“Market Legalism: Toward a New Philosophy for the Market”

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Very Rough Draft

Introduction

The market organizes human activity by allocating goods in ways that can support efficient production, investment, and consumption. Market allocation is the result of individual exchanges, rather than the outcome of collective decision-making processes or the exercise of bureaucratic expertise. In these pages I seek to offer a somewhat different approach to understanding the nature of the characteristically market exchange—roughly, I shall defend an expansive conception of market exchange, one which goes beyond the exchange of goods in satisfaction of preferences to include the exchange of reciprocal legitimacy. This latter aspect of the exchange is preference-independent in the sense that it is an attribute of the form of interaction that the exchange happens to take (say, the contract form of exchanging goods). That is, its occurrence cannot be wished away by actors whose market transaction takes the relevant form of interaction.

In order to establish this claim, a radical revision of core theoretical convictions about the market must be made. This is because the connection between market relations and the notion of legitimacy might seem strained or even mistaken when tested against the backdrop of some dominant theoretical approaches to the market. Accordingly, the ambition of the proposed argument is to intervene in the theory of the market in ways that (perhaps) could also be understood as developing preliminary steps toward a new philosophy for the market.

More specifically, two striking observations concerning the theory of the market motivate pursuing a radically revised understanding of the market and, especially, of the nature of the exchange and the human relations it can sustain. First, generally speaking, theoretical reflection on markets (at least since the groundbreaking works of Adam Smith and Karl Marx onwards) typically displays what can be called legal naiveté. Of course, many theories implicitly or explicitly incorporate ideas about the law into their analysis of the market, but do so only shallowly. They present these ideas about the law at a remarkably high level of abstraction—that is, the law sets the basic rules of the game and such rules tend to include, among other things, a scheme of private property rights and a principle of freedom of contract. But merely announcing the importance of “private property rights” or “freedom of contract” does not add much—indeed,
the widespread theoretical and practical disagreements among legal scholars and lawyers about the meaning and implications of each suggest that a non-committal resort to abstract legal concepts may have little to say about the law’s role in understanding the market. Perhaps this is precisely the point of these theories: They suppose that the law is largely neutral to philosophical, sociological, or economic analyses of the market (and in the Marxist’s case, the law is merely a reflection at the superstructure level of the underlying relations of production). Put differently, the market is an idea whose basic elements can be fully specified and analyzed apart from elaborate understanding of legal institutions.\(^1\) However, I shall seek to show that this view concerning the place of law in the theory of the market fails to appreciate that law is partially constitutive of the construction of the market and the characteristic relations among its participants. By implication, legal analysis—the sustained study of the relevant legal concepts and how they actually work—is part of what it takes to provide an adequate understanding of the market. And, indeed, the proposed claim that market exchange consists in reciprocal legitimation \textit{cannot} be developed without legal analysis that delves further into the obscure notions of property rights or freedom of contract (or law, more broadly).\(^2\)

Second, it is also striking to observe that almost all the disagreements among market theorists refer to the justification of the market, as opposed to the characterization or understanding of the nature of market relations. That is, the familiar debates between classical and modern liberals, on the one hand, and Marxists, on the other, occur at the normative, rather than phenomenological, level of analyzing the market.\(^3\) Both sides of the disagreement, however, seem to share a somewhat similar phenomenology of paradigmatic market relations, casting them (very loosely speaking) in terms of thin and detached forms of social coordination. At first glance, a consensus at the phenomenological level need not be striking or revealing in any important sense. That said, deep normative disagreements—and the market has certainly attracted great deal of substantive disagreements—have the tendency to extend beyond the domain of value to capture the lived experience that is the object of the normative inquiry.\(^4\) This speculation is best substantiated by the observed reality of contemporary markets. In particular, the thin and detached forms of market coordination that capture the dominant phenomenology of the market is at odds with the rising activism of private individuals, the rhetoric of corporate social responsibility, and with NGOs aiming to influence the decisions of private entities. To be

\(^{1}\) Talk of “legal institutions” or law, more generally, need not be reduced to \textit{state} legal institutions or \textit{state} law.

\(^{2}\) Unsurprisingly, therefore, even accounts that are openly moralistic about the market (e.g., Lisa Herzog, Inventing the Market: Smith, Hegel, & Political Theory (2013)), fail to appreciate the special morality of market relations insofar as they take the legal forms of contract and ownership interactions.

\(^{3}\) For reasons I explain below (see infra text accompanying notes 27-28), I do not include institutional economists and economic sociologists in this observation.

\(^{4}\) Consider, for example, the theory of property and the disagreements it attracts at both the normative and the phenomenological levels of analysis. See Bruce A. Ackerman, Private Property and the Constitution (New Haven: Yale University Press, 1977).
sure, I do not argue (or believe) that market activism is a genuinely novel phenomenon. What may be different is that contemporary market activism is typically more accessible and available to activists than it used to be (for obvious technological and normative reasons). Thus, whereas accounts of the market that share the thin-and-detached view of market relations could have treated past instances of market activism as peripheral cases, the burden of explaining away present instances of market activism seems remarkably higher.

Against the backdrop of these two observations (concerning legal naiveté and suspicious consensus on market phenomenology), the argument going forward seeks to challenge the latter observation and, in respect of the former one, demonstrate the importance of legal analysis to understanding the market. As will become clear in due course, these two tasks are closely related. Parts I-II focus on the observed phenomenology of market relations. Part III takes up the legal analysis of market relations. Whereas Parts I-III discuss the characterization of market relations, Parts IV-V concern the normative implications. It is important to note that the basic ambition of the normative discussion is not to pursue a comprehensive moral account of the market. Instead, its point is to demonstrate why we should care about the characterization of market relations (beyond the challenge of getting a more accurate reconstruction of the phenomenology of market relations). Accordingly, the argument in Parts IV-V offer a preliminary account of how the proposed characterization of market relations can give rise to a set of normative questions concerning responsible agency, institutional design, and the non-instrumental difference between private and public responsibility to set the world right.

One clarification will be apt before I begin. Broadly speaking, the argument concerns the idea of market activism. But since there can be many different variations on this theme, it is important at the outset to set to one side familiar variations that do not form part of the proposed argument from legitimacy. In a way, all market participants who can and do invoke their market influence to reduce prices can be viewed as market activists. But this way of defining market activism renders it redundant. Ordinarily, talk of market activism refers to two different cases. First, invoking market influence to force a participant out of the market or to incentivize him or her to behave differently (consider polluting industries). Second, exercising market influence can also be deployed in the service of avoiding one’s own complicity in the wrongful practices of another. Both variations on the market activism theme, therefore, arise conditionally—that is, exercising market activism depends on the particular object of the transaction and the probable success of bringing about the desired effect. The proposed argument, by contrast, addresses market influence that does not arise conditionally. Rather, I argue that purporting to confer or deny legitimacy is a necessary implication that follows from the fact that the market transaction takes the contract or ownership form of coordination.

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I. Two Opposing Approaches to the Value of the Market, One Shared Phenomenology

The market, and the various markets of which it is comprised, is an institutional mechanism for allocating certain goods and services across people in satisfaction of their preferences. Its peculiar method of allocation—consisting in free exchange governed by the price system—is a source of substantive disagreements for and against market orderings, its shape, and desirable scope. Strikingly, although substantive disagreements about the value of market ordering have for centuries pervaded political and social theory, much less controversy can be found with respect to the preliminary question of what market ordering is.

Two principal patterns of philosophical reflection on the market have so far emerged. One approach—most closely associated with classical and modern liberalism—concentrates its normative effort on the desirable scope, rather than the character, of the market. Whereas the other—typically Marxist—pursues a more holistic critique of market orderings by way of condemning the very character of market relations (on which more below).

As already mentioned, there exists a broad consensus among past and present, sympathetic and critical, studies of markets, according to which markets are a form of highly impersonal and self-interested mode of being with others in the world. Most such studies are influenced at almost every turn by the lived experience of market interactions, which implies that there seems to be a shared perception (among these studies and beyond) of the character of market relations. I shall seek to elaborate on the three senses in which depersonalization figures in this discourse and, then, consider what reasons there are for supposing that competitive market relations are characteristically depersonalized.

*Viewing others as mere means.* It is of course true that participants in the market typically seek to satisfy their brute preferences and practical judgments and, in this respect, act in furtherance of their self-interest (however narrow or expansive they view it). However, there is a further thought, namely, that the pursuit of one’s self-interest must mean that the other party to the transaction is thereby viewed as “merely a means to the satisfaction of ends defined

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7 Throughout, talk of the character of market relations or characteristically market relations refers to the analytically, rather than empirically, core case of market interaction—say, a discrete sale of a widget between complete strangers participating in a highly competitive market. By this I seek to isolate the market relation from, and thereby avoid its assimilation or reduction into, thicker social contexts (that may emerge out of antecedent shared background or expectations for long term reciprocity) that often accompany and supervene upon an economic transaction. I say more about these contexts and what they cannot teach us about the market below.
independent of the relationship and of the other party’s ends.”

This observation, moreover, is shared across the egalitarian terrain, all the way down (or up) to the Marxist argument from reification. Indeed, according to a prominent Marxist, Georg Lukács, because they treat one another as mere means, each participant in a market transaction views the other party as an object of a beneficial exchange. As Lukács observes, reification occurs when “a relation between people takes on the character of a thing and thus acquires a ‘phantom objectivity,’ an autonomy that seems so strictly rational and all-embracing as to conceal every trace of its fundamental nature: the relation between people.” Luckács attributes this pathological manner of engaging in market relations to people’s false beliefs—false propositional attitudes—concerning themselves and the world. Although this observation is overdrawn, it is not entirely misplaced. Indeed, it does manage to capture a recurring theme in the theory (including the liberal theory) of the market: That of instrumentalizing the role of a market transaction between persons to the point where it becomes unintelligible to conceive of it in terms of human relations that people normally experience when acting in other social spheres.

