

MARKET-INALIENABILITY ONCE AGAIN: REPLY TO RADIN

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Introduction

The world of political economy can be divided into two camps: those who wish to rid society of all commercial interactions, and those who think that engaging in any market activity should be legal. These are of course end points on the spectrum; most views fall in between. Radin¹ occupies a position very much toward the anti free enterprise end of this continuum. The goal of the present essay is to defend economic freedom against her critique. This shall be done by citing, and then critically commenting on, her text.

As the name implies, "inalienability" means that the person who owns something, cannot alienate it; e.g., cannot sell or give it away or perhaps even have it taken away (e.g., forfeited).² Market inalienability, to which she confines herself for the most part, refers to that subset of this phenomenon which deals with purchases and sales. Commodification is the obverse of inalienability; to say that something, e.g., a human kidney, is commodifiable, is to assert it can legally be bought or sold.

With "human flourishing"³ as the underpinning of her analytic framework, this author starts off on the wrong foot. There is perhaps no more subjective, ideologically charged concept than this in all of political economy. No independent criteria are offered in its defense. One gathers the spirit of a poker game where the rules are continually changed in midstream. Why in any case is freedom⁴ not part of "human flourishing?"⁵

Radin wishes "to supply . . . a general theory that can illuminate these debates [over inalienability]. Two possibilities for filling this theoretical gap are traditional liberalism and modern

1. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

2. For a defense of this claim as it applies to liberty, see George Smith, *A Killer's Right to Life*, LIBERTY, Nov. 1997, at 46-54.

3. Radin, *supra* note 1, at 1849.

4. That is, in this case, the right to alienate that which you own.

5. For the view that freedom is necessary for the nature of man, see MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* (Humanities Press 1998) (1982).

economic analysis, but in [her article she found] them both wanting."⁶

Too bad she wasn't fully aware of a third alternative, libertarianism, the perspective from which I will analyze her contribution.⁷ Briefly, this philosophy is based on the premise that the only justified use of violence, whether by the state or anyone else, is in response to a prior use of force, against person or property. Uninvited border crossings are the one and only thing against which a legal system should concern itself.⁸ This perspective too, as well as Radin's, is in intellectual tension with both

6. Radin, *supra* note 1, at 1850-51.

7. Radin misidentifies several people as libertarians, and fails to cite any radical exponents of this viewpoint. See Radin, *supra* note 1, at 1861-62 n.48. She mentions JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY* (1975); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985), and ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974). Only the latter is by any stretch of the imagination to be properly characterized as even a moderate libertarian. For a rejection even of Nozick's credentials in this regard, see Randy Barnett, *Whither Anarchy? Has Robert Nozick Justified the State?*, 1 J. LIBERTARIAN STUD., Winter 1977, at 15-22; Roy A. Childs, Jr., *The Invisible Hand Strikes Back*, 1 J. LIBERTARIAN STUD., *supra*, at 23-34; Williamson M. Evers, *Toward a Reformulation of the Law of Contracts*, 1 J. LIBERTARIAN STUD., *supra*, at 3-14; Murray N. Rothbard, *Robert Nozick and the Immaculate Conception of the State*, 1 J. LIBERTARIAN STUD., *supra*, at 45-58; John T. Sanders, *The Free Market Model Versus Government: A Reply to Nozick*, 1 J. LIBERTARIAN STUD., *supra*, at 35-44.

8. For further elaboration, see Murray N. Rothbard, *The Anatomy of the State*, RAMPART J., Summer 1965; MURRAY N. ROTHBARD, *POWER AND MARKET: GOVERNMENT AND THE ECONOMY* (1970); Murray N. Rothbard, *Why be Libertarian?*, *ABOLITIONIST*, December 1971; MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* (1973); Murray N. Rothbard, *Society Without a State*, in *ANARCHISM: NOMOS XIX* 191-207 (J. Roland Pennock, and John W. Chapman eds., 1978); HANS-HERMANN HOPPE, *A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS AND ETHICS* (1989); Hans-Hermann Hoppe, *The Justice of Economic Efficiency*, in *AUS. SCH. ECON.* (S. Littlechild ed., 1990); HANS-HERMANN HOPPE, *THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY* (1993); Douglass B. Rasmussen, *A Groundwork for Rights: Man's Natural End*, 4 J. LIBERTARIAN STUD., Winter 1980, at 65-76; ANTHONY DE JASAY, *THE STATE* (1985); LYSANDER SPOONER, *NO TREASON* (1966); WILLIAM C. WOOLRIDGE, *UNCLE SAM THE MONOPOLY MAN* (1970); JAN NARVESON, *THE LIBERTARIAN IDEA* (1988); Walter Block, *Libertarianism vs. Libertinism*, 11 J. LIBERTARIAN STUD., Winter 1994, at 117-28; WALTER BLOCK, *DEFENDING THE UNDEFENDABLE* (Fox and Wilkes 1991) (1976); Walter Block, *Voluntary Slavery*, in *LIBERTARIAN CONNECTION* (1968); Robert McGee, *A Theory of Secession for Emerging Democracies*, 33 *ASIAN ECON. REV.* 245-65 (1991); Robert McGee, *If Dwarf Tossing Is Outlawed, Only Outlaws Will Toss Dwarfs: Is Dwarf Tossing a Victimless Crime?*, 38 *AM. J. JURIS.* 335-58 (1993).

traditional liberalism and what she is pleased to call "modern economic analysis."⁹

Radin harks on the "right-duty to become educated."¹⁰ This means, I take it, that one may not alienate one's obligation to educate oneself; it should be illegal to be uneducated; punishable, presumably, by a jail sentence. (How else to deal with a law violator?) But suppose you are too poor to afford education; are you to be consigned to the hoosegow anyway? What about the Amish who refuse to allow their children to become educated? What about those with too low an I.Q. to benefit from education? Are they all to be considered law breakers?

Radin¹¹ cites Tribe¹² on necessarily inalienable rights which can't be waived by individuals because "individuals are not their sole focus." But this implies that there is such a thing as group rights, which apply to no one individual — an obvious mistake, in that groups consist of no more (and no less) than the individuals who comprise them. How can there be a group right which does not impact individuals? This is a violation of methodological individualism.¹³

9. Radin considers such "economic analysis 'morally wrong' when it is put forward as the sole discourse of human life." Radin, *supra* note 1, at 1851. Hers is an unconventional remark, in the context of scholarly discourse. However, Walter Block, *Coase and Demsetz on Private Property Rights*, 1 J. LIBERTARIAN STUD., Spring 1977, at 111, also writes in this vein in his criticism of Harold Demsetz, *Some Aspects of Property Rights*, 10 J.L. & ECON. (1966), an exponent of "modern economic analysis," characterizing the latter's pronouncements as "immoral," disregarding the question of whether or not it is "put forward as the sole discourse of human life." For this Block-Demsetz debate, see also Harold Demsetz, *Ethics and Efficiency in Property Rights Systems*, in *TIME, UNCERTAINTY AND DISEQUILIBRIUM: EXPLORATIONS OF AUSTRIAN THEMES*, (Mario Rizzo ed., 1979); Walter Block, *Ethics, Efficiency, Coasian Property Rights and Psychic Income: A Reply to Demsetz*, 8 REV. AUS. ECON. 61-125 (1995); Harold Demsetz, *Block's Erroneous Interpretations*, 10 REV. AUS. ECON. 101-09 (1997); Walter Block, *Private Property Rights, Erroneous Interpretations, Morality and Economics: Reply to Demsetz*, 2 Q.J. AUS. ECON. (forthcoming 1999).

10. Radin, *supra* note 1, at 1854 n.21.

11. *Id.*

12. See Laurence H. Tribe, Commentary; *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985).

13. See HANS-HERMANN HOPPE, *PRAXEOLOGY AND ECONOMIC SCIENCE* (1988); LUDWIG VON MISES, *HUMAN ACTION* (1949); MURRAY N. ROTHBARD, *MAN, ECONOMY AND STATE* (1962); Walter Block, *On Robert Nozick's On Austrian Methodology*, 23 INQUIRY 397-444 (1980).

The Commodification Spectrum

Radin correctly sees Karl Marx as an exemplar of total inalienability, e.g., universal non-commodification (no markets for anything).¹⁴ However, she interprets Posner as "close to the opposite theoretical pole." Overlooked is that Posner advocates prohibiting markets in silence; that is, he argues against legalizing blackmail (the sale of silence).¹⁵ Radin maintains that "[u]niversal commodification is an archetype, a caricature."¹⁶ But she herself¹⁷ cites Posner¹⁸ as stating that he "did not advocate a free market in babies." How, then, can she rank him as an extremist in the commodification or alienability sweepstakes?¹⁹

Radin maintains that "[t]he writings of Gary Becker also exemplify the universal commodification pole." But the case here, if anything, is even weaker. For this economist, too, deviates from universal commodificationism on the issue of blackmail,²⁰ and on a number of other issues.²¹ Gary Becker is one of the most creative economists in the profession.²² But as an exemplar of radical laissez faire capitalism, he is a curious choice.

14. See Radin, *supra* note 1, at 1857-58 n.38.

15. See William Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 43 (1975); Richard Posner, *Blackmail, Privacy and Freedom of Contract*, 141 U. PA. L. REV. 1817-47 (1993). For a rejoinder, see Walter Block & David Gordon, *Extortion and the Exercise of Free Speech Rights: A Reply to Professors Posner, Epstein, Nozick and Lindgren*, 19 LOY. L.A. L. REV. 37-54 (1985); Walter Block & Gary M. Anderson, *Posner on Blackmail: A Critique* (unpublished manuscript).

16. Radin, *supra* note 1, at 1862.

17. Radin, *supra* note 1, at 1863 n.51.

18. See Richard Posner, *Mischaracterized Views*, 69 JUDICATURE 321 (1986).

19. I suggest that by picking Posner as her extremist on the alienability continuum, Radin is offering us a straw man.

20. See Gary Becker, *The Case Against Blackmail* (Jan. 1985) (unpublished), cited in Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 U. PA. L. REV. 1817, 1834 (1993).

21. His Business Week columns are instructive on this matter. On March 15, 1999, he accepted U.S. fiat currency as a legitimate currency; on February 8, 1999, he favored "individual retirement accounts" as a "privatization" of social security, instead of allowing people to decide for themselves whether or not they wish to save at all; on May 18, 1998, he implicitly assented to road socialism: governmental ownership and management of highways and streets; on May 24, 1999, he advocated welfare reform, instead of calling for an immediate and complete repeal of this system; on June 29, 1998, he spoke of "proper government activities"; on June 29, 1999, he opposed those who "wanted to abolish the IMF entirely"; on April 19, 1999, he proposed using some of the federal budget surplus for governmental medical research.

22. He has made pathbreaking contributions to a number of economic issues. Indeed, it is fair to say that his research has established more than a few subfields in

There is yet another reason for not characterizing either Posner or Becker nor any of their colleagues associated with the University of Chicago as extreme commodifiers or advocates of total alienation, or laissez faire capitalism: they all accept inalienability in cases of "market failure" such as externalities, monopoly, public goods, inequality, etc. That is, whenever they spy such phenomena, they call for government intervention into the economy: regulation, antitrust or nationalization.²³ Using present terminology, this is equivalent to anti-commodification.

Radin²⁴ places Calabresi and Melamed²⁵ on the "right" side of the alienability-inalienability axis; that is, toward free enterprise and away from economic totalitarianism. She claims that for them "alienability is prima facie correct or justified, and inalienability must be the exception." She sees in these two authors "a tendency toward universal commodification."²⁶ But this is also hard to discern. On the contrary, Calabresi and Melamed are wedded to "symmetry," which they mention at the outset of their article.²⁷ This means that they are entirely neutral, as a matter of principle, between markets and central planning: it all depends upon the relative costs in each situation. To take but one of many examples of their neutrality on such matters, Calabresi and Melamed state: "We either have the right to our own property or body or the right to share others' property or bodies."²⁸ This is hardly a ringing endorsement of alienability.²⁹

economics. See, e.g. GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976); Gary S. Becker & Kevin M. Murphy, *A Theory of Rational Addiction*, 96 J. POL. ECON. 675-700 (1988); GARY BECKER, *HUMAN CAPITAL* (1964); GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957).

23. See, e.g., YALE BROZEN, *CONCENTRATION, MERGERS, AND PUBLIC POLICY* (1982); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992); for a rejoinder, see Walter Block, *Total Repeal of Anti-trust Legislation: A Critique of Bork, Brozen and Posner*, 8 REV. AUS. ECON. 31-64 (1994).

24. See Radin, *supra* note 1, at 1864.

25. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

26. Radin, *supra* note 1, at 1865.

27. See Calabresi & Melamed, *supra* note 25, at 1091.

28. *Id.* at 1100.

29. Radin herself makes much of the fact that "Calabresi has . . . made it clear that he does not embrace universal market rhetoric." Radin, *supra* note 1, at 1866 n.59. All the more puzzle, then, that she should consider him an extreme defender of free enterprise.

In like manner Radin accurately sees Richard Epstein, *Why Restrain Alienation*, 85 COLUM. L. REV. 970 (1985), as the moderate he is. See Radin, *supra* note 1, at

Universal Commodification

Radin begins her explication of this concept with a definition: "Universal commodification means 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 exchange."³⁰

She makes much of the fact that friendships, relationships, and justice would also be subject to purchase or sale under a system of full commodification or free enterprise.³¹ Undoubtedly, Radin sees this state of affairs as a prime target for a *reductio ad absurdum*. Let us not duck away from our responsibility as defenders of this system by failing to confront this charge.

Take justice first. At first blush, no greater horror can be imagined than the sale of this commodity, since an equitable legal system is the basis of all of our rights, to say nothing of its being the underpinning of civilization itself. But there is an equivocation involved in this charge. It is one thing to sell someone *else's* justice; it is entirely a different matter to sell one's own. Two examples will clarify this.

First, A and B are contending over a piece of property. Stipulate that A is in the right on this matter; that is, in justice, A is the legitimate owner. They go to court, and B (the richer man) bribes the judge into finding in his favor, for a fraction of the value of the property in question. As a result, both B and the judge enhance their wealth position. Here, A's justice has been the subject of the commercial arrangement between B and the judge. In effect, B, with the help of the judge, stole the property under contention from A.

