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Ethics

Blocked Exchanges: A Taxonomy*

Judith Andre

In *Spheres of Justice* Michael Walzer lists fourteen “blocked exchanges”: things which in the United States cannot be bought or sold.¹ He does so out of concern about domination; although his title refers to justice, his target is oppression rather than inequality as such. It lessens domination, Walzer argues, to recognize different spheres—aspects of life in which different principles of distribution are appropriate. Separating these spheres limits the power any one person can acquire; even the greatest wealth, for instance, should not be able to buy human beings, political office, criminal justice, and so on.

But in fact, of course, money is vastly powerful. If not human beings, it can buy us servants; if not political office, the attention of elected officials; if not criminal justice, the best lawyer in the country. And every day, it seems, there is more and more that money can buy. Some of the new commodities are inventive: singing telegrams, time-slices of condos; even the mortgage itself could be sold. Other commodities, actual or suggested, are more frightening. In Europe one can sell one’s own kidney: for a few thousand dollars some people will have one kidney surgically removed and implanted in someone else’s body.² Richard Posner and William Landes have suggested a market in babies in the United States.³

Walzer would impede this march toward commodification. His list of blocked exchanges is rough and unorganized, suggestive rather than conclusive. It includes human beings; political power and influence;

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1. Michael Walzer, *Spheres of Justice* (New York: Basic, 1983), pp. 100–103.

2. J. Harvey, “Paying Organ Donors,” pp. 117–19; and Bob Brecher, “The Kidney Trade: Or, the Customer Is Always Wrong,” pp. 120–23—both in *Journal of Medical Ethics*, vol. 16 (September 1990). See also Terry Trucco, “Sales of Kidneys Prompt New Laws and Debate,” *New York Times* (August 1, 1989), p. C1.

3. Richard A. Posner and William A. Landes, “The Economics of the Baby Shortage,” *Journal of Legal Studies* 7 (1978): 323.

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criminal justice; freedom of speech, press, religion, and assembly; marriage and procreation rights; the right to emigrate; exemptions from military service, jury duty, and other communally imposed work; political office; basic welfare services like police protection and education; desperate exchanges, such as those involved in accepting dangerous work; prizes and honors; divine grace; love and friendship; and criminal acts. He believes the list is complete but leaves open the possibility that it is not. His general position is that different kinds of goods carry with them different criteria of distribution.

Walzer is not alone in wanting to limit the market. Several theorists have offered other approaches to restricting it. Margaret Jane Radin, for instance, distinguishes personal from fungible property: personal property is bound up with one's being the person one is; it is valued for its own sake and cannot be replaced with money alone. Laws may therefore, she argues, prohibit its sale.⁴ Elizabeth Anderson argues not just from the nature of the goods in question but also from the nature of commerce and argues that some good things cannot survive therein. Only those things should be for sale "whose dimensions of value are best realized within market relations." That is not true of gifts, shared goods, ideals, and objects of need, all of which require other kinds of social relations.⁵

Walzer, Radin, and Anderson each offer us a single principle with which to bound the market. Radin's is broad and basic: protect human flourishing by shielding nonfungible property from the full force of the market. Walzer, too, works from a broad and basic principle—lessen oppression by using different grounds for distribution in different spheres of life—but he also lists in detail what belongs outside the sphere of money. Anderson's perspective is in one sense plural, since markets have a number of characteristics (impersonality, self-interest, want-regardingness, etc.), each of which might be destructive of different things. Yet ultimately she too is working with a single principle: protect from the market those things to which it is essentially inhospitable.

Mark Nelson takes a somewhat different approach: he lists ten examples of blocked exchanges and derives from them nine principles. The principles are only loosely related to one another.⁶

4. Margaret Jane Radin, "Market-Inalienability," *Harvard Law Review* 100 (June 1987): 1849–1937. In an earlier article she argues that personal property should also be privileged against government control; i.e., the government needs more justification to take or redistribute or control it (Margaret Jane Radin, "Property and Personhood," *Stanford Law Review* 34 [May 1982]: 957–1015).

5. Elizabeth Anderson, "The Ethical Limitations of the Market" (paper presented at the international meeting of the Conference for the Study of Political Thought on Markets and Political Theory, Williams College, Williamstown, Mass., April 1989).

6. Mark Nelson, "The Morality of a Market in Transplant Organs," *Public Affairs Quarterly* 5 (January 1991): 63–79. Nelson considers one principle, then notes an exception to it and formulates a principle to account for the exception. To that, in turn, there is an exception; and so forth.

In this article I present a new approach, neither a list (whether of blocked exchanges or of unrelated principles) nor a single overarching principle but a set of logically related considerations: a framework for thinking about the issue. Once we understand what a sale is and look closely at Walzer's useful list, we find that there are a number of distinct grounds for blocking exchanges. Divine grace, for instance, should not be sold because it cannot be, and pretending to do so is a fraud. The right to marry should not be sold because it should be inalienable. Criminal justice should not be sold because a bribed decision is not justice at all.

