

Managing Passions and Constructing Interest* Online Gambling, Human Body Parts and the Market

Philippe STEINER
Marie TRESPEUCH

Abstract. Market operation is based on the existence of material interests and reasonable, moderate passions rather than insatiable, potentially harmful ones. Interest is not a natural given but a social construct. We examine how interest was constructed through the creation of an online gambling market and why comparable construction failed in the case of human organs for transplant purposes. We study the market devices that make it possible to sell goods whose commodity status is contested on moral grounds.

Key words. ALBERT HIRSCHMAN—INTEREST—CONTESTED MARKETS—ORGAN TRANSPLANT—GAMBLING

The social construction of markets has become a very active field of economic sociology. Following the research developed by Granovetter (1994) and his colleagues (Granovetter and McGuire 1998; Yakubovich, Granovetter and McGuire 2005), many studies have pointed out the importance of the work involved in creating such an institution. They have shown how some particular types of market that include some of the most emblematic examples of contemporary financial capitalism emerged as a result of the combined action of a network of actors and the introduction of innovative trading technologies, such as the Chicago derivatives market (MacKenzie and Millo 2003; MacKenzie, 2006). In the case of financial markets, research shows how the deployment and control of the rational actor (Abolafia 1996), and the division of labour and technical computing devices, make the economic rationality assumed by economists take the form of a distributed economic agent (MacKenzie 2009). The social construction of interest is ignored, although the differences between gambling and speculation have been mentioned (Goede 2005; Hissung-Convert 2009). Interest is already there as a supposed category. Interest can indeed be taken for granted in the above studies because market transactions existed for strawberries in Fontaines-en-Sologne (Garcia 1986), financial products in Chicago in the 1970s or electricity in the American states in the early twentieth century, before new market structures were built. But this assumption cannot be made when it comes to goods whose placement on a market is the subject of moral dispute, especially where their commercialization is something new.

This article aims to shed light on the process of social construction of interest by considering two cases where the moral challenges that are raised require that

* Translated by Peter Hamilton.

interests be justified. Such goods that may be called *contested commodities* following the pioneering work of Radin (1996), are not ignored by economic sociology, especially that developed by Zelizer (1985, 2005, 2010), when she focuses on changes in moral discourse that gradually made the operation of the life-insurance market possible in the United States in the second half of the nineteenth century. But although the research on contested commodities shows the importance of moral debates that may lead to a wide range of solutions, ranging from more or less stringent regulation to a pure and simple ban on market transaction (Satz 2010), attention has not been focused on the conditions for the emergence of what can be described as *contested markets*, that is to say, markets in which contested commodities are bought and sold. This is where the social construction of interest can be understood. The question then is to know how *market devices* introduce distinctions between (harmful) passions and (legitimate) market interests, and thus making it possible to exchange contested commodities.

The article will first characterize the moral dimension of interests through the work of Hirschman (1977), from which we propose a sociological interpretation for empirically studying the importance of the separation between the passions and interests that is the condition for emergence of the institution of the market. Then we examine two contested commodities, one for which market mechanisms have been created, and another where this process has failed. The first is the online gambling industry, and the second is the market in human organs for transplantation, two areas in which goods are subject to strong moral objections. The article then examines how moral problems are solved in the case of gambling, with interest being isolated from passions through mechanisms of protection against addiction, while no such mechanisms have been proposed to distinguish between commercial interest and distress, thus preventing the creation of organ transplant markets. Following this comparison, we return to conclusions about the construction of interest as a condition for movement from contested commodities to contested markets.

Passions, interests and markets

In what is now a classic work, Hirschman showed how the emergence of capitalism is based on a long process of justification of interested behaviour. Let us briefly summarize the main argument. Alarmed by the political and social risks associated with the passions, the philosophers of the seventeenth and eighteenth centuries tried to find modes of action that gave more regular forms of social order than ones based on the passions, which are associated in the mind of these philosophers with turbulence, impulsivity, irregularity (Hirschman 1977). An initial solution was offered by the repression of passionate behaviour through moral and religious precepts; a solution which implies the problem is solved in that the passions are what they are precisely because they escape these regulatory forces. A second solution was to balance the passions among themselves: the harmless passions serving to check the more destructive ones, which, since they took over the person as a whole, endangered the continuity of the social order. However, a final solution emerged as a result of debates on the nature of politics: interest, as the principle underlying the conduct of the Prince, was gradually recognized as a general motive for action in society, and as it became more

worldly, it was reduced to material interest. Interest was thus conceived as belonging to the worlds of both passion and reason. Like the passions, interests put the individual in motion, they dynamised how he sought ways to satisfy the acquisitive passion, but they also had the advantage of being controllable by reason, in the form of calculation of his interests, the caution with which he should behave to achieve his goal, and, finally, the efficiency associated with interested conduct (*ibid.*).

As a reasonable passion distinguished from the disturbing world of the socially destructive passions, interest had a predictable and constant character, and was in the end general or universal (*ibid.*). All that remained was to make a moderate passion out of it so that the issue of the insatiability of interested behaviour did not come to disturb the fine qualities of this reasonable passion. This was more complicated. Hirschman is less clear on this point, although he emphasises the important role played by Bernard Mandeville's paradox and Adam Smith's references to an "invisible hand" that leads individuals motivated by their private interests to promote the collective interest. The operation has also been less successful in this context and opposition remained strong throughout the nineteenth and twentieth centuries, as in the work of Auguste Comte and Émile Durkheim, who denounced the danger of a project that sees interest as the dominant and sufficient passion to establish and stabilize industrial society.

The problem here is not to supplement Hirschman's approach by considering this or that thinker he might have overlooked, or this or that school of thought which could enrich his study on how interest was gradually conceived to be a moderate passion. The sociological approach cannot simply follow the thread of philosophical, political, economic, and sociological debates, because as important as they are, these discourses are not by themselves sufficient to explain how this moderation of acquisitive passion was attained. We must turn to the institution Hirschman leaves in the background of his study, that is to say, a new institution as a *widespread* social phenomenon: the competitive market. This is where the practical solution to the problem of the moderation of interest is to be found, for specific reasons that economists have made clear (Faccarello and Steiner 2008).

