

# REVIEW

## Trading in Controversy

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NEIL DUXBURY\*

*Contested Commodities*, by Margaret Jane Radin.  
Cambridge, Mass.: Harvard University Press, 1996, xvi + 279 pp.

### I. INTRODUCTION

THE QUESTION OF WHAT might constitute the appropriate limits of the market domain has, of late, inspired a significant amount of legal scholarship.<sup>1</sup> This development is hardly surprising. For all the advantages that they may bring, markets, we know, create myriad difficulties. People may find themselves exploited, coerced, excluded, discriminated against, degraded, or otherwise disadvantaged owing to market arrangements. Some of the costs or disadvantages that come with the operation of markets will be bearable.<sup>2</sup> Where this is not the case, however, academic lawyers (among others) must try to determine, first of all, why particular market-created costs are unacceptable and, secondly, what will be an appropriate legal response to the problem. One American law professor who has been addressing these issues for well over a decade now is Margaret Jane Radin. In her earlier writings, Radin was concerned primarily with the distinction between what she terms fungible and personal property.<sup>3</sup> Whereas fungible property has a purely economic or instrumental value, personal property is that with which the owner has become bound up to such a degree that its loss would cause him or her pain

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\* Reader in Law, University of Manchester, United Kingdom. I am grateful to Martin Loughlin, William Lucy, and Mike Redmayne for comments on an earlier version of this review.

<sup>1</sup> See, e.g., M.J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass.: Harvard University Press, 1993); C.R. Sunstein, *Free Markets and Social Justice* (New York: Oxford University Press, forthcoming).

<sup>2</sup> I have tried elsewhere to argue as much with regard to the degrading effects of markets. See N. Duxbury, "Law, Markets and Valuation" (1995) 61 *Brook. L. Rev.* 657 and "Do Markets Degrade?" (1996) 59 *Mod. L. Rev.* 331.

<sup>3</sup> The principal of these early writings are to be found in M.J. Radin, *Reinterpreting Property* (Chicago: The University of Chicago Press, 1993).

that could not be relieved simply by replacing the object with other goods of equal market value. Thus, a credit card is likely to be fungible, whereas many items of jewellery will (for their owners) have more personal significance. Not all property can be straightforwardly classified as personal or fungible. One's word-processor, for instance, might fall into either category, depending upon what is stored on the hard disk. Radin's point, however, is that all private property will lie somewhere on the continuum between personal and fungible.<sup>4</sup> All such property, that is, will be more fungible than personal or vice versa.

According to Radin, this broad distinction between personal and fungible ought generally to be reflected in the manner in which rights to private property are regulated. By and large, she claims, there should be a presumption that rights to personal property deserve stronger legal protection than rights to fungible property.<sup>5</sup> This claim, as developed in her earlier writings, attracted a good deal of criticism. Since different people will hold different views as to where particular property rights lie on the personal-fungible continuum, arguments for according special protections to some property rights because of their peculiarly personal status must be deemed too idiosyncratic to form the basis for regulatory strategies.<sup>6</sup> There neither exists nor can exist social consensus concerning the appropriate categorization of property rights along the personal-fungible continuum.<sup>7</sup> Many critics of Radin's early writings also felt that she was making a mistake in using rent control to try to illustrate why personal property is, as compared with fungible property, generally more deserving of special legal protection.<sup>8</sup> To argue that the peculiarly personal nature of residential leases justifies maintaining rents at levels which landlords find unprofitable is to ignore the fact that, if rent levels are controlled thus, few people will wish to be landlords.<sup>9</sup> Such a consequence could hardly be said to favour the interests of prospective residential tenants.<sup>10</sup> Furthermore, using residential leases to attempt to illustrate how the value of personal property extends beyond the reach of the

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<sup>4</sup> See Radin, *supra* note 3 at 53–54.

<sup>5</sup> *Ibid.* at 48.

<sup>6</sup> See R.A. Epstein, "Rent Control and the Theory of Efficient Regulation" (1988) 54 *Brook. L. Rev.* 741 at 770–72.

<sup>7</sup> See S.J. Schnably, "Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood" (1993) 45 *Stan. L. Rev.* 347 at 362–79.

