

# MICHAEL AND ME: A POSTMODERN FRIENDSHIP<sup>©</sup>

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This paper offers a review of *The Limits of Freedom of Contract* as an exercise in postmodern critique and politics. It examines the extent to which the book is informed by the postmodern motifs of contingency and indeterminacy. It attributes difficulties in Michael's analysis to a lack of postmodern nerve. Finally, it provides a contrast to a law-and-economics notion of citizenship which is applied to the problem of racist practices in the marketplace.

Cet article présente une revue de l'ouvrage *The Limits of Freedom of Contract* tout comme un exercice de critique et politique postmodernes. L'exercice examine comment le livre est instruit par les motifs postmodernes de l'éventualité et l'indétermination. L'exercice identifie les difficultés dans l'analyse de Michael qui résultent d'un manque de courage postmoderne. Enfin, l'exercice se contraste avec la notion de citoyenneté développée par l'école de droit-et-économie et appliquée au problème de pratiques racistes sur le marché.

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## I. INTRODUCTION

Michael and me. Two friends from different sides of the academic tracks. It has always puzzled me how and why Michael and I could have such different scholarly orientations to law and yet still share

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similar opinions and conclusions on a whole range of topics. Is he not a fully paid-up shareholder in the Law-and-Economics Enterprise and am I not a card-carrying member of Critical Legal Studies? Of course, this compatibility of views may be a greater source of potential embarrassment to me than to Michael. I might be persuaded regularly by Michael's gentle rhetoric into momentary lapses of progressive denial, or it might be confirmation of the fact that I and other CLSers are not the progressives that we proclaim ourselves to be, but erstwhile middle-of-the-roaders in radicals' clothing. Nevertheless, I am fairly confident that I am not so easily persuaded or so transparently disingenuous; many, if not all, of my views seem to remain sufficiently true to the progressive cause to save me from hypocrisy or self-delusion. So why do Michael's particular solutions to concrete social and legal problems agree or, at least, do not jar unduly with mine?

I began reading *The Limits of Freedom of Contract* with these questions in mind. I hoped to settle once and for all my puzzlement and uneasiness. I was not disappointed. It is a powerful and sophisticated piece of scholarship. Not only does it display commendable technical virtuosity, but it is also full of character and passion. Whatever is said about humdrum economists generally—that an economist is someone who deals with graphs and figures but does not have the personality to become an accountant—it cannot be levelled at the (unique?) brand of law-and-economics that Michael has produced. As my CLS friend and colleague Karl Klare puts it on the book's dust-jacket, "this is law-and-economics with soul." Indeed, Michael has managed the rare task of writing a book that reflects both his intellectual rigour and his humane sensibilities. It tackles a vast sweep of social activity in a courageous, respectful, and unsentimental way: his discussion on parenting [52] is a fine example of his unwillingness to compromise.

But, having read the book, am I any more enlightened and less puzzled? My answer is a resounding "YES." Initially sceptical and prepared for the worst, I was happily surprised and relieved. In short, I (re)learned the wisdom of that old saw that you should never judge a book by its cover. *The Limits of Freedom of Contract* much more and much less than it promises or threatens to be—its emphasis is on the limits to such an extent that *freedom of contract* ceases to be the unifying or thematic focus of his inquiry. While the book has the anticipated references to Pareto Optimality, externalities, and utility maximization, Michael plucks such ideas from the abstract realm of idealized economic

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<sup>1</sup> M.J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass.: Harvard University Press, 1993) [hereinafter referred to by page numbers in square brackets].

transactions and situates them in the sweat-and-tears of lived experience. The transformation and its effect are staggering. No longer cosseted in an artificial cocoon of hypothetical assumptions, the notions of a private market and freedom of contract begin to look less attractive. Indeed, Michael's analysis casts grave doubts on the possibility or desirability of attempting to reduce the frenzy of social life to one simple and overarching explanatory account, whatever its intellectual pedigree or ideological inspiration. Somewhat like Molière's unknowing Monsieur Jourdain, Michael Trebilcock has been a postmodernist all along without knowing it or, at least, without admitting it. Although not always prepared to follow through on the implications of such an approach, he can be read as offering a postmodernist's law-and-economics that bears the hallmark of "an incredulity towards metanarratives."<sup>2</sup>

Accordingly, in this short essay, I will offer a re-view of *The Limits of Freedom of Contract* as an exercise in postmodern critique and politics. The first section explores and emphasizes the considerable extent to which Michael's book is informed by the postmodern motifs of contingency and indeterminacy. I then move on to consider the main difficulties, including the relation of the state and the market, which arise because of his lack of postmodern nerve. Finally, I look at the impoverished notion of citizenship that Michael's preoccupation with law-and-economics suggests, and offer an enriching alternative. To give practical pertinence to my more theoretical discussion, I will contrast Michael's approach to the difficulties of racist practices in the marketplace with my own approach. Ultimately, I hope to have persuaded Michael (and the reader) that it is both intellectually compelling and politically attractive to embrace a more open and less hedged vision of postmodern scholarship. As one great economist might have said, you have nothing to lose but your inhibitions, and a postmodern world to win.

## II. INDETERMINACY ALL THE WAY DOWN

At the heart of Michael's agenda is the effort to place under the strictest scrutiny the claim that the private ordering paradigm of contracting in a free market is the best institutional arrangement for simultaneously promoting individual freedom and social welfare. He maintains that this claim, if it can be justified, "would provide a

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<sup>2</sup> J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge*, trans. G. Bennington & B. Massumi (Minneapolis: University of Minnesota Press, 1984) at xxiv.

formidable, if not decisive, normative justification for private ordering over other forms of resource allocation in many contexts.” [242] To carry out this objective, Michael traverses and evaluates activities as diverse as blood donation, pornography, immigration, prostitution, child custody, racial discrimination, surrogacy, international trade, maternity leave and, of course, commerce. His standard critical move is to look at the operation of a “free market” in an activity, highlight a particular failure in it (for example, commodification, coercion, information imperfection, *etc.*), and suggest the costs and benefits of governmental intervention. In each case, he attempts to reach some conclusion about the optimal response, as between allocative and distributional considerations, and about the optimal institutional agency, as between courts and legislation, to achieve this.