Perhaps every intermediate principle I uncover here could in turn be explained by Walzer's, Radin's, or Anderson's accounts; I do not try to settle that here. Since much theory works directly from examples, organizing those examples should help us evaluate any theories—Walzer's, Radin's, Anderson's, or others.

First, some background. We can be confused by a mental picture of a sale as primarily a physical exchange. We imagine one person handing another an object, say a pencil, while the second hands the first money. Now we all know that this change of physical relationship, of what object is in whose hand, is neither necessary nor sufficient to a sale. What is essential is that a set of rights, duties, and liabilities pass from one person to the other.⁷ The transfer depends on words or symbolic actions, and these may or may not include a physical exchange.

When we buy a physical object or a piece of land, we acquire a set of legal rights and duties concerning it, and the previous owner has the money we once had. (The legal statuses include, for instance, the right to use what is owned, the rights to its fruits, liability for upkeep and taxes, and so on.)⁸ After the sale each party has something the other had before the sale: the rights, privileges, liabilities, and so on which are constitutive of the legal status of ownership transfer without alteration to the buyer; rights over a sum of money pass unchanged to the seller.

Once we understand this, we see something else crucial: nothing can literally be sold unless someone has certain prior legal relationships to it. Roughly, nothing can be sold unless it is first owned. Ownership

7. I will use the phrase "rights, duties, and liabilities" and similar phrases to indicate a full Hohfeldian set of legal statuses: claim rights, duties, privileges, powers, liabilities, and immunities (Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal*, vol. 23 (1913), and an article by him of the same title in the same journal, vol. 26 (1917), pp. 710–67.

8. The locus classicus is A. M. Honore's "Ownership," in *Oxford Essays in Jurisprudence*, ed. A. G. Guest (Oxford: Clarendon, 1961), pp. 107–47. His list includes rights to possession, use, management, income, capital, security, transmissibility, and others. In "Full Ownership and Freedom" (1992, typescript), I develop what I think is a more ordered list.

admits of degrees; I can own a sewing machine more completely than I can own historic buildings, for instance, since the law allows me to do whatever I want to the machine but not to the building. Not every set of rights, duties, and so on concerning an object constitutes ownership. Full ownership includes the privilege of using something, a claim to state assistance in excluding others, and the right to alter and destroy what is owned. Some subsets of the rights which constitute full ownership also count as ownership; I will not try to explore the precise boundaries of the concept here.

Nothing can be sold, then, unless rights over it can and do exist. Nor can anything be sold unless it is possible to separate those rights from the person who has them. Unobjectionable sales concern rights which not only can exist but also morally may; and which it is not only possible but proper, as well, to separate from the owner. This supplies four different grounds on which an exchange might be blocked; and of course there is a fifth, for possibly something which is appropriately owned and given should nevertheless not be sold. Some people believe this about blood and kidneys.⁹ The same can be said of certain actions, such as sex (which, done for money, becomes prostitution) and judicial decisions (which cease being just).

In this article I identify these considerations, flesh them out, and organize them logically. I do not try to refine them or defend them.

WHAT CANNOT OR SHOULD NOT BE OWNED

Some Things by Their Nature Cannot Be Owned

Some of Walzer's blocked exchanges concern things over which legal rights are not possible. The clearest examples are friendship, love, and divine grace.

Friendship and love.—An essential element in friendship is spontaneous mutual appreciation; love is a matter of joy in the other's presence (at least sometimes) and concern for his welfare. These attitudes cannot be willed. The law cannot guarantee that they continue.

That is not to say the law is helpless; it could punish breach of promise and adultery, and the fear of punishment might lead to some curbing of desire. But the connection would be contingent and indirect. The essence of friendship and love is an inner attitude beyond the reach of the law. Of course one could have legal rights to their simulacra, to companionship or service. But those are not the same thing.

9. There is a different set of questions about ownership, having to do with language, which is beyond the scope of this article. I have an exclusive right to the use of my kidney, and the law will help keep away anyone who wants to take it without my consent. Whether we should call that relationship ownership, whether we should call our bodies property, is a question I do not address here. I will use the language of ownership for convenience, but I mean the words only to refer to legal states of affairs.

Divine grace.—By definition no one can have legal rights to the pleasure of God or gifts from God. An omnipotent God is beyond the reach of the state. It is meaningless to talk of protecting with force one's status before God. The reason one cannot sell divine grace is that one does not own it to begin with.

Again, however, we could have a legally constituted right to simulacra, to the performance of certain actions by priests. Failure to perform and interference with performance could be punishable by law. But whether these actions bring with them grace is not up to human beings.

If we move from secular to ecclesiastical law, things get murkier. Some churches hold that some of their officers have special powers. The church decides who holds those positions, and then God works through these people in special ways. In such a case the church claims control over a conduit of divine grace and indirectly over the grace itself. (There may be theological objections to this picture, but I want to set those aside.) What is claimed here is a kind of ownership, and therefore the later questions of how these offices can and should be transferred can sensibly be asked.

