

MAPPING THE NEW FRONTIERS OF PRIVATE ORDERING: AFTERWORD

Martha M. Ertman*

INTRODUCTION

Mapping is a definitional process, placing mountains, streams, and byways in relation to this or that meridian. The central dividing line in contract law distinguishes between legally enforceable agreements and everything else. Under traditional understandings of contract, the term itself denotes legally enforceable agreements alone, relegating anything less to other disciplines.¹ Yet new frontiers often call for new definitions.

This symposium contributes to that project, suggesting new language, such as “private ordering” in place of “contracting,” new mechanisms for contracting, and new areas of social and economic life that might be understood and regulated in contractual terms. This Afterword adds a few lines to this discussion, making explicit the definitions of private ordering and what precisely is new in the articles here. It is organized in the same format as a commercial law course in Payments, beginning with definitions, then tracing the ways that payments flow on the new frontiers in private ordering. I suggest that one way to make sense of where the money goes in new private ordering is to use a heuristic of heaven, hell, and purgatory. In this view, heaven gets things of value to have-nots, hell takes them away, and purgatory lies between these extremes.

The heaven/hell/purgatory heuristic shows that private ordering can be a good thing when it offers a way for marginalized people to “contract around” hostile majoritarian rules. The clearest example of this pattern in this symposium is Ian Ayres and Jennifer Gerarda Brown’s proposal for the “Fair Employment Mark.” The “FE” mark certifies that employers have contracted not to discriminate on the basis of sexual orientation, which is particularly valuable in jurisdictions where public law does not prohibit employment discrimination against gay people. But just as theologians differ on whether purgatory is a neutral way station on the route to heaven, or an awful limbo, some contracts theorists worry about the

* Professor, University of Maryland Law School. Thanks to Jean Braucher and Bob Hillman for shedding light on the scope of private ordering as we organized the symposium, to Sujeet Rao for research assistance, and to the University of Maryland summer research fund for financial support.

1. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

dangers of private ordering. Rachel Arnow-Richman points out the dangers of employers contracting for arbitration or non compete clauses just as new employees stock their drawers with pencils and fresh pads of paper. She creatively dubs these contracts “cubewrap” along the lines of “shrink wrap” contracts that fold in terms favorable to software manufacturers. In between these normative extremes are Danielle Caruso’s piece, which suggests that even traditional contract doctrines can protect have-nots, and Michele Goodwin’s contribution, which contends that we should lift the ban on contracting for human organs but shies away from full fledged marketization. But the ways that reasonable minds differ are not limited to normative views of contractualization. Indeed, scholars use the central term “contract” in various ways.

Rather than limit ourselves to legally enforceable arrangements, this symposium adopts the terminology “private ordering,” a phrase denoting consensual, reciprocal relationships and default rule analysis. Taking refuge under the broad umbrella offered by using the term “private ordering,” this Afterword uses the terms private ordering, contractualization, marketization, and commodification in roughly interchangeable ways. I do so to include in the discussion both contracts that conventional contract law would recognize as such and looser arrangements that may not be legally enforceable, as well as contractual rhetoric.

Rhetoric has central importance in this discussion. Contract, and law itself, cannot exist without words, and every first year knows that it matters how we say things. Similarly, the heaven/hell/purgatory rubric I use here turns largely on rhetoric. Indeed, rhetoric is all we have to go on regarding the afterlife, since there is little scientific data on heaven, hell, and purgatory. While we cannot predict the future of contractualization with certainty, this symposium reflects the rapidly accumulating data on the consequences of law and culture moving sharply toward increased contractualization in the past decades contracts.

Today, governmental entities contract out services like prisons and military service, and courts enforce marital and cohabitation contracts that were previously unenforceable. At the level of rhetoric, contractual language has also seeped into law and culture. One instance of this pattern is the way that legal economic terms such as default and immutable rules currently inform our understanding of contract doctrines under the Uniform Commercial Code. For example, I tell my students that the U.C.C. has a default rule in favor of default rules to make sense of section 1-102 of the U.C.C., which provides that buyers and sellers can generally tailor their arrangements rather than accept the “off the rack” version offered by Article 2.² I tell them that Article 2 allows parties to “contract around” the “default rules” of the Code, unless a rule is “immutable,” and thus not subject to contractual limitation or waiver.³ In contrast, when I was in law school, I

2. U.C.C. § 1-102(3) (2004) (“The effect of provisions of this Act may be varied by agreement, except as otherwise provided in this Act . . .”).

3. *See, e.g.*, U.C.C. § 2-308 (2004) (providing a default rule that goods are delivered at the seller’s place of business unless the parties agree otherwise). Immutable rules such as the prohibition of unconscionability, in contrast, are fixed and cannot be waived by contract. U.C.C. § 2-302 (2004).

recall being taught about presumptions—rebuttable and irrebuttable—a different but equally accurate way of describing the UCC or other doctrinal provisions. Farther afield from legal doctrine, contractual rhetoric also holds sway. Political projects are sometimes couched in contractual terms, such as the Republican Party’s 1994 Contract with America,⁴ or President Bush’s 2006 proposal to privatize social security.⁵ Not all projects to expand so called freedom of contract have succeeded, of course. Efforts to allow software manufacturers to contract for choice of law rules tipping the balance decidedly in their favor have been at least partly unsuccessful.⁶ Nor is freedom of contract uniformly good for have-nots. As Jean Braucher has pointed out, immutable rules, in contrast to “freedom of contract,” can be particularly important to consumers, such as unconscionability and statutory definitions of what constitutes an unlawful repossession under UCC Article 9.⁷ In the Introduction to this symposium, she suggests that the cheerful embrace of contractualization to benefit have-nots may reflect a current lack of faith that the democratic process can deliver the kinds of policies that protect individual as well as group interests, particularly those of have-nots.⁸

Nevertheless, since this is a contracts symposium, I’ve built on this tendency to contractualize anything that moves—and lots that doesn’t—in this Afterword. Mirroring the Uniform Commercial Code—in particular Payments—I discuss where money and other things of value flow in the instances of new private ordering. I explicitly state the question implicit in all the essays: namely, whether and when new private ordering benefits have-nots. If private ordering gets compensation and other things of value to have-nots—which they would not enjoy under public law—I conclude that’s a good thing. Some of the essays in this symposium share this view, most notably Ayres and Brown’s contribution. However, as a whole, this symposium suggests that while private ordering provides unique opportunities for have-nots to skirt legal or cultural obstacles, it is hardly a silver bullet that remedies all social ills or even provides fair transactions across the board.

4. Republican Contract with America, available at <http://www.house.gov/house/Contract/CONTRACT.html> (last visited Sept. 2, 2007).

