

Market-Inalienability

Margaret Jane Radin

Editor's Note and Summary

The selection from Professor Radin's article begins after the following brief summary of key points and terminology from parts of the article not included below.

Among Professor Radin's aims in the complete article are to clarify what it is for something to be a commodity and to present reasons for refusing to treat something as a commodity (i.e., for refusing to commodify it). The heart of her argument is the claim that a proper conception of human personhood and flourishing cannot be secured if certain aspects of life are regarded as in principle subject to being priced, bought, and sold.

Terminology

A thing is "market-inalienable," as Radin uses the term, if it "is not to be sold, which in our economic system means it is not to be traded in the market." A nonsalable item may still be transferred in other ways, such as by gift. Indeed, sales may be precluded in part to encourage gifts, as is the case with human organs or, in some countries, human blood. The term "commodification," most broadly construed, includes not only actual buying and selling of something (commodification in the narrow sense), but also regarding the thing in terms of market rhetoric, "the practice of thinking about interactions as if they were sale transactions," and applying market methodology to it. Commodification thus includes owning, pricing, selling, and evaluating interactions in terms of monetary cost-benefit analysis or regarding these activities as appropriate. Professor Radin also distinguishes two types of property: personal and fungible. Property is personal "when it has become identified with a person, with her self-constitution and self-development in the context of her environment. Personal property cannot be taken away and replaced with money or other things without harm to the person." "Property is fungible when there is no such personal attachment. Thus, fungible objects are commodified: trading them is like trading money."

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Positions and Arguments

Universal commodifiers hold “that anything some people are willing to sell and others are willing to buy in principle can and should be the subject of free market [laissez-faire] exchange” and that everything people need or desire is to be conceived of as a commodity. Thus, “everything that is desired or valued is an object that can be possessed, that can be thought of as equivalent to a sum of money, and that can be alienated. The person is conceived of and spoken of as the possessor and trader of these goods, and hence all human interactions are sales.” Though universal commodification is a caricature, certain economic analysts, such as Richard Posner, come close. Among the attractions of universal commodification are claimed to be the freedom it allows individuals to trade and its absence of paternalism.

In criticism of universal commodification, universal non-commodifiers hold that commodification brings about an inferior form of life. Karl Marx, in particular, argues that economic alienation (separating something from oneself as a piece of property) expresses and creates human alienation (estrangement from one’s self). A problem for universal noncommodification, indeed for any theory that seeks to change the status quo, is the transition problem: how, with justice, can society be transformed from its current degree of commodification to the more desirable degree of commodification?

Market pluralisms are a range of intermediate positions holding that a limited realm of commodification ought to be allowed to coexist with one or more nonmarket realms. The burden of market pluralists is to justify distinctions between things that should and things that shouldn’t be commodified. As a market pluralist, Radin sketches an attempt to solve this problem.

Though Radin rejects universal noncommodification, she takes several of its key insights as grounds for limiting universal commodification. These insights include recognition of the importance of rhetoric—our discourse, how we think and talk about a thing—to what the thing is for us; and recognition of the ways in which commodification, both in practice and in rhetoric, forms the sort of life we can lead. Radin recognizes the attractions of universal commodification, among which are the apparent freedom and absence of paternalism it allows to each individual in choosing whether or not to buy or sell a thing. Against this, Radin contends that if we reject the notion that freedom means negative liberty, that is, doing whatever one prefers to do as long as it doesn’t harm others, and “adopt a positive view of liberty that includes proper self-development as necessary for freedom, then inalienabilities needed to foster that development will be seen as freedom-enhancing, rather than as impositions of unwanted restraint on our desires to transact in markets.”

I. Rhetoric and Reality

“The word is not the thing,” we were taught, when I was growing up. Rhetoric is not reality; discourse is not the world. Why should it matter if someone

conceptualizes the entire human universe as one giant bundle of scarce goods subject to free alienation by contract, especially if reasoning in market rhetoric can reach the same result that some other kind of normative reasoning reaches on other grounds? . . .

. . . Recall that Posner conceives of rape in terms of a marriage and sex market. Posner concludes that “the prevention of rape is essential to protect the marriage market . . . and more generally to secure property rights in women’s persons.” . . .¹ Bodily integrity is an owned object with a price.

What is wrong with this rhetoric? [A] risk-of-error argument . . . is one answer. Unsophisticated practitioners of cost-benefit analysis might tend to undervalue the “costs” of rape to the victims. But this answer does not exhaust the problem. Rather, for all but the deepest enthusiast, market rhetoric seems intuitively out of place here, so inappropriate that it is either silly or somehow insulting to the value being discussed.

One basis for this intuition is that market rhetoric conceives of bodily integrity as a fungible object.² A fungible object is replaceable with money or other objects; in fact, possessing a fungible object is the same as possessing money. A fungible object can pass in and out of the person’s possession without effect on the person as long as its market equivalent is given in exchange. To speak of personal attributes as fungible objects—alienable “goods”—is intuitively wrong. Thinking of rape in market rhetoric implicitly conceives of as fungible something that we know to be personal, in fact conceives of as fungible property something we know to be too personal even to be personal property.³ Bodily integrity is an attribute and not an object. We feel discomfort or even insult, and we fear degradation or even loss of the value involved, when bodily integrity is conceived of as a fungible object.

Systematically conceiving of personal attributes as fungible objects is threatening to personhood, because it detaches from the person that which is integral to the person. Such a conception makes actual loss of the attribute easier to countenance. For someone who conceives bodily integrity as “detached,” the same person will remain even if bodily integrity is lost; but if bodily integrity cannot be detached, the person cannot remain the same after loss.⁴ Moreover, if my bodily integrity is an integral personal attribute, not a detachable object, then hypothetically valuing my bodily integrity in money is not far removed from valuing *me* in money. For all but the universal commodifier, that is inappropriate treatment of a person.

