Commodification can introduce wrongs – Rejecting universal commodification as presented by Markets Without Limits and the gift-commodity principle.

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Summary:
It is commonly accepted that some things, such as sex, organs, secrets, and votes may be given away, used or owned, but not bought and sold. I refer to markets such as these as 'contested markets'. The commodification debate asks whether these markets are impermissible.

Specifically, the commodification debate asks what is morally permissible to buy and sell, and what is legally permissible to buy and sell.

One position within the commodification debate is that of universal commodification. This position holds that all contested markets are permissible. However, this position is wrong. Ultimately, falsely presuming that contested markets are permissible can lead to important questions about permissibility being eschewed, and wrongful markets being implemented.

Two arguments supporting universal commodification are Jason Brennan and Peter M. Jaworski's defense of the principle 'Markets Without Limits', and Tait Szabo's defense of the 'gift-commodity principle'. Markets Without Limits makes a claim about what is morally permissible and states that: “If you may do it for free, then you may do it for money.”¹ The gift-commodity principle makes a claim about what is legally permissible and states that: “[…] if it is (or ought to be) legally permissible for me to give away or not give away X, then it ought to be legally permissible for me to sell X.”²

My thesis will reject universal commodification, both as applied to moral permissibility and legal permissibility. Specifically, I will reject Markets Without limits and the gift-commodity principle on Brennan and Jaworski's and Szabo's own premises by showing that transactions in the content of democratic votes are morally impermissible, and that blackmail ought to be prohibited.

By rejecting universal commodification as applied to both moral and legal permissibility, I provide a comprehensive rejection of the position. I complement the existing criticism by providing a comprehensive rejection of universal commodification, especially on proponents of the position's own premises.

¹ Brennan, Jason and Jaworski, Peter M., Markets Without Limits: Moral Virtues and Commercial Interests, New York, Routledge, 2016 p. 10
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1. Introduction:

It is generally accepted that I may use whatever reason I want to decide how to cast my vote, no matter how stupid or irresponsible. It is generally accepted that I can be paid for providing goods or services. However, it is also commonly accepted that it is immoral for me to cast my vote in a specific way in return for money. Similarly, though there are exceptions, it is generally accepted that I ought to have the legal right to disclose or keep secrets. It is also generally accepted that I ought to have the legal right to sell newspapers and others exclusive access to secrets. However, it is also commonly accepted that I should not have the legal right to offer not to expose secrets in return for payment (i.e. blackmail). The commodification debate asks why it is wrong or ought to be illegal to sell these things, when it is okay to give them away.

The commodification debate is concerned with limitations of the market. Specifically, with the permissibility of commodifying things and services. To commodify things and services is to exchange them on the condition of payment (i.e. turn them into a commodity). Thus, the concern of the commodification debate is whether allowing something to be bought and sold introduces moral wrongs that are not present in the absence of commercial transactions.

Due to this concern, the commodification debate is engaged with markets where the mere use or exchange of something is considered permissible, while an exchange for money is seen as impermissible. Markets in sex (i.e. prostitution), secrecy (i.e. blackmail), organs, surrogacy, votes and queue-standing services are examples of such markets. In this thesis, I will refer to these markets as 'contested markets'. I will also refer to the things and activities being considered for commodification as 'goods' regardless of whether I refer to the commodified version of these things and services or not.

The commodification debate can be divided into two entangled, but distinct discussions about different kinds of permissibility: Moral permissibility and legal permissibility. In the discussion on moral permissibility the question applies to individuals; that is, whether it is morally acceptable for an individual to buy or sell a particular good. The discussion on legal permissibility applies to a society as a whole and is concerned with whether a particular good should be legal to buy or sell. I understand society as a collection of individuals, and not an entity that is greater than the sum of its parts. Therefore, when referring to 'society' I am referring to groups of individuals.
The discussions on moral and legal permissibility are distinct. They raise different questions and answers to them require different justifications. However, they are also entangled. This is both because claims about one kind of permissibility holds weight when discussing the other, and because they are concerned with the same phenomenon.

Claims about one kind of permissibility holds weight when discussing the other. Moral permissibility constitutes a prima facie reason for legal permissibility, and vice versa. That is, intuitively, it requires some overriding reason for society to permissibly prevent me from doing something I am morally permitted to do. Likewise, it requires some overriding reason for me to permissibly do something society ought to prevent me from doing.

The discussions on moral and legal permissibility are not entangled merely because the conclusions in one informs the conclusions of the other. Many discussions are related in this way. They are also entangled because they are concerned with the same phenomenon, commodification. In practice, these discussions try to question and ultimately inform how people, as individuals on the one hand and members of society on the other, think about and act towards markets and commercial transactions. This shared concern is why both discussions are seen as part of the same debate. It is also why a comprehensive account of how people ought to think about commodification requires an answer to both the question of moral and legal permissibility.

A range of philosophers’ participate in the commodification debate, presenting a range of arguments. The focus of these philosophers has primarily been to (1.) evaluate whether individual markets ought to be permissible based on their own merits, or (2.) to establish general requirements for what makes a market permissible or impermissible. Given the scope of the debate there is naturally great variation in the arguments presented and conclusions reached. However, despite this variation, there is a general understanding that the markets in question raise genuine moral challenges and ought to be considered on a case to case basis.

However, there is an exemption to this general understanding: For example, Jason Brennan and Peter

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3 Such as: Elizabeth Anderson, Margaret Jane Radin, Michael Sandel, Debra Satz, Laura Shrage, Jason Brennan and Peter M. Jaworski, Christopher Freiman, Tait Szabo, and Walter Block.
M. Jaworski, as well as Tait Szabo, present inductive arguments for the permissibility of all contested markets. These arguments entail that the permissibility of contested markets ought to be presumed rather than being examined on a case by case basis.

Brennan and Jaworski argue that: “If you may do it for free, then you may do it for money.”\(^4\) I will refer to this principle as 'Markets Without Limits'. Szabo argues that: “[…] if it is (or ought to be) legally permissible for me to give away or not give away X, then it ought to be legally permissible for me to sell X.”\(^5\) (Szabo’s parenthesis, my own brackets). I will refer to this principle as the 'gift-commodity principle'. Although Brennan and Jaworski argue for moral permissibility and Szabo argues for legal permissibility, both arguments claim that all contested markets, or at least all contested markets they understand as relevant to the debate, are permissible. In other words, their arguments imply that no wrong-making features (warranting legal prohibition) are introduced by commodifying a good, and therefore that all goods may be commodified. I will refer to this position as 'universal commodification'.

The problem is that some controversial markets are morally or legally impermissible. Ultimately, falsely presuming the permissibility of contested markets could lead both to important questions about permissibility being ignored, as well as implementation of wrongful markets.

I am not the first to challenge universal commodification. However, other challenges share two important limitations. First, these challenges only address universal commodification as applied to either legal or moral permissibility, not both. Second, much of the disagreement is over what the parameters of the commodification debate ought to be.

First, most other challenges of universal commodification only address moral or legal permissibility, not both. However, since the discussions on moral and legal permissibility are entangled, a comprehensive rejection of universal commodification requires rejecting the position as applied to both discussions. Furthermore, since the questions of legal and moral permissibility are distinct – that is, they raise different questions that require different justifications – it is unlikely that a single argument

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can address both kinds of permissibility. For example, some philosophers accuse Brennan and Jaworski of misunderstanding what the parameters of the commodification debate ought to be. Szabo has a different view to Brennan and Jaworski on what the parameters of the commodification debate ought to be. Thus, the accusations leveled at Brennan and Jaworski cannot be applied to Szabo.

Second, much of the disagreement between the proponents of universal commodification and the philosophers who challenge them is over what the parameters of the commodification debate ought to be. In the example above, the claim is that Brennan and Jaworski's conclusion on legal permissibility should not be accepted because they have misunderstood the question (i.e. which moral features the debate hinges on). Merely criticizing an argument for not asking the right questions does not answer whether the argument holds granted its own premises. A preponderance of these kinds of challenges can, therefore, make universal commodification seem more viable than it is.

Of course, limitations are features of an argument, not shortcomings. An argument does not fall short when it fails to prove points it is not intended to prove. However, when many of the arguments in a debate share the same limitations, this can leave important points unexplored and make false arguments appear more viable than they actually are.

To complement the existing criticism I will reject universal commodification as applied to both moral and legal permissibility. I will do so by rejecting Brennan and Jaworski’s and Szabo's arguments. I will do this by rejecting two concrete markets they are concerned with – one for each principle. Although I will accept the moral commitments underpinning their arguments, I will argue that they still fail to show that all contested markets are permissible.

There are two reasons why I reject Brennan and Jaworski's and Szabo's arguments, rather than any other arguments for universal commodification. Firstly, Brennan and Jaworski's argument has received quite a bit of attention and, though the same cannot be said for Szabo, his argument is very similar to theirs. Thus, Brennan and Jaworski's argument is a natural candidate for rejecting universal commodification as applied to moral permissibility, and the similarity of Szabo's argument makes it a suitable counterpart when rejecting the position as applied to legal permissibility. Secondly, both arguments are disjunctive. They argue for universal commodification by rejecting arguments to the
contrary. Because of this both Brennan and Jaworski and Szabo strive to reject arguments to the contrary on their own premises, and avoid controversial moral commitments of their own.⁶

1.1 The debate:
Though there is a great variety of views presented in the commodification debate, there are only three positions that can be taken on contested markets: That no contested market is permissible, that some contested markets are permissible, and that all contested markets are permissible. The third position is that of universal commodification.

Of these three positions only two are actually held within the debate, the second position – that some contested markets are permissible – and universal commodification. Nobody within the debate holds the position that no contested market is permissible. Nobody argues for this position because it is either pointless or hopeless to do so. It can be grounded in one of two claims: First, that all contested markets are impermissible because all markets are impermissible. Second, that though markets in general are permissible, contested markets are, universally, the exception.

It is pointless to participate in the commodification debate when arguing that all commodification is wrong. The presumption in both modern day society and the commodification debate is that commodification in general is permissible. Contested markets are possible exceptions to this presumption. If commodification is always wrong it is a moot point whether contested markets are wrong. It is a given that they are wrong. Thus, for proponents of this claim it is the presumption they should reject, not the exceptions.

That leaves the second claim; that commodification in general is permissible, but contested markets are universally (or at least generally) impermissible. Though not logically impossible, this is a hopeless claim to defend. The claim entails that all contested markets (many of which are quite different, introducing different moral challenges) are impermissible, regardless of how they are organized, but that markets in general (some of which might face similar moral challenges as contested markets) are permissible. This is highly unlikely.

Most arguments in the commodification debate fall under the second position – that some contested markets are permissible. In fact, of the philosophers I referred to before, only Brennan and Jaworski, Szabo, and Block do not fall under the second position. This is not strange. The second position is the only position that recognizes the moral challenges raised by commodification. The first position claims that all contested markets are impermissible. Granted this position, the question becomes how to prevent these impermissible markets. Universal commodification, on the other hand, claims all contested markets are permissible. The question then becomes how to organize these permissible markets. The second position – that some contested markets are permissible – recognizes that commodification raises real moral challenges that need to be addressed.

Of the three positions, the second position has the greatest variation of arguments falling under it. Take, for example, the arguments of the philosophers I referred to that fall under the second position: Elizabeth Anderson, Margaret Jane Radin, Michael Sandel, Debra Satz, Laura Shrage and Cristopher Freiman.

Elizabeth Anderson argues that (positive) freedom and equality are not contradictory concepts, but rather mutually dependent, and that markets that undermine an equality of social participation are impermissible.8

Margaret Jane Radin argues that the tension in liberal democracies between the value of freedom of choice and the integrity of personhood is not irreconcilable, but rather the result of material and social inequality. Permitting (some) carefully regulated contested markets could both recognize the integrity of personhood as well as ameliorate the underlying conditions of inequality.9

Michael Sandel argues that markets are not value neutral. The proliferation of markets leads to a widespread acceptance of market values as the moral parameters of public life. This undermines other ways of evaluating particular goods and society in general.10

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7 Elizabeth Anderson, Margaret Jane Radin, Michael Sandel, Debra Satz, Laura Shrage, Jason Brennan and Peter M. Jaworski, Christopher Freiman, and Tait Szabo.
9 Radin, Margaret Jane, Contested Commodities, Cambridge, Harvard University Press, 2001
Debra Satz argues that the dominating understanding of markets and equality (the neo-classical model of markets and the liberal-egalitarian understanding of equality) fails to recognize the formative force of markets. As a result she advocates expanding the values by which markets are judged.\textsuperscript{11}

Laura Shrage argues that, given the history of discrimination against women, prostitution inexorably epitomizes and perpetuates harmful patriarchal attitudes. Thus, a market in sex is impermissible in any realistic circumstance because of the harm it causes both sex workers and women in general.\textsuperscript{12}

Christopher Freiman argues that the liberal-egalitarian rejection of free market regimes as a means of distributing social justice rests on methodological errors. According to Freiman, proponents of liberal-egalitarianism compare an ideal model of political behavior with a non-ideal model of market behavior. His response is a non-ideal analysis of political behavior, seeking to demonstrate that free market solutions compare favorably to political solutions also when it comes to distributing social justice.\textsuperscript{13}

These varied arguments fall under the second position not because they conclude that only some contested markets are permissible, but because they recognize that the permissibility of contested markets should not be presumed. That is, it does not matter whether none, some or all contested markets happen to be permissible. Because commodification can introduce wrongs, the permissibility of a contested market should not be presumed. Rather, permissibility should be determined on a case by case basis. This is why arguments falling under the second position focus on (1.) evaluating whether individual markets ought to be permissible based on their own merits, or (2.) establishing general requirements for what makes a market permissible or impermissible.

The third position (i.e. universal commodification) is the other position that is actually held in the debate. Proponents of this position argue that mere commodification does not introduce moral wrongs. Thus, it should be presumed that all contested markets are permissible (in some form). This shared view becomes evident when looking at arguments promoting universal commodification, for example, the arguments of Jason Brennan and Peter Jaworski, Tait Szabo, and Walter Block:

\textsuperscript{13} Freiman, Christopher, \textit{Unequivocal Justice}, New York, Routledge, 2017
Jason Brennan and Peter Jaworski present an inductive argument for the moral permissibility of contested markets. Rejecting a series of arguments for the impermissibility of contested markets, they conclude that: “If you may do it for free, then you may do it for money.”

Tait Szabo presents an inductive argument for the legal permissibility of contested markets. Rejecting what he takes to be the three strongest counter-examples to universal commodification – markets in organs, sex and secrecy – he concludes that: “[…] if it is (or ought to be) legally permissible for me to give away or not give away X, then it ought to be legally permissible for me to sell X.” (Szabo’s parenthesis, my own brackets).

Walter Block argues for the legal permissibility of contested markets based on his understanding of libertarian ethics. He argues that all contested markets ought to be legal because they are non-violent. Block understands libertarianism to entail that the initiation of violence is wrong, and law is inherently violent. Thus, any law prohibiting or limiting nonviolent behavior is wrong, as such laws would introduce violence to an otherwise non-violent situation.

All three of these arguments argue that mere commodification does not introduce moral wrongs. For Brennan and Jaworski, if something is permissible to do then it is permissible to do it for money. For Szabo, if something is legally permissible to gift then it should also be legally permissible to sell it. For Block, if an activity is non-violent then it should be legally permissible to perform it regardless of whether money is involved.

Insisting that mere commodification does not introduce moral wrongs is compatible with claiming that some forms of commodification can introduce wrongs. Mere commodification only introduces a wrong if, within the scope of an argument, there is no permissible way to buy and sell an otherwise permissible good. Anything less and it is not mere commodification that introduces wrongs, only some forms of commodification. Thus, universal commodification entails that contested markets are

16 That is, Block equates violence with coercion.
17 Block, Walter, Defending the Undefendable, Auburn, Ludwig Von Mises Institute, 2008

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permissible, and the challenge is to organize these markets in a way that avoids contingent wrong-making features.

1.2 The problem:
Universal commodification claims that all contested markets are permissible in some form. In other words, mere commodification does not introduce moral wrongs. This is wrong. Some markets are morally or legally impermissible. Falsely assuming the permissibility of all contested markets could lead both to important questions about permissibility being ignored, as well as the implementation of wrongful markets.

I am not the first to challenge universal commodification. However, other challenges share two important limitations. First, many challenges only address universal commodification as applied to either legal or moral permissibility, not both. Second, much of the disagreement is over what the parameters of the commodification debate ought to be.

First, many other challenges of universal commodification only address moral or legal permissibility, not both. However, since the discussions on moral and legal permissibility are entangled, a comprehensive rejection of universal commodification requires rejecting the position as applied to both discussions. Furthermore, since the questions of legal and moral permissibility are distinct – that is, they raise different questions that require different justifications – it is unlikely that a single argument can address both kinds of permissibility. For example, some philosophers accuse Brennan and Jaworski of misunderstanding what the parameters of the commodification debate ought to be. Szabo has a different view to Brennan and Jaworski on what the parameters of the commodification debate ought to be. Thus, the accusations leveled at Brennan and Jaworski cannot be applied to Szabo.

Second, much of the disagreement between the proponents of universal commodification and the philosophers who challenge them is over what the parameters of the commodification debate ought to be. In the example above, the claim is that Brennan and Jaworski’s conclusion on legal permissibility should not be accepted because they have misunderstood the question (i.e. which moral features the debate hinges on). Merely criticizing an argument for not asking the right questions does not answer whether the argument holds granted its own premises. Challenges such as these can give the impression
that arguments for universal commodification succeed on their own premises. This can make these arguments seem more viable than they are.

For example, two challenges of universal commodification that are limited in both of these ways are Julian J. Koplin's argument in “Commodification and Human Interests”18, and Jeppe von Platz' argument in “Person to Person: A Note on the Ethics of Commodification.”19 Both Julian J. Koplin and Jeppe von Platz reject Brennan and Jaworski’s argument for Markets Without Limits, claiming that Brennan and Jaworski have misunderstood which moral features the commodification debate hinges on. That is, both Koplin and Platz deny that the debate hinges upon whether a good is inherently unsuited for commodification. According to Koplin, the debate hinges on whether treating a good in line with market norms would (realistically) threaten the realization of particular kinds of human interests.20 Koplin argues that Brennan and Jaworski, for the most part, fail to address the commodification debate, and that where they succeed in addressing the debate, their position rests merely on optimism about the positive impact of markets, and society's capability to mitigate the negative impact. Koplin concludes that, ultimately, Brennan and Jaworski fail to show there is nothing morally problematic about commodification.21 According to Platz, on the other hand, the question of moral permissibility should be eschewed for the sake of a discussion on legal permissibility.22 He argues that Brennan and Jaworski's argument fails to address the commodification debate as it should be. He argues that the commodification debate should not hinge upon the moral question of whether a good is inherently unsuited for commodification, but rather on the political question of how we, as members, ought to organize our society and economy.23 Both Koplin's and Platz' arguments only address one kind of permissibility. Specifically, the moral permissibility of contested markets. Furthermore, both arguments challenge Markets Without Limits on their own premises. Thus, they cannot assess whether Brennan and Jaworski's argument holds, granted its own premises. This can make Markets Without Limits seem more viable than it is.

Limitations are features of an argument, not shortcomings. For example, Koplin and Platz are not

21 Ibid. pp. 437-8
23 Ibid. p. 653
trying to reject universal commodification in general, nor are they trying to criticize Brennan and Jaworski on their own premises. An argument does not fall short when it fails to prove points it is not intended to prove. However, when many of the arguments in a debate share the same limitations, this can leave important points unexplored and make false arguments appear more viable than they actually are.

1.3 My argument:
To complement the existing criticism I will reject universal commodification as applied to both moral and legal permissibility. I will do so by rejecting Brennan and Jaworski’s and Szabo's arguments, more specifically by rejecting two concrete markets they are concerned with – one for each principle. Although I will accept the moral commitments underpinning their arguments, I will argue that they still fail to show that all contested markets are permissible.

My argument complements the existing criticism of universal commodification because it has different limitations. Firstly, I reject both Brennan and Jaworski's and Szabo's arguments. These arguments are comparable, but focus on moral and legal permissibility respectively. Compared to only making claims about one kind of permissibility, addressing both of the discussions gives a more complete account of how people ought to think about commodification. Specifically, by rejecting comparable arguments promoting universal commodification, I give a more complete rejection of the position (or at least of the position as Brennan and Jaworski and Szabo understand it).

Second, I refute Brennan and Jaworski and Szabo on their own premises, using cases they are concerned with. By accepting the moral commitments of Brennan and Jaworski's and Szabo's arguments, I cut straight to the key question of permissibility. That is, I show that universal commodification is false on its own premises, and therefore, I can set aside the issue of how the debate ought to be understood, and merely ask whether, given Brennan and Jaworski's and Szabo's understanding of the debate, the permissibility of contested markets ought to be presumed.

Though my argument does not have the same limitations as much of the existing criticism of universal commodification, it does have limitations. For one, by refuting Brennan and Jaworski and Szabo on their own premises, my argument cannot take a position on what the parameters of the
commodification debate ought to be. I merely accept Brennan and Jaworski's and Szabo's view on this. More importantly, trying to give a more complete rejection of universal commodification by refuting it as applied to both the discussions on moral and legal permissibility means that the strength of my argument depends on how comparable Brennan and Jaworski's and Szabo's arguments are.

