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Book Review

Questioning Commodification

CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN
SEX, CHILDREN, BODY PARTS, AND OTHER THINGS. By Margaret Jane
Pp. xiv, 279. $36.50 cloth.

Reviewed by Marjorie M. Shultz‡

INTRODUCTION

In Contested Commodities,¹ Professor Margaret Radin gives us a
memorable and important book. She brings both a powerful intelligence and an encyclopedic knowledge of philosophy, law, and critical theory to the deep task she sets herself. She critiques and builds upon a wealth of sources. Exposing assumptions, evaluating arguments, and comparing conclusions from a multitude of eras and disciplines, she can also gracefully concede that the difficulty and uncertainty of her project necessitates some tentativeness and imprecision. As befits the complexity of her enterprise, Radin’s style is nuanced, subtle, shaded.

This book originated with an influential law review article that Professor Radin published nearly a decade ago.² In the current book, she adds extensive foundational material, more diverse examples, and several chapters that appear to respond to suggestions and criticisms that she may have received regarding the earlier article. Her focal point remains a critique of the contemporary trend toward greater use of market models and market rhetoric in American culture. She labels this process “commodification,” and discerns it everywhere—in our discourse, our concepts, our self-understanding, our politics, our law, and, of course, in


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† Margaret Jane Radin is the William Benjamin Scott and Luna M. Scott Professor at Stanford Law School. Professor Radin completed her J.D. at the University of Southern California. She began teaching law at Oregon, then returned to teach at USC for a number of years before assuming her present position at Stanford. Professor Radin is a well-known, prolific and deeply thoughtful writer in the fields of property, jurisprudence, and feminism.
‡ Professor of Law, Boalt Hall School of Law, University of California at Berkeley. I am grateful for the valuable research assistance, outstanding editing, and thoughtful conversation that were contributed to this review by Megan Weinstein, Boalt Hall, J.D., (expected) 1998.
our commercial markets. She is particularly attentive to the destructive ways that commodification depletes values and diminishes experiences of personhood and community. As more things, experiences, and persons come to be treated as commodities (monetized, interchanged, and traded to others), Radin fears impoverished selfhood, compromised interaction, and the destruction of things in which people invest individuality and by which they create meaning.

In the first third of *Contested Commodities*, Radin interweaves classical and contemporary political theory and philosophy to derive her ideas about personhood and to warn that commodification poses significant threats to that view of personhood. She also shows that law and economics scholarship is a major engine of the modern commodification that threatens human flourishing.

To illustrate her basic thesis that commodification is a significant threat to personhood, Professor Radin explores a number of issues where commodification is in dispute. She initially examines debates over commodification of women's sexual and reproductive capacities: prostitution, baby selling, and surrogacy. Patiently teasing out analytic complexities and applying pragmatist methods, she makes tentative policy recommendations in each of these areas that reflect the theories articulated in this book.

In her concluding chapters, Radin explores the close connection between commodification and inequality/subordination by describing how commodification allows people and the elements essential to their personal identity to be objectified and degraded. She reflects on problems created by her recommended constraints on market rhetoric in light of the American devotion to free expression. In addition, she explores the obvious linkages between the remedial rules of damages and her concern about excessive commodification of human suffering. A general commentary on how excessive commodification endangers democracy puts a finish to this layered and important discussion.

Radin's fundamental thesis about the dangers of commodification remains elegant, distinct, and focused throughout the book, but her discussion is also unusually expansive and integrative. She comments perceptively on a number of interrelated issues that cross the path of her discussion. These topics include gender discrimination, non-economic damages in tort, First Amendment jurisprudence, regulatory approaches to workplaces and housing, conventional and alternative family issues, debates over negative and positive liberty, criminal rape, feminist theory, inequality and subordination scholarship. In spite of the breadth these excursions represent, Radin always reconnects these branching notes

back into the chord of her main thesis, enriching our understanding by providing these resonances and overtones.

My discussion of \textit{Contested Commodities} first describes Radin's challenge to law and economics scholars influential in recent legal thought. Next, I focus explicitly on what I consider to be a major contribution of Radin's work: its detailed and penetrating discussion of the importance of rhetoric in shaping law and culture. I then suggest several of what I believe to be weaknesses in Radin's treatment of gender issues, her polarization of variables, and her prioritization of competing goals. I make some general observations about the legally "hot" field of biotechnology to illustrate and consolidate the discomfort I feel with aspects of Radin's basic schematic. I conclude by reemphasizing the important contributions made by Professor Radin in this probing, challenging book.

\section{A Challenge Issued}

A primary task of \textit{Contested Commodities} is to challenge the claims, the premises, and the basic worldview of the law and economics movement. Professor Radin's extensive work on philosophy and personhood makes this task a natural one for her. She is stimulated to take issue with the law and economics school of thought because of the extraordinary influence it has had on legal and social thought in recent decades. Like many academic disciplines insecure about the value of their product, legal scholarship in the past quarter century has rushed to embrace economics as the closest available quantitatively-oriented school of academic and doctrinal analysis. For those distressed by the radical indeterminacy and deconstruction of the critics, for those who fear that liberal openness to cultural pluralism necessarily erodes into moral relativism, the legal economists offer apparent surcease. Their approach produces sharp-lined, high resolution pictures glossed with inevitability and shot from assumedly "neutral" angles. Radin rejects that imagery, as well as the substance behind it.