5. Jonathan Weisman, *Skepticism of Bush’s Social Security Plan Is Growing*, WASH. POST, Mar. 15, 2006, at A1.

6. Several states have enacted “bombshelter” legislation invalidating choice of law provisions. See, e.g., IOWA CODE ANN. § 554D.125 (West 2004); N.C. GEN. STAT. ANN. § 66-329 (West 2001); W. VA. CODE § 55-8-15 (Supp. 2002); see also Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons For Policing of Standard Form Contracts*, 7 J. SMALL & EMERGING BUS. L. 393, 395 n.8 (2003).

7. Jean Braucher, *The Repo Code: A Study of Adjustment to Uncertainty in Commercial Law*, 75 WASH. U. L.Q. 549, 551–52, 614–16 (1997). Colorado adopted Braucher’s approach. COLO. REV. STAT. § 4-9-601(h) (2002) (defining “breach of the peace” when a secured creditor repossesses collateral as including, while not being limited to: “(1) Entering a locked or unlocked residence or residential garage; (2) Breaking, opening, or moving any lock, gate, or other barrier to enter enclosed real property; or (3) Using or threatening to use violent means” without the debtor’s contemporaneous permission).

8. Jean Braucher, *New Frontiers in Private Ordering—An Introduction*, 49 ARIZ. L. REV. 577, 578 (2007).

I. DEFINITIONS

New private ordering includes but is not limited to contract. It certainly includes contract as defined in the Second Restatement of Contracts, i.e. a “legal obligation resulting from the parties’ agreement,” which is the sum of offer, acceptance, and consideration.⁹ But it goes far beyond that to encompass both agreements that are not intended to be legally enforceable—such as Goodwin’s contract for organ sales—as well as rhetoric that turns on contract. In particular, it includes what Thomas Joo has dubbed with the shorthand “R,” in contrast to the conventional law-school shorthand “K” for enforceable agreements. According to Joo, economists are more likely to speak in terms of “R” agreements, which involve reciprocity and exchange, rather than strictly limiting contractual understandings to “K.” Private ordering includes both “R” and “K.”¹⁰

At the doctrinal level, which Joo would call “K,” new private ordering provides new mechanisms to make legally enforceable contracts, which extends contractualization to aspects of social and economic life that most people do not think about in contractual terms. One is employment discrimination, another, human organs. This symposium explores two ways that doctrinal private ordering plays out in the employment law context, one which helps haves and the other which benefits have-nots. Arnow-Richman details “cubewrap” agreements that employees sign shortly after joining a company, agreeing to arbitrate any discrimination claims against the company and/or limiting their rights to compete.¹¹ Arnow-Richman bemoans the fact that most jurisdictions enforce these agreements despite the fact that they arguably lack consent since the terms are added after the employee agrees to take the job, and hence deprive the employee of a meaningful ability to reject the terms.¹² Caruso, it should be noted, chimes in more cheerfully on this line of cases, noting that the Ninth Circuit has refused to enforce these agreements.¹³

In contrast, Ayres and Brown offer a way that new private ordering can benefit have-nots, in particular gay people. They have proposed that employers register to display a “Fair Employment Mark,” known as the FE mark, which would contractually bind them not to discriminate on the basis of sexual orientation.¹⁴ The FE mark uses private contracts to provide the kind of protection

9. RESTATEMENT (SECOND) OF CONTRACTS §§ 1, 17, 24, 50, 71 (1981).

10. Joo contends that not every “R” is a “K,” as when the statute of frauds prevents enforcement of a voluntary reciprocal promise. Similarly, not every “K” is an “R,” since the “objective theory” of contractual assent legally binds promisors even if they lacked intent to make the promise. Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. DAVIS L. REV. 779, 790 (2002).

11. Symposium, *Relational Contracting in a Digital Age*, 11 TEX. WESLEYAN L. REV. 675, 687, 692 (2005); see also Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard-Form Employment Agreements*, 49 ARIZ. L. REV. 637, 639–41 (2007).

12. Arnow-Richman, *supra* note 11, at 647–51.

13. Daniela Caruso, *Contract Law & Distribution in the Age of Welfare Reform*, 49 ARIZ. L. REV. 665, 676–76 (2007).

14. Ian Ayres & Jennifer Gerarda Brown, *Privatizing Employment Protections*, 49 ARIZ. L. REV. 587 (2007) [hereinafter *Privatizing Employment Protections*]; Ian Ayres &

that the Employment Non-Discrimination Act would statutorily extend to gay people should Congress ever pass that legislation.¹⁵ As such, the FE mark allows both employers and employees to “contract around” the States’ failure to protect against employment discrimination on the basis of sexual orientation. Historical antipathy to gay people has made federal statutory protection virtually unthinkable. But that bias is fast receding. In 1986, the Supreme Court upheld the criminalization of same-sex intercourse in *Bowers v. Hardwick*; a concurring justice reasoned that “millennia of moral teaching” supported the sodomy law at issue.¹⁶ Seventeen years later, in 2003, the Court overruled *Bowers* in *Lawrence v. Texas*.¹⁷ Some commentators have expressed fear that the recent appointments to the Court might change course to reverse or limit *Lawrence*.¹⁸ If it does, private mechanisms such as the FE mark will be all the more valuable for providing that which public law does not.

This symposium is not the first foray into private ordering. It builds on other explorations of new frontiers in private ordering, such as Denver University’s 1996 symposium on The New Private Law,¹⁹ as well as Ayres and Brown’s other proposals, like the pledge that people would vacation in a jurisdiction legislatively recognizing same-sex marriage within two years of that action.²⁰ Discussions regarding reparations for slavery also fall into this body of scholarship,²¹ as well as Lloyd Cohen’s suggestion that people make futures contracts to sell their organs.²² Along the same lines, Goodwin proposes that legal regulations allow organ “donors” to be compensated for their organs (more than their expenses, which is the current limit on remuneration).²³ She reasons that the rhetoric of altruism and slavery exacerbates the organ shortage, causing more harm than good. Most compellingly, she contends that the rhetoric of slavery fails to account for the fact that people of color will benefit from organ sales, rather than just being harmed by such marketization. While some people of color will be driven by economic desperation to sell something they would prefer not to sell—a

Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639 (2006).

15. ENDA has been proposed in Congress for a decade. Christopher Shea, *The Fair Employment Mark*, N.Y. TIMES MAGAZINE, Dec. 11, 2005, at 68. Congress introduced a new version of ENDA on April 24, 2007. H.R. 2015, 110th Cong. (2007).

16. 478 U.S. 186, 197 (1986) (Burger, C.J., concurring).

17. 539 U.S. 558 (2003).

