup>

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of income during times of restricted cash flow. Tyler’s story is typical. He entered the sex industry after deciding to change careers and return to school: “I was looking at student jobs and I really needed something that would give me a lot of flexibility. Something that would still pay the bills. Actually, I’m married . . . . We own a house that needed to be able to keep that. So, I needed something that would pay more than eight bucks an hour.” Telephone Interview with Tyler, *supra* note 235. Responses like Tyler’s serve as an important reminder of the ways that gender impacted the results of this study. Male prostitutes are less heavily policed, less likely to suffer the attentions of a pimp, and less stigmatized within their communities. All of this makes it easier for men to capture the monetary benefits of their work than their female counterparts.

<sup>257</sup> The educational function of market work is mentioned tangentially in some academic work on female prostitutes. *See, e.g.*, Brewis & Linstead, *supra* note 140, at 89, 94 (describing prostitutes who had learned to make their clients orgasm quickly). One of the best papers on the sex lives of female escorts is a twenty-year-old piece by Professors Savitz and Rosen. *See* Savitz & Rosen, *supra* note 217, at 200. Savitz and Rosen found prostitution had a beneficial impact on the sex lives of most female escorts. *Id.* at 207. *See also* Bellhouse et al., *supra* note 215, at 9 (stating that prostitution improves the private sex lives of escorts).

<sup>258</sup> Telephone Interview with Jake, *supra* note 230.

<sup>259</sup> *Id.*

<sup>260</sup> Telephone Interview with Shawn, *supra* note 249. *See also* Sanders, *supra* note 241, at 330 (discussing how female prostitutes learn to fake orgasms and sexual excitement from other sex workers).

<sup>261</sup> *See also* Telephone Interview with Alvin, *supra* note 233 (“I’m learning a whole lot more about how to be more efficient when I’m having sex, and like maybe what feels good,

Market skeptics may view these admissions through a rather dark prism, arguing that commodification simply turns all sex into a crass search for the most extreme carnal pleasures. The interviewees, however, resisted that outlook. They stressed that the knowledge gleaned through their work affirmed their private loving relationships. Steve, for example, felt that his escort work improved the companionate sex in his marriage. He enjoyed that he could share what he learned on the job with his husband. “[I]f anything, my work life has broadened my adventures in the bedroom at home,” he said, “I bring home a new skill, or a new method, or a new trick that I’ve learned, then my husband’s like, ‘[w]ell, that’s interesting. I kind of like that.’”<sup>262</sup> Others, like Harry, reported that the communication skills they learned as prostitutes made them more open-minded and responsive in their personal sexual relationships.<sup>263</sup> Alvin also felt that the commercial work taught him to focus more attentively on his partner’s needs during his personal sexual escapades: “so I’m feeling good. Is this person feeling good? What can I do to make them feel better? It’s that kind of interplay that still occurs in my head, even when I’m having casual sex [in my private life].”<sup>264</sup> Thus, far from turning sex into a flat and interchangeable commodity, market work deepened the escorts’ understanding of physical intimacy. Sex work instilled the importance of honest communication between partners, revealed that men have many different (and often colorful) needs, and showed that not all fantasies can be met by working off the same script. On these points, the market is an exacting teacher.

Importantly, escort work did more than just bestow a greater appreciation for the joyous, open, and adventurous aspects of the sexual act. Many of the interviewees reported that sex work also bolstered their confidence and reaffirmed the sacredness of the bodies.<sup>265</sup> The impact

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because I feel like I experience sex more with different people.”).

<sup>262</sup> Telephone Interview with Steve, *supra* note 231.

<sup>263</sup> Telephone Interview with Harry, *supra* note 239 (“I kind of have a better communication. Well, because in talking to clients, you know, what they’re into . . . it’s going to help open doors in my personal relationship, to be more open and into things.”).

<sup>264</sup> Telephone Interview with Alvin, *supra* note 233.

