Contested markets: morality, market devices and vulnerable populations

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Abstract

While certain contested goods do manage to make their way to market, others have moved less far in this direction and others seem permanently unable to do so. Moral contestation promotes, holds back or blocks the emergence of contested markets. This article examines the conditions that make the operation of these markets possible, and those that block their appearance. For this we propose to focus attention on the one hand on those devices that make transactions possible, and on the other, the “vulnerable populations” that these devices are intended to protect, either from or by the market.

Keywords

Devices, Gambling, Human Organs, Markets, Vulnerable Populations
The creation of new markets has become a major element of social and political life with the advent of neo-liberalism. The competitive market becomes an ideal to be inscribed within social reality so that transactions are conducted with the greatest efficiency. Consequently, we see an increasing number of contested markets or markets on which morally contested goods are bought and sold. Human organs and gambling, but also children, drugs, alcohol, tobacco and many other things are contested goods to the extent that their marketing leads to moral controversies. These are due to the fear that the logic of the market will penetrate into areas considered sensitive because they touch on people's privacy, their integrity, their health, their ability to live in dignity or the maintenance of public order. While certain contested goods do manage to make their way to market, others have moved less far in this direction and others seem permanently unable to do so. Moral contestation promotes, holds back or blocks the emergence of contested markets. This article examines the conditions that make the operation of these markets possible, and those that block their appearance. For this we propose to focus attention on the one hand on those devices that make transactions possible, and on the other, the “vulnerable populations” that these devices are intended to protect, either from or by the market.

1. Theory

Up until now interest has been mainly focused on those goods subject to moral and legal disputes, the contested commodities (Radin 1996, Satz 2010, Sandel 2012, Phillips 2013); disputes that may as easily be in actual markets, in marketing proposals (“paper markets”) or just in discourse promoting commodification (Radin 1996, Phillips 2013). This is the first step in our approach that is similar in this respect to recent studies that illuminate the formation of markets through the study of social movements (Rao 2009, Fligstein and McAdam 2012). Furthermore Viviana Zelizer has shown how markets have emerged in spite of the legal and moral disputes to which the goods were subjected (Zelizer 1983), and how common law managed to set monetary amounts where the market was unable to serve as a reference point (Zelizer 1985). From there, she developed a research programme focused around the relational work needed to make compatible the expectations of people involved in circuits of commerce involving transactions related to privacy (Zelizer 2011). Social interactions thus become the focus of concern and take on a Goffmanian tone
concerned with the construction of the interaction order between the protagonists involved in exchange¹.

The research strategy followed here is different: it is to study the mode of operation of contested markets itself. Interpersonal agreement is not created in a social vacuum; a contested market contains many social microstructures, rules, and norms that frame the interactions so that transactions can take place.

To account for the operation of contested markets the article first focuses on moral controversies that are at work to make the goods morally disputed ones. The next step is to examine the devices by which a market is set up - or not set up - up to allow transactions to take place. By devices, following the works of Foucault (1994) and those sociologists who, in different ways, have taken the topic as their subject of study (Callon, Millo and Muniesa 2007, Karpik 2010) we mean the network of heterogeneous elements (laws, safety regulations, health regulations, forms of taxation, but also buildings, advertising displays, construction of specific populations, etc.) that connect objects and people. In this sense, the devices studied here include what Neil Fligstein called the rules of exchange that define “who can make a transaction with whom, and the conditions for completion of the transaction” (Fligstein 2001, p. 34) which help to stabilise the operation of the market. But the devices studied here are not confined to the statement of the rules for transactions; these rules are not sufficient on their own for understanding how the market device cools the moral issues to make the transaction possible. We need to account for something more specific than what is highlighted by moral disputes: the social construction of the conditions of the vulnerable populations which the contested market will modify, if it happens to emerge.

Moral disputes raise the question of the compatibility of the market with competing ideas of the common good, or even what defines our common humanity. Although they may vary in intensity, these disputes, however, reveal the values that both the social body and governments wish to maintain or promote when deciding about whether to allow contested goods onto the market. The common good, whether it is concerned with environmental, economic, health, social or even bioethical matters, is rooted in various areas, where decisions affect the style of presentation of the benefits or harm that these markets (potential or actual) are able to produce. These adverse moral effects, whether real or expected, feed the arguments put forward by “claims-makers” that appear gradually, surround themselves with relays and organize their action based on repertoires of devices.

¹ See the special number of Politics & Society devoted to the relational approach in sociology (Politics & Society 2012, vol. 40-2).
mobilisation that have been analysed by the sociology of public action: the use of experts, of lobbying, the organisation of demonstrations or happenings are all methods that help to transform a localised situation into a public issue whose contextualisation eventually produces a symbolic order that is able to lastingly disqualify alternative modes of resolution (Gusfield 1970). In some cases, the forms of social movement become component parts of the contested market as Hayagreeva Rao (2009) has shown in the case of how the organization of motor racing was used in the early 20th century to create an audience acclimatized to the presence of motor cars, while at the same time demonstrating the reliability of this new mode of transportation. Promoters of contested markets are also moral entrepreneurs: they also defend a form of morality, that of free access and the common good offered by market exchange. When the market they seek to promote fails to take off, these actors can also be the bearers of a moral critique of alternative modes of social commerce.