The interested behaviour studied by Hirschman does not unfold in a social vacuum. As Polanyi said in a sentence that is as carefully crafted as it is profound: "Interests, however, like intents, necessarily remain platonic unless they are translated into politics by the means of some social instrumentality." (1944: 8). This politics stems from the fact that the form of government changes in Europe with the establishment of a market system in the highly sensitive area of the grain supply (Kaplan [1976] 1986). This change that Foucault called biopolitics aims to ensure the food security of the people of a territory through the creation of competitive markets whose virtues were extolled by the political economists of the time, from the Physiocrats on one hand to Adam Smith on the other, precisely in order to ensure the population's food supply—a task that the administration was no longer able to achieve through the use of police to control the behaviour of grain merchants (Foucault 2004). Two reasons contribute to the dressing up of the competitive market with the political and social virtues necessary to make it the solution to a problem of government. Firstly, once implemented, the competitive market is an institution that does not require any other social energy than material interests. The interest of sellers is to supply buyers; that of the latter is to have sellers facing them who are able to supply the market.

Interest binds them together; the government of individuals can thus leave individuals to do what they want to do on the market. Secondly, and this is an essential element, the market is a competitive market. In stressing this point, we want to emphasize a central social characteristic of such markets: *competition places the interests of some against those of others*. The moderation of interest as passion stems not so much from its position at the connection between the worlds of reason and the passions as it is that market competition is a social mechanism producing “rational moderation of the irrational pursuit of gain,” to quote the famous phrase with which Weber characterized modern capitalism.¹ With its characteristics of transparency, uniqueness of price, atomization of actors, competition is a mechanism that ensures that no actor decides the price or is even able to significantly influence its level. A social fact within the meaning given to that term by Durkheim, competitive price *imposes itself* on the actors within the market—economic theory calls them “price takers”—even though they contribute to setting it through their demand and supply. We cannot put it more clearly than Walras, the father of that central theoretical edifice, the theory of general equilibrium: “The price of wheat does not result from the will of the seller, nor of the will of the buyer, or from an agreement between the two. Though the seller would like to sell at a higher price, he cannot, because the wheat is not worth any more, and if he wanted to sell at this price, the buyer would find on his side a number of vendors willing to do so. The buyer would like nothing better than to buy cheaper, this is impossible, because wheat is not worth less, and if he wanted to buy at that price, the seller would find next to him a number of buyers willing to do so.” (Walras [1874] 1988: 50).

The social construction of interest is closely associated with the emergence of new markets, especially when it comes to contested commodities, such as cereals in the Europe of the Ancien Régime. The argument remains valid in the current system of markets. For a market to be formed, a disposition to act must be isolated that could be described as interest in the sense that this passion is, in Hirschman’s terms, predictable, constant, universal and moderate. This requirement becomes even more crucial where it concerns contested commodities, that is to say, goods whose commercialisation on a market raises moral issues. Commercial interest as grounds for governable action is not a natural thing. The hypothesis we make is that the social construction of the market works through market mechanisms that characterize the motive for action as an interest, rationally governable, and distinct from the passions which are to be excluded from the market. These processes at the heart of the social construction of interest can then move from the contested commodities to the contested markets. The rest of this article shows how this process was carried out during the implementation of the online gambling market in France from 2007: it then goes on to show that in failing to achieve such a social construction of interest, a market in transplant organs cannot be put in place.

1. “Unlimited greed for gain is not in the least identical with capitalism, and is still less its spirit. Capitalism may even be identical with the restraint, or at least a rational tempering, of this irrational impulse.” (Weber [1904] 1967: 17). By making competition the moderating operator of the irrational impulse towards gain, Weber makes competition into a market process distinguishing between passions and interests in Hirschman’s sense.

Regimes of contestation

The word passion is used by Hirschman in the philosophical sense that it had during the seventeenth and eighteenth centuries and which is at the heart of the Kantian approach that passion creates a barrier to the free will of the individual or removes his freedom of thought (Kant [1790] 1982:108). Passion thus means the loss of self-control, and is the opposite of the meticulous calculation of self-interest. In the case-studies which follow, this concept of passion is used in two different ways. With gambling, passion is understood as an anthropological factor—gambling is thought of as a human trait, a natural inclination—but one which can exercise such a hold over the individual that he may endanger his finances, his family ties, his psychological well-being, etc. Persons subject to such passions then form a *vulnerable population* which may be exploited by gambling providers. In the case of organs for transplantation, the phenomenon of self-dispossession is not from the depths of the human soul, but the social situation in which the individual is placed, often a situation of financial distress from which no way out seems possible unless through the sale of a part of himself. This is another *vulnerable population* that may be exploited by those—their creditors, commercial intermediaries—who derive advantage from them entering the market as organ sellers. The moral debates are an extremely important indicator of the status of contested commodities, but also of the vulnerable population that should be protected from this loss of self-control, and the distress associated with it.

Gambling—a threat to moral order?

Historically, gambling games are contested commodities in the sense that the organization of an exchange market around them means profiting from a morally reprehensible and potentially devastating passion. The slow construction of a French gambling market around firstly, monopolies, and then a more recently competitive market in the case of online gambling, show that channelling the passion of the game operates as the motive for legitimizing market exchange.

In her study on the history of gambling, Belmas (2006) refers to two types of condemnation from religious and secular authorities in the modern era: depending on luck involves an improper competition with God's judgment particularly in the case where it is just a frivolous form of entertainment; in addition, to exchange money on the basis of fate also appears questionable in a context where social hierarchies based on hereditary rank—and later, with the Third Republic, on the merit arising from work—are being undermined, potentially threatening social order. This has never stopped gambling from being used to provide various forms of revenue for the government and giving pleasure to its fans—in the court of Louis XIV in particular (Grussi 1985)—while sometimes producing damage due to the difficulty of controlling what some called the “curse of gambling” (Dusaulx, 1779). The idea of a “necessary evil”—in the sense of something impossible to ban—is inherent in the gaming business and justifies the obligation of governments to protect individuals who fall prey to this addiction. This way of protecting vulnerable citizens without asking their consent, in areas where they express their “weakness of will,” causes a “state paternalism where the individual is no longer the subject but the object of benevolent protection” (Elster 2007: 103). In terms of gambling, this attitude of government is aimed especially at

children (Belmas 2006) and the poor (Darracq 2008). They are considered more vulnerable to the lure of easy money and, more importantly, also perceived as unable to handle large gains (Collette 1999: 95). This recalls the point Zelizer made in her study of charitable organizations: in the late nineteenth century, cash given to the poor was considered a danger because their consumption choices were thought to be immoral. Indeed, “what guarantee would there be that once pocketed by the poor, charity cash would not transform itself into a corrupt currency that could be spent on immoral, stupid or dangerous things?” (1994).