From this discussion we can formulate a general principle: nothing can be owned unless it is something over which laws can be effective. Affection and divine grace are not ownable because our having them is not subject to law.

(We might also ask why anyone would bother to forbid a market which is impossible anyway. The answer must have to do with our fear of simulacra, which are quite possible and are degradations of something important and good.)

There is a second way in which things can be not-ownable: the use of some things cannot be confined to any individual or group. Some public goods are by their nature nonexclusive: the air we breathe, the climate of trust in which we operate, quiet. To some of these things we can have enforceable rights, and conceivably those rights could be owned and sold. But since those rights are not rights to exclusive use, nor to alteration or destruction, they do not constitute ownership.

Some Things Could Be (Fully) Owned, But Should Not Be

Human beings.—People should not be owned. The Kantian reasons are familiar: people have purposes (and, neo-Kantians might add, feelings and desires), and these must be treated as valuable in themselves. Persons can and must take responsibility for some of the shape their lives take; respect demands that they be allowed to. Ownership makes the subjective lives of others into means only.

In fact, it might seem that people not only should not be owned, they cannot be. Power over objects is direct: we can pick them up, move them, change them, destroy them. But power over people is

ordinarily indirect: we influence their choices. Legal power over people is usually a matter of threatened punishment. The justice system does sometimes physically restrain or confine people, but the system would not work unless most people were dissuaded from even trying to break the law.

Nevertheless, this picture is misleading, not in what it says about the way law influences people, but in what it suggests about owning objects. Property is not a relation between a person and an object, it is a relation among people about that object. Something is legally mine only if I can call in the police to keep others from taking it. Titles to diamonds, like titles to slaves, are effective because threat of legal punishment influences the choices people make.¹⁰

In slavery, of course, people were owned. A set of legal arrangements existed between people about other people. Because even an owned person makes choices, the slave owner had to use different means of control than a tractor owner would; he had to influence the choices that the slaves made. The law, too, punished actions by slaves (and of course tractors perform no actions); there is a difference in property laws about machines and those about people. But a major element in slavery was that other people—nonowners—could not interfere with what a slave owner did and could not legally help the slaves escape. The state did not (much) limit what the owner could do and did limit what nonowners could do about it.¹¹

People, then, can be owned. In fact many rights over others falling far short of slavery have been called property rights. Some arise from contract; employers and employees have rights over one another. Some arise from status: parents can make many decisions about their children, and in turn children (through representation) have enforceable rights to support and proper treatment. Alimony has been called one spouse's property right in the other. In all of these cases people can use some of the power of the state to persuade others to act.

Perhaps these arrangements should not be called property rights at all. But questions of language aside, these other rights over persons help us define by contrast what should not exist: no one should fully own—have a complete legal right to dispose of—any other human being.

Public goods.—Although they disagree about details, most political theorists agree that some public goods should be beyond private control, for reasons of efficiency, justice, or community. Earlier I spoke of

10. So, too, is the lack of legal recourse for a thief, who could not call in the law to keep others away, nor sell it and depend on keeping the proceeds.

11. This of course differed from regime to regime. For a comprehensive study of slavery in many different cultures, see Orlando Patterson, *Slavery and Social Death* (Cambridge, Mass.: Harvard University Press, 1982).

public goods that cannot be privately owned, like quiet; here I refer to things that could be but should not be privately owned. I use the term 'public goods' roughly and stipulatively to include those things that are preconditions of community life, such as defense and roads, as well as those that preserve community resources, like wetlands that protect biological diversity and forests that maintain the ozone layer. Furthermore some of the necessities of individual life—food, water, and shelter—need to be publicly available, but the prohibition here is against full ownership not of any particular loaf of bread but of the whole supply.

Art and historical objects partially constitute the life of the community, and some of these need to be kept from total private ownership. A Rembrandt, the original Declaration of Independence—these must be protected. If they go into private ownership, then it cannot be full ownership: the person who paid money for the sake of private enjoyment should not have the right to deface or destroy it. Furthermore, some things which merely adorn community or private life also should be kept public, things like beaches and parks.

The general principle here is that for the good of the community the individual ownership of some things must be limited or prohibited. Obviously there is a great deal of debate about what specifically falls under this principle, far more debate than I can address here. My purpose is only to identify the principle and relate it to others. So far I have named two major categories of blocked exchanges: those things which, by definition, cannot be owned (subject to legal control), and those things which should not be, for their own sake (e.g., human beings) or for ours (e.g., public goods).

WHAT CANNOT OR SHOULD NOT BE ALIENATED

Some Things Cannot Be Alienated

To alienate, to make other, refers to several different things. In one sense something is alienable if it can be disconnected from the person it is now connected to and yet go on existing. In this sense we can alienate land—transfer its ownership to someone else—but not our memories.

In another sense to alienate something means simply to cease to have it, whether or not another acquires it. When Jefferson wrote of inalienable rights, he meant rights which not only could not be transferred to another person but also could not be lost.

One party might be able to alienate an object which another party could not. Honors, for instance, can be refused, but once given and received cannot be put aside by the recipient. Once a Nobel laureate, always a Nobel laureate. But the committee who awarded the honor could withdraw it, as they do when they discover fraud.

