Liberal Democracy, Competition, and the *Institutional* Limits of Markets

Shai Agmon

Department of Politics and International Relations, Worcester College

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Contents

Abstract

This thesis addresses a particular class of problems affecting liberal democracies worldwide, namely, that some of their most central institutions—the electoral system, the legal system, and the free press—are undermined by their partial or complete subordination to the market. I provide a comprehensive normative analysis of this class of problems and answer the following questions: is it justifiable to place limits on markets in certain institutional goods (e.g., legal representation and the reporting of news), and if so, what should those limits be?

Arguments for limiting markets are not novel. In recent decades, a shared fear of market expansionism has developed into a vast normative literature, the 'Moral Limits of Markets'. This body of scholarship introduced new normative questions about markets and brought to the fore markets that have been hitherto underexplored.

Yet, as I argue in the first part of the thesis, despite its richness and importance, this literature suffers from a significant weakness: it fails to properly analyse normative issues arising from the clash between markets and liberal democratic institutions. In response, I develop a novel *institutional account* of the limits of markets in liberal democracies.

An intermission between the first and second parts of the thesis is devoted to the concept of competition. Competition is the key element in the institutional infrastructure of modern liberal democracies. Thus, a proper account of competition is necessary to assess the normative foundations of present-day institutional designs. I offer such an account, arguing that there are two concepts of competition, each leading to different normative requirements for institutional design. Only one is compatible with markets.

Finally, in the second part, I apply my account to markets within two key political institutions in liberal democracies—the legal system and the media—and provide normative guidelines concerning their proper limits.

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Introduction

'The legal system is broken!', 'Billionaires are buying elections!', 'The media is biased!'. These are not merely popular grumbles but also shrewd insights into a particular class of problems affecting contemporary liberal democracies worldwide, namely, that some of their most central institutions—the legal system, the free press, and the electoral system—are currently undermined by their partial or complete subordination to the market.[1] Thus, economic wealth can be translated into an advantage in the legal system through the market in legal representation,[2] media outlets within the market represent their owners' interests instead of scrutinising the government or providing a platform for informed public debate,[3] and political campaigns are heavily funded by wealthy donors and corporations, who consequently shape policymaking in their favour.[4] Put differently, market expansionism can and sometimes does corrode the normatively proper functioning of the most central institutions in liberal democracies.

To be sure, the fact that since the industrial revolution, markets have expanded their reach into most parts of our social and private lives has not escaped scholarly attention. Throughout the

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[1] For a handful of examples of such popular grumbles, see Joan Donovan, 'From to Kanye and Musk: Why Are the Super-Rich Buying Social Media Sites', *The Guardian*, 21 October 2022; Sarah Lustbader, 'Wealthy and Connected Defendants Like Roger Stone Get Off Easy All the Time', *The Washington Post*, 14 February 2020; Jane Mayer, 'The Big Money Behind the Big Lie', *The New Yorker*, 2 August 2021; George Monbiot, 'What Price British Democracy When a Rich Elite Has the Government's Ear', *The Guardian*, 23 February 2022; Jonathan Weisman and Rachel Shorey, 'Fueled by Billionaires, Political Spending Shatters Records Again', *The New York Times*, 3 November 2022; Michael Zuckerman, 'Is There Such a Thing as an Affordable Lawyer?', *The Atlantic*, 30 May 2014.

[2] E.g., Gillian K. Hadfield, 'The Price of Law: How the Market for Lawyers Distorts the Justice System', *Michigan Law Review* 98, no. 4 (2000); Richard Posner and Albert Yoon, 'What Judges Think of the Quality of Legal Representation', *Stanford Law Review* 63, no. 2 (2011); Frederick Wilmot-Smith, *Equal Justice: Fair Legal Systems in an Unfair World* (Cambridge, MA: Harvard University Press, 2019).

[3] E.g., Guy Grossman, Yotam Margalit, and Tamar Mitts, 'How the Ultra-Rich Use Media Ownership as a Political Investment', *The Journal of Politics* 84, no. 4 (2022); Victor Pickard, 'The Violence of the Market', *Journalism: Theory, Practice, And Criticism* 20, no. 1 (2019); Victor Pickard, *Democracy without Journalism? Confronting the Misinformation Society* (New York: Oxford University Press, 2020); Cass R. Sunstein, *#Republic: Divided Democracy in the Age of Social Media* (Princeton: Princeton University Press, 2017).

[4] E.g., Timothy K. Kuhner and Eugene D. Mazo, *Democracy by the People: Reforming Campaign Finance in America* (Cambridge: Cambridge University Press, 2018); Robert E. Mutch, *Buying the Vote: A History of Campaign Finance Reform* (New York: Oxford University Press, 2016).

twentieth century, many philosophers have expressed a shared 'fear of commodification', in Jeremy Waldron's words, namely, a 'widespread sense of unease that many people feel about a world in which everything is for sale, everything has a money price, everything is dealt with in the market-place'.[5] One of the most influential pioneers who provided a comprehensive articulation of market expansionism as a new social phenomenon was the political economist Karl Polanyi. In an essay from 1947, 'On Belief in Economic Determinism', he wrote:

> A chain-reaction was induced, and the harmless institution of the market flashed into a sociological explosion. By making labour and land into commodities, man and nature had been subjected to the supply-demand-price mechanism. This meant the subordinating of the whole of society to the institution of the market. Instead of the economic system being embedded in social relationships, social relationships were now embedded in the economic system […]. Marriage and the rearing of children, the organization of science and habitation, the shape of settlements down even to the aesthetics of everyday life, must be moulded according to the needs of the system. Here was 'Economic society'! Here it could truly be said that society was determined by economics.[6]

Around 40 years later, when admiration for markets was on the rise and history was about to end,[7] Polanyi's rudimentary concerns began to develop into a vast normative literature within analytical moral, political, and legal philosophy: the 'Moral Limits of Markets' (hereafter referred to as MLM). This body of scholarship has brought to the fore new kinds of normative questions about markets (What are their moral limits? What kinds of goods should or should not be bought and sold?) as well as normative analysis of new kinds of underexplored markets, such as markets in reproductive labour and organs.[8]

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[5] Jeremy Waldron, 'Money and Complex Equality', in *Pluralism, Justice, and Equality*, ed. David Miller and Michael Walzer (Oxford: Oxford University Press, 1995), 164.

[6] Karl Polanyi, 'On Belief in Economic Determinism', *The Sociological Review* 39, no. 1 (1947): 100.

[7] I paraphrase here Fukuyama's famous dictum. See Francis Fukuyama, 'The End of History?', *The National Interest* 16 (1989).

[8] These are some of the main works in the field: Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge, MA and London: Harvard University Press, 1993); Benjamin R. Barber, *Consumed: How Markets Corrupt Children, Infantilize Adults, and Swallow Citizens Whole* (New York and London: Norton, 2007); Jason Brennan and Peter Jaworski, *Markets Without Limits: Moral Virtues and Commercial Interests* (New York and London: Routledge, 2016); Cécile Fabre, *Whose Body Is It Anyway? Justice and the Integrity of the Person* (Oxford: Oxford University Press, 2006); Carole Pateman, *The Sexual Contract* (Cambridge: Polity Press, 1988); Margaret J. Radin, *Contested Commodities* (Cambridge, MA and London: Harvard University Press, 1996); Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (London: Penguin

Unlike other philosophical accounts that aspire to radically change the fundamental structure of contemporary market-based societies (e.g., by implementing non-liberal, Marxist-inspired regimes or by offering liberal alternatives to existing property rights regimes[9]), MLM theorists accept the boundaries of contemporary, liberal, market-dominated societies and operate within them. The MLM project is dedicated to identifying and providing reasons for protecting *specific* goods or social spheres from market expansionism within liberal, market-dominated societies.[10] It highlights the fact that the market is an ever-expanding social institution that permeates different spheres of human life, in the process changing social relations, the way we value certain goods, and the action-guiding principles in each sphere.

Despite its richness and importance, the MLM literature faces two major challenges, which are the focus of the first part of this thesis. The first concerns the standard MLM arguments themselves. By and large, MLM theorists tend to employ three kinds of arguments for limiting certain markets: (1) the argument from dignity—fundamental values like respect and dignity rule out the commodification of goods that are attached to these values in a significant way;[11] (2) the argument from corruption—commodification corrupts the quality or social meaning of specific

Books, 2013); Debra Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (New York and Oxford: Oxford University Press, 2010); Richard M. Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (New York: New Press, 1997); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

[9] For an example of a Marxist-inspired account, see Gerald A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995). An illuminating discussion on property-owning democracy, a radical liberal account, can be found in Martin O'Neill and Thad Williamson, eds., *Property-Owning Democracy: Rawls and Beyond* (Chichester: Wiley-Blackwell, 2014).

[10] Notice, that the MLM literature can framed as an extension of the literature on specific egalitarianism, broadly construed. Nevertheless, MLM arguments and specific egalitarianism arguments are not one and the same. While specific egalitarians argue that there are specific goods that should be *distributed equally*, MLM theorists add that there are specific goods that *should not be for sale* (either for some special feature of the good, or because general reasons that makes a market in a specific good a noxious one. I elaborate on the difference between these two kinds of MLM arguments in chapters 2 and 3). However, I do treat specific egalitarian arguments as a strand of MLM arguments from inequality. One leading example of the specific egalitarianism approach is James Tobin, 'On Limiting the Domain of Inequality', *Journal of Law and Economics* 13, no. 2 (1970). For a more detailed overview of specific egalitarianism, see Satz, *Why Some Things Should Not Be for Sale*, 79–84.

[11] E.g., Anderson, Value in Ethics and Economics, 168; Pateman, The Sexual Contract, 207; Satz, Why Some Things Should Not Be for Sale, 40–44, 117–21.

goods;[12] and (3) the argument from inequality—markets in specific goods foster normatively objectionable inequalities.[13]

Several substantive objections have been raised against these arguments. Some have argued that MLM theorists fail to justify two kinds of asymmetries. First, why can some goods be given for free but should not be sold? (e.g., organs).[14] Second, what allows us to justify limiting a market in good X while not limiting a market in another, similar good Y? (e.g., why limit sex workers from selling bodily services but not limit, say, professional athletes from selling something similar?).[15] Others have claimed that the normative worries MLM theorists raise are speculative and are not caused by markets at all but by other reasons and have provided an alternative causal explanation to support their claims.[16] Finally, a prominent objection against MLM arguments is that they rely on contingent social meanings, and the pursuit of defending these meanings is conservative and unjustified[17] (I provide a full analysis of these objections in chapter 2). Although I do not think each of these objections is decisive on its own, together, they amount to a serious challenge against the MLM intellectual project.

The second challenge is less about the specific objections to the standard MLM arguments and more about the general focus of this literature. Namely, MLM arguments overlook the normative concerns with which I opened this introduction (and which were the focus of Polanyi's pioneering work), concerns that arise from the clash between markets and *liberal democratic*

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[12] E.g., Elizabeth Anderson, 'Is Women's Labor a Commodity?', *Philosophy & Public Affairs* 19, no. 1 (1990): 76; Sandel, *What Money Can't Buy*, 34; Walzer, *Spheres of Justice*, 100.

[13] Satz, *Why Some Things Should Not Be for Sale*, 94, 153; Tobin, 'On Limiting the Domain of Inequality', 264; Walzer, *Spheres of Justice*, 105–6; Bernard Williams, *Problems of the Self: Philosophical Papers, 1956–1972* (Cambridge: Cambridge University Press, 1973), 241.

[14] Brennan and Jaworski, *Markets Without Limits*, 10–12, 78; Fabre, *Whose Body Is It Anyway?*, 10; Alan Wertheimer, 'Two Questions About Surrogacy and Exploitation', *Philosophy & Public Affairs* 21, no. 3 (1992): 220.

[15] See, for instance, Satz, Why Some Things Should Not Be for Sale, 143.

[16] For an example of such an argument, see Arrow's objection against Titmuss and Radin: Kenneth J. Arrow, 'Gifts and Exchanges', *Philosophy & Public Affairs* 1, no. 4 (1972); Kenneth J. Arrow, 'Invaluable Goods', *Journal of Economic Literature* xxxv, no. 2 (1997).

[17] Martha C. Nussbaum, '"Whether from Reason or Prejudice": Taking Money for Bodily Services', *The Journal of Legal Studies* 27, no. 2 (1998): 695; Waldron, 'Money and Complex Equality', 170.

institutions.[18] It is this challenge that is the main focus of this thesis.[19]

Generally speaking, MLM theorists are concerned with 'contested commodities', i.e., goods, the marketisation of which seems intuitively controversial.[20] Such goods can either be those relating to the human body (especially its sexual or reproductive functions), like surrogacy, prostitution, or organ transplantation.[21] Or they can be goods that relate to social norms, such as apologies or standing in line. However, what I call 'institutional goods', which derive their value primarily from their institutional function, such as legal representation or news outlets, are not usually included in this 'contested' family. Thus, apart from a few exceptions, institutional goods have been absent altogether from the mainstream MLM literature.[22]

In the rare case where MLM theorists discuss an institutional good or service, it is often assumed that it should not be for sale. That is the case, for instance, with votes or judicial services.[23] In such cases, the normative discussion on the limits of markets in these goods ends before it even begins. And, when philosophers do attempt to apply MLM arguments to institutional goods, these attempts fail, or so I argue, for two reasons.

First, in terms of *argumentative structure*, MLM arguments appeal to general moral principles (or metrics) and social meanings, thereby ignoring the specific justification of the institution in which

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[18] Some might consider Michael Walzer's account in *Spheres of Justice* as one such institutional account. I defend the novelty of my approach and discuss Walzer's work in section 3.8.

[19] It could be argued that when a market undermines a certain institution, the institution is 'corrupted'. However, arguments from corruption within the MLM literature have a very specific meaning, that does not capture institutional elements. So, I refrain from using the word 'corruption' to describe my account. In chapter 3, I explain the difference between my institutional account and the MLM arguments from corruption.

[20] This term was coined in Radin, *Contested Commodities*, 2.

[21] For instance, see Anderson, 'Is Women's Labor a Commodity?'; Richard Arneson, 'Commodification and Commercial Surrogacy', *Philosophy & Public Affairs* 21, no. 2 (1992): 132–64; Ronald Dworkin, 'Comment on Narveson: In Defense of Equality', *Social Philosophy and Policy* 1, no. 1 (1983): 24–40; Fabre, *Whose Body Is It Anyway*; Elisabeth M. Landes and Richard A. Posner, 'The Economics of the Baby Shortage', *The Journal of Legal Studies* 7, no. 2 (1978): 323–48; Nussbaum, 'Whether from Reason or Prejudice'; Pateman, *The Sexual Contract*; Satz, *Why Some Things Should Not Be for Sale*.

[22] Most exceptions can be found in the burgeoning MLM literature on votes, which I survey in chapter 3.

[23] For example, see: Anderson, *Value in Ethics and Economics*, 143; Radin, *Contested Commodities*, 19; Susan Rose-Ackerman, 'Inalienability and the Theory of Property Rights', *Columbia Law Review* 85, no. 5 (1985): 5; Walzer, *Spheres of Justice*, 10, 16, 100–103.

the institutional good is embedded, the specific institutional design that is supposed to bring about the institutional justification, and the function of the institutional good as part of this apparatus. Second, in terms of *content*, many (not all) MLM arguments concerning institutional goods focus on individual moral permissibility and obligations and not on institutional design. The most prominent example is the market in votes within the MLM literature, discussed in terms of whether it is morally permissible or impermissible to sell one's vote.[24] Both these arguments lead me to conclude that turning to standard MLM arguments to fill the philosophical gap about the marketisation of institutional goods is not a promising option.

I respond by developing a novel four-stage *institutional account* of the limits of markets in liberal democracies. To analyse the correct limits of markets in certain institutional goods, one should first extract the different normative justifications for the existence of the institution (e.g., the media is supposed to hold the government accountable). The next step is to commit to a specific institutional design that is supposed to function in accordance with these general justifications, or at least some of them (e.g., the marketplace of ideas). Only then can one focus on a specific good within the chosen institutional design and understand its function and value (e.g., media outlets within a marketplace of ideas). Bearing all this in mind, one can then determine what (if any) limits there should be to a market in such a good. In short, the focus of institutional limits of markets arguments is not the good itself but its function within a specific institutional design according to a specific institutional justification. After elaborating on this institutional account, I argue that in addition to the fact that it is the appropriate way to normatively analyse the limits of markets in institutional goods, it is also more resilient to the substantive objections the standard MLM arguments face.

The second part of the thesis is devoted to applying my institutional account to two major

[24] E.g., Jason Brennan, *The Ethics of Voting* (Princeton and Oxford: Princeton University Press, 2011), 135–61; Christopher Freiman, 'Vote Markets', *Australasian Journal of Philosophy* 92, no. 4 (2014): 759–74; Lachlan Montgomery Umbers, 'What's Wrong with Vote Buying', *Philosophical Studies* 177, no. 2 (2018):): 551–71.

institutions: the adversarial legal system and the media (more specifically, the 'marketplace of ideas'). By applying my institutional account, I answer the following questions: is it justifiable to place limits on markets in certain institutional goods (e.g., markets in legal representation, media outlets), and if so, what should those limits be? But to discuss these institutional goods with any sort of rigour, I must first offer a normative yardstick against which justifications of specific institutional designs can be appraised. I suggest that a plausible candidate for the role is the concept of competition.

Why Competition?

Competition is a key element in the institutional infrastructure of modern liberal democracies. Since the eighteenth century, the idea of competition has been germane to quite a few social institutions and the linchpin of practically every legal, economic and political one, especially in the Anglo–American world. Free and fair elections, the free press, the adversarial legal system, and the market economy are all examples of institutions meant to generate desirable social outcomes by utilising competition—be it political, legal, or economic.

The pervasiveness of competition in modern politics as an institutional mechanism is matched by its unpopularity as a subject of analysis in contemporary political philosophy. Since the turn of the twentieth century, when Frank Knight discussed the ethics of (economic) competition[25] and a handful of sociologists wrote about competition as a social structure,[26] the analysis of competition as a distinct political concept has been mainly left to economists and competition lawyers. This theoretical neglect is troubling since if most institutions in liberal democracies are based on competitive mechanisms, without a proper account of competition, we

[25] Frank H. Knight, *The Ethics of Competition and Other Essays* (New York and London: Haper and Brothers, 2014).
[26] Émile Durkheim, *The Division of Labour in Society* (Basingstoke: Macmillan, 1984); Karl Mannheim, 'Competition as a Cultural Phenomenon', in *From Karl Mannheim*, ed. Kurt H. Wolff (New Brunswick and London: Transaction Publishers, 1993); Georg Simmel, *Conflict* (New York: Free Press of Glencoe, 1964).

do not have tools to assess the normative foundations of present-day institutional designs.

Another reason for the importance of competition to this thesis is that the market is a competitive mechanism. As mentioned, when MLM theorists discuss the repugnant results of marketisation, they usually focus either on corruption of value (the way marketisation distorts the assigning of proper value to a certain good) or on inequality (market-driven inequalities cannot be justified in the context of specific goods). However, when the market expands, it not only changes the value of goods or generates inequalities; it also introduces a competitive institutional mechanism. In the market, *we compete*. Therefore, not only do we also need an account of competition to analyse the institutional design of the legal and media systems, we need an account of competition to have a better understanding of what marketisation itself entails.

Thus, the intermission between the two parts of the thesis is devoted to a novel normative account of the concept of competition in general and of competitive institutional mechanisms more specifically. Building on this account in the second part of the thesis, I only discuss competition-based institutional designs. This does not mean that my institutional limits of markets account is applicable only to competitive institutions. This also does not mean that all the institutional justifications I will be analysing are directly related to competition. It only means that I choose to focus on competitive mechanisms.

I do so for two main reasons. First, as said, competitive mechanisms are highly popular in contemporary liberal democracies, which means that the arguments I make in the thesis will cover many real-life institutions. Second, the fact that competition is pervasive across different institutions allows me to draw general conclusions concerning the institutional limits of markets in competitive institutional designs rather than idiosyncratic conclusions that are relevant only to specific institutions. Thus, the analytic and normative discussion on competition serves as a link between the theory of institutional limits of markets and its application to competition-based institutional designs.

What about Institutional Accounts outside the Moral Limits of Markets Literature?

There are two strands of approaches within political philosophy on political institutions that are relevant to my thesis. The first is the literature on the justifications of institutions in liberal democracies. Frequently, philosophers who discuss these justifications refrain from discussing a narrower set of problems that arise from specific institutional designs. Take John Rawls's account as a paradigmatic example. In *A Theory of Justice,* he proposes general justifications for the legal system and the electoral system but refrains from discussing specific institutional designs or institutional goods. In his words, 'the theory of justice […] must not be mistaken for a theory of the political system. We are in the way of describing an ideal arrangement, comparison with which defines a standard for judging actual institutions'.[27] Notice that this quote is a bit misleading. Rawls not only refrains from discussing real-life institutions but also any specific institutional design, ideal or non-ideal. Thus, his theory is not only ideal but also general. We cannot directly compare our actual institutions to Rawls's general principles, as he does not offer any ideals for institutional design.

In *Political Liberalism*, Rawls goes even further by saying

> it is beyond the scope of philosophical doctrine to consider in any detail the kinds of arrangements required to insure the fair value of the equal political liberties, just as it is beyond its scope to consider the laws and regulations required to ensure competition in a market economy.[28]

I respectfully disagree, and I hope this thesis will show the need for an additional normative layer that discusses the justification of specific institutional designs (and specifically competition in a market economy) according to general institutional principles, which Rawls did not address.

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[27] John Rawls, *A Theory of Justice*, Revised ed. (Cambridge, MA: Belknap Press, 1999), 199.

[28] Rawls's later work on market socialism and property-owning democracy—in which he considers a specific institutional design—might lead to the conclusion that he changed his mind. See John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA and London: Harvard University Press, 2001), 135–40. Be that as it may, his discussion on property-owning democracy is still very general, and my critique still applies to most parts of his work, and the work of some of his followers.

Similarly, some accounts regarding the justifications of democracy do not address specific institutional questions. While philosophers argue about political equality, to take one example, they sometimes refrain from arguing about how political equality should be justifiably brought about but rather remain at the more abstract level of justifying democracy.[29]

The second strand of institutional literature that is relevant to my thesis includes works such as John Stuart Mill's work on plural voting,[30] the Federalist Papers,[31] Charles Beitz's discussion on campaign finance and gerrymandering,[32] Debra Satz's work on education,[33] and Jeremy Waldron's account of bicameralism and judicial review.[34] Within all these works, the justification of certain institutions and their compatibility with specific institutional designs have been thoroughly discussed. So, in order not to overstate the novelty of my thesis, let me emphasise that a lot of work has been done on the issue of institutional goods and designs. However, each of these accounts focuses on a specific institution and a specific institutional justification. They can serve as examples for institutional discussion but not as a comprehensive account of how to argue or normatively analyse markets in institutional goods.

Thus, on the one hand, there is the MLM literature, which provides a comprehensive account for analysing markets in specific goods but overlooks institutional goods and is inapplicable to them. On the other hand, there are general institutional accounts that do not take into

[29] For examples of such accounts, see Thomas Christiano, 'Freedom, Consensus, and Equality in Collective Decision-Making', *Ethics* 101, no. 1 (1990): 151–81; Thomas Christiano, 'An Argument for Democratic Equality', in *Philosophy and Democracy: An Anthology*, ed. Thomas Christiano (New York and Oxford: Oxford University Press, 2003): 39–69; Ronald Dworkin, 'What Is Equality? Part 4: Political Equality', *University of San Francisco Law Review* 22, no. 1 (1987) 1–30.

[30] John S. Mill, *Considerations on Representative Government* (Cambridge: Cambridge University Press, 2010).

[31] Alexander Hamilton, John Jay, and James Madison, *The Federalist Papers* (Dublin, OH: Coventry House Publishing, 2015).

[32] Charles R. Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton: Princeton University Press, 1989).

[33] Debra Satz, 'Equality, Adequacy, and Education for Citizenship', *Ethics* 117, no. 4 (2007): 623–48.

[34] Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Cambridge, MA: Harvard University Press, 2016). For another example, see Stark's account concerning regulatory competition law and Miller's analysis of the university and the police: Johanna Stark, *Law for Sale: A Philosophical Critique of Regulatory Competition* (Oxford: Oxford University Press, 2019); Seumas Miller, *The Moral Foundations of Social Institutions: A Philosophical Study* (Cambridge: Cambridge University Press, 2010).

consideration specific institutional designs and institutional goods. Finally, there are specific institutional accounts that do not provide a general account of markets in institutional goods. Building on these important philosophical strands, my account will take a step further by both: (1) focusing on institutional goods that function according to specific institutional design; (2) offering a comprehensive account of markets in institutional goods.

Two Comments on Methodology

Two strands of general methodological quarrel are relevant to my thesis. One is the burgeoning literature on the distinction between political philosophy and moral philosophy. I focus on two main interpretations of this distinction. According to one interpretation, the distinction is between a 'realist' view, which argues that political philosophy discusses a special kind of normativity that is distinct from moral normativity, and a 'moralist' view, which states that political philosophy is a sub-field of moral philosophy. In contrast, although I do not defend this claim as part of my thesis, I assume that institutional arguments are also 'moral' in the sense that they rely on moral justifications and principles.[35] Nevertheless, even if one believes that my institutional account represents a special political normativity of some kind along the lines developed by political realists, this does not affect any of my arguments. The point I wish to make is that when, throughout my thesis, I distinguish between 'moral' and 'institutional' arguments, I do not refer to this first interpretation.

The second interpretation distinguishes between individual morality, which discusses moral standards that apply to individuals, and political philosophy, which focuses on institutions. Both

[35] For a full discussion on this view, see Jonathan Maynard and Alex Worsnip, 'Is There a Distinctively Political Normativity?', *Ethics* 128, no. 4 (2018): 756–87. See also Enzo Rossi and Matt Sleat, 'Realism in Normative Political Theory', *Philosophy Compass* 9, no. 10 (2014): 689–701.

are branches of moral philosophy in a sense, but the way of philosophising in each is different.[36] The former focuses on duties, permissibility, and interpersonal relations, while the latter focuses on institutional design, social structure, stability, and coordination. The account I propose for institutional arguments, according to which the content and argumentative structure of institutional arguments should be different, does track, to some degree, this interpretation.

The other methodological quarrel focuses on the distinction between ideal and non-ideal theories.[37] By and large, the focus of this debate is about whether political philosophy should or can be action-guiding in real life and to what extent. I refer here only to one element of this debate, namely, the question of whether feasibility considerations should constrain normative political theorising.[38]

In general, my response to such feasibility concerns is not to directly address them. The value of my thesis is to reveal the normative commitments we have regarding the different dimensions of exchange of institutional goods. I will try to show that if one supports institutional justification W and institutional design X, then the limits of the dimensions of exchange of institutional good Y should be set according to principle Z. What is the best or most feasible way, and if there even is such way to achieve principle Z, are separate questions, and I assume that there will be more than one way to answer them. My hope is that policymakers will treat the normative principles I propose as guidelines when they design real-life solutions and thus create a system that adheres to these principles. Nevertheless, I do briefly discuss feasibility constraints in the second part of the thesis (and in the intermission) to show how they affect the scope of the conclusions

[36] David Miller, 'In What Sense Must Political Philosophy Be Political?', *Social Philosophy & Policy* 33, no. 1–2 (2016): 155–74; Thomas Scanlon, 'Individual Morality and the Morality of Institutions', *Filozofija i Društvo* 27, no. 1 (2016): 3–36; Waldron, *Political Political Theory*.

[37] For an overview, see Laura Valentini, 'Ideal Vs. Non-Ideal Theory: A Conceptual Map', *Philosophy Compass* 7, no. 9 (2012): 654–64; Adam Swift and Zofia Stemplowska, 'Ideal and Nonideal Theory', in *The Oxford Handbook of Political Philosophy*, ed. David Estlund (Oxford: Oxford University Press, 2012): 373–88. See also David Enoch, 'Against Utopianism: Noncompliance and Multiple Agents', *Philosophers' Imprint* 18, no. 16 (2018): 1–20.

[38] Valentini, 'Ideal Vs. Non-Ideal Theory'.

that can be drawn from my arguments.

Four Comments on Scope

In addition to these two methodological quarrels, a few short comments concerning the scope of my argument or, putting it differently, concerning things I do not aim to do in the thesis.

First, my discussion is limited to liberal democracies. It may be that the institutional account I propose could be used to analyse other regimes, but such questions are beyond the scope of the thesis.

Second, I assume that the existence of the institutions I discuss in the second part of the thesis is justified. I neither challenge the basic assumption that there is a need for a legal system or a media system within a liberal democracy, nor am I aware of any liberal or democratic account that argues against their existence. There are other similar institutions, such as the military, police, or the education system, that I will not focus on. Their exclusion from this thesis is not on principle but rather a reflection of scope constraints. I could not include all of them in one project, and since their institutional design is normally not competition-based, their inclusion would make the thesis less cohesive.

Third, in the second part of the thesis, I do not challenge and thus take at face value, the normative justifications underpinning the key institutions of existing competitive institutions in liberal democracies (for example, that the adversarial legal system leads to the discovery of the truth) and formulate institution-specific arguments regarding the limits of markets within each of these institutions. The project is to provide arguments for the normative limits of markets these justifications require (or do not require), not to argue about the justifications themselves.

Putting the last two points differently, this thesis can and should be read conditionally—if we accept that the normative justifications I discuss are indeed the correct normative justifications

of the institutions and institutional designs on which I focus, then my arguments concerning the limits of the markets within these institutions follows.

Finally, contrary to Jacques Delors' quip while president of the European Commission that 'nobody falls in love with a common market',[39] some people do, in fact, fall in love with markets. Some theorists treat the expansion of markets as a singularly positive development, or at least a non-objectionable one. Others support a more negative argument that is not in favour of markets but against limiting them, owing to fear of the state or because of libertarian deontological and non-deontological reasons concerning rights infringement.[40] I do not provide a survey of these views. My starting point is different. I assume that there is no overarching moral reason not to limit markets *at all*, and therefore the question I explore is when and for what reasons they should be limited. I am aware that market absolutists would reject this assumption at the outset, but I am willing to bite this bullet. To be clear, I do take seriously objections to limiting markets throughout my thesis, but market absolutists are not my main interlocutors.

Roadmap

Like a standard West End musical, the thesis is comprised, as briefly mentioned, of two parts and an intermission. In the first part, titled 'Theory', I offer my account of the 'institutional limits of markets'. It is structured according to the three parts standard MLM arguments consist of: the dimension of exchange in question (chapter 1), the type of argument for or against a specific dimension of exchange (chapter 2), and the kind of good in question (chapter 3).

The first chapter focuses on the following question: what do MLM theorists wish to limit

[39] Taken from Hermann J Blanke, 'The Economic Constitution of the European Union', in *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action*, ed. Hermann J Blanke and Stelio Mangiameli (Heidelberg; London: Springer, 2012): 369–421.

[40] A well-known example of the positive view about markets can be found in Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 2002). For an example of the negative view, see Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

when they argue for or against 'markets'? There is a fundamental ambiguity about what type of exchange is being targeted by MLM arguments, which is the result of an inconsistent and interchangeable usage of terms such as commodification, marketisation, and putting a price tag to describe fundamentally different things (I am also partly to blame for using ambiguous language up to this point). As a remedy, I offer a taxonomy that distinguishes between different dimensions of exchange: alienation (the mere transfer of a good), commodification (the buying and selling of a good), marketisation (the exchange of a good in a market setting); and privatisation (a process in which ownership of a good, or responsibility for providing a service, is transferred from a public entity to a private one).

Beyond clarifying ambiguities, I use this taxonomy to make a more substantial contribution, which is that different dimensions of exchange give rise to different normative concerns about 'markets'. For instance, sometimes when philosophers argue against commodification their normative concerns are directed at objectification or commensurability, while at other times, when they argue against marketisation, the major normative concern is, to take one example, inequality. The taxonomy will also allow me to better define the scope of my arguments in the second part of the thesis, which is focused on the marketisation of lawyers or the media and not on alienation, commodification, or privatisation.

Chapter 2 discusses the second component, the different MLM arguments. I conduct a survey of the three main types of MLM arguments and discuss the main objections in the literature to each argument. My aim is to present the main objections each argument faces in order to delineate, in the end, four shared challenges that threaten standard MLM arguments.

In chapter 3, I focus on the third component, the different kinds of goods the MLM literature discusses. I make four contributions in this chapter. First, I establish the distinction between institutional goods and natural goods. Second, I develop the argument I have briefly presented above, namely that MLM arguments are inapplicable to institutional goods in terms of both

argumentative structure and content. In order to support these claims, I use the existing MLM discussion on political votes as a paradigmatic example that demonstrates the problems created by applying standard MLM arguments to institutional goods.[41] Third, I propose a four-stage 'institutional limits of markets' account to analyse the different dimensions of exchange of institutional goods. Finally, I argue that my institutional account has two additional advantages over the standard MLM arguments. First, in contrast to MLM arguments, its underlying philosophical motivation is not limited to controversial cases accompanied by moral shock. Second, institutional arguments are less exposed to the four challenges MLM arguments face.

Chapter 4 is the intermission, devoted to the discussion on competition.[42] I argue that there are two distinct senses in which competition is used as an institutional mechanism. The first, 'parallel competition', aims to create separate, independent pathways for each competitor wherein she is supposed to strive to win. The social benefit from this competition is supposed to result from aggregative effects created by the efforts of each competitor. The second, 'friction competition', is designed to facilitate a clash between competitors, which in turn is supposed to generate a desirable social outcome. This distinction has many important analytical advantages: it allows us to clarify the difference between modes of competition in different institutions and between different perceptions of competition within the same institutions. It also has normative implications: each type of competition leads to different normative requirements concerning the level of equality between competitors and the amount of freedom the competitors enjoy in each institutional design.

In part two, titled 'Applications', I apply my institutional account to two central institutions

[41] See Alfred Archer and Alan T. Wilson, 'Against Vote Markets', *Journal of Ethics and Social Philosophy* 8, no. 2 (2014): 1–6; Brennan, *The Ethics of Voting*; Freiman, 'Vote Markets'; Richard L. Hasen, 'Vote Buying', *California Law Review* 88, no. 5 (2000): 1323–71; Kasper Lippert-Rasmussen, 'Vote Buying and Election Promises: Should Democrats Care About the Difference?', *Journal of Political Philosophy* 19, no. 2 (2011): 125–44; Alexandru Volacu, 'Electoral Quid Pro Quo: A Defence of Barter Markets in Votes', *Journal of Applied Philosophy* 36, no. 5 (2019): 769–84.

[42] A version of this chapter has been published in *Ethics*. See Shai Agmon, 'Two Concepts of Competition', *Ethics* 133, no. 1 (2022): 5–37.

in liberal democracies—the legal system and the media—focusing solely on competition-based institutional designs. In chapter 5, I explore the limits of the market of legal representation in adversarial legal systems.[43] The adversarial legal system is traditionally praised for its normative appeal: it supposedly protects individual rights, ensures an equal, impartial, and consistent application of the law, and, most importantly, its frictional competitive structure facilitates the discovery of truth—both in terms of the facts and in terms of the correct interpretation of the law. At the same time, legal representation is allocated as a commodity, bought and sold in the market: the more one pays, the better legal representation one gets. In this chapter, I argue that the integration of a market in legal representation with the adversarial system undercuts the very normative justifications on which the system is based. Furthermore, I argue that there are two implicit conditions that are currently unmet but are required for the standard justifications to hold: that there is equal opportunity for equality of legal representation between parties and that each party has an equal opportunity for a sufficient level of legal representation. I then outline an ideal proposal for reform that would satisfy these conditions.

In chapter 6, I analyse the institutional limits of the 'marketplace of ideas'. First, I distinguish between friction competition over ideas and parallel competition over ideas. Then, by focusing on the United States Federal Communications Commission's (FCC) infamous and repealed 'fairness doctrine', I show how the market in political media can undercut the normative appeal of the frictional benefits of the marketplace of ideas. Next, I show that the media should not be completely marketised even under an absolutist parallel interpretation of competition over ideas. Finally, I demonstrate that real-life markets in political media are actually not marketplaces of ideas but rather marketplaces of media platforms. Subsequently, I argue that as long as one supports the normative appeal of the marketplace of ideas, the marketplace of platforms should function in a

[43] A version of this chapter was published in *Politics, Philosophy & Economics*. See Shai Agmon, 'Undercutting Justice—Why Legal Representation Should Not Be Allocated by the Market', *Politics, Philosophy & Economics* 20, no. 1 (2021): 99–123.

way that supports it. And to do so, contemporary markets in media platforms should be severely restricted and radically reformed.

To recap, the major strength, in my view, of the MLM tradition is that it tries to provide principles that would get contemporary, existing, market-dominated liberal democracies closer to certain normative ideals without 'waiting for a revolution', as it were. This does not mean that MLM theorists should necessarily object to radical anti-liberal or liberal solutions to existing market-based structures. It just means that there is more to be done even in our existing, flawed, market-based contemporary societies concerning specific spheres and goods and that political philosophy can provide normative guidelines for what should be done. This is precisely the approach I take in this thesis, as I believe much can be done to address the pressing normative issues with which I have opened this introduction.

Hence, I provide a comprehensive normative analysis of the relationship between markets and other major institutions in liberal democracies. I do so, following the MLM intellectual tradition, by taking an isolationist stance. My aim is to show whether and under which conditions certain institutional goods and institutional designs should be 'isolated' from the market in some sense, even in contemporary market-based liberal democracies, for institutions to function according to their normative justifications. In Satz's words, 'my argument will have been successful insofar as I have convinced my readers of the need for a fine-grained view of markets and their complex relationship' to institutions and institutional designs in liberal democracies.[44] Beyond contributions to the way we understand the limits of markets, contemporary debates on legal representation and the marketplace for ideas, and to our understanding of competition, I hope that this thesis will serve as an example of institutional political philosophy that political philosophers, policymakers and political leaders find useful.

[44] Satz, Why Some Things Should Not Be for Sale, 11.

Theory

1

The Moral Limits of What, Exactly?

This thesis is about the normative limits of markets. The problem is that 'markets' is a vague and multi-faceted concept, from which it is hard to discern a clear normative picture. So, before we can turn to examine the substance of the different MLM arguments (a task to which the next two chapters are devoted), a more basic question needs answering: the moral limits of *what*, exactly?

To illustrate the worry, consider Waldron's quote again on the shared and growing 'fear of commodification'. There is a 'widespread sense of unease', he claims, 'that many people feel about a world in which everything is for sale, everything has a money price, everything is dealt with in the market-place'.[1] In this quote alone, Waldron alludes to at least three different sources of concern: 'everything is for sale', 'everything has a money price', and 'everything is dealt with in the market-place'. Are having a money price, being for sale, and being dealt with in the marketplace the same thing? Is it part of what Waldron calls 'commodification'? How is 'commodification' different from 'the market'? Waldron does not provide us with answers to these questions.

And Waldron is not alone. As I will show, MLM theorists tend to employ the same few terms—commodification, marketisation, commercialisation, privatisation, market-alienability, putting a price tag, buying and selling—interchangeably as well as inconsistently and to describe fundamentally different things. Thus, the MLM literature suffers from substantial conceptual ambiguity.

My aim in this chapter is to clarify this ambiguity by offering a (non-exhaustive) taxonomy

[1] Waldron, 'Money and Complex Equality', 164.

of what I identify as the sources of the different normative concerns of MLM theorists:[2]

(1) *Alienation*: Transferring a good or service from one person to another.

(2) *Commodification*: Buying and selling a good or service. The buying and selling in this category can be for money or in exchange for other goods and services (barter). This category also captures different aims of exchanges: exchanges for the use value of the good (namely, to use the commodity that is being bought) and for the good's exchange value (that is, buying a good to sell it in the future for profit).

(3) *Marketisation*: Trading goods and services *within* a market. While the mere buying and selling of a good can occur outside an institutionalised market, the market adds distinct elements that go beyond commodification, such as the patterns of allocation markets give rise to (usually, inequalities), a preference-based price system, market competition, and so forth.

(4) *Privatisation*: The transfer of publicly provided goods or services to private entities.[3]

Notice that categories (1)–(3) are concerned with if and how we should exchange a good: whether it should be transferred, in return for what, and under which rules of regulation. Category (4) is a

[2] As far as I am aware, there have been two previous rudimentary attempts to create something like a taxonomy for the different dimensions of exchange with which MLM arguments are concerned, one by Susan Rose-Ackerman and the other by Margaret J. Radin. See Margaret J. Radin, 'Market-Inalienability', *Harvard Law Review* 100, no. 8 (1987): 1849–1937; Rose-Ackerman, 'Inalienability'. While useful, these taxonomies are lacking for the following reasons. First, they have predated most of the important works within the MLM literature. Thus, both taxonomies were not meant to make an intervention in the existing MLM literature and were a part of a separate argument about property rights and entitlements. Second, Rose-Ackerman's taxonomy lay out all the different possibilities of *legally limiting* markets, without virtually any engagement with normative arguments. Third, Radin's taxonomy includes a distinction between what I call alienation and commodification, but she does not distinguish between commodification and marketisation. Fourth, both taxonomies do not include a discussion about privatisation. Fifth, both taxonomies do not discuss the relations between each dimension of exchange and different market norms. Thus, I am building on their work, but the taxonomy I offer is distinct.

[3] As Shelby explains, 'privatisation can involve two types of rights transfer: the transfer of *ownership rights* to assets (such as land, facilities, vehicles, or machinery) and the transfer of *operating rights* to an enterprise (say, the prerogative to provide certain goods or services)'. See Tommie Shelby, *The Idea of Prison Abolition* (Princeton: Princeton University Press, 2022), 127. Indeed, this is an important distinction, but it has no effect regarding the discussion on privatisation in this chapter, and therefore I put it to one side.

bit different. It is about the *kind of entity* who owns the good or performs the service. In short, it is about who and not about how. Despite this difference, for simplicity's sake, I refer to all four categories as different *dimensions of exchange*. My argument is that when MLM theorists wish to put limits on the 'market' or argue that some things 'should not be for sale', they, in fact, allude to one, or a few, of these categories (typically, they are not concerned with all of them at once).

This taxonomy is important for several reasons. On the most basic level, conceptual ambiguity invites misunderstanding. Clarifying this ambiguity at the outset will allow me to be more precise throughout the thesis. Moreover, on a more general level, it will provide a better analytical framework for philosophers to advance the debate in the future. Second, and more substantially, each concept may point us in different directions for reform in particular cases. As I will show, it is one thing to limit commodification. It is a completely different thing to limit alienation, marketisation, or privatisation. Third, the taxonomy I offer shows that each dimension of exchange is associated with different market norms and characteristics. For instance, marketisation is usually identified with inequality, the option of exit, or determining the value of the goods according to a coordinated, preference-based price system. Commodification, in contrast, is mainly associated with objectification, fungibility and commensurability.

I proceed as follows. First, I show how pervasive the conceptual ambiguity is within the MLM literature by analysing three different MLM arguments made by three prominent MLM figures, which are focused on three different goods (1.1). Second, I examine whether turning to a list of different market norms and characteristics (e.g., inequality, objectification, commensurability and so forth) can do the job of clarifying the conceptual ambiguity I am concerned with and argue that it cannot (1.2). Third, I outline my taxonomy. I define the different dimensions of exchange, present the market norms and characteristics associated with each, and distinguish between first- and second-order MLM arguments for limiting them. In doing so, I show which kind of regulatory regime each argument leads to. I end this section by considering an objection to the distinction I

make between commodification and marketisation (1.3).

A few clarificatory remarks are in order before I begin. First, this is not a discussion about linguistics. It is not my aim to grasp what we mean when we say, for instance, 'commodification' in natural language. My taxonomy is aimed at elucidating a conceptual confusion within a specific literature. Second, I do not attempt to refine, object to, or defend the different arguments in the MLM literature. Within the confines of this chapter, I take them at face value. I elaborate on the different MLM arguments at length in the next chapter. Finally, some of the concepts I use might echo, or resemble, Marxist and Marxist-inspired concepts (for instance, 'alienation', 'commodification', 'use value' and 'exchange value').[4] Nonetheless, my taxonomy is dedicated to the MLM literature alone. Therefore, writings within the Marxist tradition about alienation, commodification, marketisation and privatisation are left, by and large, outside the boundaries of my taxonomy, as are the idiosyncratic meanings ascribed in these writings to the words I use.

The justification for focusing only on the MLM literature is twofold. First, the MLM literature warrants independent attention due both to its size and its significance. Additionally, as mentioned in the introduction, the starting point of MLM theorists is distinct. MLM theorists start by assuming that we live in a liberal, market-dominated society and ask whether, concerning *specific* goods or human spheres, different dimensions of exchange should be limited.[5] Arguments about specific goods within contemporary, liberal, market-based society are markedly different from Marxist arguments, and thus creating a taxonomy devoted solely to them makes sense.

[4] For a useful overview of Marxist-inspired definitions for these concepts, see Gerald A. Cohen, *Karl Marx's Theory of History: A Defence*, Expanded ed. (Princeton: Princeton University Press, 2001), 415–18.
[5] Vida Panitch, 'Liberalism, Commodification, and Justice', *Politics, Philosophy & Economics* 19, no. 1 (2020): 62.

1.1 Explaining the Problem

To underscore the conceptual ambiguities I seek to unpack, I focus on three paradigmatic arguments in the MLM literature (on which I elaborate in the next chapter)—arguments from dignity, inequality and corruption. These arguments have been advanced by three prominent MLM figures—Elizabeth Anderson, Debra Satz, and Michal Walzer—and are focused on three different goods—women's reproductive labour, women's sexual labour, and exemption from military conscription. My aim is to show that these conceptual ambiguities are pervasive and not limited to a specific philosopher, good or argument. If I am correct, it means that existing taxonomies that distinguish between different kinds of goods or different kinds of MLM arguments cannot be used to dispel this ambiguity.[6]

Let us begin, then, with Anderson's argument against the 'market' in women's reproductive labour. According to Anderson:

> Few things reach deeper into the self than a parent's evolving relationship with her own child. Laying claim to the course of this relationship in virtue of a cash payment constitutes a severe violation of the mother's personhood and a denial of her autonomy. The surrogate industry enforces its domination of the mother's evaluative perspective by denying her dignity and undermining her social bases of self-respect.[7]

Anderson makes an argument from dignity, according to which a 'market' in reproductive labour would lead to treating surrogate mothers as mere means. But which dimension of exchange degrades women's dignity in this case? The quote above is not very helpful, as Anderson points at

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[6] For a helpful taxonomy of different kinds of arguments in the moral limits of markets literature, see: Brennan and Jaworski, *Markets Without Limits*, 51–68. For taxonomies of the different kinds of goods discussed in the literature, see Judith Andre, 'Blocked Exchanges: A Taxonomy', *Ethics* 103, no. 1 (1992); Panitch, 'Liberalism, Commodification, and Justice'. For a useful categorisation of what makes markets noxious, see Ravi Kanbur, 'On Obnoxious Markets', in *Globalization, Culture, and the Limits of the Market*, ed. Stephen Cullenberg and Prasanta K. Pattanaik (New Delhi and Oxford: Oxford University Press, 2004): 39–62; Satz, *Why Some Things Should Not Be for Sale*, 94–100. Notice that Satz, in her categorisation of things that make markets noxious, similarly to my way of presentation, presents her categories as 'sources' of controversy. While Satz's 'sources' denote different indicators of the noxiousness of certain 'markets', my taxonomy explores a different question. It is not focused on the normative noxiousness of certain dimensions of exchange, but rather on what dimensions of exchange philosophers argue against to begin with.

[7] Anderson, *Value in Ethics and Economics*, 178.

two different things: the cash payment (namely, the mere buying and selling of the good) and the 'surrogate industry' (meaning the market in women's reproductive labour).[8]

Starting with the latter option, is it the market in reproductive labour, specifically, that violates the mother's personhood and infringes her dignity? It might be, but not necessarily. Consider, for example, a situation in which the state is responsible for buying and allocating women's reproductive labour in society for a fixed price. There is no aggressive competition over the good as the allocation is accomplished through, say, a lottery. In this case, the market is clearly not responsible for allocating the good since there is no market. The state is responsible for allocating the good in a centralised manner. Still, some women in these circumstances could be considered mere 'hatcheries', 'rented property', or as 'a surrogate uterus', as they are giving birth in exchange for a 'cash payment'.[9] As Anderson herself acknowledges, sometimes, 'a good does not have to be traded on the market or privately owned to be treated as a commodity'.[10] So, even if we accept Andersons' argument from dignity, there is a need for a further argument (if there is any) to show that the *market itself* is the dimension of exchange that is doing the normative work here and not the mere buying and selling of the good.

We are left with the second option, which is that Anderson's normative concern lies with the mere buying and the selling of reproductive labour. Once a woman can sell her reproductive labour to others, inside or outside a market, she is being treated as an object of use. It looks as if this option fits better with Anderson's argument, but again, we cannot know for certain, as she sometimes refers to the surrogate industry as the source of her dignity-based concerns.

Choosing between these two options is important.[11] To see why, consider the following

[8] Anderson uses this term other places as well. See ibid., 171.
[9] Ibid., 178.
[10] Ibid., 190.
[11] To be sure, Anderson is making arguments against both buying and selling and the surrogate industry. But it is not clear if her dignity-based argument is directed at both dimensions of exchange, and whether it even can be. So it might be the case that we should not actually choose one option over the other, but again there is a need for a further argument to show why.

objection offered by Cécile Fabre against arguments such as Anderson's: 'Objections standardly raised against [commercial surrogacy] have been shown to fail: regulation […] goes a long way towards alleviating concerns expressed over the commodification for women's labour'.[12] But, at least according to one of the interpretations suggested above, this is not the case. Strict regulation can alleviate concerns about a *market* in reproductive labour (what I call 'marketisation') by ensuring that the good is not being allocated by market principles or within a market system. But it does not alleviate concerns regarding the *mere buying and selling* of it (what I call 'commodification'). A taxonomy that helps to distinguish between these dimensions of exchange could help clarify where the disagreement lies (in this case, between Fabre and Anderson) and can help prevent theorists from talking past each other.

Let us turn to a different argument, made by Satz, concerning the 'market' in sexual labour. Satz's argument is a version of what I later call the 'argument from inequality'. According to Satz, 'prostitution […] is wrong insofar as the sale of women's sexual labor reinforces broad patterns of sex inequality'.[13] Like Anderson, Satz's argument can be interpreted as directed both against the mere buying and selling of sex—'the sale', in her words—and against markets in women's sexual labour.[14] Both options seem plausible. Buying and selling sex could be the source of the wrong since even in a highly regulated setting—within a society where gender inequality is pervasive—the mere buying and selling of sex could presumably perpetuate gender inequalities. Alternatively, a market in sexual labour could definitely be the source of 'broad patterns' of inequalities. Again, to know precisely what Satz wishes to limit, there is a need for further explanation.

Finally, consider another case, this time of a 'market' in exemptions from compulsory

[12] Fabre, *Whose Body Is It Anyway?*, 218.

[13] Satz, *Why Some Things Should Not Be for Sale*, 135. I should clarify that later in the chapter from which this quote is taken, Satz conducts a thorough discussion about the legalisation of sex work. So, in other words, she does explicitly argue for what we should limit and for what reasons. But the fact that, in one instance, an explicit discussion about what we should limit disambiguates the general conceptual ambiguity with which I am concerned, does not make the ambiguity itself less troubling. Even in Satz's case.

[14] Ibid.

military service (conscription) in wartime. Walzer famously discusses a provision in the Enrollment and Conscription Act of 1863, which established the first military draft in US history. According to the provision, any man whose name was drawn in a draft lottery was exempt from military service if he was willing and able to pay $300 for a substitute enrolee. Yet, according to Walzer, the duty to serve in the military in times of war is a paradigmatic example of what he calls a 'blocked exchange', a good the social meaning of which does not allow it to be 'marketable' or 'commodified'.[15] Selling the possibility for an exemption from military service, according to Walzer, should be blocked since it abolishes 'the *public thing* and turn[s] military service (even when the republic was at stake!) into a private transaction'.[16]

This argument is what I later call an 'argument from corruption'. Namely, for some goods, being in the 'market', or being 'commodified', changes, degrades, or corrupts their proper social meaning.[17] However, when discussing the reasons for blocking certain exchanges, Walzer melts 'private transaction', 'commodities', 'marketable goods', 'the sphere of money', and 'goods and services for use and pleasure' into one ambiguous pot.[18] He does not provide us with a clear explanation of what the source of his concern is.

Contrary to the reproductive labour and sex work examples, it seems that, in this case, the source of controversy is neither the market nor the mere buying and selling of the good. One interpretation could be that if, in a particular society, the social understanding is that everyone able to serve has, in times of war, a duty to serve, one just cannot be discharged from one's duties or pass them on to someone else. What follows, of course, is that one should not be able to exchange exemption for money.[19] But it also follows that one should not be able to be discharged for free

[15] Walzer, *Spheres of Justice*, 99–100.
[16] Ibid., 99.
[17] Ibid., 100.
[18] Ibid., 97–105.
[19] Notice that there might be a normative difference between the action of the person who passes on her duty to serve, and the person who is willing to have that duty transferred to her. Walzer does not address this difference. Actually, many times in the MLM literature, a nuanced analysis of the differences between the buyers and sellers is

either. For instance, consider the dramatic scene in the first book of *The Hunger Games* trilogy, where the protagonist Katniss volunteers to participate in the games in place of her sister, Primrose, who was initially chosen. If Walzer's objection is about the mere transferability of the conscription duty, then Primrose's duty to participate in the game cannot be transferred, period.[20] Perhaps paying to get discharged is even worse than being discharged for other, altruistic reasons. Yet, in terms of transferability, both options are normatively objectionable.[21]

Another plausible interpretation is that Walzer objects to the delegation to private persons of the discretionary power to decide who has a duty to serve. In other words, the problem is not about transferability; it is about privatisation—turning a 'public thing' into a 'private transaction'.[22] Again, each interpretation leads to different normative implications and different regulatory regimes. Under one interpretation, the focus will be to prohibit transfers altogether, while under the other, the aim will be to preserve the public nature of the good.

To be clear, I do not think the ambiguities I have highlighted so far undermine Anderson's, Satz's or Walzer's accounts. My aim has only been to show that conceptual ambiguity within the MLM literature is ubiquitous. Terms like 'commodification', 'marketisation', 'privatisation' and 'buying and selling' are used interchangeably to allude to different dimensions of exchange to mark the normative transition from a 'non-market' sphere to the 'market sphere'. Disentangling it, therefore, can help us push the MLM debate forward by clarifying what the source of the normative controversy is and by discerning different, more nuanced, normative implications about what should be limited. Also, since this ambiguity persists across different MLM arguments about

missing. For the purpose of this chapter, I leave it to one side. For helpful examples of the implication of these differences, see Andre, 'Blocked Exchanges', 145–6; Fabre, *Whose Body Is It Anyway?*

[20] Of course, Primrose is justified in disregarding her duties since she is being sent to an unjustified and horrible death. I am just using this example to illustrate my point about the transferability of conscription duties.

[21] I discuss the option of an additional harm made by transferring something for money later, when discussing commodification (section 1.3.2).

[22] For a full discussion of the privatisation of military forces, See James Pattison, 'Deeper Objections to the Privatisation of Military Force', *Journal of Political Philosophy* 18, no. 4 (2010): 425–47.

different kinds of goods, turning to existing taxonomies focused on distinguishing between MLM arguments or goods is not a promising option.

However, there might be a different way forward, namely, classifying different market norms and characteristics to identify what should be limited instead of different dimensions of exchange. The following section is devoted to exploring this option.

1.2. Turning to Markets' Norms or Characteristics Will Not Do

Instead of explicitly defining which dimension of exchange is the focus of their argument, some MLM theorists provide us with a list of norms and characteristics they attach to the 'market'.[23] These norms and characteristics are presented as the source of the normative concerns that 'markets' raise.[24] Anderson's definition of commodification is a good example of such an attempt.[25] According to her, 'a good is treated as a commodity if it is valued as an exclusively appropriated object of use and if market norms and relations govern its production, exchange, and distribution'.[26] Notice that this definition conflates being exclusively an object of use (which can be the result of merely buying and selling) and being governed by market norms (which alludes to something more systematic—being part of a market).[27] But, putting this ambiguity aside, Anderson's definition evidently relies on what she thinks market norms and characteristics are. So, presumably, a detailed list of these norms and characteristics might do the explanatory work I am

[23] I do not provide a detailed explanation of the difference between a market norm and a market characteristic. This difference does not make a difference in the context of my argument, so I leave it at that.

[24] For instance, see Anderson, Value in Ethics and Economics, 143–50; Satz, *Why Some Things Should Not Be for Sale*, 15–39; Walzer, *Spheres of Justice*, 108–23.

[25] Radin's 'indicia of commodification', in which she lists several market norms and characteristics, is another good example. See Radin, *Contested Commodities*, 118.

[26] Anderson, *Value in Ethics and Economics*, 193.

[27] Satz also provides a similar definition, according to which commodification is 'the production and exchange of goods and services through markets'. As you can see, it also conflates between marketisation and commodification. See Debra Satz, 'Noxious Markets: Why Should Some Things Not Be for Sale', in *Globalization, Culture, and the Limits of the Market*, ed. Stephen Cullenberg and Prasanta K. Pattanaik (New Delhi; Oxford: Oxford University Press, 2004), 11.

aiming for. To put it differently, if MLM theorists can point at a norm or a particular characteristic that is the source of their normative concern, then the conceptual ambiguity I worry about would be resolved without a need for a different taxonomy of different dimensions of exchange.

I do not wish to commit here to providing an exhaustive list of market norms and characteristics found in the MLM literature. A short list of a few central, common items that appear in most MLM accounts should be sufficient. The first and most prevalent item is *objectification*. To take the most common, Kantian-inspired meaning of this concept, objectification occurs when an object is treated merely as a tool, an instrument for one's own need, not as an end in itself.[28] Ostensibly, when people buy and sell commodities, they treat commodities, and sometimes the people with whom they exchange, as objects. MLM theorists object to certain 'markets' where this kind of instrumental relationship is normatively inappropriate, demeaning and so forth.[29]

The next item on the list is *commensurability*. According to Ruth Chang's definition, '[t]wo items—values, goods, etc.—are incommensurable with respect to V just in case there is no common unit by which they can be measured with respect to V'.[30] Correspondingly, two items are commensurable where there is a common unit by which they can be measured with respect to V.[31]

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[28] See Anderson, *Value in Ethics and Economics*, 144; Fabre, *Whose Body Is It Anyway?*, 139; Radin, *Contested Commodities*, 34–41. To be sure, this is not the only meaning of objectification. Nussbaum lists seven meanings that people attach to this concept. For the purpose of the chapter, only three of them are relevant: instrumentality (which I used as the definition of objectification presented in the text), fungibility and ownership. Concerning fungibility, I discuss it as a separate item. Concerning ownership, Nussbaum's definition of ownership is similar to my definition of commodification. Therefore, my discussion captures the relevant items from her list. See Martha C. Nussbaum, 'Objectification', *Philosophy & Public Affairs* 24, no. 4 (1995): 257.