18. Deb Price, Opinion, *Court Threatens to Burn Fragile Protections*, DETROIT NEWS, July 16, 2007, at 7A.

19. See Julie A. Nice, *The New Private Law: An Introduction*, 73 DENV. U. L. REV. 993 (1996).

20. IAN AYRES & JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS 67–68 (2005).

21. See Pamela D. Bridgewater, *Ain’t I A Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN’S L.J. 89 (2005).

22. Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of an Options Market*, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 355, 355 (Martha M. Ertman & Joan C. Williams eds., 2005).

23. Michele Goodwin, *The Body Market: Race Politics & Private Ordering*, 49 ARIZ. L. REV. 599, 600–03 (2007).

kidney say—other people of color may be the recipients of those kidneys. The core assertion in Goodwin's antiessentialist move is to remind us that poor people and people of color could be patients as well as potential sellers, and thus people of color may benefit, on balance, more from marketization of organs than from a regime of altruism and inalienability. In short, she contends that marketization can benefit have-nots, and that harm to would-be sellers may be overblown.²⁴

I have similarly pointed out that both conventional and unconventional family relationships can benefit from contractual ordering. Homemakers, for example, would benefit if their contributions to family wealth were understood in UCC Article 9 terms as creating a secured debt of the primary wage-earner to the primary homemaker.²⁵ On the unconventional side of things, lesbian couples' co-parenting and open adoption arrangements can be regulated by contractual relationships that allow parties to tailor rights and obligations to the intent of the participants and the way the relationship functions.²⁶ In other words, contract allows regulation akin to a dimmer switch that can recognize a range of roles for a parent, from the extremes of full time caretaker with all the rights and obligations accorded by public law on one end and an anonymous sperm or egg donor on the other. In between, a sperm donor, surrogate mother, or birth mother in an adoption might have limited visitation rights and perhaps even—especially in the donor context—some support obligations. Public law, in contrast, tends to work like a conventional light switch, treating parents as either fully on the hook or total strangers to a child and one another. If law's function is to provide certainty and a measure of justice to social and economic relations, the dimmer switch performs this function better than the rigid on/off switch of public law. In this light, we see that contract not only answers the functional needs of particular parties in particular relationships, but it also provides law and society at large a view of how public law can and should change.

Ayres and Brown explicitly adopt both this laboratory approach and the incrementalist view of contractual ordering as a means to test out new public law

24. *Id.*; Michele Goodwin, *My Sister's Keeper?: Law, Children, and Compelled Donation*, 29 W. NEW ENG. L. REV. 357 (2007). Goodwin has developed her critique of altruism-based opposition to organ markets in numerous law review articles as well as her book *BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS* (2006).

25. Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 38–46 (1998).

26. Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 23 (2003) [hereinafter *Parenthood Market*]; Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 93–94 (2001) [hereinafter *Marriage*]; Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 491–92 (1996) (describing law regulating open adoption contracts). A recent California case recognized a lesbian couple's agreement to raise twins together when one was the birth mother and the other the genetic mother. *KM v. EG*, 117 P.3d 673 (Cal. 2005); see also Martha M. Ertman, *Private Ordering Under the ALI Principles: As Natural as Status*, [hereinafter *Natural as Status*] in *RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 284, 301–03 (Robin Fretwell Wilson ed., 2006).

rules.²⁷ These functions illustrate ways that new frontiers in private ordering can serve an expressive function and be a bellwether for other areas of the law. Just as western states experimented with women voting before the rest of the country adopted the rule,²⁸ the new frontiers of private ordering may signal where public law is headed. If Ayres and Brown are right, that might be inclusion of gay people in Title VII protections. If Arnow-Richman is right, it may mean erosion of protections enjoyed by employees. Eighteenth and nineteenth century lawyers used trusts and other mechanisms to contract around the laws of coverture to provide married women some measure of independence from their husbands,²⁹ which paved the way for the Married Women's Property Acts. Yet judges narrowly interpreted those statutes to minimize wives' economic and social independence.³⁰ Reva Siegel has dubbed this process as "preservation through transformation," a phrase suggesting the difficulties of material and permanent social change.³¹ However, the very fact that the roles of many have-nots, particularly people of color, white women, and gay people, have changed dramatically in the last thirty years—let alone the last century—demonstrates that there may also be transformation through preservation. In other words, the effects of new private ordering may be, and indeed are likely, to both protect and harm have-nots in different circumstances. In post-structuralist terms, we should not fall into the essentialist trap of claiming that contract is essentially good for the haves or good for the have-nots.

The effects of expanding the frontiers of private ordering are both material and expressive. This Section addresses whether expanding the frontiers of private ordering is a good thing on either material or expressive fronts. I'll illustrate this point using an instance of contractual ordering that is hardly new, as its vintage is more like a century old. I use it to demonstrate how ways that the frontier in private ordering changed a century ago may foreshadow the new private ordering in our own future.

In the 19th century, some white men with Black paramours bequeathed property to those women in wills, exercising the freedom to contract around default rules that penalized or refused to recognize interracial romances.³² Adrienne Davis' discussion of these wills, which were enforced even in states that criminalized interracial relationships, illustrates material and expressive implications of that then-new frontier in private ordering. It also illustrates how "contracting around default rules" can mine principles of choice, autonomy, and plurality to distribute a few more goodies to have-nots. This principle remains true

27. AYRES & BROWN, *supra* note 20, at 20–22, 117.

28. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 419–23 (2005).

29. NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 72–91 (1982).

30. Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L. J. 2127, 2127–31 (1994).

31. Reva B. Siegal, "The Rule of Love": *Wife Beating as Prerogative & Privacy*, 105 YALE L.J. 2117, 2119, 2180–81.

32. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 228, 279–81 (1999).

even when an arrangement, such as a will, does not meet the conventional definition of contract.³³

Even though wills are not “Ks” in Joo’s shorthand noted earlier (the sum of offer, acceptance, and consideration), nor even reciprocal exchanges (“Rs” in Joo’s shorthand), we can see them as contracts of a sort. Contract is defined as a legally enforceable agreement, and a will, properly executed, is generally enforced by courts. But more interesting for our purposes is how a will’s contractual nature is also evident at a procedural level. A will allows people to distribute their property differently from the rules provided by intestate rules. A testator who bequeaths his estate to, say, Otterbein University, instead of his child, is contracting around a default rule. The probate court that implements this intention essentially enforces his contract, although it hardly meets the conventional definition of contract given its non-reciprocity and the fact that he could have changed it anytime before his death. Yet this power to contract around default rules is not unbounded. Estate law provides a floor under which testators cannot go, by providing an “intestate share” to say, spouses disinherited without their consent in a will.³⁴ The UCC similarly provides a floor in provisions such as that importing the duty of good faith into every contract.³⁵ In short, where a statutory scheme protecting systemically vulnerable parties such as dependent spouses and debtors allows people to contract around those rules, the statute can limit dangers of contractualization for have-nots.