Few of the things about which market theorists worry are incapable of alienation. Nothing, for instance, on Walzer's list belongs here. His list concerns exchanges which have threatened to happen, and need to (continue to) be obstructed. Or, as in the case of divine grace, realms in which we fear counterfeit and deception. There seems to be nothing of either kind to fear here.

Some Things Could Be Alienated but Should Not Be

Natural rights may be inalienable, but legal rights are not. They can be lost, and conceivably they could be transferred to another. Much of Walzer's list belongs in this category: things that not only should not be alienable for money but should not be alienable at all. We should not be able to sell our freedoms of speech, press, religion, and assembly, our right to emigrate, to marry, to procreate—but neither should we be able to renounce them or give them away. The general principle is that persons should be in some respects invincibly armored against the state and other potentially oppressive agents.¹² This principle draws from an understanding of basic human flourishing—of the independence needed for moral growth, the privacy needed for intimacy. It also assumes the equal worth of all persons.

Something similar is true of our welfare rights to education and to police protection. It is not just that we should not be able to sell them; we should not be able to lose them or transfer them to another. The general principle is that states should provide everyone with what is essential for life and growth. That principle in turn appeals either to general beneficence, to the preconditions of genuine democracy, or to the just distribution of what communal efforts make possible.

Principles of justice and democracy also apportion some duties equally. No one can fulfill another's military duty, for instance.

All of these restrictions on alienability have to do with our rights against the state and our duties toward it. Again, I do not try to refine or defend the principles at stake. Instead I want to identify objections to alienability *qua* alienability and separate them from objections to alienation for gain.

WHAT SHOULD NOT BE EXCHANGED FOR GAIN

When there is no objection to giving some particular thing away, we may still object to its being given in return for something—particularly when what we gain is money. Two general concerns figure here. (1) Concerns about the entity sold or traded: babies, for example. (2) Concerns about those who are doing the exchanging; objections to a market in organs fit here. Finally, sale strictly so-called—as opposed

12. The transfer of marriage rights may be forbidden on additional grounds. Suppose someone does not want to marry; should she be able to hand over her particular right to a friend who wants to be bigamous?

to barter—raises specific questions. Does money make an exchange for gain worse? What is so filthy about filthy lucre?

Some Markets Mistreat What Is Sold

Babies can be given away. True, not even parents can simply transfer to someone else their legal rights concerning a child. All adoptions must be approved by the state. But parents (unless they've lost their own rights) can decide whether to release a child for adoption and, often, to whom. In these ways, not absolute but not trivial, parents can give children away. And they could do so in return for gain.

Many people hold that doing so would be trafficking in human beings, a form of slavery. But the rights and responsibilities transferred from birth parents to adoptive parents are very different from what is transferred among slave traders. The state bars itself and others from interfering with most of what slave owners do to their slaves; the primary purpose of the laws is to protect the owners. Laws respecting parental rights primarily seek the welfare of the children. Slaves are said to be owned because there is little restriction on what may be done to them. Children cannot be said to be owned.

But at least two legitimate worries about market in babies arise. One has to do with consequences: new incentive structures have unpredictable results. But there is a quite different objection, independent of whether the effects of the market would be good: is it right to treat babies as a crop?

First, the concern about results. When something acquires exchange value, people have new reasons to acquire and protect it. A market in babies would not change the motivations of adoptive parents, since babies would be what anthropologists call terminal commodities: once acquired, rights over children could not again be traded. Adoptive parents' motives would be what they are now, desires to love and be loved, to nurture, to pass on one's name, perhaps to be cared for in one's old age and remembered after death. (Note that some of these desires treat the child as an end, some treat it as a means.)

Biological parents, however, would have new reasons for what they do. Some would begin pregnancies simply for what they could gain from trade. One result, the one emphasized by market theorists, is that the supply of babies would be more likely to match demand. Even the "perfect" market, however, has results beyond itself. In this case there would be more babies available for adoption. Perhaps more of these would be "desirable": healthy white infants. But perhaps not; people who turn to this livelihood are likely to be desperate, quite possibly sick or users of drugs. In either case the number of "less desirable" babies that go unadopted would be likely to increase.

No one knows for sure; economic analysis is partly made up of speculation. But it's worth noting some of the other situations in which

altered incentives have had unexpected results. One is the story of tobacco in America in the seventeenth century. For the Indians tobacco had ceremonial value; for the Europeans it had exchange value. Once tobacco could earn money (or copper or guns) more of it was grown. Tobacco exhausts land, and new fields have to be begun every few years, so the demand for tobacco created a demand for land—and that led to conflict and violence.

One reason, then, to hesitate about giving babies—or anything else—exchange value is that doing so alters incentive structures, a change with unforeseeable results. Some consequences could hurt children, those conceived to be traded as well as those who result from miscalculation or misfortune. Yet powerful as this objection is, it doesn't seem to capture our real concerns. There is something stubbornly untranslatable in our objection to treating babies as commodities. Even if we could be sure that no one would be worse off, and everyone better off, human beings may not be treated simply as means.