Anonymous exchange. Whether or not market participants adopt the instrumentalist stance just mentioned (on which more below), there is another sense in which market relations are cast in terms of a depersonalized form of social coordination. Markets can establish human interaction among complete strangers on a random basis and in connection with a discrete, short-lived transaction. The epistemic threshold for an interaction of this sort cannot be too low, to be sure, since some information concerning the object of the transaction and the entitlement of the other party to engage in such activity are necessary. And as the kind of the transaction becomes more intricate (consider a traditional employment relation) the epistemic threshold will likely be higher as well. That said, there exists a familiar thought that market relations are anonymous in the sense that they are not about the persons, and their subjectivities, simply as such, but rather about the economic consequences of being in such relations. As a result, market relations bracket out, and to this extent depersonalize, any and all information about the parties to the interaction that is not necessary to get their transaction going. And when this line of thinking is

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9 Marx’s early versions, the arguments from alienation and commodity fetishism, fall short of the elaboration and sophistication of the argument from reification later developed by Georg Lukács to whom my argument in the main text turns. In his Das Capital phase, Marx suggested that parties in a market exchange stand in “reciprocal isolation and foreignness.” Karl Marx, Capital, reprinted in Karl Marx: Selected Writings 247 (Lawrence H. Simon ed., 1994).

10 Georg Lukács, History and Class Consciousness 83 (Rodney Livingstone trans., 1971). Although the argument from reification is Marxist in origin and inspiration, it can stand, with some necessary modifications, on non-Marxists grounds as well. See Axel Honneth, Reification: A New Look at an Old Idea (2008).

11 Viewing another market participant as a mere means—or as an object for the purpose of a market exchange—need not be morally troubling if, among other things, authorized by the genuine consent of this other person. Thus, instances of objectification are troubling because they feature additional elements that can render the interaction morally objectionable.
taken one step forward, anonymous exchange is often viewed as part the nature of market exchange, and according to Max Weber a special nature at that. Others, most notably Hayek, have understood anonymous market relations as the inevitable application of individual freedom to the modern, complex society.

Sectarian-free exchange: An especially interesting subset of anonymous exchange. Market relations, it is often observed, may depersonalize social coordination in another sense, which is to say by driving a wedge between the person and her conception of the good life. Thus, even if anonymous exchange does not obtain in a particular setting, as when the lender’s father was the borrower’s roommate in college, the market relation is typically insensitive to the conceptions of the good of the parties. When Milton Friedman observed that “No one who buys bread knows whether the wheat from which it is made was grown by a communist or a republican, by a constitutionalist or a fascist…,” he probably meant, as many others before and after his time observed, that normative attachments that move people in deep and profound ways typically do not matter insofar as entering and carrying out market transactions are concerned. Very roughly speaking, a sectarian-free exchange is the market analogue to the political practice of public reason famously defended by Rawls. Accordingly, the employees, say, of IBM or the traders on Wall St. can see themselves as relating not as the persons whom they really are (which


13 Max Weber, Essays in Economic Sociology 76 (Richard Swedberg ed., 1999) (observing that “the market community as such is the most impersonal relationship of practical life into which humans can enter with one another.’’)


15 I say typically insensitive in recognition of cases where one’s conception of the good is treated by the other party as a reliable proxy for the quality of the object of the market exchange.


would include their divergent conceptions of the good and personhoods) but rather as mere bearers of the capacity for choice who approach each other as mere means to maximize profit.

Now, the two patterns of normative approaches to the market draw substantially on the connection between the depersonalized form of interaction and the ends served by the market. Consider theories of market that emphasize freedom as a key value underlying the market. On this class of accounts, a depersonalized market relation can be liberating—it can promote freedom more systematically and robustly than personalized forms of exchanging goods (such as barter or gift-giving). Moreover, it can liberate in two distinct ways. First, it replaces the domination that accompanies certain personalized relations (such as feudal relations). Second, it increases the choice-set of all the participants because depersonalized market transactions can bring together complete strangers as well as people (strangers or otherwise) who may disagree on the importance of a particular good or on the good life, more generally. Moreover, depersonalized market relations—and especially treating those who participate in them as mere means—relieve persons of the time and effort that would otherwise be invested in making and sustaining personalized interactions on the market. Certainly, it would be counterintuitive to insist on the value of a personalized exchange in an ordinary consumption transaction (such as that of purchasing a refrigerator). Along with its liberating effects, a depersonalized exchange can also confer formal equality, or equality of status, upon the participants.

Moreover, depersonalized market relations can also increase market competition and in that promote efficiency, leading to greater social welfare and (ultimately) individual well-being. Depersonalization improves competition in any number of ways, including by eroding traditional barriers to enter the markets (such as sectarian barriers) and by reducing transaction costs, more generally. For instance, a particular transaction (purchasing a refrigerator) may involve a chain of multiple actors, such as laborers, producers, exporters, importers, wholesale, and retail businesses (among others). Depersonalizing the various interactions along this chain opens the market’s doors for virtually anyone to join the competition.

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22 The link between competition and efficiency is established by the first fundamental theorem of welfare economics: When perfect competition obtains, rational actors pursuing the satisfaction of their preferences will yield a Pareto optimal allocation of goods in the core.
Apart from freedom, equality, and efficiency, the argument from social cohesion (a sophisticated reconstruction of the traditional *doux-commerce* thesis) celebrates a thin form of reciprocal respect that can, if at all, arise between market participants—it is the kind of cohesion that is sufficiently removed from circles of intimacy and webs of sectarian and national commitment to sustain the stability of a cosmopolitan order; on this view, the market sustains a non-dialogic form of consensus-making under conditions of pervasive moral and political disagreement.\(^{23}\)

The theoretical pattern shared by these approaches is that of endorsing or assuming the depersonalized character of market relations while limiting their critical stance to the proper *scope* of the market.\(^{24}\) This approach finds its intellectual roots in the writings of early theorists of markets who were acutely aware of the adverse implications of market imperialism.\(^{25}\)

The second pattern of philosophical reflection on the market, by contrast, does not limit its critical inquiry to the outer bounds of the market. Rather, it aims right at the beating heart of the market, singling out the character of market relations as a key problem that plagues market orderings. As mentioned above, the basic point that arises from the analyses of Marx and his followers under the headings of reification, fetishism, and alienation, is that depersonalized market relations are at bottom *de-humanizing*.\(^{26}\) Thus, whereas classical and modern liberalism seeks to establish a firm justificatory connection between depersonalized market relations and values such as freedom and equality, Marxists take the opposite direction of equating depersonalization with dehumanization.

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The preceding discussion has suggested that competing normative accounts of market relations are, nonetheless, of a piece insofar as they share the same phenomenological view of

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\(^{26}\) See the discussion accompanying notes 9-11.
the market. This is not to say that the consensus around this view is all encompassing. Perhaps more than anyone else, some economic sociologists and institutional economists have sought to debunk the close association of depersonalized interaction with market orderings. Economic sociologists have done so, most notably, by assimilating market interactions into thicker forms of social “embeddedness,” by uncovering the “social meaning” that market exchange can sometimes carry, or by emphasizing the economic elite’s collective undertaking to secure market stabilization.27 And institutional economists have defended the instrumental rationality of trust and reciprocity among market participants under some conditions (such as long-term economic dependence).28 But these ways of debunking the received wisdom fail due to two related shortcomings. First, both of the methodologies just mentioned focus on market relations that supervene on thicker forms of social and economic engagements, rather than market relations simply as such. And second, by focusing on these thicker forms that may accompany market exchange, these studies implicitly admit that market relations, at least when devoid of preexisting thick contexts or prospects of long-term cooperation, reflect a depersonalized way of being with others in the world. As I shall seek to show, by contrast, there are reasons to doubt attempts to associate depersonalization with the character of market relations. By implication, the prevailing social theory of the market should be reconsidered, but not for the reason that market relations may sometimes be influenced by supervening factors and extra-market meaning, but rather because a depersonalized form of interaction is not a property of market relations at all. Indeed, I shall argue that the depersonalized form in question is only contingently related to market exchange.

II. Depersonalization as Constraint, Depersonalization as Characteristic of Market Relations

When I purchase a refrigerator whose parts have been manufactured and assembled in different areas across the globe by different persons working for different businesses, it may be plausible to assume that, all else equal, the transaction would take a depersonalized form of exchange (properly conceived to reflect the three dimensions of depersonalization discussed above). And suppose that it would also be plausible to assume that this notion of depersonalized transaction does not manifest itself in any systematic fashion outside the market and so that it is distinctive of interactions among market participants. That said, a basic question suggests itself—what inference concerning the nature of market relations should be drawn from a case such as this? It should be clear by now that those who follow the dominant trend among market theorists would likely attribute the depersonalized description of this case to the character of


market relations. By contrast, the argument going forward seeks to reject this inference. I argue that the phenomenon of depersonalized interaction may be related to the market interaction but only superficially so, in which case the commonly held view that a depersonalized interaction is a defining part of the character of market relations turns out to be false. Put differently, I argue that it is an error of attribution to identify the depersonalized form of interaction with market orderings. 29 The erroneous attribution occurs when the reason for invoking a depersonalized form is explained by reference to the idea, or nature, of market exchange when, in fact, it is the upshot of certain surrounding circumstances that may limit the resort to the persons whom the interacting parties really are.

To unpack these claims, consider again Milton Friedman’s famous observation that “No one who buys bread knows whether the wheat from which it is made was grown by a communist or a republican, by a constitutionalist or a fascist…” A preliminary question would be why it is that information about the political commitments of the wheat grower is missing. One answer could be that the costs of gathering and processing information concerning the wheat grower’s political commitment might be prohibitive, at least when imposed on the individual buyer. This difficulty represents an epistemic obstacle to having a non-depersonalized market relation. But this obstacle is, conceptually speaking, a contingent one. It can be made more or less acute depending on the available regulation and technology. Certainly, it is not entailed by the activity of buying bread on the market.

However, the dominant approach to the theory of the market, you would recall, seems to suggest that the bread transaction takes a depersonalized form by virtue of being a market interaction, rather than due to an informational constraint. On this approach, the political commitments of wheat growers should not figure in the transaction even when their contents are widely discernible and easy to assess. We would still expect the buyer to treat the grower (for the limited purpose of buying the bread) as a mere means and render irrelevant any information about the latter’s political commitment. But the question is why it has to be so.