<sup>8</sup> See, e.g., D. Greenberg, "Radin on Personhood and Rent Control" (1990) 73 *The Monist* 642, and T.J. Brennan, "Rights, Market Failure, and Rent Control: A Comment on Radin" (1988) 17 *Phil. & Pub. Aff.* 66.

<sup>9</sup> See Duxbury, "Law, Markets and Valuation," *supra* note 2 at 673.

<sup>10</sup> See R.A. Posner, *Overcoming Law* (Cambridge, Mass.: Harvard University Press, 1995) at 303.

## II. WORST NIGHTMARES

"LIKE OTHER PRAGMATISTS," Radin asserts, "I do not find it very useful to go too far into hypothetical realms unconnected with our own circumstances" (at 161–62). This assertion comes as rather a surprise, given some of the other statements to be found in the book. In developing an argument to the effect that "baby-selling"<sup>17</sup> (at 136) ought never to be permitted, for example, she invites us to contemplate thus:

If a free-market baby industry were to come into being, with all of its accompanying paraphernalia, how could any of us, even those who did not produce infants for sale, avoid measuring the dollar value of our children? How could our children avoid being preoccupied with measuring their own dollar value? This measurement makes our discourse about ourselves (when we are children) and about our children (when we are parents) like our discourse about cars ... . [I]f wealth determined who gets a child, we would know that the adoptive parents valued the child as much as a Volvo but not as much as a Mercedes [at 138–39].

The fundamental problem is that:

Once something has a price, money must be a part of the interaction ... . If our children know that the going rate of babies is \$10,000, they will know that they are worth \$10,000 ... . Worse, if they know that the market price of "good" babies is \$10,000, whereas the price of "medium-grade" babies is only \$8,000, they will be anxiously comparing themselves with the "good" grade of child in hopes that they measure up [at 101].

Furthermore,

[I]f children have a market value, then even parents who do not put their children up for adoption will know what their children are worth, and how much money they are losing by not doing so ... . We will all know how much we cost our parents [at 98].

Any proposal for trade in parental rights ought to be treated with extreme reservation. Not the least problem is that, where such trade is permitted, both those who sell and those who are sold may find themselves exploited.<sup>18</sup> But the objection which Radin is mounting in the above quotations seems, for at least two reasons, to be far from compelling.

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<sup>17</sup> A term which, in itself, might be considered emotive and misleading: what is for sale is not the baby, but parental rights. Those who advocate markets in adoptions and commercial surrogacy are not, as I understand it, arguing that such markets should facilitate the deprivation of individual autonomy. See, e.g., R.A. Posner, *Sex and Reason* (Cambridge, Mass.: Harvard University Press, 1992) at 410.

<sup>18</sup> For an examination of this problem along with others, see J.R.S. Prichard, "A Market for Babies?" (1984) 34 U.T.L.J. 341.

First, her reasoning is not especially clear. Assuming trade in parental rights were permitted, it would be highly unlikely that children would have a market value. Children—even grades of children, to use Radin’s imagery—would not all be accorded the same value, just as, for example, all two-bedroom houses are not accorded the same value. Although markets generate monetary valuations, they do not preclude the possibility of the same objects (notionally speaking) attracting different valuations. The creation of a so-called market for babies would not mean that they could be rigidly priced according to standard.

Secondly, Radin’s reasoning is rooted in the sort of hypothetical realm, and relies on the style of slippery-slope alarmism, that she purports to eschew. The fact that something is accorded market value does not necessarily mean that we will each value that thing in commercial terms. My wedding ring has a monetary value; yet, while I know this, that is not how I value it. Similarly with children: if it were the case that specific children were being sold at a specific price, it would not follow that everybody would then value their children according to that price. If, as individuals, we lament some particular change in our world—a decline in good manners, charity, craftsmanship, or whatever—our inclination will often be to resist rather than to accept that change. Likewise with markets. That something has market value does not mean that it becomes, for everybody, commercialised. Some people will still retain their capacity to resist. Yet this is precisely what Radin does not acknowledge. She portrays human beings as inevitably defined by market rhetoric; and it is from this portrait that she is able to concoct a nightmare image of children as fungible items which could have been borrowed from science fiction.<sup>19</sup>