On balance, it may have been better for Black women in the 19th Century if public law allowed them to marry their white paramours. But since it did not, wills were the second-best option. Black women’s wealth and status were improved by inheritance through these instruments from their white lovers. For example, Amanda Dickson in Georgia became one of the richest people in the state through David Dickson’s bequeathing his property to her.³⁶ At the expressive level, law’s willingness to enforce the decedent’s intention through a will improves what an economist might call the beneficiary’s social capital. Up yet another level of abstraction, contractual reasoning offers parties to contracts and the rest of us benefits of living in a world where law honors values such as consent, choice, and plurality. If the alternative to status is contract, as Sir Henry Maine suggested over 150 years ago,³⁷ contractual thinking offers flexibility where status (and stasis) may otherwise win out. As John Stuart Mill observed, society and individuals

33. Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 303 (1992) (noting that death is the ultimate robber in that decedents would take it with them if they could, and only bequeath their property because this is not an option).

34. See, e.g., UNIF. PROBATE CODE § 2-202(a) (1997).

35. U.C.C. §§ 1-304.

36. See Davis, *supra* note 32, at 279–81.

37. SIR HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 165 (Univ. of Ariz. Press 1986) (1861) (“[T]he movement of the progressive societies has hitherto been a movement from Status to Contract.”).

benefit from maximum freedom of movement, maximum choice providing a plurality in political, economic, and social relations.³⁸

But at some point the law of diminishing returns comes into play. At what point on the continuum towards universal marketization, where everything is for sale, do the drawbacks of marketization outweigh the benefits? In my own work, I have defended the marketization of parental rights through markets for sperm and eggs, but draw the line at posting a baby for sale on the online auction site eBay.³⁹ Why stop there? Even once we agree that babies shouldn't be sold on eBay, what is okay? Recently, newspapers across the world covered the opening of an embryo bank.⁴⁰ Scholars continue to explore optimal regulations that would both protect people's freedom to order their own affairs and honor human dignity and equality.⁴¹

In other words, the key question in the new frontiers of private ordering, like other frontiers, is defining the boundary of the frontier. How far is too far? One could ask whether or not to contractualize employment discrimination, human organs, or parental rights. Another approach reframes the question to ask who benefits from and controls the process of private ordering.⁴² Looking at it from this vantage point focuses on what a good number of commodification skeptics view as the danger in expansive contractualization, namely its negative effect on have-nots. If have-nots have some measure of control and benefit over contractual relations, that goes a long way toward determining whether contractualization is a good thing.

Before proceeding to explore who controls the mechanisms and benefits of contractualization, I'd like to pause for a moment to comment on theoretical approaches hawking and opposing commodification. Most prominent in the pro-commodification camps is Judge Richard Posner, who has applied his formidable intellect to implement legal economic analysis in unexpected contexts. His 1992 book *Sex and Reason*, proposing what he called a "bio economic theory of sexuality," provoked a slew of law professors to write critical reviews.⁴³ Despite

38. JOHN STUART MILL, *ON LIBERTY* (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

39. Ertman, *Parenthood Market*, *supra* note 26, at 5–6.

40. See, e.g., Carol Midgley, *Embryos for Sale*, *TIMES* (London), Jan. 12, 2007, at 4; Rob Stein, *Embryo Bank Stirs Ethics Fears: Firm Lets Clients Pick Among Fertilized Eggs*, *WASH. POST*, Jan. 6, 2007, at A1.

41. For a discussion of a range of approaches to marketizing parenthood, see *BABY MARKETS* (Michele Goodwin ed., forthcoming, 2008). My chapter in that volume defends embryo markets. Martha M. Ertman, *The Upside of Baby Markets*, in *id.*

42. Joan C. Williams & Viviana A. Zelizer, *To Commodify or Not to Commodify: That Is Not the Question*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE*, *supra* note 22, at 362, 373.

43. See, e.g., William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 *YALE L.J.* 333 (1992) (reviewing RICHARD A. POSNER, *SEX AND REASON* (1992)); Gillian K. Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 *HARV. L. REV.* 479 (1992) (reviewing same); Carol Sanger, *He's Gotta Have It*, 66 *S. CAL. L. REV.* 1221 (1993) (reviewing same).

the silliness of some of his observations,⁴⁴ some of us who vigorously critiqued his blend of legal economics with sociobiology came to incorporate elements of his analysis in our later work.⁴⁵

Other views of how far contractualization should reach include Margaret Jane Radin's critique of universal commodification on the grounds that it would not only result in complete commensurability—all things being understood in monetary terms—but also in a society that would lose the ability to see anything wrong with that state of affairs.⁴⁶ Radin offers a system of "incomplete commodification" lying between commodification and market inalienability, as well as two tools to determine where to place transactions on the continuum from commodification to inalienability. These two tools are the double bind and the domino theory.⁴⁷

Radin's double bind and domino theory provide both positive and normative justification for legal rules regarding particular contested commodities, such as sex. Her analysis of prostitution, and resulting proposal for incomplete commodification, nicely illustrate how her double bind and domino principles work. Under the double bind theory, Radin argues, law should lightly regulate some contested commodities on the grounds that desperate people might have only that commodity to sell in order to survive, so that prohibition may cause more harm than good to have-nots.⁴⁸ Thus, she contends that prostitution should be incompletely commodified (decriminalized, but not granted full status as other kinds of market labor through things like yellow pages listings and headhunter firms) because criminalizing it harms more than helps the people who have no option but to sell sexual services. Under Radin's domino theory, certain things should be kept out of the market if commodified and non-commodified versions of the thing cannot coexist, on the reasoning that law should protect the continued existence of the non-monetized version. Using prostitution again as an example, Radin stops short of endorsing full marketization because she reasons that having television ads, headhunting firms, and yellow page advertising for prostitution could create a cultural climate in which non-commodified versions of sexuality are less likely, or even unlikely, to exist.⁴⁹

The political theorist Michael Sandel seeks to stem the tide of universal commodification on different grounds.⁵⁰ He offers two separate grounds for

44. See, e.g., POSNER, *supra* note 43, at 144 (comparing female infanticide to tree thinning).

45. Martha Ertman, *Denying the Secret of Joy: A Critique of Posner's Theory of Sexuality*, 45 STAN. L. REV. 1485 (1993); Ertman, *supra* note 25, at 66–73; 97–99; Jane E. Larson, *The New Home Economics*, 10 CONST. COMMENT. 443 (1993) (reviewing POSNER, *supra* note 43); see also LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 239 (1998).

46. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 2–3, 79–101 (1996).

47. *Id.* at 95–123, 134–35.

48. *Id.* at 123–25.

49. *Id.* at 133.

50. Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE*, *supra* note 22, at 122.

opposing the spread of marketization: coercion and corruption. Again using prostitution as an example, Sandel argues that sex ought not be marketized if those selling it are coerced into prostitution by desperate conditions. Corruption, in contrast, comes into play in Sandel's analysis where a particular thing or transaction is corrupted by being contractualized. Accordingly, prostitution ought to be criminalized or otherwise banned if paying for sex corrupts the non-commodified version. Not surprisingly, Sandel finds that more things should be inalienable than Richard Posner does. Richard Posner attempted to co-opt Sandel's objection to universal commodification by arguing in the context of military service that communitarians such as Sandel should appreciate the ways that privatized military service fosters community.⁵¹ Posner concludes that while a marketized military results in more working class soldiers, this market can paradoxically facilitate community, the very thing that Sandel and other communitarians worry suffers under market conditions. This happens, according to Posner, when the very middle class Americans who either would be drafted or have family members in the military in Sandel's conscription regime, admire the heroism of working class soldiers in Iraq.

Rather than adopt either Posner's contractual enthusiasm or Sandel's allergy to the spread of marketization, this Afterword seeks to transcend the terms of the debate. It explores ways that the pieces in this symposium offer examples of how contract can, and cannot, provide ways for have-nots to enjoy benefits that background and public law rules would not otherwise allow. When contract allows good things to flow toward have-nots, I call that heaven, or at least purgatory on the way to a heavenly enjoyment of public rights, such as the right to be free from employment discrimination. Since the streets of heaven are reputedly paved with gold, I'll follow the money in the instances of contractualization discussed by symposium authors, asking in each instance whether have-nots either control or benefit from an expanded notion of private ordering.

II. PAYMENTS

UCC Articles 3, 4 and 4A concern, among other things, tracing the paths that money takes, and what to do when someone misdirects funds by, say, forging a check. Here, the question is more general: namely, whether contract can further economic and social equality. Social contract theorists have long used contractual metaphors to get to core questions relating to justice.⁵² Less known, and perhaps even more fitting to the current symposium is Martin Luther King, Jr.'s metaphoric invocation of negotiable instruments in his *I Have a Dream* speech in the 1963 March on Washington. He declared:

In a sense we have come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they

51. Richard A. Posner, *Community and Conscription*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE*, *supra* note 22, at 128, 131–32.

52. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (new ed., Belknap Press 2005) (1971).

were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty and the pursuit of happiness. It is obvious today that America has defaulted on this promissory note, insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, a check which has come back marked “insufficient funds.”

But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation. So we have come to cash this check—a check that will give us upon demand the riches of freedom and the security of justice.⁵³

Admittedly, King’s rhetoric bridges inalienability and contractual rhetoric. This excerpt can be read as an assertion that if the rights of “life, liberty, and the pursuit of happiness” really were “unalienable,” there would be no need to contract. Indeed, “inalienability” is the term commonly used to describe things that cannot be contractualized.⁵⁴ However, King may also be elevating contract, at least at the level of metaphor, to inalienable rights guaranteed in the Constitution and Declaration of Independence by asserting that these documents constituted “a promissory note to which every American was to fall heir.” In either case, King likely would have agreed with Sandel that things like votes should not be for sale. But for present purposes, King’s use of contractual terms, especially the specific terms of payment systems, is most useful to demonstrate the power of contract rhetoric to benefit as well as harm have-nots. The remainder of this Afterword engages the question of what benefits or harms have-nots, fully recognizing the incapacity of both this Author and the law review format to do the task justice. The heaven/hell/purgatory heuristic offers a means for framing this inquiry.

“Heaven” is a term designating conditions in which have-nots get more of the pie than they currently enjoy (hence the term afterlife, since it differs from life here and now). In contrast, hell is a condition worse than current conditions for have-nots.⁵⁵ Purgatory, in contrast, is more moderate, not fabulous, not awful: considerably less interesting than the extremes, but nevertheless worth our attention, especially if the alternative is hell.

Of course, here, as with many issues, reasonable people disagree. Some say heaven is available to all, while others say it is open only to those who obey the dictates of their denomination or get baptized. If sin lands you in hell, there is similar difference of opinion as to the route to and nature of hell. Some people think that same-sex activity is sinful, while others believe that homophobia is sinful. Abraham Lincoln recognized the difficulty of categorizing things as heaven or hell when he observed that “marriage is neither heaven nor hell, but instead

53. Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), available at <http://www.usconstitution.net/dream.html> (last visited June 25, 2007).

54. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

55. Of course, we sometimes speak of heaven on earth or a living hell.

purgatory,” while Sartre categorically asserted that “hell is other people.”⁵⁶ Moreover, the intersection of law with heaven and hell may be a doomed effort if Grant Gilmore is right that “[i]n Heaven there will be no law In Hell there will be nothing but law, and due process will be meticulously observed.”⁵⁷

In short, I make no claim to a universal meaning of contract, let alone heaven or hell, nor their relations to law. My sole claim in this Afterword is along the lines of what Dr. King called “the riches of freedom and the security of justice.”⁵⁸ I suggest that contract may offer a purgatory between heaven and hell for have-nots.

III. A HEAVENLY OR HELLISH SYMPOSIUM?

Combining the focus of following money and seeing the degree to which particular instances of new private ordering extends “the riches of freedom and the security of justice” to have-nots, the papers in this symposium roughly map onto a rubric of heaven and hell. When contract directs cash or something else of value, and/or control of the contracting process, to traditionally marginalized groups (for example people of color, gay people, women, and other groups such as employees), I contend it’s more heavenly. Not as heavenly as public rights, perhaps, because contractualization requires the resources and willingness to craft and execute the contract. But contract, in my view, is considerably less hellish than portrayed in communitarian critiques of universal contractualization. Three of the four articles in this symposium address the question of how hellish contractualization is in particular contexts (employment relationships and the sale of human organs), while the last one, by Caruso, provides an overview of the political valence of contract law. This Section starts with Arnow-Richman’s hellish version of “cubewrap” contracts, then maps how Ayres and Brown’s FE Mark fits the map of contract as purgatory set out above. Finally, I fit Goodwin’s essay into the heaven and hell paradigm, concluding that, like Ayres and Brown, Goodwin thinks that contractualizing organ sales has much to offer have-nots, especially if the “donor” or “seller” exercises control over the contracting process.

This last element, control, nicely illustrates the continued relevance of Radin’s commodification analysis in the organ donation context. Goodwin also suggests that African American organ donors be allowed to direct that their organs be transferred to other African Americans, say, members of the same sorority or fraternity. These benefits do not readily translate to commercial terms but are nevertheless of great value on a number of fronts. In short, just as Posner observed in relation to military service, contractualization can sometimes facilitate, rather than destroy, community as well as protect individual rights.

56. THE WIT AND WISDOM OF ABRAHAM LINCOLN: AN A-Z COMPENDIUM OF QUOTES FROM THE MOST ELOQUENT OF AMERICAN PRESIDENTS 124 (Alex Ayres ed., 1992); JEAN-PAUL SARTRE, NO EXIT act I, sc. 5 (1944).

57. GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977) (paraphrasing OLIVER W. HOLMES, THE COMMON LAW 36 (1963)).

58. King, Jr., *supra* note 53.

A. Employment Relations

Early investigations into the new frontiers of private ordering often explored increased contractualization in employment relationships.⁵⁹ As Caruso acknowledges in her contribution to this symposium, employers increasingly contract around their public law obligations, often to employees' detriment.⁶⁰ Describing how the Court in *Gilmer v. Interstate/Johnson Lane Corp.*⁶¹ and cases following it⁶² enforced arbitration clauses against employees even where it could increase the cost of an employee enforcing her rights, Caruso takes refuge in the unconscionability doctrine's ability to provide a floor under which such contracts cannot descend.⁶³ Pointing out that at least courts in the Ninth Circuit tend to invalidate arbitration clauses on unconscionability grounds, Caruso makes the case that traditional contract doctrines can and do protect have-nots.⁶⁴ Particularly important for purposes of this symposium is Caruso's observation that both the courts enforcing arbitration (notably the Seventh Circuit)⁶⁵ and those refusing to do so on unconscionability grounds justify these divergent outcomes on "choice and individual freedom."⁶⁶ This observation echoes my point that contract is neither good nor bad (for have-nots), but thinking makes it so.⁶⁷ Those mapping the new frontiers can find places that are particularly dangerous for have-nots (as Arnow-Richman does), as well as the spectacular sights to be seen from great heights (as Ayres and Brown do). Considerable territory lies between these extremes, some of which is charted out in Goodwin's exploration of private ordering in organ transfers that I'll discuss shortly. First, however, I situate each essay on the continuum between heaven and hell.

As noted already, Arnow-Richman's intervention is the most dystopic, telling a hellish story of "cubewrap" contracts undercutting employees' statutory rights:

the new model of private ordering in employment relies on boilerplate documents, unilaterally drafted by the employer and presented as a condition of employment, often subsequent to the start of work. Their purpose is not to memorialize a negotiated set of

59. Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051 (1996); Dennis O. Lynch, *Conceptualizing Forum Selection as a "Public Good": A Response to Professor Stone*, 73 DENV. U. L. REV. 1071 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

60. Caruso, *supra* note 13, at 673 (quoting Stone, *supra* note 59, at 1019).

61. 500 U.S. 20 (1991).

62. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Green Tree Fin., Corp. v. Randolph*, 531 U.S. 79, 90–91 (2000).

63. Caruso, *supra* note 13, at 674.

64. *Id.* at 674–76.

65. *See, e.g., Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l*, 294 F.3d 924 (7th Cir. 2002).

66. Caruso, *supra* note 13, at 676.

67. WILLIAM SHAKESPEARE, *HAMLET*, act II, sc. ii.

terms, but to extract waivers of rights, thus realigning statutory and default rules to better reflect employers' interests.⁶⁸

However, even Arnow-Richman, the most skeptical about the dangers of the new frontiers for have-nots, does not advocate abandoning employer-drafted contracts, despite the fact that they "operate underground as a form of private legislation,"⁶⁹ by making employee-friendly statutory rights immutable. Instead, she suggests disclosure, along the lines of lending regulations.⁷⁰ It may be that her moderate position reflects the hegemonic status of contract at this particular moment more than an ideal outcome, or it might be that sacrificing employee choice in entering these agreements exacts too great a cost on those it seeks to protect. This latter possibility echoes a central paradox of contract law, namely that it coerces parties to keep freely made promises. If contract law worries about a particular kind of person's ability to freely enter agreements (because of systemic power imbalances, perhaps, or because of real or perceived deficits in cognition or ability to know what is best for oneself), that decision renders the protected party less of a citizen. It is no coincidence that a key piece of civil rights legislation after the Civil War extended to "[a]ll persons" the same rights to contract as are "enjoyed by white citizens."⁷¹ Nor that the nineteenth century Married Women's Property Acts extending contractual capacity to married women were a crucial element of women's transition from being under the aegis of husbands and fathers to being citizens capable of voting and sitting on juries.⁷² This insight places Arnow-Richman's proposal closer to purgatory than hell, in light of the way that she retains norms of freedom of contract, as long as employees freely consent to the terms offered by their new employers. Query whether this consent is genuine, given the difficulties of getting a job and cognitive distortion about whether and the conditions under which that employment might end. Nevertheless, it's worth noting that on the new frontiers of private ordering represented in this symposium, even the most hair-raising, dystopic tale about the lawlessness on the frontier allows for a relatively happy, contractual ending.

Caruso's contribution recognizes the dangers Arnow-Richman identifies in contract doctrine, looking to both employment—including some of the arbitration cases Arnow-Richman analyzes—and other contexts. Caruso's view of the cathedral reminds us that Jay Feinman's book *Un-Making Law*⁷³ tells an

68. Arnow-Richman, *supra* note 11, at 639.

69. *Id.* at 641.

70. *Id.* at 655–56, 657–60, 664; *see also*, e.g., 12 C.F.R. § 226.5(a)–(b) (2006) (setting out disclosure requirements under the Truth in Lending Act).

71. 42 U.S.C. § 1981(a) (2000).

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

72. BASCH, *supra* note 29, at 232.

73. JAY M. FEINMAN, *UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW* (2004).

important story, but an incomplete one that is darker than a friendlier read of the case law indicates. Rather than attacking head-on Feinman's contention that conservative forces use contract to roll back the common law protection for have-nots, Caruso describes several cases in which courts have recently protected have-nots with equitable contract doctrines as well as classical contract notions of independence and choice.⁷⁴ These cases, including a California case refusing to enforce a day care center's contractual limitation of liability where one child was accused of sexually molesting another child,⁷⁵ according to Caruso, demonstrate that courts continue to protect vulnerable parties under contract law, but that the rationale is more in line with classical liberal ideals of choice and autonomy than communitarian norms of redistribution. In short, according to Caruso, the real change in recent years is the re-cloaking of redistributive outcomes in language of "autonomy, self-reliance, or lean government."⁷⁶ Having reframed the question to ask "whether the change in contracts *discourse*—the demise of paternalist language and formalist suppression of distributive motives—is a reason for concern,"⁷⁷ Caruso offers three possible interpretations. Courts may be using contract law's "rich doctrinal toolset,"⁷⁸ or perhaps indulging in "unwarranted nostalgia" because the courts could have reached the same result without using "overt—and passé—redistributive language."⁷⁹ As a third alternative, Caruso suggests that the cases may represent important engagements on the merits of welfare reform.⁸⁰ In short, Caruso tells a story of the many meanings of contract: left, right and center. This perspective may map best onto purgatory in a way that Lincoln may have intended in his definition of marriage as neither heaven nor hell, but purgatory. As such, it fits well with my suggestion that contract can operate as a purgatory between the hell of a short, brutish contest of all against all and the heaven of full protection for have-nots.

