PART I

Contestable Commodities

1 Free Markets, Free Choice?

A Market Approach to Reproductive Rights

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Can markets protect reproductive rights?

It sounds like a rhetorical question, or even a patently absurd one, because markets, we are tempted to respond, have nothing to do with reproductive freedom. Markets are about money and prices, about putting buyers and sellers together in a neutral and impersonal environment. Markets do not care about reproductive rights, or indeed about any rights at all. How could they possibly be used to protect them?

Yet the apparent absurdity of this connection does not necessarily make it untrue. For although markets are clearly not designed to advance reproductive rights, they may still be able, under some circumstances, to provide this critical function. In fact, the very impersonality of markets and their sheer lack of normative content might actually make them uniquely capable of protecting reproductive freedoms.

The remainder of this chapter will explore this counterintuitive proposition, examining whether – and how, and why – markets could be harnessed to the service of this particular right.

Of Rights and Markets

The first point to consider is the normative void that lies at the center of commerce. Markets, as already noted, are not inherently defined by a commitment to any set of rights. They have no goals aside from their own function and no particular commitment to any of those who operate along their structure. Instead, markets are entirely impersonal and mechanical constructs, drawing together buyers and sellers, supply and demand, in

a chain of interactions mediated by price. As Douglass North has so eloquently elaborated, markets exist at the behest of governments and on the back of appropriate institutions. When they work best, they encompass an intricate bundle of rules, norms, and traditions, all of which are directed at the dual pursuits of efficiency and profit maximization. There is no room in this complex for societal goals like justice or equity, and no reason to suspect that markets will naturally produce these auxiliary benefits.

Just because markets are not committed to rights, however, does not mean that they are inimical to them: it simply makes them neutral. Sometimes, to be sure, markets do produce social "bads," outcomes deleterious to social welfare. If, for example, the global fashion industry develops a keen taste for baby seal fur, then the normal operation of the market will lead to an increase in the killing of baby seals. If the furniture industry likewise starts to prize rare tropical hardwoods, then the market will drive up the price of these woods, increasing incentives for loggers to fell as many trees as they can. In the United States, meanwhile, one might similarly argue that the private provision of health care has pushed prices to unaffordable levels and undermined the right of poor people to enjoy good health. In all of these cases, putting something into the market – be it seals, trees, or emergency rooms – arguably leads to a suboptimal, even harmful, outcome.

In other cases, however, the same kinds of markets, serving the same impartial dictates of supply and demand, can produce beneficial outcomes and social goods. Private farms and agribusinesses, for instance, provide nearly all of the world's food supply; private corporations supply an increasing amount of the world's fresh water.[1] Private markets generate the energy that lights our schools, the computers that teach our children, and the books we treasure as knowledge. Hospitals around the world are frequently run by for-profit corporations and most lifesaving drugs have been developed by private pharmaceutical firms – massive, undeniably commercial entities that make money while saving lives.

In practice, therefore, it seems difficult to argue that markets themselves are inherently good or bad, or that the development of a market in any

[1] Maude Barlow, Blue Gold: The Fight to Stop the Corporate Theft of the World's Water (2002).

specific area would necessarily be either protective or destructive of rights. Instead, markets drive only toward those purposes for which they are so perfectly suited: matching supply and demand, allowing firms to manufacture products and maximize profits, and offering customers the opportunity to buy. Sometimes this matching and these purchases are socially beneficial; sometimes they are not. But it is difficult, or at least unfair, to blame the market in either case for its social effect.

Markets and Reproduction

Let us turn, then, to a second consideration, and to the particular characteristics that are likely to define the market for reproductive products or services. Is there anything about these markets that will tend to make them more or less protective of rights? Anything that might push them toward either creating or destroying social value? If markets in general are inherently neutral, capable of creating both social goods and social bads, then we need to examine the specific circumstances under which reproductive markets are likely to exist, and the specific pressures that are most likely to operate upon them.