[29] To be sure, people can value the same thing in different ways at the same time. One can treat something as an object and appreciate it as an end. See Fabre, *Whose Body Is It Anyway?*, 140. I elaborate on this issue in the next chapter.

[30] Ruth Chang, 'Hard Choices', *Journal of the American Philosophical Association* 3, no. 1 (2017): 6.

[31] As Chang emphasises, some use the term 'commensurability' to describe both commensurability and comparability, which are two different concepts. Two goods are comparable if a positive value relation holds between them and we can say something affirmative about what their relation is: one good is better than the other, worse than the other, or equal to the other. Chang calls this the 'trichotomy thesis'. See Ruth Chang, 'Introduction', in *Incommensurability, Incomparability, and Practical Reason* (Cambridge, MA and London: Harvard University Press, 1997), 4. See, also, J. Raz, *Engaging Reason: On the Theory of Value and Action*, 1 ed. (Oxford University Press, 2002), 46. Moral limits of markets arguments are normally not concerned with comparability, since heirlooms, children, and sex are all comparable goods. We can compare their value to other things, just not according to one common unit. The problem with 'markets' is not that they make an heirloom comparable to a car; this is already the case. It is that it measures the value of the heirloom and the car *on the same scale*, which is normatively inappropriate, according to some MLM theorists.

The MLM claim in this regard is that 'markets' turn goods that should be incommensurable—say, a family heirloom[32]—into commensurable goods since, in the 'market', everything can be measured by a common unit, namely, money. And, in some cases, commensurability seems normatively objectionable. As Chang explains:

> Indeed, if all values were ultimately commodity values measurable by a market price, then many of our most cherished and fundamental attitudes would require radical revision. If, for example, the contribution of having children to the good life can be measured by the same unit that measures the contribution of a beach vacation, then the difference in your attitudes toward your children and toward having to forgo a holiday in the Maldives should be a matter of degree—the loss of dear Suzy is worth twenty such vacations while troublesome Johnny is worth only ten.[33]

Another item on the list which is closely related to commensurability is *fungibility*. A good is fungible when it is considered 'interchangeable'[34] with other objects and can be 'traded with equanimity'.[35] The 'market', so the argument goes, objectionably turns goods that should not be fungible into fungible goods. Fungibility is closely related to commensurability since if two things are commensurable, they can be valued by using the same unit, which makes it easier to trade them.[36]

In the 'market', people are also *oriented to exit*. According to Albert O. Hirschman's influential conceptualisation, if one does not like a specific product, brand, or store, one just 'exits' the transactional relationship and chooses another brand. Presumably, this process leads to desirable social outcomes. When many people stop buying a certain product, the seller tries to improve the quality of the product, becomes more efficient and so forth. So, exit is considered the dominant recuperation mechanism within markets.[37] The issue some MLM theorists have with orientation to

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[32] Anderson, *Value in Ethics and Economics*, 144.
[33] Chang, 'Hard Choices', 6.
[34] Nussbaum, 'Objectification', 257.
[35] Anderson, *Value in Ethics and Economics*, 144.
[36] Radin, *Contested Commodities*, 118.
[37] Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970), 21–30.

exit is that within a market, one does not try to protest or convince the manager to provide better merchandise, as one does not have a 'voice', using Hirschman's terminology again. And, in certain circumstances, it is normatively desirable that people use their voice to create social change instead of just exit (for instance, in politics).[38]

The two final and very central 'market' characteristics on this short list are *inequality* and a *preference-based price system*. Starting with the former, we note that markets lead to economic inequalities, which, in turn, give the wealthy greater market power. Indeed, not all inequalities are objectionable, but some, according to MLM theorists, are. That is because they are unfair, lead to exploitation of the vulnerable, express disrespect, and the like.[39] Regarding the latter, the value of goods on the market is determined by supply and demand, which in turn is affected by, roughly, the cost of production, exclusivity, and the scarcity of the good on the one hand, and individuals' will and ability to buy the good, on the other hand. Goods and services are exchanged without regard for the reasons people have for wanting them. If people have enough money, and a preference for owning good X, then their willingness to pay and the seller's willingness to accept will determine whether the exchange will take place, not the reasons (either good or bad) people have for wanting to buy or sell. For instance, it does not matter if the buyer wants to buy the good to make someone else jealous, because of a medical need, or just for fun. MLM theorists claim that in certain contexts, the allocation of certain goods should not be preference-based, reasons for buying and selling should matter, and the price system is not the right or most appropriate way to value goods.[40]

As mentioned, the list goes on. The main thing to notice about this partial list is that different

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[38] Anderson, *Value in Ethics and Economics*, 146; Satz, *Why Some Things Should Not Be for Sale*, 107.

[39] See, for example, Anderson, *Value in Ethics and Economics*, 186; Brennan and Jaworski, *Markets Without Limits*, 147–50; Fabre, *Whose Body Is It Anyway?*, 142–44; Sandel, *What Money Can't Buy*, 111; Satz, *Why Some Things Should Not Be for Sale*, 97; Wertheimer, 'Two Questions', 212–13. I elaborate on MLM arguments from inequality in the next chapter.

[40] See, for example, Anderson, *Value in Ethics and Economics*, 145; Sandel, *What Money Can't Buy*, 33; Satz, *Why Some Things Should Not Be for Sale*, 17; Walzer, *Spheres of Justice*, 108.

norms and characteristics could be linked with different dimensions of exchange. Some are straightforwardly linked to a *market system*—inequality, orientation to exit, and a preference-based price system. Others can be associated with the sheer *buying and selling* or *transferring* of a good—namely, objectification, fungibility and commensurability—within or outside of the market. Now, the question is: What exactly is the nature of the link between the different norms and characterises and the different dimensions of exchange?

One answer, which I think is the correct one, is that there are common ties between specific dimensions of exchange and certain norms and characteristics—as I have hinted at above—but these ties are not logical necessities. For example, as I argue below, objectification is usually tied with commodification, but not always. Alienation could also give rise to objectification in some contexts. Imagine a couple who cannot have children and require reproductive labour services. This couple lives in a country where surrogacy is allowed only if no money changes hands. Buying and selling reproductive labour is not allowed. Luckily, Amanda, an altruistic Samaritan, offers to help. Despite the altruistic nature of her transfer, the couple still treats Amanda as a mere means, an instrument for their needs (a similar case would be kids who treat their parents as cash machines). In such a case, objectification is clearly not linked to commodification but to the mere transfer of Amanda's reproductive labour.

This is, of course, only one example. But assuming it can be generalised, it means that a list of norms and characteristics is not enough to tell us what dimension of exchange is normatively objectionable since sometimes the same norm could be linked to different dimensions of exchange. Therefore, by itself, a list of norms and characteristics cannot guide us on what to limit.

To be sure, this list is still valuable, as it explains the objectionable norms and characteristics that different dimensions of exchange give rise to. So, the taxonomy I offer does not make this list redundant at all. Rather, it complements it. The list helps us identify norms and characteristics that are objectionable within particular contexts, and the taxonomy of different dimensions of

exchange I offer here is supposed to show us what is the exact source of these market norms and the characteristics that should be limited. To get the full normative picture, we need to pair norms and characteristics from the list with different dimensions of exchange. But, to reiterate, relying on this list alone just will not do.

A second answer to the question about the nature of the link between the list of norms and characteristics and the different dimensions of exchange is that the same norms and characteristics *always*, or almost always, map onto the same dimensions of exchange. In such a case, one might argue that my list is redundant since we will be able to know what to limit by using the list of norms and characteristics alone. To this claim, I offer the following response. So far, the lists of market norms and characterises offered in the MLM literature are ad-hoc, unsystematic lists. They have been used to highlight what MLM theorists *find troubling* with the 'market', not to signify *what should be limited*. Therefore, the sheer pairing of the different market norms and characteristics by which MLM theorists are troubled with different dimensions of exchange makes a significant contribution. It provides us with tools to identify which dimensions of exchange should be limited according to the different MLM arguments, tools that were hitherto absent from the MLM literature.

As said, I do not think the link between the different norms and characteristics and the different dimensions of exchange is necessary. But since both answers show that the taxonomy I offer makes a significant contribution, either way, I am happy to leave open the question of which answer is the more plausible. What I do wish to stress is when, in the remainder of the chapter, I pair some norms and characteristics with a certain dimension of exchange, I by no means wish to suggest that it is a necessary link (e.g., the second answer).

1.3 The Moral Limits of … Alienation, Commodification, Marketisation, and Privatisation

There are four main dimensions of exchange that Anderson, Satz and Walzer point to in the examples discussed above: (1) *alienation*: the option of transferring goods and services (e.g., the conscription exemption example—first interpretation); (2) *commodification*: the mere buying and selling of goods and services (e.g. reproductive labour—first interpretation); *marketisation*: trading goods and services within a market system (e.g., sexual labour example—second interpretation); and *privatisation*: transferring public resources or services to private entities (e.g., conscription exemption—second interpretation).

In what follows, I characterise each category by pairing it with the relevant market norms and characteristics from the list above and by distinguishing between first-order arguments directed against each dimension of exchange itself (e.g., the commodification of good X is wrong) and second-order, all things considered, arguments, directed against a dimension of exchange due to other reasons (e.g., the commodification of good X is not wrong per se, but buying and selling X should be criminalised nonetheless).[41]

1.3.1 Against Alienation

As shown in the compulsory conscription case above, some arguments against 'markets' in certain goods are troubled by the option of these goods becoming alienable.[42] Similar arguments have also been made concerning voting,[43] human rights,[44] organs and different kinds of human labour.[45] By

[41] To be sure, I am not the first one to make the distinction between first and second-order MLM arguments. For similar discussion see: Brennan and Jaworski, *Markets Without Limits*, 25–26; Fabre, *Whose Body Is It Anyway?*, 149–52; Satz, *Why Some Things Should Not Be for Sale*, 110–11, 50–52. My contribution is to show how this distinction relates to different dimensions of exchange.

[42] Andre, 'Blocked Exchanges', 36.

[43] For example, see Radin, *Contested Commodities*, 19.

[44] Stuart M. Brown, 'Inalienable Rights', *The Philosophical Review* 64, no. 2 (1955); William K. Frankena, 'Natural and Inalienable Rights', *The Philosophical Review* 64, no. 2 (1955): 192–211.

[45] For example, see Dworkin, 'Comment on Narveson', 39.

and large, to say that some good should be inalienable means to negate the possibility of separating the good from a particular person.[46] Although there could be many meanings to inalienability, within the context of arguments against 'markets', transferability is the most relevant.[47]

A unique trait of this category is that while arguments against alienability are being made against 'markets', the reason for concern does not stem, or at least not only, from the effects that market norms and characterises would have on such goods. For example, someone who holds that people cannot transfer their human rights, to take one example, holds it regardless of money or markets.[48] Therefore, arguments against alienability apply to all transfers—*transfers for free as well.* Thus, there are no specific market norms or characteristics that can be exclusively linked to this category, as they are all secondary to the main problem: the transfer itself. Indeed, as mentioned concerning the conscription exemption case, it might be worse to transfer something inalienable for money or within a market than transferring it for free; but the main issue is the transfer itself.

Now, there are two kinds of arguments against alienation: first-order arguments against alienation itself and second-order arguments against alienation as a policy, owing to other, first-order arguments. To illustrate, consider the case of human organs:

> *Second-order argument against alienation without first-order argument:* Yael works in health policy. She holds the view that there is nothing wrong in principle with transferring organs. Thus, she does not make any first-order argument against the alienation of kidneys. However, she argues that legal prohibition of the alienability of kidneys is necessary for other reasons. For instance, in her society, allowing voluntary transfers, for some reason, would probably lead to a fully-fledged market in kidneys. And, as Yael is against the marketisation of kidneys, she supports the complete prohibition of transferring organs. That is, her position

[46] Radin, *Contested Commodities*, 17.

[47] Rose-Ackerman, 'Inalienability', 935; Radin, *Contested Commodities*, 19.

[48] For a kind of an essentialist view about organs, see Dworkin, 'Comment on Narveson', 39. See, also, the discussion of essentialist views regarding reproductive labour and sexual labour in Satz, *Why Some Things Should Not Be for Sale*, 40–44, 117–21. For an example of such argument, see Pateman, *The Sexual Contract*, 207.

is not owing to the wrongness of transferring organs but due to second-order reasons against marketisation.[49]

First-order argument against alienation without second-order argument: Abe, in contrast to Yael, is appalled by the mere option of transferring organs. Nevertheless, he insists that transferability should not be legally prohibited because of other reasons—for instance, that the enforcement of limiting the alienation of organs could lead to severe shortage in organs available for transplants since living donors would not be able to donate. Abe clearly thinks that alienation is morally repugnant (first-order argument), but all things considered, it should be allowed (second-order argument).

Indeed, there are cases in which the first- and second-order arguments coincide. In such cases, one that argues against alienation would also argue for legally restricting transfers. In any event, the point of these examples is to show that the mere transferability of goods should be considered as a distinct, recognisable dimension of exchange that is the target of some MLM arguments.

1.3.2 Against Commodification

Arguments that fall under this category are concerned with making something an object of exchange for something else.[50] Within this context, goods that are being given for free are of no concern. In other words, this category is about alienable yet commodified goods. Actually, as I clarify in the next chapter, according to Jason Brennan and Peter Jaworski, explaining how one can be in favour of voluntary transfer for free but against voluntary transfer for money is the key

[49] There is an important distinction in the literature between making something illegal, criminalising a certain act, or not enforcing certain contracts. See, for example, Fabre's discussion on surrogacy contracts: Fabre, *Whose Body Is It Anyway?*, 211–17. I do not elaborate on this distinction here.

[50] Rose-Ackerman calls this 'modified inalienability' (category C). See Rose-Ackerman, 'Inalienability', 935. An important discussion that I do not address here is concerns the question of at what point in time non-commodified goods gain the statues of being commodities. Is it at the time of exchange, or rather when they are offered for sale? I use the term commodification in a non-restrictive way to include both options. For a full discussion of this with regard to Marx, see Cohen, *Karl Marx's Theory of History*, 416–17.

challenge that all MLM arguments face.[51] Notice that the problem with commodification is not about goods being exchanged necessarily within a market. Using Satz's words, 'an exchange can be noxious without there being a noxious market'.[52] So the argument against the commodification of good X is independent of whether this good is being bought and sold on a market.[53]

Now, 'exchange for something' could mean different things that, in turn, might lead to different normative implications. Without committing to a full account of different kinds of commodification, there are at least two main distinctions to consider. One is about the reason for exchanging: a person can use the good she purchases or sell it to a third party to make a profit. The other distinction is concerned with the things being exchanged: a good can be exchanged for money, another good, services, other financial devices and so on.[54]

Let's start with the first distinction. Sometimes people buy goods for their use value, such as a shirt, because they like it and want to wear it. People also buy goods for their exchange value. For example, they buy a shirt at a low price to sell it to a third party for profit. Some people do both: they buy something to exchange it later, but not for profit; for the use value of something else. For example, buying a shirt and then exchanging it with a friend in return for a record. The shirt, in this case, is being bought for its exchange value, but not for monetary profit and

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[51] See Brennan and Jaworski, *Markets Without Limits*, 10–11. Their main (and sweeping) argument, according to which 'if you may do it for free, then you may do it for money', aims to show that de facto the category of commodification is empty: there is no situation in which we think something can be voluntarily transferred, but not bought or sold. If they are right, so they argue, the conclusion that follows is that there should be no limits to markets. Considering my taxonomy, even if their sweeping argument is correct, their conclusion that it is enough to show that markets should have not limits is wrong. Arguments against alienation, or against marketisation, do not face this challenge. Their conclusion is thus based on the false assumption that all three categories can be reduced to the commodification category.

[52] Satz, *Why Some Things Should Not Be for Sale*, 15.

[53] Thus, when Radin calls nonsalability 'market-inalienability', or when she argues that 'when something is noncommodifiable, market trading is a disallowed from of social organization and allocation', she conflates commodification and trading in a market. See Radin, *Contested Commodities*, 15, 20. Radin later acknowledges that there is a range between completely commodified goods and incompletely commodified goods, but this still is not enough to explain the difference between commodification and marketisation. Similarly, in her discussion about 'what should not be exchanged for gain', Andre also conflates between commodification and marketisation. See Andre, 'Blocked Exchanges', 36–42. The explicit distinction I provide, therefore, sets my taxonomy apart from Radin's and Andre's taxonomies in a significant way.

[54] For an illuminating discussion on different kinds of exchanges see Cohen, *Karl Marx's Theory of History*, 421.

accumulation—rather, for the use value of the record. What are the normative implications of this distinction? One implication might be that trading something for its use value is not as objectionable as exchanging it for its exchange value because at least the good is bought for what it is (e.g., a shirt) and not just as another replaceable good aimed to generate profit. Again, I do not wish to defend this claim here, just to point out that this distinction could carry important normative implications.

Turning to the second distinction, which is that sometimes people barter. They exchange goods or services for the goods or services of others. At other times, they exchange goods or services for money. Commodification by barter could have the same normative implications as commodification by money. For example, it seems as if there is no significant difference between paying someone for her kidney, or giving her, say, a flat. However, one might argue that there are cases in which trading something for money can be worse than trading it for a good or a service. For instance, commensurability can be more troubling when money is involved in the commodification because the commodified good is valued by the same unit as another infinite number of goods. In a barter deal, where trading is being done without the use of money, only the goods or services in the specific barter are commensurable, which in certain contexts might be considered preferable.[55]

These two distinctions create a metric of commodification, as it were, with different possibilities, each potentially leading to different normative implications. But, as said, my aim is not to provide a full account of the different kinds of commodification: most MLM arguments do not get to this level of specification anyway. Furthermore, since the commodification of institutional goods is usually done for money, for the purposes of this thesis, there is no need to develop these distinctions any further.

[55] For a more detailed discussion about the difference between barter and exchange for money, see Andre, 'Blocked Exchanges', 41–42.

So, what are the norms and characteristics commodification gives rise to, about which those who argue against commodification are concerned? It seems as if most of the items that are repeatedly linked with commodification are items that relate to the way people value goods or the way people value the people with whom they trade: objectification, commensurability and fungibility.[56] Take, for example, the following argument offered by Margaret J. Radin:

> [C]onceiving of persons or of essential attributes of personhood as fungible commodities tends to make us think of ourselves and others as means, not ends. […] it undermines the conception of personhood involving the Kantian agent as end-in-itself: the Kantian person cannot be conceived of as a fungible exchangeable object.[57]

Evidently, the market system is absent from Radin's argument. Her point is that treating a good as a commodity is enough to give rise to objectification and fungibility. No market system is really needed for her argument to work.

Commensurability is another example. When something is commodified, especially where money is involved, we can suddenly value it using the same unit we value other goods. But again, no market is needed for something to become commensurable. For instance, a judge provides her judicial services to the state for money. Her salary is commensurable to other salaries, but in most countries, there is no market for judicial services (putting private arbitration aside for the sake of argument). Thus, commodification seems to be sufficient to trigger (objectionable) commensurability as well.[58]

To end this sub-section on commodification, let us turn to distinguish between first-order and second-order arguments against commodification. This time, I use sexual labour as an

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[56] Radin similarly presents a very fruitful 'indicia of commodification' that includes: (1) objectification; (2) fungibility; (3) commensurability; (4) money equivalence. See Radin, *Contested Commodities*, 118. However, she does categorise these indications according to the different dimension of exchange.

[57] Ibid., 84. For Kant's famous dictum, see Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Cambridge: Cambridge University Press, 1998), 42.

[58] Radin, *Contested Commodities*, 8–9. For another example of this discussion, see Anderson, *Value in Ethics and Economics*, 59–64.

example:

> *Second-order argument against commodification without first-order argument:* Hanna is a social worker. In principle, she thinks there is nothing wrong with buying and selling sexual labour. However, she still argues against a market in sexual labour because, in her specific society, it leads to objectional inequalities. Thus, she is someone who is against the marketisation of sex but not its commodification. Now, assume that there is no effective regulation that can prevent the status inequalities to which Hanna objects from emerging, except full restriction on trade, because of, say, some domino effect that commodifying sexual labour would lead to.[59] Thus, despite supporting the commodification of sex in principle, Hanna argues against it as a second-order argument due to first-order considerations against marketisation.
>
> *First-order argument against commodification without second-order argument:* Roy is a retired sex worker and a staunch supporter of the legalisation and decriminalisation of sex work. That is not because Roy supports the commodification of sex per se. He actually thinks it is morally objectionable since it objectifies persons and leads people to treat sex workers as mere means. Roy supports legalisation since, under a regulated system, within contemporary societies, sex workers are safer. Thus, Roy supports a first-order argument against the commodification of sex but accepts a second-order argument for it.

1.3.3 Against Marketisation

The modern market system is a distinct, complex set of social institutions that operate on a considerable scale. I do not presume to provide a full account of what constitutes a 'market'. For my purposes, a general sketch will do. Generally speaking, in a market system, individuals have property rights that grant them ownership over certain goods. With these, they can trade with

[59] Radin, *Contested Commodities*, 96–99.

whomever they wish, according to the parties' willingness to pay and willingness to accept (willingness that stems from their own preference order).

To maintain this complex system, markets rely upon a functioning legal system that is in charge of enforcing contracts, compensating for fraudulent transfers, interpreting agreements, assigning property rights and so forth.[60] The things that are traded within the market are commodities. But again, commodification can take place outside the market system, and the things that trouble philosophers about the market as an institution are different from the worries they express about commodification.

Arguments against marketisation usually focus on two basic traits of the market system mentioned in the list of market norms and characteristics above: *inequalities* and the *preference-based price system*.[61] Regarding inequalities, recall that the MLM literature is market-specific. That is to say, the essence of MLM arguments from inequality is that regardless of one's general view on principles of distributive justice and different social welfare functions (e.g., egalitarianism, libertarianism, prioritarianism and the like), there are specific goods that should not be traded within a market system. For example, a paradigmatic MLM argument from inequality is that there are specific markets wherein the unequal economic power of the trading parties allows the wealthy to exploit or take advantage of the vulnerability of the poor and therefore, such markets should be limited.[62]

These anti-marketisation, inequality-based arguments are different from anti-commodification arguments because the focus of the anti-marketisation argument is not the buying and selling. In a world where votes could be commodified so that economic inequalities

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[60] For a more thorough discussions about what markets do, see Friedman, *Capitalism and Freedom*, 12–13; Satz, *Why Some Things Should Not Be for Sale*, 15–39.

[61] The third trait that can be associated with a market system is orientation to exit. For someone to exit, and for this act of exiting to serve as a recuperation mechanism, it seems there is a need for a market system in which there is at least a few competitors. The mere commodification of a good seems not to be enough to give rise to this trait. However, as arguments against 'exiting' are not common within the MLM literature, I will not defend this claim, and will put this trait to one side.

[62] For an example of the discussion about exploitation and vulnerability, see Fabre, *Whose Body Is It Anyway?*, 200–204; Satz, *Why Some Things Should Not Be for Sale*, 97–98; Wertheimer, 'Two Questions', 212–14.

could not be translated into political inequalities, those who oppose marketisation will have nothing to complain about. On the other hand, the anti-commodification theorist might still find the commodification itself objectionable in such a case. Take another example. Consider a theorist who objects to markets in kidneys because such markets are characterised by exploitative relationships between the trading parties in contemporary societies. In a world where regulation can prevent the exploitation of the vulnerable, such a theorist would not object to the commodification of kidneys per se.

Moving on now to arguments against a preference-based price system. There is a distinction to be made between two groups of anti-marketisation arguments. According to one group of arguments, the *value* of some goods should be determined by factors other than supply and demand.[63] The value of an art masterpiece, for example, should not be set according to the price system. Some argue that the value of teaching humanities at universities, to take another example, should not be set according to supply and demand but rather according to the intrinsic value humanities studies have or due to their contribution to society as a whole, whether or not people prefer to have it.[64]

The second group of arguments focus on *allocation* according to a price system. Some goods, so the argument goes, should be allocated to people in a very specific way, regardless of people's willingness and ability to pay.[65] The most common example is healthcare and housing. Some argue that such goods are supposed to secure people's most basic needs and, thus, should be allocated according to needs-based criteria and not according to a preference-based price system.[66]

Arguments against the price system also differ from arguments against commodification.

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[63] Anderson, *Value in Ethics and Economics*, 145; Sandel, *What Money Can't Buy*, 33, 89; Satz, *Why Some Things Should Not Be for Sale*, 17; Walzer, *Spheres of Justice*, 108.

[64] For example, see Martha C. Nussbaum, *Not for Profit: Why Democracy Needs the Humanities*, Updated ed. (Princeton: Princeton University Press, 2016).

[65] Anderson, *Value in Ethics and Economics*, 159.

[66] For example, see Radin, *Contested Commodities*, 240–43; Williams, *Problems of the Self*, 240; Walzer, *Spheres of Justice*, 89.

Consider a case of a fully regulated system for the allocation of kidneys, in which the government buys kidneys from those who wish to sell them at a fixed price and allocates them according, say, need, also at a fixed price. People who buy kidneys can only do so if they have a need-based reason, not based on any whim or preference they may have. And the government can only sell it for a specific reason (we can complicate the example so the initial sellers would also be able to sell their organs to the government only for specific reasons). In such a case, one might still argue against the commodification of kidneys, although it is not managed according to a preference-based price system.

An additional feature of arguments against the price system, which has been fairly neglected in the literature, is that one who objects to marketisation on the grounds of preference-based allocation or preference-based value would *also* need to object to preference-based alienation for free. Emphasising this point is significant, as it allows us to identify a unique group of goods—namely, goods whose commodification is not objectionable (for instance, since the buying and selling is being done not exclusively according to people's preferences), even as their preference-based alienation and marketisation is objectionable. Radin determines, too quickly, in my view, that this group of goods is of no importance since 'few things can be sold but not given away'.[67] However, this is not the case.

To illustrate this point, let's return to the example of judicial services. In criminal cases, a judge is appointed to the case with no regard to the 'customer's'—namely, the prosecutor's or the defendant's—wishes. Moreover, judges cannot (and should not) provide their services for free to whomever they want and treat the court as their own. There are rules of appointment that determine judges' conduct. So, their preferences also do not count. Nevertheless, judging services are commodified in the strict sense I have defined commodification, as judges are usually paid by the government for their work (contrary to some Buddhist monks, for instance, who provide their

[67] Radin, *Contested Commodities*, 18.

communal service without payment, or certain judges and magistrates in the UK who volunteer to do their work for free), and parties are often required to pay the court a certain fee to use these services.

And it seems there are many other goods in this group. Soldiers who defend the country's borders are another example. Soldiers are paid to defend the country, and thus their services are commodified. The people living within the country are provided with defence or security services, regardless of their preferences. And the soldiers themselves cannot choose whom to defend. They are not allowed to provide their services according to their own will to whomever they wish.[68] The fact that the taxonomy I offer highlights the existence of this important and overlooked group of goods and helps us draw connections between the different dimensions of exchange (in this case, between alienation and marketisation), is a good example of how useful this taxonomy can be in depicting a more nuanced picture of the morality of markets.

Finally, the distinction between first and second-order arguments against marketisation is important too:

> *Second-order argument against marketisation without first-order argument:* Consider again the case of a fully regulated system for allocating kidneys, in which the government buys kidneys from those who wish to sell at a fixed price and allocate it according to peoples' needs, also at a fixed price. Daphne, a transplant surgeon, is fiercely against the commodification of kidneys. Nevertheless, owing to an acute shortage of kidneys for transplants, she compromises and makes a second-order argument for the commodification of kidneys as a necessary evil. However, she refuses to go all the way to support marketisation. In such a case, commodification is what is doing the normative work in Daphne's objection, but

[68] Notice, that this kind of argument is not directed against privatisation of public goods, as Andre, for example, has argued. See Andre, 'Blocked Exchanges', 35. These goods can be privately owned without being marketised, or publicly owned and marketised, as I explain in the section on privatisation.

her second-order argument is against marketisation.

First-order argument against marketisation without second-order argument: As in the alienation and commodification cases, so with regards to marketisation, there is a need for an all-things-considered argument in favour of justifying the legal restriction of markets. Ethan, a human rights lawyer, is vehemently against having a market in legal representation. However, due to the potential risk for the stability of current legal systems around the world had such a market were to be abolished, or because of the enormous costs states would have to bear to fund a new legal system, all things considered, he argues that the market in legal representation should remain as it is. So Ethan is making a second-order argument for the market in legal representation, although he supports a first-order argument against it.[69]

1.3.4. Against Privatisation

Broadly speaking, privatisation is a process of transferring the ownership of public goods, or the responsibility to perform certain public services, to private hands. Some have raised doubts that privatisation is an important normative category. The sceptic's view on privatisation is that it is a redundant normative category since the identity of the agent who owns the goods or performs the service does not matter.[70] The private and public, according to this view, as Chiara Cordelli puts it, are interchangeable.[71]

To illustrate this point, assume that healthcare should be provided to everyone according to their need. Why, the sceptic might ask, should we care about *who* is providing it? The only thing that matters is that it will be provided to all according to a needs-based criterion, be it a private or public entity. The sceptic's question could be translated into the categories of this taxonomy in the

[69] Chapter 5 is devoted in its entirety to a discussion on the market in legal representation.
[70] For a presentation of what I call the sceptic's view (they call it the 'instrumental view'), see Avihay Dorfman and Alon Harel, 'The Case against Privatization', *Philosophy & Public Affairs* 41, no. 1 (2013): 89.
[71] Chiara Cordelli, *The Privatized State* (Princeton: Princeton University Press, 2020), 46–48.

following way. Concerning the healthcare example, according to the sceptic, the MLM theorist should argue against or for the marketisation of healthcare, not against its privatisation. Healthcare can be provided by a market mechanism while publicly owned (by using a voucher system, for instance) and privately provided according to needs-based principles anchored in strict regulations. Thus, for those who hold the sceptic's interchangeability assumption, the debate on privatisation is not distinct. It can be reduced to debates about alienation, commodification and marketisation.

In response to the sceptic's challenge, some have argued that there is something distinctively wrong about privatisation that cannot be reduced to other dimensions of exchange. Avihay Dorfman and Alon Harel, for instance, argue that some goods are inherently public and cannot, by their very essence, be provided by private entities. Their leading example is punishment. They argue that one important goal of the criminal justice system is to publicly condemn the criminal for the wrong that was done. Private prisons, by definition, cannot fulfil this communicative aspect of punishment.[72] To take another example, Cordelli has recently argued that the distinct wrong of privatisation should be located not in the essentialist features of certain goods but rather in its effects on the legitimacy of political institutions. In a nutshell, she argues that there are goods and services that public institutions cannot outsource as their legitimacy is dependent on the fact that the discretionary powers involved in providing these goods and services are public. Once outsourced, the legitimacy of both the institution and of the private entity that replaced it is jeopardised.[73]

The important thing to notice about both arguments is that they focus on the transformation or delegation of some public function into private hands, not on alienation, commodification or marketisation. As Cordelli herself observes,

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[72] Dorfman and Harel, 'The Case against Privatization'.

[73] Cordelli, *The Privatized State*. For another view that rejects the interchangeability assumption, see Eric Beerbohm, 'The Free-Provider Problem: Private Provision of Public Responsibilities', in *Philanthropy in Democratic Societies*, ed. Rob Reich, Chiara Cordelli, and Lucy Bernholz (Chicago: University of Chicago Press, 2016): 207 –225.

> [M]any of the considerations that are relevant to determine the moral limits of markets cannot extend to privatization, since the latter need not involve the direct buying and selling of goods, and since privatization has often been conducted through nonprofit organizations, putatively outside the market.[74]

Thus, arguments that object to the interchangeability assumption carve out a space for a distinct and normatively important category that can be *neatly separated* from the MLM literature and nicely captured by the taxonomy I offer here. Therefore, it is no surprise that there is no specific market norm or characteristic that can be specifically linked to privatisation since, as mentioned, MLM-related considerations do not necessarily apply to it.

To be sure, privatisation is often associated with the market since it is usually the case that privatisation involves the marketisation of privatised goods and services. After all, the main argument in favour of privatisation is that it leads to a more efficient distribution of goods and services in the market. This fact does not make the distinction between privatisation and marketisation redundant, but it can help us distinguish between first and second-order arguments against or for privatisation:

> *Second-order argument against privatisation without first-order argument:* Let us turn again to the healthcare case. Devora, a public health manager, believes that healthcare should be distributed according to needs-based criteria, but she is also firmly against state intervention. Hence, she believes, at least in principle, that private NGOs should be responsible for distributing healthcare according to people's need. However, for some reason, it is too costly in Devora's country to distribute healthcare according to people's needs by non-state actors. The only way for privatisation to be sustainable is by distributing healthcare by a market mechanism, to which Devora objects. Thus, Devora decides that,

[74] Cordelli, *The Privatized State*, 6. Therefore, when Satz, for instance, argues against what she calls 'market-based privatisation', it seems as if she is actually arguing against marketisation. Debra Satz, 'Markets, Privatization, and Corruption', *Social Research* 80, no. 4 (2013): 994. See also Debra Satz, 'Some (Largely) Ignored Problems with Privatization', in *Privatization*, ed. Jack Knight and Melissa Schwartzberg (New York: NYU Press, 2018): 9–29.

in this case, she prefers the needs-based allocation of healthcare by the state over privatised market-based allocation. This is an example of a case in which privatisation means de facto marketisation. So the argument for state distribution, in this case, is a second-order argument against privatisation, but the first-order argument is against marketisation. If there were a way to distribute healthcare according to people's needs by private entities, Devora would plump for that option.

First-order argument against privatisation without second-order argument: Tal, a devoted delivery person, believes for some reason that the state has a duty to distribute the mail (either because of the communicative function of the mail or since it is integral to the institutional apparatus of a legitimate state). Outsourcing this duty, according to Tal, is normatively objectionable. However, Tal considers herself a pragmatist, and in her country, the data clearly shows that the privatisation and marketisation of postal services will carry significant benefits. Thus, objectionable nonetheless, she decides to support the marketisation and the privatisation of postal services in her country. So, she holds a first-order argument against privatisation but an all-things-considered second-order argument for it.

Before I turn to consider an objection against the taxonomy I have offered, to recap the differences between the dimensions of exchange discussed so far, see the table below:[75]

[75] Recall that I do not think that objectification and commensurability are only relevant to anti-commodification arguments, or that inequality only plays a role in anti-marketisation arguments. This is a general table in which I try to point at common tendencies within the MLM literature. It does not represent logical necessities.

	Against Alienation	Against Commodification	Against Marketisation	Against Privatisation
The source of the normative concern	Transferability	Buying and selling (for money or barter, for use value or exchange value)	Trade in a market system	Private ownership and services
Objectionable market norms and characteristics	The worry is the transfer itself. Can give rise to different market norms	Objectification, commensurability of value, fungibility	Inequality, preference-based price system, orientation to exit	The worry is the change from public to private. Can give rise to different market norms
Giving things for free?	Objectionable	Not objectionable (in principle)	Depends on the kind of anti-marketisation argument	Not objectionable (in principle)

1.3.5 Does the Distinction between 'Commodification' and 'Marketisation' Hold?

A significant potential objection against the taxonomy I argued for is that the distinction between 'commodification' and 'marketisation' does not hold. There are at least two versions of this objection that come to mind.

The first version is that the mere commodification of a good is objectionable only within a market society. Imagine a society in which the market is not a dominant institution. In such a context, the mere commodification of a good might not give rise to objectionable norms. For instance, in a non-market society, selling one's reproductive labour could be perceived as value-neutral or even a positive thing. That is, say, because there are not many things the value of reproductive labour would be commensurable with, or maybe owing to the fact that outside the market, commodification would not carry with it strong norms of objectification and fungibility and so forth. Putting the objection differently, what it might be that is doing the (repugnant) normative work in commodification is not the mere commodification of a good, as I suggest, but the commodification of a good within a market society. So, commodification cannot be considered

an independent dimension of exchange—the market is really what is doing the work.

However, and this is my response, the fact that commodification is repugnant only in a market society does not mean that commodification in such a society is not a distinct dimension of exchange. Thus, to know which dimension of exchange we wish to limit in each case, this distinction still proves useful. It is still possible, and indeed important, to distinguish between commodification within a market society and marketisation within a market society. Moreover, as mentioned in the introduction, notice that the MLM literature is unique in the sense that it seeks to provide normative reasons to limit *specific* markets *within* contemporary, liberal, market-based societies. Thus, even if I am to be accused of creating a narrow taxonomy that is suitable only to market societies, it is a taxonomy that definitely fits the needs of the MLM literature—which is the subject of my inquiry.

The second version is that the line between commodification and marketisation is blurry. One obvious example of this blurriness is a case where a person buys a good for its exchange value. When I buy a shirt to sell it for a higher price later, I already assume that there is a market in shirts from which I can make a profit. Thus, it is not clear, one might argue, which dimension of exchange is the source of concern in such a case—the commodification of the shirt itself or, rather, the fact that the reasons for the exchange assume the existence of a market system.[76]

Another way to bring to attention the blurriness of the distinction is by pressing my definition of the market itself. Admittedly, I have not provided a very robust definition of a market. Thus, there will be a quite significant range of cases between pure commodification and full

[76] Cohen's interpretation of Marx can serve to make the cut between commodification and marketisation. He distinguishes between different kinds of exchanges. First there is a barter. Using Cohen's terminology, C-C (where C stands for a commodity). A second kind of exchange is C-M-C (M stands for money). Here, a person exchanges a commodity for money, and with this money she buys something else. Third, there is M-C-M. What is special about this 'exchange circuit' is that the goal of the seller is to gain *capital*—to make a profit and accumulate wealth. When these kinds of exchanges are possible, then, maybe we can say we have reached a point where a modern market is functioning. I do not wish to commit to this analysis, but it might be a way to further explain the difference between the categories. Cohen, *Karl Marx's Theory of History*, 421.

marketisation (for simplicity's sake, by full marketisation, I mean a completely free, almost unrestricted market). Additionally, it is possible that in many of these cases, it will not be clear which dimension of exchange is the source of concern. And if this group of cases is big enough, then it calls into question how valuable my taxonomy really is.

I am happy to bite the bullet on both counts of this version of the objection. I agree that the distinction between marketisation and commodification is not perfect, that the edges of each category are blurry, and that these edges are not insignificant in scale. Moreover, I concede that I have only given a vague definition of markets (mainly in contradistinction to 'mere commodification') and that there is a noteworthy scale between an unrestricted full-fledged market in good X and the mere commodification of good X. Still, this does not make my distinction obsolete. Indeed, there might be cases in which it will be hard to identify the exact dimension of exchange that gives rise to the relevant normative concerns. Nevertheless, we will still need to identify something in order to know what to limit. It is not possible to just say, 'let's limit the objectification of the good' or 'let's limit the relevant repugnant inequality' without understanding which dimension (or dimensions) of exchange we need to limit.

So, even though my taxonomy is non-exhaustive, imperfect, and sometimes turns blurry, it is needed, and it is, therefore, better to have it this way than not have it at all. It does clarify the pervasive conceptual ambiguity the MLM literature suffers from, and it does give us tools to understand the normative importance of identifying the relevant dimension of exchange for each MLM argument we are making.

1.4 Conclusion

It is better to know exactly what we wish to limit when we argue for liming 'markets'. This has been the main observation of this chapter. I have identified four main dimensions of exchange, which are the source of most normative concerns that arise within the MLM literature: alienation,

commodification, marketisation, and privatisation. I have conveyed that beyond its analytical advantages—namely clarifying a significant ambiguity in the literature—this taxonomy is also of normative importance, as it shows that limiting the 'market' means different things regarding different dimensions of exchange and that different objectionable norms and characteristics are usually associated with different dimensions of exchange.

Before moving forward, I wish to make two additional comments. One is about privatisation and the scope of this thesis. In her pioneering work, Cordelli has already pushed the literature on privatisation in an institutional direction, which is what I hope to achieve concerning the MLM literature myself.[77] Therefore, covering privatisation in depth using my 'institutional limits of markets account' seems less urgent. This, coupled with the fact that, as briefly mentioned, the literature on privatisation can be quite neatly separated from the standard MLM literature, justifies my choice to put privatisation to one side and focus throughout the thesis, mostly on the other dimension of exchange.[78] To be sure when relevant, I will not shy away from mentioning privatisation, but my focus will be elsewhere.

The second comment is that for the rest of the thesis, I will use my taxonomy when discussing the different MLM arguments made by different theorists. However, as I illustrated at the beginning of this chapter, identifying the relevant dimensions of exchange in the existing MLM literature requires interpretation. In most cases, I will implicitly assume what I believe to be the correct interpretation of the relevant dimension of exchange. In cases where the relevant

[77] Cordelli, *The Privatized State*. A thoroughly illuminating symposium on Cordelli's work has recently been published in the *Critical Review of International Social and Political Philosophy*. For a short summary of and introduction to this symposium, see Cécile Laborde and Julie L. Rose, 'Symposium on the Privatized State', *Critical Review of International Social and Political Philosophy* (advanced online publication, 2022). I should be clear that my account can and should be applied to privatisation-related issues. Also, Cordelli mostly focuses on question of legitimacy and less so on questions concerning the internal functioning of institutional designs according to particular institutional justifications—which is my focus. So, my account supplements Cordelli's account on privatisation and institutions and cannot be reduced to it.

[78] Indeed, recent developments in the literature on privatisation shows that it now encompasses discussions that go beyond, and are not related to, the MLM literature. For three major examples see Dorfman and Harel, 'The Case against Privatization'; Cordelli, *The Privatized State*; Shelby, *The Idea of Prison Abolition*.

dimension of exchange is unclear, I will present alternative interpretations.

In the next chapter, I turn to survey the main arguments in the MLM literature and delineate the main challenges it faces.

2

The Moral Limits of Markets

Limiting markets is not easy to justify. To be able to push back against market expansionism and address the shared 'fear of commodification', MLM theorists must be able to justify limiting the dimensions of free and voluntary exchange (or transfers) either of certain goods or within specific spheres of human life. In doing so, MLM theorists have imposed—knowingly or unknowingly—two central intellectual restrictions on themselves. First, as mentioned in the introduction, MLM theorists do not reject market society as such, only the alienation, commodification, marketisation or privatisation of certain goods or certain spheres of human activity. Hence, these theorists operate within contemporary market-based liberal democracies. Second, to make a distinct intellectual contribution, MLM theorists eschew two common, long-lasting intellectual traditions relevant to the analysis of markets.

The first is neoclassical economics, broadly construed. After all, economists themselves provide reasons to put limits on markets. However, according to standard economists, the primary justification for doing so is to overcome market failures, thereby ensuring the proper functioning of the market. These are market-driven reasons, as it were. One common example of market failure is externalities. In this situation, market activity imposes costs or benefits on third parties that are not reflected in the market prices. Externalities lead to inefficient distribution, either because some people benefit from things they did not pay for (positive externalities) or because people are harmed without compensation (negative externalities).

Overcoming this market failure requires a non-market, external intervention that ensures these externalities are being internalised. The market cannot do it alone. Other examples of market failures are the provision of public goods, information asymmetries, etc. The details of what

constitutes a market failure are less important for my purposes. What is more important here is that MLM theorists wish to limit markets not to ensure the proper functioning of markets but rather for additional and independent normative reasons.

The second tradition the MLM literature seeks to distinguish itself from is the philosophical literature on distributive justice. I cannot even attempt to summarise this colossal body of work here. I will instead refer to one relevant feature of it. I am using tremendously broad brushstrokes here, but by and large, many philosophers within this literature aim to provide *general principles* of justice. As Walzer famously observed: '[T]he first impulse of the philosopher is to […] search for some underlying unity: a short list of basic goods, quickly abstracted to a single good; a single distributive criterion or an interconnected set'.[1]

MLM theorists, in contrast, reject this impulse. Their underlying position is that regardless of one's view about general principles of justice—be that libertarian or egalitarian—certain spheres of human life or certain goods give rise to specific normative requirements concerning their allocation, the correct attitudes towards them, and so forth. According to MLM theorists, analysis of these requirements can be done, at least to some extent, independently from general theories of distributive justice. So, in short, MLM theorists offer reasons for limiting markets that are distinct from market-driven reasons or from general principles of distributive justice.

With this concise overview in mind, in this (relatively short) chapter, I survey the main ways in which philosophers have tried to justify liming markets—the Argument from Dignity, the Argument from Corruption, and the Argument from Inequality—as well as of the main objections were raised against these arguments up to this point (sections 2.1–2.3).[2] I am not the first person to present a comprehensive overview of the different MLM arguments. Other philosophers have

[1] Walzer, *Spheres of Justice*, 4.

[2] I have briefly presented some versions of these arguments in the previous section to illustrate the different dimensions of exchange against which they are directed.

successfully done so before.[3]

My point in conducting this survey is twofold. First, this chapter sets the stage for the rest of the thesis. To argue for my institutional account, I must first present a complete picture of the MLM literature. This might not be an inspiring goal, but it is an essential one, nonetheless. Second, instead of only classifying the different MLM arguments, my contribution in this chapter (in section 2.4) is to delineate the *four shared challenges* that confront the various MLM arguments. Delineating these four challenges will provide us with a general normative picture of the MLM literature, one that is not confined to classifying or mapping the different arguments but also to distinguishing the shared challenges of this literature. These challenges will become especially important later on, where I show, in chapter 3, that my institutional account is more resilient to these challenges than the standard MLM arguments.

I should clarify that I do not purport to determine whether the arguments I present can withstand the objections made against them, nor do I wish to offer a defence of these arguments. It might well be the case that concerning certain objections regarding specific goods, MLM theorists have excellent responses to these challenges. What I wish to highlight is that these four challenges are pervasive, shared by all MLM arguments, and together amount to a substantive challenge to the literature as a whole. Finally, this is *not* an exhaustive survey. There are versions of certain arguments I do not include here. I am trying to paint a picture of the literature that is sufficiently comprehensive so that the challenges it faces can be adequately distinguished—not that every idiosyncratic version of each argument is covered.

[3] A prominent example is the taxonomy developed by Brennan and Jaworski. See Brennan and Jaworski, *Markets Without Limits*, 25–28. Satz also provides an overview of different egalitarian arguments for limiting markets. See Satz, *Why Some Things Should Not Be for Sale*, 63–91.

2.1 The Argument from Dignity

Following Immanuel Kant's famous dictum that: 'some things have a dignity, not a market price',[4] an important objection normally directed at the commodification of goods (and sometimes at their alienation) appeals to fundamental values like *respect* and *dignity*, which are claimed to rule out the exchange of things related in some significant way to these values. For instance, things which are taken to be part of one's personhood—like organs, identity, and sexuality—may not be bought and sold since doing so would necessarily lead to treating people (usually the sellers in these cases) as mere means.[5] Therefore, so the argument goes, such goods should not be commodified.

While promising, this line of argumentation has been met with several objections. First, it does not follow from treating something as a commodity that we treat it *only* as a commodity.[6] Thus, one can treat, say, one's lawyer with respect and appreciation while buying the lawyer's services. The same logic applies to the seller. As Fabre conveys it, 'one can sell *a part of* oneself without treating oneself as an object'.[7] Second, many MLM theorists who argue against the commodification of a particular good do not object to the alienation of the same good since they do not object to giving the good for free.[8]

The common objection concerning this tendency is directed against the possibility of holding these two beliefs—against commodification and for alienation—together. The first part of the objection is to reject this asymmetry between commodification and alienation. That is, either by claiming that both the commodification and alienation of good X are objectionable or by arguing that neither is morally objectionable, namely—using Brennan and Jaworski's adage—'if

[4] Kant, *Groundwork of the Metaphysics of Morals*, 42.

[5] For example, see Anderson, *Value in Ethics and Economics*, 168; Pateman, *The Sexual Contract*, 207; Satz, *Why Some Things Should Not Be for Sale*,, 40–44, 117–21.

[6] Brennan and Jaworski, *Markets Without Limits*, 73–74; Satz, Why Some Things Should Not Be for Sale, 82, 143.

[7] Fabre, *Whose Body Is It Anyway?*, 140, emphasis in original.

[8] Brennan and Jaworski, *Markets Without Limits*, 10–12, 78; Fabre, *Whose Body Is It Anyway?*, 10; Wertheimer, 'Two Questions', 220.

you may do it for free, you may do it for money'.[9] The second part of the objection is that granting that the asymmetry is unjustified, MLM theorists should opt to be in favour of both the commodification and the alienation of good X. One common reason given for why MLM theorists should do so is that if they were to commit to the claim that both the alienation and the commodification of good X are objectionable, they would be forced to stand behind controversial claims such as that donating organs for free is morally impermissible.

Another challenge the anti-commodification theorist must meet is to explain why the commodification of specific 'contested' goods infringes dignity while the commodification of other goods does not. Satz succinctly raises this concern regarding arguments from dignity related to the human body: 'Many forms of labor', she observes, 'cede some control of a person's body to others. […] Some control of our capacities by others does not seem to be ipso facto humiliating, destructive of our dignity.[10] Thus, to justify putting limits on a specific body-related market—in sex, organs, or surrogacy—one needs to justify why the same limits should not be put on a market in similar goods that do not seem controversial, for instance, on markets in other activities in which people cede some control over their bodies, say, professional sports.

A common response by anti-commodification theorists to this objection says that good X and similar good Y are *not the same*. There is something 'special' about good X that makes selling X tantamount to treating someone as mere means—e.g., X is more intimate to a person's body, or X is constitutive of one's identity. Good Y does not have this special characteristic, and thus it is not objectionable to commodify it.[11] Indeed, this line of response might be convincing at times. However, it opens the door to another set of objections.

To convey the specialness of the good, dignity-based arguments are often conjoined with

[9] Brennan and Jaworski, *Markets Without Limits*, 11.
[10] Satz, *Why Some Things Should Not Be for Sale*, 143.
[11] See, for instance, Anderson's argument regarding the 'special way' surrogacy degrades women: Anderson, *Value in Ethics and Economics*, 178.

strong rhetoric and expressions of moral outrage. For instance, Radin and Capron argue that the commodification of women's reproductive labour treats women as 'paid breeding stock, like farm animals'.[12] Anderson similarly contends that to treat women's labour as a commodity is to 'dehumanize and degrade pregnant women to the status of mere housing for foetuses'.[13]

Two objections can be made concerning these statements. The minor one is that oftentimes this kind of rhetoric tells us more about the moral outrage the philosopher wishes to convey than it provides us with a robust moral argument about why the market in good X uniquely infringes one's dignity. The second, and more important objection, is that these claims assume that the meaning of certain goods is fixed and unchangeable. As a result, they could reinforce contingent and unjustified moral stigma.

From the fact that there is a social stigma of a certain kind, it does not follow that commodification should be limited. In fact, sometimes, the appropriate thing to do in dealing with these kinds of stigmatisations is to confront the stigma rather than limit commodification. Martha Nussbaum's argument about sex workers neatly summarises this point. 'So long as prostitution is stigmatized', she contends,

> people are injured by that stigmatization, and it is a real injury to a person not to have dignity and self-respect in her own society. But that real injury (as with the comparable real injury to the dignity and self-respect of interracial couples or of lesbians and gay men) is not best handled by continued legal strictures against the prostitute and can be better dealt with in other ways: for example, by fighting discrimination against these people and taking measures to promote their dignity.[14]

[12] Alexander M. Capron and Margaret J. Radin, 'Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood', *Law, Medicine and Health Care* 16, no. 1–2 (1988): 36.
[13] Anderson, *Value in Ethics and Economics*, 175.
[14] Nussbaum, 'Whether from Reason or Prejudice', 710.

2.2 The Argument from Corruption

Another type of argument, which can be applied to all three dimensions of exchange—depending on the specific version of the argument—appeals to the market's corruptive effects. This is a very prominent line of argumentation in the literature and the most criticised. Therefore, I will only provide a general overview of the main types of objections raised against it.

2.2.1 Semiotic Arguments

One group of corruption arguments is what Brennan and Jaworski call 'semiotic arguments'.[15] Semiotic arguments share a common claim that the alienation, commodification, or marketisation of a good X leads to 'a form of symbolic expression that communicates the wrong motive, or the wrong attitude toward X'[16] in a way that corrupts *the social meaning* of X. The idea is that we should first establish what the social meaning of a good is. Only then can we know whether and to what extent we should limit the good's dimensions of exchange. In Walzer's words: 'we must argue about the meaning of the good before we can say anything more about its rightful distribution'.[17] For example, Sandel argues that charging admissions for congressional hearings 'is a form of corruption […]. It treats Congress as if it were a business rather than an institution of representative government'.[18] In selling babies, Anderson similarly claims, parties to the contract 'express attitudes towards children that contradict parental love. […] These actions constitute a degrading treatment of children'.[19]

However, the attempt to use social meanings as a justification for limiting certain dimensions

[15] Brennan and Jaworski, *Markets Without Limits*, 45–51; Jason Brennan and Peter Jaworski, 'Markets Without Symbolic Limits', *Ethics* 125, no. 4 (2015): 1053–77.
[16] Brennan and Jaworski, *Markets Without Limits*, 47.
[17] Walzer, *Spheres of Justice*, 100.
[18] Sandel, *What Money Can't Buy*, 34.
[19] Anderson, *Value in Ethics and Economics*, 172. Instead of corrupting social meanings, other authors describe the corruptive effect of markets in terms of *crowding out* certain meanings. For example, commercial surrogacy, according to Anderson, 'substitutes market norms for some of the norms of parental love'. See Anderson, 'Is Women's Labor a Commodity?', 76.

of exchange suffers from severe limitations. For one thing, it is not clear why the social meaning of a good or of a social sphere should dictate to individuals what to do. As Robert Nozick explained:

> But why must the internal goal of the activity take precedence over, for example, the person's particular purpose in performing the activity? If someone becomes a barber because he likes talking to a variety of different people, and so on, is it unjust of him to allocate his services to those he most likes to talk to?[20]

In other words, there is a need for an additional argument to explain how and why a contingent social meaning can give rise to such strong normative claims, strong enough to determine the way we should allocate a particular good and to limit the voluntary actions of individuals.

An even more troubling version of this objection is not only that it does not follow from the fact that something has a contingent social meaning that this social meaning gives rise to normative requirements, but that semiotic arguments might also reinforce or perpetuate social views that are the result of contingent, and many times unjustified, social relations. Continuing Nussbaum's line of argument regarding the stigmatisation of sex work, Waldron warns us against repugnant conservatism, arguing that we should be careful not to promote 'fetishism that binds us to objects by their traditional conceived meanings'.[21]

In addition to being a challenge for MLM arguments from corruption, this objection actually counts in favour of markets. That is, market enthusiasts often praise markets precisely because they disregard social stigmas and prejudices. As Milton Friedman famously argued:

> 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, or, for that matter, by a [black person] or a white [one]. This illustrates how an impersonal market separates economic activities from political views and protects men from being discriminated against.[22]

[20] Nozick, *Anarchy, State and Utopia*, 233–35.
[21] Waldron, 'Money and Complex Equality', 170.
[22] Friedman, *Capitalism and Freedom*, 21.

Another objection against semiotic arguments is that even if we grant that contingent social norms should determine the limits of the relevant dimensions of exchange of good X, the social meanings of most goods and human activities are rarely agreed upon. Even more, as Anderson observes, 'shared understandings, if they exist at all, are often riddled with contradictions and confusions'.[23] Thus, social meanings cannot serve as a solid normative benchmark for moral justifications.[24]

Furthermore, the fact that certain traits that commodification gives rise to—such as objectification or commensurability—do not properly express the ways a particular good should be valued does not entail that commodifying the good necessarily corrupts its value. As already mentioned regarding the argument from dignity, the non-commodified meaning of a good can coexist with its commodified meaning. Satz illustrates this point convincingly, claiming that 'a religious person can buy a bible without believing that its price expresses her view about its worth'.[25]

Thus, again, a further argument is needed to show how and if the alienation, commodification, or marketisation of the good crowd out all other meanings. At least on the face of it, it seems that most times, it is just not the case.[26]

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[23] Anderson, *Value in Ethics and Economics*, 143. For a similar argument see Amy Gutmann, 'Justice across the Spheres', in *Pluralism, Justice, and Equality* (Oxford: Oxford University Press, 1995), 102–11.

[24] Satz, *Why Some Things Should Not Be for Sale*, 81.

[25] Ibid., 82. This point is expanded in Brennan and Jaworski, *Markets Without Limits*, 52.

[26] I should clarify that I do not support the view that contingent social norms do not, or should not, have *any* normative standing at all. As mentioned, I do not think that all the objections against semiotic arguments are conclusive. In fact, the role social meanings should have in moral reasoning, legislation and institutional design has been at the heart of many fierce philosophical debates. Arguably the most famous of them all is the debate between Lord Devlin and H.L.A Hart on homosexuality. See Richard Arneson, 'The Enforcement of Morals Revisited', *An International Journal for Philosophy of Crime, Criminal Law and Punishment* 7, no. 3 (2013): 132–64; Ronald Dworkin, 'Lord Devlin and the Enforcement of Morals', *The Yale Law Journal* 75, no. 6 (1966): 435–54; H. L. A. Hart, *Law, Liberty and Morality* (London: Oxford University Press, 1963), 25–52. More recently, Elsa Kugelberg has examined the (underappreciated) role social norms play within liberal theory (mostly Scanlon's), and Laura Valentini has provided a defence for the normative significance of social norms. See Elsa Kugelberg, 'Responsibility for Reality: Social Norms and the Value of Constrained Choice', *Politics, Philosophy & Economics* 20, no. 4 (2021): 357–84; Laura Valentini, 'Respect for Persons and the Moral Force of Socially Constructed Norms', *Noûs* 55, no. 2 (2021): 385–408. I refer to Valentini's work, and to the question of the normative standing of social norms, in the next chapter, while discussing whether my account is also vulnerable to this kind of objection or not.

2.2.2 Low-Quality Arguments

Another version of an argument from corruption, which slightly differs from the 'semiotic' version, is the 'low-quality argument'[27]. Here the problem is not only semiotic but rather that the crowding out of norms by one of the dimensions of exchange leads to the development and prevalence of lower-quality character traits, preferences, values or goods.