<sup>265</sup> As we have just seen in this section, market skeptics have focused enormous attention on the risk that prostitution poses to private sexual relationships. But there is another, less-discussed danger that stalks escorts. Markets for sex—especially online markets—may tarnish how people understand the body. There is a very real fear among anti-commodificationists that a man who prices his body and sells access to his most private anatomy will come to view the human form as a “mere object,” rather than as an integral component of the self. In theory, such a transformation could have deep ramifications. One commentator lamented that nothing less than “how we view and understand ourselves is at stake.” Appel Blue, *supra* note 12, at 112, 116. Paul Ramsey, an early bioethicist, found that the “body is so inseparable from the person that people should not trade in it.” Appel Blue, *supra* note 12, at 85. But is that true? Does sex work inevitably degrade how the

stemmed primarily from the market's ability to make the escorts feel physically desirable. Alvin admitted that before engaging in escort activities he had a "series of insecurities."<sup>266</sup> Becoming a sex worker, however, rebuilt his self-esteem. "It's . . . glamorous to be considered good looking enough or hot enough or sexually appealing enough to be in the sex industry," he said, "and knowing that I'm literally being paid to have sex with this individual because they find me desirable, it kind of—it carries over [into my personal life]."<sup>267</sup> Tyler told a very similar story. "I never really thought I looked that great or that I was that interesting," he said, "[s]o, it was a little weird. I was like: 'wow people give me money to talk to me, touch me for a second' and I'm like 'okay!'.<sup>268</sup> And no one stated more emphatically than Shawn that prostitution has the inherent capacity to re-ignite self-belief and improve body image:

It kind of gave me confidence, you know, when I was going through all of this stuff with losing my job . . . and then going on interviews and being told, "no, you're not good enough," at least twice a week. Then, getting into the industry, as you kind of learn the ropes, as you kind of learn how to navigate the unfamiliar situations that you put yourself in, basically making people's weeks . . . giving them a good experience, them telling you positive comments, telling you that you're really attractive, you're fun to spend time with. It gives you this sense of confidence that you never really had before.<sup>269</sup>

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body is understood. The short answer is no. According to the men in this study, their participation in the market for sexual services had very little effect on how they viewed the human form. In fact, it was often difficult to engage the escorts with the line of questioning about their physiques—they simply did not perceive selling and pricing work as upsetting, difficult, or particularly remarkable. *See, e.g.*, Telephone Interview with Alvin, *supra* note 233; Telephone Interview with Tyler, *supra* note 235.

The escorts who did grapple with the question spoke with surprising nonchalance about both the pricing of their physiques and crafting on-line advertisements to hawk their bodies. They described the process as "not really that weird," "fascinating," "not that big of an issue," and "not that weird." *See* Telephone Interview with Oliver, *supra* note 232; Telephone Interview with Alvin, *supra* note 233; Telephone Interview with Ty, *supra* note 234; Telephone Interview with Tyler, *supra* note 235. When discussing pricing, no one talked about feeling disaffected or alienated from their body, and no one mentioned thinking about their physique as anything like an instrument of commerce. The finding that prostitution is not inherently degrading holds even if we examine the evidence in the light most favorable to the adherents of anti-commodification theory. Of all the escorts, Harry's response was the most supportive of the idea that assigning monetary value to the body erodes its sacredness. And yet, he could only muster that setting prices felt "a little bit strange." Telephone Interview with Harry, *supra* note 239.

<sup>266</sup> Telephone Interview with Alvin, *supra* note 233.

<sup>267</sup> *Id.*

<sup>268</sup> Telephone Interview with Tyler, *supra* note 235.

<sup>269</sup> Telephone Interview with Shawn, *supra* note 249. *See also* Rossler et al., *supra* note

The experience of escorts like Shawn punches new holes in the armor that anti-commodificationists have constructed around their arguments. The respondents' comments suggest that markets may do more to uplift and ennoble sacred things than corrupt or degrade them.