Brennan and Jaworski's and Szabo's arguments are quite similar. Both arguments are inductive arguments arguing for the permissibility of all contested markets. Additionally, both arguments support their thesis primarily by rejecting counter-arguments while adopting much of the opposition's moral commitments, and both arguments promote very similar principles; “If you may do it for free, then you may do it for money” (Markets Without Limits) and; “[…] if it is (or ought to be) legally permissible for me to give away or not give away X, then it ought to be legally permissible for me to sell X.”(My own brackets) (the gift-commodity principle)

Though Brennan and Jaworski's and Szabo's arguments are similar, there are still differences. In particular, there are four noteworthy differences: Brennan and Jaworski and Szabo participate in different discussions on permissibility, they have different criteria for which markets are relevant to their arguments, they focus on different cases, and they operate with different degrees of idealization.

The first and most obvious difference is that Brennan and Jaworski and Szabo participate in different discussions on permissibility. Brennan and Jaworski participate in the discussion on moral permissibility, whereas Szabo participates in the discussion on legal permissibility. However, this is not a problem for the comparison. Rather, it is the reason why the comparison is worthwhile.

Second, Brennan and Jaworski and Szabo have different criteria for which markets and goods are relevant to their arguments. Brennan and Jaworski argue that everything it is permissible to use, own, hold or gift is also permissible to sell or buy. Szabo, on the other hand, argues that everything that it ought to be legal to gift also ought to be legal to sell or buy.

Practically speaking, this difference in criteria is insignificant. Both arguments identify all of the

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central cases of the commodification debate. For example, Brennan and Jaworski touch upon markets in sex, organ selling, surrogacy and secrecy, to mention some. They also present independent arguments for markets in guardianship rights, and votes. Szabo presents cases for markets in sex, organs and secrecy, but states that his argument could also be applied to markets in surrogacy, guardianship rights, and votes, to mention some. Thus, the difference between using 'use' or 'gift' to identify which goods are relevant to their argument is an insignificant difference.

Third, though Brennan and Jaworski and Szabo touch upon many of the same cases, they do not focus on the same ones. That is, Brennan and Jaworski only present independent arguments for markets in guardianship rights and a market in votes. Szabo present cases for markets in sex, organs and secrecy.

Of these cases, I will focus on votes and blackmail. Specifically, I will show that transactions in democratic votes are morally impermissible and that blackmail ought to be prohibited. The reason why I make use of these cases is that my objections to transactions in the content of democratic votes and legalized blackmail have a thematic similarity. They are concerned with members of society's capabilities to conscientiously discuss practical and ethical issues as a group, and to make and act upon decisions as a group. In other words, I focus on the impact markets can have on our capabilities, as members of society, to participate (conscientiously) in shaping the society in which we live our lives. I am assuming that, generally speaking, members of a society ought to have the capabilities and legal rights necessary to participate in the shaping of the society in which they lead their lives. I hold these capabilities to be a vital part of a person's power to influence and shape their own lives.

Unlike interactions between a few individuals, interactions involving large groups of people are more prone to misunderstandings. Groups must therefore rely on rules and guidelines to enable effective and conscientious interactions. For example, my blackmailer and I might choose to make an exception from normal procedure when signing an agreement, and still be fairly confident that we have both understood what the exception entails, that it is an exception, that we both accept doing things in this way, and that we are aware of the other person's acceptance. However, this is not equally the case when larger groups of people – like the inhabitants of a town or a country – discuss issues, make decisions or act. When dealing with larger groups, it is easier for misunderstandings to occur. Thus, it requires stricter rules and guidelines to make sure that every member of the group has an adequate and shared
understanding of the situation, and are able to participate in it. These rules and guidelines must themselves be established and shared through group interactions.

Markets impact how we, both as individuals and as members of society, interact and relate to one another. Thus, it is worthwhile to consider what impact markets can have on our capability to engage with each other as a group, and to potentially limit the negative impact a market could have on these capabilities.

Fourth, Brennan and Jaworski and Szabo operate with different degrees of idealization in their arguments. A difference in degree of idealization can make arguments less comparable. This is because more idealized arguments can set aside contingent features of situations that less idealized arguments have to account for. For example, an ideal concept of human action can understand us as beings motivated by reason. Less idealized concepts of human action might see that we also have distinctly irrational motivations for acting the way we do. The degree of idealization is not indicative of the strength of an argument. Rather, what degree of idealization an argument ought to operate with varies depending on its purpose. However, a difference in degrees of idealization can make arguments less comparable. An ideal argument might rely on setting aside features less ideal arguments should not.

As mentioned, Brennan and Jaworski and Szabo operate with different degrees of idealization. Brennan and Jaworski argue that for all permissible goods there is always, in principle, some time, place and manner where selling those goods are permissible.25 Szabo argues that, for all permissible goods, it is always preferable to legalize the buying and selling of them in some form.26 If some form of market solution is not actually preferable to prohibition, Szabo's argument fails. This is not the case for Brennan and Jaworski. For them any fantastical set of circumstances will do.

However, this difference in degree of idealization is not a problem when comparing the two arguments. The difference is unproblematic for two reasons. Firstly, Brennan and Jaworski commit themselves to a less idealized standard, stating that: "[...]suppose a certain market could, in principle, be permissible, but only under highly fantastical conditions [...] If so, our thesis would remain intact, but would be


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significantly less interesting."\(^\text{27}\) (My own brackets) If Brennan and Jaworski manage to keep to this commitment, the practical difference is far less. Secondly, regardless of whether they do keep to this commitment, I will circumvent the problem by refuting Brennan and Jaworski in a way that is not sensitive to degrees of idealization. That is, I will reject Markets Without Limits with a categorical argument.

To complement the existing criticism of universal commodification I will reject the position, as understood by Brennan and Jaworski and Szabo, by rejecting Markets Without Limits and the gift-commodity principle. I will reject these principles by showing that transactions in the content of democratic votes are morally impermissible, and that blackmail ought to be prohibited.

To reject Brennan and Jaworski’s principle, Markets Without Limits, I will argue that it is inherently wrong to buy and sell the content of democratic votes – that is, the content of votes cast in the elections of justifiable democracies – because such transactions would undermine the democratic political process. That is, all transactions in the content of votes necessarily involve an obligation to vote in a way that is dictated by somebody other than the voter. This is incompatible with the grounding moral principle of democracy: Ultimate political power rests with the governed. Therefore, it undermines the democratic political process. Undermining justifiable democracies is a collectively harmful activity, and some democracies can be justified. Given the Clean Hands Principle, participating in collectively harmful activities is wrong if the cost of refraining is low. The cost of not preventing voters from exercising their political power is low. The cost is a justifiable democracy functioning as intended. Thus, I will conclude that, insofar as a democracy is justifiable, and given the clean hands principle, it is wrong to undermine the democratic, political process by buying and selling the content of votes.

I will argue that blackmail ought to be prohibited because blackmail promotes behavior that undermines a constructive public discourse, and legalizing blackmail would likely lead to an increase in market activity that would also lead to an increase in this problematic behavior. That is, blackmail incentivizes promoting behavior that undermines a constructive public discourse. Blackmailers are incentivized to maximize the harm they threaten to cause the victim, and, should an agreement fall through, the blackmailer is incentivized to realize their threat. Acting on these incentives is likely to

silence the victim or court prejudice and bigotry in the audience, and silence, prejudice and bigotry undermines a constructive public discourse. Seeing how legalizing blackmail would likely undermine a constructive public discourse, I will argue that law is a suitable tool to mitigate this. Furthermore, I will argue that prohibiting blackmail is preferable to merely regulating it as any regulation that could effectively limit the impact of legalized blackmail would unduly constrain the blackmailer's freedom of speech. In contrast, prohibition would not limit the anyone's freedom of speech, merely their freedom to act, or at least, insofar as prohibition would limit freedom of speech, it would be consistent with existing social practices.

1.4 Paper outline:
My thesis will be structured into four chapters followed by the conclusion. The first two chapters will be dedicated to presenting and rejecting Markets Without Limits, and thereby rejecting universal commodification as applied to moral permissibility. The following two chapters will be dedicated to presenting and rejecting the gift-commodity principle, and thereby universal commodification as applied to legal permissibility.

Though not crucial to my argument, I start with Markets Without Limits for reasons of ease of reading. Specifically, I start with Brennan and Jaworski's principle because they do a better job of establishing the premises for their argument, requiring less interpretative work by their reader. Furthermore, Brennan and Jaworski present an ideal argument (though they commit themselves to a less idealized scope), which means they can set aside many contingent features non ideal arguments cannot. In contrast, Szabo's argument is a non-ideal argument. Because Brennan and Jaworski does a better job of establishing the premises for their argument, therefore requiring less interpretative work, and can set aside many contingent considerations, their argument lends itself to a more succinct presentation.

Therefore, in the second chapter ("2. Presenting Brennan and Jaworski's case for Markets Without Limits") I will present the moral commitments and argumentative structure of Brennan and Jaworski's argument. The goal of this chapter is to present Brennan and Jaworski's defense of Markets Without Limits. Specifically, to present their argumentative structure, the reasons they provide in support of Markets Without Limits and the moral commitments underpinning their argument.
The following chapter ("3. Refuting markets without limits") is divided into two main sections and a conclusion. The main sections are "3.1 Presenting Brennan and Jaworski's case for a market in votes" and "3.2 Rejecting a market in votes." In the first section of the third chapter I will present Brennan and Jaworski's argument for the permissibility of transactions in votes. The purpose of this section is, again, to present Brennan and Jaworski's argumentative structure, the reasons they provide in support of the permissibility of transactions in votes and the moral commitments underpinning their argument. to the argument Brennan and Jaworski make for the moral permissibility of buying and selling votes.

In the second section of the third chapter I will reject Markets Without Limits and, thereby, universal commodification as applied to moral permissibility. I will do this by showing how transactions in the content of democratic votes are morally impermissible.

Chapter four and five will be dedicated to presenting and rejecting the gift-commodity principle, and thereby universal commodification as applied to legal permissibility. The structure of these chapters will, for all intents and purposes, mirror the preceding chapters.

Thus, in the fourth chapter ("4. Presenting Szabo's case for the gift-commodity principle") I will present the moral commitments and argumentative structure of Szabo's argument. The goal of this chapter is to present Szabo's defense of the gift-commodity principle. Specifically, to present his argumentative structure, the reasons he provide in support of the gift-commodity principle and the moral commitments underpinning his argument.

The following chapter ("5. Rejecting the gift-commodity principle") is divided into two main sections and a conclusion. The main sections are "5.1 Presenting Szabo's argument for legalized blackmail" and "5.2 Rejecting legalized blackmail." However, the first section of the fifth chapter also contains nine subsections, sections 5.1.1.-5.1.9. where I present a range of arguments Szabo rejectin defense of legalized blackmail, as well as his rejections. In the first section of this chapter I will present Szabo's argument for the permissibility of transactions in votes. The purpose of this section is, again, to present Szabo's argumentative structure, the reasons he provide in support of legalizing blackmail and the moral commitments underpinning his argument.
In the second section of the fifth chapter I will reject the gift-commodity principle and, thereby, universal commodification as applied to legal permissibility. I will do this by showing why blackmail ought to be prohibited.

In the last chapter ("6. Conclusion") I will conclude that universal commodification (at least as Brennan and Jaworski and Szabo understands it) is false. Specifically, I will summarize my argument, explain what moral commitments and reasons underpin it, as well as clarify its impact on universal commodification.

2. Presenting Brennan and Jaworski’s argument for Markets Without Limits:
I argue that universal commodification is false, both as applied to moral permissibility and to legal permissibility. Universal commodification claims that mere commodification (i.e. turning goods into commodities that can be bought and sold) does not introduce moral wrongs (that warrant legal prohibition). The problem with this position is that some goods do introduce wrongs when commodified.

The reason I reject universal commodification as applied to both moral and legal permissibility is that these two discussions are entangled. The discussion on moral permissibility applies to individuals, and asks what is morally acceptable to buy and sell. The discussion on legal permissibility applies to society as a whole, and asks what ought to be legal to buy and sell. However, answers in one discussion present prima facie reasons in the other. Furthermore, both discussions are concerned with the same phenomenon, commodification, and both discussions seek to answer how people, as individuals on the one hand and members of society on the other, ought to think about markets and market transactions. Thus, a more comprehensive rejection of universal commodification requires rejecting it as applied to both discussions rather than just one.

I reject universal commodification as applied to both the discussion on moral and legal permissibility by rejecting Brennan and Jaworski’s principle, Markets Without Limits, and Tait Szabo’s principle, the gift-commodity principle. More specifically, I reject Markets Without Limits and the gift-commodity principle by rejecting the permissibility of two concrete markets Brennan and Jaworski and Szabo are concerned with – one for each principle. Though I accept the moral commitments underpinning their arguments, I argue that they still fail to show that all contested markets are permissible.

Over the two next chapters, I will reject universal commodification as applied to moral permissibility by rejecting Markets Without Limits. In this chapter, I will present Brennan and Jaworski’s argument for Markets Without Limits, before rejecting the principle in the following chapter.

Markets Without Limits is Brennan and Jaworski’s answer to the question: What may be bought and sold? In order to assess and reject their answer (Markets Without Limits), it is first necessary to understand the question. The central question of the commodification debate (as applied to moral permissibility) is whether commodification introduces wrongs. Or, in other words, whether there are
some goods that are permissible to own, hold and gift, but are not permissible to buy or sell. Brennan and Jaworski understand this question as whether some goods are inherently unsuited for commodification. Though they acknowledge that it might be wrong to buy and sell goods because the goods themselves should not owned, held or exchanged, or because of incidental limitations, Brennan and Jaworski insist that all goods that may be owned, held or exchanged in some circumstance may also be bought and sold in some circumstance, or: “If you may do it for free, then you may do it for money.” (i.e. Markets Without Limits) However, despite this understanding of the commodification debate, Brennan and Jaworski claim that they do try to ground their argument in actual or realistic circumstances

Brennan and Jaworski’s answer to the question “what may be bought and sold?” is their principle, Markets Without Limits. This principle can be interpreted in two ways. To assess and reject Brennan and Jaworski’s argument, it is necessary to understand their answer. Markets Without Limits state that: “If you may do it for free, then you may do it for money.” In other words, the moral status of a transaction is determined by the moral status of the goods being exchanged, because mere commodification does not introduce moral wrongs. This principle can be interpreted in two ways. It can be interpreted as a universal principle that allows for no exceptions, or it can be interpreted as a general principle which only needs to be true in the circumstances it is intended to be applied to, but not in every possible extension.

Markets Without Limits should be interpreted as a general principle. There are potentially infinite contested markets, and interpreting Markets Without Limits as a universal principle means that it would be false if commodification were impermissible in even one of these infinite possibilities. Infinite possibilities cover all possibilities. In other words, if commodification can introduce moral wrongs, there is some possibility where it does so. Brennan and Jaworski do not provide an argument that

28 Ibid. pp. 40-41
29 Ibid. pp. 10, 13-17, 29
30 As I am rejecting Brennan and Jaworski's argument on their own premises, I do not consider whether or not Brennan and Jaworski succeed in grounding their argument in actual or realistic circumstances. Rather, I reject their argument claiming that the content of democratic votes (i.e votes cast in the elections of justifiable democracies) is inherently unsuited for commodification.

31 Ibid. p. 10
32 Ibid. p. 29
proves commodification cannot introduce moral wrongs. They even state: "We know of no general permissibility proof for all possible trades and markets that, in our mind, succeeds on the terms provided by the anti-commodification theorists." (Of course, if Brennan and Jaworski could present a general permissibility proof, they would not need to rely on an inductive argument.) In the absence of proof to the contrary, it is reasonable to assume that commodification can introduce moral wrongs. If commodification can introduce moral wrongs, then Markets Without Limits interpreted as a universal principle is false. Thus, the principle is best understood as a general principle, meaning it only needs to hold in the cases central to the commodification debate.

With this understanding of the question and Markets Without Limits, it is now possible to assess Brennan and Jaworski's argument. They primarily defend Markets Without Limits by rejecting arguments to the contrary:

"Our strategy in this book is, for the most part, to articulate, explain, and then debunk the various arguments anti-commodification theorists have produced to try to show that commodification is wrong. We know of no general permissibility proof for all possible trades and markets that, in our mind, succeeds on the terms provided by the anti-commodification theorists. But, if we can repeatedly show that the critics' complaints are unfounded, this builds a case for our thesis. It's always possible that the critics will produce a good criticism down the road, but we're pushing the burden of proof back onto them."

Jason Brennan and Peter Jaworski's argument is an inductive, disjunctive argument for the moral permissibility of contested markets. They are concerned with whether it is morally acceptable for an individual to buy or sell particular goods. Rejecting a series of arguments for the impermissibility of contested markets, they conclude that: "If you may do it for free, then you may do it for money."

Formalized, their argument consists of four claims:

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33 Ibid. p. 22
34 Ibid. p. 22
35 Ibid. p. 10
36 I base this presentation of Brennan and Jaworski's argument off of Platz' interpretation. Though Platz' presents Brennan and Jaworski's argument as a disjunctive syllogism I have chosen to present it with a bit more detail. Thus, I've altered the premises to account for the fact that Brennan and Jaworski's argument is inductive and that they support their
1. Either it can be shown that there are cases where I can hold, give or use a good, but not buy or sell it under any circumstance, or it should be concluded that I may buy or sell anything I can hold, give or use in some circumstances.
2. These arguments, which conclude that I may not buy or sell goods I may hold, give or use are false.
3. Persistent intuitions that I may not buy or sell goods I may hold, give or use are unreliable.
4. If granted 2.-3., it is probable that all arguments which conclude that I may not buy or sell goods I may hold, give or use are false.

Conclusion: I may buy or sell anything I can hold, give or use. (i.e.“If you may do it for free, then you may do it for money.”)

Brennan and Jaworski's argument is disjunctive. A disjunctive argument is an argument which derives its conclusion from rejecting the negation of the conclusion. That is, the argument puts forward two options that are negations of each other. For example, either prostitution is morally permissible, or it is morally impermissible. Since the claims are negations of each other, if one claim is false, the other is true. Continuing the example, if it is concluded that prostitution is not impermissible, then it follows that prostitution is permissible. For Brennan and Jaworski, their disjunctive inference depends on their understanding of the commodification debate. That is, Brennan and Jaworski argues (that it is probable) that everything that may be used, may also be bought and sold by rejecting (that it is probable) that some goods that may be used, may not be bought or sold under any circumstance. In other words, as long as it is morally permissible to buy a good under some circumstance, it isn't impermissible to buy that good. Thus, Markets Without Limits is proven by rejecting that there are any goods which may be gifted, but not bought nor sold under any circumstance.

Brennan and Jaworski's argument is also inductive. All inductive arguments rely on generalization. That is, they make a general claim based on a limited sample size. In Brennan and Jaworski's case they make the general claim that anything that may be owned, held, used or gifted may also be bought and sold (under some circumstance). Because they rely on generalizations, conclusions that are induced (i.e. arrived at via inductive arguments) do not follow necessarily from the premises, but are more or

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less probable. Therefore, what Brennan and Jaworski claim is that it is probable that anything that may be owned, held, used or gifted may also be bought and sold.

The probability of inductive arguments is determined by three guidelines: (1.) How large and varied of a sample the generalization is based on, (2.) whether there is any evidence to the contrary, and (3.) how plausible the conclusion is given other relevant knowledge.

Brennan and Jaworski's generalization is based on rejecting a range of arguments concluding that some goods are inherently unsuited for commodification, but also arguing that intuitions supporting the immorality of contested markets are unreliable. Specifically, they reject seven kinds of arguments: These are arguments concluding that contested markets (a) violate rights, (b) harm others, (c) are exploitative, (d) lead to an unjust allocation of goods, (e) incentivize people to act in ways they should be prevented from acting, (f) corrupt people's moral character, or (g) express or communicate negative attitudes.

Some markets might (a) violate people's rights, or (b) lead to increased violence in society, or otherwise harm people. Brennan and Jaworski argue that though (a) and (b) explain why some markets are wrong, they do not show that commodification is wrong. What (a) and (b) explain is why some goods may not be owned in the first place.

Some markets might (c) encourage people to exploit others (especially those who are vulnerable). Brennan and Jaworski argue that though exploitation is wrong, this is not inherent to commodification. There is always some way to buy and sell otherwise permissible goods that do not exploit people.

To allow markets in certain goods might (d) lead to those goods being allocated unjustly, or they (e) might lead to people making self-destructive choices. Again, Brennan and Jaworski argue that these features are not inherent to commodification, and that there is always some way to buy and sell an otherwise permissible good that does not raise these concerns.