At the same time as controversies about these markets unfold, one sees different moral entrepreneurs designing the contours of vulnerable populations that are to be protected by the market or, conversely, to be protected from the market. The concept of vulnerable population thus appears as a centrepiece for understanding contested markets. It refers to the groups that will or are likely to be upset by the appearance or disappearance of a contested market. The group is most often made up of human beings, but the concept also encompasses the notion of a group composed of animals. In all cases, the population is morally weakened in the sense that as the result of the creation or not of a contested market, it is in a position of either succumbing to its own moral weaknesses or, conversely, will be able to improve its capacity to exist. The notion of vulnerable population can therefore possess a positive or negative polarity in the disputes around the creation of a market.

2. Contested Markets: Two Contrasting Examples

Contested markets are studied here by taking the case of online gambling recently legalized in France, and that of human organs for transplantation. In the first case, it is an effective market in the sense that it is possible to make transactions legally, as long as there is respect, as in any market, for the rules governing trading. In the second case, it is a contested “paper market” in the

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2 This concept is a key one in Philip Pettit’s theory of republicanism and arbitrary domination (Pettit 1997). Our conception differs in the sense that we are focusing on moral issues related to the existence of different vulnerable populations confronted to the market.
sense that the proposed markets are only, with the exception of Iran since 1988, rhetorical exercises aimed at promoting the benefits that this form of trade would introduce. [Both of the cases are built upon surveys that used qualitative methods (interviews, review of archives and grey literature, ethnography)\(^3\).]

In both cases, the moral dispute is present through the controversies between advocates of the free market and those who oppose it. This remark, although seemingly trivial, has two important consequences however. First, the lack of a market does not in any way mean the absence of trade, even in the case of gambling. What is at stake in this controversy is the social form assumed by exchange and the reasons why it is suitable or not to move from an initial form of exchange (the state monopoly on gambling, the gift of organs) to another (the market). Second, the moral controversy will be studied firstly in terms of specific social arrangements that can contain or cool down legal disputes and then from the perspective of the people whose situation would be changed as a result of the establishment of the market.

2.1. Gambling

Moral objections

Historically, games of chance have raised moral objections initially related to their nature and then to the consequences they might have for the wider population. The notion of hazard or risk is the first problem. In Western societies heavily influenced by Christianity, hazard and risk are confused with divine power; it thus seems illegitimate to invoke them for what each party would see as frivolous purposes (Belmas 2006). Secularization and the emergence of probability would gradually remove gambling from the jurisdiction of religious institutions and set it, from the 18th century, on the side of acceptable pastimes. However, the association risk and money continues to pose a lasting problem.

As they were based on chance, these games were first perceived as unproductive: as only a money transfer from one party to another that was being performed without creating profit.\(^4\) The supposedly unproductive nature of gambling connected with another religious taboo, which proscribed the life of idleness. What then of a society that would seek money for itself through

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3 For the methodological details, see Steiner, 2010 and Trespeuch, 2011.
4 This is only true, however, when one excludes from the analysis the fact that when a potential organiser of gambling exists it makes a profit. The birth of a gambling industry calls into question this simplistic view of unproductive gambling.
recreational activities that used chance to distribute each persons’ share?

From this point of view, the French Third Republic was a key moment in the evaluation of meritocracy and equal opportunities through the introduction of compulsory education. The value of work, the foundation of the possibility of social mobility became a credible path to salvation for the poorest classes. The fear that some people could win large sums without merit therefore generated some reservations. Indeed, “alea negates work, patience, experience and qualifications. [...] It grants the lucky player infinitely more than he could procure by a lifetime of labour, discipline and fatigue. It seems an insolent and sovereign insult to merit” (Caillois, 2001, p. 17).

Gambling can therefore convey values contrary to the conservation of a social order based on work and savings, and upset through chance and the money that they mobilise the traditional determinants of social hierarchies, namely birth or merit.

Vulnerable populations

Regulation of the economic activity of gambling was part of the policies that sought an acceptable compromise between respect for morality, which was gradually included in the legal texts, the pragmatic need to control an activity that is difficult to completely prohibit, and the interest in drawing tax revenues from it for the Treasury. A solution emerged in the 19th century. The development of this economic activity was tolerate but within a framework that governments would describe as strictly moral, that is to say, of benefit to the public interest while protecting at the same time those populations deemed more vulnerable in relation to this activity.

Betting on horse racing was initially legitimized as a source of income necessary for the improvement of horse-breeding (Gabolde 1937, Darracq 2008). In 1933, the restoration of the national Lottery in France was justified by the need to offer decent pensions in a period of economic crisis to those injured in the Great War — the gueules cassées [“men with broken faces”] (Collette 1999). Faced with these populations of beneficiaries legitimizing the emergence of the contested market, other population categories emerged who were endangered by the market and thus required special treatment, the first of whom to appear being the poor. They represented a population that it was thought desirable to keep away from gambling, as it could divert them from labour and encourage idleness, while weakening the savings habit. Just as the working classes were considered more prone to alcoholism (Lalouette 1997), the poor were considered potentially more vulnerable to gambling. The law dealing with gambling can be seen in this regard
as a paternalism based on "the seemingly sincere belief in the fact that the danger of gambling increases especially with the littleness of the wealth of those who take part in it" (Darraqu 2008, p. 141). This way of protecting citizens without their consent in areas where they can express their "weakness of will", can lead to a "state paternalism where the individual is no longer the subject but the object of benevolent protection" (Monnet 2008). Prohibiting or restricting the possibility of gambling is indeed perceived by the authorities as a way to protect vulnerable gamblers, in this case the poor, from trends that would be prejudicial to them. Vulnerable populations are rarely sanctioned directly, as the illegal organization of gambling is considered more reprehensible than indulging in a weakness. Moreover there is differential treatment according to the social status of the manager, “the history of gambling has taught us that its repression has been primarily aimed at the gaming of the lower classes” (Darraqu 2008, p. 136).