The result of Michael’s analysis in almost all cases is that *it is too close to call*. Some of the best lessons from Trebilcock’s work are those about indeterminacy. The facts are always too unruly to accommodate the principles. His major message is that life is complex—*avoid generalization*. For Michael, economics is not only about making decisions about scarce resources, but also doing so under conditions of historical uncertainty and social instability. As opposed to the scientific pretensions of traditional and Marxist economics, there is no one simple and straightforward account that can be given about economics or law that is cogent or valid as an accurate description of what goes on, or a reliable prescription of how to change it. The only constant about law, economics, and their interaction is their messiness and contingency. There is “the perennial gale of creative destruction”<sup>3</sup> that defies simple logic and any theoretical attempt to privilege or hypostasize one particular explanation is doomed to failure. The theory and practice of economics and law are indeterminately political and politically indeterminate. There is no non-political stance to theorizing about law and economics; all claims to neutrality are premised on an always undisclosed and often unperceived set of controversial normative commitments about social interaction.<sup>4</sup>

Michael’s insistent observation is that, whatever we do in one area of our lives, good or bad, will have obvious effects on other parts of our lives. He draws from this important insight the implication that discrete solutions cannot be sanctioned without understanding their

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<sup>3</sup> J. Schumpeter, *Capitalism, Socialism and Democracy* 3d ed. (New York: Harper & Row, 1975) at 87.

<sup>4</sup> For an illustration of this point in the context of the relation between government regulation and markets, see below Part III.

larger systemic implications. Consequently, it is important—and this is an insight of Coase—to understand that, making one area more determinate, in the sense of introducing a clearer set of incentives and prohibitions, will likely result in greater uncertainty elsewhere. The world will not stay still long enough to extract one particular component, then reinsert it in a way that leaves the rest of the world untouched, or such that the rest of the world has not since moved on and reconfigured itself into an entirely different set of pressures and problems. The great challenge is not to turn uncertainty into pseudo-certainty, rendering the world determinate and thus perfectly amenable to a once-and-for-all evaluation, but rather to make sense of that uncertainty in a way that respects uncertainty. Modern economics has failed spectacularly to do this and, as Michael himself shows in spite of cautions to the contrary, so has law-and-economics. For instance, on the choice of default rules in incomplete contracts, Michael concludes typically that

[c]hoices between mandatory and optional default rules, and between tailored (to the particular parties) and untailored (to classes of transactions or parties more generally) default rules push us to the frontiers of current theorizing on the law of contracts and perhaps reveal, rather starkly, the limits of how far theory can take us. For the moment, “muddling through” may define our aspirational limits. [126, footnotes omitted]

Similarly, after discussing the issue of paternalism in public policy-making, not only does he acknowledge that “it is impossible to sustain a sharp and clear divide between the domains of private and public ordering,” [163] Michael also reaches a conclusion that places faith in sensible *ad hoc*ery and which “does not seem strikingly dissimilar from that espoused by Duncan Kennedy.”<sup>5</sup> [163]

Moving from specific issues to more general matters, Michael concedes that such indeterminacy not only exists at the level of operational efficacy, but grants that “plasticity” [246] is endemic to the guiding principles and controlling concepts themselves; autonomy and efficiency allow for sharp divergences in definition and range. Moreover, there is no “meta-theory that weighs or ranks these various values.” [248] He wants to hold the line at this point, however, and cautions against a slide into a corrosive “nihilism” in which

any set of legal rules that is likely to be constructed for governing the private ordering process is likely to be relatively unprincipled and to reflect the personal normative whims of judges in the case of judge-made law and similar whims on the part of legislators or regulators in framing legislative or regulatory regimes for the contracting process. [247]

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<sup>5</sup> See D. Kennedy, “Distributive and Paternalistic Motives in Contract and Tort Law” (1982) 41 Md. L. Rev. 563. Interestingly, he also refers to Milton Friedman in support of this view: see M. Friedman, *Capitalism and Freedom* (Chicago: Chicago University Press, 1962) at 33-34.

To guard against such a fate, though, he opts for the rather trite observations that “all the values reflected in the various normative perspectives reviewed appear to command wide-spread public support and to be legitimate in their own terms” [247-48], and “significant progress can be made at a lower level of abstraction by identifying the institutions or instruments which are best placed, among the array of instruments and institutions available to a community, to vindicate these values.” [248]

At crucial moments, therefore, Michael loses his postmodern nerve when he needs it most. For example, in assessing the relative merits of case-by-case adjudication versus legislative regimes for dealing with the pervasive tension between autonomy values and welfare considerations, he cannot resist the temptation to tally up a final accounting and make some decidedly non-contingent recommendations about institutional competence and suitability. [250-68] Yet the major thrust of his detailed analysis and survey of the relevant data is that such a once-and-for-all reckoning is neither possible nor desirable. When faced with these kinds of basic decisions, Michael’s stark injunction is “to think clearly” [248]: it appears that this is the best that he is willing to offer. This rather lame encomium, without more, is likely to pay few intellectual dividends and lead to the even more dubious achievement of “personal normative whims” of academics replacing those of judges and legislators.