As Kant said, human beings should not be treated “as means only.” But the phrase needs unpacking,¹³ since people virtually always are useful to one another, and paying attention only to that usefulness can be morally unproblematic. We can ask someone the time of day, or stand so that he blocks the sun from our eyes, without doing anything wrong.

“Treating someone as a means only” is not just an ignoring of someone's intrinsic value but a denial of it as well. Affirming their intrinsic value includes acknowledging their worth; allowing them to be, to function, and to grow; and fostering all of that. Endangering, hurting, and destroying people are obvious cases of treating them as if they had no intrinsic value.¹⁴ Failure to acknowledge their worth is a more complicated subject.

Not-attending-to implies “you are worthless” in some situations but not in others. Richard Wasserstrom gives a vivid example of the former: a southern newspaper reported that “all the children in town” took part in a festival, when only the white children had participated. A factory that puts waste in local water and never asks whether the waste is dangerous treats its neighbors as if they did not matter, even if it turns out that the waste is harmless.

Treating someone “as a means only,” then, should be understood as actions inconsistent with valuing people in themselves: harm; coercion; deception; and those actions that imply that someone has no intrinsic value. With that clarification, let us return to the question of markets

13. My treatment is neo-Kantian rather than an exegesis of Kant himself.

14. Strictly speaking this is true only if nothing else is gained by the harm, force, or deception. But it is true then, and my purpose is only to illuminate the connection between these wrongs and the failure to treat people as ends.

that demean what is sold, using as our example a market in babies. Exchange value is a particular form of instrumental value. Like other forms of instrumental value it coexists easily with intrinsic value; recognizing exchange value does not eliminate an appreciation of something's intrinsic value. The dealer in oriental rugs or in renaissance paintings may fully appreciate the beauty of his stock. But the decision to sell something is a decision about its whole future, made purely on the grounds of gain to the seller. If the "stock" is babies, the state might hedge the transaction with safeguards, and the birth parents might choose the buyer carefully. But if you conceive a child you do not mean to keep, you may be forced to let it go to an unsatisfactory home—or keep it where it is unwanted. You have done something with profound implications for another person's future, and your most important motivation had nothing to do with that person's welfare. You have treated a human being as a means only.

Now in most actual cases of contracted motherhood the biological mother has been confident that there is a family eager and able to care for the child; although these women would not have conceived unless money were offered, neither would they have done so if a home were not available.¹⁵ It is just because their motivations are mixed that we are unclear how to respond. If they believed they were not endangering the baby, then *they* were not treating it as if it had no intrinsic value. Yet a publicly sanctioned market in babies, of the kind for which Posner argues, would allow conceptions where neither the mother nor father intended to raise the baby. Whether or not that ever happened, providing the legal space for it would be tantamount to approval of it.

In any case my purpose here is not to resolve the dispute about contracted motherhood but to isolate and explicate one kind of objection to markets. A different example of the objection arises for scholars. We study and write for many different reasons; in part we want a secure job and the respect of others, but we also do it for the sake of the work: we want something important to be better understood.¹⁶ Inevitably, though, work earns rewards, and the reward can become too important. The more we shape our work to earn money or attention, the more uncomfortable we (should) become; when the pursuit of money or glory dominates, then our work has been demeaned. (I give more attention later, in the fourth section, to the ways in which actions change their meaning when done for money.)

15. I owe the term 'contracted motherhood' to Sara Ann Ketchum. As she points out, "surrogate" mothers are just mothers who have agreed to transfer their rights over their children to others, usually the biological father ("Selling Babies and Selling Bodies," *Hypatia* 4, no. 3 [Fall 1989]: 116–27).

16. We also want to be its author; this is a desire for personal worthiness. Some might call that an admixture of egoism; I would not, but that is a subject for another day.

Some Markets Are Bad for Seller and Buyer

The suggestion of a market in human organs excites similar opposition. Yet a part of a human being is not a human being; treating hair, for instance, as a commodity is not treating a human being "as a means only." But fears about altering incentive structures, mentioned above because of consequences for the object of exchange, also fit here; if money can be made from selling organs, a lot more of them will be offered. That would seem to be good for those who need transplants, but not unequivocally; people offering their organs for profit would have a reason to conceal facts making their organs unsuitable. Beyond that, we all know that those most likely to submit to painful and invasive surgery, and to accept the risks involved, will be the poor. In contracted motherhood in the United States poor women offer their wombs and their babies, rich women pay for them. In other words, we wonder about endangering buyers and exploiting sellers.