. . . The difference between conceiving of bodily integrity as a detached, monetizable object and finding that it is “in fact” detached is not great, because there is no bright line separating words and facts. The modern philosophical turn toward coherence or antifoundationalist theories⁵ means that we cannot be sanguine about radically different normative discourses reaching the “same” result. Even if everybody agrees that rape should be punished criminally, the normative discourse that conceives of bodily integrity as detached and monetizable does not reach the “same” result as the normative discourse that conceives of bodily integrity as an integral personal attribute. If

we accept the gist of the coherence or antifoundationalist theories, facts are not “out there” waiting to be described by a discourse. Facts are theory-dependent and value-dependent. Theories are formed in words. Fact- and value-commitments are present in the language we use to reason and describe, and they shape our reasoning and description, and the shape (for us) of reality itself.

These concerns are relevant to the conceptualization of rape as theft of a property right. A particular conception of human flourishing is advanced by this pervasive use of market rhetoric. To think in terms of costs to the victim and her sympathizers versus benefits to the rapist is implicitly to assume that raping “benefits” rapists. Only an inferior conception of human flourishing would regard rape as benefiting the rapist. . . .

[Thus,] one way to see how universal market rhetoric does violence to our conception of human flourishing is to consider its view of personhood. In our understanding of personhood we are committed to an ideal of individual uniqueness that does not cohere with the idea that each person’s attributes are fungible, that they have a monetary equivalent, and that they can be traded off against those of other people. Universal market rhetoric transforms our world of concrete persons, whose uniqueness and individuality is expressed in specific personal attributes, into a world of disembodied, fungible, attribute-less entities possessing a wealth of alienable, severable “objects.” This rhetoric reduces the conception of a person to an abstract, fungible unit with no individuating characteristics.

Another way to see how universal market rhetoric does violence to our conception of human flourishing is to consider its view of freedom. Market rhetoric invites us to see the person as a self-interested maximizer in all respects. Freedom or autonomy, therefore, is seen as individual control over how to maximize one’s overall gains. In the extreme, the ideal of freedom is achieved through buying and selling commodified objects in order to maximize monetizable wealth. . . . Marx argued with respect to those who produce and sell commodities that this is not freedom but fetishism; what and how much is salable is not autonomously determined. Whether or not we agree with him, it is not satisfactory to think that marketing whatever one wishes defines freedom. Nor is it satisfactory to think that a theoretical license to acquire all objects one may desire defines freedom.

Market rhetoric, if adopted by everyone, and in many contexts, would indeed transform the texture of the human world. This rhetoric leads us to view politics as just rent seeking, reproductive capacity as just a scarce good for which there is high demand, and the repugnance of slavery as just a cost. To accept these views is to accept the conception of human flourishing they imply, one that is inferior to the conception we can accept as properly ours. An inferior conception of human flourishing disables us from conceptualizing the world rightly. Market rhetoric, the rhetoric of alienability of all “goods,” is also the rhetoric of alienation of ourselves from what we can be as persons.

To reject the slogan, “The word is not the thing,” is not to deny that there is a difference between thought and action. To say “I wish you were dead” is not to

Freedom

kill you. Rather, rejecting the slogan is a way of understanding that the terms in which human life is conceived matter to human life. Understanding this, we must reject universal commodification, because to see the rhetoric of the market—the rhetoric of fungibility, alienability, and cost-benefit analysis—as the sole rhetoric of human affairs is to foster an inferior conception of human flourishing. . . .

II. Toward Evolutionary Pluralism

I now wish to develop a pluralist view that differs in significant respects from liberal pluralism and negative liberty. My central hypothesis is that market-inalienability is grounded in noncommodification of things important to personhood. In an ideal world markets would not necessarily be abolished, but market-inalienability would protect all things important to personhood. But we do not live in an ideal world. In the nonideal world we do live in, market-inalienability must be judged against a background of unequal power. In that world it may sometimes be better to commodify incompletely than not to commodify at all. Market-inalienability may be ideally justified in light of an appropriate conception of human flourishing, and yet sometimes be unjustifiable because of our nonideal circumstances.

Because of the ideological heritage of the subject-object dichotomy, we tend to view things internal to the person as inalienable and things external as freely alienable. A better view of personhood, one that does not conceive of the self as pure subjectivity standing wholly separate from an environment of pure objectivity, should enable us to discard both the notion that inalienabilities relate only to things wholly subjective or internal and the notion that inalienabilities are paternalistic.

1. Rethinking Personhood: Freedom, Identity, Contextuality

In searching for such a better view, it is useful to single out three main, overlapping aspects of personhood: freedom, identity, and contextuality. The freedom aspect of personhood focuses on will, or the power to choose for oneself. In order to be autonomous individuals, we must at least be able to act for ourselves through free will in relation to the environment of things and other people. The identity aspect of personhood focuses on the integrity and continuity of the self required for individuation. In order to have a unique individual identity, we must have selves that are integrated and continuous over time. The contextuality aspect of personhood focuses on the necessity of self-constitution in relation to the environment of things and other people. In order to be differentiated human persons, unique individuals, we must have relationships with the social and natural world.

A better view of personhood—a conception of human flourishing that is superior to the one implied by universal commodification—should present more satisfactory views of personhood in each of these three aspects. I am not

seeking here to elaborate a complete view of personhood. Rather, I focus primarily on a certain view of contextuality and its consequences: the view that connections between the person and her environment are integral to personhood. I also suggest that to the extent we have already accepted certain views of freedom, identity, and contextuality, we are committed to a view of personhood that rejects universal commodification.

Universal commodification conceives of freedom as negative liberty, indeed as negative liberty in a narrow sense, construing freedom as the ability to trade everything in free markets. In this view, freedom is the ability to use the will to manipulate objects in order to yield the greatest monetizable value. Although negative liberty has had difficulty with the hypothetical problem of free choice to enslave oneself, even negative liberty can reject the general notion of commodification of persons: the person cannot be an entity exercising free will for itself if it is a manipulable object of monetizable value for others.