That having been said, there is no reason to believe that the future history of economic arrangements will truly amount to little more than “a random walk in socio-political space.”<sup>6</sup> Michael fails to realize that nihilism is merely the bogeyman of traditional epistemology: it is the flip-side of the traditional infatuation with objective values. To concede that it is indeterminacy all the way down is not to succumb to an arbitrary or whimsical account of policy-making. On the contrary, it affirms the idea that such policy-making must become a truly public and participatory process. It does not eschew the worth of reasoned debate, but denies the possibility of a transcendent Reason as a guide for such debate. There are only various and competing modes of reasoning that are always part of, not apart from, the debate over policy-making. Judges, policy-makers, economists, lawyers, and citizens are forever situated in a socio-economic context that influences them as they strive to influence it. In a world dominated by economic thinking, the likelihood of developing a truly participatory polity is reduced. As I will

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<sup>6</sup> J. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago: University of Chicago Press, 1975) at 167.

suggest, it is in a practice of postmodern citizenship that the dictates of social contingency and democratic participation can be optimally balanced and respected.<sup>7</sup>

### III. THE STATE OF THE MARKET

Michael's work is a strong antidote to those who think that a commitment to law-and-economics is implicitly a commitment to right-wing values. His postmodern critique, with its emphasis on contingency and indeterminacy, shows that nothing follows, as a matter of necessity, from any particular commitment to some abstract grand-scale values such as equality or liberty.<sup>8</sup> However, this is not to say that a law-and-economics way of thinking and talking about the world does not have certain built-in biases and informing prejudices as any account, including my own, will have. Despite its general sophistication and erudition, one of the most important flaws in Michael's critique is his almost foundational insistence that it is meaningful to talk about free markets in contrast to schemes of government regulation—that there is some important sense in which a market can be said *not* to be a form of governmental regulation. Indeed, Michael seems to go so far as to suggest that the market is a natural or self-evidently moral arena of social behaviour because “the perfect market, were it realized, would constitute a morally free zone, a zone within which the constraints of morality would have no place.”<sup>9</sup> [29] Given such an extravagant assumption, the market needs no moral justification, but somehow stands as the moral underwriter for what is done in its name.

This is an entirely misconceived representation of the market, its relation to governmental regulation, and its moral status. It is never a question of contrasting market allocation with government distribution because the market is one form of government regulation. Contrary to Trebilcock's terms, government regulation is not “an endogenous institutional arrangement,” [60] but rather is essential to the basic operation of a free market. As Frank Knight, one of the intellectual

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<sup>7</sup> See pp. 256-57, below.

<sup>8</sup> For an excellent and more progressive analysis of some of the basic concepts of law-and-economics, see P. Schlag, “The Problem of Transaction Costs” (1989) 62 S. Cal. L. Rev. 1661; and “An Appreciative Comment On Coase's *The Problem of Social Cost* A View from the Left” (1986) Wis. L. Rev. 919. The force of these two articles is to show the indeterminacy of economic theory and to caution against the canonization of any single form of economic regulatory organization.

<sup>9</sup> Quoting D. Gauthier, *Morals by Agreement* (New York: Oxford University Press, 1986) at 84.

forefathers of law-and-economics recognized 70 years ago, “the [market] system as a whole is dependent upon an outside organization, an authoritarian state ... to provide a setting in which it can operate at all.”<sup>10</sup> Without a state willing or able to define and protect property rights, enforce contracts and prevent involuntary transactions, maintain a circulating medium, and curtail monopoly and anti-competitive behaviour, there is no market in any real or meaningful sense. For example, it is ludicrous to talk about a genuine market in prostitution as things presently stand—endemic coercion, commodification, and exploitation are the order of the day. It is only with the advent of government regulation through contract law, rules protecting personal security, and employment legislation that it would be realistic to talk of a market for prostitution; that is, unless Michael is content to treat a “black market” as a free market, in which case any exchange of “goods” would count as a market transaction. Moreover, the choice is never between the allocation of goods by a decentralized market or by centralized government administration. It is a choice among various theories about those choices: “there is no unmeditated epistemological access to something called ‘the free market’. There are only theories and representations of ‘the free market’.”<sup>11</sup>

Many implications flow from Michael’s refusal to recognize this vital and valid insight. One is that, by giving critics “the burden of justifying intervention,” [163] he skews his whole analysis in favour of market-based solutions. Another is that it tends to cast law as a one-dimensional force that only regulates and prohibits activity, rather than a multi-faceted medium through which society continuously reconstitutes itself and expresses its aspirations. But the most debilitating and troubling aspect of this tendency to see the market as something separate from governmental regulation is its effect upon the all-important question of the nature of market actors and their preference-formation. Traditional economics takes preferences as exogenous givens and treats the satisfaction of such preferences as presumptively good. Michael, of course, has little to do with such crude assumptions: “neo-classical economics essentially has no theory of how preferences are formed ... They have thus been viewed as exogenous to the exchange process, which simply facilitates their realization.” [147] He recognizes that “scholars need to take more seriously the proposition that many individual preferences are socially constructed and are amenable to

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<sup>10</sup> F. Knight, “Some Fallacies in the Interpretation of Social Cost” (1924) 38 Q. J. Econ. 582 at 606.

<sup>11</sup> Schlag, *supra* note 8 at 1698.

revision.” [267] However, he fails to grasp the corrosive implication of such a recognition in, at least, two important respects.

First, although he accepts that rich and poor people develop their preferences, at least in part, as a result of their relative positions in the market, he still manages to depict the poor as being poor *outside and independent of* the market. This is true whether he is talking about prostitutes, surrogate mothers, beggars, *etc.* Moreover, he seems to assume that, once it is recognized that many individual choices reflect adaptive preferences, the challenge is to predict the kind of choices people “would make in the absence of social, economic, legal, or other influences that have shaped these preferences.” [243] This is to miss the point of a postmodern critique entirely. Michael does not grasp that people, unless they are gods or beasts, can never be outside or “in the absence of” such influences. Indeed, without such influences, there would be no basis on which to generate preferences or to choose between them; such an account is as deficient as the classical model. People interact with and adapt to their socio-historical contexts as they struggle to transform and adapt them: there *is* no outside. The real challenge, therefore, is not to wish away the informing context and then hazard a guess at what hypothetical choices would be made, but to work towards creating a context in which people can and must develop and experiment fully with their preferences. To understand this is to appreciate that freedom is not an absence of constraints, but a particular set of constraints.<sup>12</sup>