Second case: As before, A and B are contending over a piece of property. Stipulate, again, that A is the rightful owner. They go to court, and this time A bribes the judge, not into find-

1867 n.62. Why, then, include him in the ranks of radical commodifiers? Why not instead criticize those mentioned above who do not compromise with this position? See Radin, *supra* note 8.

Radin, *supra* note 1, at 1868 n.66, cites her own article, Margaret Jane Radin, *Time, Possession and Alienation*, 64 WASH. U. L.Q. 739 (1986), and Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723 (1986), as evidence that it is difficult to reconcile utilitarianism and libertarianism. But they succeed only in overturning Epstein's rather weakly libertarian position on this issue.

30. Radin, *supra* note 1, at 1860.

31. See *id.* at 1860 nn.44-45.

ing in his own favor, but for a verdict in behalf of B.³² Justice is again exchanged for money, but this time A sold his *own* rights.

Justice was perverted in each of these two examples, but there is a sharp difference between them. In the first case, B ended up stealing A's property. In the second, A (surreptitiously) made a gift of his own property to B, something he has every right to do.³³ Here, A in effect sold, or gave up for consideration (the help he might give to his son) a just verdict which he might otherwise have enjoyed, hardly the end of Western civilization, even though justice was commodified.

Apart from this consideration, it is impossible to reconcile the sale of justice with the system of laissez faire capitalism, Posner³⁴ notwithstanding.³⁵ This is because free market exchange, the essence of commodification, *implies* justice, without which there could *be* no free market. Chicagoans and members of the Law and Economics School sometimes utilize a diagram,³⁶ featuring a downward sloping demand curve for justice, on the familiar price quantity axis. The difficulty is that for there to *be* a demand curve which is part and parcel of trade and free enterprise there must *first* be justice. If there is no justice, it is impossible to buy or sell anything. Commodifying justice, then, is to put the cart before the horse.

Radin is to be congratulated for taking Posner³⁷ to task for his statement "that efficiency is 'perhaps the most common'

32. Why might A do this? Who knows? Perhaps because B is poor but proud, and A wants to help him. He knows that B would spurn any charity. By undermining justice in this case, however, B will accept the property which he would not otherwise do.

33. Might it be argued that in making a gift to a poor but proud man disinclined to accept it justice is again perverted? Not under the libertarian legal code. Suppose, now, that A is a rich father, B a poor son; that B hates A, and will not willingly and knowingly accept a gift from him; that B is starving, A loves B and doesn't want him to come to harm. So A gives money to C, directing him to turn it over to B. Has A violated the non aggression axiom? No. There was no theft involved. See ROTHBARD, *supra* note 5. Whether this is a *moral* act is entirely a separate matter.

34. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977).

35. Radin is entirely correct in her criticism of Posner on these grounds. Her only mistake is in supposing that traditional liberalism and modern economic analysis (of which Posner is a paradigm case) exhaust the pro-commodification camp. They do not: there is a third alternative: the non-compromising libertarianism ignored by Radin. See *supra* note 8.

36. See App. 1.

37. See Richard A. Posner, *supra* note 34, at 13.

meaning of 'justice.'"³⁸ Truth to be told, for Posner there is nothing to justice *but* efficiency. The difficulty with this, of course, is that if justice and efficiency mean the same thing, why this promiscuous use of synonyms? We already have a perfectly good English word which can be used to denote what "efficiency" means. For Posner to conflate these two very different concepts is, in effect, to attempt to garner for "efficiency" the virtues of "justice."

Now let us consider the sale of friendships and relationships. At first glance, this seems to be well nigh impossible. After all, if you "befriend" someone for the money, this sounds more like prostitution or babysitting or gold-digging than it does a true relationship. But this is only a superficial analysis.³⁹ There are many kinds of friendship. Relationships are a very subjective matter.⁴⁰ Who is to say that no one in all of history ever married for money, remained in the relationship, and then eventually fell in love with her spouse, and continued to be financially supported by him. If even one such occurrence ever took place, this would presumably count as the sale of a relationship. This might not be the ideal story book type of love affair to which most people aspire, but it certainly places the commodification of friendship in a very different light.

Inalienability Corrects Market Failure

In the view of the "modern economic analysis" against which Radin aligns herself, there are numerous "market failures" such as monopoly, externalities, public goods, etc. In order to combat these infelicities, mainstream economists buy into the notion of alienability. That is, they advocate all sorts of regulations and interferences with the free disposal of property rights at mutually agreeable terms. This, of course, is an attack on full commodification. And yet our authoress uses these writers as a foil, complaining of their *adherence* to markets.

38. Radin, *supra* note 1, at 1861 n.47.

39. I owe this point to Matthew Block.

40. On subjectivism in economics, see Thomas J. DiLorenzo, *The Subjectivist Roots of James Buchanan's Economics*, 4 REV. AUS. ECON. 180-98 (1990); William Barnett II, *Subjective Cost Revisited*, 3 REV. AUS. ECON. 137-38 (1989); Walter Block, *On Yeager's 'Why Subjectivism?'*, 2 REV. AUS. ECON. 199-208 (1988); JAMES M. BUCHANAN, *COST AND CHOICE: AN INQUIRY INTO ECONOMIC THEORY* (1969); JAMES M. BUCHANAN & G.F. THIRLBY, *L.S.E. ESSAYS ON COST* (1981); VON MISES, *supra* note 13; ROTHBARD, *supra* note 13.

For example, Radin criticizes Calabresi and Melamed⁴¹ for opposing voluntary slavery only because of the inefficiency it would bring about because of third party (externality) opposition:

On a deeper level, the argument disturbingly suggests that the inalienability rule against slavery would not be justified if the rule were inefficient. If enough [third parties] liked slavery, so that the prohibition would be a cost rather than a benefit to them, slavery would be efficient and therefore (at least according to this argument) acceptable.⁴²

"Disturbingly suggests" is not the half of it. More accurately, Calabresi and Melamed⁴³ *blatantly declare* that not only slavery, but *any* government regulation is justified, provided only that it is "efficient." And, by "efficient" they mean no more than the usual definition of efficiency in mainstream economics, Pareto optimality. Calabresi and Melamed define it in this way:

Economic efficiency asks that we choose the set of entitlements which would lead to that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before.⁴⁴

An alternative definition in this vein is that resources are allocated efficiently when no alteration would make any one person better off without worsening the position of another. But, clearly, coercive slavery, let alone the voluntary variety, is perfectly compatible with this scenario.⁴⁵ Antebellum slavery in the U.S. south was Pareto optimal,⁴⁶ efficient, and therefore, at least in this view, "justified." So much the worse for such a position. One would have thought that it long ago would have been ruled out of the realm of civilized discourse.

Radin attributes this monstrous view to "the triumph of market methodology."⁴⁷ In this, she exhibits her ignorance of

41. See Calabresi & Melamed, *supra* note 25, at 1112.

42. See Radin, *supra* note 1, at 1865-66.

43. See *id.*

44. *Id.* at 1093-94.

45. Any change in it, e.g., freeing some slaves, would have made at least one person *worse* off, namely their owner.

46. For a critique of such slavery on efficiency grounds, but not defined in terms of Pareto optimality, see JEFFREY HUMMEL, *EMANCIPATING SLAVES, ENSLAVING FREE MEN: A HISTORY OF THE AMERICAN CIVIL WAR* (1996).

47. Radin, *supra* note 1, at 1866.

the niceties of free enterprise political philosophy. There are not one but rather two schools of thought which are pro-market. People such as Radin who are not knowledgeable about such matters are familiar only with the more popular one: the Chicago School-inspired Law and Economics movement which she properly castigates for the view that coercive slavery might be acceptable.

But there is entirely a different one which *also* embraces "market methodology" and free enterprise rhetoric. This one, call it the Austrian, or libertarian, school of thought,⁴⁸ identifies justice not with economic efficiency, nor with wealth maximization, nor yet with minimizing transactions costs; on the contrary, justice here is equated with property rights based on homesteading, and then with full economic freedom, based on the law of non aggression against non aggressors. It is important to distinguish between these two not only for accuracy in history of thought. More germane to the issue, had Radin been aware of the Austrian-libertarian perspective, she would not have attributed the peculiar philosophy of Calabresi and Melamed to "market methodology" which is shared by them; rather, she would have seen this as emanating from the Chicago Law and Economics tradition alone.

The Critique of Universal Commodification

Radin is on record as supporting a Marxist version of universal non commodification, apart from "a problem of transition."⁴⁹ Her remarks in this section read as if they were penned in a far gone century, an ignorant one uninformed by the experience of the fall of the Berlin Wall, the economic unraveling of the U.S.S.R., and the adoption of the capitalist path in Red China. We do well to subject this vision to withering criticism no matter how outmoded it sounds, for these words, which appear in the prestigious Harvard Law Review, have not to my knowledge been repudiated by their author; they, or words like them, have misled countless numbers of sociologists, law professors, clergy-

48. Austrianism is a value free school of economic thought, involved in positive economics. Libertarianism is a value laden political philosophy, engaged in normative economics. A sharp distinction, therefore, should be drawn between them. Nevertheless, each of them must be brought into the present discussion, for Radin, too, is dealing with both a value free branch of social science, mainstream economics, as well as with a political philosophy, liberalism.

49. Radin, *supra* note 1, at 1870.

men, feminists, other scholars and journalists. They deserve a stern rebuke, if not to have salt sown where once they stood.

Approvingly citing Marx⁵⁰ in support of her dubious contentions, Radin remarks that "the hegemony of profit-maximizing buying and selling stifles the individual and social potential of human beings. . . . Ultimately, laboring to produce commodities turns the worker from a human being into a commodity, 'indeed the most wretched of commodities,'"⁵¹ in the curious phraseology of Marx.^{52,53}

If these words were written in a play (a comedy) that would be one thing. But, they are apparently intended seriously. Many people in the Third World would like nothing better to attain the standards of living enjoyed in the U.S. and Western Europe under an approximation of a system of where everyone can freely engage in "laboring to produce commodities." In capitalist countries, everyone, not just a few Russian Olympic gold medal winners, can have a small car, a television set, an apartment, and a refrigerator. But how can society enjoy these *commodities* if they do not *labor* to create them in the first place?⁵⁴ But we need not rely on anecdotal evidence alone. There are also statistical grounds upon which to base such an opinion. For every sin-

50. See Karl Marx, *Economic and Philosophical Manuscripts of 1844*, in MARX-ENGELS READER 70 (R. Tucker ed., 2d ed. 1984).

51. Radin, *supra* note 1, at 1871.

52. See Marx, *supra* note 50.

53. Radin claims that "[c]ommodification brings about an inferior form of human life." Radin, *supra* note 1, at 1872. If so, why was there virtually one way traffic, *westward*, across the Berlin Wall? Why were there guards shooting at emigrants traveling in *this* direction, but not in the other?

54. Of course, even in the economic basket cases of Cuba and North Korea, people do eat. Thus, they produce at least some agricultural commodities. In the view of Radin and Marx, however, what causes worker "alienation" (in the psychological sense) and "commodity fetishism" is not merely laboring to produce commodities, but, rather, "producing objects that became *market* commodities" (emphasis added). *Id.* at 1871. In other words, those laboring in a factory in the workers' paradise of Cuba do not develop these dread maladies. But their counterparts working in the identical factory (they should live so long) in the U.S. do contract it. There is something about *markets*, over and above wages paid or working conditions, that attacks the souls of employees. What this phenomenon is or could be is never addressed by Radin.

gle point increase in a country's rating of economic freedom,⁵⁵ per capita GDP rises by \$0.33.⁵⁶

Radin claims that, as part of market fetishism, "[r]elationships between people are disguised as relationships between commodities, which appear to be governed by abstract market forces. I do not decide what objects to produce, rather, 'the market' does. . . . Moreover, I do not decide what price to sell them for, 'the market' does."⁵⁷

But in doing so she only succeeds in demonstrating a fetishism of her own. For in truth, there is no such thing as the market — apart, that is, from the billions and trillions of purchases, sales, rentals, trades, etc., engaged in by people all around the world. Radin supports the Marxist Lukacs'⁵⁸ opposition to "reification,"⁵⁹ but she herself indulges in such questionable behavior. Contrary to Radin, there is no "market" *over and above* the choices of individual market participants. The "market" consists of no more (and no less) than the totality of the choices of all economic actors. "You," then, most certainly *do* choose what objects to produce under free enterprise. And this applies, of course, to everyone else. There is no impersonal "market" which pulls "your" strings. Rather, some offers (e.g., a Microsoft computer) are met by greater positive reaction than others (e.g., an Edsel).

Does Radin mean to say that Bill Gates, Henry Ford, Andrew Carnegie, John Pierpont Morgan, Ayn Rand, John D. Rockefeller, Ray Croc, Michael Milken, Dave Thomas, and Michael Jordan did not *choose* an industry to enter? Rather, "abstract market forces" compelled them in their various directions? How, then, did the "market" know which occupations to command each of these entrepreneurs to take up? Does our author mean to imply that Ray Croc, for example, really wanted to build cars, but that the market demanded he create burgers in-

55. Economic freedom is defined roughly in terms of how much of a nation's economy is able to be completely commodified. The fewer restrictions and regulations on private property and markets, in other words, the more economically free is a country.

56. JAMES GWARTNEY, ROBERT LAWSON, AND WALTER BLOCK, *ECONOMIC FREEDOM OF THE WORLD*, 1975-1995 110 (1996).

57. Radin, *supra* note 1, at 1873.

58. Lukacs, *Reification and the Consciousness of the Proletariat*, in *HISTORY AND CLASS CONSCIOUSNESS* 83 (R. Livingstone trans. 1971).

59. *See id.* at 1874.

stead, and that he complied, but against his will? Perhaps, then, he should sue "the market" for damages. Does Radin mean to imply, further, that none of these capitalists had anything to do with determining the price at which they would be compensated? If so, she is then guilty of reifying or fetishizing "perfect competition," a concept much beloved of the very "modern economic analysis" she criticizes.⁶⁰ Taking seriously the views of Marx,⁶¹ and of Marxists such as Lukacs⁶² is a dangerous enterprise.