Historically and theoretically, we have a rather good idea of what causes markets to fail. We know, for example, that markets are not very good at delivering public goods – things like the classic lighthouse, or clean air, whose costs are borne by a small number of people but whose benefits are inevitably and uncontrollably shared by many.[2] Markets are also not very good at producing goods drawn from common pool resources – Atlantic cod, for example, or Scottish salmon. The markets will work in these cases, but they will tend to overproduce the commodity at hand, destroying the underlying resource and creating a clear social "bad."

Yet reproduction is neither a public good (at least in the customary economic use of that term) nor a common pool resource. Instead, reproduction is an innately *private* good, one that draws from a theoretically unlimited resource pool: ourselves.

So technically at least, we should expect a market in reproductive services or products to work very well – matching supply and demand through

[2] *See* R.H. Coase, *The Lighthouse in Economics*, 17 J. L. & ECON. 357 (1974).

the mechanism of price. Moreover, because competition in markets tends to increase supply over time and reduce price, we might also expect that an active and vibrant market for reproduction would allow individuals to have great access, at lower prices, to whatever reproductive options are commercially available. This is a critical and often overlooked point, because if we believe that one of the key aspects of reproductive freedom is access to reproductive choice, then markets – which tend naturally to produce both access and choice – are a natural ally of those who argue for reproductive rights.

Admittedly, a functioning market is not necessarily a "good" market in normative terms. We could, theoretically, imagine a vast reproductive enterprise composed of all sorts of nefarious and exploitative behavior – women being coerced to sell their wombs or eggs, for example, or desperate couples selling their infants or embryos for a supposedly fair price. Indeed, such stories already populate a whole subgenre of science fiction tales, including such classics as Margaret Atwood's *The Handmaid's Tale* and Aldous Huxley's *Brave New World*.[3] Economic theory, however, is more prosaic. It simply suggests that markets in the field of reproduction – markets for eggs, or sperm, or babies, or wombs, or embryos – are not particularly prone to either market failure or the destruction of limited resources. In commercial terms, these markets should work. Indeed, basic economics suggest that enabling and expanding markets for reproduction will simultaneously expand reproductive options and, in the process, the reproductive rights of those with access to those options. What kind of normative outcomes are produced as a result, however, is a more complicated question, and one that leads us directly to a third strand of inquiry.

Reproductive Sales: A Brief History

At a time when the reproductive market seems to be leaping into headlines around the world, it is tempting to believe that this market is brand new, a freshly born product of massive technological change. And to some

[3] Margaret Eleanor Atwood, The Handmaid's Tale (2006); Aldous Huxley, Brave New World (1998).

extent this is true. Thanks to technologies such as preimplantation diagnosis (PGD) and intracytoplasmic sperm injection (ICSI), would-be parents have far more options available to them today than they did even twenty years ago. Thanks to the Internet and other modern media, they also have a rapidly advancing stream of information about these new options. This combination of options and information makes it feel as if the market for reproduction – what I have elsewhere called the "baby business" – is a creation of the twenty-first century.[4] Yet the history here actually runs much deeper. In fact, there have been several earlier iterations of the market, instances in which buyers and sellers met together to exchange reproductive goods. How these markets evolved and how they interacted with reproductive freedoms provide an interesting insight into the connections between markets and rights in the reproductive sphere.

The Market for Contraception

Consider, for example, the case of contraception. Prior to 1873, when it became illegal, contraception was a flourishing industry in the United States.[5] In that year, however, the moral crusader Anthony Comstock convinced Congress to pass the "Act of the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use."[6] Under the bill's provisions, contraceptives were grouped with other "obscene" items and banned as such.[7] Interstate transport of contraceptives was outlawed, as was the use of the postal system for sending contraceptives and related

[4] *See* Debora L. Spar, The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception (2006).

[5] Estimated at $30,000 in 1892. Andrea Tone, Making *Room for Rubber: Gender Technology and birth Control before the Pill*, 18 Hist. & Tech. 51, 60 (2002).

[6] Act of March 3, 1873, ch. 258, 17 Stat. 598.