The work of an array of law and economics scholars, such as Professors Alan Schwartz, Richard Epstein, Gary Becker, A. Douglas Melamed, and Judges Guido Calabresi and Richard Posner, provides the raw material for Radin's discussion.\footnote{See, e.g., \textit{id.} at 3-15, 21-45, 197.} Those commentators place the "free market" at the center of their models and endorse the dominance of "commodified" market transactions as optimal policy except where severe market failures cannot be corrected. Despite her antipathy to escalating commodification, Radin realizes that markets are appropriate to
many tasks. She recognizes that stark polarization of personhood and commodification is inappropriate. Radin emphasizes that commodification can be partial and that tensions between ideal and nonideal circumstances unavoidably create ambivalence regarding optimum policy about degrees of commodification. But her central theme is that commodification and the general worldview revealed in law and economics scholarship threaten the humanist values she views as paramount.

Radin defines commodification—her summarizing word for the ethos of law and economics scholarship—in terms of four characteristics. The first, objectification, centers on the possibility of being severed, alienated, i.e., not entwined with the personhood of a moral subject or group of subjects—communities. Second, commodities are fungible, i.e., exchangeable and interchangeable. Third, commodities are valued in ways that make them commensurable, such that the worth of any commodity can be scaled or ranked in comparison with that of any other commodity. Fourth, commodities are usually capable of valuation in monetary terms because monetization is the ordinary form through which commensurable valuations are expressed. Radin acknowledges that these four characteristics are interrelated and cumulative rather than fully independent and mutually exclusive. If one is present, the others will often, although not always, be identified as well.

Radin critiques the premises and imagery lying behind the vocabulary, analyses, and models of economics-oriented legal scholars. She argues that those who adopt a worldview of universal or dominant commodification come to see human beings as atomistic individuals, whose behavior and motives are reducible to rational self-maximizing. Although economics-oriented theorists may state that they simply “assume” such human actors in order to set aside immeasurables and uncertainties for purposes of modeling and predicting, the models take on a life of their own. Gradually the work speaks as if it were describing rather than simply “assuming.” Ultimately, but not always explicitly, it virtually prescribes a world of such beings operating rationally within the confines of the theoretically optimal free market. Radin argues that, despite the utility of market rhetoric as one of a variety of discourses, something in our quest for simpler, more generalizable, certain, and quantifiable understandings leads scholars, policy-makers, and society itself to extend the commodification template far beyond its capacities, with damaging consequences. Thus, as her book title signals, she contests the commodification of various human activities that currently lie on the borderline of commodification.

5. See id. at 118-20.
6. See id. at 118-19.
7. See id. at 122.
Radin's ideal world is one in which persons and community are central, many types of value are recognized, and some kinds of property are not fungible, because they are so bound up with personhood and individual meaning. Such property, for example housing, work, and bodily integrity, resists commodification. The self is extended into and expressed by such property, which can only be understood as having incommensurable types of personal value. As such property evolves, it takes on a constitutive role in personhood. The uniqueness and value of a moral subject blends with and attaches to things that can no longer be completely objectified, monetized, alienated or compared. They are no longer appropriately traded or valued in a market for commodities.

Radin fears that over-expansion of commodification discourse, behavior, and policy will result in an impoverishment of humanist values and practices, indeed of the very self.\(^8\) Commodification contributes to an increasingly "thin" concept of self and diminished life experience for individuals and communities. She contrasts this with her own "thick" view of personhood,\(^9\) in which various forms of property become entwined with the self and not readily separable from it.

Radin urges that society and the law should resist commodification rhetoric and policy in settings involving property that is bound up with personhood. The state should recognize the noncommodifiability of such property and should adopt regulatory approaches that will protect the personal significance of potential property such as reproductive gametes, personal residences, or sexual services.\(^10\) Radin's discussion of this material, further explicated in another of her books, *Property and Personhood*,\(^11\) makes important contributions to modern perspectives on property and contract. Her schema distinguishing market commodities from personal property (defined as things that have become entwined with an individual's selfhood) creates a meaningful new way of understanding property that is likely equal in importance to such traditional categorizations as real versus personal property, tangible versus intangible property, or to more modern perspectives such as "new" entitlement-based property versus more traditional and concrete forms of property.