One typical example of such arguments is that markets tend to make people more selfish, greedy etc.[28] Another slightly more sophisticated example follows a general point raised by both Thomas Schelling and Gerald Dworkin. Contrary to the common 'the more, the merrier' view that adding options to someone's choice set is always a positive thing, or at least value-neutral, Schelling and Dworkin have shown that, in fact, sometimes adding an option could be a negative thing.[29] Sometimes, adding an option to a person's choice set prevents her from satisfying her most valued preference in a way that 'corrupts' her preference order.[30]

As an explanation, we might consider a modified version of Richard Titmuss's famous argument against the commodification of blood. Imagine someone who is perfectly happy to donate blood when selling is illegal. In fact, donating blood when selling blood is illegal is her first preference. However, when selling blood is legalised, she prefers selling over donating. The added option of buying and selling blood prompts her to eschew donating in favour of selling. Thus, merely having the option to buy and sell is repugnant on two counts. First, it leads her to act against her most valued preference—donating when selling is illegal. At the same time, it makes her act according to 'lower quality' preferences, values or motives (profit for self-interest) instead

[27] This is also sometimes referred to as crowding out argument. To prevent confusion between semiotic arguments and low-quality arguments I refrain from using this term here.
[28] For more on how markets changes people's character, see: Samuel Bowles, 'What Markets Can-and Cannot-Do', *Challenge* 34, no. 4 (1991): 13; Satz, *Why Some Things Should Not Be for Sale*, 46.
[29] Gerald Dworkin, 'Is More Choice Better Than Less?', *Midwest Studies In Philosophy* 7, no. 1 (1982): 47–61; Thomas C. Schelling, *The Strategy of Conflict* (Cambridge, MA: Harvard University Press, 1960).
[30] Satz, *Why Some Things Should Not Be for Sale*, 200.

of higher preferences or values (altruistic donation).[31]

A final example is the original version of Titmuss's low-quality argument, which focuses on blood—the good itself—and not on the buyers' and sellers' preferences or values. According to Titmuss, the marketisation of blood leads to the proliferation of low-quality blood, as people in need of money will do everything to sell it, and thus will be tempted to hide the fact they have, say, been infected with a virus whereas altruistic donors would not.[32]

The low-quality argument has also been met with serious objections. The most prominent one is that many low-quality arguments share an empirical assumption that adding an option to buy and sell something would necessarily initiate a slippery slope leading to the lowering of the quality of people's character or the quality of a good. Radin calls this the 'domino theory'. As she explains,

> The domino theory holds that there is a slippery slope leading from toleration of any sales of something to an exclusive market regime for that thing; and there is a further slippery slope from a market regime for some things to a market regime encompassing everything people value. The domino theory […claims], as an empirical premise, that a non-market regime cannot coexist with a market regime.[33]

[31] See Titmuss, *The Gift Relationship*, 263. A strong objection against this line of argument, which differs from the general objections I present below, is that gift relations are no less problematic than relations of exchange for money, and potentially even more so. As Adam Smith wrote 'when he has no other means of engaging them to act according to his inclinations, endeavors by every servile and fawning attention to obtain their good will'. Adam Smith, 'The Wealth of Nations', in *The Essential Adam Smith*, ed. Robert L. Heilbroner and Laurence J. Malone (New York: Norton & Company, 1987), 169. Eric Mack makes a similar argument against Titmuss's mischaracterisation of the preference order of the donors he describes. According to Mack, there is no reason that commodification would change the donors' preference order, unless her first preference is to donate only when someone else is entirely dependent on their donation and cannot find an alternative solution on the market. Commodification is thus very positive in these circumstances, as it 'frustrates this sort of desire by eliminating the needful one's dependency on those who value one's dependency on them'. Eric Mack, 'Dominos and the Fear of Commodification ', in *Markets and Justice*, ed. John W. Chapman and J. Roland Pennock (New York and Oxford: NYU Press, 1989), 218. To more on this see Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It)* (Princeton: Princeton University Press, 2017), 4.

[32] Titmuss, *The Gift Relationship*, 264–65.

[33] Radin, *Contested Commodities*, 99–100.

However, it might be the case that adding another option would just add another option. People would be able to both sell or buy and donate without having a corrupt character and without the quality of the good being damaged.

There is a need for minimal empirical evidence to support the assumption on which the domino theory is based.[34] As argued regarding the semiotic argument and the argument from dignity, we can hold many meanings and values together, and without further evidence, this slippery slope argument is nothing more than a speculation, reinforcing a pre-existing conviction about the 'badness' of the market. And it is a conservative speculation, at that. In fact, it might even be the case that introducing a market to a certain sphere could lead to higher-quality values, goods, or preferences, not lower-quality ones.

2.3 The Argument from Inequality

The third type of argument is typically (but not exclusively) directed against marketisation and appeals to inequality. It comes in three standard forms. One focuses on inequality in status. It takes inequality in the distribution of certain goods as undermining the social status of the disadvantaged party. For instance, Satz argues that the market in sex (or what she calls 'prostitution') is objectionable 'by virtue of its contributions to perpetuating a pervasive form of inequality: status inequality between men and women'.[35]

Another argument from inequality is that the marketisation of certain goods is unjust and unfair. There are specific goods, say, education or healthcare, that should be allocated equally or according to a different criterion than supply and demand. Marketisation, however, allows economic inequality to be translated into the unequal distribution of specific goods by allocating

[34] For the objection itself, see Arrow, 'Gifts and Exchanges', 350–51. For a response to Arrow, see Peter Singer, 'Altruism and Commerce: A Defense of Titmuss against Arrow', *Philosophy & Public Affairs* 2, no. 3 (1973): 312–20.
[35] Satz, *Why Some Things Should Not Be for Sale*, 153. For another example of the status inequality argument, see Walzer, *Spheres of Justice*, 105–6.

the goods according to people's willingness and ability to pay. Thus, to secure the correct, equal distribution of these specific goods, the market should be limited. James Tobin's 'specific egalitarianism' is a prominent example of such a view. He wrote: 'certain specific scarce commodities should be distributed less unequally than the ability to pay for them. Candidates for such sentiments include basic necessities of life, health, and citizenship'.[36]

The final form of the inequality argument is about exploitation. For my purposes, I will not go into the debate about what exactly constitutes or amounts to exploitation.[37] Here, Alan Wertheimer's straightforward definition will suffice: 'we typically say that A wrongfully exploits B when A takes unfair advantage of B'.[38] The claim here is that the marketisation of certain goods is likely to lead to exploitative relationships between the buyer or the seller or between other players involved in the exchange (e.g., pimps or surrogacy agencies). People who sell their reproductive labour, organs, blood and so forth are people who are already mostly in distress (the rich usually do not sell such things). This means that such markets involve vulnerable people who are likely to be exploited. Thus, markets for these specific goods should be limited.

The first objection against the social status version of the argument is that the anti-marketisation theorist cannot provide a justification for the asymmetry she creates between the marketisation of one type of goods or services and the marketisation of other, similar goods.[39]

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[36] Tobin, 'On Limiting the Domain of Inequality', 264. For similar views, see Williams, *Problems of the Self*, 241; Sandel, *What Money Can't Buy*, 109.

[37] On the exploitation argument in the moral limits of markets framework, see Anderson, *Value in Ethics and Economics*, 186; Brennan and Jaworski, *Markets Without Limits*, 147–50; Fabre, *Whose Body Is It Anyway?*, 142–44; Sandel, *What Money Can't Buy*, 111; Satz, *Why Some Things Should Not Be for Sale*, 97; Wertheimer, 'Two Questions', 212–13. For a wider discussion, see David Miller, *Market, State, and Community: Theoretical Foundations of Market Socialism* (Oxford: Clarendon Press, 1989), 175–200; Hillel Steiner, 'Exploitation, Intentionality and Injustice', *Economics and Philosophy* 34, no. 3 (2018): 369–79; Alan Wertheimer, *Exploitation* (Princeton: Princeton University Press, 1996).

[38] Wertheimer, 'Two Questions', 221–13.

[39] Joseph Heath provides an amusing but illuminating version of this objection that nicely captures its essence. He makes the objection within a different context; not against the social status argument from inequality, but to ridicule a certain argument for the public provision of water. He claims that those who call for nationalising the provision of water are interested in water 'delivered to the home through pipes'. But, he points out, '[w]hen it comes to the bottled water industry, they […] do not call for nationalization'. The question is, in Heath's own words, '[w]hy not? If water

Fabre offers a representative example of this type of asymmetry objection when directed against the social status argument from inequality (in the context of the marketisation of sex), claiming that:

> [M]any an institution and many a profession take place against a background of, and reinforce, discrimination against women: consider nurses, secretaries, cleaning staff, supermarket cashiers, nursery and primary school teachers. The overwhelming majority of members in those professions, all of which involve serving others, are women. […] Women enter those professions […] partly because of restricted educational and professional opportunities, the reason for which in turn lies in conventional views of women as care providers. If the institutions which use women in those ways […] are not morally wrong per se, and should not be banned (as we all agree—I hope!), why should prostitution be?[40]

Again, there is a need for a further explanation for why the inequality of social status that emerges from the marketisation of a certain good—in Fabre's case, sex— is a good enough reason to limit sex but not a good enough reason to limit markets in other goods that also involve inequality of status.

The anti-commodification theorist can argue, and some indeed tried, that prostitution and pornography are worse in reinforcing gender stereotypes in society than the other markets Fabre alludes to. However, this needs empirical support. Similar to the domino theory response, the response to the asymmetry charge involves an empirical assumption that is sometimes not defended, and that might be implicitly supported by biased, contingent-social-norms-based speculation rather than a robust argument.[41]

Concerning the 'specific egalitarianism' argument, the same objection applies. There is a need for an argument to explain, for instance, why we should allow a market in laptops but not in

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is sacred, then it should be sacred regardless of whether it comes in a pipe or a bottle'. Joseph Heath, 'Three Normative Models of the Welfare State', *Public Reason* 3, no. 2 (2011): 29.

[40] Fabre, *Whose Body Is It Anyway?*, 178. For a similar argument, see Nussbaum, 'Whether from Reason or Prejudice', 700–1.

[41] See Fabre, *Whose Body Is It Anyway?*, 181; Nussbaum, 'Whether from Reason or Prejudice', 707-8. I should clarify that I am definitely not claiming that there is no such empirical evidence to support this claim.

education or healthcare. The usual way theorists try to respond to the asymmetry challenge in this context is by referring to *necessity*. Some goods are more necessary than others—for human flourishing, the good life, or security—and therefore should be divided according to need and not according to ability to pay.[42] However, even if one accepts this claim, it only suggests a threshold notion of adequate allocation of a certain good.

The anti-marketisation theorist would therefore need to show both that a non-market system better secures the minimum necessary for everyone and that the market and non-market systems of distribution cannot work simultaneously. For example, assume that a certain level of high-school education is necessary for full inclusion in society. To argue against marketisation, one needs to show that a non-market system of distribution is better in securing high-school education and that for such a non-market system to work, no market in high-school education can exist whatsoever. What these requirements show is that rather than an argument against marketisation, many specific egalitarian arguments are, in fact, arguments for minimum supplementation by non-market mechanisms, but not against markets.

Finally, there are objections against exploitation-based arguments as well. For one thing, it seems that marketisation is not the problem but rather the social conditions within which it operates. People are poor, and in dire need of money, so they will do whatever it takes to earn it. Therefore, there is a problem of 'double punishment' here. Instead of eliminating the dire economic or non-economic circumstances from which people are suffering and which make them vulnerable and susceptible to exploitation in the first place, the anti-marketisation theorist wishes to put the burden on the exploited by eliminating the market and, thus, their source of income.[43]

Moreover, according to arguments from exploitation, the issue is not that there is a market

[42] For instance, see Panitch, 'Liberalism, Commodification, and Justice', 68–73.

[43] Arneson, 'Commodification and Commercial Surrogacy', 159. For another version of this argument see Fabre, *Whose Body Is It Anyway?*, 146.

in good X, but rather that there are instances in which the sellers of good X are being exploited. As Brennan and Jaworski put it: 'All that follows [from the argument from exploitation] is that in this particular instance, buying the good involves exploitation. In other cases, where there is no exploitation, there is no objection to buying the good'.[44] Because the problem derives from exploitative relations and not from the character of the good, such concerns could be solved by simple regulations that would still allow a market, or at least the buying and selling of the good. So, for instance, a minimum price can be set in order to avoid unfair payment. In other cases where information could be a problem requiring full disclosure of relevant information could be of assistance.[45] Putting it differently, marketisation, according to both lines of objections, is not the real issue here.

2.4 The Four Shared Challenges to the Moral Limits of Markets

I hope that by now, having gone through what I believe to be the strongest objections to the main arguments in the moral limits of markets literature, a pattern emerges. The same objections, with proper adjustments, are applied against all arguments. In what follows, I will very briefly group them into four shared challenges that any MLM argument, to be robust, must successfully overcome:[46]

> *Asymmetry 1*: this is the 'if you may do it for free, you may do it for money' challenge. MLM theorists must be able to justify why a certain dimension of exchange of good or service X (say, commodification) should be limited but another dimension of exchange of the same good or service (say, alienation) should be allowed (e.g., why some goods can be given for free but should not be for sale).

[44] Brennan and Jaworski, *Markets Without Limits*, 151.
[45] Ibid., 148; Fabre, *Whose Body Is It Anyway?*, 141.
[46] To be sure, there might be additional objections tailored against a specific argument. Overcoming these challenges is not a sufficient condition for MLM arguments, it is a necessary one.

Asymmetry 2: the second challenge from asymmetry is the 'sex workers vs professional athletes' challenge. It is not about asymmetry between limiting and not limiting different dimensions of exchange of *the same good*. It is about the asymmetry *between different goods*. The MLM theorist must be able to show a reason for limiting a dimension of exchange of good or service X while not limiting the same dimension of exchange of a similar good or service Y.

Non-Speculative: this challenge gathers a group of objections against different quasi-empirical, fairly speculative assumptions made by MLM theorists. Examples of this might be that people cannot hold different kinds of attitudes towards a good at the same time, that once a market is introduced, there will be a domino effect at the end of which all other motives or ways of allocation will be crowded out, or that the commodification or marketisation will actually lower the quality of certain goods, and so forth. In short, the challenge is that MLM theorists must show, by using empirical evidence, amongst other things, that the relevant dimension of exchange is, in fact, the cause of the theorist's normative concern or whether this concern is based on fact.

Non-semiotic: this challenge is about the tendency of many MLM arguments to base their arguments on contingent social meanings or social norms. The challenge is comprised of two parts. First, the MLM theorist must explain why contingent social meanings should give rise to strong normative requirements (strong enough to justify liming free and voluntary exchange, for instance). Second, granting that there is a justification to limit a dimension of exchange in virtue of the corruption of a social meaning, MLM theorists must show that the social meaning in question is not ambiguous, accepted by most people, and is not unjustifiably and repugnantly conservative. Alternatively, the MLM theorist can explain why her argument is not based on contingent semiotic considerations.

2.5 Conclusion

As mentioned in the introduction, MLM arguments generally consist of three components:

> (1) The dimension of exchange on which the argument focuses, namely, what it is that should be limited—alienation, commodification, marketisation, or privatisation. And, correspondingly, what the proper way to limit it is, whether regulation, restriction, criminalisation, and so forth.
>
> (2) What it is that makes alienation, commodification, marketisation, or privatisation of certain goods or services objectionable—for instance, the corruption of a social meaning, inequality, infringement of dignity, and the like.
>
> (3) The kind of good in question: the type of good at stake and how the category the good falls into affects how we normatively assess its potential dimensions of exchange.

By now, we have covered components 1 and 2. In the previous chapter, I offered a new taxonomy for component 1. In this chapter, I surveyed the standard MLM arguments from which component 2 is composed and delineated four main challenges that any robust MLM argument must overcome. The next chapter is devoted to component 3—the kind of good in question. There I turn to make the main argument of the first part of the thesis: that MLM arguments are inapplicable to institutional goods and offer a novel institutional account in their place.

3

Institutional Limits of Markets

'[W]hy should we expect the same argument that tells us why vote-selling is wrong to also be able to tell us why kidney-selling is wrong?'.[1] This question, shrewdly articulated by Vida Panitch, lies at the heart of this chapter. On the face of it, it really does seem intuitive to assume that institutional goods like voting would require different normative treatment from other goods like kidneys. And indeed, as I explain below, some MLM theorists do take into consideration in their accounts the difference between goods by considering the special social meaning attached to each good or the different attitudes associated with each good. These attempts notwithstanding, I argue that the MLM literature fails to recognise and properly analyse the distinctive way institutional goods derive their value and, in turn, apply inappropriate arguments to determine the limits of the different dimensions of exchange of such goods.

In contrast to other goods (which I call 'natural' goods), the value of institutional goods is almost exclusively grounded in their function within a specific institutional design that is supposed to serve a certain institutional justification. For instance, legal representation in an adversarial system has a different function than in an inquisitorial one, and this function is determined according to different normative justifications. Thus, any normative account aimed at explaining if and how we should limit certain dimensions of exchange of an institutional good should consider the good's distinct institutional quality.

However, MLM arguments share two common features that specifically ignore this intuitional quality, making them inapt to normatively analyse institutional goods. First, although there are different MLM accounts, all apply the same *argumentative structure* to different goods. They appeal to

[1] Panitch, 'Liberalism, Commodification, and Justice'.

general moral principles and social meanings—namely, dignity or autonomy—or to general metrics that determine what makes a market noxious and apply them directly to the relevant institutional good. In so doing, they ignore the specific justification of the institution in which the institutional good is embedded, the specific institutional design that is supposed to complement the institutional justification, and the function of the institutional good as part of this apparatus. Inappropriately applying the same argumentative structure to both natural and institutional goods, I argue, leads to ambiguities in the best case, where the institutional justification and design have been implicitly assumed, and to unintelligible claims in the worst case, where they have been completely ignored.

Second, in terms of *content*, some (though not all) MLM arguments focus on individual obligations and moral permissibility, while institution-focused inquiry is of a different kind; it focuses on the justifiability of institutions and the functionality of institutional designs. Hence, MLM arguments focused on individual morality when discussing institutional goods miss the mark (to forestall premature objections, of course there is a scope for moral evaluation of individual's conduct within institutions—I elaborate on this point below, mainly in section 3.5).

Thus, alongside the challenges presented at the end of the previous chapter, in this chapter, I show that the standard MLM arguments are limited for an *additional* and maybe *more serious* reason: their inapplicability to institutional goods. To support my argument, since philosophers within the MLM literature do not usually discuss institutional goods, I use the market in votes—the central institutional good over which a substantial body of MLM literature has developed—as a case study.

After establishing the inapplicability of MLM arguments to institutional goods, I offer a new account—'institutional limits of markets'—for normatively analysing the different dimensions of exchange of such goods. I argue that, besides being appropriate in terms of structure and content, this account has two additional advantages: (1) it is not primarily motivated by contemporary moral shock, and (2) it is more resilient against the four challenges MLM arguments face.

The chapter is structured as follows. In section 3.1, I survey previous attempts to distinguish between different kinds of goods within the MLM literature and the difficulties they raise. In section 3.2, I explain what an institutional good is and distinguish between institutional goods and natural goods. In section 3.3, I use the market in votes as a case study to discuss the way in which MLM arguments are applied to institutional goods. I show that the main MLM arguments against the different dimensions of vote exchange face the same four challenges they face when applied to natural goods. In section 3.4, I argue that applying MLM arguments to the market in votes and to institutional goods, in general, is structurally inappropriate. In section 3.5, I argue that this attempt is also unfitting in terms of content. In section 3.6, I offer my 'institutional limits of markets' account. In section 3.7, I discuss an objection to, as well as two additional advantages of, my suggested institutional account. Finally, in section 3.8, I defend the novelty of my account and discuss its relation to Michael Walzer's work.

Before we begin, two brief remarks are needed. One is that, as mentioned in the introduction, throughout this chapter, when I distinguish between 'moral' arguments and 'institutional' arguments, I do not repeat the common argument within the tradition of political realism, whereby political philosophy discusses a special kind of normativity that is distinct from moral normativity.[2] For the purposes of this chapter, I remain agnostic about this question as it does not affect my argument.

The second remark concerns the distinction I have already used above between 'argumentative structure' and 'content'. These concepts do not denote any technical meaning and should be taken at face value. By argumentative structure, I mean the way philosophers structure their arguments; for instance, whether they consider the source of the value of the good or rather apply general moral principles to all goods in the same way. By content, I refer to the normative

[2] For an overview of this debate, see Maynard and Worsnip, 'Is There a Distinctively Political Normativity?' and Rossi and Sleat, 'Realism in Normative Political Theory'.

issue the argument is concerned with, be it individual permissibility, institutional design and so forth.

3.1 Three Attempts to Distinguish between Different Kinds of Goods

Philosophers have provided three main strands of answers concerning how and whether MLM arguments should distinguish between different kinds of goods.[3] One strand is focused on the distinction between goods that categorically cannot be for sale (e.g., love) and goods that should not be for sale (e.g., kidneys).[4] However important this distinction is, it cannot provide us with tools to distinguish between different goods *within* the 'should not be for sale' category. Since most of the MLM literature discusses only goods belonging to the latter category, this distinction does not take us far—that is, assuming there are normatively important differences between different kinds of goods under the 'should not be for sale' category. So, I will put it to one side for the rest of the thesis.

Others have tried to distinguish between goods based on the special way individuals value them or the special social meanings associated with them. For instance, Anderson argues that the plurality of kinds of goods is 'distinguished by the complexes of attitudes it makes sense to take up toward them and by the distinct social relations and practices that embody and express these attitudes'.[5] According to this view, one should start by identifying a controversial dimension of exchange pertaining to a certain good that does not chime with one's normative intuitions, attitudes or social meanings—something that does not 'make sense', to use Anderson's terminology. For instance, the commodification of babies for adoption seems appalling to many.

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[3] Panitch offers a fourth answer, which is a middle way between Anderson's answer and Satz's answer. I elaborate on it in a bit more detail in footnote 51 of this chapter (section 3.4). See Panitch, 'Liberalism, Commodification, and Justice', 65–69.

[4] See Andre, 'Blocked Exchanges', 32–33; Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 349–50; Walzer, *Spheres of Justice*, 97–103. I do not commit here to the claim that love cannot be for sale (I am not sure love cannot be for sale but I leave this discussion for another time). I am just describing the distinction as it appears in the MLM literature.

[5] Anderson, *Value in Ethics and Economics*, 15.

Next, one should identify the value or social meaning normally attached to this good that would be undermined in discharging this dimension of exchange. For instance, treating a baby as a commodity undermines the baby's (or the parents') dignity. Then one should offer the proper limits for the relevant dimension of exchange, say, prohibiting the commodification of babies.

The difficulty with this attempt is twofold. First, since it is at least partially based on contingent social meanings and the 'specialness' of goods, the arguments that will follow from this attempt to distinguish between goods may be vulnerable to the *Non-Semiotic* challenge presented in the previous chapter. Second, and more importantly, under this account, the Andersonian three-step argumentative structure applied to the market in babies in the example above is applied to all goods *in the same way*.[6] Hence, Anderson's attempt does not entirely satisfy Panitch's worry since she applies the same argumentative structure to completely different goods.

The third approach to distinguishing between goods in the MLM literature is—in fact—not to distinguish between them at all. This position can be understood as a response to the objections directed at grounding MLM arguments in the specialness of certain goods. As presented in the previous chapter, one kind of objection is that there is nothing special about the good in question. The other is that even if we do evaluate something in a special way, it should not be normatively binding because deriving normative judgements from contingent social meanings may lead to repugnant conservatism. Hence, a way to get around this problem is to neglect the distinction between goods altogether and apply general principles to all goods instead.

A paradigmatic example of this strategy can be found in Satz's account, which she describes as follows: 'it grounds a moral distinction between types of markets, but one that is not primarily based on the special nature of certain goods, but on considerations that cut across goods'.[7] To do

[6] Panitch makes a similar observation regarding Sandel's account, claiming that he applies the same kind of corruption arguments to different goods. She calls this phenomenon 'misplaced generality'. Panitch, 'Liberalism, Commodification, and Justice', 66.

[7] Satz, *Why Some Things Should Not Be for Sale*, 110.

so, Satz offers a metric of general principles for what makes a market noxious, such as that it leads to extreme harms to society or individuals or that it exploits the vulnerable or those with weak agency. This strategy is, by all means, successful in avoiding objections against the normative importance of the specialness of certain goods. However, it comes with a cost: it cannot provide an answer to Panitch's question. As I will argue in this chapter, this cost is non-negligible.

Thus, the approaches taken so far either ground MLM arguments in the special features of certain goods but apply the same argumentative structure to all goods (and are exposed to the objections against the arguments from corruption and dignity) or reject the distinction between goods altogether. Both are underpinned by the assumption that the kind of good under discussion should not impact the argumentative structure being used.

In response, I defend two claims in this chapter. The first is that the argumentative structure *should* change according to the type of good in question, whether institutional or natural. The second is that the distinction between goods is normatively important in terms of content as well since the philosophical normative inquiry of institutions is distinct from an inquiry of general moral principles concerning individual morality. Thus, on the one hand, I challenge Satz's decision to elide the distinction between goods (in terms of both content and argumentative structure). On the other hand, I challenge Anderson's approach by grounding my distinction not in the special evaluative attitudes we have toward each good but in the way the goods derive their value. Moreover, instead of applying the same argumentative structure to different goods, I offer a different argumentative structure for institutional goods.

3.2. What Is an Institutional Good?

One might assume that in order to define what an institutional good is, one must first have established a clear definition of institutions. For the purpose of this chapter, however, I refrain from doing so. I put aside questions about what differentiates institutions from other social

constructions (e.g., social norms), whether institutions form special collective identities or should only be considered as the sum of the individuals they consist of, and so forth.[8]

In short, I do not commit to any ontological view regarding what an institution is. I allow myself to do so since all of the institutions I am concerned with—e.g., legal, media and election systems in liberal democracies—are usually characterised as paradigmatic cases of institutions under any definition. I am aware that this assumption might seem controversial, and I will defend it in more detail at the end of this chapter (3.7.1). For now, it is sufficient to say that the definition of what an institution is does not influence the substance of my main argument, just its scope.

So what, then, distinguishes institutional goods from other goods? Before approaching the answer to this question, a quick detour through the literature on the theory of value is needed in order to bring to the fore an important distinction. Following Christine Korsgaard, Rae Langton and Joseph Raz, my analysis relies on the distinction between the source of the value of things and the way we value things.[9] Within the former category, it is common to distinguish between intrinsic and extrinsic (or derivative) value. A good is intrinsically valuable when the source of the value is the good itself. As Korsgaard observes:

> To say that something is intrinsically good is not by definition to say that it is valued for its own sake: it is to say that it has its goodness in itself. It refers, one might say, to the location or source of the goodness rather than the way we value the thing.[10]

Conversely, a good is extrinsically (or derivatively) valuable if it derives its value from something else, from some other source. Within the latter category—i.e., the way we value or justify things—

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[8] For a comprehensive overview, see Miller, *The Moral Foundations of Social Institutions*. See also Francesco Guala, *Understanding Institutions: The Science and Philosophy of Living Together* (Princeton; Oxford: Princeton University Press, 2016), 3–20; John R. Searle, 'What Is an Institution?', *Journal of Institutional Economics* 1, no. 1 (2005): 1–22.

[9] See Christine Korsgaard, 'Two Distinctions in Goodness', *The Philosophical Review* 92, no. 2 (1983): 287–336; Rae Langton, 'Objective and Unconditioned Value', *Philosophical Review* 116, no. 2 (2007): 157–85; Raz, *The Morality of Freedom*, 176–80. Notice that each philosopher holds a different view regarding the relation between this distinction and objectivity. For instance, some hold that there is a connection between intrinsically valuable goods and objectivity. For the purpose of this chapter, I do not need to take a stand on these meta-ethical issues.

[10] Korsgaard, 'Two Distinctions in Goodness', 170.

the common distinction is between valuing something as an end (for its own sake) or valuing something instrumentally (for the sake of other things).

The two categories can intersect. We can value something that is intrinsically good both for instrumental reasons, when it contributes to bringing about something else, and as an end. Similarly, it has been argued that derivative goods can be valued as an end and not just instrumentally in cases where they are considered a part of an intrinsically valuable whole. Some call these derivative goods 'contributive' or 'constitutive' goods.[11]

Building on this framework, we can now return to the discussion on what distinguishes institutional goods from other goods. To start with, institutional goods should be considered derivative goods since they derive their value, at least primarily, from the function they serve within the specific institutional design they are embedded in, according to the value or the collective good the institution is designed to promote. To illustrate, consider the institutional good that is the main case study of this chapter, voting in an election. Some argue that the justification, or the end, of parliamentary democracy, is to achieve political equality (whatever this means). Likewise, votes, and the way we allocate them, should function within a complex institutional design to secure political equality.[12] Outside a specific election system within a democracy, and without taking into consideration a specific institutional design, the ballot we cast as citizens once every few years would be just a piece of paper, and the act of casting the vote itself would be virtually meaningless.

Even though the value of institutional goods is derivative, it does not mean we only value them instrumentally. Institutional goods may be contributive. Again using democracy as an example, some believe that democracy is intrinsically valuable. Under such views, voting could be

[11] Ibid., 172; Raz, *The Morality of Freedom*, 178.

[12] For a thorough discussion on this kind of view, see Christiano, 'Freedom, Consensus, and Equality', 171–80; Christiano, 'An Argument for Democratic Equality', 39–69; Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford: Oxford University Press, 2008), 75–131; Dworkin, 'Political Equality'; Niko Kolodny, 'Rule over None II: Social Equality and the Justification of Democracy', *Philosophy & Public Affairs* 42, no. 4 (2014): 287–336. I elaborate on Dworkin's account below.

considered as a contributive good to democracy. It does not have a direct instrumental effect in bringing about democracy; rather, it is a constitutive part of it, a part of an intrinsically valuable whole.

The fact that institutional goods can be contributive is important, as it shows that when we analyse the dimensions of exchange of institutional goods, we can discuss their value concerning both instrumental justifications of institutions and justifications of institutions as ends. This means, in turn, that an institutional approach like the one I take—which is based on the claim that institutional goods are derivative goods—can be applied to both kinds of justifications.

Of course, there can be many derivative goods that are not institutional. Therefore, defining institutional goods as derivative is not enough to distinguish them from other derivative goods. What distinguishes institutional goods from other kinds of derivative goods is that their value is derived from their function within the institution in which they are embedded. In contrast, the value of 'natural goods'—to use Seumas Miller's terminology—both derivative and intrinsic, is either logically prior to the existence of institutions or is not primarily derived from them and their existence.[13]

Take, for instance, two of the most paradigmatic MLM examples of contested goods: organs and sex. The value of these goods is institutionally independent since even in a society without institutions, we would value them. This is not to deny that these goods can be institutionalised in some way, such as through legal recognition, regulation, or, in the case of sex workers, decriminalisation or by establishing a market for the goods, such as a market in kidney transplants. Their value, however, is not exclusively dependent on their institutionalisation, like in the voting case.

One objection against my description of institutional goods could be that they can also be

[13] Miller, *The Moral Foundations of Social Institutions*, 57, 60, 65.

intrinsically valuable, not just derivatively valuable. Therefore, if my account is based on a distinction that overlooks intrinsically valuable institutional goods, the scope of my approach is limited from the outset (assuming there are many or at least a significant number of intrinsically valuable institutional goods). I wish to propose two responses to this objection. First, I am hard-pressed to come up with an example of a 'pure' institutional good whose value can be defined as *primarily* intrinsic, at least concerning the institutions I focus on in this thesis. For instance, consider the view that voting is an end since it is an expression of civil duty. Even under (such a crude description of) this view, voting has value only within the context of a democratic election system. So, an institutional good can be perceived as valuable in itself, but the source of its value is still the institution.

To be sure, my inability to come up with an example is probably a testament to the limits of imagination rather than the non-existence of such an instance. However, even if such examples exist, I allow myself to assume that there will not be many of them and that the intrinsically valuable institutional good in question would at least have derivative value in addition to its intrinsic value. This, I think, already takes the sting out of the objection.

The second, and more substantive response, is that in cases where institutional goods are intrinsically valuable, to undermine my approach, one would have to show that this intrinsic value is important enough to affect the way we normatively analyse the dimensions of exchange pertaining to this good. So, consider a claim I make later in the thesis, namely, that the value of legal representation is derived from its function within the adversarial legal system. For this objection to hold, one would need to show that the intrinsic value of legal representation—which is unclear to me—is significant enough to influence the way we determine whether legal representation should be alienated, commodified, marketised or privatised. I do not believe that anyone would be able to show that, but were they to, I admit that my argument is vulnerable to this limited line of attack. However, this objection still does not undermine the substance of my

argument; it merely points to a limit of its scope.

To be sure, the distinction between institutional and natural goods is not binary; it signifies a scale. Some goods could be hybrid. For example, some argue that the legal right to be heard in court is also valuable independent of its institutional setting.[14] When a victim of an infringement of rights can address her complaint by voicing her grievances to the wrongdoer, being able 'to be heard', so the argument goes, is valuable within or without an institution. Conversely, in a patriarchal system in which sex is deeply embedded as an institutional category, it could be considered both as a natural good and as an institutional good. My thesis, in any event, is limited to analysing goods in their institutional form, whether they are hybrid or not.

Having established the distinction between natural and institutional goods, in the following section, I turn to show how MLM arguments ignore it by applying identical arguments used for limiting markets in natural goods to markets in votes—a paradigmatic institutional good.

3.3 The One and (Almost)[15] Only Institutional Example: The Moral Limits of Markets in Votes

Buying and selling votes is considered wrong almost universally. It is not surprising, therefore, that voting has been usually regarded in the MLM literature as a paradigmatic institutional example of a good that should not be transferred, commodified or marketised. To take one example, Satz argues

[14] Alon Harel, *Why Law Matters* (Oxford: Oxford University Press, 2014), 202–5.

[15] The growing MLM-based literature on the market in citizenships can also be considered as a case of theorists applying MLM arguments to an institutional good. My arguments in this chapter concerning the inapplicability of MLM arguments to institutional goods are equally relevant to this literature as well. However, throughout the thesis, for simplicity's sake, I will use the MLM literature on political votes as my primary example. For a few main works in the literature on the market in citizenships see Lior Erez, 'A Blocked Exchange? Investment Citizenship and the Limits of the Commodification Objection', in *Citizenship and Residence Sales: Rethinking the Boundaries of Belonging*, ed. Dimitry Kochenov and Kristin Surak (Cambridge: Cambridge University Press, 2023); Javier Hidalgo, 'Selling Citizenship: A Defence', *Journal of Applied Philosophy* 33, no. 3 (2016); Ayelet Shachar, 'Citizenship of Sale?', in *The Oxford Handbook of Citizenship*, ed. Ayelet Shachar, et al. (Oxford: Oxford University Press, 2017); Ayelet Shachar and Ran Hirschl, 'On Citizenship, States, and Markets', *Journal of Political Philosophy* 22, no. 2 (2014).

that 'no one seriously proposes that we distribute a society's votes through a market'.[16] Michael Sandel similarly claims that 'we don't allow parents to sell their children or citizens to sell their votes'.[17]

Until recently, these kinds of statements were rarely supported by rigorous argumentation. In the past few years, however, several philosophers have provided more detailed accounts of both standard MLM arguments against the alienability, commodification and marketisation of voting—namely, arguments from corruption and equality—as well as objections to those arguments in support of commodification or marketisation.[18] In what follows, I briefly present these standard moral arguments and objections.[19] In doing so, my aim is not to argue that the objections to the standard MLM arguments regarding votes are conclusive or even correct. Rather, it is to convey that even when applied to institutional goods, the standard MLM arguments remain exactly the same and, accordingly, face the same four challenges they face concerning natural goods. Before

[16] Satz, *Why Some Things Should Not Be for Sale*, 34.

[17] Sandel, *What Money Can't Buy*, 15. To be sure, these are not the only two examples. See, also, Anderson, *Value in Ethics and Economics*, 143; Andre, 'Blocked Exchanges', 144; Arneson, 'Commodification and Commercial Surrogacy', 133; James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Indianapolis: Liberty Fund, 2004), 270; Radin, *Contested Commodities*, 19; Rose-Ackerman, 'Inalienability', 963; Tobin, 'On Limiting the Domain of Inequality', 269.

[18] See Archer and Wilson, 'Against Vote Markets'; Alfred Archer, Bart Engelen, and Viktor Ivanković, 'Effective Vote Markets and the Tyranny of Wealth', *Res Publica* 25, no. 1 (2019); Brennan, *The Ethics of Voting*; Brennan and Jaworski, *Markets Without Limits*; Freiman, 'Vote Markets'; Hasen, 'Vote Buying'; Lippert-Rasmussen, 'Vote Buying'; James S. Taylor, 'Logrolling, Earmarking, and Vote Buying', *Philosophical Quarterly of Israel* 44, no. 3 (2016): 905–13; James S. Taylor, 'Markets in Votes, Voter Liberty, and the Burden of Justification', *Journal of Philosophical Research* 42 (2017): 325–40; James S. Taylor, 'Autonomy, Vote Buying, and Constraining Options', *Journal of Applied Philosophy* 34, no. 5 (2017): 711–23; James S. Taylor, 'How Not to Argue for Markets (or, Why the Argument from Mutually Beneficial Exchange Fails)', *Journal Of Social Philosophy* 48, no. 2 (2017): 165–79; James S. Taylor, 'Two (Weak) Cheers for Markets in Votes', *Philosophical Quarterly of Israel* 46, no. 1 (2018): 223–39; Umbers, 'What's Wrong with Vote Buying'; Volacu, 'Electoral Quid Pro Quo'.

[19] Since dignity-based arguments against the commodification or marketisation of votes are not as popular, and because I only use voting as an example in this section—not in order to thoroughly discuss all plausible arguments in the literature—I put them to one side and focus only on arguments from corruption and inequality. For examples for MLM arguments from dignity regarding voting, see Pamela Karlan, 'Not by Money But by Virtue Won? Vote Trafficking and the Voting Rights System', *Virginia Law Review* 80 (1994): 1459; Umbers, 'What's Wrong with Vote Buying'. I also put to one side what I earlier called market-driven reasons for and against limitations of the commodification or marketisation of votes, such as that marketisation of votes would lead to negative externalities and inefficiency, or that, on the contrary, marketisation of votes would optimise the preference satisfaction of the seller and the buyers. See Richard A. Epstein, 'Why Restrain Alienation?', *Columbia Law Review* 85, no. 5 (1985): 985–89; Tobin, 'On Limiting the Domain of Inequality', 269.

doing so, two additional clarificatory remarks are in order.

Most discussions on voting within the context of the MLM literature share two characteristics. One is that voting is an integral component of all legitimate liberal democratic regimes (I leave open the question of what exactly constitutes that legitimacy). The second is that philosophers do not distinguish, for example, between votes for city council, a presidential race, party leadership and so forth. I, too, make the first assumption since I focus on institutions in liberal democracies. As for the second assumption, since it is possible that not all kinds of voting function in the same way according to the same normative justifications, for the sake of clarity, I will discuss only one type of voting—voting in general elections (for parliament, senate, presidency, etc.).[20]

The second remark is that we need to clarify what we mean when we refer to voting as a good. There is a common distinction in the literature between the *right to vote*—which every citizen has in virtue of being a citizen—and the act of *casting a specific vote,* which can be sold as a service.[21] When a seller makes a contractual obligation to either (1) vote for someone in exchange for money, (2) turn out to vote in exchange for money, or (3) abstain from voting in exchange for money, she does not sell her right to vote, but rather sells a specific service (i.e., voting or not voting for someone) as a good.[22] In all these scenarios, the buyer does not gain a further right to vote. Rather, the candidate she supports gains an additional vote. Most agree that one cannot sell one's right to vote because that will render the state undemocratic. Thus, the controversy about the different dimensions of exchange of votes is mostly related to cases of selling specific voting services. Building on this distinction, when I refer to voting as a good, I mean the services of voting or not

[20] It might also be the case that voting functions differently in a parliamentary system than in a presidential one, so I could also be open to the same criticism. For the purposes of my argument, I believe the level of specification I have chosen is enough, but if one could show that the implications of my discussion about votes could change in different kinds of general elections, then I would happily stand corrected.

[21] Brennan, *The Ethics of Voting*, 138–39; Freiman, 'Vote Markets', 760; Lippert-Rasmussen, 'Vote Buying', 127–28; Umbers, 'What's Wrong with Vote Buying', 552.

[22] It is not always clear which of the three options troubles theorists who argue against the alienation, commodification, or marketisation of voting.

voting for someone in a specific case.

3.3.1 Arguments from Corruption

The two kinds of arguments from corruption presented in the previous chapter—semiotic and low-quality arguments—have been applied to the commodification and marketisation of votes.[23] Consider semiotic arguments first. Although they come in several hues, they share a common claim. Namely, regardless of considerations of equality or dignity, the commodification of votes will somehow corrupt the social meaning of voting. According to one version, 'if votes were freely tradable, we would have a different conception of what voting is for—about the values it embodies—and this changed conception would have corrosive effects on politics'.[24] Another version is that we should not commodify votes 'because we believe that civic duties should not be regarded as private property but should be viewed instead as public responsibilities'.[25]

The low-quality argument comes in different forms as well. One is that the commodification or marketisation of votes (it is not clear which dimension of exchange is problematic here) erodes people's moral or civic character, changes the motives according to which people vote, and leads to lower-quality politics.[26] To take one example, within a market, vote buyers will not participate in the deliberative process, and hence decisions will be made solely according to the interests of the rich, which in turn will lead to worse political results (notice that this is not an inequality argument but a low quality of politics argument).

A second version of the low-quality argument is the Schelling-based claim that adding the

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[23] For a brief summary of corruption arguments against the market in votes, see Lippert-Rasmussen, 'Vote Buying', 135–36. I suspect that the general argument against social choice theories presented by Jon Elster is the basis of the concern of the arguments from corruption against the commodification or marketisation of votes. See Jon Elster, 'The Market and the Forum: Three Varieties of Political Theory', in *Philosophy and Democracy: An Anthology*, ed. Thomas Christiano (New York and Oxford: Oxford University Press, 2003), 143.

[24] Cass R. Sunstein, 'Incommensurability and Valuation in Law', *Michigan Law Review* 92, no. 4 (1994): 849.

[25] Sandel, *What Money Can't Buy*, 10. See also: Brennan, *The Ethics of Voting*, 147; Lippert-Rasmussen, 'Vote Buying', 135; Sunstein, 'Incommensurability and Valuation in Law', 849; Walzer, *Spheres of Justice*, 22.

[26] See Brennan, *The Ethics of Voting*, 148–49; Umbers, 'What's Wrong with Vote Buying', 554.

option to sell or buy votes by commodifying or marketising them is not value-neutral.[27] It will change people's preference order in a way that will prevent them from satisfying their most valued preference—in this case, voting when commodification or marketisation is not allowed. In other words, if the commodification or marketisation of voting is legalised, voting would turn into something that most do for money, causing people to be deprived of the opportunity to cast a vote not as a result of an exchange.[28]

These arguments are unmistakeably structurally identical to MLM arguments from corruption against the commodification or marketisation of natural goods. Consequently, the challenges they face are very similar, too. Starting with *Asymmetry 1*, the semiotic argument attributes the corruptive effect to the commodification or marketisation of votes. But it does not explain why votes should or should not be transferred for free. For instance, if I wish to vote according to my partner's preferences, just because I love her, it seems as if I am not voting according to the correct, common-good-driven civic ideal. Should this kind of 'transfer' of votes be allowed? If not, the problem must be with transferability—cases where one is casting a vote for another—not commodification or marketisation. And to show why transferability is problematic, one needs a different argument. Moreover, it seems as if restricting every kind of transferability would require very aggressive measures, which seem controversial. Alternatively, if one thinks these transfers are unproblematic, then there is a need to show why the corruption by commodification or marketisation—and not transferability—is problematic in a specific way that justifies their prohibition.

Turning to *Asymmetry 2*, one needs to explain why a campaign promise, say, to lower taxes for the rich or to raise taxes for the poor, is permissible while selling a vote is not.[29] In both cases,

[27] See Dworkin, 'Is More Choice Better Than Less?'; Schelling, *The Strategy of Conflict*.
[28] Lippert-Rasmussen, 'Vote Buying', 134; Taylor, 'Autonomy, Vote Buying, and Constraining Options', 714.
[29] Lippert-Rasmussen, 'Vote Buying'. For other arguments from asymmetry with regards to logrolling and earmarking, see Freiman, 'Vote Markets', 765; Taylor, 'Logrolling, Earmarking, and Vote Buying'.

it seems as if there is an exchange of money for one's vote in a way that corrupts the social meaning of voting or lowers its quality. Assuming that campaign promises are deemed permissible in all democracies, there is a need to show why only exchanging money for votes is normatively undesirable. And, if both are undesirable, then one must explain why one is still allowed while the other is not. Concerning the *Non-Speculative* challenge, the issue is that more empirical data is needed to show that, in fact, the commodification or marketisation of votes will result in low quality.[30]

Finally, there is the *Non-Semiotic* challenge. According to one objection, the semiotic argument falls short in explaining why commodification or marketisation of votes necessarily corrupts the value of voting since the non-commodified meaning can coexist with the commodified or the marketised one. In ancient Athens, for instance, citizens were paid to attend the assembly and were still considered good citizens.[31] Thus, one could be paid to turn out to vote or vote for a specific candidate without giving up on the expression of civic duty manifested in the act of voting.[32] Another objection to the semiotic argument is that it does not explain why a contingent social meaning of voting, which certain people hold dear, should have any moral weight in determining the way we distribute votes, especially where such social meaning is contested.[33]

3.3.2 Arguments from Inequality

There is a plethora of arguments from inequality against the marketisation of votes.[34] They all share a common claim that the marketisation of votes leads to some unjustifiable political inequality in

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[30] Brennan, *The Ethics of Voting*, 149; Freiman, 'Vote Markets', 769; Hasen, 'Vote Buying', 1323; Lippert-Rasmussen, 'Vote Buying', 135–6.

[31] I have drawn this example from Jon Elster, *Nuts and Bolts for the Social Sciences* (Cambridge: Cambridge University Press, 1989), 149.

[32] Lippert-Rasmussen, 'Vote Buying', 134.

[33] Brennan, *The Ethics of Voting*, 148.

[34] For a valuable summary, see Lippert-Rasmussen, 'Vote Buying', 138–43. See also Archer, Engelen, and Ivanković, 'Effective Vote Markets', 42–44; Hasen, 'Vote Buying', 1325; Satz, *Why Some Things Should Not Be for Sale*, 94, 102; James S. Taylor, 'Markets in Votes and the Tyranny of Wealth', *A Journal of Moral, Legal and Political Philosophy* 23, no. 3 (2017): 318–24; Tobin, 'On Limiting the Domain of Inequality', 266, 69; Walzer, *Spheres of Justice*, 122.

favour of the rich (notice that political equality means different things in the various arguments outlined below). I will discuss the different objections raised in response to this general underlying claim but will not separately address each version of the argument from inequality.[35]

Starting again with *Asymmetry 1*, it is not clear why it would be impermissible to sell a vote but permissible to vote for free at the request of someone else. Transferring a vote for free creates the same inequalities (the requester will gain more political power), but could still be considered permissible. This shows that those who sell their vote do not lose their political power but rather make an impact in a different way—by deciding to sell their vote. As Kasper Lippert-Rasmussen puts it: 'Selling one's vote is one way of having an impact on the political outcome. That is why it would make sense, for instance, to resent people who sold their votes to a fascist party thereby enabling it to win power'.[36]

Thus, either one claims that political inequality is always impermissible, and therefore exchanging votes for free is impermissible, or one has to accept that the marketisation of votes does not lead to undesirable inequality, as all people would still have the opportunity to vote and impact political decisions, just in different ways: one will vote according to a republican ideal, the other for money, the third because their partner asked, and so forth.

Asymmetry 2 is also relevant here. If giving unequal advantage to the rich is unfair, then every market is unfair. One needs to explain why this particular material advantage warrants prohibiting

[35] While the arguments from corruption could theoretically apply to both marketisation and commodification (first or second-order arguments) of voting, arguments from inequality usually do not (except in rare cases where the problem of inequality is created due to many single exchanges, even in a highly regulated system). Thus, the confusion between commodification and marketisation creates ambiguities within the debate about arguments from inequality. For example, some supporters of the 'market in votes' respond to arguments from inequality by saying that strict regulation can secure a reasonable degree of equality (e.g., putting a very low cap on the price of votes so that the poor can buy them too or limiting the amount of votes each person can buy). See, for example, Freiman, 'Vote Markets', 768–69. This response is meant to show that there is nothing wrong with the 'market in votes', only with severe inequalities, which can be addressed using proper regulation. As I have tried to show in the taxonomy proposed in the previous chapter, this is a mistake. All that these philosophers can show is that arguments from inequality are anti-marketisation arguments and not anti-commodification arguments. In any case, I will focus only on objections to the arguments from inequality in support of marketisation.

[36] Lippert-Rasmussen, 'Vote Buying', 140.

marketisation and commodification of votes and not, for instance, the market in media outlets, education and so forth—all of which eventually give unequal political power to the rich. If these advantages could be mediated by regulation, for instance, there is no reason to believe that the same result cannot be achieved by regulating the market in votes.[37]

Concerning the *Non-Speculative* challenge, most scholars accept the claim that marketisation will lead to political inequalities in favour of the wealthy. Therefore, I assume that this challenge has little force in this case. I also accept that the *Non-Semiotic* challenge is irrelevant here since arguments from inequality are largely non-semiotic.

To recap, the overview of MLM arguments regarding votes aimed to show that the same MLM arguments used regarding natural goods are applied to institutional goods and therefore face the same challenges.[38] Again, these challenges are not conclusive and thus do not necessarily defeat the standard MLM arguments regarding voting. But they do point at substantial potential weaknesses. Also, this overview demonstrates that the distinction between institutional and natural goods has no consequences in the existing literature, whatever the MLM approach may be (Andersonian or Satzian, as it were).

In what follows, I seek to make a stronger point against applying standard MLM arguments to institutional goods. Namely, I contend that MLM arguments in their current form are inapplicable to institutional goods.

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[37] Freiman, 'Vote Markets', 768. Furthermore, assuming (as I have been) that one should not be able to sell one's right to vote but only a specific performance of voting (or not voting), common arguments from necessity that aim to respond to *Asymmetry* 2—according to which some special goods are more necessary than others for human flourishing/the good life/security, and therefore should be divided according to need and not according to ability to pay in the market—are not available here. Because everyone has a right to vote, everyone already has access to it, and only then can choose money over it in a specific instance.

[38] Theorists often even draw analogies between institutional and non-institutional goods as if they were of the same kind. For instance, in order to object to arguments from corruption against the commodification of votes, Brennan relies on the analogy of selling organs. See Brennan, *The Ethics of Voting*, 153. Sandel, in the same vein, compares voting to the commodification of surrogacy or adoption. See Sandel, *What Money Can't Buy*, 15. Lastly, Sunstein compares the marketisation of votes to the marketisation of body parts. Sunstein, 'Incommensurability and Valuation in Law', 788.

3.4 Structural Inapplicability: Voting Detached from Democracy or a Specific Election System

Recall that the standard MLM strategies for distinguishing, or not distinguishing, between goods have no effect on the structure of the arguments. According to one strategy, we should identify the special evaluative attitude or value we attach to the good, see if one of the dimensions of exchange undermines this value or social meaning, and then decide whether any limitations should be placed on the relevant dimension of exchange. The second strategy skips the first stage and only checks whether the relevant dimension of exchange scores high on the noxious market metric, according to general principles such as excessive collective or individual harm or exploitation.

In addition to applying the same argumentative structure to all kinds of goods, these strategies share something else: both apply the arguments to the goods *directly*, without considering first the *source* of the value of the good. Take the commodification of kidneys as an example. According to the shared argumentative structure of the MLM arguments, we should first look at the good in question—kidneys. Then we should directly evaluate if the commodification of kidneys undermines a certain attitude or scores high in the noxious market metric. In both cases, the source of the value of kidneys—derivative or not, institutional or not—is of no consequence; what matters is our general principles or evaluative attitudes. However, since institutional goods derive their value, at least primarily, from the function they serve within a specific institutional design formed according to the normative justification of the institution, the direct application of general principles ignores the primary source of value for institutional goods. The following discussion about votes illustrates this point.

Granting that voting should function according to the justifications of democracy within specific designs of electoral systems, discussing the commodification or marketisation of votes without assuming anything about the justification of democracy and the ways in which a certain election system is supposed to accomplish it seems unintelligible. Nevertheless, on the face of it,

this is precisely the way MLM arguments are structured. According to arguments from corruption, for instance, votes should not be commodified or marketised because it will corrupt some important social meaning or lower the quality of something. But why is the way people vote or the social meaning they attach to voting important? The answer depends on why we think democracy is important. For example, some hold that democracy is justified, at least partially, owing to its deliberative nature. It provides legitimate political outcomes since it facilitates the conditions for a free and reasoned agreement among equals.[39] So selling one's vote could conflict with achieving this ideal since within a market, or when votes are commodified, the seller will be incentivised to vote not because of reasoned arguments but because she was paid. This, in turn, will 'lower the quality' of the democratic process, at least according to the deliberative justification.

Similarly, Millian-inspired justifications that see democracy as a way to promote the self-development of citizens and underscore the benefits yielded by participation in the political process would presumably also be in conflict with a commodified or marketised election system.[40] In such systems, citizens would be unlikely to exercise their own political judgement and would not consider participating in the political process as a duty or something important but rather as something to sell to the highest bidder.

Alternative views, however, see the value of democracy in that it ensures a political system that does not subject citizens to binding political decisions without allowing them to have some kind of an equal 'say' in the matter.[41] But the very meaning of equality changes according to the justification of democracy.[42] For example, as Ronald Dworkin contended, someone arguing for political equality can mean (at least) two different things, namely, equality in *political impact* or

[39] See, for instance, Joshua Cohen, 'Procedure and Substance in Deliberative Democracy', in *Philosophy and Democracy: An Anthology*, ed. Thomas Christiano (New York and Oxford: Oxford University Press, 2003), 21.
[40] Christiano, 'Freedom, Consensus, and Equality', 153–54; Carol C. Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society* (Cambridge: Cambridge University Press, 1988), 78; Mill, *Considerations on Representative Government*, 28–30.
[41] Kolodny, 'Rule over None II', 281.
[42] Beitz, *Political Equality*.

equality in *political influence*:

> The intuitive difference is this: someone's impact in politics is the difference he can make, just on his own, by voting for or choosing one decision rather than another. Someone's influence, on the other hand, is the difference he can make not just on his own but also by leading or inducing others to believe or vote or choose as he does.[43]

Now, as briefly mentioned above, the marketisation of votes (presumably) does not undercut equality in impact. The seller's impact on the outcome of the election, granting all have the right to vote, is still equal in the Dworkinian sense. Under a marketised voting system, for example, she still makes a difference by voting for one option rather than another or by refraining from voting. Undoubtedly, her reasons for making an impact could be different, but the impact remains the same. On the other hand, the marketisation of votes would probably be problematic in terms of equality of influence, as the rich would have another tool that the poor do not have to induce other people to vote the way that they do. Therefore, again, the arguments from inequality hinge on some assumptions about the justification of democracy.

In addition to the different justifications for democracy, there is a plethora of *institutional designs* that, in theory, can instantiate different justifications for democracy. In each of these designs, the meaning of a market in votes might differ. So, arguments from inequality do not only hinge on an assumption about the justification of democracy but also on an assumption about a specific electoral system. Take the United States Senate as an example. The election system for the US Senate is designed in such a way that each state receives an equal number of seats, although the number of people in each state varies. Thus, individuals residing in states with large populations enjoy less political power than their equivalents in states whose populations are smaller. Is this objectionable? Do the arguments from inequality apply here? The answer is that we simply cannot know without explicitly considering the justification of democracy we wish to promote. This

[43] Dworkin, 'Political Equality', 9. See, also, Harry Brighouse, 'Egalitarianism and Equal Availability of Political Influence', *Journal of Political Philosophy* 4, no. 2 (1996): 118–41.

system can be interpreted as unjustifiably unequal since some people receive more political power in terms of impact than others. Their vote, in other words, is worth more.

Alternatively, it can be interpreted as a way to secure equality of political influence because it provides small states with more political power, thereby ensuring that their citizens will be able to have some influence at the federal level, in which they will always be the minority. Thus, a market in votes for the US Senate will need to be assessed *after* having formulated the function of voting in the specific federal institutional design of the United States and the justification of democracy it purports to uphold. But, again, applying inequality directly as a general moral principle while ignoring the function of votes in fulfilling a particular justification for democracy within a specific design makes little sense.

To be clear, my argument that we should not directly apply general moral values to the dimensions of exchange of institutional goods does not mean that such values are irrelevant to the assessment of institutional goods. For instance, one could start by maintaining that all humans are equal (in the normative relevant sense) and, therefore, for any political regime to be legitimate, the subjects of the regime should be treated equally. Political equality, in this sense, is a general principle. Then, one might argue that the justification of democracy is that it ensures political equality.

Next, the claim would be that institutional design X for democracy is the best in securing political equality. This institutional design might lead to an equal allocation of votes (or might not) and might give more votes to specific groups or to people from certain geographic areas (or not). In this example, its goal is to achieve the kind of political equality the institution is formulated to bring about, not equality in general. Therefore, the meaning of equality *changes down the line* within an institutional framework, and the value of votes is determined by their function within the institutional design. We must start with general principles but applying general principles (or social meanings) directly to institutional goods—without taking into account institutional justifications

or institutional designs—creates a distorted normative image.

A possible objection to my argument is that I am attacking a strawman. According to this objection, standard MLM arguments do rely on *implicit* assumptions about democracy. And this is not a problem since those assumptions are largely uncontroversial. Thus, there is just no need to explore all the chain of argumentation from the institutional justification through the institutional design to the institutional good. For example, arguments from inequality assume that the 'one person, one vote' principle is unobjectionably central to any democratic election system.

I offer three replies to this objection. First, there are hardly any uncontroversial assumptions that one can make about the justification of democracy or the different democratic institutional designs that are supposed to match them. Even the 'one person, one vote' principle, in David Estlund's words, can be perceived as a 'questionable ideal'.[44] In a similar vein, when discussing specific electoral systems, Rawls emphasised that 'what kind of electoral arrangements are required to establish the fair value of the political liberties is an extremely difficult question'.[45] So, implicitly assuming a certain justification or design would lead to bad argumentation, as controversial assumptions would not be defended.

Second, granting that implicit assumptions about the 'uncontroversial' justification of the institution and the 'uncontroversial' justification for a specific institutional design have been made, this means that the standard MLM arguments are no longer standard, as they do not ignore the source from which the good derives its value. The question then would be, why do MLM theorists make implicit assumptions concerning institutional goods and not about natural goods? If the answer is that the way institutional goods derive their value is different and requires making such assumptions about the relevant institutional justification and institutional design, then we get to

[44] David M. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton and Oxford: Princeton University Press, 2008).
[45] John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), 362.

my institutional account—once the implicit assumptions are made explicit. Although I do not think this is a reasonable reading of the MLM literature, I can live with the fact that the strongest form of this objection is that the existing MLM literature already implicitly accounts for the distinction between institutional and natural goods and that what I am doing here is elucidating it and bringing it up to the surface. Elucidation is also of great importance, in my view at least, so although, as said, it is an unlikely reading, my account can outlast this objection as well.

Third, and most importantly in my view, the fact that the standard MLM arguments rely on implicit and controversial assumptions leads to a common fallacy within the literature on the market in votes, which I call the *pick-and-choose fallacy*. To explain, consider two recent MLM accounts on the argument from corruption against the market in votes. One is made by an opponent of such a market—James Stacey Taylor—and one by a supporter of it—Christopher Freiman.