This perception of the poor and their more general inability to manage a budget in a reasonable way, was recurrent in the 19th century, explains Zelizer in her work on American charities. From 1870, in these charity organizations, cash given to the poor was considered a risk because their consumption choices were thought to be immoral. Indeed, “What could guarantee that once in the pockets of the poor, charitable cash did not turn into a corrupt currency, spent for immoral, foolish, or dangerous purposes?” (Zelizer 1994, p. 130). These fears led at the end of the 19th century to a reduction of cash support in favour of in-kind donations. In France, the rehabilitation of the Lottery in the early 1930s was hampered by the same fear of seeing the poor having to manage a lot of money by winning the jackpot, as shown by the concerns of a lawyer in 1937: “How many dreams does [the national Lottery] puncture! For the losers and even for the winners when big prizes turn out to be a disappointment for those unprepared to receive them. Who does not remember, in fact, the vicissitudes suffered by some winners, proving once again that a fortune that arrives unexpectedly can lead to less than happy consequences?” (Collette 1999, p. 95). This critique reappeared in the media in the early 2000s as a response to the attractiveness to disadvantaged social groups of the Rapido bar game supplied by the Française des Jeux: “A Rapido player, by consuming three hours per month of his life in a public place, (which is also a source of income for the state) and by gambling 10 francs every five minutes, or 360F, will have lost an average of 115.20F or 38.40F per hour, that is to say 1.2 times the SMIC [hourly minimum wage] (...). The essence of all the vile games

5 Faced with a situation impairing their judgment, these individuals momentarily reverse their preferences to act ultimately in ways that contradict the goal they had set themselves.

that the 'modernist' managers spread throughout France in the 80s to "lighten the tax burden", combined with the effects of alcohol, if not of crack, Rapido and its various clones are without doubt the cause of genuine existential and mental ravages in the bars of cities and suburbs".

Children, because of their vulnerability or their irresponsibility, are also subject to protection from these markets. If in the 18th century children who dishonoured their families were locked up, being kept at a distance from the market is now done in the name of respect for the "innocence" of this population. The fear of seeing addictive behaviour towards gambling multiply, and of minors succumbing to the devices of easy money when it is essential instead to encourage merit and its reward through work, was evident in the concerns raised by family associations at the opening of the online gambling market in 2010 (Trespeuch 2011).

The 20 last years, the moral debate has changed its tone and with it the definition of the populations rendered vulnerable by this contested market. The designation of a vulnerable population to be protected is nowadays often accompanied by a sanitarisation of social problems (Fassin 1998): in the case of gambling (or organs) it has become the medical profession, which claims to be able to use its expertise and its ability to assess problems, and to distinguish the normal from the pathological, not in moral but in health terms. This process of medicalisation has had another process of politicisation added to it so that these problems are now reclassified as part of the agenda of the government, thanks to the intervention of businesses, associations and other relays within civil society. Hitherto something addressed in terms of a defective morality, since the 1990s the question of the passion for gambling has been translated into a medical and psychological terminology. Pathological or compulsive gambling has for some years become a syndrome recognized by the health authorities and supported by the medical community — and thus following much the same trend as alcoholism in the post-war era (Freidson 1970), or the perception of smoking as a harmful addiction — which dates only from the late 1970s. Converted into a health problem, excessive gambling was then invested by some doctors and psychologists as a cause to be taken up by public authorities (Mangel 2009). This movement was accompanied by the search for those responsible and led very quickly to blaming gambling operators and their business practices and then onto drawing up the devices to be used for taking the heat out of the controversy if an (online) gambling market was to be implemented.

\textit{Market devices: eviction and self-control}

Among the important parts of the devices for taking heat out of the controversy, we would point firstly to the legal framework. The legal rules are usually central and tax rules act as a containment factor for a contested market.

Games of chance have been cyclically banned or permitted sparingly in enclosed locations, due to their intrinsic dangerousness and the questionable morals with which they were associated. The structuring of the French gambling sector into monopolies has been the consequence of these reluctances, included in the law, and which from time to time are associated with cyclical concerns relating to the fiscal interests represented by gambling. As the outcome of successive exceptions made to the general prohibition of gambling in the law of 1836 (which is still in force), the gambling market has thus seen three major players emerge in turn: the Pari Mutuel Urbain, responsible for organizing totalisator betting on horse races (1891 Act), casinos that can offer gambling tables within their institutions (1907 Act), followed by slot machines (1987 Act) and finally, Française des Jeux, offspring of the Loterie nationale (National Lottery) created in 1933 for the benefit of victims of the Great War. These limited exemptions have been associated with strict control of the distribution network in order to limit the supply of gambling: until the early 2000s, slot machines and gambling tables could only be offered within an institution with an authorization (casinos), only newsagents with a license can sell products of Française des Jeux, in the same way as registration of totalisator betting on horse racing can only take place within the racetracks or in approved outlets.