I shall offer the two most important reasons offered by proponents of the depersonalized conception of market relations: The price system and the legal structure of the market interaction. I argue that neither explains the phenomenology of market relations, in which case a better explanation would focus on the circumstances that (not of necessity) may surround market interactions.

Begin with the depersonalizing effects of the price system. Depersonalization is often viewed as a distinctive aspect of competitive markets and, in particular, the market’s price system. Market depersonalization gets its most conspicuous treatment in the classical theories of

29 Although there may be some superficial similarities between my using the term error of attribution and the psychological study of the “fundamental error of attribution,” nothing in my argument turns on this field of study.
money. There, the money form is treated not merely as compatible with depersonalization, but rather as a key generator thereof. But this approach moves too quickly across the mechanics of the market—it is the price system, not merely the money, that establishes the link between the market and depersonalized relations. To begin with, the price system does not merely give meaning to money (which, in turn, reduces transaction costs). It also fixes the economic value of goods by attaching formally equal importance to the preferences and value-judgments of all the participants, that is to say, without passing judgment on the merits of these preferences and values. In a competitive market, participants are price-takers in the sense that no one person in particular gets to decide the price of goods. With a price system in place, questions that market participants must face, such as which goods are worth possessing and why, become fundamentally private. People may value market opportunities differently and, furthermore, may have different reasons for so valuing. In the absence of a functioning price system, some resolution of these potentially substantial disagreements must be sought in order for people to pursue their life plans—for instance, a central planner could decide for everyone what values are worth pursuing and at what cost; and a democratic society would engage in public deliberations concerning the resolution of the matter at stake. The competitive market, by contrast, offers a qualitatively different solution. It collects bits of information from each and every participant and, on the basis of this, establishes prices, and these prices displace the need to resolve the disagreements prior to entering the relevant transaction.

On this conception of mediation, the price system can render private the divergent valuations of the various participants while making public the economic value attached to each good. Thus, the market’s established price mediates between people, but not by resolving their disagreements but rather by allowing them to engage in transactions (and so to work, invest, and consume) in spite of their conflicting preferences and judgments. It features a buffer-based conception of mediation.

Against this backdrop, it may be possible to suppose that the price system creates the opening for the market participant to proceed by treating the subjectivity of other participants—which may include their preferences, judgments, and (ultimately) conceptions of the good—as private

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31 This is not to deny that money can also shape markets. The institutional and political processes through which it is created and supplied partially set the terms of the market. See, e.g., Christine Desani, Making Money: Coin, Currency, and the Coming of Capitalism (2014); Roy Kreitner, The Political Career of the Dollar (unpublished m-s).

32 Money, as oppose to the paper on which it is printed, acquires value with the introduction of prices, not prior to it.


information. At the same time, it posits prices as the publicly-shared parameters around which a deal can be struck. To this extent, treating the other party as a means, entering anonymous exchange, and setting aside normative attachments are made possible by the wedge that the price system drives between private valuation (and the particular personhood it reflects) and public measurement of value (which expresses the complex aggregation of preferences across the entire class of market participants). In the light of this wedge, it might be suggested, market relations can proceed in a depersonalized fashion, that is, without reference to any personal attributes of the engaging parties.

However, this suggestion fails. To begin with, the bread transaction may be experienced differently—i.e., get more personalized—if two conditions are met. First, the epistemic obstacle mentioned above does not obtain and, second, buyers value not just the quality of the bread, but also the political identity of the person whose wheat they buy (in the shape of a bread). After all, the preferences formed by market participants can have reference to the political commitment of the bread producer, rather than merely to the quality of his or her bread. And the price system in a competitive market can adjust the price of the bread accordingly, that is, to reflect this pattern of preferences, their relative weight, and pervasiveness in the population. It is of course possible to suppose that the price system at work in contemporary markets is not sufficiently sensitive to the identities (and the moral records) of the participants. But this shortcoming, once again, does not challenge the theoretical point just made—that, all else equal, the price system can accommodate a far more personalized conception of market relation. The shortcoming in question is a case in which all else is not being equal because surrounding circumstances such as the epistemic burdens mentioned above make it incredibly difficult for market participants to form preferences, not to mention judgments, with respect to the persons whom their parties to the transactions are. Moreover, and perhaps more dramatically, I shall argue in due course that a depersonalized conception of market relations is inconsistent with the pattern of inter-personal recognition that the two most basic forms of market interactions—contract and property—can establish. To this extent, the character of market relations is not merely a contingent matter of the existing set of preferences on the part of market participants, but rather in part a feature of the forms that establish these relations in the first place.

An alternative explanation of the depersonalized character of market relations may be found in the structure of market interactions—this is, I suspect, the most plausible way to substantiate the view that market relations are depersonalized in character. This structure should not be confused with the price structure: The former provides the mechanism by which parties can enter and carry out a transaction, whereas the latter fixes the transaction’s terms. Put simply, the claim under discussion is that the manner in which market participants relate to each other can leave

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This may be rational for two different reasons: First, the identity of the person, including her political commitments, may sometimes serve as a proxy for the quality of the good; and second, buying the bread from a person possessing a particular identity may be considered by the buyer as important in and of itself.
little space for their thicker personalities to figure in the transaction. The claim is not purely about the self-interest that motivates these persons, but rather about the frameworks of interaction that respond to such motives by facilitating “superficial contact” in order to move entitlement from one person to another. The contact, as many has observed, may be superficial in one (or both) of the following senses. First, it may not last more than “a brief space of time.” This observation is especially relevant in the case of the competitive market since all the participants are price- and term-takers (consider, as a rough approximation, a modern stock market where the “buy” order placed online by one trader meets the “sell” order of another). A competitive market, therefore, reduce significantly the role of bargaining and inter-personal engagement, more generally.

Second, superficial contact can also reflect a detached frame of coordinating the parties’ effort to pursue their self-interest by way of maximizing their joint surplus. This frame can sustain short and long-term coordination. And its significant contribution is that it replaces the need to rely on more personalized, and intrinsically valuable, frameworks of interaction, such as those that arise among friends and families, members of a thick community, and other social contexts that are shaped by interpersonal trust or solidarity. In that, a market exchange does not turn on having formed a joint commitment prior to or after the exchange takes place; more dramatically, market exchange manifests a detached frame of coordination when, unlike friendship and other forms of intrinsically valuable activities, it does even not commit participants to help one another to complete their transaction. And even when they do undertake such a commitment it may be only because, and only insofar as, it advances their own, narrow interest. This is precisely why the “cooperation” involved in a market exchange is, fundamentally, a form of competition.

The detached form of interaction draws on two institutions in particular: contract and private property. Contract is the legal framework that makes possible the superficial contact—an arm’s length transaction—as just described (and on which more below). But the detached framework of market interaction runs deeper in the sense that it precedes the transaction itself. It arises at the preliminary stage of upholding a system of private property rights in respect of which goods

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37 Ibid. See also Emile Durkheim, The Division of Labor in Society 207 (George Simpson trans., 1964).
39 The competition at issue is between the parties to the exchange, but it occurs against the backdrop of a broader competition between the particular buyer (seller) and all other potential buyers (sellers) that do not participate in the exchange at issue.
can serve as the objects of market exchange.\textsuperscript{40} Support for this observation comes for an influential view in contemporary property theory, according to which the institution of private property sustains social coordination by \textit{separating} non-owners from owners.\textsuperscript{41} It does so by placing a simple requirement, namely, to know what external object is one’s own and to keep off from the rest. In effect, the object that is not one’s own becomes the object of the keep-off duty, standing in for its owner in the same manner in which a screen conceals the identity of the person who happens to stand on its other side. To this extent, a method of reification is enlisted by the property institution in the service of \textit{liberating} people from constantly engaging property owners themselves, rather than merely their objects, in order to avoid the adverse consequences of entering, using, or taking the objects of other persons.

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The argument has so far introduced in general lines two accounts of the nature of the connection between market relations and the phenomenon of depersonalized interactions. On the constraint account, the connection is fundamentally \textit{contingent} because it is fully dependent upon the availability of information about the parties to the transaction. On the other, more ambitious account, the connection can transcend contingency since it represents a \textit{structural} property of the characteristically market relation—that is, a detached form of relating to others. The next stage of the argument seeks to reject the latter theory and advance beyond the former one. More broadly, I argue that the commonly held phenomenology of market relations is misplaced. The argument will seek to establish that, in principle, even the most detached market transaction consists in forms of personalized recognition. The explanation turns on the \textit{legal} form of interaction that typically structures market relations. It is legal analysis and theory, I argue, that is partially constitutive of the social, moral, and political theory of the market.

III. Market Legalism: Ownership, Contract, and the Standing to Say So

This stage makes a first affirmative step toward a new philosophy for the market. I argue, roughly, that the \textit{structure} of market relations implicates participants in forms of personal recognition. Ultimately, but still very roughly speaking, it comes down to recognizing the

\textsuperscript{40} The basic point made in the main text above remains virtually the same when the exchange takes place in the labor market—the employer holds a property right in the factory and this legal (or moral) fact will shape the contractual engagement between the employer and the would-be employee.

capacity of another person for making her own choices and judgments and, by implication, rendering them legitimate. Before I pursue this claim, three clarifications are in order. First, although my account aspires to transcend contingent facts, such as actual preferences and preexisting social relations, it does not make an essentialist claim about the market. Rather, it is qualified to market relations that take the (properly conceived) contract and property forms of coordination. Certainly, these forms are at the root of the modern market, but they may not exhaust the kind of interactions that arise in and around the market. Second, a non-depersonalized interaction should not be confused with an interaction between intimates (such as intra-family relations); nor does it seek to capture engagements whose value turns on authentic commitments (such as romantic love and friendship). Instead, the shift from de-personalized to personalized interactions reflects a principled openness to thicker dimensions of constituting a personality, especially the choices people make and the circumstances under which they act. Third, I do not attempt to develop a comprehensive account of contract and ownership. Rather, my ambition is to focus on certain elementary features that both forms possess (albeit in somewhat different ways). In that I seek to limit the resort to the more controversial arguments that have been developed on top of these elementary features—I therefore set to one side the possibility that contract and ownership can establish a form of respectful community, enhance robust autonomy, or advance some form of equality. I also set to one side foundational questions, conceptual and normative, such as the possible reconciliation of private ownership with the demands of distributive justice.

