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Review essay

Morality and the Market: Containing the Beast

What Money Can't Buy: The Moral Limits of Markets*

By Michael Sandel, London: Penguin, 2012.

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In his latest book the renowned political philosopher Michael Sandel asks what has become a pressing question for our age: is there anything money cannot buy? Sandel shows that there are certainly very few things now that are not subject to a price. If you have got the money you can: hunt and kill endangered species like the black rhino; buy a right to pollute the atmosphere; pay people to stand in queues for you; place a bet that a particular celebrity will die next year; buy the life insurance policies

* I borrow part of the title from an article by Kit Barker (1995).

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off people who are seriously ill in the hope of cashing in when they die; and you can even pay someone to make an apology on your behalf.

Is there anything particularly wrong or disturbing about any of this? I suspect that many of us would feel a sense of unease or (to use a word that Sandel likes) disquiet about at least some of these examples of commodification. The morality of market alienability, i.e., what should and should not be bought and sold, is of course not a new subject. It has deep roots in the Marxist tradition in relation to the buying and selling of labour and in the twentieth century significant advances were made in examining the ethics of other specific kinds of trade, such as the sale of body parts, commercial surrogacy and prostitution.¹ Unlike these other works Sandel's book is not aimed at experts but rather the general reader. Much of his energy is devoted to showing, using one provocative example after another, that markets now reach into almost every aspect of our private and collective lives.² But Sandel's aim is not just to report on what is a worrying trend. Rather, his ambitions are more philosophical in nature; to explain why it is disquieting to pay to hunt rhinos, buy life insurance policies from sick and elderly people, place bets on which celebrity will die next year, etc.

His thesis, like his well-known work on the nature of justice, owes its inspiration to Aristotle.³ Sandel's central worry is that commodification is corrupting.

¹ For two notable examples see Anderson (1993), and Radin (1996). Sandel explicitly acknowledges a debt to Anderson p. 9 n. 18.

² This was also the style he adopted in his most recent book on justice. Sandel (2009).

³ Sandel's first book on justice (1982/1998) which was a response to John Rawls' *A Theory of Justice* (1971/1999) is now considered a classic. His contribution to the literature on justice is now better known thanks to his second book which was aimed, like *What Money Can't Buy*, at a general audience

There are certain goods such as education, nature, health, and sex, and approaches to life, such as our attitude towards death, that instantiate values and are governed by norms that are fundamentally incompatible with the values and norms that we associate with markets. When markets interfere with these goods and approaches to life they “crowd out” the values and norms that are appropriate to them and thereby corrupt and diminish their value. At the heart of the book then is the Aristotelian idea that all goods and things of value have a distinctive aim or *telos*, deviation from which corrupts their nature and is a matter of serious concern or condemnation.

Clearly, there are many goods that are the proper subject matter of markets and are not corrupted by commodification. Aside from those who are against the very idea of a market, few of us would voice concern that toasters, fridges, iPods, chairs and laptops are bought and sold. But how do we distinguish these cases from those above that Sandel feels uneasy about, such as buying the right to kill an endangered animal, or placing a bet that a celebrity will die?

The answer Sandel gives is that it is not easy. In the case of each of these goods we have to unpack the values that they instantiate, and work out “case by case, the moral meaning of these goods and the proper way of valuing them” (p. 10). That way we will figure out the norms that govern these goods, and whether they are of a kind that are likely to be displaced if the good in question is commodified.

(2009). His concerns about justice seep into *What Money Can't Buy*, in particular with Sandel's claim that there are certain goods like free or subsidized tickets to concerts or theatrical performances that should not, or at least cannot without loss, be *allocated* using markets pp. 33-35, 38-39. Instead, these goods should be allocated using methods which instantiate egalitarian principles such as a queue rather than markets which depend on the ability and willingness to pay.

Sandel argues that one of the reasons for “market triumphalism”, i.e., the increasing reach of markets into our lives, is our collective failure over the past few decades to engage with the challenge of identifying what constitutes a ‘good life’. The failure may be attributed to a desire to avoid disagreement between citizens with differing moral and religious convictions, and the liberal principle, now strongly associated with John Rawls, that the state should be neutral on such matters.⁴ However, market norms and reasoning have flooded into the resulting vacuum, because “Markets don’t wag fingers. They don’t discriminate between admirable preferences and base ones. Each party to a deal decides for himself or herself what value to place on the things being exchanged” (p. 14).

Despite the virtue of its apparent neutrality, market triumphalism raises a number of distinct moral concerns. One of the problems with the commodification literature is that these concerns are very often and mistakenly run together. It is a virtue of Sandel's book that he differentiates them. There seem to be three things in particular that trouble Sandel about certain kinds of commodification: ineffectiveness, unfairness and, as I have already mentioned, his main concern, corruption by commodification.