Pushed a little further, this insight leads to the second limitation of Michael’s analysis. People’s identities are affected by their micro-social environments, such as family, friends, colleagues, acquaintances, and macro-social environments, such as nationality, class, ethnicity, *etc.* Consequently, in a society permeated by economic logic and market imagery, the existing economic arrangements not only influence the kind of substantive preferences that people have, but help shape the kind of persons that people are or can become. For example, within the classic vision of market actors as “preference maximizers,” there is little possibility of nurturing a social good that is more (or less) than the aggregate of private preferences. Further, it inculcates a consumer mentality and tutors people to be rational economic actors. This is a very sterile and one-dimensional version of human activity. The market actor is one who is cognitively supreme, possessed of both the perfectly rational ability to analyze vast amounts of information about alternative

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<sup>12</sup> See A. Hutchinson, “Identity Crisis: The Politics of Interpretation” (1992) 26 *New Eng. L. Rev.* 1173.

courses of action and the facility to prioritize them in terms of their expected utility. In doing so, the ordinary consumer is also considered to be perfectly consistent and unwavering.

Michael is silent on these matters. He fails to appreciate the extent to which the market creates this utility-monster as much as its acquired preferences. A major problem with this analysis is that either it is truly artificial, and thus useless, or it becomes self-evidently trite when it is used to explain and justify any decision by a market actor. It is not that I think that citizens act irrationally, but that on occasion they act non-rationally or, more usually, they follow different and often conflicting rationalities that cannot be reduced to a set of simple-minded directives. Insofar as a market model of human activity subsumes and homogenizes these multiplex calculations, the individual democratic citizen is reduced to little more than one more fungible consumer:

[O]nce we can convince ourselves that we can picture people evaluating end-states abstracted from their social definition and that we can aspire only to create social institutions that then passively respond to these mysterious end-state judgments, we have moved much too far in the direction of resignation, despairing impotence, and ... nihilistic skepticism about our capacity to grow.<sup>13</sup>

Postmodernism suggests an alternative vision of social interaction that is more empowering and enlightened.

#### IV. CITIZENS OF A POSTMODERN WORLD

In contrast to Michael's baseline of a private ordering paradigm, I want to suggest a different starting point. Rather than taking the market as a given, it needs to be justified as a particular kind of government regulation among a larger mix of schemes and arrangements. It is not exchange in and of itself that should be encouraged, but participation and that is not exhausted by an act of market exchange. By reducing participation to exchange, the danger is that people will begin to think of themselves as consumers in all they do, even when they are not in a market situation. The ambition is to ensure that, while people are consumers some of the time, they are citizens all of the time.<sup>14</sup> Both civic and market politics are not so much about

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<sup>13</sup> M. Kelman, "Comment on Hoffman and Spitzer's 'Experimental Law and Economics' " (1985) 85 Colum. L. Rev. 1037 at 1047.

<sup>14</sup> An objection that must be faced is that the market, warts and all, is still the least worse alternative, compared to, for example, modern Cuba, recent Russia, medieval France, *etc.*: see F. Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992). Yet even a cursory

substantive decisions actually made; each recognizes that the attempt to legislate what are and are not valid substantive decisions is fraught with historical and ideological difficulty. Accordingly, attention must be focussed on the process through which people make those substantive decisions. However, whereas the market obtains its authority from people's consuming decisions, the practice of citizenship involves a more expansive notion of participation. Markets allow only for differences counted in terms of dollars and, therefore, the primary difference is between the haves and have-nots. Democratic politics allows for an expanded recognition of differences that can be counted and debated in many different ways.

To achieve his goal of a society that can effectively debate and integrate individual liberty and social equality, Michael needs more than economic language and theory. Otherwise, his world will be economic and nothing else: *homo economicus* rules and is hegemonic in its ambitions. Using the jargon of economics as the language of citizenship tends to make us think of ourselves as consumers, competitors, and enemies, rather than as colleagues, neighbours, and friends. Like all languages, an economic vernacular is not transparent, but contributes to and constitutes the world in which people live. When people begin to talk of themselves as market actors and consumers, they begin to act out their allotted parts in a script that is not of their own making. Politics begins to resemble commerce, victory goes to the glib and the telegenic rather than the good and the wise, and free speech is converted into the right to profit. In courting this economic scenario, [261] Michael's vision of law-through-economics reduces democracy to the registering of personal preferences through consumer choices. It elides any real practice of deliberation, dialogue, judgement, and public conscience.<sup>15</sup> A good example of his failure to recognize the potential for abuse and oppression in private concentrations of power is his discussion of press ownership. [264] He runs the real risk of turning the politician into the huckster and the dream of democracy into the nightmare of crass commercialism.

Unlike the individualist cast of Michael's economic liberalism, my competing vision would not understand society as a crude aggregate

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glance around the world shows that starvation, mass unemployment, social unrest, ethnic wars, race riots, environmental despoilation, *etc.* have not been eradicated or tamed by liberal democracy's supposed sweep of all before it: see J. Derrida, *The Specters of Marx: The State of Debt, the Work of Mourning, & the New International* trans. P. Kamuf (New York: Routledge, 1994).