A more positive meaning of freedom starts to emerge if one accepts the contextuality aspect of personhood. Contextuality means that physical and social contexts are integral to personal individuation, to self-development. Even under the narrowest conception of negative liberty, we would have to bring about the social environment that makes trade possible in order to become the person whose freedom consists in unfettered trades of commodified objects. Under a broader negative view that conceives of freedom as the ability to make oneself what one will, contextuality implies that self-development in accordance with one's own will requires one to will certain interactions with the physical and social context because context can be integral to self-development. The relationship between personhood and context requires a positive commitment to act so as to create and maintain particular contexts of environment and community. Recognition of the need for such a commitment turns toward a positive view of freedom, in which the self-development of the individual is linked to pursuit of proper social development, and in which proper self-development, as a requirement of personhood, could in principle sometimes take precedence over one's momentary desires or preferences.

Universal commodification undermines personal identity by conceiving of personal attributes, relationships, and philosophical and moral commitments as monetizable and alienable from self. A better view of personhood should understand many kinds of particulars—one's politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes—as integral to the self. To understand any of these as monetizable or completely detachable from the person—to think, for example, that the value of one person's moral commitments is commensurate or fungible with those of another, or that the "same" person remains when her moral commitments are subtracted—is to do violence to our deepest understanding of what it is to be human.

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jobs, political engagements, or personal attributes. Indeed, the ability to dissociate oneself from one's particular context seems integral to personhood. But if we must recognize the importance of the ability to detach oneself, we must recognize as well that interaction with physical and social contexts is also integral to personhood. One's surroundings—both people and things—can become part of who one is, of the self. From our understanding that attributes and things can be integral to personhood, which stems mainly from our understanding of identity and contextuality, and from our rejection of the idea of commodification of the person, which stems mainly from our understanding of freedom, it follows that those attributes and things identified with the person cannot be treated as completely commodified. Hence, market-inalienability may attach to things that are personal.

2. Protecting Personhood: Noncommodification of Personal Rights, Attributes, and Things

In my discussion of possible sources of dissatisfaction with thinking of rape in market terms, I suggested that we should not view personal things as fungible commodities. We are now in a better position to understand how conceiving of personal things as commodities does violence to personhood, and to explore the problem of knowing what things are personal.

To conceive of something personal as fungible assumes that the person and the attribute, right, or thing, are separate. This view imposes the subject-object dichotomy to create two kinds of alienation. If the discourse of fungibility is partially made one's own, it creates disorientation of the self that experiences the distortion of its own personhood. For example, workers who internalize market rhetoric conceive of their own labor as a commodity separate from themselves as persons; they dissociate their daily life from their own self-conception. To the extent the discourse is not internalized, it creates alienation between those who use the discourse and those whose personhood they wrong in doing so. For example, workers who do not conceive of their labor as a commodity are alienated from others who do, because, in the workers' view, people who conceive of their labor as a commodity fail to see them as whole persons.

To conceive of something personal as fungible also assumes that persons cannot freely give of themselves to others. At best they can bestow commodities. At worst—in universal commodification—the gift is conceived of as a bargain. Conceiving of gifts as bargains not only conceives of what is personal as fungible, it also endorses the picture of persons as profit-maximizers. A better view of personhood should conceive of gifts not as disguised sales, but rather as expressions of the interrelationships between the self and others. To relinquish something to someone else by gift is to give of yourself. Such a gift takes place within a personal relationship with the recipient, or else it creates one. Commodification stresses separateness both between ourselves and our things and between ourselves and other people. To postulate personal interrelationship and communion requires us to postulate people who can yield

personal things to other people and not have them instantly become fungible. Seen this way, gifts diminish separateness. . . .

Not everything with which someone may subjectively identify herself should be treated legally or morally as personal.⁶ Otherwise the category of personal things might collapse into “consumer surplus”: anything to which someone attached high subjective value would be personal. The question whether something is personal has a normative aspect: whether identifying oneself with something—constituting oneself in connection with that thing—is justifiable. What makes identifying oneself with something justifiable, in turn, is an appropriate connection to our conception of human flourishing. More specifically, such relationships are justified if they can form part of an appropriate understanding of freedom, identity, and contextuality. A proper understanding of contextuality, for example, must recognize that, although personhood is fostered by relations with people and things, it is possible to be involved too much, or in the wrong way, or with the wrong things.

There is no algorithm or abstract formula to tell us which items are (justifiably) personal. A moral judgment is required in each case. To identify something as personal, it is not enough to observe that many people seem to identify with some particular kind of thing, because we may judge such identification to be bad for people. An example of a justifiable kind of relationship is people’s involvement with their homes. This relationship permits self-constitution within a stable environment. An example of an unjustifiable kind of relationship is the involvement of the robber baron with an empire of “property for power.” The latter is unjustified because it ties into a conception of the person we can recognize as inferior: the person as self-interested maximizer of manipulative power.

If some people wish to sell something that is identifiably personal, why not let them? In a market society, whatever some people wish to buy and others wish to sell is deemed alienable. Under these circumstances, we must formulate an affirmative case for market-inalienability, so that no one may choose to make fungible—commodify—a personal attribute, right, or thing. I shall now propose and evaluate three possible methods of justifying market-inalienability based on personhood: a prophylactic argument, assimilation to prohibition, and a domino theory. . . .

[Editor’s summary:

a. The Prophylactic Argument.

In some cases, commodifying a personal attribute may fairly reliably indicate that one was coerced, such as selling oneself into slavery or selling one’s sexual services. In such cases, banning such sale may be society’s most reliable strategy for protecting individual freedom and personhood. A problem with this view, however, is that if poverty is perceived as a form of coercion, then banning sales coerced by poverty would deny impoverished people access to goods that may be even more central to their personhood.⁷

b. Prohibition.

The prohibition argument is that commodification is bad in itself or is bad because a thing commodified is never the "same" as the thing noncommodified. This view, however, would lead to universal noncommodification and the implausible view that the commodification of nuts and bolts is as damaging as the commodification of love, friendship, and sexuality.]

c. The Domino Theory.