The manner in which Radin condemns baby-selling is but an instance of a more general tendency on her part to argue by attacking caricatures. This tendency is epitomized when she turns her attention to public choice theory. “The basic methodological premise” of public choice theory, Radin asserts, “is a rigorous atomistic individualism. The basic moral stance ... is that the theory doesn’t need one. This is ‘positive’ theory, unconcerned with the goodness or badness of political actors and institutions, seeking only to observe how incentives and institutional structures interact to produce empirical consequences” (at 207). The fundamental impoverishment of the public choice perspective is attributable to the fact that its proponents “assume a static model of human behavior. On the whole, they don’t think we can change the sorry state of democracy-as-we-know-it” (at 215). As a characterization of public choice theory, this seems misleading. For the fact of the matter is that public choice is more than just a positive theory. Certainly the positive dimension of public choice theory—explaining how “trade” among self-interested politicians, public officials and private interest groups can produce laws

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<sup>19</sup> See P.K. Dick, “The Pre-Persons” in *The Collected Stories of Philip K. Dick* (Los Angeles: Underwood/Miller, 1987).

63–78). In doing so, however, she in effect draws attention to a difficulty which rests at the heart of her critique.

According to Radin, “[t]he human capacity for self-mutability, for context-transcendence, is much more mysterious than the reductionism of commodification would portray it” (at 78). “[M]any kinds of solidarity and interrelations between people are central to our conception of human flourishing,” and one of the advantages of “[i]ncomplete commodification as an expression of a nonmarket order coexistent with a market order” is that it can accommodate our “ideals of personhood and community” (at 113). Note that Radin is assuming the existence of a shared conception of human flourishing. The idea of shared understanding in fact runs throughout the book. That there is a difficulty in making such an assumption is something which Radin recognizes. “[W]ho,” she asks, “is ‘we’ here?” (at 58). “We,” she acknowledges, may be identified in various very vague or very specific ways—as “‘our’ dominant culture” (*ibid.*), as “the mainstream group of ‘us’ ” (at 95), as “philosophizers about social justice” (at 65), or whatever. While recognizing this difficulty, however, Radin frequently appeals to what she believes we instinctively know, to our shared understandings about the appropriate reach of markets. When faced with difficulties and double binds created by markets, she claims, “we try to make incremental changes for the better, as we see the better” (at 131). The real problem here, of course, concerns what it means to say that “we” see the better. Statements such as that “we should recognize a continuum reflecting degrees of commodification that will be appropriate in a given context” (at 104), or that, when confronted with double binds, “[w]e must ... decide which horn of the dilemma is ... less bad” (at 127) simply highlight the problem. Appropriate, or less bad, according to whom? According to what criteria? Having conceded that appealing to “our” shared understandings about commodification is a dubious and contestable strategy, Radin adopts just that strategy.

When Radin makes claims purportedly founded on shared understandings, she appears, in fact, to be asserting her own particular values and beliefs. Consider the following passage:

I believe that ... personhood should understand many kinds of particulars—one’s politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes—as integral to the self. To understand any of these things as monetizable ... is to do violence to our deepest understanding of what it is to be human [at 56].

Notice that this quotation starts out as a statement of personal belief and concludes as a statement about shared understanding. How could such a statement be considered representative of shared understanding? Different people will hold different views concerning which of those “particulars” that Radin lists ought or ought not to be “monetizable.” Many, for example, will probably not see any reason

for precluding trade in certain types of experience, wisdom and personal attribute; and to suggest to those people that allowing such trade does violence "to our deepest understanding of what it is to be human" would probably seem bizarre. Radin simply asserts that there exists some basic consensus regarding the proper scope of markets. However, she demonstrates nothing of the sort.

#### IV. CONCLUSION: THE PRICE OF MARKETS

"[I]T SEEMS TO ME," Holmes wrote a century ago, "that every lawyer ought to seek an understanding of economics"; for that discipline teaches us "that for everything we have to give up something else," that we must "set the advantage we gain against the other advantage we lose, and ... know what we are doing when we elect."<sup>26</sup> I have argued in this essay that, in advancing her perspective on commodification, Radin tends to resort to exaggerated hypotheticals and caricatures concerning commercial activity and to assume and assert (but not demonstrate) that there exist fundamental shared understandings concerning the appropriate reach of markets. By way of conclusion, I should like to offer one further criticism. Holmes appreciated that, in law as elsewhere, choices impose prices. Radin, in identifying the double bind which markets often create, appears to appreciate much the same. Yet sometimes she considers only one side of the problem. "Why should it matter," she asks, "if someone conceptualizes the entire human universe as one giant bundle of scarce goods subject to free alienation by contract"? "[I]t matters because," among other things, market "rhetoric might lead less-than-perfect practitioners to wrong answers in sensitive cases" and because such rhetoric may be "insulting or [injurious to] personhood regardless of results" (at 84). Of course, declaring market rhetoric to be inappropriate in relation to sensitive issues may turn out to be an over-paternalistic course of action: the risk of getting things "wrong" is not the exclusive preserve of those who seek solutions through market reasoning. But there is a more fundamental issue to be addressed here, an issue which Radin seems not to have grasped.