According to Taylor, the commodification/marketisation of votes is objectionable owing to a Schelling-inspired argument—namely, that adding an option to sell a vote would constrain people's preferences to vote without the option of selling.[46] At one point, Taylor considers an asymmetry challenge against one part of his argument, according to which constraining the options of voters infringes on their autonomy:

> [I]f one was truly concerned with protecting the autonomy of voters then one should defend epistocratic suffrage restrictions so that it is less likely that voters would support candidates whose policies would impair their future ability to exercise their autonomy (assuming that the voters cared about protecting their own autonomy). But since such epistocratic restrictions are unpalatable, it seems that voters' use of their votes should not be restricted even when they are faced with collective action problems that would be likely to result in their voting for policies that would be likely to compromise their ability to exercise their autonomy. And, if this is so, then even if the option to sell one's vote is a doubly constraining option, this alone should not justify precluding it from voters' choice sets.[47]

[46] Taylor, 'Autonomy, Vote Buying, and Constraining Options', 712–16.
[47] Ibid., 716.

Later, Taylor responds to this challenge and explains the difference between voters who vote in a way that impairs their autonomy and voters whose autonomy is restricted due to the option of selling their vote. Without getting too much into the details of Taylor's argument, my point is to highlight the argumentative move he is making here. Notice that the objection he considers and responds to depends on a view according to which epistocratic accounts of democracy are false. Someone like Estlund, who supports a different version of epistocratic restrictions, might have responded to this objection by just biting the bullet and saying that this asymmetry is of no concern to him.[48] Thus, the objection Taylor discusses is not an objection against the market in votes. It is an objection against epistocratic restrictions in democracy. By considering and responding to it, it seems as if Taylor is vindicating a general account about the market in votes. But, in fact, he does not.

Freiman's argument in defence of the marketisation of votes has a similar structure. As a response to an argument from corruption against the markets in votes, he offers an asymmetry challenge:

> Yet this interpretation of the republican principle also implies a variety of institutional measures that seem intuitively unacceptable. For example, it implies that we should treat a farmer's self-interested vote for farm subsidies as a criminal act. This implication seems sufficiently counter-intuitive to enable us to infer, via modus tollens, the falsity of the republican legal principle. Moreover, the republican principle under consideration seems to imply that the state is justified in preventing uninformed citizens from exercising their use of the vote. To have justified beliefs about what is in the public interest, voters must possess adequate general knowledge about fields like economics, political philosophy, and history, and specific knowledge about the candidates and the offices in question.[49]

Like Taylor, Freiman does not directly defend the marketisation of votes but rather goes against the implications of rejecting such a market for one interpretation of a republican justification of democracy according to which, very roughly, everyone should vote for the common good.

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[48] Estlund, *Democratic Authority*.

[49] Freiman, 'Vote Markets', 771.

Let me clarify by saying that the blame is not entirely on Freiman since those who made the arguments from corruption to which Freiman responds indeed seem to assume a kind of a republican ideal.[50] The point is that Freiman's argument, like Taylor's, is dependent on a rejection of a specific view of democracy. He does not address all views, does not commit to a view of his own, and describes his argument as a general argument for the market in votes. This is objectionable since, essentially, he *picks and chooses* the best and worst features of each justification to defend his arguments without committing himself to one (or several) justification—and its unpleasant implications.

Of course, I do not think there is any problem with committing to a specific institutional justification and design. On the contrary, this is precisely what I think should be done. My concern with accounts like Taylor's and Freiman's is that by avoiding an explicit discussion on specific institutional justifications and designs, they can pick-and-choose justifications to support a general case for or against markets, which is an argumentative fallacy.

Thus, in the best case, the reliance of the standard MLM arguments on controversial implicit assumptions leads to the pick-and-choose fallacy, thereby facilitating an ambiguous discussion. In the worst case, they do not make any assumptions about the justification of the institution under discussion, which renders the whole debate virtually unintelligible since there is no meaning to discussing a market in votes outside the context of a specific institutional justification and design.[51]

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[50] Sandel, *What Money Can't Buy*, 10; Satz, *Why Some Things Should Not Be for Sale*, 103.

[51] Vida Panitch (who raised the question I open this chapter with) has recognised the inappropriateness of applying the same arguments from corruption to different kinds of goods, and offered an account that comes closest, as far as I can tell, to the account I offer here. She offers a middle way between Anderson's approach and Satz's approach. On the one hand, in contrast to Satz, she distinguishes between social goods, honorific goods, civic goods, necessary goods, and physical goods. She argues that while arguments from corruption can be applied to social and honorific goods, it is inappropriate to apply them to civic, necessary, and physical goods—the value and the correct principle of allocation of which should be determined according to Rawls's principles of justice. So, she acknowledges that applying the same general argument to different kinds of goods is a problem. On the other hand, like Satz, Panitch offers a general metric, a Rawlsian one to be precise, that we can apply to determine whether markets are noxious or not, without relying on social meanings or evaluative attitudes. If it is a civil good, it should not be for sale and be allocated equally. If it is a necessary good, it can be in the market, but everyone should be provided with an adequate baseline of it. Moreover, she commits to a specific view of justice, which some might consider a weakness, but I see

3.5 Inapplicability in Content: Individual Moral Permissibility Instead of Institutional Design

So far, I have discussed the inappropriateness of applying the standard MLM arguments to institutional goods in terms of *argumentative structure*. Another way of articulating the inappropriateness of applying MLM arguments to institutional goods is in *terms of content*. Kenneth Arrow once wrote, somewhat cryptically, that critiques of certain forms of commodification or marketisation 'seem more concerned with the operations of the social system than with preservation of individual integrity'.[52] In this section, I try to unpack this important observation and show that some MLM arguments overlook problems related to 'operations of the social system', in Arrow's words, because they focus on individual morality.

By individual morality, I mean, drawing on Thomas Scanlon's definition, 'moral standards that apply to individuals. Primarily, this means standards […] determining the permissibility, impermissibility, and blameworthiness [of] individual actions'.[53] The focus on individual permissibility is especially common in arguments from dignity and corruption against the alienation or commodification of certain goods, which generally state that the buying and selling of certain goods is morally impermissible per se and, therefore, individuals should not do it.

Conversely, when we discuss institutional morality, the focus is on moral standards that apply to the justifiability of institutions and institutional designs. The leading question is not what

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as a strength as she does not make implicit and undefended assumptions about her view. However, her account suffers from two major issues. First, it is still too general. As I try to show concerning the market in votes, it is impossible to directly apply considerations of equality and sufficiency to certain goods, without committing to a certain institutional design. And, as presented in the introduction, Rawls's account does not provide us with normative principles concerning just institutional designs. So, in essence, she applies general moral principles—equality and sufficiency—to institutional goods without considering their specific function within a specific institutional design. Second, her account is not comprehensive. As said, I think it is a virtue that she explicitly says she is committed to a Rawlsian framework, but we cannot use her account to analyse institutional goods under other normative frameworks. So, this chapter should definitely be considered in keeping with the general spirit of Panitch's attempt, even though in it, I am making a distinct argument that does not suffer from these two shortcomings. See Panitch, 'Liberalism, Commodification, and Justice'.

[52] Arrow, 'Invaluable Goods', 765.

[53] Scanlon, 'Individual Morality and the Morality of Institutions', 3.

an individual should do in a certain interpersonal scenario but rather how we should design just institutions. To be sure, there is a direct relation between the justification of institutions and individual behaviour, but, turning again to quote Scanlon, the conclusion we reach when we discuss institutions are 'conclusions about institutions' and not general principles about individual permissibility.[54]

So, when Lachlan Umbers argues that vote buying is wrong because vote buyers 'fail to extend appropriate consideration to others' capacities to recognise and respond to reasons […] which fundamentally explains the morally objectionable character of indirect vote buying',[55] he focuses on individual obligations and permissibility, and therefore seem to be operating on the wrong level of inquiry. To be sure, it is nice to know if there is anything morally objectionable in buying a vote. However, it has almost no bearing on whether and how the commodification or marketisation of votes should be limited. The same critique applies to Brennan's argument that 'vote selling and buying are not inherently or intrinsically wrong'.[56] It could be an argument for individual ethics of voting, but it seems it does not have much bearing on the discussion about the regulation and institutional design of votes.

The common methodology usually used by analytical philosophers concerning moral

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[54] To clarify, I am not defending what Murphy calls a 'dualist' view, namely, 'the claim that the two practical problems of institutional design and personal conduct require, at the fundamental level, two different kinds of practical principle'. Murphy argues against what he identifies as a Rawlsian view, according to which there should be, for practical reasons, a division of labour between institutions that are responsible for achieving justice and therefore should function according to principles of justice, and individuals who should be able to act freely within these institutions and should not be burdened with the duty to act according to principles of justice. The latter would just require too much. See Liam B. Murphy, 'Institutions and the Demands of Justice', *Philosophy & Public Affairs* 27, no. 4 (1998): 254. In contrast to Rawls (or at least to Murphy's interpretation of Rawls), individuals under my view could have responsibility for justice, and the way we design institutions could rely on individuals acting according to the institution's justification (section 4.3.3 on the distinction between the different intentions of individuals within institutional competition illustrates this claim). My point in distinguishing between individual and institutional morality is different, namely, that when we discuss institutions, we take into consideration different set of questions than when we discuss individual, interpersonal behaviour. So, I am a 'dualist' in the sense that I think the philosophical inquiry into institutions and individuals are different, but I am not committed to a Rawlsian normative view that we should apply different normative principles to institutions and individuals.

[55] Umbers, 'What's Wrong with Vote Buying', 564.

[56] Brennan, *The Ethics of Voting*, 135.

arguments is also quite distinct from institutional inquiries. They normally try to determine whether something is permissible or not by using intuition-pumping, counterfactual examples.[57] Setting aside the criticism that these counterfactual scenarios are often highly idealised and thus of questionable value,[58] the goal of this method is clear: to try and determine how an individual should act in different circumstances by extracting general principles from the intuitions that arise in each case. Conversely, the goal of an institutional normative inquiry is not to discover our moral intuitions in extreme cases but rather to justify an institution and an institutional design that will, in general, work in a morally justified way by taking into account issues such as psychological and economic incentives, the corruptive force of power, checks and balances, institutional resilience, and so forth.[59]

To illustrate, let's consider once more the case in which one assumes that the justification of democracy is that it is the best way to promote the common good. The best institutional design would aim to secure, as much as possible, the largest number of common-good-driven votes. Now suppose that there is such an institutional design in which the commodification of votes is forbidden. It would always be possible to construct a counterfactual case in which vote selling would promote the common good.

However, the fact that there are specific instances in which our intuitions chimes with the commodification of voting does not necessarily tell us anything about the principles we should implement with regard to the limits we should or should not put on the commodification of votes

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[57] Kimberley Brownlee and Zofia Stemplowska, 'Thought Experiments', in *Methods in Analytical Political Theory*, ed. Adrian Blau (Cambridge: Cambridge University Press, 2017), 21–35; Daniel C. Dennett, *Intuition Pumps and Other Tools for Thinking* (London: Penguin Books, 2014); Christian List and Laura Valentini, 'The Methodology of Political Theory', in *The Oxford Handbook of Philosophical Methodology*, ed. Herman Cappelen, Tamar S. Gendler, and John Hawthorne (Oxford: Oxford University Press, 2016), 542.

[58] See, for instance Jakob Elster, 'How Outlandish Can Imaginary Cases Be?', *Journal of Applied Philosophy* 28, no. 3 (2011): 241–58.

[59] This claim tracks, to some degree, List and Valentini's 'Levels View', according to which political and moral theory operate at different levels. See Christian List and Laura Valentini, 'What Normative Facts Should Political Theory Be About? Philosophy of Science Meets Political Liberalism', in *Oxford Studies in Political Philosophy Volume 6*, ed. David Sobel, Peter Vallentyne, and Steven Wall (Oxford: Oxford University Press, 2020), 193–97.

as part of an institutional design (the same claim applies to permissibility driven arguments against marketisation or alienation). When we discuss institutional morality, we are supposed to take into consideration other, more general factors that are related to social patterns, such as what results the commodification of voting will lead to in society as a whole, what kind of incentives it will create and so forth. Whether commodification might be individually permissible in a particular scenario is of little importance.

So, when Freiman argues that the commodification of votes is morally permissible because, to take one of his arguments, it leaves both sides of the transaction better off, he misses the mark. The fact that two individuals in a particular transaction would become better off is virtually irrelevant to the bigger picture of institutional design and what would happen if everyone could buy and sell votes.[60] Similarly, consider Brennan's discussion of different cases that are supposed to show that vote selling is not impermissible in principle. In his *paying the unmotivated hero* case, Brennan describes a transaction between Bob and Allan. Bob knows that Allen is an extraordinary political expert who will vote according to the common good if he turns out to vote. Bob also knows that due to particular circumstances, Alan's preference order is not to vote this time unless he is paid. Thus, as Bob wishes to encourage people to vote according to the common good, he pays Allan. According to Brennan, 'in this case, I do not see how Alan or Bob has done anything wrong'.[61] This quote clearly shows that what interests Brennan is how individuals should act and not how we should design our institutions. It is hard to understand what conclusions we can draw from this isolated and very specific case about the commodification of voting.

Freiman and Brennan are not alone. Quite a few others have also used individual-focused thought experiments to determine the limits of markets in votes.[62] Discussions of this character might be valuable in showing that there are instances in which vote buying or selling could be

[60] Freiman, 'Vote Markets', 761.
[61] Brennan, *The Ethics of Voting*, 140.
[62] Two recent examples are Umbers, 'What's Wrong with Vote Buying' and Volacu, 'Electoral Quid Pro Quo'.

individually morally permissible. But as voting is an institutional good, these particular instances are not of much interest to begin with. Thus, these permissibility-focused MLM arguments are inapt to analyse the institutional elements of institutional goods.

To be sure, there is, in a sense, a direct relation between the justifications of our institutions to questions of individual permissibility and blameworthiness since institutions are, in the end, comprised of individuals. However, there is a need to clarify when they are relevant and for what reasons. The most basic level in which principles about permissibility play an important role within any institutional justification or design is that they serve as constraints to the justifications of our institutions and to the institutional designs we can choose. For instance, if we hold a general moral principle that torturing is impermissible, then we will not design an institution that uses torture to make people vote for the common good. These kinds of principles are independent of the institution in question. They serve as constraints or requirements for the justification of our institutions. The discussion about institutions already assumes their existence but is taking place at a different level; it is affected by general questions on permissibility, but it is not about them.

The second way in which individual permissibility plays a role in institutions, which is more relevant to the subject of this thesis, is professional ethics. As already stated, an institutional design is, or at least should be, formed according to a certain institutional justification (or a combination of several justifications). All institutional designs, or at least those that I am aware of, take into account the fact that individuals who work in or engage with the institution cannot and should not be completely controlled. As much as possible, the institutional design should direct them to act according to the institutional justification—be that by criminal law or economic incentives—but there will always be imperfections that stem from autonomous individual behaviour.

One common way to direct an individual's behaviour is by implementing some formal code of ethics or even by creating a social norm that dictates how people should behave in a specific institution. Thus, doctors take the Hippocratic Oath, lawyers are obliged to act according to a code

of ethics, and so forth. These rules, or norms, are there to make sure that individuals within the institution act according to the institutional justification.[63] So, for instance, under the assumption that the justification for the existence of the media is scrutinising the government, it would be impermissible for a journalist to partake in propaganda for the prime minister, either as a norm or as part of an ethical code.[64]

The important thing to notice is that professional ethics is supposed to complement the institutional design, and is set, at least primarily, according to the institutional justifications. So, even when individual permissibility is relevant within an institutional context, the way discussions about individual permissibility are usually held, namely, pumping intuitions by counterfactual examples using cases focused on the interpersonal interaction of a few individuals, is still not conducive to and operates at a different (non-institutional) level than an institutional inquiry.

3.6 Institutional Limits of Markets

So far, I have argued that it is objectionable to apply the standard MLM argument to institutional goods: first, owing to the fact that these moral arguments still need to face the standard objections against MLM arguments; second, because they are structurally inappropriate, and; third, since the focus of some MLM arguments on moral permissibility is misplaced. What follows is an outline of a four-stage account of what I argue to be the appropriate way to conduct a normative assessment of institutional goods. At this stage, the account will be presented in general terms. In the second part of the thesis, I put forward fully developed arguments of this sort about specific democratic institutions—the adversarial legal system and the marketplace of ideas.

First stage: Extracting the different normative justifications of the institution. To lay the foundations of an institutional argument, we need to clarify what the main justifications for forming the institution

[63] David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988), 131.
[64] In some cases, we even think they should act according to a certain 'role morality' that can go against the general moral principles by which people act in their day-to-day lives. See ibid.

are.[65] To be sure, there are several competing justifications for all the institutions discussed in this thesis. Different justifications could, and sometimes would, lead to different implications concerning the principles we set for the dimension of exchange of the institutional good. Therefore, institutional arguments may end up concluding that according to justification A of institution X, good Y should be commodified, but according to justification B of institution X, good Y should *not* be commodified (the chapter on the media is a good example for such a case). In other cases, it might be that different justifications would lead to the same conclusion (the chapter on the legal system exemplifies such a case).

Second stage: Extracting the normative justifications of a specific institutional design. At this stage, the focus is on the justification for a specific kind of an institutional design. Ideally, we would analyse all possible institutional designs against the background of all the existing justifications for the institution. Each institutional design would have different justifications and, therefore, different principles regarding the alienation, commodification, or marketisation of a certain good. For instance, if we believe that the justification of the adversarial legal system is that its competitive structure facilitates the discovery of the truth, then we will need to see whether important institutional goods and services within this system, namely, judges, rules of procedures or lawyers,

[65] There are a few ways to determine why an institution exists in the first place. One example is Dworkin's famous 'constructive interpretation' method, according to which we should engage in an act of constructive interpretation to determine the 'narrative story that makes of these practices [those constituting the institution] the best they can be'. See Ronald Dworkin, *Law's Empire* (Cambridge, MA and London: Harvard University Press, 1986), vi. Another view is that the justification of the basic structure in society, namely, which institutions should exist, according to what principles they should function and so forth, should be determined according prior, general principles of justice. According to such views, we first have our basic political morality, and only then, as a matter of implementing a specific kind of political morality, we can know what the justifications of our institutions are. In contrast, a third view is that the justifications of our institutions should be practice-dependent. That is, general principles of justice must be responsive to facts about real life institutions. Under this view, the relationship between real life institutions and practices and general principles of justice is reciprocal. For a succinct overview of the second and third views, see Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality', *The Journal of Political Philosophy* 16, no. 2 (2008): 137–42. I remain agnostic regarding this debate. In the second part of the thesis, when I present the normative appeal of the adversarial legal system and of the marketplace of ideas, I rely on the most popular justifications in the relevant literature. I do not engage in a substantive argument about these justifications, the way we should extract them, and their relations to general principles of justice. However, to have a full and robust account concerning the institutional limits of a certain market, one should take this debate into consideration.

should or should not be alienated, commodified, or marketised according to their function in bringing about such legal competition. Other institutional designs will have different justifications that will lead to different discussions. Notice that market expansionism can happen at this level also, as I show in chapter 6, where the concern is not of a good being marketised or commodified but the institutional design as a whole.

Two issues concerning this stage need clarification. First, a challenge of this stage would be to consider certain dependencies or relations between institutions. For example, we might choose institutional design X for our election system, assuming that our media is designed in way Y, which complements, or addresses concerns that design X does not address by itself. The scope of this thesis does not allow me to take cross-institutional considerations, but it is an important point to bear in mind. Next, by 'extraction of the normative justifications of a specific institutional design', I do not mean to imply that these principles already exist, are justified and should be taken at face value. Different hypotheses about the function and justification of institutional designs can and should be challenged (as I explain below in section 3.7.3).

Third stage: choosing a specific institutional good and defining its function within the institutional design in relation to the institutional justifications. After extracting the institutional justifications and committing to a specific design, the next stage is identifying the function of the specific institutional good in question within this institutional design. For instance, if journalists are supposed to expose the government's misdeeds, then the principles regarding the dimensions of exchange of journalists should be set according to this function.

Fourth stage: Providing normative principles concerning the alienation, commodification, marketisation or privatisation of the institutional good. By now, one would be able to tell whether the institutional good in question—voting, lawyers, media outlets—should or should not be alienated, commodified or marketised. At this stage, as said, we might discover that different justifications would lead to different limitations on the different dimensions of exchange. At the end of this stage, one should

be able to provide normative principles for limiting the relevant dimension of exchange of the institutional good in question concerning each institutional justification.

Finally, one caveat and two clarifications about this institutional account are needed. We can start with the caveat that the same institutional design can function differently in different countries and cultures (which is a general caveat for the rest of this thesis). Institutions are not perfect machines, and their functioning depends on a certain society's political and civil culture. In Adam Przeworski's words, 'institutions are endogenous, meaning that each institutional arrangement can function only under some conditions or at least that the effect of particular institutions depends on the conditions under which they function'.[66] Thus, setting the right kind of expectations for my account is important. The normative principles for limiting certain dimensions of exchange of institutional goods in accordance with the justification of a specific institutional design might not be enough to guarantee the ideal functioning of the institution. Therefore, these principles should be understood as necessary conditions for the proper functioning of an institution, but not sufficient.[67]

Turning to the first clarification, notice that this is a normative discussion, not a political science or public policy discussion about institutional design. The philosopher here is supposed to trace the normative commitments we have regarding the specific institution and set normative principles for the limitations of the institutional goods. As mentioned in the introduction, what is the best way to achieve these principles is a different question. I assume that there will be more than one way to do it. The hope is that policymakers would treat normative principles as guidelines when designing real-life solutions, thus creating a system that adheres to these principles.

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[66] Adam Przeworski, 'Institutions Matter?', *Government and Opposition* 39, no. 4 (2004): 529–30.

[67] Also notice that I am assuming through the thesis that the functioning of institutions is not completely endogenous as Przeworski seems to suggest at times. See ibid., 530-5. Institutional design matters, and although it is not enough to determine how the institutions will work, it is an important part in the mix. Culture alone does not do all the work. However, I do not defend this minimal assumption, so I am vulnerable to a critique by sceptics of social sciences who think institutional design does not matter at all.

The second clarification is about the fact that the market is also an institution. And institutional goods within the market also derive their value from their functioning within the market. Thus, one could claim that 'institutional limits of markets' is a bit of an opaque phrase. After all, the institutional account I offer could also be applied to analyse the dimensions of exchange of institutional goods that are part of the market itself. So why focus on limiting only markets?

Maybe my account should be called 'institutional limits'. To a degree, yes, my account can be applied to analyse the different dimensions of exchange of institutional goods in markets. Moreover, it might be the case that my account could be applied to expansions of other institutions, say, the judicialisation of politics. However, it is beyond the scope of this thesis to provide an analysis of these possibilities. The phenomenon I am concerned with is the expansion of markets. I shall therefore focus on the limits of markets.

So, to recap, this four-stage proposal is supposed to bypass, or even solve, the problems I have raised regarding the MLM arguments. In terms of structure, it takes into account the institutional elements of the good—especially the source of its value. Second, it does not discuss permissibility but rather normative principles for institutional design. Third, it answers Panitch's worry since it does not do away with distinguishing between goods. Indeed, it is only a general sketch of how we should be arguing about institutional goods. Additional challenges may arise along the way regarding the different institutions under examination

3.7 One Objection, Two Advantages

Apart from being appropriate in terms of argumentative structure and content, in what follows, I wish to highlight two additional advantages of the institutional approach I propose here: that it is not limited to moral-shock-based motivations and that it is resilient against the four challenges

MLM arguments face (or at least against most of them). Before doing so, I wish to consider and respond to a plausible objection against my institutional account.

3.7.1 Objection—So What Is an Institution after All?

As promised, I now turn to scrutinise my yet-to-be-defended insistence on refraining from defining what counts as an institution. An objection against this insistence could be that it exposes the institutional account I offer to two lines of attack. One is that it is not clear whether there are any 'natural' goods at all. Perhaps goods such as water might qualify. But most human goods are mediated by social meanings, conventions, and rules.

Taking sex again as an example, it is a seemingly natural human function but soaked with social meanings and embedded in a range of institutions, such as the family, religion and social norms regulating intimacy, love, and privacy. This applies a fortiori to goods such as human organs, surrogacy, health, education, and the like. So, an expansive definition of what an institution is would include both 'natural' goods and paradigmatic 'institutional' goods, as both kinds of goods derive their values from an institution of some kind, be it a paradigmatic institution like the legal system, or a less formally defined one. And considering that my account is based on the distinction between institutional and natural goods, the fact that an expansive definition of what an institution is erodes this distinction forces me to justify and commit to a narrow definition of what an institution is. Otherwise, my account would collapse.

My response is that the result of having an expansive definition of an institution would be that many 'natural' goods would become institutional goods. This means, in turn, that to determine the normatively justified limits (assuming there are any) of the dimensions of exchange pertaining to these natural-turned-to-institutional goods, there is a need to apply my institutional account. If all these natural goods are actually institutional, we must take into account the way they derive their value, which is dependent on a specific institutional design (whatever 'design' means under a very expansive account) and specific institutional justification.

Thus, the implication of the collapse of the distinction between natural and institutional goods due to an expansive definition widens the scope of my account and limits even further the scope of MLM accounts, which are unsuitable for analysing institutional goods. So, an expansive definition does not undermine my account—quite the contrary. To be clear, I do not commit to such an expansive account. I think there is a difference between human spheres regulated by mere social norms and institutions. However, it is beyond the scope of this thesis to defend such substantive distinction, and I hope my response is sufficient to show that my account still holds against the first line of attack.

The second line of attack could be that I implicitly adopt a narrow definition of institution, one that includes only the paradigmatic institutions that I focus on but that is not necessarily suitable for analysing other kinds of institutions (e.g., the family, the education and health systems, and so forth). In this case, the distinction I offer between natural and institutional goods holds, but the account I offer is not as comprehensive as I claim it is.

My first response to this objection is that, on the face of it, I do not see what would make the analysis of markets in teachers, schools, soldiers, hospitals, or even institutional unpaid housework in the family very different from the analysis of votes, lawyers, or media outlets. But, for those who are not convinced, my second response would be that if it turns out that I am implicitly assuming a very narrow definition of institutions, I am willing to bite this bullet. I would then specify mine as a *political-institutional limits of markets* account and restrict it just to the institutions I survey in the thesis. I believe these institutions are important enough to warrant the development of an account especially for them.

3.7.2 First Advantage: Beyond Moral Shock

At the outset of this thesis, I presented the background against which the MLM literature has developed. In short, the expansion of markets into most areas of our social and private lives in the

past few decades has caused consternation among philosophers about the alienation, commodification, marketisation and privatisation of certain goods. Notice that this fear is triggered chiefly by the moral outrage caused by the alienation, commodification, marketisation or privatisation of goods or human activities that were once *outside the scope of the market*. This is why many call the phenomenon with which the MLM literature is concerned market 'imperialism' or 'expansionism'.

The mirror image of this moral outrage-based motivation can be found in the writings of those who benefit from taking part in producing this moral shock, namely, economists. As Hirschman astutely observed:

> In economics, examples of this sort of quest for the morally shocking come easily to mind. […] Lately this taste for the morally shocking has been particularly evident in the 'imperialist' expeditions of economists into areas of social life outside the traditional domain of economics. Activities such as crime, marriage, procreation, bureaucracy, voting, and participation in public affairs in general have all been subjected to a so-called 'economic approach' […]. [Their] analysis at the hands of the imperialist economist, with the emphasis on grubby cost/benefit calculus, was bound to produce moral shock; and, once again, the analysis drew strength from having this shock value.[68]

Between economists who wish to provoke moral shock and philosophers who are provoked by it, a moral-shock-driven intellectual apparatus, as it were, has developed. To prevent any misunderstandings, I do think that the moral shock caused by market imperialism is important and should serve as a motivation for philosophical concern. However, this motivation limits the scope of the philosophical inquiry. Goods that should be philosophically scrutinised but do not raise moral outrage due to contingent reasons are unjustifiably left outside the scope of the moral-shock-oriented philosophical analysis.

One prominent example is a moral-shock-based motivation, which limits our philosophical inquiries to goods the alienation, commodification, or marketisation of which has caused moral

[68] Albert O. Hirschman, 'Morality and the Social Sciences: A Durable Tension', in *The Essential Hirschman*, ed. Jeremy Adelman (Princeton: Princeton University Press, 2013), 335–36.

outrage *recently*, either because the phenomenon is new (e.g., kidney transplants, surrogacy, blood transfusions) or because the context in which the good has been alienated, commodified, or marketised has shifted (e.g., sex after the feminist revolution). This, in turn, leaves unattended those goods that have been commodified or marketised for centuries and which are considered in our culture as an integral part of the market or, conversely, those goods that have remained outside the scope of the market for decades and which are naturally considered to be non-marketable. One can reasonably expect that only recent manifestations of market imperialism would be likely to evoke such moral outrage. Goods that were marketised in the distant past or that have not been marketised at all are more likely to unjustifiably be taken for granted.[69]

A glaring example of a good that has been neglected in the MLM literature, and on which I elaborate in the next part of the thesis, is legal representation, which has been marketised in adversarial legal systems since the seventeenth century.[70] Nowadays, we do not consider the mere marketisation of legal representation as controversial. We simply see it as a fact of life. However, as I will show, the marketisation of this good is, in fact, unjustifiable, even though it does not cause moral outrage and did not take place recently.

Thus, the advantage of the approach I present here is that it offers a systematic way to analyse the limits of the dimensions of exchange of any institutional good, regardless of whether it has been recently commodified or not, and with less dependence on contingent moral controversy. As a result, it enables us to repoliticise issues that have become depoliticised over the years simply because they have been marketised for a long time.

Lastly, as not to overstate this advantage, I note that other MLM accounts, like Satz's, also

[69] Cordelli has made a similar claim about certain arguments against privitisation (what she calls the 'historical baseline' kind of argument), astutely observing that 'there is little reason to believe that just because a government has traditionally undertaken the performance of certain functions, then these functions ought to be regarded as the responsibility of government'. Cordelli, *The Privatized State*, 24.

[70] John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003).

provide a systematic way to analyse the moral limits of markets that does not depend on contingent moral shock (although most of the goods Satz analyses have become controversial fairly recently). But many MLM accounts do not. So I still consider this as an advantage.

3.7.3 Second Advantage: Resilience to the Four Challenges

The second advantage of my institutional account is its resilience to the four challenges levelled against the MLM arguments. Consider first the two challenges from asymmetry. These challenges are directed against a basic assumption which underlies some MLM arguments. Namely, that there is something special about good X or a special wrongness about a market in X that explains asymmetries such as that good X should not be alienated, commodified, or marketised while a similar good should, or why good X should not be commodified but could be alienated.

Concerning institutional arguments, however, these asymmetries are less threatening. That is because the function of institutional goods is, using Alasdair MacIntyre's terminology, 'internal to the practice' of the institution within which the good is embedded.[71] The normative benchmark for the evaluation of the dimensions of exchange of institutional goods is 'internal' since it is based on the specific justification of the institution in question and the specific justification of the institutional design, which cannot be applied to institutional goods within other institutions, or non-institutional goods. Therefore, the argumentative structure of institutional arguments already includes an explanation for the asymmetry: the institutional good serves a particular function that is internal to a given institution and is, therefore, different from other institutions.

To illustrate, let's consider the *Asymmetry 2* challenge as an example (although, as said, this point applies to both asymmetries). The challenge is to be able to show why a reason for limiting a dimension of exchange of good or service X does not apply to good or service Y. With respect

[71] Alasdair C. MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed. (Notre Dame: University of Notre Dame Press, 2007), 188. See also Aaron James account of practice-dependent 'internal' principles: Aaron James, 'Why Practices?', *Raisons Politiques* 3, no. 51 (2013): 43–61.

to institutional goods, this challenge could come in two forms. The first form concerns asymmetries between institutional and non-institutional goods or two institutional goods from different institutions. For instance, the challenge could be that one should provide a reason for limiting the commodification of political voting and not the commodification of voting in a reality show (in some reality shows, for instance, people need to pay for a text message in order to vote). Within an institutional framework, we can argue that the normative principles concerning the dimensions of exchange of a political vote should be determined according to its function within an election system, while voting in a reality show should not.

The other version of this challenge comes in the form of asymmetry between two institutional goods within the same institution. For instance, Lippert-Rasmussen argues that there is a need to explain how we can believe that the commodification of voting should be limited within a democratic election system and, at the same time, think that campaign promises—which in many cases include promises for a financial policy of some kind that will benefit a specific person or a group in exchange for their vote—should be allowed.[72] At face value, this version of the challenge might seem more worrying from an institutional perspective, as the institutional benchmark, one might argue, can be used to distinguish between goods across institutions or between institutional and non-institutional goods, but not between goods within the same institution.

This, however, is a mistake. Even within the same institution, different institutional goods have different functions. For instance, we have different principles regarding the dimension of exchange of judges and lawyers, voting and campaign promises, journalists and news outlets, and so forth. So, if two institutional goods have the *same function*, then it follows that we should treat their dimensions of exchange similarly. However, if they have *different functions*, then the asymmetry can be easily explained due to their different institutional function. Thus, when Lippert-Rasmussen

[72] Lippert-Rasmussen, 'Vote Buying'.

argues that campaign promises are similar to vote selling, he might be right. But the institutional theorist still has the tools to provide an internal explanation for why the asymmetry could be justified, according to the institutional normative benchmark.

Concerning the *Non-Speculative* challenge, I do not believe my institutional account has any advantage over the MLM arguments. In both cases, one needs to be able to show that the alienability, commodification, or marketisation of good X is likely to generate phenomenon Y, which is considered repugnant, by using empirical evidence, among other things. Maybe because there is a vast literature in political economy and other fields on institutional goods, it is easier to do so, but I cannot defend this speculation here.

Finally, the response of my institutional account to the *Non-Semiotic* challenge—namely, to be able to provide arguments that cannot be reduced solely to contingent semiotic considerations or social meanings—is what I believe to be both its greatest advantage and its greatest challenge. Let's start with the advantage. Most semiotic arguments focus on the fact that the alienation, commodification, marketisation, or privatisation of a good modifies people's *motivations, intentions* or *evaluative attitudes* in a morally wrong way.[73] It is the person's motivation that sets the deep moral difference between the otherwise identical actions of the son tending to the needs of his ailing mother and her hired caretaker. What the latter does in exchange for monetary compensation, the son does from affection and obligation.

The same logic is applied to the handling of organs, sex, and children. The wrongness of the alienation, commodification, marketisation, or privatisation of these goods, according to some accounts, has to do with people's evaluative attitudes and intentions. Recall that the objections to this kind of argument were, to name a few, that we can have different evaluative attitudes or motivations at the same time, that it is very hard to argue for a 'correct' evaluative attitude as it is

[73] Cordelli, *The Privatized State*, 34.

rarely agreed upon, and that it is a contingent argument that might preserve conservative attitudes.[74]

Institutional limits of markets arguments, in contrast, are not based on concerns related to individual attitudes, intentions, and motivations. Rather, institutional arguments address the institutional function of the good, the value of which is independent of semiotic concerns. Therefore, institutional arguments, at least concerning this interpretation, are completely unexposed to semiotic-based objections.

However, another version of the semiotic argument poses a challenge to my claim that institutional arguments have an advantage in terms of dealing with semiotic objections. According to some semiotic arguments, the alienation, commodification, or marketisation of good X corrupts the meaning of certain social norms, crowds out favourable social norms, and so forth.[75] These arguments focus on social norms and meanings, not individual motivations or attitudes. Now, recall that the objection against this kind of argument is that social norms are contingent, rarely agreed upon and change quite often. Moreover, making arguments in favour of preserving certain social norms could lead to repugnant conservatism.

This is a challenge for institutional arguments, as well, for two reasons. First, institutional justifications and institutional designs are, in fact, kinds of contingent social norms attached to a contingent social meaning. Thus, to defend my account against this version of the semiotic argument, I must show why institutional justifications and designs are not contingent as mere social norms, or contingent in a different way. Second, institutions carry semiotic meanings that can be attached to specific institutional goods (e.g., voting is an expression of civic duty), as well as to the justification of the institution or the institutional design (e.g., democracy is justified as it

[74] See, for instance, Brennan and Jaworski, 'Markets Without Symbolic Limits' and Cordelli, *The Privatized State*, 36–39.

[75] See, for instance, Walzer, *Spheres of Justice*, 19.

expresses social norms such as respect for equal status). Thus, I must show why semiotic elements of institutions, institutional designs and institutional goods are different from the semiotic elements that are the target of the semiotic challenge to MLM arguments.

Concerning the first reason, starting with institutional designs, one could argue that they are as contingent as certain social-meaning-based arguments are. And as a result, arguing to preserve them can also lead to repugnant conservatism. I concede that specific institutional designs are contingent. The fact that a particular society is used to a specific institutional design could serve as an additional reason to choose this design, other things being equal. But as a stand-alone reason, it is no different from other contingent social norms.

However, notice that according to the institutional account I offer, there is no reason to limit the different dimensions of exchange of institutional goods to preserve an institutional design. The reason for the limitation is that institutional designs should function according to the institutional justifications they are supposed to serve. So, what is doing the normative work is not the preservation of a social meaning but rather the functions of the institutional design according to its justifications. Therefore, the worry from conservatism regarding institutional design is misplaced.

In contrast, some institutional arguments could lead to radical reforms in institutions, for instance, in cases where there is a need to limit or alternatively to remove a traditional limit on a particular dimension of exchange (as I suggest in chapters 5 and 6 about the legal system and the media). Moreover, in cases where, as it turns out, the institutional design cannot function in accordance with the justification of the institution, then it should be replaced. So, instead of cherishing contingent institutional designs, institutional arguments treat them as contingent and replaceable instruments.

To be sure, one could argue that this response only pushes the problem a step back—to the institutional justification itself. Maybe the reasons for limiting the dimensions of exchange of an

institutional good according to a specific institutional design are different. However, the end goal is to protect and preserve a certain institutional justification that, so one might argue, is also a kind of a contingent social norm. The scope of this thesis does not allow me to go into a robust analysis of the difference between contingent social norms and supposedly 'universal' institutional justifications. At this point, I can only say that the institutional account I propose is exposed to a semiotic challenge levelled by people who believe, for instance, that the claim that democracy is justified because it secures political equality or that the justification of the legal system is that it provides just results, is as contingent as the claim that sports events should be a communal rather than a commercial enterprise, or that commodified sex expresses disrespect towards the seller. I wish to explicitly state that I find it intuitively convincing to assume that there is a difference between these claims, but I am well aware that I am exposed to objections on this front.

Turning to the second reason—namely, that institutions carry *semiotic meanings*—some institutional semiotic meanings could function as part of an institutional design. For instance, one might argue that we *should* consider voting as an action that expresses civic attitudes in order for a particular democratic institutional design to work. These functional semiotic meanings are no different from any other institutional function; they are just semiotic. The challenge against semiotic arguments is that certain contingent socially constructed norms should not give rise to any normative obligations.[76] But if preserving a certain social meaning is normatively important as an institutional function, the objection fails since the contingent social norm itself is not doing the normative work (assuming, again, that social norms and institutional functions are different) but rather the institutional design.

Other institutional semiotic meanings are not part of the institutional design, but rather

[76] Laura Valentini calls this the deflationary view. See Valentini, 'Respect for Persons and the Moral Force of Socially Constructed Norms', 387. To be clear, I do not hold the deflationary view. I remain agnostic about whether some social norms could have normative weight in their capacity as social norms. My aim is only to show that if one holds such a view, my institutional account is more resilient to it.

constitutive of the institutional justification itself. For instance, if one holds an expressive view of the legal system, the justification of having a legal system is primarily to express respect for people's right to be heard. Thus, it seems that what is doing the normative work is the semiotic social meaning itself and not something else since the correct social meaning *is* the institutional justification. In such cases, institutional arguments for limiting markets to preserve a particular social meaning of the institution will be equally exposed to the semiotic challenge as MLM arguments are. If I am correct, then it means that institutional arguments against markets that undercut semiotic institutional justifications are less resilient to the semiotic challenge than other institutional arguments.

To recap, the institutional account I propose here is more resilient to both challenges from asymmetry, to one common version of the semiotic challenge, and only partially to the other version of the semiotic challenge. These advantages already give us good reasons to further develop this account. As a final note, to reiterate, even if my institutional account was not resilient to these objections, that is not a sufficient reason to reject it since, as I have repeatedly stated, although the four challenges against the MLM challenges are grave, they are not decisive.

3.8 Defending the Novelty of the Account: A Note on Walzer's *Spheres of Justice*

Looming above this chapter is the only general account I am aware of that discusses the limits of the dimensions of exchange of institutional goods, Walzer's account in *Spheres of Justice*.[77] Thus, as a way of ending this chapter, I wish to dedicate its final section to clearly demarcate the borders between Walzer's view and mine. According to Walzer, a certain dimension of exchange of a good (institutional or non-institutional) needs to be limited for one (or both) of the following reasons: (1) alienation, commodification, marketisation, or privatisation leads to domination of a certain social sphere by the 'sphere of money'; (2) alienation, commodification, marketisation, or

[77] Walzer, *Spheres of Justice*.

privatisation undermines the social meaning of the good or the sphere in which the good is embedded. Notice, on Walzer's account, to discover the correct social meaning, one must engage in interpretive work and determine what the contingent social meaning that is attached to a certain good by people living in a particular historical era is.[78]

With this very brief presentation of Walzer's view in mind, my account can be distinguished from Walzer's for the following reasons. First, Walzer's 'conventionalist' theory, using Brian Barry's terminology, is highly controversial, and although its scrutiny is beyond the scope of my thesis, it is important to mention that I do not share or assume Walzer's quasi-relativist meta-ethical commitments, according to which what justice *is* in a certain society *should* be determined according to the shared beliefs of the members of that society. As Barry convincingly explained, '[t]he obvious objection to this is that […] it is not correct […] to say that the caste system is just in India—and it would not be correct to say so even if there was a consensus among Indians that it was just'.[79]

Second, Walzer's focus on domination is unjustifiably restrictive. There are additional reasons for limiting the dimensions of exchange of institutional goods, which goes beyond domination. For instance, in chapter 5 on the market in legal representation within adversarial legal systems, I show that in civil cases in which the parties are two poor people who cannot afford adequate legal representation (due to the marketisation of legal representation), justice cannot be reached. And in chapter 6, I argue that even within a fairly equal marketplace of ideas which does not involve domination whatsoever, some institutional benefits are still undercut by the market. In such cases, the problem is not that one of the parties dominates the other, as both sides are equally poor in the legal case or just equal in the media case, but rather that justice is not provided,

[78] David Miller, 'Introduction', in *Pluralism, Justice, and Equality*, ed. David Miller and Michael Walzer (Oxford: Oxford University Press, 1995), 3; Walzer, *Spheres of Justice*, xiv, 9.
[79] Brian Barry, 'Spherical Justice and Global Injustice', in *Pluralism, Justice, and Equality*, ed. David Miller and Michael Walzer (Oxford: Oxford University Press, 1995), 75.

or certain benefits from competition over ideas are not achieved. Thus, I purport to go beyond domination and discuss all kinds of reasons that could undermine the different relevant institutional justifications.

Third, many of Walzer's arguments are focused on social meanings as part of his relativist-historical account. In most cases, 'social meanings' in his account denotes contingent social norms such as the meaning of neighbourhoods or clubs.[80] However, in a few places throughout his book, the term 'social meaning' signifies something like institutional justifications.[81] Concerning the former interpretation, unlike my account, Walzer is completely exposed to the four challenges against the standard MLM arguments (especially the semiotic). Regarding the later, uncommon interpretation, Walzer does seem to provide an example of institutional argumentation. In the context of this interpretation, my account could be considered a development of Walzer's rudimentary attempt to provide an institutional account for limiting markets.

Fourth, in addition to the theoretical differences between our approaches, Walzer barely discusses the institutions I explore in the thesis.

Finally, his account is underspecified on two counts. First, like Anderson, although he does distinguish between goods in terms of their social meaning, he applies the same argumentative structure to all goods. Thus, he is open to the objections I made earlier in this chapter against applying the same arguments to both 'natural' and 'institutional goods'. Second, he does not discuss specific institutional designs but rather assumes general 'social meanings' of institutions that need to be protected. This is a significant shortcoming because without referring to a specific institutional design, one cannot provide any normative principles regarding the dimensions of exchange of institutional goods.

I believe these differences are sufficient to defend the novelty of my account. So, although

[80] Walzer, *Spheres of Justice*, 35.

[81] For instance see Walzer's discussion on votes: ibid., 22.

I am standing on the shoulders of a giant, I stand on my own two feet.

3.9 Conclusion

We have reached the end of a fairly long and winding road. I have devoted this chapter to establishing four claims. First, I have established that the distinction between natural and institutional goods is normatively significant for the analysis of the dimensions of exchange of institutional goods. Second, I have highlighted that MLM arguments concerning institutional goods (e.g., votes) ignore this distinction, are identical to MLM arguments regarding natural goods, and thus are exposed to the same four challenges that ended the previous chapter. Third, I have contended that the application of MLM arguments to institutional goods is objectionable for two other reasons: their argumentative structure ignores the institutional elements of institutional goods, and some of them inappropriately focus on individual morality instead of institutional morality. Finally, I have argued that my institutional account is the appropriate alternative to the MLM existing account in analysing institutional goods.

This ends the first part of this thesis—'Theory'. The next chapter serves as an intermission before moving to the second part of the thesis—'Applications'—where I apply my institutional account to the adversarial legal system and the marketplace of ideas. The intermission is dedicated to analysing the concept of competition. As I explained in the introduction, since my account is committed to normatively analysing institutional designs, and because most modern institutional designs (at least economic, political and legal institutions) are based on competition, to be able to apply my account in the second part of the thesis, a normative analysis of the concept of competition is needed. To this, we now turn.

Intermission

4

Two Concepts of Competition[1]

Competition is the pixie dust of economic, political, and legal institutional design in the modern age. When an institutional architect confronts private or collective 'vices'—conflicts, inefficiency, selfish behaviour, avarice, ambition, or envy—all she need to do is sprinkle a little bit of competition and puff, a desirable social outcome will emerge. Whether you believe this modern-day fairy tale or not, from around the eighteenth century onwards, the idea of competition as a key ingredient in the design of social institutions has become pervasive across the West.[2]

Democratic elections, famously, are supposed to yield desirable outcomes by promoting competition between rival political parties or candidates.[3] Likewise, the public sphere is said to advance the causes of pluralism and truth by facilitating competition among ideas, arguments, and worldviews.[4] Justice is supposed to prevail in the courtroom by virtue of legal competition between

[1] A prior version of this chapter was published in *Ethics* in 2022. See Agmon, 'Two Concepts of Competition'. I have made minor revisions to the published version in order to adjust it to the structure of the thesis.

[2] Albert O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (Princeton: Princeton University Press, 1977), 28; Ira Howerth, 'Competition, Natural and Industrial', *International Journal of Ethics* 22 (1911): 399–419; Carl Schmitt, *The Crisis of Parliamentary Democracy* (Cambridge, MA: MIT Press, 1988), 39–42. I will refer to aspects of Carl Schmitt's work throughout the thesis. I believe that those who do so have an obligation to remind the reader that he was a Nazi.

[3] For example, see Jane J. Mansbridge, *Beyond Adversary Democracy* (Chicago: University of Chicago Press, 1983); Adam Przeworski, 'Minimalist Conception of Democracy: A Defense', in *Democracy's Value*, ed. Ian Shapiro and Casiano Hacker-Cordón (Cambridge: Cambridge University Press, 1999), 23–56; Nancy L. Rosenblum, *On the Side of the Angels: An Appreciation of Parties and Partisanship* (Princeton; Oxford: Princeton University Press, 2008), 108–65; Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (London: Routledge, 2010), 50, 243; Ian Shapiro, *Politics Against Domination* (Cambridge, MA: Belknap Press, 2016), 78–84; Jonathan White and Lea Ypi, *The Meaning of Partisanship*, 1st ed. (Oxford; New York: Oxford University Press, 2016), 8–75; Waldron, *Political Political Theory*, 93–95.

[4] Alvin I. Goldman and James C. Cox, 'Speech, Truth, and the Free Market for Ideas', *Legal Theory* 2, no. 1 (1996): 1–32; Mannheim, 'Competition as a Cultural Phenomenon', 420–21; Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Clark: The Lawbook Exchange Ltd., 2012), 24–25; Radin, 'Market-Inalienability', 164–69; Schmitt, *The Crisis of Parliamentary Democracy*; Stephen Holmes, 'Liberal Constraints on Private Power? Reflections on the Origins and Rationale of Access Regulation', in *Democracy and the Mass Media*, ed. Judith Lichtenberg (Cambridge: Cambridge University Press, 1990), 28–38.

the parties.[5] Most notably, the market is meant to produce efficiency, innovation, and growth as a result of fierce competition among self-interested actors.[6]

Normally, when political philosophers consider the value of competition, they try to balance different factors, such as the social value it generates, the social ethos it promotes, and so forth. Generally speaking, they evaluate competitive institutions in contradistinction to institutions based on cooperation or that are at least competition-free.[7] However, this distinction between competitive and non-competitive institutions misses something important. Within the long list of competition-based institutions mentioned above, one can discern two distinct senses in which competition is used as an institutional mechanism.[8] The first—which I call *parallel competition*—aims to create separate, independent pathways for each competitor in which each is supposed to do her best to win. The social benefit of this competition is said to emerge as a result of the aggregative effect of the efforts of each competitor. The second—which I term *friction competition*—denotes a competitive mechanism whose goal is to facilitate a clash between competitors. When utilised as an institutional mechanism, this clash is expected to generate a desirable social outcome.

As is the case with any novel philosophical distinction, to show that this distinction is of value, I need to establish two things. The first is that it amounts to what Raymond Geuss calls a successful 'conceptual innovation',[9] which includes: (1) a clarification or elucidation of a common understanding of a certain issue and (2) an explanation of why (1) is of normative importance. Second, I need to establish that it is not superfluous, namely, that it cannot be reduced to other

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[5] E.g., Luban, *Lawyers and Justice*, 68–69; Alan Wertheimer, 'The Equalization of Legal Resources', *Philosophy & Public Affairs* 17, no. 4 (1988): 303–22. I discuss legal competition at length in the next chapter.

[6] For two prominent examples, see Friedrich A. von Hayek, *The Constitution of Liberty* (London: Routledge & Kegan Paul, 1990), 300; Rawls, *A Theory of Justice*, 316.

[7] E.g., Jules Coleman, 'Competition and Cooperation', *Ethics* 98, no. 1 (1987): 76–90, 85–86; Waheed Hussain, 'Why Should We Care About Competition?', *Critical Review of International Social and Political Philosophy* 21, no. 5 (2018): 571; Waheed Hussain, 'Pitting People Against Each Other', *Philosophy & Public Affairs* 48, no. 1 (2020): 80–81; John S. Mill, *Principles of Political Economy* (Oxford: Oxford University Press, 2008), 233.

[8] My account is not meant to be exhaustive. There might be other concepts of competition in other fields, such as the arts or science, that I will not discuss here.

[9] Raymond Geuss, *Philosophy and Real Politics* (Princeton: Princeton University Press, 2008), 46.

distinctions or concepts that already exist.

The chapter is structured in accordance with these two tasks. I begin with the distinction's analytical benefits. I show how it allows us to clarify the difference between competitions in different institutions (e.g., legal competition vs economic competition) and the difference between different perceptions of competition within the same institution (e.g., different kinds of democratic competition). Then, I move to present the normative implications of the distinction. I argue that the *design* of each type of competition leads to different normative implications concerning the level of equality between competitors that each design demands and the amount of (negative) freedom the competitors can enjoy. I also show that each type of competition generates design-based independent normative reasons for and against equality and freedom that are usually not captured in the debates between libertarians and egalitarians about these values.

Subsequently, I argue that using an undifferentiated concept of competition is objectionable since if, for instance, an institutional design is justified by its frictional structure, treating it as parallel competition could defeat the purpose of encouraging the competitive design in the first place (and vice versa). In the final part of the chapter, I defend my distinction against the claim that it is reducible to three other existing distinctions between different types of competition: zero-sum games vs non-zero-sum games, impersonal competitions with many participants vs personal competitions with a small number of participants, and unintentional, invisible-hand-based competitions vs intentional competitions. Additionally, I defend my distinction against a potential objection, namely, that it is overly idealised since, in reality, there are no pure parallel competitions.

Before I begin, four clarificatory remarks about the scope of my argument in this chapter are in order. First, this is not a semiotic argument: As was the case in chapter 1, I do not wish to analyse what we mean when we say 'competition' in natural language. Rather, my aim is to elucidate an important conceptual ambiguity that carries far-reaching implications concerning the justifications underpinning a wide range of political, legal, and economic institutions in liberal

democracies.

Second, for the purpose of this chapter, I do not scrutinise the justifications that underpin the use of competition as an institutional mechanism. Additionally, I do not discuss any proposal aimed at replacing competitive institutional designs with non-competitive ones.[10] Thus, I do not question claims such as that the truth will emerge from legal competition between self-interested parties or that economic competition between self-interested parties will lead to growth and prosperity. Instead, I take them at face value. For those who think that competition-based institutional designs are unjustified, to begin with, this chapter would be of little relevance.

Third, philosophers who have discussed the topic of institutionalised competition often focus on questions about the moral justification it allegedly provides people to act 'viciously', for example, whether lawyers can lie or whether the market is a morality-free zone.[11] In this chapter, I leave aside the discussion of individual role morality and focus on more fundamental questions regarding the design of the competition itself.

Finally, throughout this chapter, I refer to concepts such as economic competition, legal competition, or the marketplace of ideas and describe them in very broad brushstrokes. I assume an ideal picture of each competition and do not consider specific cases where this picture does not hold in reality (although I do discuss real-life examples). For instance, when I discuss economic competition, I assume 'perfect competition'.[12] I elaborate on the plausible implications of this

[10] There are many works that discuss the value of competition. See, for example, Coleman, 'Competition and Cooperation'; Joseph Heath, *Morality, Competition, and the Firm: The Market Failures Approach to Business Ethics* (New York: Oxford University Press, 2014); Mill, *Principles of Political Economy*, 251; Amartya Sen, 'The Moral Standing of the Market', *Social Philosophy & Policy* 2, no. 2 (1985): 11; Jonathan Wolff, 'The Ethics of Competition', in *The Legal and Moral Aspects of International Trade*, ed. Asif H. Qureshi, Hillel Steiner, and Geraint Parry (London: Routledge, 1998), 89–90. For a few examples of objections to competition see Cohen, *Self-Ownership, Freedom, and Equality*, 132; Hussain, 'Pitting People Against Each Other'.

[11] E.g., Arthur Isak Applbaum, *Ethics for Adversaries: The Morality of Roles in Public and Professional Life* (Princeton: Princeton University Press, 1999); Luban, *Lawyers and Justice*; Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton; Oxford: Princeton University Press, 2008); Christopher McMahon, 'Morality and the Invisible Hand', *Philosophy & Public Affairs* 10, no. 3 (1981).

[12] Peter Dietsch, 'The Market, Competition, and Equality', *Politics, Philosophy & Economics* 9, no. 2 (2010): 225.

(partial) idealisation in section 4.3.4.

4.1 Friction vs Parallel Competition

As competitive events, a 100-metre sprint and a game of basketball are not the same. In a 100-metre race, each competitor has her respective pathway (in this case, a pre-assigned lane) from start to finish.[13] She does not interfere with competitors in the lanes parallel to her. As a matter of fact, the rules explicitly forbid any friction between the runners: each runner must stick to her respective lane, running as fast as possible to the finish line. In contrast, in a game of basketball, friction between competitors is necessary. Basketball players can—indeed, are expected to—interfere with their opponents' manoeuvres by blocking them, stealing the ball from them, changing the defensive setup to counter their attacks, and so forth. This is what the game is all about.

Thus, under one concept of competition, friction between competitors is not part of the competition's design. The goal is to create rules which will, in fact, minimise the friction between competitors so that each is able to maximise her performance without interference. The competition is *designed* to create parallel tracks. I call this 'parallel competition'.[14] The second concept, which I call 'friction competition', is *designed* from the start to facilitate a 'clash',[15] a 'collision',[16]or a 'jarring'[17] between competitors. Succeeding in a friction competition means, in large part, overcoming the responses offered or attempts at interference made by the opponent.

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[13] In a recent article, Waheed Hussain has argued that providing people with clear 'pathways' is a non-competitive way to design institutions. Whether one agrees with Hussain's account or not, it does not exclude the option of a competitive 'clear pathway' design, as the one I discuss here. See Hussain, 'Pitting People Against Each Other', 103.

[14] There are 'purer' manifestations of parallel competition than running—throwing sports, ski jumping, golf, and so forth. I have chosen running as the leading example for two reasons. First, because others have used it before to describe parallel-competition-based social institutions. Second, because parallel competition in social institutions looks more like running, so the analogy works better. However, I do refer to some of the 'purer' examples throughout the chapter.

[15] Schmitt, *The Crisis of Parliamentary Democracy*, 35.

[16] John S. Mill, *On Liberty* (Cambridge: Cambridge University Press, 1989), 20.

[17] Hamilton, Jay, and Madison, *The Federalist Papers*, 346.

Thus, the rules of the competition are formulated to ensure this clash will take place.

Another way to articulate the difference between the two concepts is with reference to the manner in which the competitors achieve their results. In parallel competition, competitors begin by doing their best to achieve a particular result independently of their opponents' efforts; *only then* are the results compared, and whoever has achieved the best one wins the competition. For example, in a 100-metre sprint, each runner sprints as fast as she can, and at the end of the race, each runner's result is compared to the others. That is why in some parallel competitions—ski jumping, for instance—athletes can compete sequentially and sometimes do so in different venues. What matters is the result they independently achieve, not the friction between them. It is no coincidence, therefore, that sports pundits use phrases such as 'She is running against the clock' or 'It is just her against the pool' in the context of parallel competitions. While the runner or swimmer does not literally compete against herself, she does, at least to some extent.

In contrast to parallel competition, in friction competition, there is no initial stage in which competitors independently pursue a particular goal. Results are measured differently. Instead of comparing the independent efforts of each competitor, the result of each competitor is dependent on, or the consequence of, the clash with her opponent. That is why, in contrast to ski jumping, a basketball team cannot score points without the presence of another team on the court. In the absence of an interfering opponent, scoring a basket is meaningless. In fact, such a game would not be basketball at all.

To illustrate, suppose the final score of a specific basketball game was 78–67. If a reporter described the game by saying, 'One group independently scored 67 points and the other 78 points', the reporter would be making a *conceptual* mistake. They clearly did not watch the game and probably do not even know what basketball is. The point is that in friction competition, the struggle between competitors is part of achieving the result itself. The result each competitor obtains hinges on how she deals with her opponent's efforts to interfere with her performance.

Without the clash, there is literally no competition.