The most fundamental element in Radin's critique of the worldviews and priorities of law and economics scholarship comes in her closing chapter. Relying heavily on the wisdom of pragmatist philosopher John Dewey, Radin asks readers to treat leading liberal,

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8. See generally id. at 83-94.
9. See id. at 59-60.
10. See id. at 20-21, 107-10. Radin has written earlier pieces more focused on inalienability and property. See, e.g., Radin, supra note 2.
utilitarian and libertarian scholars not as timeless iconic thinkers, but as thinkers whose theories are particular, transient, and mutable. Similarly, although they sometimes speak in transcendent language and purport to describe universal phenomena, contemporary legal economists who follow in the path of these scholars have particular intellectual insights and passions that grow out of particular intellectual roots and address particular problems in particular historical times. Radin notes important ways in which our times differ from the times of a Mill or a Hobbes and urges us to evolve rather than rigidify traditional assumptions and touchstone values. For her, there is nothing inevitable or universal about commodifying worldviews or policies.

II
THE IMPORTANCE OF RHETORIC

Professor Radin does not attribute the increasing commodification of our modern world simply to contemporary economics-oriented legal theorists. She does, however, emphasize the significance of ideas and the rhetoric used to express how we understand and value them. She argues persuasively that “words and world are linked.” Policies matter, but concepts do not simply evolve from practices. Concepts and language shape us and our world. In Radin’s words:

Facts are theory-dependent and value-dependent. Theories are formed in words. Commitments to facts and values are present in the language we use to reason and describe, and they shape our reasoning, our description, and the shape (for us) of reality itself.

... [T]he way we conceive of things matters to who we are.13

Other scholars note that the law expresses and shapes culture,14 but none that I know matches Radin’s discussion in depth of thought and persuasiveness. Throughout the book, Radin elaborates the role of rhetoric in creating reality. For me, this constitutes one of the book’s most significant contributions. Her target here is market rhetoric. The discourse of commodification is not simply a harmless metaphor or a model-clarifying device. Rather, our descriptions influence our understanding, and our understanding molds our attitudes, actions and policies. Radin argues that market rhetoric shapes our values by masking particularity and uniqueness. It undermines personal meaning and over-simplifies value. It demands alienability and deadens attachment while diluting the richness of experience and draining substance from the self.

12. Radin, supra note 1, at 88.
13. Id. at 89, 93 (citation omitted).
Because Radin warns that market rhetoric is harmful and overextended, she necessarily implies that some kinds of speech and thought should be restricted. Professor Radin addresses issues of free speech much more directly in this book than she did in the law review article from which the book evolved. In her discussion, she makes a number of interesting points that have relevance to topics other than commodification. For example, she asks why contemporary social thinkers accept that substantial regulation of the commercial marketplace is necessary but still pursue a largely unqualified theory of freedom from regulation in the “marketplace of ideas.” On the surface, the answer is obvious: unregulated purity is more vital to the democratic marketplace than to the economic one. But the issue goes deeper than that. As she notes, it is really about perceived harm. Given the remoteness of academic market-speech as compared to the immediacy and violence that surround hate speech and pornography, Radin’s pointed query would seem to have greater force in the latter context than in her discussion of commodification.

Radin also explores the complex factual and doctrinal interplay between speech and conduct in First Amendment jurisprudence. She observes that most legal commentary analyzes when conduct counts as speech, but that an equally significant problem arises regarding when speech should count as conduct. She argues that, when applied, the speech/conduct distinction is fuzzy at best; First Amendment policies rested on that basis simply presume that speech is less dangerous than conduct. Such a presumption ignores the possibility that some kinds of speech, particularly from some sources such as the government, may in fact be more dangerous (socially harmful) than some kinds of conduct—particularly conduct of private individuals.

Although bringing useful illumination to these issues, Radin’s chapter on free expression is problematic. She seems unable (or unwilling) to differentiate innocuous and largely metaphorical commodification-speech from more damaging and literal usages. Despite the generally persuasive thesis that rhetoric matters, a metaphor sometimes seems just that—an interesting allusion rather than a determinative and potentially threatening characterization of substance and value. Where users seem unlikely to lose sight of the noncommodified nature of the issue, Radin herself may be accused of rhetorical overreaching. Certainly the metaphor “marketplace of ideas” is widely used. In certain contexts, “ideas” do seem to be “bought” and “sold.”

15. Compare Radin, supra note 2, at 1886-87 with Radin, supra note 1, at 164-83 (Chapter 12, “Free Expression”).

As Radin notes, the selling of political candidates through the mass media is one egregious and distressing example. However, perhaps it is candidate images and labels that are bought and sold rather than ideas. I doubt that use of marketplace language will really cause many people to treat ideas as fungible or commensurable, although perhaps images and labels based on ideas may be commodified in contexts that are fundamentally expressions of advertising rather than of ideas. Therefore, to suggest either that the use of marketplace metaphors grows out of or advances the commodification of ideas, or that commodification analysis illumines free speech policy, seems unpersuasive. At the same time, the chapter does little to identify what types of regulation of commodification-speech Radin would support as effective. Nor does it, apart from the interesting but mostly suggestive comments just discussed, outline in any depth the possible justifications for limits on speech.