Besides the question of unfair treatment of one party, objections to exchange sometimes concern the nature of the relationship involved. In *The Gift Relationship* Richard M. Titmuss argued that a gift relationship is superior to a commercial one, since gifts essentially involve concern for other people, while the market demands only rational self-interest.¹⁷ He held that putting something on the market destroys the "deeper freedom" to give what is priceless.¹⁸ Defending this position, Peter Singer talks about changes in social understanding: "The idea that others are depending on one's generosity and concern, that one may oneself . . . need the assistance of a stranger, . . . [that] we must rely on the good will of others rather than the profit motive—all these vague ideas and feelings are incompatible with the existence of a market in blood."¹⁹

Some of these concerns are easier to specify and to remedy than others. Diseased and defective organs can often be identified and discarded.²⁰ Exploitation and injustice are far trickier to deal with; the philosophical literature on these issues is large. The same is true of claims about lost freedom,²¹ and of fears about changes in social re-

17. Richard M. Titmuss, *The Gift Relation* (New York: Pantheon, 1971).

18. Peter Singer, "Altruism and Commerce: A Defense of Titmuss against Arrow," *Philosophy and Public Affairs* 2 (1973): 312–20, and "Freedom and Utilities in the Distribution of Health Care," in *Market and Morals*, ed. Gerald Dworkin, Gordon Bermant, and Peter G. Brown (Washington, D.C.: Hemisphere, 1977), pp. 163–64; cited in L. Lomasky, "Gift Relations, Sexual Relations and Freedom," *Philosophical Quarterly* 33 (July 1983): 250–58.

19. Singer, "Altruism and Commerce."

20. Public discourse is overly optimistic about this. For instance, HIV often is not detectable until months after it has been contracted. Furthermore this solution is possible only when we're talking about organs. If someone conceives a baby in order to sell it, then discovering its medical problems only reveals the problem. It solves nothing.

21. I examine this issue in detail in my "Full Ownership and Freedom" (n. 8 above).

lationships and in cultural climate. In this article I only locate those concerns; I do not refine or defend them.

Money Adds Particular Problems

The objections I have identified so far apply to barter as well as to sale. But sale—exchange for money—creates several particular problems.

Money is a peculiar thing. By definition it is highly abstract and makes a fully ordered set with no highest number; its distribution tends to be highly uneven and based on limited characteristics. Each of these dimensions has ethical implications.

First, prices are fully ordered: every price is either equal to, less than, or more than every other price. Everything priced is commensurable: this diamond ring is worth four thousand roller skates; that airplane cost twice what this house did. Should rights over babies be put on the market, a child would know that she cost, say, about what a second car for the family would have cost. She might also know that she cost more, or less, than other children. One moral danger, then, is an erosion of our sense of the uniqueness of what once was “priceless.”²²

Second, money accumulates. It is a form of power, as are physical strength, talent, legal status, and social standing. Like these, money begets more power: markets can be cornered, resources bought, political influence cultivated. But unlike most other forms of power, money can be accumulated endlessly: there is no highest number. Furthermore, preserving it is relatively simple; money does not rot, it takes up no room, and it can often be guarded more efficiently than objects.

Third, money accumulates unevenly. Not only do some people have vastly more than others, they collect it through various combinations of good fortune, hard work, and native ability. Moral desert is at best one of the factors at work. Perhaps luck, effort, and ability are good reasons for allowing someone to travel more widely and live more comfortably than others can. But it is not clear that they justify a greater chance at surviving disease or at establishing a family.

22. It is not my purpose in this article to evaluate these possibilities. For further discussion, see Nancy C. Hartsoc, *Money, Sex, and Power* (New York: Longman, 1983), p. 98 and passim; Erick Mack, “Dominos and the Fear of Commodification,” in *NOMOS XXXI: Markets and Justice*, ed. John W. Chapman and J. Roland Pennock (New York: New York University Press, 1989), pp. 198–225, esp. p. 217; Jan Narveson, “The Justice of the Market: Comments on Gray and Radin,” in Chapman and Pennock, eds., p. 271; and Margaret Jane Radin, “Justice and the Market Domain,” in Chapman and Pennock, eds., pp. 165–97, esp. p. 171. Many have argued recently that we humans are far too arrogant about the differences between ourselves and the nonhuman world. But the thrust of those arguments is almost always to give greater status to the nonhuman rather than less to the human.

Fourth, money is purely instrumental. Assigning a monetary value to something emphasizes its instrumentality and makes it more likely that that thing be treated simply as a means.

Fifth, money provides diminishing marginal utility. One hundred dollars means less to a Rockefeller than to a postal clerk. And some things, perhaps, should cost us roughly equally.

The abuse of indulgences illustrates some of this. Suppose we accept for a moment some theological presuppositions: that after death people will suffer for a while in purgatory until, purified, they are allowed into heaven, and that voluntary penance on earth can reduce time in purgatory. Suppose we accept, too, that the church can designate that some actions are equivalent to others: that saying certain prayers, for instance, reduces purgatory time as much as one hundred days of penance would. From here it's an easy step to rewarding certain helpful actions with indulgences, actions such as cleaning the sacristy or embroidering vestments. And after that comes the fall: what is more helpful than money? Why not reward contributions to the church with indulgences? (On this interpretation the church did something it should not have done, rather than claimed to do something it could not have done. The second question raises quite different issues.) The church should not have sold indulgences because money is too far removed from the sphere of personal desert to which indulgences are properly attached. A cost in dollars is not the same as cost in sincere prayer or bodily service.