To be clear, I am *not* arguing that there is no interaction between competitors at all in parallel competition. This is surely false. In a sprint, for example, each runner clearly cares about what the other competitors are doing. They glance over their shoulders to see where their opponents are and sometimes even adjust their behaviour accordingly. Therefore, there could be an interaction between competitors in both friction and parallel competition. My point is a different one. What distinguishes friction competition from parallel competition in which interaction takes place is that friction competition is designed to facilitate—even encourage—ongoing, *mutual interference* among the competitors. This kind of mutual interference, which I term 'friction', is constitutive of how competitors win or lose.

Conversely, interactions in parallel competition, such as glancing over one's shoulder and reacting to the opponent's pace, are exogenous to the logic underpinning the design of the competition. They are neither essential to nor constitutive of the competition itself. That is why we can easily imagine 'pure' parallel competition, in which no interaction whatsoever takes place between participants (e.g., imagine a ski jumping competition where athletes are informed neither of who their rivals are nor of their results until the very end of the event). Indeed, as mentioned, in most parallel competitions, the rules are explicitly formulated so as to minimise any interaction between the participants.

It is also worth emphasising that my argument is not that results are relational in one kind of competition but non-relational and absolute in the other. Parallel competition is relational.[18] Each runner competes against the other for the prize. Each runner's achievement or result is *relative* to those of the others. The fact that one participant runs faster diminishes, in some sense, the accomplishments of the others (not in terms of absolute performance, but in terms of placing

[18] To be sure, it is possible that in some parallel competitions, competitors do pursue things of absolute value. All I am saying is that my distinction does not hinge on this fact.

ahead of the others). This is one of the reasons why we treat it as a competition in the first place.

So, the distinction I offer is neither about whether the results in each competition are of an absolute or relational nature nor about the mere fact of interaction between the competitors. Instead, it is about the aim of the design of the competition itself: one type of competition (friction) depends on a clash between its participants, while the other (parallel) creates separate pathways for each participant.

4.1.1 Institutional Paradigms—Economic vs Legal Competition

How are these sports analogies relevant to competition as a mechanism for political, legal, and economic institutional design?[19] Overall, they represent two distinct philosophical hypotheses about competition as an institutional mechanism. A paradigmatic example of the parallel competition hypothesis is perfect competition in the free market. As Georg Simmel put it,

> This strange kind of fight is exemplified by the runner who only by his fastness, by the businessman who only by the price of his goods […] aims to reach his goal. This type of competition equals all other kinds of conflict in intensity and passionate effort. […] And yet, from a superficial standpoint, it proceeds as if there existed no adversary but only the aim.[20]

Milton Friedman made a similar observation:

> In the economic world, competition means almost the opposite [from personal rivalry …]. The wheat farmer in a free market does not feel himself in personal rivalry with, or threatened by, his neighbor, who is, in fact, his competitor. […] No one participant can determine the terms on which other participants shall have access to goods or jobs.[21]

Finally, consider Hirschman's description of perfect economic competition:

> Markets function without any prolonged human or social contact among or between the parties. Under perfect competition there is no room for bargaining, negotiation […] or mutual adjustments, and the various operators that contract together need not enter into

[19] Notice that the analogy between sports competitions and political and legal institutions is not perfect. See my discussion in footnote 73 of this chapter (section 4.2.1).
[20] Simmel, *Conflict*, 58.
[21] Friedman, *Capitalism and Freedom*, 119.

recurrent or continuing relationships.[22]

These three quotes exemplify just how ubiquitous this view of economic competition has become among theorists of different disciplines and ideological perspectives. All three depict perfect economic competition as a competition in which each person is supposed to maximise her own self-interest by adjusting to the price system. No clash is needed for the competition to generate its social value. On the contrary, antitrust laws are supposed to keep each competitor in her respective lane so that she does not interfere with the activity of the other competitors. To be sure, there is a sense in which falafel shop X doing better than falafel shop Y across the street bears on falafel shop Y's revenues. However, it does so in a way that resembles one runner's bearing on her competitor's chances of winning the race. Again, there is a relational element here, as in any competition, but no preplanned friction. Each player in the economic competition is meant to do her best in parallel to the others.

Parallel competition as an institutional mechanism is justified on varied grounds. I will briefly present what I believe to be the common denominator underlying these justifications. First and foremost, the aggregation of the independent efforts of each competitor is supposed to generate some public good. This good might be efficiency, performance enhancement, growth, a recuperation mechanism, preference ordering, or the like. Second, the design of parallel competition is associated with the idea of organising society in a decentralised manner, the intention being to both ensure the freedom of the citizenry and provide a better way of producing knowledge, as each individual is free to pursue her own interests and experiment with different ways of competing.[23]

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[22] Hirschman, 'Rival Views of Market Society', 230.

[23] Friedrich A. von Hayek, 'The Use of Knowledge in Society', *The American Economic Review* 35, no. 4 (1945): 519–30; Alvin I. Goldman, 'The Sciences of Epistemology', in *The Oxford Handbook Of Epistemology*, ed. Paul K. Moser (New York: Oxford University Press, 2002), 166–67; Heath, *Morality, Competition, and the Firm*, 219–29; Daniel Luban, 'What Is Spontaneous Order?', *The American Political Science Review* 114, no. 1 (2020): 71–72. I conduct a full discussion on the relations between the two concepts of competition and freedom in section 4.2.2.

In contrast to parallel competition, the paradigmatic example of friction competition in the context of institutional design is the adversarial legal system. As David Luban puts it, legal competition in the adversarial legal system is structured as a 'fission of adjudication into a clash of one-sided representations'.[24] In such a system, as I elaborate on in the next chapter, the parties are engaged in a legal competition against one another. Each party is incentivised to zealously fight for her individual case according to her self-interest by advancing the best plausible legal argument.[25] Notice that the competition is not designed to secure a space of non-interference for each party. On the contrary, the whole point of the system is for the parties to 'rub elbows', exchanging arguments back and forth, each attempting to refute the arguments of the other. Success in this competition depends on interference or meddling with the efforts of the opponent, albeit in a controlled way. The important point is this: the institution is designed according to the idea that the clash created by competition will lead to some desirable public result. In the legal case, it is supposed to cancel out the biases of each side and provide the impartial tribunal with the best form of legal argument from each party.[26]

Friction competition is also justified on various grounds. First, as mentioned above, something about the clash between people is expected to generate social benefits. Often, these are epistemic in nature—gaining more knowledge, say, or getting closer to the truth. As the poet John Milton had it: 'Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?'.[27] John Stuart Mill's account of the social function of 'antagonism' exemplifies the idea underlying friction competition. 'Truth', he wrote,

> is so much a question of the reconciling and combining of opposites, that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to

[24] Luban, *Lawyers and Justice*, 57.

[25] Ibid. See further discussion in chapter 5 on the market in legal representation.

[26] Wertheimer, 'The Equalization of Legal Resources', 309–10. To be sure, truth is not attained solely through competition between legal arguments alone, but also through the application of supplementary epistemic mechanisms. See Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge: Cambridge University Press, 2006). I elaborate on the different justifications of the adversarial legal system in the next chapter.

[27] John Milton, *Areopagitica* (Maryland: Arc Manor, 2008), 55.

> correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners.[28]

But friction competition is not only related to truth-seeking institutions such as the legal system. It is also associated with some of the core principles of liberal democracy, like the separation of powers. Competition over power among political parties or different branches of government—so the argument goes—will lead to an equilibrium wherein none of the actors is too powerful such that political stability will be maintained in the long run.[29] As Justice Brandeis wrote in a notable dissenting opinion on the US Supreme Court:

> [T]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.[30]

4.1.2 Democratic Competition, Competition over Ideas, and the Two Concepts of Competition

The distinction I am offering not only enables us to distinguish between competitions across institutions. It also allows us to discern two different kinds of competition-based institutional justifications for the same institution.

Consider, for example, normative discussions about democratic institutional arrangements, which include institutions such as electoral systems, representative bodies, and parties (hereafter democratic competition[31]). Roughly speaking, the philosophical debate about democratic competition is held between two 'schools'—the competitive and the non-competitive schools—

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[28] Mill, *On Liberty*, 49.

[29] Hirschman, *The Passions and the Interests*, 29–30; Daryl J. Levinson and Richard H. Pildes, 'Separation of Parties, Not Powers', *Harvard Law Review* 119, no. 8 (2006):; Luban, *Lawyers and Justice*, 78; Rosenblum, *On the Side of the Angels*, 12, 125; Schmitt, *The Crisis of Parliamentary Democracy*, 39; White and Ypi, *The Meaning of Partisanship*, 60.

[30] *Myers V. United States*, 272 US 52, 293 (1926).

[31] Usually, democratic competition is described in terms of party competition. No-party democracies, in which competition for office occurs among all the citizens, are hard to find. See Robert E. Goodin, *Innovating Democracy: Democratic Theory and Practice after the Deliberative Turn* (Oxford: Oxford University Press, 2008), 205–6. Therefore, for simplicity's sake, I will use party competition and democratic competition interchangeably.

although scholars differ regarding terminology. Jane Mansbridge calls one school 'adversary' and the other 'unitary',[32] while David Miller distinguishes between 'politics as interest-aggregation' and 'politics as dialogue'.[33] For her part, Iris M. Young prefers 'aggregative' vs 'deliberative',[34] Jon Elster distinguishes between 'the market' and 'the forum',[35] and David Estlund differentiates between 'competitive' and 'cooperative'.[36] Finally, Ian Shapiro distinguishes 'argumentative' from 'deliberative' competition.[37]

The non-competitive school argues that democracy is justified on the grounds of its deliberative qualities. Therefore it advocates institutional designs that facilitate collaborative action, motivated by the possibility of agreement.[38] In contrast, the competitive school argues that competition is democracy's 'life blood'.[39] Philosophers from this camp usually portray the deliberative ideal as naïve. They maintain that democracy is justified because it facilitates a useful, nonviolent form of political competition in which all citizens have some say and that leads to good results—not because it promotes deliberation or generates consensus.[40]

What has been overlooked so far is that the competitive school itself consists of two different groups: those who advance arguments based on friction competition and those whose arguments are based on a vision of democracy as a parallel competition. Thus, theorists within the competitive school tend to use the same word—'competition'—to describe completely different justifications for electoral competition, which lead to different institutional designs.

A case in point is Joseph Schumpeter's famous competition-based justification for

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[32] Mansbridge, *Beyond Adversary Democracy*, 8–23.
[33] Miller, *Market, State, and Community*, 254–55.
[34] Iris M. Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), 18–31.
[35] Elster, 'The Market and the Forum'.
[36] David M. Estlund, 'Democracy without Preference', *The Philosophical Review* 99, no. 3 (1990): 397.
[37] Ian Shapiro, 'Collusion in Restraint of Democracy: Against Political Deliberation', *Daedalus* 146, no. 3 (2017): 77–78.
[38] Ibid., 79; Young, *Inclusion and Democracy*, 24.
[39] Shapiro, *Politics against Domination*, 174.
[40] Ibid.; Schumpeter, *Capitalism, Socialism and Democracy*.

democracy.[41] On the one hand, it seems that Schumpeter views democracy as a parallel competition. For instance, he equates democratic competition over political power to competition in the free market and compares politicians to business people.[42] This understanding of electoral competition gives rise to an institutional design that ensures a minimal clash between parties (the firms) and that each party or candidate enjoys a secure, interference-free zone to promote its agenda and convince supporters (consumers). According to this Downsian interpretation,[43] 'politicians act like entrepreneurs and brokers',[44] offering themselves to the public and trying to satisfy the preferences of the largest number of people to get elected.

Voting is the currency people use to express their preferences according to the intensity of their feelings. Accordingly, the principal social benefit generated by democratic competition under this interpretation is the aggregation of citizens' wishes.[45] Clearly, as Miller notes, democracy so construed is modelled on the market.[46] The 'get-out-the-vote' (GOTV) campaign strategy is a useful real-life manifestation of this parallel-based view of democratic competition.[47] According to GOTV strategists, what 'wins' elections for parties is not engagement with the competing party and its voters but rather getting as many people as possible from their own 'base' to vote (another way to articulate this strategy is mobilisation rather than persuasion). GOTV strategists do not aim to win via a clash with opposing parties but focus solely on maximising the potential of their own political

[41] For a comprehensive analysis of Schumpeter's account, see Alfred Moore, "Schumpeter's Not-so-minimal Theory of Democracy", Paper delivered at the York Political Theory Seminar, 9 February 2021.
[42] Schumpeter, *Capitalism, Socialism and Democracy*, 250–53.
[43] Anthony Downs, *An Economic Theory of Democracy* (New York: Harper & Row, 1957); David Miller, 'The Competitive Model of Democracy', in *Democratic Theory and Practice*, ed. Graeme C. Duncan (Cambridge: Cambridge University Press, 1983), 133–55.
[44] Mansbridge, *Beyond Adversary Democracy*, 17.
[45] Ibid.; Miller, 'The Competitive Model of Democracy', 134–35; Miller, *Market, State, and Community*, 254–55; Young, *Inclusion and Democracy*, 19–21.
[46] Miller, 'The Competitive Model of Democracy', 134. Similarly, White and Ypi call this 'the economic view of the party'. See White and Ypi, *The Meaning of Partisanship*, 10–11.
[47] I wish to thank Avishay Ben-Sasson-Gordis for this useful example.

camp. Putting it differently, they envisage competition in parallel.[48]

On the other hand, Schumpeter also uses justifications based on an understanding of democracy as a frictional competition. As Shapiro notes,

> Schumpeterian democracy depends on alternation between two strong parties in government. The party that wins the election exercises a temporary power monopoly, but the loyal opposition—a government-in-waiting whose leaders hope to take power at the next election—continually challenges its policies.[49]

Here it seems that the value of democratic competition stems from the clash between parties. The institutional design that follows would be focused on securing this ongoing clash, not on protecting a space of non-interference for voters and parties.

The social benefits associated with this interpretation are also different. According to the frictional approach, democratic competition is not meant to serve as a procedural tool for preference aggregation. Instead, it seeks to (1) prevent elites or specific interest groups from capturing and monopolising power, thereby advancing the capacity of the people for self-rule;[50] (2) promote ideas and discussion among different worldviews;[51] (3) force parties to publicly justify their agendas, thereby enhancing legitimacy and accountability;[52] and (4) facilitate and regulate social conflict in a nonviolent and stable way.[53] It is no coincidence, therefore, that when presenting

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[48] This does not mean that GOTV supporters think that campaigns should *only* focus on getting people to vote, but that it should take priority. This is not a 'pure' example of parallel competition democratic design, but a useful way to illustrate one possible manifestation of a parallel-dominated view.

[49] Shapiro, 'Collusion in Restraint of Democracy', 78.

[50] Samuel Bagg, 'The Power of the Multitude: Answering Epistemic Challenges to Democracy', *American Political Science Review* 112, no. 4 (2018): 895–97; Beitz, *Political Equality*, 135–36; Goodin, *Innovating Democracy*, 213–14; Rosenblum, *On the Side of the Angels*, 120–21.

[51] E.g., Mill, *On Liberty*, 49; Rosenblum, *On the Side of the Angels*, 144–45; White and Ypi, *The Meaning of Partisanship*, 64–66.

[52] See Matteo Bonotti, *Partisanship and Political Liberalism in Diverse Societies* (Oxford: Oxford University Press, 2017), 34–5; Goodin, *Innovating Democracy*, 223; Shapiro, 'Collusion in Restraint of Democracy', 81–82; White and Ypi, *The Meaning of Partisanship*, 26, 62–64.

[53] Hirschman, *The Passions and the Interests*, 29–30; Rosenblum, *On the Side of the Angels*, 12, 125; Schmitt, *The Crisis of Parliamentary Democracy*, 39; White and Ypi, *The Meaning of Partisanship*, 60. These four justifications for competition between political parties are very influential among political scientists and come in different forms. For example, see Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (London: Verso, 2013); Chantal Mouffe, *The Democratic*

these friction-based arguments, Schumpeter (and others) no longer compares competition to economic competition but rather to wars and debates.[54] For instance, Schumpeterian competitive struggle, as Shapiro explains, 'thrives on the ongoing contest between opposing ideologies', and is 'epitomized at Prime Minister's Questions, the sometimes overwrought weekly gladiatorial clashes over the famous wooden despatch boxes'.[55]

This kind of ambiguity can also be found in discussions concerning competition over ideas in the public forum or the free press, on which I elaborate in chapter 6. As Alvin Goldman and James Cox argue, 'The image of a marketplace of ideas is often confused with another image, that of an adversarial system of discourse'.[56] To take one example, consider the analogy drawn by Carl Schmitt between the market and the public forum:

> One usually only discusses the economic line of reasoning that social harmony and the maximization of wealth follow from the free economic competition of individuals […]. It is exactly the same [for the public forum]: that the truth can be found through an unrestrained clash of opinion and that competition will produce harmony. The intellectual core of this thought resides finally in its specific relationship to truth, which becomes a mere function of the eternal competition of opinions.[57]

Evidently, Schmitt conflates the logic of parallel competition in the market with the logic of friction competition concerning opinions and truth in the public forum.[58]

Again, as in Schumpeter's case, it is unclear which competition he is referring to.[59] If it is

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Paradox (London: Verso, 2005); E. E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America*, (New York: Holt, Rinehart and Winston, 1960).

[54] Schumpeter, *Schumpeter, Capitalism, Socialism and Democracy*, 248. See also Rosenblum, *On the Side of the Angels*, 120.

[55] Shapiro, 'Collusion in Restraint of Democracy', 78.

[56] Goldman and Cox, 'Speech, Truth, and the Free Market for Ideas', 29.For an earlier version of this distinction and a critique against the marketplace of ideas, see Meiklejohn, *Free Speech*.

[57] Schmitt, *The Crisis of Parliamentary Democracy*, 35.

[58] Notice, that concerning both Schmitt's and Schumpeter's arguments, I am not claiming that there cannot be a mixture of the two concepts. One can imagine an institutional design in which both kinds of competitions are being used. However, using both designs need to be justified, and cannot be the consequence of conceptual ambiguity.

[59] There is additional kind of ambiguity in Schmitt's quote. When he writes of a 'competition of opinions', it is unclear who the competitors are: it could be a competition at the level of the whole population, in which case everyone is a competitor; alternatively, it could be a competition between politicians, parties, or newspapers. Each level surely requires a different kind of institutional setting—be it a friction or a parallel competition. For instance, it is hard to imagine how a friction competition between all individuals in society could be maintained. For simplicity's sake, I will

friction competition over opinions, there will be a need to create the social conditions in which some kind of a fruitful Millian clash between opponents would occur. For instance, guarantees that the different parties are granted the same level of access to the public forum would be in order,[60] as would the institutionalisation of some form of controlled friction over ideas, say, by scheduled debates in general elections, parliaments, or the daily news.[61] It seems likely that some forms of speech would need to be forbidden in order to prevent public manipulation. The list could be extended.

In contrast, if one has a parallel vision in mind, then the institutional design of the public forum will have to make sure that each individual has a space of non-interference to express herself, like in the market, and that from the aggregation of individuals with complete freedom of speech something good will happen.[62] In such a competition, people might well respond and engage with each other, but they also might not. Similarly, there might be equality of opportunity, but there might not. Either way, this will not be the focus of the institutional design, which will instead prioritise the maximisation of negative freedom and the aggregation of independent actions. While Prime Minister Questions can serve again as an example of the friction-based public forum, an extreme version of a parallel-based public forum would be the recent emergence of 'echo chambers' in news consumption. Nowadays, so the argument goes, news outlets with different political ideologies do not really clash with each other in an open public forum. Rather, they create isolated ideological echo chambers in which people hear what they already think.[63] The

not pursue the implications of this distinction any further, as my aim is only to emphasise the difference between the parallel-based and friction-based interpretations.

[60] E.g., Owen M. Fiss, *The Irony of Free Speech* (Cambridge, MA: Harvard University Press, 1996), 18–19; Judith Lichtenberg, 'Foundations and Limits of Freedom of the Press', *Philosophy & Public Affairs* 16, no. 4 (1987): 351–53; Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1995), 39–40.

[61] Rosenblum, *On the Side of the Angels*, 145.

[62] I defend this point in detail in chapter 6.

[63] Elizabeth Anderson, 'Democracy, Public Policy, and Lay Assessments of Scientific Testimony', *Episteme* 8, no. 2 (2011): 150; Arthur Beckman, 'Political Marketing and Intellectual Autonomy', *The Journal of Political Philosophy* 26, no. 1 (2018): 28–36; Kathleen Hall Jamieson and Joseph N. Cappella, *Echo Chamber: Rush Limbaugh and the Conservative Media Establishment* (Oxford and New York: Oxford University Press, 2008); Maxime Lepoutre, *Democratic Speech in*

goal of news outlets in this design is to convince people to join the echo chamber and not really to engage in a debate with competing outlets.

Notice that it is not my aim here to support one type of democratic competition (or competition in the public forum) over the other. I expect that each concept will lead to different normative considerations in different institutional contexts, something I cannot scrutinise here. My point is that the distinction between the two concepts of competition allows us to clarify and better understand different institutional arrangements and institutional justifications of democracy, which are routinely placed in the same category. Each competitive mechanism leads to a very different image of what democracy should look like and how it should work.

Additionally, it is worth emphasising that my argument is not that the two concepts of competition are mutually exclusive. As mentioned at the outset, I am focusing on ideal types. There are clearly many instances in which the line between the concepts turns blurry or where institutions encompass both concepts at the same time. Since my aim in this chapter was only to establish a distinction, I will leave hybrid cases to other chapters and future endeavours.

To recap, I have so far distinguished between two concepts of competition as an institutional mechanism: parallel and friction competition. I have shown that this distinction carries analytical benefits. It clarifies an obscure and undifferentiated conceptual picture of competition by allowing us to distinguish between different institutional justifications and their corresponding competitive institutional designs (among distinct institutions but also within single institutions). In the next section, I turn to argue that, beyond conceptual clarity, this distinction is also of normative importance.

Divided Times (Oxford: Oxford University Press, 2021), 188; Paolo Mancini, 'Media Fragmentation, Party System, and Democracy', *The International Journal of Press/Politics* 18, no. 1 (2013): 47; Sunstein, #*Republic*, 60–61.

4.2 Beyond Conceptual Clarity: The Normative Importance of the Distinction

Competitions of all kinds need to meet certain requirements or are dependent on certain background conditions in order to be valuable or even work properly. There are at least three levels at which these conditions can be analysed. At the most basic level, as Frank Knight observed, a good competitive game should maintain a balance between capacity, effort, and unpredictability.[64] Competitors should have the skills necessary to play the game, their efforts should affect the result of the competition to a certain extent (competition, in this view, cannot be a pure lottery),[65] and the result of the competition should not be known in advance, as this would disincentivise the competitors from even trying.

Beyond these basic conditions, which apply to every competitive game, there exist two other levels of inquiry. The second level focuses on the function of the competition. It relates to the conditions that each competition-based design—parallel or friction—must meet for the design to function. Concerning parallel competition, the design of the competition must (1) guarantee that the competitors are in their lanes and can compete without interference and (2) fulfil (1) in a way that incentivises them to do their best. Friction competition, on the other hand, must (1) be designed so that the competing parties are able to clash in a way that corresponds with the purpose of the competition and (2) fulfil (1) in a way that incentivises them to do their best. The third level of inquiry relates to the specific requirements that are needed for each competition to work in different institutions, for example, specific rules of procedure in the court, antitrust laws in the market, elections laws in politics, and different codes of professional ethics.

Here I wish to focus solely on the *second level*. Thus, I assume that both concepts of competition I discuss should be considered 'good' competitions according to Knight's definition,

[64] Knight, *The Ethics of Competition*, 63.

[65] Some include lotteries as a kind of competition. See, for instance, Wolff, 'The Ethics of Competition', 89–90. I do not commit to a particular view on this issue.

and I will not get into details of specific institutions. To clarify, I do not claim that securing the second-level conditions is sufficient for each competition to function. The third level is also necessary and should complement the relevant concept of competition. For instance, it might be the case that parallel competition would require a different kind of professional ethics than friction competition. However, I will not be able to provide a fully developed account of this topic here. And again, I am not sure that these ethical implications could be generalised, for they are usually institution-specific.[66]

In what follows, I argue that these second-level conditions of each design generate independent, design-based normative reasons for higher and lower requirements of equality between competitors and for limiting or widening individuals' (negative) freedom. In other words, I show that each concept of competition carries different normative implications concerning central values in political philosophy. Subsequently, I argue that if an institution is justified by one of the concepts of competition (say, parallel competition), treating it as the wrong kind of competition (i.e., friction competition) by using an undifferentiated concept could defeat the purpose of encouraging competition in the first place.

4.2.1 Competition and Equality

A common general claim about competition is that fair competition requires not just fair rules and impartial referees but also equal opportunities. For example, Brian Barry claimed that procedural fairness must be supplemented by what he called 'background fairness':

> Procedural fairness rules out one boxer having a piece of lead inside his gloves, but background fairness would also rule out any undue disparity in the weight of the boxers [or] sailing boats or cars of different sizes being raced against one another unless suitably handicapped.[67]

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[66] I do, however, conduct a rudimentary discussion in section 4.2.2. about the fact that friction competition might require a special duty of care from participants, which might be translated to generalised requirement concerning professional code of ethics.

[67] Brian Barry, *Political Argument* (New York and London: Harvester Wheatsheaf, 1990), 99.

In the market, for example, it might be considered unfair that some people's background position is better than others' owing to an accumulated family fortune.[68] Likewise, in the legal system, it might be considered unfair that one party has a better lawyer and more legal resources than the other.

Another claim about equality and competition focuses not on fairness directly but rather on the kind of goods over which we compete. One important example of such a claim is made by Harry Brighouse and Adam Swift concerning 'positional goods'.[69] These are goods 'with the property that one's relative place in the distribution of the good affects one's absolute position with respect to its value'.[70]

The main thrust of the argument about positional goods and equality is that the reason we have for distributing positional goods equally is not susceptible to the famous levelling down objection (hereafter LDO). If the good is positional, its loss by one person is, by definition, the other's gain. So, if we level down the amount of good X the rich have, we will elevate the position of the poor. Thus, levelling down in these cases would not be irrational or stem from mere jealousy. Winning a competition is positional. If I win, you lose. Thus, if one has more resources (that are relevant for the competition) than the other, we can presumably require levelling down, as it will increase the chances of the worse-off winning the competition.

It is not the purpose of this chapter to evaluate this line of argument. It is, however, worth pointing out that what is doing the work in arguments that generate a stricter equality requirement

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[68] For example, see Forrester's summary of Rawls's view on this. Katrina Forrester, *In the Shadow of Justice: Postwar Liberalism and the Remaking of Political Philosophy* (Princeton: Princeton University Press, 2019), 13.

[69] Harry Brighouse and Adam Swift, 'Equality, Priority, and Positional Goods', *Ethics* 116, no. 3 (2006): 447. Another example is Rawls's argument about 'political liberties'. Rawls does not limit his argument to competition only, although the examples he uses are mostly about legal and political competition. In short, he argues that concerning some things, which he calls political liberties, the requirement for equality between individuals should be stricter to prevent a situation in which 'those with greater responsibility and wealth can control the course of legislation to their advantage'. Rawls's argument is essentially a combination of goods- and fairness-based arguments. Because the goods in question are political liberties, it would be unfair to distribute them unequally. In any case, Rawls also does not focus on the design of the competition. See Rawls, *Political Liberalism*, 324–29.

[70] Brighouse and Swift, 'Equality, Priority, and Positional Goods', 472.

for competition is not the kind of good itself (positional or non-positional) but rather fairness. To illustrate, consider the following statement:

> Where a good is positional because its value is competitive, the value of a fair competition may provide a further reason to prefer equality to inequality […]. Competitors being equal, in some relevant respects, may be essential to a competition between them being fair.[71]

The reason Brighouse and Swift give for equalising the resources of the competitors is that we want the competition to be fair—not that we wish to elevate the situation of the worse-off. They explicitly recognise this fact. Thus, the question is whether this demand for equality has anything to do with the kind of good in question.

In any event, for the sake of my argument, assume that both lines of argument—fairness-based and goods-based—are valid. My aim is to highlight a different kind of relation between equality and competition, one that is not focused on fairness or the type of good in question: the relation between equality and the *design* of the competition. In parallel competition, even if there is no equality of opportunity and no 'background fairness', and even though the goods at hand are positional, the competition can (ostensibly) still generate the desirable social benefit it is meant to generate, at least partially. The most obvious example is the free market. Even under conditions of extreme unfairness, economic competition can still generate the social values it is designed to generate (e.g., efficiency and growth), even if not in an ideal way.

To give another example, consider again the example of the 100-metre sprint. Even if one of the competitors was Usain Bolt and the other was a mediocre runner, there would still be value in watching Bolt run as fast as possible. To be sure, an unequal running competition would be less competitive, as Bolt might not be incentivised to give his absolute all (as evidenced by the unforgettable picture of Bolt slowing down at the end of the 2008 Olympics 100-metre finals after making sure he would be first to cross the finish line). However, because parallel competition is

[71] Ibid., 475–76.

designed to maximise the effort of each runner in a space of non-interference, and the relation between the competitors is not *constitutive of success* in the competition, the design of the competition can still work, even if in a bad, and possibly unfair, way.

This does not mean that inequalities between competitors are of no significance in parallel competition. As mentioned above, parallel competition does have a significant relational element. Had Bolt been competing in the finals against an amateur runner, most, I think, would not have considered this a competition at all. The same happens in the market when one player becomes so big and powerful that it can dictate prices.[72] Still, above a certain threshold (e.g., of running ability), at least in theory, functioning parallel competition is compatible with a wide range of inequalities.

In contrast, in friction competition, equality or parity between the competitors is *constitutive* of the competition itself. Take Barry's boxing example. Because the performance and the level of competition of each boxer are *dependent* on the level of the other, significant disparities between the two would not only be unfair (which is what Barry emphasised) but would also render the competition useless since the competitors cannot simply try to maximise their performance on their own, as they can in the parallel case.[73] Similarly, in a legal competition, as I argue in chapter 5, it is not merely unfair for one side to possess more legal resources. Indeed, it essentially *undercuts the functional design* of the competitive arrangement itself. The whole idea underlying adversarial legal systems is that each party will produce the best legal argument possible and that the clash between

[72] Notice, however, that inequalities can affect economic outcomes even in cases that cannot be considered pure monopolies. See Joseph E. Stiglitz, *The Price of Inequality* (London: Allen Lane, 2012).

[73] One could argue that there are very uneven friction competitions that are still of value. For instance, in the FA cup where teams from the Premier League compete against teams from the Championship, the competition is radically uneven, but still not useless. However, the analogy with sporting competitions might be a bit misleading here. It could be the case that in a one-off uneven game the poor team wins. This would create the Cinderella story everybody loves to love. But overall, as an institutional design, if we look at the achievements of rich and poor football clubs, we can see that the competition is really taking place among the rich clubs only. So, when we translate this into an intuitional design, an uneven friction competition will create unequal patterns that will render the frictional design useless, even if in some rare cases the poor do win. This is a good example of how normatively analysing institutional designs cannot be undertaken only by finding counterexamples. As I have argued in the previous chapter, the fact that in some rare cases friction competition could work even when the competitors are unequal, does not mean that equality is not constitutive of the design of friction competition.

the arguments will consequently lead to the emergence of the truth. But if one side has more legal resources, she can use them to prevent the other side from producing the best legal argument.[74] That is because this sort of institutionalised competition is frictional and not parallel.

Another way to articulate this difference between parallel and friction competition in terms of equality is to think about competitions that involve recurring games. To name but one example, in the market, we normally allow competitors to accumulate their 'wins' in a way that affects the next 'round' of the competition. If one secures a good deal, she will start the next 'race' in a better position than someone who has just lost (e.g., economies of scale or the more normatively loaded term 'the Matthew Effect'). There might be a limit to how much one can accumulate for market competition to work. However, in general, no attempt is made to level the playing field at the beginning of each transaction, and the competition still functions to some degree in spite of that (even if it is unfair).[75]

Conversely, in the legal system, the fact that someone has lost her last case should not, at least in theory, have any effect on her next case. If a losing party happens to compete again in court, the case is supposed to start from a wholly clean slate and be judged anew.[76] The clash between arguments in each respective round is meant to bring about legal justice. One explanation for this difference is precisely the relation between each concept of competition and equality: equality between players, even repeating players, is constitutive in friction competition but not in

[74] Undoubtedly, some negligible levels of inequalities between competitors will always exist, even within a highly regulated friction competition. I am not committed to a very strict, caricature-like view of equality.

[75] This is not to say that such a 'carry-over' could never undermine parallel competition. For instance, suppose every time the winner of a 400-metre sprint wins, the rules dictate that she can start 5 seconds ahead of her competitors in the next competition. Soon enough, one might argue, this would render the subsequent races uncompetitive, since the gap between competitors might become too wide. This example demonstrates that there can be a limit to the level of inequalities even in parallel competition. However, it does not change the fact that in competitive social institutions such as the free market, such carry-over is massively tolerated, and does not completely undermine the social function of the competition, in contrast to friction competition, for which equality between competitors is constitutive.

[76] In practice, as Marc Galanter has shown, strong repeating players do enjoy accumulated structural advantages. Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', *Law & Society Review* 9, no. 1 (1974): 95–160.

parallel competition.[77]

Therefore, the distinction between the two concepts of competition gives rise to a novel, independent requirement for equality that stems from the design of the competition, which the literatures on fair equality of opportunity and positional goods do not capture. It shows why we have at least one design-based reason for requiring a higher level of equality between competitors in friction competition than in parallel competition.

4.2.2 Competition and (Negative) Freedom

For each concept of competition, there exists an institutional example where it is supposed to defend or maximise the freedom of the citizenry from arbitrary concentrated power. For instance, as mentioned, friction competition between branches of government over power (the separation of powers) is meant to create a balance that prevents each branch from possessing too much power and thus protects the freedom of the citizenry. Similarly, parallel competition is meant to create a decentralised system in which each individual is free to pursue her own goals. But while under both concepts, there are specific instances in which the social benefit of the competition is supposed to defend or maximise freedom, the relation between the design of each competition and freedom is a different matter altogether.

The relation between parallel competition and freedom is relevant at two different levels. The first is the *internal level*, that is, the relations between the competitors. In this sense, parallel competition resembles the conceptual structure of negative freedom. I use the most general definition—negative freedom as freedom from external interference.[78] Parallel competition is

[77] Surely, there are other, more nuanced explanations for this difference, based on incentives, fairness, and the like. Also, there are more complicated, mixed, examples. For instance, in the public forum, one might think that there should be a frictional competition between ideas, but that speakers are entitled to accumulate 'wins' in terms of credibility, i.e., gain public credibility having been previously proven right on some issue. Thus, my argument is neither exclusive nor sufficient. I use it only to show why the difference between the two concepts of competition tells us something important about equality and the way we treat recurring competitions.

[78] Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1979), 122–3.

supposed to create a space of non-interference for each competitor, which the other competitor cannot breach. Each competitor, in Simmel's words, competes 'without touching' the other.[79] Thus, negative freedom from the interference of other competitors is constitutive of the design of parallel competition.

The second level is the *external level*, that is, how the rules of the game are imposed on the competitors and restrict their negative freedom. Parallel competition, specifically in the free market, is normally praised for enabling spontaneous social coordination with minimum internal and external interference. Competitors do not interfere with each other's efforts, and a minimal set of rules is needed to regulate their behaviour. This notion, for example, underlies the right-wing political inclination to resist regulation of the free market and argue against central planning or the arguments made by some supporters of radical free speech in the public sphere.

However, there can be parallel competitions that necessitate high levels of external interference. For instance, parallel competitions like ski jumping or golf prohibit competitors from interfering with each other's efforts but also impose highly restrictive rules that allow competitors to only act in narrowly specific ways.[80] Thus, arguments for minimal external interference in institutional parallel competitions are not directly derived, as some suggest, from the design of the competition.[81] There is a need for an additional argument to justify minimal external intervention. The usual suspects, at least concerning the market, are epistemic arguments about the way individuals know best what is good for them or arguments against the accumulation of state power.

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[79] Simmel, *Conflict*, 59.

[80] These external restrictions may be necessary to ensure the competitors' positive freedom, i.e. their ability to carry out the activity the competition involves. I focus here solely on negative freedom, because, as mentioned above, one of the most basic conditions for the success of a competition is that the competitors have the skills necessary to play the game. Therefore, virtually any kind of competition assumes that the competitors enjoy some degree of positive liberty. To compete in a running race, one must have functioning legs (natural or prosthetic). Similarly, as I argue in chapter 5, to legally compete in an adversarial trial, one must have some minimum threshold of legal resources. However, because the requirement of positive liberty can be attributed to both concepts of competition, the distinction I am offering will not do much to determine or affect the level of positive freedom required in each context. This will have to be determined on a case-by-case basis, as part of the third level of inquiry discussed above.

[81] E.g., Friedman, *Capitalism and Freedom*, 8.

The point is that identifying economic competition with unlimited negative freedom from external interference is inaccurate.[82] First, economic competition can work with a significant amount of external interference. Scandinavian welfare states, for instance, are characterised by a mixture of a strong social safety net, robust redistributive policies, and free and competitive markets. Second, it is not competition per se which lies at the heart of the philosophical argument against state interference. What is more, sometimes, in order to meet the constitutive condition of internal non-interference in parallel competition, external interference by the state is absolutely necessary to keep competitors from turning it into friction competition.

Antitrust laws are the most obvious example of such external interference in the case of the free market. As Jonathan Wolff has argued, deontological libertarians cannot justify antitrust laws that are aimed at dismantling monopolies by turning to general arguments from freedom—for there is no reason to limit the freedom of people to create monopolies.[83] The reason to do so stems from the idea of competition: monopolies disrupt economic parallel competition by extracting rents and by exercising power over prices, suppliers, and producers in ways that interfere with the competitors' efforts to produce, market, and sell goods. Hence, competition itself is what does the normative work here, not general freedom-based libertarian arguments.

Having said this, although the reason for minimal external interference is not necessarily derived from the design of the competition, it is no surprise that supporters of negative freedom turn to parallel competition as their preferred institutional mechanism. That is because this kind of competition secures internal non-interference between individuals: all one needs to do is minimise the number of external rules.

In contrast, friction competition leads to a different conclusion. In friction competition, the

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[82] Ibid. See also Satz, *Why Some Things Should Not Be for Sale*, 21–5.

[83] That is, there is no reason to limit this freedom, provided these monopolies do not infringe some version of the Lockean proviso. For a full defence of this claim see Jonathan Wolff, 'Libertarianism, Utility, and Economic Competition', *Virginia Law Review* 92, no. 7 (2006): 1619–22.

task of the institutional architect is to create the conditions that will secure a very specific clash from which the social benefit will emerge. It matters both internally and externally. Internally, the whole point of friction competition is to construct a controlled space in which competitors can interfere with one another. Therefore, it is, by definition, not conducive to negative liberty. Externally, at least as a rule of thumb, it seems that maintaining a friction-based design requires much more extensive regulation. What I call friction competition is less 'stable', as Arthur Applbaum has it, since it needs 'carefully constructed and monitored conditions'.[84] People cannot be left alone if we wish them to act according to specific instructions and generate the desirable clash that is expected to produce a social benefit of some kind.[85]

Indeed, this claim about external interference is inconclusive since, at least theoretically,[86] one can think of examples demonstrating that some parallel competitions necessitate high levels of external interference and that some friction competitions are based on very few rules. All I wish to claim is that we have a pro tanto reason to believe that institutions based on friction competition require higher levels of external interference with competitors' negative freedom to function properly. Nonetheless, even if one does not buy this argument concerning external interference in friction competition, it is still the case that friction competition is less compatible with negative liberty because of the internal clash it requires between competitors.

Finally, the difference between the two concepts of competition concerning negative freedom carries an important implication for the popular philosophical argument that competitive

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[84] Applbaum, *Ethics for Adversaries*, 198. Heath also observes that what I call parallel competition ostensibly requires less social control but he does not distinguish between the two concepts. Heath, *Morality, Competition, and the Firm*, 214–15.

[85] This could serve as an explanation for associating parallel competition with large number of competitors. As Durkheim argued, one of the founding characteristics of modern societies is that they are organised by a mechanism that does not require a high amount of 'social control'—what I call parallel competition (he is mostly considered with the market but not only). See Durkheim, *The Division of Labour*. So the argument is that parallel competition is better for coordinating mass societies in which a high level of social control over so many conflicts will not be possible. Heath, *Morality, Competition, and the Firm*, 214.

[86] In reality, friction-based institutions are always highly regulated.

institutions 'pit people against each other'.[87] Since philosophers have not distinguished between the two concepts of competition, they have overlooked the fact that each concept pits people against each other *in a different way*. In parallel competition, although competitors are pitted against each other, the lack of friction makes the competition less confrontational. This can explain why thinkers like Friedman and Simmel consider parallel competition as non-rivalrous.[88]

This fact could lead to different normative implications. One example could be that in friction competition, we might have an additional duty of care to ensure that the competition is civilised and restricted so that the harm inflicted on competitors is controlled (which could be manifested in different professional codes of ethics). This duty of care could justify external interference where friction competition is needed, not only for the sake of social benefit but also to protect competitors from one another.

I do not wish to develop a full account of such a duty of care in this chapter. Instead, my aim is only to show that the different relations between the designs and negative freedom could lead to new, more nuanced, design-focused normative discussions about competition, which go beyond the general debate regarding competitive vs non-competitive institutions and the general debate about freedom.

4.2.3 The Objectionable Price of Using an Undifferentiated Concept of Competition

Having established that each concept of competition carries different normative implications, I now turn to highlight the problem of using these concepts interchangeably. Consider the imaginary states Frictionistan and Paralleland. Both are modern liberal democracies and differ only in that in Frictionistan, all competitions are treated as friction competitions, whereas, in Paralleland, every competition is considered to be a parallel competition. In both countries, a national debate has erupted over inequality, in this case, in the electoral system. On one side of the debate are people

[87] Hussain, 'Pitting People Against Each Other'.
[88] Friedman, *Capitalism and Freedom*, 119; Simmel, *Conflict*, 58.

who think it is wrong that there can be significant disparities, in terms of resources, between parties or candidates. On the other side are people who argue that each party should do its best to win the elections without considering the efforts or resources of the other side. Moreover, according to this view, if one party gets more money from its voters, it must be doing something right.

In Frictionistan, the benefits of political competition are expected to emerge as a result of the friction between the parties. Therefore, the state has decided to put a strict cap on campaign finance to ensure the ideal functioning of the friction-competition-based design. In Paralleland, however, electoral competition is seen differently: the social benefits do not emerge from a clash between the competing parties but rather from the aggregation of votes achieved through parallel striving. The system is designed to allow each party the negative freedom to maximise its efforts to convince voters—as long as each party does not interfere with the work of the others. Therefore, the people of Paralleland see no reason to restrict the parties' efforts and decide to leave the system as it is.

The lesson of this story is that if we interpret the design of a particular institution in terms of parallel competition, the policies that correspond to this interpretation can undercut a friction-based design (and vice versa). In the example above, supporting a parallel-based interpretation means designing an electoral system that does not allow friction competition. Therefore, using an undifferentiated concept of competition might bring in parallel-based arguments, which in turn might undermine the correct interpretation (assuming one holds a friction-based view of political competition).

The same story can be told about competition over ideas in the public forum, and not only concerning equality and freedom. For instance, as I explain in chapter 6, the people of Frictionistan could design a media system containing only one news outlet but one forced by strict regulation to facilitate debates among the different worldviews in society. The most important thing would be to bring together people with different ideas to argue with each other under conditions that

should produce the desired social outcome.

In Paralleland, on the other hand, the design of the system allows for as many news outlets to exist as necessary to ensure that different ideas and ideologies are represented. Each news outlet will do its best to 'sell' a particular ideology or view of reality to the public without interfering with the work of the other outlets. The aggregation of the activities of the many outlets is expected to lead to a desirable outcome. This time the difference between the two concepts lies in the number of competitors and the focus of the clash—rather than the different levels of equality—but the result is the same. If we choose one path, we undercut the other.

Therefore, if an institution is justified by, say, friction competition, treating it as a parallel competition could sometimes defeat the purpose of encouraging competition in the first place—but only sometimes because, again, there might be hybrid cases in which an institution can encompass both kinds of competitive mechanisms at the same time. My point in using the Paralleland vs Frictionistan example is only to show paradigmatic and important cases in which a hybrid solution is not available, and thus preferring one kind of competition undercuts the other.

To be sure, to make such judgements, we need to know what the correct interpretation of competition is in the context of each institution. But assuming that there is indeed a correct answer (as I discuss in the 'Application' part of the thesis), an undifferentiated concept of competition could be normatively problematic if it leads—as it often does—to the misinterpretation of the normative foundations upon which the institution is built and, as a result, to those foundations being undercut.

4.3 Is the Distinction Superfluous?

Over the years, some philosophers have put forward rudimentary conceptual distinctions among various competition-based institutional mechanisms. But instead of focusing on the different designs of each competition, they have emphasised other traits as the primary source of difference.

For example, (1) one competition is a zero-sum game, while the other is not; (2) one competition involves many players and is therefore impersonal, while the other is personal in character and therefore leads to a more direct rivalry; and (3) in one competition the social goal is achieved unintentionally, by an invisible-hand mechanism, while in the other, competitors intentionally compete over and try to achieve the social goal. In what follows, I attempt to show that the distinction I have drawn cannot be reduced to these existing distinctions.

4.3.1 Zero-Sum Games and Positional Goods

One central challenge to the distinction I offer is that the difference between the concepts does not stem from the way the competition is designed (friction vs parallel). The difference is that one kind of competition is a zero-sum game, while the other is not.[89] The term 'zero-sum game' is used both in economics and game theory to represent a situation in which the competition does not or cannot enlarge the pie, as it were.[90] More formally, it is a situation whereby if the total gains of the participants are added up and the total losses subtracted, they will sum to zero. Thus, the game is about distributing a fixed amount of value—whatever it may be—not enlarging it.[91] What one gains, the other loses.

The idea of zero-sum game tracks, to some degree, the philosophical discussion about positional goods. As Brighouse and Swift argue: 'The competitive features of the goods in question [positional goods] give them a zero-sum aspect; the mere fact that some have more worsens the absolute position of those who have less'.[92] One may argue, then, that the distinction between

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[89] For a paradigmatic example, see Joseph Heath, 'An Adversarial Ethic for Business: Or When Sun-Tzu Met the Stakeholder', *Journal of Business Ethics* 72, no. 4 (2007): 361. For more indirect examples, see Brighouse and Swift, 'Equality, Priority, and Positional Goods'; Hussain, 'Pitting People Against Each Other', 83–84; Rawls, *A Theory of Justice*, 466.

[90] David M. Kreps, *Game Theory and Economic Modelling* (Oxford: Oxford University Press, 1990), 10–12.

[91] It is important to bear in mind that not all zero-sum games are winner-take-all games. There are fixed-sum games in which the prize is weighted. Everyone gets something, but the winner takes home the most valuable prize. For instance, when the first and second place in a running race divide a fixed amount of money between them. One gets more, and therefore cause the other to lose something, but they can both come out ahead. For simplicity, I refer only to zero-sum-games, but my argument covers both winner-takes-it-all zero-sum-games and fixed-sum games.

[92] Brighouse and Swift, 'Equality, Priority, and Positional Goods', 477.

what I call parallel and friction competition is not really about different institutional designs but rather about different kinds of goods or games. For instance, competing in parallel is possible in the market because economic competition is not a zero-sum game and goods in the market are, by and large, not positional. The pie grows, and there is no need for a 'clash' between competitors. In contrast, in electoral competition, the pie cannot grow: one party's gain is unavoidably the other party's loss. Winning an election, in other words, is positional.

I agree that when it comes to the difference between market competition and political competition, the kind of goods that are involved does make a difference. However, the difference in the competition's design cannot be reduced to the kind of good at stake. There can be a parallel, zero-sum game competition and a frictional, non-zero-sum competition. Let us return to the running race analogy. The prize in such a competition is clearly a positional good: if one runner wins, the other loses, and the pie does not grow.

Nevertheless, the competition is designed in a parallel way that maximises the efforts of each individual without mutual interference. All each runner can do is run as fast as possible; they cannot interfere with each other's efforts. The fact that the competition is positional, therefore, does not render it necessarily frictional. The same applies to some economic views of competition in democratic elections, on which I elaborated above, according to which all electoral candidates (or parties) compete in a parallel manner. These views show that an institution can be designed as a parallel competition, even if the competition is a zero-sum game or over a positional good, as is the case in democratic elections.

Similarly, friction competition can be designed in cases of non-zero-sum games. Examples of this combination are harder to find in sports, where most competitions are zero-sum games. Let us take an institutional example instead. Recall that according to the Millian conception of competition between ideas in the public forum, the clash of ideas within is supposed to generate a social benefit of the epistemic kind. This is an instance of friction competition, where no

straightforward zero-sum prize exists: it is more of a dialectic process in which all parties improve their ideas as a result of competing one against the other. Hence, at least according to this view, even if some ideas fare better than others, the pie grows as the clash improves everyone's ideas and leads to the creation of new ideas.

Again, I concede that normally friction competition is used as an institutional mechanism in cases of zero-sum games and positional goods, whereas parallel competition is sometimes used for non-zero-sum games (but not always). However, the type of game alone—zero-sum or non-zero-sum—cannot replace the design of the competition as an explanation for the difference between the two concepts of competition.

4.3.2 Impersonality and Size

The second alternative explanation regarding the difference between the two concepts is that parallel competition consists of a large number of players—which makes it less frictional and more impersonal—while friction competition consists of a smaller number of personally identifiable players. Friedman, for example, in support of parallel economic competition, tried to distinguish between two concepts of competition along these lines:

> [C]ompetition has two very different meanings. In ordinary discourse, competition means personal rivalry, with one individual seeking to outdo his known competitor. In the economic world, competition means almost the opposite. There is no personal rivalry in the competitive market place. […] The essence of a competitive market is its impersonal character.[93]

Similarly, Rawls distinguished between two kinds of envy to show that envy caused by competition in the market is different from envy derived from competition for office and honour:

> The envy experienced by the least advantaged towards those better situated is normally general envy […]. The upper classes say are envied for their greater wealth and opportunity; those envying them want similar advantages for themselves. By contrast, particular envy is typical of rivalry and competition. Those who lose out in the quest for office and honor,

[93] Friedman, *Capitalism and Freedom*, 119.

> or for the affections of another, are liable to envy the success of their rivals and to covet the very same thing that they have won.[94]

Like Friedman, Rawls grounds his distinction in the fact that particular envy is personal—it exists between competitors who know each other and pursue the same goals—while envy between economic classes is 'general' and impersonal.[95]

As was the case concerning the zero-sum game explanation, this explanation also captures something important about the difference between economic, legal, and political institutions in liberal democracies. In perfect economic competition, there exists, ostensibly, a vast number of competitors, most of whom do not know one another and coordinate through the price system and a shared legal framework. Legal competition and political competition are clearly more personal: they include a small number of competitors whose personal identity is important for the competition itself. However, once again, this observation does not wholly explain the differences between competitions as institutional mechanisms. After all, there can be, and indeed are, small-scale parallel competitions that include personal rivalry, as well as friction competitions that are impersonal and include many players.

In the realm of sports, for instance, a competition between two runners is a parallel competition that is personal and small-scale. On an institutional level, economic views of democracy depict a world in which there exists a parallel competition between a small group of candidates who know each other personally.[96] To distinguish between a parallel-based view of democratic elections and a friction-based view of the adversarial legal system, turning to size and familiarity will not suffice.

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[94] Rawls, *A Theory of Justice*, 466.

[95] Another interpretation of this paragraph could be that Rawls is referring to the difference between positional and non-positional goods. I think both interpretations are plausible, but I emphasise Rawls's attention to impersonality for the sake of explaining the alternative explanation I present in this section.

[96] Mansbridge, *Beyond Adversary Democracy*, 17; Schumpeter, *Capitalism, Socialism and Democracy*, 243; Young, *Inclusion and Democracy*, 19–21.

Examples of impersonal friction competitions with many players are harder to find. One good example would be online war games. For instance, Fortnite, a very popular war game, takes place among individuals who have nothing to do with each other. It can be played simultaneously by over a hundred players until the last person is left standing. It is definitely a friction competition since the competitors are trying to 'kill' each other. I was not successful in finding an equivalent example at the institutional level, but this should not make a difference for two reasons. First, the fact that there are institutional parallel competition mechanisms that are not impersonal or include many players is enough to establish that this explanation is insufficient. Second, the Fortnight example shows that it is at least logically plausible to have impersonal friction competition of some kind with many players.

In conclusion, the distinction between parallel and friction competition cannot be reduced to the question of how many players are involved or the level of familiarity between them.

4.3.3 The Competitors' Intentions

Another attempt to distinguish between different kinds of competition-based institutional mechanisms is grounded in the difference between competitions in which the social good is achieved indirectly, as a result of unintentional, invisible-hand-based competitions, and competitions in which the competitors intentionally compete over the social good.

The basic narrative underlying invisible-hand arguments is of a process in which the combined effect of numerous individuals acting in their narrow self-interest results in the emergence of a social pattern, unintended—as well as unforeseen—by them.[97] Accordingly, it could be suggested that invisible-hand-based competitive institutions (invisible-hand arguments

[97] Geoffrey Brennan and Philip Pettit, 'Hands Invisible and Intangible', *Synthese* 94, no. 2 (1993): 192; Heath, *Morality, Competition, and the Firm*, 209–10; McMahon, 'Morality and the Invisible Hand', 252; Nozick, *Anarchy, State and Utopia*, 18–19; Edna Ullmann-Margalit, 'Invisible-Hand Explanations', *Synthese* 39, no. 2 (1978): 270–72.

do not necessarily involve competition)[98] do not involve direct friction as the result of a competition over the social goal itself since each competitor is expected to act according to her self-interest. [99] For instance, producers and consumers do not compete over how to generate economic growth; they just attempt to extract the most value possible from each transaction.

Conversely, in intentional competitions, the competitors do not compete solely in the pursuit of their self-interest but also directly intend to achieve a foreseen social goal. For instance, in a competition over ideas in the public forum (under one plausible interpretation), both sides ostensibly attempt to offer the best idea for the common good and try to get to the truth rather than merely seeking to convince supporters in their narrow self-interest. In such a case, one might argue, more friction is to be expected since there is an additional element to compete over. It is not a competition in which both sides simply try to maximise their self-interest, irrespective of the particular social goal at issue. Rather, they care about the social goal *itself*, and hence there are more opportunities for friction.

If this is true, then the distinction between parallel and friction competition could potentially be reduced to a distinction between competitions where the competitors directly intend to achieve a foreseen social goal (friction competition) and competitions in which they do not (parallel

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[98] The relation between invisible-hand arguments and competition is not as straightforward as some seem to assume. In fact, an invisible-hand argument does not necessarily include competition at all. One needs to explain, in Dietsch's words, what is the 'animating force that breathes life into the invisible hand and guarantees its functioning' ('The Market, Competition, and Equality', 214.) Brennan and Pettit for instance, do not even consider competition as a motivational source of invisible-hand-based economic competition—but only the pursuit of self-interest ('Hands Invisible and Intangible', 209).

[99] Notice that invisible-hand arguments come in two forms. The first focuses on the *emergence* of social patterns and institutions and tries to explain how they came about. It sees invisible hand arguments as a causal explanation for a certain process. For instance see Edna Ullmann-Margalit, 'The Invisible Hand Viewed and Reviewed', *Journal of Economic Methodology* 17, no. 1 (2010): 78. Daniel Luban refer these as 'backword-looking', spontaneous order explanations. See 'What Is Spontaneous Order?', 68–69. The second is the *end state* form, which focuses on the way social institutions function. This type of argument specifies the conditions under which an institution reaches a state of equilibrium, which is supposed to serve the institutional purpose (e.g., legal justice, economic growth) in an unintentional manner. See Brennan and Pettit, 'Hands Invisible and Intangible', 200; Ullmann-Margalit, 'The Invisible Hand Viewed and Reviewed', 78. Luban calls these 'forward-looking', spontaneous order explanations. Under both forms, the social goal is unintended and unforeseen by the competitors, so I will put this distinction to one side and discuss invisible-hand arguments in general.

competition).

Yet again, although I think this interpretation captures something interesting, it still does not render the distinction between parallel and friction competition superfluous since there can be, and there actually are, parallel competitions that could be described as intentional competitions and friction competitions that could be described as based on the invisible hand arguments. In the realm of sports, the distinction between intentional and unintentional competitions is almost irrelevant, as athletes usually focus on winning, not on the social benefits of sport.

Let us, then, go straight to institutional examples. For instance, friction competition between political parties could be described in (at least) two different ways in terms of the competitors' intentions (or a mix of both). The first is that it is a competition between two self-interested parties competing over power. As mentioned, the social benefit that emerges from this view is regulated adversarialism.[100] Controlled and planned friction competition allows each party to fight with the other side in an ordered and beneficial manner. The second is that party competition is not only about regulated adversarialism but also about a 'commitment to persuade others of their views through the appeal to reasons that can be generally shared'.[101] Under such views, friction party competition is beneficial only when the parties act responsibly—namely, when they come up with ideas about the common good and try to persuade people instead of acting solely in their self-interest. In both cases, party competition is described as frictional, but the intentions of the competitors are different.[102]

The same argument could be applied to parallel competition in the public forum, which can either be described as a competition in which each competitor tries to convince the public that their idea is right because of motivations based on self-interest or as a competition in which the

[100] Rosenblum, *On the Side of the Angels*, 12, 120; White and Ypi, *The Meaning of Partisanship*, 10–11, 60.
[101] White and Ypi, *The Meaning of Partisanship*, 3.
[102] To incentivise the right intentions under each model, at the third level of inquiry, there would need to be a complementary of code of ethics.

competitors aim to achieve the truth (or both). In each case, the competitors' intentions will differ, but the design remains the same. Therefore, there can be parallel intentional competitions and friction invisible-hand-based competitions (and vice versa), and so the distinction I offer is still irreducible.

To recap what I have said so far, I have noted that all three explanations capture something about the different institutional designs based on competition. Some institutional designs based on friction do involve a low number of identified players and a zero-sum game. In contrast, some institutional designs based on parallel competition involve a larger number of players and non-zero-sum games. Additionally, some of these parallel-based designs can be described as being supported by invisible-hand arguments. However, none can replace the distinction I am offering between different concepts of competition, which captures something distinct. That is, the different designs of competitive arrangement and the way each design is expected to bring about the social benefit: in parallel or through friction.

4.3.4 Final Challenge: What If Even the Market Is Not Parallel?

One could argue that even if the distinction I offer is not reducible, it is of little value because there is no such thing as a 'pure' parallel competition in real life. For instance, some argue that even the market—the paradigmatic example I use for the parallel competitive institutional mechanism—has features of both parallel and friction competition. Thus, when firms 'duel with one another' and 'launch price-cutting campaigns', they engage in friction competition.[103] So, if even the market is not parallel, why should we take this category seriously at all?