To avoid sudden enrichment situations among the poor, the authorities have used price as a way of ousting this vulnerable population that they do not want to see becoming a customer of the gambling industry. Until 2006, the setting of an entrance fee in the halls of the table games casinos made it possible to differentiate the space for slot machines where access was free, from the roulette and Black Jack etc rooms. The entry fee set by law also served as a social barrier, especially when dress codes guidelines were also imposed to control access. In the case of the Lottery and its rehabilitation in 1933, the ticket price was set at one hundred francs (about 50 euros in 2015), a considerable sum having regard to the cost of living at the time. Thus, as a lawyer at the Paris Court of Appeal said in 1934: “The ticket price of a hundred francs appears reasonable. It is high enough to keep the needy classes at a distance, while remaining accessible to the working classes. (...) The consequences are more severe if tickets are purchased with the savings made on staple food and household goods, especially the most necessary ones.” (Collette 1999, p.121). The democratization of gambling after the Second World War has seen prices collapse and products multiply. As gambling has
become a trivial matter in the practices of French people, debates about it have gradually extinguished. They were revived in the early 2000s with the rise of the concept of “pathological gambling”, related to the expansion of the monopolistic supply since the 1980s and the proliferation of illegal gambling sites on the Internet.

In this context, the prospect of a liberalisation of the market in online gambling in 2010 fuelled the debate: supporters of a liberalized market highlighted the presence of a thriving online supply, which was illegal, and thus needed to be disciplined and submitted to French tax rules in order to ensure that vulnerable populations would no longer be subject to the attractions of these dangerous offers; and thus, with the revenues earned from it, why not help fund activities of public interest such as sport or heritage? Against this the proponents of the status quo (and some existing operators in particular) pointed to the risks the vulnerable were running if the supply were to increase, and preferred to maintain a monopolistic system which would contain strong sanctions against illegal gambling. Under pressure from Europe, it was the proponents of a free market that prevailed. However, the law of 12 May 2010 on the liberalisation of competition and the regulation of the online gambling industry, declares that “the State's policy on gambling aims to limit and regulate the supply and consumption of games and to control the operation to: 1 Preventing excessive or pathological gambling and protecting minors” (I of Article 3). With this objective in mind, it then goes on to state the measures needed to comply with it. Legal, technical and fiscal rules of exchange are formulated in order to ensure predictable and safe transactions (Fligstein 2001), but to keep vulnerable populations at a distance or allow them to maintain control over their gambling practices in the framework of this new version of the contested market.

On the supply side, access to the status of legal gaming operator works initially for candidates for the online marketplace through an accreditation process that includes general compliance with new legal provisions set out in the Act of 12 May 2010 and especially for compliance with technical specifications, submission to the French tax system and the establishment of game moderators for Internet customers. Fifteen companies have obtained this approval, issued by a new supervisory body, the regulatory authority for online gambling (Autorité de régulation des jeux en ligne — ARJEL) which is also responsible for monitoring and punishing those operators who do not observe the rules. To promote a supply of legal gambling on the Internet — and to deter people from gambling on non-licensed sites — advertising is deemed necessary, although it is strictly regulated “to protect the most vulnerable consumers given the addictive nature and serious
social and economic consequences these games may lead to, but also, more specifically, to protect minors from the temptation to play games that are forbidden to them” (Trucy 2011). Thus, any advertising promoting the gambling operators is prohibited in publications, broadcasts or places specifically targeting minors.

On the demand side, respect for the law banning gambling for minors encouraged many operators to develop ways to verify the age of users. The process includes several steps: first the player opens a temporary account on which he/she can make a deposit but cannot withdraw any winnings. He can only do that once he has proved his identity and age. For this, the operator asks for a copy of his ID. Once the documents are checked he sends an account activation code by mail. If a child had borrowed his parents' documents, he would not necessarily have access to the activation code as the envelope is blank and does not show that it comes from a gaming operator. But minors are not the only people to be excluded from the market. Those who are “forbidden to gamble” are also kept out of it. Those players who voluntarily ask to be included on a list held by the Ministry of Interior in order to be denied access to casinos — the only physical establishment in which the systematic control of identity is ensured — are also excluded from online gambling sites.

This drastic measure emanates a posteriori from players affected by excessive gambling. Prevention measures, in turn, work firstly by limiting the number of types of marketable games: only poker, sports betting and totalisator horse race betting on the Internet can be offered in this new market, leaving a large segment of the market (scratch cards, roulette, etc.) in the hands of the existing operators. This is justified for risk mitigation reasons: limiting the online gambling offer helps in not over-tempting gamblers, and sticking to games which combine luck and expertise is put forward as a solution that maintains supervisory control, as pure chance is seen as the most addictive form of gambling by some experts.

Taxation has also played a role. The government chose the amount being gambled (turnover) and not the operators' margins as the tax base for risk mitigation reasons: basing the taxation of gambling on the amount gambled reduces the frequency of wins by gamblers who, because they are losing faster are less tempted to chase their losses and therefore, if they are vulnerable, to fall into

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8 Defining the limits is open to discussion, however, since for players support associations such as SOS Joueurs, online poker is an activity particularly at risk, see for example: "Addiction, la folie du poker fait déjà des ravages (Addiction: the poker craze is already wreaking havoc)," Le Parisien, 26 janvier 2008 and « L'avis des experts : un risque supplémentaire », Presse Océan, 8 octobre 2009 ("expert opinion: an additional risk") Presse Océan, October 8, 2009. See more generally Bruno Durieux (2008, p. 4).
the spiral of excessive gambling. This tax measure is subject to a rule capping average pay-out ratio – the return to player rates (taux de retour au joueur) — to 85% of bets, to ensure that customers do not win too much too frequently. Through these tax and regulatory instruments, the authorities promise a mastery of customer behaviour and a limitation of the appetites of new suppliers (Steiner and Trespeuch 2013), and thus the emergence of a market where contestation will be cooled down.