III
MULTIPLE CHARACTERISTICS, NOT A SINGLE POLARITY

Contested Commodities exhibits weaknesses that are reciprocal to its strengths. Although Radin writes very clearly, especially considering the abstractness of her themes, the tone and style of the book remain rather ponderous. Her insistence on defining all terms, on considering all sides of an issue, on arraying vast supportive authority, and on examining any weaknesses in all arguments bespeak the author's thoroughness. But ironically, the extent of the citation also betrays a whisper of intellectual insecurity. The flavor of "doth protest too much,"17 hints at some empty space at the core.

The derivative and reactive nature of the book also betrays a certain hesitancy. Radin concedes that market rhetoric and models have their place in the analysis and management of commercial exchange. However, she argues passionately that over-extending economic rhetoric and policies impoverishes human experience and constricts the visionary potential of society. Paradoxically, given her thesis, she puts commodification—not personhood—at the center of her scholarly enterprise. Even while she attacks it, commodification remains the central paradigm of Radin's book. The book's title, Contested Commodities, as well as her primary thesis (commodification is dangerous to personhood and community) are both (literally) derivative of the economic model. Radin concedes pride of place to the very economic model she sets out to circumscribe. That choice engages her primarily in deconstruction and critique and allows gaps and twists to distort the affirmative

17. William Shakespeare, Hamlet act 3, sc. 2.
presentation. For example, although Radin advances some of her own theories of personhood, usually in counterpoint to commodification, she turns to other scholars, especially Martha Nussbaum, to accomplish what would seem to be a central project for her—to define full and robust personhood.  

This choice to be derivative at key points of the analysis underscores a larger absence. Radin operates mostly at the level of high abstraction, supplemented by concrete detail, but she provides less mid-level analysis than is needed. She also critiques more than constructs, a characteristic that likely flows from placing commodification rather than personhood at the center of her work. For example, she does not discuss what settings, policies, and values advance human flourishing, what noncommensurate value is and how it should be treated, or why commodification rhetoric is more destructive in some contexts than in others.

Characterizing her desired state as a negation of a model she rejects is costly in another way. Radin explains:

Complete noncommodification and complete commodification can be seen as largely hypothetical end points of a continuum of possible meanings and corresponding policy choices.

... I think we should recognize a continuum reflecting degrees of commodification...  

Her commitment to negation likely obscures from her analysis the possibility that “human flourishing”—the main affirmative term that she offers—is not the opposite of commodification. My instinct, by contrast, is that human flourishing is likely a characteristic independent of the degree of commodification. I see each as mappable on its own distinct high-low continuum.

Treating the problem as one of variation along a single continuum, Radin describes an alternative she labels as “incomplete commodification,” by which she means a mixture of commodification and non-commodification.  

She identifies two types of incomplete commodification: (1) “contested concepts” occur when both commodified and non-commodified approaches to a given arena of social activity coexist; and (2) “internally conflicted or plural meanings” occur when an individual holds divergent understandings of a particular interaction simultaneously.

In my view, commodified and noncommodified conceptualizations can co-exist without necessarily being contested or in conflict. Not only

18. See Radin, supra note 1, at 66-68.
19. Id. at 104.
20. See id. at 102-14.
21. See id. at 102.
can the mix occur among different people at the same time (her sense #1) or within a given person about a particular transaction (her sense #2), but also, a given transaction, practice, value, or relationship can be characterized by simultaneously high or simultaneously low degrees of both commodification and human flourishing. Of course, an interaction may be high on one characteristic and low on the other, the situation that Radin’s schema handles most effectively. And Radin’s analysis might persuade us that the high-on-one-means-low-on-the-other pattern may be frequent.

Nevertheless, while Radin’s construct allows her to recognize varied degrees of commodification, it precludes her from understanding situations that decouple human flourishing and commodification. For example, someone might only limitedly employ commodification rhetoric or engage in market exchange, but might also have a life depleted of characteristics that would likely be called human flourishing. Commodification is not the only enemy of human meaning and community. Alternately, someone else might have a highly commodified understanding of many or even most things, but might also invest great energy and meaning in particular commodifiable transactions or relations that provide current satisfaction in her life.

For example, consider the following. A job might provide deep personal satisfaction to an individual and still be understood as something that should bring a good salary; can be replaced by some other, roughly similar job; and can be departed from without fundamental damage to the self. Indeed, the primary ideology of professions emphasizes exactly this pairing. Professionals (lawyers, doctors, etc.) expect to do well, in monetary and commodified terms, and also to do good, in terms of altruistic service and facilitation of human flourishing. The timeliness of the issues Radin discusses is evidenced in major contemporary debates over whether the professions, particularly medicine, are becoming too business-oriented to the exclusion of the traditional twin ideal of service.