As I write this article I read in the paper a story about the upcoming Americas Zone Olympic qualifying tournament in basketball: "Vancouver Grizzlies guard Felipe Lopez, who is one of the NBA's most marketable *commodities* in Latin America - he hosted Internet chat sessions for the league from the league finals and the draft - will suit up for the Dominican Republic in Puerto Rico."⁶³ Poor Mr. Lopez, reduced to the status of a mere commodity. A Marxist such as Radin might commiserate with him. In actual point of fact, this young man is having the time of his life, earns millions of dollars per year as an NBA player and from endorsements. Of course, he is a *commodity*. But this means no more than he works for a living as an employee of a private corporation. Meanwhile, of course, there are people actually starving in Communist countries. But the Radins of the world can exult, for at least they are not (horrors!) *commodities*.

Rhetoric

In the view of Radin, not only is commodification an evil, but the same applies, even, to the rhetoric of commodification.⁶⁴

60. For an Austrian critique of perfect competition, see Thomas J. DiLorenzo, *The Myth of Natural Monopoly*, 9 REV. AUS. ECON. 43-58 (1997); Donald J. Boudreaux & Thomas J. DiLorenzo, *The Protectionist Roots of Antitrust*, 6 REV. AUS. ECON. 81-96 (1992); Jack High, *Bork's Paradox: Static vs Dynamic Efficiency in Antitrust Analysis*, 3 CONTEMP. POL'Y ISSUES 21-34 (1984-85); DOMINICK T. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE (1982); DOMINICK T. ARMENTANO, THE MYTHS OF ANTITRUST (1972); ROTHBARD, *supra* note 13; Block, *supra* note 23; DON ARMSTRONG, COMPETITION VS. MONOPOLY (1982); Fred McChesney, *Antitrust and Regulation: Chicago's Contradictory Views*, 10 CATO J. 775-98 (1991); William F. Shugart II, DON'T REVISE THE CLAYTON ACT, SCRAP IT!, 6 CATO J. 925 (1987); Fred L. Smith, Jr., *Why Not Abolish Antitrust?*, REGULATION, Jan.-Feb. 1983, at 23.

61. See Radin, *supra* note 1, at 1871-73.

62. See *id.* at 1873-74.

63. *Felipe Lopez*, VANCOUVER SUN, July 10, 1999, at E4 (emphasis added).

64. Ditto for the rhetoric of alienability, capitalism, markets, free enterprise, etc.

Why is this? First, there are the risks of error: market rhetoric "might lead imperfect practitioners to wrong answers."⁶⁵

The example she gives to illustrate this is a particularly inept one; not taking into account the psychic effects of (failing to enact) rent control:

[T]he economic analysis of residential rent control could take into account not only the monetary costs to landlords and would-be tenants, but also the decline in well-being of tenants who are forced to lose their homes, break up their communities, and endure the frustration, disruption and other "costs" of moving Because it tends to ignore "costs" that are not readily monetizable, commodification-talk tends to err on the side of alienation.⁶⁶

Our author waxes eloquent about the psychic costs borne by tenants "unprotected" by rent control who are forced to vacate due to rent hikes. But the injuries they suffer — landlord belligerence, declining services, niggardly repairs, higher crime rates, corner cutting on heating, etc., are *due* to rent control, not its absence.⁶⁷

More basically, the benefits to sitting tenants of continuity of occupancy need not be taken into account in the first place since

65. Radin, *supra* note 1, at 1878.

66. *Id.*

67. For the economic case against rent control, see Gene McDonough & Walter Block, *The Evils of Rent Control*, 27 CONSENT 10-11 (1997); Patrick Mungovan, *The Ravages of Rent Control*, 359 CHALCEDON REP. 31-32 (June 1995); Kevin Sohr & Walter Block, *Rent Control*, 47 FREEMAN 681-82 (1997); Joseph Horton et al., *Rent Control: An Economic Abomination*, 11 INT'L J. VALUE BASED MGMT. 253-63 (1998); Christine Tammara et al., *Rent Control: An Economic Evil*, Commentaries on Law and Econ. (forthcoming 1999); Walter Block, *On Rent Control*, THE FORTUNE ENCYCLOPEDIA OF ECONOMICS 421-25 (David Henderson ed., 1993); Walter Block, *Rent Control: A Case Study of British Columbia*, 30 MID ATLANTIC J. BUS. 299-304 (1994); CHARLES BAIRD, *RENT CONTROL: THE PERENNIAL FOLLY* (1980); Milton Friedman & George Stigler, *Roofs or Ceilings? The Current Housing Problem*, in *RENT CONTROL: MYTHS AND REALITIES* 87-103 (Walter Block et al. eds., 1981); R.W. GRANT, *RENT CONTROL AND THE WAR AGAINST THE POOR* (1989); M. BRUCE JOHNSON, *RESOLVING THE HOUSING CRISIS: GOVERNMENT POLICY, DECONTROL, AND THE PUBLIC INTEREST* (1982); ASSAR LINDBECK, *THE POLITICAL ECONOMY OF THE NEW LEFT* (1972); Sven Rydenfelt, *The Rise, Fall, and Revival of Swedish Rent Control*, in *RENT CONTROL: MYTHS & REALITIES* 224 (Walter Block & Edgar Olsen eds., 1981); PETER D. SALINS, *THE ECOLOGY OF HOUSING DESTRUCTION: ECONOMIC EFFECTS OF PUBLIC INTERVENTION IN THE HOUSING MARKET* (1980); WILLIAM TUCKER, *THE EXCLUDED AMERICANS: HOMELESSNESS AND HOUSING POLICIES* (1990); John C. Moorhouse, *Optional Housing Maintenance Under Rent Control*, 39 S. ECON. J. 93-106 (1972).

they do not *own* these amenities.⁶⁸ Suppose a restaurant raises its prices, or goes out of business. This, undoubtedly, will cause at least a modicum of disruption to the lives of its regular patrons.⁶⁹ But do they have to be consulted before the restaurant owner can make this entrepreneurial decision? If so, that spells the death knell of our market system, for no business firm will ever obtain unanimous agreement on the part of all of its customers, neighbors, suppliers, employees, etc., to *any* decision it makes. Even the attempt to impose such a scheme would bring about widespread economic arteriosclerosis. Are not sitting tenants ever “forced” to move under Communism? What about Stalin’s treatment of the kulaks?

In any case, what Radin is implicitly asking for — a comparison of all the gains and losses subsequent to a change in the real estate market, with and without rent control, including the psychic losses of all those concerned (whether or not they hold property titles) — is impossible to attain. Further, it is strictly forbidden as a matter of scientific methodology, not at all imposed, as she contends, by economic analysis. What she is calling for is no less than an interpersonal comparison of utility.⁷⁰

Radin’s second attack on the rhetoric of commodification concerns injury to what she is pleased to call “personhood.”⁷¹ She starts by citing Posner, who sees rape as a violation of “property rights in women’s persons.”⁷² This is unobjectionable, even an admirable way of putting the matter, Radin’s complaints notwithstanding. After all, if the woman herself doesn’t own her own body, who possibly can?

But this language is unsuitable to her:⁷³

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. . . . For some-

68. In contrast, this does not apply to owners of single family housing units.

69. Perhaps, even, equivalent to that felt by long term tenants. For a dramatic example of this, see the movie *As Good As It Gets* (Columbia TriStar Pictures 1997), with Jack Nicholson and Helen Hunt.

70. For an explanation of why this cannot be done, see MURRAY N. ROTHBARD, *TOWARD A RECONSTRUCTION OF UTILITY AND WELFARE ECONOMICS* (1977). For an attempt to do this in any case, see Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 1 (1986). For a rejoinder to Radin, see Walter Block, *A Critique of the Legal and Philosophical Case for Rent Control* (forthcoming).

71. Radin, *supra* note 1, at 1879.

72. See POSNER, *supra* note 34, at 202.

73. Radin, *supra* note 1, at 1881.

one 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.

This sounds like nothing so much as the ranting of a husband in one of those uncivilized cultures where a raped wife is to be shunned, even perhaps killed for the "shame" she has brought to her family. For surely a woman who is raped is one who has lost a "personal attribute," at least on the basis of Radin's analysis. Radin tries to shield herself from this very unwelcome logical implication of her thesis, but twist and turn as she may it is very difficult to see how it can be avoided.⁷⁴ If bodily integrity is "merely" fungible, or commodifiable, at worst the raped woman has lost something which can be separated from herself. After this dastardly crime, she is still who she was before.⁷⁵ On Radin's account, however, her very "personhood" has been seized. She is no longer her person she once was.

States Radin:

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. . . . [F]acts are not "out there" waiting to be described by discourse. Facts are theory-dependent and value dependent.⁷⁶

Did reality not exist, independently of our wishes? If we were free to wish for and get whatever we want, then anything goes, including Radin's concept of "human flourishing."⁷⁷ Back in the real world, none of this applies. Here, it matters not one whit whether rape is characterized as a violation of private property rights in persons, or as an infringement upon "an integral personal attribute." Both phrases are entirely consistent with reality. The *identical* result is reached in either case.

Radin states: "A fungible object is replaceable with money or other objects; in fact, possessing a fungible object is the same

74. See *id.* at 1881 n.118.

75. She is no worse off, ideally, in a psychological sense, than a person victimized by any other assault and battery. On this see MICHAEL R. EDELSTEIN & DAVID RAMSEY STEELE, *THREE MINUTE THERAPY* (1997).

76. Radin, *supra* note 1, at 1882.

77. According to that old saw, "if wishes were horses, beggars would ride."

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."⁷⁸

Here, she reveals herself as a person innocent of even the most basic of economic axioms. First of all, there is such a thing as consumer (and of course producer) surplus.⁷⁹ Each person who takes part in *any* commercial arrangement benefits at least in the *ex ante* sense. If I give you my tie in exchange for your book, it is because I value the book I receive more than the tie I give up. Similarly, you rank the tie you receive more highly than the book with which you part. We *both* gain. Trade, purchases, sales, e.g., *all* market activity, is *mutually* beneficial; it is a positive-sum game. No one ever gives anyone else a "market equivalent." Each person pays something of *less* value to him than what he discards. Second, there is such a thing as psychic income. Some people will not sell out, for *any* price. Take the holdout, for example. He refuses to sell the old family home to make way for a developer, even at the exorbitant price the construction of a high rise will allow him to be paid.⁸⁰

That "[a] fungible object is replaceable with money or other objects," moreover, is *not* equivalent to "anything can be expressed in dollar terms." The Jewish saying "a woman is worth more than her weight in rubies" implies nothing about sale. It means only that her husband would not part with her for anything less, not that he would for anything more.

According to Radin, "[t]o 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."⁸¹ Why, else, then, does the rapist engage in this nefarious activity? *Of course* rape benefits the rapist in *some* sense;⁸²

78. Radin, *supra* note 1, at 1880.

79. As it happens, Radin does mention this concept but misidentifies it as "anything to which someone attached high subjective value." Radin, *supra* note 1, at 1980. This is but *part* of the concept. The other element is that from this must be subtracted the purchase price. If I place a very high value on a yacht, but must pay a large amount for it, my consumer surplus, the difference between these two values, need not be great at all.

80. For more on this, see Block, *Coase and Demsetz on Private Property Rights*, *supra* note 9, at 111-15.

81. Radin, *supra* note 1, at 1884.

82. See VON MISES, *supra* note 13; ROTHBARD, *supra* note 13.

otherwise, he would not have done it. It is also undoubtedly true, as Radin implies, that rape *also* has negative effects on the rapist; e.g., it (further) brutalizes him in various ways. But, from his own point of view, as expressed in his freely chosen actions, rape must of necessity benefit the rapist, apart from these harms.⁸³

But only the Chicagoite Posner, and not the Austrian-libertarian, is susceptible to Radin's criticism:

The "pleasure" and "satisfaction" of maintaining one's bodily integrity is commensurate with the "pleasure" and "satisfaction" of someone who invades it. Thus, there could be circumstances in which the satisfactions or "value" to rapists would outweigh the costs or "disvalue" to victims. In those situations rape would not be morally wrong and might instead be morally commendable.⁸⁴

This is because for Posner, it really is of crucial importance whether the benefit to the rapist outweighs the cost to the victim. If not, then Radin is perfectly correct in charging that Posner must defend the guilty rapist against criminal charges, if he is to remain true to his misbegotten and highly mischievous philosophy. Indeed, this is precisely the message of the Austrian libertarian perspective.⁸⁵ In this latter view, which is equally "guilty" of using market rhetoric as is that of the Law and Economics school,⁸⁶ the reason rape is wrong, and ought to be legally proscribed is not because wealth is thereby dissipated, or due to the fact that the rape necessarily hurts the victim more than it benefits the perpetrator, but because it violates the cardinal libertarian law against invasion of person or property. Radin is properly outraged against Posner. But she focuses on an irrelevancy, the use of market rhetoric and ignores the real cause of

83. If Radin doesn't think that rape benefits the rapist, she must also deny that drugs benefit the addict, whiskey the alcoholic, candy the compulsive overeater, etc. There is of course a sense in which none of these products benefit their users. They are all harmful to health, particularly in the long run. But surely there is also another sense in which these people benefit from their indulgences. They would hardly engage in them were this not the case.

84. Radin, *supra* note 1, at 1884.

85. See Walter Block, *O.J.'s Defense: A Reductio Ad Absurdum of the Economics of Ronald Coase and Richard Posner*, 3 EUR. J.L. & ECON. 265-86 (1996).

86. Indeed, even more so, in that the latter are consistent and radical advocates of laissez faire capitalism, while the Chicagoites are only lukewarm supporters. See Block, *supra* note 23; Walter Block, *The Gold Standard: A Critique of Friedman, Mundell, Hayek and Greenspan*, 25 MANAGERIAL FIN. 15-33 (1999).

the problem: Posner is in effect a quasi-utilitarian, and therefore, like all other "super Benthamites," must suffer an "embarrassment" when the rapist gains more than the rape victim loses.⁸⁷ "Market rhetoric" is not the culprit; it is, instead, Posner's quasi-super-utilitarianism. For the true libertarian, in contrast, it is of supreme *unimportance* whether rape increases or decreases utility. That this act is a paradigm case of an uninvited border crossing (against person *or* property it does not matter) is quite sufficient to render it a crime. Radin is thus barking up the wrong tree when she complains that "[t]his (market) rhetoric reduces the conception of a person to an abstract, fungible unit with no individuating characteristics."⁸⁸ Dogs and cats are commonly sold in markets. Yet, it would be a manifest falsity to deny that they have no distinguishing features. One might with as much reason claim that no items can be red, or round, or heavy, because they are commonly bought and sold.