The final two contributions to the symposium share a more optimistic view of the new frontiers of private ordering, as well as clearly identified positive proposals. Ayres and Brown suggest the FE Mark to privately initiate employment protections against sexual-orientation discrimination while we wait for Congress to enact ENDA, while Goodwin makes equally provocative and innovative suggestions for extending the benefits of marketizing transactions in human organs to the human beings whose choices make the organs available in the first place. Both map as contractual purgatory, each in its own way.

Ayres and Brown's FE mark maps most clearly onto my diagram situating contractual purgatory as a private way station between the public hell of criminalization of same-sex sexuality and the public heaven of full protection of gay people under statutes such as Title VII. They explicitly situate the mark as an incrementalist measure, even anticipating that the FE mark would create precedent prior to the passage of ENDA as a federal statute (which might lead skeptics to

74. Caruso, *supra* note 13, at Part I.

75. *Gavin W. v. YMCA of Metro. L.A.*, 131 Cal. Rptr. 2d 168 (Ct. App. 2003).

76. Caruso, *supra* note 13, at 688.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

sarcastically quip, “now *that’s* precedent”). Like other visions of purgatory (also known as limbo), the FE mark might be an incremental step on the way to the heaven of public rights. In the alternative, it may be a permanent limbo where gay people languish in the shadows of full citizenship, but free of the marginalization of being criminalized. Indeed, some religious doctrines suggest that heaven, by definition, can only hold so many souls. If designating some people as the elect requires that others be designated as outside the magic circle of salvation, in order to have a comparison to reflect the specialness of being elect, then perhaps purgatory is inevitable.

I have suggested elsewhere that cognitive linguistic theory goes some distance to explain why not all forms of intimate affiliation are created equal in domestic relations law.⁸¹ Cognitive linguist George Lakoff has suggested that we think in basic and radial categories. For example, most people, when asked to choose among many paint chips of various shades of red will pick the same color, a color that researchers have designated “focal red.”⁸² Apparently neural patterns of color recognition produce this agreement on what constitutes the best example of “red.” Cognitive linguists call this a basic level category. However, people also recognize that rose, burgundy, and other shades count as types of red, and cognitive linguists would call these other shades “radial categories” of red. According to Lakoff, this pattern appears in other contexts, so that the basic level category of “furniture” is “chair,” and radial categories would be “couch,” “chaise lounge” and “bed.”⁸³

Applying this body of research to Ayres and Brown’s FE mark proposal, and to gay rights generally, one might conclude that heterosexuality is a basic level category of intimate affiliation, and that same-sex sexuality is a radial category. Numerically, that would make sense, since there are so many more straight than gay people in the world. If so, that would go some way toward explaining why over forty states have passed Defense of Marriage Acts defining marriage as a relationship between one man and one woman.⁸⁴ However, gay people continue to exist in the face of this antipathy. Law’s job is both to regulate human relations that exist (buyers and sellers of goods, parents and children, landlords and tenants, companies and shareholders) and to express normative judgments of how they should exist (i.e., the duty of good faith, child support obligations, the implied covenant of habitability, and blue sky laws). If we view the basic level category of “mother” as the woman who gives birth to and raises a child, then “adoptive mother,” “surrogate mother,” and “birth mother” are radial categories. Law cannot function well if it ignores these radial categories, because it fails to provide relatively certain and fair rules for parties involved. This is a high price to pay for expressing the normative value that only the basic level category of “mother” counts. In short, Ayres and Brown’s FE proposal may represent the best that gay people can expect from legal regulation in many jurisdictions. While not perfect, it’s a sight better than legal regulation a half a century ago, which extended no

81. Ertman, *Natural as Status*, *supra* note 26, at 284.

82. GEORGE LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 26 (1987).

83. Ertman, *Natural as Status*, *supra* note 26, at 293–300.

84. 28 U.S.C. § 1738C (2006).

protections against discrimination on the basis of sexual orientation. In short, it's purgatory (aka limbo). Like Virgil's place in Dante's First Circle of Hell, the best he can do since he lived prior to Christ and thus prior to the possibility of baptism,⁸⁵ FE marks provide a habitable, if slightly overcast, spot for gay people.

B. Markets in Human Organs

Goodwin's suggestions regarding organ sales describe a purgatory of a different sort. Challenging the arguments skeptics have made against markets in human organs,⁸⁶ Goodwin debunks the race-based argument that markets in human organs are bad because they mimic slavery. The conventional wisdom she's contesting parallels organ sales to slavery on two grounds: (1) trading human body parts is like selling whole human bodies; and (2) the most likely sellers will be poor people with little else to sell than their organs, many of whom will be people of color. Just as I suggest that contract does not impact haves and have-nots in the same way across contexts, Goodwin contests an essentialist view of African-Americans as sellers of organs. In particular, she seeks to make visible the many African-American patients who would benefit from the increased supply of organs that a market would deliver. Attempting to "breathe new life into transplantation,"⁸⁷ Goodwin shores up the contractual values of autonomy and free choice of African-Americans and other people of color. Among her strongest arguments for allowing "donors" to be paid for their organs is the double standard under which corporations and other biotech organizations, make a billion dollars a year, while flesh-and-blood people whose body parts are the objects of this trade—and their relatives if the donation is postmortem—are legally prohibited from receiving compensation for their organs.⁸⁸ Goodwin seeks to alter this double standard and end what she calls a pattern of African-Americans being "excoriated and infantilized as market negotiators" in the organ market.⁸⁹

Her most intriguing suggestion is that African-Americans be able to negotiate the recipients of their organs, in addition to being paid more than the current ceiling of compensation for expenses. As justification, she catalogs disturbing statistics about the overwhelming need to increase the supply of human organs for transplantation, including the over 96,000 people on American transplantation waitlists, over 72,000 of whom are waiting for a kidney donation.⁹⁰ Well over a third of those on the waitlist are African-American, yet African-Americans wait nearly two years longer than other patients to receive organs.⁹¹ Ayres, in another project, has also noted blatant unfairness that more African-Americans, on average, need kidney transplants, but these patients with the

85. See DANTE ALIGHIERI, *THE DIVINE COMEDY I: HELL* 92 (Dorothy L. Sayers trans., Penguin Books 1949).

86. Goodwin, *supra* note 23, at 599–600.

87. *Id.* at 602.

88. *Id.* at 608–609.

89. *Id.* at 607.

90. *Id.* at 612.

