
Externalities of commodification: towards a new legal moralism?

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Résumé

This article revisits the debate on the commodification of things that pose problems to the conscience of many (for organs, babies, sexual and reproductive services). Economic analysis of law explains that inalienability of the good producing externalities is justified only when costs of transaction over the externality itself are greater than its benefits (e.g., Calabresi and Melamed 1972). However, commodification studies usually note that this efficiency argument against commodification does not suffice to explain all the restrictions to the commodification of certain goods, and does not account for the diverse ideals of justice that one wish the market also fills (Satz 2010).

It remains that, among anti-commodification arguments (including Satz's), many rest on something that resembles externalities in the larger sense of unintentional effects of A's action on B to which B has not consented. The mere existence of such sales would affect other people directly (who are injured by addicted drivers or who care about dignity) (Roth 2007) or affect what they are and how they act, their personhood, capacities, and preferences (e.g., Radin 1996, Satz 2010).

In the line of Hausman (1992), I extend the concept of externalities to obstacles to efficiency and justice, I will distinguish four of them that justify market-inalienability. The first are traditional technological, i.e. physical, externalities, with which welfare economics is concerned. The second are moral externalities, taken into account in some parts of social choice theory and law and economics (esp. Calabresi 2016). Now that we are also interested in distribution and social justice, we have to take into account pecuniary externalities as well as what I have chosen to call societal externalities. Pecuniary externalities clearly pose distributional problems, and must be dealt with if justice matters. Finally, societal externalities are perceived as modifying either norms and preferences or status and capacities.

I will argue that some anti-commodification arguments are framed or can be framed in this externality framework. One of the interests of this reinterpretation is to precise the risk of legal moralism faced by the anti-commodification arguments, in particular the different levels at which such a moralism may be at work. Legal moralism justifies that law coincides with conventional morality (Devlin 1965), in opposition with Mill (1859) (see Feinberg 1988). When we use moral and societal externalities as arguments against commodification, are we not legitimizing public intervention based on the dominant norms of morality? Moral and societal externalities of commodification are indeed defined as offending or destroying some social norms; even more, their taking into account, or their legitimacy as argument against commodification, rests on social norms as well.

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Mots-Clés: commodification, externalities, moralism, social norms, body, environment