38 Ibid. pp. 40-41
39 Ibid. p.19
40 Ibid. p. 20
41 Ibid.
Some markets might (f) corrupt people, causing them to adopt immoral preferences or character traits. Again, Brennan and Jaworski argue that these features are not inherent to commodification. Not only that, they also argue that proponents of these arguments do not have the empirical evidence needed to support their claims. On the contrary, Brennan and Jaworski claim, the best empirical evidence suggests markets cause people to adopt moral preferences and character traits.\textsuperscript{42}

Lastly, perhaps participating in certain markets can (g), independently of arguments falling under (a)-(f), express or communicate negative attitudes that are incompatible with other positive attitudes. Against (g), Brennan and Jaworski argue that the meaning of markets are largely social conventions and can be changed. Since both a market and social conventions can be changed, the question is which should be changed if a market expresses negative attitudes. Brennan and Jaworski claim that this decision should be made on the basis of the consequences of making these changes. They think that allowing the market and changing the social meaning will, consistently, produce the most beneficial consequences.\textsuperscript{43}

Brennan and Jaworski also support their generalization by arguing that intuitions supporting the immorality of contested markets are unreliable. That is, universal commodification is neither in line with common intuitions, nor the majority of theorists in the commodification debate. Brennan and Jaworski meet this challenge by criticizing common intuitions that suggests that contested markets are immoral.

Having rejected a range of arguments for the moral impermissibility of contested markets, Brennan and Jaworski acknowledge that, despite this, commodifying some goods might just not feel right.\textsuperscript{44} Or, in other words, that there are still strong intuitions indicating that it is inherently wrong to commodify some goods. These intuitions, Brennan and Jaworski claim, are unreliable. Specifically, they claim that intuitions that originate from a sense of disgust are unreliable.\textsuperscript{45} A sense of disgust is provoked by the perceived violation of sanctity, purity, the profound or the sacred.\textsuperscript{46} For Brennan and Jaworski, the problem with disgust is not that it is never appropriate, nor that it is sometimes provoked when

\textsuperscript{42} Ibid. p. 21  
\textsuperscript{43} Ibid. pp. 21-2  
\textsuperscript{44} Ibid. pp. 197-8  
\textsuperscript{45} Ibid. pp. 214-16  
\textsuperscript{46} Ibid. pp. 197-8
inappropriate. The problem is that empirical evidence show that reactions of disgust are prone to persist even when shown to be ungrounded.47 Thus, to grant disgust moral weight is to let a reaction that is not sensitive to moral issues justify moral judgments.

3. Rejecting Markets Without Limits:

I will reject Brennan and Jaworski's argument for Markets Without Limits by showing that it is

inherently wrong to buy and sell the content of democratic votes, while accepting the moral
commitments underpinning both their argument for Markets Without Limits, and their argument for a
market in votes. If my argument succeeds, it would contradict Markets Without Limits, proving it is
false.

Brennan and Jaworski touch upon a range of cases in the course of their argument. However, I focus on
a market in votes. I focus on this case for three reasons: First, Brennan and Jaworski's argument for a
market in votes is independent. Second, of the two independent arguments they present for concrete
markets, the clearest is their argument for a market in votes. Third, there is a thematic likeness between
my objection to their argument, and my objection to Szabo's argument legalized blackmail.

First, Brennan and Jaworski present an independent argument for a market in votes. That is, the
argument is not merely a refutation of some kind of counter-argument, but can be presented
independently of this context.

Second, Brennan and Jaworski present independent arguments for two cases: A market in guardianship
rights, and a market in votes. Of these two arguments, the argument for votes is clearer. That is,
consistent with Markets Without Limits, Brennan and Jaworski argue guardianship rights may be
bought and sold whenever they may be held. However, they do not give an account of when I may hold
these rights. 48 Similarly, they argue that it is permissible to buy and sell votes whenever it is permissible
to cast them. They also present an account of when I may cast my vote. Admittedly, Brennan and
Jaworski do not require such an account in order for their arguments to succeed. It is sufficient for them
to argue that commodification does not introduce wrongs. However, for the purposes of addressing
their argument, it is beneficial when they do offer an account of permissible usage. The absence of such
an account increases the likelihood of misunderstanding their claims.

Third, there is a thematic likeness between my objection to Brennan and Jaworski's argument for a
market in votes, and my objection to Szabo's argument for legalized blackmail. I argue it is morally
impermissible to buy and sell the content of democratic votes because it would undermine democracy.
In other words, a market in the content of democratic votes would undermine society's capability to

48 Ibid. pp.169-182
make and act on decisions. My objection to legalizing blackmail is grounded in the impact such a market would have on society's capability to promote justice. I reject legalizing blackmail by claiming it would likely undermine a constructive public discourse, thereby undermining society's capability to discuss what justice is, and how to promote it. I claim that legal prohibition would be the preferable way of mitigating this impact.

Brennan and Jaworski argue that buying and selling votes is permissible, and might even promote justice by increasing the likelihood of good outcomes from elections. I argue transactions in the content of democratic votes undermine democracy, and that this is wrong if the democracy is justifiable. The central concern of these arguments is the capability of the members of society to promote a just society.

3.1 Presenting Brennan and Jaworski's argument for a market in votes:
There are several kinds of goods related to votes and voting, and all of them may be commodified. Brennan and Jaworski draw a distinction between two such kinds: A right to vote and votes.$^{49}$ It is uncontroversial that at least some voting rights and some votes may be commodified. For example, I may buy a right to vote when purchasing a voting share in a publicly listed company. I may buy a vote when televoting on some reality shows or televised contests like the Eurovision song contest.

Brennan and Jaworski argue for the moral permissibility of a market in votes. Specifically, a market in the votes cast in democratic elections.$^{50}$ A market in this kind of votes is commonly regarded as impermissible, if not outrageous. Please note that from this point, whenever I refer to 'votes' I am referring to votes cast in democratic elections, unless otherwise specified.

Consistent with Markets Without Limits, Brennan and Jaworski claim that commodifying votes introduces no wrongs. This means that the ethics of a market in votes is merely the ethics of voting. Whatever I may vote for free, I may also vote for money, or pay someone else to vote. Thus, Brennan and Jaworski’s position on a market in votes is determined by their ethics of voting.$^{51}$ Their ethics of voting is established in Brennan's "Principle of Ethical Voting:"

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49 Ibid. p. 190
50 Ibid. pp. 183-5
51 Ibid. p. 184

p.35/103
"The Principle of Ethical Voting: People who choose to vote must vote for candidates or policies they justifiedly expect to best promote justice; otherwise they must abstain."\(^{52}\)

(Brennan and Jaworski's italics)

The Principle of Ethical Voting can be interpreted in a more or less strict way. The stricter interpretation would be that it is only permissible to vote for the option that best promotes justice. The less strict interpretation would be that it is permissible to vote for any option that is "good enough" (i.e. that sufficiently promotes justice). Given Brennan and Jaworski's position – that an ethics of a market in votes is simply an ethics of voting – the interpretation of the principle will have a marked impact on when it is permissible to buy and sell votes.

Regardless of interpretation, the principle of ethical voting places strict requirements on the moral permissibility of voting. My vote is not permissible simply because I have a right to vote, have beliefs about the different policies and candidates, or a preferred option. According to Brennan, it is only permissible for me to vote if I am an informed voter making a morally responsible choice.\(^{53}\) That is, I must have justified beliefs about the society of which I am a part, what the morally ideal state of society is (i.e. justice), and which policy will bring society closest to this standard. Based on these beliefs, I must then choose the option that brings society closest (or at least closer) to ideal justice. Thus, compared to impermissible votes, every permissible vote promotes justice because they increase the likelihood of the right choice being made, and society becoming more just.

Brennan justifies these strict requirements by appealing to the high stakes and forceful nature of democratic elections. That is, the results of elections matter. Political decisions have a real impact on people's lives, and the authority of the state applies to everyone in society, regardless of what they voted. Irresponsible and ill-informed decisions by the electorate significantly increase the risk of bad decisions being made. A malicious decision ensures it. When the electorate makes an irresponsible or malicious decision they show a lack of concern for the needs of the members of society (themselves included). This, Brennan claims, is impermissible.\(^{54}\)

\(^{52}\) Ibid.
\(^{53}\) Ibid. p. 185
\(^{54}\) Ibid. p. 186
Rarely are elections determined by a single voter. However, Brennan argues that it is not only impermissible for the electorate as a group, but also every single voter, to make irresponsible or malicious decisions at the ballot box. He derives this conclusion from the moral restrictions on the electorate in conjunction with what he refers to as the "Clean Hands Principle." This principle states that: "One should not participate in collectively harmful activities when the cost of refraining from such activities is low." The Clean Hands Principle is hardly controversial. If the Clean Hands Principle holds, and it is immoral for the electorate to vote irresponsibly or maliciously, then it follows that it is immoral for any single voter, as a member of the electorate, to vote irresponsibly or maliciously.

Brennan and Jaworski claim that the ethics of a market in votes is simply the ethics of voting. What matters is that votes are cast in a permissible way, not why they are cast in this way, or who cast them. This position entails that irresponsible or malicious voting is impermissible irrespective of payment, and ethical voting is permissible regardless of payment. They express this position in two principles:

"Permissible Vote Selling: So long as a person conforms to the Principle of Ethical Voting, she may sell her vote.

Permissible Vote Buying: It is permissible to buy votes from anyone who will conform to the Principle of Ethical Voting. Also, if you are justified in believing that voting for a particular candidate or position will serve the right ends of government, you may pay other people to vote for that candidate or position, even if those people are not themselves justified in believing that such votes will serve the right ends of government." (Brennan and Jaworski's italics)

Depending on the interpretation of the Principle of Ethical Voting, a permissible market in votes is more or less restricted. Given the stricter interpretation of the principle – that it is only permissible to vote for the option that I justifiedly believe will best promote justice – it is impermissible to sell votes, except when a transaction would be superfluous. That is, to vote in a permissible way I am required to choose responsibly based on justified beliefs. If the only responsible choice is the option that best

55 Ibid. pp. 187-8
56 Ibid. p. 187
57 Ibid. p. 184
promotes justice, then it follows that I must make my choice solely based on the consideration of promoting justice. Thus, I may not be swayed by payment. Given that I may not be swayed by payment, I may only sell my vote if I am being paid to vote what I would vote regardless.

The second, and less strict, interpretation is more interesting. I will base my understanding of Brennan and Jaworski's argument for a market in votes on this interpretation. Given this interpretation, it is permissible to vote for any option that I justifiably believe sufficiently promotes justice. Consequentially, I may sell my vote more freely. That is, granted that I am justified in believing a set of options will sufficiently promote justice, I may be paid to vote for any of these options. This means that not every permissible transaction is superfluous.

Granted Brennan's view on ethical voting, Brennan and Jaworski still need to argue that commodifying votes introduces no wrongs (i.e. that a market in votes is morally permissible). Consistent with their overall argument for Markets Without Limits, Brennan and Jaworski's argument for a market in votes is both inductive and disjunctive.

A disjunctive argument is an argument where the conclusion is proven by rejecting its negation. Brennan and Jaworski view a good being inherently unsuitable for commodification as the negation of a permissible market. Thus, they reject that votes are inherently unsuited for commodification.

Brennan and Jaworski's argument is also inductive. All inductive arguments rely on a generalization. That is, they make a general claim based on a limited sample size. Because they rely on generalizations, conclusions that are induced (i.e. arrived at via inductive arguments) do not follow necessarily from the premises, but are more or less probable. Brennan and Jaworski claim that it is probable that all arguments for the moral impermissibility of a market in votes fail. They justify this general claim by showing how their view tracks considerations of justice better than what they refer to as "The Folk Theory of Voting Ethics", and by rejecting a range of objections to a market in votes. Brennan and Jaworski does not formalize their own argument for a market in votes. I have chosen to formalize it like

1. Either it can be shown that there are no circumstances where I may buy or sell a vote I may

58 Ibid. pp. 188-94
59 Brennan and Jaworski does not formalize their own argument for a market in votes. I have chosen to formalize it like
cast, or it should be concluded that I may buy or sell votes in some circumstances.

2. These arguments which conclude that I may not buy or sell a vote I may cast are false.

3. Considerations of justice entails that I may buy and sell a vote whenever I may cast it for free.

4. If granted 1.-3., it is probable that all arguments which hold that I may not buy or sell a vote I may cast are false.

Conclusion: I may buy or sell any vote I may cast.

Brennan and Jaworski claim that their view on voting, and a market in votes, tracks considerations of justice better than the common view on the ethics of voting in Canada and the US. This view, which Brennan has coined “The Folk Theory of Voting Ethics”, places few restrictions on the act of voting, but categorically excludes the buying and selling of votes. In contrast, Brennan and Jaworski's view places strict requirements on voting, but no additional requirements when it comes to buying and selling votes. Brennan and Jaworski present five cases to show how The Folk Theory of Voting Ethics fails to track considerations of justice where their view does not:

"Ignacio knows almost nothing about politics. He has never studied economics or political science. Come Election Day, he watches 30-second advertisements from two major candidates. He feels in his gut that one of the candidates has better ideas than others, and (sic.) votes for those candidates, and votes accordingly."^{61} (my own parenthesis)

"Carla knows almost nothing about politics. She has never studied economics or political science. Come Election Day, she shows up to the polls, and sees a list of names she doesn't recognize for an office (the "comptroller") whose function she can't begin to guess. She picks the name she thinks sounds the most regal."^{62} (Brennan and Jaworski's parenthesis)

"[...S]uppose there are two presidential candidates, Al and Bob. Suppose Al and Bob are

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60 Ibid. p. 188.
61 Ibid.
62 Ibid.
identical in all respects, except how they intend to deal with climate change. Suppose that the evidence overwhelmingly favors Al's position; in fact, the evidence is so strong that no person could justifiably advocate Bob's position. But now suppose that either George Soros or the Koch brothers – again, pick your favorite villain here – pays the majority of voters to vote for Bob.63 (my own brackets)

"Loren is a prominent political philosopher and political economist who has written some of the world's most important books and articles on voting. Loren has a thorough understanding of the social sciences, and has as much a claim to having sound political ideas as any person alive. Still, Loren doesn't vote, in large part because he recognizes that his individual vote has almost no chance of making a difference. On Election Day, his friend and colleague Jason pays Loren $200 to vote his conscience."64

"[...S]uppose you know that many careless, ignorant voters are going to vote for a harmful candidate. They will not be convinced by evidence and argument. However, suppose you could pay them to vote for what you justifiably believe, on the basis of sound reasoning with good evidence, is the best candidate."65 (my own brackets)

According to the Folk Theory of Voting Ethics, Brennan and Jaworski claim, nothing untoward is taking place in the two first cases. Ignacio and Carla are merely exercising their right to vote in a way they are entitled to do. In the last three cases, however, moral wrongs take place because, regardless of outcome, votes have been bought and sold.66

Brennan and Jaworski claim this outcome is puzzling, because both Carla and Ignacio are acting recklessly. Furthermore, in their recklessness they increase the likelihood of a bad outcome from the election, with a potentially disastrous outcome for everybody! On the other hand, both Loren and “you” voted responsibly. If everybody voted like that, society would be a better place. Why is it immoral to pay or be paid to make society a better place?67

63 Ibid. p. 189
64 Ibid. p. 188-9
65 Ibid. p. 189
66 Ibid.
67 Ibid.
Unlike the Folk Theory of Ethical Voting, Brennan and Jaworski claim, their own view on ethical voting and a market in votes tracks concerns for justice. According to their view, it is impermissible to vote in the three first cases. Ignacio and Carla do not have justified beliefs about politics, and they cast their votes irresponsibly. George Soros or the Koch brothers vote either irresponsibly or maliciously when they pay people to vote for Bob. It is neither permissible to buy votes for Bob nor sell votes for Bob. It is, in fact, impermissible to vote for Bob regardless of payment. What is common in all of these cases is that voting in this manner increases the likelihood of a bad outcome that brings society further away from the ideal standard of justice.68

This is in contrast to the two latter cases. According to Brennan and Jaworski’s view it is permissible to buy votes in these cases because the votes being cast are, themselves, permissible. In the fourth example, Loren is a highly qualified voter that will vote responsibly. In the fifth example, buying people's votes make those who would have otherwise voted irresponsibly, vote responsibly. In both cases more votes are being cast in a responsible way, increasing the likelihood of a good outcome that brings society closer to the ideal standard of justice.69 Thus, considerations of justice implies that it is permissible to buy and sell a vote whenever it is permissible to cast it for free.

Brennan and Jaworski also support their general claim by rejecting objections to a market in votes. Specifically, they reject (a.) selling a vote is to sell the right to vote, (b.) that voting is a civic duty, so people should not get paid, (c.) that buying and selling votes communicates the wrong attitudes, and (d.) that buying and selling votes undermine civic virtue.

The first objection (a.) is that a market in votes is impermissible because the right to vote is inalienable, therefore people cannot sell it. Brennan and Jaworski respond to this objection by pointing out the difference between a market in votes, and a market in the right to vote. That is, even if I obligate myself to vote in a particular way, I still retain my right to cast a vote.70

The second objection (b.) is that a market in votes is impermissible because people have a civic duty to

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68 Ibid.
69 Ibid.
70 Ibid. pp. 189-90
vote, and should, therefore, not be paid to vote. Brennan and Jaworski reject this argument, stating that: "Many stereotypical exercises of civic virtue, such as holding political office, serving the military, performing jury duty, are paid."\(^7\)

The third objection (c.) argues that a market in votes violates the meaning of citizenship, undermining its significance. Brennan and Jaworski question if this is the case, but ultimately argue that even if it is the case, that is a reason to change the understanding of citizenship, as permissible transactions in votes promote justice.\(^7\)

The last objection (d.) claims that in order to maintain civic virtue, people need to believe that voting has a privileged moral status, and that a market in votes would erode this belief. Brennan and Jaworski respond to this objection by drawing a distinction between moral status and the perception of moral status, stating that: "Even if this were so (i.e. the objection holds), it wouldn't mean that vote selling is in fact wrong. It would at best show that it's useful for people to believe it is wrong."\(^7\) (My own parenthesis)

### 3.2 Rejecting a market in the content of democratic votes:

I reject Markets Without Limits by showing that transactions in the content of votes cast in the elections of a justifiable democracy (i.e. content of democratic votes) is impermissible. Markets Without Limits claims that all goods that may be given or used may also be bought and sold (under some circumstance). Thus, it can be proven false by showing that some good that may be given or used may not be bought or sold. I reject Markets Without Limits on Brennan and Jaworski's premises. Therefore, I argue that a market in the content of democratic votes is impermissible, while accepting the moral commitments of both their argument for Markets Without Limits and their argument for a market in votes. Specifically, I argue that it is inherently wrong to buy and sell the content of democratic votes because such transactions would undermine the democratic political process. That is, all transactions in the content of votes necessarily involve an obligation to vote in a way that is dictated by somebody other than the voter. This is incompatible with the grounding moral principle of democracy: Ultimate political power rests with the governed. Therefore, transactions in the content of

\(^{71}\) *Ibid.* pp. 190-1


\(^{73}\) *Ibid.* p. 193
democratic votes undermine the democratic political process. Undermining justifiable democracies is a collectively harmful activity, and democracies can be justified. Given the Clean Hands Principle, participating in collectively harmful activities is wrong if the cost of refraining is low. The cost of not preventing voters from exercising their political power is low. The cost is a justifiable democracy functioning as intended. Thus I conclude that, insofar as a democracy is justifiable, and given the Clean Hands Principle, it is wrong to undermine the democratic, political process by buying and selling the content of votes.

To reject Markets Without Limits on its own premises, I must accept two of Brennan and Jaworski's moral commitments – though I also implicitly accept all of Brennan and Jaworski's moral commitments that are not contradicted by my argument. I must accept Brennan and Jaworski's understanding of the commodification debate and Brennan's theory of ethical voting. Brennan and Jaworski understand the central question of the commodification debate to be whether some goods are inherently unsuited for commodification. Thus, it does not matter how narrow or fantastical the circumstances in which a good (that may be used) may be bought and sold. As long as it may be bought and sold at all it is in accordance with Markets Without Limits. I will accept this criteria and argue that the content of democratic votes may not be bought or sold under any circumstance. Furthermore, Brennan and Jaworski base their argument for a market in votes on Brennan's theory of ethical voting. This theory claims that I may only vote if I do so based on justified beliefs and in order to promote a just society. With this theory as their starting point they argue that it is permissible to buy and sell votes whenever it is permissible to vote. In other words, Brennan and Jaworski claim that the only relevant moral question when it comes to voting is whether the right votes are cast. Though I accept Brennan's theory of ethical voting, I argue that, within a democratic system, it is also relevant who votes. Specifically, I argue that in a justifiable democracy it is impermissible to prevent voters from exercising their political power, and that transactions in the content of votes do prevent that.

Though I accept the moral commitments of Brennan and Jaworski's arguments, I reach the opposite conclusion. I conclude that a market in the content of democratic votes is impermissible. I reach this conclusion based on two reasons not shared by Brennan and Jaworski: The first reason is that Brennan and Jaworski's understanding of a market in votes conflate two kinds of goods, the act of voting and the content of votes. A transaction in the content of votes necessarily obligates the seller (i.e. the voter) to
vote in a way that is dictated by someone else. They are prevented from exercising their political power. Transactions in acts of voting are not relevant to my argument. This is because transactions in the act of voting only obligates the seller to participate in an election, not to vote in any specific way. Thus, a voter that sells an act of voting is not prevented from exercising their political power. The second reason is that it is wrong to prevent voters from exercising their political power in a justifiable democracy. Specifically, my argument is that:

1. Buying and selling the content of votes necessarily obligates voters to vote in a way dictated by others.
2. If a voter is obligated to vote in a way dictated by others, then that voter is prevented from exercising their political power.
3. It is wrong to prevent voters from exercising their political power in a justifiable democracy.
4. Democracies can be justified (in some situations).