Let us put this into other words because it is so crucial a point. In the present context, Posner is attempting to obviate an objection against his system. Namely, that in his view, rape is *only* a crime because it reduces wealth, the be all and end all for Posnerians and Coaseans. But if the rapist values this act more than his victim disvalues it, then, paradoxically, rape will *increase* overall wealth,⁸⁹ and thus should not be criminalized. It is in order to counter such a *reductio ad absurdum* that Posner is lead to deny the possibility that the rape can enhance the welfare of the perpetrator to a greater degree than it can reduce the well being of the victim. But the obvious counter is to say to Posner: Suppose, just suppose, that the rapist *did* value this act more than his victim disvalued it; then, according to the misconceived Coasean-Posnerian system, rape (at least under such circumstances) should *not* be a crime. Radin, unfortunately, is not in a position to challenge Posner in this way because her ideological preconceptions preclude her from even contemplating the possibility that rape benefits the rapist in any sense.

Radin misconstrues her intellectual opponents when she states, "[It is not] satisfactory to think that marketing whatever

87. Radin, *supra* note 1, at 1883 n.124.

88. *Id.* at 1885.

89. Scholars in the law and economics tradition rush in to make interpersonal comparisons of utility where wiser scholars fear to tread; let them reap where they have sown.

one wishes defines freedom.”⁹⁰ Of course not. Marketing whatever one wishes is only a part of freedom, albeit a necessary part. In addition, freedom consists of being able to do *anything* with one’s own person and property, provided only that such actions respect other people’s equal rights to do the same. As well, a state of freedom entails that no one will violate your own rights to person and property.

Radin concedes “that there is a difference between thought and action. To say ‘I wish you were dead’ is not to kill you.”⁹¹ And she is also “deliberately not taking the position that if one kind of discourse expresses and fosters an inferior conception of human flourishing, government censorship is necessarily justified.”⁹² However, she explicitly adopts a “holistic view of rhetoric” according to which “there can be no sharp distinction between speech and action”⁹³ This being the case, perhaps “I wish you were dead” *should* be punished by law, maybe not as seriously as first degree murder, but criminalized nonetheless. But suppose someone were to posit that he found Radin’s type of discourse contrary to “human flourishing.” Would this mean it would be just, were he to have the power to do so, to criminalize Marxist, feminist and “holistic” rhetoric, on the ground that they were harmful? If what is sauce for the goose is sauce for the gander, it would appear that this would be precisely the conclusion that logic would force Radin to draw.⁹⁴

This is roughly Radin’s position on the right to view pornography: it disrespects human flourishing and women’s place in society, and ought to be banned. Well, why not ban things *she* holds dear, since they violate other people’s opinions of proper human flourishing? She goes so far as to accept that “significant strand of feminist thought [which] holds the view that even willing audiences should not be allowed to shape and reinforce their view of human sexuality, and in particular of women’s role in it, through pornography.”⁹⁵ This is a very retrograde step, in that, under this dispensation, adult women would not be allowed to

90. *Id.*

91. *Id.*

92. *Id.* at 1886 n.137.

93. *Id.* at 1886.

94. Of course, logic can always be rejected on the ground that it is phallogocentric. But then we no longer remain in the realm of civilized discourse. See the critique of polylogism by VON MISES, *supra* note 13.

95. Radin, *supra* note 1, at 1887 n.138 (internal citations omitted).

sign contracts to engage in pornography, nor even to agree to witness it. The only difference is that now, instead of a male chauvinist pig husband or father figure violating women's rights, this is to be done by feminists, in the name of women.⁹⁶

Pluralism: The Liberal Heritage

Having dealt with modern economic analysis, and its rhetoric, at least to her satisfaction, Radin is now ready to move on to a consideration of traditional liberalism. She correctly sees "negative liberty"⁹⁷ and the claim that "inalienabilities are paternalistic"⁹⁸ as basic elements of this system. Further, our author⁹⁹ is very much on the mark when she states that a person who advocates free enterprise "cannot consistently admit *any* inalienabilities without denying that the objects of them are property. . . . It would be a logical contradiction for him to postulate inalienable property."¹⁰⁰

However, she veers into error when she states:

Political theorists who explain and justify capitalist private property must address the issue of human commodification. Their problem is to condemn slavery while justifying the sale of one's labor on the market model; that is, to distinguish worker commodification under slavery from the (alleged) worker commodification under (alleged) wage slavery.¹⁰¹

Citing Patterson she continues: "[T]here is no intrinsic difference between 'property' in the work of slaves, on the one hand, and in the work of employees . . . on the other."¹⁰²

The problem is that, with one caveat, Patterson is exactly correct; there is in principle no relevant difference between slav-

96. For an antidote to this totalitarianism, see WENDY McELROY, XXX: A WOMAN'S RIGHT TO PORNOGRAPHY (1995); Wendy McElroy, *Censoring Pornography Endangers Feminism*, in FREE SPEECH (1994); Wendy McElroy, *Pornography Does Not Incite Violent Sexual Crime*, in PORNOGRAPHY: OPPOSING VIEWPOINTS (1997); CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM? (1994); Karen Selick, *Censorship: More Demeaning Than Pornography*, CANADIAN LAWYER, May 1993, at 46.

97. Radin, *supra* note 1, at 1887.

98. *Id.* at 1888.

99. *Id.* at 1889 (emphasis added).

100. For support of this contention, see Walter Block, *Toward a Libertarian Theory of Inalienability: A Critique of Barnett, Gordon, Smith, Brown, Epstein, Kuflik and Kinsella*, J. LIBERTARIAN STUD. (forthcoming); see also NOZICK, *supra* note 7.

101. Radin, *supra* note 1, at 1890 n.149.

102. *Id.* (citing ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* 21-27 (1982)).

ery of the sort we have been discussing and employment. However, we must distinguish voluntary contracts, as mandated under free enterprise, from coercive dealings, which are of course incompatible with capitalism. This distinction being incorporated into the analysis, the only difference between slavery and working for a wage is duration: the former lasts, assuming no manumission,¹⁰³ for an entire life; the latter, typically, is for a much shorter length of time.

This will appear, at first glance, as a rash statement. But we must distinguish between *voluntary* slavery, where a person sells himself, willingly, perhaps even for a large sum of money with which he purchases something of more value to him than his liberty, and *coercive* slavery, where a person is simply captured, and forced into submission against his will. It is the latter state of affairs which gives the former such a bad name. And yet there is all the world of difference between the two. The distinction is as sharp as that between seduction and rape,¹⁰⁴ gift giving and theft, or boxing versus assault and battery. All of these may appear indistinguishable to a superficial outside observer. Consent, in all of these cases is absolutely crucial. With it, we have voluntary slavery, seduction, gift giving and boxing; without it, there is coercive slavery, rape, theft, and assault and battery. The same distinction holds true for work of a shorter duration. If it is forced labor, as with a military draft, then it is incompatible with the free society; if voluntary, it is not.

The Marxists, of course, do not make this distinction, perhaps the most important one in all of political economy. For them, all employment is compulsory; the draft as well as ordinary employment. Why? Because, purportedly, the worker has no other choice. But this is false: there is always the possibility of self-employment, or even of setting up a small business. Employment is chosen because it is the best of all available options. The Marxists fail to reckon with the fact that all commercial arrangements, particularly including employment, is *mutually* beneficial. Each party to it, employee and employer, improve their situation compared to what it would have been in the absence of such a

103. For an economic analysis of this phenomenon, see JEFFREY HUMMEL, *EMANCIPATING SLAVES, ENSLAVING FREE MEN: A HISTORY OF THE AMERICAN CIVIL WAR* (1996).

104. See Walter E. Williams, *The Legitimate Role of Government in a Free Society*, *THE FRANK M. ENGLE LECTURES, 1978-1997* 640 (Roger C. Bird ed., 1998).

contract. Otherwise, they would not willingly come together in this manner.

Subject/Object Dichotomy

There are only three possible positions on the alienability - inalienability scale. Everything is alienable¹⁰⁵ (the extreme *laissez faire* position), everything is inalienable (the Communist view), or things fall into both categories (the view taken by most commentators). Say what you will about either of the first two options; at least it cannot be denied that they would both be more amenable to the strictures laid down by Occam's Razor. That is, they have the virtue of simplicity. It is only the third alternative which is complex. Here, some criterion needs to be specified so as to distinguish between that which is alienable and that which is inalienable.

Radin posits a plausible distinction: "[O]nly objects separate from the self are suitable for alienation. . . . [W]e must be able to alienate external things and we must not be able to alienate internal things."¹⁰⁶ She calls this challenge the "subject/object problem," citing Hegel:¹⁰⁷

The reason I can alienate my property is that it is mine only in so far as I put my will into it. Hence I may abandon . . . anything that I have or yield it to the will of another . . . provided always that the thing in question is a thing external by nature.¹⁰⁸

According to Radin, for Hegel things that would be inalienable under this rule "included slavery, serfdom, disqualification from holding property, . . . superstition, and ceding to someone else full power to direct one's actions or to prescribe duties of conscience or religious truth."¹⁰⁹

Consider this last one first. If strictly interpreted, and how else should one interpret attempts to probe at the essence of law, this would appear to prohibit all organized religion. For what is a belief in God, and a willingness to act upon this belief, but a "ceding to someone else's full power to direct one's actions or to

105. Everything, that is, for which alienability does not imply a contradiction. That is, you cannot sell a square circle.

106. Radin, *supra* note 1, at 1891-92 (internal citation and footnote omitted).

107. G. HEGEL, 65 *PHILOSOPHY OF RIGHT* (T. KNOX trans. 1952).

108. Radin, *supra* note 1, at 1892 (quoting HEGEL, *supra* note 107, § 65).

109. Radin, *supra* note 1, at 1893 n.159.

prescribe duties of conscience or religious truth." As the someone else to whom one is ceding control is always a human being, (e.g., the Pope, or a Chief Rabbi, or an Imam, or the medicine man), then this bears some semblance to voluntary slavery. As long as the person retains his religious belief, he will follow the guidance of his religious leader in much the same way as the voluntary slave who is upholding his end of the contract. The motivations may not be exactly the same in the two cases, but they are not too dissimilar either.

What of the case where the two of them, the voluntary slave and the religious person, change their minds? Then, the difference emerges. The believer is free to become an atheist, or an agnostic, or to convert to a different creed; the spurned leader can have no legal case against him. In contrast, at least in my view, the voluntary slave who runs away most certainly does give his owner a case in law.

As to Hegel's first point, it is unclear why that which is alienated must be "external." There is nothing more "internal" than one's own liberty. Yet, as we have seen, it is certainly coherent for the law to treat a person who *agrees* (for reasons good and sufficient to himself) to be a slave, exactly as it did the slaves who were coerced into this position, for example, in the U.S. before the civil war.

Radin quotes Kant:¹¹⁰

Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership. But a person cannot be a property and so cannot be thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.¹¹¹

She comments on this as follows: "[T]his contradiction . . . seems to rule out voluntary enslavement"

But the statement would appear to rule out more than voluntary enslavement, far more. It would also rule out *coercive* (e.g., "ordinary") slavery as well, not just morally but as a matter of fact. However, unhappily, it is a historical fact that this sort of

110. IMMANUEL KANT, LECTURES ON ETHICS 165 (J. Macmurray ed. & L. Infield trans., 1930).

111. Radin, *supra* note 1, at 1893 n.161.

slavery has existed.¹¹² This being the case, while slavery is indeed logically incompatible with *morality*, it certainly cannot be a *self* contradiction, as both Kant and Radin would have it. Further, we have only the undoubted authority of Kant for the claim that "it is impossible to be a person and a thing, the proprietor and the property." From whence does this impossibility spring? It seems logically coherent to suppose that I sell myself to you; e.g., agree to renounce what would otherwise be my right to object if you whipped or killed me, as was the practice of ordinary slavery.

Radin offers a good critique of the Hegelian internal/external distinction.¹¹³ Labor, she maintains, is also "internal." If Hegel were correct, then, not only would slavery of any kind be ruled out of court, so would paid labor. However, this boomerangs against another point of hers: it now becomes difficult to distinguish between wage labor and coercive slavery, for, by her own admission, both are "internal."

Radin takes the position that "personality is inalienable."¹¹⁴ This sounds good, but it is not really true. Surely a pill, or a frontal lobotomy, would radically change personality. For that matter, death would spell the end of personality as well. If my child's operation, costing \$1 million, was worth more to me than my own personality, and someone deemed the eradication of my personality as of greater value to him than this amount, certainly the laws of logic could play no role in enjoining this commercial arrangement.

But Radin is not yet finished arguing this point: "To alienate personhood is itself contrary to personhood, in that if I can relinquish my personhood, then no 'I' remains to have done the relinquishing."¹¹⁵ (It is unclear from the context whether this is Radin speaking, or Hegel, or her interpretation of the latter.) In any case, there are difficulties here. Again, consider the frontal lobotomy. Surely, it will cancel my personhood. Indubitably, no "I" will remain *after* this operation. But *beforehand*, there most certainly *is* an "I" which can agree to the elimination of my mental capacities in the future. That they then vanish, after-

112. There are even claims to the effect that modern day slavery exists in countries such as Sudan, Senegal, and Mauritania. See Paul Marshall, *Modern Slavery*, 6 HETERODOXY 1, 8-9 (Mar. 1998).

113. See Radin, *supra* note 1, at 1894.

114. *Id.* at 1895.

115. *Id.* at 1896.

wards, is of no moment, at least as far as violating the laws of logic are concerned.

What is so great about personhood in any case, such that it forms the bedrock of political economy? How about, as alternatives, libertyhood, freedomhood or propertyhood? Radin elevates personhood to the position of *sumum bonum* with no justification. Another commentator could have just as easily posited any of these other "hoods" as the ultimate measuring rod of public policy, certainly with equal or greater justification.