Another example is the legal obligation to serve one's country. No kind of contribution would cost everyone exactly equally; time means more to some people than others, physical effort comes more or less easily. Still, time and effort burden people more equally than monetary expense does. So we forbid buying one's way out of service in order to make more equal demands on each person.

If we turn to what should not even be owned, much less transferred to others, money darkens that picture, too. Is it worse to sell slaves than to give them away? Yes, other things being equal, and for some of the reasons just given. If it is degrading to be owned—to be fully subject to the will of another—being priced adds insult to injury: the slave is one commodity among others, worth perhaps less than a house and more than a horse. Furthermore, the slave being sold is treated as “a means only.” In an auction or purely commercial sale, the seller must yield to the highest bidder or the first offer. The decision about the slave's new owner, one which deeply affects the slave, is not made for the sake of the slave. Seller and buyer need only be moved by their own self-interest.

WHEN ACTIONS ARE “FOR SALE”

When contracts, promises, and agreements to act involve money, we sometimes use the language of sales: “He sold his talents to Exxon.”

“MGM has bought her next two performances.” This is especially true when we disapprove of what happened: “She sold out.” “The senator has been bought.”

From Walzer’s list, the following concern actions done for money: “desperate exchanges” such as dangerous or degrading work, “selling” political power and influence, public office, and criminal justice, and agreements to break the law.

Are Agreements to Act a Form of Sale?

I would argue that these transactions are not really sales: that the “seller” does not hand over, unchanged, a bundle of legal rights and liabilities which had made him an “owner.” Others, however, hold that these agreements are a kind of sale: that, for example, when a ballplayer signs with a team, he sells it exactly what it can then sell to another team: rights over the use of his time.

In opposition I would note, first, that it is often a struggle to say clearly what has been sold. Time? Effort? Ability? Freedom? (Honor?) Second, whatever it is that has been sold, it was not originally “owned” in the same sense that land and licenses are. Third, there is not just a trade in legal statuses. Typically the employee must now seek the employer’s goals, the employer must provide for and protect the employee. None of these obligations existed before the initial agreement was struck. Compare this with the sale of a house, or of a player’s contract: the new owner now has exactly those rights and liabilities which the previous owner had. In contrast, most of the legal rights, liabilities, and so on that result from contracts of service arise *de novo*. They do not preexist the arrangement and thus are not transferred from one party to the other.

Finally, the courts treat contracts for personal service quite differently than they do sales. When a sale is held to be valid, the seller must relinquish what she sold. But when the courts enforce a contract of service, the “seller” (the person who received money) is rarely required to do what he promised to do (although he will have to make recompense of some kind).

I think the attractiveness of the “sale” paradigm reflects the extent to which exchange theory, and neoclassical economics, operate as unchallenged assumptions. Note, for instance, the persistent tendency to think of gifts as disguised sales.

However, I need not settle the disagreement here. Whether agreements to act really are sales or only metaphorically so, certain interesting questions arise within them, and only within them.

The Moral Considerations

Before presenting the questions specific to the “sale of actions,” let me note that many of the problems I have identified in ordinary sales also crop up here. We block employment contracts for dangerous and

degrading work out of fear of injustice and exploitation, the same reasons for which we block the sale of organs.

Most contracts for service which are blocked, however, are blocked for a different reason. They concern actions, and actions inherently involve purposes. When something is done for money, it is done for a different purpose than it otherwise is, and the change in purpose can change the nature of the action. To use an example of Eric Mack's, sexual love is not simply a "fee-free version" of prostitution.²³ Many interactions change so radically when they are done for money that they need new names. Take the court system: a judge whose decisions have been bought is no longer dispensing "justice," because he or she is no longer deciding on the basis of evidence and law.

The new institution—criminal injustice, let us call it—is inferior to the one it replaces. Of course the judge has broken promises and broken the law, which adds to her wrongdoing; but it is not just the fact of her promise that matters, but its substance as well. Criminal justice, ideally, treats people equally; in it (again, ideally) people determine their own futures by the choices they make.²⁴ Bribery destroys all this.

The special characteristics of money highlight some of what has been lost. For one thing, since money accumulates so unevenly, no kind of equality before the law survives. For another, one's fate before the law depends not on one's conformity to it, but on the luck and effort which brought one money. Those qualities which lead to wealth, even the most admirable of those qualities, are only a subset of what makes people worthy.

The same is true of democratic office. When the person in office is chosen by the voters, the office is democratic; when the person in office is chosen by people with the most money, the office is not.

Sex is a borderline case of this kind of essential change. Ordinarily sexual interaction expresses many things, among them desire, affection, love, or commitment. The lovers may be set on exploitation, mutual reverence, pleasure, determined dedication, or some combination of these and other purposes. All of this informs what they do and what they experience.