I argue, then, that society can have a solid, capacious, and reasonably well-functioning economic market and also have a high degree of human flourishing. Likewise, it can have a command economy or one in shambles, and also have very low levels of human flourishing (freedom, identity, selfhood, choice, etc.). Radin does not see these possibilities, because she has committed herself to a polarity between human flourishing and commodification.
IV
GENDER POLITICS AND CONFUSED PRIORITIES

The possibility of a compatible relationship between human flourishing and commodification caused me to take issue with Professor Radin’s original article critiquing market rhetoric in a piece I wrote on reproductive technology and intention as the determinant of legal parenthood.22 In that paper, I used examples such as medical care, wedding rings, and homes to urge that commodification and human meaning/flourishing are not necessarily in tension. I also argued then that Radin failed to give sufficient attention to the problematic role played by gender in her main examples of incomplete or contested commodification. In Western history, the traditional dichotomization of public (the polis and the market) and private (noncommodified) spheres imposed drastic limitations on women, depriving them of independent market activity or wealth. That dichotomy mandated unpaid child-rearing and home care, subjugating women to husband-dominant power relations in the family,23 and excluded them from the marketplace.

In her original article, Radin illustrated policy analysis based on her thesis by discussing the problems of prostitution, baby-selling, and surrogacy.24 In her book, she adds brief discussions of work and housing, along with a major chapter on non-economic damages in tort. Even so, her selection of such “gender-loaded” examples seems at best odd. It certainly has potential to skew her illustrative perspective. As Reva Siegel25 and others26 have made clear, women’s sexuality and reproductive roles have been central to their sex-based oppression. Radin unquestionably knows and is responsive to such gender discrimination analyses.27 But in this work, she treats her intensely gendered examples mainly as problems of short-term, non-ideal circumstances.

In illustrating how her theories would affect policy analysis and gender politics, Professor Radin introduces what she calls the “double

24. See generally Radin, supra note 2.
25. See generally Reasoning From the Body, supra note 23.
27. Indeed, she has herself written in that field. See, e.g., Margaret Jane Radin, The Pragmatist and the Feminist, 63 S. CAL. L. REV. 1699 (1990).
bind."

The term expresses how contradictory impulses arise when complex effects of alternative courses of action are truly recognized and assessed. The double bind means that short-run effects often contradict long-term goals. Ideal states, when imaginable at all, are barely visible on the far horizon, while non-ideal realities press close at hand. Radin, a pragmatist, patiently teases apart the double bind’s strands of paradox and confirmation, conflict and convergence, the near and far term, others’ arguments and her own to arrive at necessarily tentative and reversible policy recommendations. Radin’s complex and layered approach illustrates a pragmatic method of problem-solving that is itself a significant contribution independent of the substantive work.

In her analysis of particular instances of the double bind, Professor Radin often notes that commodification of sexuality and reproduction has the short-term benefit of increased economic and social power for women. But she usually finds this the weaker argument compared to the preservation of her longer term ideals of human flourishing. To preserve these ideals, Radin recommends that prostitution remain incompletely commodified. She believes it ought to be decriminalized, but that contracts should remain unenforceable, and that advertising, intermediary distribution networks, and “free market entrepreneurship” should continue to be prohibited. She also concludes that arrangements for collaborative reproduction such as surrogacy should remain non-commodified and market inalienable.

Although I respect Radin’s thoughtful and comprehensive discussion and especially her recognition that complexity and indeterminacy make prediction of preferable decisions in these areas intensely difficult, I would place higher priority on increasing women’s capacity to use markets and commodities as an essential avenue to power. With power gained through this and other methods, women will not only affect choices about human flourishing, but they will also shape how markets operate and are conceptualized. Admittedly, this view is easier for me because I believe commodification and human flourishing are more compatible and less polarized than Radin does. Yet, the frequency with which she acknowledges that her theoretical schema does not point a clearly desirable direction, or that both commodification and noncommodification have severe drawbacks, or that some other issue, such as subordination, confounds or at least clouds the analysis, suggests not only that the issues are complex (they are), but also that the variable she highlights may be less powerful than she claims.

28. See Radin, supra note 1, at 123-30 (Chapter 9, “The Double Bind”).
29. See id. at 131-53.
30. For example, in her segment on prostitution, Radin notes that both commodification and noncommodification inflict harm in the instance of sexuality. See id. at 134.
Professor Radin gives close attention to inequality and subordination throughout her discussion. Although her position is not wholly clear, she seems to see commodification as a more pressing problem than either inequality or subordination. For example, she says, "We might...think that the danger of promoting conceptualization of children as commodities outweighs concern for women's freedom and expressive self-constitution."31 Here, she seems to see commodification as the more threatening enemy. Yet she also deftly notes the hypocrisy in much advocacy that would ban commodification of aspects of personhood: "[W]e can hardly cure the problem of objectification by trying to ban the exchange without addressing the subordination that made the exchange seem desirable."32 Finally, she comments that most "isms" are entwined,33 and "the attack should begin anywhere a foothold in the feedback loop can be found."34 Despite these concessions, Radin centers on the threat of commodification. Because I believe that subordination is the more significant problem, and also that personhood can be compatible with commodification, I would prioritize subordination as the focal problem.