These moral threats have seriously hampered the development of a legal gambling industry, governments hovering between the wish—in vain—to ban gambling, and the desire to develop operating conditions that are restrictive enough to satisfy morality, while deriving substantial tax revenues from the industry. Such a position can be seen to have been adopted from the late nineteenth century. Totally banned in 1836, gambling would gradually return to legality with three major exceptions to the general law of prohibition, the foundation of the French gambling monopolies, whose justifications have always included a general interest: at the end of nineteenth century, the government regulated totalisator betting (*pari mutuels*) on horse racing, in order to strengthen the horse-breeding industry, whose vitality was considered to be of national interest, casinos were allowed from 1907 to promote tourism in the resorts, the French National Lottery (*Loterie Nationale*) was restored in 1933 to provide decent pensions for the victims of the Great War, and to aid widows and orphans in a context of economic crisis (Collette 1999). Only such reasons as these that were higher than individual ones could justify the expansion of an activity that was also being controlled as tightly as possible. The use of restrictions on access to licensed gaming houses, either physical ones through the remoteness of institutions by siting them outside the city or by the introduction of entrance fees (casinos, gaming clubs, racetracks) or symbolically by setting high prices (tickets for the *Loterie Nationale* cost 100 francs in 1933, the equivalent of 50 euros today); limited gambling opportunities (three monthly draws of the *Loterie Nationale* when it began) were designed to limit gamblers to just the wealthier segments of the population. In addition to facilitating the collection of taxes, these measures provided a framework for controlling individual gambling activity, which helped to avoid excesses, especially with those groups deemed to be most at risk.

Relatively undeveloped until the Second World War, the French gambling industry took off with the arrival of the *Tiercé* (triple forecast on horse races) in 1953 and *Loto* (lottery) in 1976. An acceleration took place as a result of the authorization of slot machines in 1987, and with the development of “scratch cards” in the 1990s, enough to raise questions about the consistency of legislation designed to limit demand, but was being galvanized by a proliferation of products. The problem of gambling addiction, which appeared at the turn of the century at the end of a cycle of exceptional growth, reactivated the issue of an insatiable passion which was in the interests of the government and the operators, but not always of the gamblers.

In the early 2000s, the challenge to the government was reinforced by the awareness of a previously non-existent problem, one hardly even imagined until that time: “pathological gambling” (Mangel 2009). Although excessive gambling behaviour is nothing new, the perception of the phenomenon as a disease or

condition is a recent one and has had a lasting impact in changing representations of gambling. It is mainly through the influence of doctors and psychologists of addiction that the issue has been growing. Their willingness to recognize problem gamblers as users of a “drug without a substance” (Valleur and Matysiak 2006) leads to a strategy of challenging government to recognize gambling as a “disease” and to treat the resulting “patients.” The emphasis is focused on those people playing Rapido² or slot machines³ to excess, as these encourage repetitive play leading to financial, family, work or mental health problems. The rise in concern about gambling addiction can be interpreted as a modern and medicalised version of the old moral condemnation of gambling, especially in the lower classes (Fassin 1996: 256 *sq.*; Aïach and Delanoë 1998), but the basis of criticism remains the same: faced with the unleashing of passions, the commercial business of gambling is considered unhealthy and its legitimacy is questioned. The European regulatory context of the period provides an ideal framework for the playing out of this debate.

After receiving various complaints from bookmakers about European States erecting barriers to entry in their market, the Directorate-General for the “internal market” of the European Commission launched various infringement actions in 2006 in order to stop what it considered to be the offences committed by eleven Member States in terms of gambling and betting. The letter of formal notice sent to the French state itself⁴ outlined three specific grievances and invited it to justify the compatibility of its legislation with the provisions of the Treaty: 1) Betting certainly made a contribution to the overall budget and financing of the horse racing industry. But these two aspects have not been recognized by the courts as “general compelling reasons” and therefore they do not justify restrictions on competition. 2) In the fight against crime and fraud, there is no evidence that other jurisdictions (including those involving online gambling) are not just as fully able to prevent risks to public order. Moreover, unlike in France, other States have regulatory authorities for gambling that oversee and monitor operators. In addition, the countries of the Union have been required to implement and enforce the provisions of the Money Laundering Directive (2005/60/EC). 3) Where the protection of consumers is concerned, the Commission relied on the report of Senator Trucy in 2002 to establish that “the authorities and operators holding exclusive licenses do little or nothing to protect the consumer.” As such, the bar game Rapido was denounced as being particularly addictive, and minors would not, according to the Commission, be assured of protection because of the marketing of certain scratch-card games. The criticism is understandable: the most vulnerable (the “weak” and children) would not be protected but encouraged by the monopolies to engage in this sinful activity.

As with other States pursued at that time by the Commission, the central argument in the French government’s response was that there would be increased risk in the event of a multiplication of operators on the market, whilst on the other hand it would be enhancing the organization of the gambling industry by making it more attractive with abundant monopolistic supply. In this it was re-deploying a

2. Bernard Stiegler, “Rapido, assommoir contemporain.” *Le Monde Diplomatique* August 2000.

3. Armelle Achour estimates that 66% of requests for help come from gamblers dependent

on slot machines “Sos Joueurs.”, *Le Républicain Lorrain* 13 January 2006.

4. “Infraction no 2005/4953 (loteries et paris sportifs)–Mise en demeure.”

rhetoric that goes back to the governmental origins of monopolies, that is to their regulatory cogency, by using arguments which in the past had justified strong government intervention: prevention of the disorder associated with gambling. Thus, the answers given to the European Commission aim to demonstrate that national restrictions are necessary, proportionate and pursued systematically and consistently with regard to the general and compelling public interest reasons that underpin them. Under the heading of “public order” the French government promotes the existing situation and also highlights the risks that would be incurred by opening up competition. The answer firstly presents French legislation, including its requirements for the prevention of fraud and money laundering which exceed those of Directive 2005/60/EC. It then goes on to show that limiting supply reduces the risk of fraud and that the controls would prove much less effective with an increased number of operators. On the issue of “social order,” in other words the control over demand, the argument is as follows: monopolies are able to moderate consumption and their forms of gambling have little effect on minors. The accountability of the incumbent operators is also emphasized through mention of the Advisory Committee for the supervision of gambling and “responsible gambling” (COJER⁵) and the introduction of measures to help players with gambling in moderation. In addition to this promotion of monopolistic organization, the document forecasts the disorder that would occur if gambling were to be deregulated. First, the government approval of forms of gambling as and when they are put on the market is considered inconceivable in a deregulated world: an assessment of their potential negative characteristics would be impossible, and this would mean a consequent risk for consumers.⁶ Furthermore, the document states that the rate of return to players (i.e., the theoretical payout percentage) (*TRJ-taux de retour aux joueurs*), at that point capped by the Finance Ministry, was an essential element for limiting addiction. In a liberalized market, and “in the absence of tax harmonization,” the cap would be impossible to enforce, thus presenting a potential risk of an increased *TRJ* and therefore dependence phenomena. Finally, competition in the sector would be seen by the French government as synonymous with an inevitable stimulation of demand and would thus in itself lead to harmful excess.