Negative Liberty

Radin begins this section on a high note:

Two theories about freedom are central to the ideological framework in which we view inalienability: the notion that freedom means negative liberty,¹¹⁶ and the notion that (negative) liberty is identical with, or necessarily connected to, free alienability of everything in markets. The conception of freedom as negative liberty gives rise to the view that all inalienabilities are paternalistic limitations on freedom.¹¹⁷

No truer words were ever said. It is because of pronouncements of this sort, which cut to the heart of the libertarian philosophy, that I am hopeful that real disagreement with Radin — as opposed to speaking at cross purposes — can be achieved.

Whereupon Radin takes the opposite tack:

Paternalism is particularly anathema to libertarians who are also moral subjectivists. They hold that a person's subjective preferences define her [sic] interests and, therefore, that it is nonsensical to claim that anyone else knows better than she [sic] does what is good for her [sic]. For these libertarians, among whose number are many practitioners of law and economics, the notion of false consciousness is simply incoherent.¹¹⁸

There are several difficulties with this passage, which once again call into question Radin's understanding of libertarianism. First, libertarians qua libertarians are not only not moral subjectivists, they are not moralists at all. Libertarianism is a theory of

116. Radin cites Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (1969), in this regard. See Radin, *supra* note 1, at 1898 n.186. For a refutation of his vision of negative liberty, see ROTHBARD, *supra* note 5, at 215-18.

117. *Id.* at 1898.

118. Radin, *supra* note 1, at 1899 n.189.

political philosophy, not ethics; its goal is to specify justice in *law*, not a proper morality.¹¹⁹ Second, virtually none of the practitioners of “Law and Economics” are libertarians, despite, in some cases, self styled claims in this direction. The overwhelming majority of them can be placed in the Chicago School wealth maximization utilitarian tradition. Third, “false consciousness” is not “simply incoherent” for libertarians. In means, in this perspective, precisely what it means in ordinary language. It exists, all right: people do not always come to their senses with regard to jobs, relationships, political philosophies, etc., from an outside perspective, or even from their own, at a later date; they act against their own long run best interests, which even they often concede — after the fact. There is such a thing as regret, after all. The only claim libertarians would make in this regard which would not resonate with writers such as Radin is that no adult may properly initiate violence against another on the grounds that the latter is suffering from “false consciousness.”¹²⁰ The proper way to deal with this problem is through dialogue, or voluntary psychotherapy, not the force of (paternalistic) law.

Evolutionary Pluralism

In this section, finally, Radin leaves off criticizing the theories of others, and presents her own perspective. Based on the foregoing, I was anxious to read this material, and to do unto her as she has attempted to do to so many others.

In the event, I was disappointed. This is not due to the fact that I do not agree with her views (nor, even, because I do). Rather, it stems from my inability, even upon numerous readings and rereadings, to *understand* her positive contribution to this literature. The margin notes of my copy of her paper at this point are replete with words such as “incoherent,” “obscurantist” and “meaningless.”

What are we to make of the following, for example?:

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 in-

119. See *supra* note 8.

120. See Gary Anderson & Walter Block, *Procrastination and Obedience: A Reply to Akerlof*, 54 AM. J. ECON. & SOC. 201-15 (1995).

tegrity 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.¹²¹

This is but the tip of the iceberg. Another "Radism" reads as follows:

The evolutionary pluralism that I recommend might also be called pragmatic pluralism, because it endorses a nonideal, immanent, and relatively particularist analysis. As with any pragmatic understanding, I cannot prove by any abstract principle that we implicitly accept certain views of personhood; I can only appeal to our most considered judgment and deepest sensitivity. By "our" deepest sensitivity I mean the sensitivity of all those who are engaged in this conversation, who find this conversation perspicuous, who think it is about the right things — even if my views of them seem maddeningly wrong-headed.¹²²

As far as I am concerned, "maddeningly wrong-headed" would be a big step up. "Indecipherable" is more to the point. And this is more than passing curious, given that the critical parts of her paper are at least completely understandable. Further, I tend to reach for my wallet, or count my fingers, whenever anyone mentions "deepest sensitivity" as a necessary requirement for understanding a thesis. Perhaps I am just not all that sensitive.

One last example will have to suffice:

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 persons 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

121. Radin, *supra* note 1, at 1904.

122. *Id.* at 1904 n.208.

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.¹²³

What in bloody blue blazes does all this mean? Needless to say, there are no examples given to illustrate these points. How has this verbiage escaped the critical review of the editors and referees of the Harvard Law Review?

Protecting Personhood: Noncommodification of Personal Rights

In this section, happily, Radin returns to the realm of the literarily meaningful. Once again she offers opinions which are in principle capable of refutation. We take up where we have left off.

She charges that "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."¹²⁴ They are in this way victimized by "two kinds of alienation" and "disorientation of the self."

This sounds like an exercise in psychobabble. Indubitably, there are workers dissatisfied with their jobs, even those who experience anomie.¹²⁵ But this hardly stems from the fact that they commodify their labor and sell (rather, rent) it, for all employees do that, and a small minority at most are sick to their stomachs of their employment slots. There is an entire discipline of labor management relations dedicated to the task of improving worker morale. Their nostrums range from painting the walls in relaxing colors to piping in music to offering cut rate meals to organizing bowling leagues. This hardly sounds like "dissociation," or "disorientation" or alienation. And what of the proletarians forced to labor in Communist countries? Since they do not "internalize market rhetoric (nor) conceive of their own labor as a commodity separate from themselves as persons" they are presumably free of these ailments. Why, then, were they trying to *escape* the worker's paradises of the U.S.S.R., Germany, Poland, etc.? And for what? To become alienated and disoriented in the West?

123. *Id.* at 1905.

124. *Id.* at 1907.

125. That is why they invented vacations. Typically, for those for whom a holiday will not suffice, alternative and satisfactory employment is sought.

Having attacked labor under capitalism, Radin next moves on to an indictment of gift giving:

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. . . . 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. . . . Commodification stresses separateness both between ourselves and our things and between ourselves and other people.¹²⁶

This is as misbegotten a critique as can be imagined. Reflect, again, on the precise meaning of “universal commodification.” It implies that all men shall be free to subject *anything* they own (up to, and including themselves) to voluntary commercial interaction, e.g., purchases, sales, rentals, gifts, whatever. Obversely, it means that no one shall be penalized by law for engaging in such acts. Under complete laissez faire capitalism, the Radins of the world are perfectly free to eschew all “capitalist acts between consenting adults”¹²⁷ other than gift giving. They can limit their economic behavior to joining communes, sharing, gift giving, whatever they wish. But the fact that the rest of us face no fines or jail sentences for buying, selling, renting, etc., should not impinge in the slightest on the ability of people who believe in “personhood” to “freely give of themselves to others.” The beauty of free enterprise is that it leaves room for people of *all* persuasions - socialists as well as capitalists - to do their own thing, provided only that they do not use force to compel anyone else to follow their lead. The same, unfortunately, cannot be said for any other system.

And what, pray tell, is so wrong with “bestowing a commodity?” True, in the minds of many, when they give a gift they are not completely indifferent to the possibility that it may one day be reciprocated. This is more to be explained on the basis of sociobiology¹²⁸ than the free market system. In any case, univer-

126. *Id.*

127. NOZICK, *supra* note 7, at 163.

128. See MATT RIDLEY, *THE RED QUEEN* (1993); MATT RIDLEY, *THE ORIGINS OF VIRTUE* (1996); DAVID M. BUSS, *THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING* (1994); *THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE* (Jerome H. Barkow et al. eds., 1992); RICHARD DAWKINS, *RIVER OUT OF EDEN* (1995); J. PHILIPPE RUSHTON, *RACE, EVOLUTION*

sal commodification still leaves free rein for Radin and her conferees to give of themselves whole heartedly to each other without any thought whatsoever of reciprocation.

It is even problematical for Radin to refer to "our things." For the possessive pronoun implies ownership. And ownership is a commodification. In a world fully earmarked by "personhood," there would, presumably, be no such relationship of alienability between humans and objects. If I grabbed her wallet, she could not logically complain I had stolen it.

But Radin has more arrows in her quiver on this issue: "[G]ifts diminish separateness."¹²⁹ And, presumably, trades, purchases, do not. "This is why . . . people say that sex bought and paid for is not the same 'thing' as sex freely shared." In most cases, of course, it is not. But the human animal is a highly complex one. Are there no cases in all of recorded history where a man paid a woman for sex and then fell in love with her, or did so while being in love with her? Surely, there are prostitutes who have married their customers,¹³⁰ which suggests that Radin's contention cannot be sustained.

Methods of Justifying Market-Inalienabilities

In this section, Radin is no longer content merely to criticize alienability. Now, she is ready to "formulate an affirmative case for market inalienability."¹³¹ She does so as follows:¹³²

This prophylactic argument is one way for a liberal to justify, for example, the ban on selling oneself into slavery. We normally view such commodification as so destructive of personhood that we would readily assume all instances of it to be coerced. We would not wish, therefore, to have a rule creating a rebuttable presumption that such transactions are uncoerced (as with ordinary contracts), nor even a rule that would scrutinize such transactions case-by-case for voluntariness, because the risk of harm to personhood in the coerced transactions we might mistakenly see as voluntary is so great that we would

AND BEHAVIOR: A LIFE HISTORY PERSPECTIVE (1997); E.O. WILSON, SOCIOBIOLOGY (1975).

129. Radin, *supra* note 1, at 1908.

130. AYN RAND, *THE FOUNTAINHEAD* (1946), portrays a fictional account of a case where a man (Wynand) paid for the sexual services of a woman (Dominique) with whom he is in love.

131. Radin, *supra* note 1, at 1909.

132. *Id.* at 1910.

rather risk constraining the exercise of choice by those (if any) who really wish to enslave themselves.¹³³

Isn't this a fine kettle of fish? Radin admits that at least some slave sales may be totally voluntary. However, she reaches deep and finds a reason to prohibit them anyway: prophylacticism must be served. Perhaps there will be errors; the only way to deal with such a possibility is to eliminate this right, entirely. But this proves far too much. To see this, let us try the same logic on with other contracts and decisions. Marriage, the decision to have a child, smoking, moving to another country, changing jobs, taking up a new career, are also at least potentially destructive of personhood; according to this logic, we ought to declare all such choices "coerced," even when, blatantly, they are not. Yes, yes, the decision to sell oneself into slavery is a momentous one; this cannot be denied. Surely, it is unreasonable to treat this as we would a \$5 contract to buy a movie ticket. But if there are important down sides, there are also vital gains to be made by so doing. In the example we have been considering, one's child's life is in imminent danger. *This* is the reason for contemplating voluntary slavery in the first place — to obtain the funds necessary to save him. To declare such an agreement void because it is "coerced," even when we know this *not* to be the case, is to prohibit parents from saving their children's lives. Now *that* is something which is *really* "destructive to personhood." It is unclear how Radin, devoted to "human flourishing," can countenance such a state of affairs.

Even Radin admits that her own position "is deeply troubling."¹³⁴ And she puts the case against herself very competently: "If we think respect for persons warrants prohibiting a mother from selling something personal to obtain food for her starving children, we do not respect her personhood more by forcing her to let them starve instead."¹³⁵

But, our author's answer,¹³⁶ "welfare rights"¹³⁷ is very much of an evasion. To be sure, if the woman with starving children

133. See Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 Soc. PHIL. & POL'Y 193 (1986).

134. Radin, *supra* note 1, at 1910.

135. *Id.* at 1910-11.

136. See *id.* at 1911.

137. The implicit premise here is that an enlarged and expanded and more "generous" welfare system is in the best interests of the poor. For a critique of this contention from the "right," see CHARLES MURRAY, *LOSING GROUND: AMERICAN*

can avail herself of sufficient welfare payments, she will no longer have any starving children in whose interest she wishes to sell herself into slavery. But to content oneself with this observation is to eschew the point as issue. Suppose there *is* no outside payment available to the woman. Or, suppose that she needs \$1 million for an operation for her child, and that welfare payments do not rise to this level. She wants to save her children. The *only* way to do so is to sell herself into slavery. Will the law, or will it not, preclude her from such a choice? No clear answer, unfortunately, is forthcoming from our author. Radin goes so far as to opine that "this aspect of liberal prophylactic pluralism is hypocritical without a large scale redistribution of wealth and power" ¹³⁸ This is, of course, correct: liberalism has justly become an all but synonym for hypocrisy. ¹³⁹ But still, this does not an-

SOCIAL POLICY FROM 1950 TO 1980 (1984). For one from the "left," see FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (1971).

138. Radin, *supra* note 1, at 1911.

139. Two of my favorite examples of this phenomenon: First, a white female prostitute refuses to have sex with a black male would be customer. Liberal defenders of women's rights would allow for such racial discrimination on the part of this particular vendor, but no others; equally liberal defenders of "racial justice" would not, although they would gladly countenance racial discrimination perpetrated by blacks. For more on discrimination, see GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957); Walter Block, *Economic Intervention, Discrimination, and Unforeseen Consequences*, in *DISCRIMINATION, AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY* (Walter Block & Michael Walker eds., 1982); Walter Block & Walter Williams, *Male-Female Earnings Differentials: A Critical Reappraisal*, 2 J. LAB. RES. 383-88 (1981); WALTER BLOCK & MICHAEL WALKER, *ON EMPLOYMENT EQUITY: A CRITIQUE OF THE ABELLA ROYAL COMMISSION REPORT ON EQUALITY IN EMPLOYMENT* (1985); Harold Demsetz, *Minorities in the Market Place*, 43 N.C. L. REV. 271-97 (1965); RICHARD EPSTEIN, *FORBIDDEN GROUNDS* (1992); Carl Hoffman & John Reed, *When is Imbalance not Discrimination?*, in *DISCRIMINATION, AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY* (Walter Block & Michael Walker eds., 1982); WILLIAM H. HUTT, *THE ECONOMICS OF THE COLOUR BAR* (1964); ELLEN FRANKEL PAUL, *EQUITY AND GENDER: THE COMPARABLE WORTH DEBATE* (1989); THOMAS SOWELL, *ETHNIC AMERICA* (1981); Thomas Sowell, *Weber and Bakke and the Presuppositions of 'Affirmative Action'*, in *DISCRIMINATION, AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY*, *supra*; THOMAS SOWELL, *THE ECONOMICS AND POLITICS OF RACE: AN INTERNATIONAL PERSPECTIVE* (1983); THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY* (1984); THOMAS SOWELL, *RACE AND ECONOMICS* (1975); WALTER E. WILLIAMS, *THE STATE AGAINST BLACKS* (1982); Walter E. Williams, *On Discrimination, Prejudice, Racial Income Differentials, and Affirmative Action*, in *DISCRIMINATION, AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY*, *supra*; Michael Levin, *Comparable Worth: The Feminist Road to Socialism*, in *COMMENTARY*, Sept. 1984; MICHAEL LEVIN, *FEMINISM AND FREEDOM* (1987); CHRISTINA HOFF SOMMERS, *WHO STOLE FEMINISM?* (1994); Jan Narveson, *Have We a Right to Non-Discrimination?*, in *BUSINESS ETHICS IN CANADA* 183-98 (Deborah Poff & Wilfrid Waluchow eds., 1987); Walter Block, *Discrimination: An Interdiscipli-*

swer the challenge of whether the law should allow the poor woman to sell herself into slavery in order to preserve the lives of her children.