91. *Id.* at 613, 616.

greatest need are less likely to receive organs,⁹² and he has successfully pursued rule changes—such as alteration of scientifically outdated matching requirements—to improve this racialized disparity in organ transplantation.⁹³ However, the disparity persists. Enter Goodwin to offer contract as a partial solution to the problem.

Goodwin's proposal is a uniquely incisive instance of harnessing contractual norms of autonomy, plurality, choice, and consent to benefit historically disadvantaged people. She proposes that "donors" of organs be paid more than their expenses to increase supply, but more importantly for our purposes, she suggests that these "donors" be allowed to earmark their recipients.⁹⁴ One way this could happen is "paired kidney donation," in which two living donors and two living recipients engage in an organ exchange. Say that Sally and Sam Smith were siblings, and that Sam needed a new kidney. Sally wants to donate, but her kidney is not compatible with her brother's. Also suppose that Donna and Douglas are siblings in the same situation, but that Donna's kidney is a match for Sam while Sally's kidney is a match for Douglas. A paired exchange would allow Sally to designate Douglas as the recipient of her kidney on the condition that Donna's kidney goes to Sam. This looks like a classical contract: offer, acceptance, and consideration. But the consideration is banned by federal statute.⁹⁵ Goodwin's proposal would change doctrine to allow reciprocal promises related to directing donation to constitute consideration.

Goodwin takes her proposal a step further, a step that I contend is a particularly good thing for have-nots. She proposes regulatory changes to promote creativity in structuring organ transfers to increase the supply, reduce costs due to dialysis treatments, counteract racial disparities in receiving organs, and protect vulnerable parties, such as children, in organ transfers.⁹⁶ Her creative proposal mines connections in the African-American community to serve some of these goals. Under her proposal we could tweak the facts above so that all these players are members of African-American fraternities and sororities. Then we would allow Sally and Donna to earmark their kidneys as going to other members of their organizations, and thus to other African-Americans. Donald and Sam would get their kidneys, lessening the racial disparity in organ transplants. Moreover, Donna and Sally might be more likely to donate knowing their donations will directly counter this racial disparity, something they would be sensitive to given their brothers' plight. Thus Goodwin's proposal increases the incidence of donation by virtue of the contractual choices that these minority donors make. Moreover, in Posner's terms of commodification furthering community, the other members of the fraternity and sorority would also be enriched by the transactions. This reordering of the calculus of cost and benefit from marketizing organs undercuts Richard Titmuss' canonical critique of the market in human blood (and attendant

92. Ian Ayres, Laura G. Dooley & Robert S. Gaston, *Unequal Racial Access to Kidney Transplantation*, in IAN AYRES, *PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* 165, 181–82 (2001).

93. *Id.* at 227–29.

94. Goodwin, *supra* note 23, at 627–28, 633.

95. *Id.* at 622–23.

96. *Id.* at 633–65.

defense of altruism).⁹⁷ Moreover, this communal harnessing of the contractual norms of choice and autonomy further demonstrates that private ordering is not inextricably linked with the welfare of either haves or have-nots. Instead, as Viviana Zelizer, an economic sociologist at Princeton, eloquently points out, the exchange of value alone tells us little about the social relationships at issue.⁹⁸ Instead, the mechanisms of exchange and purpose are key. More specifically, Zelizer, along with Joan Williams, proposes that we ask who benefits from and controls marketization, rather than whether law allows parties to contractualize a particular relationship or transaction.⁹⁹

Goodwin's contribution fits well into the purgatory framework because of its agnosticism about the feasibility of contract for all purposes. While she seeks to facilitate more contracting for human organs, she also worries about over commodification, explicitly asking "[h]ow much commodification is too much? We do not exactly know as the lines have not been adequately studied."¹⁰⁰ She's in good company as she struggles to draw the line bordering contract and inalienability. Landes and Posner notoriously observe that "[w]here baby prices quoted as prices of soybean futures are quoted, a racial ranking of these prices would be evident, with white baby prices higher than nonwhite baby prices," but even they stop short of supporting a trade in children (as opposed to infants).¹⁰¹ Radin explicitly states that "conceiving of a child in market terms harms personhood."¹⁰² Critical race theorist Patricia Williams critiques the commodification of her own adopted child when the social worker told her there would be a "special" price for adopting "older, black, and other handicapped children." Williams observes, "in our shopping-mall world it had all the earmarks of a two-for-one sale," and concludes "I was unable to choose a fee schedule. I was unable to conspire in putting a price on my child's head."¹⁰³

IV. CONCLUSION

The refusal to collaborate with burgeoning contractualization is one way to regulate the new frontiers of private ordering. Such a response, on a legal level, can be understood as truly private law, abandoning statutory, administrative, and case law in favor of the norms of communities, background power, and other social conditions.¹⁰⁴ But shying away from the frontiers of private ordering is both unreasonable and unwise. It's unreasonable because the current climate of increased contractualization decreases the political feasibility of what Caruso calls

97. See RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971).

98. VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* (2005).

99. Williams & Zelizer, *supra* note 42, at 362, 373–74.

100. Goodwin, *supra* note 23, at 634.

101. Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 344 (1978).

102. RADIN, *CONTESTED COMMODITIES*, *supra* note 46, at 139.

103. Patricia Williams, *In Search of Pharaoh's Daughter*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE*, *supra* note 22, at 68, 70.

104. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 123 (1991).

redistributive doctrines. It's unwise in that it misses private ordering's progressive potential to skirt systemic power differentials and thus benefit some have-nots. Perhaps most importantly, attentively charting the frontiers of private ordering can help law do its job better. If politics and culture preclude appropriate regulation of, say, work place discrimination against gay people, then contractual measures such as the Fair Employment mark fill that gap. The legal realists long ago asserted that law should regulate human and corporate relationships as they exist, rather than dictate how they should be. Moreover, private ordering has the ability to harness the power of contractual norms such as plurality, choice, and autonomy for have-nots. The pressing question is determining when private ordering hurts have-nots more than it helps them.

One method to draw the meridians at the edge of private ordering is suggested by the contributors of this symposium. They ask—Goodwin most directly and the others more obliquely—who controls and benefits from a particular instance of private ordering. Goodwin proposes ways that contractualization might counter racial discrimination in organ donor transactions, reminding us that African-Americans are “buyers” as well as “sellers” of kidneys. Along the same lines, Ayres and Brown look to contract to provide employment law protections that Congress has not yet extended to gay people, and Caruso contends that traditional contract doctrines can protect have-nots on occasion even in a climate where norms of autonomy and contractual freedom hold sway. Even Arnow-Richman, the most skeptical about contract's ability to direct protections to have-nots in employment, does not argue for inalienability, opting instead for a disclosure regime in employment contracts. As we map the new frontiers of private ordering, these articles, taking a variety of normative approaches, provide a good compass to determine future directions. But as the political, social, and economic landscape changes, we'll need that compass to reassess how contract does more harm than good.