Apart from the fiscal measures, regulation involves technical measures designed to moderate the practices of gamblers more directly (Trespeuch forthcoming). On the recommendation of health professionals, the government has asked the operators to set up technical procedures on their platforms inviting players to increase their reflexivity, initially, by the use of timing counters on games, the total amount of money being gambled as well as alert messages, and on the other hand financial constraints (fixed betting ceilings...) designed to prevent excessive behaviour and finally, information to find help when needed (freephone lines to help gamblers in difficulty).

2.2. Transplant organs

Moral contestation

In the late 1970s, transplantation became a medical procedure offered on a large scale. The number of kidney transplants increased fivefold in France and sevenfold in the United States between 1975 and 1985 (Steiner 2010, pp. 109-111). Behind this singular moment, there is a continuing situation that has been created and strengthened in all countries and gradually defines the major subject of contestation: the list of people waiting for a transplant is growing around the world; patients suffer and die waiting for a life-saving transplant. Hence, moral debates follow suit to the raising waiting lists.

The moral contestation of commercial business is focussed on the volume of organs "produced" and how they are produced. The phenomenon behind the moral contestation of the market approach is the initiative taken by Dr. Harvey Jacobs, who in 1983 made contact with US hospitals to establish a business dealing in the sale of kidneys to supply the US transplant surgeons. The legislative response in the United States was rapid and robust since the ban on trade in transplant organs is still based on it.
The main argument is about efficiency (Cherry 2005, Goodwin 2006, Matas 2003, Taylor 2005): if we want to reduce the number of deaths on the waiting list and improve the lives of patients, it is necessary make the sale of organs possible. Nephrectomy is no more dangerous than many legal business activities and there is no reason to deprive sellers of their autonomy in decision making in the name of moral principles imposed by paternalism. Added to this is the fact that the development of transplantation is beneficial from a social point of view, since it reduces the costs to health care systems. Both arguments are put forward by Arthur Matas, a transplant surgeon from the University of Minnesota, who strongly defended the creation of markets for kidneys (thenafter biomarkets) in the American Journal of Transplantation, showing that it is possible to buy organs while retaining a share of the financial gain within the health care system. A simulation developed from the situation in the United States shows that transplantation saves $94,579 over the cost of dialysis, while improving the condition of transplant patients by 3.5 QALY points. Taking into account the gain in quality of life for patients, and by valuing the QALY points earned based on what they cost for a patient on dialysis, the profit of the organ graft amounts to $269,319. The simulation shows that doubling the number of grafts would be financially neutral for a price of $47,290 and would have excellent cost/benefit ratio for a sale price of $134,659 (Matas and Schnitzler 2003).

Proponents of this form of commodification have been emboldened to challenge the burden of proof: what value can justify the imposition of a morality that insists that individuals who want to sell a kidney must offer it for free and, because they cannot do so, must work in more dangerous occupations still or are reduced to even worse extremes should they resort to the black market? Proponents of the biomarket thus blame their opponents for claiming the right to impose their own values on the rest of society and thus exploit the poor: “The rich and able-bodied by forbidding organ sales would be exploiting the poor to support their particular views of moral propriety, improper commodification, or human dignity, denying the poor the opportunity to choose freely on the basis of their own judgements regarding how best to advantage themselves. The outcome is robustly paternalistic” (Cherry 2005, p. 98).

These arguments have led to vehement responses, including the very negative editorial in the American Journal of Transplantation of November 2006 responding to the proposal by Matas. See the articles by proponents of transplantation and bio-ethicists such as Delmonico (2002, Delmonico and Kahn, 2004), Caplan (2004), Rothman and Rothman (2006) and Fox (2006).
published results concerning these vendors, whether from the legal market in Iran or illegal transactions, lead to the same result: the poor sink further into poverty. For those who loathe the idea of a transplanted organ market, ethics dominates the argument: on one hand human dignity is incompatible with the sale of organs, and on the other market commercialisation endangers medical ethics concerned with care for the sick, and not those in financial need. If an organ can be taken from a living person, it is because that person is driven by the desire to help another sick person, and thus his motivation is aligned with that of the professional who then overrides the rule of primum non nocere.

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.”

Vulnerable populations

Different populations are highlighted by the protagonists in the course of the controversy. In first place comes the population of patients, those who need this form of exchange — which was unknown until the second half of the 20th century — that puts a healthy organ from one body, living or dead, into another. This population must be protected: it is a point on which the various parties involved in the controversy all agree: transplant physicians, patients and their families, supporters of commercial sales, as well as the proponents of gift exchange. But the agreement stops there because the promoters of a market in which people would be encouraged to sell an organ they are reluctant to give, privilege the population of patients who need to be protected by the market, while those who oppose them by demanding that we stick to gift exchange alone, favour the poor population, who alone come onto market as sellers of their kidneys. It is this population that must be protected from the market.

Other populations play a secondary role in the controversy. For intensive care physicians and those who coordinate the kidney transplant market and explicit

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consent avoid the painful and traumatic situation of obtaining the agreement for removal of the organ from a deceased person. Members of the seller's family who are their heirs could find some comfort in the additional amount they might receive as a result of the sale of organs. Thus medical teams and families are two other vulnerable populations, not from an economic but an emotional point of view, that the market could be able to protect.

Conversely, the supporters of gift are eager to expand the vulnerable population for whom they are the spokespersons. Beyond the poor population who would be able sell a kidney because of the economic difficulties they face, there is a much larger population that would be threatened by the legalization of market exchange. The sale by someone of their kidneys would result in a painful moral situation for anyone that finds such a trade repugnant. The sale would destroy the basis for their axiological conceptions — the Kantian view that the human being is always an end and never a means to an end.