So much for Radin's first reason for market inalienability, the prophylactic argument. The second justification is prohibition: markets are bad per se. Radin does equivocate on precisely how awful they are. Are they to be avoided for *everything*, "nuts and bolts"¹⁴⁰ included, or should commerce be precluded only for things such as health care, love, friendship, and sexuality? Here is the case for the radical perspective: "[C]ommodified nuts and bolts are produced by commodified labor, and . . . prohibiting commodified labor morally matters as much as prohibiting commodified love, friendship and sexuality. . . . [C]ommodification of their labor forces workers to experience only the commodified versions of love, friendship, and sexuality."¹⁴¹ It doesn't seem to have occurred to Radin that we have already had quite a bit of experience with countries that decommodified virtually all things, even nuts and bolts, and that it was a total and unmitigated disaster. The real world society most closely approximating this radical vision was the "pure communism" of the Soviet Union circa 1920-1923. This was too much for even Lenin, who pulled back from the precipice.¹⁴² But Lenin was no Radin.

As for health care, our author is of the view that market provision of this service "undermines a commitment to the sanc-

nary Analysis, 11 J. BUS. ETHICS 241-54 (1992); Walter Block, Compromising the Uncompromisable: Discrimination, 57 AM. J. ECON. & SOC. 223-37 (1998).

Second, it is a woman's right to choose whether or not to have an abortion; all liberals would certainly agree. But suppose her purpose is to kill only unwanted female embryos. Then, the "rights" of abortion run counter to the "rights" of females not to suffer from sexism. For a libertarian analysis of abortion, see Walter Block, *Abortion: A Libertarian Analysis* (forthcoming); Walter Block, *Abortion, Woman and Fetus: Rights in Conflict?*, REASON, Apr. 1978, at 18-25.

140. Radin, *supra* note 1, at 1912.

141. *Id.* at 1912 n.231.

142. See LUDWIG VON MISES, *SOCIALISM* (Liberty Fund 1981) (1969); Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth*, in COLLECTIVIST ECONOMIC PLANNING (F.A. Hayek ed., Kelley 1975) (1933); PETER BOETTKE, *THE POLITICAL ECONOMY OF SOCIALISM: THE FORMATIVE YEARS, 1918-1928* (1990); Peter Boettke, *The Soviet Experiment with Pure Communism*, 2 CRITICAL REV. 149-82 (1988); Morgan Reynolds, *The Impossibility of Socialist Economy*, 1 Q.J. AUS. ECON. 29-43 (1998); Joseph Salerno, *Postscript: Why A Socialist Economy is 'Impossible'*, in ECONOMIC CALCULATION IN THE SOCIALIST COMMONWEALTH 51-71 (1990); DAVID RAMSAY STEELE, *FROM MARX TO MISES: POST CAPITALIST SOCIETY AND THE CHALLENGE OF ECONOMIC CALCULATION* (1992).

tity of life.”¹⁴³ Presumably only public sector provision, or socialized medicine, will suffice for “human flourishing.” But government health care faces the insuperable problem of moral hazard: when a highly valued item is provided at a zero price,¹⁴⁴ people tend not to economize upon it. That is, they treat it not as if it comes with a very high price tag, but rather as a free good; they use it if its value to them is not much greater than zero; they pay only the cost of traveling to a doctor and waiting for his service. It is for this reason that such schemes have been plagued with shortages, long waiting lists, etc.¹⁴⁵

Radin points to a third defense of market inalienability: the domino or slippery slope theory.¹⁴⁶ Here, commodification is like a virus. If markets are legal for some of a good, and gift giving comprises the remainder of it, the former system will seep out into the latter, and “contaminate” it. She cites Titmuss’s¹⁴⁷ argument that if blood is supplied partly through market incentives and partly through charitable donations, then capitalism will “infiltrate” into the entire distribution system of this precious bodily fluid.¹⁴⁸

However, quite sensibly, Radin denies that the two “cannot coexist,” side by side, and opposes the claim that “once something is commodified for some it is willy nilly commodified for

143. Radin, *supra* note 1, at 1912.

144. People pay for this service through taxes, not on a by use basis. Therefore, the choice to obtain health care is costless to them.

145. Imagine if we organized the provision of any other valuable good or service in this manner; that is, provided it for virtually for free. Suppose we did so for oranges. Right now, this fruit is used economically. At several dollars per dozen, people buy them mainly for eating, cooking and drinking purposes. But at a nominal or zero price, all sort of other esoteric uses would be found for them: dropping them from high places, and watching them splatter. Women might take baths in orange juice; who knows, perhaps it will be found to be good for the skin. Young boys could be counted upon to give up water gun fights and embark on battles featuring the shooting of orange juice at each other. Then, of course, shortages would ensue, given these wasteful uses. We would be nagged at by the newly created governmental regulatory bureau, the OJA (Orange Juice Authority) to cease and desist from acting in a way that their own policies encouraged. Queues for this tropical fruit would develop, with month’s long waiting lists to obtain it. Politicians, bureaucrats and their cronies would get first dibs. The OJA would try to “save” socialized oranges by demanding more and more of our tax dollars. This will sound familiar to all those still suffering under the yoke of socialized medicine.

146. *Id.*

147. See RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971).

148. *Id.* at 1913.

everyone"¹⁴⁹ Radin rejects Titmussian domino theory for blood since "the argument is too general to single out blood or any small group of particular things."¹⁵⁰ There should be no fear that just because even donated blood now has a market value, people will be drawn, inexorably, into thinking they are just giving monetary equivalents, and not helping each other; even though homes have market value, according to Radin, people still "value [them] in a nonmonetary way."¹⁵¹ To buy into the slippery slope argument to this degree would be to concede too much to commodificationism: "that thinking in money terms 'comes naturally' to us."

But we are forever buying each other birthday and holiday gifts, without being deterred by the fact that the things we give have alternative or opportunity costs in money terms. Further, thinking in terms of monetary values *does* "come natural" to us. Even without adult encouragement, children as early as three or four years old play "store" with each other, buying and selling toys and dolls and other such possessions to each other.¹⁵² Youngsters of this age typically set up lemonade stands for neighborhood passersby. Smith remarked on this as the natural predilection to "barter and truck."¹⁵³

While Radin sees flaws in the domino theory, she certainly agrees with Titmuss¹⁵⁴ that markets in blood should be banned, and distribution carried out solely under charitable auspices. In this way we will avoid the ravages of commodification.

Unfortunately, many of us will not escape with our lives if such a course of action is taken. The Red Cross, a charitable, not a for profit organization, was so politically correct that it accepted donations of blood made by those infected with AIDS. By perpetrating fraud on those who foolishly relied upon it, this

149. Radin, *supra* note 1, at 1914.

150. *Id.* at 1914 n.235.

151. *Id.* at 1914.

152. My wife was amazed at my mother, who joined her grandchildren's games of this sort (aged two and four), and added a new twist to the proceedings: bargaining.

153. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Modern Library 1965) (1776).

154. For more on the case against TITMUSS, *supra* note 148, see Michael H. Cooper & Anthony J. Culyer, *The Price of Blood: An Economic Study of the Charitable and Commercial Principle*, HOBART PAPER NO. 41, (Inst. for Economic Affairs, 1968).

agency caused numerous deaths. This is the diametric opposite of "human flourishing" and should be considered murder.

Of course, this is but one example, and there is a principled point to be made. All human beings err. There is no escape from this situation. However, reliance on the entrepreneur has an important advantage over his charitable, bureaucratic and political counterparts: only he can suffer from loss of profits, only he can be bankrupted. Thus, there is a continual profit and loss weeding out process of the inefficient — but this is all but confined to the business sector.¹⁵⁵ This is the main reason it is far more effective than any other form of economic organization known to man. Imagine the howls of outrage from the Radins of the world had a *private* blood bank caused the unnecessary death of thousands of innocent people in a quest for profit.

The Problem of Nonideal Evaluation

The problem of the "double blind" which Radin finds most vexing is the following.¹⁵⁶ If she advocates immediate non commodification of everything, as she in her heart of hearts wants to do, she will enhance human flourishing; however, at least under present circumstances where there is no reasonable chance of a radical redistribution of money from rich to poor, this benefit will come at the cost to poor women who, for example, will no longer be able to sell their sexual services, and who will therefore lose out, and be placed in even more dire circumstances. And further, to allow even partial commodification of sex at present

155. There is a hierarchy in terms of the control that the average consumer has over the provider of goods and services. In the realm of business, it is very strong. The consumer's dollar vote keeps the entrepreneur in the role of supplicant, in effect prostrating himself at their feet, in an attempt to anticipate their every desire, and satisfy them. Failure to do so leads to loss of market share and eventual bankruptcy. Next comes the voluntary charitable sector. If the donor does not like the decisions made by the executives of the relief agency, he is free to divert his money elsewhere. But the president of the charity is not a residual income claimant; his reward to success does not translate into possibly vast profits. Thus, the leash around his neck is a longer one than which influences the business executive. In the political arena, command is even more attenuated. The voter gets to pronounce judgement only once every four years. He is forced into a package deal, where he must vote for one of only a very few "firms." Entry into the field is highly restricted. Barring referenda, he has no way to pronounce judgement on any individual issue. In the bureaucracy, responsibility is very weak indeed. A civil servant can be fired for a very narrow band of actions. In contrast, you can "fire" your grocer, and "hire" another on a whim.

156. See Radin, *supra* note 1, at 1915-17.

will put off even further that great and glorious day when we can all achieve our "personhood."¹⁵⁷ Radin fails to offer a principled, or even coherent, way to address this "problem," contenting herself with a "solution" on a case by case basis.¹⁵⁸ This of course is no answer at all.¹⁵⁹

This dilemma, I confess, is not a compelling one to me. As I have been at great pains to present, commodification is not the real enemy of the poor, or women, or anyone else for that matter. On the contrary, it is the last best hope for precisely the most downtrodden groups in society. Far better to be a "poor" person in a relatively heavily commodified U.S., Hong Kong, South Korea, and have to suffer with only one color television set, a ten-year-old non-luxury car, and air conditioning below Cadillac standards, etc., than to be a member of the middle class of a country with far less commodification, such as North Korea or Cuba.

Of far greater interest in this section are Radin's remarks on the issue of "pay[ing] compensation . . . to those who lost money when slaves were emancipated . . ."¹⁶⁰ She opposes this on the ground "that this would deny that the thing has been decommodified, treating it as fungible even while declaring that it is not."

It is impossible to be sure from the context whether our authoress is discussing voluntary or coercive slavery. As the liber-

157. To allow poor women to sell sexual or baby making services enriches them, now, but "harms personhood" by raising false consciousness and thereby putting off the revolution to a better day. To forbid them from doing so immiserates them, now.

This double bind has an equivalent under libertarianism. For example, getting rid of rent control promotes freedom, but puts off the day when the whole economy will come crashing down, and full and total libertarianism will have a better chance of being enacted. But there is no similar ambivalence in this case. This is because libertarianism is a more principled philosophy than the one espoused by Radin. Here, *nothing* can be advocated which is incompatible with the axiom of non aggression against non aggressors, *even if* it somehow promotes the cause.

158. *See id.* at 1917.

159. Radin's "solution" to this dilemma is to have no principle at all, to decide each case on its own merits. *See id.* But with no underlying principle (she has explicitly rejected what is for her the two and only possible principles, personhood and helping the poor) we are at sea without a rudder or compass. My resolution of her problem: reject one of the horns of the dilemma, e.g., "personhood" which is incompatible with markets and commodification. Allow (poor) women to sell whatever services they want, since it is in this direction that true "personhood" lies. To deny women this is not to promote their "human flourishing," but to engage in paternalism against them. It is to use them as pawns in Radin's ideological struggle.

160. *Id.* at 1915 n.238.

tarian analysis is very different, indeed, diametrically opposed, for these two cases, let us consider each in turn.

If the slavery is of the coercive variety, as existed in the pre civil war U.S., then there is no question of paying compensation to those who lost money from the emancipation, that is, the slave owner. Very much to the contrary, it is the latter who should be forced to compensate the former. For, stripping away the superficialities, the master in effect kidnaped the slave and benefitted from his forced labor. If anyone owes anyone anything, in justice, it is the master who should be made to pay the (now ex) slave. According to the "two teeth for a tooth" libertarian punishment theory,¹⁶¹ and, also, poetic justice, we can go even further; for the crime of slaveholding, the punishment should be to be enslaved to the ex-thrall. That is, the master would now become the property of his former slave. And, certainly, his plantation would be taken from the master and given to the ex-slave.¹⁶²

In this case, moreover, emancipation does not mean de-commodification, but only the return of stolen property (every bit as much as commodified as before) to its rightful owner. That is to say, in the free society, the ex (coercive) slave would be as free as any other member of society to return to slavery if he wished, only this time on a completely voluntary basis. He, along with all others, would still be commodified; that is, *able* to be sold back into slavery, if that is his wish.