In the case of “health bribes” Sandel is concerned about all three. Health bribes are cash incentives, benefits in-kind or cash penalties used for example by doctors and insurers to encourage people to lead healthier lives. You receive a cash payment or shopping vouchers or a lower health-insurance premium for things like

⁴ Sandel in his previous work (1982/1998) has doubted whether this kind of neutrality is desirable or indeed even possible. See also Raz (1986, chs. 5 and 6); Kimel (2003, pp. 121-126).

taking your medication, controlling your cholesterol, losing weight, or giving up smoking. The idea is that such schemes save the state and insurance companies potentially billions of dollars that would otherwise be spent on treating these people once they become ill. From the point of view of cost-benefit analysis, it is far cheaper to use cash incentives or penalties to prevent these illnesses than to cure them.

Sandel argues that, contrary to the claims of those who advocate the use of markets in health care, these schemes are ineffective. The health gains that they produce are usually only temporary. So, for example, the vast majority of smokers paid to stop smoking start smoking again very soon after the cash incentives stop (p. 59).

Secondly, Sandel worries that these schemes may be unfair. It may be unfair that those people who have not looked after themselves are rewarded for not having done so by receiving cash incentives to do what others do anyway. On the other hand, in the case of cash penalties it may be unfair that people, because of factors outside of their control, i.e., their genetic make-up or the socio-economic circumstances that they were born into, are unfairly penalized for having a poor level of health (pp. 57-58).

Sandel's third worry about these schemes is the most serious. Even if these schemes were effective, and were perfectly fair, Sandel would still object to them on the grounds that they are corrupt. They corrupt the good involved in showing "...a proper concern for our physical well-being...", which is itself "...a part of self-respect" (p. 59). That good depends on us taking an attitude of care and respect

towards our bodies. However, health bribes may discourage the formation of these attitudes, because they are manipulative: “They bypass persuasion and substitute an external reason for an intrinsic one” (p. 59). By bypassing persuasion, they do nothing to help and may indeed discourage the development of attitudes towards our bodies that are essential for self-respect.⁵ In this way, market norms displace the norms that should govern the good of health care, and by doing so they corrupt or diminish it.

Implicit here is a concern not only that the particular good associated with taking care of one’s body is corrupted, but also that there is corruption on a grander scale: our collective failure to educate and persuade the unhealthy that it is a central aspect of their living a good life that they demonstrate care and respect for their own bodies. This failure is a symptom of our concern, encouraged by Rawlsian liberalism, not to step on people’s toes. But what Sandel does so well is to show exactly where this version of liberalism leads: market mechanisms are used to short-circuit the duties that we owe to our fellow citizens, with the result that we become estranged from one another. There is a failure here to respect the humanity of others, and Sandel may also be making the deeper (Kantian) point that this constitutes a failure to respect ourselves too.

Although these three concerns, ineffectiveness, unfairness and corruption, are distinct, they may be linked in particular cases. Sandel says for instance that the failure of health bribes to encourage people to develop the right attitudes towards their

⁵ There may be a link between Sandel’s conception of self-respect and what he says earlier about the fairness of health bribes and the arbitrariness of factors like genetic make-up and socio-economic circumstances. Just as these factors are not grounds for fair allocations, they may also not be the kinds of things that ground self-respect. On this view, Sandel would be invoking a Kantian notion of self-respect. Where the grounds for self-respect are our generic capacities as human beings.

bodies, may be one of the reasons for why in the long run they prove ineffective: “absent the attitudes that sustain good health, the pounds may return when the incentives end” (p. 59).

By distinguishing between these three moral concerns, and in particular by introducing the Aristotelian idea of corruption, Sandel has made a useful and I think lasting contribution to the commodification literature. There are however problems with the book. Perhaps because the book is aimed at a general audience and perhaps because Sandel saw it as a big part of his job to highlight what he considers to be a worrying social trend, much of the ink in the book is used up in providing worrying examples of commodification. They certainly hold the attention, but one wonders whether he really needed quite so many. Not only is there a risk of overkill, but Sandel also leaves himself little space to defend his claims fully against obvious counter-objections which any intelligent reader – expert in the field or not – would have. By the end of the book, there are many unresolved issues.