In this confrontation of vulnerable populations, it is the nature of the devices for protecting vulnerable populations which is critical.

Protective devices and the social form of exchange

The architecture of the inter vivos organ removal device is explained in the recommendations of the Council of Europe on the occasion of the Third Conference of European Ministers of Health, held in Paris in November 1987 (World Health Organization 1994, pp. 450-456). At that time being able to take organs from living donors was not a priority and its disappearance was even seen as being desirable. Such a donation should only be considered if medical conditions can be met: where there is no alternative (dialysis) and in the absence of a post mortem kidney graft, and where the medical situation means that a graft from a living donor is much more advantageous than a graft taken post mortem. Then there are restrictions on those persons able to be kidney donors: they must be legally competent adults in the sense that their decision may be assessed as free and informed consent. In a case where the person is legally incompetent, an exceptional situation from a medical point of view can lead to the procurement of regeneratable human biological resources or a kidney under strict conditions. The following series of recommendations concern the information provided to the donor or his legal representative: the consequences of the act must be explained in medical, social and psychological terms, as well as the implications for the recipient. The final set of recommendations is about the responsibility that is attached to the medical decision: organ removal shall be conducted under conditions that minimize the risk to the donor, which requires the donor to
undergo a series of medical examinations. To this set of recommendations directly affecting organ donation from living donors it is necessary to add a general recommendation on organ removal and transplantation in general: they must take place in “institutions officially recognized with an experienced and trained staff and the necessary equipment.”

As in Foucault's definition of device, the text combines considerations and qualifications, requirements and legal, biological, technical and social practices, to enable a form of commerce between human beings. This device traces two borders within the medical system and the population. In the first, the device determines what can occur: people must be technically qualified to carry out organ removal and transplants, but they must also take place within the institutions that are themselves qualified by their equipment and a sufficient level of activity. Within the population, the device traces around each patient a circle of people likely to become organ donors based on their state of health, and depending on the nature of the social or biological ties that connect them to the patient, according to their legal (“able”) and psychiatric (“rational”) qualifications. At the connection between the medical system and the population there are patients who must be sick in the manner required — neither too much nor too little — so that the transplant can improve their quality of life. It is this device that, within the social construction of organ donation makes this commerce possible by keeping it away from market relations, while satisfying the axiological requirements deriving from the moral debates surrounding the emergence and subsequently the stabilisation of transplantation as a generalized therapy.

The United States developed transplantation with living donors much earlier than in Europe, at the same time establishing strict protocols. The Consensus Statement proceeds from the fact that in the inter vivos gift, the risks and benefits differ from other areas of medicine since “[p]otential donors are healthy individuals who rarely receive medical gain (i.e., only in the event an underlying condition is revealed by the evaluation and consequentially treated) and so would not otherwise be considered “patients.” (Consensus Group 2000, p. 2920). This exceptional situation requires that the conditions of consent on the part of a person defined as “competent, willing to donate, free from coercion, medically and

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13 To avoid confusing social device and legal framework, it must be emphasized that these protocols are not laws: they are practice guidelines that study groups define in a consensual manner and form of recommendations addressed to interested individuals and institutions. These parts of the social device are derived from the practice field and relayed by the agencies. The same goes for recommendations formed in the Living Donor Committee Reports (Brown and Klein 2008, Cooper and Davis 2009), available on the United Network for Organ Sharing website.
psychosocially suitable, fully informed of the risks and benefits as a donor, and fully informed of the risks, benefits, and alternative treatment available to the recipient” (ibid).

Examination of the donor's health condition is easily understood: it is necessary to ensure that the removal of the organ does not put his life in danger and that the transplanted organ is healthy, that is to say that it is not a carrier of diseases (cancer, AIDS, etc.) that might prove harmful to the recipient. With the review of the reasons for giving and the health condition of the donor it is in this case a matter of ensuring that there is a distancing of impulses, and social pressures; the collection of consent device is a way of cooling-down the commitment of the donor. It is also a way to cool-down the moral debates which, amongst the population as well as members of the medical system, have appeared around live organ donation.

In the device advocated by the living donor committees of the Organ Procurement and Transplantation Network, is a series of 21 items to be evaluated before a person can qualify for kidney donation: the device is intended primarily to protect the donor. This protection is assured for him through many routes, the main one being the appointment of an “Independent Donor Advocate” responsible for promoting his interests and rights and to give him access to information to which he is entitled. It is also available to him in the form of non-disclosure to the recipient of the reasons why the donor could retract, if he wishes. This protection also comes from the fact that the transplant centre must provide care after the operation at its own expense. The device produces an enlightened altruism: the qualification of the donor operates through the verification of his understanding of the possible results of the organ removal (for the donor) and of the transplant (for the recipient); it also requires a cooling off period between consent and organ removal. The device ensures that the donor understands the consequences of the organ removal for his/her body image, lifestyle, mental state (anxiety, depression), but also for the ever-present possibility of graft failure or death of the recipient. Finally, the device considers the financial issues in terms of costs that the donor may have to incur to get to the scene of the organ removal, for the care of children, to ensure, as well as his job, his/her ability to change it.

The French legislation that has only moved towards live donor organ removal since the revision of the 2004 bioethics law is also protective of the donor, but in a way that gives more attention to the tutelary role of the state. The protective nature of the system is ensured by the existence of “living donor committees”, collegial bodies of five members (three doctors, a psychologist and a qualified person in the human sciences), appointed by ministerial decree, which ensure the
production of an enlightened altruism before the donor is heard by a judge of the High Court\textsuperscript{14}.