Things are very different, however, in the case of the voluntary slave owner, and the slave who initially consented to take on this role. Consider, again, the poor man who sold himself into slavery for \$1 million so that he could afford a medical operation

161. See Stephan Kinsella, *Estoppel: A New Justification for Individual Rights*, in REASON PAPERS NO. 17 61 (1992); Stephan Kinsella, *Punishment and Proportionality: The Estoppel Approach*, 12 J. LIBERTARIAN STUD. 51-73 (1996); Stephan Kinsella, *New Rationalist Directions in Libertarian Rights Theory*, 12 J. LIBERTARIAN STUD. 313-26 (1996); Stephan Kinsella, *A Libertarian Theory of Punishment and Rights*, 30 LOY. L.A. L. REV. 607-45 (1997); N. Stephan Kinsella, *Reply to George Smith: A Victim's Right to Punish*, 14 J. LIBERTARIAN STUD. 79-93 (1999); ASSESSING THE CRIMINAL (Randy Barnett & John Hagel eds., 1977); ROTHBARD, *supra* note 5; Randy Barnett, *Getting Even: Restitution, Preventive Detention and the Tort/Crime Distinction*, 76 B.U. L. REV. 157-68 (1996); Roger Pilon, *Criminal Remedies: Restitution, Retribution, or Both?*, 88:4 ETHICS 348-57 (1978).

162. For a libertarian analysis of how justice might be attained via land reform of southern plantations in the modern era — taking them away from the grandchildren of the slave owners, and turning them over to the to the grandchildren of the slaves, see Walter Block & Guillermo Yeatts, *Land Reform*, University of Kentucky Journal of Natural Resources and Environmental Law (forthcoming).

to save his child's life. Now, Judge Radin comes along and "decommodifies" the situation, freeing the poor man from his bondage. In effect, the \$1 million has thereby been stolen from the rich man. Radin would not care much; she would even, most likely, exult in this theft. But the libertarian analysis lies 180 degrees in the opposite direction. Decommodification is here merely a long fancy word for stealing the rightfully owned property of the slave master.

Radin¹⁶³ also favors the prohibition of child labor.¹⁶⁴ Consider children in such countries as Bangladesh, Zambia, or Peru, who are in real danger of starving to death if they cannot find paid employment. Their plight is not at all alleviated by doing calls for a ban on importing products from abroad which are made with child labor. Radin, as well as students enrolled at elite universities, labor unions, clergymen, journalists, and others ignorant of even the most basic of economic knowledge, have demanded the prohibition of child labor. But the result of such campaigns, if implemented, will not be to *help* these unfortunate children. To the extent they succeed, the demand for child labor will be reduced, they will have a greater difficulty in attaining employment, and will be *more* likely to die. If I were a child in one of these poverty stricken countries, I would rather work and live than be consigned to unemployment by well-meaning¹⁶⁵ ignoramuses and die. The losers from the prohibition of child labor in such cases are mainly the child laborers themselves.¹⁶⁶

Incomplete Commodification

Business regulations amount to partial decommodification, or incomplete alienation. States Radin:

With respect to the social aspect of incomplete commodification, consider the regulation of labor. Although work has not

163. See Radin, *supra* note 1, at 1915 n.238.

164. For a libertarian perspective on children and their rights, see ROTHBARD, *supra* note 5, at 97-112, and BLOCK, DEFENDING THE UNDEFENDABLE, *supra* note 8, at 247-56.

165. This does not apply to unions that employ economists. For them is reserved an even lower rung in the nether world.

166. Suppose that child labor were effectively prohibited before or during the Industrial Revolution, when children as young as five years old commonly worked. Does anyone seriously believe that such an enactment would have helped these children? But in many ways the economies of the third world at the turn of the 21st century resemble those of many countries two or three hundred years ago.

been fully decommodified,¹⁶⁷ it is incompletely commodified through collective bargaining, minimum wage requirements, maximum hour limitations, health and safety requirements, unemployment insurance, retirement benefits, prohibition of child labor, and antidiscrimination requirements.¹⁶⁸

Radin speaks as if each of these provisions were beneficial to "personhood." In point of fact, however, they have caused untold harm not mainly for business firms, their ostensible targets, but rather for their presumably intended beneficiaries. For example, collective bargaining exacerbates labor management relations and retards economic growth and development.¹⁶⁹ Minimum wage rates magnify unemployment for those who can least afford it: teenagers, the handicapped, blacks, the uneducated.¹⁷⁰ Maximum hours limitations are a paternalistic attack on the hard working. Happily, the workaholic practices of the burgeoning computer programming industry are making these into dead letter laws.¹⁷¹ Health and safety requirements prohibit people from taking more risks that bureaucrats think wise, and from thereby earning the attendant greater salaries; those who accept these jobs obviously judge that the additional money more than compensates them for these dangers, but the paternalistic law denies them the ability to make this choice. Forced retirement benefits, too, make workers worse off, at least in their own estimations.¹⁷² Had they determined that additional savings were in their interests, they would have done so on their own

167. The complete decommodification of labor would be something never achieved even in the U.S.S.R., and only aimed at in the utopian period right before the New Economic Plan (a move away from complete utopian socialism toward economic rationality) of the early 1920s. It would consist of not allowing the trade or purchase or wage payments for labor services; instead, labor could only be given away as a gift. See *supra* note 142.

168. Radin, *supra* note 1, at 1919.

169. A case in point are U.S. - Canadian comparatives. The latter country suffers from a unionization rate far higher than that of the former. As a result, Canadian GDP levels and growth rates have fallen far behind their U.S. counterparts. See *U.S. and Canadian Income Maintenance Programs*, 11 J. LAB. ECON. (1993); HERBERT G. GRUBEL & JOSEF BONNICI, WHY IS CANADA'S UNEMPLOYMENT RATE SO HIGH? (1986).

170. See HENRY HAZLITT, ECONOMICS IN ONE LESSON (1979); Gary Becker, *It's Simple: Hike the Minimum Wage, and You Put People Out of Work*, BUS. WK., Mar. 6, 1995.

171. See *High-tech industry in B.C. spared overtime law*, VANCOUVER SUN, Feb. 2, 1999, at A1.

172. See PETER J. FERRARA, SOCIAL SECURITY: AVERTING THE CRISIS (1982); SOCIAL SECURITY: PROSPECTS FOR REAL REFORM (Peter J. Ferrara ed., 1985).

account. But, this law forces them to save money they value for consumption, now, more than they evaluate the benefits to them, later, of the returns, on the assumption that the money will not lose its value due to governmental created inflation of the currency in the meantime. Prohibitions of child labor, as we have seen, consign innocent children in poverty stricken third world countries to needless deaths. Antidiscrimination requirements are an attack on freedom of association. They are in effect a modern day version of (forced, not voluntary) slavery: forcing victims to associate with people they would rather have nothing to do with.¹⁷³

Radin continues:

Regulation of work can be seen as attempting to make more possible the realization of personal ideals about work, which are related to human flourishing; a self-conception inseparable from one's work (contextuality), continuity of work (identity), and control over one's own work (freedom). Regulation can be seen as attempting to ensure that employees are not forced to leave their jobs for ideological, discriminatory, or arbitrary reasons; to ensure that the workplace is safe, and free from sexual or racial harassment; and to ensure that employees have some say in workplace decisions, and the opportunity to understand how their work is helpful or significant to other people.¹⁷⁴

If employers are so evil, if their natural inclinations lead them to exploit the workers in these and so many other ways, if the solution to the problem is to constrain those who employ laborers, why not cut them out of the picture entirely? That is, why not promote workers' cooperatives, instead of the wage system?

The answer is simple. Under free enterprise, collective ownership of, by, and for the workers is not prohibited. Nor is it even placed at a disadvantage by law. People are perfectly free to pool their resources, set up their own companies or co-ops, and conduct business for themselves, thus cutting out the employer-commodifier "middleman." Why do they not engage in

173. This is precisely the definition of (coercive) slavery as well as kidnaping. For a critique of anti discrimination legislation, see Charles Murray, *LIBERTARIANISM*; RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992); Walter Block, *The Economics of Discrimination*, 11 J. BUS. ETHICS 241-54 (1992).

174. Radin, *supra* note 1, at 1920.

these activities, which would appear to be to their advantage, if Radin is correct? They do not avoid their “exploiters” for two main reasons. First, the entrepreneur is the risk bearer. He, the residual income claimant, cannot approach the workers who produced a failed Edsel car and demand that they return to him the salary he had previously paid them. No, he must suffer this loss alone; in doing so, he bears the risk that would otherwise accrue to the workers. Second, consider the plight of the syndicalist workers who want to set up shop for themselves. Even if there is a guarantee that consumers will purchase the final product,¹⁷⁵ it will still take months or even years between the time of product start up and when the final good starts rolling off the assembly line. What will the workers do in the meantime? How will they feed themselves? Where will the money come with which to set up the factory, purchase the raw materials, pay the insurance, etc.? Fortunately for them, under free enterprise, the capitalist undertakes these roles. He, in effect, advances to the workers, long before the time of completion of the product, the tools and raw materials necessary to do the job. Without him, the syndicalists would be helpless. And how does a person become a capitalist in the first place? All he need do is, as a worker, save some money out of his salary with which to invest in the jobs of other people.¹⁷⁶ Contrary to the Marxists, there is nothing nefarious about free enterprise.

Radin’s critique of the market applies as well to housing:

Consider also the regulation of residential tenancies. Rent control, habitability requirements, restrictions upon termination of tenancies, and antidiscrimination requirements can all be seen as indicia of incomplete commodification. . . .

Regulation of residential tenancies can be seen as connected to identity and contextuality: attempting to make possible and protect the constituting of one’s personhood in one’s home, and one’s continuity of residence there, because the home is a justifiable kind of personal property. Regulation can be seen as attempting to ensure that tenants are not forced to move from their homes for ideological, discriminatory, or arbitrary

175. And boy, is there ever not any such guarantee!

176. To be sure, there are capitalists who have set up shop based on prior robbery. But there are workers who steal as well. Neither labor nor management has a monopoly over nefarious deeds. But the point is that neither one *need* engage in illicit activities. This is why *both* are legitimate occupations, despite such occurrences.

reasons, or by a sudden rise in market prices, and to ensure that rental housing is decent to live in and a decent place for family life.¹⁷⁷

This sounds all well and good, until we reflect upon the fact that A's home, the place where he lives, is actually *owned* by B, the landlord. Suppose B wants to live in the apartment himself. According to Radin, he would have no such right, since to do this would be to violate the "human flourishing" of A. But what about B's "human flourishing?" As well, there is the economic point that if B is so totally constrained in his ability to benefit from the ownership of the dwelling, why would he want to own it in the first place? And if he does not, that is, if people are unwilling to become landlords, then, by definition, no one can be a tenant either. The obvious rejoinder from the Radins of the world is "Fine, who wants landlords anyway; let's all become single family owners." The trouble with this economically unsophisticated response is that it costs a significant amount of money to build or purchase a housing unit, which is beyond the reach of many. The landlord, like the employer for the employee, plays a positive role in the life of the tenant. Without him, the renter's lot in life would be a far inferior one. This is proven by the fact that the tenant agrees to pay the landlord to occupy his housing unit. If this were not beneficial to the tenant, he would have taken advantage of the other opportunities open to him. Instead of benefitting tenants, then, rent control and other restrictions on property owners urged by Radin push the poor one step closer to living on the street.¹⁷⁸

Imagine the plight of a young person just starting out on his own, looking for a place to live. If he must build a dwelling with funds now available to him, he will be in a very unenviable situation. Fortunately, capitalism allows *renting*. This means that other people can build accommodation, and this young man can avail himself of it for a relatively low price (compared to the costs of building it for himself). In much the same way as the entrepreneur invests in plant and equipment that workers would be unable to undertake on their own account, the landlord provides shelter which would otherwise be unobtainable. Radin's

177. *Id.* at 1919-20 (internal footnote omitted).

178. For a critique of interventionistic housing policies, not on grounds of injustice but rather that they boomerang and hurt the very people they are intended to help, see *supra* note 67.

"human flourishing," intent upon driving a wedge between the capitalist employer and the capitalist real estate investor, on the one hand, and the people they serve on the other (tenants, employees) will thus render the situation of the latter far more precarious than would otherwise have obtained.

Somewhat parenthetically, Radin opines that "personhood in a broad ecological context" requires "legislation banning hunting and trade in artifacts of endangered species."¹⁷⁹ "Personhood," of course, is a code word for any public policy favored by this author. Presumably, in this instance, she opposes extinction of all flora and fauna. If so, she has a strange way of indicating it. For her public policy prescription, as usual, will lead in just about the *opposite* direction to the one intended. To wit, prohibition of hunting leads to endangerment, while legalization all but guarantees survival. This may sound paradoxical to those steeped in the verities of the left wing environmentalist philosophy, but it is derivable from basic economics. With legalized hunting, assuming of course a capitalist private property system, the *last* thing the business firm in charge wants is extinction of the species which is the object of the hunt. They will strive mightily, for example, or eliminate entirely, or charge truly astronomical prices for, the culling of a pregnant elephant, for example. Virtually all killing will be directed at superfluous males, or females beyond the age of child bearing. Thus, the profit motive is placed in the *same* direction as is the environmental goal. In very sharp contrast, when hunting is prohibited, it does not end, but is instead taken over by black market poachers. These individuals are indiscriminate killers; their profits are not at all based on the preservation of females of child bearing age. Rather, the tragedy of the commons comes into play: while the interests of all poachers, taken together, is for the preservation of the species, each and every one of them, taken alone, is motivated to kill any elephant falling within his sights.¹⁸⁰

179. Radin, *supra* note 1, at 1921 n.254.

180. For examples of free market environmentalism, see Terry L. Anderson & Peter J. Hill, *Property Rights as a Common Pool Resource*, in BUREAUCRACY VS. ENVIRONMENT: THE ENVIRONMENTAL COSTS OF BUREAUCRATIC GOVERNANCE (John Baden & Richard L. Stroup eds., 1981); TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* (1991); Walter Block, *Ownership Will Save the Environment*, NEW ENVIRONMENT 41-43 (1991); Walter Block, *Population Growth: Is It a Problem?*, in RESOLVING GLOBAL PROBLEMS INTO THE 21ST CENTURY: HOW CAN SCIENCE HELP PROCEEDINGS OF THE FOURTH NATIONAL CONFERENCE OF CANADIAN PUGWASH 30-61 (1989); Walter Block, *Environmental*

For the advocate of free enterprise, all of these interferences with markets — whether in the work place or at home or anywhere else — are unjust and inefficient. They are a rogue's gallery of much that is wrong with modern society. All the more reason then, to nip this tendency in the bud by not acceding to *any* diminution of total alienability, up to, and including, voluntary slavery. This is a matter of principle, not expediency.