But what about the downsides? Were there any costs to participating in the market for commercial sex? A few. One interviewee did seem to struggle with the border between commercial sex work and his personal intimate encounters.<sup>270</sup> Ken said, "when you start doing this sex work, you obviously get paid for your time. So, when you're not on the clock . . . and just having sex in your spare time for fun, and the back of your mind, you're always thinking, 'damn, I wish I was getting paid for this.'"<sup>271</sup> Yet, even Ken still expressed enthusiasm for engaging in sexual activity in his

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28, at 147 (finding that roughly a third of female sex workers reported that prostitution improved their self-confidence).

<sup>270</sup> Market skeptics may try to argue that I have understated the power of sex work to contaminate the escorts' inner realms. Oliver, for example, reported that the act of commercial sex was "definitely not that different" from relationship sex. Telephone Interview with Oliver, *supra* note 232. "For the most part," he said, "since I'm into older guys . . . I'm not having to fake it. I'm not having to really do anything so different than what I would normally do." *Id.* Is this confession evidence that commerce inevitably slithers out of market spaces and swallows sacred things? Oliver pushed back against that narrative. While he largely enjoyed having sex with his clients, he still attached separate meaning to moments of purchased intimacy. Specifically, Oliver constructed work sex as one part of a larger therapeutic program that he provided to his clients. He estimated that over ninety percent of his patrons sought emotional support as well as an invigorating sexual experience:

I mean, the sex is one thing, but I feel like I'm pretty passionate about a lot of sort of wellness-related things . . . . It's something that I very much value in some of these exchanges. It's nice to know that there is something greater than just the sex that's happening . . . . I mean, when you have a client who cries at the end . . . . I mean, this is not an irregular occurrence for people to have these really powerful [experiences]. I mean, just in the past couple months having a few people who have said things about me changing their life and about seeing things that they've never seen. I mean, it's possible that they're just blowing smoke, but for any of them to be true or in some degree to be true is pretty validating.

*Id.* Market skeptics may also try to use Jake's interview to support their arguments. Jake found work sex "not always very different" from the physical encounters that dotted his private life. Telephone Interview with Jake, *supra* note 230. He did not, however, equate his commercial activities to the intimacy he shared with his husband. Rather, he likened work sex to the quick flings that he enjoyed with anonymous partners. And even that comparison had limits. When engaged with his clients, Jake noted the prominent role of the clock in disciplining his behavior and focusing his attention on the customer's experience. "People that are paying for it," he said, "they want to get the most out of their hour." For Jake, it was possible to construct meaning along a continuum: escort work on one side, relationship sex firmly on the other, and causal encounters in the liminal space between. *See id.*

<sup>271</sup> Telephone Interview with Ken, *supra* note 241.

dating life. He said, “I don’t think [the sex work has] detracted. I tell people all the time that I love sex. If I could have sex every day, I would. I don’t think it could ever really detract from my private life.”<sup>272</sup>

A far more common complaint among the escorts was that work sex supplanted some of the playful casual sex they enjoyed in their personal lives. One interviewee admitted, “[i]t has actually admittedly replaced a lot of the time that I would spend trying to pursue or actually engage in casual sex.”<sup>273</sup> Another concurred, “if I have some off-time now, I’m not necessarily looking for sex. I’m either resting, or I’m at the bar enjoying a drink, just because I like the taste of vodka, not because I’m trying to get laid.”<sup>274</sup> This occurred for three reasons. First, the physical nature of the work coupled with the late hours often left the escorts too fatigued for private erotic encounters. As Alvin explained, “it comes down to the fact that oh, well, I am exhausted physically.”<sup>275</sup> Second, having sex three or four times a week with clients sapped the libidinous urges of many. Oliver said, “if I’m going in [and] performing for a client . . . then [I’m] not really feeling like being sexual again.”<sup>276</sup> Third, the escorts sometimes refrained from private casual sex because it affected their ability to get an erection and ejaculate with their paying clients. Alvin made this point explicitly.<sup>277</sup> And Shawn, too, worried that his private sex life might negatively impact his professional performance, “if I have casual sex too much, I’m not as ready to go as I need to be if I get a client and I have to perform for them.” Market skeptics may lament the substitution of loving private sex for paid liaisons. A few of the men indicated that even a small decline of private sex may put stress on the escorts’ personal relationships and deny them some quantum of joy.<sup>278</sup> These complaints, however, are not anchored in concerns about commodification. Being tired at the end of the day is not the same as being tired of sex. As Ty said, escort work interferes with “day-to-day life” just as much as a “night shift . . . job.”<sup>279</sup> Moreover,