Two difficulties in particular stand in the way of grasping the precise sense in which the ownership and contract forms can shape the interaction they frame. Addressing these difficulties is, therefore, key to making some progress in divining the character of market relations. The first difficulty manifests itself in connection with drawing inferences from the observed phenomenology of market relations. More specifically, it is hard to tell why it is that these relations are, for the most part, depersonalized: Is it something about the market forces or the surrounding circumstances that accompany most market relations as we know them? In order to get a clear view at the role of the legal forms that market relations take, it will be helpful to dispel complexity by beginning with non-market interactions that take these forms. However, not all non-market interactions could prove useful. Appropriate case studies must not allow for preexisting trust, shared ethos, or communal ties to overwhelm the difference that legal form could make (so that it will not do to discuss a case that could be easily explained by reference to extra-legal aspects of the particular interaction). Moreover, these cases must also feature none of the surrounding circumstances that market relations often exhibit—in particular, they must not give rise to epistemic and affective deficits on the part of the participants. In such cases, the

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thicker identity of the participants becomes common knowledge as between the participants; and the conditions for exercising affective attitudes (such as empathy or contempt) obtain.

The second difficulty arises when an attempt to understand the ownership and contract forms takes for granted, or merely overlooks, the most elementary ways in which these forms can make a difference in the lives of their participants. For instance, theories of contract or ownership that take robust autonomy as their normative starting point might miss both the more basic ways in which contract and ownership affect the practical affairs of the entire class of participants (artificial persons, to which autonomy does not apply directly, included). For this reason, I shall take up two cases of non-market interactions in order to render more vivid the elementary difference that contract and ownership can make. These two case studies are meant to fix ideas, rather than to settle an argument. What both of them make clear is that contract and property establish patterns of recognition that, all else equal, cannot find a stable stopping point at the de-personalized depiction of the relevant parties.

A. Contract

Contemporary contract theory takes two different approaches to the connection between the contract form of coordination and the character of the relation it can establish among the interacting parties. One approach insists that every instance of contract-making, including an arm’s-length contract, creates a pattern of reciprocal recognition of the generic personality among the parties. It applies most directly to natural persons, but this view can arguably be extended, with some modifications, to capture a thin measure of recognition of artificial persons, such as entities (states, organizations, etc.) who speak and act in the name of natural persons. The other (more dominant) approach implicitly or explicitly suppose that the parties can do away with all forms of recognition—that it is up to the parties to decide how detached they would prefer to go in their contractual transaction. However, it is not clear how much of these otherwise opposing views is informed by epistemic (and other) obstacles. At any rate, I shall argue that both draw imprecise inferences from the lived-experience of contract-making: That, all else equal, it is not up to the parties to decide how detached they want their contractual

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43 Daniel Markovits, Contract and Collaboration 113 Yale Law Journal 1417 (2004); Alan Brudner with Jennifer M. Nadler, The Unity of the Common Law 171 (2nd ed. 2013). Note that the underlying reasons vary between these two; I shall leave the ones developed by the latter for another occasion.

relation to go and that reciprocal recognition cannot find a steady-state stopping point at the thin level of generic personality. The case I shall use to illustrate my thesis involves artificial persons and, only indirectly, the natural persons who control the former and the natural persons in whose names the former acts. I do not deny that patterns of reciprocal recognition among artificial persons are not identical to those that natural persons may exhibit. After all, an organization does not form intentions or acquire attitudes; rather, it personates certain natural persons, the intentions and judgments of whom can be imputed to the organization itself. That said, for the purpose of the current discussion it is sufficient to suppose that an organization may possess a capacity to make decisions and, so, can come to endorse a vision or a conception of the good purpose (which is the equivalent of a humanly conception of the good life).

Consider the following case-study. Israel and Hamas are no mere rivals. Instead, they have been for many years in a state of complete denial of each other’s legitimate standing. However, both find it useful, from time to time, to coordinate their mutual affairs in a nonviolent fashion. One possible way to do so would be that of making a binding contract which will include formal and non-formal enforcement mechanisms. They do not do that, however. Instead, they would ask a third-party (say, Egypt) to “initiate” an indirect process of negotiation with the purpose of reaching an indirect understanding. In particular, the process will culminate in two separate written or unwritten memorandums of understanding, between Israel and the third-party and between Hamas and the third-party. Of course, the measure of synergy between the two memos is bound to be perfect. Functionally speaking, the synergy that can be formed through this indirect process makes the outcome indistinguishable from a direct, contractual resolution. It is not implausible to suppose that this functional equivalence would also hold with respect to enforcement considerations. Nevertheless, it is first and foremost the different form of coordination that may force both parties to engage only indirectly—that is, although contract-making and indirect understanding can be extensionally equivalent, they are, nonetheless, intensionally distinct.

I say first and foremost because other explanations may also figure in the insistent policies of both Israel and Hamas never to engage each other in the mode of contract making. One such explanation in the case of Israel may arguably be fear of long-run implications—that is, although Israel is in principle willing to sign a contract with Hamas, it would be all-things-considered better to refrain from setting a precedent for future clashes with other rivals, including terrorist organizations. However, it seems that the resistance to take the contractual form of coordination

45 Thus, if the idea of abstract right “enshrines respect for personality and what personality entails,” I argue that personality entails the particular person through which personality manifests itself in the world. See Peter Benson, Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory, 10 Cardozo L. Rev. 1077, 1177 (1989).

46 These assertions raise important questions that I cannot address in these pages. For a preliminary analysis of related phenomena, see Avihay Dorfman & Alon Harel, The Case Against Privatization, 41 Philosophy & Public Affairs 67, 79-89 (2013).
cannot get a comprehensive, and fully satisfactory, explanation by reference to the argument from long-term considerations. The most obvious reason just is the functional equivalence between synergic understandings and contract. Given that past and present rounds of indirect negotiation are well documented and reported, it is implausible to believe that future terrorist organizations would be impressed by the formal difference that may exist between the two frames of coordination at issue. This is not necessarily because they would consider formal differences to be an instance of empty formalism, but rather because they can achieve the ends they would have achieved through contract-making save, roughly, for an acknowledgement of their legitimacy.

Now, let’s go back to the two contemporary approaches to contract theory mentioned above. Begin with the one that insists, mainly on grounds of autonomy, that it is up to the parties to decide how detached (or personalized) they want their bilateral dealing to be. The case of Israel/Hamas suggests that the contract form may be far less sensitive to parties’ preferences for more or less detachment. The case in question is particularly telling in this respect because it is hard to attribute naiveté or lack of sophistication to either party—that is, this is not a case of parties who are overwhelmed by the situation they face. The competing approach in contract theory, by contrast, is acutely aware of the invariant connection between the contractual form of interaction and a certain measure of recognition. However, its insistence on a thin measure of recognition—of each party’s generic personality only—fails to come to terms with the basic worry that urges the likes of Israel and Hamas, and the peoples on whose behalves they act, to invoke the functionally equivalent scheme of indirect talks and synergic understanding. If a fairly modest measure of respectful recognition is all that is at stake, fear of contract would be irrational on the part of both Israel and Hamas (or their respective leaders). This is because recognizing the abstract thing that Israel (or Hamas) is does not get one to recognizing it as the entity it really is (say, a Zionist political community seeking to ensure Jewish sovereignty over some key parts of Mandatory Palestine). It appears that neither Israel nor Hamas can secure a steady-state stopping point at which each party could acknowledge the other as a mere entity acting in the name of a people; both seem to suppose that a contractual engagement generates an all-encompassing measure of recognition. It would include recognition of the actual entity acting in the name of the Israeli (or the Gazan Palestinian) people. A somewhat similar pattern of inter-entity recognition, I argue presently, manifests itself at the level of inter-personal interaction:

47 There are other reasons as well. For instance, Hamas is not just a terrorist organization (in the eyes of Israel). Rather, it captures the quite distinct status of a government (and an elected one at that). This places Hamas apart from more typical encounters with terrorist organizations who merely speak on behalf of a cause, rather than also in the name of The People.

48 What if their ends include the conferral of legitimacy by Israel? Then they will not be considered (in the eyes of Israel) terrorist organizations. I have so far assumed that fear of long-terms implications is directed at future encounters with terrorists, rather than born-again humanists.
Recognition among natural persons goes deeper than respect for generic personality to include the full-blown personality whom the relevant party is.

What, then, could render the contract form of coordination as such inappropriate (in the eyes of Israel and Hamas)? It is distinctive vis-à-vis indirect understanding in the sense that each party in a contract submits itself to the standing of the other party to make, within limits, obligatory claims on the future conduct of the former. For instance, were Hamas to commit itself in a contract to refrain from arming itself with more rockets for the next couple of years, it would thereby transfer the decision-making power over this commitment from itself to Israel. Thus, Israel would have the right to oblige Hamas to refrain from so doing, in which case it is up to Israel to decide whether or not Hamas ought to perform. This is, after all, an implication of being in a contract relation. Of course, the scope of Israel’s standing is not limitless. However, within the relevant scope Israel possesses some measure of power to control the conduct of Hamas by exercising the standing to fix the normative situation of Hamas—whether or not it is under an obligation with respect to the specified performance.

This is not peculiar to the case of Israel and Hamas; nor is it peculiar to contractual engagements among artificial persons. Placing oneself under the normative control of another person entails a normative loss: That of giving up on one’s control over the matter. That is, giving up on one’s entitlement to decide what to do based on the reasons that would have been available had one not entered into a contract interaction with another (which is to say, reasons that have been excluded by entering into a contract relation). For instance, my agreement with my daughter’s piano teacher, that they meet at the latter’s studio every Tuesday at 4:30, means that it is not within my powers to decide whether or not to change the venue, duration, day, or hour of the meeting. This holds true, to an important extent, even when the circumstances have changed so that it would be all-things-considered best for both parties (and for my daughter too) to meet every other week (or, for that matter, twice a week). Once again, the teacher possesses the normative power to control the conduct and the kind of reasons that can be relevant for deciding what to do within the scope of the agreement.