Sexuality and Reproductive Capacity

Radin now moves on to a discussion of prostitution. She is of several minds on this issue. On the one hand, commodificationism destroys personhood. On the other, to prohibit this the oldest profession and drive it underground would harm "[p]oor women who believe that they must sell their sexual services to survive"¹⁸¹ Third, the domino effect is unlikely; sex still takes place without money changing hands, even in the face of widespread prostitution, legal in some jurisdictions. However, if it "were fully and openly commodified" with advertising allowed, as for any other product, this might indeed put at risk those sexual relations which are compatible with human flourishing.¹⁸²

Problems, Private Property Rights Solutions, in ECONOMICS AND THE ENVIRONMENT: A RECONCILIATION (Walter Block ed., 1990); Walter Block, *Dumping on the Economy: Why Artificial Prices Encourage Waste*, 14 J. PRICING MGMT. 21-26 (1991); Walter Block, *Resource Misallocation, Externalities and Environmentalism in the U.S. and Canada*, PROCEEDINGS OF THE 24TH PACIFIC NORTHWEST REGIONAL ECONOMIC CONFERENCE 91-94 (1990); Walter Block, *Earning Happiness Through Homesteading Unowned Land: A Comment on 'Buying Misery with Federal Land' by Richard Stroup*, 15 J. SOC. POL. & ECON. STUD. 237-53 (1990); THOMAS DILORENZO, DOES CAPITALISM CAUSE POLLUTION? (Wash. U. Ctr. for the Study of Am. Bus., Contemporary Issues Series 38, 1990); Edwin Dolan, *Controlling Acid Rain, ECONOMICS AND THE ENVIRONMENT: A RECONCILIATION* (Walter Block ed., 1990); Robert McGee & Walter Block, *Pollution Trading Permits as a Form of Market Socialism, and the Search for a Real Market Solution to Environmental Pollution*, 6 FORDHAM ENVTL. L.J. 51-77 (1994); THOMAS GALE MOORE, CENTRAL PLANNING USA-STYLE: THE CASE AGAINST CORPORATE AVERAGE FUEL ECONOMY (CAFE) STANDARDS (1991); DIXIE LEE RAY, TRASHING THE PLANET (1990); Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, 2 CATO J. (1982), reprinted in *ECONOMICS AND THE ENVIRONMENT: A RECONCILIATION* (Walter Block ed., 1990); RICHARD L. STROUP ET. AL., PROGRESSIVE ENVIRONMENTALISM: A PRO-HUMAN, PRO-SCIENCE, PRO-FREE ENTERPRISE AGENDA FOR CHANGE (National Center for Policy Analysis Task Force Report, 1991); Richard Stroup, *Buying Misery with Federal Land*, 57 PUBLIC CHOICE 69-77 (1988); Richard L. Stroup & John A. Baden, *Endowment Areas: A Clearing in the Policy Wilderness*, 2 CATO J. 691-708 (1982).

181. Radin, *supra* note 1, at 1922.

182. Radin, *supra* note 1, at 1922. seems to have in mind something along the lines of Prostitution, Inc., similar to Richard Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983). For a criticism of the latter, see Block & Gordon, *supra* note 15.

Fourth, it is already the case that "women's sexuality is incompletely commodified," in that "relationships may be entered into and sustained partly for economic reasons and partly for . . . interpersonal sharing" ¹⁸³

What to do in the face of such conflicting considerations? In the denouement, Radin argues for the legalization of prostitution, ¹⁸⁴ but no "capitalist entrepreneurship" would be allowed, such as "brokerage (pimping) and recruiting. It might also include banning advertising." ¹⁸⁵

This stance is highly unsatisfactory. Foremost is that there is no one clear principle involved. This gives the appearance of making things up as you go along. If all that were concerned were Radin's wish list, that would be fully acceptable. But her analysis, presumably, is intended to inform the practice of law making. As such it is wanting in that it is not based on the rule of law, ¹⁸⁶ surely the *sine qua non* of any rational legislation. This reaches such an extreme that Radin is unable to say, definitively, whether her own philosophy would allow for advertising in this context or not. Then, too, all of this is in the service of "human flourishing." But no clear criterion of that concept is offered. It appears almost entirely ad hoc. How else to account for the ambivalence of her response, and for her very different conclusions about allowing markets for prostitution, baby selling, surrogacy? ¹⁸⁷

183. Radin, *supra* note 1, at 1923.

184. *Id.* at 1924-25.

185. Seemingly in support of her own thesis, Radin, *supra* note 1, at 1924 n.261, reports that this is what is done for human organ sales in California; they are legal, although no brokering or middlemen are allowed. But the whole point of a free market in used bodily parts (apart from it being a pure exercise in human freedom) is to help move tissues from donors who value them less to recipients who treasure them more (often because they spell the difference between life and death.) Brokers and middlemen, as they do in real estate, retailing, etc., smooth and facilitate this process. Prohibition of their contribution takes back with one hand what the law allows with the other. In the extreme, if *all* commercial intermediation of this sort were banned, the legalization of that market would be completely ineffective in saving lives in this manner.

Imagine a "free" real estate market, one, however, which completely prohibited advertising and brokers. It is an exaggeration, but not by too much, to say that we might as well ban the purchase and sale of homes for all the good this "freedom" would do for potential buyers and sellers.

186. See F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY* (1973).

187. On this see *infra*.

In contrast, libertarianism offers a sharp and clear analysis of prostitution.¹⁸⁸ The woman owns her own body. She may do anything she pleases with it, up to renting it out by the hour, providing only that she does not use it to invade the person or property of all other similarly situated self owners. Prostitution is certainly a voluntary act between consenting adults. Therefore, prohibitions on it are a violation of women's liberty.¹⁸⁹

According to Radin, "[a] different analysis is warranted for baby-selling. . . . When the baby becomes a commodity, all of its personal attributes — sex, eye color, predicted I.Q., 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."¹⁹⁰

But, Radin cannot be allowed to have things both ways. If commodifying personal attributes is wrong, it is wrong no matter how many of them are commodified. Thus, if she favors legalization of prostitution, logical consistency would compel her to champion the same conclusion for baby selling. If I hit you once, it is assault and battery; if I hit you 12 times, the indictment is the same. Radin is in effect declaring that hitting once should be legal (prostitution commodifies only one characteristic) while hitting a dozen times (baby selling commodifies, say, a dozen of human dimensions) should be prohibited. Nor does she give good reasons to be suspicious of market alienability in the first place.

What kind of "human flourishing" is it to tell infertile parents too low on the bureaucratic adoption list¹⁹¹ that they cannot have their dream fulfilled? Where is "personhood"¹⁹² for these people? The answer seems obvious: the plight of these people has not (yet) been recognized by the politically correct philosophy espoused by Radin. Infertile couples will just have to wait,

188. And for pimping too. See BLOCK, DEFENDING THE UNDEFENDABLE, *supra* note 8, at 19-25.

189. The same, of course, applies to male prostitution.

190. Radin, *supra* note 1, at 1925 (internal footnote omitted).

191. Another bit of elementary economics: whenever prices are held down below the equilibrium point, particularly at a zero price, demand will outstrip supply; a shortage will necessarily be created.

192. Lest the reader think I am making any of this up, I quote directly from Radin, *supra* note 1, at 1927: "Conceiving of any child in market rhetoric wrongs personhood. . . . Conceiving of children in market rhetoric would foster an inferior conception of human flourishing"

as far as this quarter is concerned, for a change in what is politically correct. Given, however, that there are no underlying principles which inform it, this is not as unlikely as it might otherwise sound.¹⁹³

Radin deems it as “too risky” to legalize baby selling, since “[h]ow 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?”¹⁹⁴ For anyone suffering from this preoccupation, I suggest that they consult a psychologist. As for measuring such values, this is *precisely* the sort of thing that most economics instructors teach their freshman classes when they introduce the concept of present discounted value. After all, we have to liven up the lesson somehow. Why not apply this economic concept to the value of human (including babies’ and children’s) lives? What is so wrong about (sometimes) viewing life through the eyeglasses of an economist, so much so that it warrants prohibiting baby markets?¹⁹⁵

If baby-selling is so abhorrent, why is baby-giving legally acceptable? States Radin, “The reason, I think, is that we do not fear relinquishment of children unless it is accompanied by market rhetoric.”¹⁹⁶ This is a reasonable explanation — for a Com-

193. Surprisingly, Radin, *supra* note 1, at 1925 n.262, contends that “market inalienability is presently unjustified” in the case of “amateur” athletics. This is truly amazing. Markets, it would appear, are acceptable in this industry, but only “presently,” in her view. In contrast, for the libertarian, either the thing is wrong and should be prohibited, or it is not, and should be legalized. How can it be just to criminalize one and the same action now, but not later? This variability indicates her prescriptions have nothing to do with the act itself, intrinsically. And, in Radin’s case, this is clearly true. Justice for Radin, it would appear, is not timeless. One set of acts is should be legal before the “transition,” *see id.* at 1875, and another set, after, “in some better future” (presumably, for her, a socialist one.) For the view that justice holds for all epochs, equally, see Walter Block, *Neglect of the Marketplace: The Questionable Economics of America’s Bishops*, 2 NOTRE DAME J.L. ETHICS & PUB. POL’Y 125-60 (1985); WALTER BLOCK, *THE U.S. BISHOPS AND THEIR CRITICS: AN ECONOMIC AND ETHICAL PERSPECTIVE* (1986).

194. Radin, *supra* note 1, at 1926.

195. Radin hits a new low when she offers the case of a person trading a child for a car. *See id.* at 1926 n.267. The implication is that infertile couples who wish to adopt are all cut from this cloth. In the future, infertility will undoubtedly be declared a legally recognized handicap. On that day, in retrospect, Radin will be found guilty of infertility-ism (akin to racism or sexism).

On the other hand, I must concede that under a *laissez faire* society of full commodification, a trade of a child for a car would be legal, provided only that there was no issue of child abuse. *See supra* note 164.

196. *Id.* at 1927 (internal footnote omitted).

munist. *Anything* couched in (horrors!) “market rhetoric” would be for a person of this ideology as garlic or the cross is to a vampire. But as far as ordinary people are concerned, it is simply preposterous to suppose that a large moral gap exists between giving away a baby for adoption and for nothing and giving it away for pay, due solely to accompanying “market rhetoric” in the latter case. If X is a just act, its moral and legal status does not change for the worse merely because the perpetrator is paid for it. Obversely, if X is a criminal or rights violative act, its status does not change for the better just because it is done for free.

The third and last topic in this section concerns surrogacy. Radin’s position is “prohibition of all surrogacy, paid or unpaid”¹⁹⁷ Her reasoning is mainly in terms of safeguarding the welfare of the resultant children: “There is a danger that unwanted children might remain parentless even if only unpaid surrogacy is allowed [P]rohibition of all surrogacy might be grounded on concern for unwanted children and their chances in life.”

This does not resonate well, given that the overwhelming majority of unwanted children can be traced not to surrogacy, but to our welfare system,¹⁹⁸ which Radin defends, and even wishes to see expanded. If anything, given the amount of effort infertile couples have to go through in order to adopt, the likelihood is that these children would be particularly treasured, not unwanted. It is thus unlikely that this is her real reason for opposition. Perhaps a more accurate explanation for this stance is her visceral hatred for all institutions that help people peacefully cooperate with one another through the intermediation of markets.

Radin is intent to counter the notion that “surrogacy might be thought to foster ideals of interrelationships between men and their children.”¹⁹⁹ Her refutation states, “[I]t is unclear why we should assume that the ideal of bonding depends especially on genetic connection.”²⁰⁰ But this is empirically unsound: most child abuse is at the hands of stepfathers, not genetic fathers. The animal kingdom also furnishes evidence on this: the newly victorious lion kills the cubs of his predecessor, not their natural fa-

197. *Id.* at 1931.

198. See MURRAY, *supra* note 137.

199. Radin, *supra* note 1, at 1931.

200. *Id.*

ther. Further, Radin's contention is incompatible for the findings of modern sociobiology.²⁰¹

What of surrogate buyers who change their mind? States Radin, "[I]f a baby is brought into the world and nobody wants it, the surrogate who intended to relinquish it should not be forced to keep and raise it."²⁰²

In the libertarian society, this would be determined by prior agreement. Presumably, however, it would be the purchasers, not the seller of the baby, who would be in effect the residual income claimant or entrepreneur. The infertile couple would be the employer, the surrogate mother the employee. Typically, it is the former who is the risk bearer. However, if the surrogate contractually agrees to "keep and raise it," presumably for a fee, then she must be made to honor the obligation she takes upon herself.

Conclusion

Radin maintains that "[a]s an archetype, universal commodification is too uncomplicated to describe fully any actual thinker or complex of ideas"²⁰³ She thus ends her essay on a wrong note, just as she began it. Libertarianism is certainly a "complex of ideas" which is fully compatible with full and universal commodification. One bit of evidence which casts aspersions on this claim is Nozick who states: a "free system" is compatible with an individual legally being able "to sell himself into slavery."²⁰⁴ As Radin herself cites this passage, it is difficult to understand her view that no "actual thinker"²⁰⁵ can oppose her views.²⁰⁶

Radin reveals herself to be unprincipled, refusing, even to consistently uphold her own philosophy: "If decommmodification of things important to personhood is provisionally the ideal of justice we should strive for, trying to bring it to pass now may sometimes be unjust."²⁰⁷ It is strange to concede that your own

201. See *supra* note 128.

202. Radin, *supra* note 1, at 1934-35 (internal citation omitted).

203. *Id.* at 1936.

204. NOZICK, *supra* note 7, at 331 n.48.

205. Radin, 1987, p. 1903.

206. See also Block, *supra* note 100.

207. Radin, *supra* note 1, at 1937.

ideal is actually unjust; it is even more remarkable to insist, nevertheless, that it should be followed.

In contrast, for libertarians, the transition must be *compatible* with their own notion of justice. No one who advocates a violation of the non aggression axiom, even in the transition period, can be considered a consistent advocate of this position.

APPENDIX 1