Without developing a full argument about whether these ostensible frictional elements of the market are indeed frictional, I offer the following response. Even if one accepts that there are parallel elements in real-life institutions (as I have tried to show in various examples above) but

[103] Mark Pennington, *Robust Political Economy: Classical Liberalism and the Future of Public Policy* (Cheltenham: Edward Elgar, 2011), 22–23.

also argues that they are always mixed with frictional elements, then it seems that my distinction is still valuable. That is because it allows us to discern which elements are frictional and which are parallel and to evaluate the normative and functional implications of such distinctions. It also shows us that philosophical institutional justifications that rely only on one model of competition are overly idealised or just false. Alternatively, one could hold that there are no parallel elements in real life whatsoever. Since I have shown that there are examples of real-life institutional manifestations of parallel competition—both in the market and in other institutions (e.g., GOTV strategies, echo chambers)—this option is unlikely to be convincing.

Nonetheless, for the sake of argument, assume that it is true. Even in such a case, the distinction I offer is valuable, for it would allow us to discover that institutional justifications based on the idea of parallel competition are overly idealised and completely undermined in real life. Since there is a long-established tradition of parallel-based philosophical justification for almost all major institutions in modern liberal democracies, the acknowledgement of this fact is of great value in and of itself.

4.4 Conclusion

Competition is an important concept in normative political theory and distinguishing between the different concepts of competition is normatively important. This chapter has been devoted to establishing both claims. To do so, I have argued that the two concepts of competition provide us with analytical tools to distinguish between different institutional justifications and their corresponding competitive institutional designs. I have shown that, beyond conceptual clarity, this distinction is normatively important. It highlights that each concept of competition carries different design-related normative reasons for and against freedom and equality, which are usually not considered in philosophical debates about these values. Accordingly, I have argued that failing to recognise this difference—that is, using an undifferentiated concept of competition, thereby

mixing the different justifications for the two concepts—could undercut the reasons we had in the first place for using a certain competitive design. Notice that I have not provided any arguments for or against either concept. I have tried to supply a successful conceptual innovation that opens the way to thinking about competition in a different and, to my mind, better way.

The next chapter opens the second part of the thesis. In it, I take an additional step and use my account of the two concepts of competition to normatively analyse different institutional designs, while applying the institutional limits of markets account I have developed in part 1. I will analyse two very central institutions to any liberal democracy—the legal system, and the media—focusing on two popular competition-based institutional designs—the adversarial legal system and the marketplace of ideas. In chapter 5, my aim will be to determine what should be the limits of the market in legal representation; a market in an institutional good that is embedded within the adversarial legal system. In chapter 6, my focus will not be a specific institutional good, but the institutional design as a whole. I will determine whether the marketplace of ideas, the institutional design itself, should in fact be a market.

Recall that in chapter 1, I presented a list of market norms and characteristics MLM theorists usually discuss. Competition, one of the key institutional elements of markets, was absent from that list. Thus, another goal of mine in the next two chapters is to demonstrate how competition adds an important layer of complexity to the normative analysis of markets, and how without treating competition as a constitutive feature of markets, as most MLM theorists haven't, a proper institutional analysis of the limits of markets cannot get off the ground.

Applications

5

The Institutional Limits of the Market in Legal Representation[1]

Legal justice should not be for sale. Although most people find this uncontroversial, almost no one challenges the fact that legal representation (namely, lawyers and the other legal resources required for representation)—one of the most significant components of contemporary adversarial legal systems—is traded on the free market. This chapter offers a normative analysis of this discrepancy.

The Anglo–American adversarial method of adjudication is often defended as normatively appealing. First and foremost, the appeal lies in the supposed fact that its frictional competitive structure facilitates the discovery of truth, both in terms of the facts and in terms of the correct interpretation of the law. This, in turn, supposedly secures a high probability of delivering a just outcome.[2] Second, it is seen as a method that protects individual rights and ensures an equal, impartial, and consistent application of the law.

The method is characterised by legal frictional competition that consists (more or less) of the following three components: (1) a passive impartial tribunal (normally a judge and/or a jury); (2) formal rules of procedure; and (3) two or more competing parties who are responsible for presenting their respective cases as best as they can while opposing their adversaries.[3] As modern adversarial legal systems have become increasingly complex and professionalised, nowadays, one

[1] An earlier version of this chapter was published in *Politics, Philosophy & Economics*. See Agmon, 'Undercutting Justice'.
[2] See Wertheimer, 'The Equalization of Legal Resources', 309–31. Hereafter, I will use the term the 'truth of the matter' to refer to both discovering the facts and, and to the accurate legal interpretation.
[3] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (Oxford: Oxford University Press, 2015), 11–12; Rudolph J. Gerber, 'Victory Vs. Truth: The Adversary System and Its Ethics', *Arizona State Law Journal* 19, no. 1 (1987): 4–5; Luban, *Lawyers and Justice*, 57.

cannot normally make one's case in court effectively without professional legal representation.[4] Thus, ideally, component (3) of the adversarial method—the preparation and presentation of the legal argument, as well as the refutation of the opposing party's arguments—is performed by lawyers who advocate for their client with one-sided, partisan zeal with the sole aim of their client winning.[5]

The influence of legal representation on the adjudicative process intensifies in adversarial systems. This is due to the institutionalised passivity of the tribunal, which leaves control over significant parts of the process in the hands of the lawyers. In addition to being in charge of litigation during the trial, the lawyer is also responsible for the entire legal preparation process, from deciding on strategies for questioning witnesses and constructing legal arguments (to which the client is bound) to summoning experts. Thus, legal representation cannot be reduced only to the argumentative skills of the lawyers but also includes the access she has to quality legal resources.[6] The impartial tribunal only receives pre-processed legal material; its role is limited to assessing both sides' arguments and, in so doing, trying to extract the truth of the matter.

Thus, the quality of legal representation influences, in theory and in practice, the courts' decisions: the better the lawyer is, the greater the chance that the court favours her client's case. Therefore, allocating legal representation by the market—in which the more one pays, the better-quality legal representation one acquires—starts to look controversial, as the rich enjoy a structural advantage.[7]

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[4] Assy, *Injustice in Person*, 10; Lon L. Fuller, 'The Forms and Limits of Adjudication', *Harvard Law Review* 92, no. 2 (1978): 383; David Luban, 'Political Legitimacy and the Right to Legal Services', *Business & Professional Ethics Journal* 4, no. 3 (1985): 46.

[5] I will use 'lawyer' and 'legal representation' interchangeably throughout this chapter.

[6] See Luban, *Lawyers and Justice*, 57–58; Murray L. Schwartz, 'The Zeal of the Civil Advocate', *American Bar Foundation Research Journal* 8, no. 3 (1983): 546. Hereafter, in using the terms 'lawyers', 'legal representation' or 'quality legal representation', I refer both to the quality of the lawyer herself and the quality of legal resources available to her in managing the case, which depends on the financial resources of the client, as both influence the overall quality of the client's legal representation.

[7] Hadfield, 'The Price of Law', 956. Of course, money enters the 'legal system' in a broader sense, much earlier on. The emergence of disputes itself is influenced by the economic status of the opposing parties (as demonstrated in

To be sure, the potential influence of economic inequalities on the legal system has not been ignored. Legal scholars have long been concerned with the problem of 'access to justice'—people's inability to afford access to the court system.[8] Other worries have arisen concerning the ethical dilemmas that derive from the commercialisation of the legal profession.[9] However, this work has mainly focused on remedies designed to minimise the problematic results caused by the influence of economic inequalities within the *existing structure* of adversarial systems (e.g., implementing an ethical code for lawyers, supporting free legal clinics, and so forth). Almost all critics have refrained from challenging the fundamental structure of the whole system—that the legal representation is allocated via a market mechanism.[10] This attribute has been taken as a given and has, therefore, seldom faced normative scrutiny.[11]

This absence is particularly striking in light of the broad agreement that other legal functions, like prosecution and the judicial function, should not be marketised. Even staunch defenders of the market do not suggest extending it to the judicial system. In fact, libertarians usually regard adjudication, including legal representation (although sometimes not explicitly), as the

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William L. F. Felstiner, Richard L. Abel, and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming', *Law & Society Review* 15, no. 3 (1981): 633–37. However, these problems have been recognised and researched thoroughly, and are not unique to the legal system. Inequalities lead to a wide range of problems with respect to many parts of society. The purpose of this chapter is to show that the specific fact that contemporary adversarial legal systems are incorporated within a free market in lawyers leads to a different, more constitutive set of challenges.

[8] See, for example, Deborah L. Rhode, *Access to Justice* (New York and Oxford: Oxford University Press, 2004).

[9] See Markovits, *A Modern Legal Ethics*; Luban, *Lawyers and Justice*, 177–237; W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton and Oxford: Princeton University Press, 2010).

[10] A paradigmatic example for this phenomenon is Schwartz's discussion of the moral accountability of civil advocates (Schwartz, 'The Zeal of the Civil Advocate', 543–63.). He acknowledges and identifies normative requirements for the adversarial system that could be undercut by a free-market mechanism, but he does not question or challenge the market-based allocation of legal representation. Rather, he focuses on the implications of these requirements on the moral accountability of lawyers.

[11] Wertheimer is the only scholar I am familiar with who has provided a philosophical analysis of the market in legal representation within the adversarial legal system. However, he only discusses one justification of the adversarial legal system (providing just results) and focuses solely on civil cases (while I am discussing both criminal and civil cases). I elaborate on his argument in section 5.4 of this chapter. See Wertheimer, 'The Equalization of Legal Resources'. Additionally, Frederick Wilmot-Smith has recently published a book in which he argues for the primacy of justice over the market in legal resources. Nevertheless, Wilmot-Smith's argument—which is directed at all legal systems—is rather general and the pressing need for a detailed discussion on the adversarial legal system remains. See Wilmot-Smith, *Equal Justice*.

quintessential role of the state.[12]

In this chapter, I attempt this scrutiny and argue that the integration of a market in legal representation into the adversarial system undercuts the very normative justifications on which the system is based. The adversarial system has been justified in a way that assumes the absence of a market in legal representation. But the undeniable existence of such a market undermines the key merits that made the system normatively appealing in the first place. Furthermore, I argue that this undercutting reveals two implicit necessary conditions for the standard justifications to hold (which are currently unmet): that there should be (equal opportunity for) equality of legal representation between parties and that each party should have (equal opportunity for) a sufficient level of legal representation. In so doing, I outline an ideal reform to the system that would meet these conditions.[13]

The chapter is structured as follows. First, I briefly survey the historical development of the market in legal representation and detail its principal characteristics. Second, I present the three central normative justifications for the adversarial system, which together make up the normative appeal of the system. Third, I argue that the legal representation market undercuts this normative appeal in both the adversarial civil and adversarial criminal systems. Fourth, I show how this undercutting reveals the unstated requirements of equality and sufficiency. In this part, I also present my proposal for reform and reply to some objections to it.

Before presenting my argument, four short comments are required. First, in this chapter, the term 'the market in legal representation' denotes only three of the market's typical characteristics:

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[12] E.g., Hayek, *The Constitution of Liberty*, 200–201; Friedman, *Capitalism and Freedom*, 25; Nozick, *Anarchy, State and Utopia*, 14–15; Ayn Rand, 'The Objectivist Ethics', in *The Virtue of Selfishness* (New York: Penguin, 1964), 131.

[13] I should clarify that my ideal for reform is desirable solely in order to re-establish the appeal of the *adversarial* legal system. Further argument would be needed to apply the reform generally to *all* legal systems. Additionally, my intention is to make a *fairly general* normative claim about the adversarial legal system on the whole. Admittedly, my argument might not apply to some specific fields of law and would probably need refining in order to apply to specific adversarial systems. This simply highlights that there is more work to be done.

allocation according to agents' ability and willingness (1) to buy and (2) to sell, as well as (3) the innate tendency to produce economic inequalities. Most importantly, the market is indifferent to its distributional results; its sole concern is procedural, that is, that all transactions are voluntary and non-fraudulent.[14]

Second, some have argued that there might be independent reasons to think that legal justice should be a product of an entirely publicly owned endeavour.[15] It is not clear whether their arguments capture legal representation or not. In any event, the discussion on the public nature of the legal system is beyond the scope of this chapter. My focus is the marketisation of legal representation only.

Third, disparities between the rich and the poor are even more pronounced in cases which end in a plea bargain. Innocent defendants are more likely to plead guilty and receive harsher plea deals if they cannot access good counsel, and public defenders lacking sufficient resources are more likely to recommend taking plea bargains. This is not a minor point considering that over 90% of criminal prosecutions in the United States for the past 20 years have ended with a guilty plea.[16] However, I leave the exploration of the implications of my account concerning plea bargains for another time. Instead, in this chapter, I focus on the adversarial competitive adjudication process.

Finally, throughout the chapter, I use examples and empirical data from both the United States and the UK in order to support my arguments. More generally, I treat the adversarial legal system as if it is the same system in all common law, Anglo–American countries. Of course, this is not the case. There are important differences between adversarial systems in different countries

[14] See Nozick, *Anarchy, State and Utopia*, 163–64; Satz, *Why Some Things Should Not Be for Sale*, 17–21.
[15] For instance see Avihay Dorfman and Alon Harel, 'Against Privatisation as Such', *Oxford Journal of Legal Studies* 36, no. 2 (2016): 400–427. See also Brennan's response: Jason Brennan, 'Consequences Matter More: In Defense of Instrumentalism on Private Versus Public Prisons', *Crime, Criminal Law and Punishment* 11, no. 4 (2017) 801–15.
[16] R. Charles Breyer, Patricia K. Cushwa, and Jonathan J. Wroblewski, *Overview of Federal Criminal Cases–Fiscal Year 2021* (Washington, DC: United States Sentencing Commision, 2022).

which I do not address, as I try to remain at a more general level. Nonetheless, the idiosyncratic features of each country would, and should make a difference when applying my general argument about the market in legal representation in adversarial legal systems within the context of a specific country.

5.1. The Legal Representation Market in Adversarial Legal Systems

The altercation legal system—which preceded the adversarial system and had been in place since the Middle Ages—prohibited legal representation.[17] As the law became more complex and legal procedures grew more sophisticated, many defendants were incapable of effectively advocating for themselves, and even for those who could, trials were often too hasty to make effective arguments. As a result, pretrial processes of evidence gathering and argument construction were increasingly seen as unskilled and amateurish.

Following the volatile period of 1678–1688, England's Treason Trials Act of 1696 marked the first breach in the rule against defence counsel.[18] Many of those executed as a consequence of trials in which the crown was represented were believed to be innocent, convicted only due to political rivalries. This spurred a movement calling for greater protection of the rights of defendants. A central argument concerned the inherent inequality of prohibiting representation for the accused while the prosecution was represented by professional advocates.[19] To maintain parity, replacing a one-sided representation (of the crown) with a two-sided representation was in order, or so the argument went. A second argument was that treason cases are too complex to

[17] See Langbein, *Adversary Criminal Trial*, 51–56. It should be noted that only the defendant was expressly prohibited from hiring professional representation. Nevertheless, under the altercation system, representation was rare for the prosecuting party as well.

[18] The 1670s and the 1680s were a period of significant instability in England. Between 1678 and 1688 a series of upheavals roiled the body politic—including the Popish Plot (1678), The Rye House Plot (1683), and Monmouth's Rebellion (1685)—that resulted in major treason trials. See ibid., 68–69. See also Stephan Landsman, 'A Brief Survey of the Development of the Adversary System', *Ohio State Law Journal* 44, no. 3 (1983): 730.

[19] James Fitzjames Stephen, *A History of the Criminal Law of England*, 3 vols., vol. 1 (Cambridge: Cambridge University Press, 2014), 397.

leave individual defendants to defend themselves.[20] To address these claims, the Treason Trials Act allowed representation, although only in treason trials. Later, in the Prisoner's Counsel Act of 1836, Parliament extended the right to counsel to felony trials. With time, the lawyer-free altercation trial became lawyer-dominated and transformed into the adversarial system we are familiar with today.

Ironically, inequality soon emerged as a source of difficulty in adversarial systems as well. As John Langbein notes, many defendants in treason trials were 'persons active in high politics'. They were typically persons with great wealth who could afford to hire counsel and pay for their legal needs. Hence, 'the drafters of the Treason Trials Act of 1696 presupposed that paying for adversary justice was not going to be an obstacle for the clientele that the Act meant to benefit'.[21] With the expansion of the Act and, consequently, the lawyerisation of the legal system, the marketisation of legal representation began to emerge as a source of grievance. Almost immediately, resentment grew among those who could not afford quality representation.

Langbein recites several anecdotes, among them a woman, prosecuted in 1757 for forging a bond, who grumbled to the court: 'I have not a six penny piece left to pay a porter, much less [enough] to fee counsel […]. If I must die because I am poor, I can't help it'.[22] She was convicted and sentenced to death. Another defendant complained that he was: 'Convicted and condemned to die partly for want of money […] to employ counsel'.[23] Even some magistrates found cause to mention that a criminal unable to 'procure the aid of counsel to defend him[self], is often convicted', whereas the villain with the means to pay 'is acquitted and escapes justice […].'[24]

[20] Langbein, *Adversary Criminal Trial*, 98–102, 310.
[21] ibid., 103.
[22] Ibid., 317.
[23] Ibid.
[24] Ibid. The three paragraphs on the history of the adversarial legal system are taken from Assaf Sharon and Shai Agmon, 'Justice and the Market', in *The Cambridge Handbook of Privatization*, ed. Avihay Dorfman and Alon Harel (Cambridge: Cambridge University Press, 2021). They are the only paragraphs that do not appear in the version of the stand-alone version of the chapter published in *Politics, Philosophy & Economics*.

These (almost) three-hundred-year-old grievances are as relevant as ever. Today, in common law countries, legal representation in the adversarial system is bought on the market. Consumers (clients) can use their money to obtain the best legal representation they can afford. Producers (lawyers), on their part, can set their fees without being limited by anything other than market forces (though public defenders and prosecutors, whom I discuss later, are an exception to this rule). Unless some other normative criterion is considered, producers generally aim to earn as much money as possible from consumers. Consequently, the rich usually secure high-quality representation, while the middle class and the poor, if they are able to hire a lawyer at all, can only afford representation of lower quality. By 'quality of representation', I mean the professional level of lawyers, as well as the quality of legal resources available to them, such as experts and private investigators. The latter also cost a lot of money and are an integral part of the lawyer's work.[25]

These characteristics are not only present in the legal representation market *qua* market; they are exacerbated by its unique attributes. First, as was evident already during the eighteenth century concerning treason cases, the modern legal system is particularly complex. Lawyers undergo extensive (and expensive) training, the laws themselves are complex, the results of adjudication processes are unpredictable, and clients have trouble assessing the scope of the work that has to be done by the lawyer. Additionally, the adversarial method is competitive, and the stakes are usually high for the parties at trial. Clients, therefore, are willing to pay as much as they can to tilt the scales of justice in their favour. The combination of professional complexity and exceptional willingness to pay results in high fees and considerable disparities in the quality of representation that clients receive.[26]

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[25] See, for example, Galanter, 'Why the "Haves" Come out Ahead', 97–98, 114. Indeed, according to the American Bar Association's report (2014), most graduates from elite universities are employed by top private firms that seldom represent the poor. Moreover, a Legal Services Corporation (LSC) report from 2009 shows that the proportion of self-representation in court among low-income citizens is extremely high. See Legal Services Corportaion, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Washington, DC: LSC, 2009).

[26] Hadfield, 'The Price of Law', 963–99; Richard Moorhead, 'Filthy Lucre: Lawyers' Fees and Lawyers' Ethics—What Is Wrong with Informed Consent?', *Legal Studies* 31, no. 3 (2011): 349–50.

So, the legal representation market produces an advantage for the wealthy in terms of the quality of representation available to them. In a legal frictional competition, like the one in an adversarial system, such an advantage means that the privileged party de facto has a better chance of making its case. This common-sense and historical claim underpins the main argument of this chapter and is supported by the empirical evidence on the results of the adversarial system.[27]

Further evidence of the influence of the disparities that arise from the adversarial system is the various institutions that have developed in countries using the adversarial system, which attests to the fact that the legal system itself recognises the need to mitigate the influence of such disparities, or at least respond to it somehow. Examples of this phenomenon include class action, legal aid, and contingent fees mechanisms.[28] But these institutions have a negligible corrective force. Even if they were perfectly effective (a controversial assumption), they are either confined to a very specific field within the law (e.g., class actions) or simply insufficient to compensate for the disparities in the system as a whole (e.g., legal aid).[29] Consequently, such mechanisms are no more than a testament to the existence of the structural problems of the system.

I should clarify that the arguments presented so far should not be taken as showing that

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[27] For example, a survey conducted among American judges showed that court decisions are significantly influenced by disparities in the quality of legal representation. Posner and Yoon, 'What Judges Think', 43–46, 335–36. See also James M. Anderson and Paul Heaton, 'How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes', *The Yale Law Journal* 122, no. 1 (2012): 188–97. It should be noted that James Greiner and Cassandra W. Pattanyak have challenged the existing literature on the subject for 'purporting to measure quantitatively the effect of legal representation in civil disputes' and argued that it is extremely difficult to reach generalised conclusions regarding the impact of quality legal representation. According to them, legal representation does not always make a difference. See D. James Greiner and Cassandra Wolos Pattanayak, 'Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?', *The Yale Law Journal* 121, no. 8 (2012): 2118–214. For an example of a case heavily influenced by the quality of representation see D. James Greiner, Cassandra Wolos Pattanayak, and Jonathan Hennessy, 'The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future', *Harvard Law Review* 126, no. 4 (2013): 901–89. For the purpose of this chapter, I do not wish to evaluate the findings presented in the empirical literature. If Greiner and Pattanyak are correct, my argument is limited to cases where quality legal representation matters.

[28] Regarding Class Actions see Alba Conte, Herbert B Newberg, and William B Rubenstein, *Newberg on Class Actions*, 5th ed. (Eagan: West, 2011), 9–21; Craig Jones, *Theory of Class Actions* (Toronto: Irwin Law, 2003), 75.

[29] Winand Emons, 'Expertise, Contingent Fees, and Insufficient Attorney Effort', *International Review of Law and Economics* 20, no. 1 (2000): 21–33; Rhode, *Access to Justice*, 60–62; Issi Rosen-Zvi, 'Just Fee Shifting', *Florida State University Law Review* 37, no. 3 (2010): 721–22.

people can buy justice per se. If this were the case, there would be no difference (in effectiveness terms) between hiring a lawyer and bribing a judge. In cases where there is sufficient evidence, and the legal interpretation is conclusive, money is unlikely to influence the court's decision. Thus, the scope of my argument is limited to cases in which legal argument is required. Moreover, even when a lawyer can influence a court's decision, spending tremendous amounts of resources on legal representation is limited and does not necessarily lead to winning a case. That being said, the influence of money can manifest in ways other than winning, such as the reduction of the compensation one has to pay when found responsible or the softening of a sentence. In any event, the phenomenon I identify in the adversarial system should not be considered bribery but rather a significant structural advantage enjoyed by the wealthy.

5.2 The Normative Appeal of the Adversarial System

In this section, I present what I believe are the three most convincing normative justifications for the adversarial legal system.[30] Although I present the arguments as justifications for the system as a whole, some differ in application between civil cases and criminal cases. I elaborate on these differences in the following sections.[31]

[30] Another justification for the adversarial system on which I do not elaborate focuses on the intrinsic value of the adversarial method. This justification reflects the notion that the lawyer's role in the adversarial system is intrinsically valuable, for it is an instantiation of the client's dignity (Alan Donagan, 'Justifying Legal Practice in the Adversary System', in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*, ed. David Luban (Totowa, NJ: Rowman & Allanheld, 1983), 123–33.), the client's autonomy (Charles Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation', *The Yale Law Journal* 85, no. 8 (1976): 1072–73.), or the client's right to be heard (Harel, *Why Law Matters*, 225.). Although I do not discuss this line of justification, I do believe that it is also undercut by the market in legal representation, as one's right to be heard is dependent on one's access to legal resources. Another useful summary of the justifications for the adversarial legal system can be found in Wendel, *Lawyers and Fidelity to Law*, 17–44.

[31] I do not offer a defence for these justifications. If one rejects them, then one has no reason to believe in the adversarial system, independent of the conflict between its normative justifications and the market in legal representation (unless, of course, there is some other justification for it).

5.2.1 Providing Just Results

Using Rawls's terminology, the adversarial method of adjudication is an instance of *imperfect procedural justice,* which is comprised of two (related) components: imperfect results and an independent criterion of justice.[32] The former means that even in cases where the procedure (e.g., the law) has been carefully followed and the proceedings properly conducted, the decision-maker (e.g., the court) may still reach a wrong conclusion. The latter is best understood in contradistinction to a dependent criterion for a just result.

With such a criterion, any outcome of the procedure correctly followed is just. The procedure itself is the normative watershed. For example, a fair coin toss is a system with a dependent criterion of justice because whoever turns out to be the winner, the result will be just. With an independent criterion of justice, the way to evaluate whether a result is just or not is to employ a criterion of justice independent from the procedure. In the legal system, roughly, a just result of the adjudicative process should be judged against the criterion of the accurate interpretation of the law in accordance with the facts of the matter.[33] This implies, for instance, that those who are innocent should not be convicted.

The crucial question that arises is whether the adversarial method, as an imperfect procedural system, provides mostly just results.[34] There are two arguments in favour of the conclusion that it does: the 'invisible hand' argument and the 'division of labour' argument.

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[32] Rawls, A Theory of Justice, 73–78.

[33] Ibid.

[34] Wertheimer, 'The Equalization of Legal Resources', 309. Another relevant question is whether the adversarial system produces just results more often than alternative legal systems. I do not discuss such comparative arguments.

5.2.1.1 The 'Invisible Hand' Argument

As explained in section 4.3.3., the basic narrative underlying invisible hand arguments is of a process in which the result of numerous individuals acting in their narrow self-interest results in the emergence of an optimal overall design, unplanned as well as unforeseen by them.[35]

Regarding the adversarial method, the invisible hand argument is as follows. The individuals are the parties; each is incentivised to zealously fight for her respective case, according to her self-interest, without necessarily intending to achieve justice (yet within ethical boundaries preventing intentional obstruction of justice) by providing her best plausible legal argument while interfering with her opponent's efforts. The clash of arguments fostered by these self-interest-based actions provides the impartial tribunal with the best form of legal argument from each party. Then, so the explanation goes, although each legal argument is biased in favour of one party, the ongoing clash of arguments is supposed to weed out the lies and 'cancel out' each side's biases. As Mill put it: 'three-fourths of the arguments for every disputed opinion consist in dispelling the appearances which favour some opinion different from it'.[36] The unintended optimal design is thus of a judge provided with the best conditions to extract the truth of the matter as a result of biased, zealous representation for each party.[37]

5.2.1.2 The 'Division of Labour' Argument

The 'division of labour' argument is a comparative argument that refers to the limits of the inquisitorial system. The main feature of such a system is its judge-driven trial. The judge conducts the trial, investigates, summons witnesses, and questions the parties. The lawyers are considered

[35] See my discussion on invisible hand arguments above in the previous chapter, section 4.3.3.
[36] Mill, *On Liberty*, 38.
[37] Luban, *Lawyers and Justice*, 69; Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (New York and Oxford: Oxford University Press, 2000), 53. Notice that this is an 'end-state' of 'forward-looking' form of invisible-hand argument, not an 'emergence', 'backward-looking' kind. See my discussion on invisible hand arguments in the previous chapter, section 4.3.3.

an independent part of the justice system, not the extension of the client's will.[38] Lon L. Fuller claimed that in such a system, justice can be achieved only if the judge undertakes the role of the representative of all parties. In order to fully understand the case, the judge must 'permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving—in analysis, patience and creative power'.[39]

The problem is that after identifying with each side, the judge needs to put the impartial cap back on, as it were—a requirement that Fuller described as unrealistic:

> When [the judge] resumes his neutral position, he must be able to view with distrust the fruits of this identification and to be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.[40]

Therefore, another justification of the adversarial method is that the labour is divided: the lawyers identify with the parties and make their best case, whereas the judge judges. This is a far more achievable task for the judge, which increases the likelihood that she would provide a just result.

5.2.2 Protecting Individual Rights

The standard conception of the lawyer's role in the adversarial system consists of the following two complementary requirements:

> *Full advocacy:* A lawyer has an obligation to zealously defend her client according to her client's interests within the boundaries of the law.[41]
>
> *Non-accountability:* A lawyer is not accountable for her client's actions, should not be normatively condemned for representing her client, and is not accountable for the result

[38] Luban, *Lawyers and Justice*, 94.
[39] Fuller, 'The Forms and Limits', 383.
[40] Ibid.
[41] Ibid., 382–84; Luban, *Lawyers and Justice*, 11, 57, 62–63.

of the trial, regardless of whether it is just or not.[42]

Owing to this standard conception, the adversarial system provides maximum protection of individual rights. Two main arguments support this statement.

5.2.2.1 The 'Unconstrained Defence' Argument

Full zealous advocacy provides the best protection for an individual's rights simply because the more restrictions on the lawyer's actions there are, the fewer tools the lawyer has to protect her client. Moreover, full advocacy prevents people or institutions (especially the state) from interfering with or influencing one's defence in court, as it ensures that the lawyer is solely bound to the client's interest.[43] Zealous advocacy is one way to ensure this. Non-accountability is another. Non-accountability ensures that the lawyer can faithfully do her job without worrying about being socially condemned for her performance in court, for example, for the release of a guilty person. Thus, this principle ensures that lawyers provide maximum protection for clients' rights.

5.2.2.2 The 'Division of Judgement' Argument

The two requirements result in a division of ethical judgement: the lawyer represents and the judge judges.[44] The difference between this argument and the division of labour argument is the following. The division of labour argument focuses on the positive element of the adversarial system, namely, the division of labour according to roles in order to better achieve just results.

By contrast, the division of judgement argument focuses on *defending individual rights* by preventing such a division from collapsing as a result of controversial clients. The fear of social condemnation provides an incentive for a lawyer to either judge a client when asked to be hired and thus refuse to work for controversial clients or judge a client during representation, which results in inadequate representation. The non-accountability requirement serves as a counterweight

[42] Luban, *Lawyers and Justice*, 52–57; Wertheimer, 'The Equalization of Legal Resources', 310.
[43] In criminal cases, the role of the prosecutor is different, as I explain in section 5.3.6.
[44] Luban, *Lawyers and Justice*, 78–80.

to such fears. It equips lawyers with an 'ethical shield' that justifies their actions. Thus, it is instrumentally desirable because it increases everyone's ability to receive maximum protection of their rights by overcoming social condemnation.

These arguments may not seem to be direct arguments for the adversarial system but rather arguments for why, within an adversarial system, the lawyer's role should have particular characteristics or be regulated by specific norms. However, the formation of the lawyer's role in the adversarial system is derived from the adversarial institutional design. It is unique and is celebrated as one of the system's greatest advantages. If the lawyer's role were constructed differently, the normative appeal of the system as a system that aspires to protect individual rights would be undermined. Thus, it serves as a powerful independent justification for the system as a whole—not just as an argument for what the lawyer's role should be, having decided on an adversarial system with representation.

Finally, it is worth noting that while the invisible hand and division of labour arguments allude to the epistemic qualities of legal friction competition within adversarial legal systems, the arguments in this section are focused on the friction competition's protective qualities, as it were. The standard concept of the lawyer's role provides the parties with the tools to compete in a way that will maximise the protection of their rights.

5.2.3 The 'Formal Justice' Justification

Before elaborating on the formal justice justification, I would like to make the following distinction. The justifications I have presented so far are *intra-case justifications*. They are focused on the normatively appealing features of the adversarial system within the framework of a single case. However, they do not focus on the normative elements of the comparison between cases. The following justification does just that, and therefore I call it an *inter-case justification*.

As mentioned, the legal system is an instance of imperfect procedural justice. Its results are

considered as just if and only if they are in accordance with an independent criterion. However, the procedure itself must be just as well. An adequate justice system is one that does not subject individuals to unfair procedures, not only because they are not likely to produce correct outcomes but also owing to their procedural inadequacy. In a system of procedural justice, fair procedure matters independently of the correct outcome. One can have a valid grievance if subjected to an unfair process, even if the outcome was correct. On the other hand, one can lay no blame at the foot of the court in the case of an incorrect outcome produced by a fair procedure.[45] From a doctrinal perspective, the norms associated with due process embody the idea that a fair trial is not merely an instrument for optimal decisions.

Just institutions or systems are evaluated using the concept of formal justice. Rawls defines formal justice as the impartial, consistent, and equal application of the law.[46] In the process of adversarial adjudication, like cases should be treated alike, and irrelevant factors should be excluded. Nonetheless, fair competition requires not just fair rules and impartial referees but also equal opportunities, as mentioned in the previous chapter. Recall Barry's boxing example.[47] The point was that procedural fairness must be supplemented by background fairness, which is supposed to ensure equal opportunities to compete. Following Barry, Rawls argued for fair equality of opportunity, as opposed to merely formal equality of opportunity, because:

> [T]hose who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system. […] The expectations of those with the same abilities and aspirations should not be affected by their social class.[48]

[45] Although one might have a legitimate grievance in the case of false conviction, for example, this is a separate issue from whether the court is blameworthy.
[46] Rawls, *A Theory of Justice*, 51.
[47] Barry, *Political Argument*, 99.
[48] Rawls, *A Theory of Justice*, 63.

Fair equality of opportunity is necessary for the distribution produced by market competition constrained by the difference principle to be just.[49] Analogously, the expectations of individuals in the same legal position (in terms of crimes committed, criminal responsibility, available evidence, etc.) should not be affected by their class or financial resources.

I take it that the plausibility of such arguments and the common-sense intuition in favour of the normative desirability of formal justice allows me to assume that if a legal system does not comply with such requirements—impartiality, consistency, and equality—it is a *pro tanto* reason to deem it unjust.[50] Accordingly, there is no need to elaborate on the specific ways in which the adversarial method adheres to such normative aspirations (appointing impartial judges, strict procedural rules, and so on). It is sufficient to assume that just like any other legal system, one of the adversarial system's normative justifications is that it ensures formal justice.

5.3 Undercutting Legal Justice: Civil and Criminal Cases

In this section, I argue that the fact that legal representation is allocated by a market mechanism undercuts the normative appeal of the adversarial method. As there are relevant differences between civil and criminal cases, I discuss them separately. I start by discussing how the marketisation of legal representation undercuts each justification of the adversarial system in civil cases. Then, to avoid repetition, I discuss the aspects of criminal cases that are relevantly different.

5.3.1 Different Types of Civil Cases

In arguing that the market in legal representation undercuts the adversarial civil law system's normative appeal, I refer to three types of possible civil cases:

[49] Notice that the concern is not merely optimising outcomes. According to Rawls, restricting access to positions is a violation of equal treatment. As he notes, 'the reasons for requiring open positions are not solely, or even primarily, those of efficiency. I have not maintained that offices must be open if in fact everyone is to benefit from an arrangement'. See ibid., 73.
[50] Ibid., 52.

Poor vs Poor Case (PvP): neither party has sufficient resources to fund adequate legal representation. I do not purport to define the exact amount of money needed for each case, but I do assume that a minimal amount for adequate representation can be set. I also do not assume that low-price lawyers are incapable of providing adequate representation. By poor, I mean people who cannot acquire the minimal level of legal resources needed for their case. A good low-price lawyer cannot be of help, in some cases, without sufficient legal resources.

Rich vs Poor Case (RvP): one party has at least sufficient resources to fund adequate representation (and often much more than is required), whereas the other does not. This also includes cases where both parties have 'enough', but the gap between them is significant enough to tilt the scales of justice in favour of the richer party.

Rich vs Rich Case (RvR): both parties have an equal ability to fund very high-quality legal representation.

5.3.2 Undercutting the 'Providing Just Results' Justification (Civil)

5.3.2.1 The 'Invisible Hand' Argument

This argument relies on a qualitative assumption that each party acts according to its self-interest and provides the best legal argument possible, as well as on a comparative assumption—that the different arguments 'cancel out' each other's biases. The qualitative assumption conflicts with the market in legal representation because people who do not have the resources to buy adequate representation (i.e., a skilled lawyer with adequate legal resources) on the market usually cannot provide the best legal argument.[51] Even in PvPs, although no party has a material advantage over

[51] Rosen-Zvi, 'Just Fee Shifting', 718–19.

the other, both sides would provide poor arguments. Thus, this problem applies both to RvPs and to PvPs.

The comparative assumption also conflicts with the legal representation market in RvPs because market-driven inequalities result in a situation in which, owing to unequal legal resources, the legal arguments provided by the parties tend not to mutually 'cancel each other out' since they are not of the same quality and do not have the same recourses to counter their opponent. There is a clash between arguments, but the perspective of the rich is significantly more dominant—in a way that renders the friction competition between the parties dysfunctional. This is a clear manifestation of a case in which, in order to function, friction competition requires equality, as I have argued in the previous chapter.[52]

Thus, both conflicts—the qualitative and the comparative—make it harder for the judge to extract the truth of the matter and undermine the invisible hand argument in favour of the adversarial system.

5.3.2.2 The 'Division of Labour' Argument

According to the division of labour argument, the adversarial method is normatively appealing because it offers the most appropriate framework for delivering a just outcome. This argument does not directly conflict with the market in legal representation. Even if there are disparities between the parties, or if the quality of representation is poor, the division of labour might still be of value.

However, it does conflict indirectly with a potentially valuable response to the conflict between the market in legal representation and the invisible hand argument. According to this

[52] Recall that my argument does not encompass cases in which there is sufficient evidence and the legal interpretation is conclusive, since in such cases the impact of quality legal representation is marginal. However, in real life, even in cases where P is a stone-cold winner, R can, and sometimes does, use her economic advantage to settle the case out of court, so that the cases that do go for trial are more likely to be close cases in which disparities in legal resources are decisive. See Samuel R. Gross and Kent D. Syverud, 'Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial', *Michigan Law Review* 90, no. 2 (1991): 319–93.

response, judges could reimburse the poor party in RvPs for the influence that the rich party's wealth has. Alternatively, they could improve both sides' arguments in PvPs, thus avoiding the qualitative and comparative problems arising from the invisible hand argument. Such 'reimbursement', according to Posner and Yoon's survey, already takes place in reality.[53] Nevertheless, this response fails to vindicate the method's appeal. The normative appeal of the adversarial system stems from the superiority of its division of labour in providing just outcomes. Having a judge make arguments for one of the parties (or both) combines the two roles into one. Therefore, it undermines—and effectively eliminates—the division of labour in an unappealing way. If the judge's involvement is necessary, an institutionalised mechanism allowing her to lead the investigation seems more likely to provide just outcomes than a vague, informal, and incidental reimbursement by a passive judge who does not have the institutional tools and resources to reimburse effectively. Moreover, as a side note, this response does not apply to adversarial systems with juries comprising citizens who do not possess the legal expertise required for the proper 'improvement' of legal arguments.

5.3.3 Undercutting the 'Protecting Individual Rights' Justification (Civil)

5.3.3.1 Unconstrained Defence Argument

The standard conception of the lawyer's role, which consists of the 'full advocacy' and the 'non-accountability' requirements, is meant to protect individuals' rights. Although it is mostly regarded as a justification for criminal cases, it also applies to civil cases. Guaranteeing that irrelevant factors (like the influence of powerful corporations or public condemnation) will not influence legal representation and thus jeopardise the protection of individuals' legal rights is as relevant in civil cases as in criminal cases.[54]

However, in the market for legal representation, this standard conception leads to different

[53] Posner and Yoon, 'What Judges Think', 335.
[54] Rhode, *Access to Justice*, 8–10.

results. Concerning the full advocacy requirement, two problems arise. The first is that within the market in legal representation, zealous advocacy is the *exception*.[55] Most people do not have the resources to pay for zealous advocacy and therefore do not enjoy the quality representation needed to protect their rights. This problem is evident in RvPs, where quality disparities endanger the disadvantaged party's rights.

It is hard to think about a similar problem in PvPs. In such a case, the parties do not endanger each other as both suffer from poor representation. Nonetheless, in PvPs, it is more difficult for the judge to provide just results. Think of a case in which the court's decision is reached by a coin toss. Ostensibly, there is no inherent unfairness in the act. At the same time, there is no reason to believe that the result will be the correct one. The same applies to PvPs. Considering both sides are equal, no unfairness is evident, at least from an intra-case perspective.

Nevertheless, there is no reason to believe that the just outcome will be reached by the court if both sides are poorly represented. Thus, both sides are endangered by an unjust result that might violate their rights. In any case, it is clear that one's ability to protect oneself is undermined by poor representation.

The second problem arising from the full advocacy requirement is that, while most people cannot afford quality representation, this requirement encourages the purchase of zealous advocacy by those who can afford it based on the false assumption that any biases will cancel out. Thus, instead of protecting individual rights, zealous advocacy gives rise to a violation of rights by encouraging the wealthy to pursue their self-interest regardless of justice in the frictional legal competition at the expense of the disadvantaged.

[55] Rhode, *In the Interests of Justice*, 55–56.

5.3.3.2 The 'Division of Judgement' Argument

The heart of this argument is that the non-accountability requirement ensures that the normative and legal judgement of the case is in the hands of the judge, not the lawyer. The market in legal representation does not conflict with this justification directly. On the contrary, it might appear that it serves as an additional incentive for lawyers not to judge clients but rather accept whoever can pay. Recall Friedman's argument from section 2.2.1: the market is blind; it does not discriminate between people. The only 'filter' in use is money.[56]

However, on closer inspection, the filter introduced by the market is no better than the lawyer's own normative judgement. In the market, those who do not possess the necessary means are 'sentenced' by their financial status.[57] This is a paradigmatic example of the 'access to justice' problem, which I do not focus on in this chapter. Nevertheless, it is essential to bring it up in this context to show that the market in legal representation undermines yet another argument in favour of the adversarial method.

5.3.4 Undercutting the 'Formal Justice' Justification (Civil)

Formal justice requires that the law and its enforcement are applied impartially, consistently, and equally. The market in legal representation does not necessarily conflict with judicial impartiality. For the sake of my argument, I assume that judges rule according to what they believe is just, even if it is against the interests of the rich.

With consistency and equality, things get more complicated. Assume the law says that X leads to consequence Y. Presumably, a judge will always rule Y when faced with X. Therefore, consistency—in this narrow sense—is maintained in the market. The same applies to equality: a person found responsible for X would have to bear consequence Y, just like any other person

[56] Friedman, *Capitalism and Freedom*, 21.

[57] For instance, the LSC'S Justice Gap Report from 2009 shows that almost one million Americans were denied legal aid by the LSC alone, and were left without legal representation.

found responsible for X. The conflict between formal justice and the market in legal representation arises in a broader context, namely, in the process of arriving at the conclusion that the facts of the matter should be interpreted as X to begin with.

Disparities in the quality of representation may distort this process in two ways. One is that in some cases, wealth may be needed to unveil the facts of the case (for instance, to buy legal experts, labs, investigators, and so forth). Thus, two objectively identical cases could be treated differently in court because the rich use extensive resources to reveal the truth, while the poor cannot afford to do the same. Another distortion has to do with the comparison between identical cases (an inter-case conflict). In cases where the law is unclear and can be interpreted in different ways, parties that are better represented are more likely to convince the court to prefer their reading of the law. Thus, C_1 and C_2—two identical cases—may receive different treatment from the court, not due to an asymmetry in their factual basis but due to the different interpretations of the same set of facts in each case.

5.3.5 Different Types of Criminal Cases

I now move to argue that—although there are some differences between the criminal and civil adversarial systems—they are insufficient to imply that the justifications for the adversarial system are not undercut within the criminal system. The same arguments that apply to the civil system apply—with some minor modifications—to the criminal system. The kind of criminal cases to which I will refer is the following:

> *State vs Rich Case* (SvR): a case where the defendant has more resources than the prosecution. Theoretically, the state would almost always have more resources, or at least equal resources, compared to the defendant. However, a rich person may decide to invest a considerable amount of money in one case that has no public significance. Matching her resources in every case would be unreasonable for the state, as the rich have only one case to deal with, and the state needs to allocate its resources among many cases according to

their public significance.

State vs Poor Case (SvP): a case where the defendant is inadequately represented by a public defender due to a lack of resources or where she privately funds her representation but still has significantly fewer resources than the prosecution.

5.3.6 Differences and Similarities with Civil Cases

The main relevant difference between criminal and civil cases is that in the criminal system, we prioritise avoiding false incarceration, and to achieve this, we are willing to trade off some competence in delivering just results. As Blackstone's ratio indicates: 'better that ten guilty persons escape than that one innocent person suffer'.[58]

This difference in priority results in two of the criminal system's unique characteristics, both of which are supposed to create a structural imbalance in favour of the defendant within the frictional legal competition (when compared to the parity between parties in civil cases). One is that the public prosecutor (at least theoretically) is neither obliged nor expected to zealously defend the victim (if there is one). To be sure, the state is a party to the trial, and the prosecutor argues its case passionately. But the prosecutor represents the public—and the public's 'self-interest' is justice. So, the state pursues justice while the defence pursues its own interests.[59] The other is the 'beyond reasonable doubt' standard of proof, compared to the 'balance of probabilities' standard in civil cases, which means that in criminal cases, the burden of proof lies with the state.[60]

Despite these differences, the fact that the basic adversarial logic is supposed to function

[58] William Blackstone, *Commentaries on the Laws of England*, ed. Herbert Broom and Edward A. Hadley, 4 vols., vol. 4 (London: W. Maxwell, 1869), 445.

[59] However, oftentimes this structural imbalance does not have significant influence within a system in which the overwhelming majority of criminal cases are settled via plea-bargaining. See John F. Pfaff, *Locked In: The True Causes of Mass Incarceration—And How to Achieve Real Reform* (New York: Basic Books, 2017). Thus, some part of this section encompasses a fairly idealised normative discussion, and there might be a need to further strengthen poorly- and adequately-resourced defendants' rights against zealous prosecution.

[60] Another difference is that in criminal cases the state usually provides its own legal representation, so there is only a market in legal representation for defendants. But this does not change much for the purpose of my argument.

similarly in both kinds of cases means that, by and large, the legal representation market in the criminal system undercuts the system's normative appeal in similar ways to those presented concerning the civil adversarial system.

First, a market in legal representation means that many defendants are inadequately represented (notwithstanding the fact that some states provide some funding to poorer defendants). For example, in the United States, most court-appointed lawyers do not have the resources to defend their clients, and some do not even try. Indeed, many defendants file 'ineffective assistance' claims about unprofessional or negligent lawyers. In addition, many poor defendants are provided with inexperienced lawyers.[61] Therefore, many SvPs are similar to PvPs and RvPs in that the insufficient level of legal representation provided to the poor undercuts some of the system's justifications. So my argument about the market undercutting the 'invisible hand' (qualitative assumption: the poor cannot provide the best legal case for themselves), 'division of labour' (we do not want the judge to reimburse for low quality) and 'unconstrained defence' (the poor will not be zealously defended) justifications—as well as the resulting inter-case formal justice justification, concerning like cases being judged alike—apply. Only the division of judgement justification avoids being undercut because some level of representation is usually provided to defendants in criminal cases.

However, *intra-case disparities*, at first glance, might seem less problematic in criminal cases for two reasons. One is that the structural imbalance in favour of the defendant in criminal cases might justify the claim, as Wertheimer has argued, that people should be able to get 'the best legal representation that money can buy' in order to defend themselves.[62] The second is that, in theory, the prosecutor has no incentive to use her material advantage to tilt the scales of justice in order to win. Hence, disparities in SvPs are of less normative significance than in RvPs. After all, the

[61] Rhode, *Access to Justice*, 11–13, 122–37.
[62] Wertheimer, 'The Equalization of Legal Resources', 313.

prosecutor's goal is ostensibly to achieve justice, not winning (I return to this 'naïve' assumption below). I will take up each of these concerns in turn.

Concerning intra-case disparities in SvRs, as the system is already designed to favour the defendant, allowing the rich to tilt the scales even more is unjustified since it could shift the balance in favour of the defendant to such an extent that it might prevent the system from providing just results at all. Thus, intra-case disparities in SvRs in criminal cases, caused by the market in legal representation, also undercut the 'providing just results' and 'protecting individual rights' justifications, as presented concerning RvPs in civil cases.

A plausible response to this argument would be that, in some cases, the current institutional mechanisms that are supposed to ensure the imbalance in favour of the defendant are ineffective and that unlimited funding could be needed to achieve the right balance between the state and the protection of the individual. However, if unlimited funding is needed to achieve legal justice, the poor should also be entitled to it. But this, of course, would render the system unfeasible: we cannot provide all with unlimited resources. Therefore, either the current institutional mechanisms to favour the defendant work (an assumption I make for the purposes of my argument) or better mechanisms should be put in place. Either way, a market-based allocation that allows the rich to get the best legal representation money can buy does not lead to the re-establishment of the normative appeal of the system. Indeed, the contrary is true.

Moving to SvPs, the claim that disparities are less acute in criminal cases and thus do not undercut the normative appeal of the adversarial system is objectionable for several reasons. First and foremost, even though the prosecutor does not zealously defend a client, it does not change the fact that when she has more resources within a legal competition, her argument and the poor defendant's argument will not mutually 'cancel each other out', as has been assumed in the comparative assumption of the 'invisible hand argument', since they are not of (roughly) the same quality, and since the poor do not have the resource to refute or to challenge the prosecutor efforts.

Furthermore, if, in response, one would argue that the prosecutor can somehow 'reimburse' the poor's insufficient level of representation, then one would face the same problem of 'undercutting the division of labour' argument, as presented regarding civil cases. Only this time, the division of labour problem seems to be much worse since it leaves the defendant's fate not in the hands of the well-intentioned, impartial judge but rather in the hands of the prosecution. Benevolent as the prosecutor may be, putting the fate of the poor defendant in her hands disaffirms the fundamental assumption of the criminal adversarial system—namely, that the facts of the matter will emerge out of the legal competition between the state and the defendant. Therefore, disparities in SvPs, as in RvPs, undercut the 'providing just result' justification.

As for the 'protecting individuals' rights' justification, allowing inequality of resources in favour of the state goes directly against it because it gives the prosecutor an institutionalised advantage over the poor defendant. If the whole point of this justification is to prevent the state from abusing its power against individuals, putting the fate of individuals in the hands of the state's lawyer seems unintelligible. So disparities in criminal cases undercut this justification as well. It is true, however, that since the prosecutor is not obliged to zealously defend the victim's interests, in some cases where the prosecutor is benevolent, the results would not be as bad as in civil cases. But the fact that disparities in criminal cases would sometimes not lead to results that are as bad as the results in civil cases is not good enough a conclusion to re-establish the appeal of this justification. Finally, even if, in theory, prosecutors are supposed to pursue justice and not their self-interest, in reality, this is hardly the case. Public prosecutors are as zealous as any other lawyer, either because they are being evaluated by incarceration rates or because they believe they are pursuing justice.

Before continuing, let us briefly review. Due to the reasons specified above, although there are different normative rationales underlying civil and criminal cases, in both SvRs and SvPs, as in civil cases, the market in legal representation undercuts the system's normative appeal. There are

different existing institutional mechanisms (e.g., the 'beyond reasonable doubt' standard) that are supposed to address the differences between civil and criminal cases: the market in legal representation is not one of them.

5.4 Re-establishing the System's Normative Appeal

5.4.1 The Unstated Requirements: (Equal Opportunity For) Sufficiency and Equality

The conflict between the market in legal representation and the normative appeal of the adversarial system, both in civil and criminal cases, stems from two problematic consequences of that market:

> The *qualitative problem*: insufficient quality of representation of the badly off.
>
> The *comparative problem*: significant disparities between parties in the quality of representation.[63]

These suggest that *sufficiency* and *equality* in legal representation are unstated underlying normative requirements of the adversarial system.[64]

To be sure, as is the case regarding any institutional design, perfect sufficiency and equality are unattainable. Even with sufficient and equal legal resources, one's representation could still be insufficient because, for example, the lawyer made an unintentional human error or unequal if there are minor differences in talent between lawyers. This is where *opportunity* comes in. Addressing the ways in which the market undercuts the normative appeal of the adversarial system requires setting it up in such a way that each receives the *equal opportunity* for a sufficient level of representation, and the *equal opportunity* for equality, so that, by and large, the system will function

[63] This is a paradigmatic example of a design-based justification for equality I explored in section 4.2.1 of the previous chapter. This means, that it might be plausible that in a different legal system equality between the parties would not be needed at all.

[64] A similar idea was suggested in Schwartz's "Postulate of Equal Competence". See Schwartz, 'The Zeal of the Civil Advocate', 546–48. However, he did not draw the link between the postulate and the market in legal representation.

properly.

So, what should be done? I do not purport to provide a detailed alternative institutional design for adversarial systems, which would require sophisticated empirical and economic analysis. Instead, I will discuss two—relatively abstract—general ways to change the current market-based system. One was presented by Wertheimer, and the other I offer as a preferable alternative.[65] Such a discussion, and the normative conclusions I draw from it, should provide a normative benchmark for future consideration of more detailed proposals for reform. I start by discussing the proposals regarding civil cases and then move to detail specific considerations for criminal cases (which are slightly different).

5.4.2 First Option: Levelling Down (Civil Cases)

Wertheimer argues that in some RvPs, we should level down the resources of the rich to match those of the poor.[66] The merit of such a suggestion is twofold. First, it solves the intra-case comparative problem: the rich would not have the resources to tilt the scales to their side. Second, it acknowledges the fact that different cases require different legal resources and does not impose a single cap on costs but allows that they vary by case.

However, it is deficient for two reasons. First, it does not solve the qualitative problem. Levelling down in RvPs, where the poor cannot afford to adequately represent themselves, would mean that both parties would have inadequate representation.[67] Second, since the qualitative problem remains unsolved, it is not clear whether levelling down solves the inter-case conflict at all. Under a Wertheimerian legal system, some cases would be RvR (rich vs rich). Hence, there would be no need to level down. Other cases would be PvPs. In PvPs, where the legal

[65] I only discuss proposals that involve levelling down, as I assume that balancing the scales of justice by levelling up people's legal resources, so as to make sure all cases become, in effect, RvR cases, is unfeasible, due to scarcity of public resources.

[66] Wertheimer, 'The Equalization of Legal Resources', 304–5.

[67] Recall that the definition of RvP includes cases in which the poor side can afford adequate legal representation, but the gap with the rich is so large that it is still problematic. Only in such cases is Wertheimer's suggestion desirable.

representation of both sides is equally poor, it would be harder for the court to extract the truth of the matter and consequently harder to apply the laws consistently and equally. Thus, there would still be inter-case disparities between PvPs and RvRs. Furthermore, in such a system, it would be hard to justify the levelling down in RvP to the rich party since levelling down would mean they would be unable to receive adequate representation. Thus, Wertheimer's intra-case levelling down solution seems unsatisfactory.

5.4.3 Second Option: Levelling Down Plus Type-Based-Floor (Civil Cases)

In contrast, the combination of levelling down and setting a resource 'floor' solves, at least theoretically, the conflicts presented so far. This solution satisfies both the sufficiency ideal, since it addresses the qualitative problem and the equality ideal, since it addresses the comparative problem.[68] In each type of case, a minimum level of resources would be set, to which each party would be entitled in order to ensure that all have an adequate level of representation (the state, or other market-independent institution, would be responsible for allocating resources to those who could not afford the minimum).

Such a floor cannot be universal: some kinds of cases require more resources than others. Thus, there would need to be different thresholds for different types of cases.[69] Levelling down is supposed to ensure that parties cannot turn their market advantage into a competitive legal advantage.[70] In such a system, we are left with either AvAs (adequate representation vs adequate representation) or RvRs, since when disparities emerge, levelling down takes place. In both cases, the intra-case qualitative and comparative problems are solved: there are no intra-case disparities

[68] By 'equality', I do not mean equality per se, but rather a balance between the parties within the adversarial adjudication process.

[69] Due to the diversity of cases, the classification of types would be general, and exceptions would be required. However, such a problem is common to all general legal principles that need to be applied to a diversity of cases, and therefore using it to object my claim would be to demand too much.

[70] In some cases, one party's representation necessitates more resources than the representation of the rival party. Therefore, equalising resources by levelling down might lead to unjust results. To counter this, the threshold can be set according to the party which requires more resources. Moreover, the threshold could be a range between two limits and not a specific number.

and no qualitative deficiency.

A standard LDO to my levelling down plus type-based-floor proposal is as follows. If one can improve the quality of one's representation without harming anyone else, there is no reason to require one to level down just for the sake of equality. Such an objection fails with respect to intra-case levelling down because one's advantage in the adversarial system, as in any competition, is necessarily the other's disadvantage—as the good is positional. Therefore, levelling down is not done merely for the sake of equality but also for the benefit of the disadvantaged.[71]

Moreover, contrary to Wertheimer's suggestion, under the system I propose, the rich person whose resources are levelled down would not be able to complain that she is prevented from receiving adequate representation. She would be able to complain that she could get better representation if she faced a richer rival. However, under such a system, in which the rich person can fund her representation as she pleases in RvRs and obtain adequate representation, this complaint pales in comparison to the disadvantaged person's claim to receive an equal chance for justice.

Another objection to restricting the amount of money one could spend on legal representation is that the disparity in the willingness to pay may reflect justified preferences and not just the litigants' ability to pay. For example, a person may care greatly about a case, and this may affect how much they spend. In such a case—the objection might run—fairness could require that the one who cares more should be able to invest more in their legal representation without being levelled down.

Before responding to the argument, it should be noted that even if this objection is correct, it does not carry much weight. In reality, since defending oneself in court is a high-stakes affair, the limiting factor on spending for almost everyone would be the ability to pay rather than the

[71] See section 4.2.1 for a full explanation about positional goods.

willingness to pay. Therefore, the key question here is how many actual cases there are in which willingness to pay actually tracks the true intensity of people's preferences and not their ability to pay. This is an empirical matter, but I think I can safely assume that the number is limited.

As for the objection itself, it is unclear why one's degree of 'caring' is relevant in the context of providing legal justice in an adversarial system. First, if the equality and sufficiency requirements are correct, then the system is set up in a way that already assumes the allocation of legal representation should be done according to principles that are not responsive to preferences. Putting it differently, I contend the system is designed to provide justice—not to satisfy preferences. So one is at risk of proving too much by claiming that preferences should matter for determining the amount of spending allowed, as this undermines not only my proposal but the appeal of the system as a whole.

More generally, it is also unclear why preferences should matter in relation to legal justice. To illustrate, consider the following cases:

> The *Caring Rich*: a rich person is charged with theft and faces trial. She has an extremely strong preference not to go to jail and legitimately decides to invest everything she has in legal representation.
>
> The *Non-Caring Poor*: a homeless person faces trial. As in the Caring Rich case, she is charged with an identical case of theft. Not only can she not afford to defend herself, she actually prefers to spend some time in jail to avoid being on the street through a very hard winter. She decides, therefore, not to invest anything in legal representation.

The court will likely reach different decisions in each case—despite the charges being identical—owing to the rich woman's better legal representation. According to the objection, this disparity is justified since the rich person cares more than the poor one.