The European Commission was not convinced by these answers and invited France to make changes in its laws on gambling by opening the market to competition. This pressure, coupled with political will on the part of the President from the autumn of 2007, then put the French market on the path towards the deregulation of gambling on the internet. Opening up to competition is also about

5. Formed in 2007, COJER must ensure that the forms of gambling sold by the Française des Jeux do not involve risk of addiction and do not encourage children to gamble.

6. This argument is present in the resolution of the European Parliament of March 2009: “The European parliament ... is of the opinion that the growth of online gambling provides increased opportunities for corrupt practices such as fraud, match-fixing, illegal betting cartels and money-laundering, as online games can be set up and dismantled very

rapidly and as a result of the proliferation of offshore operators; ...considers that the potential omnipresent opportunity provided by the internet to gamble online in privacy, with immediate results and with the possibility of gambling for large sums of money, creates new potential for gambling addiction.” (“Projet de rapport sur l’intégrité des jeux en ligne.” 2008/2215 [INI], Commission du marché intérieur et de la protection des consommateurs [rapporteur: Christel Schaldemose], 17 October 2008 : 5).

confronting the question of what the conditions should be for the setting up of what could be considered to be an acceptable trade in gambling.

A market in transplant organs or respect for human life?

For their part, human organs for transplantation were not immediately thrust into a moral debate about the possibility of buying and selling them in a market. When transplantation surgery developed from the early 1950s, it had the status of an experimental treatment, offered to a very small number of patients. Because transplant surgeons faced the problems posed by rejection due to immune-response without being able to prevent them, the need for organ grafts was small. This does not mean that access to this new therapeutic resource was easy, but the problem was more of an ethical and legal nature than a commercial one, as evidenced by the discussions which took place in London in 1964, when the main actors in transplantation met under the auspices of the CIBA Foundation. The issue of the commodification of transplant organs was mentioned in passing but without any debate about it developing.⁷ Instead, the ethical issues raised by levying organs from deceased or living donors, including minors and prisoners, were so important that Thomas Starzl renounced taking them from prisoners as a result of this meeting. So it is no surprise that in its appendices, the book reproduced the ethical standards of medical experimentation to be found in Nuremberg Code (1947), followed by the ethical code on human experimentation adopted in the Helsinki Declaration in 1964 and a declaration by Pope Pius XII on re-animation. Equally significant is the content of two legal texts that followed, for neither the British Human Tissue Act of 1961 or the Tissue Bank Act of the District of Columbia (1962) raise the issue of commercial trade and do not seek to protect themselves from it. Fifteen years later, when Fox and Swazey ([1974] 1978) published the second edition of their pioneering study of the social aspects of transplantation and dialysis, they did not mention the issue of market commercialization.

The same was not the case once transplant doctors had overcome the immune-response barriers with the introduction of cyclosporine in the late 1970s. Increasing the number of organ grafts available for transplant surgeons became the central concern. This is one of the reasons advanced during the brief debate that took place in 1977 on the proposal of Senator Henri Caillavet to introduce a “presumed consent” policy, so that every French citizen is presumed to be an organ donor after death in the case of brain death, the new legal definition of death in France from 1968. The number of kidney transplants has increased five-fold in France and seven in the United States between 1975 and 1985 (Steiner 2010: 109-11). It is also from this period that what came quite quickly to be called “shortage of organs for transplantation” dates (Mader 2011: 9-10) and, in parallel, the first concerns about the market commercialization of human organs.

7. An Italian surgeon made reference to a proposed law in which Article 8 cancelled organ donation if compensation, monetary or not, came into play, Article 9 punished any intermediary to three to twelve months imprisonment and a fine of 100,000 to 2 million lire (in Cortesini Wolstenholme and O'Connor 1966: 182). An English lawyer then referred to the problem and said, “it must of course be a generous compensation, but no sale of organs, which could lead to a horrible traffic, such as children in antiquity” (quoted in Wolstenholme and O'Connor 1966: 199).

The US legislative response to the initiative of Dr. Harvey Jacobs, who, in 1983, contacted American hospitals with a view to establishing a commercial market in kidneys, is exemplary. Albert Gore, a member of the House of Representatives, immediately put forward a bill that led to the National Organ Transplantation Act of 1984, which prohibits commercial trade with a fine of \$50,000 and five years in prison (Gunby 1983). This law has also had considerable organizational consequences, being at the origin of the Organ Procurement and Transplantation Network, centrepiece of the organizational continuum through which this social commerce takes place in the absence of a market. In France, the legislative and organizational response was quite tardy, which is partly explained by the propensity for self-organization in the world of transplantation, and led to the creation of France-Transplant to collectively manage the new scarce resource. The response came eventually with the first law on bioethics (1994) and the creation of a public institution—l'Établissement Français des Greffes (French Transplantation Establishment)—in charge of the coordination of the whole process. These legislative and organizational responses are an essential key to understanding the status of organs as contested commodities in that debates are no longer mere exchange of arguments: once inscribed in law and organizations, moral debates ensure that the issue of contested commodities becomes deeply rooted in political and social life. However, the debate does not end with the wording of the law. The shortage of organs has not been eliminated, and the argument in favour of the market has been invigorated since the beginning of the twenty-first century.

For those who support the market,⁸ the main argument is its efficiency: if one wants to reduce deaths on the waiting list and improve the lives of patients, one needs to open up the possibility of selling organs. We can add to this a range of considerations such as the fact that nephrectomy is no more dangerous than many legal market activities and that there is no reason to deprive sellers of their autonomy in making decisions on behalf of moral principles imposed by paternalism. For those who find the idea of a market in transplant organs repugnant,⁹ ethical arguments hold sway: on one hand, the dignity of the human being is incompatible with the commodification of organs and, on the other, market commercialization endangers medical ethics oriented towards care of people because they are sick, not because they are in financial need. And if taking transplants from a living donor is possible, it is because the person is driven by the desire to help a sick person, aligning his reasoning on that of the medical professional who then overrides the rule of *Primum non nocere* (first, do no harm). On this basis a whole range of issues arise about the reality of the benefits or harm of markets in general and markets in organs in particular: will there be a real increase in the number of transplant organs available to professionals and the sick or will there be a decline or stagnation due to a “crowding out” effect drying up the flow of donors? Can vendors really escape poverty by selling a kidney? Will the trust relationship necessary for the particular form of conversation between the doctor and the patient suffer from this intrusion of market commerce? Will the creation of markets in kidneys in developed countries be the signal for the development of weakly regulated markets in developing countries? Is there not a risk of the emergence of new forms of international exploitation of the poor?