[7] *Judicial Regulation of Birth Control under Obscenity Laws*, 50 Yale L. J. 682 (1941). In fact one source specifically points out: "The anti-contraceptive laws were not originally passed as a result of controversy over religious doctrine; they were passed as a by-product of an attempt to give legal support to a widespread attitude about obscenity. Carol Flora Brooks, *The Early History of Anti-Contraceptive Laws in Massachusetts and Connecticut*, 18 Am. Q. 3 (1966).

information.[8] The bill also forbade the importation of contraceptives[9] and stated that:

> Whoever … shall sell, or lend, or give away, or in any manner exhibit, or shall offer to sell, or to lend, to give away, or in any manner to exhibit, or shall otherwise publish or offer to publish in any manner, or shall have in his possession, for any such purpose or purposes, any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing or other representation, figure, or image on or of paper or other material, or any cast, instrument or other article of immoral nature, or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion, or shall advertize the same for sale, or shall write or print or cause to be written or printed, any card, circular, book, pamphlet, advertisement, or notice of any kind, stating when, where, how, or of whom, or by what means, any of the articles in this section hereinbefore mention, can be purchased or obtained, or shall manufacture, draw, or print, or in any way make any such articles, shall be deemed guilty of a misdemeanor.[10]

The sentence for such crimes was a minimum of hard labor for six months with a maximum of five years for each offense and a fine of between $100 and $2,000.[11]

In the wake of what became known as the "Comstock law," most U.S. states followed suit with their own "mini" or "little" Comstock laws.[12] Twenty-two states, for example, passed local obscenity laws that theoretically made birth control illegal, although the precise determination of illegality was left to the courts.[13] Twenty-four states explicitly passed laws forbidding contraception and including advertising or information related

[8] J.E. Leonarz, *Validity of Regulations as to Contraceptives or the Dissemination of Birth Control Information*, 96 A.L.R.2d 955 (2001). See also 18 U.S.C.S. § 1461(mailing); 18 U.S.C.S. § 1462 (importation); previously 18 U.S.C. § 334 (mail) and 18 U.S.C. § 336 (interstate commerce). Also the Tariff Code of 1930 Section 350(a) of the Tariff Act of 1930 (19 U.S.C.A. § 1305(a)) provided: "All persons are prohibited from importing into the United States from any foreign country any article whatever for the prevention of conception or for causing unlawful abortion." Apparently this was one of the first examples of how the Congress could use its interstate commerce and postal powers to regulate matters typically left to the states. *See, e.g.*, Harriet F. Pilpel & Theodore S. Zavin, *Birth Control*, 14 MARRIAGE & FAM. LIVING 118 (1952).

[9] Act of March 3, 1873, ch. 258, 17 Stat. 598.

[10] *Id.*

[11] *Id.*

[12] Leonarz, *supra* note 8, at 955.

[13] MARY WARE DENNETT, BIRTH CONTROL LAWS 7 (1926); *Some Legislative Aspects of the Birth-Control Problem*, 45 HARV. L. REV. 723, 726 (1932)

to birth control.[14] Connecticut went the furthest of them all and outlawed the actual use of contraception.[15]

Even as these laws were being imposed and extended, however, contraceptive sales remained strong, driven by the strength of demand from men and women determined not to conceive. Mainstream producers of rubber continued to sell condoms under vague names such as "sheaths, male shields, capotes … or rubber goods … for gents," while smaller entrepreneurs (known less generously as "smut peddlers") offered a wide range of "feminine hygiene" products, composed primarily of douches and crude spermicides.[16] By 1938, these products with "virtually no names" included more than four hundred options and generated annual revenues of roughly $250 million.[17] Yet technically, advertising these products and selling them across state lines was still illegal.