I find this result counterintuitive, to say the least. It is unclear to me why the fact that the

result of the case is more important to one party than the other should matter in a trial. Quite the reverse, in cases where people do not wish to defend themselves, there might be a justification to compensate for that and not to reward the more 'caring' party. To illustrate, imagine that the non-caring poor not only do not have the enthusiasm to defend themselves but also insist on not being legally represented at all. In such a case, the adversarial method will not work without two distinct competing sides. Forcing the defendant to be legally represented or even conduct her trial according to a different, non-adversarial method might be justified to reach a just outcome.

A plausible objection against my argument is that the lack of strong preference for legal representation in the *Non-Caring Poor* case is rooted in injustice. So one might agree that the poor person's preference, in this case, should not count (and instead, the poor person should be provided with assistance of some kind irrespective of her trial) while maintaining that relevant idealised preferences (e.g., ones not distorted by injustice) should count.

One response to this objection is that we can assume the homeless person is justly homeless. In such a case, what is doing the work is only the preferences of the caring rich person and the non-caring poor person, not some other background injustice. But one could insist that the fact that the poor are homeless distorts our normative intuitions in this case. So another available response is to consider a slightly different two-case comparison, one between a non-caring person who has adequate resources to fund legal representation and a caring person with adequate legal representation—both are faced with identical charges. In this case, there are no background injustices whatsoever, and I would still insist that the just outcome should not be affected (as much as possible) by the parties' preferences.

Now, I am not trying to defend the rather strong claim that preferences should not matter at all in the context of adjudication. I am also not trying to argue, at least in this chapter, that we should force people to be legally represented if they do not wish to be (for instance, there might be other reasons for not forcing people to be legally represented that override the goal of achieving

just results). My point is that the examples above show that in addition to the fact that the adversarial system is already supposed to be set up in a way which is non-responsive to preferences, the more general claim that preference satisfaction should matter in the context of providing legal justice also seems controversial. This is not a conclusive response, but I think it provides a reason to consider this objection not especially forceful.

Having established the justification for intra-case levelling down (with a resources floor), we are left with the question: why allow RvRs at all? Why not force all to have equal adequate representation and remain with a system in which all cases are AvA, thereby solving the inter-case problem?

The LDO does apply to this proposal. In the system I suggest, a rich person's high-quality representation can never harm the non-rich since, in each instance of intra-case disparities, the richer are required to level down. How can we justify levelling down the rich from RvR to AvA when no one is being harmed? One answer might be that due to the requirements of formal justice, the differences in results between RvR and AvA are unacceptable. However, assuming adequate representation, the differences should not be acute since judges should be able to extract the truth from fairly strong arguments and evidence, even in an AvA. Thus, there is a trade-off between *absolute* formal justice and further restricting people's freedom to fund their legal representation as they please.

For those who are not strict egalitarians, the anti-levelling down stance is strengthened by this trade-off. Heavily funded legal representation can (and maybe does) lead to the development of the legal profession, as it incentivises talented people to become lawyers—funding that the state cannot provide. Second, it is unlikely that there would be similar AvA and RvR cases. The usual legal needs of the rich differ immensely from those of the poor.[72] Consequently, formal justice

[72] Hadfield, 'The Price of Law', 998–99.

requirements are unlikely to be violated since there are few similar cases available to be treated differently. Thus, there may be no need for inter-case levelling down in the first place.

Nonetheless, there is one reason to level down in RvRs. Investing many resources in cases where there is no need for such an investment might lead to wasting resources from the legal system—a fact which affects the public as a whole.[73] For example, cases with overinvestment in representation could take longer (good lawyers can take advantage of the system and 'drag' the case for a long time). They could also require more work from the legal system's employees, who already face challenging workloads and suffer from insufficient resources. It is true that this is a different type of reason, which is neither directly related to the qualitative problem nor to the comparative problem. Nevertheless, it is still a valid and important reason that should be weighed against the reasons mentioned above for not levelling down in RvR cases. Thus, I leave the question of whether the rich should be levelled down, even in RvR cases, open for the time being.

5.4.4 Levelling Down Plus Type-Based-Floor—Implications for Criminal Cases

In general, the levelling down plus type-based-floor suggestion also applies to criminal cases. There are, however, two differences between the cases that should be considered. First, notice that in contrast with civil cases, there are no 'RvR' criminal cases. Hence, levelling down in SvR would mean de facto that inter-case inequalities will not exist: the state will have no reason to spend more than needed (and will be levelled down if needs be), and the rich will have to level down.

Second, unlimited funding of the rich in criminal cases might be more objectionable as it entails severe public costs. If justice is to be achieved, the state would need to increase its resources to the level of the rich. Thus, spending substantial resources when facing citizens of substantial means so as to not constrain their right to use their money seems unreasonable—especially when levelling down means that the rich are still protected by the structure of the system and by adequate

[73] E.g., Lois G. Forer, *Money and Justice: Who Owns the Courts?* (New York: Norton, 1984).

representation. Thus, levelling down the rich in SvR is justified, provided that the other components of my suggestions are fulfilled.

In sum, although the criminal system operates with a different set of norms ('less justice, more protection'), my proposal stays largely the same: the poor should be provided with adequate representation (where what 'adequate' means varies by type of case), and the rich or the state should be levelled down in cases in which they possess an advantage owing to their wealth.

5.5 A Final Comment on Feasibility

The normative guidelines sketched above might seem unsatisfying since they do not address feasibility concerns, like how an adversarial system can be economically maintained without a market. One objection could be that the rich, at least in civil cases, will respond to these restrictions by opting out of the public legal system and increasing their use of private arbitration. This would create problems in terms of inter-case equality and could potentially lower the level of the services given to the rest of the public—assuming the rich's investment is crucial for sustaining the quality of the services.[74] Other objections might pose questions like: how should the thresholds be set? How can a system be funded in a manner that secures adequate representation for all? And would this reform motivate people to overuse the legal system?

These considerations are beyond the scope of this chapter. Also, following Jonathan Wolff, I am not sure that philosophers have a clear advantage over other experts in addressing them.[75] I did make some feasibility-related assumptions throughout my argument, but only uncontroversial ones that do not require complex analysis (e.g., that it is impossible to provide unlimited legal resources to everyone all the time). All other assumptions which might be deemed feasibility-related (e.g., that it is possible to provide justice by using an invisible-hand-based adversarial

[74] For a similar objection regarding the education system, see Hirschman, *Exit, Voice, and Loyalty*, 51–52.
[75] Jonathan Wolff, *Ethics and Public Policy: A Philosophical Inquiry*, Second ed. (London: Routledge, 2020), 260.

mechanism) are *internal* to the justifications of the adversarial system. If they are incorrect, then the system is founded on false assumptions and is unjustified, to begin with.

One might argue that without answering these feasibility-related questions, my argument is meaningless. I dispute this claim. My purpose was to show that if we take the normative appeal of the adversarial system seriously, the requirements of equality and sufficiency must be somehow satisfied—and that for any kind of real-life legal adversarial mechanism to work, market-based allocation is not the way to satisfy it. Thus, the levelling down plus type-based-floor proposal serves as a normative benchmark to evaluate whether an adversarial legal system is justified or not.

My discussion of this proposal was intended to anticipate normative objections that could have potentially stopped it from getting off the ground (e.g., the LDO). Questions regarding viability do not undermine my proposal but rather the possibility of establishing a (roughly) justified adversarial system in real life.

To see this, consider these three scenarios concerning the relation between feasibility concerns and the normative stand of the adversarial system:

> (1) A free market in legal representation is *necessary* for the economic sustainability of the adversarial method but meeting the normative ideals of such a system is impossible. Consequently, the method *cannot* be justified. That is unless one finds other justifications for maintaining the system. For example, if there are no other feasible legal systems that are more desirable. In this case, the trade-off would be between a non-appealing adversarial legal system, other less-appealing systems, and no system at all.
>
> (2) A free market is *not necessary* for the system but getting rid of it is too costly (e.g., in terms of efficiency or stability). In this case, an adversarial method *could* be justified (under very different circumstances) but *is* not.
>
> (3) There is a way to both implement the levelling down plus type-based-floor ideal and

keep the system sustainable. In this case, once a reform is implemented, the adversarial method *could* be, and de facto *is* justified.

In all three cases, feasibility-related concerns either affect the possibility of ever establishing justified adversarial legal systems (option 1) or the possibility of establishing a justified adversarial system in reality (options 2 and 3). They do not, however, impact the justification for the normative ideal I propose.

5.6 Conclusion

In contemporary adversarial systems, the services provided by lawyers have been marketised. Much has been said and written about the problems that this institutional structure gives rise to—the 'symptoms of the disease', as it were. But the disease itself—namely, the fact that there is a market in legal representation incorporated into the adversarial system—has rarely been subject to normative examination. In this chapter, I have tried to address this discrepancy by taking a new approach to the philosophical evaluation of our adversarial legal systems. Instead of making arguments about the role of distributive justice or professional ethics in the legal system, I have discussed the institutional normative limits of the market in legal representation.

After carrying out a scrutiny of this kind, my conclusion is that allocating legal representation by the market in adversarial systems undercuts the system's normative appeal. In order for this normative appeal to survive, I showed that two (previously unstated) normative requirements must be satisfied and serve as limits on the market in legal representation: (equal opportunity for) equality in legal representation and (equal opportunity for) sufficiency of legal representation. My levelling down plus type-based-floor proposal serves as a starting point for a reform that would satisfy these requirements.

In the next chapter I turn to apply my institutional account to another central institution in liberal democracies, the institutional design of which is also based on competition: the media.

6

The Institutional Limits of the Marketplace of Ideas

The market and the media are inseparable, or so it seems,[1] at least when it comes to contemporary liberal democracies. The dissemination and production of political information, as well as public discussion on political affairs, occur in many countries via and within mass media markets. Private companies own and manage television news outlets, radio stations, newspapers, social media platforms, and news websites. These private companies supply their products for profit either directly through subscriptions or paywalls or indirectly through advertising (some do both). Even in countries where parts of the mass media are publicly owned or where there are policies in place that are supposed to ensure market-independent production and dissemination of information, these non-market-based measures are perceived only as supplements to the market—not as a comprehensive, independent, institutional design of the press. Furthermore, in recent decades there has been 'a convergence toward' the market-dominated model in most liberal democracies.[2] So even countries where the market in political media is not yet dominant are seemingly on their way to full marketisation of the media.

The market and the media are inseparable not only in practice but also, and more importantly for the purposes of this chapter, in normative theory. For more than 100 years, the dominant and developed normative account concerning what the institutional design of the press should be has been the 'marketplace of ideas'.[3] In brief, the idea is that open, uncensored, unregulated, fierce

[1] As I shortly explain (see section 6.1), I use the words 'media', 'press', 'political media' and 'media system' interchangeably.

[2] Daniel C. Hallin and Paolo Mancini, *Comparing Media Systems: Three Models of Media and Politics* (Cambridge: Cambridge University Press, 2004), 251–95.

[3] To be sure, there are *other* models of media systems, but no general normative theory has been developed to justify them. For instance, Hallin and Mancini's social democratic model is an empirical account, not a normative one (see ibid., 14.) Even in the famous 'Four Theories of the Press', in which each theory is supposedly normative, there are only two theories that are relevant to liberal democracies (the libertarian theory and the social responsibility theory),

competition over ideas amongst individuals and media outlets in the market is the best way to achieve the main sought-after institutional functions of the media. The first of these is to foster the discovery of the truth through debate, the exchange of ideas and investigative journalism.[4] The second institutional function is to act as a 'watchdog' for the people to prevent abuse of power and corruption by the governing elite.[5] The third is to bolster the ability of citizens to self-govern by informing them about political affairs, providing them with a plurality of competing platforms to express their concerns and making the ruling elite responsive to their wishes.[6]

Against this apparently neat normative picture, in this chapter, I argue that for it to live up to its normative appeal, the marketplace of ideas should not, in fact, be fully marketised. My argument is comprised of three parts. First, building on the distinction between the two concepts of competition I have established in chapter 4, I argue that arguments that appeal to the benefits of a marketplace of ideas fail to distinguish between two different ways in which ideas are designed to compete: *parallel competition* over ideas, and *friction competition* over ideas. Subsequently, I show

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and as Pickard has acknowledged, the social responsibility theory is a mere 'rebranding' of the libertarian one, which is what I call the marketplace of ideas theory. See Pickard, *Democracy Without Journalism?*, 33; Fred S. Siebert, Theodore Peterson, and Wilbur Schramm, *Four Theories of the Press: The Authoritarian, Libertarian, Social Responsibility, and Soviet Communist Concepts of What the Press Should Be and Do* (Urbana: University of Illinois Press, 1984). Tambini has also recently distinguished between negative and positive approaches to media regulation, the negative being attributed to the United States and the positive to Europe and Britain), but the positive approach does not provide us with a theory of institutional design, but rather an inclination towards conditional regulation, as Tambini himself acknowledges. See Damian Tambini, *Media Freedom* (Cambridge: Polity Press, 2021). One would expect a theory of institutional design of mass media of some kind to have emerged out of the new works on deliberative democracy, but surprisingly, none has been forthcoming. Instead, the policy proposals arising from such works include only parliaments, juries and so forth. The mass media system has been therefore left unandressed. See Robert E. Goodin and Kai Spiekermann, *An Epistemic Theory of Democracy* (Oxford: Oxford University Press, 2018); Hélène Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century* (Princeton; Oxford: Princeton University Press, 2020).

[4] E.g., John Charney, *The Illusion of the Free Press* (Oxford: Hart Publishing, 2020), 58; Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 337; Holmes, 'Liberal Constraints on Private Power?', 28; Tambini, *Media Freedom*, 11.

[5] E.g., Matthew Gentzkow and Jesse M. Shapiro, 'Competition and Truth in the Market for News', *The Journal of Economic Perspectives* 22, no. 2 (2008): 136; Randall Stephenson, 'A Truth-Seeking Justification for Press Freedom?', *Oxford Journal of Legal Studies* 39, no. 3 (2019): 700–701; Tambini, *Media Freedom*, 5.

[6] Fiss, *The Irony of Free Speech*, 53; Joseph Raz, 'Free Expression and Personal Identification', *Oxford Journal of Legal Studies* 11, no. 3 (1991): 308; Jacob H. Rowbottom, 'Government Speech and Public Opinion: Democracy by the Bootstraps', *Journal of Political Philosophy* 25, no. 1 (2016): 24. Often, arguments from self-government are presented against the marketplace of ideas, but it does not mean that the marketplace of ideas cannot be justified in the same way.

that the marketplace of ideas is compatible only with parallel competition and can undercut friction competition—namely, prevent friction competition over ideas from functioning according to its normative justification. Thus, to secure the social benefits of friction competition (that are wrongly associated with the market), competition over ideas cannot take place exclusively within a market.

Second, I show that although parallel competition over ideas is compatible with the market to an extent, it does not live up to some of its normative promises when fully marketised. That is, since a profit-driven and preference-based media is not structured to promote the discovery of the truth and can lose its independence to players and interest groups within the market, even though it is independent of the state. Accordingly, I propose a plausible direction for future reform: a new kind of antitrust law that would focus on securing the correct functioning of parallel competition over ideas. To focus in this way, a reform like this would have to be markedly different from existing antitrust laws, which focus solely on economic competition.

In the final step of the argument, I shift from focusing on the marketplace of ideas as an ideal institutional design to the actual market in mass political media. According to the ideal story, in a marketplace of ideas, there is literally a *market in ideas*. People sell their ideas, and the audience buys the idea that is most appealing to them. In contrast, the actual market in mass political media is, by and large, an advertising-based market of *media platforms*. Each platform tries to convince people to consume its content in the hope of selling advertising slots (i.e., viewers' or readers' 'eyeballs') to advertisers to turn a profit. Under such a model, people watch cable TV news (e.g., Fox News) or read a newspaper (e.g., *The Guardian*) but do not buy an idea per se. That is to say, they buy products from a platform that is associated with particular views, cultures, or values. Thus, my argument is that as long as one supports the normative appeal of the marketplace of ideas, the marketplace of platforms should function in a way that complements it. And to do so, it is highly likely that contemporary markets in media platforms should be severely restricted and radically reformed.

The chapter is structured as follows. I begin with a few introductory remarks to set the stage for my argument (6.1). Next, I introduce the distinction between the two kinds of competition over ideas. By focusing on the United States Federal Communications Commission's (FCC) long-contentious, now repealed 'fairness doctrine', I show how the market in political media can undercut the friction-based normative appeal of the marketplace of ideas (6.2).[7] Then, I discuss whether a fully marketised parallel competition over ideas is compatible with the central normative justifications for parallel competition over ideas. I argue that it does not (at least partially) and offer general normative guidelines for reform (6.3). Subsequently, I show that the competition over ideas and the marketplace of platforms are two separate things. I argue that to function in a justified way, contemporary media markets must facilitate competition over ideas. And to that end, it is justified to limit the marketplace of platforms (6.4).

6.1 Setting the Stage

The 'whole subject is immensely difficult, and full of traps'.[8] This is how Walter Lippmann despairingly described the institutional design of political media. I could not agree more, and Lippman is not alone in his observation. Many have acknowledged that the realm of political speech, discussion and information is 'unruly',[9] 'wild',[10] and 'chaotic'.[11] Its institutionalisation is challenging and always partial, and the language used to describe it is often vague at best. Thus, to try and avoid at least some of these traps, a few, unfortunately, lengthy clarificatory remarks are in order.

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[7] Throughout this chapter, I mostly use examples from and empirical data about the United States. I do so for two reasons. First, the media system in the United States is a paradigmatic case of an almost fully marketised system. Second, unfortunately, the normative discussion about the media is almost completely Americanised, so I have no other choice but to engage with the US example.

[8] Walter Lippmann, *Liberty and the News* (Princeton: Princeton University Press, 2008), 25.

[9] Jürgen Habermas, 'Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research', *Communication Theory* 16, no. 4 (2006): 417.

[10] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996), 307.

[11] Robert M. Simpson, 'The Relation between Academic Freedom and Free Speech', *Ethics* 130, no. 3 (2020): 300.

6.1.1 Language and Conceptual Clarifications

First, I use the words 'media', 'press', 'political media' and 'media system' interchangeably to loosely describe an intricate set of organisations that participate in the mass circulation and production of political information and the facilitation of political debate. The obvious examples are newspapers, television and radio stations, and political magazines—both online and offline.

Second, I focus on *political information* and debate. While the media market consists of many other things, the institutional justifications of the media are primarily concerned with functions related to political affairs, not entertainment, the arts, and the like. I acknowledge that the distinction between political and apolitical information is crude, but for the purposes of this chapter, it should suffice.

Third, an overwhelming number of political and legal theorists discuss the normative status of the media in terms of freedom ('the free press').[12] Strictly speaking, it is better to speak of the independence of the press than freedom of the press. It allows us to analyse the relationship between the press and other institutions or forces without committing that this relationship must entail a certain kind of freedom—a highly contested concept as it is. Hence, I avoid using 'freedom' to describe the press to prevent unnecessary ambiguities. But, even if one does speak of freedom of the press, one must not use the language of freedom as a means to stipulate by definition that any restriction on the press is a restriction on freedom and, therefore, morally unjustified. I elaborate on this point in section 6.3.

Fourth, this chapter is about the normative justifications for a specific institutional design of the press. It is not about free speech. Typically, when discussing the marketplace of ideas, or media regulation of any kind, philosophers, as well as legal and media scholars, tend to bundle

[12] See, for instance, Joshua Cohen, 'Freedom of Expression', *Philosophy & Public Affairs* 22, no. 3 (1993): 207–63; Tambini, *Media Freedom*; Raz, 'Free Expression and Personal Identification'.

freedom of speech[13] and freedom of the press together, thereby implying, as Judith Lichtenberg observed: 'that they are inseparable, probably equivalent, and equally fundamental'.[14] A few scholars have attempted to clarify this ambiguity and offered different ways to distinguish between the two concepts.[15] Without diving too deep into this debate, I contend that the distinction that does best in this regard is that between free speech (which is an *individual moral right*, be it absolute or not) and free press (which is related to the normative appeal of an *institution* or an *institutional design*).[16]

Drawing on the terminology presented in chapter 3, using free speech and free press interchangeably leads to a confusion between individual morality, which is focused on questions of permissibility and individual rights (i.e., free speech), with institutional morality that is focused on the justifiability of institutions and institutional designs (i.e., free press).[17] To be sure, I do not wish to claim that free speech and free press could or should be completely separated. The right to free speech, as with any other general moral principle, puts constraints on the way we build our institutions. But if we can differentiate between the two concepts, we can better understand the relationship between them and apply them in the proper context. So, I refrain from using both

[13] Some use 'freedom of expression' instead of 'freedom of speech'. See, for instance, Cohen, 'Freedom of Expression'. I do not see a substantive difference between the two (as one can define speech very broadly or expression very narrowly), so I have selected 'speech' randomly.

[14] Lichtenberg, 'Foundations and Limits', 329. For examples for this conflation, see Cohen, 'Freedom of Expression'; Charney, *The Illusion*; Sunstein, *Democracy and the Problem of Free Speech*.

[15] See, for example, Dworkin, *A Matter of Principle*, 385; Lichtenberg, 'Foundations and Limits', 329–33, 346; Meiklejohn, *Free Speech*, 61–62; Onora O'Neill, 'Ethics for Communication?', *European Journal of Philosophy* 17, no. 2 (2009): 167–69; Raz, *The Morality of Freedom*, 253; Thomas Scanlon, 'A Theory of Freedom of Expression', *Philosophy & Public Affairs* 1, no. 2 (1972): 204–26; Thomas Scanlon, 'Freedom of Expression and Categories of Expression', in *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge: Cambridge University Press, 2003); Tambini, *Media Freedom*, 11, 129.

[16] For different versions of this distinction, see Stephanie Craft, 'Press Freedom and Responsibility', in *Journalism Ethics: A Philosophical Approach*, ed. Christopher Meyers (Oxford: Oxford University Press, 2010), 45; Lichtenberg, 'Foundations and Limits', 333; Scanlon, 'A Theory of Freedom of Expression'; Potter Stewart, 'Or of the Press', *The Hastings Law Journal* 26, no. 3 (1974): 632. Bejan's distinction between Isegoria and Parrhesia also tracks, to some extent, this distinction but she uses equality-related and freedom-related considerations as the main difference and not the institutional vs individual distinction. Teresa M. Bejan, 'Two Concepts of Freedom (of Speech)', *Proceedings of the American Philosophical Society* 163, no. 2 (2019): 95–107.

[17] Scanlon, 'Individual Morality and the Morality of Institutions', 3.

'freedom'—while alluding to the institutional design of the media—and 'speech'—since my focus is the institutional design of the media rather than mere speech.

Fifth, very roughly, modern mass media organisations are supposed to provide correct and relevant information to the people by performing (at least) three critical functions within the marketplace of ideas: (1) reporting the news; (2) producing knowledge through investigative journalism; and (3) facilitating political public debate (in the broadest sense). It might be the case that, in theory, different institutional designs could be set up to fulfil each function separately.[18] However, these functions are not differentiated in practice, and media outlets undertake all of them simultaneously. So, I assume the marketplace of ideas as an institutional design is meant to capture all three functions. And I will address these functions together as a bundle, except where it is necessary to deal with them separately.

6.1.2 Scope and Level of Analysis

I now turn to a few remarks about the scope and the level of analysis of the chapter. First, the way a TV news network operates is different in some respects from the way a newspaper, a radio show, or an online magazine operates. Thus, different kinds of media might require different regulatory adjustments. As Lisa Herzog contends, we should not expect a one-size-fits-all solution.[19] That being said, there is no reason to believe that there cannot, or should not be, one dominant, overarching theory concerning the institutional design of political media.

To illustrate this point, consider the legal system. There is one unifying theory for the institutional design of the legal system—namely, the adversarial legal system—which is applied differently to the different fields of law. One prominent example is the different rules of procedure

[18] For instance, one could imagine an institution called, say, 'the public investigator' covering a broader range of issues than the standard ombudsman, with its own radio or TV station, and solely devoted to investigative journalism. Assume that such institution would not be reporting the news or facilitating public debate.

[19] Lisa M. Herzog, *Citizen Knowledge: Markets, Experts, and the Infrastructure of Democracy* (Oxford: Oxford University Press, forthcoming, 2023), 140.

applied to criminal and civil cases within adversarial systems. If, in the case of the institutional design of the legal system, we can and do make context-dependent adjustments while applying a comprehensive theory, there is no reason to believe that the same logic cannot be applied to the institutional design of the media.[20] Moreover, even if there is no one-size-fits-all solution for the institutional design of the media, as Herzog argues, the arguments in favour of the marketplace of ideas do, in fact, purport to provide justifications for a one-size-fits-all design. Like in the previous chapter, my starting position in this chapter is to accept the underlying assumptions and motivations of the institutional design I am exploring on their own terms. So, following Owen Fiss's (and others') steps, I consider the sphere of political media 'as a unitary whole'.[21]

Second, I will not get into the question of whether recent technological changes and the rise of social media warrant an entirely new institutional design of the media. I believe that despite recent dramatic changes, 'similar policy quandaries remain'.[22] Furthermore, I do not take a stance regarding the debate about what constitutes media, i.e., whether media regulations should apply to social media and whether bloggers should enjoy the privileges conventionally afforded to journalists.[23] These are all important questions, but again, beyond the scope of this chapter.

Third, this chapter is about the marketisation of political media, not its commodification or privatisation. Throughout the years, many have expressed anti-commodification views concerning the media. The common claim is that there should be a difference between an 'objective news

[20] Notice that Herzog's argument is normative. In real life, as Hallin and Mancini's descriptive account confirms, Herzog is right. In most countries, the media do not constitute any single system, and is composed of many separate and often inconsistent elements. See Hallin and Mancini, *Comparing Media Systems*, 12. This descriptive fact might have implications about the feasibility of applying a unified system to contemporary fragmented media systems, but it is not enough to justify Herzog's normative claim.

[21] Fiss, *The Irony of Free Speech*, 53. For examples of other theorists who have taken the same approach see: Harry Brighouse, 'Political Equality and the Funding of Political Speech', *Social Theory and Practice* 21, no. 3 (1995): 477; Jürgen Habermas, Sara Lennox, and Frank Lennox, 'The Public Sphere: An Encyclopedia Article (1964)', *New German Critique*, no. 3 (1974): 49; Sunstein, *Democracy and the Problem of Free Speech*, 111–12.

[22] Victor Pickard, *America's Battle for Media Democracy: The Triumph of Corporate Libertarianism and the Future of Media Reform* (New York: Cambridge University Press, 2015), 220. See also Pickard, *Democracy Without Journalism?*, 38.

[23] For a useful presentation of this debate, see Tambini, *Media Freedom*, 14–15.

story and a free reader for a furniture store', as US President Franklin D. Roosevelt eloquently put it.[24] Others have drawn the distinction in all manner of colourful ways, such as between the *New York Times* and a 'fertilizer factory'[25] and between journalism and 'peanuts and potatoes',[26] 'shoes', 'toothpaste',[27] and 'paper towel'.[28]

Although these claims seem just like the paradigmatic MLM anti-commodification arguments from corruption that I discussed in chapter 2, many of them are, in fact, not. The source of the apprehension of the writers who have used them is not the mere commodification of the media, which somehow degrades it, changes its social meaning and so forth. In fact, most of them explicitly propose publicly owned media of some kind that pays journalists and editors and sells its product for a reasonable price. Rather, these rhetorical flourishes are meant to support an argument against the marketisation of the media.[29] To be sure, there could be principled anti-commodification arguments concerning the media in general and concerning ideas more specifically.[30] However, they are both exposed to most of the objections against the standard MLM arguments, and it is not clear what kind of institutional design should follow from them. Therefore, for the purposes of this chapter, I put them to one side.

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[24] This quote is from a letter President Roosevelt sent to the renowned publisher Joseph Pulitzer in 1938— published in Pulitzer's *St. Louis Post-Dispatch*—in which Roosevelt expressed his worry regarding the profit-driven model of the media. See Franklin D. Roosevelt, 'Letter of Congratulations to the St. Louis Post-Dispatch', https://www.presidency.ucsb.edu/documents/letter-congratulations-the-st-louis-post-dispatch. See, also, Pickard, *Democracy Without Journalism?*, 27–28.

[25] Steven H. Shiffrin, *What's Wrong with the First Amendment?* (Cambridge: Cambridge University Press, 2016), 126–27.

[26] Justice Frankfurter, *Associated Press V. United States*, 326 US 1, 28 (1945).

[27] Pickard, Democracy without Journalism?, 62.

[28] David A. Anderson, 'Freedom of the Press', *Texas Law Review* 80, no. 3 (2002): 478. The list of examples goes on. More than three hundred years ago, John Milton claimed that truth and knowledge should not be treated the same as 'broadcloth' or 'woolpacks'. See Milton, *Areopagitica*, 38. More recently, Sunstein has distinguished between free expression and the sale of 'cars, brushes, cereal, and soap'. See Sunstein, *Democracy and the Problem of Free Speech*, 17.

[29] Habermas, for instance, clearly acknowledged that '[T]he rise of autonomous art and an independent political press since the late eighteenth century proves that the commercial organization and distribution of intellectual products do not necessarily induce the commodification of both the content and the modes of reception'. Thus, the problem is not commodification but rather marketisation. In Habermas's words: 'it is the intrusion of the functional imperatives of the market economy into the "internal logic" of the production and presentation of messages'. See Habermas, 'Political Communication in Media Society', 422.

[30] Some of Radin's arguments about the marketplace of ideas could be read as anti-commodification arguments. See Radin, *Contested Commodities*, 166–68.

Similarly, there is an abundance of literature on the privatisation of political media. In this case, also, many arguments are focused on anti-marketisation rather than anti-privatisation of the media.[31] Be that as it may, there could be pure anti-privatisation arguments concerning the media, which I also put to one side. Thus, from this point onwards, I will assume that the mere commodification of ideas is either not objectionable or is objectionable but, overall, could be justified and that most views considering the privatisation of the media could be in tandem with my arguments regarding its marketisation.

Lastly, in the previous chapter on the market in legal representation, I focused on the marketisation of a specific good *within* the adversarial legal system. I assumed a particular competition-based design and chose an institutional good within it. In this chapter, my starting point is different since it is not clear which kind of competition the institutional design of the media is based on. Moreover, I do not examine whether the marketisation of a specific good within the media system undercuts the justification of its institutional design. Rather, I examine marketisation at the level of the institutional design itself—namely, whether the entire competitive institutional design should be a market or not. So, I am operating at a different level of analysis than in the previous chapter.

6.2 Two Kinds of Competition Over Ideas but Only One Marketplace

The seminal metaphor of 'the marketplace of ideas' is a creation of the American legal system. It was first coined by Justice William O. Douglas in *United States v. Rumely* (1953). In his concurring opinion, Justice Douglas maintained that '[L]ike the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas'.[32] As Napoli notes, the metaphor 'had fully crystallized into a concise expression' only 12 years later when Justice

[31] See, for example, Owen M. Fiss, 'Why the State?', in *Democracy and the Mass Media: A Collection of Essays*, ed. Judith Lichtenberg (Cambridge: Cambridge University Press, 1990); Pickard, *America's Battle for Media Democracy*.
[32] *United States V. Rumely*, 345 US 41, 56 (1953).

Brennan used it as a single word—marketplace—thereby cementing the expression we are so familiar with today.[33]

Although Justices Douglas and Brennen were the first to use the metaphor in its familiar form, their rulings continued a much longer intellectual tradition stretching from John Milton and John Stuart Mill to Justice Oliver Wendel Holmes Jr.[34] Some have disputed how continuous this tradition really is,[35] but the key point shared by all these thinkers is that *competition over ideas* leads to desirable social results (most notably, the discovery of the truth and the ability to hold government accountable).[36] Subsequently, the market is the institutional design that has been recognised as most suitable to facilitate such competition.[37]

However, as many commentators have recognised, the metaphor of the marketplace of ideas is 'fuzzy',[38] 'ambiguous'[39] and 'polysemic'.[40] In what follows, building on the two concepts of competition I introduced in chapter 4, I argue that embedded in this metaphor are two distinct kinds of competition over ideas that have diverging implications for the institutional design of the media, namely, *parallel competition* and *friction competition* over ideas.[41] While the former is compatible

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[33] Philip M. Napoli, 'The Marketplace of Ideas Metaphor in Communications Regulation', *Journal of Communication* 49, no. 4 (1999): 155.

[34] Gentzkow and Shapiro, 'Competition and Truth', 134; Stanley Ingber, 'The Marketplace of Ideas: A Legitimizing Myth', *Duke Law Journal* 1984, no. 1 (1984): 3; Pickard, *Democracy without Journalism?*, 13; Radin, *Contested Commodities*, 165.

[35] For an excellent account on this, see Jill Gordon, 'John Stuart Mill and the "Marketplace of Ideas"', *Social Theory and Practice* 23, no. 2 (1997): 235–49. For a more recent example, see Herzog, *Citizen Knowledge*, 134–37.

[36] To be sure, some elements of competition over ideas, when not institutionalised properly, can lead to repugnant results. See Elizabeth Anderson, 'Can We Talk?: Communicating Moral Concern in an Era of Polarized Politics', *Journal of Practical Ethics* 10, no. 1 (2022): 67–92. My starting point in this chapter is that competition over ideas is the main justification for the institutional design of the media, and thus I do not discuss accounts that reject competition as an ideal institutional design.

[37] E.g., Ronald H. Coase, 'The Market for Goods and the Market for Ideas', *The American Economic Review* 64, no. 2 (1974): 384–402; Pickard, *Democracy Without Journalism?*, 58; Robert Sparrow and Robert E. Goodin, 'The Competition of Ideas: Market or Garden?', *Critical Review of International Social and Political Philosophy* 4, no. 2 (2001): 48.

[38] Robert M. Entman and Steven S. Wildman, 'Reconciling Economic and Non-Economic Perspectives on Media Policy: Transcending the "Marketplace of Ideas"', *Journal of Communication* 42, no. 1 (1992): 6.

[39] Jeremy Waldron, 'Heckle: To Disconcert with Questions, Challenges, or Gibes', *The Supreme Court Review* 2017, no. 1 (2018): 16.

[40] Herzog, *Citizen Knowledge*, 128.

[41] Herzog has recently introduced a distinction between two kinds of metaphors for competition over ideas: (1) competition in the marketplace and (2) competition in a battle, or sports contests. Herzog's account is mainly focused

with a marketised institutional design, the latter is undercut by it.

6.2.1 Parallel Competition over Ideas

Given that the market itself is a paradigmatic case of institutionalised parallel competition, it is unsurprising that the most common interpretation of competition within the marketplace of ideas tradition also reads it as primarily parallel.[42] On this interpretation, the marketplace of ideas is 'rather more literal than figurative'.[43] There are producers, whether news outlets, journalists, public figures, or anyone else with something to say. They come to the marketplace of ideas—namely, the public forum—and compete for the public's attention, money, and acceptance. Each consumer can then assess the different ideas and choose, buy, accept, or support the best one amongst them (or at least the ones they like the most).[44]

Waldron's picturesque description nicely captures this view:

> [I]deas are set out as in an orderly market square—one idea or array of ideas to each stall—and people move from stall to stall in an orderly fashion engaging in quiet and thoughtful comparison shopping. The most popular stall wins the contest (and maybe that's what we should identify as truth).'[45]

Thus, each 'stall' is (and ought to be) protected by a zone of non-interference.[46] The competitors first develop their ideas independently while 'swimming in their separate lanes',[47] and only then are the ideas compared in the market by consumers (e.g., 'comparison shopping'). There is no clash involved or at least no institutionally preplanned clash.

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on discussing which metaphor is more apt to describe the epistemic benefits of competition over ideas. My distinction is focused on two different kinds of institutional designs, not metaphors, and purports to capture other elements of the different competitions over ideas beyond their epistemic benefits. Moreover, there are parallel sport contests, as I have shown in chapter 4, so I am not convinced that Herzog's distinction can hold in all cases. See ibid., 134–37.

[42] Sparrow and Goodin, 'Market or Garden', 48.

[43] Catharine A. MacKinnon, 'Pornography, Civil Rights, and Speech', *Harvard Civil Rights–Civil Liberties Law Review* 20, no. 1 (1985): 5.

[44] Charney, *The Illusion*, 65–66; Goldman and Cox, 'Speech, Truth, and the Free Market for Ideas', 17; Gordon, 'John Stuart Mill and the "Marketplace of Ideas"', 236; Radin, *Contested Commodities*, 168; Waldron, 'Heckle', 15–18.

[45] Waldron, 'Heckle', 16.

[46] Fiss, 'Why the State?', 140; Meiklejohn, *Free Speech*, 71–72; Waldron, 'Heckle', 19.

[47] Waldron, 'Heckle', 24.

Accordingly, the social benefits of this competition are grounded in its parallel design.[48] First, there is the aggregation of individual choices. In aggregate, so the argument goes, the best ideas are expected to emerge victorious. No friction is necessary, as the aggregation by the market is expected to do the work. As Alexander Meiklejohn noted:

> We Americans […] have taken the 'competition of the market' principle to mean that as separate thinkers we have no obligation to test our thinking […]. That testing is to be done, we believe, not by us, but by 'the competition of the market'.[49]

The second benefit is that the aggregation of information, and people's preferences about this information from diverse sources, is supposed to be more informative than a centralised system. It allows people to experiment with different ideas and worldviews and create knowledge in a more spontaneous, diverse, and, therefore, better way.[50] Moreover, beyond this epistemic benefit, a decentralised public forum is supposed to prevent elite capture. It makes it harder for one person, or a particular group of people, to accumulate too much power, control the public forum and use it to manipulate people to gain even more power.

From this perspective, the rise of cable news, the internet, social media, and other unregulated, hyper-specialised media sources seems like a clear advance. It ensures the availability of a nearly infinite variety of views, or 'stalls', thereby maximising individual choice and guarantees a free, decentralised, and diverse public forum. Within the Milton–Holmes tradition, Holmes's view in his famous dissent in *Abrams v. United States* represents the parallel interpretation:

> [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That in any rate is the theory of our constitution. It is an experiment, as all life is an experiment.[51]

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[48] I elaborate on the justifications for parallel competition over ideas in section 6.3.
[49] Meiklejohn, *Free Speech*, 86.
[50] Gentzkow and Shapiro, 'Competition and Truth', 135.
[51] *Abrams V. United States*, 250 US 616, 630 (1919).

6.2.2 Friction Competition over Ideas

Milton and Mill, the two other sides of the marketplace of ideas intellectual triangle, exemplify the friction-based interpretation of competition over ideas. Recall Milton's well-known dictum mentioned in chapter 4: 'Let [Truth] and Falsehood grapple, who ever knew Truth put to the worse, in a free and open encounter'.[52] Or Mill's account about how truth is revealed through a process of a struggle between combatants 'fighting under hostile banners'.[53] Under the Milton–Mill account, competition over ideas is more like a basketball game or a boxing match than a 100m sprint. It is, borrowing Waldron's words, about 'the immediacy of interjection'.[54] Succeeding in a friction competition over ideas means, in large part, overcoming the responses or interferences acquitted by the opponent. Discussion, refutation, exchange of ideas and mutual interference are constitutive of the friction-based design.

Accordingly, the normative benefits of competition over ideas are grounded in the friction between competitors. The first benefit is epistemic: the clash between ideas, as opposed to the mere aggregation of different views in separate lanes, is supposed to induce the creation of better knowledge, get us closer to the truth, or help us find better ideas about how to improve our societies. Using Mill again, only 'collision with error' can produce 'the clearer perception and livelier impression of truth'.[55]

The second benefit is protective. A paradigmatic manifestation of the protective function of friction, as stated in chapter 4, is the argument that friction competition over power between different branches of government leads to an equilibrium wherein none of the actors is too powerful, and thus, citizens will be protected from arbitrary power.[56]As the 'fourth estate', one of

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[52] Milton, *Areopagitica*, 55.
[53] Mill, *On Liberty*, 49.
[54] Waldron, 'Heckle', 19.
[55] Mill, *On Liberty*, 20.
[56] E.g., Hirschman, *The Passions and the Interests*, 29–30; Levinson and Pildes, 'Separation of Parties'; Rosenblum, *On the Side of the Angels*, 12, 125; White and Ypi, *The Meaning of Partisanship*, 60.

the most central institutional functions of the media is to contribute to the maintenance of this inter-institutional equilibrium by acting as a 'watchdog' on behalf of the people to prevent the governing elites from abusing their power.[57]

Notice, however, that the fact that there should be inter-institutional friction competition between the media and the other branches of government over power does not necessarily entail that the solution is to have intra-media friction competition over ideas as the institutional design of the media or a competitive design at all for that matter. As I have just shown, parallel competition over ideas within the media system is also considered a way to prevent elite capture and achieve beneficial inter-institutional friction competition.

Moreover, one can imagine, in theory, a non-competitive public forum that can perform well in the inter-institutional friction competition. So, there is a need for a further explanation to show why *intra-media friction competition* over ideas is conducive to an *inter-institutional friction competition*. One such explanation is that friction competition over ideas allows the media and the people to hold politicians accountable by ensuring they will be confronted and challenged in public. That is, for instance, by requiring and facilitating platforms for frictional debates between politicians and requiring members of the elite to attend hard interviews with adversarial journalists. Therefore, friction competition over ideas could be (and, in fact, is) an important ingredient in the inter-institutional checks and balances mix.

I should briefly restate the arguments so far. There are two kinds of competition over ideas. The normative appeal of both is used to justify or is associated with the same intellectual tradition and the same central, overarching metaphor—the marketplace of ideas. I now turn to argue, using the 'fairness doctrine' from the United States as a case study, that a market in ideas is compatible

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[57] E.g., Gentzkow and Shapiro, 'Competition and Truth', 136; Pippa Norris, 'Watchdog Journalism', in *The Oxford Handbook of Public Accountability*, ed. Mark A. P. Bovens, Robert E. Goodin, and Thomas Schillemans (Oxford: Oxford University Press, 2014), 525; Stephenson, 'A Truth-Seeking Justification for Press Freedom?', 700–701; Tambini, *Media Freedom*, 5.

only with parallel competition and undercuts the normative benefits of friction competition over ideas.

6.2.3 A Case in Point: The Federal Communication Commission's Fairness Doctrine

Introduced in 1949 by the FCC, the fairness doctrine was a policy directed at holders of broadcast licences in the United States that consisted of two basic requirements:

> (1) that every licensee devote a reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance; and (2) that in doing so … [the broadcaster] must affirmatively endeavor to make […] facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented.[58]

Supplementary requirements of the fairness doctrine were also codified into regulation, such as the requirement that those who were talked about on air be given a chance to respond to the statements made about them ('the personal attack rule') and the requirement that opposition candidates must be offered an opportunity to respond when a broadcaster editorially endorsed a candidate running against them ('the political editorial rule').[59] A few decades after its formation, during Ronald Reagan's presidency, a heated national debate erupted over the doctrine and dogged efforts by conservatives to repeal it bore fruit. In 1987, as discussed in further detail below, the FCC repealed the fairness doctrine, although the corollary personal attack and political editorial rules were not repealed until 2000.[60]

Oftentimes, the debate over the fairness doctrine is portrayed in binary terms, one side supporting unregulated free competition over ideas in the market and the other rejecting it in favour of regulated fairness and balance. This way of presenting the debate is not false. However, it is also illuminating to read the debate another way, namely, as one over two different

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[58] Federal Communications Commission, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance* (Federal Register, 1964). See also Pickard, *America's Battle for Media Democracy*, 116, 122; Sunstein, #*Republic*, 75.

[59] Fiss, 'Why the State?', 152, footnote 2.

[60] Ibid., 137.

understandings of what competition over ideas means and which kind of competition—friction or parallel—the fairness doctrine was supposed to defend.

As Victor Pickard has shown, the fairness doctrine was not plucked out of thin air. It originated at the tail end of the media reform movement, whose initial goal—going back to the late 1920s—was to carve out, through a series of controversial policy decisions, a non-commercial segment on the United States' airwaves.[61] One such decision was the 1929 *Great Lakes Broadcasting Co.* decision of the Federal Radio Commission, the predecessor to the FCC. As part of the decision, it was asserted that the 'public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies to all discussions of issues of importance to the public'.[62]

Forty years later, in 1969, after the fairness doctrine was already in place, the US Supreme Court upheld the doctrine's constitutionality in *Red Lion Broadcasting Co. v. FCC*. The court found that the FCC had acted within its jurisdiction in ruling that a Pennsylvania radio station had violated the fairness doctrine by denying a writer who had been characterised in a broadcast as a communist to respond on air to the allegations. In his ruling, Justice White expressed a view along the same lines as the one presented in the *Great Lakes* decision about the role of the FCC in general and the fairness doctrine more specifically. 'The 'public interest' in broadcasting', he argued, 'clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public'.[63]

Evidently, one plausible reading of the justification for the fairness doctrine (it is not the only one, as I show below) is that it was meant to secure the conditions necessary for friction competition over ideas to function. Putting aside the question of whether this specific policy was

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[61] Pickard, *America's Battle for Media Democracy*, 98–123.
[62] Federal Radio Commission, *Third Annual Report of the Federal Radio Commission* (Washington, DC: Government Printing Office, 1929), 33.
[63] *Red Lion Broadcasting Co. V. Fcc*, 395 US 367, 385 (1969).

an effective measure for achieving this goal,[64] the doctrine's requirements were designed, according to this friction-focused reading, to facilitate friction between ideas about controversial issues, ensure that vigorous debate over them took place, and secure participants' ability to respond to and rebut one another's positions. It is not enough, under this reading, for the FCC to allow people with different views to express their beliefs in parallel or to provide them with a general opportunity to defend their good name in parallel to those challenging them.

However, as said, this is not the only plausible reading. One could argue that the doctrine was only supposed to ensure that different points of view over controversial topics would have a chance to be aired on the radio, not to secure friction between them. Another way of putting it is to say the fairness doctrine was supposed, under this reading, to fix a market failure of some kind. Radio spectrum is a scarce resource allocated by the government in a non-competitive way, and so to ensure that different points of view get a chance to compete, there is a need for the doctrine.[65] However, once the different views are in competition, they should compete in parallel.

Almost sixty years after the *Great Lakes* decision, on 6 August 1987, in response to a complaint against a New York television station, WTVH Syracuse, the FCC concluded that the fairness doctrine was unconstitutional and should be repealed. In so doing, the commissioners cited the 1974 Fairness Report, which had pointed to the 'paradox' seemingly raised by the fairness doctrine: '[T]he doctrine's affirmative use of government power to expand broadcast debate would seem to raise a striking paradox [since] the principal function of the First Amendment has been to protect the free marketplace of ideas'.[66] In 1974, the fairness doctrine only 'seemed' to raise a paradox. The commissioners had raised the matter back then but reaffirmed the doctrine anyway.

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[64] This fact has been disputed. For a brief discussion on the matter, see Sunstein, #*Republic*, 75. See, also, Gentzkow and Shapiro, 'Competition and Truth', 148.

[65] In fact, in his *Red Lion* ruling, Justice White relied heavily on the fact that radio spectrum is scarce. This fact might have opened the space for the FCC's parallel interpretation to become dominant in the years afterward.

[66] Federal Communications Commission, *Fairness Doctrine and Public Interests Standards—Fairness Report Regarding Handling of Public Issues* (1974).

In 1987, things were different. The commissioners asserted that past FCC decisions had, in fact, been misplaced and the doctrine had been problematic all along.[67]

Still, until the 1980s, the fairness doctrine was considered a tool to foster competition over ideas. Then, in 1987, it was suddenly deemed incompatible with it. The fourth paragraph of the 1987 decision gives a good explanation for this shift. Citing its own 1985 Fairness Report,[68] the 1987 decision claimed that 'Evaluating the explosive growth in the number and types of information sources available in the marketplace', the 'public has "access to a multitude of viewpoints without the need or danger of regulatory intervention"'.[69]

Thus, a plausible reading of the FCC's justification to repeal the fairness doctrine is that they adopted a parallel, marketised view of competition over ideas. Going back to Waldron's description, the fact that people can access many stalls, as the FCC emphasised, does not mean that there is friction between the stalls. Access to a multitude of viewpoints would not be enough, under a friction-based interpretation, to justify repealing the fairness doctrine. There would still be a need for securing the beneficial clash. Conversely, under a parallel-based interpretation, the repeal is justified. Since once the conditions for people to compete in parallel and maximise the potential of their ideas are in place—which was the situation according to the FCC in the 1980s owing to the development of the media market—there is no justification for government intervention. On the contrary, securing a clash between ideas would go against the logic of the parallel competition itself. Each kind of competition, therefore, pulls in different regulatory directions.

Thus, the case of the fairness doctrine provides us with a real-life example of how an

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[67] Federal Communications Commission, *Complaint against Meredith Corporation Concerning Fairness Doctrine Violations at Wtvh-Tv Filed by the Syracuse Peace Council; Remand of Proceeding from Usca-Dc Circuit to Review Issues Raised by Wtvh*, 1987.
[68] Federal Communications Commission, Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees (1985).
[69] Complaint against Meredith Corporation Concerning Fairness Doctrine Violations, 5043.

exclusively marketised, parallel-based interpretation of competition can *undercut* the friction-based elements of competition over ideas. As a matter of fact, this is actually what happened in practice. As Napoli has shown, while the marketplace of ideas metaphor has been used to justify both friction and parallel competition over ideas throughout the years (using my terminology here), during the 1980s, it was used by the FCC majority far more often 'in deregulatory contexts' that represent a purely 'economic vision'.[70] The parallel, market-based interpretation has, therefore, in practice, undercut the friction-based one, leading ultimately to the repeal of the fairness doctrine.

6.2.4 Objection: Parallel Competition Facilitates Friction

A plausible objection against the argument I have presented so far is that the distinction I draw between the two kinds of competition over ideas is too sharp. Even under parallel competition, there can be—and actually is—friction between opinions. As Waldron concedes:

> Of course I exaggerate. A succession of separate speeches […] can be related to one another dialectically if someone cares to make the effort to bear the first one in mind as he listens to the second and then the third. And sometimes what individual speakers, swimming in their separate lanes, want to do with their receptive audience is precisely to draw attention to the flaws in their opponents' positions. So engagement is not out of the question.[71]

One might argue that if 'engagement' is possible, then parallel competition does not undercut friction, as I suggest. However true this objection was in the age of cable news, new technologies have driven the parallel logic to its limits, especially in the United States. A growing body of evidence suggests that in modern, highly marketised media systems, different political ideologies and opinions seldom clash in frank and open debate. Rather, these systems create isolated

[70] Napoli, 'The Marketplace of Ideas Metaphor', 155–60.
[71] Waldron, 'Heckle', 24.

ideological echo chambers in which people hear what they already think, as they can ignore any 'stall' they do not like.[72]

The goal of news outlets under this design is to convince people to join the echo chamber, not to engage in extended debates with competitors. As one study shows, in 2000 and 2004, a standard Democrat was no more likely than a standard Republican to watch MSNBC. By 2008, the same Democrat was 20 percentage points more likely to watch MSNBC. Similarly, a Republican was only 11 points more likely than a Democrat to watch Fox News in 2000 and 2004. By 2008, the gap had increased to more than 30 points.[73] Thus, according to a 2014 Pew Research Center report on US political media consumption: 'When it comes to getting news about politics and government, liberals and conservatives inhabit different worlds. There is little overlap in the news sources they turn to and trust'.[74]

Consequently, as Matthew Gentzkow and colleagues' summary of the empirical literature shows, '[d]ifferent media outlets indeed select, discuss, and present facts differently, and they do so in ways that tend to systematically favour one side of the political spectrum or the other'.[75] This results from a marketised, parallel competition since 'ideologically specific media rose to meet the demand from the divided citizens those media serve'.[76] Hence, a kind of self-perpetuating cycle is created: fragmentation gives rise to still more fragmentation.[77] So, at least according to these

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[72] E.g., Anderson, 'Democracy, Public Policy, and Lay Assessments of Scientific Testimony', 150; Beckman, 'Political Marketing and Intellectual Autonomy', 28–36; Lepoutre, *Democratic Speech*, 188; Mancini, 'Media Fragmentation', 47; Sunstein, *#Republic*, 60–61.

[73] Gregory J. Martin and Ali Yurukoglu, 'Bias in Cable News: Persuasion and Polarization', *The American Economic Review* 107, no. 9 (2017).

[74] Amy Mitchell et al., *Political Polarisation & Media Habits*, (Washington, DC: Pew Research Center, 2014), https://www.pewresearch.org/journalism/2014/10/21/political-polarization-media-habits/. See, also, Natalie J. Stroud, *Niche News: The Politics of News Choice* (New York and Oxford: Oxford University Press, 2011), 169; Daniel Williams, 'The Marketplace of Rationalizations', *Economics & Philosophy* (2022): 9.

[75] Matthew Gentzkow, Jesse M. Shapiro, and Daniel F. Stone, 'Media Bias in the Marketplace: Theory', in *Handbook of Media Economics* (New York: North Holland, 2016), 624.

[76] Morgan Marietta and David C. Barker, *One Nation, Two Realities: Dueling Facts in American Democracy* (New York: Oxford University Press, 2019), 14.

[77] Lepoutre, *Democratic Speech*, 193.

findings,[78] within modern market-based media systems, indirect friction or engagement is becoming less and less plausible.[79]

But even if, in theory, there can be occasional engagement as part of a marketised media system, my point is that it is *incidental*. In a marketised parallel competition, it is not the purpose of the institutional design to secure beneficial friction. Therefore, it might happen due to chance or luck, but it also might not happen, as the empirical evidence strongly suggests. So, my argument is not that in parallel competition over ideas, *there is no* engagement between competitors at all. This is surely false. As Waldron convincingly illustrates, one only needs to 'care to make the effort' to address other people's views to create engagement of some kind. My point is that what distinguishes friction competition from parallel competition in which engagement takes place is that friction competition is *designed to facilitate*—and even encourage—the ongoing mutual rebuttal of the competitor's efforts and that this kind of mutual confutation is constitutive of (and not exogenous to nor an incidental result of) the way the competitors compete.

And, given that an important part of the normative appeal of the marketplace of ideas within the (unjustifiably) interwoven Milton–Mill–Holmes tradition is derived from its frictional elements, it would be an odd way to support this normative appeal by establishing a marketised institutional design that leaves the existence of frictional elements up to chance and that in some circumstances directly undercuts them. Thus, a 'frictionist', as it were, should support introducing some limits to the market in political media unless there are very strong unrelated reasons against such limits.

[78] Notice that although these findings are strong, there is still an ongoing debate on the conclusions we can draw from them in the empirical literature. See A. Tucker Joshua et al., *Social Media, Political Polarization, and Political Disinformation: A Review of the Scientific Literature* (Loughborough: Loughborough University, 2018), https://hdl.handle.net/2134/37088.

[79] Goldman and Cox, 'Speech, Truth, and the Free Market for Ideas', 31.

6.2.5 Equality Beyond Fairness (and a Specific Justification for Democracy)

As in the previous chapter, one obvious issue that has been absent so far from the discussion is *fairness*. In practice, inequalities in the economic market are being translated into the marketplace of ideas, and thus, as George Orwell put it, 'money controls opinion'.[80] This, one might argue, is the real problem with the parallel-market-based view, not that it undercuts friction competition over ideas. The goal should be, in Brighouse's words, to create a 'fair marketplace of political ideas'.[81] In other words, the fairness doctrine is, first and foremost, about fairness.

To be sure, a society with significant inequalities in opportunities to influence the public sphere due to wealth disparities is unfair. Each opinion and each person should be assured they get their 'fair share'[82] or the fair 'value of political liberties'[83] they deserve. Moreover, it might even be undemocratic. According to some views, the primary justification for democracy is that it is the form of government that best achieves political equality. And again, only according to some views, political equality includes equality of opportunity in political influence in general and equal influence in the public forum more specifically.[84] But, identifying the difference between the friction-based and parallel-based elements of the normative appeal of the marketplace of ideas reveals an additional reason for putting limits on marketised media systems that is not dependent on one's view on fairness, democracy, or what counts as equal opportunity of political influence, but rather on the competitive institutional design itself.

As I have shown in chapter 4, because parallel competition is designed to maximise the effort of each competitor in a space of non-interference, and hence the relation between the

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[80] George Orwell, 'Why I Join the I.L.P', *The New Leader*, 24 June 1938.
[81] Brighouse, 'Political Equality', 475.
[82] Beitz, *Political Equality*, 211.
[83] Rawls, *Political Liberalism*, 360.
[84] For a rigorous analysis of this view, see Dworkin's discussion of what he calls 'the detached conception of democracy': Dworkin, 'Political Equality'. For other discussions on this matter, see Brighouse, 'Political Equality'; Beitz, *Political Equality*; Niko Kolodny, 'Rule over None I: What Justifies Democracy?', *Philosophy & Public Affairs* 42, no. 3 (2014); Christiano, 'An Argument for Democratic Equality'.

competitors is not *constitutive* of success for the competition, the competitive institutional mechanism can still function and generate the desirable social benefits it is meant to generate, although in a less ideal and maybe unfair way. After all, even if the person in the stall is rich, she does not necessarily damage the development of the ideas of others as she operates independently from the persons in the other stalls. So, to an extent, an unequal marketplace of ideas is not a problem under an absolutist parallel vision so long as it has many options. Here, consumers have enough options to choose from, and the ideas can be developed without interference.

Against this background, it is easier to understand the US Supreme Court's oft-cited statement in *Buckley v. Vale*, according to which 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment'.[85] If equality is not constitutive of the competition over ideas, then levelling down could be rejected, even in cases where the good is positional, as the court clearly acknowledges here (levelling down will allow other people's voices to be heard—so the good is positional). Arguments for equality in such a case would rely on one's specific egalitarian or democratic views and would be rejected by non-egalitarians or people with other views about political equality in a democracy.

In contrast, in friction competition, because the performance and the level of competition of each person in the debate depend on the level of the other, significant disparities between them in terms of resources would not only be unfair (according to egalitarians) but would also render the competition dysfunctional since the competitors cannot simply try to maximise their performance on their own, as they can in the parallel case.[86] Thus, in friction competition over ideas, if supporters of one view can use their wealth and resources instead of arguments to weaken the competing ideas, say, by securing more airtime, then the competition loses its normative

[85] *Buckley V. Valeo*, 424 US 1, 49–50 (1976).

[86] This is a similar claim to the one I defended in the previous chapter concerning friction competition in the adversarial legal system.

appeal. The clash of opinion would not be doing the work, but rather the wealth disparities between the different speakers.

Therefore, regardless of one's opinion about fairness or democratic political equality, be that egalitarian or libertarian, equality of influence or formal equality, a more egalitarian distribution of media-related resources is needed for friction competition over ideas to work. Moreover, this requirement for equality highlights another way in which the parallel, market-oriented interpretation of competition over ideas undercuts the friction interpretation. It is not only because parallel competition requires securing a zone of non-interference to speakers that it undercuts the possibility of having institutionalised friction. It is because it can accommodate and thus provide the space for justifying (by using levelling down objections, to take one example) higher levels of inequalities between competitors, which also undercut the friction competition design.