8. We rely on the work of Matas (2004), Cherry (2005), Taylor (2005) and Goodwin (2006).

The Istanbul Declaration adopted in May 2008 by representatives of 150 scientific and medical institutions from around the world established that the transplant organ is and remains a *contested commodity* and must be banned, and states in Article 6: “Organ trafficking and transplant tourism violate the principles of equity, justice, and respect for human dignity and should be prohibited. Because transplant commercialism targets impoverished and otherwise vulnerable donors, it leads inexorably to inequity and injustice and should be prohibited.”¹⁰

Gambling and human organs are at the centre of moral debates about plans to expand or create markets: in this respect, both commodities can be seen as belonging to the category of contested commodities. These debates are structured in both cases around the forms of argumentation constructed by “moral entrepreneurs” (Becker 1963) or “entrepreneurs in economicity” (Steiner 2005) highlighting either the safeguarding of the social order and human dignity, or that of economic efficiency. But beyond the moral debates, we must examine how market mechanisms contribute to the legitimization of transactions of such goods.

Motives for the social construction of interest

Gambling and human organs are essentially different things when it comes to the question of what conditions should be fulfilled to justify and/or ensure their marketing. In the case of online gambling, the government put a number of devices in place at the time of deregulation in 2010 that were designed to remove excessive behaviour from demand, and so ensure that the passion for gambling was nipped in the bud in favour of a more cautious exercise of gaming practice. Such a social construction of interest could not, however, have occurred in the case of organ transplantation, where it seems that the distress of suppliers could not be mitigated by the development of competitive market rules.

Sidelining addiction in online gambling

The development of processes and rules for taming the appetites of producers of gambling and moderating consumer practices was an essential moment of legitimization for the market in the process of liberalization. Prior to the opening of the French market for online games, the notion of responsibility had emerged in the discourse of companies in the gambling industry as a sign of “quality” sent to the French government. The conversion of voluntary self-regulation policies into binding law marks an important development: the rules which would henceforth be common to all operators should bring about a market for online gambling that can take control over its own excesses. A series of measures would ensue.

9. We rely on the work of Caplan (1992, 2004), Fox (1996), Veatch (2000), Kahn and Delmonico (2004), Rothman and Rothman (2006).

10. The declaration of Istanbul on organ trafficking and transplant tourism: <http://www.agence-biomedecine.fr/article/222>.

Limited scope for games requiring "expertise"

Since 2008, the range of online games being deregulated has stabilized, through the publication of a report assessing different scenarios for liberalization in terms of criteria in which the prevention of addiction was seen as a priority. The report delivered by Bruno Durieux¹¹ to the Prime Minister in March 2008 thus describes the addictive potential of games without being able to rely on trustworthy figures: "Some games are 'structurally' more addictive than others due to different factors: time factors (short delay between betting and notification of winnings, frequency and duration of the game), financial factors (amount bet, the return to players rate), physical factors (availability and accessibility of games, environment encouraging repetition of the game) and factors related to the involvement of the player (expertise, feelings of being in control of luck). Regarding online games, the collective assessment by INSERM in March 2008 refers to the work of Mark Griffiths, who believes that certain characteristics of these games are likely to encourage dependency (anonymous nature of the game, comfort of playing at home, possibility of simulation before gambling with real money)."¹²

The marriage of chance and expertise has served as justification for the limited range of gambling games distributed legally on the French Web from 2010: only poker, fixed-odds sports betting and totalisator betting (*paris mutuels*) on horse racing have been allowed. The popularity of online poker, however, focused many concerns: Armelle Achour, founder of *SOS Joueurs* (SOS gamblers), was alarmed about the development of online poker "which represents 50% of addictions and affects many young people," according to her.¹³

The government justified its choice of a limited range as a trade-off between the effectiveness of deregulation and the public display of a policy of protecting gamblers. They were required to regulate some of the online activities that had hitherto been beyond any control, without too suddenly harming the sales of the monopoly operators and thus their tax revenues, which amounted to 5.3 billion euros in 2006. However, odds betting and poker between them attracted many online players, although the casinos had hardly even begun to develop them. Casinos and licensed gaming houses (*cercles de jeux*) the only businesses allowed to offer poker games in France, had not in fact been given the right to operate on the internet before liberalization. As to the odds betting offered by the Française des Jeux, it was well behind what could be played illegally online (in the eyes of French law). The credibility of the new regulations thus involved the building of an area of liberalization attractive enough to control some of the previously illegal activities, without frustrating the existing operators in the market. The rationale of player protection was deemed credible enough to respond to criticism when the government announced its decision to apply the principle of market competition to online gambling: "The scope of the gaming to be opened up to competition is limited to gambling which also relies on the expertise of its players and which has less risk of addiction, compared with pure games of chance such as slot machines

11. The ex-minister Bruno Durieux was selected by the Prime Minister to carry out an inquiry into the conditions required for deregulating the on-line gambling market.

12. B. Durieux, dir., "Rapport de la mission

sur l'ouverture du marché des jeux d'argent et de hasard." Paris: La Documentation Française: 2008: 4.

13. "L'avis des experts: 'un risque supplémentaire'." *Presse Océan* 8 October 2009.

or other games of high frequency lottery draws, for which the maintenance of the current system of exclusive rights is fully justified. These games, namely horse-race betting, sports betting and poker are also those which are currently in strong demand and for which there is substantial unauthorized supply¹⁴.

A tax regime for the moderation of appetites

During the debates on the open market, the tax base was the focus of attention by actors within the industry. On the one hand, taxation represented a cost for those business that were candidates for legalisation, and on the other, the choice of tax base determined the distribution of income between the French government, gamblers, operators, the sports movement and the horse industry.