Conclusion: It is necessarily wrong to buy and sell the content of votes in a justifiable democracy.

Brennan and Jaworski argue for the moral permissibility of transactions in votes. However, their understanding of 'votes' conflate two kinds of goods, the act of voting and the content of votes. I argue that buying and selling the content of democratic votes – that is, the content of votes cast in the elections of justifiable democracies – is inherently wrong.

Brennan and Jaworski's conflation is clearly demonstrated by comparing two of the five cases they use to show that their theory tracks considerations of justice. Specifically, in the fourth case where Loren is paid to vote his conscience, and the fifth case where “you” pay ignorant and irresponsible voters to vote for the candidate you justifiedly believe is best suited for office. According to Brennan and Jaworski, both of these cases are examples of permissible transactions in votes. However, in the fourth case, Loren, a competent and responsible voter is paid to vote his conscience. This is an example of a transaction in the act of voting. By accepting payment Loren obligates himself to participate in the election, but not to cast his vote for any concrete candidate or policy. He is free to

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74 Ibid. p. 188-9
75 Ibid. p. 189
76 Ibid.
77 Ibid. p. 188-9
express his own political opinion. Though he is obligated to participate in the election, he can exercise political power on behalf of himself. In the fifth case, “you”, a well informed and responsible person, pay misinformation and irresponsible voters to vote for the candidate that you believe is best suited to promote justice. You hold this opinion based on sound empirical data, and a good understanding of both political science and morals. This is an example of a transaction in the content of votes. By accepting your payment, the irresponsible voters are not only obligated to participate in the election, but also to vote in a way that is dictated by you, and not them. That is, they are obligated to exercise political power on your behalf, and prevented from exercising it on their own behalf.

Transactions in the content of votes necessarily obligates the voter to vote in a way that is dictated by others. Even an informed voter that freely and responsibly chooses to sell the content of their vote is prevented from exercising their political power on their own behalf. This is because the informed voter chooses to enter into an agreement that obligates them to vote in a specific way. It is the buyer of the vote that dictates how the vote is cast. Thus, the voter exercises their political power on behalf of the buyer, not themselves. This is true even if the voter would only sell their vote on the condition that it be cast in this specific way. Consider this analogous situation: If a carpenter is commissioned to build a house, it is not the carpenter that is having the house built. It is the customer. It is their house. This is true regardless of why the carpenter choose to build the house for them. The carpenter could have any number of conditions for taking the job, but they are nonetheless building it on behalf of somebody else. Similarly, transactions in the content of votes necessarily prevent voters from exercising their political power on their own behalf.

It is inherently wrong to buy and sell the content of democratic votes because in a democracy it is not only morally relevant whether the right votes are cast, but also who votes. Democracy is a system for a group of people to make collective decisions, and it is based on the principle that ultimate political power belongs to those who are subject to it. In other words, for a system to be democratic, the governed have to be involved in some essential part of the decision-making process. Conversely, preventing the governed from participating in the decision-making process would mean the system is no longer democratic. As I am concerned with the moral status of transactions in votes, my focus is on

78 Ibid. p, 189
democracies where the governed exercise their political power through elections – the typical example being a democratic state, or local government. Ideally, there is no discrepancy between the electorate and the governed. However, in practice, there must be some. Not everyone ought to have the right to vote despite being subject to the political system.\textsuperscript{80} For example, children are subject to the state, but are generally not seen as competent to vote. However, assuming the electorate consists of those among the governed that ought to have the right to vote, preventing them (as a whole) from exercising their political power would be incompatible with the grounding principle of democracy. It would mean that democracy would be overturned.

Even if preventing the electorate from voting would overturn democracy, it is not granted that it is wrong to do so. It is only wrong to overturn a democracy if, in the circumstances, democracy is a justifiable way to make collective decisions, and no legitimate political decision has been made to overturn the system. Democracy is not always justifiable. In the context of the military, for example, a hierarchical system is generally seen as more suitable. However, democracy is commonly regarded as a justifiable system for state and local government. Thus, it is reasonable to assume that democracies can be (and that some are) justified, and that preventing the electorate as a whole from participating in the elections of a justifiable democracy is wrong.

It is wrong to prevent the electorate as a whole from voting. It is also wrong to prevent any one member of the electorate (i.e. voter) from voting. To prevent a voter from exercising their right to vote is a collectively harmful activity. This is true regardless of whether it is the voter themselves or someone else that prevents them from doing so. According to Brennan and Jaworski, a collectively harmful activity is an activity where the group causes harm, but individual input in the group activity has no appreciable impact.\textsuperscript{81} As part of his theory of ethical voting, Brennan argues that voting irresponsibly is a collectively harmful activity because it increases the likelihood of a bad outcome. Preventing someone from exercising their legal right to vote is analogous to this. That is, even though preventing one person from voting does not contribute significantly to the overturning of democracy, it does contribute. Likewise, one bad vote does not significantly increase the likelihood of a bad outcome, 

\textsuperscript{80} I am concerned with what members of the electorate may do with their votes. Specifically, whether they may buy or sell them. Thus, I will assume, for the sake of argument, that any justifiable democracy can also justify whatever discrepancy there might be in the members of the electorate and the governed.

but it does increase the likelihood. If enough people vote irresponsibly, a bad outcome will be the result. If enough people are prevented from exercising their legal right to vote, democracy will be overturned.

Brennan appeals to the Clean Hands Principle when explaining why participating in collectively harmful activities are wrong. I am doing the same. The principle states that: "One should not participate in collectively harmful activities when the cost of refraining from such activities is low." 82 I have already accepted this principle as part of Brennan's theory of ethical voting. However, my application of the principle is not dependent on this theory. Thus, I need to justify the principle, as well as showing that it is applicable in the context of my argument.

The Clean Hands Principle is hardly controversial. As Brennan points out, it can be derived (in different permutations) from several different moral theories, like Kantianism, rule consequentialism, and eudaimonism. 83 However, even if it is uncontroversial, it must be supported by some justification. Brennan justifies the principle by appealing to intuitions. I will make use of his defense:

"Consider an analogy. Suppose a 100-member firing squad is about to shoot an innocent child. They will fire all at once. Each bullet will hit the child at the same time, and each shot would, on its own, be sufficient to kill her. You can't stop them, so the child will die regardless of what you do. Now, suppose they offer you the opportunity to join in and fire with them. You can make the 101st shot. Again, the child will die regardless of what you do. Is it impermissible for you to join the squad?" 84

Brennan claims that most people would have a strong intuition that it is wrong to participate in the firing squad, especially if the cost of refraining is low. A reasonable explanation of this intuition, Brennan offers, is that the Clean Hands Principle is true. There is, in fact, a moral obligation to avoid participating in harmful activities even if they are over-determined, and especially if the cost of refraining is low. 85 I find this justification of the Clean Hands Principle plausible.

82 Ibid.
83 Ibid.
84 Ibid.
85 Ibid.

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If the Clean Hands Principle is true, the question is whether it is applicable to my argument. I have already argued that preventing members of the electorate from voting is a collectively harmful activity. However, the Clean Hands Principle is only relevant if the cost of refraining from participating in the collectively harmful activity is low. The cost of refraining from voting badly is low. The voter may either vote responsibly or abstain. Either way they will face little to no negative repercussion for their choice. The same is true of not preventing voters from voting. The cost of not preventing voters in a justifiable democracy from exercising the political power they ought to have (i.e. their vote) is merely a democratic political process that functions as intended. Thus, the Clean Hands Principle is applicable, and it follows that it is wrong to prevent voters from voting.

I have argued that it is inherently wrong to buy and sell the content of democratic votes because such transactions would undermine the democratic political process. The democratic process is a process by which we, as members of society, make collective decisions and act upon them. All transactions in the content of votes necessarily involve an obligation to vote in a way that is dictated by somebody other than the voter. This is incompatible with the grounding moral principle of democracy: Ultimate political power rests with the governed. Thus, it undermines the democratic political process. Undermining justifiable democracies is a collectively harmful activity, and democracies can be justified. Given the Clean Hands Principle, participating in collectively harmful activities is wrong if the cost of refraining is low. The cost of not preventing voters from exercising their political power is low. The cost is a justifiable democracy functioning as intended. Thus I conclude that, insofar as a democracy is justifiable, and given the Clean Hands Principle, it is wrong to undermine the democratic, political process by buying and selling votes.

3.3 Chapter Conclusion:
I reject universal commodification as applied to the discussion on moral permissibility by rejecting Brennan and Jaworski’s principle, Markets Without Limits. Markets Without Limits claims that all goods that may be given or used may also be bought and sold (under some circumstance). Therefore, it can be proven false by showing that some good that may be given or used may not be bought or sold. Though I accept Brennan and Jaworski’s moral commitments, I have argued that the content of democratic votes may not be sold under any circumstance, even when it is permissible to vote. If this argument holds that proves Markets Without Limits false.

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Though I accept Brennan and Jaworski's moral commitments, my argument does not rely on them. Both my argument and Brennan's theory of ethical voting relies on the Clean Hands Principle, however, my argument does not rely on Brennan's theory of ethical voting. My use of the Clean Hands Principle is distinct from Brennan's use of it.

I have argued that transactions in the content of democratic votes. Such transactions are wrong because they would undermine justifiable democracies by taking political power away from the voters. Taking political power away from the voter is collectively harmful act and, given the Clean Hands Principle, it is wrong to commit collectively harmful acts when the cost of refraining is low. The cost of refraining from taking political power away from the voters is low. The cost is a justifiable democracy functioning as intended.

Granted my rejection of the moral permissibility of transactions in the content of democratic votes, Markets Without Limits is false. Thus, for the purpose of this thesis, I have rejected universal commodification as applied to moral permissibility.

4. Presenting Szabo's argument for the gift-commodity principle:
I argue that universal commodification is false, both as applied to moral permissibility and to legal permissibility. Universal commodification claims that mere commodification (i.e. turning goods into commodities that can be bought and sold) does not introduce moral wrongs (that warrant legal prohibition). The problem with this position is that some goods do introduce wrongs when commodified.

The reason I reject universal commodification as applied to both moral and legal permissibility is that these two discussions are entangled. The discussion on moral permissibility applies to individuals, and asks what is morally acceptable to buy and sell. The discussion on legal permissibility applies to society as a whole, and asks what ought to be legal to buy and sell. However, answers in one discussion present prima facie reasons in the other. Furthermore, both discussions are concerned with the same phenomenon, commodification, and both discussions seek to answer how people, as individuals on the one hand and members of society on the other, ought to think about markets and market transactions. Thus, a more comprehensive rejection of universal commodification requires rejecting it as applied to both discussions rather than just one.

I reject universal commodification as applied to both the discussion on moral and legal permissibility by rejecting Brennan and Jaworski's principle, Markets Without Limits, and Tait Szabo's principle, the gift-commodity principle. More specifically, I reject Markets Without Limits and the gift-commodity principle by rejecting the permissibility of two concrete markets Brennan and Jaworski and Szabo are concerned with – one for each principle. Though I accept the moral commitments underpinning their arguments, I argue that they still fail to show that all contested markets are permissible.

I have already rejected universal commodification as applied to moral permissibility by rejecting Markets Without Limits. Over the two next chapters of this thesis I will reject the gift-commodity principle, and with it universal commodification as applied to legal permissibility. In this chapter, I will present Szabo's overall argument for the gift-commodity principle, before rejecting it in the following chapter.

Szabo promotes the gift-commodity principle and, like Markets Without Limits, this principle can be interpreted in two ways. Understanding how to interpret the gift-commodity principle is necessary to
assess and reject Szabo's argument. The gift-commodity principle states that: “[…] if it is (or ought to be) legally permissible for me to give away or not give away X, then it ought to be legally permissible for me to sell X.” (My own brackets)\(^86\) In other words, mere commodification does not introduce moral wrongs that warrant legal prohibition. This principle can be interpreted in two ways. It can be interpreted as a universal principle that allows for no exceptions, or it can be interpreted as a general principle which only needs to be true in the circumstances it is intended to be applied to, but not in every possible extension. Again, like Markets Without Limits, the gift-commodity principle should be interpreted as a general principle.

The gift-commodity principle is best interpreted as a general principle, but for a different reason than Markets Without Limits. Markets Without Limits is best interpreted as a general principle because Brennan and Jaworski do not present any general proof that commodification cannot introduce wrongs. If commodification can introduce wrongs, a universal principle is necessarily false. In the absence of proof to the contrary, it is reasonable to assume commodification can introduce wrongs. Thus, Markets Without Limits is best interpreted as a general principle, as this interpretation allows for exceptions. Unlike Brennan and Jaworski, Szabo claims the burden of proof rests on his opponents. In other words, there is a presumption that contested markets ought to be legal.\(^87\) It is unclear how he justifies this claim. Szabo's justification might be that an underlying presumption for the commodification debate is that markets in general are permissible, so the burden of proof is on those who argue there are exceptions – even if these exceptions are intuitive and commonly held beliefs. Regardless, I will accept Szabo's claim for the sake of argument. However, even if there is such a presumption, the gift-commodity principle is best interpreted as a general principle. A general principle only needs to hold in some cases. The gift-commodity principle, interpreted as a general principle, only needs to hold in the cases that are central to the commodification debate. This limitation in scope also limits counter-arguments to only addressing the central cases of the debate. Therefore, though Szabo does not specify how to interpret the gift-commodity principle, it is reasonable to interpret it as this leaves the least room for counter-arguments.

Counter-arguments are also limited by the degree of idealization an argument makes use of. A non-ideal argument must consider factors an ideal argument need not, and vice versa. Brennan and Jaworski's

\(^{87}\) Ibid. pp. 3-4
argument is an ideal argument. It asks whether any contested market is *inherently* wrong.\(^{88}\) That is, though they try to ground their argument in actual circumstances, they don't need to do so for it to succeed.\(^{89}\) Their argument succeeds as long as commodification does not introduce wrongs in some circumstance, no matter how fantastical. In contrast, Szabo's argument is a non-ideal argument. He asks whether prohibiting contested markets is *actually* preferable to legalization.\(^{90}\) Szabo is not free to ignore actual circumstances, nor society's realistic ability to alter these circumstances. For example, one of the reasons Szabo emphasizes when defending the gift-commodity principle is the possibility that prohibition leads to a black market:

"Several of my responses to the defenses of the criminal prohibitions also appeal to the fact that the exchanges in question take place regardless of their current criminal status. In other words, black markets exist in organs, and prostitution and blackmail take place in any case. [... T]he criminal status of, for example, organ-sales or prostitution may make those activities even more dangerous than they would be if they were legal and regulated."\(^{91}\) (My own brackets)

Black markets are only a valid concern in a non-ideal argument. That is, it is not necessarily true that legal prohibition leads to a black market. It is possible, and maybe even likely, but it is also possible, *in principle*, that transactions will cease when prohibited. Thus, for Szabo's argument to succeed he must show that it is preferable to legalize contested markets given actual circumstances, or the existing capabilities to alter those circumstances, whatever those capabilities realistically are\(^{92}\).

Szabo defends the gift-commodity principle by rejecting arguments to the contrary:

"The general approach to this project [i.e. Szabo's argument] is to defend the gift-commodity principle by rejecting what seem to be some the strongest counterexamples, namely organ-sales, prostitution and blackmail. I aim to provide a detailed critical


\(^{89}\) *Ibid.* p. 49


\(^{91}\) *Ibid.* p. 7

\(^{92}\) As I reject Szabo's argument on his own terms I will not question whether he makes realistic or unrealistic assumptions about society's capabilities to change contingent wrong-making features of markets. I will merely accept his view.
rebuttal to a comprehensive range of arguments offered in defense of the legal prohibition of each kind of exchange. […] In each case, the burden on my opponents is heavy. A stronger defense is required to justify a legal prohibition rather than mere regulation, or a legal prohibition rather than mere moral condemnation. Furthermore, my opponents are defending the legal prohibition of things that they agree ought to be legally permissible to give away or not to give away. Despite the burden on my opponents, however, the gift-commodity principle runs strongly against conventional beliefs. The legal prohibitions that I reject are commonly accepted.”93 (my own brackets)

Szabo's argument is an inductive, disjunctive argument for the legal permissibility of contested markets. He asks whether it ought to be legal to buy and sell goods that it ought to be legal to gift. Rejecting a series of arguments for the impermissibility of contested markets, Szabo concludes that: “[…] if it is (or ought to be) legally permissible for me to give away or not give away X, then it ought to be legally permissible for me to sell X.”(My own brackets)94 Formalized, Szabo's argument consists of six claims95:

1. Either it can be shown that there are cases where a good shouldn't be legal to buy or sell, but should be legal to give away or not give away, or it ought to be concluded that every good that should be legal to give away or not give away should also be legal to buy or sell.
2. The strongest cases supporting the position that some goods shouldn't be legal to buy or sell, but should be legal to give away or not give away are the buying and selling of organs, sex and secrecy.
3. If the strongest cases supporting the position that some goods shouldn't be legal to buy or sell, but should be legal to give away or not give away do not hold, then it is reasonable to assume that there are no cases where a good shouldn't be legal to buy or sell, but should be legal to give away or not give away.
4. These arguments concluding that organs, sex and secrecy shouldn't be legal to buy or sell, but

93 Ibid. pp. 3-4
94 Ibid. p. 2
95 Unlike Brennan and Jaworski, Szabo's argument has not received much response. Additionally, Szabo himself does not formalize his argument. Thus, I have chosen to formalize it in a way that highlights the similarities to Brennan and Jaworski's argument.

Ibid. pp. 1-9

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should be legal to give away or not give away are false.

5. Granted 4., it is reasonable to assume that all arguments concluding that organs, sex and secrecy shouldn't be legal to buy or sell, but should be legal to give away or not give away are false.

6. If granted 2.-5., it is reasonable to assume that there are no cases where a good shouldn't be legal to buy or sell, but should be legal to give away or not give away.

Conclusion: if it ought to be legal to give away or not give away a good, then it ought to be legal to buy or sell that good. (i.e. “[…] if it is (or ought to be) legally permissible for me to give away or not give away X, then it ought to be legally permissible for me to sell X.”(My own brackets)\(^96\))

Like Brennan and Jaworski's argument, Szabo's argument is disjunctive. A disjunctive argument is an argument which derives its conclusion from rejecting the negation of the conclusion. It is possible to conclude that a claim is true by rejecting the negation. This is because a claim and its negation are mutually exclusive. If one is true, the other is necessarily false. In Szabo's case, the disjunctive inference relies on his understanding of legality. That is, Szabo argues (that it is probable) that all contested markets ought to be legal by rejecting (that it is probable) that all contested markets ought to be prohibited. He views total prohibition as the negation of legality.\(^97\) In other words, as long as it is legal to buy and sell a good in some form, it isn't prohibited. Thus, the gift-commodity principle is proven by rejecting that any contested market ought to be prohibited.

Szabo's argument is also inductive. Again, this is similar to Brennan and Jaworski's argument. All inductive arguments rely on generalization. That is, they make a general claim based on a limited sample size. In Szabo's case, he makes the general claim that contested markets shouldn't be prohibited based on his claims that organ-selling, prostitution and blackmail should not be prohibited. Because they rely on generalizations, conclusions that are induced (i.e. arrived at via inductive arguments) do not follow necessarily from the premises, but are more or less probable. Therefore, Szabo claims that it is probable that no contested markets ought to be prohibited.

The probability of inductive arguments is determined by three guidelines: (1.) How large and varied of

\(^{96}\) Ibid. p. 2
\(^{97}\) Ibid. pp. 3, 12, 14, 15-6

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a sample the generalization is based on, (2.) whether there is any evidence to the contrary, and (3.) how plausible the conclusion is given other relevant knowledge.

Szabo's generalization is based on what he takes to be the three strongest counter-examples to the gift-commodity principle: Organ-sales, prostitution and blackmail. For each case he rejects a comprehensive range of arguments defending the legal prohibition of the market. Though some of these arguments might be similar, others are unique to the market in question98. I will not present all of these arguments here, nor Szabo's rejection of them. My aim is to reject the gift-commodity principle by providing proof to the contrary. Specifically, by showing that blackmail is legally impermissible (whereas choosing whether to conceal or reveal information should generally be legal). Therefore, I will accept Szabo's defense of organ selling and prostitution for the sake of argument and give a more detailed presentation of Szabo's defense of blackmail in the next chapter.

Though I will not present all the arguments Szabo treats, nor his rejections, I will present the three argumentative strategies he emphasizes when defending the gift-commodity principle. Specifically, his appeals to internal consistency in a set of social policies, the existence of black markets, and the double bind. Presenting these argumentative strategies is worthwhile because Szabo appeals to them repeatedly and regardless of case to defend the gift-commodity principle. Therefore, seeing their strength and limitations gives a better understanding of Szabo's reasoning.