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<sup>272</sup> *Id.*

<sup>273</sup> Telephone Interview with Alvin, *supra* note 233.

<sup>274</sup> Telephone Interview with Shawn, *supra* note 249.

<sup>275</sup> Telephone Interview with Alvin, *supra* note 233. *See also* Telephone Interview with Shawn, *supra* note 249 (“So, that’s one of the hard things about it, when you go home to someone else, then you have to do the same thing to them, and you’re exhausted from it.”); Brewis & Linstead, *supra* note 140, at 93 (discussing female prostitutes who also admit feeling too tired to have sex with their private partners after work).

<sup>276</sup> Telephone Interview with Oliver, *supra* note 232.

<sup>277</sup> Telephone Interview with Alvin, *supra* note 233 (“I know I can’t climax in the next few days because I have this appointment.”).

<sup>278</sup> Telephone Interview with Oliver, *supra* note 232. *See also* Telephone Interview with Shawn, *supra* note 249 (discussing how prostitution can be exhausting).

<sup>279</sup> Telephone Interview with Ty, *supra* note 234.

reducing the frequency of sex does not inherently change the meaning attached to physical intimacy or spontaneously refashion moral commitments. Tyler perfectly captured the distinction. He summarized the effect of sex work on his life: “the rate at which I look for [sex] has gone down, but my enjoyment hasn’t.”<sup>280</sup>

Before moving on, it is worth thinking back one last time on the dominant narrative about commercial sex. Market skeptics posit that individuals who trade sex for money will gradually lose the ability to access the more spiritual virtues of the sexual act. Sex, so the argument goes, will inevitably become something bleak and mechanical. The prostitutes in this study provide a sturdy challenge to this worldview. Despite their immersion in the market for intimate services, the interviewees emphasized that they still found meaning in the sexual act. Their personal sex lives remained exciting, satisfying, and full of beauty. Moreover, the escorts indicated that they had little difficulty demarcating their professional personas from their personal identities. Negative views about commodified sex did not seep into their quotidian routines or imperil their non-commodified understandings of love and relationships. Rather, their market work seemed to impart new insights about desire and a deeper appreciation for the power of sex. Going forward, scholars should acknowledge that the mental barricades protecting sacred things like sex are stronger and less porous than anti-commodification scholars insist.

## V. CONCLUSION

The promise of a world without competitive markets is seductive. Marx knew this. The kibbutzniks, too. Our sympathies drift toward claims that we can achieve material abundance without the amoral and unruly beat of commerce. And during the last twenty years, no group has argued more passionately (or more effectively) against the preeminence of market-thinking than a loosely organized bloc of philosophers and legal-theorists, often referred to as the anti-commodificationists. They contend that the logic of bargain and sale endangers the meaning of goods with moral or civic value. The demands of the market, they allege, inevitably coarsen our understandings of sacred things and ultimately promote inferior conceptions of the good life.