The domino theory envisions a slippery slope leading to market domination. The domino theory assumes that for some things, the noncommodified version is morally preferable; it also assumes that the commodified and noncommodified versions of some interactions cannot coexist. To commodify some things is simply to preclude their noncommodified analogues from existing. Under this theory, the existence of some commodified sexual interactions will contaminate or infiltrate everyone's sexuality so that all sexual relationships will become commodified. If it is morally required that noncommodified sex be possible, market-inalienability of sexuality would be justified. This result can be conceived of as the opposite of a prohibition: there is assumed to exist some moral requirement that a certain "good" be socially available. The domino theory thus supplies an answer (as the prohibition theory does not) to the liberal question why people should not be permitted to choose both market and nonmarket interactions: the noncommodified version is morally preferable when we cannot have both. . . .

The argument that market-inalienabilities are necessary to encourage altruism relies upon the domino theory. . . . But why do we need to forbid sales to preserve opportunities for altruism for those who wish to give? In a gifts-only regime, a donor's gift remains nonmonetized, whereas if both gifts and sales are permitted, the gift has a market value. This market value undermines our altruism and discourages us from giving, the argument runs, because our gift is now equivalent merely to giving fifty dollars (or whatever is the market price of a pint of blood) to a stranger, rather than life or health.

The "domino" part of this argument—that once something is commodified for some it is willy-nilly commodified for everyone—posits that once market value enters our discourse, market rhetoric will take over and characterize every interaction in terms of market value. If this is true, some special things . . . must be completely noncommodified if altruism is to be possible. But the feared domino effect of market rhetoric need not be true. To suppose that it must necessarily be true seems to concede to universal commodification the assumption that thinking in money terms comes "naturally" to us.⁸ Most people would probably think the assumption false in light of their common experience. For example, many people value their homes or their work in a nonmonetary way, even though those things also have market value.

Rather than merely assuming that money is at the core of every transaction in "goods," thereby making commodification inevitable and phasing out the noncommodified version of the "same" thing (or the nonmarket aspects of

sale transactions), we should evaluate the domino theory on a case-by-case basis. We should assess how important it is to us that any particular contested thing remain available in a noncommodified form and try to estimate how likely it is that allowing market transactions for those things would engender a domino effect and make the nonmarket version impossible. This might involve judging how close to universal commodification our consciousness really is, and how this consciousness would affect the particular thing in question.

The possible avenues for justifying market-inalienability must be reevaluated in light of our nonideal world. One ideal world would countenance no commodification; another would insist that all harms to personhood are unjust; still another would permit no relationships of oppression or disempowerment. But we are situated in a nonideal world of ignorance, greed, and violence; of poverty, racism, and sexism. In spite of our ideals, justice under nonideal circumstances, pragmatic justice, consists in choosing the best alternative now available to us. In doing so we may have to tolerate some things that would count as harms in our ideal world. Whatever harms to our ideals we decide we must now tolerate in the name of justice may push our ideals that much farther away. How are we to decide, now, what is the best transition toward our ideals, knowing that our choices now will help to reconstitute those ideals?

In light of the desperation of poverty, a prophylactic market-inalienability may amount merely to an added burden on would-be sellers; under some circumstances we may judge it, nevertheless, to be our best available alternative. We might think that both nonmarket and market interactions can exist in some situations without a domino effect leading to a more commodified order, or we might think it is appropriate to risk a domino effect in light of the harm that otherwise would result to would-be sellers. We might find prohibition of sales not morally warranted, on balance, in some situations, unless there is a serious risk of domino effect. These will be pragmatic judgments.

Nonideal evaluation of market-inalienability faces a characteristic double bind. Often commodification is put forward as a solution to powerlessness or oppression, as in the suggestion that women be permitted to sell sexual and reproductive services. But is women's personhood injured by allowing or by disallowing commodification of sex and reproduction? The argument that commodification empowers women is that recognition of these alienable entitlements will enable a needy group—poor women—to improve their relatively powerless, oppressed condition, an improvement that would be beneficial to personhood. If the law denies women the opportunity to be comfortable sex workers and baby producers instead of subsistence domestics, assemblers, clerks, and waitresses—or pariahs (welfare recipients) and criminals (prostitutes)—it keeps them out of the economic mainstream and hence the mainstream of American life.

The rejoinder is that, on the contrary, commodification will harm personhood by powerfully symbolizing, legitimating, and enforcing class division and gender oppression. It will create the two forms of alienation that correlate

with commodification of personal things. Women will partly internalize the notion that their persons and their attributes are separate, thus creating the pain of a divided self. To the extent that this self-conception is not internalized, women will be alienated from the dominant order that, by allowing commodification, sees them in this light. Moreover, commodification will exacerbate, not ameliorate, oppression and powerlessness, because of the social disapproval connected with marketing one's body.⁹

But the surrejoinder is that noncommodification of women's capabilities under current circumstances represents not a brave new world of human flourishing, but rather a perpetuation of the old order that submerges women in oppressive status relationships, in which personal identity as market-traders is the prerogative of males. We cannot make progress toward the noncommodification that might exist under ideal condition of equality and freedom by trying to maintain noncommodification now under historically determined conditions of inequality and bondage.

These conflicting arguments illuminate the problem with the prophylactic argument for market-inalienability. If we now permit commodification, we may exacerbate the oppression of women—the suppliers. If we now disallow commodification—without what I have called the welfare-rights corollary, or large-scale redistribution of social wealth and power—we force women to remain in circumstances that they themselves believe are worse than becoming sexual commodity-suppliers. Thus, the alternatives seem subsumed by a need for social progress, yet we must choose some regime now in order to make progress. The dilemma of transition is the double bind.

The double bind has two main consequences. First, if we cannot respect personhood either by permitting sales or by banning sales, justice requires that we consider changing the circumstances that create the dilemma. We must consider wealth and power redistribution. Second, we still must choose a regime for the meantime, the transition, in nonideal circumstances. To resolve the double bind, we have to investigate particular problems separately; decisions must be made (and remade) for each thing that some people desire to sell.

If we have reason to believe with respect to a particular thing that the domino theory might hold—commodification for some means commodification for all—we would have reason to choose market-inalienability. But the double bind means that if we choose market-inalienability, we might deprive a class of poor and oppressed people of the opportunity to have more money with which to buy adequate food, shelter, and health care in the market, and hence deprive them of a better chance to lead a humane life. Those who gain from the market-inalienability, on the other hand, might be primarily people whose wealth and power make them comfortable enough to be concerned about the inroads on the general quality of life that commodification would make. Yet, taking a slightly longer view, commodification threatens the personhood of everyone, not just those who can now afford to concern themselves about it. Whether this elitism in market-inalienability should make us risk the dangers of commodification will depend upon the dangers of each case.