Furthermore, this power is practical, rather than merely epistemic. Consider the Israel/Hamas case again. In occupying the standing at issue, Israel can insist that the reason for Hamas’s conformity with its commitment not to get more rockets be that Hamas recognizes that it is Israel that decides so. There may of course be many other reasons that could support Hamas’s

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50 The normative loss in question is not inconsistent with the common law default remedy of expectation damages.

51 I use reason (as in generating a reason) as a justification of action. That is, a reason for action seeks to provide persons with a justification as to why it is rational, or even necessary, to act in this or that way. Thus understood,
conformity (such as those that pertain to its own short- or long-term success). But the contract with Israel adds another such reason, and—within limits—this reason purports to control Hamas’s conduct *even when* the other reasons cut in the opposite direction.\(^5\) Thus, when Israel supposedly insists that no more rockets can be brought into Gaza strip, it does not merely report on existing reasons that apply to Hamas’s conduct independently of its reporting so. Rather, Israel generates the reason by claiming that it is up to its decision-making authority to decide on the matter (and a similar analysis applies with respect to the personal case of the piano teacher).

Now I can return to my earlier point that there is something special about the contract form of coordination (when compared to indirect understanding) that makes it rational, though not necessarily reasonable, for both Israel and Hamas to invoke a functionally equivalent form of coordination.\(^5\) I argue that it is the standing of one party in relation to the other that places a demand on the latter to recognize the former, not merely as an abstract purposive entity, but rather as the entity whom it actually is. Satisfying this demand further generates the important implication of purporting to confer legitimacy on the former party.

Begin with the notion of recognition in the contract context. All else equal, you cannot submit yourself to the reason-giving standing of another without recognizing her *capacity* to reason, judge, and make choices. (Of course, all else is sometime not equal as when exceptional circumstances, such as those involving coercion and necessity, strip the idea of recognition of its intuitive appeal.) Talk of recognition should be understood in terms of deferring to the decisions of another person, which is to say *judging* him or her as one whose capacity for choice merits some measure of deference.\(^5\) This is why those who lack this capacity (e.g., infants, animals) are also denied the legal personality to enter into a legally binding contract.

Different implications may arise out of the recognitional structure of the contract. I seek to emphasize only one such implication—that of purporting to confer legitimacy on the other party, there exists a critical distance between the normative grounds of and the motivation for conforming to the demands of a given reason. The former can only purport to influence persons to acquire the latter, rather than actually produce it.

\(^5\) Note that I do not claim that reasons generated by the contract make or should make *all* the difference there is in the deliberations of the likes of Hamas. Relatedly, it is beyond the scope of the present argument to address the question of how the mandatory reasons that arise in a contract purport to impact practical deliberation. For instance, it may be the case that these reasons are either peremptory, exclusionary, or merely first-order reasons whose weight and relevance could typically render them controlling.

\(^5\) It may not be reasonable because in some cases overcoming animosity and conferring legitimacy on the other party is the morally right thing to do.

\(^5\) In that, “recognition” is no mere awareness of another’s capacity for choice. Submission (by way of deference) is necessary.
which is an aspect of recognizing another as the person whom he or she is.\textsuperscript{55} As mentioned above, it seems plausible to suppose that both Israel and Hamas are acutely aware of precisely this implication.\textsuperscript{56} The connection between recognition and legitimation can be made more precise by explaining the sense in which legitimacy can figure in a contract relation. To begin with, legitimation is meant to express a normative judgment concerning the properness or acceptability of something or someone—to say that A is a legitimate NBA player, for instance, expresses a normative assessment of a player against the baseline of play-skill and talent that are ordinarily expected from those who play in this league.\textsuperscript{57} When people attribute legitimacy to a basketball player (or, for that matter, to a political argument in favor of cutting taxes) they need not go out of their way to associating this player with the very best, and likewise they need not endorse the political argument as their winning argument. Rather, they express a value judgment, according to which this player (or argument) is located somewhere in between the lower threshold of acceptability and the higher one of endorsement. This way of setting up the normative terrain should also exclude the idea of complicity, which may be viewed as a particularly powerful instantiation of endorsement, from legitimacy’s immediate scope of application.

Against this backdrop, the question becomes how it is that recognizing the capacity for choice of another party implicates one in the business of conferring legitimacy on that party. The answer is that recognition of its capacity for choice can be achieved \textit{only through} recognizing (at least some of) the choices themselves. Indeed, a capacity for choice manifests itself in the world in the various choices that emanate (in the right sense) therefrom, just as the capacity for mathematical reasoning among children manifests itself in the brute fact of mathematical reasoning. Accordingly, respecting another person by virtue of possessing a capacity for choice generates the further implication of respecting this person in connection with her choices, or at least with the more important ones.\textsuperscript{58} This intimate connection between the capacity and the fact

\textsuperscript{55} \textit{Purporting} to confer legitimacy is not the same as conferring legitimacy. But as I explain more fully below, the distance between the two remains largely theoretical. See infra text accompanying notes 76-78.

\textsuperscript{56} The implication in question is familiar in the legal and philosophical discourse on negotiation and compromise. See Robert H. Mnookin, Bargaining with the Devil: When to Negotiate, When to Fight (2010); Avishai Margalit, On Compromise and Rotten Compromise (2009). Note that both negotiation and compromise are closely related to my discussion of contract in one respect (but not in others). That is, they are special cases of the larger category of cases governed by, or oriented toward, the contract form of coordination.

\textsuperscript{57} My use of legitimacy departs from two familiar senses in which this concept is being used in the literature. First, it is a normative, rather than a descriptive or Weberian concept of legitimacy. Thus, it is not about what people happen to believe, but rather what reasons do they have to conceive of something as legitimate. Second, within the domain of the normative concept of legitimacy, I depart from the view that narrows our views of legitimacy to the right to rule. Legitimacy as the right to rule may form a private case of the larger notion of legitimacy as a judgment of properness.

\textsuperscript{58} The second-order question of what choices count as important can be addressed in the following way. Choices should count as important because, and insofar as, they reflect the ground projects or defining ambitions of the
of the choice strikes an intuitive chord: The value behind the capacity for choice, if it is a value at all, is not just that of being able to be an agent who makes his or her choices, but also of being one.

Consider family life by analogy. Suppose that a parent is disposed to respect his daughter by recognizing her capacity to make choices. If so, there is no other way in which he can make good on his commitment other than by respecting her choice. He would do so not necessarily because he endorses the choice on the merits, in fact he may even be certain that pursuing this choice is not in her best interest, but rather because it is her choice (which is why this form of parental respect comes only when the child’s moral personality is sufficiently developed). Furthermore, respecting his daughter in connection with her choice would imply that her choice is (at minimum) acceptable to him; he may thereby conceive of it as legitimate though not necessarily the right one.

The contract form of coordination invites enemies like Israel and Hamas to share a structurally similar progression of recognition and legitimation in the absence of empathy, trust, and solidarity. I have argued that a reciprocal submission to each other’s capacity to make judgments would imply reciprocal recognition and, hence, conferral of legitimation that must go beyond merely acknowledging each other in the abstract (by which I mean in complete disregard of the agendas and purposes that move each one of them in deep and profound ways). Indeed, recognizing the capacity of another to choose and judge cannot be exercised apart from recognizing, and by implication purporting to render legitimate, the choices and the judgments that arise therefrom. Once again, this progression explains the familiar hostility to contractual engagement when the choices, judgments, and vision of one party are deemed non-acceptable from the point of view of the other party, as illustrated in the case of Israel and Hamas.

One last point must be made before I move to consider the ownership form of social coordination. Broadly speaking, it concerns the role of motivation in the proposed account. Thus, one may protest that my talk of recognition (and, by implication, legitimation) is mere rhetoric. For I have not supplied an account of the motivations and dispositions that underlie acts of “recognition”; nor have I proved that these (arguably) conative states can and, in fact, do figure in the minds of the natural persons that speak and act in the name of parties such as Israel and Hamas. But this line of protest misunderstands the important connection between contract and the notion of recognition (and between the category of legality and our ethical life, more generally). It looks for recognition inwards—in our affective attitudes, motives, and states of mind. But this is not the only way to approach the notion of recognition (or the idea of law, more generally). Indeed, on the proposed account, contract just is a certain form of recognition. It is a legal form of recognition in the first instance: It creates, among other things, a freestanding frame of inter-party deference among persons ranging from intimates, to friends, to rivals, and to person. Choices can also be important in virtue of the moral stakes that are involved in the choice, irrespective of how crucial this choice is from the first person perspective. I return to this point below.
foes. To this extent, recognition (and legitimation) through contract does not turn on the content of the motives with which a person in fact enters and implements a contract. All that this legalistic conception of recognition requires is a commitment to deferring, within the scope and degree specified by the contract, to the capacity of another person to make his or her judgments. A commitment of this sort may in fact be motivated by any number of reasons, including reasons that have nothing to do with the moral importance of recognizing others. (Of course, if relating to others by way of recognizing them as the persons whom they really are is morally valuable (as I argue elsewhere) then a person who enters a contract has a reason—justification—grounded in interpersonal morality to care about committing herself to deferring to the other party. This reason, to be sure, can only purport to influence persons by way of providing a justification to acquire the right motivation, rather than actually produce it.)

B. Ownership

The following discussion of ownership seeks to radicalize the preceding analysis of contract. Ownership provides right-holders the standing to say so, and this status gives rise to patterns of recognition that do not turn on the existence of contract among the persons who occupy the poles of receiving and giving the recognition. The point I shall seek to make is that ownership is a form of recognition and, by implication, legitimation of the persons (natural and artificial) whose practical affairs it coordinates. Once again, I illustrate the argument by drawing on a non-market interaction that leaves virtually no epistemic or affective gaps in the minds of the participants. My current ambition is to extend the preceding discussion (concerning contract) to the case of ownership. The extension does not mean to imply that contract and ownership stand in a relation of particular and general or of species and genus. Rather, the extension is limited to some parallels in the ways that both legal forms coordinate interactions among persons by establishing legal standing over some persons in relation to some spheres of action.