<sup>15</sup> See J.B. Elshtain, *Democracy on Trial* (Concord, Ont.: House of Anansi Press, 1993) at 28-30; and A. Hutchinson, "Money Talk: Against Constitutionalizing (Constitutional) Speech" (1992) 17 Can. J. Bus. L. 2.

of separate things, but as connected cells in a thriving organism. Individuals are not universal and abstract moral entities, but are situated within a local and concrete context; they are political beings with particular historical and social affiliations. Between people, a sense of belonging and reciprocal responsibility for others would be fostered. Freedom, rather than being viewed as contractual in origin and static in nature, would be understood more organically and dynamically. Accepting that the social whole is much greater than the haphazard aggregation of its individual parts, personal worth and self-esteem would be embedded in and nourished by affective affiliations: “solidarity is the social face of love.”<sup>16</sup> Personal liberty without public responsibility is, at best, hollow and unsatisfying; at worst, it is uncivil and corrupting. Instead of relying upon transcendent values and abstract rationality, the search for social justice would be based upon a practical reason that is contextual and contingent in character; flights of metaphysical musing would become hopelessly fanciful and indulgent. The political agora and the economic marketplace would cease to be simply arenas for the confrontation of competing wills and the satisfaction of individual wants, and would become crucibles in which to forge a common good.

Although a revitalized practice of citizenship has a rich and distinguished past, its contemporary significance and potential has largely been overshadowed by rights-talk—of which Michael’s economic argot is but one manifestation—which has hijacked citizenship and made it subservient to its particular civic agenda. In the economic and liberal almanac, citizenship is little more than “the right to have rights”:<sup>17</sup> this is the abasement of citizenship, not its apotheosis. If there is to be a serious effort to move away from rights-talk’s “dialogue of despair”<sup>18</sup> to democracy’s conversation of hope, the rights-holder must give way to the citizen in the political scheme of things. Of course, the kind of citizens that people can be is affected by the kind of society and community in which they live. However, an enhanced concept and practice of citizenship can begin to transform the society and community in which people live, so that they view themselves as participants in a larger civic project and see others not only as threats to freedom and fulfillment. Citizenship is more a social activity than an individual status as it allows people to inhabit the contested terrain between individual rights and

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<sup>16</sup> R. Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (New York: Free Press, 1976) at 206.

<sup>17</sup> *Trop v. Dulles*, 356 U.S. 86 at 102 (1958), Warren C.J.

<sup>18</sup> M. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991) at 182.

communal Right by colonizing it in the name of democracy. Neither individualistic nor communitarian, the enhanced concept of citizenship recognizes that any vision of “the good life” is always provisional and contingent. There is no fixed or final version of what amounts to the best way to live: the good life is to be found in the details of living, socially and privately, which must be constantly re-worked and re-negotiated. Whereas liberals put representative democracy in the service of private values, and Marxists imagine that direct democracy will bring an end to politics, participatory citizens accept that the relation between public virtue and private values is open to revisable articulation, and that the attraction of democracy is its promise to keep politics permanently open and fluid. As such, citizenship under radical democracy is not committed to one common good, but to a practice of engaged civility in which the common good is always up for consideration and conversion. For the democratic citizen, a good life consists in public-spirited engagement with others over the shape and substance of “the good life.”

Within a democratic dialogue of citizenship, it is possible to integrate *homo economicus* and its rights-talk into a much broader and deeper conversational context. The notion of the “free market” and its abstract denizens would not be outside or beyond political authority, but would be within its bailiwick. Crucially, this would allow the notion of “responsibility” to occupy a similar place in the economic and democratic conscience as the notion of rights currently does. Whereas economic actors and rights-holders exist in an abstract realm of optional interactions with anonymous others, the citizen is located in an historical time and in a local place where personal and social living unfold in a web of connections between real people, some of whom are known and liked, while others are not. This implies that, in exercising their rights and making claims, people would have to take into account their responsibilities to others, particularly those less fortunate and more vulnerable than themselves. Actions and practices would have to be evaluated within the socio-historical context of the democratic community: the particular mix of entitlements and responsibilities would always be reconfigurable in light of contingent concerns.

The appeal and limits of Michael’s cherished economic liberalism both flow from the same sources for “at the heart of this ethic lies a vision of the person that both inspires and undoes it.”<sup>19</sup> At the same time that it offers the prospect of empowering individuals and

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<sup>19</sup> M. Sandel, “The Procedural Republic and The Unencumbered Self” (1984) 12 *Pol. Theory* 81.

rescuing them from collective tyranny, rights-talk also stifles the possibility of truly progressive social change. As an historical artifact, rights-talk has played a positive role in social struggle and retains obvious strengths, such as the emphasis on the value of human dignity, physical protection, distrust of bureaucracy, and worth of rational justification.<sup>20</sup> However, *homo economicus* has overthrown the divine right of kings, clergy, and aristocracy only to replace it with the sovereignty of the abstract individual—God in a more philosophical and less theological uniform. Rights-talk treats people as abstract individuals rather than as situated citizens whose lives are currently constrained as well as potentially satisfiable within their relational contexts. Like all ways of seeing and comprehending the world, economic rights-talk distorts as much as it illuminates; it tends to shape the world in its own political image. The individualistic and economic vision of rights-talk depicts individuals as separate and egoistic, striving for a liberty that is self-regarding and a sociability that is hollow, each with equal capacity to use those rights. As such, rights-talk provides an inherently false account of human community both in its present practice and future possibilities. A rights-centric society becomes little more than an aggregate of self-interested individuals who only band together to facilitate the pursuit of their own uncoordinated, independent, and rationally-chosen life projects—a relation of strategic convenience and opportunism rather than mutual commitment and support. Rights become simply another commodity to be traded in the marketplace of humanity, and act as a barrier separating people from genuine communion with their fellow citizens.