One way to mediate the dilemma presented by the double bind is through what I shall call incomplete commodification. Under nonideal circumstances the question whether market-inalienability can be justified is more complicated than a binary decision between complete commodification and complete noncommodification. Rather, we should understand there to be a continuum reflecting degrees of commodification that will be appropriate in a given context. An incomplete commodification—a partial market-inalienability—can sometimes substitute for a complete noncommodification that might accord with our ideals but cause too much harm in our nonideal world.

Before considering examples, it may be helpful to distinguish two aspects of incomplete commodification: participant and social. The participant aspect draws attention to the meaning of an interaction for those who engage in it. For many interactions in which money changes hands, market rhetoric cannot capture this significance. In other words, market and non market aspects of an interaction coexist: although money changes hands, the interaction also has important nonmonetizable personal and social significance. The social aspect of incomplete commodification draws attention instead to the way society as a whole recognizes that things have nonmonetizable participant significance by regulating (curtailing) the free market. . . .

III. Evolutionary Pluralism Applied: Problems of Sexuality and Reproductive Capacity

I now offer thoughts on how the analysis that I recommend might be brought to bear on a set of controversial market-inalienabilities. It is not my purpose to try to provide the detailed, practical evaluation that is needed, but only to sketch its general contours. The example I shall pursue is the contested commodification of aspects of sexuality and reproductive capacity: the issues of prostitution, baby-selling, and surrogacy. I conclude that market-inalienability is justified for baby-selling and also—provisionally—for surrogacy, but that prostitution should be governed by a regime of incomplete commodification.

1. Prostitution

[Editor's summary:

In the application of her theory to prostitution, Professor Radin argues that though an ideal of personhood would seem to include equal, nonmonetized sexual sharing, the criminalization of commodified sexual activities such as prostitution in our present social circumstances tends to undermine the personhood of poor and powerless women who feel forced to engage in prostitution in order to survive. Yet to allow all forms of free market activity in relation to sex—such as public advertising on billboards and TV, agencies to recruit and train—would foster a rhetoric that would harmfully reshape our conceptions of sexuality and personhood. Radin's suggested solution is incomplete commodification of sexual activity: prostitution should be decriminalized so as to protect

poor women from the degradation and danger of the black market and of occupations that appear even less desirable to them than prostitution, but other organized marketing of sexual services such as brokerage (pimping), recruitment, and, probably, advertising should be prohibited.]

2. Baby-Selling

A different analysis is warranted for baby-selling. Like relationships of sexual sharing, parent-child relationships are closely connected with personhood, particularly with personal identity and contextuality. Moreover, poor women caught in the double bind raise the issue of freedom: they may wish to sell a baby on the black market, as they may wish to sell sexual services, perhaps to try to provide adequately for other children or family members. But the double bind is not the only problem of freedom implicated in baby-selling. Under a market regime, prostitutes may be choosing to sell their sexuality, but babies are not choosing for themselves that under current nonideal circumstances they are better off as commodities. If we permit babies to be sold, we commodify not only the mother's (and father's) baby-making capacities—which might be analogous to commodifying sexuality—but we also conceive of the baby itself in market rhetoric. When the baby becomes a commodity, all of its personal attributes—sex, eye color, predicted IQ, predicted height, and the like—become commodified as well. This is to conceive of potentially all personal attributes in market rhetoric, not merely those of sexuality. Moreover, to conceive of infants in market rhetoric is likewise to conceive of the people they will become in market rhetoric, and to create in those people a commodified self-conception.

Hence, the domino theory has a deep intuitive appeal when we think about the sale of babies. An idealist might suggest, however, that the fact that we do not now value babies in money suggests that we would not do so even if babies were sold. Perhaps babies could be incompletely commodified, valued by the participants to the interaction in a nonmarket way, even though money changed hands. Although this is theoretically possible, it seems too risky in our nonideal world.¹⁰ If a capitalist baby industry were to come into being, with all of its accompanying paraphernalia, how could any of us, even those who did not produce infants for sale, avoid subconsciously measuring the dollar value of our children? How could our children avoid being preoccupied with measuring their own dollar value? This makes our discourse about ourselves (when we are children) and about our children (when we are parents) like our discourse about cars. Seeing commodification of babies as an inevitable and grave injury to personhood appears rather easy. In the worst case, market rhetoric could create a commodified self-conception in everyone, as the result of commodifying every attribute that differentiates us and that other people value in us, and could destroy personhood as we know it.

I suspect that an intuitive grasp of the injury to personhood involved in commodification of human beings is the reason many people lump baby-selling together with slavery. But this intuition can be misleading. Selling a baby, whose personal development requires caretaking, to people who want to act as

the caretakers is not the same thing as selling a baby or an adult to people who want to act only as users of her capacities. Moreover, if the reason for our aversion to baby-selling is that we believe it is like slavery, then it is unclear why we do not prohibit baby-giving (release of a child for adoption) on the ground that enslavement is not permitted even without consideration. We might say that respect for persons prohibits slavery but may require adoption in cases in which only adoptive parents will treat the child as a person, or in the manner appropriate to becoming a person. But this answer is still somewhat unsatisfactory. It does not tell us whether parents who are financially and psychologically capable of raising a child in a manner we deem proper nevertheless may give up the child for adoption, for what we could consider less than compelling reasons. If parents are morally entitled to give up a child even if the child could have (in some sense) been raised properly by them¹¹ our aversion to slavery does not explain why infants are subject only to market-inalienability. There must be another reason why baby-giving is unobjectionable.