Given her large canvas, Professor Radin necessarily paints with a broad brush. Even accepting that, her analysis regarding surrogacy seems manipulated, the argument unpersuasive. For example, in discussing various reproductive techniques, she coins the term "commissioned adoption" to describe what she acknowledges is a hypothetical situation, one in which a woman would be commissioned to get pregnant and to surrender the child for adoption after birth. She also describes paid adoption, or baby selling, and urges that neither commissioned nor paid adoption should be allowed. She characterizes paid surrogacy as "a special case of commissioned adoption," and argues that surrogacy differs little from either commissioned or paid adoption because "[b]oth are adoptions for which consideration is paid."35 By hypothesizing commissioned adoption and lumping surrogacy together with baby-selling, Radin is able to borrow the general public's disapproval of paid adoption and apply it to surrogacy.

Despite her assertion to the contrary, paid adoption and surrogacy are actually quite different. In ordinary adoption (transfer at or near the time of birth), the birth mother has a child that she does not want and may be ill-equipped to raise (in monetary or caregiving terms). Her intentions about the child may be muddy, or she may have nothing
that can be called intentions at all. As a route to procreation, ordinary sexual relations are not often deliberated. She may not have expected or wanted to become pregnant. Or, she may have been receptive to parenthood but have expected to share rearing tasks with her partner—hopes that are now disappointed. Her decision to “give up” the baby is often made against a backdrop of being “stuck” or “trapped” against her wishes.

By contrast, the surrogate (typically) makes arrangements at arms length. She is not under the immediate pressure of pregnancy and childbirth; no child has yet been conceived. Although the surrogate may be subject to financial or other pressures, she generally has greater freedom to deliberate than the woman who consents to adoption, especially if the surrogate is competently advised by someone familiar with the issues and pitfalls of this arrangement. She becomes pregnant on purpose and has articulated a plan regarding her pregnancy and the rearing of the resulting child. Indeed, all parties to collaborative reproduction can have greater intentionality about their decisions than is available to most mothers relinquishing a child for adoption. Radin pays little or no attention to the differences between surrogacy and paid adoption. Sliding these same distinctions was the basis for the New Jersey Supreme Court’s finding in the Baby M case that surrogacy contracts were illegal. Both the court and Professor Radin seem to me to be wrong in their judgments.

In her discussion of surrogacy, Radin slides too quickly over another problem as well. She claims that even if one rejects the analogy to paid adoption, alternate characterizations of surrogacy as a service rather than as the selling of a good, the baby, are not persuasive. She asserts that the drive to protect male genetic lineage is the “more plausible” interpretation of covert motivations for surrogacy than the alternatives offered by dissenters. In drawing that conclusion, Radin takes inadequate account of disconfirming evidence. For example, she cites Johnson v. Calvert in her discussion of race and class subordination. But she notes only in a passing factual parenthesis that in the Johnson surrogacy dispute, the parties’ contract and the court’s decision

36. Of course, many early surrogates were not well advised and did not adequately deliberate. I believe that is more the result of the surrogacy agreements being forced “underground” as illegal or immoral than of the nature of the arrangement per se.
37. 537 A.2d 1227 (N.J. 1988); see Shultz, supra note 22 (critiquing Baby M decision and arguing that intention should determine legal parenthood in situations of assisted reproduction).
38. RADIN, supra note 1, at 141.
40. See RADIN, supra note 1, at 151.
protected the genetic lineage of both the intending mother and the intending father.

Radin is correct that preoccupation with male genetic lineage is linked to gender hierarchy, but she uses that argument to dismiss—inappropriately, I believe—the facts regarding artificial insemination by donor (AID). The numbers of AID children dwarf the numbers conceived by surrogacy. But AID utterly eliminates the legal father’s genetic role while preserving the genetic role of the legal/genetic mother. She argues that male lineage and dominance raise the specter of genetics overpowering relationship as a source of parent-child connection. In urging that this cluster of concerns provides adequate reason to oppose payment within collaborative reproductive arrangements, Radin plays fast and a bit loose with a series of interrelated but also highly complex and independent issues. Among other problems, this approach leads her to give inadequate weight to either the numbers or the ideological significance of AID.

In AID, men are paid for sperm “donations” and they give up parental claims to resulting children. In assessing social damage associated with reproductive policy, the problem of men detaching from children is as serious as is treating women as baby machines. Furthermore, the damaging assumption that men can get paid for everything while women should act altruistically and be paid for almost nothing connected to their gender roles is very much alive and well. Radin’s chain of logic connects the evil of gender subordination to protection of male genetic lineage to collaborative reproduction agreements in order to argue that surrogacy and other reproductive arrangements within her category of commissioned adoption should remain outside the market realm. The chain is weak. Perhaps Professor Radin uncritically selected those feminist arguments against surrogacy that support her commodification thesis without adequately probing the counterarguments herself.

V

The Flourishing Commodities of Biotechnology

My discussion of Radin’s views on gender issues grew out of my critique that commodification and human flourishing are less polarized than her book suggests. Another context, that of recent legal issues within the rapid-growth industries of biotechnology and medicine, provides a different illustration of the same critique.