In calling for the abandonment of markets as the organizing theoretical and organizational paradigm for civic interaction, I am not to be taken as making some commitment to a discredited and disavowed model of a state-planned economy. Any lingering faith in the possibility that a planned distribution of goods and services through bureaucratic channels might be the best alternative to a free-market ideology is to be thoroughly debunked and discarded; such polarized thinking is entirely antithetical to a postmodern and democratic way of proceeding. The mainstream notions of unified economic actors with fixed preferences, instrumental causality, and objective rationality are also preoccupations of Marxian economic thought. Indeed, Marxian economic thought sees itself as making up for and correcting the relativism, uncertainty, and indeterminacy of the mainstream models of economic theorizing. However, in the same way that Marxian economists have been quick to

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<sup>20</sup> See E. Wolfgast, *The Grammar of Justice* (Ithaca, N.Y.: Cornell University Press, 1987).

overemphasize the disordered and negative nature of capitalist markets, they have exaggerated the ordered and positive consequences of a state-planned economic order.<sup>21</sup> Neither a market-based nor a planned economy is as predictable, rational, or controlled as its apologists contend. The search for a structural and ahistorical foundation that can account convincingly for present economic behaviour and that can forecast confidently future economic arrangements is misconstrued: contingency is incorrigible and indeterminacy is inextinguishable. At different times and in different ways, the postmodern policy-maker must be prepared to adopt a variety of strategies and interventions that draw pragmatically on the imagery of both neoclassical market thinking and its Marxian critique as viewed from a suitably postmodern, non-essentialist, and historically-situated perspective.

Most importantly, those lawyers, economists, and scholars who are committed to progressive action in a postmodern world must resist the temptation to seek theoretical finality and practical dogma: closure is always contrived, frequently arbitrary, and usually conducive to established power relations. Relieved of Michael's anxiety to craft solutions that are somehow apt for all times and places, they can concentrate on the pressing problems of contemporary Canadian society and experiment with interventions that can best address the prevailing institutional structures of power. At his postmodern best, Michael recognizes this imperative but, at his modernist worst, he ignores its force at his and everyone else's peril. Michael's pressing and persistent challenge should not be, as he mistakenly insists, how best to maximize personal autonomy and individual entitlement. Rather, he should be more concerned to fathom how best to incorporate such values with the equally important virtues of social solidarity and the acknowledgement of difference. A major item on the political agenda of the truly democratic state will be the need to accommodate diversity and plurality without disaggregating to such an extent that the citizens do not act as a civic community. In place of rights-talk's willingness to go along with a me/them mentality, civic citizenship and the participatory state encourage a me/we involvement: it understands that the fate of each of us is unavoidably tied to the fate of all of us and that the self and the

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<sup>21</sup> J. Amariglio & D. Ruccio, "Postmodernism, Marxism, and the Critique of Modern Economic Thought" (1994) 7 *Rethinking Marxism* 7 at 21. This is also the case from a feminist economic perspective. Several writers identify and reject the totalizing, constructed, and male tendencies of traditional neoclassical theories: see S. Feiner & B. Roberts, "Hidden By The Invisible Hand: Neoclassical Economic Theory and the Textbook Treatment of Race and Gender" (1990) 4 *Gender & Soc'y* 159; and J. Nelson, "Gender, Metaphor, and the Definition of Economics" (1992) 8 *Econ. & Phil.* 103.

collective are not antagonistic entities, but complementary components of a political community. In an important sense, democratic conversation's opportunity is found in rights-talk's failure. Today's rights-holders, and especially their articulate and sophisticated representatives like Michael, must be prepared to take that chance for tomorrow's citizens.

## V. LIFE AFTER SHOPPING

In this section, I wish to show how the kind of theorizing in which Michael engages has operated to insulate prevailing structures and ideologies from lasting or profound change. For all the hard work of the consumer lobby, the increasing domination of *homo economicus* is illustrated by the fact that public discourse has become hostage to economics and has begun to dance to, instead of call, the economic tune: it is thoroughly infiltrated by the economic mind-set and attuned to its interests. People think of themselves primarily as consumers rather than citizens. The middle-class weaknesses of ostentation and envy are exploited; Yuppiedom becomes its own political credo and lifestyle. Electoral politics is eviscerated and reduced to hollow spectacle; form triumphs over substance by converting it into its own empty reflection. The effect of such a commercially-saturated atmosphere is to trivialize and impoverish democratic politics as well as life itself. "You live; you shop; you die"—that is the motto of modern Western societies. And, notwithstanding the considerable benefits that it has brought, it also promises to be its epitaph. Moreover, the cheery optimism of many 1970s law reformers, among whom Michael's was a leading voice,<sup>22</sup> has given way to a sombre pessimism—evidence of the failure of those reforms to disturb radically rather than merely reduce marginally the oppressive operation of a liberal capitalist economy.

My immediate task is to demonstrate how this situation has come to pass and to suggest ways in which it might be possible to effect a more genuine transformation in social life and politics—one that shifts the civic fulcrum from that of shoppers, with their individual parcels of rights and acquisitions, to that of citizens, with their social responsibilities and well-being. In doing this, I will build on the impressive body of work that my friend and colleague Iain Ramsay has been assembling. As I read it, he has sought to move beyond traditional

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<sup>22</sup> See M. Trebilcock, "Consumer Protection in the Affluent Society" (1969) 16 McGill L.J. 263; see also J. Ziegel, "The Future of Canadian Consumerism" (1973) 51 Can. Bar Rev. 191.

analyses and to propose a different discourse within which to frame and address the problems that are traditionally associated with consumer law and policy. As he puts it, “consumer law seems to be a particularly postmodern form of law ... [that] is neither obviously a prop for the status quo nor an instrument of social transformation.”<sup>23</sup> It is as much about alienation and consciousness as it is about economic power. Law in general and consumer law in particular have not only an instrumental and economic function, but also operate in ways that are more symbolic and cultural. Like Ramsay, I want to work toward an emancipatory culture that goes beyond the rhetoric of markets, consumers, and rights and begins to re-align itself around a civic discourse of citizenship. Accordingly, I contribute a postmodern effort that eschews a belief in grand narratives that either describe the ills of society or offer a single sweeping remedy for its improvement. Instead of Michael’s shoppers, I offer Allan’s citizens.