Before the market was opened up, the two historical monopolies, PMU and Française des Jeux, were being taxed on the bets placed, equalling their turnover, while casinos were taxed on gross gaming revenue (*produit brut des jeux*, PBJ), equalling profits after the winnings paid to gamblers. For Web operators the tax base was also very often their gross gaming revenue or PBJ. A levy on bets means that every stake is a taxable amount: before liberalization, when a customer of Française des Jeux staked 100 euros, won 200 euros, then reinvested 100 and lost, the government would have taxed the total amount staked, i.e. 200 euros; however, if the customer had played a similar game in a casino, it would have been taxed on the total losses of the player (that is to say, the PBJ for the operator), zero in this case. The tax on stakes determines what is to be shared between the operator (the margin) and gamblers. However, the tax on the PBJ allows the operator to have greater control over his margin by defining, upstream of the tax, the share between the PBJ (which includes his income and tax) and gamblers' winnings. Indeed, the tax on stakes almost automatically determines the maximum amount of bets that will be repaid to gamblers once the administration's tax levies have been made, while a tax on the PBJ allows greater flexibility for operators to determine their returns and what is redistributed to gamblers, as it is they who determine the tax base. In the first scenario, new entrants were concerned that their strategy was fully defined by the tax administration, in the sense that the traditional means of "controlling their margin" would be neutralized. The stake, however, was chosen as the base for taxation, because of technical limitations¹⁵ and also to answer the regulatory objectives that the government has set itself and justifies once more because of the need to prevent things getting out of hand. Those drawing up the legislation have in effect supported the traditional argument that is used to justify limiting the supply of gambling, postulating a positive relationship between the number of gamblers and the growth of the product offer: "It is the act of gambling or betting itself that is taxed given the dangers to public order and social order related to this activity¹⁶." Taxed on their turnover,

14. Projet de loi relatif à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent en ligne, N° 1549, déposé le 25 mars 2009 à l'Assemblée nationale, page 4.

15. One of the key reasons is a subtlety of the legal and tax regime: the TRJ being to some extent the operators' income, it is taxable by the tax authorities of the country where their business is based: to avoid double taxation

disputes by the operators, it was better to choose another tax base.

16. J.-F. Lamour, "Rapport fait au nom de la Commission des finances, de l'économie générale et du contrôle budgétaire sur le projet de loi relatif à l'ouverture à la concurrence et à la régulation du secteur des jeux d'argent et de hasard en ligne (N° 1549)." July 2009: 248-49.

gambling producers are less likely to increase their sales while a tax on their product would have an incentive effect. As moderation of the appetites of gambling entrepreneurs is now being taken on by the tax rules, it only remains to control those of the gamblers.

On the “demand” side, the government has also set up regulations intended to limit excessive gambling. Among these measures, the law-makers have developed the prevention rules outlined above, but also framed the rates of return for gamblers. How can they ensure that the gambler is not being constantly encouraged to “recover” his losses? By reducing his average winnings, represented by the return-to-player rate (TRJ). The logic is as follows: a high TRJ generates more regular returns (wins) and more frequent gambling and this increased frequency of gambling increases the risks of addictive behaviour. Although real situations may include many other parameters than just probabilistic reasoning, we must admit that its logic is, all things being equal, impeccable. Therefore, the Budget Ministry relied on this argument for the importance of limiting the average winnings of gamblers and imposed less frequent returns on them in the name of protecting their own interests. The ceiling for the TRJ has been set at 85% of the stakes for online horse racing and sports betting.¹⁷ By moderating the desire to gamble, this measure also has implications for the operators, who as a result lost an important tool for competition: offering attractive TRJs makes it possible to attract gamblers by promising higher rates of return.¹⁸

Complementing these measures, the principle of self-constraint required of gamblers when associated with the technically inviolable limits of gambling helps to systematize the principle of moderation on sites and to construct interests on the demand side. The decree 2010-518 of 19 May 2010 contains measures of exclusion and self-restraint that must be compulsorily offered by gambling sites to their customers to open an account, each player must fix a credit and stake limits. The balance of the gambler’s account must also be shown by the operator on each occasion that the site is visited. Finally, the user can at any time request to be temporarily (for at least 7 days) or permanently excluded, which then causes the closing of his account.¹⁹ The player thus has to face up to his responsibilities: he must create his own limits—within a framework of standards imposed by law—and will be reminded by a technical device if he tries to break his own rules.²⁰

Interests and market rules

At the end of 2009, some “illegal” operators complained about the rules imposed by the government, forecasting that it would be difficult for them to capture customers because of the capping of the TRJ, the problems of singling out

17. Article 3 du décret N° 2010-605.

18. These TRJ are for example transparent in odds betting and the rates of return offered by different operators for the same sporting event can be easily compared (Trespéuch 2011b).

19. We tested this measure by opening an account at bwin.fr at the time of the opening up of the market in June 2010, but which we requested to be closed a few months later. The

request to close the account made it impossible to re-register for 36 months.

20. These rules have not always been welcomed, especially among some poker players used to more flexible rules in the pre-liberalisation system and who accuse the law of denying their freedom to gamble: see, for example, discussions about this when the law was passed in the Senate on site <http://www.clubpoker.net/projet-loipasse-senat/n-2150>.

products due to the small number of authorized gambling games, and little room to manoeuvre over margins due to the tax on stakes. At a meeting of gambling operators in spring 2009, these barriers were again listed by an online operator seeking a licence, and in doing so annoying a representative of the PMU, who remarked ironically: “But why then? Why do you want to come in if it will be so unbearable?” The (rhetorical) question elicited a smile but received no reply. Indeed, what interest do online operators have in fighting for legal access to the French market? The answer is perhaps to be found in the quest for equal treatment and a stable economic environment. We agree with the analysis of Fligstein about the role of the State, whose role is to make the market a space of fair competition, to limit uncertainty and especially to prevent instability—degradation of the quality of products, price wars or business failures (Fligstein 1990)—through the establishment of a means of coordination between actors. As elimination of or merger with main competitors often proves impossible by recourse to the means of market control alone, he concluded that firms need to use the State to organize competition. The choice of relatively restrictive rules when liberalization was brought in did not start a craze for the French market at the time of its opening, because now it was operating under the same conditions, interests could truly express themselves. The ability to advertise their products had become a *sine qua non* for the development of the businesses of candidates for entry. However, various legal proceedings in previous years to prevent them from increasing their visibility in and share of the French market had become cumbersome and costly (Trespeuch 2011a). A less favourable tax regime could thus be offset by access to a large pool of gamblers and the reassurance of operating under legal conditions. But ambivalence is also acceptable where it concerns monopolies: for although the PMU and Française des Jeux at first firmly defended their exclusive exploitation rights before 2008, they then changed their position once liberalization was announced, since the partial opening up of the market gave them unexpected freedom of action. The ability to fight on equal terms against those who had hitherto enjoyed few regulatory constraints to flood French customers with more attractive games on the internet, particularly in the departments of the monopolies working on open games, had in fact attracted competition despite the legal monopoly from 2008 (Trespeuch 2011b). Finally, on the side of the French State, the fear of deregulation was of the loss of gaming revenue, which could not be offset by a strong increase in the volume of betting, because of the risk of being accused of promoting gambling and contravening its regulatory role. It appears that the shared moderation of game producers and gamblers, imposed thanks to the betting tax and the capping of TRJ, had produced an assurance for the tax authorities that they would obtain a pre-defined percentage on each stake and therefore the promise of not seeing tax revenues deteriorate compared to the situation prior to deregulation.