Faced with this structuring of non-market commerce in transplantation, what is proposed by the proponents of the biomarket? What might be the device that could "cool-down" moral debates to make the operation of this biomarket possible?

In his plea for the biomarket, James Taylor examines the regulations required to act as the screen between desires and actions, so as to ensure the cold rationality of the seller. What is the nature of the proposed regulation? It aims at the formation of informed consent with information on the nephrectomy provided by the procuring organization, but also by an independent agency that would convene a meeting between the potential seller and other sellers, those who now regret their act and others who do not. Regulation would ensure that there would be no compulsion (in the sense of voluntary coercion) weighing on the seller and put the seller in contact with several fee collection centres in order to allow competition. Regulation would include monitoring the competence of commercial organ graft professionals, medical tests to ensure the quality of the graft and to reassure buyers, but also post-donation treatment for the seller. These measures are similar to those noted by Matas, which, however, are more specific: minimum age of the seller from 18 to 25 years, possible limitation of the geographical areas from which he/she could come, checks on his/her health, care and post-donation monitoring of health in the long term, limitation of the biomarket solely to kidneys. Payment would not necessarily take place in money, as it could be possible to use a form of a payment of preferential rights of access to an organ in case of future need, reducing health insurance contributions, credits for access to higher education or cultural programs, or for funeral expenses.

The market in question would thus be fairly far away from what is commonly meant by this term. The question is, however, that of the specific devices that proponents of the biomarket propose to implement. The answer is simple: none. Moving the problem of consent in order to file it under the heading of voluntary contracts actually raises more problems than this helps solve. On one hand, 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

\textsuperscript{14} Reference may be made to the story told by Christian and Olga Baudelot on the progress of this protective device (Baudelot and Baudelot 2008, pp. 31-46, 74-77, 105-132). This testimony is also enlightening on the mismatch between the protective device introduced between the immediate and unreflective decision to give an organ, and the slow pace of proceedings imposed by the protective device.
ability to rid the biomarket of the people that financial distress itself leads to present themselves as sellers of their kidneys. On the other hand, the law of contract presupposes the existence of property rights that in turn imply that the body is legally equivalent to a fungible good. Roman law as well as common law does not recognize such a right of ownership. The promoters of a biomarket have never explained how the legal obstacles could be cleared and what form the legal fictions should take to make such a market transaction possible.

At the present time there is no solution to the question of what is the qualification of the object that is bought and sold on a biomarket; there are no devices for closing the market to meet the moral controversy about the risk of exploitation of the poor. It is therefore hardly surprising that such markets have not emerged.

3. Discussion

Both contested markets studied in this article show that the overlapping of morality and exchange nestles in the devices that cool down moral contestation to allow the implementation of exchange on a regular and predictable basis. These parts of the device are concerned with, as appropriate, either the supply of contested goods or demand, or both at the same time.

When it comes to supply, it is often the legal rules defining who is entitled to stand as seller, according to which rules the transactions take place, etc. (in the case of human organs); regulation may go as far as the definition of a public monopoly in charge of providing the supply throughout the entire national territory (as in the case of the lottery and offline horse betting). It can also include devices in which pricing becomes an essential component: as with the case of online gambling with the definition of the rate of return to players that defines the profitability of operators and the prospects of winning for players. The administrative structure of tariffs, an essential part of these devices, is consequently the meeting point par excellence between morality and the market economy (or its absence).

Secondly, on the demand side, limiting market access takes a specific form with the creation of vulnerable populations, social groups defined on an ad hoc basis that the devices should be able to protect. The most common category is that of children who must be protected from the market for online gambling. Children are also protected in the case of contested goods that do not lead to the creation of a market as is the case for human organs. But we must distinguish two things: in
these latter cases, we must protect children because of their weak legal status — they are legally “incapable” — against the possible manoeuvres of those who have authority over them (parents or institutions) and act in their own interests by transforming these children themselves into contested goods. In other cases, a child is defined as weak because it cannot fully resist the attractions of the market, regardless of its legal status. It is therefore understandable that the concept of "vulnerable population" is potentially applicable to any form of contested market. The designation of a vulnerable population to be protected is often accompanied by a sanitisation of social problems (Fassin, 1998) that offers contestation a change of context: in this case it is the medical profession which claims to be able to use its expertise and its ability to assess problems, and to distinguish the normal from the pathological, not in moral but in health terms. This process of medicalisation has had another process of politicisation added to it so that these problems are now reclassified as part of the agenda of the government, thanks to the intervention of businesses, associations and other relays within civil society. The vulnerable population so defined participates in the market legitimation process (or not) and state intervention instruments (taxation of those who produce health damage, campaigns for the prevention of risky behaviour etc.).

The emergence of vulnerable populations explains why demand in contested markets is the object of containment in one form or another. The definition of vulnerable populations or target populations leads to the social containment of transactions by limiting who can present themselves as buyers. But containment also affects where the transaction can take place, its publicising, and its places of consumption. It is thus a series of devices that help define the compromise between the logic of the market, which includes its catallactic morality, and moral values.

Although the notion of vulnerable population may have a blurred outline it has great potential in the controversy and can take the following generic form. Behind the argument that the legal prohibition of a contested market will produce a socially disastrous result because it will create a black market, there is an implicit notion of the existence of a dangerous population of traders who cannot resist the lure of profit and, where appropriate, the exploitation of a vulnerable population composed of the poor and needy. This argument continues to rage within the debates over the prohibition of a market in gambling or human organs.