”In responding to the various arguments defending the legal prohibitions on the market that I argue ought to be removed, I often appeal to other activities, behaviors, or occupations that I claim are analogous in relevant ways to organ-sales, prostitution, or blackmail, but are nevertheless legally permitted. The point of doing so is to demonstrate that the legal prohibition in question is inconsistent with our social policies as a whole. I take it that internal consistency is a hallmark of any rational, defensible set of social policies. This approach does, however, leave it open to my opponents to bite the bullet. […] Where my arguments leave it open to my opponents to respond in this way, I have often also tried to demonstrate how unappealing it is to do so, although in some cases I take it that no effort is needed to demonstrate how unappealing that

98 Ibid. p. 3

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One of the considerations Szabo repeatedly raises in defense of the gift-commodity principle is that legal prohibition of some contested market is inconsistent with already existing and accepted social policies. This consideration features heavily in Szabo's argument for legalizing blackmail. Granted that internal consistency is important for a set of social policies, this creates a powerful reason to change policy. However, as Szabo points out, it is not granted that what ought to be changed is the legal status of the contested market. It could be that instead it is the analogous activity that ought to be prohibited – of course, if the inconsistency is that it ought to be legal to gift a good, but not legal to sell it, biting the bullet makes the counter-argument irrelevant to the gift-commodity principle. Acknowledging this possibility, Szabo argues that inconsistent social policies that involve contested markets ought to be consistently remedied by legalizing the markets.

“Several of my responses to the defenses of the criminal prohibitions also appeal to the fact that the exchanges in question take place regardless of their current criminal status. In other words, black markets exist in organs, and prostitution and blackmail take place in any case. The criminal prohibition of an activity, behavior or occupation does not entail its actual eradication (even if that is desired), and this fact must be taken into account in these arguments. This is especially important for arguments that rely on appeals to protecting the persons involved in these activities, behaviors, or occupations. [… T]he criminal status of, for example, organ-sales or prostitution may make those activities even more dangerous than they would be if they were legal and regulated.”

(My own brackets)

Another consideration Szabo raises repeatedly when defending the gift-commodity principle is the possibility that prohibition of contested commodities can lead to black markets, and that these markets would be worse than their legal counterparts. This can be a powerful reason to legalize controversial markets, especially markets where the main concern is the well-being of the participants. However, though Szabo does not point it out, appeals to black markets can cut both ways. As long as some ways of buying and selling goods are illegal (viz. a regulated market) it is possible to sell goods illegally.

99 Ibid. pp. 5-6
100 Ibid. p. 7
Thus, the question becomes whether a regulated market or total prohibition is best suited to mitigate the harms of a black market.

“The problem of the double bind, according to Radin, is a practical problem faced by concerns of justice. If we compromise ideals too much because of the difficulties of present circumstances, we may entrench the status quo. [...] On the other hand, if we are too idealistic and ignore present circumstances we may also entrench the status quo. [...] While we try to make progress toward our ideal vision of the good world, we must take into account the present conditions of the world we live in now. If due to present conditions both legally permitting and legally prohibiting prostitution, for example, may worsen the situations of women, we must change the conditions that create the dilemma of this double bind, and we must consider whether the legal permissibility or legal prohibition of prostitution in the meantime best contributes to this change.”

The last consideration Szabo repeatedly raises when defending the gift-commodity principle is the dilemma of the double bind as promoted by Margaret Jane Radin. The double bind is a practical problem. Because reality is less than ideal, sometimes all the options available are incompatible with the ideal state of affairs. For example, legalizing prostitution might lead to increased discrimination against women in general, thereby reinforcing the inequality and oppression of women, but prohibiting prostitution might put sex workers in a more vulnerable position, and also reinforce the inequality and oppression of women. According to Szabo, the answer to the dilemma is to change the conditions that create it in whatever way contributes the least to undermining justice, even if that option is only the lesser of two evils. In the discussion on legal permissibility, this question becomes whether prohibiting or legalizing a contested market undermines justice the least. Szabo argues that, consistently, legalizing contested markets undermine justice the least and is, therefore, the best way to escape the double bind.

Common for all three of these appeals is that they can cut both ways. A prohibition that is inconsistent with existing and accepted social policy can be mitigated either by legalizing the market or changing existing policy – granted, of course, that the inconsistent policy is not preferable to the alternatives. As

101Ibid. pp. 8-9
102Radin, Margaret Jane, Contested Commodities, Cambridge, Harvard University Press, 1996, p. 123

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long as the legal market is regulated, black markets can exist. If a black market is harmful the question is simply whether legalizing or prohibiting the market is the best way to mitigate the harm. If both legalization and prohibition is incompatible with justice, the question is which option can change the conditions creating the dilemma while undermining justice the least. Tough all three appeals can cut both ways, Szabo argues that, consistently, they will favor legalizing contested markets, not prohibiting them.

5. Rejecting the gift-commodity principle:
I reject universal commodification as applied to both the discussion on moral and legal permissibility by rejecting Markets Without Limits and the gift-commodity principle. I have already rejected Markets Without Limits by showing that buying and selling votes is morally impermissible. In this chapter, I will reject the gift-commodity principle by showing that blackmail ought to be prohibited. Furthermore, I will reject a market in blackmail while accepting the moral commitments underpinning Szabo's argument.

The gift-commodity principle is concerned with legal permissibility. It states that: “[…] if it is (or ought to be) legally permissible for me to give away or not give away X, then it ought to be legally permissible for me to sell X.” (My own brackets) 103 Thus, if blackmail is legally impermissible, but keeping or sharing secrets ought to legal, then that constitutes a counter-example to the gift-commodity principle.

I reject blackmail, rather than some other contested market, for two reasons: First, because the gift-commodity principle should be interpreted as a general principle and Szabo defends the gift-commodity principle by rejecting the prohibition of blackmail. Second, my rejection of blackmail, Brennan and Jaworski's argument for the moral permissibility of transactions in votes, and my rejection of permissible transactions in democratic votes are all concerned with how these markets impact society's capabilities to promote justice.

First, the gift-commodity principle ought to be interpreted as a general principle. Therefore it only needs to hold true in the cases central to the commodification debate. Szabo defends the gift-commodity principle by rejecting that organ-sales, prostitution and blackmail ought to be prohibited. Thus, by rejecting one of the cases Szabo bases his argument on, I will show that the gift-commodity principle does not hold, even in cases where it is intended to hold.

Second, I reject blackmail rather than organ-sales or prostitution. This is because my objection to blackmail has a thematic likeness to my objection to a market in the content of democratic votes. I argue that it is morally impermissible to buy and sell the content of such votes because it would undermine justifiable democracies. In other words, a market in the content of democratic votes would

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undermine society's capability to make and act on decisions. My objection to legalizing blackmail is grounded in the impact such a market would have on society's capability to promote justice. I reject legalizing blackmail by claiming it would likely undermine a constructive public discourse, thereby undermining society's capability to discuss what justice is, and how to promote it. I claim that legal prohibition would be the preferable way of mitigating this impact.

5.1 Presenting Szabo's argument for legalized blackmail:

Szabo states that:

"Generally, we are and ought to be legally permitted to keep secrets. Generally, we are and ought to be legally permitted to give our money to whomever we please. Generally we are legally permitted to do both of these things at our own discretion. We are not permitted, however, to keep secrets on the condition of receiving money. Why this is so requires justification."¹⁰⁴

In accordance with his overall argument, Szabo argues that blackmail ought to be legal. Specifically, he claims that the criminalization of blackmail is paradoxical, and that no argument for the prohibition of blackmail has successfully dispelled the paradox.¹⁰⁵ In other words, Szabo claims that the permissibility of blackmail ought to be presumed, and that there is no proof contradicting this presumption. Szabo understands blackmail as "keep[ing] secrets on the condition of receiving money."¹⁰⁶ (My own brackets)

Of course, blackmail only encompasses vendor-initiated agreements.¹⁰⁷ Buyer-initiated purchases of secrecy, such as a newspaper buying exclusive rights to a story, are generally seen as permissible. The gift-commodity principle states that: “[…] if it is (or ought to be) legally permissible for me to give away or not give away X, then it ought to be legally permissible for me to sell X.”(My own brackets)¹⁰⁸ Thus, Szabo concludes that it ought to be legal to keep secrets on the condition of payment whenever it ought to be legal to choose between keeping or exposing a secret for free (granted that the payment itself is permissible).

¹⁰⁴Ibid. p. 136
¹⁰⁵Ibid. pp. 136-9
¹⁰⁶Ibid.
¹⁰⁷Ibid. p. 144
¹⁰⁸Ibid. p. 2
Not all instances of blackmail are relevant to Szabo's argument. The central question of the commodification debate (as applied to legal permissibility) is whether commodification introduces wrongs that warrant legal prohibition. The gift-commodity principle only claims that all goods that are otherwise permissible (i.e. ought to be legal to gift) ought to be legal to buy and sell. However, blackmail can be wrong for reasons unrelated to commodification. It is wrong for a lawyer to blackmail their client with privileged information, for example, but that is because they do not have the right to expose privileged information in the first place. Instances of blackmail that are wrong for different reasons than commodification are irrelevant to the commodification debate and the gift-commodity principle. Szabo uses four criteria to identify relevant cases of blackmail:

"We must make some stipulations about the core cases of blackmail: (i) the information used in the exchange was acquired in a legal manner; (ii) the blackmailer has no independent legal obligation to disclose the information; (iii) the blackmailer has no independent legal obligation not to disclose the information (or to actively conceal the information); (iv) what the blackmailer asks to be done is itself legal."\(^{109}\) (Szabo's parenthesis)

According to Szabo, blackmail is only permissible if the information used was acquired legally, the blackmailer has no independent legal obligation to keep or expose the information, and the requested payment is itself legally permissible. Violating any of these criteria is legally impermissible independently of commodification, as doing so would violate laws or legally binding obligations.

In accordance with his overall argument, Szabo's argument for the permissibility of blackmail is disjunctive. A disjunctive argument is an argument where the conclusion is proven by rejecting its negation. Szabo views total prohibition as the negation of legality.\(^{110}\) Thus, he argues for the legalization of blackmail by rejecting arguments for the prohibition of blackmail.

Szabo's argument is also inductive. All inductive arguments rely on generalization. That is, they make a general claim based on a limited sample size. Because they rely on generalizations, conclusions that are induced (i.e. arrived at via inductive arguments) do not follow necessarily from the premises, but are

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\(^{109}\)Ibid. p. 137

\(^{110}\)Ibid. pp. 3, 12, 14, 15-6

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more or less probable. Szabo claims that it is probable that no argument for the prohibition of blackmail succeeds in dispelling the paradox of blackmail. He bases this general claim on the paradox of blackmail (i.e. the presumptive reason to accept that blackmail ought to be legal) and his rejection of arguments for the prohibition of blackmail.\textsuperscript{111} Formalized, his argument becomes\textsuperscript{112}:

1. Either it ought to be legal to keep secrets on the condition of payment whenever it ought to be legal to keep or expose the secret for free, or it ought to be prohibited to keep secrets on the condition of payment even when it ought to be legal to keep or expose secrets for free.
2. Presumably, it ought to be legal to keep secrets on the condition of payment whenever it ought to be legal to keep or expose secrets for free. (i.e. the paradox of blackmail)
3. These arguments concluding that it ought to be prohibited to keep secrets on the condition of payment even when it ought to be legal to keep or expose secrets for free are false.
4. If granted 2.- 3., it is reasonable to assume that all arguments claiming it ought to be prohibited to keep secrets on the condition of payment even when it ought to be legal to keep or expose secrets for free are false.

Conclusion: It is probable that it ought to be legal to keep secrets on the condition of payment whenever it ought to be legal to keep or expose secrets for free. (i.e. blackmail ought to be legal)

Szabo bases his generalization on the paradox of blackmail, and his rejection of arguments for the prohibition of blackmail. The paradox of blackmail, as Szabo understands it, consists of three reasons which indicate that blackmail ought to be legal that, in and of themselves, are not sufficient to justify legalizing blackmail. These three reasons do, however, make it reasonable to presume that blackmail ought to be legal, and, therefore, constitute three challenges any argument for the prohibition of blackmail need to address. The three claims are: (1.) Every relevant case of blackmail consists of otherwise legal acts, (2.) similar activities ought to be legal, and (3.) both victim and blackmailer prefer a world where blackmail is permissible.\textsuperscript{113} I will now present Szabo's understanding of these three reasons in order.

\textsuperscript{111}Ibid. pp. 136-7
\textsuperscript{112}Szabo does not formalize his own argument for the legalization of blackmail. I have chosen to formalize it in this way, however, to emphasize the similarity both to Brennan and Jaworski's argument, and to Szabo's overall argument.
\textsuperscript{113}Ibid. pp. 139-46
Because the commodification debate asks whether commodification introduces wrongs that warrant legal prohibition, it is only concerned with the legal permissibility of otherwise permissible goods. In other words, every relevant case of blackmail consists of otherwise legal acts. This limitation supports Szabo's first reason for the paradox of blackmail:

"As an argument to illustrate the paradox, the first premise is that the blackmailer has (or ought to have) the legal right to show or not show the information he has as he chooses. To prohibit this is tantamount to prohibiting gossip. The second premise is that the blackmailee has (or ought to have) the legal right to give money (or something comparable) or not give money to the blackmailer as he chooses. The third premise is that if the first two premises are true, then the blackmailer has (or ought to have) the legal right to decide that he will make his decision whether to show or not to show the information contingent upon whether the blackmailee does or does not give the blackmailer money. In other words, the blackmailer has (or ought to have) the legal right to decide that he will not show the information if and only if the blackmailee gives him money. Finally, as core cases of blackmail just are the type of transaction referred to in the third premise (i.e. making one decision contingent upon another), the blackmailer has (or ought to have) the legal right to blackmail. This is of course only a paradox if we think the conclusion is false. Otherwise it is just an argument to legalize blackmail"¹¹⁴ (Szabo's parenthesis)

Blackmail is paradoxical in part because every component of a blackmail transaction ought to be legal. The blackmailer ought to have the legal right to choose whether or not to expose the information they threaten to reveal. The blackmailee ought to (generally) have the legal right to use their money (or something comparable) as they please. To justify the prohibition of blackmail it is necessary to explain why these legal acts become illegal when combined.

However, even if all the parts of blackmail transactions are permissible, this is not sufficient to justify the legality of blackmail. When it comes to blackmail, the sum might be more than its parts. Szabo quotes Michael Clark:

¹¹⁴ibid. pp. 138-9
“The threat to do A unless you do B is not merely a combination of a threat and a request or demand: It is a demand backed by a threat, the threat is made with a view to facilitating the demand.”\textsuperscript{115} (Clark's italics)

According to Clark, blackmail isn't merely the combination of different parts such as a threat to reveal some information, a demand and a promise. It is a specific combination, a threat made with a view to facilitate the demand. Thus, Clark argues that it is not sufficient to show that the constituent parts are permissible, it is also necessary to show that the particular combination is permissible.\textsuperscript{116}

However, according to Szabo, what is paradoxical about prohibiting blackmail isn't merely that (1.) the constituent parts of blackmail transactions are permissible. This is only one of several reasons. Prohibiting blackmail is also paradoxical because (2.) similar activities ought to be legal, and (3.) both victim and blackmailer prefer a world where blackmail is permissible. Szabo quotes Saul Smilansky:

“This issue is the apparent similarity between clear cases of blackmail and much in our social and economic life. Blackmail is disturbingly similar to other practices, which are not taken to be very negative by morality, and are not prohibited by law.”\textsuperscript{117}

Prohibiting blackmail is paradoxical in part because blackmail is similar to other activities that ought to be legal. Boycotts, strikes, gossiping and tabloid journalism, to mention some, are similar to blackmail and all ought to be legal. Boycotts and strikes threaten harm to (or at least a failure to benefit) their target in order to change behavior. To gossip is to expose information about someone. Tabloids expose information about people for the sake of profit. Furthermore, blackmail only encompasses vendor-initiated transactions in secrecy. Buyer-initiated agreements are generally seen as something that ought to be legal.\textsuperscript{118} The challenge is to draw a distinction between all of these activities and blackmail in a way that can justify prohibition. Again, Szabo quotes Smilansky:

“Our current moral and legal distinctions are dubious, in that we draw the line between

\textsuperscript{115}Clark, Michael 'There is no paradox of blackmail' \textit{Analysis}, Vol. 54, No. 1, January 1994, p. 55
\textsuperscript{116}Ibid. p. 60
\textsuperscript{117}Smilansky, Saul 'May We Stop Worrying About Blackmail' \textit{Analysis}, Vol 55, No. 2, April 1995, p. 116
the permissible and that which is considered to be 'outrageous blackmail' in a place which in itself seems morally impossible to defend\textsuperscript{119} (Smilansky's italics)

Thus, to claim that blackmail ought to be prohibited, it is necessary to draw a distinction between blackmail and similar activities that ought to be legal in a way that can justify the difference in legal status. According to Szabo, the permissibility of blackmail ought to be presumed because it seems impossible to draw a distinction.\textsuperscript{120}

The final reason Szabo presents for the claim that prohibiting blackmail is paradoxical is that (3.) both victim and blackmailer would prefer a world where blackmail is permissible. That is, blackmail can compare favorably to, for example, gossip.\textsuperscript{121} Szabo quotes Michael Gorr:

"[... I]n some cases such a policy [i.e. the criminalization of blackmail] appears to make both the blackmailer and his potential victim worse off than they would otherwise be by preventing each of them from choosing his most preferred alternative (for the victim, the blackmailer's silence, and for the blackmailer, his victim's money)."\textsuperscript{122} (Gorr's parenthesis and italics, my own brackets)

Szabo claims that blackmail can be compared favorably to gossip. That is, a world without blackmailers, but with gossips and people who keep secrets for free, is worse than a world with.\textsuperscript{123} That is because the blackmailer serves the interests of both blackmailer and victim, whereas the gossip does not. Though both the gossip and the blackmailer serve their own interests – the wish to expose secrets on the one hand and be paid on the other – only the blackmailer serves the interests of the victim. The gossip does not serve the interests of the victim because the gossip would expose their secret without giving the victim the opportunity to prevent it. The blackmailer on the other hand could be paid to keep the victim's secret (if the victim feels the price is worth it). Thus, the victim is better off with a blackmailer than a gossip.

\textsuperscript{119}Smilansky, Saul 'May We Stop Worrying About Blackmail' Analysis, Vol 55, No. 2, April 1995, p. 117
\textsuperscript{120}Szabo, Tait, In Defence of Commodification, Ph.D thesis, University of Colorado, 2008, pp. 143-4
\textsuperscript{121}Ibid. p. 141
\textsuperscript{122}Gorr, Michael 'Liberalism and the Paradox of Blackmail' Philosophy and Public Affairs, Vol. 21, No. 1.,Winter 1992, p. 59

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Thus, Szabo argues that prohibiting blackmail is paradoxical, meaning that the permissibility of blackmail ought to be presumed, and that any successful argument for the prohibition of blackmail must account for this. That is, in order to successfully argue for the prohibition of blackmail it is necessary to show that it is not the case that: (1.) every relevant case of blackmail consist of otherwise legal acts, (2.) similar activities ought to be legal, and (3.) both victim and blackmailer prefer a world where blackmail is permissible. Alternatively, it must be shown that blackmail ought to be prohibited despite these reasons.  

Szabo claims that it is plausible that no argument successfully justifies the prohibition of blackmail. He bases his claim on rejecting a range of arguments aiming to justify a prohibition. Specifically, he rejects that there is a morally relevant difference between blackmail and boycotts, and he rejects arguments appealing to freedom of speech, blackmail as theft, violations of privacy, unproductive exchanges, the irrationality of blackmail, blackmail relying on illegitimate threats, pragmatic considerations, and consequences. Szabo rejects most of these arguments by claiming that the reasons provided for prohibiting blackmail are inconsistent with existing social polices (i.e. that similar activities ought to be legal).

I will present a short summary of the arguments Szabo reject, as well as his rejections. However, in my argument, I will claim that blackmail ought to be prohibited because of the likely negative consequences of legalization. What Szabo describes as potential positive consequences of blackmail are in fact negative, or at least that they are undermined by the likely negative consequences of blackmail. Therefore, I will give a more thorough presentation of both the arguments claiming that blackmail ought to be prohibited due to the likely consequences of legalization, as well as Szabo’s rejections of these arguments.

5.1.1. Boycotts are a kind of blackmail:

Boycotts, Szabo claims, are a form of blackmail. Therefore, blackmail should be legal whenever boycotts should be legal. Specifically, Szabo claims that both boycotts and blackmail are threats making use of the vulnerabilities of their victims for the purpose of securing some special "payment". Furthermore, both boycotts and blackmail are exchanges where acceding to the demands gain the

124 Ibid. pp. 139-46
victim nothing they would not have had if the exchanges were effectively prohibited and refusing to accede could be potentially harmful. Thus, if boycotts should be legal, so should blackmail.\textsuperscript{125}

5.1.2. Freedom of speech:
Szabo rejects three arguments concerned with freedom of speech. Specifically, he rejects Hugh Evans' argument that blackmail ought to be prohibited because it does not promote the concerns justifying freedom of speech. He rejects Michael Gorr's argument that blackmail ought to be prohibited because freedom of speech ought to be far more restricted than it currently is. Lastly, he rejects Michael Levin's argument that freedom of speech cannot justify blackmail.