Without doubt, the application of market reasoning to what are commonly regarded to be non-market activities sometimes causes considerable consternation and offence. If, however, there is indeed a risk in certain contexts that market reasoning may prove insulting, why should anyone other than attention-seekers and shock-tacticians wish to resort to it? Perhaps the answer is that, although the choice to use market reasoning will impose a price, there will be a good chance that this price is worth paying. Radin at one point invites us to

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<sup>26</sup> O.W. Holmes, "The Path of the Law" (1897) 10 Harv. L. Rev. 457 at 474.

values, the more it is so" (at 223)—indeed, "[t]he reason people are troubled by "mere" market rhetoric, when applied in ways they think inappropriate, is that they think it will be contagious and will lead to literal commodification" (at 13). Hence, thinking would appear to make it so; and therefore, to return to baby-selling, "Posner and Becker's conceptual scheme, if it becomes widespread, must structure, or help to structure, our relationships with our children" (at 165). Market rhetoric, when introduced into areas of human life where we do not normally expect to find it, alters "the texture of the human world."<sup>22</sup>

The import of these quotations seems unclear. Market rhetoric does not "bring on" literal markets; yet it is "contagious"—the more we think in market terms, "the more it is so." Those—as if such people existed—who wish to adopt market rhetoric as "the sole rhetoric of human affairs" should be permitted to do so; yet allowing them to do so is to risk altering the texture of the human world. What does emerge very clearly, yet again, from the above quotations is Radin's fatalistic view of human behaviour. Absent from her observations is an acknowledgement of the human capacity for abstinence. Nobody, she appears to be claiming, can be unaffected by the introduction of markets or market rhetoric. No doubt, sometimes, general human behaviour will be altered when markets are introduced into particular domains. Most people who would otherwise give blood, for example, might not wish to do so if it can be bought and sold.<sup>23</sup> As an assessment of the power of markets and market rhetoric in general, however, Radin's claim, or apparent claim, seems over-reliant on exaggeration.

### III. THE PRESUMPTION OF SHARED UNDERSTANDING

IN THE PAST, Radin has been taken to task for founding her critique of market reasoning on an unelaborated, indeed unstated, theory of human flourishing.<sup>24</sup> Drawing upon and developing Nussbaum's Aristotelian theory of human essentialism,<sup>25</sup> she endeavours in *Contested Commodities* to remedy this shortcoming (at

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<sup>22</sup> To use a phrase which Radin borrows from Putnam: see Radin, *supra* note 13 at 88 and 122; and also H. Putnam, *Reason, Truth and History* (New York: Cambridge University Press, 1981) at 141.

<sup>23</sup> For the classic study of this particular issue, see R.M. Titmuss, *The Gift Relationship: From Human Blood to Social Policy*, 1st ed. (New York: Pantheon Books, 1971).

<sup>24</sup> See Duxbury, "Law, Markets and Valuation," *supra* note 2 at 666.

<sup>25</sup> For the details of which, see, for example, M.C. Nussbaum, "Human Functioning and Social Justice: In Defense of Aristotelian Essentialism" (1992) 20 *Political Theory* 202; M.C. Nussbaum, "Non-Relative Virtues: An Aristotelian Approach" in M.C. Nussbaum & A. Sen, eds., *The Quality of Life* (Oxford: Clarendon Press, 1993) 242; M.C. Nussbaum, "Human Capabilities, Female Human Beings" in M.C. Nussbaum & J. Glover, eds., *Women, Culture, and Development: A Study of Human Capabilities* (Oxford: Clarendon Press, 1995) 61.