To fix ideas, several persons are gathered for a dinner at a friend’s house. One of them shares a beer brewed at the basement of his friend’s West-Bank-settlement home. One of the other invitees, who has never met this person or his settler-friend before, decides not to try, not even to taste, the beer because it was made in a West-Bank settlement. She may do so even if she believes that her abstinence is economically and politically impotent; and she may even conceal the actual reason in order not to destroy the apolitical atmosphere around the dinner table. At any rate, what essentially guides her decision is that she refuses to recognize and render legitimate that person’s friend in connection with his entitlement to control the brewery and its products. This case helps to reveal that the absence of a direct, contractual relation does not

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59 An alternative version of this hypothetical could also go like this: Upon realizing that a West-Bank-settlement beer is being served at that social gathering, one of the invitees decides to leave the place immediately. This factual pattern is materially equivalent to the one developed in the main text above.
eliminate the possibility of relations of recognition and legitimation among persons. In what follows, I seek to explain how it is that the ownership form can implicate non-owners (such as those who consume the beer) in the business of recognizing and legitimizing owners as the persons they actually are.

To begin with, the concept of private ownership picks out a special normative standing—a power to change the normative situation of others in relation to a particular object. Thus, private owners possess an unusual status, which is to say the standing not just to be in control of an object against the backdrop of non-owners’ competing claims, but rather to determine what others may or may not be legally entitled to do with this object. This notion of standing in relation to another person is what unifies the various incidents traditionally associated with exclusion and alienation rights—they are incidents of the distinctive standing that owners have to address others in the form of right-conferring and duty-imposing.

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

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60 The following discussion draws on my previous work. See Avihay Dorfman, Ownership and the Standing to Say So, 64 University of Toronto Law Journal 402 (2014); Dorfman, Private Ownership, 16 Legal Theory 1 (2010).

61 The judgments in question can be either the upshot of the specific intentions formed by the owner to address the present case or the policy he or she has with respect to the class of cases within which the present case falls. Policy, that is, is a form of a general intention that replaces the need to engage in a minute-by-minute planning.
considered best to glance over few other chapters of the book. The existence of my standing to say so just is the absence of your normative control over this matter.

In this respect, ownership’s standing to say so is qualitatively different from other property configurations that allow for some measure of private control over objects. Thus, the same analysis will not be true if, for instance, my entitlement to the book would be akin to usufruct (which is a species of a right to the effective use of a thing). This type of property entitlement can only go so far as blocking others from using the book while I use it or about to do so. A property right to an effective use picks out the “standing” to make assertions of the epistemic sort, merely announcing the reasons, duties, or norms that obtain independently of such assertions. Thus, my saying “that’s mine” against the backdrop of a regime of effective use does not add to the reasons that should have figured in your decision to use the book. And these reasons (or, at least, the ones that are especially relevant here) are based on two sets of inquiry: My actual use of the book, on the one hand, and the possible inconsistency between this use and your plan to use the book, on the other. Both sets of inquiry invoke factual questions that are, in principle, accessible and applicable to your deliberation concerning the question of whether or not to use the book.

Crucially, this form of engaging me qua right-holder does not even require that you ask my permission to use the book. I may refuse to grant you the “permission,” but this is beside the point—bluntly put, it is not up to me. For the relevant question, instead, is whether there exist good reasons for you to believe that your intended use of the book exerts pressure toward interference with my use of the book. If no such reasons exist so that my right to effective use cannot be violated by your intended use, my saying so—“don’t touch what’s mine”—turns out to be a brute demand, rather than an assertion of right.

Against this backdrop, the decision to abstain from drinking the settler’s beer can be rendered more intelligible when approached from the point of view of ownership. Accepting the invitation to consume the beer, or for that matter adhering to the owner’s decision to keep off the beer, is an instance of conforming to a demand that the owner has a standing to execute simply by virtue of being an owner. It reflects the more general point that it is not up to others to decide what can be done with the owner’s object. This is an instance of displaying deference to another person in recognition of his or her capacity to make judgments concerning an object. To this extent, the ownership form shares important similarities with the contract form of social coordination, including in particular the submission to the practical powers of another person.62

The beer incident represents one case among a wide range of small-scale instances, widely familiar in the lived-experience of many people, where non-owners become acutely aware of the

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62 Certainly, there are also important differences; some of them are qualitative in nature. I take up this matter in Dorfman, The Society of Property, 62 University of Toronto Law Journal 563, 595-96 (2012).
legitimating implications that arise in deferring to the special standing of owners. 63 Rather than assuming too much, these non-owners identify the close connection between recognizing a person’s capacity for choice and the fact of his or her choice (such as the place of production). To repeat a point made in connection with contract, the former manifests itself in the world only through the latter. Rendering legitimate the capacity in question also renders legitimate that which embodies such a capacity, which is to say the various choices or, at the very least, the ones that reflect a genuine exercise of the capacity in question. 64

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Contract and ownership are two principal pillars of market orderings. I have argued that these two forms of social coordination defy the common understanding of the market, especially the view that depersonalized modes of interaction are of the essence, or character, of market orderings. As I mentioned above, this long-standing understanding associates contingent aspects about market relations (such as epistemic hurdles) with their very character. 65 On the proposed analysis, contract and ownership, when isolated from the supervening factors and surrounding circumstances that often accompany market transactions, are forms of legal recognition. Furthermore, the object of the recognition is not merely an abstract being, a bearer of the capacity to make choices, but rather the person this being happens to be, which may include his or her choices. And for this reason, market relations that take the contract and ownership forms can implicate their participants in the business of purporting to confer (or deny) legitimacy.

The proposed analysis has deliberately drawn, for the sake of illustration, on non-market interactions that take the contract and ownership forms. Market interactions can exemplify the same point, too, insofar as the epistemic threshold for passing judgments of legitimacy obtains. Consider very briefly two types of cases in which the exchange of legitimation overwhelms the

63 See, e.g., Isaac Scharf & Aron Heller, Israeli Settlements also Face Pressure from Within, AP (Dec. 12, 2014) available at http://news.yahoo.com/israeli-settlements-face-pressure-within-195703032.html: “[A] de facto distancing from the settlement enterprise is increasingly evident, especially in people refraining from buying settlement products ranging from wines to organic produce and cosmetics made from the Dead Sea… “I oppose a regime in the West Bank that I find illegitimate…,” said Yaron Racah, a 38-year-old high-tech worker from the Tel Aviv area.”

64 By limiting the embodiment relationship between choice and the capacity to make choices, I allow for some space to accommodate paternalistic concerns in situations of extreme vulnerability, dependency, or irrationality on the part of the choosing person. Choosing one’s locus of activity in the case of the settler’s beer typically raises no such hard questions.

65 One more important conclusion at this stage is that, contrary to a conventional view among legal theorists, contract and ownership are not detached or depersonalized forms of interaction in their core. They often “behave” in depersonalized ways, but only because those who come under their purviews face insurmountable epistemic difficulties.
market interaction. First, survivors of war atrocities committed by another state often experience strong reluctance to purchase goods produced in this state years after the war ended, not because of the quality of the goods, but rather in spite of it.\textsuperscript{66} And the same is true in respect of the opposite factual pattern, best exemplified by the sit-ins of early 1960s, according to which some black students deliberately acted in violation of the tort law duty against committing trespass on land in part because they sought to resist the legitimating effect that arises from deferring to the owner’s decision to exclude them, say, from his department store’s lunch counter or from any other privately-owned business.\textsuperscript{67}

IV. From Morphology to Normativity: Responsible Market Agency

The preceding stage of the argument has focused on the characterization of social relations that take the contract and ownership forms. Market relations are social relations, too. And to the extent that contract and ownership are the market’s two basic pillars, it follows that, contrary to a dominant trend in the theory of the market, there is nothing in the character of market relations that entails a depersonalized exchange of goods. Further, to the extent they take the forms of contract and ownership, market relations can give rise to an expansive conception of market exchange, one which includes the exchange of reciprocal legitimation, rather than merely the good (be it a widget, service, labor, and so on). Moreover, whereas the question of what goods are to be exchanged in the market and under what terms depend, with some important exceptions, on supply and demand, the exchange of reciprocal legitimation is built into the form of the exchange and, so, remains preference-independent. This is why parties such as Israel and Hamas, or the brewer and guest, cannot bypass the legitimation effect simply by announcing to have done so, including by forming an agreement that commits both parties to such a policy. This effect is a feature of adopting the contract and ownership forms of social coordination; it is part of the package that comes with the pattern of deference and recognition through which both legal forms function.

The proposed characterization of market relations also sets the scene for explaining why market participants have reason not merely to exchange goods on the basis of the relevant considerations, but also actively to take responsibility for exchanging, or denying the exchange

\textsuperscript{66} Two documented cases (and systematically studied by marketing scholars under the heading of animosity model) are those of holocaust survivors and those who survive the brutal occupation of China’s Nanjing by Japan during World War II.