The reason, I think, is that we do not fear relinquishment of children unless it is accompanied by market rhetoric. The objection to market rhetoric may be part of a moral prohibition on market treatment of any babies, regardless of whether nonmonetized treatment of other children would remain possible. To the extent that we condemn baby-selling even in the absence of any domino effect, we are saying that this "good" simply should not exist. Conceiving of any child in market rhetoric wrongs personhood. In addition, we fear, based on our assessment of current social norms, that the market value of babies would be decided in ways injurious to their personhood and to the personhood of those who buy and sell on this basis, exacerbating class, race, and gender divisions. To the extent the objection to baby-selling is not (or is not only) to the very idea of this "good" (marketed children), it stems from a fear that the nonmarket version of human beings themselves will become impossible. Conceiving of children in market rhetoric would foster an inferior conception of human flourishing, one that commodifies every personal attribute that might be valued by people in other people. In spite of the double bind, our aversion to commodification of babies has a basis strong enough to recommend that market-inalienability be maintained.

3. *Surrogate-Mothering*

The question of surrogate mothering seems more difficult. I shall consider the surrogacy situation in which a couple desiring a child consists of a fertile male and an infertile female. They find a fertile female to become impregnated with the sperm of the would-be father, to carry the fetus to term, to give birth to the child, and to relinquish it to them for adoption. This interaction may be paid, in which case surrogacy becomes a good sold on the market, or unpaid, in which case it remains a gift.

Those who view paid surrogacy as tantamount to permitting the sale of babies point out that a surrogate is paid for the same reasons that an ordinary adoption is commissioned: to conceive, carry, and deliver a baby. Moreover, even if an ordinary adoption is not commissioned, there seems to be no

substantive difference between paying a woman for carrying a child she then delivers to the employers, who have found her through a brokerage mechanism, and paying her for an already “produced” child whose buyer is found through a brokerage mechanism (perhaps called an “adoption agency”) after she has paid her own costs of “production.” Both are adoptions for which consideration is paid. Others view paid surrogacy as better analogized to prostitution (sale of sexual services) than to baby-selling. They would say that the commodity being sold in the surrogacy interaction is not the baby itself, but rather “womb services.”

The different conceptions of the good being sold in paid surrogacy can be related to the primary difference between this interaction and (other) baby-selling: the genetic father is more closely involved in the surrogacy interaction than in a standard adoption. The disagreement about how we might conceive of the “good” reflects a deeper ambiguity about the degree of commodification of mothers and children. If we think that ordinarily a mother paid to relinquish a baby for adoption is selling a baby, but that if she is a surrogate, she is merely selling gestational services, it seems we are assuming that the baby cannot be considered the surrogate’s property, so as to become alienable by her, but that her gestational services can be considered property and therefore become alienable. If this conception reflects a decision that the baby cannot be property at all—cannot be objectified—then the decision reflects a lesser level of commodification in rhetoric. But this interpretation is implausible because of our willingness to refer to the ordinary paid adoption as baby-selling. A more plausible interpretation of conceiving of the “good” as gestational services is that this conception reflects an understanding that the baby is already someone else’s property—the father’s. This characterization of the interaction can be understood as both complete commodification in rhetoric and an expression of gender hierarchy. The would-be father is “producing” a baby of his “own,”¹² but in order to do so he must purchase these “services” as a necessary input. Surrogacy raises the issue of commodification and gender politics in how we understand even the description of the problem. An oppressive understanding of the interaction is the more plausible one: women—their reproductive capacities, attributes, and genes—are fungible in carrying on the male genetic line.

Whether one analogizes paid surrogacy to [the] sale of sexual services or to baby-selling, the underlying concerns are the same. First, there is the possibility of even further oppression of poor or ignorant women, which must be weighed against a possible step toward their liberation through economic gain from a new alienable entitlement—the double bind. Second, there is the possibility that paid surrogacy should be completely prohibited because it expresses an inferior conception of human flourishing. Third, there is the possibility of a domino effect of commodification in rhetoric that leaves us all inferior human beings.

Paid surrogacy involves a potential double bind. The availability of surrogacy option could create hard choices for poor women. In the worst case, rich women, even those who are not infertile, might employ poor women to bear

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children for them. It might be degrading for the surrogate to commodify her gestational services or her baby, but she may find this preferable to her other choices in life. But although surrogates have not tended to be rich women, nor middle-class career women, neither have they (so far) seemed to be the poorest women, the ones most caught in the double bind.

Whether surrogacy is paid or unpaid, there may be a transition problem: an ironic self-deception. Acting in ways that current gender ideology characterizes as empowering might actually be disempowering. Surrogates may feel they are fulfilling their womanhood by producing a baby for someone else, although they may actually be reinforcing oppressive gender roles. Even if surrogate mothering is subjectively experienced as altruism, the surrogate's self-conception as nurturer, caretaker, and service-giver might be viewed as a kind of gender role-oppression. It is also possible to view would-be fathers as (perhaps unknowing) oppressors of their own partners. Infertile mothers, believing it to be their duty to raise their partners' genetic children, could be caught in the same kind of false consciousness and relative powerlessness as surrogates who feel called upon to produce children for others. Some women might have conflicts with their partners that they cannot acknowledge, either about raising children under these circumstances instead of adopting unrelated children, or about having children at all. These considerations suggest that to avoid reinforcing gender ideology, both paid and unpaid surrogacy must be prohibited.

Another reason we might choose prohibition of all surrogacy, paid or unpaid, is that allowing surrogacy in our nonideal world would injure the chances of proper personal development for children awaiting adoption. Unlike a mother relinquishing a baby for adoption, the surrogate mother bears a baby only in response to the demand of the would-be parents: their demand is the reason for its being born. There is a danger that unwanted children might remain parentless even if only unpaid surrogacy is allowed, because those seeking children will turn less frequently to adoption. Would-be fathers may strongly prefer adopted children bearing their own genetic codes to adopted children genetically strange to them; perhaps women prefer adopted children bearing their partners' genetic codes. Thus, prohibition of all surrogacy might be grounded on concern for unwanted children and their chances in life.