To conclude this section, I wish to reiterate the implications of the argument I have presented so far. First, note that I have not argued for or against friction or parallel competition over ideas. All I have tried to show is that as long as part of the normative appeal of the marketplace of ideas relies on frictional competitive design, then it is undercut by an exclusively parallel competition over ideas in the market. Therefore, *some limitations* on the market in ideas are warranted to guarantee beneficial friction. Depending on the context, this might entail the institutionalisation of debate in certain forums, prohibitions on certain forms of speech, and so forth.

Second, on a frictional model, any expectation of convergence on or drift towards 'better' ideas will depend on a more extensive and active set of pre-conditions. Not only must the proponents of different ideas actively engage one another, but this engagement must also occur on relatively egalitarian terms. This might entail guarantees of equal access, requirements of fairness or transparency in content selection, limits on media spending by political actors, and so on.

Third, in contrast to my argument about the market in legal representation, the argument in this section is less far-reaching regarding the limits that should be put on the market. Friction-non-market and parallel-market mechanisms can and often do coexist in the same public forum. Within a marketised public forum in which there is parallel competition over ideas, we might be able to carve out or insulate spaces designed specifically for friction competition over ideas to function. Thus, I am not arguing against any kind of marketisation of political media (as I did regarding the market in legal representation). My argument in this section holds only against market *absolutism*. It is true that there is a tendency for markets to expand, so one can question whether such coexistence is feasible in the long run. I, too, think that in a market-dominated society, it will be hard to carve out safe islands of friction competition. But this is an empirical matter. At least, in theory, I see no reason to object to such a suggestion. For the time being, I leave this question open.

6.3 Parallel Competition over Ideas vs Marketised Parallel Competition over Ideas

Until now, for simplicity's sake, I have used two distinct notions interchangeably: parallel competition over ideas and parallel competition over ideas *within the market*. However, in theory and practice, there can be institutionalised parallel competitions that function outside the market sphere (competition between prospective students over places at elite universities is one recognisable example). So, although parallel competition is a feature of marketisation and marketisation is thus compatible with parallel competition over ideas to an extent, the question of whether there should be limits to the marketisation of parallel competition over ideas remains. Answering it is the purpose of this section.

In a nutshell, I argue that some features of marketisation partly or fully undercut the two primary justifications for having a competition over ideas in the public forum, to begin with—the epistemic justification and the watchdog justification—and that the market in ideas should be

limited for this reason.[87] By and large, versions of the arguments I present in this section against the marketisation of the media have already been made by others. The contribution of this section is to show that these arguments, which are usually presented as arguments against marketisation, are at the same time arguments *in favour* of parallel competition over ideas. Often, the claims of those who object to the marketplace of ideas can be interpreted as supportive of a non-competitive, 'public'[88] or 'deliberative'[89] forum. I show that some of the arguments against the marketisation of the media should also be advocated by fierce parallel competition over ideas supporters.[90]

Before I begin, I wish to take off the table something that has been looming over the discussion so far: the free speech absolutist view. A significant part of the literature on the

[87] Two short clarifications are in order. First, these justifications are usually not presented as justifications for parallel competition over ideas but rather as justifications for the marketplace of ideas. Since, as I have shown, the marketplace of ideas is an ambiguous concept, I have tried to reconstruct these justifications, as charitably as I can, with regards to parallel competition over ideas. Second, there is another general justification for the media that I have decided to leave to one side: the self-government justification. In short, the idea is that by informing citizens about political affairs and providing them with a plurality of competing platforms to express their concerns, the ruling elite will be more responsive to their wishes in way that will secure citizens' ability to self-govern. See C. Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge: Cambridge University Press, 2007), 7–9; Holmes, 'Liberal Constraints on Private Power?', 35; Lichtenberg, 'Foundations and Limits', 337; Meiklejohn, *Free Speech*, 25; Radin, *Contested Commodities*, 169; Raz, 'Free Expression and Personal Identification', 308; Tambini, *Media Freedom*, 11. In one important sense, a marketised parallel competition is compatible with this justification since it incentivises producers of ideas to take into consideration people's preferences. However, there are reasons to believe that the market could be in tension with this justification as well. First, as I show below (see the discussion on performativity), producers in the market not only *respond to* people's fixed preferences, but also *shape them*. Therefore, it is an open question as to what extent the media market is responsive to people's wishes, and to what extent it is a tool of the elite to shape people's preferences. Second, and more substantially, there is a debate about what we mean when we say we wish the elite to be responsive to the popular will. As Fiss explains, there is an important distinction between 'populist views' (people should determine what is on the news according to their preferences) and 'perfectionist views' (in order to properly self-govern, people should be properly informed). See Fiss, *The Irony of Free Speech*, 53. See also Pickard, *Democracy Without Journalism?*, 64. Evidently, populist views are compatible with marketised parallel competition. But perfectionist views are not. If all preferences are equally taken into account, misinformed preferences could be very influential and thus the public's ability to self-govern, according to perfectionist views, would be diminished. I only briefly mention this justification and its tension with fully marketised parallel competition over ideas since it hinges on different views about self-government (i.e., perfectionist vs populist), the scrutiny of which is beyond the scope of this chapter. I prefer to focus on the two main justifications than rush through all three of them.

[88] E.g., Pickard, *America's Battle for Media Democracy*, 225; Pickard, *Democracy Without Journalism?*, 65.

[89] Habermas, *Between Facts and Norms*, 378–79; Sunstein, *Democracy and the Problem of Free Speech*, 19–21.

[90] Indeed, the notion that parallel competition over ideas can be justified remains controversial. For instance, the idea that the aggregation of ideas can lead to the truth has been challenged. See Herzog, *Citizen Knowledge*, 122–23. Nevertheless, as stated at the beginning of this chapter, I do not challenge the underlying assumptions of these justifications, as others have done.

institutional design of the press, especially discussions within American jurisprudence over the First Amendment, has been devoted to refuting the free speech absolutist view, according to which the government should not regulate or interfere with the 'free' marketplace of ideas under (virtually) any circumstances.[91] Due to the dominance of this view in American politics, theorists usually start by trying to justify the mere option of regulating the press or speech and only then turn to suggest which kind of regulation they support.

However, as many have argued before, any kind of institutional design of the press, including the 'free' marketplace of ideas, cannot be justified according to an absolutist view of freedom of speech.[92] In the words of Goldman and Cox: 'what the marketplace-for-ideas thesis seems to be saying […] is not that all regulation should be excluded, but that only regulation by market mechanisms should be allowed'.[93] Like the deontological libertarian who cannot justify antitrust laws to foster market competition (because one should have the right to have a monopoly), the free speech absolutist cannot justify necessary regulations for the functioning of competition in the marketplace of ideas. She can only justify an anarchical public forum.[94] Therefore, the absolutist view should be a non-starter when it comes to discussing any competitive institutional design, even a parallel one—which is the focus of this section. Accordingly, I continue by assuming that some regulation is justified.

6.3.1 The Epistemic Justification

The epistemic justification for parallel competition over ideas comprises two central elements. First, there is decentralisation. As briefly mentioned above, the (somewhat Hayekian) argument is that the best way to discover, develop and disseminate information in society is not by a

[91] Two paradigmatic examples are Sunstein, *Democracy and the Problem of Free Speech*, 5–6 and Tambini, *Media Freedom*, 66.

[92] For a convincing example of such an argument, see Sunstein, #*Republic*, 189.

[93] Goldman and Cox, 'Speech, Truth, and the Free Market for Ideas', 4.

[94] For the full argument concerning libertarians and market competition, see Wolff, 'Libertarianism, Utility, and Economic Competition'.

centralised, top-down mechanism but instead by the aggregation of decentralised spontaneous efforts made by individual citizens who enjoy the freedom to experiment with ideas and information.[95] A decentralised public judgement is desirable for two main reasons. First, the aggregation of many perspectives of different people will, ostensibly, overcome the biases (including intentional corruption) of a given public official.[96] Second, aggregation takes advantage of the full potential of the pool of ideas that exists in society by letting different people from different backgrounds compete. This allows, as Dworkin argued, 'a variety of hypotheses about the best developments to be formulated and tested in experience'.[97]

The second element is the way parallel competition provides structure to this decentralised, spontaneous process. The competition itself creates incentives for individuals to do their best to maximise the quality and number of their ideas.[98] This way, parallel competition is supposed to unleash, as it were, 'the creative energies and decentralized intelligence of citizens in solving common problems'.[99] Subsequently, it is assumed that the best ideas, or the truth, will emerge triumphant in such competition.[100]

A fully marketised design of parallel competition over ideas might be able to facilitate or obtain some of these elements, as it is a decentralised institutional design that allows parallel competition to take place. However, three main features of market competition can undercut the epistemic justification for a parallel competition over ideas: (1) preference satisfaction as the key criteria for evaluation of ideas (consumers); (2) profit-making as the main incentive to compete (producers); and (3) the market being neutral about the motivation of the competitors and the

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[95] Gentzkow and Shapiro, 'Competition and Truth', 135; Goldman and Cox, 'Speech, Truth, and the Free Market for Ideas', 2; Hayek, 'The Use of Knowledge in Society', 520–21.

[96] E.g., Rowbottom, 'Government Speech and Public Opinion', 28; Sunstein, *Democracy and the Problem of Free Speech*, 119.

[97] Dworkin, *A Matter of Principle*, 347. See also: Gentzkow and Shapiro, 'Competition and Truth', 135; Lichtenberg, 'Foundations and Limits', 341; Sunstein, #*Republic*, 76.

[98] Goldman and Cox, 'Speech, Truth, and the Free Market for Ideas', 2.

[99] Holmes, 'Liberal Constraints on Private Power?', 32.

[100] Charney, *The Illusion*, 58; Gentzkow and Shapiro, 'Competition and Truth', 133; Goldman and Cox, 'Speech, Truth, and the Free Market for Ideas', 17; Ingber, 'The Marketplace of Ideas', 3; Tambini, *Media Freedom*, 11.

kind of content they produce. I will address each of these features in turn.

Starting with the first, I note that two main assumptions underlie the epistemic justification. One is that the judges of the competition over ideas should be 'the people'. The other is that the criterion for judgement should be somewhat related to the epistemic quality of the ideas: truth, functionality, creativity and so forth. Alas, within a marketised system, the criterion for evaluating products is people's preferences, or more specifically, their willingness to pay—whatever the reason. The problem is that people's preferences might not be to reveal the truth or support the best ideas but rather to seek comfort, group confirmation, amusement, self-assurance, power, and so forth.[101]

Actually, as Herzog suggests, there are good reasons to believe that when it comes to political ideas, it is more likely that people will not prefer to support or buy the most epistemically valuable ideas but rather those they already support and that are part of their identity.[102] Thus, in a marketised system, it is to be expected that the winning ideas and the epistemically valuable ideas will diverge considerably.[103] Although some people may evaluate ideas on their epistemic merit, many will not, *and are not expected to*, under a market logic. In such a case, parallel competition over ideas will not lead to the aggregation of the most epistemically valuable ideas but of the ideas that best fit the various preferences of the public.[104] And, at least on the face of it, there is no reason to believe that the truth will emerge from this process.[105]

Moving to the second feature, the predominant incentive of producers within a marketised competition over ideas is to make a profit by selling ideas. Hence, producers will want to produce

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[101] Herzog, *Citizen Knowledge*, 134; Sparrow and Goodin, 'Market or Garden', 52; Radin, *Contested Commodities*, 182; Williams, 'The Marketplace of Rationalizations', 4–7.

[102] Herzog, *Citizen Knowledge*, 134.. See also Gentzkow and Shapiro, 'Competition and Truth', 147; Williams, 'The Marketplace of Rationalizations', 5–12.

[103] Fiss, 'Why the State?', 143; Goldman and Cox, 'Speech, Truth, and the Free Market for Ideas', 18.

[104] Herzog, *Citizen Knowledge*, 134; Sparrow and Goodin, 'Market or Garden', 52–53.

[105] Note, again, that this is not a sweeping argument against aggregation as a result of parallel competition over ideas. It is only an argument against a marketised parallel competiton over ideas.

cheaply and sell at volume. Since the emergence of 'penny press' newspapers—the first commercial, mass media produced in the United States—in the 1830s, profit-motivated producers of ideas have used sensationalist, dramatised, gossipy reporting and discussions to sell more newspapers.[106] Originally, this approach to news coverage was referred to as 'yellow journalism'. Today we call it 'clickbait journalism'.[107] Either way, the issue remains the same: producers of political ideas and information within a market focus on grabbing people's attention as readily as possible, not on producing complex, high-quality ideas that may struggle to gain and maintain people's interest.[108] Just as in the case of the preference satisfaction feature, this is *not* a market failure. It is precisely what the market is supposed to do.

There is a more nuanced version of this problem. Consider an imaginary world where most people prefer epistemically valuable ideas and information. It might seem that under such circumstances, producers would be driven to produce epistemically valuable ideas in order to make a profit. In such a case, there would be no tension between making a profit and the epistemic justification. However, even if there was such a society, people's preferences are neither pre-determined nor constant.[109] The market does not merely organise and aggregate pre-determined preferences of people. Rather, borrowing a concept from the sociologist Donald Mackenzie, the market is also 'performative', meaning that it affects, transforms, and changes people's preferences.[110]

Thus, over time—even in an ideal society—it would be in the interest of producers to strive to change consumer preferences, so consumers would demand a certain kind of supply, the kind

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[106] See Pickard, 'The Violence of the Market', 155; Pickard, *Democracy Without Journalism?*, 18–19; Michael Schudson, *Discovering the News: A Social History of American Newspapers* (New York: Basic Books, 1978), 15–60.
[107] Pickard, *Democracy Without Journalism?*, 18–19.
[108] Fiss, *The Irony of Free Speech*, 52; Meiklejohn, *Free Speech*, 86; Rowbottom, 'Government Speech and Public Opinion', 31.
[109] Sunstein, *Democracy and the Problem of Free Speech*, 20.
[110] Donald A. MacKenzie, *An Engine, Not a Camera: How Financial Models Shape Markets* (Cambridge, MA and London: MIT Press, 2006).

that would be cheaper, more efficient and profitable to produce, rather than demanding the best ideas out there. To be sure, there might always be space for markets in 'luxury ideas', but such markets would constitute a minimal share of the general market (as is usually the case with markets in luxury commodities) and would not be at the epicentre of the public forum.

Even if one rejects the argument that a market in ideas is 'performative', an additional problem arises. Under a profit-driven competition over ideas, producers have an incentive to produce ideas that people want,[111] and not, going back to Dworkin, to foster 'a variety of hypotheses'.[112] This problem usually comes in one of two forms. Either producers produce mainstream, consensual views in order not to alienate their customers,[113] or, in polarised societies—in which there is no agreed common good, and public opinion is fragmented—they produce tailor-made information for a specific crowd to capture enough market share to turn a profit.[114]

In the former case, the market in ideas could lead to the production of conformism and the marginalisation of minority views.[115] In the latter, the result will be echo chambers, radicalisation and the proliferation of group-based biases (which I already discussed in section 6.2.2). In both cases, profit-driven competition goes against the epistemic appeal of competition over ideas. To determine whether it completely undercuts it would be a matter of empirical investigation in a given context. However, the fact that there is an acute tension between the market and the

[111] Gentzkow and Shapiro, 'Competition and Truth', 147; Gordon, 'John Stuart Mill and the "Marketplace of Ideas"', 241. In this section I am discussing an ideal model of a market in ideas (I address this point in the next section). But note that if we consider the real economic model underpinning 'the marketplace of ideas' in the past 200 years or so, the principal engine driving profits has been *advertising*. In markets driven by advertising, an additional problem arises: producer's do not necessarily wish to satisfy people's preferences, problematic as they may be, but rather those of advertisers, which are much narrower. This is a problem both epistemically, and in terms of the watchdog function of the media.

[112] Dworkin, *A Matter of Principle*, 347.

[113] Lichtenberg, 'Foundations and Limits', 330; Pickard, *Democracy Without Journalism?*, 18.

[114] Gentzkow and Shapiro, 'Competition and Truth', 147; Sunstein, *#Republic*, 76; Williams, 'The Marketplace of Rationalizations', 17.

[115] Lichtenberg, 'Foundations and Limits', 330; Pickard, *Democracy Without Journalism?*, 18.

epistemic justification of parallel competition is clear enough.

The third feature of the market, as said, is that it is morally neutral about producers' motives and about the content or quality they wish to produce. Again, the public is the judge, not the regulator. Now, although making a profit is the main incentive for competitors within a market, it does not have to be. Within the marketplace of ideas, a range of rewards beyond mere profit exists to entice producers of news. Influencing political discourse and gaining political power are two obvious examples.[116] So, producers might disseminate low-quality information or even straight-up 'fake news' not to make a profit but simply to woo the crowds. This is a problem for any institutional design of the press. But the fact that the market is morally neutral about the motives of the participants and, by and large, about the quality of what is being produced creates a fertile ground for those seeking power to pollute the public debate.

In response, market enthusiasts could argue that spreading low-quality information is a classic information asymmetry market failure. People do not have enough information about political affairs, and producers can use their knowledge to their advantage and sell flawed merchandise to consumers. Recall, as explained at the beginning of chapter 2, that the normative arguments for limiting markets, at least within the MLM tradition I am operating in, purport to convey that there are additional reasons to limit markets that go beyond fixing a market failure. Recall that fixing a market failure is considered a *market-driven reason*. Its aim is to place a limit on the market in order for markets to function properly, not as an additional normative reason for doing so. Thus, if this low-quality information problem is just a market failure, the problem can be addressed within a marketised framework without undercutting the epistemic justification.

However, even if we do look at this problem as a market failure (which I accept we can), we will observe that the way markets are regulated to prevent false advertising is by prohibiting

[116] Habermas, 'Political Communication in Media Society', 421; Grossman, Margalit, and Mitts, 'How the Ultra-Rich Use Media Ownership as a Political Investment'.

producers from deceiving customers. Taking the same approach for political debate would be problematic since it is soaked with normative convictions and content, the truth value of which is almost always contested. It is no coincidence that there is a consensus among most free speech and free press scholars that content regulation should be used as a last resort for epistemic reasons and other reasons besides (for instance, the perpetual political question of 'who decides').[117] Thus, it is not clear how possible it is to fix this market failure, which leaves the epistemic justification within a market standing on very shaky ground.

To conclude this sub-section, I draw attention to the fact that the epistemic justification is left standing on shaky ground not *just* because the market allows low-quality information and ideas to spread, either due to people's preferences or due to the producer's incentive to make a profit or gain power. Rather, it is also on shaky ground owing to the way parallel competition is supposed to produce the epistemic social benefit, namely, through the aggregation of independent efforts. In contrast to other designs, which suggest some way to weed out falsehoods and bad information (friction between competitors, to take one example), a marketised media system consists of a unique and problematic combination that does not offer such a suggestion.[118] This combination includes (1) neutrality towards both people's preferences and producers' motivations, so falsehoods and bad information can readily enter the system and (2) no mechanism for discriminating between truth and falsehood at the aggregation stage. From this combination, one is more likely to obtain a not-so-very 'happy cacophony of democracy'—to paraphrase the oft-quoted ruling of the US District Court for the Northern District of Illinois in *Landry v Daly*—rather than the truth.[119]

Consequently, to make parallel competition over ideas in tune with its epistemic justification,

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[117] See, for example, Cohen, 'Freedom of Expression', 213–15; Thomas Nagel, 'Personal Rights and Public Space', *Philosophy & Public Affairs* 24, no. 2 (1995): 99; Simpson, 'Academic Freedom and Free Speech', 290.
[118] Herzog, *Citizen Knowledge*, 135.
[119] *Landry V. Daley*, 280 F. Supp. 938 (1968).

there is a need either to (1) find a way to prevent epistemically bad information and ideas from entering the parallel competition, to begin with (to deal with producers' irrelevant motivations or just with bad products) or (2) supplement the aggregation mechanism with an additional mechanism that will ensure that the winning ideas and the epistemically valuable ideas will overlap as much as possible (for instance, by ensuring evaluation by an epistemically relevant criterion that is not preference satisfaction).[120] Both options will require either putting limits on the market in political media or getting competition over ideas outside the market altogether. Thus, the notion that, as Fred Schauer put it, '[j]ust as Adam Smith's "invisible hand" will ensure that the best products emerge from free competition, so too will an invisible hand ensure that the best ideas emerge when all opinions are permitted freely to compete',[121] is plainly false.

6.3.2 The Watchdog Justification

The celebrated watchdog metaphor serves as one of the most central justifications for the institutionalisation of the media in liberal democracies. As mentioned above, the idea is that the media should act on behalf of the people in a kind of friction competition against the elite to prevent elite capture and protect the people from arbitrary power.[122] Put differently, the media should investigate the behaviour of the elite and disseminate general information about public affairs that may be hidden from or unnoticed by the public.[123] This justification is grounded in an assumption about the power of 'publicity', a concept closely associated with the Enlightenment intellectual tradition. It is presumed that when public affairs are open, visible, and liable to criticism, it is harder for the powerful to establish 'back-stairs influence and clandestine

[120] Herzog, Citizen Knowledge, 85.

[121] Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982), 16.

[122] See, for example, Lichtenberg, 'Foundations and Limits', 332; Lippmann, *Liberty and the News*, 20; Norris, 'Watchdog Journalism', 525–27; Stephenson, 'A Truth-Seeking Justification for Press Freedom?', 700; Jesper Strömbäck, 'In Search of a Standard: Four Models of Democracy and Their Normative Implications for Journalism', *Journalism Studies* 6, no. 3 (2005): 332.

[123] Norris, 'Watchdog Journalism', 525–26; Stephenson, 'A Truth-Seeking Justification for Press Freedom?', 701. 526.

government'[124] because people will have the information needed to impede elite capture.[125] As David Hume put it,

> It is apprehended, that arbitrary power would steal in upon us, were we not careful to prevent its progress, and were there not an easy method of conveying the alarm from one end of the kingdom to the other. The spirit of the people must frequently be rouzed [*sic*], in order to curb the ambition of the court […].[126]

This signalling mechanism is not only relevant for monarchies of yore—quite the contrary. With time, the importance of an independent press acting as a watchdog has become even more salient.[127] Two centuries after Hume, Amartya Sen conveyed the same message, noting, 'No substantial famine has ever occurred in any independent country with […] a relatively free press',[128] and arguing that 'a free press […] constitute[s] the best early-warning system a country threatened by famines can have'.[129]

Now, parallel competition over ideas comes into this picture as a supposedly robust institutional design for establishing such a warning mechanism.[130] For one thing, assuming that to win the competition over ideas, one must provide the public with information about public affairs and misconducts of the elite, the competition itself creates incentives for competitors to act as watchdogs. Moreover, a decentralised parallel competition over ideas helps secure the independence of the press. The more independent competitors protected by a zone of non-interference are out there, the more likely that at least one of them will be able to provide the public with the needed information, even at the potential cost of elite retaliation after the story is

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[124] Edmund Burke, 'Thoughts on the Cause of the Present Discontents (1770)', in *Selected Writings and Speeches*, ed. Peter Stalis (Chicago: Regnery, 1963), 114.
[125] Holmes, 'Liberal Constraints on Private Power?', 26–33; Rawls, *Political Liberalism*, 347.
[126] David Hume, 'Of the Liberty of the Press', in *Hume: Political Essays*, ed. Knud Haakonssen (Cambridge: Cambridge University Press, 1994), 3.
[127] Tambini, *Media Freedom*, 5, 21.
[128] Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999), 152.
[129] Ibid., 181. Habermas similarly described mass media as a 'warning system with sensors'. See Habermas, *Between Facts and Norms*, 359.
[130] As mentioned, intra-media parallel competition in this case serves as a tool for the inter-institutional friction competition.

exposed. At the same time, it will be less likely that the government, or other members of the elite, would be able to suppress a story or control the public forum more generally.[131]

Ostensibly, a fully marketised parallel competition over ideas could be compatible with the watchdog justification. First, producers in the market are independent of the state. Second, an ideal market in ideas is supposed to facilitate fierce competition between many competitors that are incentivised to make a profit. Thus, competitors are expected to care more about their consumers, i.e., the people, than the elite. Nevertheless, there are ways in which a marketised system undercuts, to a degree, the watchdog justification for parallel competition over ideas.

As many have observed, to act as a watchdog for the people, the press should be independent not only of the state but also of private entities.[132] As Lichtenberg insists, 'anyone who suspects government so unrelentingly needs to justify his (relative) trust of corporations'.[133] Now, there is a distinction here to be made between two different claims that are usually bundled together when discussing the independence of the press from the market.

One claim is, using Orwell again, that 'the fact that most of the press is owned by a few people operates in much the same way as state censorship'.[134] The worry is that when a few ultra-rich people control the media, they will be able to gain and wield arbitrary power by dominating the marketplace of ideas itself. However, note that a media system controlled by a few ultra-rich persons or corporations is also a problem for market enthusiasts. The monopolisation of the media degrades not only the competition over ideas but also market competition. Thus, one could argue for strict enforcement of normal antitrust laws in the media sphere to prevent monopolisation and

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131 E.g., Gentzkow and Shapiro, 'Competition and Truth', 136.

132 For instance, see Anderson, 'Democracy, Public Policy, and Lay Assessments of Scientific Testimony', 159; Susan J. Brison, 'The Autonomy Defense of Free Speech', *Ethics* 108, no. 2 (1998): 334; Fiss, 'Why the State?', 142; Habermas, 'Political Communication in Media Society', 419; Pickard, *Democracy Without Journalism?*, 14; Tambini, *Media Freedom*, 131.

133 Lichtenberg, 'Foundations and Limits', 353.

134 George Orwell, 'Freedom of the Park', *Tribune*, 7 December 1945.

still hold that the competition over ideas should be marketised.[135] As long as there are many competitors and no significant barriers to entering the marketplace, it seems as if a marketised parallel competition should work.

The second claim in the bundle poses a more serious challenge to market enthusiasts. Within the market, competitors decide whether to criticise or investigate a particular issue according to their profit-related or power-related motives (since the market is neutral about them) and not according to the public interest. For example, they might not investigate powerful economic players with whom they do business or refrain from criticising the government when it can harm their profits in some way (for instance, when their consumer's preferences would be against such criticism). Moreover, not only would producers refrain from acting as watchdogs when it suits their commercial interest, but they could also use their power in the market directly against their watchdog-related duties.[136] For instance, they could actively try to set the public agenda on a specific issue according to their needs in direct contradiction to the public interest.[137] In fact, in recent decades, many influential entrepreneurs have purchased media outlets to gain political power and advance their agendas. In such a case, the media would be weaponised by the elite against the weakest in society. The press would serve as a lapdog for producers, not as a watchdog for the people.[138]

A market enthusiast might respond by saying, once more, that this is a claim against monopolies, not a marketised media. Within a functioning decentralised market where none of the competitors is dominant, the media could still function as a watchdog even though some (rich) groups would have a slight advantage in the competition. However, this time the market enthusiast would be wrong. The second, more substantive argument I presented is not about the market

[135] I discuss contemporary media markets in the next section of the chapter.
[136] Gordon, 'John Stuart Mill and the "Marketplace of Ideas"', 240.
[137] Habermas, 'Political Communication in Media Society', 42.
[138] For recent findings about how powerful media owners actually are, see Grossman, Margalit, and Mitts, 'How the Ultra-Rich Use Media Ownership as a Political Investment'.

power of the rich but about the motives of producers in the market. Within a market, producers can independently pursue their self-interest, but this is the wrong kind of independence in the context of the watchdog justification.[139] The watchdog justification assumes that competitors are independent of interests or motives that are foreign to the public interest (whatever it may be), *including* commercial interests, which would be dominant in a fully marketised system. And the lack of independence from the market is a problem even in a perfect, ideal market where many small competitors exist.[140]

At this point, the market enthusiast might yield but still insist that if we must decide between independence from the market and independence from the state, the latter is more important since the government poses a graver risk to the independence of the media. Hence, a marketised media system is the least bad form of institutional design available. However, this dichotomy between market-governed and state-governed media is a false one. There are enough established functioning institutional mechanisms that are both independent of the state and are not part of the market. One prominent example is the judiciary. Courts and judges are funded by the state but independent from it. I can see no reason to believe that we can have an independent judiciary (or police force, or prosecution, or central banks) outside the market but not an independent press.

Another way the market can undercut the watchdog justification is by maximising options and reducing costs. As Cass Sunstein vividly illustrates:

> It is obvious that if there is only one flavor of ice cream and only one kind of toaster, a wide range of people will make the same choice. […] It is also obvious that as choice is

[139] John Dewey, 'Our Un-Free Press', ed. Jo Ann Boydston and Larry A. Hickman, *The Later Works of John Dewey, 1925–1953. Volume 11: 1935–1937, Essays, Liberalism and Social Action* (Charlottesville: InteLex Corporation, 1996), 270–73.

[140] To be sure, in real life, this problem is exacerbated since there are barriers to enter the media market (you need to be fairly rich), and because the market in media in many countries has been going through a process of monopolisation, or 'ownership concentration'. For a helpful summary, see Joseph Trappel and Werner A. Meier, 'Soaring Media Ownership Concentration', in *Success and Failure in News Media Performance: Comparative Analysis in the Media for Democracy Monitor 2021*, ed. Joseph Trappel and Tales Tomaz (Gothenburg: Nordicom, University of Gothenburg, 2022), 147–64. In any event, at least in theory, only the second claim shows why the market in ideas puts press independence in danger.

> increased, different individuals and different groups will make increasingly different choices. It is obvious, finally, that as the costs of reaching people with particular interests, and of interacting with them […] start to shrink, then we will see a massive increase in niche markets of multiple kinds. This has been the growing pattern over time with the proliferation of communications options.[141]

Indeed, Sunstein's depiction does not necessarily fit all markets, but at least in the case of the market in media, in some countries, the market had developed in such a way.[142] The problem with this market-induced segmentation is not only epistemic (i.e. the echo chamber problem) but also that in a fragmented market wherein many small producers are competing, the competitors might be too weak to stand against the powerful.[143] In a situation where each competitor has its respective niche, and public discourse is fragmented, so each part of society consumes news within its respective echo chamber, it is much harder for the media to arouse the spirit of the people, as it were. Accordingly, in such a case, the ability of the media to function as a watchdog is undercut.

In response, one could argue that although this argument might be true, it is against parallel competition in general, not against its marketisation. Parallel competition is supposed to secure a zone of non-interference for many competitors to increase the likelihood that one of the competitors would reveal the truth or go against the powerful. Hence, if many small, fragmented competitors are a problem, it is a general argument against parallel competition, not against the market. I think this response stands only if one assumes there is no way to reach an equilibrium of the right number (or a specific range of numbers) of competitors outside the market. If we can design a parallel competition over ideas in which the number of competitors would be neither too big nor too small, then we will have a solution that is superior to the market. However, if there is no way to achieve such balance, then I accept it is a general argument against parallel competition over ideas which is beyond the scope of this chapter.

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[141] Sunstein, *#Republic*, 60–61.

[142] For a nice summary of the dynamics of choice maximisation in the market in media, see Williams, 'The Marketplace of Rationalizations', 17.

[143] E.g. Mancini, 'Media Fragmentation', 53.

6.3.3 Taking Stock: Implications and Two Objections

I have reached two main conclusions so far. The first is that as long as we wish to realise the normative appeal of friction competition over ideas, we cannot have a fully marketised media system. However, it might be possible to have both a marketised media system and isolated spaces of friction competition over ideas outside the market in which competitors must be more equal, and beneficial friction between them needs to be secured.

Second, even if we reject the normative appeal of friction competition altogether and support only parallel competition as the correct institutional design of the media, we will still need to limit the market to realise the normative appeal of the design in ways that goes beyond normal antitrust laws which are focused on economic competition instead of competition over ideas. That is, by fulfilling one or all of the following normative requirements: (1) finding a new criterion for judgement of ideas which is not preference-based; (2) adding a mechanism to the aggregation process that would be reasonably effective in weeding out bad preferences and; (3) ensuring that making a profit is not the main incentive for people to produce ideas.

Against these normative requirements, two additional unaddressed objections come to mind. First, one might argue that to overcome the difficulties I have explored so far, the regulation of the system can be left to itself. If journalists, editors, pundits, and media owners were only objective and fair in pursuing the truth and scrutinising the powerful, then a marketplace of ideas would achieve the desired normative appeal. Putting it differently, the problems I am pointing at are a manifestation of breaches of professional ethics rather than of malfunctions in institutional design.

Unfortunately, this argument has been tested and failed. At the beginning of the twentieth century, in response to a century-long process of marketisation of the media in the United States, a process of professionalisation commenced, reducing the negative externalities of the commercialisation of the media. It included the development of professional ethics, requirements

for objectivity and so forth. As Pickard explains: 'the very project of developing ethical codes and professional standards was to prevent journalism from being overwhelmed by business priorities'.[144] The goal was to, at a minimum, 'create a veneer of objectivity and social responsibility'.[145] However, As Pickard himself has shown, just as was the case regarding the professional ethics of lawyers, it was not enough to endure the pressures and the incentives of the market that overwhelmed the system. Over time, even with professional ethics in place, the same market-induced problems emerged.

Beyond this historical story (that some might dispute), a more substantive response to the professional-ethics-based objection is that (as mentioned in chapter 3) professional ethics are supposed to complement a specific institutional design, not to override the very strong incentives that are created by the institutions. For instance, when we design a medical system, we require doctors to take the Hippocratic Oath. But, if it were allowed to pay doctors not to save patients, we would set the system for failure, even if the professional ethics requirements were in place. So, it might be true that in a kingdom of angels, we could have had a fully marketised media system, but then it seems to me as if we would not need an institutional design of the media in the first place. A sound institutional design is supposed to create the conditions under which *imperfect human beings* act appropriately in most cases. It just does not make sense to create a system that incentivises all the relevant players to break the rules and then count on professional ethics to fix this. Thus, professional ethics cannot vindicate a fully marketised parallel competition over ideas.

The second objection is, again, about feasibility. I have offered only ideal normative guidelines, so it might not be feasible to implement them in real life. A limited media market might not be economically sustainable, or the moral costs of limiting the market might be unacceptable (for instance, in terms of free speech limitations). My response is similar to one I gave in the

[144] Pickard, 'The Violence of the Market', 156–57.
[145] Pickard, *Democracy Without Journalism?*, 12. see also Charney, *The Illusion*, 64.

previous chapter, which is that feasibility considerations do not undermine my argument. They can only change the conclusions that can be drawn.

One option is that if a fully marketised media system is *necessary* for the economic sustainability of parallel/friction competition over ideas, and yet we can do nothing to get it closer to realise the normative guidelines I have suggested, then a fully marketised media system *cannot* be justified for a frictionist and would be only partially justified for the parallelist (as I do not think the market completely undercuts the normative appeal of the parallel-based design). Thus, unless one finds other justifications for maintaining the system, we should replace it. Such a reason could be a comparative one. When we discuss the normative appeal of a particular institutional design, we do not claim it is perfect—as no institutional design is. Instead, we make a *comparative* claim, namely, that this certain institutional design is better than others.[146] If a fully marketised media system is the best we can do, we should stick with it. In this case, the trade-off would be between a non-appealing, marketised media system, other less-appealing systems, and an anarchical public forum.

Another option is that a fully marketised system is *not necessary* for parallel/friction competition to function but getting rid of it is too costly (e.g., in terms of efficiency or other moral costs). In this case, parallel/friction competition over ideas *could* be justified (under very different circumstances) but *is not* due to the costs involved in changing the current system.

The third option is that there is a way to both implement the normative requirements I have offered and keep the system sustainable. In this case, once a reform is put in place, both competitions *could* be, and de facto are justified. Under all options, my claim that to secure its normative appeal, both friction and parallel competition over ideas must be appropriately isolated from some aspects of the market (or from the market altogether) still stands.

[146] Goldman and Cox, 'Speech, Truth, and the Free Market for Ideas', 9.

6.4 Between the Marketplace of Ideas and the Marketplace of Platforms

Treating the 'marketplace of ideas' metaphor as a serious proposal for an institutional design comes at a price. Metaphors can sometimes create misperceptions. As I have demonstrated above, the marketplace of ideas metaphor leads to such misperceptions by conflating two kinds of competition over ideas. But there is another problem with this metaphor, a double deception, if you will. The metaphor creates an imaginary story of a *literal market* in ideas. Ideas are the commodities, news producers 'sell' them, and the audience buys the most appealing ones. This picture, however, is problematic and raises several issues.

First, it is not clear what a market *in ideas* actually means. Theorists have challenged the mere possibility of treating ideas as commodities, arguing that commodities must be tradable, meaning that people should be able to exchange them for money, or for other goods and services. The difficulty is that it seems hard to separate individual ideas in practice (since they usually come not as isolated thoughts but as bundles or clusters of ideas) as well as from the producer of the idea (since even when one 'sells' one's idea, one does not really give it away, and the idea cannot just be taken out of one's head).[147]

Another concern, to borrow Robert Sparrow and Robert Goodin's words, is that it is 'far from clear what is supposed to be exchanged for ideas'.[148] In any other market, consumers pay for a product they wish to purchase either with money or by offering goods or services in exchange. In contrast, it seems that the marketplace of ideas metaphor alludes to a different kind of payment: changing one's mind and beliefs, expressing support, passing the idea to others and so forth. To 'buy' an idea, in other words, is also a metaphor. Thus, as Sparrow and Goodin put it, it 'remains deeply mysterious how this [believing in an idea or changing one's mind] represents an exchange with the producer of an idea, how it could allow competition between consumers to purchase the

[147] For example, Herzog, *Citizen Knowledge*, 131–33; Sparrow and Goodin, 'Market or Garden', 48–50.
[148] Sparrow and Goodin, 'Market or Garden', 49.

best idea, or how it advantages the producer of the idea'.[149]

Evidently, if we wish to use the marketplace of ideas metaphor as a normative yardstick for the desirable institutional design of the media, these issues must be resolved. But for the purposes of my argument in this section, I wish to put them to one side and grant that they can indeed, in principle, be resolved. My focus is elsewhere. The problem that I am concerned with regarding the marketplace of ideas metaphor is that actual markets in mass political media are not, in fact, markets in *ideas*. They are, by and large, advertising-based markets of media *platforms*. And the main competition driving media markets is not over ideas but rather over advertisers, ratings, and viewers (and most recently, data mining). Each platform tries to convince people to consume its content, hoping to sell as many advertising slots (and data) as possible, or gain as many new subscribers as possible at the highest price possible to maximise profit.

One major problem with this advertising-based market of media platforms is that, according to many political economists, it is not sustainable.[150] In recent years, especially since the rise of social media, many media platforms have experienced severe economic predicaments. As Pickard describes in his writings, local media is shrinking, journalists are being laid off, and media platforms are struggling to find advertisers and are closing their doors at a rapid clip. In short, the economic model on which the media industry has been based for more than a century is crumbling.[151]

As I am not a political economist, I leave the challenge of finding a more viable economic model for news media platforms to other experts. My concern is with the discrepancy between the metaphor and actual markets. To put it differently, it is about the relation between the normative

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[149] Ibid.

[150] For two representative examples of this kind of argument, see Julia Cagé and Arthur Goldhammer, *Saving the Media: Capitalism, Crowdfunding, and Democracy* (Cambridge, MA: Harvard University Press, 2016) and Robert Waterman McChesney, *Digital Disconnect: How Capitalism Is Turning the Internet against Democracy* (New York: The New Press, 2013).

[151] See Pickard, 'The Violence of the Market'; Pickard, *Democracy without Journalism?*, 69–104. Billionaires are in prime position to take advantage of this market crisis, as they can afford to take on the losses associated with running uneconomical platforms to gain other kinds of benefits, mostly politcal power. For more on this, see Grossman, Margalit, and Mitts, 'How the Ultra-Rich Use Media Ownership as a Political Investment'.

appeal of competition over ideas—friction and parallel—and the real-life marketplace of platforms.

Throughout this chapter, I have surveyed several justifications for having a competitive institutional design for the media. But these justifications assumed that the competition is between ideas, not platforms. Therefore, assuming we endorse the normative appeal of a competition-based design for the media to justify the actual marketplace of platforms, it needs to be shown that such a market can ensure the proper institutional functioning of competition over ideas.

The marketplace of platforms can function within different media designs. For simplicity's sake, I consider two ideal types of such designs, the more familiar one that I call here the 'mainstream media model', which follows the traditional journalistic norms of objectivity and balance,[152] and the 'partisan media model', where news outlets are affiliated with certain ideologies or parties.[153]

Under the mainstream media model, which became dominant at the beginning of the nineteenth century, platforms are perceived as objective facilitators. They are supposed to ensure and facilitate *intra-platform*[154] competition for the public, where heterogeneous ideas are expressed and compete against one another in each individual news outlet. According to this model, people who read the *New York Times*, watch the BBC, or log into Facebook or Twitter are supposed to find different people participating in a vivid competition over diverse ideas on every platform. In an ideal world, consumers would choose the platform that facilitates the best competition over ideas,

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[152] See Richard L. Kaplan, *Politics and the American Press: The Rise of Objectivity, 1865–1920* (Cambridge: Cambridge University Press, 2002), 25, 140–75; Schudson, *Discovering the News*, 3–61.

[153] Some call this model 'party-press parallelism' or 'political parallelism'. See Hallin and Mancini, *Comparing Media Systems*, 27. For an insightful history of partisan media in the United States, see Kaplan, *Politics and the American Press*, 22–55.

[154] The distinction I make between intra-platform and inter-platform competition builds on a common distinction within media studies between internal and external pluralism. See Hallin and Mancini, *Comparing Media Systems*, 29. Sunstein, following Heather Greken, uses a similar distinction between first-order diversity and second-order diversity. See Sunstein, *#Republic*, 76. My focus is different; it is not about diversity or plurality of views per se, but rather competition.

thereby rewarding it for fulfilling its justified institutional function.

Notice, however, that profit-driven markets of platforms are unlikely to achieve this goal. To secure a healthy intra-platform competition over ideas, the inter-platform competition over viewers must not create incentives that go against it. To illustrate this point, assume that it is more profitable for CNN, to take one example, to give airtime only to people from one side of the ideological spectrum. In such a case, the incentives to win the inter-platform competition over viewers goes against CNN's institutional function—to secure intra-platform competition over ideas. Thus, to live up to the normative appeal of competition over ideas, a marketplace of platforms in the mainstream media model must be limited in some significant way.

One could also imagine a marketplace of platforms where the competition over ideas occurs *between* (inter-) and not *within* (intra-) platforms. This is the partisan media model of media, which was dominant in many democracies before the turn to 'objectivity'. Very roughly, in such a model, every platform is associated with a bundle of partisan views, values, identity and cultural norms. People who read a certain newspaper are reading it because it reflects their views, not to be exposed to a balanced intra-platform competition. Under this model, competition over ideas should occur between the media platforms, not within them. In an ideal world, partisan news platforms compete with audiences shifting their support from platform to platform according to the quality or persuasiveness of the ideas each platform is putting forward.

The question that arises concerning the market of platforms in this context is how it can ensure that the competition between the platforms is over *ideas* and not only over viewers. As the empirical evidence surveyed above suggests, this is a real concern. A marketplace of platforms, in some circumstances, incentivises platforms to focus on a very specific market share, foster loyalty among existing viewers, create echo chambers rather than inter-platform competition, and strengthen group identity instead of competing over ideas. Thus, the market of platforms is not very likely to be compatible with the normative appeal of competition over ideas unless that market

is severely limited.

The short, crude discussion above is not meant to present a nuanced view regarding the market of platforms under each model. Rather, it is intended to highlight a basic but fundamental point: that the marketplace of platforms and competition over ideas *are not synonymous*. A platform marketplace can be justified if it can secure and facilitate a normatively desirable competition over ideas. And, as the discussion above on the mainstream media and partisan models suggests, it is highly likely that to be able to justify such a market, we would have to limit it significantly. The justification for limiting the marketplace of platforms will not be to secure *economic* competition. It will be to secure competition over ideas. These, again, are two different things.

6.5 Conclusion

Lippman was right. I believe this chapter has demonstrated that the institutional design of the media is indeed a very difficult subject. What is clear, however, is that the common and long-lasting identification of competition over ideas with the market should end.

It should do so first because there are two kinds of competition over ideas, only one of which—parallel competition over ideas—is compatible with a marketised institutional design. Thus, a fully marketised media system undercuts institutional justifications based on friction competition. Moreover, as I have shown, to live up to its normative appeal, even parallel competition over ideas should not be completely marketised. Finally, competition in actual political media markets is a competition of platforms over viewers and advertisers, not over ideas. As long as one supports the normative appeal of an institutional design based on competition over ideas—be that parallel or friction competition—the marketplace of platforms should function in a way that supports it. To do so, it is highly likely that contemporary markets—both under the mainstream media model and under the partisan model—should be severely restricted and radically reformed.

As a normative remedy for the undercutting of the normative appeal of competition over ideas by the market, I suggested the following. Realising the benefits of friction competition requires, at a minimum, that islands of friction competition over ideas be secured. Regarding parallel competition over ideas, a way forward would be to find a non-preference-based criterion for judging the quality of ideas, add a mechanism to the aggregation process that would be responsible for weeding out bad preferences, or guarantee that profit is not the main incentive to produce ideas.

Conclusion

The market is not a universal lid that fits every institutional pot. To achieve certain social goals, or to generate valued or desired social benefits, institutional mechanisms other than markets—e.g., adversarial legal systems or friction competition over ideas—have been developed and established in liberal democracies over time. In some (important) cases, when markets expand into areas in which they are not apt, they fail to achieve the desired social goods certain institutions are meant to achieve at best and completely undercut the normative justifications of these institutions at worst.

Additionally, in order to function according to the normative justifications of the institutional design in which they are embedded, some institutional goods—e.g., lawyers, votes—should not be marketised, or at least not entirely. And since in contemporary liberal democracies, markets tend to indiscriminately expand into almost every human sphere, even to those in which they are not apt, they should be limited so that our political and legal institutions are able to function according to their normative justifications. These have been the overarching normative arguments of the thesis.

Arguments from dignity, corruption, and inequality, which form the bedrock of the MLM literature, the dominant philosophical literature on the limits of markets, are inappropriate to normatively analyse the limits of markets in institutional goods and designs. These arguments apply general moral principles that do not address specific institutional elements and are overly focused on permissibility and individual ethics instead of institutional design. In their place, I have offered an institutional account that addresses the limits of markets in institutional goods and designs by delineating the relevant institutional justifications, making clear how a specific institutional design is meant to serve those justifications, and examining the functions of each institutional good within this design. This institutional account requires a normative analysis of the most pervasive

institutional mechanism of the modern age—competition. I have offered such an analysis, showing that there are two kinds of competitive institutional mechanisms, and that each kind requires different normative standards to function. These have been the main theoretical and conceptual innovations of the thesis.

I have applied my account to two specific institutions: the adversarial legal system and the marketplace of ideas. First, I argued that in order to live up to its normative appeal, the adversarial legal system must guarantee equal opportunity for equality of legal representation between parties and that each party has an equal opportunity to obtain a sufficient level of legal representation. This means, in turn, that the market in legal representation must be severely limited or even eliminated, as it creates inequalities that are institutionally unjustifiable and prevents people who cannot afford it (or do not want it) from purchasing quality legal representation.

Second, I suggested that the concept of the marketplace of ideas alludes to two kinds of competition over ideas—friction and parallel—and that each kind is designed to generate public benefits in different ways. I argued that the marketisation of competition over ideas undercuts the benefits of friction-based competition. Moreover, while a marketised media system is more compatible with parallel-based competition, a fully marketised media undercuts some of the benefits of the parallel-based competition as well. Subsequently, I showed that to realise the benefits of parallel competition over ideas, we need to either (1) find a criterion for judging the quality of ideas that is not based on individual preferences; (2) add a mechanism to the aggregation process of parallel competition over ideas that would be reasonably effective in weeding out bad preferences, or; (3) ensure that making a profit is not the main incentive to produce ideas. Either way, to achieve the benefits of friction competition over ideas, frictional islands with proper rules which compel people to exchange and refute each other's ideas must be secured.

Beyond this brief overview, in the remainder of my concluding remarks, I will revisit three crucial payoffs that are specific to my institutional-focused inquiry and, in so doing, shed a more

cohesive light on the contribution of my institutional approach.

Equality, Freedom, and Institutional Designs

A central recurring theme in this thesis has been that the analysis of specific institutional designs provides us with a more complex picture of normative considerations regarding equality and freedom in liberal democracies. Due to functional considerations, some institutional designs require a stricter level of equality, while others require securing negative freedom. What I wish to reiterate is that these normative implications are neither grounded in general egalitarian or libertarian theories of justice nor in values like fairness, but rather in specific institutional designs. So, an egalitarian who supports, say, parallel competition as the primary institutional mechanism for a certain institution must also support securing negative freedom for competitors within that institution irrespective of fairness or general commitments to equality, but for functional reasons. The same goes for libertarians and friction competition, or other designs that can be in tension with negative freedom, for that matter.

Indeed, I have already highlighted this payoff throughout the thesis. Here I wish to emphasise how far-reaching it is. As citizens in liberal democracies, we spend a significant part of our time within institutions as active competitors, audiences, judges and so forth. We are consumers, producers, and workers in the market; we are defendants and claimants in the courts; we are voters; we are viewers; we produce ideas. Thus, the range of human activity captured by general egalitarian or libertarian theories of justice is limited since much of the normative requirements that apply to us on a day-to-day basis are determined at the level of the design of the institution in which we operate.

This shows that without a proper normative analysis of institutional designs, many of our normative requirements go unnoticed. This, in turn, might push both libertarians and egalitarians to consider, and perhaps provide concrete arguments for, which kind of institutional designs are

more compatible with their general normative framework, for what reasons, and whether their general normative framework can actually be implemented within existing institutional designs.

The Limits of 'Professional Ethics' and 'Access To' Arguments

The institutional analysis of the market in legal representation and the marketplace of ideas revealed a pattern that I have hitherto underemphasised and wish to address directly. The pattern is that two dominant potential solutions to mischiefs caused by these markets are usually offered: 'professional ethics' (for lawyers and journalists) and 'access to' (justice, and the media).

Starting with the professional code of ethics for the media, I noted that the idea that the appropriate response to growing sensationalism and other market-driven ills is that the media should self-regulate by adhering to strict professional norms of objectivity, impartiality, the pursuit of the truth, and a commitment to serve the public interest. If only journalists and editors acted professionally, the idea goes, most of the normatively market-driven objectionable features of modern mass media would be effectively tackled. Similarly, in the context of the legal system, the worry is that financial incentives obstruct lawyers' ethical commitment to their clients, the courts, and the law. Again, a professional code of ethics for lawyers is considered an appropriate remedy for the ills created by the market in legal representation.

However, as I have shown, relying on professional ethics is not really a plausible solution. First, historically, this attempt has failed. A complex code of ethics has developed over the years in both the legal system and the media. Yet, complaints about the way markets undermine political and legal institutions are as relevant as ever. Second, as a matter of principle, professional ethics cannot be used as a rug under which all institutional failures are swept. Professional ethics should be compatible with the institutional design, not in direct tension with it. As I have argued, it does not make sense to establish an institutional design that creates strong incentives for people to act in ways that go against their normatively appropriate institutional function and then turn to a

professional code of ethics to counteract these objectionable incentives.

Finally, in the unlikely cases where professional ethics can be resilient against objectionable market incentives on their own, professional ethics cannot solve all the problems that arise from the marketisation of certain institutional goods. For instance, even if lawyers acted like saints, allowing the rich to spend more resources on legal representation would have still undercut the proper functioning of friction legal competition and, in turn, the normative justification of the adversarial legal system.

Turning to the 'access to' response, the argument is, by and large, that lack of access to the legal system or the media can undermine the equal standing in society of the disadvantaged and may qualify as an unfair distribution of an essential resource. For example, if one does not have access to the media, one cannot participate in the public forum. This is both unfair and degrades one's democratic standing. Therefore, access should be provided by the state, NGOs, or through *pro bono* activities. Putting aside questions such as what fair access even means in different institutional contexts (for instance, I am not sure that according to all justifications of the media, people should have equal access to it), this solution is also partial at best since even markets to which everyone has access can undermine certain institutional justifications. Recall the discussion on the market in votes. It was assumed that everyone's right to vote is guaranteed, and so all can trade, at any given moment, a specific token of their vote, but not the right itself. This is an example of a case in which everyone has access to votes (since their right to vote is being 'given' for free), but that a market in votes could nonetheless be objectionable for other reasons. The same point applies to the market in legal representation and to the marketised media system. Regarding the former, even if everyone has access to legal representation, the market in legal representation should still be limited due to other reasons—for instance, the inequalities it creates. Concerning the later, even if everyone has access to a fully marketised media system—both in terms of consuming ideas and in terms of expressing ideas—such a system would still undercut friction

competition over ideas.

I should be clear that my purpose in this section is not to merely argue against 'professional ethics' and 'access to' arguments. Indeed, both remedies are important means of addressing some of the problems caused by markets, and they could and should be used in appropriate contexts. My point is that both solutions remain *within* the paradigm of marketisation. They aim to mitigate some of the pernicious effects of the distribution of legal representation by a market mechanism or the design of the public forum according to market principles without questioning or seeking to challenge marketisation itself.

Finally, another way to describe the 'professional ethics' and 'access to' arguments is through the MLM framework. The argument from corruption supports ethics restrictions on lawyers or journalists as the market degrades the quality of legal representation and reporting, while the argument from inequality seems to support ensuring an adequate level of access to the legal system and the media for all citizens. Assuming this framing is correct, it serves as another illustration of the shortcomings of the MLM literature when it comes to institutional goods and design. The 'professional ethics' and 'access to' arguments fall short because they focus on fairness (e.g., 'access') and individual role morality (e.g., 'professional ethics'), thereby failing to challenge the institutional design itself.

Highlighting this pattern of using these two arguments as remedies shows (1) the pervasiveness of MLM thinking even outside the MLM literature and (2) the need for an institutional account that can replace, or at least supplement (depending on the context) MLM arguments.

Different Kinds of Market Expansionism

Market expansionism can occur at different levels. A specific good can be marketised—but so can entire institutional designs. For instance, as I have shown in chapter 6, consider inappropriately

adopting the ideal of parallel competition, closely identified with the idea of economic competition in the market, as the primary institutional design of the public forum (namely, the marketplace of ideas), when friction competition is actually more apt. In such a case, no specific good is being objectionably marketised. Instead, what is being marketised is the *institutional design as a whole*.

While MLM theorists have taught us that the alienation, commodification, marketisation and privatisation of certain goods can be normatively objectionable, their accounts do not operate on the level of institutional designs. Normally, MLM accounts either apply a general normative metric or principle to a specific good (e.g., Satz's account) or try to identify the right evaluative attitude we should have towards a certain good (e.g., Anderson's account). Since they go immediately from the good to their general normative evaluation, they skip, as it were, the stage of evaluating marketisation at the level of institutional design. By addressing the evaluation of institutional design, my proposed four-stage account allows us to account for different levels of marketisation.

So, another main contribution of the institutional approach is that it uncovers a different dimension of market expansionism. This kind of market expansionism is driven by a different kind of motivation: not that the best way to allocate a certain good is through markets, but rather that all of our institutions should be run as if they were a market.

To recap, I hope that the three payoffs with which I have chosen to conclude this thesis amount to me making good on my promise in the introduction—that this thesis 'will show the need for an additional normative layer that discusses the justification of specific institutional designs'. Institutional designs matter normatively, and an institutional account that allows us to unpack these normative layers—by analysing what competition is, highlighting design-based normative requirements, or alluding to failures in general moral accounts—is of normative importance and provides us with an enriched normative picture.

To be sure, a lot remains to be done. More can be said, for instance, about the relationship between markets and other institutions in liberal democracies. There are other institutions and

institutional designs to explore, both competitive and non-competitive. Some important examples that come to mind are the party system (and electoral competition more specifically), the family, the military, and the education and health systems.

My institutional approach to political philosophy, in general, could also be relevant to other fields and lines of normative inquiry. For instance, my account of the two concepts of competition can be further developed to analyse other issues in contemporary politics, such as the justification of antitrust laws, the proper distinction between beneficial normative competition and malignant affective polarisation, and so on. I intend, in due course, to pursue these lines of inquiry. For now, I hope I have successfully highlighted the importance of expanding our normative endeavours into new institutional realms and that the framework I provided could aid us in thinking about them.

A Polanyian Moment?

I began this thesis with Polanyi, and with Polanyi, I shall end it. In his seminal work *The Great Transformation: The Political and Economic Origins of Our Time,* Polanyi explained the undercurrents responsible for the major social changes underway at the turn of the twentieth century and introduced the idea of the 'double movement'.[1] 'For a century', Polanyi argued, 'the dynamics of modern society was governed by a double movement: the market expanded continuously but this movement was met by a countermovement checking the expansion in definite directions'.[2]

In short, Polanyi argued that the establishment of the free-market economy was accompanied by a utopian ideology that he sometimes called a 'commodity fiction'. According to this fiction, the self-regulated free market would manage all aspects of human life.[3] However, the process of market expansionism led to 'permanent evils', and thus the countermovement was born.

[1] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001).
[2] Ibid., 136.
[3] Ibid., 76.

It was 'more than the usual defensive behavior of a society faced with change', he explained; 'it was a reaction against a dislocation which attacked the fabric of society, and which would have destroyed the very organization of production that the market had called into being'.[4] The reaction comprised social protection legislation, labour associations, and other instruments of intervention meant to 'tame' the market.

This dynamic between market expansionism and the reaction to it caused institutional strain, which opened the door, frankly speaking, to fascism. 'The fascist solution of the impasse reached by liberal capitalism', Polanyi wrote, 'can be described as a reform of market economy achieved at the price of the extirpation of all democratic institutions, both in the industrial and in the political realm'.[5]

A similar story can be told about events at the turn of the twenty-first century. Market expansionism peaked in the early 2000s. Its evils were laid bare for all to see in the financial crisis of 2008, and now we face the institutional strains caused by rampant markets. And as before, the call to re-establish control comes at the same time as the rise of anti-liberal movements.

Without proper empirical research, it would be irresponsible to insist that this correlation is causally significant or to build too much on these similarities. I only wish to suggest that we can, to some degree, interpret this current moment in history as a 'Polanyian moment'. If we zoom out from the analytic arguments I have provided throughout this thesis and put the debate on the institutional limits of markets into a historical perspective, we can see that the popular grumbles about overreaching markets I surveyed in the introduction are not an entirely new phenomenon. The dynamic between market expansionism and attempts to limit it has a history and can be described as a constitutive challenge of liberal democracies since the industrial revolution. If indeed we are at another peak of this dynamic, the arguments in this thesis could be read as sympathetic

[4] Ibid., 136.
[5] Ibid., 245.

justifications for 'taming' the market in the hope that doing so could provide an answer to the hostile anti-liberal alternatives that are now on the rise. I end, then, on this optimistic note.

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