One aspect of consumer law and practice that has taxed reformers and theorists alike is the need to curb racism and sexism in the marketplace. Much progress has been made in eradicating the more overt and egregious forms of discrimination that have blighted the sale of goods and services. A combination of consumer legislation and human rights codes has outlawed those barriers and practices that keep people of colour and women from participating fully *qua* women or people of colour in the give-and-take of the marketplace. While there is an acknowledged need for more robust enforcement and education, the panoply of laws in place are considered to be sufficient to tackle the problem. In keeping with the overall tenor and thrust of rights-talk, the assumption was that, once people broke through the formal and artificial barriers that had previously excluded them from access to certain services and shops, the competitive discipline of the market and individual sellers’ profit motive would ensure commercial equality; money was a transparent medium that had no particular race or gender. The substantive nature of any deal sought and obtained would still vary in accordance with the parties’ ability and capacity to bargain and negotiate effectively, but in this regard female and black consumers would be in no better and no worse a position than any other purchaser. For sellers or providers of services to discriminate in pricing on the basis of the buyers’ race would be a case of cutting off one’s nose to spite

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<sup>23</sup> I. Ramsay, “Consumer Law and Structures of Thought: A Comment” (1993) 16 J. Cons. Pol. 79 at 91. See also I. Ramsay, *Consumer Protection: Text and Material* (Osgoode Hall Law School, York University, 1989); and “Consumer Law and The Search For Empowerment” (1991) 19 Can. Bus. L.J. 397.

one's face: bigoted sellers would be at a competitive disadvantage and ultimately be driven out of the market. Although such discriminatory price-fixing might occur among the more recalcitrant of sub-markets, it would be occasional and perverse rather than systemic and prevalent.

However, recent studies strongly suggest that not only is there still rampant and widespread discrimination in the marketplace, but that the available legal solutions and, in particular, the thinking behind them are not up to the task of rooting out actual or potential racism in consumer practices. In a much-discussed and sophisticated article about negotiating for the purchase of new cars, Ian Ayres came to the stark conclusion that "white males receive significantly better prices than blacks and women."<sup>24</sup> For example, as well as disclosing that a very different style and substance of negotiating was used by dealers depending on the identity of the prospective purchaser, the profit that dealers made from black women was almost quadruple that made from white men. These results occurred in situations where the class and other relevant consumer characteristics (dress, attractiveness, *etc.*) of the testers were constant across race and gender. Also, in a revealing finding, it was discovered that the worst (or best?) deals were often made between salespersons and buyers of the same race and gender. Although Ayres concluded that "the results of this study can be described as a set of facts in search of a more complete causal theory," he did insist that "whatever its causes, however, the discrimination revealed in this study stands squarely in the face of earlier analysis" that there would not be widespread price variation within and across dealers on the basis of gender and race.<sup>25</sup>

To combat such discrimination, Ayres offered several suggestions for legal reforms and consumer protection remedies; they are the exactly the kind of serious proposals that I believe a similarly troubled Michael would make. The first is to resort to a more beefed-up version of existing contract law in the form of the "substantive unconscionability" doctrine. However, the likelihood of success for such a strategy is very low in light of the courts' dismal record in pursuing a

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<sup>24</sup> I. Ayres, "Fair Driving: Gender and Race Discrimination in Retail Car Negotiating" (1991) 104 Harv. L. Rev. 817 at 819. There are a number of empirical-type problems with this study—not the least of which is the fact the testers were only required to engage in a set series of negotiating tactics; they were not obliged to close an actual sale. In particular, there is no real study of what would have happened if the dealers had been faced with making no deal unless they dropped their prices. Nevertheless, I do not think that this limitation in Ayres' research impairs or invalidates the conclusions that I draw from it. The basic thesis stands up to scrutiny—that different people were treated differently on the basis of their race and gender.

<sup>25</sup> *Ibid.*

robust campaign against individual dealers, and their lack of appetite for such substantive intervention. Discouraged, Ayres goes on to recommend two other, regulatory-type strategies for reform. Whereas one would legislate a permissible price dispersion on a range of products and services such that dealers would be penalized for excessive markups, another would mandate disclosure by sellers of extensive information (for example, wholesale price, average profits, *etc.*) that would be valuable to consumers. While it is true that both these strategies would strike at the heart of the problem and, therefore, warrant support, their underlying rationale draws upon a very different rhetoric and political theory than the more traditional solutions to market failure. Indeed, their potential efficacy arises from the very fact that they impliedly query and reject the “truck and barter” mentality of a generation of economists weaned on a puritan diet of bargaining exchange. Ayres’ proposed remedies (and what I suggest would be Michael’s likely response) do not so much compensate and adjust for market failure, but rather challenge the whole operation of the market and its accompanying imagery as the prime institutional and ideological device for the distribution of goods and services.

The most that consumer laws, based on a market-failure model and framed in economic terms, can do is attempt to place consumers in a position to make the best deals that they are able to do. Whereas human rights law works to overcome the formal barriers that prevent or disadvantage one party from negotiating with another, the common law rules of misrepresentation, duress, fraud, mistake, and the like only place substantive limits on the kind of bargain that can be struck. What they do not do—in progressive or liberal guise—is to ban or challenge the idea of a bargain in a free market. There is no such thing as a market price, only one that the buyer and seller negotiate. While banning certain bargaining techniques deemed to be presumptively unfair and correcting for excessive imbalances of economic power, the whole of the liberal legal and social regime allows buyers and sellers to make the best deal that they can—where *best* is measured solely with reference to the buyers’ and sellers’ own self-interest. Concern for any communal good is, at best, an incidental issue that has no direct bearing on the particular bargain at hand. Indeed, the bulk of existing price-control regulation is devoted to ensuring that prices are *not* fixed and that the play of competition is left largely uncontrolled, so that the market is allowed to work in a fair and so-called natural way.