Perhaps a more visionary reason to consider prohibiting all surrogacy is that the demand for it expresses a limited view of parent-child bonding; in a better view of personal contextuality, bonding should be reconceived. Although allowing surrogacy might be thought to foster ideals of interrelationships between men and their children, it is unclear why we should assume that the ideal of bonding depends especially on genetic connection. Many people who adopt children feel no less bonded to their children than responsible genetic parents;¹³ they understand that relational bonds are created in shared life more than in genetic codes.¹⁴ We might make better progress toward ideals of interpersonal sharing—toward a better view of contextual personhood—by breaking down the notion that children are fathers'—or parents'—genetic property.

self-deception

grounded on the adoption market

Illusion of Genetic Connection

In spite of these concerns, attempting to prohibit surrogacy now seems too utopian, because it ignores a transition problem. At present, people seem to believe that they need genetic offspring in order to fulfill themselves; at present, some surrogates believe their actions to be altruistic. To try to create an ideal world all at once would do violence to things people make central to themselves. This problem suggests that surrogacy should not be altogether prohibited.

Concerns about commodification of women and children, however, might counsel permitting only unpaid surrogacy (market-inalienability). Market-inalienability might be grounded in a judgment that commodification of women's reproductive capacity is harmful for the identity aspect of their personhood and in a judgment that the closeness of paid surrogacy to baby-selling harms our self-conception too deeply. There is certainly the danger that women's attributes, such as height, eye color, race, intelligence, and athletic ability, will be monetized. Surrogates with "better" qualities will command higher prices in virtue of those qualities. This monetization commodifies women more broadly than merely with respect to their sexual services or reproductive capacity. Hence, if we wish to avoid the dangers of commodification and, at the same time, recognize that there are some situations in which a surrogate can be understood to be proceeding out of love or altruism and not out of economic necessity or desire for monetary gain, we could prohibit sales but allow surrogates to give their services. We might allow them to accept payment of their reasonable out-of-pocket expenses—a form of market-inalienability similar to that governing ordinary adoption in some jurisdictions.

Fear of a domino effect might also counsel market-inalienability. At the moment, it does not seem that women's reproductive capabilities are as commodified as their sexuality. Of course, we cannot tell whether this means that reproductive capabilities are more resistant to commodification or whether the trend toward commodification is still at an early stage. Reproductive capacity, however, is not the only thing in danger of commodification. We must also consider the commodification of children. The risk is serious indeed, because, if there is a significant domino effect, commodification of some children means commodification of everyone. Yet, as long as fathers do have an unmonetized attachment to their genes (and as long as their partners tend to share it), even though the attachment may be nonideal, we need not see children born in a paid surrogacy arrangement—and they need not see themselves—as fully commodified. Hence, there may be less reason to fear the domino effect with paid surrogacy than with baby-selling. The most credible fear of a domino effect—one that paid surrogacy does share with commissioned adoption—is that all women's personal attributes will be commodified. The pricing of surrogates' services will not immediately transform the rhetoric in which women conceive of themselves and in which they are conceived, but that is its tendency. This fear, even though remote, seems grave enough to take steps to ensure that paid surrogacy does not become the kind of institution that could permeate our discourse.

Thus, for several reasons market-inalienability seems an attractive solu-

Against Prohibition
Commodification
Concern

Domino

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tion. But, in choosing this regime, we would have to recognize the danger that the double bind might force simulations of altruism by those who would find living on an expense allowance preferable to their current circumstances. Furthermore, the fact that they are not being paid "full" price exacerbates the double bind and is not really helpful in preventing a domino effect. We would also have to recognize that there would probably not be enough altruistic surrogates available to alleviate the frustration and suffering of those who desire children genetically related to fathers,¹⁵ if this desire is widespread.

The other possible choice is to create an incomplete commodification similar to the one suggested for sale of sexual services. The problem of surrogacy is more difficult, however, primarily because the interaction produces a new person whose interests must be respected. In such an incomplete commodification, performance of surrogacy agreements by willing parties should be permitted, but women who change their minds should not be forced to perform. The surrogate who changes her mind before birth can choose abortion; at birth, she can decide to keep the baby. Neither should those who hire a surrogate and then change their minds be forced to keep and raise a child they do not want. But if a baby is brought into the world and nobody wants her, the surrogate who intended to relinquish the child should not be forced to keep and raise her. Instead, those who, out of a desire for genetically related offspring, initiated the interaction should bear the responsibility for providing for the child's future in a manner that can respect the child's personhood and not create the impression that children are commodities that can be abandoned as well as alienated.¹⁶

We should be aware that the case for incomplete commodification is much more uneasy for surrogacy than for prostitution. The potential for commodification of women is deeper, because, as with commissioned adoption, we risk conceiving of all of women's personal attributes in market rhetoric, and because paid surrogacy within the current gender structure may symbolize that women are fungible baby-makers for men whose seed must be carried on. Moreover, as with commissioned adoption, the interaction brings forth a new person who did not choose commodification and whose potential personal identity and contextuality must be respected even if the parties to the interaction fail to do so.

Because the double bind has similar force whether a woman wishes to be a paid surrogate or simply to create a baby for sale on demand, the magnitude of the difference between paid surrogacy and commissioned adoption is largely dependent on the weight we give to the father's genetic link to the baby. If we place enough weight on this distinction, then incomplete commodification for surrogacy, but not for baby-selling, will be justified. But we should be aware, if we choose incomplete commodification for surrogacy, that this choice might seriously weaken the general market-inalienability of babies, which prohibits commissioned adoptions. If paid surrogacy is permitted, it will become a substitute for commissioned adoption.

If, on balance, incomplete commodification rather than market-inalienability comes to seem right for now, it will appear so for these reasons:

When women want
the child...

No. Different
Incentive Structure

because we judge the double bind to suggest that we should not completely foreclose women's choice of paid surrogacy, even though we foreclose commissioned adoptions; because we judge that people's (including women's) strong commitment to maintaining men's genetic lineage will ward off commodification and the domino effect, distinguishing paid surrogacy adequately from commissioned adoptions; and because we judge that the commitment cannot be overridden without harm to central aspects of people's self-conception. If we instead choose market-inalienability, it will be because we judge the double bind to suggest that poor women will be further disempowered if paid surrogacy becomes a middle-class option, and because we judge that people's commitment to men's genetic lineage is an artifact of gender ideology that can neither save us from commodification nor result in less harm to personhood than its reinforcement would now create. In my view, a form of market-inalienability similar to our regime for ordinary adoption is the better nonideal solution. . . .