To illustrate this point I will consider two of his arguments against market triumphalism: ineffectiveness and corruption. As we have seen Sandel uses the example of health bribes to illustrate how market incentives may prove ineffective: by providing “external” reasons for keeping healthy, people tend to lose the incentive to take care of themselves once the cash incentive dries up. Another example he uses to make the same point is the “late pickup”. Sandel cites a study of an incentive scheme in Israel where parents were fined if they picked up their children late from day-care centres (p. 64 n. 37, study by Gneezy and Rustichini, 2000). The aim of the scheme was to encourage parents to be on time. However, the scheme had a surprising effect: instead of reducing the incidence of late pickup, the number of late pickups actually

went up. Sandel explains the result on the ground that the incentive scheme had the effect of displacing the norms that would normally apply to govern the interactions between parents and carers in these cases:

“Before, parents who came late felt guilty; they were imposing an inconvenience on teachers. Now parents considered a late pickup as a service for which they were willing to pay. They treated the fine as if it were a fee. Rather than imposing on the teacher, they were simply paying him or her to work longer”. (pp. 64-65)

I doubt that efficiency theorists, i.e., those that claim that the principle of promoting efficiency should govern *all* of our actions and interactions, and who are usually the strongest advocates of markets, would be overly concerned with Sandel’s argument that the market is an ineffective mechanism for achieving outcomes in these types of case. They could reply to Sandel in two ways. First, they would claim that the only way to measure effectiveness is through efficiency. Although it may well be true that the market is not the best way to promote health care or ensure that parents pick up their children on time this does not mean that the market has failed. The only end that markets have is the promotion of efficiency, i.e., to ensure that goods and services are allocated to those who are willing to pay the most for them. So, if parents would prefer to pay a fee rather than pick up their children on time, and if day-care centres are willing to pay overtime or lay on extra staff to accommodate these preferences then the market-based incentive scheme is perfectly ‘effective’.⁶

⁶ Indeed some in the law and economics tradition have even advocated markets in babies on the grounds that they are efficient. See famously R Posner and E Landes (1978). For the efficiency theorist

Alternately, efficiency theorists could argue that the failure of the markets to ensure that desired goals are met (healthier people or more prompt nursery pickups), simply proves that certain goods such as health care or respectful relations between parents and teachers should not be subject to market-based mechanisms for promoting efficiency. In these cases market mechanisms are inefficient. From the point of view of a cost-benefit analysis, if providing financial incentives to people to lose weight, take their medication, etc., is a waste of money because these schemes do not work then the efficiency theorist would be the first to acknowledge that they should be dropped. This is an efficiency-based argument, familiar in the law and economics literature, for why certain goods should be market inalienable, i.e., free from market processes or exchange.⁷ Although Sandel is clearly not blind to these efficiency-based arguments for market inalienability (see pp. 31-32), he does not consider fully or in any systematic way in this book the extent to which inefficiency, rather than deeper moral concerns, may explain the unease we feel about the various examples of commodification cited in the book.

Sandel could respond to this point by saying that he never meant to deny that efficiency theorists could construct plausible sounding accounts of the disquiet we feel about these cases. He just wanted to show that efficiency though plausible is the wrong kind of reason for why we feel unease in many of these cases. The unease is a consequence of the fact that when markets extend their reach into domains like health

efficiency should be promoted even in cases where there is a conflict between the pursuit of that goal and deeply held moral convictions.

⁷ See for example Posner (1979, pp. 125-126), arguing that transaction costs explain the inalienability of fundamental rights.

care or the relations between parents and teachers, they crowd out the norms that ought properly to obtain in these domains and corrupt or diminish the goods at stake.

This argument that market triumphalism corrupts particular goods and society at large is, as I have said, the central thesis of Sandel's book. Although it is a novel and interesting argument, it raises as many questions as it answers. I will focus on two of the most important questions raised. First, it is not immediately self-evident that money does corrupt goods or valuable ways of life. The fact that there is a market for paintings by Munch, Vermeer and Caravaggio, and that they fetch millions of dollars at auction, does not seem to diminish the intrinsic artistic value of these works or our engagement with them. The same can be said, in many parts of the world, for going to the opera, theatre or the ballet – increasingly a very expensive business. Indeed, perhaps the fact that people are willing to pay so much for these things adds to rather than diminishes our engagement with their value? Viewing a Caravaggio that I know is worth millions of dollars may motivate me to spend a little longer appreciating the work than I otherwise would. The fact that it cost me a lot of money to go to the theatre may mean that I concentrate more during the performance than I otherwise would.

Moreover, the fact that these goods are expensive may open up possibilities for altruism that would not otherwise exist. In the book Sandel gives the example of the New York Public Theatre which gives away free tickets to theatrical performances in Central Park. Paying someone to stand in a queue for you in order to obtain tickets, or buying these tickets from a tout, Sandel argues, spoils the purpose behind them which is the making of a gift (p. 33). However, perhaps these gifts have the

expressive value that they do, at least in part, because theatre is a commodity and a relatively expensive one at that? The monetary value of the gift may change its nature, and *add* to its expressive value.