For centuries, society, culture, and the law have made rough but deep divisions between things sacred and things profane. The archetype of the sacred is classically life—especially human life—itself. The archetype of the profane, by contrast, is typically the market and the
"filthy lucre" that animates it. Biotechnology spans this partition, revealing the division as too brittle and rendering it obsolete. The very phrase itself bridges: the "bio" part expresses the "life" side of the old dichotomy, while "technology" suggests the hard-edged objectification, fungibility, and scaleable qualities that Radin uses to define commodification. The term biotechnology arises from the commercialization of elements and forms of life. After commercialized chemistry and instrumental physics, science has recently arrived at big-time business biology. Nor can the trend be reversed, nor would most observers want it to be, despite responses of ambivalence and cognitive dissonance that most of us experience in the face of patented genes, marketed gametes, gene therapy, transferred pre-embryos, and engineered DNA. The new frontiers of medical research and practice lie now in commercial genetics and biochemistry. The necessity for money and market to stimulate innovation and dissemination requires protection of proprietary interests to make treatment and cure available to large numbers of people. Social invention will need to blend life processes with markets, contracts, and ownership.

The case of Moore v. U.C. Regents illustrates the stark necessity of finding a way to accommodate both Radin's noncommodified, humanistic worldview and the market-commodity-alienability model she critiques. Only if these two poles are separated on two independent continua—allowing integration of more complex variations of relationship—will we be able to incorporate both and reduce the zero-sum conflict that is built into Radin's cognitive map. In Moore, suit was brought by a man who had his cancerous spleen removed by a doctor who was conducting research on human blood antigens that might be useful in fighting cancer. The doctor-researcher sought informed consent from Moore for the surgery. Moore alleges, however, that the only information he received about research was a generic consent form agreeing to medical research on tissue removed during surgery or post-operatively. Yet, Moore alleged, the researchers had targeted his particular blood antigens, had applied for a patent on an immortal cell line based on Moore's body products well before they stopped taking tissue samples from his body, and ultimately sold a license to use the cell line to a major pharmaceutical company in exchange for large amounts of money and stock options.

Most people feel a powerful intuition that something significant is wrong here, but the legal analysis of the rights and wrongs was far from easy. Moore's lawyers sued for conversion of property, breach of fiduciary duty, failure to disclose, failure to obtain informed consent,

41. 1 Timothy 3:2.
42. 793 P.2d 479 (Cal. 1990).
misrepresentation, and a number of other things. Informed consent and fiduciary duty involve the protection of core constitutional and common law values—reliance on a trusted confidante and protection of personal autonomy and bodily integrity. These emphasize what Radin would likely categorize as non-commodified values. On the other hand, the tort of conversion protects ownership interests in property, or what Radin would classify as an example of “commodification.”

The California Supreme Court found that the appropriate causes of action were breach of fiduciary duty and/or breach of obligation to obtain informed consent. Writing for the majority, Justice Panelli rejected the approach taken by the intermediate court of appeal that had characterized the issue as one of conversion of property. Panelli relied on concerns that such a characterization could obstruct medical research and on statutes that limit the ownership and control of bodies. The dissenters, Justices Broussard and Mosk, persuasively attacked the majority’s rejection of a property characterization. They argued that the approaches to protecting Moore’s interests adopted by the majority and concurring opinions did not, and probably could not, effectively vindicate those interests.

The majority’s view of the action as one of breach of the duties of disclosure and fiduciary loyalty would likely trigger use of the causation standard applied in informed consent cases. That standard asks whether a reasonable patient would have consented to the surgery had he known the facts that were not disclosed. Because the surgery was necessary to save Moore’s life, he could not likely demonstrate any damages under the routine informed consent action. Yet there remains a powerful intuitive sense that while Moore would likely have consented to the surgery, he was nevertheless injured by having cells taken from his body for use in a commercial venture that had not been disclosed to him.

In Radin’s terms, the majority’s decision in Moore chose less commodified approaches focused on protecting trust in fiduciary relationships rather than more commodified property-like approaches that would force the monetization of the interest violation. The dichotomy

43. See id. at 491-97.
44. Both dissenting justices wrote strongly in support of the conversion theory as the only real way to protect Moore’s monetary property interests. See id. at 489-506 (Broussard, J., dissenting); id. at 508-13 (Mosk, J., dissenting). As Justice Broussard put it:
   Far from elevating these biological materials above the marketplace, the majority’s holding simply bars plaintiff, the source of the cells, from obtaining the benefit of the cells’ value, but permits defendants, who, allegedly obtained the cells from plaintiff by improper means to retain and exploit the full economic value of their ill-gotten gains free of their ordinary common law liability for conversion.

Id. at 506.
that Radin embraces in a much more sophisticated way in her book is made explicit by Justice Arabian’s concurrence in Moore:

Plaintiff has asked us to recognize and enforce a right to sell one’s own body tissue for profit. He entreats us to regard the human vessel—the single most venerated and protected subject in any civilized society—as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane.\(^45\)

Justice Arabian states his conviction that his concern about the sacred and profane “informs much of [the majority’s] opinion but finds little or no expression therein.”\(^46\) In choosing justifications that parallel the noncommodified side of Radin’s dichotomy, the majority failed to provide an avenue to rectify the monetary dimension of Moore’s interest in knowing control over his body.