At base, this Article pushes back against the cornerstone promise of anti-commodification theory and attempts to force scholarly attention on the empirical weakness of the market skeptics’ claims. I build the case along two fronts. The first half of this project argues that commentators

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<sup>280</sup> Telephone Interview with Tyler, *supra* note 235.

have overstated—sometimes quite recklessly—the strength of the evidence that purports to show the corrosive nature of commerce. The most-cited research is deeply flawed. In fact, on close inspection, the empirical data is a patchwork of ambiguous conclusions, flawed experimental design, and cherry-picked quotes. This finding suggests that, going forward, policymakers should not put such easy faith in the anti-commodification literature—especially those conclusions that turn on the studies about blood, daycares, and nuclear waste facilities.

The second part of this Article then pushes beyond a critique of others' writing. Here, I present the results of a study intended to more directly test whether commerce in sacred objects taints our values and moral commitments. To uncover evidence of corruption, I interviewed men and women who have immersed themselves in markets for things that many people regard as “priceless.” According to anti-commodification dogma, such individuals should lose sensitivity to the transcendental qualities of the objects they buy and sell. But does the data support this theory? The short answer is no. The art appraisers I spoke to unanimously insist that they still experience feelings of awe when confronted with creative masterpieces. And the men who sell access to their bodies routinely encounter the more hallowed and transcendent understandings of the sexual act.

Finally, it bears underlining that the controversy over the proper role of the market amounts to more than academic navel gazing; the issue has profound implications for a bundle of policy debates near the center of legal and philosophical discourse. A new and more skeptical view of the commodification argument may upend debates about therapeutic cloning,<sup>281</sup> ethical tourism,<sup>282</sup> the commercialization of indigenous crafts,<sup>283</sup> and selling immigration visas.<sup>284</sup> Additionally, as mentioned throughout

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<sup>281</sup> See Gregory Pike, *Therapeutic Cloning Will Commodify Human Life*, AGE (Oct. 4, 2005), <https://www.theage.com.au/national/therapeutic-cloning-will-commodify-human-life-20051004-ge0zhc.html>. The United Nations has also called on member states to prohibit cloning because of its impact on human dignity. See G.A. Res. 59/280, annex, ¶ (b) (Mar. 8, 2005). See also Timothy Caulfield, *Human Cloning Laws, Human Dignity and the Poverty of Policy Making Dialogue*, 4 BMC MED. ETHICS 3, 3 (2003) (“[O]ne of the most commonly used ethical justifications for cloning laws [is] that reproductive cloning necessarily infringes notions of human dignity.”).

<sup>282</sup> See Stroma Cole, *Beyond Authenticity and Commodification*, 34 ANNALS TOURISM RES. 943, 945 (2007) (“A common view in the literature [is that] tourism turns culture into a commodity . . . resulting in a loss of authenticity.”).

<sup>283</sup> See Victoria F. Phillips, *Commodification, Intellectual Property and the Quilters of Gee's Bend*, 15 J. GENDER SOC. POL'Y & L. 359, 370–71 (2007) (“[P]utting [these goods] into the marketplace seems in some ways undesirable as it threatens [the makers] personhood.”).

<sup>284</sup> See Brown, *supra* note 53, at 1099 (stating that market-based approaches to

this Article, current legal prohibitions on the sale of organs, gestational services, and sex are all justified, at least in part, by the fear that commodification will stain communal values and undermine human flourishing. The consequences of restricting sales of these commodities—especially organs—remains a matter of life and death for many Americans. More than one hundred thousand patients with renal failure languish on the official waiting list, with five thousand dying every year.<sup>285</sup> We should not sacrifice anyone’s life—and certainly not thousands of lives—on the altar of a policy built atop such a rickety empirical foundation.

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immigration “have been subject to a range of critiques that broadly fall under the anti-commodification heading”); Kit Johnson, *A Citizenship Market*, 2018 U. ILL. L. REV. 969, 996 (2018) (“One argument about the inalienability of citizenship comes from the backlash against the commodification of citizenship.”).

<sup>285</sup> Krawiec, *supra* note 5, at 1.