Hugh Evans argues that though there is generally a right to publish information or remain silent and be paid to do so, and there is a right to obtain payment by threatening to harm someone by remaining silent, there is no right to obtain payment by threatening to harm someone by publishing. There is no right to do so, according to Evans, because allowing the purchase of silence does not promote the concerns justifying freedom of speech. To make this point, Evans quotes Mill: “a silenced opinion may be the true one, or contain a portion of the truth; truth undefended from error will become prejudice and be deprived of any real effect on men's characters.”\textsuperscript{126}

Szabo rejects Evans' argument, arguing that, even if free speech is valuable and the aims of free speech are not served by legalizing blackmail, it does not follow that blackmail should be illegal, only that the permissibility of blackmail does not follow from the right to free speech\textsuperscript{127}.

Michael Gorr argues that blackmail ought to be prohibited because it should not be legal to publish harmful material about other people. That is, he denies that freedom of expression always trumps considerations of harm. Though Gorr argues that, for example, matters of public interest and concern can justify causing harm, he denies that this is a relevant concern when it comes to blackmail.\textsuperscript{128}

Szabo rejects Gorr's argument, claiming that it puts far to heavy restrictions on freedom of speech.

\textsuperscript{125}\textit{Ibid.} pp. 146-148
\textsuperscript{126}Evans, Hugh 'Why Blackmail Should be Banned,' Philosophy, Vol. 65, No. 251, 1990, pp. 89-94, refering to; Mill, John S. \textit{On Liberty}, Ch. 3.

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According to Szabo, Gorr's view – that it is impermissible to harm other people through speech solely based on self-interested concerns – entails that, for example, gossip, racist and sexist jokes, and books that promote harmful beliefs all ought to be prohibited. Thus, accepting Gorr's argument entails a far too strong limitation on freedom of speech. 129

Lastly, Szabo examines Michael Levin's argument: That appeals to freedom of speech cannot justify blackmail. Szabo quotes Levin:

“I may agitate my body and the surrounding air as I please because they are mine. But it seems to follow from this that your speaking, even on your property, violates my property rights by agitating my body and ambient air without my consent.” (Levin's italics) 130

This objection, Szabo claims, is far too broad. If speech violates property rights, any communication would violate the parties' property rights. 131

5.1.3. Blackmail as theft:

James Lindgren argues that blackmail is a kind of theft. Specifically, Lindgren claims that only the parties directly involved in a dispute have the right to capitalize on it. Thus, the blackmailer's attempt to profit off of knowledge about other person's misdeed is a kind of theft. The blackmailer makes use of leverage that only the person harmed by the misdeed is entitled to. 132

Szabo rejects this. The implications of this kind of claim is far too strong. If it is only permissible for parties directly involved in a dispute to profit off of it, Szabo points out, not only would blackmail be impermissible, but also any kind of profitable use of the information by a third party – whether by newspapers seeking to publish a story or merely a gossip taking enjoyment from their hobby. 133

5.1.4. Violation of Privacy:

130Levin, Michael 'Blockmail' Criminal Justice Ethics, Vol. 18, No. 2, Summer 1999, p. 14

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Szabo broaches the possibility that blackmail is impermissible because people ought to have a right to privacy. In other words, there is some personal information that the individual ought to have the legal right to control. Thus, by threatening to expose information without the victim's consent, the blackmailer violates their right to privacy.\footnote{Ibid. p. 156}

Szabo rejects this possibility because it fails to draw a distinction between blackmail and other potential uses of personal information. If persons should have the right to control their personal information, then blackmail would be impermissible, as the blackmailer shouldn't have the legal right to conceal or expose the information they threaten to reveal. However, people ought to have a legal right to conceal or expose private information. For example, like blackmailers, private detectives, newshounds, tabloid journalists and gossips also share private information. Additionally, the gift-commodity principle is only concerned with cases where all the constituent parts of a blackmail transaction is permissible. Thus, if it is impermissible to make use of others' personal information, then any instance of blackmail making use of such information would be irrelevant to the gift-commodity principle.\footnote{Ibid. pp. 156-7}

5.1.5. Unproductive Exchanges:
Robert Nozick claims that blackmail ought to be prohibited because it is an unproductive exchange, and unproductive exchanges ought to be prohibited.\footnote{Nozick, Robert, \textit{Anarchy, State, and Utopia}, New York, Basic Books Inc., 1974, pp. 84-5} Szabo quotes Nozick:

“If I buy a good or service from you, I benefit from your activity […] whereas if I pay you for not harming me, I gain nothing from you that I wouldn't possess if either you didn't exist at all or existed without having anything to do with me. […] Roughly \textit{productive activities} are those that make the purchaser better off than if the seller had nothing \textit{at all} to do with them”\footnote{Ibid. p. 84} (Szabo's brackets, Nozick's italics)

Szabo rejects Nozick's argument, arguing that blackmail is no more unproductive than many other exchanges, and, therefore, that blackmail is either not an unproductive exchange, or it is far from obvious that unproductive exchanges ought to be prohibited. Szabo quotes Alan Wertheimer: “[... T]he
fact is that blackmail is not necessarily unproductive, for without the blackmailer's service, the information that the victim wants concealed may fall into others' hands.**138 (My own brackets) Thus, both blackmailer and victim get something they want out of the exchange. The blackmailer gets paid and the victim is more likely to keep their secret. Furthermore, Szabo adds, some permissible transactions might be no more productive than blackmail. Buying luxury products at inflated prices, for example, can also be said to not make you better off. Thus, even if blackmail is an unproductive exchange, this is insufficient to warrant prohibition as long as blackmail is comparable to other exchanges that ought to be legal.139

5.1.6. Paternalism:

David Owens argues that blackmail ought to be prohibited because it is irrational to enter into a blackmail agreement. He provides three reasons for why blackmail agreements are irrational: First, a blackmailer can never assure the victim that the secret will not be discovered by other people. Second, the blackmailer's offer is monopolistic. Third, blackmail transactions lack security because there are too many ways a blackmailer can retain leverage, and no effective means of preventing them.140

Szabo rejects Owens' argument. Entering into a blackmail contract, he argues, is not necessarily irrational, and, regardless, it is not a matter of course that irrational agreements should be prohibited. Szabo addresses each of Owens' points:

First, a blackmailer can never assure the victim that the secret will not be discovered by other parties. However, Szabo points out, this is the case in many exchanges. A doctor performing a risky procedure, for example, can never guarantee the operation will be successful, but that is no reason to prohibit the operation. Additionally, like an operation the exposure of a secret can have a severe impact on the victim's life. Thus, just as it is permissible for a victim to undergo a high risk procedure for an improved chance of either avoiding an unfavorable outcome, or achieve a favorable outcome, so is it permissible for a victim to enter into a blackmail agreement to achieve the same.141

Second, Owens claims that the blackmailer's offer is monopolistic. Only the individual blackmailer can

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offer their discretion. In other words, no competition is possible between blackmailers. Szabo argues that this consideration is not sufficient to justify prohibition. The blackmailer's monopoly is no different than any other transaction in rare or unique goods. Of course, it might also be that the victim is the only one willing to pay for the blackmailer's discretion. Again, Szabo rejects this, claiming that there is nothing inherently impermissible about niche transactions.\textsuperscript{142}

Third, Owens argues that blackmail transactions are insecure because there are too many ways for a blackmailer to retain leverage. Secrets can be remembered, records copied, etc. Thus, it is irrational to enter into a business agreement where the good can never actually be purchased. There is nothing to prevent the blackmailer from repeating the threat. Szabo argues that a lack of security provides a reason to legalize blackmail. Legalization would mean that blackmail agreements would be legally binding, giving the parties legal recourse in case of contract violations. Additionally, laws could be passed to further protect the victim. Furthermore, closed court proceedings could protect the victim's interest in secrecy, making legal recourse a somewhat viable option. A legal recourse also gives the victim some leverage over the blackmailer. After all, to be publicly held to have reneged on a contract would harm the credibility of the blackmailer.\textsuperscript{143}

Lastly, Szabo argues that irrational contracts in general are considered permissible as long as they are enforceable. Thus, the fact that an agreement is irrational is not a sufficient reason to prohibit it.\textsuperscript{144}

5.1.7. Illegitimate Threats:

Szabo explores the possibility that blackmail ought to be illegal because it necessarily involves a coercive threat. He rejects this possibility for two reasons: It is far from obvious that the threat inherent in blackmail is coercive and, coercive or not, the kind of threat inherent in blackmail is permissible.\textsuperscript{145}

Szabo argues that the threat of exposure inherent in blackmail isn't coercive. It isn't coercive because the victim has a choice between two possibilities, both of which, independently of blackmail, the blackmailer has the legal right to bring about.\textsuperscript{146}

\textsuperscript{142}Ibid. pp. 161-2
\textsuperscript{143}Ibid. pp. 163-7
\textsuperscript{144}Ibid. pp. 167-8
\textsuperscript{145}Ibid. pp. 168-173
\textsuperscript{146}Ibid. pp. 168-9
Regardless of whether the threat inherent in blackmail is coercive, not all coercive threats ought to be illegal. According to Szabo, the threat inherent in blackmail is a threat to harm the victim's reputation by exposing information. He argues that many threats, even threats to do harm, ought to be legal. Szabo claims that, if it is permissible to do something, then it is also permissible to threaten to do it, and, again, it is permissible for the blackmailer to expose the information they threaten to expose.147

5.1.8. Pragmatism:
Szabo rejects two arguments claiming that blackmail ought to be prohibited for pragmatic reasons. Specifically, Michael Gorr's argument that there are no acts that it is permissible to blackmail someone for, and Jeffrie Murphy's argument that blackmail of private persons ought to be prohibited because it takes unfair advantage of the victim's vulnerabilities.

Michael Gorr argues that it is only permissible to blackmail people for harmful acts that ought to be legal. He claims such situations are the only ones where both concealing and exposing the acts causes no harm, and blackmail involves a commitment to either conceal or expose information on the condition of payment. However, ideally, harmful acts ought to be illegal. Furthermore, according to Gorr, there are only pragmatic reasons why some harmful acts are legal, but no such reasons apply to blackmail. Thus, Gorr concludes that blackmail ought to be prohibited because all harmful acts ought to (ideally) be illegal, blackmail is a harmful act, and there are no pragmatic reasons why blackmail should be permissible.148

Szabo rejects this argument. Gorr, he states, acknowledges that there might be some acts that are both harmful and that ought to be legal for non-pragmatic reasons. Gorr does not think these exceptions justify legalizing blackmail.149 However, according to Szabo, Gorr's acknowledgment undermines his argument, making it insufficient to justify a prohibition of blackmail.150

Jeffrie Murphy argues that blackmail of private persons ought to be prohibited because it takes unfair advantage of the victim's vulnerabilities.

147Ibid. pp. 170-3
149Ibid. p. 56-7
advantage of the victim's vulnerabilities. Though Murphy allows that taking unfair advantage of other people's vulnerabilities should sometimes be legal, he claims that this should not be allowed when it is also socially disutil. Blackmail of private persons both takes unfair advantage of people's vulnerabilities, and is socially disutil. It is disutil because there is no pre-existing market for information on private persons. Blackmailing a private person likely leaves both parties worse off as the victim must either pay or have information that would otherwise remain concealed be exposed, and the blackmailer must go through the trouble of blackmailing someone with no option of recuperating their investment if the victim should refuse. However, Murphy acknowledges, the same cannot be said for blackmail of public persons, as there already exists a market for information about such persons. Providing a public person with the option to purchase silence at market price could leave both parties better off. The victim gets to keep their secret and the blackmailer takes no economic loss. Thus, Murphy claims, blackmail of private persons ought to be illegal, but blackmail of public persons ought to be legal.\footnote{Murphy, Jeffrie, 'Blackmail: A Preliminary Inquiry,' \textit{The Monist}, Vol. 63, No. 2, April 1980, pp. 156-171}

Szabo relies on Erick Mack to reject Murphy's argument. Mack observes that it is not granted that blackmail is immoral. For example, if blackmailing someone can avert a legal, but harmful and wicked act, presumably doing so would be morally permissible? Furthermore, it is not granted that blackmail, even of private persons, is socially disutil. There does exist a legal market for investigations into private persons, and opportunistic blackmail (the sale of information acquired through daily activities) has a far lower entry cost. Lastly, Mack points out, it seems difficult to determine the distinction between a private and public person. After all, any act of blackmail requires some public to expose the information to. Mack suggests that the only way to preserve the distinction would be to hinge it on the motives of the blackmailer. That is, whether the blackmailer treats their victim as a private or public person. If the blackmailer treats the victim as a public person, they would reveal the information even if blackmail were not an option. However, establishing this kind of motive, Mack notes, would be difficult, if not impossible.\footnote{Szabo, Tait, \textit{In Defence of Commodification}, Ph.D thesis, University of Colorado, 2008, p. 182, and; Mack, Eric, 'In Defense of Blackmail,' \textit{Philosophical Studies}, Vol. 41, No. 2, March 1982, pp. 273-284}

5.1.9. Consequences:
Szabo examines the possibility that blackmail ought to be prohibited because of the bad consequences legalizing it would entail. For example: Michael Levin claims that legalizing blackmail could drastically expand the market in embarrassing information, which would lead to a general increase of anxiety in society.\(^{153}\) Richard Epstein claims that the drastically reduced opportunity costs of blackmail that would arise from legalization would encourage the formation of corporations that would ferret out information on people in order to blackmail them.\(^ {154}\) However, regardless of whether large corporations are permitted in a legalized market, Levin is equally worried about the impact of small independent businesses, freelancers and part-timers in the blackmail trade.\(^ {155}\) Furthermore, Michael Gorr argues that, even if the legalization of blackmail is a boon for some people, prohibition is still warranted because: “either their being made worse off in this way is not morally undeserved or, where it is undeserved, there is no feasible alternative that would produce a lesser amount of justice”\(^ {156}\)

Szabo rejects that blackmail ought to be prohibited because of the undesirable consequences of the alternative. He rejects that blackmail ought to be prohibited for two reasons: Firstly, Szabo argues that these consequences do not warrant legal prohibition. Secondly, he argues that it is important not to discount the positive consequences of legalized blackmail.

Firstly, Szabo argues that the undesirable consequences of legalized blackmail do not justify prohibiting it. Szabo joins Walter Block in claiming that even if a corporation such as Blackmail Inc. were to form, it would not be a sufficient reason to prohibit blackmail. The tastelessness or unseemliness of such corporations is no more a sufficient reason to prohibit them than when it comes to prohibiting gossip or tabloid journalism.\(^ {157}\) Furthermore, Szabo quotes Block:

> “Causing anxiety is not, per se, a ground for criminal prohibition. A great number of human activities – from exams to hangliding to investing in the stock market to being ‘victimized' by 'hate' speech – are anxiety-producing, but we do not see such anxiety as a legitimate reason for seeking to prevent such activities. Almost any change is potentially

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anxiety-producing, and a policy of anxiety reduction would be a prescription for maintaining the status quo. If anxiety is the problem, it is better to see a psychiatrist.”\textsuperscript{158}

Levin himself also notes that: “At best the unconsumability of the blackmailer's service explains why he sows anxiety; it does not entail that blackmail is wrong or appropriately forbidden by force.”\textsuperscript{159} Bad consequences are not necessarily sufficient to warrant prohibition. Much of what ought to be legal has bad, or even harmful consequences – such as drinking, extreme and contact sports, or maintaining an unhealthy lifestyle. Thus, Szabo argues, the potentially bad consequences of legalized blackmail do not warrant prohibition.\textsuperscript{160}

Secondly, Szabo argues that the positive consequences of legalizing blackmail should not be discounted. In fact, he claims that some of the bad consequences are in fact good. Specifically, Szabo argues that the drastic expanse of the market that would follow from legalizing blackmail not only increases anxiety, but also provides a deterrent to committing genuinely discreditable behavior.\textsuperscript{161} Increased market activity makes it more likely that discreditable behavior is discovered. This increases the opportunity cost of discreditable behavior as the increased likelihood of discovery by a blackmailer also increases the likelihood of either exposure or the required expenditure to purchase silence. Levin also recognizes these positive aspects of legalization, but does not see them as significant: “People who do not wish to be spied on can pull down their blinds, and indeed can guarantee invulnerability to blackmail by leading blameless lives. An incidental benefit to the rest of us.”\textsuperscript{162} Szabo, on the other hand, argues that limiting the anxiety of discreditable transgressors (i.e. the potential victims of blackmail) should be seen as less morally important than discouraging their transgressions.\textsuperscript{163}

Additionally, in a related point, Szabo joins Michael Clark when stating that, granted it ought to be legal to blackmail criminals:

“[... S]ome blackmail may actually lead to the exposure of crime which would otherwise go unreported, because victims who refuse to pay up will be exposed by blackmailers.

\textsuperscript{159}Levin, Michael 'Blockmail' Criminal Justice Ethics, Vol. 18, No. 2, Summer 1999, p. 14
\textsuperscript{160}Szabo, Tait, In Defence of Commodification, Ph.D thesis, University of Colorado, 2008, pp. 188-9
\textsuperscript{161}Ibid. p. 189
\textsuperscript{162}Ibid. p. 12
\textsuperscript{163}Ibid. p. 190

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who, if they had not tried to extort money for their silence, would not have dreamt of taking the trouble to report the crimes as a matter of social conscience. It is possible, too, that legalizing blackmail of this sort would encourage enterprising would-be blackmailers to ferret out crime, some of which would also be exposed by blackmailers or their victims.\textsuperscript{164} (My own brackets)

Thus, Szabo concludes, consideration of the consequences support legalizing blackmail, not prohibiting it.\textsuperscript{165}

5.2 Rejecting legalized blackmail:
I reject the gift-commodity principle by showing that blackmail should be prohibited. The gift-commodity principle claims that everything that ought to be legal to give away or not give away also ought to be legal to buy and sell.\textsuperscript{166} Thus, it can be proven false by showing that some good that ought to be legal to give away or not give away should not be legal to buy and sell. I reject the gift-commodity principle on Szabo's premises. Therefore, I argue that blackmail is impermissible while accepting the moral commitments of both his overall argument for the gift-commodity principle, and his argument for legalizing blackmail. Specifically, I argue that blackmail ought to be prohibited because blackmail promotes behavior undermining a constructive public discourse, and legalizing blackmail would likely lead to an increase in market activity that would also lead to an increase in this problematic behavior. Seeing how legalizing blackmail would likely undermine a constructive public discourse, I argue that law is a suitable tool to mitigate this, and that prohibition is preferable to mere regulation.

To reject the gift-commodity principle on its own premises, I must accept Szabo's understanding of the commodification debate (within the context of legal permissibility), as well as his understanding of the paradox of blackmail. However, I also implicitly accept all of Szabo's moral commitments that are not contradicted by my argument.

Szabo understands the central question of the commodification debate as whether it is preferable to

\textsuperscript{164}Clark, Michael, 'There is no paradox of blackmail' \textit{Analysis}, Vol. 54, No. 1, January 1994, p. 58
\textsuperscript{166}Ibid. p. 2
prohibit or legalize a contested market, and he understands legality as the negation of prohibition. Thus, it does not matter how limited or specific the circumstances a contested market ought to be legal in. As long as it ought to be legal at all (in some actual circumstance) it is in accordance with Szabo's gift-commodity principle. I will accept this criteria, but argue that blackmail ought to be prohibited (in all actual circumstances).

Furthermore, Szabo claims that prohibiting blackmail is paradoxical. Specifically, he claims that: (1.) Every relevant case of blackmail consists of otherwise legal acts, (2.) similar activities ought to be legal, and (3.) both victim and blackmailer would prefer a world where blackmail is permissible, because blackmail transactions can serve both victim and blackmailer's interests.\textsuperscript{167} Any successful argument for prohibition must account for all three of these paradoxical aspects of blackmail. My argument can account for all of them. That is, I claim that: (1.) Blackmail is more than the sum of its parts, (2.) the function of the threat, as well as some pragmatic reasons, distinguishes blackmail from other similar activities (such as boycotts), and (3.) \textit{legalizing} blackmail does not serve the interests of potential victims.

Szabo understands blackmail as “keep[ing] secrets on the condition of receiving money.”\textsuperscript{168} (my own brackets) However, he also recognizes that blackmail necessarily involves a threat of exposure.\textsuperscript{169} My argument emphasizes likely negative consequences of blackmail threats, as well as likely negative consequences of failed blackmail threats. Because of the emphasis on threats in my argument I will understand blackmail as a conditional threat of exposure, the condition being payment. This understanding should be in accordance with Szabo's understanding of blackmail.