The impossibility of protecting vulnerable people in the organ market

Proponents of the idea that a transplant organ market can solve the problems created by the shortage of transplant organs cannot be content with abstract ideas about the benefits of the market, as they must also specify the forms that it would take. A great disparity exists on this point: some only consider the possibility of a market for kidneys levied from live donors (Rapoport, Kagan and Friedlaender 2002; Matas 2004; Matas and Schnitzler 2004; Cherry 2005; Taylor 2005)

sometimes limited to an ethnic minority (Goodwin, 2006), or from dead people (Byrne and Thompson, 2001) whilst others envisage levies from both the living and dead (Adams, Barnett and Kaserman 1999; Becker and Elias, 2007), while others open the door to a commercial multi-organ levy on dead people, in the form of a futures market (Schwindt and Vining 1986). There is room for a wide variety of market mechanisms.

Beyond this diversity, the establishment of a market for transplant organs requires that an assessment be made of the price of the organ. The determination of this price is not a simple matter. Three methods have been used: the first, or contingent valuation method, calculates the price by conducting a survey of people who are asked if they would be offended by such a proposal, and at what minimum price they would agree that their kidneys could be removed after their death (Adams and Kaserman Barnett 1999: 152-54). Using a rather context-sensitive method, the authors arrived at the relatively low price of \$1000 and believed that the negative effects of commercialization would be low, since only 4% of respondents would be shocked by such a commercial offer. A more sophisticated method was used by Becker and Elias (2007), who determine the price by adding what is necessary to pay the individual seller of a kidney to cover the risk of death, loss of income and the risk of reduced quality of life after the nephrectomy.²¹ The average price obtained for a kidney is then \$15,000. The third approach takes as its starting point the society and not the individual. Indeed, Matas and Schnitzler carry out simulations based on medical data (survival of patients on the waiting list, transplant organ survival, death with transplant organ functioning, death after loss of transplant organ) and economic data (cost of dialysis, cost of the organ, transplantation cost, postoperative costs, cost of return to dialysis, point value QALY) to define the reservation price of a kidney transplant, that is to say, the price at which society is financially indifferent between the transplant and dialysis. The simulations lead to a reservation fee of \$94,600 and a cost-effectiveness of \$269,300 after taking into account the gain in quality of life; if donors disappear and only sellers remain, these figures are set at \$47,300 and \$134,600 dollars (Matas and Schnitzler 2004: 218). No price is suggested: simulations only define the upper limit of the range in which the price can be set from the point of view of society.

Deciding the price of a transplant organ is therefore not a simple matter, but studies show that this is possible once a particular method has been adopted.²² Beyond pricing theory, how it would be practically determined by the interests at work in the market? This question takes us to the heart of the matter, that is to say to the determination of specific forms of market trading. Few authors consider a direct bid between the vendor and the patients waiting for a transplant. A market relationship on the actual distribution of the scarce resource is excluded for reasons of fairness: the best financially endowed patients would benefit from a transplant performed with the best organs. Instead, proponents of the market suggest that if the demand side of the market was to be controlled by a public

21. The evaluation of the first and the third component is tricky: the first is based on what the individual demands as compensation for increased risk-taking (death) and the third involves how to translate monetarily QALY (Quality adjusted life years point) with which a

measurement is made of the loss of quality of life.

22. The legal dimension plays an important role in this, as Fourcade (2011) has shown in the case of the value of nature.

authority, or by the insurance companies who pay for dialysis, a form of competition could then exist between these companies, which would delight the most fervent defenders of the market (Taylor 2005: 112). However this might work, the actors on the demand side are encouraged to buy transplant organs to reduce their financial burden. In this latter case, the central problem is that of supply: what is the interest, socially perceived as legitimate, for a person to put themselves forward as a seller of a kidney? What market devices are used to separate the interests from the passions or unacceptable perversions according to the moral arguments put forward in the debate about contested commodities?

Not all objections raised against a commercial market are of equal value. The main ones concern decision-making on the part of the seller and the exploitation of the poor. Consent must be informed, which means, in the most complete version that has been clarified (Taylor 2005: 110-12),²³ that the seller would receive advice from the transplant centre as well as from independent professionals, before being put in touch with sellers who have been both satisfied and dissatisfied with their act. In addition, as a donor under the current legislation, the seller would be given a physical and psychological examination by experts to ensure his medical and psychological fitness as an organ donor. The provision and collection of this information takes time, which introduces a period of delay that helps to protect the seller from his own impulses. In addition, the commercial process is designed so as to reduce the risk of regret from the seller by setting a minimum price of the organ and by tying its sale into the provision of postoperative care where needed.

Are this delay period and the precautions designed to avoid regret able to solve the problem of the formation of a legitimate interest in the sale? The first, in particular, may give the impression that this operation was carried out, especially when it is coupled with the argument, present in all the contributions to debates about the organ transplant market, that the sale of a kidney carries fewer dangers than some legally and socially valued jobs—firefighters and fishermen are the two most frequently mentioned occupations—and if these occupations are allowed, then the danger does not justify proscription of the market. This is not the case: the thorny issue of the obvious asymmetry between rich and poor, often presented in terms of exploitation of the poor by the rich, remains unresolved, and with it the possibility of separating interest from passion, namely, the despair caused by financial distress.

The issue of exploitation is central for all writers, whether their expertise is in philosophy and ethics (Veatch 2003; Cherry 2005; Taylor 2005), in medicine (Matas 2004) or in economics (Becker and Elias 2007). The terms of the debate are questionable and may lead to such paradoxical distinctions that one can get the feeling of descending into word-games.²⁴ When the issue of poverty is taken seriously, it is a formidable ethical problem and, consequently, it is an obstacle to the formation of a legitimate commercial interest on the supply side. The relationship between the sale of an organ and poverty is conceptualized in terms of the “

23. Rapoport, Kagan and Friedlander (2002), Matas and Schnitzler (2004) put forward several market devices along the same lines, but none of them provide much detail about the markets they wish to see established.

24. Thus, for Taylor, exploitation involves

the intent to exploit and, he says, as poverty is not desired by the rich, there cannot be any exploitation. The author admits, however, like all the others, that the sellers will be the poor who cannot hope to escape their condition without selling part of their biological capital.

irresistible offer” that a poor person cannot dismiss without missing a (rare) chance to escape poverty. So the financial distress that would be the starting point for the market supply of organs for transplantation is what would be the motive that would provide a solution to the plight of patients waiting for a transplant—hence the phrase “distress commerce” to characterize the commercial trade in organs (Steiner 2010: 309-16). The countries that would allow the sale of organs would make public their decision to give priority to the distress of the patient over that of the poor person, but as a transplant is an opportunity to reduce the financial costs of the health care system, such a country would be sending a message that the poor are being used to relieve the public finances, or those of people who can protect themselves by buying adequate medical coverage from their insurance company. To put it in bioethical terms: “The problem is whether those in power are able to meet the basic needs of poor people to the point of selling their organs. In the United States, it is clear that there are enough resources to develop a protective safety net capable of meeting the basic needs of life without forcing people to consider extreme solutions. If those who defend the organ market do so to escape their responsibilities in terms of meeting the needs of the most needy of their society, this is an unacceptable excuse.” (Veatch 2000: 157).