Sandel might well reply that the fact that people attach value to things because of how much they are worth demonstrates his point. Rather than appreciate these items because of their artistic, aesthetic or literary merit, we do so for the wrong reasons, i.e., because of their financial worth, and thereby diminish our engagement with them. That may well be a plausible and persuasive reply to these kinds of objections to Sandel's thesis, but in the book there is not enough of this kind of going back and forth between the thesis and obvious objections to it.

A further problem arises because even if Sandel is right that the deepest problem with market triumphalism is the corruption of certain valuable forms of life or ways of interacting with things and people, he does not explain adequately what weight we should attach to these concerns. As we saw above, Sandel claims that we figure out "case by case" whether a good is corrupted by working out the norms that ought to govern it and whether they are likely to be displaced by commodification. What is less clear though is what the implications are if a good is corrupted by market norms.

If the commodification of opera, education, health care, theatre or great paintings diminishes our engagement with the values that underpin these things, what are the implications? Should we stop selling these things, or should we only sell them below certain prices? Does the state have a duty to subsidize them or provide them for

free? Sandel says very little about these questions. All that he seems to say is that commodification in cases like these is a cause for regret, but if it serves some social good, like improving health or educational attainment, then there may be good reasons to retain it. Where it serves no good end, then there is a case for removing the good from the market (p. 78). So, for example, Sandel argues that the market for hunting endangered species promotes inappropriate attitudes towards animals, but if the reason for having the market is that this is the only way to help conserve these creatures then commodification may be justified. However, if there is no good purpose achieved by this trade then it should be banned (pp. 79-84). Aside from saying that the satisfaction of perverse or debased preferences, such as killing these animals just for the sake of killing them, carries “no weight in any calculus of social utility” (p. 84), Sandel gives very little direction on what counts as a social good. Nor does he adequately explain how concerns about the moral corruption of certain goods should be balanced against considerations of social utility, and what the policy implications of this balancing exercise should be. Indeed, for many deontologists the very idea of this kind of balancing is morally problematic. It would have been helpful for Sandel to say more about these issues. As it stands, the reader may be left troubled by the corrupting influence of market triumphalism, but left very unsure about what, if anything, he should do about it.

By the end of the book the reader may well feel slightly short-changed.

Perhaps because the book was aimed at a general audience, Sandel tends to avoid going too deep into possible counter-objections, philosophical controversies and the detailed implications of his views. On the plus side he is able to concentrate on what no doubt he considered his central task, to identify a worrying social trend, the ever

increasing reach of markets into our lives, and the pressing moral concern to which it gives rise, the moral corruption of certain goods and forms of life that are central to our pursuit of lives that are worth living. This he achieves admirably, and in doing so he helps to shake us out of the moral complacency that develops when markets pervade. Nevertheless, Sandel may have underestimated his readership. I suspect that many, once alive to the moral issues at stake, would want to know more about the possible solutions. There is another book here waiting to be written.

References

Anderson, E., 1993. *Value in Ethics and Economics*. Cambridge, Massachusetts; London, England: Harvard University Press.

Barker, K., 1995. Unjust Enrichment: Containing the Beast. *Oxford Journal of Legal Studies*, 15, pp. 457-475.

Gneezy, U., and Rustichini, A., 2000. A Fine is a Price. *Journal of Legal Studies*, 9, 1-17.

Kimel, D., 2003. *From Promise to Contract: Towards a Liberal Theory of Contract*. Oxford; Portland, Oregon: Hart Publishing.

Posner, R., and Landes E., 1978. The Economics of the Baby Shortage. *Journal of Legal Studies*, 7, pp. 323-348.

Posner, R., 1979. Utilitarianism, Economics and Legal Theory. *Journal of Legal Studies*, 9, pp. 103-140.

Radin, M.J., 1996. *Contested Commodities: The Trouble with the Trade in Sex, Children, Body Parts, and Other Things*. Cambridge, Massachusetts; London, England: Harvard University Press.

Rawls, J., 1971/1999. *A Theory of Justice*. Rev. edn. Oxford: Oxford University Press (1999)

Raz, J., 1986. *The Morality of Freedom*. Oxford: Clarendon Press.

Sandel, M.J., 1982/1998. *Liberalism and the Limits of Justice*. 2nd ed. Cambridge: Cambridge University Press.

Sandel, M.J., 2009. *Justice*. London: Penguin.