The importance of the concept of vulnerable population is not exhausted by the statement of a vast list of such vulnerable populations to be protected from the moral risks that come from the creation of contested markets by the dangerous population of marketeers in contemporary neo-liberalism. A less expected result is
the existence of vulnerable populations who will need to be protected as a result of the opening of a market. The concept of vulnerable population is thus likely to take on a positive moral value. In this case, moral contestation may therefore reverse the process by demanding the creation of a limited access market to best meet the demands of these suffering populations. The vulnerable population may concern both animals and humans: to facilitate the legalization of new forms of gambling, horses were constructed as the target population in question whose quality needed to be improved; after the great massacre of 1914-1918, it would be the “men with broken faces” who came to play this role of a positively valued vulnerable population in the creation of the French National Lottery.

Two vulnerable populations with positive and negative values may be in opposition: one is put forward by those who are morally opposed to the emergence of a contested market, while the other is used by those who want to bring about the contested market. One must be protected from the market, while the other must be protected by the market. In the case of human organs two vulnerable populations are affected by this “distress commerce.” Patients waiting for a transplant constitute the vulnerable population that use the supporters of a market for transplant organs against another vulnerable population, a negative one this time, namely the poor who could not resist the “irresistible offer” that the sum they would receive from the sale of an organ would represent to them (huge, given their level of resources). This latter population prevails here over the positive one — the sick; the contested market cannot emerge. The reverse is also apparent: in gambling, positively-valued vulnerable populations (horses, “Men with broken faces”, sports associations) win out against the populations who should be protected from the contested market: there is thus legitimation through a transfer of moral value.

Vulnerable populations against the market, vulnerable populations for the market, vulnerable populations against vulnerable populations … The various scenarios are numerous and the devices which would make it possible to match them up in markets are even more so. Both can be used to feed the Foucauldian governmentality thesis. This form of government by other people, characteristic of contemporary neo-liberalism, is associated with the development of the market as a political form. Once the institution of the market is created, and the market device (dispositif) in place, self-interest is sufficient for it to function: it is in this sense a form of government very different from the law (what is prohibited and what permitted) and discipline (the careful control of behaviour). Contested markets are certainly not outside the law — especially when they cannot happen — nor discipline since moral entrepreneurs such as economic efficiency
entrepreneurs are always ready to intervene when the market device is not working as it should; but they are mainly concerned with governmentality. Faced with vulnerable populations with equal moral value, but an opposing sign, both law and discipline may appear as clumsy tools of government to deal with the flexibility of governmentality and its various optimization technologies (Steiner, 2008; Dubuisson-Quellier, forthcoming). The search for the best is not so much that of higher moral value; rather, it is in the "lesser evil" which is also a good, in the words of Leibniz. This “lesser evil” is thus the subject of incessant work of redefinition, hence the shifting boundaries between market and non-market, and the infinite multiplicity of market and nonmarket devices associated with them.

**Conclusion**

Contested markets are largely characterized by the device capable of cooling down the moral challenges that develop around the marketing of contested goods. The examination of two contested markets, one that has been able to set up and one that has not been, has shown that the contours of some populations affected by the existence or non-existence of the market plays a central role. The moral controversies that the devices are intended to cool down primarily concern the different populations whose fragility can be connoted either positively or negatively; in most cases the issue is about how to balance two vulnerable populations of opposing moral values and moral signs. Making one have higher value than the other is thus the task of the moral entrepreneur, whether he is in favour or opposed to the contested market.

This work was based on the study of only two contested markets. But there are many others, among which we can mention the market for international adoption, genetically modified organisms, tobacco, drugs; but also personal data, pornography or corpses (Steiner and Trespeuch 2015). The cooling down of moral controversies through devices must also be understood in relation to the vulnerable populations affected by the potential emergence of these markets.

**REFERENCES**


BROWN, Robert S. and KLEIN, Andrew, Selected Recommendations of the OPTN/UNOS Living Donor Committee to the Board of Directors, www.unos.eu, 2008
CAPLAN, Arthur J., If I were a rich man could I buy a pancreas? And other essays on the ethics of health care, Bloomington, Indiana university press, 1992
COLLETTE, Sandrine, De la loterie nationale à la Française des Jeux (1933-1998), Contribution à une sociologie de l’État moderne, political science PhD, Université Paris X-Nanterre, 1999
COOPER, Matthew and DAVIS, Connie, OPTN/UNOS Living Donor Committee Report to the Board of Directors, www.unos.eu, 2009
FASSIN, Didier (dir.) Les figures urbaines de la santé publique. Enquête sur des expériences locales, Paris, La Découverte, 1998


MANGEL, Anne-Claire, *Analyse de la construction sociale de la notion de “jeu pathologique” et de ses effets sur les représentations et pratiques des joueurs de la Française des Jeux*, Sociology PhD, Université Paris-Descartes, 2009


MONNET, Éric, “Faiblesses de la volonté et consentement. A partir de Agir contre soi de Jon Elster”, *Tracés* [on line], n° 14, 2008.


Steiner, Philippe and Trespeuch, Marie (Eds.), *Marchés contestés. Quand le marché rencontre la morale*, Toulouse, Presses Universitaires du Mirail, 2015


World Health Organization, *Legislative Responses to Organ Transplantation*, Dordrecht, Martinus Nijhoff Publisher, 1994


Zargooshi, Javaad, “Quality of Life of Iranian “Donors”, *Journal of Urology*, vol. 166, n°5, 2001b, pp. 1790-1799