\textsuperscript{67} Michael Walzer, the (then) student reporter for the \textit{Dissent}, documents a group of black students engaging in window-shopping on a privately owned shopping center. Walzer describes the confrontation between the vice-president of the shopping center and the group in ways that track the notion of ownership as a standing to say so. The students not only refused to leave the area, but also “demanded that they … be arrested.” Soon after, many more students arrive at the scene and, as Walzer observes, “Everyone wanted to be arrested.” Michael Walzer, \textit{A Cup of Coffee and a Seat}, 7 Dissent 111, 117 (Spring 1960).
A justification of this kind does not concern itself with the responsibility market participants have more generally, by which I mean responsibility for the interests of others that applies to people by virtue of being persons or citizens. Instead, it concerns the responsibility that is distinctively triggered by the contract and ownership forms of interaction, irrespective of the demands of citizenship or other forms of associative obligation. Furthermore, for the reason just mentioned, the case for responsible market agency does not turn on effects that may on occasion flow from a market interaction. For instance, some forms of market cooperation, such as the creation of a partnership with the devil, can give rise to a charge of complicity. Other market transactions can be criticized on account of the harmful effects on third parties (consider the purchase of cigarettes). These and many other cases exhibit the possible failure of their participants to act responsibly. But this form of criticism is conditional upon the particular object of the transaction—such as cigarettes—and its potential consequences. By contrast, I shall focus on the demand to act responsibly that arises unconditionally, that is, by virtue of entering a market relation that takes the contract or ownership form.\footnote{It is unconditional in the sense that it does not depend on the object of the transaction. It may well be conditional in another sense, namely, on whether the epistemic conditions for making considered judgments of legitimacy are met.}

\subsection*{A. Expanding the Role of the State in Constructing and Facilitating Market Relations}

Some preliminaries are due before I can turn to the notion of responsible market agency. In particular, two thresholds must be met before a practice of market relations could reflect, to the desirable extent, its underlying recognitional structures of interactions: An institutional and a substantive one. The institutional threshold concerns the largely non-normative conditions necessary for market participants to be able to engage each other concretely, according to the persons whom they are, rather than abstractly, according to the generic traits of personality they occupy. These are non-normative conditions in the sense that they are preoccupied with feasibility, rather than desirability. I shall briefly mention the two most urgent ones. The first one has already mentioned above in discussing the epistemic hurdle. What makes cases such as Israel/Hamas and the settler’s beer particularly revealing is that they raise (almost) no epistemic difficulties that many pedestrian market transactions tend to raise. The observations I have made at the outset, which mainly focused on the work of social movements, NGOs, and ordinary individuals, and the increasing tendency to impose legal requirements of greater transparency and compliance represent recent attempts toward defusing the epistemic hurdle.\footnote{Of course, it is important to distinguish between sham and genuine requirements and, moreover, between ineffective and effective ways of disclosing reliable information.} Technological progress (consider Big Data or social networks that gather, process, and share information) provides some ground for optimism that the hurdle in question is far more contingent than has so far assumed.

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\begin{thebibliography}{99}
\bibitem{1} It is unconditional in the sense that it does not depend on the object of the transaction. It may well be conditional in another sense, namely, on whether the epistemic conditions for making considered judgments of legitimacy are met.
\bibitem{2} Of course, it is important to distinguish between sham and genuine requirements and, moreover, between ineffective and effective ways of disclosing reliable information.
\end{thebibliography}
Another important hurdle relates to the human faculties of sympathy and especially empathy. Even given that all the relevant information concerning the moral record of a potential party to a transaction is readily available, it is well documented that for some people empathy is being experienced in a flatly parochial and morally arbitrary manner. The worry could then be that market participants might not open themselves up to the injustices inflicted by other participants on third parties (say, the guest would not extend her empathy to the victims of human rights violations that may be partially attributed to the activity of brewing in the West Bank). The worry is only reinforced when subsidiaries and other mediating factors are involved in a seemingly one-to-one transaction such as the one between a merchant and a consumer, diluting further still the willingness of participants to experience empathy with the sufferings of remote third parties. However, recent studies have also found that it is a mistake to suppose that human empathy is biased in nature. Unsurprisingly perhaps, these studies have shown that the emphatic capacity of people is subject to critical reflection, in which case parochial empathy is a problem of motivation, rather than that of ability.

There may be other hurdles, of course, but I shall set them aside. This is because none of them seems to transcend the state of contingency and, so, none of them should stand in the way of incorporating a practice of thick recognition into market interactions. By implication, the proposed account of the market carries important implications for the law governing the market. On the standard account, the law is charged with setting and enforcing the rules of the game. The proposed account provides a far more expansive understanding of these rules as facilitating not merely the economic exchange, but also the exchange of legitimation which, in turn, commands the active participation of the law in overcoming the epistemic and the emphatic hurdles (among others).

The second threshold is substantive. It concerns the value of enabling market participants to engage each other concretely, rather than abstractly. The question is not whether these persons should adopt the former, or the latter, form of engagement, but rather whether they should be put in a position that makes it possible for them to address this question in the first place. The most

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70 See, e.g., Ezra M. Markowitz et al., Compassion Fade and the Challenge of Environment Conservation, 8 Judgment & Decision Making 397 (2013); Tehila Kogut & Ilana Ritov, One of Us: Outstanding Willingness to Help Save a Single Identified Compatriot, 104 Organizational Behavior & Human Decision Procedures 150 (2007).

71 Of course, the reason—i.e., justification—for conferring or denying legitimacy in the particular case does not turn on whether or not empathy obtains. That said, acquiring and failing to acquire empathy can affect people’s actual responsiveness to the demands of right reason that apply in their case.

straightforward response is that it would be unduly paternalistic categorically to deny from market participants the possibility to decide for themselves what form of interaction—depersonalized or non-depersonalized—to adopt. And as already mentioned, a shift toward greater availability of useful information is well beyond the get go stage. For these reasons, the more challenging questions lie beyond the threshold stage. They concern, first, the justification of a market practice of conferring and denying legitimacy and, second, the theory of legitimation that informs decisions to confer or deny legitimacy.

B. Responsible Market Agency: The structure of taking responsibility not only for choosing what goods to exchange, but also for whose goods merit exchange

Assuming that market transactions can be made among concrete persons, there arises a normative question concerning the incorporation of reciprocal legitimation into the exchange of the good that is the subject of the transaction. Why be judgmental with respect to the other party’s moral record or, more precisely, why market participants have a reason to be judgmental in the sense of taking seriously not just the material exchange, but also the one surrounding the legitimacy of each other. The answer has to do with the responsibility for getting the conferral or denial of legitimation right; and its discharge concerns—and in some cases is owed to—those who might suffer as a result of failing to do so in a reasonably satisfactory fashion. I begin by elaborating the importance of taking responsibility that accompanies contract and ownership interactions—the importance of displaying a degree of concern and respect toward certain others in executing decisions about entering or exiting contract and ownership relations.73 I shall then situate the argument against the backdrop of potentially constraining concerns: Freedom, political stability, and efficiency.

The normative loss occasioned by deferring to the standing to say so of the other party to a contractual or ownership relation may prove beneficial to the deferring person. However, it also has the ability to generate an effect in the world to which the person whose normative loss it is must attend even when it does not bear on his or her own self-interest. The effect comes down to the alleged moral status of the recognized party within the relevant class of reference—a legitimate government in the case of Hamas, a legitimate brewer or petit bourgeois in the case of the settler’s beer, and so on. And since the contract and ownership forms of coordination create this possibility, there is a reason to care about the moral record of the person to whom contractual or ownership recognition is extended. That is, there is a reason to display an appropriate degree of respect and consideration toward others—to treat them as equals—insofar

73 I shall seek to avoid some of the controversies concerning the notion of responsibility (including the conditions that must obtain in order to hold someone morally responsible) by focusing on the relatively simple case of a moral duty to display some measure of concern and respect toward certain others in the course of making an informed, voluntary decision concerning whose goods merit exchange.
as entering or refusing to enter contractual or ownership relations undermines their status as free and equal persons.

Certainly, the government of Israel must assume this responsibility in the face of its citizens and other political communities insofar as they stand to lose by the inclusion of Hamas in the class of legitimate governments (and the same may be argued in the opposite case of including Israel in such a class). Consider the citizens who have lost their dearest in one of Hamas’s attacks on innocent civilians; or consider the Palestinians who are subject, without fault or choice of their own, to Hamas’s despotic control. And similarly the guest is required to act responsibly in her encounter with the brewer because the inclusion of the latter in the class of legitimate brewers would fail to respect the direct victims (i.e., Palestinians) of maintaining a brewery in the West Bank. Thus, the power to render another person legitimate invites responsibility: The decision whether to enter a contractual or ownership relation with another should take into account, among other things, considerations pertaining to the person whom the other party is.

The preceding examples have focused the discussion on responsible agency in connection with decisions of inclusion. There, responsibility was linked to third parties—the frustration of their reasonable expectations and the display of disrespect by purporting to render legitimate their perpetrator, exploiter, etc. Denying legitimacy, however, is not merely the mirror image of rendering legitimacy. This is because decisions of exclusion change the preceding analysis by adding the person who is denied legitimacy to the circle of immediate victims. Thus, a decision not to host a person in one’s hotel on account of his or her race is not merely disrespectful of third parties (although it is this also). Rather, it harms this person, and it offends against this person’s equal dignity to be put in the class of the illegitimate. Accordingly, the power that comes with the contract and ownership form of interaction—the power to deny legitimation—calls for responsibility. Its demandingness is not a matter of choice; it is an inherent upshot of the contract and the ownership forms of interaction.

Of course, a structural argument from responsibility cannot tell us what would be the normative baseline—a theory of legitimation—against which to decide whether the denial or acceptance of the brewer’s standing is justified or otherwise permissible as a matter of morality and, separately, of law. Although developing such a theory is beyond the scope of the present argument, let me explain very briefly the rather limited significance of this theory to the concrete level of regulating everyday judgments of individuals in and around the market. A central element in this explanation is that of reconsidering the distance between purporting to confer and conferring legitimation.

Moreover, it is plausible to suppose that, in the light of the differences in the gravity of the disrespect, exclusion would typically require a heightened degree of vigilance than inclusion. I leave this complication for another occasion.

As mentioned above, purporting to confer legitimacy is not the same as conferring legitimacy. That said, there are reasons to believe that the de-facto connection between purporting and conferring is quite robust within limits. One limiting class of cases arises when there is absolutely no moral doubt that the relevant party cannot be rendered legitimate; to this extent, it is not up to people’s judgments (arguably, purporting to render legitimate the Nazi regime will necessarily fail). The opposite limiting class features cases in which there is no moral doubt that the relevant party is beyond reproach, in which case rendering or denying legitimation should not be up to people’s judgments (can one deny legitimation based on another person’s gender?). It is possible to understand one of the roles of basic moral and legal rights as ensuring that no one can deny another person his or her legitimacy on account of some basic immutable and mutable traits he or she possesses.