I argue that blackmail ought to be prohibited because it promotes behavior undermining a constructive public discourse, and legalizing blackmail would likely lead to an increase in market activity that would also lead to an increase in the problematic behavior. That is, blackmail incentivizes promoting behavior that undermines a constructive public discourse. Blackmailers are incentivized to maximize the harm they threaten to cause the victim, and, should an agreement fall through, the blackmailer is incentivized to realize their threat. Acting on these incentives is likely to silence the victim or court

\textsuperscript{167}\textit{Ibid.}, pp. 139-46
\textsuperscript{168}\textit{Ibid.}, p. 190
\textsuperscript{169}\textit{Ibid.}, pp. 139-40
prejudice and bigotry in the audience, and silence, prejudice and bigotry undermines a constructive public discourse. Seeing how legalizing blackmail would likely undermine a constructive public discourse, I argue that law is a suitable tool to mitigate this. Furthermore, I argue that prohibiting blackmail is preferable to merely regulating it, as any regulation that could effectively limit the impact of legalized blackmail would unduly constrain the blackmailer's freedom of speech. In contrast, prohibition would not limit the anyone's freedom of speech, merely their freedom to act, or at least, insofar as prohibition would limit freedom of speech, it would be consistent with existing social practices. Formalized, my argument is:

1. Legalizing blackmail will likely lead to more occurrences of blackmail.
2. Every occurrence of blackmail is likely to promote behavior that undermines a constructive public discourse.
3. Increasing the occurrences of blackmail is likely to also increase the promotion of behavior that undermines a constructive public discourse.
4. An increase in the promotion of a behavior will likely also increase the amount of that behavior.
5. If granted 1.-4., legalizing blackmail will likely also increase the amount of behavior that undermines a constructive public discourse.
6. Behavior that undermines a constructive public discourse ought to be mitigated by means up to and including legal prohibition.
7. The likely increase in behavior that undermines a constructive public discourse which would result from legalizing blackmail can be mitigated either by regulating blackmail or by prohibiting blackmail.
8. Regulating blackmail can only mitigate the likely increase in behavior that undermines a constructive public discourse which would result from legalizing blackmail by unduly limiting freedom of speech.
9. Prohibiting blackmail can mitigate the likely increase in behavior that undermines a constructive public discourse which would result from legalizing blackmail without unduly limiting freedom of speech.
10. Freedom of speech should not be unduly limited.
11. If granted 6.-10., prohibiting blackmail is the preferable way of mitigating the likely
increase in behavior that undermines a constructive public discourse which would result from legalizing blackmail.

Conclusion: Blackmail ought to be prohibited.

My argument claims that legalizing blackmail would undermine a constructive public discourse. A public discourse can roughly be understood as what occurs when individuals or other entities engage each other as members of a group. Specifically, when participants engage each other as members of a group in order to address issues and questions that are relevant to the group in a way that is not just aimed at informing individual views, but also potentially aimed at changing social norms (i.e. a shared understanding of what behaviors and attitudes are acceptable) and practices.

There is a need for constructive public discourse. As members of society we are faced with moral and political questions. The resolutions to these questions are crucial for the common good (i.e. the set of conditions we provide for one another to flourish as human beings). Many of these questions are not merely practical and political questions about how to organize society, but principled questions about which attitudes and considerations should inform our practical and political solutions. In other words, they are questions asking what justice is and how to promote a just society. However, people disagree on what justice is and how to promote it. A constructive public discourse tries to address these issues through conscientious, engaging and reasoned discussion, ultimately aimed at discovering and communicating the truth.

I am not alone in defending the need for a constructive public discourse. John Stuart Mill, for example, argues that the legal right to speak in public without retribution from the government (i.e. freedom of speech) is important precisely because it enables a public discourse aimed at discovering and communicating the truth:

"First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.

Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of the truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions
that the remainder of the truth has any chance of being supplied.

Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of prejudice, with little comprehension or feeling of its rational grounds. And not only this, but fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct.\footnote{Mill, John Stuart 'On Liberty' \textit{Classics of Moral and Political Theory}, 4$^{th}$ edn., edited by Michael L. Morgan, 2005, p. 962} 

According to Mill, people and groups can be wrong about moral issues. Therefore, for a constructive public discourse to conscientiously seek truth it must account for this fallibility and challenge what is socially accepted. In other words, society should enable morally permissible expressions of dissent in order to better promote justice.

To effectively challenge social norms can require more than publishing philosophical arguments and opinion pieces. Effectively calling attention to a social wrong can require extensive, persistent and organized dissent, using many forms of expression. It is hard to believe, for example, that gay and trans rights would be where they are today if not for the LGBTQ+ movement(s). This kind of dissent can be time consuming, emotionally taxing, expensive and on a scale where no single person could possibly do it on their own. Therefore, effective dissent is often the work of organized groups of people that are willing to put in the effort required because they care deeply about the issues at hand. Presumably, the people most likely to care deeply about (wrongful) social norms are those who are harmed by them. Furthermore, people who are harmed by existing social norms are sometimes in a unique position to recognize the pervasiveness and impact of the norms in question. Mill also recognizes this, stating that: “[... T]here are many truths of which the full meaning \textit{cannot} be realized, until personal experience has brought it home.”\footnote{Ibid. p. 957} (Mill's italics, my own brackets) The "MeToo" movement is a good example of large scale dissent, where the people being harmed by social norms were in a unique position to dissent. "MeToo" began as a social campaign in October, 2017, and was intended to draw attention to the pervasiveness and acceptance of sexual abuse, harassment and misconduct in society, with the ultimate goal of changing these social norms. It was a decentralized, large scale movement where
women were encouraged to publicly share their stories of being subjected to sexual abuse, harassment or misconduct. It is difficult to determine what the long-term impact of “MeToo” will be. However, in Norway, the movement has led to increased legal protections against sexual harassment. Many Norwegian workplaces and organizations have also firmed up their guidelines on sexual misconduct.172

Recognizing the importance of experience in forming opinions, Mill also argues that the legal right to act as one chooses (within limitation) without retribution from the government (i.e. freedom to act) must be protected because it enables a constructive public discourse.

“[… T]he same reasons which show that opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost. That mankind are not infallible; that their truths, for the most part, are only half-truths; that unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good, until mankind are much more capable than at present of recognizing all sides of the truth, are principles applicable to men's modes of action, not less than to their opinions. As it is useful that while mankind are imperfect there should be different opinions, so it is that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them.”173 (My own brackets)

According to Mill, the fact that people and groups can be wrong about moral issues, the need for a constructive public discourse in order to address those wrongs, and the need for personal experience in order to form opinions, all underline the importance of tolerating behavior that transgresses social norms. Thus, society should tolerate some types of transgressive behavior (i.e. behavior that transgresses social norms) because transgressors are more likely to have the investment and personal experience to call attention to the social norms that harm them. The point of tolerating transgressive behavior is to enable morally permissible expressions of dissent, which in turn strengthens a constructive public discourse and, therefore, promotes justice.

172'metoo' Store Norske Leksikon [Website], Visited on June 6th, 2019 (https://snl.no/metoo)
Mill argues that to tolerate transgressive behavior, it is necessary to protect a freedom to act. However, I claim that tolerating transgressive behavior requires more than merely recognizing a legal right to transgress. That is not to say that my argument is necessarily incompatible with Mill's. Mill argues for the necessity of a freedom of speech and a freedom to act, while I argue that blackmail ought to be prohibited. The different goals of our arguments can account for the difference in focus regarding the need to tolerate transgressive behavior. To tolerate transgressive behavior is to allow its occurrence without interference, but to abstain from interfering is not a passive pursuit. Some interference is unavoidable, because we, as members of society, act within a social context. We consciously and subconsciously shape our behavior in accordance with social norms. We avoid eye contact on the subway, we tend to walk on the right side of the sidewalk, we dress in accordance with gendered codes, etc. By acting in accordance with social norms we reinforce them. We reconfirm an expectation of how society ought to function. Likewise, reactions to transgressive behavior will also reinforce social norms. Behavior that transgresses social norms can surprise us, irritate us, leave us dumbfounded or even angry. Again, the reason society ought to tolerate transgressive behavior is to enable expressions of dissent. Intolerance can interfere with expressions of dissent both because it can hinder the forming of transgressive social groupings capable of formulating and organizing dissent, and because it can increase the social cost of expressions of dissent. Thus, in order to tolerate transgressive behavior it is not sufficient to merely abstain from willfully punishing transgression. It requires an active engagement with and understanding for how our behavior impacts people's capability to transgress and dissent.

This does not mean that we should permit all kinds of transgressive behavior. For example, bank robberies transgress social norms, but they obviously ought to be illegal. The challenge is that we (as members of society) have to use our own fallible understanding of right and wrong, as well as what is socially acceptable, in order to judge what kind of transgressions ought to be tolerated and how they ought to be accommodated. What conditions we ought to provide in order to secure a constructive public discourse is, in itself, a question for public discourse, and it should be answered on a case by case basis in light of what best promotes justice.

I argue that blackmail ought to be prohibited because it incentivizes promoting behavior that
undermines a constructive public discourse. Legalizing blackmail would likely result in increased market activity, making it more likely that a constructive public discourse would be undermined. Furthermore, Szabo claims that legalizing blackmail will have positive consequences. Specifically, he claims that the likely increase in market activity would result in more failed blackmail attempts, which in turn would lead to more criminal activity being reported to the police. Additionally, he claims that the likely increase in market activity would also deter genuinely discreditable behavior. I contend that these consequences are, in fact, negative consequences, or at least, that they would be undermined by the negative consequences of legalized blackmail.\(^{174}\)

Blackmail incentivizes promoting behavior that undermines a constructive public discourse. A blackmail threat is a threat to cause harm to the victim by exposing their secret. Therefore, blackmail necessarily emphasizes the victim's vulnerability to being harmed by calling to their attention the risk and possible consequences of exposure. Furthermore, the blackmailer is likely to exacerbate the victim's vulnerability. The blackmailer's interest in securing an agreement and maximizing profit incentivizes them to threaten more harm than the secret warrants. This is likely to silence the victim. Being aware of the risk of exposure and fearing the consequences, the victim is less likely to behave in a way that could lead to exposure, whether that is exposure of the victim's secret, or the exposure of other transgressive acts. Therefore, the victim is less likely to associate themselves with transgressive groups, express sympathy and understanding with the transgressors, or contribute their own experiences to a constructive public discourse. Additionally, should an agreement fall through, the blackmailer is incentivized to realize their threat and maximize the harm caused to the victim. The blackmailer is likely to maximize the harm caused to the victim by exposing the victim's secret in a way that prompts condemnation from the audience. Of course, the blackmailer could also intend for exposure to have other effects where condemnation is less important, such as the exposure leading to a criminal investigation of the victim, but these effects are not necessarily incompatible with encouraging condemnation. The best way for the blackmailer to encourage the condemnation of the victim is to court a bigoted and prejudiced response from the audience. If the audience can be encouraged to accept the blackmailers narrative as truth, regardless of whether it is, and discouraged from exploring any other possible interpretation, then it is more likely to harshly condemn the victim.

Blackmail necessarily emphasizes the victim's vulnerability to being harmed. The blackmailer's preferred outcome to a blackmail situation is to secure an agreement of payment and maximize profit. The means by which the blackmailer pursues this outcome is through a conditional threat of exposure. It is the consequences of the exposure, or rather the victim's perception of the consequences of exposure, that lends force to the threat and value to the blackmailer's good, secrecy. Any victim of blackmail must have something they wish to hide, though the victim doesn't necessarily have to know that this is the case prior to receiving the blackmail threat. Regardless of the victim's prior awareness, blackmail (i.e. a conditional threat of exposure) necessarily draws attention to the risk and possible consequences of exposure.

A blackmailer is likely to exacerbate the victim's vulnerability to being harmed in order to maximize their own profit. Presumably, whether and how much the victim is willing to pay depends on how likely they think it is that the blackmailer would expose their secret, and how severe they believe the consequences of such an exposure would be, regardless of what the consequences ought to be. Or in other words, the victim's willingness to pay depends on how vulnerable they perceive themselves as being. Considering the victim's interest in avoiding the consequences of exposure and the blackmailer's interest in securing a deal and maximizing profit, the blackmailer is incentivized to not only take advantage of the victim's vulnerability, but also to make the victim more vulnerable than they otherwise would have been. The blackmailer is incentivized to make sure that the victim understands that failure to pay will result in exposure. The blackmailer is also incentivized to threaten the victim with maximizing the harm exposure would cause, regardless of whether the victim's secret warrants that level of harm.

There are limits to what kind of harm the blackmailer is likely to be able to cause for the victim, and what level of harm the victim will believe the blackmailer can cause. The blackmailer does not threaten to do harm to the victim by means they can unilaterally control. The blackmailer is not, for example, threatening to beat the victim up or burn down their house. The blackmailer threatens to cause the victim harm by encouraging a third party, the audience, to harm the victim. In other words, the blackmailer's threat is grounded in how the audience is likely to react when learning the victim's secret. However, the blackmailer cannot unilaterally define social norms or law, nor can they decide what the

consequences of exposure will be. If the blackmailer's claims are too outlandish, the threat looses credibility. The victim might assume that the blackmailer is bluffing and that they would or could not provoke the desired reaction from the audience. As a result the victim might decide that the price the blackmailer demands is simply not worth paying.

Even if the blackmailer cannot one-sidedly decide whether the victim will find their threat credible, nor how the audience will react to the victim's secret, they can try to influence both victim and audience. That is, the blackmailer has the power to chose how, when and to whom they would expose the victim, and the victim knows this. This power can give the blackmailer a lot of influence over the narrative and can, therefore, lend credibility to the blackmailer's threats even when they threaten unwarranted harm.

Just as the victim's willingness to pay depends on how vulnerable they perceive themselves as being, so does the victim's willingness to risk exposure in other ways. Presumably, the victim's willingness to risk exposure depends on how likely they think it is that their secret would be exposed, and how severe they believe the consequences of such an exposure would be, regardless of what the consequences ought to be.

Blackmail necessarily emphasizes the risk and possible consequences of exposure. Furthermore, the blackmailer is incentivized to exacerbate the victim's vulnerability by presenting the consequences of exposure as disastrous. Granted, the consequences the blackmailer presents might only be likely given a malicious agent, but that does not mean that the victim can discount the possibility, especially given that they have already encountered one such malicious agent (i.e. the blackmailer). If the victim accepts the blackmailer's offer of secrecy, having bought their figurative stay of execution, the victim is less likely to risk future exposure, and the harmful consequences that would follow by behaving in a way that could expose their secret, or committing future acts of transgression which could be exposed.

Szabo argues that a positive consequence of blackmail is that the increase in market activity can serve as a deterrent to committing genuinely discreditable behavior that could motivate a blackmail threat. Levin also recognizes this deterrent, stating that: "People who do not wish to be spied on can pull up their blinds, and indeed can guarantee invulnerability to petty blackmail by leading blameless lives – an

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incidental benefit to the rest of us.” However, these are not positive consequences. Though blackmail might provide a deterrent to committing genuinely discreditable acts, it would deter them because they are transgressive, not because they are immoral or ought to be illegal. What motivates blackmail is the potential for the blackmailer's personal gain by threatening exposure. It is the victim's perception of the actual consequences of exposure that lends force to the threat and value to the blackmailer's good (secrecy), not what the consequences ought to be. Thus, legalizing blackmail would deter transgressive acts.

I have already argued that society ought to tolerate transgressive acts in order to encourage a constructive public discourse capable of promoting justice. Legalizing blackmail would likely deter transgressive acts, regardless of whether they are genuinely discreditable or merely transgressive. The deterrence blackmail provides would likely interfere with transgressive behavior in a way that would undermine a constructive public discourse. That is, being aware of the risk of exposure and fearing the consequences, the victim is less likely to behave in a way that could lead to exposure, whether that is exposure of the victim's secret, or the exposure of other transgressive acts. Therefore, the victim is less likely to associate themselves with transgressive groups, express sympathy and understanding with other transgressors, or contribute their own experiences to a constructive public discourse.

If legalized, the detrimental impact of failed blackmail attempts on a constructive public discourse would likely be worse than the detrimental impact of successful blackmail. Failed blackmail attempts are not likely to silence the victim in the way successful blackmail attempts are. However, these attempts are likely to promote prejudice and bigotry, and prejudice and bigotry is antithetical to a constructive public discourse. Failed blackmail attempts are likely to promote prejudice and bigotry because, should an agreement fall through, the blackmailer is incentivized to realize their threat and maximize the harm caused to the victim. The blackmailer is incentivized to do this, not merely in retaliation to the victim, but also in order to maintain their credibility as a blackmailer. Additionally, in some cases, the blackmailer can be incentivized to maximize the harm caused to the victim in order to draw attention away from their own malicious act of blackmail.

The blackmailer is likely to maximize the harm caused to the victim by exposing the victim's secret in

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a way that prompts condemnation from the audience. Of course, the blackmailer could also intend for
exposure to have other effects where condemnation is less important, such as the exposure leading to a
criminal investigation of the victim, but these effects are not necessarily incompatible with encouraging
condemnation. The best way for the blackmailer to encourage the condemnation of the victim is to
court a bigoted and prejudiced response from the audience. If the audience can be encouraged to accept
the blackmailer's narrative as truth, regardless of whether it is, and discouraged from exploring any
other possible interpretation, then they are more likely to harshly condemn the victim.

When blackmailer and victim fail to reach an agreement the blackmailer is incentivized to realize their
threat and maximize the harm caused to the victim. Though the blackmailer likely would prefer to get
paid, and they might not have any personal reason to wish harm to the victim, exposing the victim's
secret is not merely gratuitous retaliation. Rather, the blackmailer is incentivized to expose the victim
in order to maintain their credibility as a blackmailer for future blackmail attempts, and, in some cases,
to distract from their own malicious act of blackmail.

Exposing the victim in a way that maximizes harm maintains the blackmailer's credibility for future
blackmail attempts. Because blackmail is a threat to cause harm by exposing information, a threat to
expose information is more credible if the blackmailer can point to previous instances where they have
carried out their threats. Likewise, the blackmailer's threat to maximize harm will be more credible if
the blackmailer can point to previous instances where the blackmailer's exposing a victim had ruinous
consequences for them. Furthermore, this incentive would be stronger if blackmail were legalized
because the risk of criminal prosecution would no longer deter the blackmailer from limiting their
blackmail activity nor from taking credit for previous instances of blackmail.

In some cases the blackmailer might want to maximize the harm caused to victim in order to draw
attention away from their own malicious act of blackmail. Even if blackmail is legalized that does not
guarantee it is always morally permissible, or socially accepted. In these cases the blackmailer might
want to avoid the reactions to their malicious act of blackmail. It might also be that knowledge about
the blackmailer's actions might provoke sympathy towards the victim or take the bite out of the
audience's response in other ways. However, if the audience is busy condemning the victim they might
be less likely to discover, or care, that the victim's actions were exposed due to blackmail.
The blackmailer is likely to maximize harm by exposing the victim's secret in a way that prompts condemnation from the audience. Of course, the blackmailer could also intend for exposure to have other effects where condemnation is less important – such as the exposure leading to the victim being fired, losing or having terminated an important contract, or the opening of a criminal investigation, but these effects are not necessarily incompatible with encouraging condemnation. For example, the blackmailer might intend for the victim to both be fired from their job and be publicly condemned. The best way for the blackmailer to encourage the condemnation of the victim is to court a bigoted and prejudiced response from the audience. If the audience can be encouraged to accept the blackmailer's narrative as truth, regardless of whether it is, and discouraged from exploring any other possible interpretation, then they are more likely to harshly condemn the victim.

Szabo claims that a positive consequence of legalizing blackmail would be that the likely increase in market activity would result in more failed blackmail attempts, which in turn would lead to more criminal activity being reported to the police. Even granted that the increase in reported criminal activity would lead to an increase in convictions, and a reduction in overall crime, this positive consequence is undermined by the likely negative consequences of failed blackmail attempts. Specifically, by the way the increase in blackmail is likely to silence its victims, and promote bigotry and prejudice, undermining a constructive public discourse.

I have argued that legalized blackmail is detrimental to a constructive public discourse. This is because blackmail incentivizes promoting behavior that undermines a constructive public discourse, and legalizing blackmail will likely lead to an increase in market activity, which makes it likely that more of this behavior will take place, ultimately undermining society's capability to promote justice. The question is whether law may be used to protect a constructive public discourse and whether prohibiting blackmail is, all things considered, a constructive way of doing so?