which are adverse to the public interest—often generates rather pessimistic, some might say cynical, conclusions.<sup>20</sup> But there is also a normative dimension to the theory: *viz.*, prescribing changes in constitutional and general institutional arrangements in order to control and improve the functioning of the political process. As two of the principal representatives of public choice theory claim:

Public choice ... can be properly defended on moral grounds if we adopt a “constitutional perspective”—that is, if the purpose of the exercise is conceived to be institutional reform, improvements in the *rules* under which political processes operate. This perspective requires that we shift attention *away* from the analysis of policy choice by existing agents within *existing* rules, and towards the examination of alternative sets of rules. Improvement, or hope for improvement, emerges not from any expectation that observed agents will behave differently from the way the existing set of incentives leads them to behave, but from a shift in the rules that define these incentives ... [The public choice theorist’s] task is not the Machiavellian one of advising governors, directly or indirectly, on how they ought to behave. His task is that of advising all citizens on the working of alternative constitutional rules.<sup>21</sup>

By neglecting to take account of the normative aspect of public choice theory, Radin is able to characterize it as amoral. Yet anyone familiar with public choice literature will recognize the inadequacy of this characterization.

Radin’s somewhat alarmist style of argumentation is attributable to more, I think, than merely a predisposition to caricature. Accounting for this style requires also an appreciation of the manner in which she connects thoughts and deeds. In essence, her position is that “Our conceptualizations of what is matter for what is” (at 88), “that the way we conceive of things matters to who we are” (at 93). She believes “that most of the time Chicago-style market rhetoric does not of itself operate to bring on literal markets” (at 14) and “that even if it is wrong to sell babies, it is not wrong for Richard Posner or Gary Becker to conceive of children as commodities and speak of them in market rhetoric” (at 164). Such pronouncements of belief, however, do not go unqualified. “[M]etaphorical markets cannot be placed beyond the scope of concern by defining them as ‘mere’ discourse as opposed to action” (at 14), for “something important to humanity is lost if market rhetoric becomes (or is considered to be) the sole rhetoric of human affairs” (at 122). For example, “[t]hinking of rape in market rhetoric implicitly conceives of as fungible something that we know to be personal” (at 87) and is thus “threatening to personhood” (at 88). “The more we conceive of all things that people value as mere preferences that can be expressed in dollars and traded off against other dollar

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<sup>20</sup> See, e.g., S. Kelman, “‘Public Choice’ and Public Spirit” (1987) 87 *The Public Interest* 80 at 93–94, arguing, apropos of public choice, that “[c]ynical descriptive conclusions about behavior [sic] in government threaten to undermine the norm prescribing public spirit.”

<sup>21</sup> G. Brennan & J.M. Buchanan, “Is Public Choice Immoral? The Case for the ‘Nobel’ Lie” (1988) 74 *Va. L. Rev.* 179 at 187.



Imagine the case of grief-stricken parents being asked to donate the heart of a brain-dead child to a newborn victim of congenital heart disease in a distant hospital. The parents are being asked to give up the symbolic integrity of their child and face immediately the brute fact of death. The act of donating the heart may be one of those distinctively human moments of terrible glory in which one gives up a significant aspect of oneself so that others may live and flourish [at 97].

“But now imagine,” she continues,

[T]he experience if the grieving parents know that the market price of hearts is \$50,000. There seems to be a sense that the heroic moment now cannot be, either for them to experience or for us to observe, in respect and perhaps recognition. If the parents take the money, then the money is the reason for their action. But if they don't take the money, then the act can seem like transferring “their” \$50,000 to the transplant recipient ... . No matter what choice the parents make, the opportunity for a pure act of caring is foreclosed. (*ibid.*)

No doubt, in such tragic circumstances, the presence of the market does rob us of something. No doubt there is a price to be paid. Surely, however, it is worth paying that price if a consequence is that the lives of others are improved or saved. While the loss of a potential “heroic moment” may well be a cause for lament, one of the reasons for arguing in favour of markets in situations such as the above is that they may prompt people to do what they might otherwise not have done. There exist, for Radin, “noncommodified ideals of political life, of social value, of self-constitution in a social context,” and those ideals, she insists, should be regarded as “precious” (at 223). Yet we inhabit, as she says, a “nonideal world” (at 110). Acknowledging the double-bind means appreciating that, in such a world, the noblest strategies are not always the most desirable ones.