IV. Conclusion

. . . Market-inalienability ultimately rests on our best conception of human flourishing, which must evolve as we continue to learn and debate. Likewise, market-inalienabilities must evolve as we continue to learn and debate; there is no magic formula that will delineate them with utter certainty, or once and for all. In our debate, there is no such thing as two radically different normative discourses reaching the "same" result. The terms of our debate will matter to who we are.

Notes

1. Posner, *Economic Analysis of Law*, 202 (3rd. ed., 1986).

2. In Radin, *Property and Personhood*. 34 *Stan L. Rev.* 957 (1982), I suggest that property may be divided into fungible and personal categories for purposes of moral evaluation. Property is personal in a philosophical sense when it has become identified with a person, with her self-constitution and self-development in the context of her environment. Personal property cannot be taken away and replaced with money or other things without harm to the person—to her identity and existence. In a sense, personal property becomes a personal attribute. On the other hand, property is fungible when there is no such personal attachment. *See id.* at 959–61, 978–79, 986–88.

3. The distinction between fungible and personal property is intended to distinguish between, on the one hand, things that are really "objects" in the sense of being "outside" the person, indifferent to personal constitution and continuity, and on the other hand, things that have become at least partly "inside" the person, involved with one's continuing personhood. The traditional subject-object dichotomy makes the notion of personal property hard to grasp, and, in the present context, poses a danger. To analogize bodily integrity to personal property may simply reintroduce the suggestion inherent in market rhetoric that I am trying to argue against: the suggestion that

bodily integrity is somehow an owned object separate from personhood, rather than an inseparable attribute of personhood.

4. This should not be understood to argue that someone who is raped is changed into a completely different person. To assert either that she is altogether the “same” afterwards or that she is completely “different” afterwards would trivialize her experience: we must have a way of conceptualizing our understanding both that she is different afterwards, so that we recognize that she has been changed by the experience, and simultaneously that she is the same afterwards, or else there would be no “she” that we can recognize to have had the experience and been changed by it. Just as personal attributes should not be seen as separate from an abstract self, neither should our experience be seen as separate from ourselves.

5. Antifoundationalism denies that rationality or truth consists of linear deductions from an unquestioned foundational reality or truth. Coherence theories stress holistic interdependence of an entire body of beliefs and commitments; they judge truth or rightness by fit, not by correspondence with an external foundational standard. . . .

6. Those who subjectively identify with things not properly personal might be said to be alienated, improper object-relations keep them from being integrated persons according to the conception of human flourishing we accept.

7. The puzzle about whether poverty can constitute coercion is a philosophical red herring that conceals a deeper problem. Insofar as preventing sales seems harmful or disempowering to poor people who otherwise would sell personal things, it is so even if we think of the choice to sell as not coerced. Because allowing sales, even if we think of them as freely chosen, also seems harmful or disempowering, we are caught in a double bind, a painful dilemma of transition.

8. The assumption is a concession to universal commodification if it means that thinking in money terms comes naturally to people *sub specie aeternitatis*. But non-commodifiers might assume that thinking in money terms comes naturally to people who live in a commodified social order. This assumption expresses the link between rhetoric and the world, discussed above. My argument is that it should be evaluated more particularly, not that it should be ignored.

9. If marketing one’s body is an available option, then those who fail to commodify themselves to feed their families might be thought blameworthy as well. See Shapiro, “Regulation as Language: Communicating Values by Reducing the Contingencies of Choice,” forthcoming.

10. Perhaps we should separately evaluate the risk in the cases of selling “unwanted” babies and selling babies commissioned for adoption or otherwise “produced” for sale. The risk of complete commodification may be greater if we officially sanction bringing babies into the world for purposes of sale than if we sanction accepting money once they are already born. It seems such a distinction would be quite difficult to enforce, however, because nothing prevents the would-be seller from declaring any child to be “unwanted.” Thus, permitting the sale of babies is perhaps tantamount to permitting the production of them for sale.

11. But perhaps we should prophylactically decline to trust any parents who wished to give a child away for “frivolous” reasons adequately to raise a child if forced to keep her.

12. See, e.g., *To Serve “the Best Interest of the Child,”* N.Y. Times, Apr. 1, 1987, § B, at 2, col. 2 (The trial judge in the Baby M case said, “At birth, the father does not purchase the child. It is his own biological genetically related child. He cannot purchase what is already his.”). Indeed, the very label we now give the birth mother reflects the father’s ownership: she is a “surrogate” for “his” wife in her role of bearing “his” child.

13. There has been very little study, however, of the emotional aftermath of adoption. See C. Foote, R. Levy and F. Sander, *Cases and Materials on Family Law*, 404-24 (3rd ed. 1985). As we can recognize from the widespread incidence of child abuse and neglect, not all genetic parents are bonded to their children in any ideal sense.

14. True, there is usually a deep bond between a baby and the woman who carries her, but it seems to me that this bond too is created by shared life, the physical and emotional interdependence of mother and child, more than by the identity of the genetic material. It will be difficult to study this question unless childbearing by embryo transfer, in which a woman can carry a fetus that is not genetically related to her, becomes widespread.

15. In light of the apparent strength of people's desires for fathers' genetic offspring, the ban on profit would also be difficult to enforce. As with adoption, we would see a black market develop in surrogacy.

16. The special dangers of commodification in the surrogacy situation should serve to distinguish it from the way we treat children generally. Perhaps a regulatory scheme should require bonding, insurance policies, or annuities for the child in case of death of the adoptive parents or reneging by them. See Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act* 73 Geo. L. J. 1283 (1985), 1304. But cf. Hollinger, (arguing that financial requirements for surrogate parents are unwarranted because the state does not require that "children generated by coital means be similarly protected"). Perhaps a better scheme (because less oriented to market solutions) could require that alternative adoptive parents at least be sought in advance. *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. Mich J. L. Ref. 865, 911 n. 174 (1985)

The Ethics of Reproductive Technology

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