In between these two extremes, purporting to deny or confer legitimation may be the only plausible way for the truth of legitimation imperfectly to manifest itself in the practical lives of market participants. This would be so at least insofar as the practice in question operates on people’s moral intuitions and considered judgments. To begin with, sometimes purporting to render someone or something legitimate may be all that is needed to satisfy the requisite conditions for it to count as legitimate (perhaps this could explain the Israel/Hamas affairs and their mutual resistance to a contractual form of interaction). This would be the case when, unlike the Nazi example, there are no knock-down arguments against the object of legitimation, on the one hand, and the conferring party is appropriately situated to make the legitimation judgment, on the other. Indeed, it seems that Israel (or Hamas) is better situated to render Hamas (Israel) legitimate than Switzerland is. Moreover, there is also a more fundamental reason for taking seriously a moral practice of purporting to render legitimation and it pertains to the limits of moral/political/legal philosophy itself. A moral theory of legitimation (which is an important starting point for the development of political and legal theory of legitimation) can articulate general principles at some level of abstraction. The thought that these principles could then fully determine for us highly particularistic questions, on a case-by-case basis, seems incredibly unrealistic. This is not to deny that applied ethics, morality, and political morality has no added value or, more profoundly, that there are no right answers to these question; rather, the point is that the ad-hocism built into the moral practice of rendering legitimation in the context of free market exchange places severe limitations on the ambition of a general theory of legitimation to possess a recursive structure that would enable it to identify definitive answers to every particular question. By implication, the most immediate contribution of a theory of legitimation

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76 Leif Wenar’s work also explains, with respect to injustices that arise in and around natural resources, how these moral intuitions can and should be given legal expression in each state’s property law and, more broadly, in private international law. See Leif Wenar, Coercion in Cross-Border Property Rights, 32 Social Philosophy & Policy 171 (2015).

77 In which case, the moral practice of legitimation is just another case where practices (such as the practice of human rights) are partially constitutive of the content of the abstract values they seek to instantiate.
lies in identifying, in general terms, the limiting cases of denying (or conferring) legitimation in the market context. Beyond this function, commonsense morality can capture much of what a market practice of purporting to confer or deny legitimation can appeal to in order for it to count as an adequate instantiation of the correct theory of legitimation.

C. Responsibility in relation to Freedom, Stability, and Efficiency

Freedom, stability, and efficiency are widely viewed among the most valuable achievements of market orderings. Is there a principled inconsistency between any of them and the notion that market relations call for taking responsibility for conferring or denying legitimation? In the case of efficiency, if the preferences of participants largely cohere with the notion of responsible agency then, in principle, there should be no inconsistency (so that participants would, rather than merely should, care about the legitimation effect they generate in entering contractual and ownership relations). And as I observed above, the price system can accommodate a personalized conception of market relation by responding to the preferences and judgments of the participants. In the light of this, I shall limit the discussion to the first two concerns: Freedom and stability.

Freedom. Part of what makes the market orderings so attractive from the point of view of freedom is that it is literally liberating in the sense discussed above. Thus, if I need to get a new refrigerator, a competitive market makes it relatively easy and safe to purchase one that best suits my needs and resources without detracting my attention from the more important projects I seek to pursue in life. This point seems to clash with my suggestion that there is a compelling reason to take a judgmental stance toward the concrete person with whom a market transaction is made, a stance that may not be, strictly speaking, related to the quality of the good. However, this conventional view of market freedom doubly fails to appreciate the importance of taking responsibility. The first failure is this: It is one thing to argue that people should not be expected (on grounds of freedom) to invest too much time, energy, and thought in incorporating judgments concerning the persons whom their interacting parties are; quite another to argue that they should not make any effort of this kind whatsoever. And insofar as the epistemic hurdle is sufficiently muted (which is, recall, my working hypothetical assumption), the conventional argument from freedom is not an argument to do away with responsibility. Rather, it is best reconstructed as an argument for excusing market participants from the demands of responsible agency when the conditions for exercising it do not obtain. The second failure of the conventional argument from freedom is that its implicit conception of importance (as in important projects) is difficult to accept. The distinction between buying refrigerator and pursuing one’s grand projects (say, academic career or family life) captures only one dimension of what counts as important—activities that are intrinsically valuable. However, buying a refrigerator can be important in a different sense, one which reinforces the normative significance of responsibility in the market context—suppose that the refrigerator’s water inlet
valve has been assembled by workers who have been subjected to harshly exploitative conditions. Against this backdrop, it is not clear whether the argument from freedom can resist the demands of responsible agency simply by making a distinction between intrinsically and instrumentally valuable interactions.

**Stability.** As with freedom, there is ample space to admit stability considerations within the set of constraints that may be imposed on the market practice of exchanging legitimation. In fact, it is even plausible to suppose that preserving social stability is a consideration that ought to figure, in some measure, in making responsible decisions concerning the inclusion and exclusion of others. The only principled tension that exists between stability and the responsible exchange of legitimation is when stability requires a depersonalized form of market relations. On this requirement, it is a necessary condition for stability to persist that market participants approach one another as abstract bearers of the capacity for choice (or generic personality). As I have argued above, it is not clear whether it is possible to drive a wedge between a person’s capacity for choice—his or her generic personality—and at least the important choices this person has in fact made. But even if it would have been possible to limit recognition in this way, the thought that there is a necessary connection between depersonalized market relations and sustaining social stability seems unduly speculative. It is speculative in the sense that it seems to rely on psychological assumptions. It may be true that for some people, a depersonalized engagement generates a quietening effect, whereas others would presumably have the opposite reaction (perhaps because they would suspect that a depersonalized scheme of market relations has the potential to serve as a sham laundromat of injustices).

V. Normative Implications: Private Responsibility Redux

According to a familiar liberal-egalitarian tradition, the basic responsibility to set the world right is held by the people acting collectively through the state. In that, individual persons are not required, as a matter of law and of justice, to adopt this end in their market (and other private) affairs. More specifically, their being legally relieved of this responsibility is not due to some pragmatic considerations; rather, it finds its grounding in political morality. To begin with, there is the argument from moral division of responsibility between the state and the individual. On

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78 I do not mean to suggest that on this picture individuals are absolutely absolved of any demand of justice. The point, instead, is that their responsibility to realized the demands of justice (beyond the point of preserving the just status quo if it is just) is fundamentally accessory and conditional. It is accessory in the sense that social and political institutions, rather than private persons, are in charge of realizing the demands of justice so that these demands are fully specified apart from private individuals’ role as supporters and compliers. And it is conditional in the sense that individual (accessory) responsibility arises only because, and only insofar as, private misconduct happens to contribute to the perpetuation of ongoing injustice in a certain market (or in civil society, more broadly). Cf. John Rawls, A Theory of Justice 293–294 (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971).
some accounts, it reflects a form of value pluralism under which private individuals can pursue, within limits, their valuable, non-justice ends, leaving the state with the obligatory end of realizing the demands justice. On other accounts, the moral division of responsibility expresses the value of personal independence—the state must secure for all the private individuals residing in its jurisdiction the formally equal right to set and pursue their own ends, using their own means. Both (and other) interpretations of the moral division of responsibility apply broadly to capture the activity of persons in their capacity as private individuals, rather than citizens (law-makers) or public officials.

The economic orientation of the market, which is a subset of this private sphere, further strengthens the argument from moral division of responsibility. Indeed, in a sufficiently competitive market, each participant ought to care only for his or her interests. The reason, sometimes associated with the notion of the invisible hand, is not that of egoism, but rather that of improving the interest of all. Now, as already mentioned, it is perfectly possible to assume that for some market participants there would exist no inconsistency between doing well (economically), doing good (in pursuing a conception of the good), and doing right. That said, the important point is that the liberal-egalitarian tradition in question provides market participants with a moral permission, according to which they can absolve themselves from the responsibility to set the world right.

However, the proposed account of market relations as giving rise to reciprocal exchange of legitimacy reveals that the argument from moral division of responsibility fails. Insulating the market domain from justice concerns may fail precisely because persons acting in this domain engage in market transactions (that take contract and ownership forms). Indeed, acting on the basis of judgments about the legitimate moral status of another person (or another person’s act)

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81 Another principled argument in favor of the division of responsibility between the state and the individual suggests, with Ronald Dworkin, that the state’s obligation to display equal concern and respect to the persons involved does not extend to private individuals. See Ronald Dworkin, Law’s Empire 296, 299 (1986).
82 Recall the first fundamental theorem of welfare economics mentioned above. And with the addition of the second fundamental theorem (concerning the compatibility of efficiency and distributive justice), the “egoism” conventionally attributed to characteristically market behavior may not be reducible to ethical egoism (which is the view that one is doing right simply and merely by his or her doing well in the market and elsewhere).
83 Note that the argument from the moral division of responsibility mainly focuses on the demands of justice, whereas my argument concerns considerations of legitimacy. The nature of the relationship between justice and legitimacy is multi-dimensional and complex. However, for the purpose of the present argument it is sufficient to assume that clear cases of illegitimate conduct also represent deviations from the demands of justice (though not all clear cases of injustice must also be viewed as instances of illegitimate conduct).
may leave participants up to their necks with some of the questions that, on the liberal-egalitarian tradition under discussion, are left for the state’s responsibility to tackle.

Conclusion

The view that society is composed of different spheres, the market being one of them, is a modern one, and especially a liberally modern one. The market sphere, it is sometimes thought, carves out a space in which people may pursue their narrow self-interests. The depersonalized character of market relations is an important surface manifestation of this view. In these pages, I have sought to demystify this manifestation and, in this respect, cast doubt on the possibility of maintaining a strict separation between distinctively market reasoning and practical reasoning. To this end, the argument has focused on the legal forms of market interactions, contract and ownership, in an attempt to understand their inherent qualities and immediate implications. These forms, I have argued, can shape the nature of the market exchange so that its object spans reciprocal legitimation, rather than merely the market good on demand (and supply). This way of establishing a structural connection between market exchange and judgments of legitimacy creates the opening for a new philosophy for the market, one which takes more seriously the importance of responsible market agency and, more generally, the ineliminable role of private responsibility for realizing (some of) the demands of justice. To this extent, I have argued that market orderings predicated on the contract and ownership forms of coordination is just another sphere in life in which doing well does not crowd out the imperative of doing right.

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84 Michael Walzer’s observation—concerning liberalism and the art of separation—is perhaps the most familiar variation on this theme. See Michael Walzer, Liberalism and the Art of Separation, 12 Political Theory 315 (1984).