Writing at the time, many observers noted that the thriving underground industry for birth control had effectively rendered the laws meaningless. "If the purpose of the statutes be to minimize the use of contraceptives," reported a 1939 article in the *University of Chicago Law Review*, "the rapid growth of the industry, particularly in recent years, shows clearly that such purpose is not being achieved."[18] Others noted that the legal prohibitions had actually encouraged the development of a wholly unregulated market: "The notorious unenforceability of such statutes is evidenced by the flourishing bootleg industry which prospers in spite of them. These laws, by driving the industry underground, have impaired effective government regulation and thus indirectly promote the sale of worthless products at exorbitant prices."[19] There was also dismay that the laws prevented doctors from doing what the bootleggers were doing: "Year after year this vicious law legally tied the hands of reputable physicians while quacks and purveyors of bootleg contraceptives and 'feminine hygiene' articles and formulas flourished."[20]

[14] DENNETT, *supra* note 13, at 10; *Some Legislative Aspects of the Birth-Control Problem*, *supra* note 13, at 723.
[15] DENNETT, *supra* note 13, at 10.
[16] Tone, *supra* note 5, at 445–47.
[17] *The Accident of Birth*, 17 FORTUNE 83, 85 (1938).
[18] *Contraceptives and the Law*, 6 Univ. Chi. L. Rev. 265 (1939).
[19] *Judicial Regulation of Birth Control Under Obscenity Laws*, 50 YALE L. J. 682, 686–87 (1941).
[20] Margaret Sanger, *The Status of Birth Control*: 1938, 94 NEW REPUBLIC 324 (1938).

Meanwhile, of course, activists such as Mary Dennett Ware and Margaret Sanger were also attacking the prohibitions on more philosophical grounds. Ware, a middle-aged activist and grandmother, tried to get the Comstock laws revoked by striking "for the prevention of conception" from Section 1142 of the New York Penal Law, which made it a misdemeanor for "a person to sell, or give away, or to advertise or offer for sale, any instrument or article, drug or medicine, *for the prevention of conception*."[21] She failed and was instead convicted in 1929 of sending obscene material through the mail.[22] In 1918, Sanger similarly went before the New York Court of Appeals, arguing for a doctors-only bill that would have exempted physicians from the Comstock laws.[23]

Eventually, the activists' reasoning gained ground. In a landmark 1930 decision regarding condoms, the Court interpreted the Comstock laws to apply to intent rather than products, ruling, "There is no federal statute forbidding the manufacture or sale of contraceptives. The articles which the plaintiff sells may be used for either legal or illegal purposes."[24] Three years later, in *Davis v. United States*, the Sixth Circuit Court of Appeals likewise determined (again in a case concerning condom sales) that the sale or advertisement of contraceptive materials was not necessarily illegal – instead, illegality required proof that the contraceptives were to be used for contraception rather than for combating disease.[25] Finally, in 1936, the Court issued its most liberal ruling on contraception, determining in *United States v. One Package* that physicians could legally both import and prescribe birth control.[26]

[21] Carole R. McCann, Birth Control Politics in the United States: 1916–1945 68–69 (1994). *See generally* John M. Craig, *"The Sex Side of Life": The Obscenity Case of Mary Ware Dennett*, 15 Frontiers: J. Women's Stud. 145 (1995).

[22] United States v. Dennett, 39 F.2d 564, 569 (2d Cir. 1930); Craig, *supra* note 21, at 158.

[23] McCann, *supra* note 20, at 68–69.

[24] Young's Rubber Co. v. C.I. Lee & Co., 45 F.2d 103, 107 (2d Cir. 1930).

[25] Davis v. United States, 62 F.2d 473, 475 (6th Cir. 1933).

[26] United States v. One Package, 86 F.2d 737 (2d Cir. 1936).Section 334 referred to the mailing provision and made it "unlawful for anyone to deposit or cause to be deposited 'non-mailable matter,' and defines that phrase to include any printed circular giving information where and how things designed, adapted and intended for indecent or immoral use, or for preventing conception can be obtained." Section 396 was the similar provision for interstate commerce, making it "unlawful for anyone to knowingly deposit, or cause to be deposited, with any express company or other common carrier for carriage in interstate commerce, any 'article, or thing designed, adapted, or intended for preventing conception."