In commercial sex the partners need to care only about themselves. Each wants one thing—money, satisfaction, domination—and each agrees to give what the other wants. Neither needs to care about the other. Objections to prostitution assert that sexual interaction should not be a meeting of mutually self-interested parties, treating one another only as a means to their own ends. Objectors hold that mutual concern is central to sex as it should be and that any arrangement which makes mutual concern unnecessary and unlikely should not exist.

23. Mack, pp. 198–211.

24. Herbert Morris, "Persons and Punishment," *The Monist* 52 (1968): 475–501.

Divine favor is something else which would not be what it is if it could be bought. I suppose a deity is imaginable who looks with favor upon the wealthy²⁵ or upon those who support his work with the most money. But that could not be the God of the Judaeo-Christian-Islamic tradition, loving all equally, responding to purity of soul.

Respect is another interesting case. On the face of it we cannot respect someone because of the amount of money she has. Yet in a way we do; we can certainly be impressed. And we might well respect the effort and ability which brought her wealth. Still, that would not be respecting her for her money, but for what the money represents. And it's hard to imagine one person paying another for respect; one would get instead respectful actions, what MacIntyre calls 'simulacra', not the same thing at all.

And so for prizes and honors: they represent accomplishment and merit. If they could be bought, they would represent something else: the luck, particular effort, and specific abilities which give one wealth. When a prize is bought, it is not really a prize at all.

Prohibitions on doing something for pay, then, usually concern actions whose very nature changes when money motivates them. Our language suggests that it is the presence of money which contaminates the interaction. Almost always phrases like "X is for sale," when they are not literally true, are pejorative. My analysis suggests that it is not so much the presence of money as the absence of other things to which we object; but that is not quite the whole picture. Take, for instance, a recent article praising Jimmy Carter for his work in conflict resolution. In saying "For Carter the presidency has a 'Not for Sale' sign," the writer implicitly criticizes Ronald Reagan, who accepted a million dollars for a brief appearance in Japan. The implicit criticism was not just of the former president's doing nothing, but of his using his office for self-interest.

We use terms like buying and selling, then, partly to lament the extinction of something good but also to rebuke the substitution of self-interest for the other, preferable, motives. If what Reagan had received were a priceless *netsuke* I suspect there would have been less outcry. Money seems to us the capital occasion for selfishness, because—I think—of its pure instrumentality. Desire for money has no admixture of appreciation of something's intrinsic value, as would desire for an exquisite carving.

CONCLUSION

Questions about the proper scope of the market will always be with us. Money is so powerful that the borders between its domain and others will always need defense. At the beginning of this article I

25. Calvin's God, I believe, rewarded the worthy with prosperity. The wealth was a sign, not a cause, of divine favor.

described a number of perspectives which have been offered to help us draw the borders clearly. Margaret Jane Radin protects nonfungible property from the full force of the market; Michael Walzer limits the market in order to lesson oppression; Elizabeth Anderson analyzes market relations (impersonality, self-interest, and so on) and shows that some good things cannot survive within them. Mark Nelson derives a number of principles from a set of examples; the examples are not logically generated, and the principles are only loosely related to one another.

The perspective I offer here is more complex. There are many reasons why some sales cannot or should not take place. The questions we need to ask include the following:

The possibility of ownership.—Is it possible for this entity to be controlled by legal arrangements? (Divine grace and friendship cannot be.)

The morality of ownership, that is, exclusive control.—Is this the kind of thing which may legitimately be controlled? (No person should be completely subject to another.) Is this the kind of thing which may legitimately be kept from others? (Public goods should be available to all.)

The possibility of alienation, that is, separation.—Can this thing be separated from the person to whom it now attaches? (Moral rights cannot be lost.)

The morality of alienation.—Should it be possible for anyone to lose this? (Basic civil rights should be inalienable.)

The impact of the market on what is exchanged.—Does exchanging this thing for gain endanger or demean it? (Some babies conceived for sale would suffer; some would be treated “as means only.”)

The impact of the market on buyer and seller.—Does exchanging this thing for gain exploit, endanger, or demean anyone? (Commercially obtained organs may be contaminated; sellers are poor and desperate.) To what extent does the market relationship of mutual self-interest crowd out other relationships of mutual concerns?

The way money shapes an interaction.—Everything priced is commensurable. (Can we retain an understanding of a child’s immeasurable worth if the child was purchased?) Money is unevenly distributed; accumulating it depends upon luck, work, and ability. (Should civic duties be distributed upon different criteria, perhaps equally?)

The fact that accepting money essentially changes some actions.—Does allowing people to do this for the sake of money destroy something of value (democratic office, prizes, criminal justice) or replace a desirable institution with a less desirable or bad one (prostitution)?

I doubt that any single principle or perspective can synthesize all these questions. Yet they are more than simply a list. They form a logically related set which can help us think in an orderly way about the questions which steadily confront us.

POSTSCRIPT

Many audiences have pointed out to me that these questions are double-sided. A relationship can be improved, for instance, by being commercialized: money can counter social prejudice and bring it about, for example, that racists sell to and behave civilly toward minorities. The positive side of commodification could be approached through the same taxonomy with which I have here sketched the negative side.