In this sense, the formation of a legitimate interest that could be the basis of the commercial behaviour of the supplier on the biocapital markets comes up against a major problem. It is not that poor people cannot be in a position to make a decision that would be considered legitimate and thus autonomous: the processes envisaged by Taylor and Matas are exactly the same as what is already being used in the procedures set up by the laws that prevent the creation of biomarkets and regulate the transfers of resources known as organ gifts.²⁵ But the difficulty about the process of building a legitimate interest in creating a supply on the organs market is based on the fact that the society which opens such a market would no longer seek to aid financially distressed citizens, to the profit of (some) of its citizens who were in a state of medical distress. This is the argument that Veatch puts forward in article where he changes his position on the matter: “As long as the government continues to withhold a decent minimum of welfare, liberals should, with shame, cease opposing financial incentives for organ procurement.” (2003: 19). In other words, the collective interest that is thought to emerge as an unintended consequence of commercial behaviour is in fact the intended outcome of a collective selfishness.

Finally, it is useful to examine the information available on the only legal market in transplant organs, that is of kidneys in Iran. Recent research confirms the thesis put forward here, that the protection of vulnerable people is incompatible with the creation of a contested market. A survey of the social backgrounds of sellers shows that the latter are in a “situation of stress” with a score on this measure twice as high as that of the Iranian population as a whole. This situation of stress is mostly related to recent (less than six months) and difficult situations, of which the three most common are increase in the cost of living (82%), low income (79%), and family charges (73%). The Iranian doctors who carried out this research noted that examination and follow-up care of these sellers are far from

25. Information about this can be gained from the story of the gift of a kidney between a married couple—only made possible by the revisions to the law on bioethics in 2004—in the remarkable book by Christian Baudelot and Olga Baudelot (2008).

being the rule in this market (Nejatisafa *et al.* 2008). These results are confirmed by another survey showing that 62% of kidney sellers were living below the poverty line at the time of the survey, that the money received from the transaction was used in 56% of cases to pay off debts and in 63% of cases that “payment had a moderate effect on the economic status of the donor’s life” (Malakoutian *et al.* 2007). The Iranian case thus confirms the thesis advanced here that a market in transplant organs is incompatible with those market devices that protect vulnerable people, quite simply because by creating a more stringent informed consent the latter make the supply side of the transplant organ market disappear.

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Although it often passes unnoticed in studies of the social construction of markets for products whose commodification no longer poses ethical problems in the public domain, the social construction of interest proves to be an important stage when it comes to contested commodities whose mode of commodification changes (gambling) or where they are new contested commodities (human organs). Comparative study shows that the ability to distinguish interests from passion can be seen, following Hirschman’s work, to be an essential step in the construction of the market.

Over and above their differences, if human organs and gambling raise issues of contestation as commodities, it is because of the risks of exploitation of the vulnerability of individuals, and especially the poor. The moral challenge thus stands as a bulwark against the dangers of the market. Focusing attention on these two contested commodities also sheds light on how the social construction of interest plays a crucial part in the debates around the “transition to the market (or not),” and in the market devices that need to be created to ensure that it operates in an acceptable manner.

In the gambling market, constraints over the range of supply and the necessary adherence to standards of accountability, now enshrined in law, are two key elements in the social construction of interest. The systematic management of behaviour through the introduction of a special tax regime, has a parallel in the way the French government wanted to include ways of preventing disorder in the rules governing this market. The non-exhaustive measures described in this article are the expression of a wish to enshrine the rules that prevailed before deregulation in law (principles of taxation based on the regulation of monopolies) and the various voluntary and strategic initiatives taken by the operators in preparation for the opening-up of the market. This time, however, the rules are common to all operators and their application is controlled by a third party, the Regulatory Authority for Online Gambling (Autorité de Régulation des Jeux en Ligne–ARJEL), set up when deregulation took place, and which guarantees their application so that there should be healthy competition between operators. The common rules are based on the collective moderation of appetites, on profit on the supply side, and winnings on the demand side. Provided with precise technical, fiscal and social procedures, the principle of moderation has been able to respond to its critics by constructing the interest of all actors, an indispensable prerequisite to the movement from contested commodities to contested market.

The situation is different in the case of organs. By reacting as quickly as they did, governments in the United States, but also in Spain and France, have not only banned the market in the name of moral values, but they have developed a whole set of rules and set up a series of medical organisations under an umbrella Agency in order to facilitate the non-market transfers that organ transplanting requires. More than a form of government monopoly, such as that set up initially in the case of gambling in France, this is about the social construction of the non-commercial domain with its own procedures to respect the ethical principles of autonomy and accountability of donors, devices that allow doctors who are often reluctant to intervene surgically on healthy people, thereby violating the ethical criterion of *primum non nocere*. These devices can also be seen to be flexible as they were easily amended when necessary to include the possibility of exchanges between pairs of incompatible donors-recipients with the revision of the French Bioethics law in 2011. The promoters of human organ markets have not been able to offer market devices to go beyond these devices and to distinguish between passions—distress—and the interests that might justify the emergence of the market and the presence of sellers within it. At best, their plans merely reproduce the features of the construction of the non-market domain. No more is envisaged, and for good reason: the market devices that would avoid financial distress would simply mean excluding the poor, that is, those likely to be sellers of their own organs.

Finally, given the large number of contested commodities, such as weapons, drugs, medications, tobacco, bodies, etc., this article suggests ways to systematically study how market devices make it possible to proceed beyond the moral debates associated with contested commodities to the operation of contested markets. This is a novel and so far unexplored way of taking note of the relationship between values and commercial practices through the processes by which markets are socially constructed.

Philippe STEINER

GEMASS—Université Paris-Sorbonne
Maison de la Recherche
28, rue Serpente
75006 Paris
Institut Universitaire de France

philippe.steiner@paris-sorbonne.fr

Marie Trespeuch

Laboratoire SENSE—Orange Labs
38-40, rue du Général Leclerc
92794 Issy-les-Moulineaux cedex 9

marie.trespeuch@orange.com

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