Radin would probably have treated Moore as a problem of incomplete commodification, or one of noncommodified harm that requires monetary compensation not as a scalar measure of the harm but as a symbolic public recognition of wrongdoing and invasion of rights.\(^47\) Worthy of note, however, is the fact that Radin does not suggest how she would measure a payment intended to restore moral balance. Would all rights and wrongs have the same symbolic monetary value? Or would we rank the severity of an injury, or the neediness of the victim, or the wealth and culpability of the defendant in monetary terms?

If my speculation about Radin’s approach is valid, it seems very close, both functionally and in terms of justification, to the way that punitive damages now function or that a judgment for non-economic harm is ordered. The difference is primarily that in ordering such a payment, Radin would use language about restoring moral balance rather than about “compensation,” which is commodification rhetoric. I do not think many people are confused by commodification rhetoric into thinking that pain and suffering resulting from, for example, a severe injury is really equalized by damages, i.e., is rendered commensurable or fungible or monetizable or objectifiable. Thus, Radin’s themes applied in this context seem to have little significance.

A better solution to Moore requires a cognitive map able to describe, evaluate, and remedy both elements of what Radin forces into an either/or dichotomy. Justice Arabian, and perhaps the majority as well, make an analogous error. Yet, the facts of Moore demand a map that recognizes and remedies both commodified and noncommodified aspects of the problem in a coherent and integrated fashion.

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45. Id. at 497 (Arabian, J., concurring) (emphasis in original).
46. Id.
47. See RADIN, supra note 1, at 185.
Because Moore settled out of court after the supreme court decision, no further law was made, nor were the contested facts ever determined. Nevertheless, the extraordinary notoriety of the case reflects the cognitive and ideological difficulty it presented by demanding simultaneous resolution of interests that many people dichotomize into some variation of the sacred and the profane or, in Radin’s terms, as human personhood/community versus the commodified market.

Analogous discomfort about cognitive mapping is apparent in other biotechnology cases like Davis,48 regarding whether and how a collection of frozen embryos should be divided during a divorce, and Chakrabarty,49 regarding patentability of an engineered living organism. It is also revealed in the furor over NIH patenting of genes,50 human and animal cloning,51 the development of an “engineered” animal species such as the Harvard oncomouse,52 and others. If nothing else, the extraordinary amounts of money and progress that will be entwined with components and preservation of life prevent us from continuing to think of these arenas as either sacred or profane. They are both.

Radin complexifies bipolarity by recognizing intermediate points of “incomplete commodification.” Because she rejects the domino effect—the claim that any partial commodification slides inevitably toward universal commodification—Radin sees incomplete commodification as a potentially stable state. She also rejects any notion that total noncommodification would necessarily be optimal. But despite these subtleties, her basic polarity constrains her. It commits her to a game that is mainly zero sum: the more commodification, the less human flourishing. The lessons of the novel disputes now arising in biotechnology are that human meaning and commodification not only can coexist, but must, and must do so as independent rather than reciprocal variables. Moore’s spleen implicated both fundamental human values and relationships (trust in one’s doctor, truth-telling, identity, autonomous control over one’s body) and vast commercial potential captured in fungible, monetizable and objectified products. The transaction between Moore and his researcher-doctors should be analyzed as high on both continua.

48. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).
52. See, e.g., Richard Saltus, Era of ‘Designer Animals’ Looms: Scientists Using Transgenic Technology Try to Build a Better Mouse, or Cow, or Pig, or..., BOSTON GLOBE, Dec. 26, 1988, at 63.
The California Supreme Court’s inadequacy in addressing the unusual issues perhaps came from a sense that it had to choose between two poles on a single continuum. The Moore problem involved both substance and money damages, both human dignity and valuable commodities, both relationships and products. Treating these issues under an either/or conceptualization led to a fundamentally unsatisfying and incomplete resolution of the issues for the same reasons that Radin’s treatment of surrogacy and other reproductive techniques is, for me, unsatisfactory.

Conclusion

By exposing the impoverished reductionism that attends a commodification worldview, Professor Radin has woven a powerful and important critique of the legal academy’s too-easy acquiescence to legal economists’ claims. Law and economics scholarship is a favorite target for critics. But unlike many who feel dissatisfied by the market metric yet concentrate only on particular disputed claims or merely take pot-shots in passing, Radin has created a deep and comprehensive critique of the foundations, methods, and implications of an entire school of thought. The academy is indebted to her for enriching the intellectual environment that has too often been cramped by debates that while valuable are limited.

In this Review, I dispute certain of Radin’s priorities and polarities and state my desire that she have more fully developed her theory of personhood. Nevertheless, her work is a challenge and a stimulus to people who care about these issues. Her vision should renew the energy of scholars whose fundamental instincts and insights lie elsewhere than in the economists’ realm. Radin’s book creates intellectual breathing room for the work of mid-level theorists and contemporary policy analysts who are animated by a different gestalt of the human situation than the one offered in the rhetoric of Rational Self-Maximizer Man actively trading in a hypothetically Free Market.