Based as it is on an over-utilized notion of market failure and an under-theorized idea of consumer preferences, economic rights-talk *à la* Michael manages to reinforce rather than transform the structures and

assumptions of liberal capitalism: it expresses a tolerant market morality in which the right to act against the common good has to be conceded, albeit reluctantly, a significant role.<sup>26</sup> Even those who champion the values of trust, fairness, and cooperation in an alternative vision of contract still operate within the broad confines of the market and an exchange ideology. Whereas liberalism and rights-talk is all about the art of the deal, a discourse of citizenship not only allows us to correct for the failures of the market, but it incorporates a discussion about the kind of people we are and can become in our struggle to negotiate not only deals, but our lives. Bargaining is not a natural human attribute, but a function of the social conditions in which people are nurtured and formed. All that consumer rights mentality can do is to reinforce that rather than re-imagine social beings who are not reducible to and determined by the economic conditions in which they live. Insofar as people are consumers, they are also citizens in a social arrangement that encompasses, but is not exhausted by, the market. Shopping is part of life, but the “shop-until-you drop” consumer need not be an individual’s main or only self-image: the languages of consumption and competition are best nurtured in a fuller conversational ethic of trust and collaboration.

By re-presenting the problem of racism and sexism in the marketplace in the discursive framework of democratic citizenship, it becomes possible to tackle such debilitating practices directly and systemically. Instead of evaluating consumer practices in terms of bargaining and deal-making, the evaluative focus can shift to the civic lights of participation and consent. Both of these notions are detectable in existing law, but they currently play a minor and marginalized role and tend to be procedural and piecemeal in intent and operation.<sup>27</sup> Suitably expanded and informed by a democratic impetus, these institutional imperatives can place greater emphasis on the mutual responsibilities between people. On this dialogic understanding, participation comprises much more than the expenditure of money to register and satisfy preferences that are deemed to be, at least in some part, exogenous to the consumer process: it allows citizens to exercise an active and direct

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<sup>26</sup> See E. Andrew, *Shylock's Rights: A Grammar of Lockian Claims* (Toronto: University of Toronto Press, 1988) 12-21.

<sup>27</sup> I am thinking here of the common law doctrines of informed consent in tort law and misrepresentation in contract law: see C. Boyle & D. Percy, eds., *Contracts: Cases and Commentaries*, 5th ed. (Scarborough, Ont.: Carswell, 1994) at 359-77. For a suggestive account of how such doctrines can be invigorated in the service of democratic ends, see A.C. Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (Toronto: Carswell, 1988) at 215-22.

part in the overall political process through which preferences are generated, challenged, confirmed and met. Of course, what amounts to the common good at any time and in any interaction is not fixed or final, but is always up for grabs. However, such a different way of formulating and scrutinizing consumer relations does allow the idea of public virtue to be combined with the pursuit of private interests. Framed in this way, a democratic model of economic activity suggests the development of more community-based and local initiatives that reflect and encourage a “me/us” rather than “me/them” sensibility of cooperation. While there is no guarantee that a civic conversation of democratic citizenship will eradicate sexism and racism in the marketplace, it will have a much better chance of success than the attenuated discourse of rights-talk and economic rationality.

When P.G. Wodehouse, the English comic novelist, was asked if he spoke Spanish, he said “I don’t know: I’ve never tried.” Legal, economic, and law-and-economics commentators would do well to heed that open-minded attitude and begin to experiment more transformatively with different structures and arrangements for the formation and satisfaction of people’s preferences as consumer-citizens. The kind of rights-talk and market ideology that Michael espouses is not equal to that task; it only tends to make the best of a bad job and legitimate the problem, rather than resolve it. Even at their most ideal, consumer rights can only hold in check the vices of racism and other kinds of civically-debilitating discrimination. In contrast, a shift from rights-talk to democratic dialogue can challenge such social cancers fundamentally and directly. It is not enough to be happy shoppers and marketeers. It is better that people strive to be good citizens in a jolly community that treats all as worthy and deserving, whether rich or poor. The dominant narrative paradigm of pervasive consumerism must be challenged, fragmented, and contextualized. While I am not suggesting that a postmodern dialogue of citizenship is the only possible alternative to extant market-driven rights-talk, or that such a civic conversation leads to any necessary or determinate recommendations, I do maintain that it is the least undesirable complement to a social commitment to a robust and direct mode of democratic governance. In short, more democracy—less capitalism.

## VI. THE BOTTOM LINE

So can Michael and I remain friends? I hope so. Even if understanding why we agree causes us to disagree more, it ought not to

be a gap that is too hard to bridge. There is much in his work to ponder and learn from. In particular, I agree entirely that, in the same way that the political right cannot ignore issues of redistribution, “progressives cannot exclusively pre-occupy themselves with issues of redistribution.” [258] There is too much mutual suspicion that leads to an unproductive stand-off. Instead, Michael argues for a “new convergence between economic and social policy-making around the role of the state in promoting the development of human capital.” [260] This is an admirable and noble ambition, provided that the state is understood in the postmodern language of democratic participation and institutional experimentation.<sup>28</sup> As postmodern friends, Michael and I might join to re-invigorate the jaded imagination of late twentieth-century citizens. *That’s my Michael!*

What is the price of experience? Do men buy it for a song?  
Or wisdom for a dance in the street? No it is bought with the price  
Of all that man hath—His house, his wife, his children.  
Wisdom is sold in the desolate market where none come to buy  
It is an easy thing to triumph in the summer’s sun  
And in the vintage and to sing on the wagon loaded with corn.  
It is an easy thing to talk of patience to the afflicted  
To speak the law of prudence to the homeless wanderer.  
It is an easy thing to rejoice in the tents of prosperity  
Thus could I sing & thus rejoice: but it is not so with me!<sup>29</sup>

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<sup>28</sup> See A.C. Hutchinson, *Waiting for Coraf: A Critique of Law and Right* (Toronto: University of Toronto Press, 1995) c. 8.

<sup>29</sup> W. Blake, “America” and “The Four Zoas” in D. Erdman, ed., *The Complete Poetry and Prose of William Blake* (Berkeley: University of California Press, 1982) at 53 and 325.