I have argued that the blackmailer is incentivized to threaten to maximize the harm caused to the victim, and to actually cause that harm should an agreement fall through. However, I have not claimed blackmail ought to be illegal because of the harm caused. This is not because I think personal harm is

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an irrelevant consideration for law-makers (it clearly is relevant), but because Szabo claims that legalizing blackmail would benefit society as a whole. I argue that legalizing blackmail would not benefit society. It would, in fact, be detrimental to society's capability to promote justice. Thus, I do not merely argue that legalizing blackmail is bad and would have negative consequences. I argue that, given Szabo's argument, legalizing blackmail would not have any positive consequences at all, or at least that the positive consequences would be undermined by the negative consequences. Specifically, I argue that

A constructive public discourse, and thereby society's capability to promote justice, ought to be defended even through legal means, up to and including prohibition. For example, Mill defends freedom of speech and the freedom to act because of their role in enabling a constructive public discourse.179 Furthermore, there are also laws aimed at promoting a constructive public discourse by prohibiting behavior that is likely to undermine it. Such as defamation and libel laws, or laws aimed at protecting journalistic and editorial integrity. A concrete example of such laws is the Norwegian “Editorial independence in the media act” (“Lov om redaksjonell fridom i media”). This act secures the editorial independence of media that creates or communicates news or publicly relevant information, or that contributes to public discourse in other ways. The “Editorial independence in the media act” does this by prohibiting owners or management from making editorial decisions or demanding insight in to the editorial process prior to release of the information.180

Of these examples the most comparable to my argument are the laws aimed at protecting editorial integrity. I will use the Norwegian “Editorial independence in the media act” (“Lov om redaksjonell fridom i media”) as my example. There are clear parallels between my claim that blackmail ought to be prohibited to minimize the harmful behavior it promotes, and the “Editorial independence in the media act”. Both my argument and the act is grounded in the need to promote a constructive public discourse.181 Furthermore, both my argument and the “Editorial independence in the media act” seek to promote a constructive public discourse by prohibiting behavior that enables or encourages the problem, not the problematic behavior directly. That is, even if blackmail is prohibited it still ought to legal to promote prejudice and bigotry. Even if it is prohibited for owners and management to interfere

180Lov om redaksjonell fridom i media 2009 (Nor)
181St.meld. nr. 57 (2000-2001), see also; Ot.prp. nr. 19 (2007-2008)
with the editorial process, it is not illegal for the editor to behave contrary to the standards expected of their profession.

Granted that legal prohibition could be an appropriate tool to promote a constructive public discourse, a question is whether prohibiting blackmail would be a preferable way of doing so. Perhaps merely regulating blackmail would be sufficient? After all, it is the behavior blackmail is likely to promote, and not any inherent feature of blackmail, that undermines a constructive public discourse. Therefore, it could be preferable to simply deter the problematic behavior through legal means while legalizing blackmail. Furthermore, Szabo argues that boycotts are a form of blackmail, but boycotts ought to be legal. Surely, if boycotts are a form of blackmail, and boycotts ought to be legal, then blackmail also ought to be legal?¹⁸²

I claim that boycotts are not a form of blackmail. Both blackmail and boycotts involve a conditional threat to cause harm, the condition being payment – whether in the form of a change in behavior, money or something else. The boycotter threatens to cause harm by encouraging people not to do business with the target of the boycott. The blackmailer threatens to cause harm by exposing the victim's secret. What distinguishes boycotts from blackmail is what function realizing the threat serves. The boycotter threatens to escalate the situation, not to shut the door on the possibility of a mutually agreeable, or at least negotiated, solution. In fact, the purpose of carrying out the boycott (i.e. realizing the threat) is to make the target of the boycott more susceptible to the boycotter's demands. In the case of blackmail, the threat is an ultimatum. The blackmailer's good, secrecy, is only valuable before the information is exposed. Thus, when the blackmailer realizes their threat, they retaliate against the victim for failing to accept their demands.

Society should be more accepting of activities that cause harm for the purpose of promoting an agreeable (or at least agreed upon) solution to a conflict than of activities that unilaterally cause harm with the intention to punish those who fail to acquiesce to demands. After all, as members of society, we have to live with one another and cooperate to solve mutual problems. Presumably, mutually agreed upon solutions to conflicts are preferable to unilateral acts of retaliatory harm when it comes to building and maintaining trust and good will, which is beneficial to peaceful coexistence and

cooperation.

Even if blackmail is not comparable to boycott, the question of whether it is preferable to prohibit or merely regulate blackmail remains. I argue that blackmail ought to be prohibited. Assuming blackmail were legal, effectively regulating it so it does not promote behavior undermining a constructive public discourse would unduly limit the blackmailer's freedom of speech. On the other hand, assuming blackmail were prohibited, no undue regulation of freedom of speech would be required.

Assuming blackmail were legal, the incentive to promote behavior that undermines a constructive public discourse is inherent to blackmail. It cannot be regulated away. What regulations can try to do, however, is to limit the ways in which the blackmailer can pursue their interests, thereby limiting the impact legalized blackmail is likely to have on a constructive public discourse. Blackmail is an act of communication – both threatening the victim and exposing the secret are acts of communication. In other words, regulating blackmail will require limiting the ways in which the blackmailer can speak.

The natural starting point for answering how blackmail can be regulated is existing rights to privacy, defamation and libel laws. These laws try to balance considerations for the individual's freedom to speak, protecting the privacy of individuals, and promoting the quality of a public discourse. For example, §3-6 a. of the Norwegian Damages Act (“Lov om skadeserstatning”) lays out the following criteria for whether or not a statement is defamatory or libelous:

1. Whether or not the statement is true
2. Whether or not the statement is of public interest
3. Whether the statement is factual or a value judgment
4. Whether the statement concerns public or private persons
5. Whether the statement is a direct statement or a reported statement.
6. Whether or not the statement is made with due consideration of the facts
7. Whether or not the subject of the statement has been given the opportunity to address it

Generally speaking, a statement is less likely to be considered libelous if it is of public interest, is a

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183Lov om Skadeserstatning 1969 (Nor), §3-6 a.
value judgment, is reported statement, concerns a public person, or if there are good reasons to believe the statement is true. Conversely, a statement is more likely to be considered libelous if it is of little public interest, if it is a factual claim, if it is a direct statement, if it concerns a private person, or if there are few reasons to believe the statement is true.¹⁸⁴

Historically, Norwegian libel laws have been interpreted with a basis primarily in whether or not the statement is true. However, the current interpretation is less strict, and considers a number of different factors when deciding whether or not a statement is libel or not. This shift is in accordance with the European Convention on Human Rights, which puts a greater emphasis on freedom of speech.¹⁸⁵

Existing laws emphasize the *content* of statements, and whether the speaker has acted with due consideration of the facts. In other words, existing laws focus on what can be said. They focus less on how something can be said. In Norwegian privacy law, for example, a key consideration is whether or not the information presented is offensive, rather than how it is presented.¹⁸⁶ This is likely out of consideration of freedom of speech. In “On Liberty”, Mill explains why considerations of freedom of speech precludes regulating how things may be stated:

> “The gravest of [the objectionable ways to express an opinion] is, to argue sophistically, to suppress facts or arguments, to misstate elements of the case, or misrepresent the opposite opinion. But all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible on adequate grounds conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct.”¹⁸⁷ (My own brackets)

Mill claims that by prohibiting objectionable ways of expressing things – such as sophistry,

¹⁸⁴ 'Ærekrenkelser' Norsk Redaktørforening [Website], https://www.nored.no/Juss/Krenkelser/AErekrenkelser (Last visited: 11/6-19)
¹⁸⁶ 'Privatliv' Norsk Redaktørforening [Website], https://www.nored.no/Juss/Krenkelser/Privatliv (Last visited: 11/6-19), and; *Lov om Straff 1902* (Nor), §267
misrepresentation and misleading remarks – freedom of speech is unduly limited. This is because, though these rhetorical techniques might be used on purpose, they can also be honest mistakes. Furthermore, I add, objectionable means of expressing an opinion can still be a constructive contribution to a public discourse. It could, for example, be used to challenge our norms of what are "acceptable" ways of expressing oneself, or for comedic effect, etc. Even if some people are unable or unwilling to participate constructively in a public discourse, we, as members of society, should not silence them. This is because silencing badly expressed opinions deters people from participating in public discourse, robbing the conversation of their perspective.

The blackmailer's ability to threaten and cause harm depends on their ability to influence the victim and the audience, and the blackmailer is incentivized to influence the victim and audience in a way that is likely to silence the victim or promote prejudice and bigotry in the audience. The blackmailer influences the victim and the audience by controlling the narrative, choosing how, when and to whom they would expose the victim. To effectively regulate blackmail, thereby promoting a constructive public discourse, requires regulating how the blackmailer may speak. For example, whether the blackmailer may influence the victim or the audience by emphasizing the aggravating aspects of the victim's secret, while disregarding or downplaying mitigating aspects. This is an undue restriction of the blackmailer's freedom of speech. Thus, blackmail should not be legal as, if it were legal, any effective regulation would unduly restrict freedom of speech.

Prohibiting blackmail places no restrictions on person's freedom of speech, and only minimal restrictions on a person's freedom to act. Though it would be illegal to make a blackmail threat, it would not be illegal because of what is said, but because the speech act constitutes an act of blackmail. However, should this claim be wrong, and prohibiting blackmail does limit freedom of speech, that limitation would be consistent with existing social policies. Like the right to privacy, and defamation and libel laws, a prohibition would be a limitation on what may be said, not how things may be said. Thus, blackmail ought to be prohibited because prohibition is the preferable way to mitigate the impact an increase in market activity would likely have on a constructive public discourse.

Lastly, Szabo claims that prohibiting blackmail is paradoxical. Specifically, he claims that: (1.) Every relevant case of blackmail consists of otherwise legal acts, (2.) similar activities ought to be legal, and
(3.) both victim and blackmailer would prefer a world where blackmail is permissible, because blackmail transactions can serve both the victim and blackmailer's interests.\footnote{Szabo, Tait, \textit{In Defence of Commodification}, Ph.D thesis, University of Colorado, 2008, pp. 139-46} Any successful argument for prohibition must account for all three of these paradoxical aspects of blackmail. My argument can account for all of them.

Though every relevant case of blackmail consists of otherwise legal acts, this does not impact my argument. I have claimed that the problem with blackmail is that the blackmailer's incentive to maximize profit off of selling secrecy encourages the blackmailer to behave in a way that promotes behavior which is likely to undermine a constructive public discourse. In other words, it is not any constituent part of blackmail that gives rise to the problem, but blackmail as a whole.

Szabo claims the prohibition of blackmail is paradoxical in part because activities that are similar to blackmail ought to be legal. I have already argued that blackmail is dissimilar to boycotts because the blackmail threat serves as an ultimatum, and the threat to boycott serves as an escalation of the situation, but keeps the door open to negotiations. The same distinction is applicable to strikes and at least some hard economic transactions. Another distinction between blackmail and some similar activities, such as hard economic transactions, is the impact legalized blackmail is likely to have on a constructive public discourse. Though hard economic transactions might involve ultimatums where the parties threaten to cause harm, it is far from obvious that these threats are likely to have the same detrimental impact on a constructive public discourse. This is because it is likely that the threat is not first and foremost a threat of a harmful social reaction, but an economic loss. Lastly, buyer initiated purchases of secrecy, such as a newspaper buying exclusive rights to publish a story, are generally seen as permissible. This could be for pragmatic reasons. The alternative to letting newspapers buy information, for example, might be to shill the press. Regardless, if no such pragmatic reason applies, and there is no distinction between blackmail and buyer-initiated purchases of secrecy, I would merely bite the bullet.

Szabo follows Gorr in claiming that blackmail can serve the interests of both victim and blackmailer because the victim is interested in maintaining secrecy, and the blackmailer is interested in payment (i.e. securing and maximizing profit). That is, blackmail can be compared favorably to gossip.\footnote{Szabo, Tait, \textit{In Defence of Commodification}, Ph.D thesis, University of Colorado, 2008, p. 141, and; Gorr, Michael p.94/103}
However, this is no reason to legalize blackmail. Though anyone at risk of exposure might prefer to be exposed by a blackmailer rather than a gossip, they might still prefer that blackmail is prohibited. This is because, if Szabo's understanding of the likely consequences of blackmail is granted, legalizing blackmail would increase the chance of discovery and exposure. This is the case regardless of whether these consequences are positive or negative. That is, Szabo claims that legalizing blackmail would likely lead to an increase in reported crimes due to failed blackmail attempts, and provide an effective deterrent to discreditable behavior (viz. transgressive behavior)\(^{190}\). Presumably, if legalizing blackmail would decrease the risk of discovery and exposure, then it would not deter discreditable behavior, but encourage it. Thus, legalizing blackmail does not serve interests of any potential victim as it would increase the likelihood of discovery and exposure, not reduce it.

I have argued that blackmail ought to be prohibited because blackmail promotes behavior undermining a constructive public discourse, and legalizing blackmail would likely lead to an increase in market activity that would also lead to an increase in the problematic behavior. That is, blackmail incentivizes promoting behavior that undermines a constructive public discourse. Blackmailers are incentivized to maximize the harm they threaten to cause the victim, and, should an agreement fall through, the blackmailer is incentivized to realize their threat. Acting on these incentives is likely to silence the victim or court prejudice and bigotry in the audience, and silence, prejudice and bigotry undermines a constructive public discourse. Seeing how legalizing blackmail would likely undermine a constructive public discourse, I have argued that law is a suitable tool to mitigate this. Furthermore, I have argued that prohibiting blackmail is preferable to merely regulating it as any regulation that could effectively limit the impact of legalized blackmail would unduly constrain the blackmailer's freedom of speech. In contrast, prohibition would not limit the anyone's freedom of speech, merely their freedom to act, or at least, insofar as prohibition would limit freedom of speech, it would be consistent with existing social practices. Thus, I conclude that blackmail ought to be prohibited.

5.3 Chapter conclusion:
I reject universal commodification as applied to the discussion on legal permissibility by rejecting the gift-commodity principle. The gift-commodity principle claims that everything that ought to be legal to


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give away or not give away also ought to be legal to buy and sell (under some actual circumstance). Therefore, it can be proven false by showing that some good that ought to be legal to give away or not give away should not be legal to buy and sell. Though I accept Szabo's moral commitments, I have argued that blackmail ought to be prohibited. If this argument holds, it proves that the gift-commodity principle is false.

My argument relies on one of Szabo's moral commitments. However, this commitment is not controversial. Szabo claims that legalizing blackmail will likely result in an increase in market activity with positive consequences. My argument claims that an increase in market activity would have negative consequences. Thus, if it is not accepted that legalizing blackmail will likely result in increased market activity, my argument fails. Additionally, my argument does not rely on all of Szabo's commitments, even the one I make use of. Szabo argues that it is important for a set of social policies to be consistent. I use this argument to strengthen my claim that it is preferable to prohibit blackmail. However, though this argument strengthens my conclusion, my conclusion does not depend on it. I provide several reasons why it is preferable to prohibit blackmail: I have claimed that the alternative to prohibition, regulating blackmail, would unduly restrict the blackmailer's freedom of speech. Furthermore, I have claimed that prohibiting blackmail would not limit freedom of speech, because it only limits speech insofar as the speech constitutes an act of blackmail. It is only if the distinction between speech and act is not accepted that it becomes relevant that prohibiting blackmail would be consistent with existing social policy.

I have argued that blackmail ought to be prohibited because it promotes behavior undermining a constructive public discourse, and legalizing blackmail would likely lead to an increase in market activity that would also lead to an increase in this problematic behavior. Seeing how legalizing blackmail would likely undermine a constructive public discourse, I have argued that law is a suitable tool to mitigate this, and that prohibition is preferable to mere regulation.

Granted my rejection of blackmail, and that blackmail is considered a contested market, the gift-commodity principle is false. Thus, for the purpose of this thesis, I have rejected universal commodification as applied to legal permissibility.

191Ibid. p. 2

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6. Conclusion:
To complement the existing criticism of universal commodification, I have rejected the position as applied to both moral and legal permissibility. I have done so by rejecting Brennan and Jaworski’s principle, Markets Without Limits, and Szabo's principle, the gift-commodity principle. Specifically, I reject their principles by arguing that transactions in the content of democratic votes are morally impermissible, and that blackmail ought to be prohibited. Although I have accepted the moral commitments underpinning Brennan and Jaworski's and Szabo's arguments, I have shown that not all contested markets are permissible.

Universal commodification is a position within the commodification debate which holds that all contested markets are permissible. In other words, that commodification (i.e. the buying and selling of goods) does not introduce any wrong-making features (warranting legal prohibition). Because of this view, proponents of universal commodification claim that the permissibility of contested markets ought to be presumed rather than being examined on a case by case basis.

I have claimed that the permissibility of contested markets should not be presumed because commodification can introduce wrongs (that warrant legal prohibition). Specifically, I have shown that transactions in the content of democratic votes are morally wrong, and that blackmail ought to be illegal.

The reason why I have made use of these cases is that my objections to transactions in the content of democratic votes and legalized blackmail have a thematic similarity. They are concerned with members of society's capabilities to conscientiously discuss practical and ethical issues as a group, and to make and act upon decisions as a group. In other words, I focus on the impact markets can have on our capabilities, as members of society, to participate (conscientiously) in shaping the society in which we live our lives. I am assuming that, generally speaking, members of a society ought to have the capabilities and legal rights necessary to participate in the shaping of the society in which they lead their lives. I hold these capabilities to be a vital part of a person's power to influence and shape their own lives.

Unlike interactions between a few individuals, interactions involving large groups of people are more prone to misunderstandings. Groups must therefore rely on rules and guidelines to enable effective and
conscientious interactions. For example, my blackmailer and I might choose to make an exception from normal procedure when signing an agreement, and still be fairly confident that we have both understood what the exception entails, that it is an exception, that we both accept doing things in this way, and that we are aware of the other person's acceptance. However, this is not equally the case when larger groups of people – like the inhabitants of a town or a country – discuss issues, make decisions or act. When dealing with larger groups, it is easier for misunderstandings to occur. Thus, it requires stricter rules and guidelines to make sure that every member of the group has an adequate and shared understanding of the situation, and are able to participate in it. These rules and guidelines must themselves be established and shared through group interactions.

Markets impact how we, both as individuals and as members of society, interact and relate to one another. Thus, it is worthwhile to consider what impact markets can have on our capability to engage with each other as a group, and to potentially limit the negative impact a market could have on these capabilities.

I am not the first to criticize universal commodification. However, my argument complements the existing criticism because it does not share the same limitations. Firstly, I have rejected both Brennan and Jaworski's and Szabo's principles. Brennan and Jaworski and Szabo present comparable arguments for their principles, but focus on moral and legal permissibility respectively. The discussion on moral permissibility applies to individuals, and asks what is morally acceptable to buy and sell. The discussion on legal permissibility applies to society as a whole, and asks what ought to be legal to buy and sell. The discussions are entangled because answers in one discussion present prima facie reasons in the other, both discussions are concerned with the same phenomenon, commodification, and both discussions seek to answer how people, as individuals on the one hand and members of society on the other, ought to think about markets and market transactions. Because the discussions are entangled, addressing both of the discussions gives a more complete account of how people ought to think about commodification.

Secondly, I have refuted Brennan and Jaworski and Szabo on their own premises, using cases they are concerned with. By accepting the moral commitments of Brennan and Jaworski's and Szabo's arguments, I cut straight to the key question of permissibility. That is, I have shown that universal
commodification (as understood by Brennan and Jaworski and Szabo) is false, even on its own premises, not merely false granted some different understanding of the commodification debate.

I have rejected universal commodification as applied to the discussion on moral permissibility by rejecting Brennan and Jaworski's principle, Markets Without Limits. Markets Without Limits claims that all goods that may be given or used may also be bought and sold (under some circumstance). Therefore, it can be proven false by showing that some good that may be given or used may not be bought or sold. Though I have accepted the moral commitments of Brennan and Jaworski, I have also argued that the content of democratic votes may not be sold under any circumstance, even when it is permissible to vote. Such transactions are wrong because they would undermine justifiable democracies by taking political power away from the voters. Taking political power away from the voter is a collectively harmful act and, given the Clean Hands Principle, it is wrong to commit collectively harmful acts when the cost of refraining is low. The cost of refraining from taking political power away from the voters is low. The cost is a justifiable democracy functioning as intended. If this argument holds, it proves that Markets Without Limits is false, and, for the purposes of this thesis, that universal commodification as applied to moral permissibility is false.

I have rejected universal commodification as applied to the discussion on legal permissibility by rejecting Szabo's gift-commodity principle. The gift-commodity principle claims that everything that ought to be legal to give away or not give away also ought to be legal to buy and sell (under some actual circumstance).\(^{192}\) Therefore, it can be proven false by showing that some good that ought to be legal to give away or not give away should not be legal to buy and sell. Though I accept Szabo's moral commitments, I have argued that blackmail ought to be prohibited. Specifically, I have argued that blackmail ought to be prohibited because it promotes behavior undermining a constructive public discourse, and legalizing blackmail would likely lead to an increase in market activity that would also lead to an increase in this problematic behavior. Seeing how legalizing blackmail would likely undermine a constructive public discourse, I have argued that law is a suitable tool to mitigate this, and that prohibition is preferable to mere regulation. If this argument holds, it proves that the gift-commodity principle is false, and, for the purposes of this thesis, that universal commodification as applied to legal permissibility is false.

\(^{192}\)Ibid. p. 2
Having rejected universal commodification as applied to both legal and moral permissibility, I conclude that universal commodification, or at least universal commodification as understood by Brennan and Jaworski and Szabo, is false.

My rejection is not only applicable granted Brennan and Jaworski's and Szabo's understanding of universal commodification. Rather, my arguments would be applicable on any version of universal commodification that sees markets in the content of democratic votes and blackmail as relevant and permissible. This is because, though I accept, and to some degree depend, on Brennan and Jaworski's and Szabo's premises, the premises I do depend on are not controversial, and the rest are not necessary to my argument.

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